REVIEWS

LOYALTY AND SECURITY. Yale Law School Studies, Volume 3. By Ralph S. Brown, Jr. New Haven: Yale University Press, 1958. Pp. xvii, 524. $6.00.

AT least twice in his book, Professor Brown expresses the hope that the material with which he deals will become progressively less important. It is true that the subject of the federal loyalty-security programs, and their many diverse local and national kin, has fallen off in importance as a matter of public interest since the abandonment of the practice of making political capital out of the number of federal employees with derogatory data in their files. But this relaxation in current political interest to my mind is simply a mark of the unhappy fact that the programs' existence has been swallowed by the people and the Government and they are now an institutionalized part of our lives. I do not think that Mr. Brown's hope will come true. This fact obviously increases the value of the book as a treatise for use by lawyers with a security case practice. More importantly, however, *Loyalty and Security* deals in a thorough and perceptive manner with the entire problem of loyalty and security in the cold war context. It is a major contribution to the current legal history of the impact of the cold war on traditional individual freedoms.

The first part of the book, entitled "The Operation and Effects of Employment Tests," is largely expositive, describing in considerable detail the federal industrial security, port security, and military programs, as well as the basic loyalty-security program applicable to federal civil servants. It also covers tests used by state and local government or quasi-government agencies, and includes a chapter on those adopted by unions and by employers— particularly schools and universities, communications (movies, radio, and television), and in less detail, big industry.

This section of the book contains factual data respecting the impact of the basic programs. These data in their full presentation must be startling even to persons intimately acquainted with the scope of the programs. Professor Brown reports, for example, that over a half a million security investigations had been made for the Atomic Energy Commission alone by the end of 1955.[1] His coverage of less accurately ascertainable statistics is careful, thorough, and frightening. With numerous disclaimers of statistical precision, he estimates that some 300,000 or more professional persons (scientists, engineers, and the like) have jobs dependent upon their ability to meet loyalty and security criteria;[2] that at least an equally large number of the members of "the social professions" (which include lawyers, as well as most teachers,

1. P. 63.
2. P. 168.

are also subject to both the usual and special security-loyalty test pressures;[3] that there are seven and one-quarter to seven and one-half million persons in the federal, state, and local governments exposed to high intensity employment tests;[4] that an astonishing four and one-half million must meet various industrial security tests;[5] and that there are another 800,000 workers covered by the port security program.[6] Taking these figures all together, and eliminating overlapping, Professor Brown concludes that at least one person out of five "as a condition of his current employment" has taken a test oath, or been required to make a loyalty statement, or in some other way has survived a loyalty or security check.[7] This estimate, based upon a total labor force of sixty-five million persons, means that personnel and security officials have been required to pass upon the probable loyalty to their country *in present jobs* alone of more than thirteen million people.

Professor Brown's comments on the significance of these data are restrained.[8] The restraint is typical of the book and reflects a sincere effort to treat without prejudice a national problem whose causes are very deep-rooted and very complex. It is the more remarkable in view of the vast collection of painful instances and absurdities which—to judge from the footnotes—Mr. Brown must have collected in a very extensive file. For all this, the massive and futile injustice of the loyalty and security programs seems to me obvious from the simple telling of the story. Despite his sometimes considerable efforts to be fair, Professor Brown found himself compelled at this point to focus on the national (as well as individual) losses rather than on the gains stemming from employment tests.[9] An evaluation of gains he leaves to the rest of the book; the next 300-odd pages are his attempt to answer the question whether the costs of the "blunderbuss operation" which he has described are higher than required by the stated and felt needs for the programs.[10]

Professor Brown's own answer to this question is a product of his constant awareness of the pressures of the cold war. At the outset, he assumes a need "to maintain a security system that brings us close to the severities of a garrison state."[11] He denies that either loyalty or security employment tests are wholly irrational and unnecessary, and asserts that although the tests lend themselves to repressive ends, their primary purposes are anticommunist ones, dictated by basic national political needs, which he assumes to be fundamentally sound.[12] As a result of these assumptions, Professor Brown accepts the theoretical and

3. Pp. 168-74.
4. P. 178.
5. P. 180.
6. P. 179.
7. P. 181.
8. Ch. 7.
9. P. 201.
10. P. 202.
11. P. 3.
12. P. 12.

philosophical validity of employment tests of the political character involved in the loyalty-security programs, and disputes their use only on essentially pragmatic grounds.

