# BOOK REVIEWS

SELECTED ESSAYS ON CONSTITUTIONAL LAW, Vol. III: Book 3, THE NATION AND THE STATES. Compiled and Edited by a Committee of the Association of American Law Schools. The Foundation Press, Inc., Chicago, 1938. Pp. liv, 1663. Price: $15.00.

This is Volume Three of a four-volume set of readings under a similar name published under the auspices of the Association of American Law Schools.[1] While one may well doubt the scholarly contribution of reprinting in a collection articles which have already appeared in the English language in available sources, it must be taken for granted that the purpose of the series and of this particular volume was to make available in convenient form the outstanding articles so that they could be used by persons and schools unable to afford a library large enough to contain the wide variety of source materials from which the articles are taken. Perhaps there was also an intent to save time of the practicing lawyer or over-loaded beginning teacher who cannot burrow through the voluminous material which is constantly appearing on the subject of constitutional law.

Although the time and effort devoted to this series might better have been spent on translating foreign classics on public law, one must admit that the compilers have excellently performed the task set for them by the Association. The gigantic task of exclusion and inclusion has been boldly executed. Conflicting points of view are well sampled. The collection as a whole, although it does not neglect history, places emphasis upon the current problems of constitutional law arising from our unique system of divided sovereignty. At first glance the reader interested in these questions is struck by the scarcity of material on taxation, but since this subject has been treated in Volume One, the brief treatment in this portion of the series is understandable.

In light of the fact that the book was ostensibly to be used as subsidiary reading in constitutional law courses, the authors are to be congratulated for the manner in which they have cut across the conventional field of constitutional law and have included materials often found in other courses. The articles on government corporations, interstate compacts and modern economic problems are particularly noteworthy in this respect. The last quarter of the material is devoted almost entirely to discussions usually found in the subject matter of the course in conflict of laws, but since the authors have undertaken to set up the constitutional problems of relationship between the states and the nations, this material certainly belongs here.

In view of the fact that the classic course in constitutional law is rapidly being subdivided, one is inclined to wonder whether or not this volume is a forerunner of a new arrangement of courses. It is not at all clear that the book itself could not be used as a basis of such a course; and if supplemented with problem material, it might be a great improvement both in outline and informative content on our present courses in this field of constitutional law.

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1. For reviews of the first two volumes of this set see Ribble, Book Review (1939) 88 U. OF PA. L. REV. 237; and Young, Book Review (1939) 88 U. OF PA. L. REV. 239.

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SELECTED ESSAYS ON CONSTITUTIONAL LAW, Vol. IV: Book 4, ADMINISTRATIVE LAW. Compiled and Edited by a Committee of the Association of American Law Schools. The Foundation Press, Inc., Chicago, 1938. Pp. lxxiv, 1647. Price: $15.00.

The Association of American Law Schools in 1931 presented to the legal profession a new type of book—*Selected Readings on the Law of Contracts*,[1] containing more than a hundred articles, notes and book reviews from American and English legal periodicals. In his introduction to that volume Judge Cardozo (later Mr. Justice Cardozo) said:

> "In the engulfing flood of precedents the courts are turning more and more to the great scholars of the law schools to canalize the stream and redeem the inundated fields. . . . Judges and advocates may not relish the admission, but the sobering truth is that leadership in the march of legal thought has been passing in our day from the benches of the courts to the chairs of the universities. . . . In any event the outstanding fact is here that academic scholarship is charting the line of development and progress in the untrodden regions of the law. This change of leadership has stimulated a willingness to cite the law review essays in briefs and opinions in order to buttress a conclusion." [2]

The law reviews had become such "an accepted instrumentality in connection with both the teaching and practice of law",[3] and this volume was so well received,[4] that the Association's Committee on Reprinting Leading Articles recommended that it next reprint articles from leading periodicals concerning constitutional law.[5] The result is that the legal profession has again been placed in debt to the Association for presenting a four volume compilation of selected essays on constitutional law. Volume Four is devoted to essays on administrative law.

