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Book Reviews

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The Great Rights. Edited by Edmond Cahn. New York: The Macmillan Company, 1963. Pp. 242. $5.95.

This volume includes the first four James Madison Lectures delivered at New York University School of Law, with an introductory chapter by Professor Edmond Cahn and an essay by Irving Brant. The purpose of the Madison Lectures is to enhance the appreciation of civil liberty and strengthen the sense of national purpose. The first four lectures were delivered by Supreme Court Justices Black, Brennan, Douglas and Chief Justice Warren. These lectures were intended to present the general philosophy of constitutional liberty. Professor Cahn writes that "invitations were extended to jurists who were deemed most thoroughly imbued with Madisonian ideals and principles."[1]

Professor Cahn introduces the reader to the Madisonian approach to liberty, and outlines the Supreme Court's progress in moving toward the present era of major attention to matters of personal liberty. Cahn is a great, biased man. He is an original thinker who can write beautifully when he wants to. In addition he is one of those rare fellows who can tear his own biases to pieces in honest fashion. One may ask whether the Madison described is the true Madison, or whether this is Cahn under the Madison label. Why, for example, isn't Felix Frankfurter more like the real Madison than is Hugo Black? I wish Cahn would do an article on whether we have found Madison as he really was or whether we have made Madison into what we want him to be.

Irving Brant, author of a superb six volume work on Madison,[2] writes about the important part Madison played in the formation of the Constitution. Brant traces the roots of Madison's ideas concerning civil liberties, his efforts on behalf of civil liberties in the Constitutional Convention, and the interplay of ideas among the great men of the day concerning the Bill of Rights. Mr. Brant asserts that Washington, John Adams, and Hamilton were not as far removed in philosophy from Jefferson and Madison as is sometimes supposed. Their differences, Brant writes, "were gradations

[1] CAHN, THE GREAT RIGHTS 11 (1963).
[2] BRANT, JAMES MADISON (1941-1961).

in a general devotion to the principles set forth in the opening paragraph of the Declaration of Independence."[3] Madison's influence on the later interpretation of the Constitution comes from his account of the deliberations of the Constitutional Convention, and from the *Federalist Papers*. Mr. Brant defends Madison against recent charges that he changed the diary of the constitutional debates in his old age. Madison knew the danger of runaway legislation in the emotional periods of history; that is why he wanted "every Government disarmed of powers which trench upon those particular rights."[4] Brant contends that Madison did not expect when he wrote "Congress shall make no law" that the Court would ever decide "on balance" whether Congress could or could not make a given law infringing these liberties.

The lectures of the four Supreme Court Justices are juxtaposed against the background and opinion of Madison and Madison's concept of the Bill of Rights. Mr. Justice Black discusses the Bill of Rights and the federal government; Mr. Justice Brennan discusses the Bill of Rights and the states. Mr. Chief Justice Warren deals with the Bill of Rights and the military, and Mr. Justice Douglas winds up with the topic, "The Bill of Rights is not Enough." There are no extraordinary statements; rather, the four speakers give a calm, considered discussion of particular problems in freedom. One concludes the book with the feeling that the Supreme Court has done a better than adequate job in protecting our liberties. Each lecture is good, and each interesting.

The volume, I think, should be read slowly, perhaps an essay a day; not because the writings are difficult—a layman can read them with pleasure. Some pencil marks along the way are in order, so that the reader may come back and linger awhile over a line. Also, this would be a fine book for a discussion group to spend an evening or so with.

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[3] CAHN, THE GREAT RIGHTS 17 (1963).
[4] 1 ANNALS OF CONG. 441 (1834).

Flags of Convenience. An International Legal Study. By B. A. Boczek. Cambridge: Harvard University Press, 1962. Pp. xvi, 323.

> Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ship's papers and its flag. The United States has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering state.

The United States Supreme Court, per Mr. Justice Jackson, in *Lauritzen v. Larson.*[1]

What makes a discussion of this principle pertinent today is the dramatic increase in the number of ships now registered in Panama, Liberia, and Honduras (sometimes Costa Rica is added). Panlibhon, as they have come to be styled, are conspicuous in the shipping world today because their collective merchant fleets have accounted for 43 per cent of the increase in world tonnage between 1939 and 1961. Of course the sharpest rate of increase in ships registered under the flags of these countries came about after World War II when a rapidly expanding world trade coincided with inflation in American ship construction and operating costs. Liberia, a country without a merchant ship to its name in 1939, had become in 1959 the third largest maritime country—behind only the United States and Great Britain.

