

## REVIEWS

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ARMS CONTROL AND INSPECTION IN AMERICAN LAW. By Louis Henkin. New York: Columbia University Press, 1958. Pp. xii, 289. \$5.50.

PROFESSOR Henkin has written what he calls "essentially a memorandum of law."<sup>1</sup> He addresses himself to the consequences, for American law and administrative practice, of the possible establishment of internationally agreed provisions for the control of armaments. He begins by setting out some "likely provisions" in such an agreement; examines constitutional and legislative obstacles to the carrying out of those provisions by Americans or on American soil; considers what new statutes or regulations might be required; and devotes a brief chapter to the problem of state laws and local cooperation. In two final chapters, which make up almost a separate essay, he contemplates the effects, under American law, of continuing international administrative regulation of armaments, and of resort to international tribunals to resolve disputes under such regulation. This continuing regulation is distinguished from the sporadic international inspection of national activity, the matter in question throughout most of Chapters I-VI.

The book accepts the postulates that disarmament is something worth thinking about and perhaps worth fighting for; that the way to disarmament is to reduce arms; and that a crucial question in assuring the reduction of arms is the availability of effective measures of inspection. Because at this point the author is only setting the stage for the legal investigation he is about to make, he offers only the briefest outline of some arguments for and against disarmament, some arguments for and against negotiating about disarmament, and some arguments over limited arms control. No attention is given to the argument, beginning to be raised elsewhere, that peace may be achieved more readily and surely by measures other than disarmament, for example, by providing for a certain stability of armaments of retaliation. If one is entitled to see, behind the mask of Professor Henkin's "citizen," the beliefs of Professor Henkin himself, it may be fair to infer that he attaches to disarmament a very great moral value indeed. Yet it is outside the scope of his inquiry to discuss at any length the argument that disarmament is itself but a dependent variable.

The trouble with inspection in aid of disarmament, as the author never tires of pointing out, is that it cuts two ways. In the last few years the United

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1. P. 3. The technical legal parts of the "memorandum of law" appear principally in the notes, which, together with the list of constitutional provisions, cases and statutes and treaties referred to, and bibliography, take up 120 of the book's 280 pages. In some books, the text is the main structure and the notes are the decoration. In this one, the notes seem at times to be the real bricks; the text is the mortar that lends a decent, graceful unity to the pile.

States has so consistently been on the side of urging more, and more effective, inspection in aid of disarmament, and the Soviet Union has appeared to be so consistently opposed to the idea of effective international inspection, that Americans may have lost sight of the inconvenience and disruption of established patterns that inspection might entail for the United States. The author frequently reminds his presumably American readers that if they find some proposed method of inspection offensive, they ought to realize that the Soviet Union would find the same obligation at least similarly awkward. Correspondingly, if they desire to obtain benefits from a certain type of inspection of the Soviet Union, they must face the prospect of inconvenience or annoyance from similar inspection on their own shores.

The third and fourth chapters are concerned primarily with constitutional aspects of arms control. Chapter three considers the power of the government to control arms under the United States Constitution; chapter four considers constitutional barriers, if any, to the investigation of compliance with rules of arms control. The upshot of Professor Henkin's investigation on this score is anticlimatic. About the only constitutional right that might be invaded by provisions for arms control, in his opinion, is the right of the states to maintain state militia; even here, he finds the existence of that right somewhat doubtful, and points out that in any event the arms control provisions would be so worded as to leave the states the right to maintain small armed forces, almost akin to police forces, which it is unlikely that the parties to the international agreement would wish to prohibit.

Among private rights potentially affected by international arms control, Professor Henkin treats principally various rights of property. The Constitution, he says (making repeated use of *Ware v. Hylton*),<sup>2</sup> may permit the taking of a citizen's property where a prevailing treaty so requires, but may at the same time entitle the citizen to compensation as a condition of substantive due process.

When the author inquires into the legal aspects of possible investigation of compliance in the United States with international provisions for arms control, he considers the degree to which international inspectors may either short-cut the domestic judiciary or call in aid the processes of domestic law enforcement. Here he embarks upon a sketch, which occupies much of the rest of the book, of what might be called superfederal jurisdiction: principles that might, or ought to, regulate the gradual but progressive transfer, to an authority beyond but including the United States, of some powers that traditionally have been thought to be essential elements of national sovereignty.<sup>3</sup> An extensive discussion of search and seizure under the fourth amendment leads to the suggestion—perhaps somewhat labored—that a constitutional amendment may be needed

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2. 3 U.S. (3 Dall.) 199 (1796).

3. Students of movements for gradual integration of political units into some larger unit recall the famous epigram of John Randolph of Roanoke, to the effect that "asking a state to surrender part of its sovereignty is like asking a lady to surrender part of her chastity." Randolph meant that each request was equally unthinkable and ungrantable.

to permit the inspection, without a warrant, of a large private estate on which activities in violation of an arms control agreement might be occurring, and to the warning that other branches of the United States Government than the judiciary must be on guard against undue encroachments upon the liberty of the citizen.

