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COMMUNISM'S CHALLENGE AND THE CONSTITUTION*

MURRAY COHEN AND ROBERT F. FUCHS

V. Communist Political Organizations

In the light of our assumptions, members of the American Communist Party can be considered no more than foreign agents. Since in the past Congress has felt it advisable to protect the nation by requiring registration and disclosure of foreign agents and subversive domestic organizations,¹⁸² similar provisions for American Communists seem a logical development. Actually, such registration may be even more desirable, for unlike many indigenous fascist organizations whose use of uniforms and publicity afforded opportunity for government surveillance,¹⁸³ American communist movements are enshrouded in secrecy. Thus, compulsory registration of the Party and disclosure of its members is the only way to acquire adequate information about the threat communists present.

However, although the strict discipline of the Communist Party distinguishes it from other American political parties,¹⁸⁴ its general unpopularity should not hide the fact that "political parties are effective agents of the democratic process only because they represent devious and unfettered ideologies."¹⁸⁵ To allow attack, by means of compulsory registration of its members, on even the most extreme of these parties is to pave the way for attack on all of them. And compulsory registration of members of a particular political party seems inconsistent with the fluidity with which Americans change political allegiance.¹⁸⁶ Further, those who wish to remain loyal to the Party, in effect will lose their franchise of the secret ballot,¹⁸⁷ as their political preference, unlike that of other

* This is the second of two instalments. The first appeared in the Winter 1948 issue of the QUARTERLY. The relevant provisions of the Mundt-Nixon Bill discussed in this article will be found in the appendix to the first instalment.

¹⁸² 54 STAT. 1201 (1940), as amended, 18 U. S. C. § 2386 (Supp. 1948); 52 STAT. 631, as amended, 53 STAT. 1244 (1939), 22 U. S. C. §§ 611-21 (1946).

¹⁸³ See Nation, Jan. 15, 1938, p. 146; April 30, 1938, p. 515.

¹⁸⁴ "It is essential to understand in considering the subject that the Communist Party of the United States is not a political party in the true American sense. . . . Under our political system, any citizen having proper residential qualifications cannot be denied the privilege of joining a party or be expelled from it. . . . It will be observed, therefore, that stringent conditions are imposed on [Communist] party membership which are wholly foreign to the American concept of political organization." H. R. REP. NO. 153, 74th Cong., 1st Sess. 21-22 (1935).

¹⁸⁵ Note, 48 COL. L. REV. 253, 258 (1948).

¹⁸⁶ See Berdahl, *Party Membership in the United States*, 36 AM. POL. SCI. REV. 16, 241 (1942).

¹⁸⁷ See Davis, N. Y. Times, Feb. 21, 1948, p. 6, col. 6.

voters, would be publicly listed.¹⁸⁸

Perhaps the crucial question is one of draftsmanship. If criminal sanctions are levied against mere Communist Party membership, the Party is unlikely to register¹⁸⁹—"self-preservation is the right of political parties as well as of individuals."¹⁹⁰ The only result of such legislation would be heavy criminal sanctions against the Communist Party for failure to register. However, if no criminal sanctions are levied against mere membership, there is no real justification for failure to register. And to achieve effective enforcement of other provisions of the Mundt-Nixon Bill,¹⁹¹ or other legislation of this general character, it is a requisite that our authorities have accurate information as to the identity of Party members.

Whatever may be the Supreme Court's conclusion regarding registration disclosing the names of communist-front officers, compulsory registration of the names of *all* members of communist political organizations presents a far more delicate problem of free speech. Certainly, there is no element of protecting the American public from "fraudulent solicitation" in listing the names of Party members. The only substantive evil against which registration of members can protect is a threat to our national security. Though one who is registered might be reluctant to bring himself to the attention of the authorities by controversial speeches, the registration does not aim at or directly infringe free speech. However, today where political pressure is feasible only through association, freedom of expression is merely nominal without freedom

¹⁸⁸ The exact status of American political parties is a hybrid one. See Starr, *The Legal Status of American Political Parties*, 34 AM. POL. SCI. REV. 439 (1941). No mention of political parties is made in the Constitution, and it seems clear that there is no property right in party membership. Gardner v. Ray, 154 Ky. 509, 157 S. W. 1147 (1913); Kearns v. Howley, 188 Pa. 116, 41 Atl. 273 (1898). However, it has been held that mention of political parties in state constitutions puts them on a constitutional footing there. *Ex parte Wilson*, 7 Okla. 610, 125 Pac. 739 (1912).

Strong language has been used indicating such rights do not need such support. "No statement is needed . . . that electors holding certain political principles in common may fully assemble . . . [and] . . . organize themselves in political parties. . . . Such a right . . . is inherent in the very form and substance of our government and needs no expression in our Constitution." Britton v. Board, 129 Cal. 337, 61 Pac. 1115 (1900). See State v. Phelps, 144 Wis. 1, 12, 128 N. W. 1041, 1047 (1910); Note, 19 MISS. L. J. 210 (1948). For a comparison of the status of political parties under other systems of government see Boerner, *The Position of the NSDAP in the German Constitutional Order*, 32 AM. POL. SCI. REV. 1059 (1938); Stiener, *The Constitutional Position of the Partito Nazionale Fascista*, 31 AM. POL. SCI. REV. 227 (1937).

¹⁸⁹ "One thing we will not do is register." Foster, N. Y. Times, April 30, 1948, p. 1, col. 2, and May 29, 1948, p. 1, col. 1; Davis, N. Y. Times, Feb. 21, 1948, p. 6, col. 6.

¹⁹⁰ Britton v. Board, 129 Cal. 337, 346, 61 Pac. 1115, 1120 (1900), quoting Whipple v. Board, 25 Colo. 407, 55 Pac. 172 (1898). See Michels, *Some Reflections on the Sociological Character of Political Parties*, 21 AM. POL. SCI. REV. 753 (1927).

¹⁹¹ In particular, restriction of travel, federal employment, and supporters of communist fronts.

of group expression.¹⁹² While an analogous registration was once upheld,¹⁹³ the Supreme Court's increasing deference to the four liberties protected by the First Amendment¹⁹⁴ and the summary treatment accorded the principle of registration in the *Thomas* case¹⁹⁵ may foreshadow a different result.

The Mundt-Nixon Bill in § 8 (4) requires every communist political organization when registering to disclose the name of each individual who, any time during the preceding twelve months, was a *member* of the organization.¹⁹⁶ Although courts have disagreed as to the amount of identification necessary to consider an individual a member of the Communist Party,¹⁹⁷ such disagreement apparently was due to the degree to which courts were willing to equate nominal membership with party principles and tactics, when a finding of membership would result in criminal liability. If mere registration does not result in such sanctions, it would seem advisable to make registration as inclusive as possible; the vagueness of prior judicial tests makes accurate listings by communist political organizations impossible and might serve to hide their jettisoning of important names. On the other hand, the necessity

¹⁹² See Note, 48 COL. L. REV. 253, 258 (1948).

¹⁹³ *Bryant v. Zimmerman*, 278 U. S. 60, 49 Sup. Ct. 42 (1928).

¹⁹⁴ Though this trend has been strong in all cases dealing with civil liberties, the Court has gone farthest in a series of decisions where issues concerning freedom of press were merged with those of freedom of religion. *Schneider v. Irvington*, 308 U. S. 147, 60 Sup. Ct. 146 (1939); *Lovell v. Griffin*, 303 U. S. 444, 58 Sup. Ct. 666 (1938); (distribution of literature allowed in both cases without necessity of prior permission); *Tucker v. Texas*, 326 U. S. 517, 66 Sup. Ct. 274 (1946); *Marsh v. Alabama*, 326 U. S. 501, 66 Sup. Ct. 276 (1946); *Martin v. Struthers*, 319 U. S. 141, 63 Sup. Ct. 862 (1943); *Cantwell v. Connecticut*, 310 U. S. 296, 60 Sup. Ct. 900 (1940) (freedom of access progressively increased; *private* property right to deny Jehovah Witnesses entry increasingly limited). These decisions, and two others invalidating license taxes on distribution of religious literature—*Follett v. McCormick*, 321 U. S. 573, 64 Sup. Ct. 717 (1944); *Murdock v. Pennsylvania*, 319 U. S. 105, 63 Sup. Ct. 870 (1943)—seem relevant to the problem presented in the Mundt-Nixon Bill.

¹⁹⁵ *Thomas v. Collins*, 323 U. S. 516, 65 Sup. Ct. 315 (1945).

