

BOOK REVIEWS

IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW. By Krystyna Marek. Geneva, Switzerland: Librairie E. Droz, 1954. Pp. 613. Sw. Fr. 40.

The Legations of Esthonia, Latvia and Lithuania are still functioning in Washington; their personnel are still included in the State Department's Diplomatic List; they still issue passports which are not only recognized but required by United States Immigration authorities. Factually, however, the three Baltic States were incorporated in the Soviet Union by typical communist methods fifteen years ago. Are these states, in Mr. Justice Holmes' phrase, "ghosts that are seen in the law but that are elusive to the grasp," like the Kerensky Government of Russia whose diplomatic representation in Washington the United States continued to recognize until 1933? In our courts, are the acts of the presently functioning authorities in Latvia to be treated as nullities? Will an Esthonian consular officer accredited by the pre-Soviet regime be given standing in our courts to represent Esthonian interests under a treaty between the United States and Esthonia which was concluded in 1925? Such problems as these are involved in Dr. Marek's study of the identity and continuity of states, which, as she says, is merely another aspect of the problem of state extinction: has one state died and another been born or does the old State continue its "unchanged legal personality"? Through the pages of this valuable contribution to the literature of international law the author considers the nature of international law itself and of the international community and has much to offer anyone interested in such practical problems as the legal consequences of recognition, belligerent occupation and the status of puppet governments. She is forced to deal with what she acknowledges to be "highly controversial" questions since her cases necessarily arise "as a result of some violent upheaval" whose "historical background will not be one of peace, but of storm." As in the case of the Baltic States, she must weigh the question whether the final curtain has fallen or whether we must await a new act in the drama before reaching final conclusions; has the villain really killed the hero or will the latter emerge triumphant in the end? In such situations subjective feelings are bound to intrude, as the reader must feel particularly in the discussion of Czechoslovakia and Poland, but the author on the whole handles her material with admirable objectivity. She commands the literature in English, French, German, Italian and Latin and has marshalled a vast amount of factual historical and juridical data. The American lawyer will note that she has had to rely on the Annual Digest rather than the original reports for decisions of United States courts—just as most American authors would depend on the same source for decisions of European courts—but in her treatment this has not led her astray with two possible exceptions: she misunderstands our courts' characterization of "political" questions which merely

means that under our Constitution these are questions entrusted to the executive rather than to the judicial branch of the government (p. 157); and she seems to be unfamiliar with the basis of our statutory definitions of "alien enemies." (p. 345).

The book is organized as follows: Part I devotes 190 pages to the definition of the problem and the general theoretical and practical bases of the applicable rules of international law. Part II, covering 355 pages, includes case studies of Italy, Austria, Yugoslavia, Ethiopia, Czechoslovakia, Albania, the Baltic States and Poland. A final 44 pages in Part III contain a restatement, a general assessment of state practice and conclusions. The same points are thus discussed in several places and in different contexts involving inevitable qualifications and amplifications of certain conclusions.

The author is an avowed monist, constantly drawing on Kelsen but ready to challenge him on particular points. In her foreword she acknowledges her debt to Professor Paul Guggenheim but it is a tribute to her and to him that the student does not hesitate to cross swords with the teacher. In ascertaining state identity she applies three rules, each of which is examined from the point of view of theory and doctrine, of state practice and of judicial decisions. First Rule: Territory does not determine identity since identity is not affected by territorial changes. Second Rule: The continuity (identity) of a state is not affected by an internal revolution. Third Rule: A state's continuity is not affected by belligerent occupation. The first rule is subject to the qualification that total or even very great loss of territory may affect a state's identity although she shows convincingly that the state may continue to exist outside of its own borders during a period of "physical suppression" as by belligerent occupation. Continuity of a revolutionary state is maintained by those who, with the Vienna School, accept the primacy of international law and are therefore not concerned with the destruction of the internal legal order. "International law does not prohibit revolutions" (p. 51), and a "refusal to recognize a government on account of its revolutionary origin might border on illegal intervention and thus be contrary to positive international law." (p. 56). The author does, not however, accept Lauterpacht's views on the legal nature of recognition and the "duty" to recognize. If a revolution is definitely victorious, it is of no legal consequence that it expresses the will of only a minority. This is true because of the "principle of effectiveness which constitutes an overriding principle of international law." (p. 58). But if the revolution is a "fake," being instigated and supported from outside the state, it is intervention and not revolution. Revolution under foreign occupation raises a presumption that it is not genuine, though the presumption may be rebutted. Therefore a puppet state set up by a "fake revolution" is not identical with the preexisting state which may however survive this disguised conquest. In the case of belligerent occupation, the Hague rules and the Geneva Convention of 1949 afford support as does recent practice. Norway and The Netherlands, for instance, survived with Governments-in-exile. Annexation by a belligerent occupant during the

war is illegal and, as in the case of Ethiopia, the "annexed" state survives the illegal attempt at its extinction.

