1942


Ralph F. Fuchs
Indiana University School of Law

Follow this and additional works at: https://www.repository.law.indiana.edu/facpub

Part of the Administrative Law Commons

Recommended Citation
https://www.repository.law.indiana.edu/facpub/1611

This Book Review is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.
The publication of Pike and Fischer's service is an extremely important step in the development of administrative law, with a significance transcending that of the ordinary looseleaf service or other search book. Aside from the timeliness of the work, this significance stems chiefly from two sources: the analysis of the subject to which all of the included material is keyed, and the critical appraisal of administrative law problems which appears among the materials. These two contributions accompany a good selection of recent literature and decisions, including much that is not readily available elsewhere. The whole is published just when administrative law has definitely moved from a period of generalized discussion to one of realistic attention to specific procedural details—a transition which this work will help to clinch. The contents of the new work, as the title does not sufficiently indicate, are limited to Federal materials; but the analysis and most of the problems discussed are as pertinent to state administrative law as they are to Federal. Although the work is not uniformly thorough and complete, it is an extremely useful product in its present form and furnishes an excellent basis for further development.

The absence of administrative law as a rubric in digests and other inclusive analyses of modern law is a phenomenon which has been often noted; but Pike and Fischer have actually done something about it. In the "Guide" to their new volumes, which constitutes their first section, they have created an arrangement of topics that for the first time provides an adequate series of headings for case summaries or textual material on administrative law. The headings divide the subject "horizontally" in relation to such aspects as administrative organization, types of functions, procedure, and judicial review. The major subdivisions are, of course, not original—Dickinson, Freund, and the Attorney General's Committee on Administrative Procedure have contributed most of them. But the particular arrangement and the detailed breakdown are original. Some aspects of the more theoretical first portion are not beyond criticism; but the pattern as a whole is excellent. It ramifies into

1 Attorney, Office of Price Administration.
2 Attorney, War Production Board.
3 There seems to be little practical reason for devoting a sizeable topic to the separation of powers and for treating types of administrative functions as a subdivision of that subject (topic 12a.1) or for singling out the President and Defense Administration as subjects for separate treatment—the latter in respect to structure of agencies as well as procedure despite the fact that, except as to government corporations, the structure of agencies is not otherwise covered in the Guide. Two over-all introductory topics, dealing respectively with administrative agencies (including some aspects of their structure) and with administrative functions, would
literally thousands of minute paragraphs covering almost all conceivable aspects of the subject. A decimal system of numbering provides room for expansion to any needed extent.

Each major subdivision of the Guide begins with a brief text, outlining the subject matter and dealing with some of the issues involved. Placed together, these passages make up a good short summary of administrative law. Primarily expository, the text nevertheless includes freely-expressed judgments upon important problems. These add to its interest without, in their setting, prejudicing the reader. One may or may not fully agree, for example, with the editors' contention that administrative procedure should not be confined to judicial methods, "designed to guide the presentation of facts to an untrained jury and a judge of unspecialized experience"; but one to whom the thought seems new will be challenged by the contention and will be in no doubt as to the reasons for it. Especially good among these brief texts are those on Adjudications, which distinguishes clearly among constitutional, statutory, and administrative sources of procedural methods, and that on Judicial Review in General, which clearly differentiates the problems of "standing" to seek review, "appealability" of decisions (in terms of suitability of issues for judicial handling and availability of procedures), and scope of review.

