1966

Book Review. Jaffe, L.L., Judicial Control of Administrative Action

Ralph F. Fuchs
Indiana University School of Law

JUDICIAL CONTROL OF ADMINISTRATIVE ACTION. By Louis L. Jaffe. Boston: Little, Brown & Company. 1965. Pp. xvi, 792. $20.00.

In this excellent, significant work, Professor Jaffe makes a major contribution to the understanding of government by means of administrative agencies and of the related actions of courts. His thesis, as stated in the Preface, is "that agencies and courts are in a *partnership* of law-making and law-applying" which operates in a matrix of authority bestowed by the legislature, within constitutional limits. The book explores all aspects of its subject, including the historical and constitutional foundations of governmental powers, the procedures by which judicial decisions are brought to bear, along with administrative actions, on a common subject matter, and the resulting division of labor in carrying out the deciding function. Internal agency procedures are not covered. State law is interwoven with federal law or discussed in juxtaposition to federal law throughout.

As the Preface also explains, much of the book has been published previously in law review articles that have here been revised and brought up to date; and these have been supplemented by several new chapters which round out the subject and tie it together. The text achieves unity and coherence. The publishers have recently announced a student edition which omits the last three chapters. These are new, but carry the main thought into supplementary areas that are not often reached in law school courses.

The entire work is a commentary in the best sense of the term, examining the reasons for doctrines and decisions, determining their historical, logical, and practical soundness, and applying a critical judgment to the whole. A vast amount of reading and of inquiry into affairs lies behind this book, and a beautiful objectivity enters into its conclusions. Professor Jaffe serves no cause other than the cause of understanding and improving the law. His conclusions, expressed with moderation and with deference when appropriate, reflect attachment to the values of freedom and welfare which Anglo-American legal development has on the whole fostered, and to the continued service of these values in the operation of legal institutions today. No slogans or clichés obscure his perception of the realities involved. The author's quest is for wise decisions; the approach is typically that of the judicial statesman, seeking sound answers to problems that arise when, as is so often the case, enacted law leaves room for choice.

Such a work is primarily an aid to learning and reflection, rather than a tool for advocates in search of authoritative support for predetermined positions. The references to decisions are properly selective, although on

numerous points the varying holdings and lines of reasoning of different courts are set forth in footnotes. Well over 2,000 cases are cited in all, together with a selection of statutes and of scholarly writings. Apart from these citations and the views of the author himself, which will surely carry weight with many courts, the analyses of issues will be of genuine value in the preparation of briefs. The book is highly useful for law students as well, and will hereafter be indispensable to serious scholarship in its field.

Since the functions of agencies and of courts rest ultimately on the constitutional allocation of governmental powers, including the legislative power to allocate further, Jaffe deals with this subject in chapters 2 and 3, after an introductory summary of current problems surrounding the operation of administrative agencies. His conclusion that the issue of constitutional validity of delegations of "legislative power" is not dead in the federal system, as well as in the states, but that ultimate solutions remain elusive, seems to me to be sound. The chapter on *Constitutional Competence of Court and Agency*, which is newly written, contains an extraordinarily perceptive discussion, blending history, logic, and practical considerations. For example, in the author's discussion of the proper initial roles of agencies and courts in such harsh actions against private interest as license revocation and imposition of fines, he takes full account of traditional concepts of "judicial" and "administrative" functions, the influence of long-standing practice, and the relative availability and effectiveness of agencies and courts for performing the required tasks.

Chapter 4 discusses primary jurisdiction and is followed by five chapters which deal, essentially, with the availability of judicial review of agency action. These cover the scheme of remedies and of other occasions for judicial consideration of agency regulations, orders, and acts; sovereign immunity; and the general sweep of the right to review and of exclusions from it. Here again the discussion weighs, in a delicate balance, the many pertinent considerations bearing on successive points. As to possible loss of the right to challenge an agency rule or order in a penal proceeding to enforce it, because of failure to employ statutory administrative and judicial remedies that were available originally,[1] one could argue that greater account might well have been taken of the need for expeditious enforcement, of the awkwardness of the processes of a trial court to determine validity when a full administrative record is not available, and of the enhancement of difficulties by a long lapse of time.[2]

[1] Pp. 196, 264-265, 384-389, 390-393, 450 et seq. The discussion of this matter is concluded as part of the treatment of exhaustion of administrative remedies.

[2] See, however, pp. 393-394, where the unsuitability of jury determination of the validity of an order is discussed.

The general conclusion on this point, that flat rules are generally absent and that the final determination of roles should lie with the courts when constitutional issues are involved, is nevertheless sound.

