PROFOUNDLY UNDEMOCRATIC: THE PROPOSED INDEPENDENT PLANNING COMMISSION

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1. Famously the public inquiry into the proposals into a proposed fifth terminal at Heathrow took 46 months (that is, the best part of four years). The Inspector took 18 months to write his report and the Secretary of State 11 months to make his decision on that report. Thus it was more than 6 years from the beginning of the inquiry to decision.

2. Evidence, you may think, of a pretty unsatisfactory procedure.

3. There are however two particular reasons why the T5 proposals took a long time.

4. First, there was no clear airports policy promulgated by Government which could be applied to the proposal.

5. Second, the road proposals were in state of flux at the time that the inquiry began – the original orders which the inquiry was asked to consider were withdrawn (and new ones made) in the course of the inquiry.

6. And an indication of the complexity of the matter is given by the fact that it took the Secretary of State 11 months to decide, even having had his Inspector's distillation of the issues.

7. So T5 was not typical, even of the category "big" inquiry. However, it suits Government to play up the length of the inquiry in order to provide support for change; and there is no doubt that the Government **is** genuinely concerned about the length of time inquiries take, and wants to speed things up.

8. What this is all about is nuclear power. Despite our love affair with the Bomb, the British have never been very enthusiastic about the civil use of nuclear power. However most people who have realistically examined the issue think that there is no alternative way of meeting Britain's energy needs except by the generation of electricity by nuclear power. The word *realistically* in that sentence begs a lot of questions, and you may disagree that the nuclear option is the only realistic one. However from the Government's point of view at least the future is definitely nuclear.[1] It cannot face with equanimity the prospect of

[1]The Government…have…reached the preliminary view that private sector energy companies should have the option of investing in new nuclear power stations...:paragraph 120 of *Meeting the Energy Challenge A White Paper on Energy* (May 2007) Cm 7124. See also the speech by Tony Blair, MP, when

prolonged public inquiries into new nuclear power stations. Hence proposals for "streamlining" the inquiry system contained in the Queen's speech.

9. The Notes which the Department for Communities and Local Government have published on the Queen's Speech make it clear that what is proposed is the implementation of the proposals in the White Paper[2] published in May 2007 for the establishment of an Independent Infrastructure Planning Commission to deal with major infrastructure projects.

10. So instead of infrastructure projects being considered by a Planning Inspector, an application for a major project would be considered by a panel of the Planning Commission, all the members of which would have relevant expertise. One can envisage the panel being chaired by a recently retired senior civil servant, or a QC – someone of that kind. Another member might obviously be a "sound" Professor in a relevant scientific discipline. You get the idea.[3]

11. The panel will adopt an inquisitorial approach, using its expertise to assess the submissions. Most of this would be consideration on paper, but there would be some oral evidence. There might also be "open floor" sessions, the idea of which seems to be as some kind of safety valve for objectors. No cross examination by expensive barristers – no cross examination at all.

12. There will be a statutory time limit of nine months from start to finish, although the panel could take more time in an complex case – the thought being that any additional time sought would have to be proportionate to the original nine months. Fifteen months from start to finish by current standards would be exceptionally quick.

13. There must be some doubt as to the adequacy of a report produced on this sort of time scale, in two senses. First of all, as measured by objective standards of adequacy. Government, of course, would only care about this aspect of adequacy if the Panel produce the "wrong" result; and it is banking on the new Commission delivering the goods – the decision it wants on the timescale it wants. More significantly – and this will be an issue for Government - haste will increase the prospect of successful legal challenge.

14. The reason why the Government thinks that it will prove possible to adhere, more or less, to the tight timescale is that it will hit proposals with a National Policy Statement. This will say, to a greater or lesser extent, that it is national policy that a further nuclear power station be built at, say Windscale.

Prime Minister to the CBI on 16 May 2007 (headlined by the *Guardian* as *Blair presses the nuclear button*).

[2] *Planning for a Sustainable Future* (Cm 7120).

[3] A comparable exercise – comparable also in its manner of proceeding – was the panel appointed to recommend the site of the proposed large casino. This was chaired by Professor Stephen Crow, the former Chief Planning Inspector.

