The Right to Fair Hearing in Japanese Administrative Law

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The right to fair hearing in contemporary Japanese administrative law is a tender plant, lacking deep roots in historical tradition, and struggling for survival in a relatively hostile environment. Fair hearing was a concept practically unknown to the administrative law of pre-war Japan, which, taking its cue from German and French law, relied principally, not on the procedural rights of the individual, but rather upon the skill and dedication of administrators for the achievement of efficiency and justice, with only occasional judicial review by the Administrative Court.1 The Anglo-American maxim that "he who decides must hear" was indeed foreign to most Japanese administrators. After the war, however, Japanese constitutional revision emphasized individual rights and duties, and prescribed many procedural guarantees for the judicial process;2 at the same time, various regulatory and

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The English language translations of Japanese materials are those of Professor Fujita unless otherwise indicated.


2. For example, Article 37 of the Constitution provides that in all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal; that he shall have full opportunity to examine all witnesses as well as the right of compulsory process for obtaining witnesses on his behalf, at public expense, and that he shall have the assistance of competent counsel, who shall, if necessary, be assigned to his use by the state. Article 38 provides that no person shall be compelled to testify against himself; that confessions made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted into evidence, and that no person shall be convicted or punished in cases where the only proof against him is his own confession.
welfare statutes introduced the Anglo-American concepts of "notice and hearing," or *audi alteram partem*, into the Japanese administrative process.

To date this experiment in legal transplantation has not been entirely successful. A recent official survey showed that, despite the statutory provisions, hearings are rarely held, parties who are entitled to an administrative hearing are generally reluctant to request one or to seek judicial review when a hearing is denied, and administrative agencies using the hearing procedure are inclined to regard it as only a device designed to facilitate preliminary administrative investigation, rather than as a procedure necessary to the protection of individual rights. Nevertheless, there are hints of change in the wind. These are especially apparent in two cases now pending before the Supreme Court of Japan, in which the right to a fair hearing is the principal issue. In one of these, *Kawakami v. Tokyo Land Transportation Bureau* [hereafter referred to as the *Taxi-Cab case*] the government is appealing a decision of the Tokyo High Court which invalidated a denial of a taxi-cab license on the ground that the applicant did not receive a fair hearing. In the other case, *Gumma Central Bus K.K. v. Minister of Transportation*, the Bus Company is appealing a decision of the Tokyo High Court which rejected the company's claim that it was denied a fair hearing on its application for a certificate to operate a new bus line. Before discussing these pending cases in detail, we must outline the framework of Japanese constitutional law which surrounds them.

I. THE CONSTITUTIONAL BASIS FOR A RIGHT TO FAIR HEARING

Although the present Japanese constitution reflects the influence of American constitutionalism in many ways, particularly in its provision


for constitutional review of legislation by the judiciary\(^6\) and in its guarantees of individual rights,\(^7\) yet one of its most notable omissions is the absence of an explicit "due process clause" like those of the Fifth and Fourteenth Amendments to the American Constitution. The closest analogous provision in the Japanese Constitution is in Article 31, which provides:

No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.

Even apart from the deletion of the word "property," and the phrase "except according to procedure established by law" for the phrase "without due process of law," comparative interpretation of Article 31 and the American due process clauses is further complicated by the interpolated clause "nor shall any other criminal penalty be imposed." There has been a wealth of Japanese academic analysis and considerable judicial exploration of the question whether Article 31 is equivalent in meaning to our due process clauses. There is, however, no decision of the Japanese Supreme Court which explicitly holds that Article 31 (or any other provision of the Japanese Constitution) protects the private individual against administrative imposition of burdens, or denial of benefits, without a fair hearing.\(^8\) Thus, the question whether there is indeed a constitutional right to fair hearing under Japanese administrative law remains open.

The strongest authority for expansive interpretation of Article 31, treating the phrase "procedure established by law" as substantially equivalent to "due process of law," is the Supreme Court's 1962 decision in \textit{Japan v. Nakamura}.\(^9\) This case involved a forfeiture decree

\begin{itemize}
\item[6.] JAPANESE CONST. art. 81 provides: "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act." The same power is also deemed, by implication, to reside in the inferior courts. \textit{See} Nathanson, \textit{Constitutional Adjudication in Japan}, 7 Am. J. Comp. L. 195 (1960).
\item[7.] These guarantees include, for example, freedom of thought and conscience (Article 19); freedom of religion (Article 20); "freedom of assembly and association, as well as speech, press and all other forms of expression" (Article 21); freedom of occupation (Article 22); academic freedom (Article 23); and the right to own and hold property, which may be taken for public use only with just compensation (Article 29).
\item[9.] 16 Saikō saibansho keiji hanreišū 1593 (hereinafter cited as Keisšū). (Sup. Ct., 275}
entered against a vessel which had been used for illegal smuggling purposes by defendants other than the owner of the vessel. The forfeiture was decreed incident to the criminal trial and conviction of the smugglers, even though the owner of the vessel was neither formally named as a defendant nor given an opportunity to contest the forfeiture. A majority of the Grand Bench held that the decree of forfeiture of the vessel, under these circumstances violated Article 29, paragraph 1, and Article 31 of the Japanese Constitution. In explanation of their decision the majority said:  

However, in our opinion, depriving a person who is not a defendant of the ownership of a vessel or goods is extremely unreasonable and is not permissible under the Constitution, if done without giving him notice and the opportunity to excuse or defend himself. Article 29, paragraph 1 of the Constitution provides that the right to own or to hold property is inviolable, and Article 31 of the Constitution provides that no person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law. So if the ownership of a vessel or cargo of a nondefendant will, as mentioned above, be affected by a supplementary penal judgment of forfeiture against the defendant, it is necessary to give the nondefendant notice and the opportunity to excuse or defend himself. Without this, depriving him of ownership amounts to the imposition of a

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Grand Bench, Nov. 28, 1962). This is sometimes known as the Second Customs Law case, as distinguished from the First Customs Law case, Japan v. Omachi, 14 Keishū 1574 (Sup. Ct., Grand Bench, Oct. 19, 1960), presenting substantially the same facts, and explicitly overruled in Nakamura. In the Omachi case the Supreme Court, by a vote of 8 to 7, upheld the lower court's order of confiscation on the procedural ground that the defendant Omachi could not take advantage of a third-party shipowner's constitutional right. Apart from this threshold question, however, the concurring Justices Tarumi and Takagi agreed with the 7 dissenting Justices, led by Justice Irie, that Article 31 of the Constitution requires that an opportunity for hearing and defense must be afforded whenever the State imposes a quasi-criminal penalty, or makes some other disposition which may encroach upon the people's rights. In still a third Customs Law case, Japan v. Mihara, 16 Keishū 1672 (Sup. Ct., Grand Bench, Dec. 12, 1962), the Court again applied the rule of Nakamura. For more detailed analysis of these cases, see Henderson, Japanese Judicial Review of Legislation: The First Twenty Years, 43 WASH. L. REV. 1005, 1023-27 (1968), reprinted in Henderson, supra note 8, at 115, 133-38.

10. This translation is taken from Judgment Upon Case of Violation of Property Rights and Due Process of Law—Series of Prominent Judgments of the Supreme Court Upon Questions of Constitutionality, No. 7 (General Secretariat, Supreme Court of Japan 1964).

The whole of JAPANESE CONST. art. 29 reads as follows:

Article 29. The right to own or hold property is inviolable. Property rights shall be defined by law, in conformity with the public welfare.

Private property may be taken for public use upon just compensation.
penalty impairing the right to own and to hold property without due process of law. Whatever kind of post-forfeiture remedy may be available, it makes no difference here. Article 118, paragraph 1 of the Customs Law provides that vessels and goods relating to the offenses described in that article, shall be forfeited even where owned by a nondefendant; and there is no provision in the Customs Law or the Code of Criminal Procedure or any other law, providing for notice and the opportunity to excuse or defend. Therefore, the forfeiture of property of a nondefendant under article 118, paragraph 1 of the Customs Law, must be adjudged to violate Articles 29 and 31 of the Constitution.

Although five of the fourteen justices who participated in the Nakanamura case dissented from the judgment, none of these dissenters expressed disagreement with the majority holding that Articles 29 and 31 provide constitutional protection against deprivations of property without “due process of law,” generally, and more specifically notice and opportunity to be heard. Rather, the principal basis of dissent was that the defendants in the case, who did not own the vessel, lacked standing to assert the constitutional rights of the owner. An additional ground for dissent was that, as a matter of general law and without recourse to constitutional theory, the forfeiture decree could not be effective against an owner who was not party to the proceedings. Obviously, neither of these grounds detracts from the force of the majority holding, except in so far as they may suggest the dissenters’ hesitancy to adopt the majority’s constitutional theory.

The supplemental opinions of the three concurring justices serve even less to undercut the basic thrust of the majority opinion. All of these opinions expressly state the view that forfeiture of the owner’s property without notice and hearing is unconstitutional, even if it is authorized by a statute. Indeed, one of the concurring opinions, that of Justice Irie, adopts an interpretation of Article 31 which far surpasses that of the majority. Irie makes this statement:

First, (1) the guarantee of due process of Article 31 of the Constitution is not satisfied merely by adhering to legal proce-

11. This was the position taken in the dissenting opinions of Justices Fujita, Shimoiizaka, and Ishizaka. Justice Tarumi referred to his concurring opinion in the Omachi case, which was to the same effect. Id. at 12, 15, 18 and 19.
12. This was the position taken in the dissenting opinion of Justice Yamada. Id. at 20.
13. Id. at 4-5.
dutes. Even if legal procedures are adhered to, the guarantee is violated if the substance of a law contravenes the basic constitutional principles existing in modern democratic countries. I understand that the guarantee of Article 31 applies not only to procedural provisions, but also to substantive laws governing rights themselves. In addition, I understand that Article 31 applies not only to the imposition of criminal penalties, but that, in addition thereto, infringements on the rights or privileges of a person are included in "deprivation of liberty." (The fact that Article 31 embodies the content of Article 23 of the Meiji Constitution, and that Article 23 of the Meiji Constitution was generally understood to apply to arrest, detention, hearing and punishment not only in criminal proceedings but also in administrative proceedings should be remembered.) However, (2) I do not think that Article 31 requires that notice and the opportunity to explain or defend always be given to a person whose rights or privileges are violated by the state. Of course, by reading other provisions of the Constitution, e.g., Articles 32, 37 and 82, in conjunction with Article 31, this clearly is required in criminal cases. But in cases other than those involving criminal penalties, the necessity of giving notice and the opportunity to explain or defend depends on the circumstances of the case; and to the extent not indispensable in order to protect the fundamental human rights guaranteed by the Constitution as a whole, failure to give notice and the opportunity to explain or defend does not violate Article 31, putting aside the question whether or not notice and the opportunity to explain or defend may be desirable as a matter of legislative policy. (3) Since a declaration of forfeiture of property belonging to a nondefendant is inseparable from the main penalty imposed on the defendant, the nondefendant must be made a party to the criminal proceeding, and he must be given a notice and an opportunity to explain or defend himself; this is required by Article 31 of the Constitution.

This approach would provide both substantive and procedural constitutional protections from any type of detrimental governmental action (whether legislative, judicial or administrative), although the degree of protection would depend upon the seriousness of the invasion of individual rights.

Justice Irie's opinion also serves to highlight one aspect of the majority opinion which might be relied upon to distinguish the case from ordinary administrative proceedings, and to limit its application to
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criminal cases and penalties. *Nakamura* was, of course, a criminal case, and the principal penalty inflicted upon the immediate defendants was a criminal penalty—clearly within the scope of Article 31. The majority opinion is susceptible to the interpretation that the decree of forfeiture of the vessel was regarded as a "criminal penalty" within the meaning of Article 31. Such an interpretation of *Nakamura* would clearly make it inapplicable to most types of administrative proceedings, including, for example, the granting and revocation of licenses. The general theory of Justice Irie's opinion, on the other hand, would be equally applicable to licensing proceedings; but he carefully refrained from committing himself as to the ultimate extent to which notice and hearing are constitutionally required in that type of administrative proceeding.  
Thus, we must look elsewhere for support for the application of Article 31 (with or without the aid of other constitutional provisions) to administrative proceedings.

A case which is somewhat similar to *Nakamura*, in so far as it involves prejudice of third parties without notice, but in an administrative proceeding, is *Hayashi Ken Zōsen K. K. v. Kōtō Kainan Shimpānchōkan* (*Hayashi-Ken Shipbuilding K. K. v. The High Marine Disasters Inquiry Board*), decided by the Grand Bench of the Supreme Court in 1961.  
This case involved a formal inquiry, conducted by the defendant Board, as to the causes of a ship collision. After interrogating the masters and the owners of the colliding ships, the Board concluded that there was no negligence attributable to either of the principals involved in the collision, but that, instead, the collision had been caused by defects in a rudder installed by the plaintiff shipbuilder. The plaintiff, however, was not a party in any way to the inquiry proceedings, and was given no opportunity to plead, present evidence, or otherwise defend itself. Nevertheless, the Board declared

14. Japanese scholarly opinion is divided as to the extent to which the Customs Law cases may be regarded as establishing a due process principle applicable to administrative proceedings. See Takagi, *Gyōseiho bunshun no chōmon* (Hearing prior to administrative disposition), in 2 SHIRÔKENSÔJO SÔRITSU JÜGO-SHÔNEN-KINEN ROMBUN-SHÔ 1, 3-4, 24 (The Legal Training and Research Institute's 15th Anniversary Essays, 1963); Takayanagi, *Gyôseitetsuzuki to jinken-hôshû* (Administrative procedure and human rights guarantee) 2 Kempô Kôza 260, 277-79 (Constitutional Lecture Series, 1964).

in the "Dispositif," or judgment, part of its decision (shubun) that the ship collision was caused by the negligence of the plaintiff company.

The shipbuilding company sued in the Tokyo High Court16 to set aside the Board's ruling on the ground that it violated the principle of "no action, no decision" (fukoku furī no gensoku) insofar as it implicated the plaintiff.17 In defense of its judgment, the Board argued that the plaintiff had no standing to attack the ruling, since it did not directly affect any right or interest of the plaintiff. The High Court sustained the complaint, suggesting that the Board could have simply decreed in the "Dispositif" that the parties before it were not subject to any disciplinary measures, and stated in the "Reasons" that neither party was guilty of negligence, but that the collision was caused by a defect in a rudder installed by a third party. The Supreme Court, however, reversed the High Court's decision and dismissed the complaint on the ground that the plaintiff had no standing to use. The Court held that the Board's ruling did not impose any duty or disadvantage on the plaintiff, and that its findings of fact would have no binding effect in a criminal or civil suit against the plaintiff. Thus, there was no "decision" against the plaintiff at all, and the principle of "no action, no decision" was irrelevant. The court did, however, concede by way of dictum that it was "inappropriate for the Board to find and declare in its 'Dispositif' negligence on the part of the plaintiff who neither participated in the adjudication nor was given any opportunity to be heard."18 Justice Kotani, in a concurring opinion, recited the proverb, "Don't hear one and judge two" (Hengen shō o danzezu).19

16. The statute Kainan shimpan- hô (Marine Disaster Inquiry Law), art. 53 (Law No. 135, 1947) provides that a challenge to the Board's ruling is to be brought in the Tokyo High Court, rather than in an ordinary district court. A trial de novo is, however, permitted in the High Court, since there is no statutory provision making the substantial evidence rule applicable. See discussions in note 43 infra, and in text between notes 52 & 53 infra.

17. "No action (or prosecution), no decision (or trial)" (i.e., adjudicator cannot decide beyond what was asked) becomes an issue only after judicial or quasi-judicial proceedings have been instituted. Strictly speaking, therefore, this principle does not directly concern our subject matter; i.e., whether and when a hearing should be held, but rather how it should be conducted.

18. 15 Minshū at 472. "Inappropriate" (furō or datō de nai) is usually used in contrast to "illegal" (ihō), to indicate that the action taken is not desirable but is nevertheless legal.

