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THE BILL OF RIGHTS

and

THE MUNDT-FERGUSON BILLS

(S. 1194 and S. 1196)

AN ANALYSIS OF THE PROVISIONS AND
OPINION ON THEIR CONSTITUTIONALITY

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**ANALYSIS OF THE MUNDT-FERGUSON BILLS
 AND
 OPINION ON THEIR UNCONSTITUTIONALITY**

STATEMENT

Adherence to democratic principles has made America great—has made it possible for our country to progress in the face of gigantic trials and vast changes in the condition of life in the United States and the rest of the world. Our national interest, and the welfare of every American, requires that this heritage of freedom and democracy shall be cherished by us all, and vigilantly safeguarded against every threatened inroad.

The National Lawyers Guild is opposed to the passage of the Mundt-Ferguson bills because it regards them as dangerous and far-reaching encroachments on the fundamental liberties of the American people, including freedom of speech, press, assembly, and the guarantee against punishment without due process of law. It believes that these bills if enacted will go far towards destroying the very foundations of our democratic system, for they would outlaw any effective voice in serious opposition to the existing order.

MAIN PROVISIONS OF THE BILLS

The Mundt bill is a refurbished version of the Mundt-Nixon bill which failed of passage in the closing hours of the 80th Congress after having engendered a storm of opposition. The new bill is, according to Mr. Mundt in a press release, designed to be "tougher" than its predecessor; it "sharpens the teeth and expands the bite." In view of the virtual identity of the Mundt and Ferguson bills we shall discuss only the former.

The heart of the bill lies in its provisions relating to the registration of certain organizations, and the consequences of membership therein.

1. THE REGISTRATION PROVISIONS (Sections 7 and 8)

The bill recognizes two types of "subversive" organizations: "Communist political organizations" and "Communist front organizations." Together, there are known as "Communist organizations."

Every Communist political and front organization as defined in the bill is required to register as such with the Attorney General. The registration statement must include the name of the organization, the name and address of each officer, and an accounting of all moneys received and expended during the preceding year, including the sources from which received and the purposes of expenditures. In the case of Communist Political organizations, the registration statement must also include the names, addresses and aliases of all members. The distinction in favor of Communist front organizations is, however, more apparent than real. Since front organizations must register the sources of their revenues, complying with such regulations as the Attorney General may prescribe, it is obvious that they may be required to register the names of dues-paying members as sources of revenue. A member of an organization which registers as a Communist political organization, but which fails to list his name, must himself register, or be subject to criminal penalties.

The registrations must be kept up to date by annual reports and are open to public inspection.

Literature of any organization which has registered or been ordered to register may not be mailed or transmitted in interstate commerce unless labelled on the outside as disseminated by a Communist organization. Radio or television broadcasts of such organizations must be preceded by an announcement that the program is sponsored by a Communist organization. Such organizations are also denied tax exemptions, and contributions to the organizations are not tax-deductible.

Members of organizations registered or ordered to register as Communist political organizations may not hold non-elective federal office, and it is unlawful for them in seeking or accepting any federal office or employment to conceal their membership. Such members, also, may not apply for or use passports.

But these disabilities, severe as they are, are mild compared to the unexpressed social and economic consequences which will befall the members of a registered organization. A registered organization is, under the bill's definitions, contained in Sections 2 and 3, conspiratorial, disloyal, and seditious. By legislative fiat such organizations are "found" to be directed and controlled by "the world communist movement" dominated by Russia, and dedicated to "the overthrow of existing governments" . . . by "conspiratorial and coercive tactics." Individuals in the United States "who knowingly

participate in the world Communist movement" are "found" to "repudiate their allegiance to the United States."

It is perfectly apparent therefore, that no organization can or will voluntarily register under these provisions. Attorney General Tom C. Clark pointed this out when he said: "It can be assumed that no organization would confess guilt by registration. . . ." (Page 424, Hearings on H. R. 5852). The simple fact is that the mere act of registration would cause an organization either to disappear or to become an illegal, "underground" society. No organization could retain open membership and support if it either voluntarily registered or was ordered to do so by official governmental action requiring disclosure of its membership. Its officers, members and contributors must either depart from the organization or be subject to the most onerous, and increasingly familiar sanctions of public odium, including loss of employment, social stigmatization, expulsion from "legitimate" organizations, and perhaps mob violence. Even resignation would not wholly save the victims because the names must be filed of all those who were members at any time in the preceding year. What is more, they may all be subjects for prosecution under section 4(a) of the bill, discussed below. (See Attorney General's Opinion to the same effect, page 423 of Hearings on H. R. 5852.)