Dr. Marek is inevitably led into frequent discussions of two antinomic principles—*ex iniuria ius non oritur* and *ex factis ius oritur*. She ends by asserting that the former maxim, which must be fundamental to any legal system, "remains a 'principle' without becoming a rule, for lack of force to support it." (p. 587). Each case must be tested by assessing state practice. In some instances it seems she finds state practice conclusive when it leads to the result that the state's identity continues but inconclusive when it would mean that the state had become extinct; this is rationalized by weighting the result which is "in conformity with general international law," e.g., by supporting the maxim *ex iniuria ius non oritur*. (cf. p. 413). In some of her assessments she does not adequately take into account that the evidence is fragmentary. For instance, in the Ethiopian case, she shows that over thirty states recognized the Italian conquest and she identifies this fact as "the will of the international community," despite which Ethiopia survived. But she also notes that Ethiopia's name was retained on the list of members of the League of Nations and the ILO; the United States never recognized Italian sovereignty in Ethiopia and this position seems to have been shared by some thirty other states. When Italy was defeated in the war, Great Britain and others reversed their stands and in historical retrospect we see the continuity of Ethiopia. In the case of Poland we have full-fledged membership in the United Nations and continued recognition of the old Poland by only Cuba, Eire, Lebanon, Spain and the Vatican, where interestingly, the Polish ambassador is Doyen of the Diplomatic Corps. It is in this case that the author seems to go very far to support what the reviewer agrees would be a welcome result, that is the final vindication of the continuity of Poland as it was in 1939. Although she says the Yalta decision on Poland is of "undoubted illegality," "Yalta-Poland" seems to exist by virtue of the maxim *ex factis ius oritur*, but to accept this position too readily would be to consider international law static. The "new international law" offers hope. Yalta, she says, is now being questioned and the issue is reopened, and this position is supported, astoundingly enough, by the intensely partisan fandango of the Republican Party platform of 1952 and ensuing political speeches and by her (unsupported) assertion that the old Polish claim is supported *inter alia* by "the six million Americans of Polish descent represented in Congress." (p. 536). On the Baltic States, it may be said, she has amassed much more persuasive evidence. Dr. Marek carefully disavows the role of political prophet and the reviewer agrees that she has demonstrated how the wheel of international politics can turn. It might have been helpful if the author emphasized more directly the regrettable international fact that when the evil-doer is victorious, the maxim *ex factis ius oritur* prevails. Actually her evaluation of the Stimson non-recognition doctrine is excellent.

Within the limits of this review all of Dr. Marek's veivs and conclusions cannot be summarized. The reviewer would signal a few points. It is surprising to find governments and states equated as they seem to be in

discussing the responsibility of the Huerta Government in Mexico and the new state of Israel. (p. 144). There seems to be some inconsistency in the evaluation of a general European or general international interest in the Austrian case (pp. 339, 346) and in the Ethiopian case. (p. 272 n. 4). Governmental acts which probably had a purely political motivation are sometimes given a strained interpretation by attempting to find a legal reason for them, as where the United States attitude on Poland is called "inexplicable" unless a certain legal position is assumed. (p. 527). The idea of prescription in international law is summarily dismissed without the author's usual penetrating analysis. (pp. 577-8).

This book is such a rich storehouse that one must regret the absence of an index which would make its riches more readily available. The detailed analytical Table of Contents is helpful but not a substitute. The bibliography has a general section and then separate sections relating to each of the case studies in Part II. The reviewer would repeat that the student should cull the book thoroughly if he would not miss related items of interest and value.

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FEDERALISM, MATURE AND EMERGENT. Arthur W. Macmahon, Editor. Garden City: Doubleday & Co., 1955. Pp. xi, 557. \$7.50.

REPORT OF THE COMMISSION ON INTERGOVERNMENTAL RELATIONS. Washington, D. C.: U. S. Government Printing Office. Pp. xi, 311. \$1.25.

