

## BOOK REVIEWS

THE PROFESSOR AND THE COMMISSIONS. BY BERNARD SCHWARTZ. New York: Alfred A. Knopf, Inc., 1959. Pp. 275. \$4.00.

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Professor Bernard Schwartz, not yet recovered from his brief sojourn in the public spotlight, has composed a justification of his trip to Washington. In September 1957, Professor Schwartz was hired as Chief Counsel of the Subcommittee on Legislative Oversight, a stepchild of the Interstate and Foreign Commerce Committee of the House of Representatives. In less than six months he was unceremoniously fired. During his tenure, however, he engendered vast public and congressional debate; in fact, he became the center of more discussion and the object of more praise, scorn and derision than the independent regulatory agencies he was hired to investigate and whose Commissioners' practices he claimed to have "exposed." The creation of the subcommittee—at the instance of Speaker Rayburn—created little publicity. But only the most careful recluse could have avoided a general acquaintance with the succeeding private and public rows of its members. The controversy surrounding the first hearings on expense vouchers of Federal Communications Commissioners, and the subsequent hearings—disorganized, often absurd—which followed Professor Schwartz's ouster only added to the furor. The events are so recent that the reader of *The Professor and The Commissions* is familiar with their details; they are *too* recent to permit an adequate evaluation of the subcommittee investigation or a proper determination of Professor Schwartz's responsibility for its ultimate success or his culpability for its ultimate failure. But in a judgment of Professor Schwartz's performance either as author or committee counsel, one should note that despite this immediacy of the events he himself has been able to see the rights and wrongs to his own satisfaction. He writes as if he were passionately certain that the ends he sought and the means he chose in Washington were proper and praiseworthy; he argues passionately to help his readers draw the same conclusions. This appearance of certainty, indicating his desire for public exculpation, deprives the book of literary and academic effectiveness.

For although the author has placed himself before the public as "The Professor," he presents his defense unrestrained by the concomitants of his "established scholarly reputation." (p. 17). In debate, or even in an effort to arouse the public about a matter of national concern, "The Professor" would seem to have obligations he may not ignore, for one who

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speaks as a member of the academic community cannot permit himself the license granted the pamphleteer.<sup>1</sup> The stump orator may distort facts to suit his own purpose and ignore arguments which support another thesis. The scholar may not. "The Professor's" academic integrity demands, rather, an accurate presentation of facts and an adequate testing of hypotheses and conclusions. In short, the scholar must consider and present the matter entire. But despite the title of his book, the author does not here fill the role of "Professor." Instead, his desire for personal vindication has enticed him to perform without credit to himself and without obedience to the tenets of the academic community in which he claims membership.

His disobedience manifests itself in many ways. It is apparent, for instance, that the book was quickly—much too quickly—prepared and published. At one point in his text Professor Schwartz refers to a recent Federal Communications Commission station exchange case. He comments that "the Commission rushed through its approval without even the semblance of a hearing and without even notice to, much less consulting, the Antitrust Division." (p. 132). In a more recent law review article, however, he states: "The FCC did, it is true, notify the Antitrust Division, in August 1955, of the pendency of the proposed station exchange and also made its staff reports on the case available. But that was the total extent of the liaison."<sup>2</sup> The failure of the FCC to pay due regard to congressional intent and the public interest may well be debated; but the debate should follow a full and fair presentation of the facts. Without a proper background the debate can be no more than a harangue.

And whereas "The Professor" must be objective, Professor Schwartz is often blatantly self-righteous. The midnight delivery of subcommittee files to Senator Morse "was designed to dramatize my own lack of confidence in the Subcommittee majority." (p. 246). Claiming that those who objected to his methods had ulterior motives—that critical press reports might well have been occasioned by the critics' desire to keep their own skeletons well closeted—he states:

"Thus, my most intemperate critics were *Time* and *Life*. It is more than mere coincidence that *Time-Life* itself, has under the present Administration, built up a TV-and-radio empire with the approval

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<sup>1</sup> Note the attitude of Professor Glanville Williams, expressed in response to a criticism of one of his discussions: "I share [the critic's] . . . feeling that there are profoundly disturbing possibilities here; and if I had been merely a propagandist, intent upon securing agreement for a specific measure of law reform, I should have done wisely to have omitted all reference to this subject. Since, however, I am merely an academic writer, trying to bring such intelligence as I have to bear on moral and social issues, I deemed the topic too important and threatening to leave without a word." Williams, "*Mercy-Killing*" Legislation—*A Rejoinder*, 43 MINN. L. REV. 1 (1958).