15. It then becomes the Commission's task to approve, say, the proposed nuclear power station at Windscale, unless adverse local impacts indicate otherwise. It is unclear how the Commission is supposed to weigh national policy against adverse local impacts; or, to put the same point another way, what local impacts might conceivably outweigh national policy (and there must in theory be such impacts, or else the whole process would demonstrably be a charade).

16. The Commissioners will be independent.[4] The decision as to whether there is a new nuclear power station at Windscale is to be handed over to three people who will be accountable to no-one and nothing but their own consciences.[5]

17. The Government's thought in this matter is that they will have hit the proposal so hard with policy that the Commission will only have one real option. They hope to enjoy the benefits of a speedy decision along the lines that they want, but to be able to say that it is not their own decision but that of an independent Commission (and that therefore they shouldn't be blamed).[6]

18. However the perceived[7] convenience of the proposed Commission to Government does not commend it to me; and the facts that

- proposals will be subject to anxious scrutiny by men and women[8] whom one hopes will be of high calibre; and

- decisions may be made quicker (or even be, objectively, generally better)

should not blind us to the fact the proposal for a Commission is, in principle, objectionable. This is because it is wrong that the Commission should be independent; wrong that it should not be accountable to anybody.

19. Judges need to be independent because they are determining facts and interpreting the law without fear or favour. The Commission is making a political judgment – whether, in my example, a nuclear power station should be built at Windscale. The only person who can decide whether policy properly outweighs local objections or vice versa is the appropriate Secretary of State, acting for the Government, if necessary taking the decision to Cabinet.[9] Don't

[4] Tenure of eight years is spoken of.
[5] I do not undervalue conscience in these matters. But X, Y and Z may conscientiously decide in a way which I think is completely wrong, and my concern is not met by the knowledge that the decision maker has acted according to his lights; or even by reflecting on Cromwell's words *Consider, in the bowels of Christ, that ye may be wrong.* Sound advice, of course, but the Commission may be wrong as well as me.
[6] Similarly those who are school governors will be aware of decisions which have to be taken, and for which governors are legally responsible, but which are dictated by Government.
[7] It could all backfire.
[8] Men and a woman appointed because there has to be a woman, I wager. (I won't say token woman because I am sure she will be as good or better than her colleagues).
[9] Famously the decision to demolish the Euston Arch in 1962 was taken to cabinet, but not, I think in the context of an application. It would have been a word in the ear of the Chairman of the British Railways Board.

confuse the duty to be fair and not to take bribes (to be *quasi-judicial*) with a requirement to be independent. If he gets it wrong (ie sufficient people disagree), that disagreement can be expressed through the ballot box.

20. This isn't dryasdust constitutional theory[10], but actually reflects reality. The green belt would today be a sea of mud[11] if there weren't votes in the matter, requiring the Government[12]to tread carefully.

21. The view I have expressed as to the matter was also that articulated by the House of Lords in the *Alconbury* case[13]. In that case, the Secretary of State did not contend that, when he was making planning decisions, he was acting as an independent tribunal (ie did not contend that he was acting in a judicial or quasi-judicial capacity).[14] To the argument that he should be so acting, he responded that this was contrary to the way our democratic constitution worked, and that the European Convention on Human Rights could not properly operate to strike down a central plank of the constitution of a democratic state. The House of Lords strongly endorsed this argument. Lord Nolan said

…the decision to be made…is an administrative and not a judicial decision. In the relatively small and populous island which we occupy, the decisions made by the Secretary of State will often have acute social, economic and environmental implications. A degree of central control is essential to the orderly use and development of town and country. Parliament has entrusted the requisite degree of control to the Secretary of State, and it is to Parliament which he must account for his exercise of it. To substitute for the Secretary of State an independent and impartial body with no central electoral accountability would not only be a recipe for chaos: ***it would be profoundly undemocratic***[15] (emphasis supplied).

