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COMMENTS

CONSTITUTIONAL LAW—FEDERAL ANTI-SUBVERSIVE LEGISLATION —THE COMMUNIST CONTROL ACT OF 1954—On August 24, 1954, President Eisenhower signed into law the Communist Control Act of

1954.[1] By so doing he brought to a close the tempestuous history of a unique piece of federal anti-subversive legislation. It is not overstating the case to say of it that "this is a most unusual bill—brought up in a most unusual manner. . . . It is replete with and bristles with Constitutional questions."[2] This comment is intended as a preliminary step in an analysis of the legislative history of the act and a consideration of both its potential effectiveness and constitutional validity.

I. *The Legislative History*

In analyzing the Communist Control Act, it would appear necessary to precede substantive consideration with a brief survey of how the act came into being. For if it is unique in any respect, the act is so in that its final form is meaningless unless it is seen as the product of intense political maneuvering.[3]

One piece of anti-subversive legislation that had the backing of the Eisenhower Administration was the Butler-Velde bill[4] to amend the Internal Security Act of 1950[5] to provide for sanctions against Communist-infiltrated organizations. While it was under debate on the Senate floor on August 12, 1954, Senator Hubert Humphrey introduced a substitute bill which provided that knowing and willful membership in the Communist Party could be punished by five years imprisonment or a $10,000 fine or both.[6] Though he and his co-sponsors asserted that the motive behind this move was to "get at the root of the evil of Communism,"[7] it has also been suggested that they were

[1] 68 Stat. L. 775 (1954), 50 U.S.C.A. (Cum. Supp. 1954) §§841-844.

[2] Congressman Celler on the House floor, 100 CONG. REC. 14643 (1954). See also the remarks of Senator Morse, 100 CONG. REC. 15115 (1954).

[3] For critical comment on the political aspects of the act's history, see 64 TIME, Aug. 30, 1954, p. 8; N.Y. TIMES, Aug. 19, 1954, p. 22:2; Aug. 21, 1954, p. 6:2 and 16:2.

[4] S. 3706 and H.R. 9838, 83d Cong., 2d sess. (1954). See S. Rep. 1709 and H. Rep. 2651, 83d Cong., 2d sess. (1954). For some of the interesting history of the House bill, see part II of the last-cited report and the interchange between Congressmen Walter and Velde, 100 CONG. REC. 14642, 14659 (1954).

[5] 64 Stat. L. 987 (1950), 50 U.S.C. (1952) §§781-826. For the purposes of this comment the relevant portion of the Internal Security Act is Title I, entitled the Subversive Activities Control Act of 1950.

[6] 100 CONG. REC. 14208 (1954); N.Y. TIMES, Aug. 13, 1954, p. 1:8. It is reported that the Humphrey substitute was written between midnight and 1 A.M. on the same day. N.Y. TIMES, Aug. 14, 1954, p. 1:6 at 5:2. Senator Humphrey claims it was drafted the previous day. Transcript of Address by Senator Humphrey to the American Political Science Association, Sept. 10, 1954, p. 4 (supplied to the writer through the courtesy of Senator Humphrey and hereinafter cited as Humphrey address).

[7] See the numerous remarks of Senators Humphrey, Morse, Mansfield, and others, during the first debate, 100 CONG. REC. 14208-14234 (1954).

equally, if not more, interested in making a dramatic political gesture[8] and perhaps killing the Butler-Velde bill in addition.[9] If this last consideration was at all relevant, the sponsors were disappointed; during the chaotic debate on the Humphrey substitute a bill substantially the same as the Butler-Velde one was added onto it.[10] Together the measures passed by an 85-0 vote.[11]

The Administration was opposed to any measure providing criminal penalties for membership in the Communist Party[12] but it succeeded in marshalling its forces against the Humphrey move only over the August 13-15 weekend.[13] Under a suspension of the rules in the House, Congressman Graham led this move by introducing an Administration compromise proposal as a substitute for the Humphrey bill.[14] The central feature of the new bill was a section which provided, inter alia, that all rights, privileges and immunities granted to the Communist Party or its successors under any laws were terminated. This provision now comprises section 3 of the present act. The inspiration for the wording of the section apparently came from a portion of a bill[15] introduced earlier in the session by Congressman Dies and considered by a House subcommittee of which Congressman Graham was chairman.[16] Section 2 of the Dies bill terminated all

[8] 64 TIME, Aug. 30, 1954, p. 8; N.Y. TIMES, Aug. 21, 1954, p. 16:2. Some remarks by the bill's sponsors add weight to this thesis, e.g., statements by Senator Humphrey, 100 CONG. REC. 14210 (1954) and Senator Morse, 100 CONG. REC. 15116 (1954); Humphrey address, note 6 supra, at 4, 7.