Federalism, Mature and Emergent is a collection of essays prepared for one of the conferences constituting the Bicentennial Conference Series of Columbia University. Despite an extremely impressive list of contributors and an apparently carefully thought-out and embracing scheme of organization, it is for the most part an aggravating and disappointing volume. Judging the essays individually, there are relatively few first-rate contributions; collectively they do not seem to add up to a significant integrated picture. To some extent this is probably the occupational hazard of all ambitious symposia; usually they tend to promise more than they can perform. To some extent it is also perhaps endemic to the subject matter. If there is indeed a "problem of federalism" it appears to defy comprehensive statement, even in the integrating essays with which the editor, Professor Macmahon, introduces each of the major sections of the volume. Federalism is an instrument of government useful for solving certain types of problems; a judgment with respect to its usefulness depends primarily upon exhaustive analysis of the problems it is called upon to solve and the conditions limiting

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their solution, rather than analysis of the instrument itself. As Professor Neumann says in one of the essays: "When the Founding Fathers wrestled with the problem, they did not ask whether they desired a federal state. They rather, and correctly, asked whether there should be a union and how far this union should go." (p. 54). The difficulty is also illustrated by Professor Macmahon's opening essay which suggests the paradox that "in the formative stage of federalism . . . the desperate need is a modicum of union where unity is impossible. When federal systems survive and mature, the problem . . . appears basically as the double question of the desirability and the practicability of maintaining a decentralized pattern originally dictated by necessity." (p. 1). This introduction, read in the light of what follows, suggests the editor's recognition that the detailed discussion of the problems of a mature federalism, represented by the current American scene, appear to shed little light on the problems of emergent federalism, represented by various proposals for the unification of Europe, discussed in Part IV of the volume. That the editor finds even this lack of relationship, a significant indication of the "paradox that is at the heart of federalism," is a tribute to his imaginative capacity for integration, which he is frequently called upon to exercise in order to suggest a unifying thread.

Aside from Professor Macmahon's introductory survey, Part I, entitled "Federalism: Its Nature and Role," consists of four essays suggesting questions with respect to federalism in general. Professor Neumann asks and answers in the negative the question whether there is some peculiar value in federalism, as a method of government, apart from the particular problems of time and place with which the constitution makers happen to be faced. Mr. Fischer, editor-in-chief of *Harpers*, on the other hand, sees the basic problem as a choice between two alternatives, a federalist society and a communist society, and he has no doubt which is the better choice. On a closer examination it appears that this apparent fundamental difference is probably only a question of semantics. Professor Neumann is using federalism in a specialized sense, distinguished from other forms of union, such as a tighter treaty system combined with specialized agencies, a confederation, a unitary state with a substantial amount of decentralization and a unitary state with a centralized administration. (p. 54). Mr. Fischer, on the other hand, is thinking of some form of union, coupled with a measure of diversification. Finally, Professor Berle finds in the development of "administered capitalism" a form of economic federalism which he describes in summary as "non-political economic centralization, which guards a high degree of autonomy in great corporations yet increasingly delegates certain powers to a central group, which in turn seeks authority and legitimacy from the central government. . . ." (p. 73). In this development of a new form of economic federalism Berle finds the over-riding problem of modern political economy—the reconciliation of these instrumentalities of economic progress with the protection of individuals against invasion of personality, a theme more fully and impressively developed in his recent volume entitled *The 20th Century Capitalist Revolution*. Thus, under the

broad panoply of the term federalism, generously defined, almost any thesis relevant to freedom and authority may be restated to fit the subject-matter.

Part II entitled "Basic Controls in a Maturing System" is devoted primarily to the structure of American federalism with some comparative suggestions. Professor Wechsler analyzes the political safeguards of federalism, in the sense that the basis of the National Government itself, equal representation in the Senate, state control of voters' qualifications and congressional districts, and finally the electoral college, tend to protect the interests of the state from intrusion by the National Government. To the extent this analysis buttresses the familiar theme that Senators and Congressmen are peculiarly sensitive to the sectional interests they represent it is hardly debatable; but more questionable is the conclusion that such responsiveness to sectionalism is synonymous with the desire to preserve, to the fullest extent practicable, the vitality of state governmental authority. Similarly, Professor Truman's illuminating analysis of the essentially federalist character of political parties in the United States, as contrasted with the relatively centralized control of political parties in Canada and Australia, is relevant not so much to the preservation of state authority as to strength of local influences. The foundations of this difference Professor Truman finds both in the presidential as opposed to the parliamentary system, and also in the relatively low temperature of American domestic politics, with the exception of the conflicts leading up to the Civil War. Whatever the explanation, the analysis suggests that insofar as the political party machinery is itself an instrument of government, we have a form of local autonomy and self-expression which continues to operate irrespective of the accretion of power by the central government.

