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Henkin: Arms Control and Inspection in American Law

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RECENT BOOKS

ARMS CONTROL AND INSPECTION IN AMERICAN LAW. By *Louis Henkin*. With a Foreword by *Philip C. Jessup*. New York: Columbia University Press. 1958. Pp. x, 289. Index. \$5.50.

The character of war has changed qualitatively with the development of new "absolute" weapons against which there is no effective defense. Arms regulation under international control has become a central problem of American foreign policy and in the Geneva negotiations for the cessation of nuclear weapons tests, the great powers came to grips with real issues and concrete solutions for the first time in the long history of disarmament discussions.

The recently-published Feld Report, prepared by a group of American scientists, emphasizes the necessity for obtaining more knowledge than is now available on the technical problems of disarmament, on topics ranging from the detection of nuclear explosions and radioactivity to the surveillance of weapons production facilities. The Report concludes that such technical research is essential for making sound policy decisions before and during disarmament negotiations and also may encourage governments to seek appropriate types of arms limitation agreements, some of which may previously have not been considered feasible or desirable.¹

The need for more knowledge is not limited to the technical aspects of arms control. As Judge Philip C. Jessup points out in his forceful introduction to Professor Henkin's volume, "Arms Control and Inspection in American Law," no one seems to have heretofore studied the problem from the point of view of the legal and administrative issues involved in enforcing an inspection system in the United States. This may be due, he suggests, to the fact that the entire subject has appeared to the public as "remote governmental business," removed from the individual and from the community. Yet every citizen would be deeply concerned if, for instance, the United States should accept an agreement giving an international inspection team the right to enter a plant which he owns or where he works or even the home where he lives. While legal and constitutional considerations of course will not determine the basic arms control policy, they will have to be taken into account at least in ensuring that any control agreement which the United States would want to urge upon others can be made effective by and in the United States.

In order to reach the constitutional and legal issues, Professor Henkin was required to project his thinking and speculate on three different levels. That he succeeded in his undertaking is telling evidence of his imaginative prowess.

The *first* and "highest" level of his speculation called for developing certain minimum assumptions of what American arms control policy will be

¹FELD, BRENNAN, FRISCH, QUINN & ROCHLIN, *THE TECHNICAL PROBLEMS OF ARMS CONTROL—A REPORT TO THE INSTITUTE FOR INTERNATIONAL ORDER 1* (1960).

in the years ahead. Professor Henkin calls his book "a memorandum of law," and his policy projection is limited to providing background and foundation for the legal study. Consequently only the first chapter, containing sixteen pages, is devoted to this topic, and future American policy is sketched in a very general outline based on past proposals: while retaining full military strength and capacity for reprisal, the United States will be prepared initially to enter into agreement on small steps including limitations on the number of men under arms, a moratorium on the testing of new weapons and on the production of nuclear materials for additional weapons, subject of course to inspection, including aerial inspection. In discussing the future place of disarmament in American foreign policy, Professor Henkin states that "The United States earnestly seeks disarmament"; (p. 9) yet two pages later he reports that "Even in the consternation caused by the missile race, leaders in Congress and in government, with few exceptions, appear to exclude arms control from serious consideration in the development of national policy." (p. 11) This apparent contradiction illustrates the distressing dilemma of responsible men in the United States who accept the need for arms regulation but justly suspect that the primary if not the only objective of the Soviet Union in past disarmament negotiations was unilateral disarmament of the West.

The *second* level of Professor Henkin's speculation concerns the content of the control and inspection provisions in an imaginary future agreement on arms regulation. The provisions which he postulates in the second chapter, a brief eight pages, are not found in any one proposal hitherto made but are instead a distillation of various suggestions and estimates of what may be required. Here the author relies in part on the results of a parallel technical inquiry by Columbia University Institute of War and Peace Studies.² The assumption is that an international agreement in the form of a treaty would be ratified by the United States with the necessary implementing legislation adopted by the Congress. The treaty would provide for control of possession and manufacture of certain arms, munitions and materials, and of the conduct of certain activities by anyone in the United States, the type and disposition of armed forces, verification, reporting and inspection by international inspectors employing any known method including aerial observation, acoustic and seismic devices, physical entry, etc. Professor Henkin refers in a footnote to the Statute of the International Atomic Energy Agency, which contains a framework of safeguards and inspection relating to nuclear material. The area of speculation might have been reduced somewhat if more detailed consideration had been given by the author to these provisions which were accepted by some seventy states, including the Soviet Union and the United States.

The *third* and "lowest" level of Professor Henkin's projection deals with the impact on American law of the control and inspection provisions of

² INSPECTION FOR DISARMAMENT (Melman ed. 1958).