[9] 131 NEW REPUBLIC, Aug. 30, 1954, p. 8; Statement by Senator Butler, 100 CONG. REC. 14211 (1954). See Humphrey address, note 6 supra, at 4.

[10] 100 CONG. REC. 14211-14215 (1954). These provisions remained a part of the bill throughout the legislative history and presently compose §§6-12 of the Communist Control Act. A consideration of any legal problems raised by those sections is beyond the scope of this comment.

[11] 100 CONG. REC. 14234 (1954).

[12] Testimony of Attorney General Brownell in H. Hearings before Subcommittee No. 1 of the Committee on the Judiciary on H.R. 226 and other bills, 83d Cong., 2d sess., p. 133 et seq. (1954); Remarks of President Eisenhower reported in N.Y. TIMES, March 4, 1954, p. 12:6.

[13] N.Y. TIMES, Aug. 14, 1954, p. 1:6; Aug. 15, 1954, p. 1:3; Aug. 16, 1954, p. 1:6.

[14] 100 CONG. REC. 14639-14641 (1954). Administration officials worked closely with House Republicans in drafting this bill. Statement of Representative Halleck, 100 CONG. REC. 14658 (1954).

[15] H.R. 8912, 83d Cong., 2d sess. (1954). This bill and a predecessor [H.R. 7894, 83d Cong., 2d sess. (1954)] were written by Justice Michael A. Musmanno of the Pennsylvania Supreme Court. Statement by Congressman Dies, 100 CONG. REC. 14652 (1954). Each of the Dies bills inspired an imitation. See H.R. 8326 and H.R. 9502, 83d Cong., 2d sess. (1954).

[16] H. Hearings before Subcommittee No. 1 of the Committee on the Judiciary on H.R. 226 and other bills, 83d Cong., 2d sess. (1954). A recommendation during the hearings (at p. 366) that H.R. 8912 be approved was passed. (N.Y. TIMES, July 22, 1954, p. 1:2) but evidently the full committee did not follow up this action.

rights, privileges, etc., of Communist or Communist front organizations and declared them "illegal." Congressman Graham not only modified this section[17] but left out entirely section 3 of the Dies bill which set up penalties for individual membership in such organizations. He and other Administration leaders argued to the House that the provision terminating the rights and privileges of the Communist Party was truly "outlawing" it, whereas the Senate bill succeeded only in nullifying the registration provisions of the Internal Security Act.[18]

Despite criticism from the floor over the hasty and obscure conception of the Administration compromise, it was substituted for the Senate bill by a 305-2 vote.[19] Senate action on this substitute was predictable. No doubt observing that section 2 of the Dies bill had, in modified form, become section 3 of the House bill and that section 3 of the Dies bill, which provided penalties for membership, had been omitted, Senator Humphrey promptly moved to amend the House bill by adding a provision for such penalties.[20] This provision, stipulating the same penalties as his earlier bill, became section 4. Senator Humphrey also took another section from the Dies bill, one which provided evidentiary rules for determining membership, and submitted it as section 5.[21] The vote on these amendments was 41-41, but the Democratic leaders persuaded two of their number who had voted as opposed to withdraw those votes and announce themselves as paired with two absent supporters of the amendments.[22]

The package bill, now closely resembling the Dies bill, passed by an 81-1 vote[23] and was returned to the House where Congressman Dies found immediate support for a resolution instructing the House con-

[17] The significant changes were the dropping of any reference to "frontal" organizations and the elimination of the clause providing that all Communist organizations were "illegal."

