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Book Reviews

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Treaties And Executive Agreements In The United States: Their Separate Roles And Limitations. By Elbert M. Byrd, Jr. The Hague. Martinus Nijhoff, 1960. Pp. 276; with appendices, bibliography, and index.

The separate provisions in our Constitution relating to foreign affairs and the absence of any specific limitations on the treaty power have long posed a problem of the nature of limitations within this area, if any, and of reconciling the respective powers of (1) the President, (2) the President and Senate, and (3) Congress, over foreign affairs. The confusion has been compounded by *dicta* of the Supreme Court itself. Differing points of view have been presented exhaustively in earlier and more comprehensive works, such as the classic two volume work of Butler and those works of Tucker, Corwin, and others. The book under review is not presented as an exhaustive or definitive work. It is a thoughtful, penetrating study and represents the author's effort to formulate a coherent legal theory in much of this area. It should be consulted by students of this complicated subject. While the author's thesis is too complex to be fairly summarized within the limits of a review, a review may perhaps properly start with what the author states is the "hard core" of his theory. He says his major basic conclusions (numerals inserted by reviewer for convenience of discussion) are:

> "(1) the treaty making agency is a separate branch of the federal government; the Senators in their treaty approving role act simultaneously in a state and a national capacity; (2) the legislative powers of Congress are adequate to the approval of many types of international agreements; unlike the treaty power, the legislative power of Congress is restricted by the Tenth Amendment, and therefore the treaty power must be used to effectuate an international agreement when the legislative power as contemporarily construed is not sufficiently extensive; when a legitimate choice between the two powers exists, the legislative power should be preferred for both political and theoretical reasons; (3) both powers are limited by the specific prohibitions in the Constitution." (201-2)

(1). The first proposition, admittedly novel at least in emphasis, is in the author's view a justification for the complementary conclusion that the treaty power as such is a substantive power and is not limited by any state powers either under the Constitution or the Tenth Amendment, except for a few express provisions like the guarantee of a republican form of government. Thus the theory runs that in the exercise of the treaty power as such our Government is unitary and not federal in nature. Whether the conception that Senators act in part as ambassadors from their respective states would in fact furnish any protection against erosion of state powers through the treaty power does not seem to necessarily follow; and, if the guarantee of a republican form of government is to furnish the states any meaningful protection, it will require a more liberal interpretation than it has received in other areas.

(2). The power of Congress over foreign affairs, unlike the treaty power, is delegated by express provisions (for example, power over foreign commerce, tariffs, treaty implementing appropriations, and the like); hence, it must be found in the Constitution and is subject to the Tenth Amendment. The difference in their constitutional limitations so stated spotlights the great importance of the choice between treaty and "Congressional-Executive" agreements ("those international agreements other than treaties entered into under a combination of the powers of the President and of Congress" (149)). The author makes a strong case against their complete interchangeability, a theory propounded by some writers, pointing out that such a doctrine would destroy constitutional distribution of powers.

(3). The third proposition, insofar as it states that the treaty power as such is limited by the Constitution, requires the refutation of the inherent powers doctrine, *viz.* that the treaty power is inherent in sovereignty and hence is not derived from, nor restricted by, the Constitution. This doctrine gained renewed vitality from the *Curtiss-Wright dictum* of Mr. Justice Sutherland,[1] speaking for a substantial majority of the Court. As the author points out, it was widely and uncritically accepted by many writers. These included Corwin, who edited in 1953 a comprehensive work on the Constitution, under the direction of the Senate Foreign Relations Committee. The many lawyers who will heartily agree with the author's

[1] United States v. Curtis-Wright Corp., 299 U.S. 304 (1936).

rebuttal of this theory will hope that he is correct in concluding that the language of Mr. Justice Black in 1957 in *Reid v. Covert*,[2] though speaking for himself and only three other Justices, has in fact *sub silentio* overruled *Curtiss-Wright* and buried the inherent powers doctrine forever.

In addition to the points referred to, the author takes a liberal view of the President's powers, particularly as Commander-in-Chief, and the power of recognition of foreign governments, which do not require implementing legislation. He likewise clarifies the classification of international agreements and other points.

Chapter summaries, a bibliography and appendices, particularly one listing constitutional provisions which may limit the treaty power, are helpful to students of the subject.