his postulated agreement. This part forms the bulk of the volume. The fundamental question — can the United States under its Constitution agree to control arms, and if so, subject to what limitations? — leads to an expert examination of the limits upon the treaty power as defined through history from *Geofroy v. Riggs*, *Missouri v. Holland* to *Reid v. Covert*. Perhaps the most interesting part of the analysis is buried in footnotes which, alas, are inconveniently placed at the back of the volume in a misguided effort to make the book more palatable to the “layman.” Having considered Articles II and VI of the Constitution and the possible objection that a treaty limiting U.S. armed forces impairs the President’s power as “Commander-in-Chief,” or the congressional power to maintain “armies” and “a navy,” or to declare war, Professor Henkin rejects any doubt as to the power of the United States under the Constitution to enter into an arms control agreement. In the absence of some form of supra-national government, however, any such agreement would not be “irrevocable” in the sense of depriving Congress of the power to enact conflicting legislation. “Although there has not been adjudication in the courts of the validity of any disarmament agreement of the United States, this nation has made agreements in the past to limit the size of its navy and to disarm all vessels on the Great Lakes; it has also agreed in the United Nations Charter that the appropriate organ of the United Nations shall consider and recommend to members proposals for disarmament; and it has negotiated on disarmament on numerous occasions with a view to concluding a treaty.” (pp. 28-29) In a similar vein, Professor Henkin investigates the constitutional provisions relating to the rights of states (“the reserved powers” and the state militia provisions) and the rights of persons (the right to bear arms under the second amendment, the protection of liberty and property under the fifth amendment, the patent rights and the due process protection of academic and intellectual freedom) to conclude that these provisions likewise would not bar an arms control treaty.

In Chapter IV, the author examines the extent to which measures which would be required to investigate and enforce compliance with arms control would conform to the fourth, fifth, sixth and fourteenth amendments. His analysis includes both indirect methods (such as reports by governments, aerial inspection and wire-tapping) and direct interrogation by an international inspectorate of U.S. officials and private citizens, as well as inspection of private enterprises and dwellings. To be lawful, an inspection of a dwelling without a court warrant might require a constitutional amendment, he concludes.

Chapter V deals with the type of congressional legislation which would be necessary to implement arms control, particularly the regulatory legislation and immunity statutes to offset the privilege against self-incrimination and to define privileges and immunities of the inspectors.

In Chapter VI, pointing to the unhappy experience with Prohibition and some other attempts at federal regulation, Professor Henkin stresses

the need for popular acceptance of any controls and for support from state and local authorities: "Some eccentric elements in a control scheme . . . might even require formal state consent by legislation or constitutional amendment. In other respects, state action . . . might be important or helpful." Only a brief seven pages are devoted to this important aspect; but in this and in other instances where one might wish for a fuller exploration of the questions raised, the author's restraint is understandable considering the limited objective which he had set for himself.

The concluding Chapters VII and VIII consider the constitutional problems which would arise if important powers of regulation, administration and adjudication should be delegated to an international control body with authority over American citizens.

The author's conclusions confirm his mature political judgment, his sense of reality and proper appraisal of the role of law in policy making. In general, he points out, legal as well as domestic political problems would be avoided if the United States Government were made responsible to an international control body, and if the national government rather than the international body were given the task to regulate the activities of its citizens to assure the nation's compliance with the treaty. This would avoid "the new and difficult issues" involved in a system of international administrative process applied directly to the citizens. Professor Henkin makes a convincing case that the probable characteristics of an arms control plan, including essentials of direct inspection, would lie largely within the United States Constitution. It is the "eccentric, perhaps the extreme suggestion" which is not necessary to effective enforcement — the incursion into the home — which would raise major constitutional questions. As for the implementing legislation, the Congress would be required to establish a system of regulation not unlike that which applies to existing regulated industries. The Atomic Energy Act, to mention one example, would require extensive revision, and legislation would be necessary to protect the citizen and industry from damage or loss due to abuse of the inspection process. But for most of the legislation envisaged, there is precedent in existing laws, and, in its impact on the citizen, arms control "should not prove more onerous, more jarring to traditional behavior and liberties than control of narcotics, or liquor, or firearms, or filled milk." (p. 154) Few Americans would probably hear of the "foreign" inspectors and fewer still would have contact with them.

These concluding thoughts confirm what hardly needs any confirmation: the important obstacles to arms control have not been in law but in "the foreign policies of nations," first and foremost of the Soviet Union. Yet Professor Henkin warns that were the Soviet Union to make important concessions toward reasonable agreement, there might still be opposition in the United States to substantial reduction and control of arms because of the fear and distrust of the Soviet Union. In the opinion of this reviewer, the understandable fear of impairing the essential military strength of the

United States has made it impossible thus far for the United States Government to develop technically sound, comprehensive and detailed proposals which would provide for realistic inspection safeguards commensurate with each progressive step of the plan and which could be offered as a basis for realistic negotiations. If there should be any indication of a substantial modification of the Soviet attitude, it will be necessary, Professor Henkin suggests, "to educate ourselves in new habits of thought. . . . The purpose of a defense policy," he states, "is to forestall and, if possible, remove danger. The United States may do that more effectively by disarming its enemies than by frantically building up its armaments of uncertain comparative effectiveness. . . ." (p. 156)

The nineteenth-century American lawyer did not feel compelled to think ahead when the steam-engine was about to change the face of the Continent and affect profoundly the lives of its people; he was satisfied to confront the new problems as they emerged in litigations before the courts or as they demanded urgent remedial legislation. In our century, the high stakes in preserving peace and the social values involved do not allow the leisurely empirical and pragmatic approach of the last century. Today, when an important advance in technology presents new social problems, a modern lawyer who has acquired some understanding of the technical, political and economic implications can make an important contribution in the policy-making process by anticipating institutional and administrative questions and suggesting alternative solutions. This applies to advances in the field of atomic energy, use of the outer space, and automation — to mention only a few. Professor Henkin has shown in his stimulating volume, written in an urbane and lively prose, that the proposition applies also in the field of arms control. Today, his book should prove interesting to planners; and if any progress is made toward an agreement on arms control, it will become invaluable to negotiators and lawmakers.

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