[18] 100 CONG. REC. 14643, 14652, 14658 (1954). This point was often discussed during the history of the Communist Control Act. Of those strongly supporting a provision to make membership per se a crime, the realists were frank to admit that it would, by virtue of the privilege against self-incrimination of the Fifth Amendment, nullify the individual registration provision (§8) of the Internal Security Act. Statement by Congressman Dies, 100 CONG. REC. 14652 (1954); statements by Justice Musmanno in H. Hearings before Subcommittee No. 1 of the Committee on the Judiciary on H.R. 226 and other bills, 83d Cong., 2d sess., pp. 108, 254-255, 397 (1954).

[19] 100 CONG. REC. 14658-14659 (1954); N.Y. TIMES, Aug. 17, 1954, p. 1:1.

[20] 100 CONG. REC. 14721-14722 (1954).

[21] Section 4 of the Dies bill consisted of a fifteen point summary of evidence which a jury should be instructed to consider in determining whether or not the accused was a member of the Communist Party. In becoming §5 of the Communist Control Act the number of clauses was reduced to fourteen. See note 31 infra.

[22] Senators Kefauver and Lennon so changed their votes. 100 CONG. REC. 14726 (1954); N.Y. TIMES, Aug. 18, 1954, p. 1:8 at 12:4.

[23] 100 CONG. REC. 14729 (1954).

ferees to assent to the bill as it stood.[24] But in fact no formal meeting of the conferees ever seems to have taken place. Rather, the final change was wrought in a backstage compromise between all concerned.[25] The change made was in section 4, dealing with the penalties for individual membership in the Communist Party. Instead of concluding that anyone found to be knowingly such a member could be fined or imprisoned or both, the section now ends with the provision that they will be "subject to all the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a 'Communist-action' organization."[26] This conference change was swiftly approved, 265-2, by the House, with even Congressman Dies assenting to the final product.[27] After a more lengthy round of expressions of general dissatisfaction and confusion, the Senate followed suit by a 79-0 vote[28] and the bill soon became law, though accompanied by a none-too-enthusiastic presidential statement[29] and by reports that in the general confusion the Congress had never seen the final wording of the law it had passed.[30]

II. *Legal Problems in the Application of the Act*

Of the five sections of the critical part of the Communist Control Act, sections 3 and 4 seem the most worthy of analysis, both in regard to their application and to the constitutional issues they raise.[31]

A. *Section* 3. In final form, section 3 of the act provides:

> "The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose objective or purpose is to overthrow the Government of the United

[24] The vote, after only a short debate, was 208-100. 100 CONG. REC. 14851 (1954).

[25] N.Y. TIMES, Aug. 20, 1954, p. 1:8 at 6:6. The Attorney General, his Deputy, and Presidential Assistant Shanley seem to have been the prime movers for the Administration. Humphrey address, note 6 supra, at 4; N.Y. TIMES, Aug. 20, 1954, p. 18:5.

[26] A one-page conference report detailing this and one other minor change and containing a statement by the House managers was released. H. Rep. 2673, 83d Cong., 2d sess. (1954).

[27] 100 CONG. REC. 15236-15237 (1954). Congressman Dies appears not to have remained satisfied. In the present session of Congress he and Senator Margaret Smith have introduced identical bills to amend the Communist Control Act to make it read like the original Dies bill, H.R. 8912, 83d Cong., 2d sess. (1954). See H.R. 8 and S. 251, 84th Cong., 1st sess. (1955).

[28] 100 CONG. REC. 15101-15121 (1954).

[29] The text of President Eisenhower's statement upon signing the act is set out in N.Y. TIMES, Aug. 25, 1954, p. 16:3.

[30] N.Y. TIMES, Aug. 24, 1954, p. 15:2, 3; Aug. 27, 1954, p. 20:5.

[31] Of the remaining three sections, §1 is merely a title provision. Section 2 of the present act consists of a legislative finding of fact that the Communist Party is a criminal conspiracy and an agency of a hostile state seeking to overthrow the Government of the

> States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are hereby terminated."

It is followed by a proviso denying any construction of the section as amending the Internal Security Act of 1950.