¹⁹⁶ Only one historical precedent for registration of such members exists: in 1941 the House passed an amendment to the Foreign Agents Registration Act requiring the Communist Party, the German-American Bund, and the Keffhauser Bund to file membership lists. H. R. 6269, 77th Cong., 1st Sess. (Dec. 19, 1941). The measure was attacked on the floor during reconsideration as a bill of attainder and was later abandoned. Reps. Hobbs, Marcantonio, 88 CONG. REC. 803 (1942); see Note, 51 YALE L. J. 1358 (1942); cf. H. R. 10,446, 76th Cong., 3d Sess. (Sept. 3, 1940); H. R. 4907, 76th Cong., 2d Sess. (March 9, 1940).

¹⁹⁷ Many courts have recognized the undesirability of a rule which penalizes nominal membership and have read unqualified statutes as pertaining only to active members. See *People v. Lloyd*, 304 Ill. 23, 88, 136 N. E. 505, 530 (1922); *Shaw v. State*, 76 Okla. Cr. 271, 134 P. 2d 999 (1943). Some courts, however, have determined that nominal membership alone is enough to constitute either the individual's acceptance or approval of party principles and tactics: *Skeffington v. Katzeff*, 277 Fed. 129, 132 (C. C. A. 1st 1922); *State v. Lowery*, 194 Wash. 529, 535, 177 Pac. 355, 356 (1918). Others have even been more extreme: *United States v. Wallis*, 268 Fed. 413 (S. D. N. Y. 1920); *State v. Boloff*, 138 Ore. 568, 4 P. 2d 326 (1931). For a discussion of these and other cases see Note, *Conduct Proscribed as Promoting Violent Overthrow of the Government*, 61 HARV. L. REV. 1215 (1948).

of a single criterion of membership to be applied throughout the Bill¹⁹⁸ makes it inadvisable to frame the definition too broadly.

By leaving the definition of membership completely to judicial interpretation as in other statutes,¹⁹⁹ the Bill has side-stepped an important issue. Despite the difficulty of erecting standards, some criteria should be indicated. Such criteria seemingly should revolve around the unique ties usually attributed to membership in the Communist Party: party cards, due books, voting at meetings, and contributions. To prevent wholesale false disassociation based on desire to avoid disclosure, it would seem advisable to relate the definition back in point of time, since unless this is done no adequate listing of members would result till receipt of supplementary registration statements. To preclude such a definition from having harsh retroactive effect, this relation back should serve merely to shift the burden of proof from the Government to the individual on the only relevant question—whether the individual is currently a member. Moreover, since the Mundt-Nixon Bill provides no way for an individual to challenge listing of his name after the Attorney General has made the registration public, an adequate revision should entail a mandamus procedure to grant such relief.

In § 15 (b) of the Bill, criminal sanctions are provided against a communist political organization which willfully omits any facts or makes a false statement in registration. As a broad interpretation of the word "willfully"²⁰⁰ may cast a heavy burden on the organization to determine what constitutes membership, it would seem that the duty should be limited to knowingly failing to include all its members.

Recommendations:

Section 3 (10). The term "member of a communist political organization" means any person who

(a) thirty days after there is in effect a final order of the Attorney General requiring an organization to register under § 8 of this Act as a communist political organization (i) holds or within the preceding six months has held a membership card issued to such individual by such organization or, (ii) is paying or within the preceding six months has paid dues to such organization or, (iii) has within the preceding six months voted in a national or local meeting held by that organization or, (iv) has contributed in the preceding six months exclusive of dues more than twenty-five dollars (\$25) to such organization intending

¹⁹⁸ Secs. 3 (3); 3 (4); 4 (4); 6 (a); 6 (b); 7 (a); 7 (b). What would constitute membership seemed to bother only one member in House debate. Rep. Miller (Conn.), 94 Cong. Rec. 6174 (May 18, 1948).

¹⁹⁹ 54 STAT. 1141 (1940), 8 U. S. C. § 705 (d) (1946).

²⁰⁰ See discussion and citations in MILLER, CRIMINAL LAW 70 (1934).

that organization to receive such funds; *provided that*, no individual who can presently prove effective disaffiliation or disassociation from such organization shall be considered to be a member thereof,

(b) at any time after the registration of an organization as a communist political organization shall (i) apply for and receive, or hold, a membership card in such organization or, (ii) pay any dues to such organization or, (iii) vote in any national or local meeting of such organization or, (iv) contribute exclusive of dues more than fifty dollars (\$50) per annum to such organization intending that organization to receive such funds.

Section 8.

(c) The registration made under subsection (a) or (b) shall be accompanied by a registration statement, to be prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the following information:

(d) In case of a communist political organization, the name and last known address of each individual who was a member of the organization at any time during the period of six full calendar months preceding the filing of such statement.

Section 15.

(b) Substitute the word knowingly for the word willfully now found in this subsection.

Section 8.

(g) It shall be the duty of the Attorney General to send to each individual listed in any registration statement or annual report, filed under this section, as a member or officer of the organization in respect of which such registration statement or annual report was filed, a notification in writing that such individual is so listed; and such notification shall be sent at the earliest practical time after the filing of such registration statement or annual report. Such individual may, within thirty days of receipt thereof, bring in any district court an action of mandamus against the Attorney General to strike the individual's name from the registration statement of which that individual is listed as a member or officer, and shall upon proving effective disaffiliation or disassociation from such organization be entitled to an order granting such relief.

As contrasted to the three alternate criteria in § 3 (4) defining a "communist front," the only criterion applied by subsection (3) of the Bill in determining whether a suspect organization "having some, but not necessarily all, of the ordinary and usual characteristics of a political party" is a "communist political organization," is whether it is *reasonable to conclude* that such party is under the *control* of a com-

munist foreign principal. Since the legislative goal here is not the prevention of "fraudulent solicitation" as it was in subsection (4) but is rather a security measure, and since the definition of communist political organization, by excluding organizations not political parties,²⁰¹ is framed to prevent the trapping of liberal organizations, the broad language is not quite so disturbing. And as the clandestine nature of a communist party, unlike the public participation necessarily sought by communist front organizations, restricts effective investigation, broader language may be necessary.

Though the same lack of precision runs through the ten considerations found in subsection (3), *some or all* of which are to be used in determining whether the requisite foreign "control" exists,²⁰² analysis will not be made here of those considerations that do not present policy or drafting problems significantly different from their counterparts in subsection (4).²⁰³

Consideration (A): "the extent and nature of its activities, including the expression of views and policies," seems to be framed in almost blunderbus terms. As was pointed out on the House floor,²⁰⁴ not only could this criterion be utilized to trap non-communist elements, but its general scope is covered in other considerations. Since these other considerations are preferable because they require a tie connecting the organization's views and policies with communist agencies, consideration (A) should be deleted.

Consideration (D): "the extent to which it supports the basic principles and tactics of communism as expounded by Marx and Lenin," is one of the most controversial of the considerations. The "basic principles" cover wide spans of economics, sociology, and political science; their exact nature is subject to various interpretations.²⁰⁵ Although this consideration could be used to track down communist political organizations, it might also be used as a dragnet for all varieties of liberals,

²⁰¹ It is possible that some political parties could be covered, *e.g.*, the Socialist Party, the American Labor Party, the Liberal Party. Moreover, it is conceivable that an organization not a political party but directly under foreign communist control would not fall under either (3) or (4) though probably (4) (ii) or (iii) would cover it.

²⁰² The phrase "some or all" was attacked in the House on two counts. Rep. Holifield said that it was far too vague. 94 Cong. Rec. 6018 (May 14, 1948). And Rep. Smith claimed that the use of the clause would vitiate the requisite of foreign control. 94 Cong. Rec. 6179 (May 18, 1948). *But see* Rep. Nixon, 94 Cong. Rec. 6179 (May 18, 1948).

²⁰³ For these reasons, considerations (B), (C), (E), (F), (G), (H), and (J) will not be discussed. Minor changes in them will be made directly in the recommended legislation.

²⁰⁴ Rep. Owens, 94 Cong. Rec. 6271 (May 19, 1948).

²⁰⁵ HOOK, *THE MEANING OF MARX: A Symposium by Bertrand Russell, John Dewey, Morris Cohen, Sidney Hook, Sherwood Eddy* (1934). *Compare* LENIN, *THE STATE AND REVOLUTION* (Handbook of Marxism) 756 (1935), *with* NEW TESTAMENT (Noyes's Translation) Acts V, p. 263.

socialists, and theoretical communists—all of whom Congress intended to exempt.²⁰⁶ Moreover, though adherence to Marx and Lenin is a conspicuous part of communist ritual, present political development in Stalinist Russia is said by most observers to have relatively little in common with what many consider Marx and Lenin's basic principles.²⁰⁷ Thus; the identifying feature of Soviet political development today is not an adherence to the theory of communism as a social and economic ideology but rather adherence, in the name of communism, to ethical values which violate western traditions—the police state and the justification of means by ends.