Chapters 10 through 13 deal with prerequisites to judicial review—ripeness, exhaustion of administrative remedies, and standing. The author makes his way skillfully and discerningly through the thicket of overlapping concepts involved and the welter of subtly differing agency regulations, orders, and pronouncements to which these concepts relate. He takes cognizance, too, of the varying application of these concepts in the several kinds of judicial proceedings in which they arise. He states his conclusions in this area, as in others, clearly but undogmatically.

In chapters 14 through 16, which deal with the scope of judicial review of agency action, Professor Jaffe realistically points to the element of judgment, or "intuitive leap," that is involved in every kind of determination, whether denominated a determination of law or of fact—or something else—that requires a resolution of conflict or difficulty in the basis of decision.[3] Fact itself is an inference from evidence, not something that can be known with complete certitude; and the application of a rule of law which allows any choice whatever requires that the decision be made on some basis that lies outside the rule itself, if only in the understanding of a doubtful word used in the rule. Any such determination, along with those which result from the expressed power to make choices for achieving prescribed purposes (such as the power to formulate rules for guarding machines in the interest of safety), is likely to be made on the basis of facilitating the ends which the deciding authority has in mind—which means, in the case of an administrative agency or of a court reviewing its action, its conception of the purpose of the governing statute. There is therefore a continuum of powers of choice, to which Jaffe applies the term "discretion," involved in all kinds of determinations of doubtful questions. In the sequence which involves court review of agency determinations, the two bodies play their respective roles as to the same determinations, in the "partnership" the author envisages. The court, which has the last word, necessarily determines ultimately the allocation of authority between agency and court. When inferences from evidence as to present or past phenomena dominate a decision, the question is one of "fact" for review purposes, and the court recognizes the agency's conclusion as final if there is substantial evidence in its support; but if the meaning of a statutory word (such as "employee") is also in issue, "the dispute must be resolved by reference to the purpose of the statute and the question is thus one of law."[4]

---

[3] See pp. 550-556.

[4] P. 551.

In a passage which follows, Jaffe seems to equate resolving questions of law, which ordinarily are considered interpretative, and "law making" in the sense of developing new rules.[5] They may be so equated, because of the element of choice in interpretation; but further along he recognizes that "adopting and then applying" a rule (including, it would seem, interpretation of it) may arise successively in a determination. In some contexts, agencies may be allowed to play a primary and influential, but of course not an unlimited, role in either or both.[6]

The author views the problem of scope of review primarily from the standpoint of a court which has the reviewing task to perform. A different approach to allocating authority between agency and court is possible, however—the approach of the statutory draftsman or legislator who is trying as best he can to prescribe a sound division of labor in advance of the actual execution of the powers he is bestowing. For him it may be useful to reserve the term "discretion" for the power, which may be explicitly bestowed, to make subordinate choices of policy with finality, and thereby to "make law"; to distinguish from this function the ascertainment of past or present phenomena which, as the author brings out, may relate to "facts" that are regarded as having objective existence independently of determinations about them; and to seek to prescribe, when feasible, verbal guides to decision which are to have the force of "law," and the interpretation of which presents questions "of" law. Nothing Jaffe writes is inconsistent with this approach; he only stresses the problems that must continue to arise at the reviewing stage because of the inadequacy of statutory words to operate with complete precision and because statutes must be applied to changing conditions.

The three concluding chapters deal with *Judicial Stays Pending Administrative Action, Judicial Stays Pending Judicial Review,* and the allocation of jurisdiction over a proceeding, as between court and agency, during and after judicial review. These are to a large extent pioneering treatments of their subjects, and are correspondingly valuable. Certainly they are not less important from a practical standpoint than the more traditionally recognized topics that relate to judicial review.

Careful workmanship and attractive format characterize this work as a whole. Typographical errors have not been avoided altogether, but none that I noticed is other than obvious or affects the meaning significantly. Some questionable citations are bound to occur in so detailed a study, involving so many jurisdictions, and there probably are a few in this book. It is difficult to see, for example, how *Russell v. Johnson,*[7] an

---

[5] Pp. 553-555.

[6] Pp. 563-565.

[7] 220 Ind. 649, 46 N.E.2d 219 (1943), cited in footnote 24 on p. 557.

Indiana case, can be said to support the proposition, for which it is cited, that some courts "in reviewing a workmen's compensation award make an independent determination in every case." The case supports such a practice by the full state Industrial Board in reviewing a single member's decision, but it limits the courts (in an "independent action" for review) to ascertaining "if, in the broad sense, the requirements of due process have been met," including whether there is substantial evidence in the record to support the Board's determinations of fact.

RALPH F. FUCHS†

---

† Professor of Law, Indiana University School of Law.