This section has inspired much speculation as to its possible application. The only aid derived from the expressions of those responsible for the earlier Dies bill is largely negative; section 2 of that bill appears to have been planned more as an expression of policy than as a provision enforceable per se.[32] Nevertheless, it has been said that the

United States and that therefore it "should be outlawed." As to the weight accorded such findings, in the context of the Internal Security Act, see Galvan v. Press, 347 U.S. 522 at 529, 74 S.Ct. 737 (1954); Communist Party v. S.A.C.B., (D.C. Cir. 1954) Civil No. 11850, at p. 55; 51 COL. L. REV. 606 at 607-615 (1951). (Page citations to Communist Party v. S.A.C.B., supra, and in notes 53 and 62 infra, are to the printed opinion of the court supplied the writer by the Department of Justice. At this writing the official report had not appeared.) As to such findings in the legislative antecedents of the 1954 act, see the testimony of Attorney General Brownell in H. Hearings before Subcommittee No. 1 of the Committee on the Judiciary on H.R. 226 and other bills, 83d Cong., 2d sess., p. 139 (1954).

On §5 of the present act, see note 21 supra and the comments of Congressmen Walter and Dies, 100 CONG. REC. 14850 (1954). In reargument in Communist Party v. S.A.C.B., (D.C. Cir. 1954) Civil No. 11850, the Communist Party urged that §5 established "vague and irrational" criteria to decide who is a member for the purposes of the registration provisions of the 1950 act. Supplemental Brief for Petitioner, pp. 7-20. The court ignored this argument in the light of the government's clearly correct contention that these criteria are merely rules of evidence to be used, in possible future court action, to determine who is a member, and are not substantive definitions of membership in the Communist Party. Supplemental Reply Brief of the Respondent, pp. 2-4. But the matter is urged again by the party in its Petition for Certiorari before the Supreme Court, pp. 7, 57-58.

[32] In considering what Congressman Dies and Justice Musmanno meant to accomplish by the similar section of their earlier bill, one finds that statements on that point are conspicuously absent, save for that cited in note 33 infra. Probably the keenest observation on this matter was made by a witness for the Veterans of Foreign Wars: ". . . for the Congress by legislation to say that the Communist Party is unlawful is merely asserting a corollary to the declaration of illegality of membership." H. Hearings before Subcommittee No. 1 of the Committee on the Judiciary on H.R. 226 and other bills, 83d Cong., 2d sess., p. 186 (1954). Thus it may be concluded that the parent section to the present §3 was never thought of by its framers as having much independent force and effect. Rather, Congressman Dies stressed that the penalties provided for membership in the Communist Party constituted the real "enforcement provisions" of his original bill and that, lacking those, the Administration compromise bill led to a "ridiculous situation." 100 CONG. REC. 14652, 14850 (1954).

1954 act means that the Communist Party can no longer hold bank accounts, make leases, obtain judicial enforcement of contracts, sue or be sued in the courts, appeal adverse court rulings, conduct any business activity, or appear on any ballot.[33] Generally it is seen as a legislative denial that the Communist Party is a legal entity.

Some of these specific suggestions are too farfetched to deserve analysis. Others, though perhaps having some potential, seem hard to visualize in practical context. Perhaps the most challenging problem and the one having the strongest possibility of repeated judicial scrutiny is whether the act can deprive the Communist Party of a place on federal and state ballots. The language of the section and the expressed intent of Congress would, themselves, permit such a result. But can Congress constitutionally deny an organization the privilege of appearing on the ballot? The problem, of necessity, must be broken down into a consideration of (1) purely state elections, and (2) federal elections.

1. In *Salwen v. Rees*,[34] a New Jersey Communist attempted to run for a county office under the Communist Party label.[35] When the county clerk declined to place him on the ballot because of the Communist Control Act, he commenced suit. The Superior Court dismissed the action and the Supreme Court of New Jersey affirmed in a unanimous per curiam opinion which only set out the lower court opinion. The reasoning of the Superior Court judge is that the act is designed to keep the Communist Party off the ballot and that this goal may be given effect by state election machinery. Since the act is directed at the party, the individual candidate cannot ask that it be declared unconstitutional; he need only cease to offer himself to the

[33] These suggestions appear in N.Y. TIMES, Aug. 17, 1954, p. 1:1; Aug. 20, 1954, p. 1:8 at 6:5; Aug. 29, 1954, §4, p. 6:1 at 6:2, and in 131 NEW REPUBLIC, Aug. 30, 1954, p. 7; 91 AMERICA, Sept. 4, 1954, p. 532; statements by Congressman Celler, 100 CONG. REC. 14644 (1954), Senator Ferguson, 100 CONG. REC. 14719 (1954), and Senator Butler, 100 CONG. REC. 14713 (1954). Congressman Dies believed that his earlier bill would result in the party's being denied access to the ballots. H. Hearings before Subcommittee No. 1 of the Committee on the Judiciary, on H.R. 226 and other bills, 83d Cong., 2d sess., p. 22 (1954).