Aside from questions listed by the author for further study, there are two troublesome problems related to the enforceability of treaty limitations: (1) How can treaties as such, making domestic law, be made subject to court review under present constitutional provisions which do not require implementing legislation? Sometimes, of course the treaty itself provides that it is to have no domestic effect except insofar as so implemented. (2) How far will the Supreme Court carry its rule of self-restraint that foreign affairs involve political questions not subject to court review, as in *C. & S. Air Lines v. Waterman Corp.*,[3] *Oetjen v. Central Leather Co.*,[4] etc.? The ordinary reader will be always concerned as an individual in the use and possible abuse of the treaty power in making domestic law. How the author's theory of limitations would affect specifically such treaties as were proposed a few years ago relating to Genocide, Covenant of Human Rights, International Criminal Court, and other matters, is not clear. The public reaction to such treaties resulted in assurances to the Senate that they would not be presented for ratification during the administration then in office. This in turn contributed largely to the defeat by one vote of passage by the Senate of a proposed constitutional amendment. Because such treaties may be revived by some future administration, it may be interesting to note that the present State Department policy is as follows:

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[2] 354 U.S. 1 (1957).

[3] 333 U.S. 103 (1948).

[4] 246 U.S. 297 (1918).

> "Treaties are not to be used as a device for the purpose of affecting internal social changes or to try to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern." (Appendix G, 251, not discussed by the author in this context).

This policy statement recalls Mr. Chief Justice Hughes' suggestion of thirty years ago, that there might be an implied limitation based on the grant of treaty power being made in relation to external affairs.[5] The State Department policy above quoted seems to depend on motives and may not therefore provide a basis for an enforceable constitutional limitation. The author would presumably not believe the study of any such implied limitation profitable, for he says, although not quite in the same context, "as early as 1796 it was generally agreed that there was really no way to differentiate between the subjects of domestic and foreign affairs." Probably most lawyers, however, irrespective of their views on constitutional limitations, would agree with the policy statement of the State Department.

Within the limits set, this study does present a coherent legal theory which should contribute to the search for one which will be finally accepted. It does not purport to, nor does it, answer satisfactorily all of the procedural problems and difficulties of practical application of constitutional limitations to domestic law when made by treaty or "Congressional-Executive" agreements.

*Frank B. Ober**

Law Finding Through Experience And Reason. By Roscoe Pound. Athens, Georgia. University of Georgia Press, 1960. Pp. 65. $2.50.

In this small volume are three lectures on jurisprudence given by Dean Pound at the Centennial Celebration of the University of Georgia School of Law earlier this year. In lucid prose the author traces the development of law from the strict law of the earlier Roman Republic to the present, to present an historical framework within

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[5] *Proceedings of the American Society of International Law* (1929), 194, 196.

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which to move "toward a law of the world that is to bring us world peace."

Dean Pound repeats his well-known definition of law *(ius)* as an interaction between reason and experience which, unlike legislation *(lex)*, is designed primarily to deal with generalities in universal rather than in local terms. In his first lecture he identifies the nineteenth century as the period of maturity of the law and argues that in our century the law has tended to become socialized — that, presently, judges tend to look at the consequences of the continued application of a rule of law to see if the rule has achieved a desirable social end rather than simply deciding cases on the basis of often specious analogy. In his second lecture he explores the varying approaches to the doctrine of *stare decisis* and shows that the position of Mr. Justice Frankfurter and others, recognizing the maxim as an embodiment of a principle of social policy rather than an inflexible rule of law, typifies the sociological approach of our time. In his final lecture he takes up a number of cases from different fields of law, in which the courts, by reasoning by analogy rather than employing the techniques of today's functional-sociological jurisprudence, have reached conclusions inapposite to the realities of modern life. These instances are carefully chosen to enforce his argument. Thus, the analogy between the law of capture of animals *ferae naturae* and the ownership of deposits of gas and oil may some day, in Pound's view, be regarded as the classic example of inapposite reasoning.

This is a thought-provoking book of prime interest to those of the profession who are inclined to think of the theory of law and jurisprudence, and to those who know and value Dean Pound's thought. All who read it will find a *precis* of Pound's legal philosophy.

*Nelson Reed Kerr, Jr.**

Sacco-Vanzetti: The Murder And The Myth. By Robert H. Montgomery. New York. The Devin-Adair Company, 1960. Pp. x, 348; with chronology and index. $5.00.