From this starting point, parts II and III of the book make a sharp distinction, which is basic to Professor Brown's own conclusions and recommendations, between the use of employment tests to protect the national security and their use for the more abstract purpose of ensuring loyalty as an end in itself. In essence, employment tests are justified in the name of security, because security is a practical and inevitable need in a cold war existence, but are not justified in the name of loyalty alone, because loyalty (in persons unable to harm the national interests through their employment status) is an ideal and an abstraction without felt consequences. For example, it is stated at one point that "no competing values" are at stake when fair and effective employment tests are used as a countermeasure against sabotage. The passage also appears to accept employment tests as valid countermeasures against pro-Soviet policymaking.[13]

This acceptance of the propriety of at least some employment tests for security purposes is far from an endorsement of the existing programs. There is throughout the book recognition and forceful criticism of the tendency towards a proliferation of so-called sensitive positions.[14] Professor Brown finds no excuse for the sweeping approach evidenced by the "rudderless course" of the port security program,[15] or for the use of employment tests as a safeguard against sabotage in areas where the general public has access and no employment status is required to afford an opportunity for sabotage.[16] This last point is, I think, a highly important one which is generally lost in the common acceptance of employment tests as a defense against sabotage as well as espionage without distinguishing between the two.

With such objections to the broad sweep of the existing federal security program, Professor Brown proceeds in an orderly fashion to consider first the identification of what jobs are sensitive,[17] then the problem of deciding what kind of person is too risky to have in a sensitive job,[18] and finally the procedural means by which the too risky people should be eliminated from sensitive jobs.[19] The analysis leads to some recommendations which I think are in the main beyond rational attack if the basic validity of employment tests as a method of security is accepted.

Professor Brown's first recommendation is for drastic cutbacks in the scope of the programs which are justified in the name of security. The quantitatively most far reaching change suggested is the elimination of any clearance proced-

13. P. 220.
14. *Eg.*, pp. 107, 238.
15. P. 246.
16. P. 249.
17. Ch. 10.
18. Ch. 11.
19. Ch. 12.

ures for the handling of Confidential material. Instead, Professor Brown would confine employment tests in the name of security to those jobs requiring the equivalent of access to Secret material [20]—the word "equivalent" being used in the summary of recommended changes apparently in an attempt to permit the classification of some jobs as "sensitive" even if they do not necessarily involve access to material officially and legally classified as Secret or Top Secret. This step is intended to eliminate the need for at least two-thirds of the present clearances under the industrial security program and to shorten abruptly the reach of the port security program. By Professor Brown's figures some five million jobs would be thereby freed from the requirement of security clearances,[21] leaving between two and three million public employees in positions where their present livelihood depends upon being able to withstand a security clearance investigation. Professor Brown makes a number of substantive recommendations as to them. He would change the criteria for identifying "risky" individuals by an insistance on judging "the whole man," unblurred by the process of selection and emphasis caused by the practice of trying men on isolated and often individually insignificant charges.[22] In this connection, the book points out what appears on experience to be forgotten in most security hearings and by virtually all security officers—that their job is limited to finding people "who they think might be willing to betray the interests of the United States and work for Russia."[23] This blunt statement of the aim of a security test, if accepted and followed as requiring a showing of a reasonable degree of likelihood of betrayal,[24] would eliminate a great deal of the futility and injustice in the operation of the security program. Certainly there appears no basis in the public records in the widely publicized cases—most recently, *Greene*, *Vitarelli*, and *Taylor* [25]—upon which a finder of fact could have made the express finding that the men involved might in this sense be willing to betray the interests of the United States and work for Russia.

In advancing the suggestion for judging "the whole man," however, Pro-

20. Pp. 250, 291.

21. Pp. 250-53.

22. Pp. 275-76.

23. P. 274.

24. Compare the construction of the word "may" in the Clayton Act. Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356-57 (1922).

25. Taylor v. McElroy, 360 U.S. 709 (1959); Greene v. McElroy, 360 U.S. 474 (1959); Vitarelli v. Seaton, 359 U.S. 535 (1959); see YARMOLINSKY, CASE STUDIES IN PERSONNEL SECURITY (1955), Case No. 58 in which may fruitfully be compared with the *Vitarelli* record. These cases were all decided since the appearance of *Loyalty and Security*, and represent the most important respect in which its strictly legal reporting is out of date. The *Greene* case casts some doubt on Brown's acceptance of "deficient confrontation" in security cases. Pp. 297-98. A bill to overrule the decision was reported out by the House Committee on Un-American Activities on September 2, 1959. See H.R. 8121, 86th Cong., 1st Sess. (1959). The *Vitarelli* case may have much more far-reaching effects in narrowing the incredibly diffuse range of charges and evidence which security boards may consider. See especially 359 U.S. at 542 and the full text of n.5.

fessor Brown recognizes that there is inherent in the security programs an obsessive fear of the "sleeper" who may change sides, and that that fear normally and almost necessarily leads to an administrative tendency to take no chances on anyone, but to apply the most rigid standards as to possible risks.[26] The only remedy suggested to meet this difficulty—and it is suggested rather diffidently—is to place all responsiblity for decision in the hands of the hiring superior, rather than in the hands of a security officer.[27] The practicability of this suggestion would turn of course on the judgment and confidence of the hiring official involved; the opportunity for political attack on him is obvious.