A perplexing factor is added by the clause at the end of the section. How does this affect "rights or privileges" (e.g., use of the mails) which are allowed to the party under the 1950 act if certain conditions are met (§10 of the Internal Security Act)? For the government's concession that, in such a case, §3 of the 1954 act would be inapplicable, see Supplemental Brief of Respondent, p. 42, in Communist Party v. S.A.C.B., (D.C. Cir. 1954) Civil No. 11850.

[34] 16 N.J. 216, 108 A. (2d) 265 (1954).

[35] Salwen wanted to run for freeholder of Mercer County. Another New Jersey Communist faced the same difficulties in Essex County. See Supplemental Brief of Petitioner, p. 3, n. 2, in Communist Party v. S.A.C.B., (D.C. Cir. 1954) Civil No. 11850; N.Y. TIMES, Oct. 3, 1954, §4, p. 10:6 at 10:8.

electorate under the Communist label to escape the act's effect. The opinion ends with the implication that congressional restrictions on access to public office are valid if they are necessary to effectuate "outlawry" of the party.

If the opinion rests dismissal on a party-in-interest basis, it is one thing. If, however, the case is intended to support substantive application of the act, it is to be regretted that the New Jersey courts did not address themselves to the question of the source of congressional power to regulate access to state ballots. This question arose several times in the legislative history of the act[36] but was never accorded authoritative discussion. What authority is present seems to indicate that the power of Congress to regulate in this respect is derived from and extends no further than the power to legislate for the effectuation of the Fifteenth Amendment.[37] During hearings on an earlier bill[38] to deny the Communist Party a place on state ballots, the attorney general's office wrote to the interested committee that such a bill would be "an attempt by the Federal Government to legislate . . . in a field for which no Federal authority exists."[39]

The only basis upon which it might be contended that such congressional power did exist would be that it was "necessary and proper"[40] to the effectuation of Congress's admitted power over national security. Thus, it may be argued, if Congress can legislate rules of evidence for state courts in the implementation of federal immunity statutes[41] or control the activities of federal officers at state elections by virtue of its plenary power over such officers,[42] it can keep subversive organizations off state ballots. It is conceivable that such an argument could overcome the rather old authority[43] on the limits of congressional power in this area.

[36] Statement of Senator Kefauver, 100 CONG. REC. 14720 (1954); statement of Senator Humphrey, 100 CONG. REC. 14722 (1954).

[37] United States v. Amsden, (D.C. Ind. 1881) 6 F. 819; Lackey v. United States, (6th Cir. 1901) 107 F. 114; Karem v. United States, (6th Cir. 1903) 121 F. 250. See United States v. Reese, 92 U.S. 214 (1875); James v. Bowman, 190 U.S. 127, 23 S.Ct. 678 (1903), and the concurring opinion of Hughes, J., in United States v. Munford, (C.C. Va. 1883) 16 F. 223 at 229. The Nineteenth Amendment confers upon Congress the same limited power.

[38] H.R. 4482, 80th Cong., 2d sess. (1947). Other recent bills having this same object include H.R. 9218, 81st Cong., 2d sess. (1950) and H.R. 425 and H.R. 1576, 83d Cong., 1st sess. (1953). Only the first-cited bill reached the hearing stage.

[39] A portion of the letter is set out in 34 VA. L. REV. 450 at 453 (1948).

[40] U.S. CONST., art. I, §8.

[41] Adams v. Maryland, 347 U.S. 179, 74 S.Ct. 442 (1954); 52 MICH. L. REV. 1240 (1954).

[42] United Public Workers v. Mitchell, 330 U.S. 75, 67 S.Ct. 556 (1947). See United States v. Wurzbach, 280 U.S. 396, 50 S.Ct. 167 (1930).