The volume on administrative law contains fifty-five leading articles (in whole or in part) taken from twenty-six law reviews and twenty-one editorial notes which have appeared in the law reviews. The erudition of the editorial group [6] is alone a self-assurance of the selectivity and high scholarship of those essays honored by inclusion. The richness of learning exhibited in these essays is now made readily accessible, in a convenient volume, to those lawyers engaged in trying to unravel the complexities of that "complicated system of nearly one hundred tribunals adjudicating disputes that occur in connection with the functioning of the Federal Government",[7] recently described as "a headless fourth branch of the Government" and as doing "violence to the basic theory of the American Constitution." [8]

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1. The Macmillan Company, New York, 1931.
2. Introduction, pp. viii and ix.
3. Reese, *A Brief Survey of Legal Periodicals* (1938) 24 A. B. A. J. 121, 165.
4. For some of the reviews see: (1931) 80 U. OF PA. L. REV. 142; (1932) 18 CORN. L. Q. 144; (1932) 45 HARV. L. REV. 766; (1931) 5 SO. CALIF. L. REV. 176; (1931) 41 YALE L. J. 325.
5. (1933) 7 AM. L. SCHOOL REV. 778.
6. The Editorial Group for Book 4—ADMINISTRATIVE LAW consisted of Prof. Ralph F. Fuchs, Washington University, Editor; and a Committee of Prof. James F. Davison, George Washington University; Prof. Walter Gellhorn, Columbia University; and Prof. E. Blythe Stason, University of Michigan. Professors Fuchs and Stason have since been named members of the Attorney General's Committee on Administrative Procedure.
7. BLACHLY, WORKING PAPERS ON ADMINISTRATIVE ADJUDICATION (Printed for the use of the Committee on the Judiciary, 1938) 1.
8. THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES (1937) 36.

The fact of the matter is "administrative government is here to stay. It is democracy's way of dealing with the over-complicated social and economic problems of today".[9] This volume will therefore be of permanent value to an ever-increasing portion of the bar and to the many administrators of this new branch of the law.

The contents of the volume are logically arranged. Its perusal shows one the development of administrative agencies, the limits of discretion in rule-making and in the exercise of powers of specific application. The limitations upon the vesting of judicial power in administrative authorities and upon the delegation of official power to non-official groups are discussed in illuminating essays. Constitutional limitations in relation to administrative procedure and judicial review of administrative decisions are likewise extensively developed in an especially well selected group of articles and notes. The volume closes with an extensive treatment of some constitutional aspects of general governmental administration. To single out any one or any group of essays contributing to the volume for special comment would be invidious to say the least. To have been included in the volume is praise enough for any of them. Some of them will no doubt be always considered as among the classics of legal essays.

The biographical notes of the writers add interest to the reading of the essays. However, these notes frequently refer to earlier volumes, so that unless the reader is possessed of the entire set of four volumes he is sometimes thwarted in his search for these data. This is unfortunate. A bibliography of the many excellent essays not possible to include in this volume would have added to its usefulness.

The index is clear, concise and adequate. The typography is excellent. The mechanical features of the book are all that could be asked.

Tested in the crucible of the law office this reviewer has found the volume to be a ready help in locating the leading case and in furnishing a valuable discussion of a particular subject. He knows of no other single volume so ably exhibiting the development of the fundamental concepts of administrative law, now the "green pastures" of the members of the bar.[10]

The editorial group deserves commendation for not having taken an advocate's approach. To this reviewer it appears that care has been taken not to present a wholly "one-sided" view of a subject where the available literature permitted a judicial approach and the presentation of various viewpoints.

*Clarence A. Miller.*†

THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE. By Alwyn V. Freeman. Longmans, Green & Company, New York, 1939. Pp. xix, 758. Price: $12.50.

The author states that his work has a twofold aim: "first, to construct a consistent theory of state responsibility; and second, to analyze and correlate for the practical needs of the international lawyer the vast amount of arbitral and diplomatic materials now available, in the hope that the work of others in this field may thereby be facilitated."

9. Mr. Associate Justice Douglas (when Chairman of SEC). N. Y. Times, March 26, 1939, VIII, p. 4, col. 4.

10. Hogan, *Fresh Fields and Pastures Anew.* Address before the New York State Bar Association (1938) 61 N. Y. B. A. J. 533.

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The purpose first expressed is evidently to emphasize fundamental principles of law determinative of international responsibility and practical methods of giving application to such principles, and it may be said that the author has given clear expression to sound and useful conclusions. With respect to his further purpose, it may be observed that the book reveals great industry in the examination of materials and much accurate analysis of numerous legal precedents which are cited and discussed.