19. 15 Minshū at 474. Literally it means "Do not decide a case by hearing one-sided words." This old Chinese proverb does not directly cover the question of the right to
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Justice Fujita, dissenting, criticized the majority's formalistic view of standing, stating that the plaintiff's business and reputation would undoubtedly suffer greatly from this official declaration of its negligence, and that a trial court, in possible litigation against the plaintiff, would be greatly influenced by the findings of fact of this board so expert in marine matters. Consequently, Justice Fujita would have supported the High Court's decision vacating the Board's ruling according to the principle of "no action, no decision." Justice Kawamura agreed, expressing his view that this is a "constitutional" principle, but not indicating any specific article embracing it.

Perhaps even more important, for the purposes of our discussion, is Justice Tarumi's concurring opinion, which directly confronts the question of the applicability of Article 31 of the Constitution, and concludes, largely on the basis of its phraseology, that its requirement of fair and reasonable process relates only to cases involving a criminal or quasi-criminal penalty. Since the ruling in question did not legally (as distinguished from factually) affect the plaintiff's position, it was not governed by Article 31. However, Justice Tarumi did not indicate how liberal a construction should be applied to the phrase "quasi-criminal penalty," and we might speculate, for example whether it would, in his view, include a revocation of a license for misbehavior, or a discharge from public office for misconduct.

The Supreme Court's attitude respecting the possible application of Article 31 to quasi-criminal and non-criminal penalties is further illuminated by the decision of the Grand Bench in In re Fukui, decided in 1966. This case involved the imposition of a non-criminal fine (karyō) for failure to register (as required by statute) the name hearing either except in so far as it suggests that the deciding officer should hear both sides of the case. See note 17, supra.

20. 15 Minshū at 486. Justice Fujita's opinion might well be compared with Mr. Justice Frankfurter's concurring opinion in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 149 (1951), arguing that the listing of an organization as "subversive" (placing it on the Attorney General's published list of subversive organizations) was sufficient injury to require a fair hearing. Although Mr. Justice Frankfurter did not speak for the court, his opinion is now generally regarded as authoritative.

21. 15 Minshū at 492.

22. 15 Minshū at 474. Justice Shimoizaka, concurring, vigorously insisted, as in the Customs Law cases, on the procedural barrier against the discussion of the constitutional principle on the merits, suggesting that the complaint was like an arrow shot without a target. 15 Minshū at 484. Justice Irie simply joined the majority. It is rather disappointing not to have his separate opinion in this case.

23. 20 Minshū 2279 (Supreme Court, Grand Bench, Dec. 27, 1966).
of a newly elected director of a foundation. The defendant's principal objection was that the fine was imposed by the court in a non-contentious proceeding (hisshō jiken tetsuzuki), without affording the open court adversary hearing guaranteed by Articles 82 and 32 of the Japanese Constitution. The Supreme Court rejected this argument, stating that a non-criminal fine is not a "criminal penalty," but an administrative disposition; and since even an administrative agency could impose such a fine, the adjudication was not required to be made after a trial-type hearing in open court. However, since the imposition of a non-criminal fine is obviously a disadvantageous sanction which confiscates property, the Court thought it necessary to examine the operation and fairness of the Non-Contentious Procedure Law. The Court then concluded that the statutory procedure satisfied the Article 31 requirement of due process of law because: (1) it required a court, rather than the administrative agency concerned (Registrar, Ministry of Justice), to determine the imposition of the fine as an entirely neutral arbiter, after deliberate investigation; (2) in principle, the charged party was given an opportunity to submit a written or oral statement prior to the decision; (3) if by any chance, the fine were imposed without such an opportunity, the charged party could make an objection which would automatically void the decision and force the court to decide again de novo, after hearing the party's statement; and (4) the decision had to be accompanied by "reasons," and was subject to review in a higher court.

Justice Irie, the only dissenter in Fukui, did not disagree with the view that Article 31 requires a fair hearing before imposition of a non-criminal or administrative sanction. But he would have gone further to require that, once the decision in a non-contentious proceeding is challenged by appeal, the proceeding must assume the characteristics of litigation between the fined party and the administrative agency, to which Articles 32 and 82 apply.

24. JAPANESE CONST. art. 82: "Trials shall be conducted and judgment declared publicly."
JAPANESE CONST. art. 32: "No person shall be denied the right of access to the courts."
25. Hishō jiken tetsuzukihi (non-contentious procedure law) (Law No. 14, 1898) in 2 EHS No. 2380.
27. 20 Minshū at 2288.
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On the basis of these cases, we feel justified in concluding that the Supreme Court of Japan regards Article 31 as embracing a principle of fair hearing, applicable at least where private individuals are subjected to sanctions which are similar to criminal penalties. Whether the same attitude would apply to other types of administrative sanctions, in licensing or disciplinary proceedings, is a more debatable question.

For example, in *Kitaya v. Nara Education College,*\(^{28}\) decided by a Petty Bench of the Supreme Court in 1959, a student who had been expelled from a public college for cheating on an examination challenged the validity of the sanction on the ground that it was imposed without giving him an adequate opportunity for hearing. According to the findings of fact by the trial court, the student had been initially interrogated by a professor (acting as an advisor to students) and two assistant professors (acting as student counsellors); he then signed, as requested, a student inquiry paper recording the questions, answers, and explanations. Later, he was given an opportunity to appear and speak before the faculty disciplinary committee, and the final decision was made at a faculty meeting, upon the basis of the disciplinary committee's recommendation, which in turn had been based upon the student-inquiry record and the testimony of the examination-supervisor who discovered the cheating. The trial court dismissed the complaint, saying that the faculty decision was made on the basis of fair procedures in which the plaintiff was given ample opportunity to be heard. On appeal to the Supreme Court, counsel for the student argued that the student inquiry procedure was a routine process which did not constitute a fair hearing, and that the faculty really decided after hearing only the prosecuting party, *i.e.* the examination-supervisor. The Supreme Court affirmed the judgment of the trial court in a brief opinion which simply stated that the facts established at trial supported the conclusion that the plaintiff student had been given a fair opportunity to be heard.

While the Court may have been too cavalier in equating an inquiry for purposes of investigation with a hearing for the protection of an accused, it is yet noteworthy that the Supreme Court did not flatly

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reject the student’s claim to a fair hearing on the simple ground that
the statute contained no provision requiring such a hearing, as had
the Kyoto District Court in a similar 1955 case. On the other hand,
since the Court based its opinion on an examination of the facts, it
may be too much to infer that the Court committed itself therein to
the proposition that a fair hearing must be held before subjecting a
student to serious discipline, even though the opinion apparently in-
dulges that assumption.

With this background in mind, we return to the licensing cases now
pending before the Supreme Court.

29. Matsuura v. Kokuritsu Kyoto Daigaku Sōchō (President of Kyoto University), 6 Gyosei reishū 3003 (Kyoto Dist. Ct., Dec. 28, 1955). Here a leader of the radical student
movement (Zengakuren) who had been expelled from the University without a hearing, challenged the President's disciplinary action. The district court rejected his fair-hearing argument saying flatly:

Plaintiff argues that the present action is illegal in that it was decided without first
giving him an opportunity to be heard. However, there is no statutory provision
rendering the present disciplinary disposition illegal merely for failure to give him
such opportunity. The foreign proverb referred to by plaintiff, “no man should
be condemned unheard” cannot be accorded in this country the status of primary
authority.

Id. at 3025. The High Court of Sendai took a similar position with respect to a 70-day
suspension of a driver's license without hearing, where the statute required a hearing
only if the suspension was for 90 days or more. Shimazu v. Yamagata-Ken Kōan I’inkai
(Yamagata Prefecture Public Safety Commission), 11 Gyosei reishū 455, 462 (Sendai
High Ct., Feb. 26, 1960). The Kitaya and Matsuura cases may also be compared with
recent American cases holding that students expelled from public universities are entitled
to notice and hearing. See, e.g., Dixon v. Alabama State Board of Education, 294 F.2d
150 (5th Cir. 1961).

30. Somewhat but not entirely comparable to the question of the applicability of
Article 31 to administrative proceedings, are the problems involving the applicability
of Article 35 (searches and seizures) and Article 38 (privilege against self-incrimination)
to administrative proceedings. Article 35 provides in part:

The right of all persons to be secure in their homes, papers and effects against
entries, searches and seizures shall not be impaired except upon warrant issued for
adequate cause and particularly describing the place to be searched and things to
be seized, or except as provided by Article 33.

Article 33 provides:

No person shall be apprehended except upon warrant issued by a competent judicial
officer which specifies the offense with which the person is charged, unless he is
apprehended, the offense being committed.

See, e.g., Japan v. Masaki, 9 Keishū 924 (Sup. Ct., Grand Bench, April 27, 1955)
(The Moonshining Case) where some members of the Court thought that Article 35 was
applicable only to criminal enforcement procedures and not to administrative investiga-
tory procedures; and Japan v. Matsumoto, 15 Keishū 1940 (Sup. Ct., Grand Bench,
Dec. 20, 1961) (the Red Purge case) where some of the justices thought that the particular
administrative investigation was tantamount to a criminal investigation and therefore
violated Articles 31, 33 and 38, whereas other justices thought that none of these articles
was applicable because the investigation was administrative rather than criminal in nature.
For further discussion of these problems see George, The Right of Silence in Japanese
Law, 43 Was. L. Rev. 1147, 1161-65 (1968) reprinted in Henderson, supra note 8 at
257, 271-75.

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II. THE TAXI-CAB CASE AND THE GUMMA BUS CASE

Kawakami, the plaintiff in the Taxi-Cab case, had applied for a license to operate a so-called individual taxi-cab business. Competition in this field was intense (6,630 applications for 983 licenses), and his application was rejected after a hearing pursuant to the Road Transportation Law. The reason given by the Tokyo Land Transportation Bureau for the rejection of the application was that the information it set forth was insufficient to satisfy certain licensing standards adopted by the Bureau: namely, "(6) that it is not difficult for the applicant to change his occupation where he is presently engaged in a business other than a driver, and (7) that the applicant has had more than seven years experience as a professional driver." However, these standards had never been made public.

At the time of the hearing, according to the findings of the Tokyo District Court, Kawakami was running a small miscellaneous-goods shop, and had not had a driving job for several years. Before he opened the shop, he had been working as a driver at a U.S. Army base, but only for five years. Nonetheless, had Kawakami been informed of the standards, he could have proved (1) that the annual income from his shop was so small that he was ready at any time to close it down, and (2) that he had been a driver in the Japanese Army continuously between 1938 and 1945, which time could have been counted for purposes of his license application, but which he did not mention because he believed that the more recent five-year experience was enough to show his driving skill.

Kawakami instituted suit in the Tokyo District Court under the Administrative Litigation Act alleging that the procedure which

31. *Dōro unsōhō* (Road transportation law) (Law No. 183, 1951). The applicable provisions were: Art. 122-2
(1) The Land Transportation Bureau Chief may conduct a hearing, whenever he deems necessary, with respect to the following matters requesting the presence of the interested parties and references:
(i) Application for a license for an automobile transportation business.
(ii) Suspension and cancellation of such license.
(iii) Approval of basic automobile transportation fares or fees.
(2) The Land Transportation Bureau Chief must conduct a hearing with respect to the above matters, requesting the presence of the interested parties and references when requested by the interested parties or instructed by the Minister of Transportation.
32. 14 Gyōsei reishū at 1679. See note 4, supra.
33. *Gyōsei jiken sosōhō* (Administrative litigation act) (Law No. 139, 1962) in

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led to denial of his application was unfair and arbitrary because the licensing standards had not been disclosed so as to enable him to present the most pertinent and advantageous evidence required at the hearings. Indeed, surprisingly enough, it was discovered during trial that the standards in question had been adopted by high ranking staff members of the Bureau's licensing section after Kawakami's hearing had started, but had not been systematically communicated to other staff members. Consequently, some of the hearing examiners including Kawakami's examiner, did not know about the standards, and simply asked generalized questions concerning the items appearing in the application form, such as present job, amount of income, family situation, traffic violation record, and the like. After the hearings were completed, the high-ranking staff members conferred and made the final decisions, applying the standards.

In disposing of the case, Judge Shiraishi, speaking for the Tokyo District Court, announced two general rules which the licensing process must follow in order to be fair: (1) where the agency chooses among competing applicants on the basis of fact-findings rather than by lot, there must be concrete standards prepared before the hearings and known to all examiners, in order to ensure findings of relevant facts and equal application of the standards; and (2) where such standards require subtle judgment, they must also be made known to the applicants beforehand, so they can attempt to prove all relevant and favorable facts. Since the agency action in Kawakami's case failed to meet these requirements, the court set aside the denial of his application as unfair and, therefore, invalid.

The significance of this decision lies not so much in the outcome of the litigation as in the reasoning by which the court derived these two general rules from the Constitution. The District Court first observed that Article 6(1) of the Road Transportation Law requires the Bureau Chief to hold a hearing in certain cases prior to granting or denying

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2 EHS No. 2391. This law, which prescribes the general procedure for obtaining judicial review of administrative action, is discussed in detail in Ogawa, Judicial Review of Administrative Actions in Japan, 43 WASH. L. REV. 1075 (1968), reprinted in Henderson, supra note 8, at 1185.

34. Judge Shiraishi has commented on both this case and the Gumma Bus case, over which he also presided, in Shiraishi, Gyo seisijikei soshō no arikita (A New Approach to Administrative Litigation), HANREI JİHO (No. 428) 3 (1966).

35. 14 Gyosei reishū at 1676-77.
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a license, and to take into consideration (1) the public need for the particular transportation service, (2) the need to avoid excessive business competition, and (3) the ability of the particular applicant to properly operate the business. The statute did not prescribe any detailed standards for licensing or hearing procedures, obviously leaving these matters to the discretion of the Bureau. But, in the court's view, the scope of the Bureau's discretion had natural limitations and boundaries in the Constitution. More particularly, the court held that the Constitution guarantees the people a right to have their license applications disposed of with such a degree of due process as to place the agency's action beyond any reasonable suspicion of arbitrariness. The heart of the court's reasoning is set forth in this passage:36

It is but natural in light of Article 14 of the Constitution which established the principle of equality under the law that such procedures [of selecting a few qualified persons from a large number of applicants] must be fair ones to be applied uniformly and equally to all applicants. In addition, people's rights and freedom cannot be complete and substantial without the guaranty of procedures to assert and protect such rights and freedom. Accordingly, Articles 13 and 31 of the Constitution must be interpreted to mean that people's rights and freedom be respected not only substantively but also procedurally. To begin with, moreover, government (administration) is a sacred trust of the people (Constitution Preamble), and the public officials who are in charge of administration have the obligation of handling their office faithfully as the servants of the whole community and not of any group thereof, Constitution Article 15. Therefore, although the strictness and deliberateness of judicial procedures are not required here, officials have no discretionary freedom to impose upon people the result of a decision made through such procedures as permit anybody to suspect their arbitrariness and unfairness as regards findings of fact in selecting a few individuals from a large number of applicants. Thus, even in instances where there are no provisions whatsoever relating to the selecting methods and procedures, it must be recognized that a license applicant has a guaranty of his legal interest in having his application disposed of

36. 14 Gyōsei reishū 1666, at 1675-76. Article 13 of the Constitution provides:

All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.
through such fair procedures as would leave no room for reasonable suspicion of arbitrariness in findings of fact.

On appeal by the Tokyo Land Transportation Bureau, the Tokyo High Court affirmed this ruling. The High Court denied any need to notify applicants of the detailed standards, but conceded that they should be informed as to the type of facts which would be deemed relevant for selecting purposes. Consequently, the High Court held that the Bureau’s action in the instant case was illegal, violating Kawakami’s right to have his application handled with fair procedures, because more than half of the examiners, including Kawakami’s, had not been informed of the detailed licensing standards, and were incapable of eliciting facts which might be critical to satisfaction of the standards. The High Court did not comment on the constitutional basis of the District Court’s decision, thus leaving open the question whether the requirement of fair hearing was based upon some constitutional theory, or upon implication from the statutory provisions.