Mr. Montgomery's book presents an interesting reaction to the forty years of liberal activity and comment which have followed what may well be this country's

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most debated criminal case, *Sacco-Vanzetti*. In those years, many reputable writers have tended to vilify Judge Webster Thayer, the prosecution, and all those in any manner connected with the prosecution, especially the United States Department of Justice, for discrimination and unfairness regarding two defendants with anarchistic, therefore unpopular, views. But Mr. Montgomery would go farther in stating the "liberal" attitude toward *Sacco-Vanzetti* and would find it virtually a Communist text:

> "SACCO-VANZETTI as myth is a murder engineered by a decadent ruling class ('hangmen in frock coats') to eliminate two radicals ('goddam agitators') who were interfering with their betters and obstructing their exploitation of the proletariat. * * *"

Unfortunately for those such as this reviewer who would prefer a somewhat more disinterested approach, this conclusion seems also the author's premise. Mr. Montgomery states that before the trial "there was no reason to suspect [it] would not follow the course of . . . any other Massachusetts criminal trial with all civil rights protected." Then came the Sacco-Vanzetti Defense Committee, largely comprised of "Communists, Socialists, and 'liberals' as well as anarchists. . . ." The myth resulted, being forced out of the trial, the post-trial motions, appeals, and inquiries, by such agitators.

In spite of the author's one-sided approach and several rather lengthy arguments with "liberal" commentators on the case, such as Mr. Justice Frankfurter, the book does present a rather carefully drawn analysis of the facts produced before the *Sacco-Vanzetti* trial court and adequately describes the later judicial and administrative hearings on the case. But the main value of THE MURDER AND THE MYTH is as an opinion to be read and tempered with some of the earlier and "liberal" reports of the case, which may have swung a bit far to the left just as Mr. Montgomery swings a bit far to the right.

Robert J. Carson

Nine Famous Trials. By John Evarts Tracy. New York. Vantage Press, Inc., 1960. Pp. 176. $3.50.

The law in all its aspects is drama to the lawyer; to the layman the trial is often its most interesting aspect. John Evarts Tracy's NINE FAMOUS TRIALS is the result of this realization and the author's contribution toward interesting laymen in the administration of justice through emphasis on *dramatis personae* rather than technicalities.

Each of the chapters was first written as a paper for a dinner group of which the author was the only lawyer-member, and publication is a result of the group's interest. The late Mr. Tracy (he died December 31, 1959, just after the manuscript had been completed) was Professor of Law at the University of Michigan Law School, a practicing lawyer, and the author of several other books.

The most remarkable facets of the present work are the freedom of its language from esoteric legal terms and its fresh approach to the trial. In dealing with the nine trials the author not only clearly sets forth the facts of each case with all the pertinent background, the points of law involved, and the application of the law to the facts, but he also describes the characters and personalties of the parties involved, and of the judges and lawyers, and points up the importance of the litigation in the public view at the time.

Great care and discrimination are shown in the selection of the trials presented. Some illustrate the progress of the law over the centuries, others the establishment of great legal precedents, and all are interesting to a high degree. The legal questions and principles presented run the gamut from the constitutional questions involved in the trial of Aaron Burr and in *In re Neagle* to problems of property rights, admiralty, and criminal law.

The *Annesley* and *Tichborne* cases furnish two examples of the missing heir-claimant, famous in fiction as well as in law. They are two fascinating mystery stories and created much popular interest in their day. Here, technicalities of procedure and rules of evidence which have since been changed are also shown.

In re Neagle, a most singular case, is given added dimensions by the author. Mr. Justice Field's family and professional history, and the personalities and marital background of David S. Terry and his wife, who had threatened to "get" Field, are related to give the case great dramatic impact.

Most moving of all the trials is perhaps the story of the trial of Mary, Queen of the Scots. Elizabeth's reasons to fear her, and Mary's reasons for acting as she did, are revealed by the author as a setting for Mary's noble death. It is the furnishing of such information which gives the book its special value. The emotions and animosities of the survivors of the wreck *William Brown*, the generosity of Connecticut citizens in providing for the welfare of negroes who had allegedly mutinied on a slave ship, the politics surrounding the trial of Andrew Johnson — personal motivations and popular sentiment and reaction—are brought in in such a way as to give meaning and body to the dry facts of litigation. The legal points, clearly presented, provide additional interest for the lawyer.

NINE FAMOUS TRIALS concludes with an Epilogue, "The So-Called Technicalities of the Law." Even though this is the one area where there is a noticeable lapse into technical language, the outlook presented is valuable for both laymen and lawyer in its attempt to portray our legal system as a precept of civilized living. As a presentation of the author's philosophy it indicates why he was able to create a book appealing alike to layman and lawyer, and why his treatment of the trials has power to appeal pleasurably to both.

*Stewart Day**

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