Occasionally designations for service on international tribunals have been conferred on men lacking practical experience in international law; at times on men wanting in such experience in domestic law. Some members have been sadly deficient in knowledge of both systems of jurisprudence. Detailed analysis of opinions framed by such arbitrators is seldom a pleasant preoccupation, and at times it may not be very useful.

Perhaps the broad purposes which the author had in mind were not very effectively furthered by elaborate discussion of definitions of which extensive use was made in some opinions which he has cited. This may be said with regard to such terms as "denial of justice", "direct and indirect responsibility" an "old theory" of the law of damages, "rightfully presented" claims, "complicity" and "condonement". However, it may be observed that the majority opinions in the *Janes* case, the *Chattin* case and the *American Dredging Company* case in the arbitration under the Convention of September 8, 1923, between the United States and Mexico, furnished abundant materials for such discussion.

On the other hand, some general definitions and general classification of international responsibility employed for convenience in cases of claims perhaps do not merit the author's adverse comments. For example, he criticizes views expressed by some writers with regard to "the general ground for diplomatic intervention". Those views were stated with reference to the disposition of claims and not in relation to "an insult to a nation's honor" through "the person of its ambassador" which the author states should not be regarded as a "denial of justice". He quotes the following remarks:

> "The term 'denial of justice' has been used to designate solely wrongful action on the part of the judicial authorities of a government. But it may be useful and not illogical to regard it as the designation of the general ground for diplomatic intervention with respect to complaints against administrative, legislative or judicial authorities."

Perhaps this guarded declaration scarcely warrants the author's explanation that it is a statement of a conclusion that "the general ground for diplomatic intervention is a denial of justice".

The book contains an appendix of reprints of interesting and useful materials pertaining to the subjects with which the author deals.

*Fred K. Nielsen.*†

WHEN CIVIL LAW FAILS. By Robert S. Rankin. Duke University Press, Durham, 1939. Pp. vii, 224. Price: $3.00.

Martial law is the government by military force, instead of by civil law, of civilians as distinguished from soldiers, whether in peace or war time, with the suspension of the writ of habeas corpus, either (1) within the theater of war, or (2) outside the theater of war (a) to aid the courts in en-

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forcing the law, or (b) to supplant the courts when they are not open and functioning, in case of invasion or insurrection.

Elihu Root once wrote, "The true purpose of an army is to fight with the people of other nations. . . . If our citizens are unwilling to behave themselves they should be compelled to do so by civil peace officers rather than by soldiers." Undoubtedly Mr. Root was entirely correct in his viewpoint as to the use of an army, yet under the United States Constitution it must be admitted that it is legal to use an army against the citizens of our own country as well as against those of foreign countries with which we are at war. Since this is contrary to the true purpose of an army and navy under the Constitution, however, it should be confined within as narrow limits as possible. The power of martial law is an implied power of the federal, and possibly of the state governments,—implied from the war power and the power to execute the laws. It is certainly constitutional within the theater of war, and is constitutional outside the theater of war in cases of invasion or insurrection and in case of industrial disputes which are serious enough to threaten the existence of government. Yet in the United States we have gradually allowed the use of martial law more and more in the case of industrial disputes when they do not threaten the existence of government. In such cases martial law is simply a means of settling the disputes between private parties, which disputes are supposed to be settled by the courts. We have made strikes legal, yet in spite of this we will proclaim martial law against people for striking. It would seem that when martial law is used in this way there is no constitutional basis for it. But how can this unconstitutional practice be stopped? The only constitutional weapons available for the purpose seem to be the clause guaranteeing a republican form of government and the due process clause. The due process clause seems to give the best solution. Undoubtedly the governor or the president can declare a state of insurrection without control by the due process clause, but his declaration of martial law ought to be, and is now held by the courts to be, subject to review under the due process clause.

Professor Rankin in his small book has admirably traced the growth of the doctrine of martial law under the United States and state constitutions and has shown how the courts have finally come to the position set forth above. In Jackson's time martial law was confined to use in times of invasion rather than in quelling civil disturbances within the war zone or theater of military operations, but was exercised over civilians and involved the suspension of the writ of habeas corpus. Then, in Rhode Island, in 1842, martial law was extended to include insurrection or domestic violence and it was established that a state as well as the Federal Government might declare martial law, but one state could not extend martial law to other states.