Basically the same questions were involved in *Gumma Central Bus K.K. v. Minister of Transportation*, which involved bus-line licensing procedures. In 1956, the plaintiff bus company applied for a license to operate a long-distance bus line through the main cities in Gumma Prefecture, to Kusatsu and other famous hot-springs resorts, thus serving many tourists from Tokyo and other parts of the country. At the time of plaintiff’s application, such tourists were served by the buses of the Japan National Railways, the Tobu Railway K.K., the Gumma Bus K.K., and the Kusatsu Electric Railway K.K., which were all short-line services which terminated at their respective railway

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37. 16 Gyösei reishū 1585 (Tokyo High Ct., Sept. 16, 1965).
38. The closest the High Court came to general constitutional theory was in this sentence:
Because licensing for the individual taxi business concerns the freedom to choose one’s occupation guaranteed by the Constitution as one of the fundamental human rights (Article 22), the administrative agency that rules on who may engage in a business, selecting a few persons from many applicants, should at least establish certain standards for review by amplifying each item of the Road Transportation Law Article 6(1) [the general statutory standards] concerning the hearing and review (preconditions to the rulings) and should conduct the hearings and final fact findings after ensuring that the officials in charge of the hearing fully understand the content of these standards and the criteria for applying them, in order to guarantee that the procedures are fair and that fact finding is not arbitrary.
16 Gyösei reishū at 1588.
stations in various cities in the prefecture. Plaintiff's plan was to offer a convenient "through" transportation service to tourists traveling long distances.

Upon public notice of the Gumma Central Bus application for a license for long-distance bus service, the Gumma Bus Company filed a protest. The Ministry of Transportation acted rather slowly on the application and protest; three years after the filing of the application, a public hearing was held by the Transportation Council, an advisory branch of the Ministry, in accordance with Articles 6 and 16 of the Law Establishing the Ministry of Transportation. The interested parties—i.e., the applicant and the four existing bus operators—were allowed to submit their views and to present oral and written arguments. But the Council gave them no indication, prior to the hearing, of what facts would be deemed relevant to satisfaction of the abstract standards, such as "public need" and "public interest," set forth in Article 6 of the Road Transportation Law. Apart from the arguments presented, there were no trial-type hearing or presentation of evidence.

The Council remained silent for two more years after the 1959 hearing, apparently because it could not reach a decision. In the meantime, in December of 1960, the President of the Gumma Bus Company, a Mr. Kogure—the strongest opponent of the application—became the Minister of Transportation, and shortly thereafter the investigating Bureau reached a negative conclusion as regards the application, and on the basis of this view, the Council, in May, 1961, made a similar negative recommendation to Minister Kogure, who immediately turned down Gumma Central Bus Company's license application. The reason given for the denial was that existing transportation facilities were more convenient for the public with respect to schedules, fares, etc., and, therefore, there was no serious public need for the proposed bus service. One month after this decision, there occurred a long-anticipated reshuffling of the Cabinet, and Mr. Kogure returned to the Gumma Bus Company, as the chairman of its board of directors. About the same time, a former high-ranking Bureau official

40. The role of the Transportation Council will be discussed more fully in Part IIIB, dealing with hearings by administrative councils. For present purposes, it is sufficient to note that the statute requires a public hearing on such an application whenever a protest is filed.
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became the president of the Gumma Bus Company, and another official became an executive director of the Tobu Railway (another opponent of the plaintiff's application).

Following these developments, the Gumma Central Bus Company brought suit under the Administrative Litigation Act, seeking revocation of the Minister's adverse decision, and alleging, *inter alia*, that the whole decision-making process had been unfair and tainted by political considerations. The Tokyo District Court, Judge Shiraishi again presiding, sustained the complaint and reaffirmed the views expressed in the Taxi-Cab case, using identical phraseology to describe the requirements of due process of law under the Preamble to the Constitution, as well as Articles 13, 14 and 31. The District Court regarded as unfair the Council's public hearing procedure, because the Council had failed to give the parties advance notice of the type of concrete facts and issues which would be deemed relevant in determining whether the particular application satisfied the abstract statutory requirements of public need and interest. Indeed, in the court's opinion, the criteria which the Bureau and the Council used to determine public convenience—*i.e.*, schedules, fares, traffic conditions, excessive competition, etc.,—were rather arbitrary and vulnerable to criticism. The court further observed that the Council's decision and findings of fact might have been quite different had the parties been informed of these criteria, challenged their reasonableness, and produced relevant evidence to support their contentions.

Since the agency in charge has very broad statutory discretion as regards criteria, findings of fact, and final judgment regarding the public need and interest, the court conceded that the scope of judicial review must be relatively narrow with respect to the merits (appropriateness) of the Minister's decision. In view of the complex and technical character of transportation administration, this was inevitable. However, the presence of such broad discretion requires that there be procedural safeguards to protect the people from abuses of discretion by the agency. Thus, in this context, the main function of the judiciary was not to ascertain whether there had been an abuse of discretion on the merits, but rather to safeguard the people's legal interest in having their license applications disposed of with such a
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degree of due process as to place the agency’s action beyond any reasonable suspicion of arbitrariness or political motivation.

This judicial view is remarkable insofar as it suggests a new approach for Japanese courts in litigation regarding today’s technical and complicated service administration. Upon appeal to the Tokyo High Court, however, the District Court’s decision was reversed, and the complaint was dismissed.41 The District Court’s procedural approach to administrative litigation seems to have been largely rejected by the High Court, which was primarily concerned with the merits (appropriateness) of the agency decision. First, the High Court characterized the bus business as a public enterprise closely related to public welfare and safety, not a private enterprise comprehended by the freedom of occupation guaranteed in Article 22 of the Constitution.42 Therefore, a license for a bus line was a privilege rather than a right, and the agency in charge had a strict duty to carefully examine license applications from the standpoint of public need and public interest as required by law. Second, the High Court (which is, in part, a second trial court in Japan)43 examined whether in fact there had been an abuse of discretion when the Minister of Transportation rejected the plaintiff’s application. The court found that the Minister’s judgments concerning schedules, fares, traffic conditions (safety), public demand, etc., were sound. Third, the High Court stated that the fact that the then Minister Kogure and other high-ranking officials had a special personal interest in denial of the application could not

41. 18 Gyösei reishii 1014 (Tokyo High Ct., July 25, 1967).
Among the specific contentions noted and rejected by the High Court was the objection that not all of the members of the Council who participated in the recommendation had attended the hearing or heard the evidence. In fact the transcript of the hearing was lost and could not be read by new members of the Council. The Court seemed to think it a sufficient answer to point out that the new members could have asked for such additional information as they thought important. Compare First Morgan Case and some of its progeny. Morgan v. United States, 298 U.S. 468 (1936); and cases collected in L. JAFFE & N. NATHANSON, ADMINISTRATIVE LAW 948-52 (3d ed. 1968).
42. Art. 22 provides:
Every person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare.
43. An ordinary civil case is tried first in a District Court. The defeated party can appeal as of right to a High Court. This appeal, called kōsō, is, in part, a second instance, or continued trial (zokushin). The findings of fact of the District Court do not bind the High Court, which may also hear whatever additional evidence the parties wish to offer. The Supreme Court, on the other hand, is a true “appellate court” in the Anglo-American sense.
alone justify revocation of the Minister's decision. The mere suspicion that they might have conspired and decided the case on the basis of improper private or political considerations was unproven and therefore irrelevant. Then the court examined the evidence and concluded that Minister Kogure's decision had been based on the opinion of the Bureau, which had great expertise in transportation regulation.

Fourth, the court held that, although the Minister must consider its recommendation, the Transportation Council is merely an advisory organ (shimon-kikan), and not a "participating organ" (sanyo-kikan) so far as the decision-making process is concerned. Therefore, its recommendation was not binding upon the Minister, and even if there was some substantive or procedural error underlying the Council's recommendation, the final independent decision of the Minister would not be tainted by such error. The High Court also ruled that the Council was under no obligation to notify the parties, prior to the public hearing, of the relevance of certain facts and issues so as to encourage them to produce all relevant evidence. Inasmuch as the licensing here involved was a granting of privilege rather than right, the Council could properly base its conclusions on statements and other materials submitted by the parties, who knew well the necessity of convincing the agency of the existence or non-existence of a public need for, and public interest in, the proposed business plan. If those materials were not sufficient, the Council could yet conduct any additional ex officio investigation as it might deem proper, but it was under no duty to do so. Thus, the court found no procedural defect in the public hearing. That the Council had made its recommendation after consulting with the Bureau was consistent with long-established custom, and was to be praised rather than condemned, because the Bureau is a master of the technical, specialized, and complicated problems of transportation administration. Moreover, the court said, considering the high personal qualifications of the Council members, such consultation involved no danger of affecting the independence and fairness of the Council's unbiased judgment.

Finally, the High Court expressed its hope that the agency in performing its duty, would keep in mind the policies expressed by the Tokyo District Court, which were worthy of serious consideration. But the High Court did not go so far as to agree with the District
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Court's interpretation of Article 31 of the Constitution regarding the application of due process of law in this type of licensing case.

It is unclear whether or not the High Court agreed with the District Court's general interpretation of Article 31, and related articles, even apart from their application to this type of case. Thus the High Court in the *Gumma Bus* case, as in the *Taxi-Cab* case, avoided coming to grips with the fundamental constitutional theories developed by the District Court concerning the right to fair hearing in administrative proceedings. Both cases are now pending in the Supreme Court. Whether that court will choose to follow the path of the Tokyo District Court, or that of the Tokyo High Court, is naturally most interesting to all of us who are concerned with the future development of Japanese administrative and constitutional law. Before speculating on such possibilities, we turn to a survey of the general nature of hearings in Japanese administrative proceedings.

III. ACTUAL NATURE AND CONDITION OF HEARINGS UNDER VARIOUS STATUTES

As the history of the American administrative hearing system illustrates, recognition of the constitutional right to fair hearing by way of due process of law does not solve all the problems of administrative proceedings. Even if we assume that Articles 31, 13, and 14 of the Japanese Constitution comprehend the American concept of due process of law, uncertainty still remains as to whether, and what type of, a hearing must be accorded in each particular case. Absent any accumulation of judicial decisions (which Japan simply lacks) indicating criteria for concrete application of the general principle, examination of the constitutional basis for the right to an administrative hearing does not offer much guidance to the practitioner.

Indeed, almost every administrative action affects people's rights and interests, but no one asserts that a full, trial-type hearing is always required as part of the administrative process. Thus, even Justice Irie, the most forthright proponent of due process in the *Customs Law* cases, did not regard Article 31 as requiring notice and hearing every time people's rights and interests may be affected by the State; instead, he suggested case-by-case differentiations according to the na-
feature of each particular administrative action. Judge Shiraishi also conceded, in both the *Taxi-Cab* case and the *Gumma Bus* case, that the concrete ingredients of "such due process as would leave no reasonable suspicion of arbitrariness on the part of the agency in charge" could not be determined without taking into account various factors such as the purposes and nature of the particular administrative action, the nature of the rights and interests to be affected by that action, and the characteristics of the particular agency involved.

Furthermore, the content of the constitutional principle of due process of law in administrative proceedings cannot be concretely developed wholly apart from the context of statutory provisions which shape the contours of such administrative action. It would be too dangerous to ask each agency in charge to judge whether, and what type of, a hearing is constitutionally required for each particular action. Thus, at the moment, we must look into the statutory environment to get a realistic picture of the present condition of the Japanese administrative hearing system.

According to the Special Commission for Investigating [the Present Condition and the Future Reform of] Administration (*Rinji Gyösei Chōsa-kai*), there are 481 articles (in 227 statutes) requiring hearings in 764 types of administrative dispositions. These provisions cover practically all adjudicatory administrative actions, and justify the

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44. See 14 Keishū at 1584-1585; 16 Keishū at 1599-1600.
45. See 14 Gyösei reishū at 1676; 14 Gyösei reishū at 2306.
46. See note 3, *supra*. There are some agency actions for which the legislature has not prescribed hearings; for example: cancellation of a license to manufacture airplanes or their parts (*Kōkūki seisoku jigyōhō* (Airplane manufacturing enterprise law) (Law No. 237, 1952), arts. 2-13); to do construction work in a bay or harbor (*Kōwan hō* (Bays and harbors law) (Law No. 218, 1950), art. 37-3); to operate an employment exchange project (*Shokugyō antei hō* (Employment stability law) (Law No. 141, 1947), art. 50).

In these instances, the parties affected may file objections and seek revocation of the agency actions taken against them. (Objections may be filed, of course, even where there is a guaranteed hearing prior to agency actions.) In dealing with such an objection, there is provision for oral as well as written presentation of evidence under the *Gyösei fuku shinsa hō* (Administrative appeal law) (Law No. 160, 1962) arts. 25 and 26, and other special statutes like the *Kokka kōmin hō* (National public servants law) (Law No. 120, 1947) arts. 89-92, the *Dempahō* (Radio law) (Law No. 131, 1950) arts. 83-96, *as amended*. The scope of our present inquiry is not intended to cover, except incidentally, the hearing procedures in such *post disposition cases*. As to the relationship between proceedings under the Administrative Appeal Law (administrative review) and administrative litigation (judicial review), see generally, Ogawa, *Judicial Review of Administrative Actions in Japan*, 43 WASH. L. REV. 1075, 1091 (1968), reprinted in Henderson, *supra* note 8 at 185, 201. We were told that in 1966, 56,685 cases were filed.
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conclusion that, so far as statutory provisions are concerned, the administrative hearing has been established in Japan as a general procedure, notwithstanding controversies over its constitutional basis. These statutory provisions were enacted after the war, apparently under American influence. Our task here is to ascertain whether this post-war legal transplantation has been successful in practice, and how well Japanese administrators have assimilated the Anglo-American hearing system into their traditional Continental-type of authoritative administration.

A. Hearing by Administrative Commissions

An especially conspicuous phenomenon in post-war Japan’s administrative law was the establishment of so-called administrative commissions (gyosei-finkai), such as the Fair Trade Commission, the Labor Relations Board (National and Prefectural), the Personnel Board (National), the Personnel Commission (Prefectural), the Public Safety Commissions (National and Prefectural) and others.47 These commissions were intended to act more-or-less independently of the Cabinet, Ministries, and other related administrative agencies, and to exercise quasi-judicial as well as quasi-legislative functions.48 Undoubtedly, this American type of commission was introduced in the hope of halting the Japanese tradition of centrally-controlled, authoritative administration, by decentralizing the decision-making process under the Administrative Appeal (Complaint) Law. Of these 47,302 were tax appeals. Interview with officials of Administrative Management Bureau, May 26, 1969.

47. For a history of the establishment and decline of administrative commissions, see Wada, Gyosei-finkai (Administrative commissions), Jususyuto 70 (No. 361, 1967); Kawakami, Gyosei-Finkai, 4 Grōshinō-Kōza 50 (Administrative Law Lecture Series, 1965).

48. Examples of rule-making hearings by administrative commissions are: specifications of unfair trade practices (FTC: Shiteki dokusen no kinshi oyobi kōseitorihi kō kakuiho ni kansuruhō (Law concerning prohibition of private monopoly and preservation of fair trade practice [popularly known as Anti-Monopoly Law]) (Law No. 54, 1947), art. 71); designation of a mining-prohibited area (LUAC: Tochi chasei finkai setchihō (Land Use Adjustment Commission Law) (Law No. 292, 1950), art. 23). Sometimes, administrative councils will conduct such public hearings: designation of a cultural properties protection area (CPPC: Bunkazai hogohō (Cultural property protection law) (Law No. 214, 1950), art. 85(1)iii); fares of bus, railway, airline (Transportation Council: Unyushū setchihō (Transportation ministry law) (Law No. 57, 1949), arts. 6, 16); radio regulatory rules (RRC: Radio law art. 99-12, supra note 46). Regarding public hearings for such quasi-legislative purposes, see generally, Takayanagi, Gyosei-shimpān (Administrative adjudication), 3 Grōshinō Kōza 98 (Administrative Law Lecture Series, 1965).
and by giving an opportunity for fair hearing to the parties involved in certain agency actions.