[43] Note 37 supra.

2. If the issue arises in the context of a federal election, the question would be posed in terms of the validity of congressional legislation which discriminates against the Communist Party. Congress has a general regulatory and supervisory power over the election of federal officers.[44] Any constitutional limitations on this power must be such as are subsumed under the vague contours of the due process clause of the Fifth Amendment. As that amendment does not contain any specific equal protection clause, the nearest that one can come to a definition of the limitation is that discriminatory federal legislation will be sustained only if there is a rational, and not arbitrary, basis for the classification.[45] Past Supreme Court decisions indicate that reasonable federal or state legislation aimed at Communists can pass this test.[46]

A correlative problem, arising largely out of an interpretation of section 3 which insists that the Communist Party is "outlawed," is that of a bill of attainder.[47] A bill of attainder is a legislative act which inflicts punishment without judicial trial.[48] The right to be free from attainder may, it clearly appears, be asserted by groups as well as by individuals.[49] There has, however, been a tendency in the past to

[44] Ex parte Siebold, 100 U.S. 371 (1879); United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031 (1941); United States v. Crosby, (C.C. S.C. 1871) 25 Fed. Cas. 701, No. 14,893; United States v. Munford, (C.C. Va. 1883) 16 F. 223. *Accord,* Murphy v. Ramsey, 114 U.S. 15, 5 S.Ct. 747 (1885). The source of the power is art. I, §4 and art. I, §8 (the "necessary and proper" clause). United States v. Classic, supra.

[45] Detroit Bank v. United States, 317 U.S. 329, 63 S.Ct. 297 (1943); Hirabayshi v. United States, 320 U.S. 81, 63 S.Ct. 1375 (1943); Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693 (1954); Bertelson v. Cooney, (5th Cir. 1954) 213 F. (2d) 275; Antieau, "Equal Protection Outside the Clause," 40 CALIF. L. REV. 362 (1952). It is not clear whether legislation depriving a party of a place on the ballot involves questions of First Amendment freedoms. For the view that it does not, see Field v. Hall, 201 Ark. 77, 143 S.W. (2d) 567 (1940).

[46] E.g., American Communications Association v. Douds, 339 U.S. 382, 70 S.Ct. 674 (1950) (Taft-Hartley Act non-Communist affidavit); Gerende v. Board of Supervisors, 341 U.S. 56, 71 S.Ct. 565 (1951) (state law requiring oath of candidates on state ballots). Query whether the legislative history of the Communist Control Act, detailed above, will have any bearing on whether the prescribed discrimination may be called reasonable.

For a discussion of state laws designed to keep the Communist Party off the ballot see 25 NOTRE DAME LAWYER 319 (1950). On the problem of federal-state relations in this area, see Hunt, "Federal Supremacy and State Anti-Subversive Legislation," 53 MICH. L. REV. 407 (1955); 66 HARV. L. REV. 327 (1952).

[47] U.S. CONST., art. I, §9 prohibits the Congress from passing a bill of attainder. This problem, too, arose several times during the act's legislative course, but was never accorded thorough discussion. H. Hearings before Subcommittee No. 1 of the Committee on the Judiciary on H.R. 226 and other bills, 83d Cong., 2d sess., pp. 198-199, 258-259 (1954).

[48] Cummings v. Missouri, 4 Wall. (71 U.S.) 277 (1866); Ex parte Garland, 4 Wall. (71 U.S.) 333 (1866); 63 YALE L.J. 844 (1954).

[49] In re Yung Sing Hee, (C.C. Ore. 1888) 36 F. 437; Gaines v. Buford, 1 Dana (31 Ky.) 481 at 509-510 (1833); Ex parte Law, (D.C. Ga. 1866) 15 Fed. Cas. 3, No. 8,126. See the opinion of Justice Black in Joint Anti-Fascist Refuge Committee v. Mc-

