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Book Reviews: Judicial Control of Administrative Action and The Ombudsman, Citizen's Defender

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BOOK REVIEW

Judicial Control of Administrative Action

BY LOUIS L. JAFFE

Boston: Little, Brown and Company, 1965. Pp. xvi, 792. \$20.00

and

The Ombudsman, Citizen's Defender

EDITED BY DONALD C. ROWAT

London: George Allen & Unwin, Ltd., 1965. Pp. 348. \$8.25

Can the judiciary be counted on to be the official ombudsman of the citizen? Will the judiciary be the citizen's defender? Neither of these questions are answered by the authors of the reviewed books; but both books are illustrative of actual and prospective control over administrative action.

To say Professor Jaffe's book is the most comprehensive and analytical approach to the problem of judicial control of administrative action is an understatement. It is *the* book on the subject.

A series of law review articles, published in the Harvard, Buffalo, Michigan and Pennsylvania Law Reviews, heralded the advent of the work of judicial control of administrative actions. This reviewer expected that these articles would be warmed over, expanded and published as a new statement on the subject — but, such was not the case. Indeed, in addition to these articles, there are new chapters entitled "Constitutional Competence of Court and Agency," "Judicial Stays Pending Administrative Action," "Temporary Judicial Stays of Administrative Action" and "Exclusive Jurisdiction and Remand." In addition, the chapter entitled "The System of Judicial Remedies" has been completely revised and expanded.

Perhaps the first two chapters of this work, "Introduction: the Administrative Process" and "Delegation Legislative Power," are the most important. Therein, the foundation for understanding administrative actions as well as the judicial checks on those actions are delineated.

The first chapter is a revision of an article which appeared in the Harvard Law Review.¹ This chapter describes the role of the administrative process in view of what is currently transpiring in the

¹ Jaffe, *The Effective Limits of the Administrative Process: A Re-evaluation*, 67 HARV. L. REV. 1105 (1954).

world of the administrative agency. Included is a historical development of the administrative process and some observations on the current controversy involving that process. Concluding this chapter, Jaffe states what most interested parties would perhaps like to know most, ". . . are these agencies as we know them 'expert'?"² This question of expertise is the one that most often is asked when the litigating parties go before an administrative tribunal.

In the second chapter, which is also a revision of previous articles on the delegation of legislative power, the author ponders the question of whether or not a book whose central theme is the relationship between court and agency should have a chapter on delegation of powers. His answer is simple:

It is the central theme of this book that agencies and courts are in a partnership of lawmaking and law applying. The legislative delegation of power is the matrix, the charter as it were of this activity. If that is so it would seem appropriate to probe the character of the delegation device.³

And probe he does. Neatly dissected and lain bare for all to see is the general theory of delegation as well as the development of the doctrine of the separation of powers. Succinctly he points out that while the delegation of power is the dynamo, the power supply to the administrative agency, the judiciary is the accepted constitutional circuit-breaker of that power. The constitutional system of checks and balances is thereby preserved. Furthermore, in spite of criticism for forcing the legislature to do its job well, the judiciary must continue to set standards in order that the dynamo of administrative process does not go unchecked.

What has long been thought to be a problem in the area of administrative decisions, the force of *res judicata* upon the agencies and the courts, is skirted by the book. In chapters 14 and 15, however, the consideration of judicial review of questions of law and questions of fact carries the clear import of such a discussion. Although the words *res judicata* are not used, the reader cannot escape the conclusion upon finishing the book that the subject has been covered.

While ingesting the Jaffe book the reviewer questioned whether a better way to control administrative action could be provided. If the control of administrative action is left in the hands of the judiciary, the ultimate user of the administrative process is still at the mercy of a super authority. Since the system of checks and balances works, if at all, only for those who are checking or balancing, who

² JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 25 (1965).

³ *Id.* at vii.

checks for the ultimate user of the administrative process, the common man? In many countries it is the obudsman; and it is through the obudsman that a better method of administrative control may exist.

Who is the ombudsman? What are his duties? How did the ombudsman's office come into being? What are his powers? To whom is he responsible? Ronald C. Rowat's book, *The Ombudsman: Citizen's Defender*, answers these questions and asks a few more. In twenty-nine articles by writers from thirteen different countries bits and pieces of information explain existent systems employing the office of ombudsman.

One might say that the ombudsman is the manager of a country's complaint department. He is an appointed official whose duty it is to investigate complaints of a private citizen with respect to any legislative, and presumably administrative, abuse. His powers are such that he may subpoena witnesses, compel testimony, review facts, form opinions based on these facts, and publish findings of fact and opinion. He cannot, however, change a decision nor may he punish, except by way of publishing his opinion, any person.

The function of the ombudsman is to make the government aware that abuses have arisen which ought to be corrected. The administrative agency which has felt the sting of the ombudsman's published opinion often sees the wisdom of the opinion and changes its ways accordingly. The administrative agency, though not bound by the decisions of the ombudsman, having seen the reasonableness of the decision, often adopts an action which is more beneficial and more predictable to the common man.

Though not a part of the law of any nation until first suggested by the Swedish Constitution of 1809, the office of ombudsman had as its counterpart the Swedish Supreme Procurator (*Högste Ombudsman*).⁴ This office created by King Charles XII through his Order of Chancery in 1713, had as its most important function the twofold task of supervising the enforcement and compliance by the citizenry with laws and regulations and the assurance that all public officials discharged their duties in a proper manner.

Since that early beginning the office of ombudsman has been introduced in many nations around the world. In the United States, California, Connecticut, Illinois and New York (even New York City has endeavored to establish the office of ombudsman) have begun the initial establishment of a state ombudsman.

Chapter 3, "Proposed Schemes," insists that it be read. Within

⁴ ROWAT, *THE OMBUDSMAN, CITIZEN'S DEFENDER* 17 (1965).

this chapter, Representative Henry S. Reuss (D., Wis.) and his legislative assistant, Everard Munsey, set out their proposed scheme for an ombudsman in the United States. With some preliminary discussion of the unsuccessful Philippine Presidential Complaints and Action Committee, which was abolished because "it was alleged that its methods of investigation encroached upon the civil liberties of the citizen,"⁵ Mr. Reuss proposes that an Administrative Counsel be established in order that the legislator might help his constituents while still performing his legislative duties. In the House of Representatives the ombudsman sitting on the Administrative Counsel would perform functions similar to those of his foreign colleagues.

The major criticism of Mr. Reuss' plan is that the ombudsman would still be a person in the employ of Congress. Thus, in the case of an uncooperative ombudsman, appropriations could result in his being put on a starvation diet.

In conclusion, the question is apparently judicial review or ombudsman checking. Judicial supervision of administrative process does work; but, only in an agonizingly slow manner. The ombudsman is more approachable, and provides less expensive, more direct and quicker review. Thus, would it not be possible to augment the judiciary with an independent ombudsman whose very presence might force the administrative agencies into more predictable actions — actions reflective of a true measure of justice?

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⁵ *Id.* at 159.

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