THE COMMUNIST CONTROL ACT OF 1954

"What does this bill really entail? Nobody really knows."
—Rep. Emanuel Celler *

THE Communist Control Act of 1954[1] marks the most direct statutory attack on internal communism yet undertaken by Congress. Hitherto, legislation employed to curb communist activities has been of a general nature; categories of proscribed groups or individuals have been established,[2] and these classes have been interpreted to encompass the Communist Party and its members.[3] Although a number of the CCA's provisions simply constitute amendments to these earlier "anti-subversive" acts,[4] many of its important sections are directed specifically against the Party and its members.[5]

This new approach in a controversial area has produced a complicated law with an unusual legislative background. Much of it was proposed on the floor of Congress, without hearings and with little opportunity for careful analysis of the statutory language.[6] The haste and confusion attending the Act's passage [7] have resulted in many vague and ambiguous provisions. An examina-

*This statement was made by Rep. Celler during the debates on the Communist Control Act. 100 Cong. Rec. 13836 (daily ed. Aug. 16, 1954).

1. Communist Control Act of 1954, Pub. L. No. 637, 83d Cong., 2d Sess. (August 24, 1954) (hereinafter cited as CCA).

2. See, *e.g.*, Internal Security Act of 1950, 64 STAT. 987, 50 U.S.C. § 781 (1952) (hereinafter cited as ISA) (proscribed groups); Alien Registration Act, 54 STAT. 670 (1940), 18 U.S.C. § 2385 (1952) (Smith Act) (proscribed individuals).

3. See Communist Party v. Subversive Activities Control Board, Civil No. 11850, D.C. Cir., Dec. 23, 1954 (affirming the order of the SACB applying the ISA to the Communist Party); Dennis v. United States, 341 U.S. 494 (1950) (applying the Smith Act to Communist Party leaders); United States v. Flynn, 216 F.2d 354 (2d Cir. 1954) (same); United States v. Lightfoot, N.Y. Times, Jan. 27, 1955, p. 1, col. 2 (applying the Smith Act to Communist Party members).

4. CCA §§ 6-11.

5. CCA §§ 2, 3 (party); CCA §§ 4, 5 (members).

6. All of the CCA §§ 2-6 and the proviso in § 7(a) of the CCA became part of the Act on the floor of Congress or in the conference committee. 100 Cong. Rec. 13549 (daily ed. Aug. 12, 1954) (proviso in § 7(a)); *id.* at 13557 (§§ 2 and 6); *id.* at 13985 (daily ed. Aug. 16, 1954) (§ 3 as contained in the House bill presented to the Senate); *id.* at 14090 (daily ed. Aug. 17, 1954) (§ 5); *id.* at 14332, 14390-91 (daily ed. Aug. 19, 1954) (amendments recommended by conference committee, including § 4 presented to the House and Senate).

There were extensive hearings by the Senate on most of §§ 7-11 of the CCA. See 100 Cong. Rec. 13410 (daily ed. Aug. 11, 1954); S. REP. No. 1709, 83d Cong., 2d Sess. 1954). For a transcript of some of the hearings, see, *e.g.*, *Hearings before Subcommittee of the Committee on the Judiciary on S. 23, S. 1254, and S. 1606*, 83d Cong., 1st and 2d Sess. (1954). However, the House apparently held no hearings even on these provisions. See H.R. REP. No. 2651, pt. 2, 83d Cong., 2d Sess. 1 (1954) (minority report).

7. See remarks by Rep. Celler, 100 Cong. Rec. 13836 (daily ed. Aug. 16, 1954); Sen. Cooper, *id.* at 13953; Sen. Lehman, *id.* at 13900; and Sen. Kefauver, *id.* at 14395 (daily ed. Aug. 19, 1954).

tion of the legislative history of the Act will be helpful to a later analysis of its specific provisions.

LEGISLATIVE HISTORY

The CCA is the outgrowth of two separate bills dealing with distinct but related subjects. Senator Butler introduced the first of these bills as an amendment to the Internal Security Act of 1950.[8] That Act created and defined two types of "communist organizations."[9] Senator Butler's bill was designed to add a third class, the "Communist-infiltrated organization,"[10] meant to apply particularly to labor unions and thereby to facilitate removal of communists from positions of union leadership.[11] Senator Humphrey, on the floor of the Senate, offered an amendment in the nature of a substitute.[12] This amendment was directed at the Communist Party and its members, the "root of the evil."[13] The major provision in Senator Humphrey's bill made it a crime to be a Party member and provided for penalties of up to five years imprisonment and a fine of $10,000.[14] By an amendment proposed by Senator Daniel,[15] the Butler and Humphrey bills were combined into a single bill,[16] which the Senate unanimously approved.[17]

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8. S. 3706 was reported out of the Senate Judiciary Committee on July 6, 1954. 100 Cong. Rec. 9217 (daily ed. July 6, 1954). The Butler bill consisted of what eventually became §§ 7-11 of the CCA.

9. The two categories of "communist organizations" defined by the ISA are the "Communist-action" and "Communist-front" organizations. 64 STAT. 989 (1954), 50 U.S.C. § 782 (1952). See note 247 *infra* for definitions of these organizations.

10. See statements of Sen. Butler, sponsor of the bill. 100 Cong. Rec. 13411 (daily ed. Aug. 11, 1954). Also see S. REP. No. 1709, 83d Cong., 2d Sess. 1 (1954); H.R. REP. No. 2651, pt. 1, 83d Cong., 2d Sess. 1 (1954).

11. See note 269 *infra*.

12. For the text of the original Humphrey bill, see 100 Cong. Rec. 13557 (daily ed. Aug. 12, 1954).

13. *Ibid.*

14. Section 3 of the Humphrey bill provided that knowing and willing members of "(1) the Communist Party, or (2) any other organization having for one of its purposes . . . the establishment, control, conduct, seizure, or overthrow of the Government of the United States . . . by the use of force or violence, with knowledge of the purpose or objective of such organization, shall upon conviction be punished as provided by the penalty provisions of section 15 of the Subversive Activities Control Act of 1950." 100 Cong. Rec. 13557 (daily ed. Aug. 12, 1954). Section 15 of that Act provides a maximum penalty of a $10,000 fine and five years imprisonment. 64 STAT. 1003 (1950), 50 U.S.C. § 794(c) (1952).

Several states have statutes making membership in the Communist Party a crime. See IND. STAT. ANN. § 10-5204 (Burns Supp. 1951); MASS. ANN. LAWS c. 264, § 19 (Supp. 1954); TEX. REV. CIV. STAT. ANN. art. 6889-3A, § 5 (Supp. 1954). The constitutionality of these laws have not been passed upon by either state or federal courts.

In addition to the section making membership in the Party a crime, Senator Humphrey's bill included findings of fact (now § 2 of the CCA) and a provision amending the ISA to make it unlawful for members of a "Communist-action" or Communist-front" organizations to be officers of unions (now § 6 of the CCA).

15. 100 Cong. Rec. 13561 (daily ed. Aug. 12, 1954).

16. *Id.* at 13578.

17. *Id.* at 13583.

The House version,[18] passed a few days later, [19] also combined the two original Senate bills. But instead of the section making party membership a crime, the House substituted a section which deprived the Communist Party of "whatever rights, privileges, and immunities . . . have heretofore been granted to said party."[20] When the Senate was confronted with the House version, it added to it both the original provision making membership in the Party a crime and a section which listed criteria for determining what constitutes membership in the Communist Party and related organizations.[21]

In conference, a major change was made in the bill. The section making party membership criminal was altered so as merely to subject Party members to the "provisions and penalties of the Internal Security Act of 1950" as members of a "Communist-action" organization.[22] This amendment was due largely to extensive criticism of the original provision, the major objection being that it would seriously impair the effectiveness of the registration provisions of the ISA.[23] The bill as thus amended was approved by a unanimous Senate [24] and by all but two members of the House of Representatives,[25] and was signed by the President.[26]

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18. *Id.* at 13832-34 (daily ed. Aug. 16, 1954).

19. *Id.* at 13849-50.

20. See § 3 of the House bill, *id.* at 13833. This section now constitutes § 3 of the CCA.

21. These amendments were proposed by Senator Humphrey, 100 Cong. Rec. 14090 (daily ed. Aug. 17, 1954), and were accepted by the Senate, *id.* at 14093-94. The section establishing criteria for membership was finally adopted virtually intact as § 5 of the CCA.

22. See the report of the conference committee, 100 Cong. Rec. 14332, 14390-91 (daily ed. Aug. 19, 1954). The provision as thus amended became § 4 of the CCA.

23. Some congressmen had doubts concerning the constitutionality of the provision as originally proposed by Senator Humphrey. See remarks by Rep. Celler, 100 Cong. Rec. 13836 (daily ed. Aug. 16, 1954), and Sens. McCarran, Butler, and Cooper, *id.* at 13943, 13560-61, 13566 (daily ed. Aug. 12, 1954). It was also felt that the section added nothing to existing statutes since the Smith Act already made a crime of membership in an organization advocating the violent overthrow of the government. See remarks of Sens. Cooper, *id.* at 13566, and McCarran, *id.* at 13944 (daily ed. Aug. 16, 1954).

However, the major point of criticism was that it would interfere with and perhaps void the registration provisions of the ISA, on the theory that if membership in the Party were made a crime, members could base a refusal to register under the ISA upon an invocation of the Fifth Amendment privilege against self-incrimination. See remarks of Rep. Reed, *id.* at 13836 (daily ed. Aug. 16, 1954) and Sens. McCarran, *id.* at 13945, and Kefauver, *id.* at 14079 (daily ed. Aug. 17, 1954). See also the statement by Sen. Humphrey, *id.* at 14394 (daily ed. Aug. 19, 1954).

24. *Id.* at 14410.

25. *Id.* at 14332. Reps. Burdick and Multer cast the two dissenting votes.

26. There is some question whether the President signed the same bill that was passed by Congress, or whether it was changed somewhat after he signed it. See Complaint, United Electrical, Radio and Machine Makers v. Brownell, reproduced in BNA WASHINGTON DAILY REPORTER SYSTEM, DAILY LABOR REPORT (No. 194, Oct. 6, 1954), in which the union is seeking a declaratory judgment that the CCA is "not a statute, act or law of the United States and is, therefore, null and void and has no legal force or effect."

THE CONGRESSIONAL FINDINGS

Section 2 of the CCA consists of congressional findings concerning the nature of the Communist Party and the danger the Party poses to the security of the United States. In these findings, Congress declares that the Communist Party, "although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States." The findings then list the differences between the Communist Party and the other political parties in the United States:[27] the policies of the Communist Party are dictated by foreign leaders; the members are subject to slavish discipline imposed by party chieftains; and the Party recognizes no constitutional or statutory limitations upon either its conduct or that of its members. Congress also finds that, though the Party is numerically small, its dedication to the violent overthrow of the United States Government and its role as the agent of a hostile foreign power make its existence a "clear, present and continuing danger to the security of the United States."[28] Therefore, Congress concludes, "the Communist Party should be outlawed."[29]

Similar legislative findings have been incorporated into related statutes such as the ISA [30] and New York's Feinberg law.[31] These findings may become very important when questions of a statute's constitutionality are raised. For example, the existence of circumstances showing both a need for the legislation and the reasonableness of the remedy adopted by the legislature becomes crucial when the statute is attacked as violating due process or First Amendment rights.[32] If the legislative findings are the product of extensive investigation, as

27. Section 2 avoids the use of the phrase "other political parties." This wording was originally used, but was changed in order to emphasize Congress' belief that the Party was a conspiracy rather than a political party. See 100 Cong. Rec. 13987, 13989 (daily ed. Aug. 16, 1954), 14080 (daily ed. Aug. 17, 1954).

28. The CCA, however, does not make the *existence* of the Party unlawful. See remarks of Sens. Kefauver and Butler, 100 Cong. Rec. 14079, 14081 (daily ed. Aug. 17, 1954).

Compare the laws of several states which make the existence of the Communist Party illegal: MASS. ANN. LAWS c. 264 §§ 16A, 17 (Supp. 1954); TEX. REV. CIV. STAT. ANN. art. 6889-3A, § 2 (Supp. 1954). The Texas statute, like the CCA, denies the Party "any rights, privileges, or immunities attendant upon bodies under the jurisdiction of the State of Texas . . . ," but it also orders that the funds, records, and other property belonging to the Party be seized and forfeited to the state.

Other state laws declare the existence of organizations advocating the violent overthrow of the Government of the United States or of the state illegal, and provide for the seizure and forfeiture of the organizations' funds, books, and records. See, *e.g.*, LA. REV. STAT. § 14.370 (Supp. 1954).

29. Aside from the title of the act, this is the only part of the CCA in which the term "outlawed" is used. This statement of congressional opinion appearing only in the preliminary part of the statute probably has no effect. See Adler v. Board of Education, 342 U.S. 485, 496 (1952); 2 SUTHERLAND, STATUTORY CONSTRUCTION § 4804 (3d ed., Horack 1943). Sen. Ferguson said, however, that the disabilities imposed on the Party by the Act in effect outlawed it. 100 Cong. Rec. 14087 (daily ed. Aug. 17, 1954).

30. 64 STAT. 987 (1950), 50 U.S.C. § 781 (1952).

31. N.Y. Sess. Laws 1949, c. 360 § 1.

32. The question of the importance of legislative findings as "constitutional facts"

here, and are reasonable in the light of the evidence adduced, they will generally be accorded great weight by the courts.[33]

TERMINATION OF THE RIGHTS, PRIVILEGES, AND IMMUNITIES OF THE COMMUNIST PARTY

Section 3 of the CCA provides that "whatever rights, privileges, and immunities which have heretofore been granted to said [Communist] party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are hereby terminated . . . ."[34] This section raises three

has been extensively treated elsewhere. See Note, 51 COLUM. L. REV. 606, 607-15 (1951), and authorities cited therein (discussion of this issue with reference to the congressional findings in the ISA).

33. *Id.* at 610; Galvan v. Press, 347 U.S. 522 (1954); Communist Party v. Subversive Activities Control Board, Civil No. 11850, D.C. Cir., Dec. 23, 1954, pp. 55-56.

In the debates, Sen. Humphrey suggested a use for the legislative findings aside from sustaining the constitutionality of the statute. He suggested that Congress' determination that the Communist Party is part of a conspiracy to overthrow the government of the United States by violence relieves the Attorney General of the burden of proving this fact in prosecutions under the Smith Act. 100 Cong. Rec. 14394, 14406-07 (daily ed. Aug. 19, 1954). However, it appears that although congressional findings of fact may be *admissible* to prove one or more of the elements of a cause of action or of a criminal prosecution, these findings may not be regarded as conclusive. 4 WIGMORE, EVIDENCE § 1352 (3d ed. 1940), 5 *id.* § 1362; Note, 51 COLUM. L. REV. 606 n.45 (1951). In Communist Party v. Subversive Activities Control Board, *supra*, at 55-56, although the court held that the evidence presented to the SACB warranted the Board's findings as to the existence and nature of the world communist movement, the court also intimated that the congressional findings in § 2 of the ISA were sufficient *of themselves* to sustain these findings. As authority for this latter proposition, the court quoted from Galvan v. Press, *supra*. However, the *Galvan* case used the congressional findings in the ISA to uphold the constitutionality of § 22 of that act, providing for the deportation of alien members of the Communist Party, and not as the basis for the court's determination of any facts which the Government had to prove. Before § 22 of the ISA, federal law provided for the deportation of aliens who were members of an organization which advocated the violent overthrow of the Government of the United States, and in each case where the Government sought to deport an alien member of the Communist Party it was necessary to show the Party was such an organization. The *Galvan* case did *not* say that the *congressional findings* in the ISA relieved the Government from proving this characteristic of the Communist Party. *Galvan* said, rather, that § 22 of the ISA now specifically provides for the deportation of alien members of the Communist Party, and the court used the congressional findings to uphold the constitutionality of this section.

In United States v. Silverman, 23 U.S.L. WEEK 2439 (D. Conn. Feb. 23, 1955), involving prosecution of second string Communist leaders under the Smith Act, the defendants apparently argued that the findings in the CCA conclusively established that the Communist Party and its members advocate the violent overthrow of the Government and hence amended the Smith Act, thereby rendering it unconstitutional. The court held that since the indictment was issued before the CCA was passed, it could not affect the Government's burden of proof in this case. However, it appears that the findings of fact in § 2 cannot have the effect contended for by the defendants in *Silverman*. See *supra*. And the courts should not permit these findings to be used to satisfy the Government's burden of proof.

34. The complete section provides:

"Sec. 3. The Communist Party of the United States, or any successors of such party

major questions[35] of interpretation and validity: (1) What "rights, privileges, and immunities" *could* the Act embrace? (2) Is the section subject to serious attack as a bill of attainder regardless of the scope given the "rights, privileges, and immunities" phrase? (3) Assuming that the section survives such attack, how broadly *should* the deprivation of "rights, privileges, and immunities" be interpreted?

"Rights, Privileges, and Immunities" Which Might be Encompassed by Section 3

The cryptic language of the section is of little help in determining all the rights, privileges, and immunities which it might possibly include. Moreover, the congressional history offers only limited assistance, since the statements of various congressmen as to the benefits to be withdrawn were intended to be merely illustrative rather than enumerative.[36] It is necessary, therefore, to look outside the statute and congressional history to federal and state constitutions and statutes, for these will indicate all the rights, privileges, and immunities which the section could encompass. Before this, however, it is necessary to settle the preliminary question of whether Congress meant to terminate rights, privileges, and immunities granted by state law as well as those granted by federal law.

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regardless of the assumed name, whose object or purpose is to overthrow the Government of the United 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: *Provided, however*, That nothing in this section shall be construed as amending the Internal Security Act of 1950, as amended."

35. An initial problem raised by § 3 is the extent of its application to organization members. By its terms, the section applies only to organizations. However, it may be used against members if necessary to make the deprivation against the organizations effective. See Salwen v. Rees, 23 U.S.L. WEEK 2158 (N.J. Super. Ct., Sept. 30, 1954), *aff'd*, 23 U.S.L. WEEK 2176 (N.J. Sup. Ct., Oct. 11, 1954), applying § 3 to a Communist candidate for local state office in order to make effective the § 3 denial to the Communist Party of a place on the ballot. See note 81 *infra*.

A second question presented by § 3 is whether it applies to state and local Communist Party organizations as well as to the Communist Party of the United States. Although the section begins by saying that the *"Communist Party of the United States*, or any successors of such party" are not entitled to rights, privileges, and immunities, the clause which actually terminates these rights, privileges, and immunities is directed against *"said party or any subsidiary organization."* This language seems broad enough to include the Communist Parties of the various states and territories.

36. For statements made by various congressmen, see note 111 *infra*. When making these statements, none of the congressmen indicated that he was enumerating all the deprivations covered by the Act. Rather, they appeared merely to be giving examples of the divestments that would be effectuated by the CCA.

Does Section Three Deny the Party State as Well as Federally Granted Rights, Privileges, and Immunities?

While the language of section 3 [37] is ambiguous, it will probably be interpreted to include the rights, privileges, and immunities granted to the Communist Party by the states as well as those granted to it by the federal government. Whether it does depends upon the construction to be given the phrase "political subdivision"[38] in the section's two principal clauses. The section begins by defining its subject as the "Communist Party . . . or any successor of such party . . . whose object it is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government *of any political subdivision therein* . . . ." Section 3 then states that such organizations are not entitled to any "rights, privileges, and immunities . . . created under the jurisdiction of the laws of the *United States or any political subdivision thereof* . . . ," and that the "rights, privileges, and immunities which have heretofore been granted . . . by reason of the laws of the *United States or any political subdivision thereof* are hereby terminated." Because Congress specifically mentions the states in the first part of section 3 where it also uses the phrase "political subdivision," courts might infer an intent to exclude the states from the meaning of "political subdivision" as it appears in the latter two parts of the section. Yet, if "political subdivision" does not include the states, it could refer only to the territories and the District of Columbia. But these are also specifically referred to in the first part of section 3. Therefore, "political subdivision" as used in the first part of the section seems to refer to *local* government units within the states and territories, while "political subdivision" as used in the part of section 3 actually terminating the rights of the Communist Party appears to include the states.

