

Book Reviews

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State Administrative Law. By Frank E. Cooper. Bobbs-Merrill Company, Indianapolis: 1965. Vols. I & II. Pp. 951, including index. \$35.00.

This book is intended to be a comprehensive study of state administrative law, making available to those interested in the development of such law — as opposed to federal law — a treatise devoted solely to the subject. The need for such a book is clear to anyone who has attempted to research a question of administrative law as it pertains to the various states. There has been no basic source for such research, and the frustrated researcher was usually forced to examine a multitude of indices. The leading treatise on administrative law, by Professor Kenneth C. Davis,¹ is sometimes helpful, but it is directed more toward federal than state law. Thus, the need is clear; whether Mr. Cooper's work is a complete answer is debatable. Indeed, there is a serious question whether *any* book designed as a general study of state administrative law could completely meet the need.

Administrative law is often thought of as nebulous, internally contradictory, rapidly changing and generally bewildering. Such a view is probably not unfair. It can be stated in defense of this much-maligned area of the law that nothing more should be expected of a comparatively recent set of legal principles asked to serve equally well all types and sizes of administrative agencies, regardless of their diverse natures, purposes, organizations and personnel. The difficulty of describing and commenting upon such an area of the law as respects one jurisdiction — such as the federal government or a particular state — is obvious. Imagine, then, the difficulty (or perhaps impossibility) of performing such a function regarding all fifty states.

Mr. Cooper's understanding of administrative law, from both a scholarly and practical viewpoint, is one of the strong points of the book.² He is able to discuss and present complicated phases of the subject with clarity and brevity, without sacrificing thoroughness, and yet consistently tempering theoretical ideals with the common sense and practicality of an experienced attorney.

Mr. Cooper uses the Revised Model State Administrative Procedure Act³ as his frame of reference for studying state statutes and

1. DAVIS, ADMINISTRATIVE LAW (1958).

2. Mr. Cooper, a practicing attorney in Detroit, has taught administrative law at the University of Michigan Law School and acted as consultant to the committee of the Conference of Commissioners on Uniform State Laws which wrote the Revised Model State Administrative Procedure Act promulgated in 1961. He is the author of ADMINISTRATIVE AGENCIES AND THE COURTS (1951); THE LAWYER AND ADMINISTRATIVE AGENCIES (1947); and CASES ON ADMINISTRATIVE TRIBUNALS (3d Ed. 1957), written jointly with Dean E. Blythe Stason.

3. 9C UNIFORM LAWS ANNOTATED 117 (Supp. 1965).

judicial decisions relating to the procedural aspects of administrative agencies. Rule making, contested cases, licensing and judicial review, for example, are discussed in the same order as they appear in the Revised Model Act. These specific topics are introduced by chapters on the history of state agencies, separation of powers and delegation of powers, which are general topics not dealt with in the Revised Model Act. Under each of these subjects, the author endeavors to analyze the existing statutory and judicial law of the states and then to compare the rule suggested by the Commissioners in the act. This format permits a logical and coordinated development of the discussion, providing the reader a well-lighted path through what otherwise might be impenetrable darkness.

Mr. Cooper's explanations and presentations of many difficult concepts in administrative law — *e.g.*, delegation of powers, the right to a hearing, primary jurisdiction — are probably the best parts of the book. They are clear, complete and should be understandable to even the beginning student in administrative law. For this reason, the book is valuable as a basic text for someone with an unfamiliar problem in administrative law who wants a starting place for consideration of the matter. This is so whether the problem concerns federal or state law, because the basic issues and rules of administrative law are the same in both jurisdictions, even though the solutions and applications may sometimes be different. These discussions are also valuable to someone engaged in framing or evaluating legislation dealing with administrative agencies, and, indeed, the book was intended in great part to benefit just such people. For instance, Mr. Cooper explores at great length the advantages and disadvantages of the delegation of powers from a legislative body to an administrative agency and lists seven possible bad results of such action, which he states "may wisely be considered by those engaged in the drafting of legislative standards designed to channel administrative discretion."

