1966


Ralph F. Fuchs
Indiana University School of Law

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

Part of the Administrative Law Commons, and the Legal Education Commons

Recommended Citation
http://www.repository.law.indiana.edu/facpub/1641

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 wattn@indiana.edu.
BOOK REVIEWS


This highly useful volume continues an important series of collections of studies of decision making by government agencies. These studies have been written by individual scholars under the auspices of the Inter-University Case Program, and have been published separately, as well as in collection, for greater flexibility of use. They are designed to introduce greater realism into the study of public administration by disclosing the ramifications, complexities, and sometimes fortuitous circumstances that enter into governmental action involving conflicting interests and viewpoints. Legal education too can benefit from using these studies to develop, in the handling of significant problems, "a sense of law-in-operation through diverse channels over periods of time."

The seven case studies which are here brought together all involve, as the title to the volume indicates, the regulatory operations of government in relation to business enterprise. Two principal kinds of regulatory processes are included. One employs informal inquiry and negotiation as a basis for official action; the other embraces formal hearing procedures on which decisions are based. In this book the first category is represented by an account of the handling of a crisis situation resulting from the detection of poisonous weed-killer residue on cranberries by the Department of Health, Education, and Welfare just before Thanksgiving of 1959; a study of the effort of the National Bureau of Standards, and incidentally the Post Office Department, to deal in the early 1950's with an apparently worthless commercial additive for batteries; and the story of the efforts of the federal government and the major petroleum companies to provide crude oil and refined products for Europe after the blocking of the Suez Canal in the 1956 Middle East warfare. The second category embraces an account of a proceeding in the Federal Trade Commission against the maker of "Dolcin," an analgesic which was extravagantly advertised as a means of relief from arthritis; the story of the same agency's proceeding against the Standard Oil Company of Indiana for alleged violation of the Robinson-Patman Act by certain sales of gasoline in the Detroit market; an account of the General Passenger Fare Investigation of the Civil Aeronautics Board just prior to 1960; and a study of a proceeding in the Interstate Commerce Commission involving the licensing of truckers to

1. Ninety-seven studies, numbered serially, have so far been issued through several publishers. Most of them have been reprinted in the present volume or in the following: Public Administration and Policy Development: A Case Book (Stein ed. 1952); Case Studies in American Government (Bock & Campbell ed. 1962); State and Local Government: A Case Book (Bock ed. 1963).
provide transportation service for a new plate glass factory in Cumberland, Maryland.

The authors of the studies are political scientists keenly interested in adjudicatory procedure, when that is involved, as well as in the management, policy, and public relations aspects of the proceedings they review. Their accounts of the less formal kind of governmental proceeding tend to be more lively than those which focus on trial-type hearings and records; but the bitterly contested Dolcin and Standard Oil cases provide their share of drama too, especially because the authors of both have gone behind the records by means of interviews and reading of correspondence, to identify and characterize the interests and personalities at work. Both of these studies cast valuable light on the internal operations of a major regulatory agency in its institutional handling of a formal adjudication. The Passenger Fare and Plate Glass Trucking cases have large economic significance and are representative of agency resolution of policy issues in such proceedings. The authors draw largely on the written record to reflect the contentions of the parties and the rationale of the agency decisions. Such concentrated doses of close reasoning as to technical matters are hard to absorb, but rigorous attention yields insight into what went on. The reader finds it hard to attribute greater validity to the outcome in either case than would have attached to several possible alternatives. The utility of authoritative answers that can be rationally supported, more largely than the attainment of statesmanlike policies, is the value that seems to warrant a preference for adjudication over purely political processes in the handling of this type of problem.

The Emergency Oil Lift story deals with essentially political handling of a crisis situation. Government agencies concerned with foreign policy, national defense, and the welfare of the petroleum industry, as well as conflicting interests in that industry, had to be brought together in a common course of action which no one of them alone could dictate. Such information as was available and was deemed to be reliable had to be used. Judgments colored by interest had to be employed. The result was far from ideal, but the essential task was performed without too much sacrifice. More objective decisions, better grounded in evidence, would have been desirable, but the luxury of protracted proceedings could not have been afforded.