This interpretation seems to accord with congressional intent. Although Senator Butler said that section 3 "strips the Communist Party of all its rights, privileges, and immunities under the Constitution of the *United States* and all laws of the *United States*,"[39] he and others have also stated that it would deny the Party a place on the ballot.[40] Since the right to appear on the ballot, whether for state or for federal office, depends on state law,[41] these congressmen must have intended that state granted rights be included within section 3's prohibition.[42] Furthermore, construing section 3 to embrace such rights is in harmony with the obvious desire of Congress to enact as broad a deprivation as possible.

37. See full text of § 3 quoted in note 34 *supra*.

38. "Political subdivision" does not appear to have any established meaning. See 32 WORDS AND PHRASES 815 (1940); 40 *id.* at 352. It has been defined to include states. See 45 STAT. 1064 (1928), 43 U.S.C. 617k (1952). For a discussion of its meaning for income tax purposes, see Commissioner v. Shamberg's Estate, 144 F.2d 998 (2d Cir. 1944); Abad v. Puerto Rico Communications Authority, 88 F. Supp. 34, 40 (D.P.R. 1950).

39. 100 Cong. Rec. 14079, 14081 (daily ed. Aug. 17, 1954).

40. See note 111 *infra*.

41. See note 47 *infra*.

42. This conclusion is fortified by Sen. Ferguson's statement that under the new law the Party "would not be able to make any leases or hire people under contract . . ." or

State Rights, Privileges, and Immunities Which Might Be Terminated

State constitutions and laws present one source from which the "rights, privileges, and immunities" mentioned in section 3 might arise. Because unincorporated associations such as the Communist Party[43] are not considered legal entities at common law, they do not have a common law right to sue and be sued in civil suits in the state courts;[44] nor to hold or convey property;[45] nor to enter into contracts in their own names.[46] In addition to statutes giving the Party the right to appear on the ballot,[47] many states now have laws giving unincorporated associations the capacity to sue and be sued in their

"enter into any contractual relations . . . ." 100 Cong. Rec. 14088 (daily ed. Aug. 17, 1954). Since the Party, as an unincorporated association, has no capacity to enter into a contract at common law, it can only do so if given this right by state statutes. See notes 46 and 51 *infra* and accompanying text.

43. The Communist Party of the United States and the state organizations are unincorporated associations. Letter from Mr. John J. Abt, Attorney for the Communist Party in the appeal from the order of the SACB requiring the Party to register as a "Communist-action" organization, to the *Yale Law Journal*, dated Feb. 21, 1955, on file in Yale Law Library.

44. CRANE, PARTNERSHIP § 100 (2d ed. 1952); WRIGHTINGTON, UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS 425-36 (2d ed. 1923); Starr, *Legal Status of American Political Parties*, 34 AM. POL. SCI. REV. 439, 685, 693 (1940); Notes, 35 CALIF. L. REV. 115 (1947); 30 N.C.L. REV. 465 (1952); 7 C.J.S., *Associations*, §§ 36-6 (1937); *cf.* Brown v. United States, 276 U.S. 134 (1928); United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922).

45. 3 CASNER, AMERICAN LAW OF PROPERTY § 12.78 (1952); 4 *id.* § 18.50; CRANE, PARTNERSHIP § 98 (2d ed. 1952); LLOYD, UNINCORPORATED ASSOCIATIONS 165-78 (1938); PATTON, TITLES § 228 (1938); 1 POWELL, REAL PROPERTY §§ 130-31 (1949); WRIGHTINGTON, *op. cit. supra* note 44, at 336-37; 7 C.J.S., *Associations* § 14 (1937); Starr, *supra* note 44, at 694. *But see* Jeffery v. Ehrhardt, 210 S.C. 519, 43 S.E.2d 483 (1947).

However, there is some authority supporting the right of unincorporated associations to hold personal property in their own names. Lavretta v. Holcombe, 98 Ala. 503, 12 So. 789 (1893); Hadden v. Dandy, 51 N.J. Eq. 154, 26 Atl. 464 (Ct. Ch. 1893), *aff'd*, Dandy v. Methodist Society of Ireland, 51 N.J. Eq. 330, 30 Atl. 429 (Ct. E.A. 1893); White v. Brownell, 2 Daly 329, 356 (N.Y. 1868); WRIGHTINGTON, *op. cit. supra* note 44, at 351-55; Note, 46 MICH. L. REV. 824, 825-26 (1948). This common law right of the Party may also be terminated by § 3 of the CCA. Whether it is would depend on how broadly the courts construe "laws" in § 3. See note 34 *supra*. Nothing in the legislative history indicates what Congress' intent on this question was.

Most associations use the trust device to hold property. The title is in the trustee for the use of the members of the organization. LLOYD, *op. cit. supra*, at 165-78; WRIGHTINGTON, *op. cit. supra*, at 337-43.

46. Hunt v. Adams, 111 Fla. 164, 149 So. 24 (1933); I. W. Phillips & Co. v. Hall, 99 Fla. 1206, 128 So. 635 (1930); Franklin Paper Co. v. Gorman, 70 Pa. Super. 270 (1921); LLOYD, *op cit. supra* note 45, at 133-48; Starr, *supra* note 44, at 694; 7 C.J.S., *Associations* § 15 (1937).

47. State law determines the parties and candidates which can appear on the ballot for both federal and state offices. Under Article I, § 4 of the United States Constitution, the states are empowered to regulate the "Times, Places and Manner of Holding Elections for Senators and Representatives . . . ." Although Article I, § 4 gives Congress the power to alter State regulation of the election of Senators and Representatives, and although in the past Congress has exercised this power, at present, these elections are

own names or in the name of a designated officer.[48] However, although many states have given certain unincorporated associations the right to take and hold property,[49] very few of these statutes are broad enough to cover political parties.[50] Moreover, it seems that no state has made a general statutory grant to unincorporated associations of the right to enter into contracts in their own names.[51] But any other rights which are or will be granted to unin-

largely controlled by state law. United States v. Gradwell, 243 U.S. 476 (1917). 18 AM. JUR., *Elections* § 9 (1938). In addition, the states are given exclusive power to regulate the election of presidential electors by Article II, § 1 of the Constitution.

Most states have statutes allowing parties to have their candidates placed on the ballot if the party received a certain percentage or number of votes for a specified office in the preceeding election. Most states also provide an alternative method of securing a place on the ballot for those parties which did not get the requisite number of votes in the prior election. Usually this method consists of securing a certain number of signatures on a nominating petition. See Starr, *supra* note 44, at 452-55, 685-90; Comment, 57 YALE L.J. 1276 (1948); Notes, 37 COLUM. L. REV. 86 (1937); 34 VA. L. REV. 450, 450-52 (1948). See also MacDougal v. Green, 335 U.S. 281 (1948), where the Supreme Court upheld the constitutionality of an Illinois statute which required a certain number of signatures on the petition from each county in the state before a party could appear on the ballot for federal and state office.

For a suggestion of other rights of political parties which may be derived from state law, such as the right to nominate candidates, see Starr, *supra* note 44, at 447-52.

48. WRIGHTINGTON, *op. cit. supra* note 44, at 436-39; 4 AM. JUR., *Associations and Clubs*, § 47 (1936). See, *e.g.*, CONN. GEN. STAT. § 7797 (1949) (suits in name of association); N.J. STAT. ANN. § 2.78-1 (1937) (same); VT. REV. STAT. § 1565 (1947) (same); N.Y. GEN. ASSOC. LAW §§ 12, 13 (suits in name of president or treasurer).

49. *E.g.*, VA. CODE § 40-63 (1950) (unions); *id.* § 57-7 (religious organizations); WYO. COMP. STAT. ANN. § 44-907 (1945) (all unincorporated associations except those which are seditious, political, or revolutionary in character, and those which are organized to carry on business). See also 1 POWELL, REAL PROPERTY 490-91 nn.39-40 (1949).

50. Most statutes are limited to religious, charitable, and benevolent associations. See note 49 *supra*. However, a provision in the Louisiana Civil Code, LA. CIV. CODE art. 446 (1952), granting unincorporated associations the right to "acquire and possess estates" appears to be broad enough to include political parties. See United Brotherhood v. Stephens Broadcasting Co., 214 La. 928, 39 So. 2d 422 (1949) (applying the provision to a labor union). Also, in Simpson v. James R. Crowe Post No. 27, American Legion, 230 Ala. 487, 490, 161 So. 705, 707 (1935), the Alabama Supreme Court said that provisions in the Alabama Code granting unincorporated associations the capacity to sue and be sued in their own names and subjecting such associations' property to the payment of judgments obtained against them "recognize that unincorporated associations may acquire and hold property, real and personal . . . ." However, later Alabama decisions, without mentioning the *Simpson* case, have stated that unincorporated associations cannot take and hold realty. Hamner v. Carroll's Creek Baptist Church, 255 Ala. 277, 51 So. 2d 164 (1951); Vaughn v. Pansey Friendship Primitive Baptist Church, 252 Ala. 439, 41 So. 2d 403 (1949); Darby v. Jones, 249 Ala. 104, 29 So. 2d 879 (1947); Street v. Pitts, 238 Ala. 531, 192 So. 258 (1939).

51. However, the contract made by an authorized agent of the association is binding on the members, LLOYD, *op. cit. supra* note 45, at 134-37; 1 WILLISTON, CONTRACTS § 308 (1936). In addition, one who has received benefits under a contract made with an unincorporated association may be held estopped from denying the lack of capacity in the association to contract. *E.g.*, State Farm Mut. Automobile Ins. Co. v. Mackechnie, 114 F.2d 728 (8th Cir. 1940); Lamm v. Stoen, 226 Iowa 622, 284 N.W. 465 (1939); Petty v. Bronswick & W. Ry. Co., 109 Ga. 666, 35 S.E. 82 (1899).

corporated political associations by state law could also be included within the scope of section 3.

Federal Rights, Privileges, and Immunities Which Might Be Terminated

There are two sources of federally-created rights, privileges, and immunities: The Constitution and statutes. Constitutional *privileges and immunities* are created by the Fourteenth Amendment and Article IV, Section 2.[52] Neither of these provisions, however, is applicable to the Communist Party. By their terms they apply to "citizens" of the United States and the states; and numerous decisions have held that only natural persons are to be considered citizens under these provisions.[53] However, the Communist Party is presumably granted certain *rights* by the Constitution. Among these are the right to due process of law,[54] the right to a speedy public trial in a criminal proceeding,[55] and probably rights under the First Amendment.[56] But since it does not

52. U.S. CONST. amend. XIV, § 1 "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; . . ." The "privileges and immunities" involved in this provision are enumerated in the Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873).

U.S. CONST. art. IV, § 2: "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The "privileges and immunities" involved in this provision are enumerated in Corfield v. Coryell, 6 Fed. Cas. 546, No. 3230 (C.C.E.D. Pa. 1823). Also see Hague v. C.I.O., 307 U.S. 496, 511 (1939).

53. Cases involving the Fourteenth Amendment: Hague v. CIO, 307 U.S. 496, (1939); Western Turf Association v. Greenberg, 204 U.S. 359 (1907); The Insurance Co. v. New Orleans, 13 Fed. Cas. 67, No. 7052 (C.C.D. La. 1870).

Cases involving Art. IV, § 2: Asbury Hospital v. Cass County, 326 U.S. 207 (1945); Hemphill v. Orloff, 277 U.S. 537 (1928); Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868).

54. U.S. CONST. amends. V and XIV, § 1.

Although the Communist Party is an unincorporated association, see note 43 *supra*, it would appear that it is entitled to due process. This right of unincorporated associations was recognized in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) (concurring opinions of Justices Black, Frankfurter, and Douglas) and in Communist Party v. Subversive Activities Control Board, Civil No. 11850, D.C. Cir., Dec. 23, 1954, pp. 25-31.

55. U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Sixth Amendment applies only to prosecutions in the federal court. *E.g.*, Betts v. Brady, 316 U.S. 455 (1942) Howard v. Kentucky, 200 U.S. 164 (1906); Eilenbecker v. Plymouth County, 134 U.S. 31 (1890). Assuming this condition is met, it would appear that "accused" is broad enough to encompass all defendants, including unincorporated associations like the Communist Party. The Party would have need of this right in prosecutions under § 15 of the ISA, 64 STAT. 1002 (1950), 50 U.S.C. § 794 (1952), which subjects communist organizations to a $10,000 fine if they fail to comply with the registration provisions of the act.

56. See, *e.g.*, Grosjean v. American Press Co., 297 U.S. 233 (1936) (corporation held entitled to freedom of speech and press); Associated Press v. National Labor Relations Board, 301 U.S. 103, 133 (1937) (dissenting opinion) (same). See also note 54 *supra*. But see Hague v. CIO, 307 U.S. 496, 527 (1939).

Other constitutional guarantees may also be applicable to unincorporated associations. However, some would not appear relevant, since by their nature they can be exercised

seem that Congress could, by statute, deprive the Communist Party of constitutional rights merely because the Party advocates the violent overthrow of the government, these rights should be considered beyond the possible scope of section 3.

Federal statutes create at least two relevant rights. The first is the right to sue or be sued in the federal courts, provided for by Rule 17(b) of the Federal Rules of Civil Procedure.[57] The second is granted by section 315 of the Federal Communications Act,[58] which entitles candidates to "equal time" for radio broadcasts during political campaigns. Although section 3 is directed only against the Communist Party as an organization and not at its members, the courts might extend the section to revoke the "equal time" rights of individual Party members in order fully to effectuate the denial to the Party of the state granted right to appear on the ballot.[59]

Bill of Attainder Aspects of Section 3

The success of most of the constitutional attacks which may be made upon section 3 will depend upon which rights, privileges, and immunities the courts ultimately include within its scope.[60] However, termination of *any* of these rights, privileges, and immunities may be the basis for invalidating section 3 as a bill of attainder.[61] Therefore, the bill of attainder issue should be considered before examining how the courts may delimit section 3.

A bill of attainder is generally described as a legislative act which imposes punishment upon a named individual or an easily ascertainable group without a judicial trial.[62] Certainly section 3 partially complies with this definition, since it does not provide for a judicial trial to determine the culpability of the organizations included within its scope. It is more difficult to ascertain whether any or all of the deprivations which might be included within section 3 constitute "punishment." One commentator has concluded that the question of whether the legislature has imposed punishment when it disqualifies individuals or groups from exercising rights or privileges is to be answered by ascertain-

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only by individuals. *E.g.*, the right to bear arms, U.S. CONST., amend. II; the right to grand jury indictment for a capital or otherwise infamous crime, *id.* amend. V.

57. This rule provides that the capacity of unincorporated associations to sue and be sued shall be determined by the law of the state in which the district court sits except that "a partnership or unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States . . . ."

58. 48 STAT. 1088 (1934), as amended, 47 U.S.C. § 315 (1952).

59. See note 35 *supra.*

60. See text pp. 726-30 *infra.*

61. In this case, depriving the Party of *any* right, privilege or immunity constitutes "punishment." See text at notes 74-80 *infra.* Therefore, each deprivation can be the basis for a bill of attainder as it is defined in this section of the text.

62. United States v. Lovett, 328 U.S. 303, 315 (1946); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1867); Comment, 63 YALE L.J. 844, 857 (1954).

ing whether the legislation evinces a "penal intent."[63] This view is supported by the purpose and judicial development of the prohibition against bills of attainder. The constitutional injunction against this type of statute was designed to maintain the separation of the legislative and judicial functions and thereby preserve to the individual the traditional safeguards of a judicial trial.[64] Those safeguards are denied when the legislature exceeds its proper function of defining crime and purports to judge those guilty of the crime.

The courts have regarded certain classes of facts as establishing a legislative penal intent. One such situation is where the legislature is so indiscreet as openly to avow its purpose.[65] Courts have also found penal intent where the characteristic causing persons to be disqualified was irrelevant to the activity from which they were excluded.[66] Thus, in *Cummings v. Missouri*,[67] a statute prohibiting persons from being ministers if they had aided the Confederacy in the Civil War was struck down by the Supreme Court as a bill of attainder. Even where relevancy existed, courts have discovered penal intent when the legislature imposed a disqualification after consideration of evidence as to the character of the proscribed individuals.[68] In contrast to this latter type of case where the legislature's actions make clear that it is judging individuals or groups and deciding that they are deserving of punishment, there is the situation where the legislature disqualifies a class from certain rights

63. Wormuth, *Legislative Disqualifications as Bills of Attainder*, 4 VAND. L. REV. 603, 608-10 (1951).

64. *Id.* at 603-05, 610-11; DOUGLAS, AN ALMANAC OF LIBERTY 103, 205 (1954); Comment, 63 YALE L.J. 844, 845 (1954).

65. See concurring opinion of Justice Frankfurter in United States v. Lovett, 328 U.S. 303, 318 (1946); see Wormuth, *supra* note 63, at 608.

66. See Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 319-20 (1867) (voiding a statute requiring priest to take oath that he did not participate in the Civil War on the side of the South); Pierce v. Carskadon, 83 U.S. (16 Wall.) 234 (1873) (voiding a statute requiring persons seeking the use of state judicial processes to file affidavits that they had not participated in the Civil War on the side of the South); *cf.* Dent v. West Virginia, 129 U.S. 114, 128 (1889) (upholding a statute providing for the licensing of doctors and distinguishing *Cummings* on the grounds of relevancy).

When a statute disqualifies a person from the exercise or enjoyment of a right or privilege because of past conduct, and if the characteristic causing the disqualification is not relevant to the exclusion from the right or privilege, the statute may also be an ex post facto law. See Cummings v. Missouri, *supra*; Pierce v. Carskadon, *supra*; Cases v. United States, 131 F.2d 916, 920-21 (1st Cir. 1942), *cert. denied sub nom.* Velazquez v. United States, 319 U.S. 770 (1943) (upholding statute punishing certain ex-convicts for transporting firearms in interstate commerce or receiving firearms so transported); Bauer v. Acheson, 106 F. Supp. 445, 450 (D.D.C. 1952) (statute and regulation governing the issuance of passports held not an ex post facto law); McAllister, *Ex Post Facto Laws in the Supreme Court of the United States*, 15 CALIF. L. REV. 269, 279-83 (1927).

67. 71 U.S. (4 Wall.) 277 (1867).

68. In United States v. Lovett, 328 U.S. 303 (1946), the Supreme Court struck down as a bill of attainder a provision in an appropriation act prohibiting paying three named individuals any of the money appropriated. A House committee had found these persons to be "subversive." *Cf. Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867). See also Wormuth, *supra* note 63, at 610.

or privileges without intending to penalize the individuals who may fall into that class. For example, in *Hawker v. New York*,[69] where the Supreme Court upheld a statute prohibiting felons from practicing medicine, the legislature manifestly was not assessing the characters of individuals and then imposing a penalty upon them; it was not at all concerned with the persons who were or might become members of that class. Rather it was enacting a protective statute on the basis of "general human experience" as to the characteristics of that class.[70]

Even though there is a legislative investigation into the character of individuals or groups and a disqualification on the basis of the legislature's implicit determination of culpability, recent cases require that the proscription have retroactive application in order to constitute punishment.[71] In *American Communications Ass'n v. Douds*,[72] the Supreme Court upheld section 9(h) of the NLRA, which restricted the opportunity of Communists to serve as union officials by denying unions the advantages of the NLRA if their officers refused to take a non-Communist oath. The Court emphasized that this section was prospective in character, since individuals could serve as union officials merely by renouncing membership in the Party.[73] It therefore found that Congress was not imposing punishment for past conduct, but was merely preventing future disruption of interstate commerce.

Section 3 of the CCA appears to fall well within the established definition of a bill of attainder,[74] regardless of which deprivations the section is ultimately

69. 170 U.S. 189 (1898).

70 Hawker v. New York, 170 U.S. 189, 195-96 (1898). Also see Dent v. West Virginia, 129 U.S. 114 (1889); Wormuth, *supra* note 63, at 611-13.