<sup>2</sup> Schwartz, *Antitrust and the FCC: The Problem of Network Dominance*, 107 U. PA. L. REV. 753, 759 (1959). Professor Schwartz might be trying to account for his statement in the book when he argues that liaison with the Antitrust Division should have included notice of the Commission's intention to approve. *Id.* at 760. The original statement, if open at all to such a narrow interpretation, is an unfair partial truth without further explanation.

of the FCC, and that at least one of its TV acquisitions (that in Denver) had been slated for inquiry in my projected investigation schedule." (p. 250).

Nor is there a shortage of such intemperate remarks. Professor Schwartz's comments regarding the questionnaire which within two months of his arrival in Washington he had sent to each commissioner requesting details of any benefits received from members of the regulated industry typify his attitudes in the book: "In actuality, only commissioners who had committed improprieties had anything to fear from our questionnaires. 'It should be easy to answer,' I was quoted in the press as saying, 'for those who have nothing to hide.'" (pp. 64-65).

One more instance should suffice: Professor Schwartz consistently makes reference to the "public interest" as if it were synonymous with what Professor Schwartz believes to be proper. Thus, Oren Harris, Chairman of the House Interstate and Foreign Commerce Committee, is accused of having been "on the wrong side on almost every issue where the public interest is involved" (p. 9); Representative Harris, the author points out, was co-sponsor of the natural gas bill which would have exempted some gas producers from federal regulation. There is, to be sure, a difference of opinion as to the propriety of this legislation; there is no doubt that natural gas producers have supported it. But the Chairman of the Federal Power Commission and the President of the United States are also among its active supporters. Under the circumstances, one would expect from "The Professor" more evidence that the bill is contrary to the public interest than a statement that it "would cost the consuming public untold millions of dollars." (p. 9).

Such statements also display Professor Schwartz's penchant for violent attacks upon those who opposed him. He claims that Oren Harris, wishing to have a "safe" and inoffensive investigation, chose Morgan Moulder as chairman of the subcommittee because of his reputation for being pliable and non-assertive, and refused to grant the subcommittee the independent authority to subpoena witnesses or spend its allocated funds. Discussing Representative Moulder's appointment, he writes:

"Why, it may be asked, did not Harris assume the chairmanship himself? It would, however, have been out of character for a man desiring to 'pull strings' behind the scenes to adopt such a straightforward approach. If there were repercussions from a claimed suppression of the investigation, Harris could always declare that he was not responsible." (pp. 12-13).

Also singled out for special insult are CAB Chairman Durfee (p. 70) and Speaker of the House Rayburn. While admitting that Speaker Rayburn "was probably sincere in his desire for an investigation," (p. 7) Professor Schwartz asserts that when the investigation threatened to get out of hand

"I began to realize that Speaker Rayburn himself was playing a direct role in seeking to prevent the investigation from 'running away.'" (p. 89). The author goes on to explain with unbecoming innuendo: "One wonders, all the same, whether the Speaker's real motive was not to protect his nephew Robert T. Bartley, a member of the FCC, who was involved in some minor instances of misconduct. . . . Rayburn has no children and he has always regarded Bartley with all but parental affection." (p. 89).

Throughout the book one frequently discovers journalistic simplification of the issues raised by the subcommittee investigation and by the author's own conduct. Thus, he argues that "in the present-day ICC there is an almost complete identification of the interest of the railroads with the public interest" (p. 120) and that "the Commission has allowed collective price-fixing through rate bureaus and conferences, despite the fact that co-operative price-fixing by competing companies has often been held to be a *per se* violation of the anti-trust laws." (p. 122). He neglects to mention that the Reed-Bulwinkle Act authorizes the ICC to approve such cooperative rate-making; it is the express will of Congress that rates established under ICC approved procedures be exempted from the antitrust laws. More generally viewed, this journalistic tone prevailing throughout the book proclaims its superficiality. Professor Schwartz announces his debt to the working press directly (p. 294) and by his frequent use of quotations from news stories for factual material and as supporting authority for his arguments. (*e.g.*, pp. 96, 98, 127, 174, 176). Most would agree that the New York Times' Anthony Lewis is an excellent reporter; it is still surprising to find an author with "an established scholarly reputation" relying upon Mr. Lewis' analysis of an important phase of the judicial process. (p. 189). The reader comes away from the book with the feeling that its author's almost exclusive research source has been a news clippings scrap book of his congressional employment.