Of what value is this book to someone interested in the administrative law of a particular state? In most instances, the answer will be that it is of very little value once the general principles of the problem are understood, for the book does not attempt to present in detail the law of any particular state. As an illustration, the chapter on delegation of powers cites two Maryland cases for the proposition that such a delegation to an agency is invalid unless the legislation contains definite standards limiting the discretion of the agency: *Tighe v. Osborne*,⁴ decided in 1925, and *Maryland Theatrical Corp. v. Brennan*,⁵ decided in 1942. No other Maryland case is cited on this subject, although the law of our state has progressed far beyond the preliminary principles enunciated by those decisions. The reader looks in vain for any mention of more recent cases such as *Maryland Coal & Realty Co. v. Bureau of Mines*⁶ and *Pressman v. Barnes*,⁷ which upheld such legislation without any standards at all. Similarly, the chapter dealing

4. 149 Md. 349, 131 Atl. 801 (1925).

5. 180 Md. 377, 24 A.2d 911 (1942).

6. 193 Md. 627, 69 A.2d 471 (1949).

7. 209 Md. 544, 121 A.2d 816 (1956).

with the constitutional right to a hearing discusses the propensity of "older" cases to rely on distinctions between "judicial" and "legislative" functions and between "rights" and "privileges" as an aid in decision; but it does not refer to the fairly recent Maryland case of *Albert v. Public Serv. Comm'n*,⁸ where our Court of Appeals relied on just such distinctions. These illustrations are representative of most of the book, and so, as a research tool, it has severe limitations.

The position of Mr. Cooper as one of the draftsmen of the Revised Model Act, and his decision to gear his discussions to the format of the act, give this book a special character. It is greatly oriented to the thinking of the draftsmen of the act and is, in a sense, proselytizing those state legislatures which have not yet seen the wisdom of adopting the act. The views of the Conference of Commissioners are certainly worthy of consideration, especially in a state such as Maryland which has adopted the original Model Act.⁹ The appendix, containing a history of the preparation of the original and revised Model Acts and the text of the Revised Act with comments, is especially helpful as a ready reference source.

On the other hand, Mr. Cooper's situation as an advocate of the Revised Model Act may have hindered to some extent an objective appraisal of the act. This model legislation is the work of a committee and, like most products of committees, no doubt represents a consensus submerging many differing opinions. The act certainly has numerous merits, but there is still room for constructive criticism. For instance, the act requires state agencies to follow the rules of evidence in civil cases unless the facts are not reasonably susceptible of proof thereby. Mr. Cooper favors this rule, relying in great part on the trend of the large federal agencies to adopt the legal rules of evidence. Yet, at the beginning of the book, he emphatically points out that state agencies in general are different from federal agencies; they are smaller, often staffed by part-time personnel, and less professional in character. If so — and there is no doubt that such a difference exists — why should the largely unprofessional state agencies be required to follow legal rules of evidence just because the more sophisticated federal agencies do? Also, Mr. Cooper discusses at great length the difference between the "clearly erroneous" test and the "substantial evidence" test, as respects the scope of judicial review of agency action, and explains why the draftsmen of the Revised Model Act chose the former, despite the fact that the latter was used in the original Model Act. He considers this change a significant improvement. The relevant language permits a court to reverse agency action which is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record."¹⁰ Why, it may be asked, did the draftsman use the words "substantial evidence" in setting forth the "clearly erroneous" test? Does this really facilitate clarity in understanding the difference between the two tests?

8. 209 Md. 27, 120 A.2d 346 (1956).

9. MD. CODE ANN. art. 41, §§ 244-56 (1965).

10. REVISED MODEL STATE ADMINISTRATIVE ACT § 15(g)(5).

In summary, this book is an extremely competent attempt to perform a task of overwhelming proportions. It is not the definitive work on state administrative law, but until the definitive work arrives — if that time ever comes — this book will be a real asset.

*Leonard E. Cohen**

Judicial Control Of Administrative Action. By Louis L. Jaffe. Little, Brown and Company, Boston: 1965. Pp. xvi, 792. \$20.00.

