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## Ombudsmen For American Government? Edited By Stanley V. Anderson

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## BOOK REVIEWS

THE AMERICAN COMMONWEALTH. By Louis Heren. New York: Harper & Row. 1968. Pp. 366. \$7.95.

When faced with an analysis of the American political system written by a European, I tend to approach it with an air of hesitancy. It has been my experience that many contemporary non-American writers often do not really understand the intricacies of our political system, and, therefore, cannot explain the total operation of our politics objectively. There always seems to be the tendency to compare the American system with their native system, and, thereupon, to offer an explanation based upon reflection rather than examination.

Louis Heren's *The American Commonwealth* comes very close to following the pattern described above, but there are just enough astute observations of the American scene to place this book on the borderline. This book could not be used as a text in American Government, even though there are some excellent chapters such as the ones concerning the Secretary of State and the National Security Council, because it lacks a certain intuitive understanding that most American writers and analysts seem to display. It would, however, be extremely useful for students of American Government to read *The American Commonwealth* for an interesting account of their system and themselves from an outsider's point of view.

Louis Heren is the *Times* (London) correspondent in Washington, D.C. He is a devoted British subject, and like most educated Britons, quite knowledgeable in the areas of government and history in the United Kingdom and the Commonwealth. This awareness of British politics provides a prejudicial basis for understanding other systems and at the same time creates an analytic barrier to things not British.

There is also some question in my own mind concerning whether Heren is more the 19th century than 20th century man. Recently, on a television news program, he made two 19th century observations about 20th century problems. When questioned on his feelings about the racial crisis in the U.S., Heren observed that he did not consider it critical enough to destroy the system under present conditions. He used India as an example of a country which has experienced considerable racial and religious difficulties and has managed to maintain stability. There is little doubt that the Indian National Government has been relatively stable but socially India has been quite unstable. It is at this point that Heren's comparison of the U.S. and India under similar conditions breaks down.

The second 19th century observation related to the threat of Communist China. Heren did not understand the fear that China invoked in other nations. He considered China to be an adolescent power hemmed in by mountains and therefore, not a serious threat to other countries. One could not ask for a better example of 19th century perception than that.

It is not unusual, therefore, that Heren starts and finishes his book with a controversial analysis and comparison of the American President and what he calls the "presidential system" with the concept of an "English medieval monarchy." It is on this point that he introduces most of his British history and indicates his inability to relate to the complexities and uniqueness of American federal politics. In belaboring the awesome responsibilities and power of the President, Heren also seems unable to understand the very simple universal concepts of power.

It is his contention that the U.S. was founded upon republican and democratic principles of representative government but that these principles have eroded, particularly at the national level. As a result, power has been shifted almost completely to the President and he alone reigns supreme. Once he has received the mandate of the people, he assumes the role of the most powerful individual in the world and there seems to be little in way of controlling him while he is in office.

He is a "King-President" utilizing the Divine Right of Kings in modern times. He is beholden to the people but he also speaks for them. He ultimately controls their lives domestically and internationally. The King's men are various advisors, friends and Cabinet Secretaries, all of whom are appointed and are part of his entourage when he assumes office. They remain only so long as they are agreeable to the President. Once they are viewed as disagreeable, they are released and others are appointed. All offices under his jurisdiction are extensions of his authority.

The "many hats of the President" illustration is utilized (Chief Legislator, Chief Diplomat, Commander-in-Chief, etc.) to strengthen this argument. Virtually, nothing is left out. The Vice President is the crown prince and the Secret Service agents are beefeaters with crew cuts and button-down collars.

All of this and more emanates from the President's inherent and broadly interpreted constitutional powers. The analogy is fair to the respect that both feudal kings and modern presidents have been endowed with vast power. The similarity really ends here because the ways in which they attain power, use it and lose it are quite different. This feudal monarch analogy really is a very poor one.

How many feudal kings would have permitted their judiciary to assume the lead in various important renovations of the political system such as civil rights and reapportionment, or would have abdicated because a growing militant minority refused to accept a position on foreign policy and were able to sway many others to their way of thought? How many of the feudal monarchs would have permitted a legislature which did not truly represent the majority of opinion nationally or even on occasion, in their constituencies, to stifle their programs?

There are many more illustrations, both formal and informal, to counter Heren's analogy. He does not understand the latent responsibilities of the President, his advisors and cabinet to American democratic government. Nor does he seem to understand or recognize the interplay between Congress, the President, and the Court, and for that matter, the differences of opinion in the lower echelons of the administrative bureaucracy.

Heren would have to combine the concepts of democracy as presented by Plato with the results of contemporary empirical investigation into political behavior patterns to understand the current American approach to democracy.

If one can get through the first chapter, "The Presidency," without being too greatly offended, he will find the rest of the book rather informative and enjoyable. Heren's chapters on the Supreme Court and Congress are standard and well done. His discussion of Congress with reference to their roles as delegates rather than representatives is particularly thought provoking to anyone who happens to be considering a reorganization of that branch. He also covers the other areas of parties, state and local government, and the people in a routinely textual fashion adding a bit more history and personal opinion than is usually seen in texts of this type.