Contrasted with these political controls are the legal controls discussed by Professors Freund and Hart, the former being concerned with the Supreme Court as the umpire of the federal system, and the latter with conflicts and other relationships between the law administered by the state and federal systems of courts. Like Professor Wechsler, Professor Freund emphasizes that the Court is not the only guardian of the position of the states in the federal system, and that its record when it tries to do too much in this regard has not been a happy one. With regard to state invasion of the federal domain, on the other hand, Professor Freund seems inclined to the view that the Court, "despite a little fuzziness and untidiness at the edges" has done about as well as can be expected. Professor Hart introduces a pretty complicated account of the complexities of the interrelationship of state and federal law, with the reminder that simplicity of structure, from the point of view of the student of the law, is itself no great desideratum, so long as each area of conduct is subject only to a single directing voice, rather than a variety of competing voices. In order to secure "this uniformity of legal obligation . . . without sacrifice of the necessary or useful independence of either the federal or state government," little more is needed, he concludes, "than restoration of the nerve to grapple intelligently with the familiar and entirely manageable problems of the distinction be-

tween substance and procedure." (p. 211). One wonders whether the advantages of federalism in this particular respect—*i.e.*, concurrent jurisdiction of state and federal courts—are so great as to warrant such heroic effort.

In Part III, entitled "Functional Channels of Relationship," the most enlightening, or at least challenging, essays are presented by Charles McKinley, on "The Management of Land and Water Resources under the American Federal System," and by Professor Roy Blough on "Fiscal Aspects of Federalism." Professor McKinley finds that "interstate compact contrivances thus far suggested for meeting the need for regional public policy formulation and administration of land and water resources appear to be cumbersome, jerry-built structures lacking in region-wide political responsibility, parasitic on national finance, and negative or unduly dilatory in decision-making." (p. 347). In these circumstances, he concludes that "our best hope for formulating and implementing resource policies consistently with both regional and national needs is through the perfection of the collaborative national institutions of nation-state-locality already functioning or incipiently developed . . ." (p. 347), recognizing also that "our prospective population-income requirements and our totally new position in global affairs necessitate that the national government in the future take increasing responsibility for seeing that our physical resource base of land, water, and minerals is so developed and used as best to meet our social requirements." (p. 344). Professor Blough, after considering the principal objections to the overlapping characteristics of many state and federal taxes and various suggestions for solution by separation of tax sources, concludes that "the separation of tax sources . . . would not be a satisfactory solution to the problem of financing a federal system of government in the United States." (p. 400). So too, after considering other possible solutions, he concludes that "there seems to be no overall solution to the fiscal problems of federalism. Instead it is necessary to use various methods in conjunction with each other to promote the goal of having as strong a state financial structure as is possible alongside the federal government." (p. 404). The methods include continued use of particular grants-in-aid, some credits for state taxes, and the withdrawal of the Federal Government from a few tax areas where the states have demonstrated an ability to develop efficient tax collections systems such as gasoline taxation and admission taxes.

It is interesting to compare these comments on current problems of American federalism with the recent *Report of the Commission on Intergovernmental Relations*. For example, where Professor Wechsler finds a brake against the spread of federal power in the disproportionate representation of rural as distinguished from metropolitan communities in the federal legislature, the Commission finds just the opposite effect from a similar disproportionate representation in the state legislatures, because the larger municipalities are driven to look to federal aid for solution of their problems. With regard to fiscal relationships, the Commission seems to arrive

at a general conclusion very similar to Mr. Blough's, finding no overall solution, either in separation of tax sources, or in general equalizing grants or subsidies, but suggesting the possibility of some relief from relinquishment by the Federal Government of certain types of taxes, "when further tax reduction is possible." (p. 106). With regard to land and water uses, the Commission encountered some of the sharpest division of opinion among its members. For example, the Commission recommended that the programs of soil conservation, technical assistance to farmers and soil conservation payments be modified so as to permit greater state participation, on a grant-in-aid basis. Senators Humphrey and Morse, and Congressman Dingell dissented from both aspects of this recommendation on the ground that "the paramount national interest would not be adequately protected and, if carried out, the recommendations would eventually weaken, rather than strengthen, the soil and water conservation movement in the United States." (pp. 164-65). Four other members dissented from part of the recommendation. With respect to water resources, the Commission found the problem so complex that it recommended establishment of a permanent Board of Coordination and Review to advise the President and Congress on a coordinated natural resources policy within the National Government and between it and the states. The Commission also recommended that "agencies of the National Government afford to the States a larger measure of initiative and responsibility in multipurpose, basinwide development of water resources." (p. 242). Senators Humphrey and Morse added the qualification that this "should not be construed as meaning any lessening of the National Government's responsibility." (p. 242). A similar difference of opinion between the majority and Senators Humphrey and Morse appears with respect to education. The former oppose federal aid except as a last resort, if it becomes clearly evident that a particular state "does not have adequate tax resources to provide adequate physical facilities for elementary and secondary schools"; the latter "do not feel that the solution to the urgent education needs should be postponed until the states correct their economic and constitutional limitations." (pp. 196-97).