It is pointed out that the writ of habeas corpus is constitutionally suspendable during times of rebellion or invasion either by Congressional (or legislative) action or by the president (or governor) because of his power to declare martial law. But reference is made to the case of *Ex parte Milligan*,[1] which held that martial law could not be declared outside of the war zone if the courts were open and functioning. Then, in Idaho in 1899, Pennsylvania in 1902, and Colorado in 1903 and 1904 a qualified martial law was developed to aid the courts, and under this law citizens could be kept in detention without the privilege of habeas corpus, though they could not be tried by military courts. Subsequently it was held in West Virginia that punitive martial law could be used anywhere within the state within or without the zone of disturbance if there was a disturbance anywhere, and

1. 4 Wall. 2 (U. S. 1866).

that military tribunals could be provided for civilians and could render any sentences, but this holding of the Supreme Court of West Virginia was criticized by a Congressional committee. In Colorado, Montana and West Virginia in more recent times there has been a tendency to hold that a government has no power to declare punitive martial law but only qualified martial law because only the Federal Government has the war power; and it has been held that a governor cannot suspend the writ of habeas corpus because this is a legislative function. The true position undoubtedly is, however, that the president (or governor) may suspend the writ because of his power to declare martial law, and he cannot suspend the writ without declaring martial law. Finally, in *Sterling v. Constantin* [2] the United States Supreme Court has taken the position that the action of a state executive in declaring martial law and suspending the writ of habeas corpus is subject to judicial review under the due process clause.

Professor Rankin is not always perfectly clear as to what the law is, as for example in case of the governor's power, the scope of a republican form of government, and the due process clause; but in general he has made a careful case study, shows a good attitude, is unbiased, yet is outspoken and in general makes wise generalizations and conclusions.

*Hugh E. Willis.*†

AIRPORTS AND AIRPLANES AND THE LEGAL PROBLEMS THEY CREATE FOR CITIES. Prepared by John A. McIntire, Charles S. Rhyne and Associates. National Institute of Municipal Law Officers, Washington, 1939. Pp. v, 51. Price: $1.00.

The Air Commerce Act of 1926 marked the beginning of a genuine interest on the part of some attorneys in the law of the air. This pamphlet cannot fail to impress upon these pioneers the extent to which aviation law has progressed in many areas from the philosophical and conjectural state to well-established law and precedent. It is now safe to maintain that the acquisition of land by a municipality is a "public purpose", and that a municipal airport is a public utility. One can also be rather positive in his statement that a city is conducting a proprietary function in the operation of its airport and hence is subject to a tort liability for negligence. It is interesting to note, however, that some states are attempting to reverse a general trend of enlargement of municipal liability for tort by legislative declarations that the operation of municipal airports is a governmental function.

The best developed section of this pamphlet and probably the most interesting is that devoted to the protection of the airport approach. Briefly stated, the problem involves the legal and legislative means to be employed in keeping the airspace surrounding an airport free from obstructions in order to insure the safe ingress and egress of aircraft. The subject has engaged the interest of several writers during the past six years. While the present study is a good summary of these earlier efforts, it offers little that is new. The report lists ten possible methods of dealing with the problem. First, voluntary action by the owners of the hazard in its elimination or its proper marking with lights. Ten city attorneys reported the use of some compulsion in requiring the owners to light or mark such hazards. Second, the purchase of all land near the airport and the razing of hazards located thereon. The cost of this method is usually prohibitive unless the land can be sold back to the former owner subject to an easement forbidding the

2. 287 U. S. 378 (1932).

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erection of obstructions dangerous to navigation. Third, the purchase of airspace rights over land near an airport. This method has apparently not been used except that Dayton, Ohio, has purchased trees near an airport in order to remove them.

Fourth, acquisition of land by use of the power of eminent domain, in order to raze present and prevent future obstructions. Reading, Pennsylvania, has used this device. Defects noted are high costs and the necessity in each instance of court action. Fifth, acquisition of airspace rights over land by use of the power of eminent domain to raze present and prevent future hazards. Disadvantages of this method are similar to those stated for the fouth method with the additional factor of placing a fair valuation on airspace rights condemned. Sixth, police power condemnation of hazards to the use of the airport. Since this method does not involve the payment of damages, it is obviously open to strong legal attack, particularly when applied to existing hazards. Some cases are cited [1] sustaining the use of the police power where persons had erected "spite" obstructions. Unfortunately, most obstructions would not come under such a category. The cases cited would therefore not be in point. It is recommended that this method be used only "when those hazards have come into existence after the airport was constructed and the particular area becomes conditioned to airport use".