The Cranberry, Battery Additive, Dolcin, and Standard Oil narratives reflect a basic dilemma which is involved in the provision of procedures for a large and important type of regulatory operation. In each of these instances a decision had to be reached on a problem of manageable size that vitally affected both the "public interest," as legislatively defined, and important, articulate private economic interests. Except for the time factor in the Cranberry situation, which required Secretary Flemming of the Department of Health, Education, and Welfare to act quickly if at all to protect the public
health, the question in each case could have been resolved, so far as inherent factors are concerned, either by means of informal inquiry and judgment based on the resulting information or through the process of gathering evidence in hearings and grounding a decision on the resulting record. In the Cranberry and Battery Additive situations, because the critical action to be taken was simply the release of information to the public, informal processes were all that were required by the governing laws; in the Dolcin and Standard Oil cases, because enforceable cease-and-desist orders were contemplated, the statutes required complaints, hearings, and record-based decisions. As a result, in the Cranberry case a failure of communication created misunderstanding at a critical juncture with regard to the precise nature of the official action that was contemplated. In the Battery Additive matter the Bureau of Standards was free for a significant period to withhold tests which later turned out to be needed; scientists conducted tests on at least one occasion without a clear understanding of the use which was to be made of the results; and private parties were able to employ outrageous forms of publicity to influence official action. In the Dolcin and Standard Oil cases, by contrast, technical medical and economic issues, which could have been resolved by sober judgment based on data adduced through essentially cooperative methods, were subjected instead to hard-fought, protracted contests in which counsel for both the Federal Trade Commission and the respondents felt no obligation to behave otherwise than according to completely adversary methods.3

If the confinement of scope and clarity of purpose of formal proceedings could be combined with control by the impersonal investigator over the utilization and much of the assembly of data, a far better process would result than now exists. Interested parties could submit data and argument and subject each other's offerings to cross-examination and other tests, but these methods would be employed in the context of a structured inquiry rather than a contest. Gerard Henderson urged precisely this course with respect to the Federal Trade Commission many years ago.4 No doubt American competitiveness and addiction to victory preclude resort to any such "soft line" of

3. The lawyer for the Dolcin Corporation, protesting at one point against methods of the Commission's counsel in trying what counsel called a "lawsuit," contended that the proceeding should be "an administrative investigation of facts." P. 111. His own introduction of evidence, however, was carefully devised to require counsel for the Commission to expose the weaknesses that resided in it.4. Henderson advocated that the Commission institute a proceeding by issuing "not a complaint, but an interlocutory order or citation" to commence an inquiry, attended by a hearing at which Commission counsel could appear, not "with a view to sustaining or defeating the complaint, but merely to make sure that the facts were fully developed and that impartial expert testimony was available." HENDERSON, THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE 329, 330 (1924). The present method of proceeding, he noted, produces lengthy contests in pursuit of victory, which often fail to attain their purpose because of lapse of time. Id. at 331. Henderson also suggested, however, that parties originally complaining to the Commission be permitted to intervene and press their charges before formally neutral Commissioners. Id. at 333. Considerable doubts arise as to the desirability of this aspect of his proposal.
progress. If it could be followed, however, the excesses and blindnesses of contests carried on for the sake of success could be greatly reduced without sacrifice of the precision of seeking truth in an ordered proceeding.

Be that as it may, the book under review is an excellent means of raising this question and many other significant ones about the regulatory operations of government. It makes good reading on the whole, and its uses are many.

RALPH F. FUCHS

Professor of Law, Indiana University


This book is the product of the author's five years as Deputy Assistant Secretary of State for International Organizations, in charge of the hard-working generalists who have to deal with United States interests in everything from the United Nations to the North Pacific Fur Seal Commission and the other fifty-one international organizations to which our country belongs. The post provided an unequalled opportunity for participation in the international turbulence of our times and for thinking about that turbulence and what can be done about it. The author has done plenty of participating; last fall as an adviser to the U.S. delegation to the 20th U.N. General Assembly he was said to have spent his days in outer space and his nights on birth control. The book shows that he has done plenty of thinking.

The author's credentials are impressive. A cum laude graduate of Yale Law School, he also holds a Ph.D. in Economics from Oxford. Before serving with the Department of State, he practiced law in New York City, was a Professor of Law at Columbia and authored Sterling-Dollar Diplomacy,1 the standard work on the postwar reconstruction of a liberal international economic system. Since relinquishing his post at State, he has returned to Columbia where he conducts courses in international law at the Law School and in international affairs generally at the School of International Studies. He is a rare combination of lawyer, professor, economist and public servant, and good at all four callings.

In Pursuit of World Order first appeared in December 1964, and a student edition was brought out in 1965. The book's importance is evidenced by the fact that after its original publication the United States Information Agency chose to contribute to the publication costs of several foreign editions. The 1966 revision has updated the facts and figures presented and has added