The hearings afforded by these administrative commissions are satisfactory on the whole, even by Anglo-American standards. A typical example is the procedure of the Fair Trade Commission. A party charged with violation of the Law concerning Prohibition of Private Monopoly and Preservation of Fair Trade Practice has a right to be notified, to appear, and to defend (with or without the aid of counsel) in an open hearing, where he is entitled to produce evidence and cross-examine adverse witnesses. Decisions must be given in writing, and must set forth the reasons which support them, i.e., findings of fact and conclusions of law. The FTC decisions are published and reported annually. Moreover, the private party may appeal an adverse decision to the Tokyo High Court, and the findings of fact by the FTC will bind the court where there is "substantial evidence" to support them.49

The FTC's statutory hearing is the most formal trial-type hearing in Japan. However, it is noteworthy that most parties charged by the FTC simply accept its recommendations (advisory decisions, kankokushinketsu) to cease monopolization or unfair trade practices, without resort to the guaranteed formal proceedings. Thus the traditional and informal "administrative guidance," widely practiced by the ministries controlling the Japanese economy, has penetrated the practice of even the administrative commissions.50 Rather exceptional was the recent Yawata-Fuji Steel merger case, wherein Japan's two largest steel companies refused to accept the FTC's advice, and requested a formal adjudication as to the illegality of the proposed merger plan.51 But even when such formal proceedings are instituted, in most cases the

49. See the Anti-Monopoly Law, supra note 48, ch. VIII, arts. 27-76, and ch. IX, arts. 77-88-2.
50. As to "administrative guidance," see Part III (C) Hearings by Ordinary Administrative Agencies, infra. In detail, see Narita, Administrative Guidance, 2 LAW IN JAPAN 45 (1968); Symposium, Gyōsei-shidō no kihon-mondai (Basic problems of administrative guidance), JURISUTO 21 (No. 342, 1966).
51. The details of the Yawata-Fuji Merger case were continuously reported by the Nihon Keizai Shimbun (Japan Economic Newspaper), International Weekly Edition. Particularly the issues of May 13, 1969 at 1-2 and May 20, 1969 at 2. Even here, however, after some weeks of formal hearing, apparently accompanied by further negotiations, a "consent decision" was reached permitting the merger on certain conditions. Id. issues of Oct. 21, 1969, at 2, and Oct. 31, 1969, at 1, 4.
parties apply for "decision by consent" (dō-shinketsu), thus avoiding the trial-type hearing.

The organic structure and hearing procedures of the Land Use Adjustment Commission are very similar to those of the FTC. LUAC's main activities are (1) designation of prohibited areas for mining, (2) disposition of objections to mining licenses or the use and expropriation of land for mining, and (3) adjudication of conflicts between proposed uses of land for public purposes (e.g., parks, water-gathering grounds, protective forests) and private purposes (e.g., agriculture, mining). The LUAC adjudicatory hearing is practically quite similar to a judicial trial, applying, mutatis mutandis, many articles of the Code of Civil Procedure. An appeal from the Commission's decision must be taken to the Tokyo High Court, and its findings of fact bind the court if they are supported by "substantial evidence."

However, the "substantial evidence" rule is applied only in appeals from decisions made by the FTC, LUAC, and the Radio Regulatory Council. Adjudications by the Patent Board and the High Marine Disasters Inquiry Board are subject to a judicial trial de novo in the Tokyo High Court, which employs trial-type proceedings. Some scholars have argued that, inasmuch as the object of such a suit against an

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52. Some scholars believe that the rule of substantial evidence is not as strict in Japan as it is in the United States, and that Japanese courts have often inquired more freely into the appropriateness of the findings of fact by the commissions. An example sometimes mentioned is Kokura-shi v. Tochi Chōsei Pinkai (Kokura City v. LUAC), 5 Gyōsei reishii 1690 (Tokyo High Ct., July 7, 1954), where LUAC's decision was set aside as unsupported by substantial evidence. The Fukuoka Division of the Ministry of International Trade and Industry [hereinafter cited as MITI] had granted a license for the Toyokuni Cement K.K. to prospect for lime within the boundaries of the city of Kokura. The city filed an objection alleging that there was a serious danger of destroying or causing deterioration of its water-gathering ground. LUAC decided in favor of MITI and the cement company. In LUAC's adjudicative proceedings, two experts were called. One of them just stated: "I cannot positively say as regards the question of whether the present gathering ground will be dried up as a result of the prospecting, but I guess there might be no danger." Another expert said: "I do not believe that the prospecting will affect the water unless the digging extends within 300 meters in diameter of the presently used gathering ground." Id. at 1693. Although there was no guarantee that the cement company would refrain from extending its prospecting to that area which was included in the license, LUAC relied on the testimony of a MITI official that administrative guidance would be properly applied. The Tokyo High Court held that LUAC's conclusion that there was no danger of affecting the City's water condition was untenable for lack of substantial evidence in the record; in view of the grave consequences which the prospecting might cause to the public health, the inconclusive experts' opinions and the company's self-restraint through administrative guidance could not be heavily relied upon. The Supreme Court affirmed the high court's ruling. 16 Minshū 781 (Sup. Ct., 1st Petty Bench, April 12, 1962). Query whether the result would be likely to be any different in U.S. practice?
administrative commission or board is to judge whether its particular adjudication was rightly decided, new allegations and new evidence should not be admitted at the trial de novo.\textsuperscript{53} Nonetheless, the case law clearly holds that, in the absence of statutory provision for application of the substantial evidence rule, new allegations and evidence can be introduced freely in the judicial trial.\textsuperscript{54}

This opportunity to retry completely a case in court may influence parties to refrain from presenting all their allegations and evidence in the administrative hearing, thus detracting from the quasi-judicial function of administrative commissions. This danger is especially evident in the case of the Labor Relations Boards. The Central and Prefectual Labor Relations Boards were established in 1946, and were further developed by the Labor Union Law of 1949. They each consist of 21 members (or 15, in the case of several prefectural boards) appointed by the Minister of Labor Relations (or by the Governor in the case of a prefectural board). One-third of the members are appointed pursuant to the recommendation of employers' associations, and another one-third, according to the preference of labor unions. The remaining one-third—called "public-interest members"—are appointed upon the approval of the other two-thirds of the appointees. The Labor Boards are empowered, \textit{inter alia}, to enjoin unfair labor practices by employers, and to mediate or arbitrate labor disputes. Their adjudicatory functions are mainly executed by the neutral, public-interest members, after consultation with the other members who represent the interests of either side. In the case of unfair labor practices, the parties (i.e., employer and employee) are guaranteed a full trial-type hearing in which they have a right to produce evidence and cross-examine witnesses.\textsuperscript{55}

\textsuperscript{53} See Kaneko, \textit{Shinketsu no shihō-shinsa} (Judicial review of administrative adjudications), in \textit{Sōseido to saiban} (Litigation and trial), IWAMATSU SAIBAN'EN KAKEXI KINEN (In commemoration of the Sixtieth birthday of Justice Iwamatsu) 457-469 (1956).


\textsuperscript{55} \textit{Rōdō Kumiainō} (Labor Union Law) arts. 19-27 (Law No. 174, 1949). This is illustrated by the decision in Ibikawa Denki Kōgyō K.K. v. Gifu-ken Rōdō Ōinkai (Ibikawa Electric Industry K.K. v. Gifu Labor Relations Board), 2 Rōdō reishū 215 (Gifu Dist. Ct., July 11, 1950), where the board issued an order to the plaintiff company to retract a dismissal of an employee, which it viewed as an unfair labor practice. The ruling was based on testimony and other evidence taken and examined in the investigation.
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But because unfair labor practice disputes are also directly actionable in an ordinary district court, employees often tend to bring their cases before such a court rather than a labor board. This is not surprising, since the courts possess more efficient means for providing immediate relief. Under the Code of Civil Procedure, a district court can issue an order of temporary (but, in effect, sometimes final) disposition (dankō no karishobun) for payment of wages provided the dismissed worker shows cause (somei, offering some credible proof, as distinguished from shōmei, presentation of evidence at the trial). A decision of a Labor Board, on the other hand, is subject to judicial review by a district court (not a high court), and the Board's findings of fact are not binding upon the court; in short, review will be a trial de novo. Under these circumstances, it is rather surprising that parties ever bring unfair labor practice cases to the Labor Board at all. At any rate, in order to enhance the prestige and effectiveness of the

proceedings, without giving the adverse party an opportunity to rebut and cross-examine. The court set aside the board's order as violating the Labor Union Law Article 27(1), which requires a trial-type hearing in order for the board to take action respecting an unfair labor practice.

56. As to the important role of temporary disposition in a labor case, see particularly, Sonobe, Rōdō-karishobun—Honshō to no kankei (Temporary disposition in labor case—relationship between [the petition for the temporary disposition] and the principal suit), Junusyō 252 (No. 361, 1967); Sawa, Karishobun no hon'anka (Petition for temporary disposition taking over principal suit) in Soshō to Sāban, supra note 53, at 377. An example of this type of relief may be found in George v. International Air Service Co., 16 Rōdō reibū 308 (Tokyo Dist. Ct., April 26, 1965), English Translation, 10 JAPAN ANNUAL OF INTERNATIONAL LAW 189 (1969), involving an American pilot dispatched in 1961 to Japan Air Lines from the International Air Service Co., a California corporation. George, the pilot, was dismissed on account of a labor dispute. While a petition was pending before the appropriate labor board in the United States, asserting that the dismissal constituted an unfair labor practice, he brought another petition before the Tokyo District Court seeking payment of his salary by way of the abovementioned "temporary disposition," recognized under the Japanese Code of Civil Procedure. Totally disregarding the United States labor board's proceeding (partly because International failed to raise the issue), the Japanese court sustained the petition and ordered International to pay the salary due.

57. Despite these drawbacks the caseload of the labor boards with respect to unfair labor practice cases is substantial and increasing. We were told, for example, that two years ago the Central Labor Relations Board had only 60 unfair labor practice cases per year, whereas they now have 90 cases a month. (Interview with Chairman Ishii of the Central Labor Relations Board, May 21, 1969.) We were also told that there were approximately 140 cases pending before the Tokyo Prefectural Board, that 70 or 80 were settled annually by decision or withdrawal, that the losing party in such cases can either appeal to the Central Labor Board or go directly to court, and that losing employers prefer to go directly to court, while losing employees prefer to appeal to the Central Labor Relations Board. (Interview with Chairman Tsukamoto of Tokyo Labor Relations Board, April 24, 1969.) Of course, these figures are very small compared with the caseload of the U.S. National Labor Relations Board. Chairman Ishii also agreed with the desirability of a legislative change in the method of judicial review.
Labor Boards, at least with respect to unfair labor practices, there should be some legislative restructuring to establish a more reasonable relationship between the Boards and the courts.

Another area where the right to fair administrative hearing is theoretically well-established is in disciplinary proceedings before the Personnel Commissions. But here again there are indications of substantial shortcomings in practice. For example, in *Kusaka v. Okayama-Ken Jinji P'inkai* (Kusaka v. Okayama Prefecture Personnel Commission), a Petty Bench of the Supreme Court held that the parties had no right to inspect the administrative record. The plaintiff, a public servant of Okayama Prefecture, had been dismissed in 1952, after which he appealed to the Prefecture's Personnel Commission. In 1956, pending the appeal, he petitioned for inspection of a relevant part of the Commission's record, which the Commission permitted. In 1957, still pending the appeal, he again applied for inspection of the Commission's record; this time, however, the Commission refused his request. The plaintiff then brought suit in the Okayama District Court demanding that the Commission's refusal be set aside as violative of Article 31 of the Constitution and the principle of open, public hearing. The district court dismissed the complaint, and the Hiroshima High Court followed suit. The Supreme Court, Justice Tanaka presiding, affirmed the High Court's decision and relied on the same reasoning. First, the Court conceded:

The hearing procedures of the Personnel Commission are to guarantee the deliberateness as well as the rationality of the hearing and the decision. The record thereof is to note and to publicly evidence the processes and the results of the procedures. Therefore, from the standpoint of procedural fairness and justice in the most strict sense, it is desirable that the parties be given an opportunity to inspect the record and take exceptions as regards [the correctness of] the record so that the hearing pro-

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58. In this connection, it is interesting to note that the Personnel Commissions, under Article 17 of the Public Service Law, have subpoena powers, unlike the United States Civil Service Commission, which does not have such power. We were also told by Mr. Tatsuo Sato, Chairman of the National Personnel Authority, that in disciplinary proceedings secret evidence was not used and that adverse witnesses were required to appear if the charged party wished to examine them. Interview, April 23, 1969.


60. 18 Minshū at 1621.
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...cedures may be conducted duly and fairly and the record may reflect the procedures correctly.

Nevertheless, the Court concluded that it is a question of legislative policy whether the party is to be given a right to inspect an administrative record.61

In the hearing by the Personnel Commission, the one who filed the appeal and requested a hearing is in a position to be able to know whether the procedures are conducted duly and fairly, since he is participating in the proceedings as the party. On the other hand, the Commission's record is not, in the absence of special provisions, the absolute evidence of the procedures like the record of litigation procedures. The Commission's record can be supplemented or contested by counter-evidence. Therefore, we do not think that the guarantee of such right to inspect the record of the Commission's hearing procedures is absolutely necessary. We rather think that whether to give to the party such right or not is a matter of legislative policy. Especially, since the party can invoke judicial review of the Commission's decision on the ground of a procedural fault if the outcome of the hearing would have been different but for that particular procedural fault, the protection of the party's interests is not necessarily insufficient. Accordingly, we cannot say that it is unconstitutional for the legislature not to accord to the party the right to inspect the Commission's record.

In essence, the Supreme Court was saying that a party must wait until the Commission issues its final decision on the merits of his appeal; if the decision is unfavorable to him, he can then institute a suit against the Commission on various grounds, including any procedural errors which might have affected the outcome of his appeal. However, in this particular case, the plaintiff's request for inspection of the record came four-and-a-half years after the filing of his appeal (and five years after his dismissal). Furthermore, upon judicial review, the plaintiff would have the burden of proving procedural fault in the Commission's hearing (if any), and establishing that such fault affected the outcome of the appeal. Certainly an administrative record is not "absolute evidence" and is subject to supplementation and rebuttal, but if that record omits or distorts certain procedural facts,

61. 18 Minshū at 1621-22.
it would be extremely hard for the private party to prove contradictory facts. As the courts conceded, the record is intended by law to publicly evidence the Commission's procedures; accordingly, a court will heavily rely on it whenever a dispute arises as to procedural facts.

The Commission's main concern in this case was that the record contained some confidential information concerning other persons' cases. But the plaintiff asked to see only the part of the record related to his case. Since the law requires that the hearing must be open if the party so requests, and that the Commission must keep a record,\(^62\) it would not be difficult for the courts to construe the law so as to entitle the party to inspect the record. Otherwise, the Supreme Court's first statement (quoted above), regarding procedural fairness and justice, sounds like mere lip-service. As Judge Shiraishi observed in the Taxi-Cab case and the Gumma Bus case, in a democratic society it is critically important for the party to be convinced psychologically that his case is being handled fairly, in a manner free from even suspicion of unjust and arbitrary treatment. Surely the party who is refused permission to see the record will become confirmed in suspicions regarding the fairness of the procedures and the correctness of the record. Unfortunately, the Japanese higher courts still seem unimpressed by such considerations.