Seventh, zoning to prevent and eliminate hazards near airports. Municipal ordinances limiting the height of structures near the airport are now quite common. No court of last resort has passed upon the legality of such ordinances. Reasoning by analogy is helpful but hardly conclusive. If the courts will sustain the use of the zoning power to limit the height of various structures surrounding airports, such ordinances obviously would be the preferred and most economical solution of the problem.

Eighth, use of the commerce power by the Federal Government. It is here suggested that since most air travel is interstate in character, the national government could employ the commerce power [2] to prohibit the erection and maintenance of all hazards to the use of aircraft in or near airports. This method would seem to have much promise. In the belief of many experts, such an extension of federal jurisdiction would be sustained. It is pointed out [3] that the Communications Act of 1934 now provides for the appropriate marking of radio towers. The ninth and tenth methods of dealing with the approach problem suggest respectively the use of the war and the postal powers of Congress as a basis for possible legislation. The use of the commerce power is so much more logical as a basis for such federal legislation that these last two suggestions can be dismissed without further comment.

The appendix of this pamphlet contains a valuable collection of statutes and ordinances of considerable utility to the city solicitor required to draft an ordinance for his city council. It will prove to be useful also to the student in making a comparative analysis of the various legislative efforts to solve the airport approach problem. Particular attention should be directed to the worthwhile effort of the National Institute of Municipal Law Officers to draft a model ordinance for the protection of airport approaches.[4]

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1. P. 11.
2. U. S. CONST. Art. I, § 8, cl. 3.
3. P. 20.
4. P. 38.

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HANDBOOK OF INTERNATIONAL LAW. (3d ed.) By George Grafton Wilson. West Publishing Co., St. Paul, 1939. Pp. xxiv, 623. Price: $5.00.

Professor Wilson's texts on international law have long held an accepted place in the teaching of international law. The new edition of his Handbook will therefore be welcomed by those who have found the earlier editions a successful method of giving to law students a brief but comprehensive survey of the subject.

The author has deliberately refrained from changing either the nomenclature of his subject or the traditional arrangement of topics, in spite of the far-reaching political changes that have taken place since the first edition of 1910. He is not troubled by the writers who of recent years have raised questions as to the existence of international law; and he refutes their doubts by pointing to the fact that the highest courts of the world as well as arbitral tribunals continue to respect the principles of international law in their decisions and awards. In the classification of topics he follows the traditional lines, taking up in turn the Persons in International Law, General Rights and Obligations, Intercourse of States, International Differences, War, and Neutrality.

Perhaps it is too much to ask that in a volume of this character the author might have undertaken to analyze somewhat more critically certain rules of international law that have been under controversy of recent years; and it may also be unfair to expect a critical discussion of the nature of international law and of the reasons for the failure of the law to perform its primary function of maintaining law and order in the world and protecting the fundamental rights of states. To many students it will seem paradoxical to have problems of "Status", "Recognition", "Existence", "Equality", and other fundamental issues described without reference to the fact that the traditional rules relating to those subjects have been so sharply challenged of recent years as to raise grave doubt whether there can be said to be an accepted rule at all on many of these points. An attempt, however, at a critical appraisal of the effects of violations of the law upon the authority of the law itself would have led the author away from his primary purpose, which has been to set forth the body of customs and treaties which constitute the traditional law. Beyond that it is probably not feasible for a brief text to go. The terms of the present challenge to the authority of the law are so obvious that they may well be left to the comment of the instructor and to the reactions of the students themselves.

Nevertheless, accepting the volume within the scope assigned to it by the author, no one can turn its pages without realizing that "the old order changeth, giving place to new"; only in this case the new does not give us much promise of a better world; and it may well be asked whether international law will survive at all unless it sets itself, as municipal law has long since done, to the task of repressing violence and promoting justice. It is only through the acceptance by the whole community of nations of a collective responsibility to protect each of its members and to promote such economic and social conditions as will remove the causes of conflict that it will be possible for international law, in the final test, to maintain its authority.

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