71. See Garner v. Board of Public Works, 341 U.S. 716 (1951), where the Court held prospective and therefore valid a city ordinance requiring oath by city employees that they do not, or within the past five years have not, advocated or belonged to an organization which advocates the violent overthrow of the government. There, a provision in the city's charter in effect for more than five years made such persons ineligible for public employment. See also American Communications Ass'n v. Douds, 339 U.S. 382 (1950) (upheld requirement that union officers take oath that they are not presently members of the Communist Party in order to qualify their union to use NLRB facilities); Albertson v. Millard, 106 F. Supp. 635 (E.D. Mich. 1952), *vacated and remanded on other grounds*, 345 U.S. 242 (1953) (upheld Michigan Trucks Act which banned the Communist Party and its candidates from the ballot) (for further discussion of the *Albertson* case see note 81 *infra*); Huntamer v. Coe, 40 Wash. 2d 767, 246 P.2d 489 (1952) (upheld non-subversive affidavit prerequisite to candidacy for public office).

72. 339 U.S. 382 (1950).

73. American Communication Ass'n v. Douds, 339 U.S. 382, 413-14 (1950).

74. Most of the cases involving bills of attainder deal with legislative acts directed against individuals or groups of individuals. Also, the generally accepted definition of a bill of attainder is phrased in terms of individuals or members of a group. See note 62 *supra* and accompanying text. Therefore, the fact that § 3 is directed at an organization as such, and not at its members, may cause some courts to hold that § 3 cannot be a bill of attainder. However, such reasoning appears to be erroneous; the courts should not hesitate to strike down § 3 if they feel it otherwise fits the definition of a bill of attainder. There do not appear to be any cases in which the courts have refused to invalidate a legislative act as a bill of attainder merely because it was directed against an organization

held to include. In those instances where the disqualification of the Party would be irrelevant to the orderly carrying out of the activities from which it is excluded, as where the Party is denied the right to sue and be sued or to take and hold property, a penal intent would be evident.[75] And even where the requisite relevancy might be said to be present, as in the denial to the Party of the right to appear on the ballot, an intent to punish the Party for its past acts may clearly be inferred from the Act's language and legislative history.[76] Congress was not guided by "general human experience" in passing the CCA.[77] It did not establish a proscription in general terms, leaving it to the judiciary to determine which groups fall into the proscribed class. Rather it conducted extensive investigations into the Party's character, made findings expressing a judgment as to that character,[78] determined that the Party "should be outlawed,"[79] and specifically directed the deprivations against the Party.[80] Finally, since the Party cannot avoid these deprivations by purging itself, section 3 has retroactive effect within the meaning of the *Douds* rule.[81]

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itself rather than against the individual members. On the other hand, there are indications in some cases that an organization can be the subject of a bill of attainder. See the concurring opinion of Justice Black in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 144 (1951). See also Thompson v. Wallin, 196 Misc. 686, 93 N.Y.S.2d 274 (Sup. Ct. 1949), which held a state statute to be a bill of attainder as against the Communist Party. Although the latter case was reversed on appeal, 276 App. Div. 463, 95 N.Y.S.2d 784 (3d Dept. 1950), *affirmed*, 301 N.Y. 476, 95 N.E.2d 806, *appeal dismissed*, 342 U.S. 801 (1951), the appellate courts seemed to accept the premise that the organization involved, the Communist Party, could be the victim of a bill of attainder but held for other reasons that it was not. The basic purpose of the constitutional prohibition against bills of attainder is to preserve the separation of governmental powers and to assure an accused the safeguards of a judicial trial. See note 64 *supra* and accompanying text. This policy is violated as much when an organization is declared guilty of a crime and punished by legislative fiat as when an individual is the victim of the legislature's displeasure.

75. In these instances, § 3 would also constitute an ex post facto law. See note 66 *supra*.

76. In the debates Sen. Butler said: "The bill does not outlaw the Communist Party by making its activities criminal. It makes the Communist Party impossible. It destroys all of its rights, privileges, and immunities, and strips it of all legal rights under the Constitution and the laws of the United States." 100 Cong. Rec. 14081 (daily ed. Aug. 17, 1954). Also, Sen. Humphrey said concerning his bill: "We shall have struck at the snake. We shall hold him in the hollow of our hands . . . . We shall have the means to strike a lethal blow at the conspiratorial forces of international communism . . . ." *Id.* at 13559 (daily ed. Aug. 12, 1954). Rep. McDonough said, "The Communist movement in the United States should be wiped out completely." *Id.* at 13838 (daily ed. Aug. 16, 1954).

77. See text at note 70 *supra*.

78. See text pp. 715-16 *supra*.

79. See text p. 715 *supra*.

80. CCA § 3, quoted note 34 *supra*.

81. An important element of the *Douds* decision holding that the non-communist oath required by § 9(h) of the Taft-Hartley Act is not a bill of attainder was "the fact that members of those groups identified in § 9(h) are free to serve as union officers if at any time they remove the allegiances which constituted a bar to signing the affidavit in the past . . . . In the cases relied upon by the union, on the other hand, this Court has empha-

Despite the fact that section 3 seems clearly to come within the definition of a bill of attainder, the apparently waning vitality of this constitutional safeguard [82] and the temper of the times may militate against reinvigorating it. If the courts hold that section 3 is not a bill of attainder, they will be faced with the task of determining the scope of the section and of passing upon the other constitutional problems involved.

Suggested Scope of Section 3

Section 3 declares that the Communist Party is not entitled to "any" rights, privileges, and immunities, and further states that "whatever" rights, privileges, and immunities have been granted to it are terminated.[83] If this comprehensive language is literally interpreted to include *all* rights, privileges, and immunities granted to the Party by federal and state law, the unconstitutional deprivation of *any* right, privilege, or immunity would cause the whole section to fall.[84] Thus interpreted, section 3 would be constitutional only if

sized that, since the basis of disqualification was past action or loyalty, nothing that those persons proscribed by its terms could ever do would change the results." American Communications Ass'n v. Douds, 339 U.S. 382, 414 (1950). Under § 3 of the CCA, the rights, privileges, and immunities of the Communist Party are *"hereby* terminated." Nothing the Party can do or refrain from doing could take it out of the reach of the statute; and the congressional history seems to emphasize the punative aspects of § 3 rather than its preventive potentialities. See note 76 *supra.* The rationale of the Douds case may be used to support a finding that § 3 is not a bill of attainder in its application to individual Party members. For situations where the sanction may be applied to such members, see note 35 and text at notes 58-59 *supra.* As in the Douds case, individuals can always resign from the Party and thus escape whatever disabilities are placed on Party members. In Salwen v. Rees, 23 U.S.L. WEEK 2158 (N.J. Super. Ct., Sept. 30, 1954), *aff'd,* 23 U.S.L. WEEK 2176 (N.J. Sup. Ct., Oct. 11, 1954), the validity of § 3 was upheld when applied to deny a Communist candidate a place on the ballot for local state office. Although the bill of attainder issue was argued, Brief for Appellant, pp. 19-24, Salwen v. Rees, 23 U.S.L. WEEK 2176 (N.J. Sup. Ct., Oct. 11, 1954), neither the lower court nor the state Supreme Court mentioned the problem. The *Douds* case appears to be ample authority for the rejection of the argument that § 3 was a bill of attainder as against Salwen, since he could purge himself by running under a designation other than that of the Communist Party. See note 149 *infra.* However, the *Salwen* case is not necessarily authority for the proposition that § 3 is not a bill of attainder as against the Communist Party, which cannot purge itself, since the Party was not involved in the suit. See also Albertson v. Millard, 106 F. Supp. 635, 644-45 (E.D. Mich. 1952), where a three-judge district court held that the provision in Michigan's Trucks Act denying the Communist Party and its nominees a place on the ballot was not a bill of attainder. Although the Communist Party was a party to the action, the court appeared to consider the bill of attainder problem only with reference to individual candidates of the Party. The case was vacated and remanded by the Supreme Court because the state courts had not had an opportunity to construe or pass on the validity of the statute. 345 U.S. 242 (1953).

82. For a discussion of the problem of the decreasing effectiveness of the bill of attainder protection, see Comment, 63 YALE L.J. 844 (1954).

83. See text of entire section quoted in note 34 *supra.*

84. If any right held to be included within the § 3 deprivation is found to be unconstitutionally abridged, the whole section will be rendered unconstitutional; it would be impossible to separate the unconstitutional portion of the section from the constitutional

Congress could validly deny the Communist Party every right, privilege, and immunity granted to it by federal and state laws.

The constitutionality of such a broad deprivation depends in the first place upon the scope of Congress' delegated powers. Congress certainly can act to preserve the nation's existence and to provide for its safety,[85] and was obviously thinking in terms of this power in passing the CCA.[86] It also has other powers on which it might rest the denial of one or more of the rights that could be included within section 3. For example, it could be contended that Congress' power to regulate the "manner" of the election of Senators and Representatives extends to the barring of the Party from the ballot for these offices.[87] However, difficulties would be encountered where state granted rights are involved, such as the right to sue in state courts or to hold property. The Tenth Amendment reserves to the states those powers not delegated to the federal government, and the courts might feel impelled to hold that Congress has no power to interfere in such areas traditionally regulated only by the states.[88]

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part. All deprivations are brought about by the same general language, that is, "Whatever rights, privileges and immunities which have heretofore been granted . . . are hereby terminated." Hence, even with the liberal separability clause in § 12 of the CCA, permitting the remainder of the Act to stand if the application of the Act to "any person or circumstance is held invalid," see note 108 *infra*, it would appear to be impossible to sever from § 3 the deprivation of any particular right, since it is impossible to sever the part of the statute which brings about the unconstitutional divestment without also severing the portion which imposes valid deprivations. Although cases have used a separability clause such as that in § 12 to bolster a construction of a statute that would render it constitutional, see note 110 *infra*, and have stated that such a clause can be used to sever unconstitutional portions of a statute, Utah Power & Light Co. v. Pfost, 286 U.S. 165, 183-85 (1932); Williams v. Sandard Oil Co., 278 U.S. 235, 242 (1929); Chicago Board of Trade v. Olsen, *262* U.S. 1, 42 (1922), apparently no cases have used a separability clause to "sever" particular unconstitutional applications of certain language in a statute from other valid applications. However, if the courts do use the separability clause in § 12 to sever unconstiutional applications of § 3, then even if the "all" language in § 3 is literally construed, the courts can merely strike down the unconstitutional applications and leave the others intact. The result would be the same as where the separability clause is used to construe the language in § 3 so as to render it constitutional. See note 110 *infra*.

85. See Dennis v. United States, 341 U.S. 494, 501 (1950); Communist Party v. Subversive Activities Control Board, Civil No. 11850, D.C. Cir., Dec. 23, 1954, pp. 9-10. See also Burrough v. United States, *290* U.S. 534, 544-45 (1934).

86. The findings in § 2 of the Act which are concerned exclusively with the subversive nature of the Communist Party and its threat to the national safety, see text p. 715 *supra*, strongly indicate that Congress was probably thinking in terms of its power to provide for the national safety when it enacted the CCA.

87. See text at note 152 *infra*.

88. The Tenth Amendment does not impose any limitation on the powers of the federal government. Case v. Bowles, 327 U.S. 92, 101-02 (1946); Fernandez v. Wiener, 326 U.S. 340, 362 (1945); United States v. Darby, 312 U.S. 100, 123-24 (1941). It merely gives doctrinal body to an objection that Congress has no power at all to act in certain areas. It "states but a truism that all is retained which has not been surrendered." United States v. Darby, *supra*. Thus if Congress has power to act in a given area, no

Even if Congress is attempting to combat an evil within the range of its authority, the courts must ascertain whether denying the Party all its rights, privileges, and immunities is reasonably related to the relief sought, or whether it is arbitrary and discriminatory; for this is the test of substantive due process.[89] Congress may certainly meet the danger posed by organizations dedicated to the forceful overthrow of the legally constituted government by exercising its power to preserve the nation's safety.[90] And in applying the substantive due process test, a court might hold that because the basic purpose of the Party is to overthrow the government, the denial of *all* the Party's rights, privileges, and immunities, including those involving peaceable activities, is reasonably related to securing the national safety. The proper approach, however, seems to require a court to find a reasonable relationship between the deprivation of *each* right, privilege, or immunity and the evil which Congress seeks to prevent. This application of the due process test permits Congress to disable an organization from endangering national security, but precludes any possibility of arbitrary legislative action. Such an approach appears to be supported by the decision in *Communist Party v. Subversive Activities Control Board*,[91] where the Court of Appeals for the District of Columbia upheld the Internal Security Act;[92] this statute, like the CCA, imposes a number of sanctions upon proscribed organizations and their members.[93] Thus, if the

valid objection can be raised because of the fact that it thereby enters a field which ordinarily has been regulated by the states. Case v. Bowles, *supra*; Bowles v. Willingham, 321 U.S. 503, 521-23 (1944) (concurring opinion by Justice Rutledge); United States v. Darby, *supra*, at 114, 123-24; Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 156 (1919). However, where the federal government seeks to intervene in an area long regulated only by the states, the courts may refuse to find that Congress has power to do so.

89. *E.g.*, American Communications Ass'n v. Douds, 339 U.S. 382, 391-92 (1950); Olsen v. Nebraska, 313 U.S. 236 (1941); Nebbia v. New York, 291 U.S. 502 (1934).

90. See note 85 *supra*.

91. Civil No. 11850, D.C. Cir., Dec. 23, 1954.

92. In Communist Party v. Subversive Activities Control Board, Civil No. 11850, D.C. Cir., Dec. 23, 1954, the court, in upholding the ISA, appears to have included in its treatment of the First Amendment the requirement that each of the sanctions imposed upon the Party be reasonably related to a substantive evil which Congress has power to prevent. *Id.* at 10, 15-16, 32. Reasonable relationship is usually a pertinent inquiry in determining whether a statute meets the requirements of substantive due process under the Fifth Amendment. See note 89 *supra*. However, the court treats the due process issue separately in another portion of the opinion. Communist Party v. Subversive Activities Control Board, *supra*, at 25-31. Since the court felt that it was necessary for each sanction to be reasonably related to a legitimate congressional end, the inclusion of this test under the First Amendment rather than under the Fifth does not appear to be very important. The *Communist Party* case would still appear to require that each sanction imposed by the Communist Control Act be reasonably related to a substantive evil which Congress can prevent, regardless of whether this is said to be required by the First or the Fifth Amendment.

93. For sanctions imposed upon members, see text pp. 745-46 *infra*.

For sanctions imposed upon organizations, see provisions cited in the notes 267-68, 271 *infra*.

deprivation under the CCA is of a right such as the right to hold property or to sue and be sued in the state courts, the exercise of which does not seem to endanger the nation or to be related to any other evil which Congress may combat,[94] the courts may hesitate to find the necessary relationship between the restriction and the achievement of a proper legislative end.[95]

Moreover, if the section is given a comprehensive coverage, a serious First Amendment problem will arise. Although section 3 does not by its terms specifically limit the exercise of First Amendment rights, some of the deprivations it imposes upon the Communist Party would make it difficult for the Party to operate as an effective organ of political expression and would presumably discourage members from continuing their affiliation.[96] The courts may well find that these effects constitute an abridgement of First Amendment rights.[97] Such a finding would necessitate an initial inquiry as to whether the activities restricted involve lawful and peaceable conduct. In *De Jonge v. Oregon*,[98] the Supreme Court held that the right of the Communist Party to engage in peaceable assembly and lawful discussion could not be curtailed, despite the fact that the general objective of the Party was to overthrow the government by force. Thus, if any of the deprivations in section 3 constitute limitations on First Amendment rights, and if any of them involve solely lawful and peaceable activity, *De Jonge* would appear to require the whole section to be voided as violative of the First Amendment.

Even if a literal interpretation of section 3 would not result in its invalidation under the *De Jonge* rationale, it would intensify the seriousness of the remaining First Amendment questions. Some of the deprivations which would be effected by a comprehensively construed section 3, such as the right to

94. For a possible argument that the deprivation of the right to appear in the federal courts may be reasonably related to a valid congressional purpose, see notes 139-42, 147 *infra* and accompanying text.

95. Although the Supreme Court now seldom strikes down legislation as violative of substantive due process, especially in the area of economic regulation, Note, 24 IND. L.J. 451 (1949), the test is still applied and must be satisfied. See Beauharnais v. Illinois, 343 U.S. 250, 261 (1952); American Communications Ass'n v. Douds, 339 U.S. 382, 390-93 (1950). And if the courts accept the reasoning of the D.C. Circuit in Communist Party v. Subversive Activities Control Board, Civil No. 11850, Dec. 23, 1954, see note 92 *supra*, the question of reasonable relation will also be a pertinent inquiry under the First Amendment.

96. For example, the right to sue to enforce First Amendment rights; the right of Communist Party candidates to equal radio time, see notes 58-59 *supra* and accompanying text; and the right to appear on the ballot, see note 47 *supra* and accompanying text.

97. See Starr, *The Legal Status of American Political Parties*, 34 AM. POL. SCI. REV. 439, 444 and nn. 32-33 (1940).

98. 299 U.S. 353 (1937).

In *De Jonge* the Court held unconstitutional an Oregon statute applied to punish members of the Communist Party for presiding at a meeting of the Party involving peaceable assembly and lawful discussion. The Court stated that notwithstanding the fact that the Communist Party's objective was the violent overthrow of the government, the participants in a meeting called by the Party could not be punished for the lawful exercise of their rights of speech and assembly. De Jonge v. Oregon, 299 U.S. 353, 363-66 (1937).

appear on the ballot,[99] might be regarded as "direct" abridgements of First Amendment rights. The strict "clear and present danger" test of *United States v. Dennis*[100] would have to be applied to such sanctions. Even if the courts hold that First Amendment rights are only "indirectly" limited by a broadly interpreted section 3, the *Douds*[101] case would require the courts to judge the section by balancing the seriousness of the restraints against the substantiality of the public interest involved.[102] The more severe the restraint, the more probable a judicial holding that the public interest protected is outweighed.[103] Hence, although the First Amendment question would be present even if section 3 were limited to include fewer deprivations than its comprehensive language literally allows, such a limitation would make the problem less critical.

Many of the constitutional questions created by giving section 3 a comprehensive interpretation could be avoided by limiting the section's applicability to only federally granted rights. This would eliminate the Tenth Amendment problem. It would also lessen the risk of section 3 being struck down as violative of substantive due process as well as the First Amendment, since fewer rights would be denied the Party. It is conceivable that the courts will resort to such a construction to save the section. This, however, is both improbable and undesirable in view of the fairly clear congressional intent to terminate state as well as federal rights.[104]

A much more satisfactory solution would be to limit the section *to only those rights, privileges, and immunities which Congress can constitutionally deny the Party.* Such a construction would be in accord with the well estab-

99. However, the Supreme Court has apparently settled the First Amendment problem in regard to this deprivation in favor of the restriction. See note 162 *infra* and accompanying text.

100. 341 U.S. 494, 508-11 (1951).

101. American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

In *Douds*, there was no direct restriction on the exercise of First Amendment rights. However, the Court felt that § 9(h) of the Taft-Hartley Act in effect would require union leaders to renounce Communism in order to retain their positions in the union, and thereby would discourage the exercise of political rights protected by the First Amendment. *Id.* at 392-93, 399. Similarly the CCA may not directly abridge freedom of speech or assembly. However, the sanctions imposed upon members of the Communist Party by § 4 of the Act and the denial to the Party of all its rights, privileges, and immunities under § 3 certainly do much to discourage the free exercise of politcial rights which are protected by the First Amendment.

102. American Communications Ass'n v. Douds, 339 U.S. 382, 399-400 (1950).

103. In *Douds*, the Court concluded that the restraints on First Amendment rights were not great enough to override the need for unburdened interstate commerce, because "in this legislation, Congress did not restrain the activities of the Communist Party as a political organization; nor did it attempt to stifle beliefs . . . . Section 9(h) touches only a relative handful of persons, leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint. And it leaves those few who are affected free to maintain their affiliations and beliefs subject only to possible loss of positions which Congress has concluded are being abused to the injury of the public by members of the described groups." American Communications Ass'n v. Douds, 339 U.S. 382, 404 (1950).