B. Hearing by Administrative Councils

Administrative Councils (gyōsei shingikai) are, in most cases, an attenuated form of those post-war independent administrative commissions which were deprived of their final decision-making power after Japan regained its independence in 1952. Instead they were then relegated to an advisory status by statutory provisions which require the responsible Minister to consult with the appropriate council before making a final decision, and to give due respect to its recommendation.\(^63\)

However, the hearing procedures which typified those earlier Com-

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63. As to the decline of administrative commissions and the appearance of administrative councils in their places, see Wada, Gyōsei-Finkai (Administrative commissions), Jurisuto 70 (No. 361, 1967); Kawakami, Gyōsei-Finkai (Administrative commissions), 4 Gyōseintō Kōza 50 (Administrative Law Lectures Series, 1965).
missions have theoretically, at least, escaped abolition. A full, trial-type hearing is required by the Radio Law, for instance, when the Radio Regulatory Council deals with an objection to the licensing of a radio or television station by the Minister of Postal [and Communications] Services. Although the final disposition of the objection is made by the Minister, he must base his decision on the RRC's tentative decision (kettei-an). Inasmuch as the Minister's written opinion must include findings of fact by the RRC, its tentative decision apparently will be practically binding on him, so far as the facts are concerned. The final decision may be appealed to the Tokyo High Court (not to a district court), and that court is also bound by the RRC's findings of fact if there is substantial evidence in the record to support them. Thus, despite the change of the RRC's status from an independent commission to an advisory council, its proceedings (of the FTC type) have theoretically survived the 1952 revision of the Radio Law.

In practice, however, the decline of the commission system has naturally been accompanied by a diminution in the importance of such hearings. In some instances, including licensing, the Radio Law provides that the RRC may hold a hearing whenever it deems one necessary, before making its recommendation to the Minister. Some writers have argued that "may" should be read "shall," when the parties involved request a hearing. However, as the following case indicates, since the 1952 statutory revision the RRC has not once convened such a discretionary hearing, even when such a hearing was requested by the interested parties. Most licensing cases are really decided by the Radio Regulatory Bureau, without substantial review by the RRC whose recommendations are formed after consultation with the Bureau, as in the case of the Transportation Council; thus conflicts of opinion between the Council and the Bureau are avoided.

Chūō Kyōiku Terebi K.K. v. Yūsei-Daijin (Central Education T.V.K.K. v. Minister of Postal Services) (the Twelfth T.V. Channel case), decided by a Petty Bench of the Supreme Court on December 24,

65. See Takagi, Gyōsei shobunzen no chōmon in 2 SHINSHOKENSHOYO SÔRITSU JÔGO-SHÔNEN-KINEN ROMBUN-SHû, supra note 14, at 19.
1968, is illustrative of the present condition of RRC hearing procedures. The 12th T.V. Channel was relinquished by the U.S. Army in 1962, and the Japanese Government thereafter reserved the channel exclusively for scientific and technological education programs. Five applicants competed for the channel license, and pursuant to the Radio Law, the Minister submitted the case to the RRC for its recommendation on November 9, 1962. However, prior to this submission, the Asahi Shimbum (Japan’s largest newspaper) had reported (on July 13, 1962) Minister Sakomizu’s statement to newsmen that “I think it appropriate to grant the license to a non-profit organization. I assume that the Radio Regulatory Council will also recommend that the license be granted to a non-profit organization.” Of the five applicants for the license, only one was a non-profit organization, namely the Japan Science and Technology Development Foundation. The four others were all kabushiki-kaisha (k.k.), private business companies. In addition, two of the five members of the Radio Regulatory Council were then directors of the non-profit Foundation. Thus, consultation with and recommendation by the RRC appeared to be simply a formality. Indeed, the Minister’s formal written request of November 9, 1962, for the RRC’s recommendation read as follows:  

Re: Granting the [12th T.V. Channel] license to the Japan Science and Technology Development Foundation whose application satisfies the requirements of the Radio Law in the judgment [of the Bureau], and Rejecting other applications which do not satisfy the requirements. . . .

The members of the RRC and their examiners apparently reaffirmed this decision by merely reading through the application forms and their attachments, and despite the applicants’ requests for a hearing, none was held. Four days later, the RRC made the recommendation anticipated by the Bureau, and on the same day, the Minister decided in accordance with the recommendation to grant the license to the Foundation and to reject other applications, including that of the Central Education T.V. K.K.

66. 22 Minshū 3254 (Sup. Ct. 3rd Petty Bench, Dec. 24, 1968) aff’g 16 Gyōsei reishū 1266 (Tokyo High Ct., June 1, 1965).

67. 16 Gyōsei reishū at 1277.
Central filed objections, and the Minister again submitted the case to the RRC pursuant to the Radio Law, which explicitly requires a trial-type hearing at this stage of the proceeding. Central alleged in its written objections that the RRC and the Minister had erred in finding that the Foundation was better qualified than Central, and that there had been procedural unfairness in the decision-making process, especially in the RRC’s denial of Central’s request for an opportunity to be heard. In the RRC hearing on these objections, the Council apparently did not receive evidence concerning which of the two applicants (Foundation or Central) was better qualified, especially as regards financial stability, to efficiently operate the unprofitable educational television enterprise. Counsel for the Ministry argued at the hearing that the Minister had favored the Foundation because (1) it had submitted a written pledge that it had sufficient financial resources in the form of contributions from cooperative private companies, and (2) it was taking certain steps to secure a continuous inflow of such contributions, and was implementing other concrete financial measures. Central contested this allegation, but the RRC did not ask or require counsel for the Minister to present evidence regarding those “certain steps” and other “concrete financial measures.” Instead, the Council simply examined the allegations of both parties and concluded that “The question of financial resources for the unprofitable enterprise of education television is a matter of future speculation. Therefore, the crucial test is which applicant has produced more concrete evidence to show such resources. Judging from this test, it was reasonable for the Minister to have found relative preference for the Foundation rather than Central.” Thus, the Council tentatively overruled Central’s objection, even though it could not show what, if any, “more concrete evidence” had been produced by the Foundation.

The Minister overruled Central’s objection, in keeping with the RRC’s tentative decision. As required by the Radio Law, the Minister’s decision contained a column entitled “Findings of Fact by the Radio Regulatory Council;” these “findings” simply reiterated the contradictory allegations of the Minister’s counsel and the complaining

68. See 16 Gyösei reishū at 1309.
applicant, Central. Central then brought suit in the Tokyo High Court. Referring both to the United States Constitution and the Federal Communications Act, Central argued that the Minister's original decision rejecting its application had violated the principle of "no adverse action without a hearing." The defendant Minister replied that any hearing prior to the original licensing decision is discretionary, and that, since the 1952 change in the RRC's status, such hearings had never been held by the RRC regardless of the parties' requests, because the law providing for the hearings employs the term "may" rather than "must."

However, the Tokyo High Court did not discuss this particular issue, since it sustained Central's complaint for the simple reason that the Minister's decision overruling Central's objection had not contained "Findings of Fact by the RRC," as required by the Radio Law. The court held that the "findings" set forth by the Minister did not show any concrete facts (as distinguished from allegations) established by substantial evidence, sufficient to convince ordinary people and unsuccessful applicants that the RRC's judgment (or the Minister's decision based on it) was fair and reasonable. Further, the court refused to decide the case de novo upon its own findings of fact.

The Supreme Court affirmed the Tokyo High Court's decision on the same reasoning, holding that the Minister's decision did not contain the concrete sort of fact-findings contemplated by the law, particularly as to the comparative qualifications of the applicants. The Court also held that, although the Radio Law lacks provisions like those of the Anti-Monopoly Law (Article 81) which expressly prohibit the court from receiving new evidence, the intent of the former is the same as the latter: that is, as far as facts are concerned, the reviewing court may not try the case de novo or supply findings of fact which the administrator has failed to make. Hopefully, this case will become leading authority for the proposition that, when a statute requires a full trial-type hearing, it is not sufficient to merely observe the formalities of a hearing without actual examination of evidence; that instead the decision-maker and his advisory council must examine the evidence sufficiently to make findings which are concrete enough to convince the

69. 16 Gyōsei reishū at 1297.
parties and the general public that the particular administrative action is based on fair proceedings and good reasons.

Despite its promising outcome, the facts of the Channel 12 case illustrate the inevitable disintegration of hearing procedures associated with an advisory council whose independence is more theoretical than real. The Transportation Council, whose hearing procedures were questioned in the Gumma Bus case, supra, is another example. The Japanese Government rejected GHQ's post-war suggestion that transportation matters be governed by an independent commission comparable to the United States Interstate Commerce Commission. Instead, the Advisory Transportation Council resulted from a compromise, and its independence was questionable from the start. Six members of the Council are appointed by the Prime Minister with the approval of the Diet, and the Vice-Minister of Transportation is the seventh member, acting ex officio. In all twenty years of its history, the Minister of Transportation has never disapproved a recommendation of the Council; the significance of this fact can only be evaluated in light of the actual consultation process which normally transpires between the Bureau Chief and the Council. Staff of the Council assigned to draft a recommendation consult with the staff of the Bureau Chief who are assigned to the same case. They exchange drafts and undertake the negotiations which eventually lead to an agreed recommendation. Sometimes the Minister of Transportation has indicated a general policy in advance. But even if he has not, no recommendation of the Council is ever formally issued until it is known to be agreeable and acceptable to the Minister.

When the issue is the licensing of a bus line, truck route, air route or railway, public notice of application for the license is given, and protests must be filed within two weeks. If there is a protest, a public hearing must be held; if there is no protest, a public hearing still may be held. At the hearing, witnesses are heard, and a record is kept. Lawyers do not usually appear (although they may if they desire), and the Bureau staff members assigned to the case will be present. After the hearing, conferences are held by the Council members, Examiners, Bureau Chief, and staff, and, as noted earlier, the Council's recommendation is finalized when agreement has been reached between the Council and the Bureau Chief. The Gumma Central Bus K.K.'s objec-
tion to the fairness of the Council's hearing proceedings cannot be fully understood without knowledge of this background. On the other hand, the Tokyo High Court's conclusion that the Council's consultation with the Bureau prior to making its recommendation did not affect the independence and fairness of the Council's judgment is also understandable in light of this background. Since such consultation in advance is a routine process, neither secret nor peculiar to that particular case, it did not shock the court.

With the exception of the law governing the Radio Regulatory Council, Japanese administrative statutes generally do not require Ministers to base their decisions on findings of fact by administrative councils. Instead, they usually provide only that Ministers must pay due respect to council recommendations. Under such statutes, the courts tend to characterize the councils as "mere advisory organs," as distinguished from "participating organs." The conclusion drawn from this premise is that, inasmuch as Ministers are not bound by council recommendations or fact-findings, a "mere" procedural defect (e.g., neglect of fair hearing) in the formation of an advisory opinion does not alone taint the validity of Ministers' final decisions. This attitude is reflected in a variety of cases, for example in the fourth point of the Tokyo High Court's opinion in the Gumma Bus case, supra.

Judicial references to "mere" advisory organs (which is a form of popular participation in the decision-making process) and "mere" neglect of statutory administrative procedures (which provisions could be the most important safeguard against abuse of executive power) do not sound strange at all to the ears of Japanese lawyers. The traditional, and still prevailing, Japanese rationale is that illegal administrative actions are not all void or revocable, but are void only where the fault involved is clear and grave. Generally speaking, failure to consult an advisory organ is not considered clear and grave error; rather such consultation is deemed necessary "merely" to ensure the deliberateness of administrative actions in an internal, rather than external, context. Therefore, even when an agency completely ignores

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an advisory organ with whom it is legally obliged to consult prior to making a final decision, the agency’s action will not necessarily be void or revocable, even though it is illegal. Although this traditional theory sheds no light on fair hearing procedures by such administrative councils, it may yet help us to understand the Japanese attitude toward due process of law in the administrative context.

Unfortunately, after the war the Supreme Court adopted this familiar, continental theory of administrative actions without much reflection. For example, in *Nasu v. Yamada (the Land Substitution case)*, the plaintiff lost a tract of land to the defendant by way of a “Land Substitution Schedule” under the Special City-Planning Law of 1946. The plaintiff argued, *inter alia*, that the schedule was void because the City of Takamatsu, before making the schedule, had not consulted the local Land Partitions Adjustment Committee as required by the statute. Plaintiff’s complaint was dismissed in both the Takamatsu District Court, and the Takamatsu High Court, and somehow, neither of the two lower courts even discussed this particular issue. On appeal, the

71. A good example of this traditional view is found in the decision of the Great Court of Cassation in *Ueda v. Shimoyabara et al (The Farm Rent case)*, Hōritsu shimbun (No. 4827) 3 (Gr. Ct. Cass., Dec. 16, 1942), where the plaintiff, a farmland owner, demanded payment of farm rent in kind at a rate fixed years before. In fact, the rate was substantially reduced in 1941 by the order of each prefecture’s Governor pursuant to the Temporary Farm Land Control Order to implement the National Mobilization Law of 1938, the underlying policy being to help the exhausted tenants who were the main source of the Japanese Army. Ueda contended that the Governor’s order was void because he had not consulted the local Agriculture Committee before issuing it, as provided by the Control Order. The Court held, however, that since the Committee was merely an advisory organ, the Governor was not bound by its advice in any way, and his decision to reduce the rate was not void even though he acted illegally in ignoring the Committee’s existence. Another example is the May 17, 1915, Administrative Court’s decision, 26 Gyōroku 529, ruling that a governmental employee who had been hired without the required recommendation of the Ordinary Governmental Employees Examination Committee was nevertheless entitled to a retirement pension, since his employment had become effective when the hiring decision was made by a particular bureau chief, the Committee being merely an advisory organ. The results in both of these cases were probably sound, satisfying justice in the given situations. However, the broad reasoning used carries the danger of encouraging neglect of procedural law by administrators in general.

The Grand Court of Cassation (Daishin’in), then the highest court of Japan, was transformed into the Supreme Court (Sakō Saibansho) in 1947 under the New Constitution. The Administrative Court (Gyōsei Saibansho) was the organ which finally reviewed administrative actions, independently from the judiciary. This extraordinary court was abolished under the new Constitution Article 76(2): “No extraordinary tribunal shall be established nor shall any organ or agency of the Executive be given final judicial power.”

72. 19 Minshū 1468 (Sup. Ct., 3rd Petty Bench, Nov. 27, 1956). This is an ordinary civil case between private parties in which an agency action was challenged collaterally.

73. *Tokubetsu toshi keikaku hō* (Special city planning law) (Law No. 81, 1946).
plaintiff attacked the lower courts' disregard of the issue, but the Supreme Court affirmed, saying: 74

It is true that [the City] must hear the opinion of the local Land Partitions Adjustment Committee to make a land substituting disposition. (The Special City Planning Law Article 10.) However, it is not necessarily construed that the consultation with the LPAC is a prerequisite for such disposition. The Rule Implementing SCPL Article 11 provides that where the LPAC refuses to convene or submit its opinion, the authority can make a decision without waiting. This article indicates that the Law is intended to require the consultation as a mere, formal procedure for a land substitution disposition. We cannot understand the Law as making the consultation a condition necessary for such disposition. Therefore, although the court below erred in upholding the legality of the present land substitution disposition without inquiry into whether [the City] had heard the opinion of the LPAC, this error does not affect the conclusion reached by the court below. (Emphasis ours.)

The outcome of this litigation may be sound: perhaps the defendant's interest in the newly-acquired land should not be damaged on account of the public authority's disregard of statutory procedures in the land substitution process, of which the defendant had no knowledge and for which he was not to blame. Nevertheless, the reasoning does not seem very convincing. The above statute states very simply: "The authority shall decide the matters relating to land substitution and compensation therefor after hearing the opinion of the Land Partitions Adjustment Committee." There is ample room in this language for a positive interpretation, that the consultation is a prerequisite to agency action relating to land substitution and compensation. Why was it necessary for the highest court to go out of its way to encourage neglect of statutory administrative processes, thereby denying the natural interpretation of the statute? The Court's reference to the Rule Implementing Article 11 is far from appropriate, because that article is apparently an exceptional, emergency provision; it seems more than unusual for the LPAC to "refuse" to respond to a request for consultation. Moreover, the judiciary can review any implementing rule made by an administrative agency, if necessary, to see whether it

74. 10 Minshū at 1470-71.