Consideration (I) covers the extent to which an organization fails to disclose, or resists efforts to obtain, information about its membership or other records; its members refuse to acknowledge membership therein; its meetings are secret, and "it otherwise operates on a secret basis." The addition of the last clause on the House floor indicates an attempt to make this consideration as wide as possible. The technique of attempting to extract guilt from silence is reminiscent of that utilized by the House Un-American Activities Committee. To allow a failure of proof to be used as proof itself, is to discourage thorough investigation.

Although political secrecy has little place in a democracy, and although the Communist Party takes wide advantage of such secrecy, other political organizations in the United States have done the same.²⁰⁸ And it may well be that the use of such language may so fix the label attached to the Communist Party that even were it to break away from foreign control, it would still be held under the Bill.

Recommendations:

Section 3.

(3). The term "communist political organization" means any organization in the United States having, in general, the characteristics of a political party, with respect to which, having regard to the following typical considerations:

- (A) (Delete from Bill),
- (B) the extent to which its policies are formulated and carried out and its activities performed, pursuant to directives of the foreign government or foreign governmental or political organization in which is vested, or under the domination or control of

²⁰⁶ H. R. REP. No. 1844, 80th Cong., 2d Sess. 4, 6 (1948); Rep. Nixon, N. Y. Times, April 10, 1948, p. 1, col. 2.

²⁰⁷ DEAN, *THE UNITED STATES AND RUSSIA* 82, 83 (1948); cf. MAYNARD, *RUSSIA IN FLUX* 518 (Guest 1948).

²⁰⁸ Perhaps the most famous example was the Know Nothing Party of the late 1840's and early 1850's.

of which is exercised, the direction and control of the world communist movement,

(C) the extent to which its views and policies are the same as those of such foreign government or foreign organization,

(D) the extent to which it supports or advocates the tactics now being carried out by such foreign government or such foreign organization,

(E) the extent to which it receives support, financial or otherwise, from or at the direction of such foreign government or foreign organization,

(F) the extent to which it sends members or representatives to such foreign country or other communist foreign countries for instruction or training in the principles, policies, strategy, or tactics of such world communist movement,

(G) the extent to which it reports to such foreign government or foreign organization or to its representatives,

(H) the extent to which its members or leaders are subject to or recognize the disciplinary power of such foreign government or foreign organization or its representative, and

(I) (Delete from Bill),

(J) the extent to which its members consider the allegiance they owe to the United States as subordinate to their obligations to such foreign government or foreign organization,

it is reasonable to conclude on a preponderance of evidence that it is under the control of such foreign government or foreign governmental or political organization.

Section 8 leaves it somewhat uncertain whether an organization must register before the Attorney General issues an order requiring registration.²⁰⁹ However, subsections (a) and (b) of this section, by specifically covering those organizations required to register by a final order of the Attorney General as distinct entities, indicate that there are at least two categories of registered organizations. The Bill seemingly meant to require at least some organizations to register without the necessity of an intervening order. This is made clear by § 8(c) (1) and (2), which require communist organizations to register thirty days after either enactment of the Bill or any time thereafter upon becoming such an organization.²¹⁰

Since criminal sanctions are provided in § 15 (a) for failure to register either by a communist political or front organization, under the due process clause, the Bill must provide an ascertainable standard in ad-

²⁰⁹ 94 Cong. Rec. 6181, 6182 (May 18, 1948).

²¹⁰ Subsection (c) (3) makes this even clearer by specifying that in this subsection alone is a final order of the Attorney General needed.

vance of criminal liability by which those who are required to register may be certain of the Bill's applicability.²¹¹ If a penalty is provided for a communist organization's failure to register, without a prior determination that the organization is covered by the Bill, it seems clear that the legislation is unconstitutional because of the vagueness and indefiniteness found in the definitions of communist organizations in § 3. Not only statutes dealing with civil liberties must be more definite.²¹² Other types of statutes which have laid down standards far more ascertainable than those found in this section have been held invalid.²¹³ The use of the term "communist" has even been found too vague,²¹⁴ and these definitions prescribe a far more difficult determination of applicability.

A simple method of providing a standard would be to apply a possible construction of § 8(c) (3): to insist in all cases on a final order by the Attorney General requiring registration before any sanctions can be levied for failure to register. Though such a construction would have the benefit of a judicial presumption,²¹⁵ it seems doubtful that a court could read subsections (1) and (2) out of the Act.

However, if a statute were so construed, a problem would still arise as to whether Congress had delegated too much of its power to the Attorney General; that is, whether it had laid down an intelligible and reasonable standard for him to follow in carrying out its policy.²¹⁶ Here, the difficulties inherent in defining a communist organization, the fact that the statute has carried legislative guidance to a reasonably

²¹¹ "The essential requirement of due process is that a penal statute be 'sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties' and be couched in terms that are not 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Whitney v. California*, 274 U. S. 357, 368, 47 Sup. Ct. 641, 645 (1927). See *Aigler, Legislation in Vague and General Terms*, 21 MICH. L. REV. 831 (1923); 21 TEMP. L. Q. 266 (1948).

²¹² *Winters v. New York*, 333 U. S. 507, 68 Sup. Ct. 665 (1948); *cf. Herndon v. Lowrey*, 301 U. S. 242, 57 Sup. Ct. 732 (1936).

²¹³ *E.g., Lanzetta v. New Jersey*, 306 U. S. 444, 59 Sup. Ct. 615 (1939).

²¹⁴ *United States v. Hautau*, 43 F. Supp. 507 (D. N. J. 1942). "In ascertaining whether there is now any unity of thought bearing on the word Communist, I have made inquiries of men of reasonable intelligence. I asked whether those who believe in and advocate government ownership of irrigation projects and government dams erected for the sale of water power by the government could reasonably be classified as Communist. In some instances the answer was 'No', in others 'Yes'. . . ." In this regard, it might be noted that Rep. Rankin, one of the strongest advocates of anti-communist legislation, when sponsoring TVA in the House, was known by his fellow representatives as "Cheap Juice John." See *Nation*, March 22, 1947, p. 321, col. 1. Mr. Rankin is still a strong supporter of TVA. *N. Y. Times*, Aug. 29, 1948, § 4, p. 2, col. 1.

²¹⁵ *ROTSCHAEFER, CONSTITUTIONAL LAW* 18 (1939).

²¹⁶ See *United States v. Rock Royal Cooperative Inc.*, 307 U. S. 533, 59 Sup. Ct. 993 (1939); *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 55 Sup. Ct. 837 (1935). For a collection of cases dealing with the problem, see 2 *PIKE & FISCHER LAW* § 12a.31 (1948).

practical point,²¹⁷ and the desirability of some discretion in an agency more adept than Congress to deal with the matter, indicate that, in general, the delegation will not be considered too broad. The only real question lies in whether Congress could have been more precise in its choice of guides.²¹⁸ Lack of precision has been found in several of the considerations, with the conceivable exception of considerations (A) and (D), but none is so vague as to be unconstitutional. The problem is rather one of limiting the area of enforcement to those intended to be covered by the Bill.

Recommendations:

Section 8 (a). Each communist political organization shall, within the time specified in subsection (3) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a communist political organization.

(b). Each communist front organization shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a communist political organization.

(c). The registration required by subsection (a) or (b) shall be made within thirty days after a final order of the Attorney General requiring such organization to register.

Sections 13 and 14 of the Mundt-Nixon Bill represent a careful attempt to safeguard suspect organizations procedurally; as a result these two sections will be treated sketchily—by covering the procedural highlights and suggesting a few desirable changes which follow the congressional trend.

All the amendments adopted during House debate furnished additional protection. Probably the most important of these was substituting, for a requirement that the Attorney General's findings of fact be based only on substantial evidence,²¹⁹ a requirement that those findings be supported by a preponderance of evidence. Congress, realizing the Bill's impact on civil liberties and recognizing the tremendous influence a single political appointee could wield,²²⁰ went beyond the judicial review normally accorded administrative findings. Additional safeguards were

²¹⁷ *United States v. Chemical Foundation*, 272 U. S. 1, 47 Sup. Ct. 1 (1927); *State ex rel. Wisconsin Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N. W. 920 (1928).

²¹⁸ See ROTTSCHAEFER, *CONSTITUTIONAL LAW* 75 (1939). Cases dealing with the question have considered the problems inherent in statutory coverage of communists. *Compare Dunne v. United States*, 138 F. 2d 137 (C. C. A. 8th 1943), *with Feinglass v. Reinecke*, 48 F. Supp. 438 (E. D. Ill. 1942); see 16 *Geo. Wash. L. Rev.* 265 (1948).