104. See text at notes 41-42 *supra.*

lished doctrine that, wherever possible, the courts will interpret a statute in such a way as to preserve its constitutionality.[105] In implementing this principle, the Supreme Court has narrowly construed the language of many broadly worded statutes.[106] In the case of the CCA, the suggested interpretation would not be strained. There is nothing in the legislative history of section 3 compelling the courts to hold that the section includes *all* rights, privileges, and immunities. Expressions of intent as to the coverage of section 3 are quite sketchy.[107] However, the liberal separability clause in section 12,[108] while apparently not of itself authorizing a restrictive interpretation of section 3,[109] does indicate a general congressional intent that such a construction be adopted if a broad interpretation would result in the invalidation of the entire section.[110] Therefore, a construction of section 3 that limits it to those rights, privileges, and immunities, both federal and state, which Congress can constitutionally

105. Dennis v. United States 341 U.S. 494, 501-02 (1950); American Communications Ass'n v. Douds, 339 U.S. 382, 407 (1950); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348 (1936) (concurring opinion by Justice Brandeis); United States v. Delaware & Hudson Co., 213 U.S. 366, 407 (1908); Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 448 (1830); SUTHERLAND, STATUTORY CONSTRUCTION § 83 (2d ed., Lewis 1904).

106. In one case, half of an evenly divided Supreme Court gave a very liberal construction to seemingly absolute language in order to preserve the constitutionality of a statute. Blodgett v. Holden, 275 U.S. 142, 147 (1927) (opinion of Justice Holmes). Other cases have limited broad language in statutes in order to render them constitutional. See United States v. Harriss, 347 U.S. 612 (1954); United States v. Rumely, 345 U.S. 41 (1953); United States v. CIO, 335 U.S. 106 (1948).

107. There are only a few general remarks in the debates using the "all" language of the statute. See remarks by Sen. Ferguson, 100 Cong. Rec. 14087-88 (daily ed. Aug. 17, 1954), and Sen. Butler, *id.* at 14079, 14081. Moreover, congressmen stated generally that the CCA would "outlaw" the Party. See remarks by Sen. Butler, *id.* at 14082, and by Reps. Reed and McDonough, *id.* at 13836, 13838 (daily ed. Aug. 16, 1954). However, little was said to elucidate on these general statements.

Some specific examples were given as to the effect of § 3, such as the denial to the Party of the right to sue and be sued, to appear on the ballot, or to contract. See note 111 *infra*. Here too, the statements were general, and the scope of the specified deprivations was not made clear; it was not explained whether the Party would be denied the right to sue in the federal or state courts, or both; or whether it was denied a place on the ballot for federal or state office or both, although Rep. Celler said the new law would prevent the Party from appearing in "any elections." 100 Cong. Rec. 13837 (daily ed. Aug. 16, 1954).

108. CCA § 12 provides:

"If any provision of this title or the application thereof to any person or circumstances is held invalid, the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby."

109. See note 84 *supra*.

110. In United States v. Harriss, 347 U.S. 612 (1954), the Court narrowly construed a statute in order to limit its application and hence avoid declaring it unconstitutional. It used a severability clause similar to the one in § 12 of the CCA as an indication of Congress' intent to have the act "operate on this narrower basis, even if a broader application . . . were not permissible." *Id.* at 620-21. See also Adler v. Board of Education, 342 U.S. 485, 496 (1952); Crowell v. Benson, 285 U.S. 22, 62-3 (1932); United States v. Dennis, 183 F.2d 201, 214 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

deny the Party is as reasonable an effectuation of congressional intent as is possible. If this interpretation is given section 3, the courts will have to examine the specific right, privilege, or immunity involved in any given case to ascertain whether its termination by Congress would be constitutional. If they find that the deprivation would be unconstitutional, then section 3 will be construed as not requiring it. Similarly, if the denial of a particular right, privilege, or immunity is found to be unconstitutional *only in certain circumstances*, then section 3 will be construed as not terminating the right, privilege, or immunity in those instances.

Constitutionality of Various Possible Applications of Section 3

It would be unfeasible to discuss here the constitutionality of every deprivation of right, privilege, or immunity that section 3 might effect. It is appropriate, however, to consider the application of section 3 to the right to sue and be sued and the right to appear on the ballot, for these were the rights most often mentioned in the congressional debates.[111]

The Right to Sue and Be Sued

The denial of the right to sue and be sued in civil suits is subject to at least one fairly obvious exception. Under section 14 of the ISA, an aggrieved party has the right of appeal to the courts from any order entered by the Subversive Activities Control Board.[112] This right is preserved to the Communist Party and its subsidiaries by the specific provision in section 3 of the CCA which stipulates that nothing in it shall be construed as amending the ISA[113]

An examination of the possible sources of congressional authority is necessary to determine if the Party may be foreclosed from resort to the courts in all situations other than proceedings under the ISA. If these sources are found inadequate in any instances, then, under the theory that the courts will interpret section 3 as extending only to those rights which Congress may constitutionally deny the Party, the section will be regarded as not terminating the right to sue or be sued in those instances. There are three grounds which might support the validity of this deprivation: (1) Congress' power to preserve the existence and safety of the nation;[114] (2) its power to regulate the jurisdiction of the federal, and in some instances, the state courts;[115] (3) its power to terminate any right it has granted by statute.[116]

111. Several congressmen said that § 3 would prevent the Party from appearing on the ballot. See remarks of Rep. Celler, 100 Cong. Rec. 13837 (daily ed. Aug. 16, 1954) and Sens. Kefauver and Butler, *id.* at 14082 (daily ed. Aug. 17, 1954). It was also stated that § 3 would deprive the Party of the right to sue and be sued in the courts. See remarks of Sens. Kefauver and Butler, *supra.* In addition, Sen. Ferguson suggested that § 3 denies the Party the right to enter into any contractual relations. *Id* at 14088.

112. 64 STAT. 1001 (1950), 50 U.S.C. § 793 (1952).

113. See note 34 *supra.*

114. See note 85 *supra.*

115. U.S.CONST. art. III. See also notes 120-21 *infra.*

116. See note 143 *infra.*

(1) Under the first of these powers, Congress has broad authority to cope with all situations endangering the nation. Consequently, it is clear that Congress may meet any threat to national safety engendered by activities of the Communist Party.[117] However, due process demands that the means which Congress adopts be reasonably related to this legitimate purpose.[118] It is difficult to see how the orderly participation of the Communist Party in federal or state court proceedings is even remotely related to the safety of the nation. When this consideration is coupled with the fact that denying the Party the right to sue and be sued would probably preclude innocent non-Communist plaintiffs from securing judicial redress against the Party,[119] it seems unlikely that courts will hold the deprivation to be a valid exercise of Congress' power to protect the nation.

(2) Article III of the Federal Constitution gives Congress broad authority to create and delimit the jurisdiction of the lower federal courts.[120] In addition, Congress can grant sole jurisdiction to the federal courts, to the exclusion of the state courts, over cases coming within the federal judicial powers as enumerated in Article III, Section 2.[121]

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117. See note 85 *supra*.

118. See note 89 *supra*.

119. It was stated in the debates that the Party cannot "sue *or be sued*" in the courts. See note 111 *supra*.

120. Kline v. Burke Constr. Co., 260 U.S. 226, 233-34 (1922); United States v. Union Pacific R.R., 98 U.S. 569, 602-03 (1878); Sheldon v. Sill, 49 U.S. (8 How.) 440 (1850); Cary v. Curtis, 44 U.S. (8 How.) 235, 245 (1845); BUNN, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES 9-11 (5th ed. 1949); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

Congress may also make "exceptions" and "regulations" concerning the appellate jurisdiction of the Supreme Court, but may not alter its original jurisdiction. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869); BUNN, *op. cit. supra* at 11-13.

121. Although there is general language in the decisions to the effect that Congress has the power to vest in the federal courts exclusive jurisdiction over any cases coming within the federal judicial powers set forth in Article III, Plaquemines Fruit Co. v. Henderson, 170 U.S. 511, 517-18 (1898); The Moses Taylor, 71 U.S. (4 Wall.) 411, 429 (1866), Congress apparently has never withdrawn from the state courts jurisdiction over diversity cases, BUNN, *op. cit. supra* note 120, at 100-01. However, it has used this authority to deny state courts jurisdiction over suits in admiralty: 63 STAT. 101 (1949), 28 U.S.C. § 1333 (1952); The Moses Taylor, *supra*; patent cases: 62 STAT. 931 (1948), 28 U.S.C. § 1338(a) (1952); Note, 31 COLUM. L. REV. 461 (1941); and price control cases: 56 STAT. 31 (1942), 50 U.S.C. APP. §§ 923-24 (1946); Lockerty v. Phillips, 319 U.S. 182 (1943). In general, see BUNN, *op. cit. supra*, at 100-03.

In some cases Congress has exercised its Article III powers to deny both federal and state courts jurisdiction over certain cases arising from federal statutes. Thus, for example, Congress restricted the jurisdiction of federal and state courts in cases involving the validity of price regulations under the Emergency Price Control Act of 1942, vesting exclusive jurisdiction over such cases in a single specially created federal court. See 56 STAT. 32-33, 50 U.S.C. APP. § 924(d) (1952); Bowles v. Willingham, 321 U.S. 503 (1944); Lockerty v. Phillips, *supra*; HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 295-300 (1953). And suits under the Fair Labor Standards Act of 1938, 52 STAT. 1060, 29 U.S.C. § 201 (1952), were excluded from state and federal courts by the Portal-

Termination of the right to sue and be sued could conceivably be regarded as an exercise by Congress of its Article III powers. Under this view, section 3 might be held to limit the jurisdiction of the federal courts so as to deny them authority to hear cases in which the Communist Party is a litigant;[122] and it might exclude all such cases from state court jurisdiction if they fell within the federal judicial powers.[123] But it would clearly not interfere with the right of the Party to sue and be sued in the state courts in non-diversity cases which involve purely state questions.

Interpreting section 3 as an exercise of Congress' Article III powers, however is not very acceptable. This construction would require a somewhat strained interpretation of the simple phrase terminating the Party's rights, privileges, and immunities.[124] There is nothing in the wording or legislative history of the section to indicate that Congress intended to resort to its Article III powers when it enacted section 3.[125] Moreover, it is not at all clear whether Congress has the authority under Article III completely to preclude a particular individual or group from obtaining adjudication of all matters falling within the federal judicial power. Congress has never attempted this.[126] In some cases it denied everyone a particular remedy, but the deprivation was not absolute since other remedies were available.[127] In one case all remedies to enforce a particular right were withdrawn. The Portal to Portal Act of

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to-Portal Act of 1947, 61 STAT. 85, 29 U.S.C. § 252 (1952). See, Seese v. Bethlehem Steel Co., 168 F.2d 58 (4th Cir. 1948); HART & WECHSLER, *op. cit. supra* at 300-02; *cf.* Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948).

122. See note 120 *supra*.

123. See note 121 *supra*.

124. Unlike provisions such as FED. R. CIV. P. 17(b), granting unincorporated associations such as the Party the capacity to sue and be sued in the courts, it is not clear that statutes which grant federal and state courts general jurisdiction over certain classes of cases confer "rights" or "privileges" on the Party.

125. See note 86 *supra* and accompanying text.

126. When a state attempted to deny persons who fought on the side of the South during the Civil War the right of access to the state courts, it was struck down as an ex post facto law. Davis v. Pierse, 7 Minn. 13, 82 Am. Dec. 65 (1862). However, the state constitution, unlike that of the United States, specifically guaranteed all persons free access to the state courts and this provision was also relied on by the court in holding the law unconstitutional. Many states have similar constitutional provisions. 11 AM. JUR., *Constitutional Law* § 326 (1937). See also Pierce v. Carskadon, 83 U.S. (16 Wall.) 234 (1872) (Virginia statute requiring oath that applicant had not participated in the Civil War on the side of the South held to be a bill of attainder and an ex post facto law).

127. In the Norris-LaGuardia Act, 47 STAT. 70 (1932), 29 U.S.C. § 101-15 (1952), as amended by the Labor Management Relations Act of 1947, 61 STAT. 146, 155, 29 U.S.C. §§ 160(j)(k), §§ 178-80 (1952), Congress employed its Article III powers to restrict the jurisdiction of the federal courts to grant injunctions in certain instances. See Lauf v. E. G. Shinner & Co., 303 U.S. 323, 330 (1938); HART & WECHSLER, *op. cit. supra* note 121, at 295. And under §§ 203-04 of the Emergency Price Control Act of 1942, 56 STAT. 32-33, 50 U.S.C. APP. §§ 923-24 (1952), the state courts and the regular federal courts were denied jurisdiction over suits to enjoin or determine the validity of price regulations promulgated under the act; but a special Emergency Court of Appeals was established

1947[128] terminated certain overtime pay rights to which employees were entitled under the Fair Labor Standards Act of 1938,[129] and also deprived the federal and state courts of jurisdiction over any suit brought to enforce the extinguished rights.[130] In *Battaglia v. General Motors Corp.*,[131] the government contended that the Act's limitation of jurisdiction was valid regardless of the constitutionality of the direct extinguishment of the overtime rights.[132] The Second Circuit, in rejecting this argument, stated that this denial of access to the courts would be a valid exercise of Congress' Article III powers only if it did not result in the unconstitutional divestment of a right which the parties sought to enforce.[133] The court then held that the statute was constitutional whether the overtime rights arose exclusively from federal statute or were also founded on contract; for Congress may legally terminate any right grounded on a federal statute, and in this case it could modify the contracts because of their effect on interstate commerce.[134] *Battaglia* establishes that Article III apparently will not support a sweeping denial to the Communist Party of access to the courts. For the exclusion to be valid, the right which the Party is seeking to enforce must be one which Congress could destroy directly.[135] While Congress usually has this power over rights originating solely from federal statutes, at least as long as its action is not patently arbitrary or capricious,[136] it does not generally have it, for example, over ordinary property rights.[137] The restriction established by *Battaglia* is eminently reasonable, since otherwise Congress could effectively abridge rights which it could not terminate directly, simply by denying the owners of such rights judicial remedies to enforce them.[138]

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by the act and given exclusive jurisdiction over such suits. See Bowles v. Willingham, 321 U.S. 503 (1944); Yakus v. United States, 321 U.S. 414 (1944); Lockerty v. Phillips, 319 U.S. 182 (1943); HART & WECHSLER, *op. cit. supra* note 121, at 295-300. See also Hart, *supra* note 120, at 1366-67.

128. 61 STAT. 85 (1947), 29 U.S.C. § 252 (1952).

129. 52 STAT. 1064 (1938), 29 U.S.C. § 201 (1952).

130. See HART & WECHSLER, *op. cit. supra* note 121, at 300-02.

131. 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948).

132. Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948).

133. *Ibid.*

134. *Id.* at 259-62.

135. See also Manosky v. Bethlehem-Hingham Shipyard, Inc., 177 F.2d 529, 532 (1st Cir. 1949), holding that Congress could not indirectly terminate overtime pay rights under the Portal-to-Portal Act by denying courts jurisdiction over cases involving such rights unless it could constitutionally extinguish the rights directly. *Cf.* Seese v. Bethlehem Steel Co., 168 F.2d 58 (4th Cir. 1948).

136. For example, it does not appear that Congress could deny an ordinary tax exemption to all Republicans.

137. Of course, the Government may summarily deprive persons of their property rights if necessary in time of war or other severe emergency. See United States v. Russell, 80 U.S. (13 Wall.) 623 (1872); Franco-Italian Packing Co. v. United States, 23 U.S.L. WEEK 2424 (U.S. Ct. Cl. Feb. 8, 1955); Dakota Coal Co. v. Fraser, 283 Fed. 415 (D.N.D. 1919), *vacated on appeal as moot*, 267 Fed. 130 (8th Cir. 1920).

138. See Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673 (1930); Graham & Foster v.

In opposition to the *Battaglia* restriction, it could be argued that, since Congress might reasonably believe the Communist Party to be an unruly litigant, it could deny the Party access to the federal courts under any circumstances. It is true that the maintenance of judicial order and decorum might conceivably be thought a problem where the Communist Party is a suitor,[139] whereas such considerations were entirely absent in *Battaglia*. But Congress made no findings concerning the Party's behavior in the courts, and the paucity of supporting facts should lead the courts to reject this suggested basis for total exclusion from the federal courts. Since the reasonableness of a federal statute is at issue, however, the contention that the Party's behavior may disrupt judicial proceedings would probably be aided by a presumption.[140] If the presumption were not overcome, a conflict between a power and a right both normally constitutional would arise in cases involving the complete deprivation of a right which Congress could not directly abridge.[141] Such a deprivation would occur only where the right is enforceable solely in the federal courts. Congress has no power to preserve order in the state courts; hence the *Battaglia* restriction would still be applicable there, and would allow state adjudication of a right enforceable in both state and federal courts. But where denial of access to the federal courts totally extinguishes the right, apparently the proper approach would be to balance the significance of the public policy which Congress is seeking to effectuate against the importance of the right which will be curtailed.[142] Because the complete divestment of a right is involved, and because the courts have authority to maintain order by use of contempt

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Goodcell, 282 U.S. 409, 430-31 (1931) (dictum); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1371-72 (1953).

139. During the trial before Judge Medina of the eleven top Communist leaders, there were several instances of unruly conduct which disturbed the proceedings. See, *e.g.*, N.Y. Times, May 19, 1949, p. 1, col. 3; *id.*, June 14, 1949, p. 1, col. 8; *id.*, June 29, 1949, p. 8, col. 3; *id.* Aug. 2, 1949, p. 1, col. 2.

140. Borden's Co. v. Baldwin, 293 U.S. 194, 209-10 (1934); ROTTSCHAEFER, CONSTITUTIONAL LAW 459-60 (1939).

141. If Congress could reasonably believe that order in the judicial system would be promoted by depriving the Communist Party of the right to sue and be sued, due process requirements would probably be fulfilled in all those situations where the Party was not prevented from vindicating rights which Congress could not directly abolish. The CCA presumably divests the Party of all other rights, and questions of substantive and procedural due process could not arise from the denial of access to the courts to enforce non-existent rights. However, procedural due process would obviously be an impediment where the divestment would result in the inability of the Party to enforce rights which Congress could not directly eliminate.

142. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 124-27 (1866) (conflict between the exercise of war power to declare martial law and right to trial in the courts resolved in favor of preserving the civil right); Duncan v. Kahanamoku, 327 U.S. 304, 324, 335 (1946) (concurring opinions of Justice Murphy and Chief Justice Stone) (same); United States v. Russell, 80 U.S. (13 Wall.) 623 (1872) (conflict between government's need for private property during period of war emergency and the rights of private property resolved in favor of the government); Franco-Italian Packing Co. v. United States, 23 U.S.L. WEEK 2424 (U.S. Ct. Cl. Feb. 8, 1955) (same); Dakota Coal Co. v. Fraser, 283 Fed. 415 (1920), *vacated on appeal as moot*, 267 Fed. 130 (conflict between state's power

powers, it seems very improbable that the courts would strike the balance in favor of the congressional action.

(3) Many decisions have held that a right or privilege dependent for its existence solely upon a statute can be terminated at the will of the legislature by the repeal or amendment of that statute.[143] Under this theory, the right of the Communist Party to sue and be sued in ordinary civil suits in the federal courts could be revoked by Congress, since unincorporated associations have this right only by virtue of federal statute.[144] The right of access to state courts, however, would be unaffected, since it is not derived from federal law.[145] And even the exclusion from federal courts would probably be invalid if it would result in the deprivation of a right which Congress could not abridge directly.[146] Thus, where the Party seeks to enforce a right which can be vindicated only in the federal courts, Congress probably cannot deny the Party a federal adjudication unless it could extinguish the right directly. This proposition is again subject to the possibility that the courts may say that Congress could reasonably have assumed that litigation by the Party will be disruptive of judicial order in the federal courts. If the courts adopt this view, they should balance the desirability of the CCA as an instrument for maintaining order in the courts against the indirect deprivation to the Party of rights which Congress could not otherwise take away.[147]

Thus, although the precise boundaries of Congress' authority to deny the Communist Party the right to sue and be sued are not clear, it is at least

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to seize property to provide for the public welfare during an emergency and the rights of private property resolved in favor of the state).

143. Chase Securities v. Donaldson, 325 U.S. 304 (1945) (held valid a statute lifting the bar of the statute of limitations in pending action); Campbell v. Holt, 115 U.S. 620 (1885) (same); Ewell v. Daggs, 108 U.S. 143 (1883) (held valid the repeal of a usury statute thereby terminating the defense of usury); Norris v. Crocker, 54 U.S. (13 How.) 429 (1851) (held valid the repeal of statute giving owner of runaway slaves right to a penalty against those who aid fugitives, even though action was pending); Seese v. Bethlehem Steel Co., 168 F.2d 58 (4th Cir. 1948) (held valid the termination by Portal-to-Portal Act of rights to overtime pay under the Fair Labor Standards Act).