Organized under the headings provided by the Guide are some of the remaining sections of Pike and Fischer, containing the Background Digest of judicial decisions prior to January 1, 1941, a growing Current Text of analysis and comment prepared by the staff of the service upon

probably have been better. One significant function, which should appear alongside rule-making, investigating, and licensing, is omitted from Pike and Fischer. It is what Freund called the issuing of "directory orders" (rate orders, orders to eliminate nuisances, cease-and-desist orders, etc.) addressed to named respondents. Despite its significance, this function has gone largely unrecognized as a category, partly because it embraces such a variety of orders and partly because no really satisfactory term has ever been found to designate it. The strictly procedural headings are grouped under the general topic of Adjudications. After preliminary points have been covered, they follow the sequence of the typical administrative proceeding: notice and pre-hearing steps; the hearing, including subpoenas and evidence; preliminary disposition; and final determination. Some subjects, commonly considered as unified, are divided by this treatment. Thus as to evidence, admission and exclusion are dealt with in connection with the hearing; taking additional evidence in connection with final consideration; weight and sufficiency of evidence in connection with final determination; insufficiency of evidence in connection with rehearing; and, finally, a series of evidence issues in connection with judicial review. There is some obvious repetition here — most of it, however, merely by way of cross reference; but there is also realistic discrimination which emphasizes distinctions that need to be made. The weighing of evidence and its adequacy from an administrative standpoint to support findings of fact are, for example, different from the factors that will justify reversal on evidence grounds at the hands of a court. It is not hard to follow through in the Guide from one related topic to another, and the arrangement avoids the confusion of issues that are too easily blurred.

6 Topic 40.
7 Topic 50.
8 301 pages in Volume I.
selected topics, and the entire second volume which contains a section of brief Decision Notes and another of decisions and excerpts from decisions of both administrative agencies and courts upon procedural points. These, of course, are regularly supplemented by current materials. The Guide, with its supplements, lists references to the material in these sections and serves as a table of contents to them.

Other sections of the work are not organized upon the pattern of the Guide which, however, lists page references to their pertinent portions. These sections include the text of much of the Report of the Attorney General’s Committee on Administrative Procedure; a section containing the rules of practice of the principal Federal regulatory agencies; a War Agency section which reproduces the monumental recent Harvard Law Review Note on American Economic Mobilization; 9 and a section containing recent law review articles and notes on procedure, reproduced in full or in abridged form, and an original contributed article.

Most of this borrowed textual material has obvious value, especially in the setting of Pike and Fischer's work. The Report of the Attorney General’s Committee seems to be taking its place as a definitive statement of the significant tendencies and needs now existing with respect to administrative procedure and related problems of organization. The inclusion of much of it, while perhaps not justified by its cost in the face of the availability of the official edition, may serve to orient some who would not acquire the original or keep it available. Pike and Fischer’s Guide, together with the digested cases and the rules of practice,10 will carry the student or lawyer approaching a problem into the details relevant to his purpose. The law review literature or the Current Text may contain a critical discussion of a pertinent topic.

The War Agency section, however, like the related topic in the Guide, does not form part of the same subject matter as the rest of the work, for it deals largely with organization and function rather than mainly with procedure; nor is it kept currently up to date. Certain cases and text scattered through the service keep up with procedural points affecting the war agencies and are an integral part of the work as a whole. The lengthy borrowed text upon a subject which calls for up-to-the-minute treatment if it is to be dealt with at all seems a diversion of resources; but it does, of course, have value of its own.

The original portions of Pike and Fischer, other than the Guide, require further comment. The Background Digest is, of course, the only digest of American court decisions on administrative law. Inevitably it is incomplete; the devotion of greater time and resources to its compilation might, one suspects, have considerably increased its bulk. The Guide, however, is a useful and unique research tool, the merits of which greatly outweigh the deficiencies.

The current decisions are drawn from both administrative and judicial

9 Note (1942) 55 Harv. L. Rev. 427.
10 It would be helpful to have selected statutory provisions too.
sources — the former for some years back and the latter since January 1, 1941. The decisions of the Federal agencies relating to procedure are illuminating and are difficult, if not impossible, to get at elsewhere. The fact that they are here brought together not only supplies the lawyer with material for argument but should also result in cross-fertilization of procedural methods and ultimately in greater uniformity than now obtains. The current Federal judicial opinions on administrative procedure are reported with completeness in Pike and Fischer — a service for which the harassed would-be comber of advance sheets, as well as the investigator of particular problems, will be grateful.