Heren offers the reader something extra in Part II of his book. This section covers the Departments of State and Defense and the National Security Council. Usually, the subjects are given scant attention by writers of American Government texts. They are handled very well and his ability as a reporter is more clearly evident here than elsewhere.

The style, thoughts and analyses are British. *The American Commonwealth* is a historical essay on the American Political System. Unlike Robert Dahl's *Pluralistic Democracy in the United States* which technically falls into the same category, it is devoid of important empirical observations. Even though it appears to have been written for the British public and contains a rather controversial

description of presidential authority, *The American Commonwealth* is a commentary on our political system worth reading.

DONALD M. BORROCK\*

WHAT THE GENERAL PRACTITIONER SHOULD KNOW ABOUT TRADEMARKS AND COPYRIGHTS. By Arthur H. Seidel. Philadelphia. ALI-ABA Joint Committee on Continuing Legal Education. 1967. Pp. 199. \$4.75.

This book can prove very valuable, but the function which the book will serve must be understood before the book has real significance.

The subject of trademarks and copyrights is one which has become increasingly important to almost every lawyer, whether he be located in a large metropolitan area or a small town, and whether he is primarily concerned with trial practice or business practice. Clients are naturally involved with their own individual problems, but experience indicates that as any practice develops, client Jones who initially appeared with a personal injury case, a tax problem, or a divorce problem, is likely to thereafter appear with a business problem or is likely to make a recommendation to someone else who has a business problem.

In many of such situations, it is common to find that the client wants to organize a business and select a particular name, that the client has been engaged in a particular business but has a new product which he would like to distribute, or that the client has some advertising technique or program which he wants to use, or protect and present nationally for widespread publication. Mr. Seidel's book, *What the General Practitioner Should Know About Trademarks and Copyrights* purports, by its title, to supply the lawyer who does not specialize in trademarks and copyrights with some guidelines. While a careful review of the book indicates that it contains, in an organized manner, almost all, if not all, the information which is essential to handling at least the initial stages of trademark and copyright matters, the presentation in the book seems likely to drive the general practitioner directly to the specialist when, during the initial stages, the general practitioner is probably trying to secure more of a "feel" for the problem than specific refinements which would either later

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be handled by the specialist, or considered after extensive study of the matter by the general practitioner.

If the client is a young organization which is not well financed, the general practitioner may recognize that it would be desirable to secure the services of a specialist, but financial conditions preclude this possibility. The general practitioner therefore finds himself in a position where he has some basic questions such as: Is it a simple job to at least make some check of prior registrations of the particular trademark involved? Is it a relatively simple matter to secure some basic rights under the copyright law without necessarily consulting a specialist and proceeding with the immediate filing of a copyright registration? Or, from the practical standpoint, should I do more than find out from the Corporation Commission of the state in which this company is to be organized whether the name which the company has selected is available?

These basic questions can be easily answered if one first considers some of the simpler and less refined trademark procedures or some of the most basic requirements of the copyright statutes. Yet, Mr. Seidel's book tends to approach the situation from the standpoint of complexity rather than simplicity. The first sentence, for example, reads as follows: "The American trademark system is complicated by the fact that it comprises two separate systems, namely, the federal trademark statutes and the trademark statutes of each of the states . . ." (p. 1).

There is no doubt that this statement is quite accurate. At the same time, it leads the general practitioner to the conclusion that every trademark problem is necessarily complicated, when in fact, most trademark considerations can be rather easily handled merely by making a comparatively inexpensive search through the pertinent records in the United States Patent Office. Similarly, from the copyright standpoint, use of the copyright notice on any published material is the essential prerequisite to copyright protection and this simple notice, such as "© 1968 Jones, Inc." can be readily applied to any printed material.

To the client and to the general practitioner concerned with a trademark, the important factors are whether the mark is in conflict with another mark, and if not, whether the particular mark under consideration can be protected. It makes little difference at the outset if it is used on a particular product so that it is technically a trademark, if it is used in association with a particular service so that it is technically a service mark, if it names a particular organization so that it is technically a collective mark, or if it identifies a

given stamp of approval and is technically a certification mark. Although a search through the Patent Office records admittedly is not "all inclusive," it is used as a guide in a multitude of instances, and certainly can be used as a means to determine that a particular mark is definitely not available. In the writer's opinion, therefore, the discussion in Mr. Seidel's book concerning the complexities of the trademark law and the categories of marks is a matter which should follow a rather simple initial explanation of the overall general situation. In this sense, Mr. Seidel's book is lacking in a practical approach. The same seems true of the copyright discussions in the book.

Yet, if the book is to be used by the general practitioner as a "short form" source book in the same sense that the general practitioner might use *Corpus Juris*, then the book is highly recommended because it contains the information which would be significant for this purpose.