144. See text at note 57 *supra*.

145. See notes 44 and 48 *supra* and accompanying text.

146. The legislature's power to terminate rights it has granted would appear to be subject to some limitations. For example, even if a right is derived from a statute, the legislature cannot terminate it after it has become "vested," either by prosecution to final judgement; or, if it is a right derived from adverse possession, by possession for the statutory period; or otherwise. See Chase Securities Corp. v. Donaldson, 325 U.S. 304, 311, 315 (1945); Campbell v. Holt, 115 U.S. 620, 623 (1885); Battaglia v. General Motors Corp. 169 F.2d 254, 259 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948). In addition, although Congress has been said to have unlimited powers to delimit the jurisdiction of the federal courts which it creates, see note 120 *supra*, it has been held that it cannot deny a party access thereto if this would result in the denial of a right Congress could not terminate directly. See notes 131-38 *supra* and accompanying text.

147. See note 142 *supra* and accompanying text.

certain that this power is subject to some strict limitations. Congressional power to provide for the nation's safety does not permit it to terminate the Party's right of access to the courts. Nor does its authority under Article III or its power to terminate rights created solely by federal statute appear to allow Congress completely to exclude the Party from the courts where such denial would result in the deprivation of a right which Congress could not extinguish directly. Since all other rights are presumably terminated by the CCA anyway, the denial of access to the courts seems to add little to the sanctions otherwise imposed by the Act.[148] This deprivation will be given broader scope only if the courts consider the indirect termination of otherwise inviolable constitutional rights as a valid inevitable byproduct of a legitimate congressional attempt to prevent disruption of the federal judiciary.

The Right of the Party to Appear on the Ballot

Section 3 may be interpreted to deny the Communist Party the right to appear on the ballot for either federal or state office. The effect of this deprivation would be to prevent Party members from running under the Communist Party designation for any federal or state office.[149] The legislative history of the CCA clearly indicates that Congress intended to restrict the Party in its right to appear on the ballot.[150] How far this restriction was meant to extend, though, is not at all clear.[151] The delineation of the permissible scope of this deprivation will pose a knotty problem for the courts.

Federal Offices—Senators and Representatives. There are two grounds on which Congress may rely to deny the Communist Party and its candidates a place on the ballot for seats in the Senate and House of Representatives. These are its power under Article I, Section 4 of the Constitution to regulate

148. If the Communist Party is excluded from the courts only in those instances where Congress could constitutionally deprive it of the underlying right it seeks to enforce, no substantial limitation on First Amendment rights could result. Therefore, the *De Jonge* limitation, see note 98 *supra* and accompanying text, would not appear applicable.

149. The New Jersey Supreme Court so held in Salwen v. Rees, 23 U.S.L. WEEK 2176 (N.J. Sup. Ct., Oct. 11, 1954), *affirming* 23 U.S.L. WEEK 2158 (N.J. Super. Ct., Sept. 30, 1954). See note 81 *supra*. The lower court's opinion contained dictum to the effect that if Salwen had chosen to run without the Communist Party label he could have done so, see p. 9a of the advance sheet of the Superior Court opinion. There is some legislative history supporting this conclusion. See remarks of Rep. Celler, 100 Cong. Rec. 13837 (daily ed. Aug. 16, 1954).

150. See note 111 *supra*.

151. Sen. Kefauver said merely that the Party "could not be placed on the ballot . . . ." 100 Cong. Rec. 14082 (daily ed. Aug. 17, 1954). Representative Celler seemed to go somewhat further when he said "the Communist Party cannot appear on the ballot, . . . cannot appear in any elections . . . ." *Id.* at 13837 (daily ed. Aug. 17, 1954). However, this is all that appears in the legislative history concerning this deprivation. It is not made clear whether the Party and its candidates are to be denied a place on the ballot for federal or state office or both.

the "manner" of holding elections for Senators and Representatives,[152] and its power to preserve the safety and existence of the nation.[153]

Article I, Section 4 authorizes the states to prescribe the "Times, Places, and Manner of holding Elections for Senators and Representatives"; Congress, however, is empowered by the same section to alter any of these state regulations and enact its own.[154] The right to control the "manner" of holding elections would seem to include the right to determine who can appear on the ballot. Since the only source of state power with respect to the election of Senators and Representatives comes from this section of the Constitution,[155] the states presumably are acting under it when they enact statutes prescribing which parties and candidates can appear on the ballot for federal office.[156] And the only part of the section which can authorize such control is that allowing the states to regulate the "manner" of holding elections. If the states derive this power from Article I, Section 4, the federal government, which obtains the same type of regulatory authority from the section, also has this power.[157]

152. U.S. CONST. art. I § 4 states: "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, except as to the Places of choosing Senators."

153. See note 85 *supra*.

154. See note 152 *supra*. See also United States v. Classic, 313 U.S. 299 (1941) (federal statute making it a crime to deprive a citizen of a right secured to him by the Constitution applied to the election of congressmen); *Ex parte* Yarbrough, 110 U.S. 651 (1884) (same); *Ex parte* Siebold, 100 U.S. 371 (1879) (federal regulatory statute to insure honesty and accuracy in elections in which congressmen were chosen); *Ex parte* Clarke, 100 U.S. 399 (1879) (same).

155. See Newberry v. United States, 256 U.S. 232, 280-81 (1921) (concurring opinion of Justice Pitney).

156. See note 47 *supra*.

Some states exclude from the ballot candidates who are members of organizations which advocate the violent overthrow of the government. Other states specifically exclude the Communist Party and its candidates from the ballot. See Notes, 96 U. PA. L. REV. 381, 388-91 (1948); 34 VA. L. REV. 450, 450-52 (1948). For recent statutes see LA. REV. STAT. § 14:361 (Supp. 1954); MD. ANN. CODE GEN. LAWS art. 85A, § 5 (1951); MASS. ANN. LAWS c. 264, § 20 (Supp. 1954); MICH. STAT. ANN. § 28.243(17) (Supp. 1954); N.H. REV. LAWS c. 193, § 14 (1951); TEX. REV. CIV. STAT. ANN. art. 6889-3, § 6 (Supp. 1954); WASH. REV. CODE § 9.81.100 (1951). The Supreme Court has not yet passed on the constitutionality of any of these statutes which extend to federal offices, although it has upheld the Maryland act which was limited to state offices. Gerende v. Board of Supervisors, 341 U.S. 56 (1951). A lower federal court and the Supreme Court of Washington have recently upheld statutes denying the Communist Party a place on the ballot for federal as well as state offices. Albertson v. Millard, 105 F. Supp. 635 (E.D. Mich. 1952), *vacated and remanded on other grounds*, 345 U.S. 242 (1953); Huntamer v. Coe, 40 Wash. 767, 246 P.2d 489 (1952). But see Feinglass v. Reinecke, 48 F. Supp. 438 (N.D. Ill. 1942) (held unconstitutionally vague a statute barring from the ballot political organizations associated with Communist, Fascist, Nazi, or other un-American principles and which engage in propaganda designed to teach the violent overthrow of the government); Communist Party v. Peek, 20 Cal. 2d 536, 127 P.2d 889 (1942) (statute barring from the ballot any party using the designation "communist" held unconstitutional as a "special law").

157. See Note, 37 COLUM. L. REV. 86, 88 n.16 (1937).

And the exercise of this power to keep Communist candidates from running for Congress appears to be reasonably related to the legitimate congressional purpose of keeping from governmental positions of trust and authority members of an organization whose basic objective is violent overthrow of that government.

The second power on which Congress may rely in excluding Communist Party candidates from the ballot for the Senate and House of Representatives is its power to provide for the nation's safety. In section 2 of the CCA, Congress finds that the Party is the instrumentality of a conspiracy to overthrow the government by force.[158] In the light of these findings, the courts may well conclude that barring the Party from the ballot is reasonably related to a legitimate congressional purpose.[159]

The exercise of these two congressional powers is always subject to constitutional limitations. *Gerende v. Board of Supervisors*[160] seems to have settled a number of constitutional questions arising out of Congress' denial to Communist Party candidates of a place on the ballot. In that case, in a short per curiam opinion, the Supreme Court upheld Maryland's Ober Act, which requires candidates for state office to take an oath that they are not members of any organization attempting to overthrow by force the governments of the United States or of Maryland.[161] Although the Supreme Court did not discuss the issues involved in the case, it affirmed the decision of the Maryland Supreme Court which had held that the statute did not abridge freedom of speech, press, or assembly.[162] There are no grounds apparent for distinguishing *Gerende* merely because it involved a restriction on running for state rather than federal office.

A more serious constitutional problem exists, however. Nothing in the United States Constitution stipulates that candidates for Senator and Representatives cannot run as Communists. If denying Communist Party candidates a place on the ballot is regarded as imposing additional qualifications upon congressional aspirants, as it well might be,[163] substantial authority indicates

158. See p. 715 *supra*.

159. See Albertson v. Millard, 106 F. Supp. 635, 642-44 (E.D. Mich. 1952), *vacated and remanded on other grounds*, 345 U.S. 242 (1953) (Michigan Trucks Act barring the Communist Party and its candidates from the ballot held reasonable); Communist Party v. Peck, 20 Cal. 2d 536, 551, 127 P.2d 889, 898 (1942) (dictum).

160. 341 U.S. 56 (1951).

161. MD. ANN. CODE GEN. LAWS art. 85A § 5 (1951).

162. In Shub v. Simpson, 196 Md. 177, 76 A.2d 332 (1950), which was affirmed in *Gerende*, the Supreme Court of Maryland construed the statute so as to limit it to candidates for *state* office and to require the candidates to swear that they do not advocate the *violent* overthrow of the government of the United States or Maryland. In sustaining the statute, the court held it did not abridge freedom of speech, press or assembly; nor attempt to establish guilt by association; nor constitute a bill of attainder. *Id.* at 195, 76 A.2d at 339-40.

The *De Jonge* case, see note 98 *supra*, was not mentioned in either *Shub* or *Gerende*, and would not appear to be applicable since in *De Jonge* the exercise of First Amendment rights did not involve any possible danger to the nation.

163. In Shub v. Simpson, 196 Md. 177, 76 A.2d 332 (1950), the court limited the

that it should be held invalid.[164] However, were prohibiting Communists from serving in Congress essential to the nation's safety and were the only way to accomplish this the exclusion of Communist candidates from the ballot, the courts would probably give effect to the superior interest of preserving the nation. But in this case no pressing necessity exists that would justify the courts in disregarding the exclusiveness of the constitutional qualifications. Each house of Congress is the sole judge of the qualifications and elections of its members,[165] and therefore could probably deny the right to be seated to any Communist who might by chance be elected. Thus, the absence of any real need may cause the courts to prohibit Congress from barring the Communist Party from the ballot for Federal office.

State Offices and Presidential Electors. Although there is much authority opposed to congressional interference in the election of state officers and presidential electors,[166] there are some grounds to support the validity of an injunction by Congress against Communist Party candidates running for these offices. Many commentators and a number of decisions have stated that

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Ober Act to candidates for state office because to require congressional candidates to take an oath that they do not advocate the violent overthrow of the government before they could appear on the ballot would create an additional qualification for Senators and Representatives and would thereby render the statute unconstitutional. In Imbrie v. Marsh, 3 N.J. 578, 71 A.2d 352 (1950), the New Jersey Supreme Court held that requiring candidates for state office to take an oath that they do not believe in, or belong to any organizations which advocate the violent overthrow of the government adds a new qualificaton to those provided in the state constitution, and hence is void. The complete denial to certain persons of the right to appear on the ballot under the name of their chosen party appears to be just as much of an additional qualification for office as the requirement that such candidates take an oath which they could not truthfully take. But see Huntamer v. Coe, 40 Wash. 2d 767, 246 P.2d 489 (1952), where the court upheld an oath required by a Washington statute similar to the oath required by the Ober Act of Maryland, but where the Washington court construed its statute to apply to candidates for Congress. The court held that since the oath was essentially the same as that required by Article VI, paragraph 3 of the United States Constitution, no additional qualifications for office were imposed.

164. THE FEDERALIST No. 60, at 394 (Modern Library ed. 1937) (Hamilton); 1 COOLEY, CONSTITUTIONAL LIMITATIONS 139-40 (8th ed. 1927); MECHEM, PUBLIC OFFICES AND OFFICERS §§ 65, 96 (3d ed. 1890); 1 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 625 (5th ed., Bigelow 1891); Shub v. Simpson, 196 Md. 177, 76 A.2d 332 (1950); *Cf.* Imbrie v. Marsh, 3 N.J. 578, 71 A.2d 352 (1950). See also Letter to Sen. Mike Mansfield from the American Law Division of the Library of Congress, Feb. 10, 1954, in 100 Cong. Rec. 13992, 13993-94 (daily ed. Aug. 16, 1954), advising Senator Mansfield that denying Communists the right to run for President of the United States would be void since it would add to the exclusive qualifications for that office provided in the Constitution.

165. U.S. CONST. art. I, § 5.

166. Regarding state officers, see THE FEDERALIST No. 59, at 385 (Modern Library ed. 1937) (Hamilton); 5 ELLIOT, DEBATES 402 (Supp. 1866); 18 AM. JUR., *Elections* § 8 (1938); Maurer, *Congressional and State Control of Elections under the Constitution*, 16 GEO. L.J. 314, 327-40 (1928); Notes, 34 VA. L. REV. 450 (1948); 96 U. PA. L. REV. 381, 390 (1948); United States v. Reese, 92 U.S. 214 (1875); Lackey v. United States, 107 Fed. 114 (6th Cir. 1901); Newberry v. United States, 256 U.S. 233, 268 (1921) (dic-

Congress can regulate in this area only where necessary to preserve the purity of the election of federal officers chosen in the same election with state officers,[167] where required to maintain honesty in the election of presidential electors,[168] or where necessary to enforce the Fifteenth Amendment.[169] Most of the major decisions which so hold arose during the Reconstruction period following the Civil War, when Congress passed many laws seeking to assure Negroes their newly acquired right to vote. In very few of these cases was any source of power other than Article I, Section 4 or the Fifteenth Amendment argued as the basis for congressional interference.[170] In *Burroughs v. United States*,[171] however, the right of self preservation of the federal government was suggested as the ground for an act of Congress designed to preserve the honesty of the election of presidential electors.[172] Although previous decisions had said this area belonged exclusively within the realm of state regulation,[173] the Supreme Court upheld the statute.[174] From this it appears that denying Communist candidates the right to appear on the ballot for state offices and for presidential electors might be upheld as a valid exercise on Congress' power to provide for the national safety. The rational relation between the

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tum on concurring opinion of Justice White); *Ex parte* Siebold, 100 U.S. 371, 393 (1879) (dictum).

Regarding presidential electors, see McPherson v. Blacker, 146 U.S. 1 (1892); *In re* Opinion of the Justices, 188 Me. 552, 107 Atl. 705 (1919); 3 WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES §§ 936, 938 (2d ed. 1929); Maurer, *supra*, at 324-27; Annot., 153 A.L.R. 1066 (1944).

167. *Ex parte* Siebold, 100 U.S. 371 (1879); *Ex parte* Perkins, 29 Fed. 900 (C.C.D. Ind. 1887). However, both cases emphasize that Congress may not enact regulations having exclusive reference to the election of state officers merely because the elections for federal and state officers are held at the same time. *Ex parte* Siebold, *supra* at 393; *Ex parte* Perkins, *supra*, at 904-05.

168. Burroughs v. United States, 290 U.S. 534 (1933); *cf. Ex parte* Yarbrough, 110 U.S. 651 (1884). See also Annot., 153 A.L.R. 1066, 1077-78 (1944).

169. United States v. Reese, 92 U.S. 214 (1875); Lackey v. United States, 107 Fed. 114 (6th Cir. 1901); Maurer, *supra* note 166.

Congress presumably also has power under the Nineteenth Amendment to legislate to prevent discrimination among voters because of sex.

170. For cases in which the power to preserve the nation and its governmental institutions was raised as the basis for congressional regulation of of elections, see Burroughs v. United States, 290 U.S. 534 (1934); *Ex parte* Yarbrough, 110 U.S. 651 (1884).

171. 290 U.S. 534 (1934).

172. Burroughs v. United States, 290 U.S. 534, 545-48 (1934).

173. See note 166 *supra*.

174. The statute involved was the Federal Corrupt Practices Act of 1925, which required organizations to keep records of contributors and file reports with the clerk of the House of Representatives if they accepted contributions and made expenditures for the purpose of influencing the election of presidential and vice-presidential electors in two or more states. In holding that Congress had the power to pass such a law, the court stated: "To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny the nation in a vital particular the power of self-protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the depart-

exercise of this power and the barring of Communist candidates from the ballot is apparent. Congress could reasonably believe that the strategic placement of Communist in state offices would threaten the safety of the United States.[175]

Another power upon which Congress might rely as the basis for excluding Communist Party candidates from the state ballot is its obligation under the Constitution to guarantee to the states a republican form of government.[176] The courts have consistently refused to void state action which is attacked on the ground that it is repugnant to the constitutional guaranty to each state of a republican form of government, saying that the question of whether this guaranty has been violated is a problem within the exclusive domain of Congress.[177] And Congress could reasonably believe that if Communists succeed in gaining control of a state government, the form of that government would soon cease to be republican.

If the courts find that Congress has power to regulate these non-federal elections, the remaining constitutional objections should not prove troublesome. The *Gerende* case would again settle most of the constitutional problems in favor of the statute.[178] And the vexing question of whether the statute imposes additional qualifications for office would not be present. The federal Constitution contains no provision setting forth qualifications for presidential electors or state officers.[179] And where state constitutions establish qualifications for local officers, under the supremacy clause these constitutional provisions would be overridden by a valid federal statute.[180]

In *Salwen v. Rees*,[181] the only case that has arisen under section 3 of the

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ments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption." Burroughs v. United States, 290 U.S. 534, 545 (1934).

The fact that the *Burroughs* case did not involve the regulation of the election of state officers, but only of the election of presidential electors, would not appear to be significant. If the safety of the nation requires the exclusion of Communists from state office, *Burroughs* appears to be good authority to support congressional regulation of the elections of these officers, even though it has been previously held that this area was within the exclusive province of the state.

175. See note 159 *supra*.

176. U.S. CONST. art. IV, § 4.

177. See, *e.g.*, Ohio v. Akron Park District, 281 U.S. 74 (1930); Mountain Timber Co. v. Washington, 243 U.S. 219 (1917).

178. See notes 160-62 *supra* and accompanying text.

Also, the *De Jonge* case is not applicable. See note 162 *supra*.

179. In reference to the absence in the Federal Constitution of qualifications for electors, see Letter to Sen. Mike Mansfield from American Law Division of the Library of Congress, Feb. 10, 1954, in 100 Cong. Rec. 13993 (daily ed. Aug. 16, 1954).

180. Valid federal statutes prevail over state constitutional provisions. Florida v. Mellon, 273 U.S. 12 (1926); Gunn v. Dallman, 111 F.2d 36 (7th Cir. 1948); Antle v. Tuchbreiter, 414 Ill. 571, 111 N.E.2d 836 (1953); Schaffer v. Leimberg, 318 Mass. 396, 62 N.E.2d 193 (1945).

181. 23 U.S.L. WEEK 2158 (N.J. Super. Ct., Sept. 29, 1954), *aff'd*, 23 U.S.L. WEEK 2176 (N.J. Sup. Ct., Oct. 11, 1954).

CCA, the New Jersey Supreme Court upheld the section when applied to deny a Communist Party candidate for local state office a place on the ballot. Although the court did not discuss the source of congressional authority for this regulation, Congress' power to preserve the safety of the nation was argued [182] and was probably viewed by the court as determinative.