Both the Columbia studies in Federalism, insofar as they deal with the problems of present-day America, and the report of the Commission on Intergovernmental Relations indicate how barren is the approach which merely inveighs against the expansion of federal functions as a threat to liberty or local self-government. In the first place, local representation and authority have frequently found considerable self-expression and influence within the framework of federal programs or mixed programs, as well as within purely state programs. In the second place, the growth of the Federal Government has not been accompanied by a weakening of state government in any realistic sense; on the contrary, as the Commission report indicates, state governments have also expanded their functions and increased their importance in terms of comparison with their own past. Only relatively, in comparison with the National Government, have they declined in importance. Is this really a cause for alarm? Should there be a concerted effort to increase the relative significance of state governments as compared

with Federal Government, even at the expense of some immediate practical advantage? The general tone of the Commission report suggests that there should be, although it shrinks from applying such an approach to many concrete issues, with the few exceptions already noted. Senator Morse in a general dissent suggests quite a different point of view and this attitude is implemented by the views expressed by him and Senator Humphrey on the specific issues. Curiously enough, the Columbia symposium contains no real discussion of this general problem, except for a reference in one of Professor Macmahon's introductory essays to a remark made by Professor Hurst in oral discussion, to the following effect:

"There is not only the question of the allocation of power but there is also in operation something of a law of limitation of the energies, imagination and will; and that is a phenomenon of twentieth century government in contrast to the early development of insurance regulation, say, which was relatively simple and straightforward. The twentieth century presents us with problems of government whose cause and effect are quite complex and they require a great deal of tracing through with several sets of analysis to see wherein the public interest lies. There is some evidence in the last fifty years that there just does not exist the amounts of imagination and will within the confines of most states to mobilize the aggressive minority pressure to get something done about it; and that perhaps nothing but a nationwide forum would mobilize the energies and imagination to handle such problems." (p. 93).

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CASE STUDIES IN PERSONNEL SECURITY. Adam Yarmolinsky, Editor. Washington, D.C.: Bureau of National Affairs, Inc., 1955. Pp. x, 310. Distributed Free by the Fund for the Republic, Inc.

This volume is an illuminating collection of material portions of 50 Federal Government loyalty-security case proceedings of very recent years. The editor tells us in his introduction that these 50 have been taken from a "current total of 230 cases from 12 cities" and that a further collection is under way.

The selection and presentation has been made under the direction of Mr. Adam Yarmolinsky with the assistance of 100 lawyers as interviewers and supervisors. The documentation of the primary facts—concerning the employee respondent; his position, salary, and access, if any, to classified materials; summaries of and quotations from the hearing transcripts; and resulting clearance or final dismissal—was obtained by these interviewers from the respondents themselves, and is here published without their identification, but with their consent. Expenses of making the study were financed by the Ford Foundation.

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The crescendo of criticism of standards, procedures, scope and effectiveness of the government program is too well-known to call for comment, beyond noting that a substantial part emanates from responsible sources within the executive and legislative branches of the Federal Government and from equally responsible individuals and groups in private life. In the summer of 1955 both Houses of Congress adopted a resolution for the appointment of a special investigating commission of six members from the government service and six from the public at large, to examine, reappraise and report later to Congress upon the present federal security program system. There is substantial hope to expect a valuable contribution from the work of this commission. However, an initial problem which will confront that commission, and one which will go to the heart of its potential usefulness is how it will obtain access to a sufficiently representative number of complete case histories, including that portion of the full record in each case which contains the "derogatory information" assembled from confidential sources. This part of the record, rarely if ever fully disclosed to the individual respondent, is freely used by the security officers in making their ultimate judgments.

Mr. Yarmolinsky expresses the caution that the records here presented are incomplete by omission of the confidential information adverse to the respondent because obviously it could not be obtained. What the reader is enabled to examine, however, is what was disclosed to the employee of the nature and substance of the "charges," and the testimony offered by him and his witnesses. Authentic information and specific facts about any representative number of loyalty and security cases has been almost completely lacking for the obvious reasons that the security boards and hearing officers do not make public the charge or its source, the testimony and the results, and furthermore the employee under investigation, whether or not he be in the end cleared and resumes his official duties, has every interest in not disclosing even the fact that he has been under investigation. Critics and defenders of the present system have both been groping for a sufficiently full, broadly representative and factual basis for their arguments. Anonymous statistics alone—of numbers investigated, of hearings held, of clearance and dismissal—afford only the opportunity for partisan interpretation. It is only rarely that an Oppenheimer or a Peters or a Condon takes his case to public hearings or otherwise voluntarily reveals the full record. The few cases, among the many thousands of employees who have been through the wringer since 1948, where the record has come to public light provide the thinnest of platforms for general conclusions of fairness or unfairness, of the need for confrontation of the accuser or of the necessity to maintain anonymity in the interest of security. Congressional committee investigations, on the other hand, for the most part do disclose the full record.