²¹⁹ Rep. Marcantonio, 94 Cong. Rec. 6017 (May 14, 1948); 94 Cong. Rec. 6287 (May 19, 1948).

²²⁰ Rep. Sabath, 94 Cong. Rec. 5987 (May 14, 1948); Rep. Celler, 94 Cong. Rec. 5990 (May 14, 1948); Mayor O'Dwyer, *N. Y. Times*, May 17, 1948, p. 21, col. 8.

provided for the administrative hearing by giving the organizations both the right to subpoena evidence and the right to a public hearing, including opportunity to present all their evidence and to conduct cross-examination. The procedural shields afforded by these two sections are buttressed by § 16, also added on the House floor, which makes the Administrative Procedure Act applicable when the latter's provisions afford greater protection.

Investigations may be instituted either by the Attorney General, on reasonable belief, or by a registered organization applying for cancellation of its prior classification. A full hearing with all its incidents is provided in both cases. If the Attorney General orders an organization to register or either refuses or grants a cancellation application, he is required to make a written report of his findings of fact.

We propose three recommendations not covered by the Administrative Procedure Act. First, since political partisanship could result in discriminatory investigations, the Attorney General should not be required to investigate upon Congressional request, unless both Houses, as contrasted to the mandatory request that one chamber could now invoke, concur in such a request. Second, the registered organization's right to request cancellation of its prior classification should be enhanced by merely requiring their showing substantial evidence, instead of a *prima facie* case, in order to institute investigations. Third, because of the stigma attaching to the initial investigation alone, organizations found not to be communist are entitled to have the Attorney General issue findings of fact so stating.

VI. *Criminal Sanctions*

Some persons believe that the only effective way to deal with communism is through criminal sanctions.²²¹ Sanctions can be applied either against an individual's membership in a communist political organization, which in effect would outlaw the party, or—a more drastic step—against any advocacy of communism.²²²

In light of our assumptions of fact, there may be an urgent need for curbing communism, and therefore measures attempting to diminish its influence may be justified. However, the most undemocratic means, that of criminal sanctions placed on thought and association in prospect of a future attempt to materialize communist ideas, are not justified. Even if the impact of such sanctions on civil liberties could be limited

²²¹ *E.g.*, Stassen, N. Y. Times, May 18, 1948, p. 1, col. 4; Moley, N. Y. Times, Feb. 12, 1948, p. 48, col. 7.

²²² *E.g.*, H. R. 4581, 80th Cong., 1st Sess. (1947).

to communists alone, an exhaustion of all other measures would first seem desirable.²²³ The ramifications of criminal sanctions go beyond their objective; they set political precedent, to be utilized against any minority deemed dangerous to our welfare.²²⁴ And such sanctions would have an *in terrorem* effect on liberals; the "counterargument" against a person criticizing governmental policies would be the cry of "communist."²²⁵ This cry is used to some extent today, but how much more effective it would be if indictments and prosecutions could follow.

The effectiveness of such legislation is in serious doubt for it has failed in other countries.²²⁶ Outlawing the communists might drive them underground,²²⁷ but it has been stated that this is where they have always done their important work and that a communist political party is merely a convenient façade.²²⁸ However, retention of the present communist iceberg, where at least a little is exposed to view, may be desirable as it may facilitate security investigations,²²⁹ counter-propaganda and education. The danger of martyrdom²³⁰ may be tempered by public opinion concerning communists, but the psychological support of the persecuted, prevalent in the American scene, makes this a factor to be considered.

Currently, syndicalist statutes are in effect in some states²³¹ and it is a federal offense to advocate the violent overthrow of the government;²³²

²²³ In this connection it should be noted that the MUNDT-NIXON BILL, when first submitted to the House Un-American Activities Committee, contained only disclosure, federal employment and restriction of foreign travel provisions.

²²⁴ *E.g.*, American Civil Liberties Union, N. Y. Times, March 7, 1948, § 4, p. 10, col. 1. It must be remembered that to suppress communists criminally here will weaken our ability to criticize the communist governments for also suppressing free thought. *E.g.*, H. R. REP. No. 1844, 80th Cong., 2d Sess. 6 (1948); N. Y. Times, May 17, 1948, p. 18, col. 6.

Cf. the following statement by Mr. Justice Douglas at the Altgeld Centennial: "A people who proclaim their civil liberties, but extend them only to preferred groups, start down the path to totalitarianism." 94 Cong. Rec. 6015 (May 14, 1948).

²²⁵ *E.g.*, Shapley, N. Y. Times, April 18, 1948, p. 2, col. 2; Committee of 1000, N. Y. Times, May 4, 1948, p. 6, col. 3; Americans for Democratic Action, N. Y. Times, May 7, 1948, p. 2, col. 2.

²²⁶ *E.g.*, Lowenstein, *Legislative Control of Political Extremism in European Democracies*, 38 COL. L. REV. 591, 725 (1938); H. R. REP. No. 1844, 80th Cong., 2d Sess. 6 (1948); Gov. Dewey, N. Y. Times, May 4, 1948, p. 4, col. 3.

²²⁷ *E.g.*, N. Y. Times, May 23, 1948, § 4, p. 7, col. 1; Birkhead, N. Y. Times, April 25, 1948, p. 2, col. 2.

²²⁸ *E.g.*, Stassen, N. Y. Times, April 3, 1948, p. 13, col. 1, 2; N. Y. Times, April 13, 1948, p. 23, col. 4, 6; Adler, N. Y. Times, May 14, 1948, p. 15, col. 4.

²²⁹ Clark and J. E. Hoover, N. Y. Times, March 7, 1948, § 4, p. 10, col. 1; *cf.* Ernst, N. Y. Times, Feb. 12, 1948, p. 48, col. 7.

²³⁰ *E.g.*, Rep. Carroll, 94 Cong. Rec. 6015 (May 14, 1948); Clark, N. Y. Times, Feb. 6, 1948, p. 26, col. 2; Gov. Dewey, N. Y. Times, May 16, 1948, p. 59, col. 2. *But cf.* Adler, N. Y. Times, May 14, 1948, p. 15, col. 4.

²³¹ *E.g.*, CAL. GEN. LAWS (Deering, 1944) Act 8428; ILL. ANN. STAT. (Smith-Hurd, 1935) c. 38, § 558; OHIO GEN. CODE (Page, 1938) §§ 13421-23-26; PA. STAT. ANN. (Purdon, 1945) tit. 13, § 4207; see Groner, *State Control of Subversive Activities in the United States*,

but to date there has been no federal criminal legislation against a particular political group. However, § 4 of the Mundt-Nixon Bill attempts to outlaw the Communist Party.²³³ Since the Bill does not specifically name the American Communist Party, that Party could escape the Bill's sanctions by a complete policy shift.²³⁴ But § 2 of the Bill attributes certain characteristics to a communist political organization; while § 3 by the definition of such organizations encompasses the Party. And since the prohibitions of § 4 relate to the characteristics of a communist political organization as listed by § 2, the Party *is* effectively outlawed.²³⁵

Any attempt to make criminal the present activity of communists will have to meet almost unsurmountable constitutional limitations. In *Schenck v. United States*,²³⁶ decided in 1919, Mr. Justice Holmes laid down the clear and present danger test:

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."²³⁷

Subsequently this test was abandoned *sub silentio*, the Court drawing a distinction between statutes prohibiting only certain conduct and statutes prohibiting certain types of speech.²³⁸ The distinction limited the clear and present danger test to speech under the former type of legislation and invoked the rule that the latter statutes were constitutional if the condemned speech had a reasonable tendency to bring about evils which the legislature could legitimately prevent.²³⁹ But in

9 FED. B. J. 61 (1947); Note, *Conduct Proscribed as Promoting Violent Overthrow of the Government*, 61 HARV. L. REV. 1215 (1948).

²³² 54 STAT. 673 (1940), 8 U. S. C. § 452 (1946).

²³³ Rep. Javits, 94 Cong. Rec. 6011 (May 14, 1948); N. Y. Times, June 6, 1948, § 4, p. 7, col. 1. See the reported confession by Rep. Nixon to this effect, N. Y. Times, May 15, 1948, p. 8, col. 5.

²³⁴ E.g., H. R. REP. No. 1844, 80th Cong., 2d Sess. 6 (1948).