Thus, although Congress may not be able to refuse Communist Party candidates the right to run for Congress if such a denial is deemed to establish additional qualifications for Congressional office, there seems to be substantial basis for congressional action denying Communists the right to appear on the ballot for state offices and for presidential electors, despite many statements that state power in this field is exclusive.[183] Therefore, section 3 may best be construed to keep Communist candidates off the ballot only for state offices and presidential electors. If it is so limited, it will be constitutional when applied. However, if the courts hold that Congress does not have the power to regulate the election of either federal or state officers, then section 3 must be struck down *in toto* as unconstitutional.[184] Since the legislative history clearly indicates that Congress intended to deny Communists *some* right to appear on the ballot,[185] the courts would be engaging in judicial legislation if they excluded this deprivation from the scope of section 3 merely to preserve its constitutionality.

Disabilities Imposed upon Individual Party Members

In contrast to section 3 of the CCA, which is aimed at the Communist Party itself, section 4 is specifically directed towards *members* of the Party and of similar organizations.[186] However, as in the case of section 3, neither the

182. It was argued that Congress' power under the common defense and welfare clause in Article I, § 8, cl. 1 of the Constitution justified federal intrusion into state elections. Brief for Appellant, p. 17, Salwen v. Rees, 23 U.S.L. Week 2176 (N.J. Sup. Ct., Oct. 11, 1954).

183. See note 166 *supra.*

184. See note 84 *supra.*

185. See note 111 and text at note 150 *supra.*

186. Section 4 provides:

"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.

"(b) For the purposes of this section, the term 'Communist Party' means the organization now known as the Communist Party of the United States of America, the Communist Party of any State or subdivision thereof, and any unit or subdivision of any such organization, whether or not any change is hereafter made in the name thereof."

language of the statute nor the legislative history clearly indicates what Congress intended to do.

Meaning and Scope of Section 4

Section 4 provides that those who come within its scope are "subject to all the provisions and penalties of the Internal Security Act of 1950, as amended, as members of a 'Communist-action' organization." The section covers anyone who "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, 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 . . . . "

Before dealing with the problems raised by section 4, the ISA should be examined to determine which of its "provisions and penalties" apply to members of "Communist-action" organizations.[187] No obligations or sanctions are imposed upon such persons until the organization has registered as a "Communist-action" organization or there is in effect a "final order" of the Subversive Activities Control Board requiring it so to register.[188] At that time the members are subjected to certain disabilities: they may not apply for or use passports,[189] work in a defense facility,[190] hold any non-elective office or employment under the United States,[191] or obtain or receive certain classified information.[192] In addition, if a proscribed organization does not register its members within sixty days after it registers or a "final order" is entered against it, they can be directed to register by the Attorney General.[193] If a member does not register when so ordered, he is subject to heavy penal sanctions.[194] And he is liable to additional penalties if he applies for a passport,[195] gets work

187. See note 247 *infra* for definition of "Communist-action" organization.

188. 64 STAT. 991-93 (1950), 50 U.S.C. § 783(c), 784-85 (1952). See also Note, 51 COLUM. L. REV. 608, 617, 624 (1951).

An order of the SACB does not become "final" until after the "aggrieved party" has had the opportunity to appeal the Board's order to the court of appeals and the Supreme Court. 64 STAT. 1002 (1950), 50 U.S.C. § 793(b) (1952).

189. 64 STAT. 993 (1950), 50 U.S.C. § 785 (1952).

190. 64 STAT. 992 (1950), 50 U.S.C. § 784(a) (1952).

191. *Ibid.*

192. 64 STAT. 991 (1950), 50 U.S.C. § 783(c) (1952).

193. Under the ISA, 64 STAT. 995 (1950), 50 U.S.C. § 787(a)(b) (1952), the members of a "communist-action" organization are under an obligation to register 60 days after the final order against their organization or after learning a registered organization to which they belong has failed to register them. However, no penalty is incurred by a failure to register until there is a final order of the SACB directing the *individual member* to register. 64 STAT. 1002 (1950), 50 U.S.C. § 794(a). See Note, 51 COLUM. L. REV. 606, 617 n.122 (1951).

194. The statute provides for a maximum penalty of 5 years imprisonment and a $10,000 fine, with each day of failure to register constituting a separate offense. 64 STAT. 1002 (1950), 50 U.S.C. § 794(a) (1952).

195. 64 STAT. 1003 (1950), 50 U.S.C. § 794(c) (1952).

in a defense plant without revealing his membership,[196] or receives classified information.[197] At present, no order requiring any organization to register as a "Communist-action" organization has been made final, although the United States Court of Appeals for the District of Columbia has upheld the order of the SACB finding the Communist Party to be a "Communist-action" organization and ordering it to register.[198] This order is not "final" until the Supreme Court affirms the decision or denies certiorari.[199]

The most perplexing problem raised by section 4 is how, if at all, it changes the situation existing under the ISA. Though somewhat contradictory, the debates on the floor of the Senate at least indicate that a number of Senators believed that the section did more than merely reenact the ISA.[200] What this "more" is, however, is not at all clear. Two possible interpretations of section 4 emerge from the debates. One maintains that section 4 requires the members of the Communist Party and other organizations within its scope to register immediately, rather than sixty days after a final order of the SACB; and if they fail to register, it empowers the Attorney General to proceed at once against them before the SACB for an order requiring them to register. But presumably the other sanctions of the ISA would not be imposed until the organization registers or there is in effect a final order directing it to do so. Apparently this was the interpretation given the section by Senators Cooper and McCarran.[201] The other interpretation is that section 4 immediately subjects the members of the Communist Party and other organizations within its compass to the disabilities imposed by the ISA upon members of "Communist-action" organizations *except* for the registration requirement. This apparently was the view adopted by Senators Butler and Morse.[202] Although both Senators McCarran and Butler were members of the conference committee

196. *Ibid.*

197. 64 STAT. 991 (1950), 50 U.S.C. § 783(d) (1952).

198. Communist Party v. Subversive Activities Control Board, Civil No. 11850, D.C. Cir., Dec. 23, 1954.

199. See note 188 *supra.*

200. It is difficult to believe that Congress would include a section in the statute which it felt had no function whatsoever. Although Senator McCarran said once in the course of the debates that § 4 "reenacted" the ISA, 100 Cong. Rec. 14403 (daily ed. Aug. 19, 1954), he and other Senators at other times indicated that it did something more. See notes 201-02 *infra* and accompanying text. Senators Humphrey and Butler made it clear that they felt the new bill would "expedite action under the Internal Security Act" and "supplement, implement, and strengthen the whole body of law directed at the communist conspiracy in America." 100 Cong. Rec. 14394 (daily ed. Aug. 19, 1954).

201. When asked by Senator Cooper whether "the only substantial difference between the Internal Security Act and [section 4 of the CCA] . . . is that, whereas it is necessary for a demand to be made on the communist-front [action?] organization to register its members and its failure to do so before an individual member can be required to register, under the Internal Security Act an individual member could be directed to register immediately under [section 4]?," Senator McCarran answered in the affirmative. 100 Cong. Rec. 14403 (daily ed. Aug. 19, 1954).

202. In discussing § 4, Sen. Butler said: "[M]ere membership in the Communist Party will not be a crime. A person must knowingly and willingly be a member of the Communist

which drafted section 4 in its present form,[203] the statements of Senator Butler are probably entitled to greater weight. His views on section 4 were expounded in a series of extensive statements,[204] whereas Senator McCarran's interpretation of the section was expressed in a short answer to a single question.[205] Also, when Senator Morse later repeated Senator Butler's remarks as being his understanding of what section 4 accomplished, no one corrected or questioned him.[206] Therefore, on the basis of the best part of a confused legislative history, it appears that section 4 differs from the ISA only to the extent that section 4 *immediately* subjects members of the Communist Party and the other organizations coming within its scope to the disabilities, other than registration, imposed by the ISA.

Party. He has got to know what it is and join it willingly. When he does that, he becomes a member, within the meaning and intent of the Internal Security Act of 1950, of a Communist-action organization. *When he takes that step* he becomes subject to the sanctions of the Internal Security Act, which I shall place in the Record . . . .

"The provisions are: [Sen. Butler then listed the sanctions imposed upon members of "Communist-action" organizations by the ISA: They cannot hold jobs in the Government or in defense facilities, and if they apply for such jobs, they must disclose their membership. Also, they may not knowingly receive certain classified information. Although it was not listed by Sen. Butler, the new prohibition against holding office or employment in labor organizations, directed against members of "Communist-action" organizations under the ISA, as amended by § 6 of the CCA, should also be included among those sanctions imposed upon Communist Party members by § 4 of the CCA.]

"The members of a Communist-action organization must also, *under certain circumstances*, register with the Attorney General as a member of such organization." 100 Cong. Rec. 14392 (daily ed. Aug. 19, 1954) (emphasis added). Sen. Humphrey in effect repeated the above statement as his understanding of § 4. *Id* at 14407.

In an exchange with Sen. Kefauver, Sen. Butler again indicated that the provisions and penalties are immediately applicable to members of the Party:

Sen. Kefauver. "Suppose a young man named John Smith, 21 years of age, and in college, decides he is a Communist, and suppose . . . he even joins the Communist Party."

Sen. Butler. "Knowing and willfully?"

Sen. Kefauver. "Well, he merely knew he joined the Communist Party."

Sen. Butler. "But it is assumed that he did so knowingly and willfully?"

Sen. Kefauver. "Knowingly, let us say."

Sen. Butler. "If his action was knowing and willful action, he *immediately* comes within the toils of the law, because that is what the act is aimed at." *Id.* at 14393 (emphasis added).

Senators Butler and Humphrey stated that "under certain circumstances" the members of the Communist Party must register. Although these circumstances were not specified, the debates indicate that at least Sen. Butler felt them to be those set out in the ISA, that is, no registration of Party members could be compelled until sixty days after a final order requiring the Party to register. In explaining § 4 to Sen. Kefauver, Sen. Butler stated: "If the organization of which he is a member, the Communist Party of the United States, is found by the courts to be a Communist-action organization, *then* that organization of which he is a member would have to register, and his name would have to be on the roster of members of that organization. If the organization did not register, *then* he would have to register and he would have to do nothing else." *Ibid.* (emphasis added).

203. See report of conference committee, 100 Cong. Rec. 14390-91 (daily ed. Aug. 19, 1954).

204. See note 202 *supra*.

205. See note 201 *supra*.

206. 100 Cong. Rec. 14407 (daily ed. Aug. 19, 1954).

Even after there is a "final order" requiring the Communist Party to register under the ISA, section 4 will still have some utility. It is true that after a "final order" the disabilities of the ISA will be imposed on Party members by virtue of the ISA without any assistance from section 4.[207] However, this section covers other subversive organizations[208] and hence will expedite action against them by immediately subjecting their members to the "provisions and penalties" of the ISA, even though there are no final orders in effect against the organizations. Moreover, section 4 may prevent circumvention of the ISA by Communist Party members who seek to avoid the effect of a "final order" by resigning from the Party and joining a similar organization with a different name. Under the ISA, the Attorney General might have to go through another long process of litigation before the SACB and the courts to get a "final order" requiring the new organization to register. Under section 4, however, the new organization would probably be included within the broad definition of the Communist Party as "any unit or subdivision of . . . such organization, whether or not any change is hereafter made in the name thereof."[209]

Constitutional Problems Raised by Section 4

Section 4 raises few constitutional questions that are not also raised by the ISA.[210] The same sanctions and provisions are involved, the only difference being that some of the sanctions are imposed immediately rather than after a "final order." The First Amendment problems posed by the ISA sanctions were considered by the Court of Appeals for the District of Columbia in *Communist Party v. Subversive Activities Control Board*.[211] There the court, applying both the clear and present danger test and the *Douds* balancing of interests standard, held that the ISA does not infringe First Amendment rights.[212] It is likely that any First Amendment objections to section 4 will receive the same answer. The *Communist Party* case also decided that the ISA is not a bill of attainder.[213] Although this problem is somewhat greater under section 4 because of its specification of the Communist Party, the retrospective

207. See notes 188-93 *supra* and accompanying text.

208. See CCA § 4(a) (2), quoted in note 186 *supra*.

209. CCA § 4(b).

This will be of great assistance to the Attorney General. It has taken more than four years to get as far as the Supreme Court in the attempt to get the Communist Party to register as a "Communist-action" organization. See remarks of Sen. Lehman, 100 Cong. Rec. 14079 (daily ed. Aug. 17, 1954).

210. For a discussion of the constitutional problems raised by the ISA, see Sutherland, *Freedom and Internal Security*, 64 HARV. L. REV. 383 (1951); Comments, 39 GEO. L.J. 440 (1951); 46 ILL. L. REV. 274 (1951); 25 ST. JOHN'S L. REV. 397 (1951); Notes, 51 COLUM. L. REV. 606 (1951); 31 NEB. L. REV. 429 (1952).

211. Civil No. 11850, D.C. Cir., Dec. 23, 1954.

212. Communist Party v. Subversive Activities Control Board, Civil No. 11850, D.C. Cir., Dec. 23, 1954, pp. 10-16.

213. *Id.* at 40.

effect requirement of the *Douds* case [214] probably rules out the possibility of invalidating the section as a bill of attainder, since it applies only to one who "willfully becomes or remains a member" of the proscribed organization.

Determination of Membership

Section 5 of the CCA lists thirteen criteria [215] which, if evidence concerning them is presented, the court is supposed to instruct the jury to consider in determining: (1) membership or participation in the Communist Party; (2) membership or participation in any other organization defined in the Act; and (3) knowledge of the purpose or objective of the Communist Party or of any other organization defined in the Act. For example, the jury is to take into account whether an individual has made financial contributions to the organization, has made himself subject to its discipline, or has executed its orders,

214. See notes 72-73 *supra* and accompanying text.

215. "Section 5. In determining membership or participation in the Communist Party or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, the jury, under instructions from the court, shall consider evidence, if presented, as to whether the accused person:

"(1) Has been listed to his knowledge as a member in any book or any of the lists, records, correspondence, or any other document of the organization;

"(2) Has made financial contribution to the organization in dues, assessments, loans, or in any other form;

"(3) Has made himself subject to the discipline of the organization in any form whatsoever;

"(4) Has executed orders, plans, or directives of any kind of the organization;

"(5) Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the organization;

"(6) Has conferred with officers or other members of the organization in behalf of any plan or enterprise of the organization;

"(7) Has been accepted to his knowledge as an officer or member of the organization or as one to be called upon for services by other officers or members of the organization;

"(8) Has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of communication orders, directives, or plans of the organization;

"(9) Has prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectives and purposes of the organization;

"(10) Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization;

"(11) Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the organization, or to anyone else in behalf of the objectives of the organization;

"(12) Has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization;

"(13) Has in any other way participated in the activities, planning, actions, objectives, or purposes of the organization;

"(14) The enumeration of the above subjects of evidence on membership or participation in the Communist Party or any other organization as above defined, shall not limit the inquiry into and consideration of any other subject of evidence on membership and participation as herein stated."

plans, or directives.[216] The jury's findings of knowledge and membership or participation are important in determining the application of section 4 of the Act.[217]

An initial problem raised by section 5 is the effect to be given these criteria. During the limited debate on the section, there was one suggestion that it establishes a *definition* of membership in the Communist Party or other proscribed groups.[218] This view, however, cannot be given much credence. Senator Humphrey, who introduced the section, regarded it as merely establishing rules "by which the court can hear evidence" and instruct the jury.[219] Nor does the section's wording indicate that Congress intended to set up strict definitions of membership or knowledge.[220] Furthermore, the obvious due process objections which would be presented if the vague criteria of section 5 were construed as definitions militate against such an interpretation.[221]

Any argument that a conclusive presumption of membership or knowledge should be raised by proof of the section 5 factors must also be rejected. Nothing in the section or its legislative history indicates that Congress intended section 5 to have this effect. Moreover, it seems clear that such a conclusive presumption would be held to be an unconstitutional impingement on the judicial function and a deprivation of due process.[222]

Although less serious constitutional problems are created by giving the

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216. See note 215 *supra*.

217. Knowing and willing members of the Communist Party and certain other organizations are "subject to all the provisions and penalties of the Internal Security Act of 1950, as amended, as members of a 'Communist-action' organization." Thus, for example, when an individual applies for a job in a defense facility without disclosing his membership in the Party, he would be indicted for violating § 5 of the ISA, 64 STAT. 992 (1950), 50 U.S.C. § 784 (1952), and the criteria in § 5 of the CCA would be used at this trial to determine the defendant's membership in the Party and his knowledge of its purposes or objectives. 100 Cong. Rec. 14392 (daily ed. Aug. 19, 1954) (remarks of Sen. Butler).

218. See remarks of Reps. Dies and Feiglan, 100 Cong. Rec. 14041 (daily ed. Aug. 17, 1954).

219. Sen. Humphrey said: "The purpose of the new section . . . is to establish certain criteria by which the court can hear evidence so as to determine effective membership . . . ." 100 Cong. Rec. 14091 (daily ed. Aug. 17, 1954).

220. Section 5 refers to the criteria as "subjects of evidence." See note 215 *supra*.

221. For a discussion of the due process requirement of definiteness in statutes, see Note, 62 HARV. L. REV. 77 (1948).

222. The legislature may make a conclusive rule of evidence only if it could constitutionally attach to the facts giving rise to the presumption the same legal consequences which flow from the fact presumed. Otherwise it is void as violative of due process and an unwarranted infringement upon the judiciary. 4 WIGMORE, EVIDENCE § 1353 (3d ed. 1940). For cases in which conclusive presumptions have been invalidated, see Heiner v. Donnan, 285 U.S. 312 (1931) (statute by which gifts made within a given number of years before death were conclusively presumed to have been made in contemplation of death); Schlesinger v. Wisconsin, 270 U.S. 230 (1925) (same); *cf.* Commissioner v. Clark, 202 F.2d 94 (7th Cir. 1953) (Clifford Regulations taxing income of trusts to settlor if they were to last for less than ten years).

effect of a rebuttable presumption to proof of the section 5 criteria, this interpretation is not supported by either the section's language or its legislative history. If the courts nevertheless adopt this interpretation, section 5's constitutionality will depend on the reasonableness of the connection between the facts presumed (membership and knowledge) and the facts proved (the thirteen criteria).[223] The courts would have to apply this test to each of the criteria, striking out any that do not qualify.

The most acceptable view is that section 5 was intended merely to establish a rule for the admissibility of evidence pertaining to the criteria and to require the court to instruct the jury to consider this evidence.[224] Such an interpretation is most in accord with the section's wording[225] and with what can be gleaned from the meager legislative history.[226] Under this construction, section 5 has little legal significance. Evidence as to the items listed would probably be admissible as relevant without benefit of the section.[227] Moreover, federal judges have long had the right to make fair comment to the jury on the evi-

223. Tot v. United States, 319 U.S. 463 (1943); McFarland v. American Sugar Refining Co., 241 U.S. 79 (1915); Luria v. United States, 231 U.S. 9 (1913); Mobile, J. & K.R.R. v. Turnipseed, 219 U.S. 35 (1910); Griffin v. State, 142 Ga. 636, 83 S.E. 540 (1914).

224. The legislature can change rules of evidence. Adams v. New York, 192 U.S. 585, 599 (1904); Fong Yue Ting v. United States, 149 U.S. 698, 729 (1892); 1 WIGMORE, EVIDENCE § 7 (3d ed. 1940).

In Communist Party v. Subversive Activities Control Board, Civil No. 11850, D.C. Cir., Dec. 23, 1954, p. 40, the court treated as merely "evidentiary considerations" the eight criteria found in § 13(e) of the ISA, which were designed to be used in determining whether an organization is a "Communist-action" organization. The court specifically rejected the suggestion of the Party that § 13(e) creates a presumption. *Id.* at 43.

In United States v. Silverman, 23 U.S.L. WEEK 2439 (D. Conn. Feb. 23, 1955), involving prosecution of second string Communist Party leaders under the Smith Act, the defendants moved to dismiss the indictment on the ground that the broad criteria in § 5 of the CCA would make their defense difficult, if not impossible, since witnesses and lawyers would hesitate to aid them for fear of later being punished as members of the Communist Party. The court rejected this argument although it granted the motion to dismiss on another ground. The court said that the CCA did not impose sanctions upon persons who ceased to be members of the Communist Party before the Act was passed; consequently, these persons need not fear aiding the defendants in preparing their defense, since the criteria in § 5 can only be used to show membership in the Party after the effective date of the CCA. If a witness or other person aiding in the defense was a member of the Party after the passage of the CCA, the court said that the defendants' difficulties were no different from those of other defendants who seek to get criminals to testify and are unsuccessful because the witness fears he himself will be apprehended. The court's reasoning is sound, especially in view of the fact that the criteria in § 5 merely create rules for the admissibility of evidence, and most, if not all, of the facts coming within the criteria in § 5 would be admissible as relevant evidence without the aid of the section. See note 227 *infra* and accompanying text.