The value of this collection, the first substantial cross-section for general examination, lies in the relative fullness of the typical record picture and in the quality of selective presentation offered by Mr. Yarmolinsky and his

assistants. Fifty case records out of thousands is, to be sure, a very small fraction and we should have many more made available; but here at least we do have for the first time 300 pages of actual records, in summary and partially verbatim text. Thirty-one of these cases are of Federal Government employees, fifteen of defense contract employees, two of military personnel, one of port security and one of United Nations employment.

Judging from considerable past experience in the administration of the earlier form of the loyalty program under the executive order of President Truman, this reviewer is of the opinion that the selection here presented has been made in an admirably objective spirit, without attempt to color or weight the record summaries and thus to highlight critically any aspect of the system which is under fire from responsible critics or which constitutes the core of chief reliance by its present defenders. Selective examples drawn from this collection will illustrate the wide scope of employee position, charges, nature and course of the hearings and testimony, results, time lag between first step and final conclusion, and actual cost to the employee involved.

Case No. 119 was that of a plumber foreman or supervisor working on an Armed Forces Special Weapons project at an Air Force Base who had started on his first "sensitive" job, in which he was in charge of classified plans and blueprints. The only charge against him: you are "currently maintaining a close continuing association with your wife," who was stated to be engaged in activities of an organization which is "communist." The organization, it was later specified, was the Communist Party. Both husband and wife testified and were cross-examined at length. Apparently there was no documentary evidence or substantial proof of any such "activities" on the part of the wife. The husband, who had been initially discharged, was ultimately reinstated in his same position twenty months later.

In No. 39 the charges were limited to "close association" with his father and mother, their memberships and activities.

The hearings records are presented in considerable detail with much verbatim quotations from the transcript, in an average length of over six large pages each. The cross-section covers "sensitive" and "nonsensitive" positions in a ratio of perhaps one to four—which appears to be the ratio in all government civilian employment according to the estimate of one careful student of the program. The time lag between the bringing of charges, generally accompanied by immediate suspension without pay, and the final determination of the case varies widely; four months is uncommonly speedy, eleven months very common.

The collection as a whole illustrates the habitual failure (universal so far as this reviewer was able to determine from these 50 cases) of any adverse witness to appear and testify openly in the presence of the respondent, and hence total want of confrontation and cross-examination. Membership or participation in activities may lead to investigation in the case of all organizations of suspect nature including those on the Attorney General's list, those identified by the House Un-American Activities Committee or

the notorious California Tenney Committee of the early 1940's, and other organizations not identified.

Questioning by security officers covers an immensely wide range of topics: membership and association generally; signatures on nominating petitions for public office; mail received; charitable contributions; books, newspapers and magazines subscribed to or even casually read; trends and tenor of conversations at home among friends and social acquaintances; political party memberships; attitude toward the Korean War; purpose in the purchase of Communist classics; views on "race equality," "civil rights," and "guilt by association"; how many times the employee (case No. 58) had voted for Norman Thomas or Henry Wallace. The topical area of the questioning of the employee, as revealed in Mr. Yarmolinsky's selection, thus ranges from the potentially dangerous Communist Party membership and genuine activities in its interests to the very fringes of relevant materiality.

In case No. 75 the government interlocutor asked the employee:

"If you had knowledge of your brother (name) belonging to any of these organizations that are listed in the Attorney General's list, would you come forward and give that information or would you try to shield him?" . . . 'Suppose you were reinstated and found out later that your brother was involved in any one of these organizations that are on the Attorney General's list. Would you come forth and tell your supervisor in this agency that your brother was connected in any of these organizations?' The employee's answer was: 'Would that be part of my duties?' The Board member then said: 'You would receive instructions here.'"

The volume offers no conclusions, comments or other form of editorial judgment. So far as even an informed student of the subject can determine without comparison with the complete text of the entire file made available to the editor, the summary of all relevant facts is comprehensive, unbiased and impartial. This reviewer is unable to form any opinion from what is here presented as to what the editor's conclusions and judgments may be about any aspect of the present government security program and system. The reader is deliberately left without "evaluation" to draw his own conclusions about the reliability of the suspension charges, witnesses heard, testimony offered and clearance or discharge judgment of the security authorities.

Ernest Angell †

GRAND INQUEST; The Story of Congressional Investigations. By Telford Taylor. New York: Simon & Schuster, 1955, Pp. 358. \$4.50.