22. Lord Hoffmann identified (and subsequently defended against legal challenge)

…the principle that policy decisions within the limits imposed by the principles of judicial review are a matter for democratically accountable institutions and not for the courts.[16]

[10] Although not be derided on this basis if it were.
[11] Ie prior to the construction of new housing estates.
[12] **All** Governments – I'm not making a party point.
[13] Ie *R(Alconbury Developments) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 (HL).
[14] See the speech of Lord Slynn at paragraph 42.
[15] See paragraph 60.
[16] See paragraph 76. It is also appropriate to quote what Lord Slynn accepted as a pithy summary from Gregory Jones (of these Chambers) who appeared in that case: *it is not right to say that a policy maker*

23. If the Government do go down the Planning Commission path, they risk jeopardising the basis which gives decisions on major projects legitimacy. It perhaps is a bit unlikely that by itself, the establishment of a Planning Commission will lead to riots on the streets. But if people feel that they have not been treated fairly – that their objections have had *a fair crack of the whip*[17] - because they feel that the whole process of National Policy Statements and the Planning Commission is way of steamrollering projects through, I think that there could be major problems. Perhaps not with nuclear projects if the government does win the argument that TINA.[18] I certainly can see problems with airport expansion if Government proposals are adhered to.

24. But if this is the bad news – to which must be added the fact that lawyers are left out in the cold in the procedures before the Commission, there is some good news (of a sectional kind). The silver lining is that there will be considerable incentives to objectors to bring legal challenges. Work in the future may not be as much fun as it was in the past, but every promoter of a major project will have her legal team pouring over every word that is issued into the public domain; the Commission and objectors likewise. We may be fiddling while Rome burns, but at least we won't be unemployed.

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cannot be a decision maker or that the final decision maker cannot be a democratically elected person or body (paragraph 48).

[17] See *Fairmount Investments v Secretary of State for the Environment* [1976] 1 WLR 1255 (HL): …*a phrase whose derivation neither I nor your lordships could trace* per Lord Russell of Killowen at pp1265-6.

[18] There is no alternative. Writing in an article *Planning for a New Generation of Power Stations* [2007] JPL 843 before *Planning for a Sustainable Future* was published, Keith Lindblom QC and Richard Honey concluded *Whilst it is possible, and indeed desirable, to improve the way that consents for new power stations are secured, radically to change the system at this critical moment is unlikely significantly to smooth the path of the next generation of power stations towards securing consent.* The whole of this excellent article repays careful reading and consideration.

APPENDIX 1

1. The question arises of course as to how the Commission will know when local considerations properly outweigh national policy, and *vice versa.*

2. At this point the White Paper seems to me to be opaque. It tell us that

> *Relevant adverse local consequences would be defined as those incompatible with relevant EC and domestic law, including human rights legislation. Relevant domestic law would be specified in the planning reform legislation.*

3. Box 5.2 in the White Paper seeks to explain what is proposed further:

Box 5.2: Illustrative factors the infrastructure planning commission would take into account in deciding an application for development consent

Relevant EC and domestic law for development consent covers a **wide range of factors, including those relating to the impact on the local community and local environment**, which the commission would have to take into account before taking its decision to reject or approve an application for development.

- The **Human Rights Act 1998** seeks to prevent unjustifiable interferences with a person's family life, home, and possessions. This is of particular relevance where a planning application includes a proposal for the compulsory purchase of land.

- Other legislation contains **processes** which must be followed when taking planning decisions, for example, the T&CP (Environmental Impact Assessment)(England and Wales) Regulations 1999 (see Box 4.3). Assessment of environmental impact covers a wide range of aspects, including for example effects on human beings, fauna, flora, heritage and landscape, as well as main alternatives studied and mitigation measures envisaged for significant adverse effects. The assessment does not contain a particular standard that proposed development must pass, but the commission would have to consider and balance the impacts against the national benefits in the national policy statement and other benefits. In certain locations, it would be subject to the requirements of the Habitats and Birds Directives (see Box 5.3).

- Some relevant legislation contains **specific environmental standards** that development must meet, for example, EC air quality values. So, where relevant, the commission would have to stipulate that development could go ahead only if stringent environmental standards on air quality could be met. The environmental information prepared by the promoter would have to include this information.

- Some legislation contains **qualitative factors** that the commission must take into account in its decisions. For example, the commission would be required to have regard to the purposes of National Parks and Areas of Outstanding Natural Beauty by (respectively) the National Parks and Access to the Countryside Act 1949 and the Countryside and Rights of Way Act 2000, when making decisions that affect them.