In its Current Text section Pike and Fischer’s work reaches its highest excellence, although not its greatest day-to-day utility. Most of the included discussions are easily equal in quality to the very best law review material. Some of the articles, such as those on “Hearsay Evidence” and on “Inclusion of Trial Examiner’s Report in the Record on Review,” are largely devoted to summarization of regulations and practice. Others are descriptive of the practice of single agencies. The most significant articles, however, are those which accompany summarization with analysis and critical comment. The texts on “Bias and Prejudice,” on “Administrative Power over Accounting,” and especially on “Introduction before Agencies of Evidence Bearing on Constitutional Issues” are little short of superb. Whoever wishes to achieve genuine understanding of administrative law problems cannot afford to overlook such contributions to the literature. May their number grow steadily.

It is difficult to say whether for the practitioner’s purposes the “horizontal” approach to administrative law is superior to the “vertical,” or agency by agency, approach. Probably for day-to-day dealing with particular agencies it is not. One can take up an ordinary matter or prosecute a proceeding before the Federal Trade Commission or Agricultural Marketing Service or Wage and Hour Division or any other Federal agency, accepting fully its particular routines, by referring solely to its regulations and decisions and the decisions of the courts relating to it. For the hard case, however, and certainly for the study of administrative procedure by those who seek its improvement from within and from without, an examination of the subject as a whole and the use of analogy and suggestion from many sources are essential. Uniformity is impossible; adaptation of procedure to specific function is a basic necessity; but norms can nevertheless arise which, if flexibly applied, will result in better methods, easier to comprehend, than those that would be worked out by each agency separately. Inevitably the practitioner who can invoke the whole range of relevant considerations is better off at critical times than one who cannot. Pike and Fischer do well to treat administrative law as a unified subject.

There is importance in the fact that the most significant largescale contributions to administrative law in recent years have been made under institutional auspices. During this period administrative law has
been developed largely by means of the Commonwealth Fund’s assistance to individual scholars, providing collaborators for them; by the Government’s sponsorship of the studies of the Attorney General’s Committee; and now by the commercial production of a significant research service. The period has ended in which the wisdom and brilliant insight and suggestion of the pioneers of administrative law could suffice to carry the subject forward. If the time ever comes when a single individual produces the definitive treatise on administrative law, it will be after the collaborators in group enterprises have continued for a good many years to pool resources and skill in exploring the vast reaches and myriad ramifications of the subject and in reducing its multitudinous details to manageable order.

In the institutional development of administrative law Pike and Fischer’s service occupies an honorable, as well as a pioneering, place. The work is not complete, both for reasons previously indicated and because at present, as is natural in a work designed primarily for the practicing lawyer, its emphasis is upon those agencies that carry on formal adjudication requiring the services of attorneys for the parties. Benefit procedures and informal adjudication receive slight attention. But the work contributes much to knowledge and understanding; its quality is high; and it is susceptible of further growth. Individual practitioners, the legal profession, and the future understanding of law and government will gain greatly from its vigorous continuance.

RALPH F. FUCHS.*


In the blurb printed on the inside of the jacket of this outstanding book, we find: “Here, in one concise volume, from the pen of America’s foremost theoretician and practical law teacher, is all there is to be said concerning the past, present and future of our system of civil appellate procedure.” That is a large order, and this reviewer cannot go quite so far. We shall have such a volume if, as, and when (to employ the once familiar nomenclature of the broker) a single individual combines the patience of Job, the physical strength of Hercules, the acumen of Machiavelli, the legislative genius of Tribonian, the magisterial sweep of Marshall, the wisdom of Solomon, the prophetic foresight of Elijah, and the nervous system of William Jennings Bryan. The remarkable thing about Dean Pound’s book, however, is not how far he falls short of this ideal but how closely he approximates it.

* Professor of Law, Washington University (on leave); Board of Legal Examiners, United States Civil Service Commission.

1 University Professor, Harvard University.