The extraordinary increase in the exercise of the investigative function of Congress in recent years has stimulated a rising flood of articles on the

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subject in the law reviews and lay periodicals. But prior to 1955 no book-length accounts of the entire subject had appeared since Dimock and Eberling wrote in the late 1920's and McGeary in 1940.¹ Now two excellent and comprehensive books on the subject have appeared: *Grand Inquest* by Telford Taylor and *Government by Investigation* by Alan Barth. Designed for the general reader, these admirable works will also be very useful source and guidebooks to bench and bar and all students of legislative investigations. Although they cover much the same contemporary ground, these books also complement each other in that Barth concentrates on recent developments, while Taylor also traces the historical origin and evolution of the investigative power, practice, and pertinent judicial decisions.

Barth writes from the vantage-point of an editorial writer on the *Washington Post*; Taylor from first-hand experience between 1935 and 1939 as counsel to the inquiry into railroad finance headed by Senators Burton K. Wheeler and Harry S. Truman. He has also served as chief counsel for the prosecution of war criminals at Nuremberg, as general counsel of the Federal Communications Commission, and as Small Defense Plants Administrator.

In writing this book Mr. Taylor's purpose was "to describe the origin and growth of the investigations, to explore their purposes and powers, and to trace the process by which they have now arrived at the center of the political stage, where they are playing so controversial a role." (p. xi). He stresses the contrast between the traditional congressional inquiries of the past, which sought to obtain information as a basis for law-making or to reveal administrative conduct and which were comparatively remote from the life of the average citizen, and the recent loyalty investigations into the political activities, attitudes, and associations of people for the purpose of "exposing individuals to public contumely." Use of the investigative power for "extra-legal condemnation on suspicion of political unreliability" he regards as a "new and dangerous political device, never authorized by law or contemplated during the evolution of legislative investigations." (p. xiv). The congressional loyalty inquiry of latter years is seen by the author as the effective weapon of the nationalists in a "cold civil war" which had produced a "crisis of confidence." (p. xv).

Grand Inquest is divided into ten chapters. In Chapter I we learn "how it all began." The origins of legislative investigations in seventeenth-century England are explored and the heritage of the device by the colonial assemblies and early state legislatures is traced, on the acknowledged basis of previous studies by James M. Landis and Charles S. Potts that appeared in the *Harvard Law Review* and in this *Review*, respectively.² French and

1. DIMOCK, CONGRESSIONAL INVESTIGATING COMMITTEES (1929); EBERLING, CONGRESSIONAL INVESTIGATIONS (1928); MCGEARY, THE DEVELOPMENTS OF CONGRESSIONAL INVESTIGATIVE POWER (1940).

2. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153 (1926); Potts, *Power of Legislative Bodies To Punish for Contempt*, 74 U. PA. L. REV. 691, 780 (1926).

German experience with legislative inquiries is briefly examined and differences noted in the power to punish witnesses for contempt. In Great Britain, the House of Commons' power of inquiry is legally unlimited, because Parliament is supreme, whereas in continental Europe the development of investigative power has been stunted by the prevailing belief that "individuals should be investigated by the police and tried by the courts, rather than by committees of politicians."

Chapter II gives a full-length account of the first congressional investigation which took place in 1792 when a select committee of the House of Representatives inquired into the defeat of General St. Clair by the Indians. Taylor's story of this historic inquiry, its causes, conduct, and consequences, is the most complete account of "the ordeal of Major General St. Clair" to be found in the literature. It raised at the beginning of our national history deep constitutional issues that are still rife in Washington. When the House committee called upon Secretary of War Knox for the St. Clair documents, President Washington conferred with his Cabinet and laid down the rule that has stood ever since as executive policy in response to congressional request for executive papers, *i.e.*, that "the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would endanger the public." Taylor concludes that the St. Clair investigation was highly successful in its primary purpose of informing the Congress, but that it failed to determine who was to blame for St. Clair's defeat.

In Chapter III the author reviews the history of congressional investigations down to the end of the 1920's and the relevant court decisions. During the nineteenth century inquiries were largely in aid of supervising executive operations and were generally enforced by Congress' inherent power to imprison for contempt. A unique contribution of this chapter is the account of the "Know-Nothing" investigations of 1855 in New York and Massachusetts that gave rise to the first American judicial decision dealing with the nature and powers of investigative committees, *Briggs v. Mackellar*.³ Judge Daly's opinion in this case is regarded as "a sound cornerstone and an enduring landmark of the law of legislative investigations" (p. 43); a century ago it enunciated principles that have stood the test of time. From the *Kilbourn*⁴ case in 1880 to the *Daugherty*⁵ and *Sinclair*⁶ cases of 1927 and 1929, the U. S. Supreme Court rendered a series of decisions, briefly reviewed by the author, which affirmed the investigatory and contempt powers of Congress, but imposed limitations on the scope of their exercise.

Chapter IV reviews the great legislative investigations of the Harding and New Deal eras, when they were used to expose scandals and to develop

3. 2 Abb. Pr. 30 (1855).