²³⁵ Rep. Multer, 94 Cong. Rec. 6008 (May 14, 1948). Rep. Judd, speaking in behalf of the bill, cogently stated, "The Mundt Bill does not outlaw the Communist Party by name, and that is where Governor Dewey placed his emphasis. But it does outlaw the party in fact because it outlaws the kind of activities in which it is engaged." 94 Cong. Rec. 6177 (May 18, 1948).

²³⁶ 249 U. S. 47, 39 Sup. Ct. 247 (1919).

²³⁷ *Id.* at 52, 39 Sup. Ct. at 249.

²³⁸ *Gitlow v. New York*, 268 U. S. 652, 45 Sup. Ct. 625 (1925); *Whitney v. California*, 274 U. S. 357, 47 Sup. Ct. 641 (1927). The rationale of this distinction seems to be that where utterances were prohibited, the legislature had already determined that the danger of such advocacy warranted this punishment. Where conduct was prohibited, the legislature was considered to have condemned only speech which presented a clear danger of instigating that conduct.

²³⁹ E.g., *Gitlow v. New York*, 268 U. S. 652, 45 Sup. Ct. 625 (1925); *Abrams v. United States*, 250 U. S. 616, 40 Sup. Ct. 17 (1919); *Frohwerk v. United States*, 249 U. S. 204, 39 Sup. Ct. 249 (1919); *Debs v. United States*, 249 U. S. 211, 39 Sup. Ct. 252 (1919).

1937 the clear and present danger test returned to the fore,²⁴⁰ and during the past ten years, it has been reiterated with increasing vigor.²⁴¹

It is clear that under any of the Supreme Court tests, immunity from punishment extends not only to peaceful criticism of our laws but also to the advocacy, no matter how radical, of change by legal processes of our basic institutional structures.²⁴² On the other hand, freedom of speech has never been absolute, and advocacy of action may be punished although no harmful result is actually produced.²⁴³

However, the clear and present danger rule "forbids the punishment of words merely for their injurious *tendencies*,"²⁴⁴ and rather demands *imminent danger* that such utterances will produce a harmful effect.²⁴⁵ It is a sense of the importance of free speech²⁴⁶ rather than a formula that determines, and those who desire their constitutional standards capsuled will search, especially in this field, in vain.

As in the due process and equal protection clauses, the test first used to determine the validity of legislation which infringed upon the First Amendment was whether the statute was arbitrary or an unreasonable exercise of police power.²⁴⁷ But today it seems clear that the normal presumption of constitutionality will not be given to a statute which

²⁴⁰ Herndon v. Lowrey, 301 U. S. 242, 57 Sup. Ct. 732 (1937).

²⁴¹ E.g., Pennekamp v. Florida, 328 U. S. 331, 66 Sup. Ct. 1029 (1946); Thomas v. Collins, 323 U. S. 516, 65 Sup. Ct. 315 (1944); Bridges v. California, 314 U. S. 252, 62 Sup. Ct. 190 (1941); Thornhill v. Alabama, 310 U. S. 88, 60 Sup. Ct. 736 (1940). *But cf.* Hoar, *Subversive Activities Against Government—Two Conflicting Doctrines*, 27 MARQ. L. REV. 72 (1943).

²⁴² E.g., Stromberg v. California, 283 U. S. 359, 51 Sup. Ct. 32 (1931); Fiske v. Kansas, 274 U. S. 380, 47 Sup. Ct. 655 (1927).

²⁴³ "This extreme view was rejected even by CHAFEE, FREEDOM OF SPEECH IN WAR TIME (1920) 7." Fraenkel, *One Hundred and Fifty Years of the Bill of Rights*, 23 MINN. L. REV. 719 (1939).

²⁴⁴ CHAFEE, FREE SPEECH IN THE UNITED STATES 35 (1941). (Italics supplied.)

²⁴⁵ Bridges v. California, 314 U. S. 252, 263, 62 Sup. Ct. 190, 194 (1941); see Mr. Justice Brandeis dissenting in Gitlow v. New York, 268 U. S. 652, 672, 45 Sup. Ct. 625, 632 (1925); see Mr. Justice Holmes, dissenting in Abrams v. United States, 250 U. S. 616, 630, 40 Sup. Ct. 17, 22 (1919).

²⁴⁶ "Years ago, Mr. Justice Holmes remarked something to the effect that law is a prophecy of what courts will do in fact. Federal constitutional law depends upon what five Justices of the United States Supreme Court will in fact do." Letter of Prof. Thomas Reed Powell, *Hearings before the Subcommittee on Legislation of the Committee on Un-American Activities on H. R. 4422 and H. R. 4581*, 80th Cong., 2d Sess. 493, 494 (1948). Although it is true that decisions concerning the protection afforded by the Bill of Rights will vary with the times and with the individuals who write the opinions, this extreme statement is in our opinion erroneous, and is rather cynical for a man who has ably devoted most of his life to teaching what these Justices "will in fact do."

²⁴⁷ Whitney v. California, 274 U. S. 357, 47 Sup. Ct. 641 (1927); Gitlow v. New York, 268 U. S. 652, 45 Sup. Ct. 625 (1925). Even Mr. Justice Brandeis states in his concurring opinion in the *Whitney* case, "The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the State, creates merely a rebuttable presumption that these conditions have been satisfied." *Id.* at 379, 47 Sup. Ct. at 649. This, although a shift from mere reasonableness to a clear and present danger test, still leaves the risk of non-production of evidence on the defendant.

limits the guarantees of the First Amendment. On the contrary, such legislation will be presumed to be unconstitutional.²⁴⁸ This presumption of unconstitutionality can only be rebutted by proving to the Court's conviction that there is a clear and present danger which justifies the statute.²⁴⁹

Moreover, even if it is proved that there is a clear and present danger that the prohibited speech will bring about an evil that Congress has a right to prevent, "the evil itself must be substantial; it must be serious."²⁵⁰ The Court stated in *Bridges v. California*²⁵¹ that "even the expression of legislative preferences or beliefs cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty and expression."²⁵² This condition will probably raise a constitutional question concerning other objectives²⁵³ of the Mundt-Nixon Bill, once they are held on their face to infringe on the First Amendment. However, the crux of § 4 is to protect against the establishment in this country of a totalitarian dictatorship under foreign control—a sufficiently serious evil to meet this test.

It is only when the degree of imminence is extremely high and the substantive evil very serious, that the importance to be placed on the social interest of public safety outweighs the social interest in the unimpaired search for truth.

It must be borne in mind that the past cases

“. . . do not purport to mark the furthestmost constitutional boundaries of protected expression. . . . They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging

²⁴⁸ "The presumption rather is against the legislative intrusion into these domains." *United States v. C.I.O.*, 335 U. S. 106, 68 Sup. Ct. 1349 (1948); *Thomas v. Collins*, 323 U. S. 516, 65 Sup. Ct. 315 (1945); see Cushman, *Ten Years of the Supreme Court: 1937-1947, Civil Liberties*, 42 Am. Pol. Sci. Rev. 42, 43 (1948).

²⁴⁹ "Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending." *Thomas v. Collins*, 323 U. S. 516, 530, 65 Sup. Ct. 315, 323 (1945).

²⁵⁰ Mr. Justice Brandeis, concurring in *Whitney v. California*, 274 U. S. 357, 374, 376, 47 Sup. Ct. 641, 647, 648 (1927); *Bridges v. California*, 314 U. S. 252, 262, 62 Sup. Ct. 190, 193 (1941); *Thornhill v. Alabama*, 310 U. S. 88, 60 Sup. Ct. 736 (1940).

²⁵¹ 314 U. S. 256, 62 Sup. Ct. 191 (1941).

²⁵² *Id.* at 263, 62 Sup. Ct. at 194. Although the evidence gathered by Congress will be given weight in determining whether a clear and present danger exists, the legislative fiat, in § 2 (11), that a clear and present danger exists, in itself, will be given little if any weight. See letter of Prof. Thomas Reed Powell, *Hearings before the Subcommittee on Legislation of the Committee on Un-American Activities on H. R. 4422 and H. R. 4581*, 80th Cong., 2d Sess. 493-95 (1948).

²⁵³ The evil of non-disclosure in communist propaganda and the techniques of communist front organizations might not be considered serious enough to justify an infringement upon free speech if it were found to exist.

the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."²⁵⁴

Thus, it would seem that speech which advocates the setting up in this country of a totalitarian government under foreign control would be prohibited only if such advocacy presented an imminent danger of the setting up of such a government. To state the test as applied to § 4 is to show that it is not met, for obviously at present there is no such clear and present danger.²⁵⁵ Moreover, when in *any* of the legislative provisions discussed in this article, the court finds a limitation placed on the guarantees of the First Amendment, such a provision will be invalidated, for a clear and present danger must be proved.