225. See note 215 *supra*.

226. See note 219 *supra*.

227. For general rules of relevancy of evidence, see, *e.g.*, 1 WIGMORE, EVIDENCE §§ 24-36 (3d ed. 1940).

dence;[228] thus section 5 seems simply to impose a duty to do something which was previously discretionary.

A second question raised by section 5 is whether it applies to prosecutions and proceedings under statutes other than the CCA.[229] The section is not by its terms limited to prosecutions under the CCA.[230] Because of the intimate relation between section 4 of the CCA and the ISA, section 5 presumably applies to those proceedings under the ISA in which a jury must determine whether an individual is a member of the Communist Party or other proscribed organization mentioned in the CCA, or whether he had knowledge of its objectives.[231] In determining whether section 5 applies to statutes other than the CCA and ISA, the legislative history is of little help. If section 5 is interpreted as merely requiring the courts to admit certain kinds of evidence and instruct the jury to consider the evidence presented, it would not make much difference if it were given general application. But if the section is construed as creating a rebuttable presumption, the courts might be somewhat reluctant to apply it outside the CCA and ISA.

AMENDMENT OF THE INTERNAL SECURITY ACT OF 1950

The second half of the CCA, made up of sections 6 to 11, directly amends the ISA of 1950. Most of these sections constitute what was originally the Butler bill.[232]

Miscellaneous Amendments of the ISA

Two of the CCA amendments are relatively simple, and the constitutional problems which they pose are related to those already raised by the ISA. Therefore, they will be but briefly discussed here.

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228. Quercia v. United States, 289 U.S. 466 (1933); Rucker v. Wheeler, 127 U.S. 85 (1888); Wheatley v. United States, 159 F.2d 599 (4th Cir. 1946); WHITMAN, FEDERAL CRIMINAL PROCEDURE § 30.6 (1950).

229. The question of membership in the Communist Party may be presented to a jury in a variety of instances:

1. Prosecutions under the ISA and § 4 of the CCA for applying for a passport; working in a defense facility or in a government job; receiving certain classified information; holding office or employment with a labor organization (added by § 6 of the CCA; see text at note 233 *infra*); or failing to register when required by the ISA.

2. Prosecutions under the Smith Act, 54 STAT. 671 (1940), 18 U.S.C. § 2385 (1952).

In a number of other instances, the question of membership in the Party must be considered by administrative agencies and the courts without a jury.

1. Naturalization proceedings, 66 STAT. 240 (1952), 8 U.S.C. § 1424(a) (1952).

2. Proceedings to revoke naturalization, 66 STAT. 261 (1952), 8 U.S.C. § 1451(c) (1952).

3. Proceedings to exclude, 66 STAT. 184 (1952), 8 U.S.C. § 1182(a) (1952), or deport, 66 STAT. 205 (1952), 8 U.S.C. § 1251(a) (1952), aliens.

4. Proceedings before the SACB to determine if an organization is "Communist-infiltrated." Section 13A(e) of the ISA (added by § 10 of the CCA).

230. See note 215 *supra*.

231. See note 229 *supra*.

232. Section 6 was part of the original Humphrey bill. 100 Cong. Rec. 13557 (daily ed. Aug. 12, 1954).

The first of these amendments is found in section 6, which imposes a new employment disability on members of "Communist-action" and "Communist-front" organizations. This section makes it unlawful for them "to hold any office or employment with any labor organization as that term is defined in section 2(5) of the National Labor Relations Act, as amended . . . , or to represent any employer in any matter or proceeding arising or pending under that Act."[233] Violators of this provision are subject to severe penalties.[234]

The seriousness of the constitutional problems raised by section 6 will depend upon whether its broadly worded provisions are held to apply only to unions whose activities affect interstate commerce. This limitation would render the section valid under the Supreme Court's rationale in the *Douds* case, which gave Congress wide latitude to control communists in labor unions under its authority to prevent obstructions to the free flow of interstate commerce.[235] Such a restriction is not contained in the words of the section, since the definition of labor organizations which the section incorporates from the NLRA is not confined to organizations representing employees in industries affecting interstate commerce.[236] However, the limitation probably represents congressional intent, since it is likely that Congress was thinking in terms of the Taft-Hartley non-communist oath, which is required only of leaders of unions whose activities affect interstate commerce.[237] Moreover, in the absence of this restriction it might be more difficult to show that section 6 effectuates a legitimate congressional purpose. The ISA's control over private employment is limited to defense facilities, and hence is clearly valid as an exercise of the power to preserve the national safety.[238] To justify section 6 on the same grounds, it would have to be demonstrated that a threat to national security may arise from communist infiltration of labor unions whose activities do not affect interstate commerce.

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233. This section 6 amendment constitutes a new subsection of § 5(a)(1) of the ISA. 64 STAT. 992 (1950), 50 U.S.C. § 784(a)(1) (1952).

234. The statute provides for a maximum penalty of 5 years imprisonment and a $10,000 fine. 64 STAT. 1003 (1950), 50 U.S.C. § 794(c) (1952).

235. In American Communications Ass'n v. Douds, 339 U.S. 382 (1950), the Court upheld the requirement that union officers take a non-Communist oath as a prerequisite to the union's right to use the facilities of the NLRB. The Court held this was a valid exercise of Congress' power to prevent the obstruction of interstate commerce by political strikes. *Id.* at 387-93.

236. The labor organizations referred to in § 6 are those defined in § 2(5) of the NLRA, as amended. See text at note 233 *supra*. This definition provides: "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 61 STAT. 137 (1947), 29 U.S.C. § 152 (1952).

237. 61 STAT. 143 (1947), 29 U.S.C. § 159(h) (1952).

238. Communist Party v. Subversive Activities Control Board, Civil No. 11850, D.C. Cir., Dec. 23, 1954, p. 34.

239. For the ISA provisions, see 64 STAT. 993 (1950), 50 U.S.C. § 784(c) (1952) (employment); 64 STAT. 993 (1950), 50 U.S.C. § 785(c) (1952) (passport).

A second amendment of the ISA was effectuated by section 7(c) of the CCA. This repealed certain ISA provisions which had suspended imposition of employment and passport sanctions on individuals who sought to correct erroneous listings of their names in the registration statement of a communist organization.[239] Previously, when an individual brought proceedings to rectify an incorrect listing, he could postpone for six months public notice of the fact that his name was listed;[240] during that period, the passport and employment sanctions were not effective.[241] Under the section 7(c) amendment, publication of the complainant's name is still delayed,[242] but the sanctions become effective immediately. This provision has recently been upheld by the Court of Appeals for the District of Columbia.[243]

The Communist-Infiltrated Organization

The CCA broadens the scope of the ISA by amending it to include another type of "communist organization," the "Communist-infiltrated" organization.[244] The amendments define the new classification and establish the consequences which flow from a determination that an organization meets this definition.

Definition of a "Communist-Infiltrated" Organization

Section 7(a)[245] of the CCA provides that a group must have two characteristics to constitute a "Communist-infiltrated" organization. First, it must be an organization, other than a "Communist-action" or "Communist-front"

240. 64 STAT. 996 (1950), 50 U.S.C. § 788(b) (1952).

241. See note 239 *supra*.

242. Section 7(c) did not repeal any part of 64 STAT. 996 (1950), 50 U.S.C. § 788(b) (1952).

243. Communist Party v. Subversive Activities Control Board, Civil No. 11850, D.C. Cir., Dec. 23, 1954, p. 30 n.48.

244. This extension of the ISA was thought necessary because of the ineffectiveness of the Taft-Hartley affidavit requirement in getting communists out of positions of union leadership. H.R. REP. No. 2651, pt. 1, 83d Cong., 2d Sess. 2-3 (1954). See also Shair, *How Effective Is The Non-Communist Affidavit?*, 1 LAB. L.J. 935 (1950). Also, it was felt that unions could not be included within the ISA definition of "communist-action" or "communist-front" organizations. S. REP. No. 1709, 83d Cong., 2d Sess. 2 (1954); remarks by Sen. Butler, 100 Cong. Rec. 13411 (daily ed. Aug. 11, 1954).

245. Section 7(a) adds a new subsection to § 3 of the ISA, the definition section, 64 STAT. 989 (1950), 50 U.S.C. § 782. It provides:

"Sec. 7. (a) Section 3 of the Subversive Activities Control Act of 1950 (50 U.S.C. 782) is amended by inserting, immediately after paragraph (4) thereof, the following new paragraph:

"(4A) The term 'Communist-infiltrated organization' means any organization in the United States (other than a Communist-action organization or a Communist-front organization) which (A) is substantially directed, dominated, or controlled by an individual or individuals who are, or who within three years have been actively engaged in, giving aid or support to a Communist-action organization, a Communist foreign government, or the world Communist movement referred to in section 2 of this title, and (B) is serving, or within three years has served, as a means for (i) the giving of aid or support to any such organization, government, or movement, or (ii) the impairment of the military strength

organization, which is substantially directed, dominated, or controlled by an *individual or individuals* who are, or within the past three years have been, actively engaged in giving aid or support to a "Communist-action" organization, a Communist foreign government, or the world Communist movement. Secondly, the *organization* must be serving, or within three years have served, as a means for giving aid or support to a "Communist-action" organization, a communist foreign government, or to the world communist movement, *or* as a means for the impairment of the military strength of the United States or its industrial capacity to furnish logistical or other military support required by the Armed Forces.[246]

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of the United States or its industrial capacity to furnish logistical or other material support required by its Armed Forces: *Provided, however,* that any labor organization which is an affiliate in good standing of a national federation or other labor organization whose policies and activities have been directed to opposing Communist organizations, any Communist foreign government, or the world Communist movement, shall be presumed prima facie not to be a 'Communist-infiltrated organization'."

By § 7(b) of the CCA, subsection 5 of § 3 of the ISA is amended to include "Communist-infiltrated" organizations along with "communist-action" and "communist-front" organizations in the definition of "communist organizations."

246. Section 10 of the CCA added § 13A to the ISA. In § 13A(e) are seven criteria to be used by the SACB in determining whether an organization is "Communist-infiltrated." Section 13A(e) provides:

"(e) In determining whether any organization is a Communist-infiltrated organization, the Board shall consider—

"(1) to what extent, if any, the effective management of the affairs of such organization is conducted by one or more individuals who are, or within two years have been, (A) members, agents, or representatives of any Communist organization, and Communist foreign government, or the world Communist movement referred to in section 2 of this title, with knowledge of the nature and purpose thereof, or (B) engaged in giving aid or support to any such organization, government, or movement with knowledge of the nature and purpose thereof;

"(2) to what extent, if any, the policies of such organization are, or within three years have been, formulated and carried out pursuant to the direction or advice of any member, agent, or representative of any such organization, government, or movement;

"(3) to what extent, if any, the personnel and resources of such organization are, or within three years have been, used to further or promote the objectives of any such Communist organization, government, or movement;

"(4) to what extent, if any, such organization within three years has received from, or furnished to or for the use of, any such Communist organization, government, or movement any funds or other material assistance;

"(5) to what extent, if any, such organization is, or within three years has been, affiliated in any way with any such Communist organization, government, or movement;

"(6) to what extent, if any, the affiliation of such organization, or of any individual or individuals who are members thereof or who manage its affairs, with any such Communist organization, government, or movement is concealed from or is not disclosed to the membership of such organization; and

"(7) to what extent, if any, such organization or any of its members or managers are, or within three years have been, knowingly engaged—

"(A) in any conduct punishable under section 4 or 15 of this Act or under chapter 37, 105, or 115 of title 18 of the United States Code; or

The vagueness of the section 7(a) definition raises serious doubts as to the constitutionality of the provisions directed against "Communist-infiltrated" organizations. That definition is not as explicit as the ISA definitions of "Communist-action" and "Communist-front" organizations,[247] which are more readily capable of proof or disproof.[248] The generalities contained in the section 7(a) definition might encompass innocent and patriotic groups. Terms such as "serving . . . as a means for the giving of support," or "means for . . . the impairment of the military strength of the United States or its industrial capacity," vest extremely broad discretion in the Attorney General, who initiates the proceedings, and the SACB, which makes the findings. The language, for example, affords opportunity to disrupt a legitimate strike or ruin an innocent union.[249] It is true that statutes imposing penal sanctions will be struck down as void for vagueness more readily than civil statutes.[250] And

"(B) with intent to impair the military strength of the United States or its industrial capacity to furnish logistical or other support required by its armed forces, in any activity resulting in or contributing to any such impairment."

These criteria are not a substitute for the definition in CCA § 7 and it is that definition that must be satisfied. See Communist Party v. Subversive Activities Control Board, Civil No. 11850, D.C. Cir., Dec. 23, 1954, pp. 40-45 (discussion of similar criteria to be considered by the SACB in determining if an organization is a "Communist-action" organization); Note, 51 COLUM. L. REV. 606, 616 n.107 (1951) (same).

247. "Communist-action" organization is defined as:
"any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 781 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in said section." 64 STAT. 989 (1950), 50 U.S.C. § 782(3) (1952).

"Communist-front" organization is defined as:
"any organization in the United States (other than a Communist-action organization as defined in paragraph 3 of this section) which (A) is substantially directed, dominated, or controlled by a Communist-action organization, and (B) is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement referred to in section 781 of this title." 64 STAT. 989 (1950), 50 U.S.C. § 782(4) (1952).

248. See Note, 51 COLUM. L. REV. 606, 615 (1951).

249. One of the major complaints of those who opposed the Butler bill was that the vagueness of the definition and the great discretion given to the Attorney General made § 7(a) a potentially dangerous anti-labor weapon that could be used to break a legitimate strike and ruin unions in no way connected with the communist movement. H.R. REP. No. 2651, pt. 2, 83d Cong., 2d Sess. 3-4 (1954) (minority report); see remarks by Sen. Lehman, 100 Cong. Rec. 13416-17 (daily ed. Aug. 11, 1954), and Sen. Morse, *id.* at 13461.

As an alternative, Sen. Morse proposed that communist domination of unions be made an unfair labor practice, thereby placing the whole matter under the jurisdiction of the NLRB rather than the Justice Department. *Id.* at 13462-63. Sen. Lehman, on the other hand, felt that the unions were doing a good enough job on their own in cleaning communists out of the labor movement and urged a "hands-off" policy. *Id.* at 13416-17. All of the major labor unions opposed the Butler bill. H.R. REP. No. 2651, pt. 2, *supra*, at 3.

250. See Notes, 62 HARV. L. REV. 77, 85 (1948); 45 HARV. L. REV. 160 n.1 (1931).

The Supreme Court has held that civil statutes too can be unconstitutionally vague.

although the sanctions imposed by the CCA upon "Communist-infiltrated" organizations are serious, they do not appear to constitute criminal penalties.[251] Nevertheless, because of the gravity of the deprivations, the courts should require Congress to formulate a definition which would enable organizations to guide their future conduct and which would provide an objective test by which the SACB and the courts could reach consistent results.[252]

The Section 7(a) Proviso

To meet the argument that the vague language of section 7(a) could endanger loyal and patriotic unions, a proviso was added.[253] This created a *prima facie* presumption that "any labor organization which is an affiliate in good standing [254] of a national federation [255] *or* other labor organization [256] whose policies and activities have been directed to opposing Communist organizations, any Communist foreign government, or the world Communist movement" is not a "Communist-infiltrated" organization.[257] It is difficult to see

See A.B. Small Co. v. American Sugar Refining Co., 267 U.S. 233 (1925) (holding unconstitutional a statute which would have invalidated a contract, leaving the parties to their remedy in *quantum meruit*).

251. A labor union found to be a "Communist-infiltrated" organization is denied all the benefits granted by the NLRA. See text at notes 270-79 *infra*. And any organization categorized as "Communist-infiltrated" is denied certain favorable tax treatment, see note 267 *infra*, and is required to label its mail and radio broadcasts as "distributed by" or "sponsored by" a communist organization. See note 268 *infra*. Although these disabilities may be important to the organization, they do not appear to constitute criminal sanctions, since the first two merely withdraw benefits granted by statute and the last simply provides a means for informing the public as to the nature of the organization distributing literature or making broadcasts.

252. See Notes, 62 HARV. L. REV. 77, 85-86 (1948); 45 HARV. L. REV. 160, 163 (1931).

253. For text of proviso, see note 245 *supra*. The proviso was proposed by Sen. Ives, 100 Cong. Rec. 13549 (daily ed. Aug. 12, 1954).

254. The "in good standing" language refers to the standing of labor unions with their national federation with respect to "subversion and communism and nothing else." Remarks by Sen. Ives, the sponsor of the proviso, 100 Cong. Rec. 13552 (daily ed. Aug. 12, 1954). The unions which have been expelled from the CIO because of their communist leaders were said not to be entitled to take advantage of the prima facie presumption created by the proviso. *Id.* at 13554-55 (remarks by Sen. Ives). But it is not necessary that a union be expelled from the National Federation in order for it to be deemed not in "good standing," *id.* at 13552.

255. The CIO, AFL, UMW, and the Railroad Brotherhoods were given as examples of "a national federation." 100 Cong. Rec. 13549 (daily ed. Aug. 12, 1954) (remarks of Sens. Ives and Morse).

256. "[O]r other labor organizations" was added so as not to limit the proviso solely to the large federation. Thus, small independent unions with a history of anti-communism could take advantage of the proviso. 100 Cong. Rec. 13553-55 (daily ed. Aug. 12, 1954) (statements by Sens. Holland, Ives, Smith, and Butler).

257. This proviso was said to give unions a chance to "clean house" themselves, thus making the rooting out of communists from unions a cooperative enterprise between the unions and the government. 100 Cong. Rec. 13553 (daily ed. Aug. 12, 1954) (remarks by Sens. Morse, Ives, and Butler).

how this proviso improves the position of those unions which may take advantage of it. Under the statutory procedure set up by the ISA and adopted by the CCA,[258] the Attorney General has the burden of proof in establishing that an organization is "Communist-infiltrated."[259] Thus, unless the "presumption of innocence," as the proviso was labelled,[260] imposes by negative implication a presumption of guilt upon unions which do not qualify under it, the proviso in section 7(a) seems to bring about no substantial change.[261] And it is clear from the legislative history that the proviso was not intended to create such a presumption of guilt.[262] Therefore, the proviso gives innocent unions no additional protection against the dangers inherent in the vague section 7 definition.[263]

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258. Section 13A(d) of the ISA (added by § 10 of the CCA) adopts the procedure of §§ 13(c), (d) of the ISA, 64 STAT. 998 (1950), 50 U.S.C. §§ 792(c), (d) (1952), for proceedings before the SACB to determine if an organization is communist-infiltrated. Also, § 11 of the CCA amends § 14 of the ISA, 64 STAT. 1001 (1950), 50 U.S.C. § 793 (1952), so that the orders of the SACB concerning "Communist-infiltrated" organizations may be appealed to the courts and may be set aside if not "supported by the preponderance of the evidence." See Note, 51 COLUM. L. REV. 606, 622-23 (1951).

259. Section 7(c) of the Administrative Procedure Act, 60 STAT. 241 (1946), 5 U.S.C. § 1006(c) (1952), which governs the procedure to be followed by federal administrative tribunals, states: "Except as statutes otherwise provide, the proponents of a rule or order shall have the burden of proof." This section is regarded as imposing upon the proponent not only the burden of proof but also the burden of going forward with the evidence. See DAVIS, ADMINISTRATIVE LAW 468 (1951). The Administrative Procedure Act is applicable in proceedings under the ISA, 64 STAT. 1003 (1950), 50 U.S.C. § 795 (1952). Thus, since nothing is said in the ISA concerning burdens of proof, if the Attorney General seeks to obtain an order from the SACB that a union is "Communist-infiltrated," he has both the burden of going forward with the evidence and the ultimate burden of proof.