SAMUEL L. DAVIDSON\*

OMBUDSMEN FOR AMERICAN GOVERNMENT? Edited by Stanley V. Anderson. Englewood Cliffs, New Jersey: Prentice-Hall. 1968. Pp. 192. \$4.95.

This book attempts serious scrutiny of the desirability of the adoption of the Ombudsman idea in this country. It consists of five essays by students<sup>1</sup> of the institution and a reprint of a model statute drafted by Professor Gellhorn of Columbia University Law School which would serve to create the office. Each of the contributors appeared to be committed to an affirmative response to the question whether Ombudsmen would be a desirable addition to American government so that the negative of the question is never seriously or professionally examined. The editor, Mr. Stanley Anderson, in his essay states what are presumably the most cogent arguments against the adoption of the office in the United States and Professor Gwyn recites what are alleged to be the undesirable consequences of the introduction of the office, but their presentations clearly do not stem from conviction and reinforce the lawyer's view that adversary exposition is the best way to achieve full understanding of an issue in controversy.

This particular study failed to convince the writer that there was any inherent desirability in the adoption of the notion. In fact, notwithstanding the perceptiveness of Professor Moore's analysis of the case work of state legislators which would be grist for the Ombuds-

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man, which in conjunction with Professor Gwyn's essay, give us a good notion of what this office is all about, in my view the study perpetuates the confusion which surrounds the institution and which inheres in the debate concerning its adoption in this country.

I have adverted to the one-sidedness of the presentation.<sup>2</sup> What is less excusable and is a pervasive failure of this work is the lack of analysis of the nature of the office based upon its original purpose and its development since that time. A more careful analysis would have introduced a precision in the discussion which is lacking in this book and indeed in much of the literature on the subject. In addition to the lack of original analysis, we were disappointed that in this kind of a study by political scientists about what is claimed to be a significant political institution there could not be found reference to any *a priori* support for the notion in the writings of political theorists. We can only presume there is none; it of course is difficult to believe that Sweden alone of the Western democracies was capable of creating an instrument of government as vital to the well-being of a democratic society as this one is claimed to be and that it should have remained undiscovered for 160 years.

We in America should not brook reproach for an alleged failure to exploit to the full the tools available to government for the protection of the individual or become defensive and point to institutions which have arisen or have been created to perform comparable functions. Defensiveness is uncalled for and would stem from the same lack of analysis of which those who would reproach us are guilty. The superiority of the institution of the Ombudsman is non-existent: it was never intended to accomplish what it is now most admired for and even for that purpose can only be called inept; it is unthinkable that any political theorist would suggest the creation of this kind of an institution to achieve the ends which it is purported to accomplish.

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<sup>1</sup>Stanley V. Anderson, Editor, *Introduction*; Donald C. Rowat, *The Spread of the Ombudsman Idea*; William B. Gwyn, *Transferring the Ombudsman*; John E. Moore, *State Government and the Ombudsman*; William H. Angus and Milton Kaplan, *The Ombudsman and Local Government*; Stanley V. Anderson, *Proposals and Politics*; Walter Gellhorn, *Appendix: Annotated Model Ombudsman Statute*.

<sup>2</sup>It is difficult to understand why none of the seriously adverse comments on the institution found their way into this work. *E.g.*, Jagerskiold, *The Swedish Ombudsman*, 109 U. PA. L. REV., 1071, 1089 (1961), where a Swedish professor points out that the Ombudsman's power to reprimand officials without judicial action is non-reviewable and so is capable of abuse; in effect, that some of the practices he has developed are suggestive of blackmail. See also Gellhorn, *The Ombudsman in Denmark*, 12 MCGILL L.J. 1, 2 (1966), where the Ombudsman is quoted as saying "the office has been oversold."

The Ombudsman was created in the Swedish Constitution of 1809 for the fundamental purpose of maintaining the integrity of the Swedish governmental services.<sup>3</sup> Protection of the individual was not an objective of its creation.<sup>4</sup> If the Swedish language had the equivalent of the term "supervisor", and so labeled this institution for what it is, *i.e.*, an overseer of government services, the infatuation for this office would not have reached the proportions which it has now assumed in this country since it would have been clear that there was nothing esoteric about its function or purpose.

Apparently in the period from its organization until recent years the necessity for legislative oversight of the governmental ministries diminished; we can only speculate that improved communications, the creation of a class of professional administrators, an increase in the level of education, etc., etc., resulted in a diminution of the activities of the Ombudsman directed toward the fundamental objective of the institution and a corresponding decline in the number of derelictions of duty to cope with. Concurrently, one of the methods by which any governmental investigatory or supervisory service achieves its purpose, *i.e.*, by means of information from the public about official wrongdoing, grew in importance. It may be that satisfaction of the informant became something of an objective, and so complaints which were not serious enough to call into play the prosecuting function of the Ombudsman became occasions for writing to various ministries that they had been, *e.g.*, unnecessarily rude to some citizen or other.