Finally, deriving from his distinction between security and loyalty programs, Professor Brown suggests a relocation of affected employees rather than outright discharge.[28] This proposal follows rationally from the assumption that the employment test is only for the purpose of preserving the national security, and that there is no sufficient reason to preclude even a risky person from performing a nonsensitive job. To my mind, however, the proposal intrudes a note of unreality. It is not a solution at all for an applicant, as against an existing employee, and it is doubtful if it could ever be worked as a solution in any industrial security program. The *Greene* case is witness to this. In addition, it seems unlikely that even the bravest of hiring officers in the most nonsensitive of agencies would knowingly employ a man who had been identified, under Professor Brown's standards, as a person who might be willing to betray the interests of the United States and work for Russia. The only instance cited as an example of relocation is the episode of Wolf Ladejinsky, a man who would never have been found risky under any sensible security program.[29] It is only fair to note that such factors as this cause Professor Brown to set forth his recommendations with an admission of "unconcealed misgivings" about the entire idea of a security program involving employment tests and based procedurally upon administrative discretion.[30]

These recommendations conclude Professor Brown's treatment of the security programs; the succeeding chapters deal with loyalty tests as an almost entirely new subject. This organization leads to some repetition. Despite the great importance to the thesis of the book of the distinction between the security and loyalty programs, it is early recognized that in practice such programs overlap in many of their features. Thus in his introduction, Professor Brown states that "most security cases are cut from the same cloth as loyalty cases, and involve the same elements of beliefs and associations."[31] As a result I think that from time to time the distinction breaks down, and criticisms of loyalty programs are made which are to some extent inconsistent with the acceptance of employment tests as a valid security measure.

26. P. 276.
27. P. 292.
28. Pp. 292-93.
29. See pp. 255, 299, 305.
30. P. 305.
31. P. 10.

As in the case of the security program, the treatment of the loyalty program moves from point to point in an attempt to treat as if it were a logical and rational national policy what is finally called a product of "our national exasperation" with domestic communism.[32] It is only after a careful statement of the justifications which have been advanced for loyalty tests that Professor Brown concludes that the solution for loyalty tests is to end them.[33] His conclusion is reached by a process of analysis, similar to that sometimes urged in various contexts of constitutional litigation,[34] requiring a balancing of "the modest need against the major abuses."[35]

This is a result with which I find it impossible to disagree, although it should be added that to my mind the abuses which control Professor Brown's conclusion in the case of loyalty programs are just as rampant in the security programs. The loyalty program examples given in chapter 15, for example, could as well occur under a security program; the individuals referred to in most cases held positions which would require exposure to Secret material or for other reasons could be classified as "sensitive." These and other examples throughout the text and the footnotes show that the security program is as voracious as the loyalty program, and that its proceedings also constitute "bargain-counter treason" trials.[36] It is not the lack of abuse, but the increased importance of the balancing need, that justifies employment tests as a security measure to Professor Brown. No one who has not immersed himself as thoroughly as Professor Brown has in this area should arbitrarily disagree with the reading he finds on his scales, and I do not venture to do so. But the prospect of a permanent employment test program in the name of security for the four or five millions who would be left in "sensitive" positions even under Professor Brown's recommendations is so appalling that I hope that others will strive to find a way to protect valid secrets—which must be accepted as a legitimate and unavoidable task of government—without any use of security-type employment tests except, perhaps, by intelligence and counterintelligence units in their own hiring.[37]

Professor Brown did not choose to end with his conclusion that the loyalty program should be eliminated. He assumes—and it is hard to dispute the assumption—that there is a sufficient public demand for such programs that their continuance is a necessary result of democratic processes. Accordingly,

32. P. 337.

33. Pp. 380-82, 478-82.

34. *E.g.*, Breard v. Alexandria, 341 U.S. 622, 644 (1951) (Reed, J.); Martin v. Struthers, 319 U.S. 141 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Niemotko v. Maryland, 340 U.S. 268, 273-74 (1951) (concurring opinion of Frankfurter, J.).