260. Statement by Sen. Ives, 100 Cong. Rec. 13554 (daily ed. Aug. 12, 1954).

261. A prima facie presumption in favor of the union would probably place upon the Attorney General only the burden of going forward with the evidence, although it might also be regarded as also imposing upon him the ultimate burden of proof. In any event, the legislative history clearly shows that the presumption was intended to be rebuttable. See remarks of Sens. Cooper, Ives, and Ferguson, 100 Cong. Rec. 13551-52 (daily ed. Aug. 12, 1954). However, even without this presumption, the Attorney General had both the burden of proof and of going forward with the evidence. See note 259 *supra*.

262. The purpose of the proviso was not to worsen the situation of unions with leaders of questionable patriotism, but to better the position of loyal and patriotic unions. The debates indicate that no presumption of guilt was intended. Sen. Cordon asked Sen. Ives, "Are we saying certain groups are presumed not to be Communist-dominated, and therefore other groups are presumed to be Communist-dominated?" Sen. Ives answered "No; that is not the intent or purpose of it at all." 100 Cong. Rec. 13555 (daily ed. Aug. 12, 1954).

263. That the proviso did little to ameliorate the anti-labor potentialities inherent in the § 7(a) definition seems to have been recognized by Sen. Lehman. Even after the proviso was adopted, he again attacked the Butler bill as having within it the seeds of destruction for loyal, non-communist labor unions. See remarks by Sen. Lehman, 100 Cong. Rec. 14078-79, 14095-96 (daily ed. Aug. 17, 1954).

Consequences Arising from a Final Determination That an Organization Is a "Communist-Infiltrated" Organization

Consequences to Individual Members of the Organization

The only direct consequence to members of an organization which has been finally adjudged to be "Communist-infiltrated" is that they may not without special authorization knowingly receive classified information from officers or employees of the United States.[264] Unlike members of "Communist-action" or "Communist-front" organizations, the members of "Communist-infiltrated" groups are not subject to the employment or passport disabilities of the ISA;[265] nor do they have to register with the Attorney General as do members of "Communist-action" organizations.[266] However, a determination that an organization is "Communist-infiltrated" has serious indirect effects upon its individual members because of the consequences to their organization.

Consequences to the Organization

Although the CCA denies all "Communist-infiltrated" organizations tax advantages [267] and requires them to label their mail and radio and television broadcasts as "distributed by" or "sponsored by" a communist organization,[268] the most important sanctions imposed on such organizations are directed only against those which are labor unions.[269] Under section 10 of the CCA, upon

264. Section 4(c) of the ISA, 64 STAT. 991 (1950), 50 U.S.C. § 783(c) (1952), which imposes this disability is applicable to "any Communist organization." And the CCA has amended the ISA to include a "Communist-infiltrated" organization within the definition of "communist organization." See note 245 *supra*. Also see H.R. REP. No. 2651, pt. 1, 83d Cong., 2d Sess. 1-2 (1954).

265. The sections of the ISA imposing the passport and employment disabilities, 64 STAT. 992-93 (1950), 50 U.S.C. §§ 784(a), 785(a) (1952), only apply to members of a "Communist organization" when such organization "is registered or there is in effect a final order of the Board requiring such organization to register." Although a "Communist-infiltrated" organization is a "communist-organization," see note 245 *supra*, it cannot be made to register. See note 271 *infra*. Therefore, the ISA provisions imposing passport and employment disabilities will not be applicable to members of "Communist-infiltrated" organizations. See also H.R. REP. No. 2651, pt. 1, 83d Cong., 2d Sess. 1-2 (1954).

266. Under the ISA, 64 STAT. 995, 1002 (1950), 50 U.S.C. §§ 787, 794 (1952), only members of "Communist-action" organizations must register.

267. Section 8(b) of the CCA amends § 11 of the ISA, 64 STAT. 996 (1950), 50 U.S.C. § 790 (1952), to include "Communist-infiltrated" organizations among those denied certain favorable tax treatment. Contributors are not allowed a deduction for their contributions, and the organization is deprived of any exemption to which it might otherwise be entitled under the federal income tax law.

268. Section 8(a) of the CCA amends § 10 of the ISA, 64 STAT. 995 (1950), 50 U.S.C. § 789 (1952), to include "communist-infiltrated" organizations among those which must label their mail and broadcasts.

269. Although the provisions in the CCA directed against "Communist-infiltrated" organizations are applicable to all organizations generally, see definition note 245 *supra*; 100 Cong. Rec. 13550 (daily ed. Aug. 12, 1954) (remarks by Sens. Malone and Ives); *id.* at 13834 (daily ed. Aug. 16, 1954) (remarks by Rep. Keating), the nature of the sanctions imposed upon "communist-infiltrated" organizations clearly indicates that these

a final order of the SACB determining a labor union to be a "Communist-action," "Communist-front," or "Communist-infiltrated" organization,[270] such union becomes ineligible to: "(1) act as representative of any employee within the meaning or for the purpose of section 7 of the National Labor Relations Act, as amended . . . ; (2) serve as an exclusive representative of employees of any bargaining unit under section 9 of such Act . . . ; (3) make, or obtain any hearing upon, any charge under section 10 of such Act . . . ; or (4) exercise any other right or privilege, or receive any other benefit, substantive or procedural, provided by such Act for labor organizations."[271]

It is clear that under these provisions Communist-infiltrated unions are denied all the benefits derived from the NLRA, but the first clause seems to impose additional disabilities. Section 7 of the NLRA gives employees the right to act collectively "for the purpose of collective bargaining or other mutual aid or protection."[272] If a union is made ineligible to act as a representative of employees for all of these purposes, there would seem to be little left for it to do. However, the Act, correctly interpreted, probably does not go that far. Its legislative history appears to indicate that Congress intended merely to deny Communist-infiltrated unions all the benefits granted to them

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provisions are primarily directed against unions. See text at notes 272-76 *infra*, and the legislative history, H.R. REP. No. 2651, pt. 2, 83d Cong., 2d Sess. 2 (1954); 100 Cong. Rec. 13550 (daily ed. Aug. 12, 1954) (remarks by Sen. Ives).

Section 13A of the ISA (added by § 10 of the CCA) also provides sanctions for an *employer* organization that is found to be "Communist-infiltrated." Under § 13A(g) the SACB must file a copy of its order concerning an employer organization with the NLRB. If there is a final order of the SACB determining an employer organization to be "Communist-infiltrated," § 13A(j) makes the employer ineligible to:

"(1) file any petition for an election under section 9 of the National Labor Relations Act . . . or participate in any proceedings under such section; or

"(2) make or obtain any hearing upon any charge under section 10 of such Act . . . ; or

"(3) exercise any other right or privilege or receive any other benefit, substantive or procedural, provided by such Act for employers."

These provisions were added to the CCA by an amendment on the floor of the Senate in order to apply "to employers the same rules which would be applied to labor organizations." 100 Cong. Rec. 13579 (daily ed. Aug. 12, 1954). However, it seems unlikely that these provisions will be used very much, since the major problem giving rise to the passage of the Butler bill was Communist infiltration into unions rather than into management. H.R. REP. No. 2651, pt. 1, 83d Cong., 2d Sess. 2-27 (1954); S. REP. No. 1709, 83d Cong., 2d Sess. 2 (1954).

270. Section 11 of the CCA amends § 14(b) of the ISA, 64 STAT. 1002 (1950), 50 U.S.C. § 793(b) (1952), so that an order of the SACB with respect to "Communist-infiltrated" organizations becomes final in the same way as those pertaining to "Communist-action" and "Communist-front" organizations, that is, after final appeal to the courts or failure to appeal within the time allowed.

271. However, no "Communist-infiltrated" organization need register with the Attorney General. Under § 7 of the ISA, 64 STAT. 993 (1950), 50 U.S.C. § 786 (1952), both "Communist-action" and "Communist-front" organizations must register. In addition, "Communist-action" organizations must submit a list of their members. The CCA did not amend the ISA in this area.

272. 61 STAT. 140 (1947), 29 U.S.C. § 157 (1952).

by the NLRA.[273] This intent is also demonstrated by the absence of sanctions against Communist-infiltrated unions that continue to act as representatives for employees for collective bargaining and other purposes.

Even under this relatively limited interpretation, the Act goes somewhat further than section 9(h) of the Taft-Hartley Act.[274] Under that section, unions whose officers fail to file non-communist affidavits: (1) cannot seek any redress for employer unfair labor practices; (2) cannot be certified as bargaining agents; and (3) cannot have a union shop or maintenance-of-membership clause in any subsequently negotiated or renewed collective bargaining agreement.[275] In addition to these deprivations, the CCA denies Communist-infiltrated unions all other substantive and procedural benefits that the NLRA grants. Thus, for example, communist-infiltrated unions cannot take advantage of section 301 of the NLRA, which enables unions to sue in the federal courts to enforce collective bargaining agreements regardless of diversity of citizenship or jurisdictional amount.[276] However, the union can presumably continue to serve as the bargaining agent of the employees if they so desire. But since it is no longer the exclusive representative of all the employees in the bargaining unit, it can represent only its own members in any negotiation with the employer. Furthermore, the employer may refuse to bargain with the Communist-infiltrated union and can instead negotiate with another group. If it were not for the CCA, the union would presumably be certified and could petition the NLRB to order the employer to cease and desist, since refusal to bargain with the certified representative of the em-

273. The House Report states that "the Communist-infiltrated organization is ineligible *under the National Labor Relations Act* to act as a labor organization and represent employees in a bargaining unit." H.R. REP. No. 2651, pt. 1, 83d Cong., 2d Sess. 2 (1954) (emphasis added). The Senate Report states that "section 13A would deprive any labor organization, after it has been finally determined to be a Communist-infiltrated organization, of its legal standing *under the National Labor Relations Act* to act as a labor organization for the purposes of representing employees in any bargaining unit." S. REP. No. 1709, 83d Cong., 2d Sess. 5 (1954) (emphasis added). In the debates, Rep. Velde stated, "When a union is finally determined by the Subversive Activities Control Board to be Communist dominated, it has no rights before the NLRB . . . ." 100 Cong. Rec. 13834 (daily ed. Aug. 16, 1954). And he later stated in a hypothetical, "After proper hearings if the Subversive Activities Control Board finds in fact that the [Harry] Bridges union has been infiltrated, it, upon final determination of such finding, would be required to certify that finding to the National Labor Relations Board and also cause same to be published in the Federal Register. The National Labor Relations Board would then be required to deny privileges and benefits of such Communist-infiltrated unions which it had hitherto enjoyed under the provisions of the National Labor Management Relations Act of 1947, as amended." *Id.* at 13835.

274. 61 STAT. 146 (1947), 29 U.S.C. § 159(h) (1952).

275. See Kearns, *Non-Communist Affidavits Under the Taft-Hartley Act*, 37 GEO. L.J. 297 (1949); Daykin, *The Operation of the Taft-Hartley Act's Non-Communist Provisions*, 36 IOWA L. REV. 607 (1951); Comment, 18 U. CHI. L. REV. 783 (1951).

276. 61 STAT. 156 (1947), 29 U.S.C. § 185 (1952). For the scope of § 301, see Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 23 U.S.L. WEEK 4141 (U.S. March 28, 1955).

ployees and negotiation with another union constitute unfair labor practices.[277] One thing the CCA does not do is abrogate collective bargaining agreements existing between the union and the employer,[278] and apparently the union or the employees may still enforce such agreements in the courts.[279] In addition, if the union has the cooperation and support of its members, it can still call a strike in order to force the employer to bargain with it or comply with the agreement.

Although these sanctions against "Communist-infiltrated" unions will not immediately destroy them, they will be so seriously handicapped that they may eventually collapse. Members of such unions would naturally desire an organization which can effectively protect them. There may thus be a great incentive for them either to purge their union of its communist-linked leaders in order to secure a determination that it is no longer "Communist-infiltrated," or to form an entirely new union. The latter alternative is facilitated by section 10 of the CCA, which enables twenty per cent of the members of a "Communist-infiltrated" organization to petition the NLRB for elections to revoke their union's authority as bargaining agent and to select a new representative for collective bargaining purposes.[280] This method for regaining NLRA rights

277. 61 STAT. 140 (1947), 29 U.S.C. § 158 (1952).

278. H.R. REP. No. 2651, pt. 1, 83d Cong., 2d Sess. 2 (1954); S. REP. No. 1709, 83d Cong., 2d Sess. 5 (1954).

279. See 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING § 163 (1940); Note, 63 YALE L.J. 1173, 1173-75 (1954). Under § 301 of the Taft-Hartley Act, 61 STAT. 156 (1947), 29 U.S.C. § 185 (1952), unions and employers may sue in the federal courts to enforce collective bargaining agreements regardless of diversity or jurisdictional amount. Note, 63 YALE L.J. 1173, 1175 (1954). Although the Supreme Court has recently stated that § 301 does not enable unions to sue to enforce the individual rights of employees to wages, the court did not declare the section unconstitutional; presumably unions still derive some benefit from it. Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 23 U.S.L. WEEK 4141 (U.S. March 28, 1955). However, since the CCA denies "Communist-infiltrated" unions the benefits of § 301, see text at note 276 *supra*, the union will have to show diversity and jurisdictional amount in order to enforce the contract in the federal courts. This may be difficult, since diversity requires all members of the union to be citizens of a state other than the employer; the problem may, however, be partially avoided by the use of a class suit. 3 MOORE, FEDERAL PRACTICE 1412-13 (2d ed. 1948). If the union cannot sue to enforce the collective bargaining agreement in the federal courts, it may have difficulty bringing suit in the state courts, since some states do not consider unions legal entities capable of suing and being sued. Note, 63 YALE L.J. 1173, 1174 n.7 (1954).

280. Section 13A(i) of the ISA (added by § 10 of the CCA) provides:

"(i) When an order of the Board determining that any such labor organization is a Communist-infiltrated organization has become final, and such labor organization theretofore has been certified under the National Labor Relations Act, as amended, as a representative of employees in any bargaining unit—

"(1) a question of representation affecting commerce, within the meaning of section 9(c) of such Act, shall be deemed to exist with respect to such bargaining unit; and

"(2) the National Labor Relations Board, upon petition of not less than 20 per centum of the employees in such bargaining unit or any person or persons acting in their behalf, shall under section 9 of such Act (notwithstanding any limitation of time

seems to be much more practicable than the alternative method whereby, after ousting its objectionable leaders, a union may petition the SACB to adjudge that it is no longer "Communist-infiltrated."[281] The latter remedy can only be used after a lapse of six months following a final order of the Board classifying the union as "Communist-infiltrated."[282] In addition, the formation of a new union would avoid for the organization the taint of once having been declared "Communist-infiltrated."

The consequences that can result from labelling a union "Communist-infiltrated" or from merely initiating proceedings against it under the CCA[283] require a more adequate and precise definition of "Communist-infiltrated" organization in order to avoid the possibility of serious injury to innocent unions. The proviso in section 7(a) of the Act does little to mitigate this danger.

Proceedings Before the Board

After defining "Communist-infiltrated" organizations, the CCA sets forth in section 10 the procedure to be followed in determining which organizations fall within this classification. As under the ISA,[284] the Attorney General is given extensive discretion in deciding whether to initiate proceedings against a group; whenever he has "reason to believe any organization is a Communist-infiltrated organization . . . ," he may file a petition with the SACB to have it so adjudged.[285] Two or more affiliated organizations may be joined by him in the same proceeding.[286] He may obtain an early hearing by certifying that the proceeding is of "exceptional public importance."[287] Notice of the grounds of the petition and of the time and place for the hearing must be given the organization concerned.[288] Also, the procedure established by the ISA for proceedings before the Board is to be applied in hearings conducted under the CCA for determining whether a group is a "Communist-infiltrated" organiza-

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contained therein) direct elections in such bargaining unit or any subdivision thereof (A) for the selection of a representative thereof for collective bargaining purposes, and (B) to determine whether the employees thereof desire to rescind any authority previously granted to such labor organization to enter into any agreement with their employer pursuant to section 8(a)(3)(ii) of such Act."

This provision reduces the percentage of the employees which must petition the NLRB for an election from the 30% ordinarily required by the Taft-Hartley Act. 61 STAT. 143 (1947), 29 U.S.C. § 159(e) (1952). In addition, it exempts cases coming under it from the time limitations in § 159(e)(2) of the Taft-Hartley Act which provides that a new election may not be held if there has been a valid election within the preceding 12-month period.

281. See note 292 *infra* and accompanying text.
282. See notes 293-94 *infra* and accompanying text.
283. See remarks of Sen. Morse, 100 Cong. Rec. 13461 (daily ed. Aug. 11, 1954).
284. 64 STAT. 998 (1950), 50 U.S.C. § 792(a) (1952).
285. ISA § 13A(a) (added by § 10 of the CCA).
286. *Ibid.*
287. *Ibid.*
288. ISA §§ 13A(a), (c) (added by § 10 of the CCA).

tion.[289] After the hearings have been held before the SACB, the Board is authorized to make a report setting forth its findings of fact and to enter an order either granting or denying the determination sought by the petition.[290] Provision is made for appeal to the courts from this order, and the courts may set the order aside if it is not supported by a preponderance of the evidence.[291]

The statute states that an organization determined by the Board to be "Communist-infiltrated" may petition the Board "within six months after such determination" for a decision that it no longer falls within this classification.[292] From this laguage it would appear that an organization can file such a petition *only within a six month period* after it is finally categorized as a "Communist-infiltrated" organization; if it fails to clean house before this period is up, it can never seek a new determination. However, the legislative history of this provision clearly indicates that the petition may be filed any time *after* six months have elapsed from the time the order of the Board becomes final.[293] The wording of the statute is the result of poor draftsmanship.[294] The courts therefore should interpret the provision to carry out Congress' evident intent and allow petitions for a new determination any time *after* the six month period.[295].

CONCLUSION

The haste that marked the formation and passage of much of the Communist Control Act of 1954 is reflected in the ambiguity and incongruity of many of

289. See note 258 *supra.*

290. ISA § 13A(f) (added by CCA § 10).

291. See note 258 *supra.*

292. ISA § 13A(b) (added by § 10 of the CCA).

293. The provision at first required a one year wait before a petition to determine that the organization was no longer "Communist-infiltrated" could be filed; and only one petition a year could be filed. 100 Cong. Rec. 13569 (daily ed. Aug. 12, 1954). It should be noted that this first provision did not set a one year limit within which a petition must be filed, if it was to be filed at all. The provision was attacked as unfair to unions who cleaned house before the one year period was up. *Id.* at 13463-64 (daily ed. Aug. 11, 1954). It was also deemed unfair to limit petitions to one a year. *Ibid.* Therefore, § 13A(b) was changed to allow a petition to be filed by the proscribed organization "upon removing from the organization those persons determined by this section to be Communists." Fault was also found with this wording since there was no provision in the statute for determining individual persons to be Communists, and therefore the new provision could never be satisfied. *Id.* at 13945 (daily ed. Aug. 16, 1954) (remarks by Sen. McCarran), and 13987 (remarks by Sen. Butler). Therefore the wording was again changed to its final and present form. Sen. Butler who introduced the amendment to change the language to its present form said: "The amendment eliminates the impossible requirement and substitutes instead a requirement that the organization *must wait six months after such determination* before filing a petition for redetermination of its status." *Id.* at 13987 (emphasis added).

294. Perhaps the reason this seemingly obvious error went unnoticed is that during the major part of the debate on the new language there was only one copy of Sen. Butler's amendment available for the whole Senate. See remarks by Sen. Kefauver, 100 Cong. Rec. 13987-89 (daily ed. Aug. 16, 1954), and Sen. Lehman, *id.* at 13990.

295. See 2 SUTHERLAND, STATUTORY CONSTRUCTION §§ 4924-26 (3d ed., Horack 1943).

its provisions. There is serious doubt as to whether this type of legislation is either an effective or a desirable method of combating internal communism. Even assuming that it is, however, the obscure language and the grave constitutional defects in the CCA will probably severely limit its utility. Further consideration should be given to the Act by Congress in order to clarify some of its provisions, remove its constitutional pitfalls, and eliminate the possibilities of inequity and oppression inherent in parts of the Act. Without further action by Congress, the task of the courts in construing the Act will indeed be prodigious.