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Jaffe: Judicial Control of Administrative Action

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of the world from the safety of a mountain of gold. Britain, in contrast, has been stubbornly clinging to an exchange parity that dooms the country to chronic payments deficits and repeated crises of confidence.

Mr. Shonfield emphasizes the liberalization and expansion of international trade as a factor favorable to postwar Western prosperity, and he rightly points to the international monetary system as a potential Achilles' heel. He does not, however, sufficiently consider how the structure of exchange rates caused liberalization of trade and other international transactions to have quite a different impact on the various countries he studied.

Mr. Shonfield, to his credit, devotes the concluding chapter of his book to a thoughtful essay on the problem of assuring democratic control of the economic planning he admires. This is more than the usual problem of controlling a bureaucracy to which power of decision on important complex matters has been delegated. How can elected officials control intimate collaboration between bureaucratic experts and organized private interests? How do spokesmen and negotiators for functional groups—Labor or Business or Chemical Industry or Agriculture—acquire legitimacy? The corporate state is not an appetizing prospect. Fortunately a democratic government can probably plan and guide the growth of a mixed economy without enlarging its powers or sharing them with private groups.

JAMES TOBIN†

JUDICIAL CONTROL OF ADMINISTRATIVE ACTION. By *Louis L. Jaffe*.^{*} Boston: Little, Brown & Co., 1965. Pp. xvi, 792.

After many years of judicial review of government agencies, the law on this subject is still obscure and uncertain. Professor Louis L. Jaffe's important new treatise, *Judicial Control of Administrative Action*, describes the judicially developed techniques to control or, perhaps more accurately, to influence administrative action. He discusses such basic matters as standing, sovereign immunity, exhaustion of administrative remedies, and the scope and manner of judicial enforcement of agency orders. But beyond the usual topics, Professor Jaffe also deals with less frequently considered problems, such as the judicial power to

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issue stays pending administrative decisions and damage actions against governmental officers.

To the practicing lawyer involved with administrative agencies, the book undoubtedly will be a valuable reference. Professor Jaffe is no mere chronicler of precedent. He has analyzed the cases and, more important, has given them the benefit of mature consideration. He does not hesitate to criticize positions taken by courts or other commentators or to restate concepts and rules in ways which, he believes, more accurately reflect the present state or direction of the law. The work is of particular value in that Professor Jaffe's views are likely to have significant impact on future developments in this area.¹ My principal disagreement with Jaffe concerns his treatment of judicial review of agency procedural decisions. In a relatively brief discussion, Jaffe is understandably critical of courts which have reversed agency actions on procedural grounds when their real motive for reversal was a disagreement on the merits. He believes these decisions hinder agency attempts to improve their procedures. In the absence of clear legal prescriptions to the contrary, Jaffe thinks "reasonable" procedural decisions should not be disturbed.

In my view, courts should continue to play an important role as monitors of agency procedure. Without judicial prodding, agencies have displayed far less ability or willingness than courts to fashion fair and prompt procedures. Thus the courts have not supervised the agencies' prehearing procedures, and, correspondingly, the agencies have failed to develop simple and expeditious prehearing techniques.

Contrary to Jaffe's views, I doubt that vesting greater discretion in agencies with respect to procedure would make their proceedings less cumbersome or protracted. In fact, many of the deficiencies in agency adjudicatory proceedings seem to be due to the unwillingness of agencies and their hearing examiners to let the parties clarify and define issues. In my experience, there is a marked contrast between the attitudes of agencies and of judges on this point. Trial judges are much more insistent that the parties eliminate minor issues. Agency proceedings, on the other hand, are frequently filled with disputes on trivial matters. Furthermore, judicial scrutiny has been an important protection against arbitrary agency action. I believe that in the absence of meticulous review by the courts, agencies would pay mere lip-service

1. See, for example, the reliance of the Court of Appeals of the District of Columbia on Jaffe's writings with respect to standing in *Office of Communication of the United Church of Christ v. FCC*, No. 19409, D.C. Cir., March 25, 1966.

to the fairness of their procedures, because of their primary interest in achieving regulatory objectives.

Professor Jaffe's book extensively discusses the metes and bounds of judicial review of the adjudicatory proceedings, with particular emphasis on those of the federal administrative agencies. The heart of Professor Jaffe's approach is the requirement that the judiciary consistently recognize the respective roles of the agency and the court in fact-finding and lawmaking. Specifically, he believes it essential that questions of "fact," on which agency determinations are given greater weight, be distinguished from questions of "law." Professor Jaffe takes strong issue with the courts which gloss over the fundamental distinction between "fact" and "law" in order to disguise administrative agency lawmaking as factual adjudication. He disputes the pragmatic position of Professor Kenneth C. Davis that a determination of what is "fact" or "law" should depend on whether or not the reviewing court believes the question is more appropriately decided by a court or by an agency. Jaffe vigorously asserts that consistent application of legal principles requires that the courts recognize agency lawmaking for what it is.