4. *Kilbourn v. Thompson*, 103 U.S. 168 (1880).

5. *McGrain v. Daugherty*, 273 U.S. 135 (1927).

6. *Sinclair v. United States*, 279 U.S. 263 (1929).

support for economic and social reforms; and their later use in the 1940's and 1950's with shifting winds in the fields of loyalty and subversion to counteract the communist conspiracy. Taylor holds "investigative omniscience" to be an "illusion" which he undertakes to dispel by reference to the limits on the power of Congress imposed by the Constitution, by claims of privilege, and by procedural safeguards.

Five chapters follow in which each of these limitations on the investigative power is examined and analyzed in a masterly manner. The bearing of the separation of powers on congressional investigations is thoroughly explored. The long-standing conflict between investigative power and executive privilege, which raged from Washington to Truman over congressional access to executive documents, is objectively reviewed. The "constitutional crisis of 1954"—marked by Senator McCarthy's attack on the power of the President, the "Battle of the Pentagon," and the Army-McCarthy hearings—is vividly described as "a major battle of the cold civil war." And the basic issue of the battle is seen to have been "the proper balance of Congressional investigative power and executive power." Faced with a frontal attack on the executive power, it was the President's constitutional duty, Taylor contends, to repel the assault and preserve the integrity of the executive branch.

Chapter VI considers the impact of the investigative power on the individual liberties guaranteed by the Bill of Rights. The *Rumely*⁷ case and its implications are examined, in which the first amendment prevailed over the Buchanan committee. The author analyzes the conflicting judicial approaches to the questions of the range of congressional power and the scope of the free speech guarantee and accepts Judge Learned Hand's formula for deciding where to draw the line between the investigative power and individual freedom. Thoughtful sections are devoted to the motives of witnesses and the division of public opinion about investigations of communism, the right of privacy, and the "identification" theory of investigative power in the field of subversive activities. The constitutional limits of legislative power to investigate in the field of loyalty and subversion are examined, and the factors listed that are likely to carry weight in court decisions. Mr. Taylor holds that loyalty inquiries are regarded by many as an extra-legal means of exposing unpopular opinions and punishing persons who have them. He disagrees with Judge Wyzanski's faith in exposure of individual beliefs and associations and doubts that it strengthens democracy. Freedom and security are set forth as interdependent.

An excellent chapter treats of the fifth amendment privilege against self-accusation, tracing its historical evolution from seventeenth-century England down through American colonial practice and the state constitutions to its recent "perversion" in the expression "Fifth Amendment Communists." The use and abuse of the privilege is described, the duty to answer questions about other persons examined, the implications and con-

7. *Rumely v. United States*, 345 U.S. 41 (1953).

sequences of claiming the privilege explored, and the development of immunity statutes since 1857 reviewed. Mr. Taylor holds that resort to the privilege against self-incrimination implies neither guilt nor innocence.

Other limitations and privileges relating to legislative investigations are also examined, including the federal system and states' rights, the due process clause, the pertinency of questions to authorizing resolutions, and the problem of privileged communications as between attorney and client.

Another chapter considers investigating committee procedures, the rights of witnesses, and secret versus public hearings. Objections to televised hearings such as those conducted by the Kefauver committee are explained and the pros and cons of codes of fair practice set forth. Mr. Taylor has little faith in the proposed codes because they are based, he believes, on the "assumption, which I believe to be erroneous, that a legislative investigating committee can be made to resemble and operate like a court." (p. 256). Instead, he suggests, first, that the subpoena power of Senate standing committees be repealed and, second, that the investigative power be enforced and tested, not by criminal prosecutions as at present, but by court order.

Finally, the author concludes that recent abuses have evoked no compelling public demand for reform because popular fear of communism has tended to make the end justify almost any means. The masses have supported the loyalty investigations as a means of protection against communism. The loyalty committees are held to have failed, however, in several basic respects because they have been conducted for political rather than legislative purposes. The Fort Monmouth hearings are described as a good example of "how not to hunt a skunk" and a common denominator is discerned in the government agencies attacked by Senator McCarthy. The Communist Control Act of 1954 is regarded as a "legislative disaster" resulting from the loyalty investigations.

Three Appendices contain a description of the British parliamentary investigative practice, a note for lawyers on the new federal "immunity" statute, and an historical note on outlawry. Thirty-five pages of Chapter Notes complete the volume.

This is a brilliant book, written in a distinguished and vigorous style. Every important aspect of the subject is thoroughly and judiciously analyzed. The needs of national security in a perilous age are evenly balanced with devotion to democratic ideals of individual freedom. Telford Taylor has written a book that will be of lasting value to all students of congressional investigations.

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