Activity, outside the guarantees of the First Amendment, which attempts to establish or aid in bringing about under foreign control a totalitarian government in the United States can constitutionally be prohibited by § 4(a) (1) and (2). In a few sporadic instances proof beyond a reasonable doubt might be introduced under those subsections to connect an individual with a foreign principal and to show specific action attempting to bring about a totalitarian government. But existing legislation, which these subsections parallel, already covers such cases,²⁵⁶ and the failure of that legislation gave impetus to the Mundt-Nixon Bill.²⁵⁷

Cases may arise in which, although it may be proved that an individual's activity is directed toward the establishment of a totalitarian regime, it cannot be proved that he intends that regime to be controlled by a foreign principal. Under the Bill such intention probably may be shown by the fact of the individual's leadership or membership in the Communist Party. Probably existing legislation would more easily prohibit such activity than does this approach.²⁵⁸ Moreover, under this technique the Government would have to prove²⁵⁹ that the Communist

²⁵⁴ *Bridges v. California*, 314 U. S. 252, 263, 62 Sup. Ct. 190, 194 (1941).

²⁵⁵ "This measure was gone over time and time again by some of the best constitutional lawyers in America. There is no question as to its constitutionality." Rep. Rankin, 94 Cong. Rec. 6267 (May 19, 1948).

²⁵⁶ See note 275 *infra*.

²⁵⁷ E.g., Clark, *Hearings before the Subcommittee on Legislation of the Committee on Un-American Activities on H. R. 4422 and H. R. 4581*, 80th Cong., 2d Sess. 20, 21 (1948); H. R. REP. No. 1844, 80th Cong., 2d Sess. 3, 5 (1948); cf. Rep. Isacson, 94 Cong. Rec. 6021 (May 14, 1948).

²⁵⁸ THE SMITH ACT OF 1940, 54 STAT. 671 (1940), as amended, 18 U. S. C. § 2385 (Supp. 1948), prohibits activity which has as its purpose the violent overthrow of our government. For all practical purposes, today, this is the only way a communist dictatorship could be established in this country, and yet the Mundt-Nixon Bill goes farther and requires proof of foreign domination which will often be difficult to obtain.

²⁵⁹ If the organization of which the defendant was a member had been previously

Party was under foreign control or domination, and further, would have to impute this control or domination to the individual defendant²⁶⁰—a problem of guilt by association which will be discussed subsequently.

Often no proof of either specific acts indicating totalitarianism or foreign control thereof will be present. However, prosecution against communist leaders could still be instituted under subsections (3) and (4), which utilize guilt by association principles, by showing that the Communist Party attempts to set up a totalitarian government in this country under foreign control. A similar attempt could be made against an ordinary Party member under the dragnet of § 4 (5), which makes it unlawful to *conspire* to do anything prohibited by the preceding four subsections.

Where specific acts are lacking, there is the necessity of proving that an objective of the Communist Party is the establishment of a totalitarian dictatorship under foreign control or domination. The second hurdle is judicial reaction to the technique of guilt by association.

The crime of conspiracy has always been considered a dangerous instrument, and it is not found, nor even understood, in many foreign systems of jurisprudence.²⁶¹ Until fairly recently, even in this country, there was little recognition of its fruit, guilt by association.²⁶² Although the *Whitney* case²⁶³ implied that perhaps membership alone might be sufficient, this substitute for proof of individual guilt has met with considerable judicial attack in the past ten years.²⁶⁴ The most famous of these condemnations was in *Schneiderman v. United States*²⁶⁵ where the Court stated, “. . . under our traditions, beliefs are personal and not a matter of mere association . . . Men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all its platforms or asserted principles.”²⁶⁶ Even though this statement

determined to be a communist political organization, the determination would mean, under § 3, that it was an organization under foreign control, but not that it attempted to establish a dictatorship in this country. It is dubious, however, whether such a prior determination could be introduced as determinative of such a fact in the individual's trial as it is hearsay opinion, although the determination might be introduced as evidence together with the reported testimony taken therein if sufficient privacy were found between member and organization.

²⁶⁰ Cf. MUNDT-NIXON BILL § 2 (9).

²⁶¹ O'Brian, *Loyalty Tests and Guilt by Association*, 61 HARV. L. REV. 592, 599-601 (1948); Mr. Justice Jackson, LXX REP. N. Y. STATE BAR ASS'N 154 (1947).

²⁶² O'Brian, *Loyalty Tests and Guilt by Association*, 61 HARV. L. REV. 592, 602 (1948).

²⁶³ *Whitney v. California*, 274 U. S. 357, 47 Sup. Ct. 641 (1927).

²⁶⁴ *Knauer v. United States*, 328 U. S. 654, 669, 66 Sup. Ct. 1304, 1312 (1946); *Schneiderman v. United States*, 320 U. S. 118, 136, 154, 63 Sup. Ct. 1333, 1342, 1350 (1943); *Herndon v. Lowrey*, 301 U. S. 242, 258, 57 Sup. Ct. 732, 739 (1937); cf. *Bridges v. Wixon*, 326 U. S. 135, 148, 65 Sup. Ct. 1443, 1449 (1944).

²⁶⁵ 320 U. S. 118, 63 Sup. Ct. 1333 (1943).

²⁶⁶ *Id.* at 136, 63 Sup. Ct. at 1343.

may not be as true of the closely knit and cohesive Communist Party²⁶⁷ as of other political groups, a few are probably not cognizant that they are considered members. Further, some members are illiterate, others believe that the Party has sincerely repudiated violence, and still others, while cognizant of its aims, may abhor force or foreign domination but believe in the Party's social and economic reforms.²⁶⁸ In any case, it seems fairly clear that the Supreme Court will strike down a conviction substantially based on guilt by association rather than on individually incriminating evidence; this would render useless § 4 (1) and (2), and the Court probably would construe "conspiracy" in § 4 (5) as requiring the defendant's knowledge of the purpose for which such concerted action was entered into.

Subsections (3) and (4) raise a more serious question, for they make unlawful active participation in the supervision of any movement to establish foreign-controlled domestic dictatorship. The Supreme Court, in the *Schneiderman* case, rejected the Government's argument that because Schneiderman was not a mere "rank and file or accidental member of the Party" but a person who "became a leader of these organizations as an intellectual revolutionary,"²⁶⁹ the imputation of guilt was proper there. But in that case only a method of proof was condemned,²⁷⁰ not a statute which made such active participation a crime. Although one member of the Supreme Court has shown a willingness to consider guilt by association itself unconstitutional,²⁷¹ it is probable that if an organization is engaged in unlawful activity, criminal sanctions could be placed on its active participants.²⁷²

On its face § 4 covers not only acts of espionage, sabotage, and attempts to usurp the state police power,²⁷³ but also covers speech, press,

²⁶⁷ Timasheff, *The Schneiderman Case—Its Political Aspects*, 12 *FORD. L. REV.* 209, 228-30 (1943).

²⁶⁸ *Cf.* CHAFEE, *FREE SPEECH IN THE UNITED STATES* 474-482 (1941).

²⁶⁹ *Schneiderman v. United States*, 320 U. S. 118, 147, 63 *SUP. CT.* 1333, 1347 (1943). It is interesting to note that the Government admitted in this case that "It is normally true . . . that it is unsound to impute to an organization the views expressed in the writings of all its members, or to impute such writing to each member." *Id.* at 147, 63 *SUP. CT.* at 1347.

²⁷⁰ There was no statute making membership a crime, membership being used only to prove the defendant's fraudulent state of mind at the time of naturalization.

²⁷¹ "The doctrine of personal guilt is one of the most fundamental principles of our jurisprudence. It partakes of the very essence of the concept of freedom and due process of law. It prevents the persecution of the innocent for the beliefs and actions of others. . . . This fact alone is enough to invalidate the legislation." Mr. Justice Murphy, concurring in *Bridges v. Wixon*, 326 U. S. 135, 163, 65 *SUP. CT.* 1443, 1456 (1944).

²⁷² For often this will be the most effective method of requiring an organization or a corporation to comply with the statutory mandates.