The author is quick to explain how this somewhat incredible state of affairs came about. The flight to the so-called flags of convenience can be traced to the felt need of American ship-owners to put themselves on a more competitive footing with European owners who were favored by lower building and operating costs. The subsidy which the United States Government has bestowed on its nationals in respect of certain kinds of carriage since 1936 (passenger and dry cargo), although responsive to this condition, does not help the owners of tankers or tramp freighters—and the tanker fleets of the world have experienced the greatest increased demand during this period.

The attraction these owners found in Panlibhon is, in the first place, the comparatively nominal fees imposed upon the registry of ships. Secondly, and more importantly, under such registry there

[1] 345 U.S. 571, 584 (1953).

are few if any limitations as to the nationality of the crew, so that labor may be had more cheaply than would be possible if the ship retained American registry. No United States income tax need be paid on the earnings of such a ship (provided of course its profits are not repatriated to the United States owners or shareholders), and corporate income taxes in these countries have been relatively insignificant. In addition the ship can be repaired abroad with additional savings in overhead. Finally, though this is becoming more legendary than demonstrably the case because new construction is steadily replacing the "Liberties" of the post-war era,[2] the standard of conditions and equipment on board is not as high as that required by United States authorities. It is estimated that the over-all savings effected by the American owner who transfers his ship (or has his foreign corporation do it) to Panlibhon registry is about one-half in cost of operating. Even so the American owner is then about on a par with his European or Japanese rival. It should not be understood, however, that Americans are the only owners or investors using the Panlibhon device, for the Greek magnates are very much in the picture. The author estimates that these two national groups account for 80 per cent of the Panlibhon registration.[3]

It is also true that substantial material advantage has accrued to these states having attracted registration by foreign owners or by local corporations chiefly owned and controlled by foreign capital. As much as one-seventh of a single Panlibhon country's total revenues may come from the "enterprise" of collecting registry fees and annual taxes. It should not be surprising therefore to find that these countries have vigorously defended their status as maritime states whenever the need arises.

The challenge has come, the author reveals, principally from two quarters. One is the circle of European owners who have felt the competition of the Panlibhon fleets. The other is American labor organizations which regard the presence of foreign crews on ships of American beneficial ownership as something akin to an unfair labor practice in the nature of a "runaway ship." Both groups

[2] The author points out that Liberia now has the most modern tanker fleet in the world, surpassing traditional contenders like the United Kingdom, Norway and the United States by some two to three million gross tons.

[3] The chief attraction for Greek owners has been avoidance of high taxes at home, but this, the author says, is a situation fast being remedied by a Greek government alert to changing conditions.

have through their separate pressures succeeded in mustering the support of a respectable number of governments and international lawyers to champion the argument—advanced in the United Nations International Law Commission in 1956 and in the International Convention on the Law of the Sea in 1958—that there should exist something called a "genuine link" and not merely the formality of registration and issuance of papers between ship and registering state. In pressing this argument it is said that absent such a link the flag state cannot effectively supervise labor and safety standards on board these ships (which admittedly are infrequent callers at ports of the flag state) or in general "effectively exercise its jurisdiction and control."[4] But the Panlibhon countries have not fared too badly considering their number. At Geneva they achieved a minor victory in getting the objectionable non-recognition clause striken from the "genuine link" proposal, which would have enabled governments unilaterally to ignore the nationality bestowed upon a ship. Furthermore in an advisory opinion of 1960 the International Court of Justice, in passing upon the disputed claim of Liberia and Panama to sit on a key committee of the U.N. sponsored Inter-Governmental Maritime Consultative Organization (IMCO), quite clearly rejected the argument that one state could look behind the attribution by another state of nationality to vessels manifested in the registration of the ship in accordance with the law of the registering state.