But nowhere is the desire for justification more apparent and less consistent with academic standards than in Professor Schwartz's discussions of the ethical problems to which his conduct gives rise. Discovering after he was fired that the subcommittee planned to subpoena his appearance the following day with all subcommittee files in his possession (p. 104), nonetheless, at midnight, together with a reporter, he transported a "working copy of every important document" to Senator Williams for his perusal. Then Senator Morse "forwarded through Jack Anderson, Drew Pearson's principal associate," a request to view the files (the author does not state how Senator Morse discovered that a set of the documents might be obtained); in the company of the two reporters, Professor Schwartz delivered the files to the Senator's apartment. This was done because "in view of my own opinion as to the main motives of the Subcommittee, I felt it essential that the files not be turned back to their unfettered discretion." (p. 105). His defense of this conduct leaves much to be desired: "Of course the doctrine that the end justifies the means is an immoral one.

But if the means used are legitimate, it is certainly good to know that they have succeeded in attaining the desired end." (p. 246). And in another context as well—defending his unauthorized publication of a subcommittee memorandum—Professor Schwartz presents more than a begged question: "My motive was to vindicate the public's right to know the facts about these vital agencies. It was the only means by which I could counter the Congressmen's decision to bury the results of the investigation." (p. 87).

It is the normal precept that a client's confidence must be preserved. But certainly the attorney employed by a subdivision of the government has obligations transcending those he would owe to a private client. Indeed, writers on legal ethics have approved an attorney's invocation of public opinion to disclose "gross abuses" of governmental bodies; however, the attorney must give the highest officials opportunity to correct the situation by prior notice of his intention to disclose.<sup>3</sup> Much soul-searching is needed to determine whether fraud and injustice, the perpetuation of a national evil, can be avoided only by conduct otherwise improper. There is no evidence, however, in *The Professor and The Commissions* that Professor Schwartz gave mature consideration to the problem either at the time he made his choice or during the subsequent calm while composing his book.

To this reviewer, several difficult ethical problems are suggested by Professor Schwartz's activities. None is more serious, and none more cavalierly treated by himself, than his approval of the use by two subcommittee attorneys of an electronic device to record an interview with FCC Commissioner Richard A. Mack. Professor Schwartz's defense of this conduct is astounding. He claims that "a public official being interviewed by congressional investigators about a serious matter of financial irregularity must, in all prudence, assume that he is speaking for the record," and adds that because Commissioner Mack was aware that the subcommittee attorneys were taking copious notes, the recording was unobjectionable, as merely ensuring "that the record was more accurate." (p. 243). It seems unnecessary to parse the illogic of this explanation; one can only regret that the need for vindication has taken the author to such extremes.

Professor Schwartz also claims that two Supreme Court decisions, *Rathburn v. United States*<sup>4</sup> and *On Lee v. United States*,<sup>5</sup> are "relevant" in determining the propriety of the use of a wire recorder. Both cases concerned the admissibility in criminal trials of testimony as to the defendants' statements; the statements were overheard by means of a telephone extension in one case and a "detectaphone" in the other. The issue required, respectively, construction of a federal statute and of the Constitution. Schwartz's reliance upon these cases to prove that "there was nothing improper" in his conduct is wholly misplaced. The Justices were con-

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<sup>3</sup> DRINKER, LEGAL ETHICS 137-39 (1953).

<sup>4</sup> 355 U.S. 107 (1957).

<sup>5</sup> 342 U.S. 747 (1952).

cerned with the admissibility of evidence, not with the ethical standards of members of the Bar. It is not the object of this review to come to any final conclusions about Professor Schwartz's conduct. This reviewer believes that propriety requires weighing the need for an accurate record against the baseness of deceptive conduct. Certainly, a strong argument may be made that recording an interview is proper only with the knowledge and consent of the interviewee. In any case, Professor Schwartz's defense is embarrassing. It should be contrasted with his uncompromising criticism of the attempted "bugging"—with a detectaphone—of Bernard Goldfine's hotel room (p. 257); here we find an accusation that Representative Harris and the majority of the subcommittee were seeking, after the author's ouster, to discredit the investigation. (p. 257).

