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Judicial Control of Administrative Action, by Louis L. Jaffe (1965)

Cornelius J. Peck

University of Washington School of Law

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

A book with the depth and scope of Professor Jaffe's recently published work on judicial control of administrative action is not an easy one to review. While one is tempted to write a parallel work of commentary and criticism, such a task is beyond the scope of a review; anything less, however, seems light and superficial when put beside the work commented upon. Nevertheless, the following is offered for interested readers.

Professor Jaffe's book was not written in the tradition of legal treatises which present a detailed, systematic, and tightly organized treatment of a subject. On the contrary, though he refers to the work as a treatise, the volume grew out of a number of separately published law review articles, supplemented by four new chapters. Although some integration of the articles has been accomplished, the total impression created is more that of a volume of provocative legal essays than of the structured and sometimes dogmatic presentation endemic to treatises. Revisions made in the articles previously published are of interest and of particular value in reflecting a judgment matured both by reconsideration and by a discerning receptiveness to criticisms directed at the previously stated views.

This is not to say that comparisons may not be made between Professor Jaffe's work and the well-known four-volume treatise by Professor Davis. Indeed, Professor Davis has already furnished a fairly detailed and annotated list of his disagreements with Jaffe.¹ Aside from these specific substantive issues upon which they are divided and the more limited coverage of Jaffe's book, the primary difference between the two works is in their tone. As those familiar with Professor Davis' writings are aware, he is inclined to categorize decisions as right or wrong, depending upon how well they conform to the scheme he created when organizing his treatise. Jaffe on the other hand assiduously avoids positions which have any aspect of dogmatism, with the frequent consequence that while the problem has been exposed in all of its delicate aspects, the reader is left to make his own resolution of the issues. Thus, while Professor Davis' condemnation of the decision in

¹Davis, "*Judicial Control of Administrative Action*": *A Review*, 66 COLUM. L. REV. 635 (1966).

*International Longshoremen's Union v. Boyd*² leaves no doubt that he considers it an erratic and unfortunate response of the Supreme Court in dealing with problems of ripeness,³ Jaffe's tempered treatment leaves his readers with no more guidance than that the decision is one which he has found hard to accept.⁴ For Jaffe there can be no formula for preventing "industry orientation" of agencies, or by which it is decided whether a board or officer should be made subject to Presidential removal, or by which rule or policy-making functions should be separated from adjudication.⁵ Although review by way of trial de novo of an administrative order made after a full and fair hearing seems to him at first sight wasteful and almost contradictory, he concludes that its operative effect may in fact have redeeming value.⁶ He even refuses to take a firm position with respect to public actions in the federal sphere,⁷ despite the fact that he has assumed the role of a reformer interested in changing the law governing standing to maintain public actions.

The introductory comments, in which he passes some generalized judgments upon the administrative process, are among the more interesting portions of Jaffe's book. He asserts that administration involves policy-making, and policy-making is politics—a politics which cannot be hidden by the pretence that expertise provides an objective determinant of policy.⁸ He doubts, however, that administrative agencies can plan effectively because they lack the essential political force and become too involved with day-to-day details of their work.⁹ The planning that is done is likely to be oriented toward problems which were experienced in the past, rather than toward those which might be anticipated in the future.¹⁰ He believes that in recent years the reformers who supported the development of the administrative process have become disillusioned,¹¹ and leads his readers into the consideration of the subject with the concession that administrative agencies have limitations which give rise to a picture having disturbing aspects.¹²

² 347 U.S. 222 (1954).

³ 3 DAVIS, ADMINISTRATIVE LAW § 21.08, at 184 (1958).

⁴ P. 415.

⁵ P. 27.

⁶ P. 99. *But see* Wollett, *The Board of Industrial Insurance Appeals After Nine Years: A Partial Evaluation*, 33 WASH. L. REV. 80 (1958).

⁷ P. 495.

⁸ P. 22.

⁹ Pp. 49-51.

¹⁰ Pp. 16-18.

¹¹ P. 3.

¹² P. 25.

In the way of substance, one familiar with Jaffe's writing notes with interest that his revised views on the matter of primary jurisdiction do not leave him in the sharp opposition to that doctrine which he once expressed in a still provocative law review article.¹³ In keeping with the tone of the entire book, he will not make the dogmatic assumption that effective economic regulations must be exclusively judicial or that the premises of the anti-trust laws are more in the public interest than those underlying the regulatory statutes.¹⁴ For those who have the interest, or more likely, those who are compelled by the necessities of litigation or research, a detailed discussion of certiorari and mandamus may be found in a chapter on the system of judicial review.¹⁵ For the historically minded, there is also a dividend in the chapter on sovereign immunity.¹⁶

Jaffe's substantive comments do create some puzzles. For example, his defense of a broad application of discretionary governmental immunity from tort liability¹⁷ seems to be at war with his advocacy of rules liberalizing the recognition of public actions brought by taxpayers, citizens, or consumers.¹⁸ I should think one would be more likely to tolerate challenge to and possible conflict with official policy determinations in actions brought by those who had suffered specific, identifiable, and unique injuries than to allow such challenges to be made by parties whose interest is no different from that of any other member of the body politic.

Also somewhat surprising is Jaffe's praise for the jurisdictional fact doctrine of *Crowell v. Benson*,¹⁹ which he defends against what he calls an overly stringent but logical critique.²⁰ It is true that the doctrine provides an implement in the Court's armory which might be used to meet an exceptional situation. But it is an implement so fashioned as to be useful only in a few very exceptional cases, and even in those, one the effectiveness of which is easily equaled by other techniques less disturbing to the general relationship between courts and agencies in matters of judicial review.

The closing chapters of the book contain what is probably the closest and most detailed published treatment of problems of judicial stays

¹³ Jaffe, *Primary Jurisdiction Reconsidered*. *The Anti-Trust Laws*, 102 U. PA. L. REV. 577 (1954).

¹⁴ P. 151.

¹⁵ Pp. 165-194.

¹⁶ Pp. 197-231.

¹⁷ Pp. 258-260.

¹⁸ Pp. 459-500.

¹⁹ 285 U.S. 22 (1932).

²⁰ P. 641.

pending administrative action and judicial stays of administrative action pending judicial review. So exhaustive is the treatment that one is left wondering how all that precedes it could have been compressed into 650 pages.

The critical comments in this review should not be taken as an attempt to slight the value of what is an extremely important book in the field of administrative law. Jaffe's book is no substitute for Davis' treatise, but it does not appear to have been intended to serve as such. Indeed, it seems likely that even for the subjects treated by Jaffe, the Davis work will remain the favorite of practitioners and judges seeking firm and unequivocal expressions of opinion as to what the law is and what the law should be. But for the student and the scholar the less positive, the less assertive work of Jaffe is invaluable as an introduction to an area of law in which, as demonstrated by the conflict of opinions displayed in law review articles on administrative law, there is a great diversity of opinion and considerable variation in approach. It should be mentioned that there is available a soft cover student edition of the book, which has been abridged by elimination of the last three chapters of the complete work.

Cornelius J. Peck*

* Professor of Law, University of Washington. B.S. (1944), LL.B. (1949), Harvard. Member of the Massachusetts and Washington Bars.