While Jaffe's arguments have some validity, there is real doubt whether the available legal tools are sharp enough to make consistent, principled classifications of "fact" and "law." For example, Jaffe defines findings of fact as "the assertion that a phenomenon has happened or is or will be happening independent or anterior to any assertion as to its legal effect." But this definition, which Jaffe himself submits is subject to qualification, may provide little effective guidance.²

Jaffe would have courts determine the role of agency expertise in lawmaking by evaluating that expertise in the light of the terms and over-all purposes of the relevant legislation. But it does not seem to me that this approach will significantly reduce the courts' burdens.

Other aspects of judicial review of agency findings reflect similar difficulties. For example, Jaffe discusses the "whole record requirement" of the "substantial evidence test" announced by the Supreme Court in *Universal Camera*.³ Under this test, as Professor Jaffe recognizes, the reviewing court must take into account matters in the record which would lessen the weight of the evidence supporting the agency's findings. Nevertheless, he argues that the judges must be careful not to weigh the evidence as a whole. Once a judge has determined that there

2. As Judge Henry Friendly indicated in *NLRB v. Marcus Trucking Co.*, 286 F.2d 583, 590-91 (2d Cir. 1961).

3. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

is a "reasoned probability" of the fact found by the agency, he must accept it even though on the whole record the judge believes that a contrary inference is much more probable. In principle the concept may have some validity; but, as Jaffe himself recognizes, it is quite a subtle and difficult one. And if in practice judges cannot follow it, perhaps we should leave a determination of substantial evidence to the dictates of their own consciences.

In short, a number of Jaffe's distinctions are elusive and difficult to apply. This is probably inevitable, however, in view of the inherent complexity of judicial review of agency action. Even Jaffe wisely cautions against regarding principles of administrative law as dogma and urges that, in cases involving matters of great importance (particularly to individuals), judicial review must be more exacting than what is normally prescribed by the rules.⁴

As Jaffe's analyses demonstrate, judicial review has limitations, and we cannot depend on it alone to ensure that agencies operate within the limits of powers granted them and in conformance with accepted legal principles. The agencies themselves must have a strong commitment to legal principles. This is particularly necessary because in many areas agency action cannot realistically be subject to judicial review or even a formal agency hearing. To cite a few instances: the Securities and Exchange Commission staff engages in virtually unreviewable regulation in proxy contests. The parties in such contests are required to submit all proxy soliciting materials to the SEC for "comments" by the staff. The parties are under severe pressure to conform their materials to the staff's comments, regardless of their validity. If the staff's comments are not followed, there is a risk that the agency will seek injunctive relief. The mere commencement of a suit might well cause the dissenting party to lose the contest, even though ultimately the agency's position may be reversed by the court. Similarly, the Food and Drug Administration can, by advising producers of its views, regulate the type of new food products that may be introduced to the public. To ignore the agency advice is to risk seizure of the product after it has been distributed to retail outlets. The publicity or disruption of marketing attending such a seizure might well be the kiss of death for the new product, and the threat dissuades a potential producer from his plan.

4. Jaffe has further expounded on this position in his recent comments, *Burden of Proof and Scope of Review*, 79 HARV. L. REV. 914 (1966), in which he comments on the reversal by the Second Circuit Court of Appeals of an order of deportation in *Sherman v. Immigration and Naturalization Service*, 350 F.2d 894 (2d Cir. 1966).

At one point in the treatise, Professor Jaffe states that administrative agencies are but another room in the "great mansion of law." But frequently an agency and its personnel forget that they are part of a legal system. This lack of sensitivity may be due to the wide discretion often vested in the agencies under vague grants of authority, which make them feel outside the sphere of law. Also, in the case of agencies directly involved in enforcement, agency members are often committed to certain preconceived objectives and place less emphasis on making determinations in accordance with accepted legal techniques. Perhaps it is too much to expect agencies engaged in enforcement activities to behave otherwise—we would not, for example, anticipate that a district attorney's office would make an altogether objective court.

Nevertheless, it is the lack of real commitment to principles of law that has, in my view, contributed to the failure of administrative agencies to develop workable and clear standards.⁵ The absence of such a commitment can result in reliance on "expertise" to rationalize decisions based largely on the members' prejudices and preconceptions.

One way of mitigating this problem would be to reformulate our basic attitudes toward agencies. Specifically, our conception of agencies and courts as essentially different institutions may have outlived its usefulness. In a number of important ways, the differences between them are negligible. For example, both the Federal Trade Commission and the National Labor Relations Board, in adjudicating unfair practices and in fashioning remedies under the statutes which they administer, operate very much in the manner of courts, utilizing the same evidentiary principles and giving somewhat similar deference to *stare decisis*. There is no reason why we should not expect these and other agencies to take both formal and informal action on the basis of reasoned and supported determinations.

Professor Jaffe's treatise makes a valuable contribution to the subject of judicial control. Hopefully, it will lead to refinement of judicial techniques which will improve the quality of judicial review of agency action. This refinement should imbue in the agencies themselves a greater dedication to legal principles. Improved judicial control must be accompanied by internal strengthening of these agencies if we are really to perfect our administrative process.

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5. Cf. Friendly, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS* 5-26 (1962).