say that legislation which withdrew a "privilege" from a person or group was not punishment under the accepted definition of a bill of attainder.[50] This restrictive interpretation may be at an end due to two decisions of the Supreme Court. First the Court held that denial of government employment was punishment,[51] and then, in *American Communications Association v. Douds*,[52] appears to have cut away further at the doctrine by implying that a denial of access to the National Labor Relations Board could also be punishment. But in striking down the privilege theory as a method of avoiding the attainder prohibition, the Court may have given birth to a new one. The theory adapted in the brief consideration given the attainder question in the *Douds* case seems to involve a distinction between legislation punishing past conduct and legislation, passed under the police power, which is designed to prevent future conduct. This philosophy was followed in *Albertson v. Millard*,[53] in which a federal district court sustained state legislation denying the Communist Party or any member of it a place on the state ballot. As long, the new theory seems to say, as there is a reasonable basis for belief that one's loyalties may lead to inimical future action, the legislature may act to cut off political privileges without transgressing the attainder prohibition.[54]

During the debates on the Communist Control Act, considerable mention was made of the constitutional problems arising from the act's inter-relationship with the registration provisions[55] of the Internal Security Act of 1950. The elimination from the 1954 act of a penalty-for-membership provision rendered moot any problems of self-incrimination that such a provision, in combination with the 1950 act, might raise.[56] As to the 1950 act's requirement that the Communist Party

Grath, 341 U.S. 123 at 142, 71 S.Ct. 624 (1951). For citation of English bills of attainder that were directed against whole groups, see Ex parte Law, supra.

[50] The cases are collected in 63 YALE L.J. 844 at 848 (1954).

[51] United States v. Lovett, 328 U.S. 303, 66 S.Ct. 1073 (1946). See Davis, "United States v. Lovett and the Attainder Bogy in Modern Legislation," 1950 WASH. UNIV. L.Q. REV. 13 (1950).

[52] 339 U.S. 382 at 413-415, 70 S.Ct. 674 (1950).

[53] (D.C. Mich. 1952) 106 F. Supp. 635 at 644-645, revd. on other grounds 345 U.S. 242, 73 S.Ct. 600 (1953). See also Communist Party v. S.A.C.B. (D.C. Cir. 1954) Civil No. 11850, at p. 40.

[54] For a rather strong attack on any theory which injects a "reasonableness" qualification into the attainder prohibition, see 63 YALE L.J. 844 (1954). It may be noted, however, that this kind of judicial dilution of the attainder clause finds some support in the similar relaxation, during a period of national emergency, of the parallel prohibition against impairment of contractual obligations. Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231 (1934).

[55] Sections 7 and 8.

[56] See note 18 supra for a statement of the main problem and 100 CONG. REC. 15102, 15112, 15114 (1954) for statements that the final form of the act eliminated it.

register vis-a-vis section 3 of the 1954 act, it is settled that an unincorporated association cannot claim the privilege against self-incrimination.[57] It also seems clear that outlawing an organization by one act is not inconsistent with requiring it to register under another.[58]

B. *Section 4.* In section 4(a) of the Communist Control Act, it is provided:

> "Whoever knowingly and willfully becomes or remains a member of (1) the Communist Party, or (2) any other organization having for one of its purposes or objectives the establishment, control, conduct, seizure, or overthrow of the Government of the United States, or the government of any State or political subdivision thereof, by the use of force or violence, with knowledge of the purpose or objective of such organization shall be subject to all the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a 'Communist-action' organization."

Section 4(b) thereafter defines the Communist Party to include its component units and any possible successor organizations.

It will be noted that under the Internal Security Act of 1950, an organization found to be a Communist-action organization by the Subversive Activities Control Board must register with the attorney general and make extensive disclosure of its operations, membership, etc.[59] If it fails to do so, each individual member must register within sixty days after such SACB order, on penalty of a $10,000 fine, five years in prison or both.[60] The SACB has found that the Communist Party of the United States is a Communist-action organization and has ordered it to register.[61] This administrative finding has been upheld, as has the constitutional validity of the Internal Security Act, by the Court of Appeals for the District of Columbia,[62] but the Communist Party has repeatedly announced that it will not register with the attorney general.[63]

[57] United States v. White, 322 U.S. 694, 64 S.Ct. 1248 (1944); United States v. Peace Information Center, (D.C. D.C. 1951) 97 F. Supp. 255; United States v. Onassis, (D.C. D.C. 1954) 125 F. Supp. 190. The issue was discussed by Senators Butler and Kefauver at 100 CONG. REC. 14712 (1954).