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is consistent with the statute, or with the Constitution. The traditional Japanese inclination to make light of administrative "process" is particularly evident in this case, specifically in the often-used phraseology, "as a mere, formal procedure." In an effort to protect the defendant's interests in the land, the Court seems to have committed the error of killing a fly with a spear. The Court could easily have dismissed the appeal on other grounds. But, two years later, the Supreme Court again applied this traditional view in Kobari v. Fukushima-Ken Senkyo Kanri Iinkai (Fukushima Prefecture Election Management Commission) (the Town-Village Merger case), another case where the same result might have been reached on less devastating grounds.

These opinions of the Supreme Court have clearly discouraged efforts by lower courts to review administrative action from a due process of law perspective. Especially conspicuous has been the conservative tendency of High Court judges, reflecting the Supreme Court's attitude. Undoubtedly it was quite natural that the traditional, continental theory of administrative actions should persist after the war, considering that the pre-war scholars, judges and Government officials remained in their posts after the war. But this survival was indeed unfortunate when we consider how urgently Japan needed a radical change in its mode of legal thinking during its period of transition from authoritarian bureaucracy to democratic administration.

75. The Court could have ruled, for instance, that in light of Article 11 of the Gyōsei jiken sosō tokureihō (Administrative litigation special law) (Law 81, 1948), the particular agency action could not be revoked, illegal though it was, because revocation would inevitably cause great public confusion respecting use of the tracts of land involved. The Court might even have suggested, by way of dictum, that the plaintiff could sue the agency for damages under paragraph (3) of Article 11 and the Kokka baishōkō (State compensation law) (Law No. 125, 1948). The Administrative Litigation Special Law (Law No. 81, 1948) Article 11 (presently, the Gyōsei jiken sosōhō (Administrative litigation act) (Law No. 139, 1962) art. 31) provides that the court can dismiss a complaint where the revocation of an illegal agency action will have a serious adverse effect on the public welfare (par. 1), provided that the judgment contains a declaration that the agency action was illegal (par. 2), and that the plaintiff is not precluded thereby from suing the government for damages (par. 3).

76. 12 Minshū 2097 (Supreme Court, 2d Petty Bench, Sept. 19, 1958). Lower court decisions reflecting the same attitude are Fujiwara v. Nagasaki-Ken Chiji (Governor of Nagasaki Prefecture), 5 Gyōsei reishihō 1962 (Nagasaki Dist. Ct., Aug. 6, 1954) (failure of governor to consult local Fishery Adjustment Committee before deciding between two competing applications for an ocean fishery license); Ito v. Shimane-Ken Chiji (Governor of Shimane Prefecture) (the Hot Spring case), 14 Gyōsei reishihō 2242 (Hiroshima High Ct., Dec. 25, 1963), reversing 10 Gyōsei reishihō 2264 (Matsue Dist. Ct., Nov. 29, 1959) (failure of governor to consult local Hot Spring Council before granting permission to one innkeeper to install a motor system which would increase his supply of hot spring water and decrease the supply of another innkeeper).
But perhaps we should derive some slight consolation from the fact that even the traditional theory demands strict observance of procedural safeguards when a person's status and vested rights may be directly affected by a particular administrative action (as in the cases of disciplinary proceedings and revocation of licenses).

For example, in Minagawa v. Fukuoka-Ken Keisatsu-Honbukō (Fukuoka Police Bureau) (the Police Officer Dismissal case), the plaintiff-policeman had been dismissed by the Police Bureau Chief upon recommendation by the local Police Disciplinary Committee. The local Police Rules provided that, where the Chief requests the Committee to conduct a disciplinary hearing, the Committee must send to the party charged a "Notice of Hearing," accompanied by a copy of the Chief's "Request for [hearing for the purpose of] Disciplinary Disposition," which contains the details of the misconduct charged. The Rules also provided that there must be at least 15 days between the notice and the hearing date. However, in this case, the Committee sent the policeman a Notice of Hearing only three days before the hearing, and did not attach thereto a copy of the Request for Disciplinary Disposition. The Notice of Hearing did contain a column entitled "Reasons for Disciplinary Hearing," but the statement in that column was very abstract: "The person named failed to observe police discipline during his suspension from duty." (He had been suspended from duty for other reasons.) The Request for Disciplinary Disposition submitted by the Bureau Chief to the Committee, on the other hand, contained a much more concrete statement concerning the alleged misconduct: "The person named told a newspaperman that he had been unjustly suspended from duty for no other reason than the chief's emotional prejudice against him, and that he was then intending to appeal to the Fukuoka Division of the Ministry of Justice." During the hearing, the plaintiff objected to the three day notice but, under the circumstances, felt compelled to respond to the Committee's questions on the merits. He then requested that the Committee receive the testimony of certain witnesses, which the Committee did, though it subsequently recommended that the policeman be dismissed.

The plaintiff brought suit seeking (1) a declaration that the initial
suspension from duty had been null and void, and (2) a revocation of the subsequent dismissal. The Fukuoka District Court sustained the complaint on both counts. The law authorized the Police Bureau Chief to discipline police officers in only three ways: (a) reprimand, (b) reduction of salary, or (c) dismissal. Therefore, the order to suspend the plaintiff from duty was obviously null and void. Respecting the later dismissal, the court held that there had been grave procedural faults in the Committee's hearing inasmuch as the plaintiff had not been informed of the alleged misconduct with which he was charged, and, consequently, he had not been able to prepare his defense properly. Had the procedure been correct, the outcome of the hearing could have been quite different. Since the plaintiff objected to the improper procedure at the start of the hearing, the fact that he went on to contest the allegations made did not cure or waive the illegality of the Committee's action. Accordingly, the ultimate dismissal based upon the Committee's recommendation, which was the result of the gravely illegal hearing, had to be revoked, so that the Committee might properly conduct another hearing.\(^7\)

The Fukuoka High Court, however, reversed the District Court's holding as to the dismissal, and rejected that part of the complaint. The non-delivery of a copy of the "Request for Disciplinary Disposition" was deemed immaterial, because the statement of the "Reason for Disciplinary Hearing" contained in the "Notice of Hearing" was considered to be an adequate, although somewhat abstract, summary of the Request. In addition, the High Court thought that the plaintiff should be regarded as having waived or withdrawn his procedural objection when he eventually answered and defended on the merits. Thus, the High Court concluded that the procedural faults were light, rather than grave.\(^9\)

On appeal, however, the Supreme Court, Justice Kuriyama presiding, set aside the High Court's decision and reinstated the District Court's judgment in toto. The Court emphasized that the purpose of the notice procedure is to let the party know the nature of the charges against him, and to give him a fair opportunity to prepare his defense.

78. 2 Gyōsei reishū 1098 (Fukuoka Dist. Ct., May 18, 1951).
79. 5 Gyōsei reishū 1518 (Fukuoka High Ct., June 22, 1954).
Further, the Court very properly observed that it would be too much to require the charged party to persist in objecting to the entire procedure, when, as a matter of fact, the Committee gave him no choice but to answer and defend on the merits.80

C. Hearings by Ordinary Administrative Agencies

In cases where the administrative commissions, boards or advisory councils are not involved, hearings required by statute are administered by the ordinary administrative agencies—e.g., Ministers, bureau chiefs, officials, police officers, etc. However, there are very few judicial decisions dealing with such hearing procedures. Fortunately, the Rinji Gyōsei Chōsakai, the Special Commission for Investigating [the Present Condition and Future Reform of] Administration, has provided an excellent general picture of Japanese administrative hearings in its careful, nation-wide survey conducted between 1962 and 1964. In our discussion, we rely heavily upon its 1964 REPORT ON ADMINISTRATIVE PROCEDURE,81 and on its “OPINION ON THE REFORM OF ADMINISTRATIVE PROCEDURE TO ASSURE FAIRNESS,”82 in order to bridge the gaps not covered by relevant cases.

80. Another case worth noting is Asakura v. Saitama-Ken Chiji (Governor of Saitama Prefecture), 5 Gyōsei reishti 917 (Urawa Dist. Ct., April 20, 1954), where the Governor's order to cancel the designation of a certain physician as a Health Insurance doctor, upon recommendation of the local Social Insurance and Medical Council (SIMC), was suspended because of a procedural fault in the SIMC's hearing. The Health Insurance Law provides that the Governor must consult the SIMC before cancelling such a designation, and that the party shall be notified of the reasons for the cancellation, as well as the date and place of the hearing. The petitioner-doctor was charged with claiming excessive treatment expenses and the Governor submitted the case to the SIMC on that particular ground. However, the SIMC did not examine that specific charge, and somehow found that he had been a retained doctor of a national sanatorium, but had started the private practice as a Health Insurance doctor without first obtaining the necessary permission of the authority. The SIMC advised the Governor to cancel his designation as a Health Insurance doctor for that particular reason. The Urawa District Court issued an order to suspend the Governor's decision, on the ground that the SIMC had not made any recommendation on the subject-matter presented to it. The court was probably suggesting that, since the doctor had not been notified of the reason for the cancellation, he had not been given a fair opportunity to prepare his defense. See Takagi, Gyōsei shobunzen no chōmon in 2 SEIHOKEN SÉJÔ SORITSU JUGO-SHÔNEN-KINEN ROMBUJÛN-SHÔ, supra note 14, at 11-12.

81. Gyōsei Tetsuzuki Ni Kansuru Höboku (Report on administrative procedure): A pamphlet issued and submitted on Feb. 7, 1964, by the Rinji Gyōsei Chōsakai (the special commission for investigating administration) Daisei semmonbu-kai (the Third special division) Daini bunka-kai (the Second section), represented by M. Kan'ichi Kodama and Prof. Kiminobu Hashimoto. Some call this report simply the "Hashimoto Report." The following description is primarily based on this Report, at 17-28.

82. Gyōsei no Kōsei Karuho no Tame no Tetsuzuki no Kajaku Ni Kansuru
Chapter II (the Statutory Environment of Administrative Procedure) of the Commission's Report emphasizes the conspicuous lack of uniformity among statutory provisions for administrative hearings. Among these, there is extreme confusion, even in terminology. Many different terms are used for "hearing": some statutes use *chōmon* (to hear and listen) or *chōmon* (to hear and inquire); some use *benmei suru kikai* (opportunity to explain), *shakumei suru kikai* (opportunity to clarify), *chinjutsu suru kikai* (opportunity to make a statement); some others use *shinmon* (to try and inquire), *shinri* (to try and decide), *shimpan* (to try and judge), *kōto-shinri* (to try orally and decide); and still others use *iken no chinjutsu* (statement of opinion), etc. The Report concludes that there are no distinguishable standards for, or reasons for using, these different words. But this lack of uniformity in terminology has been very annoying to the public, and detrimental to efficient administration.

In addition, the methods of legislative provision for hearings are extremely diverse. Some statutes have comparatively detailed provisions; for example, Article 9 of the Building Standards Law provides as follows:

Article 9(1) [The agency in charge may order suspension of construction of a building or removal, remodelling or prohibition of use thereof in case there is a violation of the Building Standards Law.]

(2) Where the agency intends to order any of the above measures, it shall give to the person subject to such order a written notice of the specific measure to be taken and the reasons therefor.

(3) The above person may request the agency within 3 days from the receipt of the above notice, to conduct a public hearing.

(4) When requested as above, the agency shall ask the above person or his counsel to appear before it and shall conduct a public hearing.

(5) Where a public hearing is to be held as above, the specific measure to be taken and the date and place of the above hearing

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*iken* (Opinion on the reform of administrative procedure to assure fairness): A pamphlet issued and submitted by the Rinji Gょうせい Chōsakai represented by Mr. Kichiyo Sato. This opinion also appears in *JITI TSUSHINSHA, GYOSAI NO KAIKAKU, RINJI GYOSAI CHOSAKAI IENSHO* (Reform of Administration, the Special Commission’s Recommendations) 488-504 (1967).

83. The statutory examples used in this section are found in *RINJI GYOSEI CHOSAKAI, OPINION 4-14.*
shall be made known to the above person and be made public at least two days before the date.

(6) The above person may, at the hearing, produce witnesses and evidence in his favor.

(7)—(11) [Emergency measures can be taken without giving a hearing.]

Another good example is Article 7 of the Medical Practitioners Law which contains the following paragraphs:

Article 7 (1)—(4) [Substantive provisions for cancellation, suspension, re-issuance of license.]

(5) [In the case of cancellation or suspension of license], an advance notice shall be sent to the licensee subject to such disposition, stating therein the date and place of hearing and the grounds constituting the charges against him.

(6) The licensee shall be heard in his defense either in person or by counsel, and may produce witnesses and other evidence in his favor.

(7) The person conducting the hearing shall take and preserve a record of hearing, and shall prepare a written report of his finding and state his opinion to Minister of Health and Welfare for decision.

However, such detail is exceptional. Most statutes simply provide that there shall be a hearing, and that the date and place of the hearing shall be announced. For example, Article 43-15 of the Health Insurance Law provides as follows:

Article 43-15. The prefectural governor shall, in a case where he intends to refuse the designation of an insurance medical care organ or insurance dispensary, or to cancel its designation or to cancel the registration for an insurance doctor or insurance pharmacist, give the establisher of said medical care organ, dispensary, or said insurance doctor or insurance pharmacist an opportunity to explain. In this case, the date and the time, place and matter to be explained shall be made known in writing beforehand.

In addition, there are some statutes whose provisions state only that there shall be a hearing; for example, the Road Law, Article 71:

Article 71 (1)—(2) [The agency in charge may cancel the permission for road construction formerly granted or may order suspension of construction, removal or remodelling of a structure, etc.]
(3) Where the agency intends [to take an action under the preceding paragraphs], the person subject to such action shall be given a hearing.

The Commission's Report concludes that this lack of legislative uniformity is generally neither related to, nor the result of, diversity in the nature and content of respective administrative activities, but instead is a by-product of hasty legislative creation of such provisions after the war, without sufficient study or reference to established principles, thus leaving matters largely to executive discretion. The Report also discloses many other deficiencies in most of the statutes. They usually fail to state whether the party can be represented by an attorney, how many days must intervene between the notice and the hearing, whether the hearing shall be conducted by the official in charge or by an independent examiner, whether the hearing shall be an open or closed one, and so on. Consequently, practice differs widely among the agencies.

The Commission's Opinion on Reform provides several examples: The Road Law merely provides that the agency in charge (in most cases, the Governor of each prefecture) shall hold a hearing prior to taking certain actions (like suspension of road construction, and evacuation of structures), and thus the administrative practice respecting the permissibility of representation by counsel differs from prefecture to prefecture. The same is true under the Land Partitions Adjustment Law. The Beauty Shop Law is silent concerning the period of time between notice and hearing in a case of cancellation of a business license, and the administrative practice consequently varies among the authorities; some of them allow only three days. Some prefectures conduct an open hearing to cancel or suspend an architect's license, and some conduct a closed hearing, because the Architects Law is silent on the point. The Opinion observes that the lack of detailed provisions respecting the manner of conducting hearings has turned the hearing system into a mere formality.

There are some statutes which completely omit mention of hearings, thus making possible unreasonable disparities among similar administrative actions. For example, Article 2-13 of the Airplane Manufacturing Law, Article 37-3 of the Harbor and Bay Law, and Article 50 of the Employment Stability Law all fail to require a hearing before
cancellation of a business license, in stark contrast to other similar cases involving a cancellation of a business license. Moreover, disparities exist even under the same statute, and within the same article.84

According to the Report, the above-described various defects in the existing statutory provisions may have three detrimental effects: Since administration of the hearing provisions of these statutes is left entirely to the discretion of the respective agencies, a merely formal hearing may be regarded as meeting the statutory requirements, regardless of whether the people involved are given a real opportunity to be heard. This is especially true in Japan, where there is a conspicuous absence of judicial decisions indicating the exact ingredients of a fair hearing. Agencies which are anxious to abide by the spirit of a statute may not be able to act promptly and efficiently, due to the absence of specific directions therein. When the contents of statutory procedural guaranties are so vague and uncertain, citizens are not likely to be very enthusiastic about their right to a fair hearing.