4. The idea seems to me that the adverse consequences that might be of sufficient weight are clear cut breaches of standards eg (see Box 5.2) air quality standards. But it all becomes a bit subjective if one is "in to" human rights (every relevant right is qualified by reference to the potentially overriding national interest) or the purpose of a national park.

5. In most cases, the decision maker ends up weighing economic benefit against environmental harm. Does the economic benefit of the Cardiff Bay Barrage justify the loss of an SSSI (a feeding ground for redshank and dunlin)? Does the economic benefit of an enhancement to the Thameslink service justify harm to the Borough Market Conservation Area? Does the economic benefit of an expansion of Stansted justify the loss of an extensive area of countryside?[19] These are "apples and pears" judgments. They have to be made, but they are not susceptible of precise analysis. I am sure we can all think of planning decisions of Government with which we disagree, from the Euston Arch through to Okehampton bypass to whichever tall building in London you dislike the most. (Or on the other side, what about Dibden Bay?) But unless (when permitted) the project fails to deliver the economic "goods", there is no right or wrong to decisions such as these.

[19] The harm flowing from increased CO2 emissions may be a matter addressed in national policy.

APPENDIX 2

Is there a constitutional objection to planning appeals being decided by a Planning Inspector rather than the Secretary of State? If not, does this tell us anything about the role of the Planning Commission?

1. When I started at the planning bar (more years ago than I care to think), almost all decisions were taken by the Secretary of State. Not personally, of course. The Inspector would report to the Secretary of State, and at the Department were officials who would actually decide the appeal and who would sign the decision letter on the Secretary of State's behalf.

2. However the system soon changed. Inspectors were given power to make the decision themselves in some cases, and eventually we reached the position that obtains today, namely that the Inspector makes the decision in most cases.

3. The reality is that these are essentially local decisions, to which Inspectors loyally apply (as appropriate) national policy.[20] Although it is nowhere "spelt out" it is assumed that national policy "trumps" local policy. Thus it is realistic to assume that in most cases, if the decision actually were made by the Secretary of State, he would make the same decision as his Inspector. When for example Circular 22/80 was issued by the Secretary of State telling inspectors not to be so fussy about design issues, Inspectors did what they were asked to do, even though many will have had reservations about the policy they were being asked to apply.

4. There will occasionally be finely balanced decisions in respect of which there is no objectively "right" answer, but given the volume of appeals and given the (comparatively) limited significance of most of them, it is unrealistic to think that the Secretary of State could take all these decisions personally. If however a pattern of decisions became apparent that were unsatisfactory the Secretary of State would- subject to one matter I shall come to in a moment - be answerable in Parliament for his Inspectors decisions. He would have to take steps to change the system so that it worked properly.

5. In fact, the way the system has worked in the past is that the really controversial decisions have been called in for the Secretary of State's own decision. If granting or refusing the permission looks too "brave" (ie politically unpopular), the brave decision would not be taken, despite a recommendation by an Inspector to the contrary. It may not be very satisfactory that ministers are afraid to make brave decisions, but it is democracy in action.

[20] Note that these comments do not apply to certain appeals or certain aspects of certain appeals , which are fact and not policy based – eg in respect of enforcement notices. There is no constitutional objection to these being considsed by an independent inspector answerable to no-one.

6. So, subject to one matter, the system whereby Inspectors make decisions is constitutionally satisfactory.

7. The one matter is the fact that the Planning Inspectorate is a Government Agency. In theory the Secretary of State could say if criticised about the decisions of the Inspectorate that this is not a matter for him but for the Chief Planning Inspector to account for. An interesting precedent is that of Michael Howard[21], who, in declining to resign following one prison breakout, argued that the Chief Executive of the Prison Service[22] was responsible – and proceeded to sack him, even though there was no contractual basis for doing so. However as regards the decisions of Inspectors it is difficult to imagine we could ever be into this territory. Individual rogue decisions will be subject to quashing. So at this level it is essentially a matter of constitutional theory.

8. But decisions about nuclear power stations are a different matter.

[21] Home Secretary 1993 - 1997.
[22] Derek Lewis.