Accordingly, the sponsors of the bill misstate the case when they assert that the bill merely performs disclosure functions, and does not outlaw any organization. *The fact is that the bill envisages not that any organization will register, but rather that individuals will be relentlessly prosecuted for belonging to organizations which have failed to register.*

The bill then, effectively outlaws organizations within its scope. Our next point is that this scope is unconscionably broad and vague; that it includes organizations which merely exercise constitutional rights; that its standards for determining which organizations must register are irrelevant to the opprobrious conclusions to be drawn; that an entire group can be destroyed because some of its members or leaders are believed to be "bad" people.

The bill establishes a Subversive Activities Commission, composed of three members designated by the President, one each from the State Department, the Department of Commerce, and the National Military Establishment. If the Attorney General has "reason to believe" that an organization which has not registered is in fact required to register, he must seek an administrative determination on the subject from the Commission. In addition, the Commission reviews

determinations of the Attorney General refusing requests to cancel a registration of a registered organization or to strike the name of an individual listed in a registration statement. The standards which this Commission is to apply in making its determinations are contained in those sections of the bill which define "Communist political" and "Communist front" organizations.

Definitions

A Communist political organization is defined in Section 3(3) as an organization having some but not necessarily all, of the ordinary and usual characteristics of a political party, which is dominated or controlled by the (unnamed) foreign government or foreign organization which controls the world Communist movement (found to exist in the preamble), and which operated primarily to advance the objectives of that movement as set forth in the preamble.

A Communist front organization is defined in Section 3(4) as an organization which is under the control of a Communist political organization or is primarily operated for the purpose of giving aid and support to a Communist political organization, a Communist foreign government, or the world Communist movement.

These general definitions are, however, to be applied according to certain criteria prescribed by the bill.

Section 14(e) of the bill requires the Commission, in determining whether any organization is a Communist political organization, to take into consideration eight factors. These are:

(1) The extent to which its policies are formulated and its activities performed pursuant to directives *or to effectuate the policies* of the foreign government or foreign organization which controls the world Communist movement.

(2) The extent to which *its views and policies do not deviate from* those of such foreign government or organizations.

(3) The extent to which it receives financial or other aid, *directly or indirectly*, from *or at the direction* of such foreign government or organization.

(4) The extent to which it sends members or representatives to any foreign country for instruction in Communism.

(5) The extent to which it reports to the foreign government or organization.

(6) The extent to which *its principal leaders or a substantial number of its members* are subject to or recognize

the disciplinary power of such foreign government or organization.

(7) The extent to which it fails to disclose, or resists effort to obtain information as to its membership or other records, its members refuse to acknowledge their membership, its meetings are secret, and it otherwise operates on a secret basis.

(8) The extent to which *its principal leaders or a substantial number of its members* consider the allegiance they owe to the United States as subordinate to their obligations to such foreign government or foreign organization.

Section 14(f) of the bill establishes standards for the Commission's determination of Communist front organizations. The Commission is required to take into consideration the following factors when determining whether an organization is a Communist front.

(1) The identity of active members.
(2) The sources from which an important part of its support, financial or otherwise, is derived.

(3) The extent to which it uses its funds, resources, or personnel to further political objectives of a Communist political organization.

(4) The extent to which the position taken or advanced by it from time to time on matters of policy does not deviate from the position taken by any Communist political organization.

Even a cursory analysis of the foregoing definitions and criteria reveals that:

(1) The mere exercise of freedom of speech and assembly or association can subject an organization to the bill's penalties. Do its policies tend to effectuate the policies, however unobjectionable, of a foreign group? Are they the same as or similar to the policies of the foreign group? Does it send representatives abroad, perhaps to international conferences in which Communists may take part, hence receiving "instruction" from them or "reporting" to them? Does the organization have Communists among its members who may contribute their support, financial or otherwise, to its worthy purposes, and thereby bring to it "indirectly" the support of the "world Communist movement?" Do its members sometimes meet in private? Does the organization decline to subject its members to blacklisting? Then it can be destroyed under these criteria.

(2) Many of the terms used have no clear and definite meaning. Some examples are: "some, but not necessarily

all," "dominated or controlled," "the extent to which" (what extent is to be deemed significant?), "other aid, . . . indirectly," "a substantial number," "identity" of active members, "important" part of the organization's support. There is no indication that more than one of these criteria shall be found to be applicable.

(3) The entire organization can be outlawed because of the "identity" of some active members or leaders, or because a "substantial number of its members" (certainly this can be a minority) are subject to the disciplinary power of a foreign movement (the definitions in Section 2 say that all Communists are in this category), or because some of its members fail or refuse to acknowledge their membership.

(4) Though the organizations are to be branded as foreign agents seeking to establish a "totalitarian dictatorship" in the United States, the tests for inflicting the brand are not necessarily germane to such a finding. Indeed most of them are wholly unrelated to foreign control or any object to establish any dictatorship.

The fact is that the definitions and criteria for both "Communist political organizations" and "Communist front organizations" are so vague and irrelevant to any purpose or effort to establish a "totalitarian dictatorship" that the Commission could require registration of almost any liberal organization in its virtually unfettered discretion.