²⁷³ A majority of the lower courts, before the *Schneiderman* case, held that membership in the Communist Party is equivalent to support of force and violence. See cases cited in 6 *INT. JURID. ASS'N BULL.* 135 (1935); 48 *YALE L. J.* 111 (1938). "The *Schneiderman*

assembly, contributions and membership. As certain activity in that section has been previously shown to be clearly protected by the First Amendment, the whole section may be declared unconstitutional under the rationale of *Thornhill v. Alabama*.²⁷⁴ Since § 4 is not "narrowly drawn to cover the precise situation giving rise to the danger,"²⁷⁵ its broad application to all conduct acts as a deterrent to constitutionally protected activity. Thus, subsections (2) and (4) on their face apply to advocacy by an individual or by an organization of which he is an active manager, because although such advocacy need not, by these subsections present an imminent danger, that advocacy may aid or facilitate the future establishment in this country of a foreign-dominated totalitarian government. And under subsection (3) the movement to establish such a dictatorship would include on its face those organizations using only the guaranteed rights of the First Amendment. This would also seem true of subsection (1) which prohibits an individual from attempting *in any manner* to establish a foreign police state. Courts may save these subsections by narrowly construing their intended application. A statute which infringes free speech is presumed to be unconstitutional, but there is also a presumption that the legislature did not intend to infringe upon that freedom.²⁷⁶ The section would still have some *in terrorem* effect, but such a construction would probably make it useless for criminal prosecutions.

Outside of problems arising under the First Amendment, another serious constitutional challenge to this section, and especially subsection (1), is the due process clause of the Fifth Amendment. Such phrases as "in any manner,"²⁷⁷ "to facilitate or aid," or "actively to participate in" may not be definite enough to withstand the previously discussed²⁷⁸ due process attack on the basis of vagueness in a criminal statute pertaining to civil liberties.

Some persons have also condemned § 4 as a legislative substitute

case came out in 1943 at a time when we were an ally of the Soviet Union." Rep. Cox, quoting Mr. Donald Richberg, 94 Cong. Rec. 6016 (May 14, 1948). But the difficulty that the Attorney General has found in proving communist belief in force and violence, and the subsequent decisions which have also condemned guilt by association, indicate that the decision is much more than a product of judicial notice of war time alliance with Russia.

²⁷⁴ 310 U. S. 88, 60 Sup. Ct. 736 (1940). See Note, *Inseparability in Application of Statutes Impairing Civil Liberties*, 61 HARV. L. REV. 1208 (1948).

²⁷⁵ Mr. Justice Rutledge, concurring in *United States v. C.I.O.*, 335 U. S. 106, 129, 68 Sup. Ct. 1349, 1367 (1948).

²⁷⁶ *United States v. C.I.O.*, 335 U. S. 106, 129, 68 Sup. Ct. 1349, 1367 (1948); see *State v. Cox*, 91 N. H. 137, 142, 16 A. 2d 508, 512 (1940), *aff'd sub nom. Cox v. New Hampshire*, 312 U. S. 569, 61 Sup. Ct. 762 (1941).

²⁷⁷ Rep. Hollifield, 94 Cong. Rec. 6018 (May 14, 1948); Rep. Coudert, 94 Cong. Rec. 6186 (May 18, 1948).

²⁷⁸ See notes 228-30 *supra*.

for the constitutional definition of treason.²⁷⁹ For whether or not Congress labels as treason a crime which contains the constituent elements of the constitutional definition of treason,²⁸⁰ the statute would still be invalid.²⁸¹ Although an argument can be made for the protection of peaceful political activity by the treason clause, there is no evidence that the definition in the Constitution was intended to exclude from legislative consideration any subversive crimes except the levying of war and adherence to enemies. In fact, almost all the available historical data on the purpose of the treason clause points the other way.²⁸²

The draftsmanship of § 4 is both vague and extensive. The *mala fide* intent which it is necessary to prove in subsection (2) makes that subsection almost completely ineffective. The distinction between subsection (3) and (4) is that in the former, active supervision of a movement to establish a foreign dictatorship is required, while the latter condemns such participation in a movement *to facilitate or aid* such establishment. The intent is probably to include communist political leaders in (3), while including communist front leaders in (4); but the line between these two subsections is at best vague. If such leaders are included in (3) or (4), it is difficult to perceive the value of subsection (1), unless such attempts by non-leaders can be proved. This is a doubtful possibility in light of the failure of past legislation. Subsection (5), which prohibits a conspiracy to do anything made unlawful by the preceding subsections, could conceivably include all members of communist or front organizations as co-conspirators of the violators of these subsections.

Recommendations:

Delete § 4 from the Mundt-Nixon Bill.

Section 10²⁸³ of the Mundt-Nixon Bill makes it unlawful for any person to become or to remain a member of any organization one hundred and twenty days after there is in effect a final order of the Attorney General requiring such organization to register as a communist political

²⁷⁹ Rep. Javits, 94 Cong. Rec. 6011 (May 14, 1948); Rep. Holifield, 94 Cong. Rec. 6019 (May 14, 1948).

²⁸⁰ For a discussion on the interpretation of Art. 3, § 3, see 19 TEMP. L. Q. 306 (1946); 20 TEMP. L. Q. 475 (1947).

²⁸¹ Hurst, *Treason in the United States*, 58 HARV. L. REV. 395, 418-423 (1945).

²⁸² *Id.* at 425-28. "Crimes so atrocious as those which have for their object the subversion by violence of those laws and those institutions which have been ordained in order to secure the peace and happiness of society, are not to escape punishment because they have not ripened into treason." Chief Justice Marshall in *Ex parte Bollman*, 4 Cranch 75, 126 (U. S. 1807).

²⁸³ This section was changed during House debate and constitutes a considerable improvement over the original version.

organization, and such organization has not so registered. Little constitutional objection can be made to this provision, since it merely prohibits a person's association with an organization which has disobeyed and is criminally disobeying the law. However, although this section may insure registration by its sweeping sanctions, it should be omitted. First, the section effectively outlaws the party and makes possible the mass prosecution of over 75,000 persons for their political and social convictions. Members will probably have little to say about whether the organization should register or not. That decision will probably be made by the officers of the Communist Party. Secondly, adequate enforcement of registration is provided by § 15 (a) where failure to register is a recurring offense against both the organization and its officers. This sanction is effective—the criminal penalty against the officers is imprisonment from two to five years and this penalty is cumulative. It is difficult to see how an active organization can refuse to register under such sanctions, for without officers, or those having the normal functions of officers, it cannot exist. Lastly, the section as now drawn would make persons criminally liable who are not cognizant of the fact that they are considered members or that the organization has failed to register.

Recommendations:

Delete § 10 from the Mundt-Nixon Bill.

Miscellaneous

Some have taken the extreme position that the Communist Party should be prohibited from a place on the ballot and that its members should be barred from seeking elective office.²⁸⁴ Although not a part of the Mundt-Nixon Bill, several legislative proposals have included such a prohibition.²⁸⁵

The improbability of the communists' gaining public position through the ballot, the disclosure of communist numerical strength afforded by allowing its leaders to run for public office, and the dangerous precedent that such curtailment would establish,²⁸⁶ weigh heavily against such

²⁸⁴ *E.g.*, N. Y. Times, Jan. 21, 1948, p. 16, col. 3; *Tolerance*, Sat. Eve. Post, Dec. 9, 1939, p. 24, col. 1; *cf.* N. Y. Times, Jan 30, 1948, p. 6, col. 3.

For a discussion of state statutes see Grover, *State Control of Subversive Activity in the United States*, 9 FED. B. J. 61 (1947). For legal obstacles to minority parties see Note, 51 YALE L. J. 1276 (1948).

²⁸⁵ *E.g.*, H. R. 5615, 80th Cong. 2d Sess. (February 16, 1948); H. R. 4482, 80th Cong., 1st Sess. (November 17, 1947); H. R. 5403, 80th Cong., 2d Sess. (February 16, 1948).

²⁸⁶ "If at the moment when communism is most disliked, most unbeliev'd in, most dis-trusted, you say that American communists may not run a candidate in an election, you are not doing much, if anything to destroy communism, but you are doing quite a bit

legislation. The democratic process should not offer its elective machinery only to those who believe in the maintenance of that process.²⁸⁷

Moreover, constitutional limitations would raise a serious hurdle to such legislation. Congressional action would have to be limited to federal elections, as the federal Government has no power to prescribe qualifications of electors to state offices.²⁸⁸ Under Art. 1, § 4 of the Constitution, Congress could probably place limitations on the election of national legislators,²⁸⁹ but the limitation would likely be subject to the requirement of reasonable classification under the due process clause.²⁹⁰ Furthermore, to justify legislation which is a serious indirect encroachment upon freedom of speech and association, a showing of a clear and present danger would be required.²⁹¹

A technique long favored by those in power is the simple yet drastic step of denying the privileges of domicile or citizenship to those deemed inimical to the interests of the state.²⁹² No power could be more complete; none could be more susceptible of abuse.