Undeniably there is enormous appeal in the notion that if the clerk in the motor vehicle bureau is offensive a citizen should be able to obtain redress of some kind, and so what is veritably a by-product of the institution, has become popularized in this country, as if it were its very essence.

But note that what has been popularized is an inversion of the function of a very ordinary and pedestrian institution. By reason of this inversion, the institution is now ambivalent in function. It not only supervises the administrative arm of government, it affords "redress" to the victims of the defects in the administrative machinery.

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<sup>3</sup>The jurisdiction of the two Ombudsmen consists of supervising "the observance of the laws and statutes . . . *The Swedish Ombudsman*, *supra* note 2.

<sup>4</sup>This is more clearly stated with respect to the Danish Ombudsman, Christensen, *The Danish Ombudsman*, 109 U. PA. L. REV. 1100, 1103 (1961). "The Ombudsman is by law the mandatory of Parliament and exercises his control over the government services on behalf of that body."; See Gellhorn, *supra* note 2, at 3, where it is noted that the objective of the office was "the establishment of increased guaranties for lawful conduct of the government's civil and military administration."

The redress, of course, is most pallid; unless the informant's purpose is to correct a violation of law by a civil servant and call into play the prosecuting function of the Ombudsman, the result of the complaint is that the offending or offensive administrator will be rebuked by the Ombudsman.

This functional inversion<sup>5</sup> or ambivalence creates great difficulty in maintaining fruitful discussion since the institution is praised in respect to its performance of both functions even where the point at issue, as in this book, is its incidental, or "redress" function. So its proponents who purport to be advocating its adoption for the sake of an oppressed citizenry point indiscriminately to institutions of standing and even of renown which accomplish effectively one or the other of the ambivalent functions of the Ombudsman *but not both*. Professor Gwyn points to the French *Conseil d'Etat* as an institution with "Ombudsmanlike features" but the *Conseil* is in fact a tribunal of justice, an administrative court comparable to our own Court of Claims.<sup>6</sup> It has no duality of function; it is unequivocally there to afford redress to citizens aggrieved by administrative action.

The institution of the Ombudsman is then compared by another contributor, Professor Moore, with the California Commission on Judicial Qualifications. But there is no ambivalence in the function of that Commission. It was created "to investigate and hold hearings on complaints alleging misconduct, failure of performance, habitual intemperance, or disability of judges; to encourage the resignation or retirement of unfit judges, and—where necessary—to recommend that an order of removal be issued by the State Supreme Court"<sup>7</sup> (p. 73).

It is perfectly clear that the Commission was designed to enforce acceptable standards of judicial performance among the members of the California bench. It has nothing to do with redress of grievances except in the most indirect way. It is submitted that this institution is precisely the equivalent of the Ombudsman *in its original form*. To extol it as the ideal instrument of redress for persons aggrieved by judicial behavior would be a misconception of the function.

Professor Rowat's chapter on the Spread of the Ombudsman Idea consists of a series of indiscriminate references to any institution with functions comparable to either of the Ombudsman functions.<sup>8</sup>

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<sup>5</sup>"Indeed the Nineteenth Century JO (Ombudsman) scarcely qualifies as an Ombudsman as described in this essay" (p. 62).

<sup>6</sup>Wyle, *The Strength and Weakness of French Administrative Law*, CAMB. L.J. 242 (1965).

<sup>7</sup>Professor Moore himself cites the fact that the Commission's orientation is toward the improvement of the judiciary.

<sup>8</sup>He refers, for example, to Vigilance Commissions formed in India to combat

If I may suggest an analogy to illustrate the fallacy at the root of all of the clamor for the Ombudsman, let us suppose that a forceful and persuasive judge of the Court of Claims toured the speaking circuits in the Scandinavian countries emphasizing the beneficial effect on administrative action of Court of Claims decisions overruling errors of the administrative agencies. Let us further suppose that many members of the Scandinavian bar were intrigued by this method of improving administrative procedure and were vociferously and effectively in favor of the institution of a Court of Claims *for the purpose of improving administrative procedures!* If that fanciful set of facts were to materialize, we would have the obverse of what we are witnessing here with respect to the Ombudsman.

One of the most inexplicable aspects of the enchantment with the Ombudsman is the fact that he is powerless to right a wrong; he can merely reprimand the erring civil servant. Unfortunately in this work, the Ombudsman's lack of power, although frequently mentioned, is inadequately emphasized and its significance never evaluated. There is a tendency, I believe, to justify this relative impotence, by stressing the improvement in public administration which should result from the institution.<sup>9</sup> This, of course, brings us full circle: an institution designed to supervise administration becomes popularized on the basis of one of its incidental benefits and its adoption for that purpose is justified on the ground that it will improve administration!