Professor Henkin discusses, without resolving, the question whether existing constitutional limits would apply to the attempt to establish, by means of a treaty, a new sovereignty over United States citizens and residents. For purposes of his discussion of international administrative regulation of armaments generally—a rough counterpart of the Baruch plan for regulating atomic energy—he assumes that constitutional limitations would be regarded as applicable. Considerations of procedural due process lead him to favor “national administration under international supervision.”<sup>4</sup> When the author considers the wisdom of providing criminal trials by an international tribunal for American citizens charged with violating arms control provisions in the United States, similar factors lead him to suggest that, at least within the territory of the United States, the trials should be conducted by a United States court, absent a constitutional amendment vesting jurisdiction in an international tribunal. On the other hand, he says, prosecution of private individuals for smuggling on the high seas or across national boundaries might be constitutionally and practicably feasible in the hands of an international criminal tribunal.

Ranging over so wide a panorama, Mr. Henkin's lens is not always in focus. For example, he appears to exaggerate the extent of the change in our system of classifying documents and information for security purposes that would be entailed by the establishment of a system of international arms control.<sup>5</sup> Much security intelligence has no bearing on weapons production, stocks of weapons, or even strictly “military” planning or capabilities. Indeed, it might be predicted that the amount of classified or classifiable information on other aspects of warfare than the “hardware” aspects would be increased rather than decreased by an effective system of international arms control. In some parts of his inquiry into superfederal jurisdiction, the author appears to assume, possibly only for the sake of clarity in his discussion of hypotheses, an improbably high degree of supranationality.<sup>6</sup> On a very few occasions his legal memoranda seem, no doubt in the interest of brevity, to be content with an abstract verbal reference rather than a reference to real objects or events, as in the case of his very brief comments on “taking” in connection with the right to compensation.<sup>7</sup> His historical chronicle of attempts at arms control and his

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With all possible respect to the great Virginian and to the female society with which he was only theoretically familiar, it may be suggested that these partial surrenders are equally possible and that both indeed happen all the time.

4. P. 120.

5. Pp. 85-86.

6. *E.g.*, p. 99: “[W]e assume that the international inspection body, operating in this country pursuant to treaty and laws of the United States, would stand in a position similar to that of a federal agency vis-à-vis state and municipal institutions.”

7. Pp. 43-44, 184-85.

discussion of the contemporary international scene tend to skimp both history and analysis, and are more successful as reminder than as narrative.

These objections, and others that might be noted, are perhaps only some of the troubles that beset the pioneer. The book on the whole is a bold, careful, and successful effort to examine the interwoven legal problems of international law, constitutional law, and federal jurisdiction, raised by a particular complicated and important contemporary issue. The author takes us outside the machinery of United States governmental power and lets us look at a cut-away model, as if he were leading a sophisticated civics class of Martian candidates for an American J.S.D. To his task he has admirably fitted a clear and unobtrusive style, which is related to typical law-review style as the whole-tone scale is to atonality.

If anything like the provisions for arms control being postulated in this book or being discussed currently should be enacted, someone in the United States will have to deal with problems of compliance, enforcement, and administration. Someone will have to turn to the drafting of statutes, regulations, ordinances, and, possibly, even constitutional amendments. Whoever is charged with these tasks, even if it be Professor Henkin, will find this book an indispensable desk-book for the first twelve months of his tenure. The rest of us also must remain in Professor Henkin's debt.

LEON LIPSON†

CAUCASIANS ONLY. By Clement E. Vose. Berkeley and Los Angeles: University of California Press, 1959. Pp. xi, 296. \$6.00.

THE *Restrictive Covenant Cases* of 1948—*Shelley v. Kraemer*<sup>1</sup> and *Hurd v. Hodge*<sup>2</sup>—were possibly the most noteworthy civil rights cases of their decade. By denying on equal-protection and due-process grounds the power of state and federal courts to give specific enforcement to covenants aimed at the exclusion of Negroes, the Supreme Court greatly enlarged the choice of housing available to Negroes and other minority groups. In addition, looking beyond the direct impact of the decisions themselves, they facilitated the final invalidation of state-supported segregation;<sup>3</sup> and the rationale of the *Restrictive Covenant Cases* provided an important new dimension to the concept of state action.

In *Caucasians Only* Professor Clement E. Vose of the Government Department of Wesleyan University provides a fascinating "inside" view of the activities of the various special interest groups which participated in the *Restrictive*

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†Professor of Law, Yale University.

1. 334 U.S. 1 (1948).

2. 334 U.S. 24 (1948).

3. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954). See also *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala.), *aff'd*, 352 U.S. 903 (1956).