One of the principal burdens of Mr. Boczek's book is to demonstrate that the genuine link theory has introduced confusion into an area of the law that had been clear and workable. The principle that every state may decide for itself what ships shall fly its flag, be entitled to its protection, and subject to its laws is a venerable one and probably owes is genesis to the need for some attributes of nationality in a part of the world where no territorially organized communities exist, the open seas. Both order within the ship and public order on the oceans have been supported by a system through which ships are assigned definite and easily ascertainable states of allegiance. It has not mattered where the ship was built or who manned it or what ports it served. The fact that it was the ship of some state (and it need not be a coastal state) has made it possible for the ship to fulfill its role in helping to carry on international trade

[4] The quoted language is from Art. 5, Convention on the High Seas, Proposed at Geneva in 1958.

free from periodic interruptions which would surely characterize every voyage were there no ready and uniform means of ascribing—and recognizing such ascription—a single nationality to a ship. The existing rule of international law, and the one repeated in the United States Supreme Court opinion quoted above, has served these practical necessities very well. The effort to undermine or supplant the principle is disingenuous. Fundamentally the idea of a genuine link lacks precision, and its proponents have failed to list any component elements which would give it substance. If some concepts of property like beneficial ownership be made a determinative factor, few cases would be clear ones, for many ships are owned in that sense by shareholders from several countries. Nationality based on that of the operating company would stand on no better footing. Nor would a test based on nationality of crew be any more helpful since mixed crews are quite common, and a reshuffling in this respect would work to the disadvantage of states without the fortuitous combination of the several skills and resources needed to train a modern merchant marine. In short the alternatives to the present principle are not appealing as practical responses to a real need. More pertinent for international law is the objection that any rule which would permit each state individually for its own ends to pass judgment on the competence of another state to bestow nationality on ships it has found qualified would begin the process of deterioration which ends in anarchy.[5]

Conceding the general desirability of retaining the traditional principle, there remains the nettling problem of what to do about the attempted application of United States labor and admiralty law to Panlibhon ships coming to American ports, having in mind that until this year the NLRB has been unchecked in asserting its jurisdiction over foreign crews of Panlibhon ships in organizational disputes and that courts have in several cases given a Jones Act remedy to foreign seamen serving in Panlibhon ships. The former practice will presumably now be abated in light of the decision in *McCulloch v. Sociedad Nacional de Marineros de Honduras*[6] by the Supreme Court last term. And as to the other practice no special threat to comity is seen in it by the author even if the courts abandon

[5] It is implicit here that a state will not undertake to register a ship already possessing nationality unless the original flag state consents to the transfer.

[6] 372 U.S. 10 (1963).

their apparent policy of restraint insofar as ships not controlled by U.S. nationals are concerned.[7] Considerable concern, however, is voiced over the potential effect of the Labor Board's activities in this area. The point here is that the attempt to fit these foreign seamen into the scheme of benefits created for American labor is irrational and not merely illegal (since ships within a coastal state's territorial waters are generally subject to the laws of that state). First, it is clear that the Government of the United States (specifically the Maritime Administration and the Defense Department) is in favor of the practice whereby American ship owners can keep their ships going even if they do not sail them under the American ensign, reliance being placed ultimately on the ready acquiescence of friendly Panlibhon governments in any future seizure of ships beneficially owned by American citizens for use in a national emergency (the Korean and Suez experiences are cited as precedents). Second, the application of United States labor standards (pay, hours, number of hands, etc. would quickly dilute if not destroy the advantage of foreign registry in the first place. And as a matter of international custom or practice states have refrained from exercising jurisdiction over internal matters of foreign ships in their territorial waters, allowing the law of the flag state to control except for the most serious incidents. If the United States foregoes its traditional restraint in this regard, the author suggests, we need not expect other states to have any greater forebearance.

It was with similar considerations before it that the Supreme Court in *Sociedad Nacional de Marineros,* elected to rationalize the American practice in this area by purporting to find no congressional intention to apply the National Labor Relations Act to seamen aboard ships of foreign flags even if such ships have abundant "American contacts" because "to follow such a suggested procedure to the ultimate might require that the Board inquire into the internal discipline and order of all foreign vessels calling at American ports. Such activity would raise considerable disturbance not only in the field of maritime law but in our international relations as well."[8]

In reaching this result the Court has helped preserve this country's adherence to broadest community perspectives, for the over-

[7] *Compare* Rodriquez v. Solar Shipping Ltd., 169 F. Supp. 79 (S.D.N.Y. 1958), *with* Argyros v. Polar Compānia, 146 F. Supp. 624 (S.D.N.Y. 1956).
[8] 372 U.S. at 19.