Since it is exceedingly difficult in this environment to state a case for a relatively powerless institution, the lack of power in the Ombudsman is compensated for by frequent reference, at least in Chapter 4, "Ombudsman in Local Government," to examples of so-called Ombudsmanlike action, many of which have absolutely nothing in common with the concept of the Ombudsman. In fact some of the instances advanced to illustrate the desirability of an Ombudsman in local government are fatuous beyond belief. The author hails the case where a citizen reports to the Nassau County equivalent of the Swedish Ombudsman that a neighbor's driveway is being asphalted

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corruption to the office of Inspector General of the United States Army and to the Conseil d'Etat mentioned above. Even Prof. Kenneth Culp Davis does not maintain the distinction between the two functions above-described. In Davis, *Ombudsman in America*, 109 U. PA. L. REV. 1057 (1961), he writes "When a bureaucrat irritates you or delays too long or requires too much red tape or denies what you want you can quickly and easily get relief if you are entitled to it by merely writing to the Ombudsman." *Id.* at 1057. He then discusses what he calls "Ombudsman in America" and includes the Hoover Commission, a Congressional Committee on Administrative Procedure and Practice and comparable Committees and Commissions devoted to the oversight function.

<sup>9</sup>*E.g.*, Gwyn, at 41; Moore, at 98; Anderson, at 155.

by a county truck, and the latter rushes to the scene to find that an asphalt dealer had purchased a truck from the county but the county insignia were never removed! If this happy ending for good government had not ensued, if this *were* a county truck, an official whose power was limited to a written rebuke would not be the person I would like to call. Other examples cited in this chapter make the Ombudsman a guardian of the etiquette of judges to lawyers, an extremely able social worker, an object of complaints about governmental indifference to a road menace, a protector against police brutality and the instigator of improved tax lien legislation. The examples are numerous but by and large trivial.<sup>10</sup> In fact triviality is clearly the hallmark of all the numerous examples of the performance of the Ombudsman function in other countries and it is submitted must be the hallmark of any function whose work product is letters of reprimand. No really important goals are remitted to achievement by correspondence. If a trivial grievance is sufficiently widespread to amount in the aggregate to a significant issue, it is fair to conclude that it will not go unnoticed. If it is more than trivial, the possibility of a more effective form of redress and a corresponding lack of a need for the Ombudsman is enhanced. Professor Moore's chapter on State Government and the Ombudsman, a workmanlike and scholarly effort to analyze the utility of the Ombudsman in terms of the "case work load" of a pair of California state legislators, is the best indication of the nature of the work the Ombudsman will handle and the most persuasive statement of the triviality of the proposed work load of the Ombudsman. His feeling that such "case work" could be better handled by transferring it to an Ombudsman who would introduce continuity and expertise seems to me to be a further step in the dehumanization of government and, assuming the legislators are adequately staffed, something of a vote of no confidence in representative government. To whom should the citizen more properly look for satisfaction for mistreatment than his elected representative?

If we disregard what I perceive to be the fundamental confusion

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<sup>10</sup>The supporters of the Ombudsman feel that he should be a man of great stature, a person comparable in standing to the judge of the highest court in the state (Gellhorn's statute gives him a salary, allowances and benefits equivalent to that of the chief judge of the highest court of the state). The incongruity of having a distinguished member of the bar in charge of an office, writing letters to local commissioners of motor vehicles to suggest that they speed up the issuance of operators' licenses and otherwise to perform work ordinarily relegated to state legislators and their administrative assistants is never given attention. It is clear from every example cited in this book that the function is too trivial to warrant the employment of a person of talent.

which arises from the duality of the Ombudsman function is it possible to create an office whose avowed objective is the redress of grievances of individuals suffering at the hands of inefficient and discourteous civil servants? This is what Professors Moore and Gwyn are talking about and it is very similar to the Norwegian Ombudsman who differs from those of Sweden, Finland and Denmark. He does not have the power to prosecute breaches of duty by administrative officials as they do and in Norway the office was created to "protect the interests of the individual against all the mistakes we know are bound to occur within a large administration."<sup>11</sup> His duty is to see that "the public administration does not commit any injustice against any citizen."<sup>12</sup> However, the rules for the conduct of his office require the exhaustion of administrative remedies before he may act. This is unquestionably a necessary rule if he is not to be swamped with work but it is one which would completely frustrate the objectives of proponents of the institution in this country.

It is interesting that the Norwegian Ombudsman, whose function is limited to what I call the by-product of its Swedish prototype, appears to be a matter of indifference in its own country. Gellhorn quotes both a Norwegian lawyer and an official of a Norwegian Ministry of Justice as feeling that the Ombudsman was unnecessary.<sup>13</sup>

I do not believe that we in this country can effectively employ the Ombudsman notion because it is too inherently involved in trivialities. The maxim *de minimis non curat lex* is not a cry of indifference; it is an axiom of objective reality. When the cure is not worth the candle, the only recourse is to suffer the disease. Many of the evils which are of concern to those who would seek to provide an instrument of redress are no more than the inconveniences of modern life. Perhaps because the poor are most frequently the butt of the vicious, or the inefficient civil servant, these failings assume unwarranted proportions. But unless miracles of administration could be achieved and a complaint instantly registered to a person instantly capable of rendering a judgment and delivering a rebuke, it is submitted that the objectives of the proponents of the Ombudsmen are too hopelessly unrealistic to receive serious attention.