Professor Jaffe, Byrne Professor of Administrative Law at Harvard Law School, has provided us with an excellent treatise on the relationship between courts and officers administering powers delegated to them by the legislature. The originality and depth of the work make it a substantial new contribution to the growing area of administrative law. The approach of the present work differs from that of the well-known treatise by Kenneth E. Davis¹ in that the latter centers on agency use of the administrative process under rules and procedures determined by the legislature, the courts and the agencies themselves, while the former centers almost exclusively on the role of the courts in controlling administrative action. Professor Jaffe structures his chapters around the thesis that agencies and courts, acting within the matrix of the legislative delegation of power, are — or should be — in a harmonious partnership of law-making and law-applying. Most of the book grew out of a series of articles published chiefly in the *Harvard Law Review*, but Professor Jaffe has substantially revised and up-dated his earlier presentations. All who toil in the amorphous area of administrative law should greatly benefit from this assembling of the major contributions of a scholar who has devoted his career to public service and teaching.

Professor Jaffe's task of depicting the relationship between courts and agencies is indeed an ambitious one. Modern social and regulatory legislation has spawned a myriad of agencies, each with its own function, outlook and procedure. The term "agency" covers such diverse governmental units as independent federal regulatory commissions, state licensing and public health boards, and both federal and state executive officers with delegated rule-making or adjudicatory authority.² Such diversity raises a basic question: can there be a single body of "administrative law?" The treatise attempts to answer this question affirmatively by including within its scope all the above areas of delegated authority; each chapter stands on its own as a compact essay on

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1. DAVIS, ADMINISTRATIVE LAW (1958).

2. Both the Federal Administrative Procedure Act, 5 U.S.C. 1002(a) (1965), and the Maryland Administrative Procedure Act, MD. CODE ANN. art. 41, § 244(a) (1965), define "agency" in very broad terms.

a particular topic of administrative law. Perhaps Professor Jaffe tries too hard at times to reconcile conflicting authorities on the basis of over-subtle distinctions. Nevertheless, his essays contain a precise analysis of existing law and many thoughtful suggestions for its development.³

The heart of the treatise concerns the availability and scope of judicial review. Professor Jaffe skillfully uses English legal history in depicting the efforts of Sir Edward Coke, Lord Holt and the other great judges who fashioned the doctrine of the rule of law. Under this doctrine, the King's officers were subject to the law and could be sued in damages for their violations of the law; the courts could thus order the King's officers to account for their conduct. From this accountability of royal officers to the courts, Professor Jaffe formulates the presumption that an individual whose interest is acutely and immediately affected by an administrative action has a right to secure at some point a judicial determination of its validity. Although the United States Supreme Court during the nineteenth century demonstrated a considerable deference to executive authority not in accord with this presumption, the court took a sudden and dramatic turn in 1902 in *School of Magnetic Healing v. McAnnulty*,⁴ where it reviewed a fraud order of the Postmaster General barring the affected party from the use of the mails.

This presumption of reviewability of administrative action has encountered rough sailing in areas of sovereign immunity, administrative discretion and statutory exclusion of judicial review. Professor Jaffe treats these topics as part of what he calls the "common law" of judicial review. Viewing sovereign immunity as a purely historical doctrine requiring consent as a basis for certain suits affecting the treasury, property or contracts of the state, he criticizes the opinion of Chief Justice Vinson in *Larson v. Domestic & Foreign Commerce Corp.*⁵ In *Larson*, the War Assets Administrator, who was authorized by statute to dispose of surplus government property, had contracted to deliver surplus coal to the Domestic and Foreign Commerce Corporation, which had already acquired an export license. When the Administrator refused to perform the contract, the corporation sought to enjoin him from selling the coal to anyone else. The Court dismissed the suit as one brought against the United States without its consent, reasoning that immunity attached because the Administrator was acting within his statutory authority, even if it were assumed that his construction of the contract was erroneous and his failure to de-

3. Introductory chapters discuss the Nature of the Administrative Process and the Delegation of Legislative Power. Subsequent chapters discuss Primary Jurisdiction, The System of Judicial Remedies, Sovereign Immunity, Damage Action against Governments and Officers, Judicial Enforcement of Administrative Orders, Right to Judicial Review, Ripeness and Reviewable Orders, Exhaustion of Administrative Remedies, Standing to Secure Judicial Review, and the Scope of Judicial Review on Questions of Law, Questions of Fact, and on Constitutional and Jurisdictional Facts. With the assistance of several of his students, Professor Jaffe has added chapters, which have not previously appeared in article form, on Temporary Judicial Stays and on Exclusive Jurisdiction and Remand.