The technique's four principal ramifications: exclusion, deportation, denaturalization, and deprivation of native born citizenship, all could be used to curb individual freedom of expression; but the first seems conceded within Congress's complete discretion.²⁹³ Though deportation statutes which tend to infringe civil rights have recently been considered by some to be protected by most of the constitutional standards applicable to civil liberties statutes,²⁹⁴ deportation has traditionally been

to destroy the American tradition that any little boy can become President." Paulding, *100,000 Communists*, Commonweal, April 11, 1947, p. 631; cf. 54 HARV. L. REV. 155, 157 (1940).

²⁸⁷ See Note, 96 U. OF PA. L. REV. 381, 390-91 (1948).

²⁸⁸ Lackey v. United States, 107 Fed. 114 (C. C. A. 6th 1901); Note, 96 U. OF PA. L. REV. 381, 390 (1948).

²⁸⁹ U. S. CONST. Art. 1, § 4 provides that "The Times, Places and Manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations. . . ." It seems probable that the word "Manner" would be interpreted to include the parties and persons which may appear on the election ballot. See Note, 37 COL. L. REV. 86, 88 (1937).

²⁹⁰ See Note, 37 COL. L. REV. 86, 89 (1937). The limitations placed on Congress by the Fifth Amendment would probably be the same as the protection against state action afforded by the Fourteenth Amendment.

²⁹¹ See Note, *Conduct Proscribed as Promoting Violent Overthrow of the Government*, 61 HARV. L. REV. 1215 (1948); cf. 54 HARV. L. REV. 155 (1940).

²⁹² The technique can be traced back to the Greeks and the Romans. CLEVELAND, AMERICAN CITIZENSHIP 90-93 (1927).

²⁹³ See Mr. Justice Murphy, concurring in *Bridges v. Wixon*, 326 U. S. 135, 161, 65 Sup. Ct. 1443, 1455 (1945); CHAFFEE, FREEDOM OF SPEECH 202 (1920).

²⁹⁴ See Mr. Justice Murphy, concurring in *Bridges v. Wixon*, 326 U. S. 135, 161-66, 65 Sup. Ct. 1443, 1455-58 (1945); 1 WILLOUGHBY, CONSTITUTIONAL LAW 325 (1929). This would seem a foreseeable result in light of the Court's present paternalism towards civil liberties.

deemed within the orbit of congressional discretion.²⁹⁵ With the advent of denaturalization proceedings for political beliefs, constitutional safeguards were sought to prevent the creation of two classes of citizens "one free and independent, one haltered with a lifetime string tied to its status."²⁹⁶ And it would seem that a statute which attempted to denaturalize citizens because of political beliefs or associations would be invalid unless supported by a clear and present danger.²⁹⁷

Section 5 (a) of the Mundt-Nixon Bill transcends all past attempts by using the fourth facet in providing that *any* person shall lose his citizenship²⁹⁸ upon conviction of a violation of § 4. Since we believe § 4 is unconstitutional, § 5 seemingly would fall with it. Even by itself, § 5 may be unconstitutional for in a case regarding a naturalized citizen, the Court said that the power vested in Congress "is a power to confer citizenship, not a power to take it away."²⁹⁹ And citizenship of the native born has always been regarded as more sacrosanct.³⁰⁰ Though the abolition of a double standard of citizenship may be a laudable objective, constitutional hurdles might preclude its accomplishment when it is done by means of making neither class safe.

Conclusion

Because expediency required isolated treatment of legislative methods, the additional constitutional problem of the cumulative impact that these provisions have on civil liberties has been masked. Provisions forbidding communist travel abroad, prohibiting their being federally employed, compelling labeling of their propaganda, etc., may separately be able to withstand constitutional attack. But when one of these provisions is challenged, the court may well consider, expressly or impliedly, the narrowing area of free expression left to the communists by the

²⁹⁵ The theory advanced by the court is that deportation is neither punishment nor a deprivation of liberty and thus the due process and *ex post facto* clauses are inapplicable. *Bigajewitz v. Adams*, 228 U. S. 585, 591, 33 Sup. Ct. 607, 608 (1923); *Wang Wing v. United States*, 163 U. S. 228, 16 Sup. Ct. 977 (1896). But in fact, as was pointed out by Mr. Justice Brandeis, deportation may be a deprivation "of all that makes life worth living." *Ng Fung Ho v. White*, 259 U. S. 276, 284, 42 Sup. Ct. 492, 495 (1922).

²⁹⁶ See Mr. Justice Rutledge, concurring in *Schneiderman v. United States*, 320 U. S. 118, 167, 63 Sup. Ct. 1333, 1356 (1943); Note, 51 *YALE L. J.* 1215 (1942).

²⁹⁷ See Note, 51 *YALE L. J.* 1215 (1942); Balsch, *Denaturalization Based on Disloyalty and Disbelief in Constitutional Principles*, 29 *MINN. L. REV.* 405 (1945). But cf. Hefferman, *Communism, Constitutionalism, and the Principles of Contradiction*, 32 *GEO. L. J.* 405 (1944).

²⁹⁸ See HUTCHINSON, *INTRODUCTION TO THE LAW OF AMERICAN CITIZENSHIP* 138 (1939); ROTTSCHAEFER, *CONSTITUTIONAL LAW* 377 (1939). The Nationality Act of 1940 currently lists ten means by which American citizenship can be lost. 54 *STAT.* 1168 (1940), as amended, 58 *STAT.* 4 (1944), 8 U. S. C. § 801 (1946).

²⁹⁹ *United States v. Wong Kim Ark*, 169 U. S. 649, 18 Sup. Ct. 456 (1898).

³⁰⁰ Such a deprivation has been considered "an unknown thing in reference to [American] citizens." CLEVELAND, *AMERICAN CITIZENSHIP* 92 (1927).

whole Bill. If such a judicial approach were taken, the validity of any of the legislative objectives would have to rest on the justification and the proof that the American communists represent a clear and present danger.

Yet the Constitution need not bar all effective measures against communism. A great deal may be accomplished by publicity. What is needed is not a witch hunt,³⁰¹ but rather an intelligent factual presentation of the Russian way of life or proof of actual subversive activity by American communists.³⁰² An American "Canadian Report" would be an effective tool in combatting communism, and would not present the dangers inherent in our present technique of publicity—guilt by indictment and subpoena.³⁰³

Certain legislation could effectively be coupled with such publicity. Despite some criticism that the Mundt-Nixon Bill is aimed at all liberals, were it narrowly drawn, it might well act as a sufficient prophylactic against communism. But such anti-communist techniques are purely negative. Any measure to be effective must enhance our democracy. Communists nourish on poverty, inequality, and other maladjustments of society³⁰⁴—to deal with communism effectively we must attempt to explore and grapple with the political and economic dynamics from which it arises.³⁰⁵ We do not know whether the solution will require that the fulcrum of the American political scene shift to the left. But we agree with Mrs. Eleanor Roosevelt,

"that it has been proved through the years that democracy is able to give a better standard of life to the people as a whole. The only way to convince the communists, however, is to progress under our democratic form of government and, year by year, give our people more of the things which make life worth living. If we do this, Communism can never be a menace to us."³⁰⁶

³⁰¹ Russell, *How to Stop Communism*, Vital Speeches, Sept. 1, 1938, p. 698; cf. *Red Hunt*, Colliers, Jan. 18, 1947, p. 78.

³⁰² E.g., Americans for Democratic Action, N. Y. Times, Feb. 25, 1948, p. 14, col. 5. Mr. John Foster Dulles has suggested that a federal agency, with cabinet status, be set up to expose the aims, activities, and connections of domestic communists. N. Y. Times, May 7, 1948, p. 6, col. 3.

³⁰³ The present technique of the House Un-American Activities Committee, although it may uncover some communist affiliations, is a dangerous weapon of publicity. With the aid of the press, and the sanctity of congressional hearings, an individual's accusations become tantamount to a judicial conviction of disloyalty.

³⁰⁴ Rep. Kelley, 94 Cong. Rec. 6268 (May 19, 1948); Rep. Buchanan, 94 Cong. Rec. 5998 (May 14, 1948); Sen. Lodge, Time, April 26, 1948, p. 20; Att'y Gen. Clark, quoted in Patch, *Communism in America*, Editorial Research Reports, Nov. 13, 1946, p. 788.

³⁰⁵ E.g., Pres. Truman, N. Y. Times, June 5, 1948, p. 1, col. 1; Justice Wm. Douglas, N. Y. Times, May 25, 1948, p. 25, col. 1; Rep. Lynch, 94 Cong. Rec. 6000 (May 14, 1948); 94 Cong. Rec. 6013 (May 14, 1948).

³⁰⁶ See her daily newspaper column on Oct. 7, 1946.