ROBERT H. HAGGERTY\*

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<sup>11</sup>Gellhorn, *The Norwegian Ombudsman*, 18 STAN. L. REV. 293, 295 (1966).

<sup>12</sup>*Id.* at 296.

<sup>13</sup>*Id.* at 321.

\*Partner, Dewey, Ballantine, Bushby, Palmer and Wood; New York, N.Y.

THE RECONSTRUCTION AMENDMENTS' DEBATES. Edited by Alfred Avins. Richmond: The Virginia Commission on Constitutional Government. 1967. Pp. 761. \$4.50.

This documentary compilation, published by the Virginia Commission on Constitutional Government and edited by Professor Alfred Avins of Memphis State University Law School, purports to be a collection of all relevant legislative history on the Reconstruction amendments to the Federal Constitution. The work encompasses not only debates concerning the amendments themselves, but also printed congressional discussion of civil rights questions beginning in 1849 and extending to 1875. Not surprisingly, this editorial effort comprises a rather massive tome consisting of 764 large pages of relatively small print plus thirty-two pages of introduction.

The editor has arranged the debates in chronological rather than topical form. He defends his organization on the ground that since the congressional commentators seldom delivered their oratory on single subjects, to edit speeches for a topical approach would result "in an ensuing loss of continuity." A recommended reading list, a reader's guide, a subject index, a table of cases and authorities cited by the debaters, a cross-reference to cases and authorities, and indices of congressional speakers supplement the debates themselves.

The reader is supposed to learn from these debates that the modern meaning of the Reconstruction amendments differs from that intended by the drafters. This difference is crucial, so the publisher and editor contend, since in their opinion the Constitution is a static not an organic document, and therefore its true meaning can only be discerned by determining the intent of the framers. Any judicial interpretation of provisions or amendments violative of this legislative intent is at best poor law and at worst unconstitutional. What the Commission and Professor Avins hope to accomplish by their publication is of course to undermine the authority of recent Supreme Court decisions and congressional legislation in the areas of civil and criminal rights. Professor Avins has made this goal obvious in a series of related law review articles based on the legislative history he has compiled.<sup>1</sup> In these articles he castigates, among other things, efforts of the Supreme Court to decree racial integration on the basis of the fourteenth amendment. He has even gone so far as to argue that because the Court in *Brown v. Board of Education*<sup>2</sup> allegedly did not

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<sup>1</sup>E.g., Avins, *Fourteenth Amendment Limitations on Banning Racial Discrimination: The Original Understanding*, 8 ARIZ. L. REV. 236 (1967).

<sup>2</sup>347 U.S. 483 (1954).

adhere to the legislative intention of the framers of the fourteenth amendment, its ruling in that case is not the law of the land.<sup>3</sup>

One can quarrel with several of the assumptions of the publishers and editor. In the first place it is questionable whether the Constitution is an embodiment of immutable principles to be discovered by simply uncovering legislative intention. Virginia's own Chief Justice Marshall warned against such a narrow conception when he wrote in *McCulloch v. Maryland*<sup>4</sup> that "we must never forget, that it is a *constitution* we are expounding."<sup>5</sup> Other famous jurists have echoed this sentiment. Chief Justice Hughes, writing in *Home Building & Loan Association v. Blaisdell*,<sup>6</sup> contended that the argument "that what the Constitution meant at the time of its adoption it means today . . . that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them . . . carries its own refutation."<sup>7</sup>

Secondly, it is not clear that the prevailing spirit of the debates as compiled by Avins lends itself irrevocably to the propositions he has so prodigiously advanced here and in other places. What emerges from a reading of this record is a mixed and confused picture. It is true that some of the debaters expressed narrow constructions of the amendments' broad language. But it is also true that many opponents of Reconstruction read the amendments far more flexibly and predicted many of the interpretations which would come with the Warren Court. Likewise, many of the most ardent supporters of the amendments, whom Avins is fond of characterizing as "ultra-radicals," displayed a seemingly premeditated evasiveness regarding the implications of such ambiguities as "due process," and "equal protection of the laws." They did not deny the amendments could have broad meaning, nor did they assert such comprehensiveness. They simply talked in lofty terms, perhaps in the hope that at some future time an enlightened Court would utilize the vague language of the amendments to fashion protection for the various minority groups of society, whether they be racial or supposedly criminal. Furthermore, many of the orators spoke so vaguely about the statutory language they had molded that no precise meaning is extractable from their comments.

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<sup>3</sup>Avins, *De Facto and De Jure School Segregation: Some Reflected Light on the Fourteenth Amendment from the Civil Rights Act of 1875*, 38 *Miss. L. Rev.* 179 (1967).

<sup>4</sup>17 U.S. (4 Wheat.) 316 (1819).

<sup>5</sup>*Id.* at 407 (emphasis added).

<sup>6</sup>290 U.S. 398 (1933).