4. 187 U.S. 94 (1902).

5. 337 U.S. 682 (1949).

liver the coal in breach of the contract. Professor Jaffe rightly argues that if the officer's statutory authority in this sense is taken to mean that all his decisions, whether valid or not, are beyond question by a court, the law of judicial review would cease to exist. A more acceptable rationale for *Larson*, proposed by Professor Jaffe, is that the action was for breach of contract and that the bar of sovereign immunity prevents the plaintiff from obtaining from the United States without its consent not only money damages, but also specific performance, which was what the injunction really demanded.

The statutory authority assigned to the War Assets Administrator in *Larson* resembles the discretion, or power to choose, which is the hallmark of the administrator. Often this discretion serves to insulate administrative action from judicial review, but Professor Jaffe argues that an exercise of discretion is presumptively reviewable for legal error, procedural defect or "abuse." Section 10 of the federal Administrative Procedure Act codifies this presumption of reviewability and clearly implies that judicial review is available, despite the presence of discretion. Professor Jaffe acknowledges that there remain troublesome areas of non-reviewability where statutes either expressly or by implication exclude judicial review, or where the nature of the administrative area (foreign affairs, defense functions, government dispensing of privileges) prevents such review. Recent decisions⁶ indicate that these areas of non-reviewability may be decreasing, and Professor Jaffe believes that such well-known decisions denying review as *Switchmen's Union v. National Mediation Bd.*⁷ and *Perkins v. Lukens Steel Co.*⁸ have borne little fruit. The present treatise will no doubt hasten this seemingly desirable trend toward increased judicial review. I only wish that Professor Jaffe had delved more deeply into political theory to explain why increased judicial review is desirable. Are courts necessarily *better* than agencies? Are judges the only guardians of legality and of individual rights in our political system? Are there not other and better controls over administrative action than judicial review, *e.g.*, legislative reform, an ombudsman on the Swedish model,⁹ or a requirement that administrators act fully in the open? These questions remain largely unanswered. I also regret that Professor Jaffe felt compelled to state his conclusions on the constitutional basis for judicial review in such cautious and limited terms. A stronger argument for a broad constitutional requirement of judicial review might place the author's presumption of reviewability on firmer ground than the common law of judicial review, whose very existence has been denied.¹⁰

6. *E.g.*, *Harmon v. Brucker*, 355 U.S. 579 (1958) (army discharge held reviewable).

7. 320 U.S. 297 (1943) (losing union sought review of the certification of its rival as a collective bargaining representative).

8. 310 U.S. 113 (1940) (steel company did not have standing to challenge Secretary's determination of "locality" for prevailing minimum wage).

9. See Gellhorn, *The Swedish Justitieombudsman*, 75 YALE L.J. 1 (1965). The idea of an official watch-dog or ombudsman to whom private citizens can direct complaints against governmental action has spread from Sweden to a number of smaller nations.

10. Mr. Justice Frankfurter once said, "There is no such thing as a common law of judicial review in the federal courts." *Stark v. Wickard*, 321 U.S. 288, 312 (1944) (dissenting opinion).

My chief reservation about the treatise as a whole coincides with my reservation on the study of administrative law through the use of appellate opinions of federal and state judges reviewing a great variety of agencies.¹¹ I am not certain that there is a cohesive body of law indentifiable as "administrative law." Rather, there seem to be many smaller bodies of law surrounding the Federal Communications Commission, the National Labor Relations Board, state Workmen's Compensation Boards and other individual agencies. Different agencies have different tasks, outlooks and procedures; each agency has developed, through the course of administration, its own particular body of law. A judge reviewing the action of a particular agency realizes that his decision must form part of this body of law. Furthermore, a judicial decision reviewing the action of one agency may have only a marginal effect on other agencies.