The Special Commission's survey strongly supports its prediction of these three ill effects. Chapter III of the Report (Actual Administration of Statutes) begins with this remark relating to mandatory hearings: "In the first place, it must be pointed out that with few exceptions, very few hearings have been held." Furthermore, as the Minister of Postal Services quite unabashedly confirmed in the Twelfth TV Channel case, it is almost certain that there will be no hearing, even when the party requests one, where a statute provides for hearing as a "may" rather than a "must." This conclusion is supported by the Special Commission's 1963 Interim Report, which contains statistics showing the infrequency of administrative hearings.85

The Special Commission enumerates the following reasons for the scarcity of administrative hearings:

84. An example is the Dōro kōtsūhō (Road traffic law) art. 104 (Law No. 105, 1960), which requires a hearing before suspending a driver's license for 90 days or more, but not for less than 90 days. See Shimazu v. Yamagata-Ken Kōan Tōinai (Yamagata Prefecture Public Safety Commission), 11 Gyōsei reishū 455, 462 (Sendai High Ct., Feb. 26, 1960), upholding 70 day suspension without hearing since there was no statutory requirement applicable. See also note 29, supra.

Of course, a case can be made for the reasonableness of distinguishing between a 70 day suspension and a longer suspension for hearing purposes, if the shorter period were used as a means of providing a temporary suspension pending hearing. Compare cases collected in L. JAFFE & N. NATHANSON, ADMINISTRATIVE LAW 823-27 (3rd ed. 1968).

85. These statistics, for the years 1957 through 1961 are as follows:
### JAPANESE ADMINISTRATIVE HEARINGS STATISTICS

*(APPENDIX TO THE 1963 INTERIM REPORT OF THE SPECIAL ADMINISTRATIVE INVESTIGATION COMMISSION)*

A: Total number of administrative actions.  
B: Number of hearings given to the actions.  
C: Number of cases appealed to the courts.

<table>
<thead>
<tr>
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<tr>
<td>Anti-Monopoly Action</td>
<td>Fair Trade Commission</td>
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<td>0</td>
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<td>Land Use Adjustment Commission</td>
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<td>Transportation Council</td>
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<td>11</td>
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<td>426</td>
<td>5</td>
<td>0</td>
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<td>Road Transportation Business License</td>
<td>Minister of Transport</td>
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<td>413</td>
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<td>Land Transportation Bureau</td>
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<td>370</td>
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<td>Minister of Transport</td>
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<td>3543</td>
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<td>Approval of Transportation Fares</td>
<td>Land Transportation Bureau</td>
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<td>11778</td>
<td>19</td>
<td>0</td>
<td>322</td>
<td>23</td>
<td>0</td>
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*Remarks: A: Number of cease and desist orders  
A: Number of refusals to grant license  
A: Number of cases submitted to the Council*
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<td>Land Partition Adjustment</td>
<td>Tokyo Gov't</td>
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<td>6</td>
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<td>Removal Orders Under the Road Law</td>
<td>Tokyo Gov't</td>
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<td>Hokkaido Gov't</td>
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<td>0</td>
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<td>Cancellation or Suspension of</td>
<td>Local Divisions</td>
<td>297</td>
<td>15</td>
<td>0</td>
<td>1248</td>
<td>45</td>
<td>0</td>
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<td>Ministry of</td>
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<td>Justice</td>
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<td></td>
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<tr>
<td>Entertainment Business License</td>
<td>Tokyo Public</td>
<td>613</td>
<td>613</td>
<td>0</td>
<td>40</td>
<td>440</td>
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<td>Cancellation</td>
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<td>Suspension of Driver's License for</td>
<td>Tokyo Public</td>
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<td>274</td>
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<td>More Than 90 Days</td>
<td>Safety Commission</td>
<td></td>
<td></td>
<td></td>
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*Numbers represent certain percentage (as shown in the parenthesis) of the total number of suspension of driver's license regardless of the period for suspension.*
Right to Fair Hearing in Japan

(a) There are many instances in which an administrative agency avoids a formal administrative action for which a hearing is required by statute, but instead achieves the same goals by what is generally called "administrative guidance," i.e., informal but strong suggestion, advising the applicant in an informal meeting to withdraw his license application, or suggesting that an entertainment business operator voluntarily close down his night club for a violation of regulations, and the like. Annually, there are about 60 cases in which the agency informally instructs a manufacturer voluntarily to correct his weights and measures, without holding the hearing required by the Industrial Measures Standardization Law. The Report warns that such administrative guidance may turn many statutory provisions for fair administrative procedure into dead letters.

(b) A portion of the cases where a hearing is avoided are those in which an agency warns a party to desist from future violations, by way of administrative suggestion rather than by immediately taking formal action against him. The Report approves this kind of administrative guidance.

(c) "Next, it must be mentioned here," the Reporter says, "that, as a matter of the public mentality, people fear that some disadvantage might be imposed on them tomorrow because they fight with the government officials today." Especially in fields where administrative control is pervasive, there is a conspicuous tendency for citizens to avoid open disputes with officials, because they are mindful of the old

(Footnote 85 Continued)
Statistics for later years may of course, show substantial increases, as has already been indicated with respect to the Central Labor Relations Board. See note 57, supra. Statistics supplied by the Fair Trade Commission, on the other hand, show no significant increase in the number of formal complaints and hearings:

FAIR TRADE COMMISSION
NUMBER OF RECOMMENDATIONS AND DECISIONS

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Number of Recommendations</th>
<th>Number of Complaints Issued</th>
<th>Due to Acceptance of Recommendations</th>
<th>Decisions After Formal Hearing</th>
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<td>1964</td>
<td>32</td>
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<td>1965</td>
<td>31</td>
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<td>1966</td>
<td>18</td>
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<tr>
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<td>1968</td>
<td>34</td>
<td>1</td>
<td>28</td>
<td>3</td>
</tr>
</tbody>
</table>

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sayings, "Revenge may be taken in Nagasaki for an insult in Edo," and "The King has long arms." Thus, they commonly accept administrative guidance and waive the right to a hearing. They also avoid taking advantage of hearing procedures, even when formal action is taken against them and the statute requires a hearing by use of the word "must."\(^8\) It seems readily apparent that this mentality of the people largely accounts for the fact that they rarely file administrative objections with a superior agency, or institute litigation in court, when a particular agency in charge fails to give them a hearing or conducts an unfair hearing. The appeals in the Taxi-Cab case and the Gumma Bus case are important exceptions to this trend. This numerical scarcity of administrative objections and suits for judicial review has already been reported in Professor Gellhorn's interesting article, *Settling Disagreements with Officials in Japan.*\(^8\)

(d) Finally, the Report states that the vagueness and uncertainty of statutory provisions for administrative hearings are largely responsible for the infrequency of such hearings.

Furthermore, the Report directs attention to the fact that, in many instances, completely perfunctory hearing procedures are conducted merely to satisfy the applicable statutory requirements. Of course, officials dare not openly violate the law, so they hold hearings reluctantly; but in fact they decide controversies beforehand, and the results of the hearings are not seriously taken into consideration. Thus, many hearings end in a few minutes, because parties seldom contest the charges against them or present evidence in their own favor.\(^8\)

The Report also specifically mentions the common misinterpretation of the purpose of hearing procedures; Japanese agencies are apt to utilize the hearing system as a forum for warning, instructing, guiding, interrogating and other steps in administrative investigation. This is especially true in cases involving license revocation or suspension for

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86. The statutes sometimes provide that, where the party charged does not appear, the agency may take action without holding a hearing. E.g., *Dōro kōtsū hô* (Road traffic law), art. 104(5) (Law No. 105, 1960); *Jūhō tōkenrī shōji tō torishimari hô* (Guns and swords law), art. 12(3) (Law No. 6, 1958). Even without such express provisions, the same conclusion can be reached on a theory of waiver of hearing.


violation of police regulations such as the Entertainment Business Law, the Public Bath Law, the Used Goods Stores Law, the Guns and Swords Law, the Road Traffic Law, etc. These regulations often employ very misleading phraseology: "[In such and such cases], the Public Safety Commission shall demand the presence of the party, and conduct an open hearing." Hence, police officers acting in the name of the Public Safety Commission tend to think they are ordering the party to appear before them. Thus, the hearing is not considered primarily a procedure to enable the party to produce evidence advantageous to him, but rather an opportunity to interrogate him, confirm his repentence, and determine what type of sanction should be imposed on him—i.e., revocation or suspension, and suspension for how long. And, conversely, the people charged with violation of these police regulations tend to think of a notice of hearing as a kind of subpoena or summons ordering them to appear in the police building. They are usually not represented by lawyers and they are afraid of the officials. Under such circumstances, it is not surprising that most people are not enthusiastic about administrative hearings at all. In summary, the idea that agency hearings are intended to benefit the people rather than the agencies is still far from prevalent in Japan.

The idea that the purpose of a hearing is to afford the party an opportunity to present favorable evidence, rather than an opportunity for the authority to interrogate the party charged, has not thoroughly penetrated the Japanese courts either. For example, in Nakamoto v. Tochigi-Ken Chi ji (Governor of Tochigi Perfecture), a social insurance doctor had been reprimanded by the Governor for alleged overcharges. He challenged the Governor's action on the ground that it lacked any factual basis, and had been taken without giving the doctor an opportunity to be heard pursuant to the Code of the Social Insurance Medical Services Auditing. The District Court found that the

89. Although the hearings in police-regulation violation cases are conducted in the name of a prefectural public safety commission, such daily duties are carried out by the police bureau, while the commission concentrates primarily on making fundamental policies and controlling the police bureau generally, Keisatsuho (Police law), arts. 38(3), 44 (Law No. 162, 1954).

90. 8 Gyösei reishı 901 (Utsunomiya Dist. Ct., May 28, 1957).
plaintiff-doctor had been given notice and ample opportunity to be heard, because the auditing officers had given him prior notification of the auditing, had inspected his medical services record on the fixed auditing date, had prepared their auditing report in his office after questioning him and considering his explanations, and had then and there asked him to sign the auditing report, perhaps as a witness to the inspection procedures. Similarly in the Driver's License Suspension case,\textsuperscript{91} the Sendai High Court rejected plaintiff’s demand for a fair hearing because the law did not require a hearing for a suspension of a driver’s license for less than 90 days; the court added:\textsuperscript{92}

Moreover, he was interrogated by the police regarding the traffic accident, and witnessed the accident-inspection [i.e., signed the inspection paper as a witness]. \textit{Thus}, he was given an opportunity to be heard. Therefore, we do not think he should have been given another day to be heard prior to the present disposition [i.e. suspension of driver’s license for 70 days]. (Emphasis ours.)

Finally in the Exam-Cheating case,\textsuperscript{93} the Osaka High Court and the Supreme Court agreed that the student had been given an ample opportunity to be heard \textit{because} he was called before the students’ advisor and counsellors, was asked some questions by them about the cheating, and signed, upon request, the student-inquiry paper recording the questions and answers.

The danger in all three of these cases is that the courts seem to attach too much importance to a party’s signature on an inspection-paper or inquiry-record prepared by the authority. Realistically speaking, it would be extremely difficult under such circumstances for a party to refuse the authority’s request for his signature on such a paper. Consequently, it seems unreasonable to say that answering an officer’s interrogatories and signing an inquiry-paper are equivalent to an opportunity to be heard. The courts should at least recognize, by analogy to criminal procedure, that the former are a prosecutor’s means of gathering \textit{his} evidence, and that the latter is the defendant’s opportunity to present \textit{his} evidence. Such judicial recognition would help to effectuate the ideal expressed in the Special Commission’s Report that

\textsuperscript{91} 11 Gyōsei reishū 455 (Sendai High Ct., Feb. 26, 1960), notes 29, 84 \textit{supra}.

\textsuperscript{92} 11 Gyōsei reishū at 462.

\textsuperscript{93} 6 Shōmu geppō 1535 (Sup. Ct., 3rd Petty Bench, June 28, 1960), note 28 \textit{supra}.

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Right to Fair Hearing in Japan

administrative hearings are primarily intended for the protection of the people, and not for the convenience of the agencies.

The Report also suggests that, in license application cases, the hearing system is defective in its uncertainty as to the time period in which a licensing agency must decide whether to grant or refuse a license application, and that administration in this field is further plagued by public ignorance as to the standards by which applications are decided. The Report specifically refers to the Taxi-Cab case (Tokyo District Court's opinion), and stresses the need for prior publication of licensing standards.⁹⁴

The Report concludes Chapter III by noting that, despite the unsatisfactory state of the present administrative hearing system, it should not be regarded as totally deficient. The very fact that agencies usually do not take immediate, formal, adverse action (because that would require a hearing), but instead prefer informal administrative guidance, demonstrates that the hearing system is working as a check and restraint on arbitrary and hasty use of power. Besides this, there are many examples of successful hearings, and it naturally takes some time before a new legal system begins to operate successfully and at its full potential. Consequently, the Commission suggests reform, rather than abolition, of the present hearing system. To achieve such reform, the Commission in 1964 recommended to the Cabinet the enactment of a General Administrative Procedure Law, to cure the above-described deficiencies, and to bring about uniformity of practice among diverse agencies. It prepared a Draft Law which contains, inter alia, provisions for the following:⁹⁵

(a) a fixed period of time (generally 3 months) in which to dispose of application cases;
(b) publication of detailed licensing standards;
(c) a warning period: opportunity for the people to cure voluntarily their violation of regulations before imposing final, adverse disposition;
(d) at least 10 days between notice and hearing date;

⁹⁴. The Tokyo High Court's opinion in the Taxi-Cab case, which denied the necessity of publicizing the licensing standards before decision, was delivered in 1966, two years after the Commission's Report.
⁹⁵. RINJI GYÔSEI CHÔSAKAI REPORT 87-149, supra note 3.
(e) segregation of examiners and decision-makers;
(f) a right to employ attorneys;
(g) a right to inspect records of hearings, and to take exceptions;
(h) a right to explain and defend, with favorable witnesses and other helpful evidence;
(i) the principle of open hearings;
(j) a right to intervene;
(k) that tentative decisions by examiners, and final decision based thereon, must contain findings of fact and reasons for decision;
(l) disclosure of the tentative decision to the party, and a right to file an objection with the decision-maker before the final decision is made;
(m) allowance of summary procedures for simple cases.