<sup>7</sup>*Id.* at 442-43.

Finally, it is debatable whether Avin's collection is definitive. He appears to have included all of the relevant Congressional debates from 1849 to 1875, even that material which runs counter to his point of view. But is it possible to determine "legislative intent" in the broader sense of the term by simply amassing Congressional debates? Ofttimes congressmen are not particularly candid in their congressional oratory. On some occasions they engage in "planned dialogue" in order to misrepresent legislative intention. In some instances they express their true feelings in extra-legislative sources. In short there is no iron law of judicial interpretation which requires a judge to examine only the printed records of a legislature to find legislative intent, especially when the Constitution is concerned.

Despite these faults, Avins and the Commission have fashioned an impressive collection which will be useful to lawyers, judges and students of constitutional history. The compilation is complete as far as it goes and is carefully annotated and indexed. Although it is too lengthy and detailed for use in any but a very narrowly based college course, it will serve well as a research tool.

ROBERT M. IRELAND\*

THE FIRST FREEDOM. By Bryce W. Rucker. Carbondale, Illinois: Southern Illinois University Press. 1968. Pp. xvii, 322. \$12.50.

The second<sup>1</sup> *The First Freedom* presents a survey of the attrition in public comprehension and debate of local and national issues attributable to the demise of publishing and broadcasting as competitive industries. Author Bryce W. Rucker's theme is that the grasp of chain ownerships, of monopoly and oligopoly, of merger and conglomeration conflicts with the end of news media—the objective dissemination of and naturally biased editorializing on the news. His minor premise, developed in Chapter 13 by reference to a Supreme Court of the United States' homily, is that the guaranty of a free press "rest[s] on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public" (p. 188).<sup>2</sup> His conclusion is that the chains and networks have perverted the protection of the first amendment such

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<sup>1</sup>Professor Rucker has adopted the title from a 1946 book by Morris Ernst, an attorney. The first *First* limited its castigation to the press; the second updates the first and broadens the impact areas to include the broadcasting media.

<sup>2</sup>*Associated Press v. United States*, 326 U.S. 1, 20 (1945).

that it is most frequently invoked to still voices which cry for the preservation of the competitions of ideas and which would have government intervene to that end.

The format of the presentation includes a capsule history of the inception, the growing pains, the delinquency and degeneration of the papers, news services and syndicates, AM and FM radio, UHF and VHF television, community antenna and subscription television. His exposures and excoriations depend upon statistics for their force. Professor Rucker blends the spice of anecdotes, gossip and scandal with his extensive documentation to procure readability.

The author's message regarding the press is that in the devolution from competing dailies and divergent viewpoints to the single ownership of news media the public is the loser.

Newspaper publishing is big business. In 1910, 57.1 per cent of daily newspaper towns were served by competing dailies but by 1957 the percentage was 4.13 (p. 8). In seven cities with more than 500,000 population no general circulation dailies compete (p. 8). Of the 94 American cities with more than 100,000 population only 24 are served by non-chain newspapers (p. 9). The widespread failure of newspapers with healthy circulations are attributed to the perfidy of the competition—discounted rates for morning and afternoon papers or for multi-media advertising, exclusive contracts for advertising, circulation and syndicate features.

The currency of the material of *The First Freedom* is reflected in the treatment of joint operation agreements. The author's criticism of these arrangements—conceived to preserve independent news and editorial departments at the expense of joint advertising and circulation departments—is that they promote combined advertising rates which discriminate against competing media and forestall the entry of rival newspapers.<sup>3</sup> Predictably, joint operation which is defended as preserving divergent viewpoints via the sustenance of failing newspapers is often a prelude to merger. (p. 15).

Against this background, Professor Rucker introduces *United States v. Citizen Publishing Company*,<sup>4</sup> a civil action by the Justice Department against a Tucson publishing company. Judge Walsh found the operating agreements entered into between two Tucson publishing companies were illegal *per se* under section 1 of the Sherman Act.<sup>5</sup>

<sup>3</sup>*United States v. Citizen Publishing Co.*, 280 F. Supp. 978 (D. Ariz. 1968) recites that combination rates for advertising in the jointly operated *Tucson Star* and *Citizen* garnered the advertisers a rate 19% less than the sum of the costs of placing separate advertisements.

<sup>4</sup>280 F. Supp. 978 (D. Ariz. 1968).

<sup>5</sup>15 U.S.C. § 1 (1964).

Senator Hayden of Arizona and the American Newspaper Publishers Association (ANPA) have acted. The author states ANPA "in the name of 'freedom of the press' has used its influence to have a bill introduced in Congress which would block the Justice Department and deprive it of its most recent gain" (p. 16). The Tucson suit was filed January 4, 1965, Senator Hayden introduced S.1312<sup>6</sup> on March 16, 1967 and ANPA as of March 1, 1968 had taken no official position on the bill.