35. P. 381.

36. See p. 8.

37. Professor Brown opens his book by quoting a 1946 speech by Dean Acheson stressing, in a general vein, the hard needs of security. P. vii. By contrast, in later discussing Executive Orders 9835 and 10450 specifically, Mr. Acheson referred with apparent regret to his share in "the responsibility for what I am now convinced was a grave mistake and a failure to forsee consequences which were inevitable." ACHESON, A DEMOCRAT LOOKS AT HIS PARTY 127 (1955).

the book proceeds to suggest an approach to adequate standards and procedures. Professor Brown's suggested standards are set forth in full text,[38] and would unquestionably clarify and lend point to the job confronting whatever administrative boards would be required to pass on a person's loyalty. In addition, he urges full administrative due process including specific charges, confrontation, a fair hearing (with subpoena powers), the requirement of a decision setting forth the reasons for the board's conclusion, and an opportunity for review.[39]

The remainder of the book, aside from the excellent summation, is devoted to discussion of odds and ends which are of considerable importance but peripheral to its central theme. These include specialized problems of evidentiary inferences—the effect to be given to an unwillingness to inform on others, to a plea of possible self-incrimination, or to a prior lie made by the employee under scrutiny—and consideration of possible protections against arbitrary private or union employment tests. Necessarily this material is less fully developed than the analysis of the basic programs, and the recommendations advanced appear more arbitrary. An example is the sudden suggestion that the Taft-Hartley Act oath requirement be repealed.[40] Another is the equally sudden plea that Congress also repeal the Internal Security Act.[41]

In these final chapters, and throughout the book, there are two omissions—one of detail and one of approach—with which it would have been my personal inclination to try to deal.

The matter of detail concerns the status of applicants for employment, particularly those who had at some point previously resigned under fire or been released as a result of an adverse security or loyalty decision. As Professor Brown recognizes in passing from time to time, an applicant for employment is virtually without rights, and must depend upon the grace of the Civil Service Commission, security officers, and personnel men.[42] Under the federal system, he cannot demand a hearing except in a limited number of cases (such as in applying for a position under the control of the Atomic Energy Commission) where the security standards are very high. The unfortunate former employee who has left under attack and is almost sure to experience new employment difficulties hence has virtually no way of clearing his record; such limited provision as is made for him affords no rights beyond the right to file a statement and ask for a new investigation.[43] I should like to have seen his plight, and the plight of other applicants-with-a-past, more specifically dealt with in Professor Brown's recommendations.

The other point derives from a deeper personal preference. *Loyalty and Security* is essentially a practical book, dealing with the routine of firmly rooted programs and with ways of improving them. It almost explicitly rejects

38. Pp. 391-93.
39. Pp. 394-99.
40. P. 471.
41. P. 472.
42. *E.g.*, pp. 52, 303.
43. See Civil Service Regs., 5 C.F.R. §§ 9.107-.108 (Supp. 1958).

any interest in "abstractions,"[44] and despite the basic constitutional approach of balancing felt needs against restrictive effects, there is virtually no consideration of possible constitutional requirements.[45] For example, Professor Brown either explicitly accepts,[46] or at least does not object on principle,[47] to membership in the Communist Party being treated as an automatic disqualification for employment. Yet membership in the party was legal for years, still is not an automatic crime, and probably could not constitutionally be made so. Further, the Communist ideal and the Marxist doctrine generated one of the great movements of history. As a matter of political theory and history, it can be asserted that the first amendment was designed to protect the right of the people to exposure to ideas which have vast consequences, as well as to those which have none. Admitting the reality of our power struggle with Russia, the loyalty and security programs are an integral part of a comprehensive legal structure which clashes with this theory and history, and in their full sweep the programs are justified by no countervailing republican political theory that I have ever seen expressed. This clash is a basic issue of our time. I should like to have seen it discussed as such in the book.

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THE ANATOMY OF A CONSTITUTIONAL LAW CASE. By Alan F. Westin. New York: The Macmillan Co., 1958. Pp. viii, 183. $1.60.

PROFESSOR WESTIN'S book, intended to supplement the traditional constitution law casebook by calling attention to developments which precede, and presumably affect and account for, Supreme Court decisions, is a "documentary portrait," rather than an interpretative monograph, of *Youngstown Sheet & Tube Co. v. Sawyer*,[1] the *Steel Seizure Case* of 1952. Beginning with a summary of the steel crisis drawn from "The News of the Week in Review" of the *New York Times* for April 6, 1952,[2] the book moves chronologically through materials demonstrating President Truman's reasons for the seizure[3] and the industry's response,[4] then follows the resulting litigation step by step. Well-edited selections from the proceedings, briefs, oral arguments, and judicial opinions show how the doctrine of inherent presidential power to seize was early put forward by the Government, only to be jettisoned when it fell under constant attack by the companies. The opinions of District Judge David Pine and six Supreme Court Justices provide contrasting modern statements of the doctrine that the King is under law. Throughout, Westin's comments

44. P. 478.
45. See pp. 408-10.
46. See p. 265.
47. See pp. 381-82.

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1. 343 U.S. 579 (1952).
2. P. 2.
3. Pp. 8, 14.
4. Pp. 18, 46.