Professor Jaffe very likely would agree with these generalizations. In discussing the decisions of the District of Columbia Court of Appeals reviewing FCC licensing, he recognizes that the judges who imposed onerous procedural requirements on the FCC may well have been influenced by the tortuous and confused course adopted by that agency in awarding licenses without the guidance of intelligible standards. In the two *Philco*¹² decisions, the court held that Philco was entitled to protest the renewal of NBC's Philadelphia TV license at the administrative hearing level as a "party in interest," despite the apparent remoteness of Philco's interest in the renewal. While Professor Jaffe disapproves this judicial tactic of interfering in procedural matters to obstruct or delay an unsatisfactory agency policy, the structure of his treatise does not permit full recognition of the more important point that the court's willingness to permit intervention at the administrative level may reflect more the law of the FCC than "administrative law."

The way a court's decision reflects the law of the agency under review is perhaps better illustrated by an analysis of the scope of judicial review on questions of law. Professor Jaffe suggests as a general criterion that the reviewing court should permit the agency to make law and policy ("exercise its discretion") up to the point where the court becomes convinced that the agency has contradicted the clear purpose of its statutory delegation. However, in a number of labor law decisions during the 1964 Term, the United States Supreme Court demonstrated a remarkable disregard for the law-making competence of the NLRB.¹³ On such difficult and controversial issues as the scope of mandatory collective bargaining,¹⁴ the impact on employees' rights of a lockout,¹⁵ and the effect on employees of an actual or threatened discriminatory plant closing,¹⁶ the Court paid little heed to the Board's

11. On this point, see especially Westwood, *The Davis Treatise: The Meaning to the Practitioner*, 43 MINN. L. REV. 607 (1959).

12. *Philco Corp. v. FCC*, 293 F.2d 864 (D.C. Cir. 1961); *Philco Corp. v. FCC*, 257 F.2d 656 (D.C. Cir. 1958).

13. See Summers, *Labor Law in the Supreme Court: 1964 Term*, 75 YALE L.J. 59 (1965).

14. *Fireboard Paper Products Corp. v. NLRB*, 379 U.S. 650 (1964).

15. *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Brown*, 380 U.S. 278 (1965).

16. *NLRB v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

judgment and freely announced its own. The Court seems to have lost faith in the Board because of the Board's hesitation and frequent reversals in resolving policy questions; at the same time, the Justices seem to have developed confidence in their own mastery of labor law and in their ability to shape national labor policy.

In sharp contrast stand recent Court decisions in FTC and FPC cases, where the Court upheld considerable agency law-making powers.¹⁷ Perhaps it is slightly unfair to cite decisions more recent than Professor Jaffe's book, but I do so not to show that he has incorrectly analyzed any cases, but rather to show that his "clear purpose" criterion does not sufficiently reflect that the Supreme Court behaves differently in reviewing different agencies. The treatise is simply not structured to recognize this basic fact. What we need, in addition to this type of book, are more basic texts along the lines of Loss's *Securities Regulations*¹⁸ and Henderson's excellent but outdated study of the Federal Trade Commission.¹⁹ Such texts would center on a particular agency and would recognize that each agency has developed its own body of law. An important question which still remains unanswered is to what extent the courts should develop basic principles of a uniform "administrative law" which would apply to control the actions of most or all agencies. Professor Jaffe's work certainly prompts such a development, but he does not discuss whether this development would prevent adequate consideration of the special accomplishments and problems of individual agencies.

Professor Jaffe has made an excellent contribution to legal literature, which should prove invaluable to judges, scholars, practitioners and all who are interested in the operation of the judicial system. In this treatise he brings balanced judgment, deep understanding, and considerable wisdom to the pervasive problem of the relationship between the courts and the growing number of agencies which play so great a part in the governmental system. In light of the ambitiousness of the task, the work must certainly be judged a success.

*Edward A. Tomlinson**

17. *E.g.*, *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223 (1965); *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965).

18. LOSS, *SECURITIES REGULATION* (2d ed. 1961).

19. HENDERSON, *THE FEDERAL TRADE COMMISSION* (1924).

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