This Draft Law was prepared under the leadership of Professor Hashimoto, after study of the United States Administrative Procedure Act, as well as the corresponding statutes of Austria, England, Italy, Poland, Spain and other countries. The Draft was submitted to the principal administrative agencies as well. We were told by staff members of the Cabinet Legislative Bureau that Professor Hashimoto's Report and Proposal (i.e., the 1964 Special Commission's Report and Opinion) were quite a "shock" to many government officials, because they are generally neither interested in, nor familiar with, the problems of administrative procedure. Because the proposed act contemplates drastic changes in the present system of administrative hearings, government officials are generally unfriendly toward it, and are particularly opposed to (1) a fixed period of time (3 months unless otherwise specified) in which to decide application cases; (2) an inflexible requirement that all dispositions be made in writing unless expressly excused; (3) publication of detailed licensing standards, which would be like "disclosure of their strategy to the enemy side"; and (4) disclosure of tentative decisions, which would be a breach of the confidential relationship between arms of the agency. We were also told that, while there has yet been no official response to the Hashimoto Draft, the proposed act is regarded as the most important issue before the Cabinet Legislative Bureau, which gives legal advice to the government on legislation and the drafting of statutes. Finally, we were assured that a number of government officials are genuinely concerned
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about procedural protection of human rights, and rationalization of Japanese administrative procedures.\textsuperscript{86}

IV. IN CONCLUSION: THE TAXI-CAB AND GUMMA BUS CASES IN COMPARATIVE AND HISTORICAL PERSPECTIVE

As the Report on Administrative Procedure frequently emphasizes, the existing unsatisfactory condition of the administrative hearing system in Japan cannot be fully understood wholly apart from the social and political attitudes of the Japanese people. Despite the lofty language of the Preamble to the Japanese Constitution, proclaiming that

Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people

still, in the minds of many of the people (especially the older and the less-educated), government officials remain "okami"—lord, ruler, or superior—rather than "kōboku"—public servants of the people.\textsuperscript{97} This attitude is probably shared to a considerable extent by the public officials themselves, since they are recruited from the best students of leading universities and are quite conscious of their elite status.\textsuperscript{98} Moreover, the rapid recovery of the Japanese post-war economy, accompanied by the increasingly specialized and complicated administration of a "welfare state" and a partially-planned economy, has

\textsuperscript{96} These statements about the governmental response to the Commission's recommendation are based upon a meeting on May 26, 1969, between Professor Nathanson and Mr. Yasuo Kikui, Councillor of the Cabinet Legislative Bureau. Others present were Professor Ogawa of Tokyo University, Professor Hokama of Chuo University, Mr. Yokota as interpreter, of International Christian University and other members of the Cabinet Legislative Bureau.

\textsuperscript{97} Except for some local farmers' riots and merchants' self-governments during and before the Tokugawa Era (ending in 1868), Japan has had no revolution from the bottom-up. Both the Meiji Restoration and the post-war democratization were the results of top-down political reforms. See generally, E. Reischauer, Japan: Past and Present, (rev. ed. 1953); J. Fairbank, E. Reischauer & A. Craig, East Asia: The Modern Transformation (1968); K. Nakamura, The Formation of Modern Japan as Viewed from Legal History (1962).

\textsuperscript{98} See S. Tsuji, Nihon Kan'yōsei no Kenkyū (Study on Japanese Bureaucracy) (1952); Kubota, Higher Civil Servants in Postwar Japan (1969).
tended to reinforce the inherent strength of the Japanese bureaucracy. Some even speak of the birth of a new bureaucracy, especially in the fields of economic and industrial regulation dominated by the Ministry of International Trade and Industry (well known to foreign business as MITI). Lawyers dealing with that agency are thoroughly familiar with its velvet-glove approach, through which "administrative guidance" (gyōsei-shidō) and "administration by circulars" (tsūtatsu ni yoru gyōsei) have substantially supplanted "administration by law" (hōritsu ni yoru gyōsei). Moreover, it is likely that the common people of Japan are well-inured to a substantially similar, though perhaps less polite and sophisticated, system of public administration. In short, the basic characteristics of Japanese government—especially its perpetuation of the so-called "Bureaucrat's Government" of pre-war Japan—remind us of a favorite saying of Japanese scholars, attributed to Otto Mayer, the father of German administrative law: "Constitutions change, administrative law remains the same." 

This peculiar background of Japanese administrative law may help us to understand why Judge Shiraishi, the presiding judge of the Tokyo District Court, was so anxious to find a firm constitutional basis (as well as statutory grounds) for his decisions in the Taxi-Cab and Gumma Bus cases. Nevertheless, the obvious appeal and significance of his approach should not blind us to the very real difficulties involved in applying the due process theory to both of these cases. Application of Article 31 to the facts of these cases requires not only the substitution of "fundamentally fair procedures" for "procedures established by law," but also necessitates characterization of a license denial as an "other criminal penalty." Even in the United States, where we do not have to struggle with any such limiting language, it has taken us a long time to make due process requirements generally applicable to license application proceedings. 

99. As to "administrative guidance," see articles cited in note 50. As to "administration by circulars," see generally, Tanaka, Hōritsu ni yoru gyōsei to tsūtatsu ni yoru gyōsei (Administration by law and administration by circulars), 32 Jōgai Kenkyū 7 (1956); Arai, Tsūtatsu gyōsei no konnichi-teki shihaku (Present phase of administration by circulars), 17 Hōritsu no Hiroba No (No. 10, 1964).


101. The United States Supreme Court has not elaborated any general principle of due process applicable to all types of licensing applications, although it has stated
Furthermore, the exact issues involved in the both the Taxi-Cab and Gumna Bus cases are fairly debatable, even if a statutory or constitutional requirement of fair hearing is assumed. For example, there is a certain practical common-sense appeal to the government's view that, in a case like Kawakami's, the ultimate standards of decision should not be disclosed to the applicants until after the decision is made; otherwise, applicants might be tempted to make their qualifications conform to the standards, even at the expense of truth. Veracity would then be the major issue, and, when the number of applicants is so large, the probability of abstract fairness in determining that issue might be significantly impaired. But, of course, if the standards are not disclosed, it is essential that the hearing examination bring out all that a certified public accountant may not be denied the opportunity to practice before the Board of Tax Appeals, upon character grounds, without opportunity for notice and hearing (Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, 123 (1926)); and that an applicant who has passed the bar examination may not be denied admission to the bar on character grounds without notice and hearing, including confrontation and cross-examination of those whose word might deprive him of his livelihood. Willner v. Committee on Character and Fitness, 373 U.S. 96, 103-106 (1963). It has also been held by lower federal courts that a bondsman may not be denied renewal of his license on character grounds without such "hearing and opportunity to answer . . . as would constitute due process" (In re Carter, 192 F.2d 15, 17 (D.C. Cir. 1951)), and that an applicant cannot be denied a liquor store license without procedural due process. Hornsby v. Allen, 326 F.2d 605, 612 (5th Cir. 1964). Recently the Supreme Court of Massachusetts has recognized a due process right to a fair hearing in connection with the denial of a permit to conduct a retail drug store. Milligan v. Board of Registration in Pharmacy, 348 Mass. 491, 204 N.E.2d 504 (1965). In the past many state courts have taken the position that certain types of licenses (especially liquor licenses) are "privileges" rather than "rights," and may be denied or revoked in summary proceedings, but such decisions are now less common. See 1 K. Davis, Administrative Treatise ($§ 7, 19 (1958)), Id. at 182-85 (Supp. 1965); Byse, Opportunity to be Heard in License Issuance, 101 U. Pa. L. Rev. 57 (1952).

This is apparently the consideration which the staff members of the Cabinet Legislative Bureau had in mind when they said that publication of the standards would be like disclosing strategy to the enemy. Of course, there are always such arguments of administrative convenience to justify a denial of fair hearing. This type of argument was especially common in the controversy over the fairness of loyalty and security hearings in the United States. Disclosure of the government's confidential informants would supposedly gravely interfere with the investigative efficiency of the FBI. See, e.g., Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), aff'd per curiam by an equally divided court, 341 U.S. 918 (1951). Gradually the American courts have grown less tolerant of this justification. See Greene v. McElroy, 360 U.S. 474 (1959); Garrott v. United States, 340 F.2d 615 (Ct. Cl. 1965). Especially relevant to the particular problem in the Taxi-Cab case, i.e., disclosure of standards, is the holding in Hornsby v. Allen 326 F.2d 605, 612 (5th Cir. 1964), where the court said:

If it develops that no ascertainable standards have been established by the Board of Aldermen by which an applicant can intelligently seek to qualify for a license, then the court must enjoin the denial of licensing under the prevailing system and until a legal standard is established and procedural due process provided in the liquor licensing field.

326 F.2d at 612.
the relevant facts, as was not done in the *Taxi-Cab* case. This was the basis of the High Court's decision in that case, and it is difficult to see how the Supreme Court can avoid affirming, at least on that ground.\(^{103}\) For the purposes of that particular case, and even for longer range purposes, it does not appear to be crucial whether the theoretical basis for decision is a constitutional theory of due process derived from Article 31 and other articles, or simply a principle of statutory interpretation. The statute in the *Taxi-Cab* case provided for hearings and presumably the legislature intended them to be fair.\(^{104}\) There is ample precedent in Anglo-American law for the proposition that, even in the absence of a statutory hearing provision, the requirement of fair hearing may be implied if the nature of the administrative function to be performed makes it appropriate.\(^{105}\) If the Supreme Court of Japan were to adopt this general principle of statutory interpretation, buttressed by the general spirit of constitutional protection of individual rights, it might well be just as effective as a more elaborate and specific, but also more questionable, constitutional approach to the problem.\(^{106}\)

The particular issues of fairness involved in the *Gumma Bus* case are more difficult than those of the *Taxi-Cab* case. Failure to disclose,
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in advance of the hearing, the exact standards for decision and the specific issues which will be deemed relevant, may have been of little significance, because such factors were well-known to all the parties concerned from their general experience with the subject matter. Presumably they were comparable to the issues involved in an ICC common-carrier certification case, including the adequacy of existing service, the extent to which the proposed service would be an improvement, the competitive effects upon existing services, and the like.

American law does not require the ICC to spell out such factors at the beginning of each hearing, even though specific findings must be made with respect to each of them. Ordinarily, however, ICC procedure does include an initial or recommended decision, which serves to crystallize issues and provides a basis for exceptions which may be argued before the final deciding authority (although, in initial licensing cases, even this may be dispensed with under the Federal Administrative Procedure Act, in exceptional circumstances107). More shocking to American ears is the Japanese practice, approved by the High Court's opinion in the Gumma Bus case, whereby the Advisory Council consults with the Bureau of the Ministry and withholds its recommendations until agreement is reached on disposition of the case. The problems involved here are essentially similar to those involved in our Morgan cases108 and in the English Arlidge case.109 The Japanese practice is not quite identical to an ex parte discussion between the prosecuting and deciding branches of the government, since neither

107. 5 U.S.C. § 557 (1967). In comparing the Taxi-Cab and Gumma Bus cases it might also be suggested that they might be distinguished from each other for hearing purposes on the basis of the nature of the factual issues involved. In the Taxi-Cab case, the facts in dispute concerned the personal qualifications of the particular applicant; these would doubtless be considered by Professor Davis as "adjudicatory facts," peculiarly appropriate for determination in a trial-type hearing. See 1 Davis, Administrative Law Treatise § 7.02 (1958). In Gumma Bus, on the other hand, the factual issues involved the comparative merits of the proposed and existing services and the general competitive situation pertaining to those services; these might arguably be regarded as either "adjudicatory" or "legislative" facts, appropriate either for trial-type or legislative-type hearings. The mere fact that they are generally determined in trial-type hearings in the American practice is hardly conclusive. Compare for example, First National Bank of Smithfield, North Carolina v. Saxon, 352 F.2d 267 (4th Cir. 1965), holding that a hearing was not required before a determination by the Comptroller of the Currency permitting the establishment of a branch of a National Bank in a community already served by another National Bank. Professor Davis agrees that a trial-type hearing should not be required in such a situation, although he argues that an informal hearing should be held. See 1 Davis Administrative Law Treatise § 4.04, 82-83 (Supp. 1963).


the Bureau nor the Council functions as a prosecutor. But their ex parte consultation does, nonetheless, deprive the applicant of an opportunity to hear and counter what might well be the most damaging arguments against his position, just as, in the Morgan cases, the Bureau of Animal Industry's ex parte presentation to the Secretary of Agriculture concerning the reasonableness of the rates in issue was deemed to deprive the interested parties of an opportunity for fair hearing. But, here again, as in the Taxi-Cab case, it is not essential for the Supreme Court to expound a constitutional theory of due process in order to find the hearing unfair. The statute itself requires a hearing, and it would require no excessive stretching of the language to hold this means a full and fair hearing, in the same way that Chief Justice Hughes interpreted the statutory requirement of a "full hearing" in the second Morgan case.\textsuperscript{110} It is true that Chief Justice Hughes analogized the Bureau of Animal Industry to a prosecutor in that case, since its position at the hearing had been primarily adverse to that of the private parties concerned.\textsuperscript{111} However, that analogy was rather overdrawn and certainly not the strongest point in the Chief Justice's opinion. A closer analogy might be drawn between the position of the Advisory Council and the hearing examiner in the American cases, or the inspector (hearing officer) in the English cases. It is now standard procedure in both American and English practice to disclose the hearing officer's report in advance of the final decision, in order to give private parties an opportunity to challenge his findings of fact, conclusions of law, and adverse recommendations.\textsuperscript{112} In the Japanese setting, it would seem reasonable to require that, if the Bureau in charge intends to recommend to the Minister a disposition which is adverse to the interests of any private parties, that recommendation should be disclosed to the private parties in time for them to counter the force of the arguments or findings relied upon by the Bureau. This could be done either at the hearing before the Advisory Council, or in

\textsuperscript{110} Morgan v. United States, 304 U.S. at 19.
\textsuperscript{111} Id. at 20.
\textsuperscript{112} In the United States, this is now generally required by the Administrative Procedure Act, as well as by the principles announced in the Morgan cases. Supra note 97. It has also been generally achieved in Great Britain as a result of the Report of the Committee on Administrative Tribunals and Enquiries (1957), popularly known as the Franks Report, even though it is not required by statute. See H. WADE, TOWARDS ADMINISTRATIVE JUSTICE 70-72 (1963).
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subsequent written submissions to the Minister, or both. Indeed, it would seem more consonant with the general statutory scheme of hearings before the Advisory Council to require that the position of the Bureau be made known at that hearing, so that it might be countered by the interested parties, and then fully considered by the Advisory Council, before the Council makes its recommendation to the Minister. If such a procedure were insisted upon, the hearing before the Council would be restored to its proper role, and the recommendations of the Council would clearly be entitled to the respect which the statutes originally intended for them.

In a general sense, we might draw an analogy between the present state of Japanese administrative law and the state of American administrative law in the 1930's, during which our Supreme Court decided the Morgan cases. The American people were just then becoming conscious of the importance of administrative fact-finding, and were disturbed by the great variety of administrative procedures. Congress, too, was beginning to take part in the fray, by suggesting various methods of rationalizing administrative procedures along more judicial lines. After extensive investigations, there finally emerged the Report of the Attorney General's Committee on Administrative Procedure in 1941, and the adoption of the Federal Administrative Procedure Act in 1946.113 It would be exciting indeed if the Supreme Court of Japan were to seize the opportunity now presented by the Taxi-Cab and Gumma Bus cases, to dramatize the problems of the administrative hearing system and to point out the general road to their solution, as did Chief Justice Hughes' opinions in the Morgan cases. This might also prompt more serious consideration in the Cabinet Legislative Bureau, and eventually in the Diet, of the Hashimoto Draft proposals for legislative reform of the administrative process. Naturally we do not suggest that Japanese administrative reform should be patterned exactly after the American way of doing things. Experience amply demonstrates that the importer of foreign legal wares must have a keen eye for the needs, tastes, and peculiarities of his local market. Besides, the American emphasis upon the trial-type hearing is cer-

113. For a brief history of the developments leading to the adoption of the APA, see Nathanson, *Some Comments on the Administrative Procedure Act*, 41 Illinois L. Rev. 368-371 (1946).
tainly not entirely above criticism, and in recent years has been sub-
jected to considerable reevaluation and some reform.\textsuperscript{114} Nor would we
overlook the obvious fact that the American administrative process,
like the Japanese, must rely on informal methods to dispose of the
overwhelming bulk of its business.\textsuperscript{115} But we do think it is not too
much to hope that the Japanese, by realistically reappraising both the
virtues and vices of their present hearing system, may point the way
towards an administrative process, designed to serve efficiently the
needs of a welfare and regulatory state, while yet adequately protecting
the rights, interests and dignity of the individual.

\textsuperscript{114} A famous and devastating example of such criticism, aimed especially at the
independent regulatory agencies, is James M. Landis' Report on the Regulatory Agencies
to the President-Elect (Senate Committee on the Judiciary, 86th Cong., 2d Sess., Comm.
Print, 1960). A more recent example is the Report of the American Bar Association
for particular reforms may also be found in the various reports of the Administrative
Conference of the United States. See Selected Reprints of the Administrative Conference