S.1312, entitled the "Failing Newspaper Act", is ostensibly designed to provide an exemption from antitrust prosecution for joint operating agreements "that may be necessary for the survival of one of the newspapers involved."<sup>7</sup> A "failing newspaper" is defined as one which "appears unlikely to remain or become a financially sound publication."<sup>8</sup> The exemption is retroactive and applies to pending actions.<sup>9</sup> This evidence suggests individuals with vested interests, rather than ANPA, have been the moving force behind S.1312. *The First Freedom* lists 23 such joint operations as of May, 1967 (p. 253, n.37).

ANPA members were furnished a copy of S.1312 in a booklet dated June 15, 1967 which also contained an interview with Senator Hayden and a favorable letter from Arthur B. Hanson, ANPA's general counsel who in an individual capacity testified before the Senate Antitrust and Monopoly Subcommittee, July 12. Fourteen publishers have expressed varying degrees of opposition to S.1312 in subcommittee testimony.<sup>10</sup> At the ANPA convention in April, 1968, J. Hart Clinton, publisher of *The San Mateo Times*, and Harold Andersen, president of *The Omaha World-Herald*, debated its merits.<sup>11</sup> In the report of the ANPA Federal Laws Committee approving S.1312 the philosophical and pragmatic views of publishers opposed to S.1312 on the grounds of weakening the first amendment and inviting stringent federal regulation of the newspaper industry were reported.<sup>12</sup> In sum, ANPA membership has hardly been a united lobby on behalf of S.1312.

The legal implications of the Tucson case are far-reaching. In granting the Justice Department a summary judgment, the district

<sup>6</sup>S.1312, 90th Cong., 1st Sess. (1967).

<sup>7</sup>*Id.* § 2.

<sup>8</sup>*Id.* § 3(6).

<sup>9</sup>*Id.* § 5. The retroactive application of S.1312 is designed to remove clouds from previously consummated joint operating agreements. The Justice Department is not blocked by time limitations in giving antitrust laws a "backward sweep" by attacking such operations. See *United States v. E. I. duPont de Nemours & Co.*, 353 U.S. 586 (1957).

<sup>10</sup>See ANPA Gen. Bull. Nos. 31, 32, 33, 34, 35, 36 (1967), No. 12 (1968).

<sup>11</sup>N.Y. Times, Apr. 25, 1968, at 21, col. 2.

<sup>12</sup>ANPA Gen. Bull. No. 2 (Jan. 9, 1968).

court exposed every joint operating agreement in the country to nullity and cast further doubts upon the future of the "failing business doctrine," a standard which S.1312 is designed to rejuvenate and relax for newspapers.

Standard (AM) radio in large measure has triumphed over network monopoly; and while their fare is not always palatable, independent stations have prospered. Predictably, however, few of the powerful 50,000 watt day and night stations are independent of chains, newspapers and special interest groups. Professor Rucker reports that overcommercialization of the broadcast hour, the loudness of commercials generally and "white areas" are leading problems confronting the FCC. UHF television and FM radio have been nurtured with the neglect generally reserved for illegitimate children. The networks with unexpected help from the FCC virtually eliminated UHF as a competitive threat during the 1950's, but since April 30, 1964, when Public Law 87-529 became effective and required all television sets shipped in interstate commerce to have UHF reception capacity,<sup>13</sup> interest in establishing UHF stations has flourished. The FCC though has not enforced a restriction upon the quantity of UHF stations which may be held by networks and other chains.

Community Antenna Television (CATV) was developed in response to the demand for service in "white areas". Spurred by initial successes, CATV has invaded urban areas plagued with man-made mountains where its systems markedly improve reception. The FCC assumed jurisdiction of most CATV systems in 1966 and set forth guidelines as to duplication of local television programming. The author reports CATV is considering program origination—a development which might force the networks to upgrade their programming. Subscription television (STV) which presents perhaps the greatest opportunity for an escape from the ennui and malaise of network fare still lacks FCC authorization. Both CATV and STV, however, are bucking powerful vested interests, the networks which are hedging their bets by investing in CATV and STV.

The author's "Blueprint for Action" encompasses tax reform to make the sale of newspapers and broadcasting stations less attractive; mandatory public auction of a failing newspaper; more aggressive reaction by the Justice Department and the FCC and FTC to license trafficking, monopoly, merger and newspaper murder; and meaningful declaration of the outside ownership interests of publishing, network and conglomerate chains. Professor Rucker does not explore the opti-

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<sup>13</sup>Professor Rucker cites (p. 285, n.26) of the costs of P.L. 87-529 to the public at \$500 million by 1970.

mum role of the Justice Department and the regulatory agencies or the doctrine of primary jurisdiction. He does emphasize that in news media unlike public utilities the premium is upon competition. The treatment of STV and CATV while concise is especially stimulating.

*The First Freedom*, provocative (ANPA and the networks will certainly be provoked) and informative, will provide the lawyer and laymen with interesting leisure reading. The antitrust specialist and administrative agency practitioner will find the documentation frustrating because the precedents that are referred to often lack sufficient citation for access.

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