No more opportune moment could have been chosen for a challenge to the regulatory agencies. The public was shocked from its normal lethargic inattention by the subcommittee disclosures of improprieties by federal officials. The challenge, of course, must be able to sustain public attention; the regulators and the regulated must not be permitted to wait confidently for the inevitable termination of their notoriety. Insofar as he excites public scrutiny, then, Professor Schwartz deserves applause for the very act of having written his book. And no less laudable is his stated purpose: he wishes the public to share his indignation at improper conduct by governmental officials. But the book does not fulfill its larger responsibility; too many essentials of the task have been ignored. *The Professor and the Commissions* can give no impetus to reform, for the casual reader—as well as the Congress in considering legislation—must doubt its author's objectivity. Because in the presentation of his material "The Professor" of the title has not been professorial in fact, the book is a failure.

THE COMMON LAW OF MANKIND. By C. WILFRED JENKS. New York: Frederick A. Praeger, Inc., 1958. Pp. xxvi, 456. \$12.50.

By Louis B. Sohn †

Mr. Jenks is one of the rare persons who have successfully combined two divergent careers, that of an effective international civil servant with that of an eminent scholar. He joined the staff of the International Labor Office in 1931, becoming its legal adviser in 1940. Even after his elevation to the post of an Assistant Director of the Office in 1948, Mr. Jenks continued to take an important part in its legal work. At the same time, he was able over the years to maintain a steady stream of scholarly writings of consistently high quality. In some of them, he has dealt with

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questions of a practical nature which have arisen in the work of the International Labor Organization; the most prominent among these is his recent book analyzing the large mass of international semi-judicial decisions in the field of trade union freedom.<sup>1</sup> In his other writings, he has made important contributions to the theoretical foundations and the systematization of the new branch of international law relating to the constitutional and administrative problems of international organizations.<sup>2</sup> *The Common Law of Mankind* contains a generous selection from his previously published articles and papers, as well as the hitherto unpublished lectures entitled "The Universality of International Law," delivered at the Geneva Graduate Institute of International Studies in January 1957.

In his approach to international law, Mr. Jenks is not a pessimistic conservative; he does not belong to the group which believes that in the world of power politics there is no room for an effective legal order. On the contrary, he is a bold innovator, full of dynamism and foresight. He prefers to nurture each seed of progress, and concentrates on improving it and helping it to grow. Where necessary, he is willing to plant new seeds and to anticipate the brilliant future which should result from their expected phenomenal growth. In many cases he does not hesitate to blaze new trails directly; in other cases, he contents himself with outlining a job of work for others.

In his essay, "The Scope of International Law," Mr. Jenks departs from the classical view that international law is merely the legal system governing the relations among a limited group of sovereign states. He believes that in recent years international law has changed into "the common law of mankind," which he defines as "the law of an organized world community, constituted on the basis of States but discharging its community functions increasingly through a complex of international and regional institutions, guaranteeing rights to, and placing obligations upon, the individual citizen, and confronted with a wide range of economic, social, and technological problems calling for uniform regulation on an international basis which represents a growing proportion of the subject-matter of the law." (p. 8). This very definition shows the new scope of the international legal system, which must take into account both the recent growth of a network of international organizations and an increasing concern for the rights of individuals and the economic well-being of all the members of the international community.

The law of international institutions needs to be given more recognition "as the law governing the constitutional framework of a developing world community." (p. 22). This new branch of international law may be subdivided into the following categories: (a) the constitutional law of international organizations, which deals with their legal status, membership,

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<sup>1</sup> THE INTERNATIONAL PROTECTION OF TRADE UNION FREEDOM (1957).

<sup>2</sup> See, e.g., Jenks, *Some Constitutional Problems of International Organisations*, 22 BRIT. YB. INT'L L. 11 (1945).

structure, jurisdiction and powers;<sup>3</sup> (b) the parliamentary law of international organizations, which deals with their rules of procedure and parliamentary practices;<sup>4</sup> (c) the administrative law of international organizations, which deals with their finances, staff and immunities, as well as with the rules governing judicial redress against decisions of international bodies (for example, in the European Coal and Steel Community); and (d) the law governing the mutual relations of international organizations.<sup>5</sup> During the last fifteen years there has been a tremendous growth in this whole area and it calls for far more intensive study than it has yet received.