[58] The point was briefly mentioned in the Senate, 100 CONG. REC. 14714 (1954) and upon reargument in Communist Party v. S.A.C.B., (D.C. Cir. 1954) Civil No. 11850. N.Y. TIMES, Oct. 22, 1954, p. 19:1.

[59] Section 7.

[60] Sections 8 and 15.

[61] 18 FED. REG. 2513 (April 29, 1953); N.Y. TIMES, April 21, 1953, p. 1:2.

[62] Communist Party v. S.A.C.B., (D.C. Cir. 1954) Civil No. 11850. The court stated that the Communist Control Act did not affect the 1950 act in any way (p. 48).

[63] E.g., N.Y. TIMES, April 21, 1953, p. 19:5; Jan. 2, 1955, §4, p. 7:7 at 7:8; Nov. 25, 1950, p. 1:6.

Assuming that it may be taken at its word on this matter and assuming that the Supreme Court affirms the validity of the act and the SACB finding, it would then follow that individual party members would be required to register or suffer the prescribed penalties. It is difficult to see what section 4 of the 1954 act adds to this result or procedure. Truly, "the new Act states principally that the 1950 Act meant what it said."[64] The statement that members become subject to the "*provisions* and penalties" of the 1950 act would seem to negate the interpretation that they would have to register individually irrespective of what the party chooses to do,[65] and it certainly negates any suggestion that the penalties of section 15 of the Internal Security Act become automatically applicable to Communist Party members.[66] However, it seems that the phrase does mean that party members fall automatically and immediately under those sanctions of the Internal Security Act[67] which are applicable to members of groups found to be Communist-action organizations.[68] Section 4 states, in effect, that the party shall be considered to be such an organization. This would appear to be nothing more than a substitution of legislative fiat for what was supposed to be an administrative, and judicially reviewable, finding by the SACB.[69]

In short, it is difficult to see what section 4 does that has not or will not be done under the Internal Security Act.

III. *Conclusion*

In light of the politically charged history of the Communist Control Act, and in view of the difficulty inherent in defining the potential effectiveness of the act, it is conceivable that it will be allowed to die on the statute books.[70] There is, it is submitted, much to be said for

[64] 131 NEW REPUBLIC, Aug. 30, 1954, p. 7. For admissions that §4 amounts to no more than a re-enactment of relevant provisions of the Internal Security Act, see the statements by Senators Cooper and McCarran, 100 CONG. REC. 15114 (1954).

[65] See the statements of Senator Butler, 100 CONG. REC. 15103 (1954). But see Senator Cooper's question and Senator McCarran's answer, 100 CONG. REC. 15113 (1954).

[66] But see Congressman Dies' statement that the final bill made membership a crime in itself, 100 CONG. REC. 15237 (1954). Surely the correct view, however, is that expressed by Senator Butler, responding to queries by Senator Kefauver, 100 CONG. REC. 15102, 15103 (1954).

[67] Those contained in §§5 and 6 prohibiting such members from holding jobs in government or defense facilities or receiving passports.

[68] Statement of Senator Butler, 100 CONG. REC. 15103 (1954). See Supplemental Brief for Respondents, p. 44, in Communist Party v. S.A.C.B., (D.C. Cir. 1954) Civil No. 11850.

[69] N.Y. TIMES, Aug. 29, 1954, §4, p. 6:1 at 6:4; 91 AMERICA, Sept. 4, 1954, p. 532.

[70] N.Y. TIMES, Aug. 29, 1954, §4, p. 2:2. But for indications that the act might be used, see the statement by Senator Humphrey, 100 CONG. REC. 15120 (1954); Humphrey address, note 6 supra, at 5; Report by Assistant Attorney General Tompkins to the Attorney

such a result. Whatever may be the policy merits of "outlawing the Communist Party," such a move should at least be accorded careful and mature legislative consideration and the benefit of meaningful draftsmanship. It is to be regretted that neither of these factors is present in the Communist Control Act of 1954.

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General, reported in N.Y. TIMES, Jan. 2, 1955, p. 19:3 (promise to use all available laws in anti-Communist drive). The Communist Party has announced its intention to "defy" the new law. N.Y. TIMES, Aug. 26, 1954, p. 14:5.