Similarly, Mr. Jenks outlines areas for research in other new fields of international law, such as the rules governing the law-making processes of the international community, the regulatory and investigatory powers of international organizations, the rules governing economic relations between states, international protection of human rights, and the law governing the use of force in international relations.

Even this ambitious program is dwarfed, however, by the scope of the research plan presented in the lectures on "The Universality of International Law." The almost complete universality of the United Nations and the general acceptance of the standards of behavior prescribed in the Charter of the United Nations have not been accompanied by universal acceptance of the traditional rules of international law. Mr. Jenks considers that this is due to the primarily Western and Christian origin of international law, and the general assumption that in consequence of its origin this system of law does not take into account the legal concepts and traditions of other parts of the world. He suggests, therefore, a broadening of the field of inquiry beyond the legal systems of the North Atlantic Community. "We must learn to think instinctively in terms of a group of major legal systems including Latin American, Islamic, Hindu, Jewish, Chinese, Japanese, African and Soviet law. We must seek to develop from the common elements in these legal systems, all of which are still in process of evolution, a universal legal order which gives reasonable expression to our sense of right and justice." (p. 169).

To show how this method works, Mr. Jenks considers several basic principles of the international legal order and investigates their acceptance in the domestic legal systems of the principal areas of the modern world. He studies, for example, the principle that the sovereignty of the state is not a discretionary power which overrides the law, the acceptance of third-party judgment, the limits of the right of self-defense, the protection of acquired rights and the performance of contractual obligations, and the

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<sup>3</sup> The broad scope of this subject may be seen in the *REPERTORY OF PRACTICE OF UNITED NATIONS ORGANS* (5 vols. published by the United Nations in 1955, with later supplements). See also Kelsen, *THE LAW OF THE UNITED NATIONS* (1950); SOHN, *CASES ON UNITED NATIONS LAW* (1956).

<sup>4</sup> For a pioneering study in this field, see Jessup, *Parliamentary Diplomacy*, 89 *RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL* 181 (1956).

<sup>5</sup> See, e.g., Jenks, *Co-ordination in International Organization: An Introductory Survey*, 28 *BRIT. YB. INT'L L.* 29 (1951).

principle that the law is "not a set of rigid rules inherited from the past and allowing no scope for development but a body of living principles in the light of which new problems can be resolved as international relations develop." (p. 121). While the survey made by Jenks is necessarily superficial, his conclusions are rather optimistic both with respect to the feasibility of this method of approach and with respect to the actual acceptance of the most important basic principles by almost all legal systems.

If we should want to follow Mr. Jenks in this direction, a tremendous task would lie ahead. We would need to assemble from non-Western countries historic, diplomatic and legal precedents seldom available in generally accessible languages. We would need to leave the comfortable, narrow confines of studies comparing merely the principal Western legal systems, and to acquire the more difficult knowledge of non-Western laws and customs.

Mr. Jenks also recommends a technical assistance program for the study of international law and of the basic principles of Western law in the countries outside the North Atlantic area. Adequate libraries of international law should be established throughout the world, major treatises and collections of cases and diplomatic precedents should be translated into native languages, university chairs of international law should be endowed, fellowships and scholarships for the study of international law abroad should be multiplied. If this can be done, we might be able "to create a political reality within the framework of a universal United Nations, to organise on a universal basis an economy of abundance for the common good, to secure human freedom everywhere on the basis of the Universal Declaration of Human Rights, and to fuse the legal traditions of the diverse cultures of contemporary civilisation into a universal legal order dedicated to promoting and maintaining peace, order and good government and securing freedom and welfare throughout the world." (p. 172).

Similar bold approaches characterize the other papers included in this volume. Whether Mr. Jenks deals with atoms for peace, Antarctica or the conquest of outer space, his perspective is large and his conclusions are stimulating. After summarizing the current state of the law, he analyzes the defects of the present system and outlines the possible ways of improving it.

This book shows clearly the great new vistas opening before us in the international field. It also points out that a tremendous effort is required to accomplish what is necessary for the survival of humanity. Here is a task not just for a small group of international lawyers but for the whole legal profession. It is gratifying to note that the American Bar Association under the leadership of its Committee on World Peace Through Law has recently recognized the importance of this task. Mr. Jenks has shown us the way; it will require the concentrated effort of a generation to execute even a part of his great agenda.