For example, the Progressive Party, which obtained more than a million votes in the last election, could readily be determined to be a "Communist political organization" by these tests. Because it disapproves of the Marshall Plan, the Truman Doctrine, aid to Franco Spain, aid to Chiang Kai Shek, compulsory military service, etc., the Commission could, if it desired to do so, find that its policies and activities effectuate the policies of Russia and that its "views and policies do not "deviate" to a sufficient extent from those of Russia. In addition, the Commission might find that some of its leaders and a "substantial number" of its members are Communists (and thus, by the findings in section 2(5) and 2(9) are persons who recognize the "disciplinary power" of Russian Communists or who owe Russia a "superior allegiance"). Furthermore, the Progressive Party would undoubtedly resist, for purposes of self-preservation, efforts to obtain information as to its membership, and very likely some members of that Party (like members of the Democratic or Republican Party) often meet in closed, unpublicized ("secret") meetings.

As for Communist fronts, these can include virtually all

labor unions and progressive organizations, because for example, some of their active members who may also contribute funds, are Communists or members of the Progressive Party (already shown to be a likely candidate for designation as a Communist political organization). They may take policy positions which do not deviate from certain policies of the Communist or Progressive Parties.

Penalties (Section 16)

Once there is in effect a final Commission order requiring an organization to register, severe penalties apply for failure to register. The organization may be fined not less than \$2,000 and not more than \$5,000. The officers of the organization obliged to file the registration statement may be similarly fined or imprisoned from one to five years or both. These penalties, severe enough in themselves, become astronomical because each day of failure to register constitutes a separate offense. An individual who knowingly becomes or remains a member of an organization which has been ordered to register but has not done so may be fined from \$2,000 to \$5,000 or imprisoned from two to five years or both. Falsification of registration statements carries similar penalties.

Administrative Determinations and Court Review

We have shown that the condemnation of an organization under the provisions of this bill is tantamount to destruction. Yet no more is required to effectuate this result than the finding of a mere commission composed of political appointees. Thus the requirement of judicially competent proof beyond a reasonable doubt before a Court of law and an impartial jury, which is essential under our judicial system for even the most innocuous misdemeanors, would be avoided in cases involving thousands of individuals, perhaps hundreds of organizations, and their fundamental civil liberties. The avoidance of such proof, required under other existing legislation, may be the main purpose of this bill.

The fact that Court review is available for the Commission's findings does not mitigate the vices inherent in the bill. If the standards are vague and improper for the purpose of administrative determinations, then the same standards are vague and improper for the purpose of judicial review. Furthermore, the Commission's findings of fact are conclusive if supported by a preponderance of the evidence (substantial evidence only under the Ferguson bill).

Unconstitutionality of Registration and Related Provisions

The foregoing analysis demonstrates that the registration and related provisions of the bill are unconstitutional for the following reasons:

1. Sections 5 and 6 deny the right of employment or of holding non-elective office under the United States and the right to obtain passports, merely for membership in a "Communist political organization." Section 10 makes mere membership in such organization a crime under certain conditions. These penalties and the drastic social and economic consequences of belonging to a persecuted organization apply without regard to any action, fault or wrongful intent on the part of the individual. This is the clearest application of the unconstitutional doctrine of built by association. Under our law, guilt is personal, and our Courts have recognized that members of an organization notoriously do not adhere to all of its tenets.

2. Organizations may be destroyed and their members subjected to legal, social and economic disabilities merely because of the views they or some of their members advocate, regardless of how peaceable their conduct. Thus the First Amendment, which guarantees freedom of speech and assembly is violated.

3. Registration imposes severe punishment on the organizations and their members. This punishment is imposed on the basis of vague standards, and hence violates the due process clause of the Fifth Amendment.

4. Registration may readily subject the organization and its members to prosecution under section 4(a). Hence, the requirement of registration compels self-incrimination in violation of the Fifth Amendment.

Our views as to the unconstitutionality of these bills are supported in large measure by the opinions of the lawyers whom the Senate Judiciary Committee last year recognized as constitutional experts. Their comments were made with respect to the former Mundt-Nixon bill (H. R. 5852), but the present versions of these bills have not removed the defects they noted.

Charles Evans Hughes, Jr. found the criteria for determining "Communist organizations" in section 3 of the old Mundt bill (now contained in sections 3 and 14) to be clearly unconstitutional for vagueness. He said:

"In my judgment, the definitions in section 3 of the organizations against which, or against the members of which, the above sections are directed, are permeated

with even greater vagueness and ambiguity than are those of section 4." (Page 417 of Hearings on H. R. 5852). John W. Davis expressed a similar view. He said:

"I am constrained to think that because of its indefiniteness and uncertainty the bill fails to meet the constitutional requirement of due process.

"... It would seem to be clear that if the definitions are themselves vague and uncertain that uncertainty must vitiate the act throughout." (Page 420 of Hearings on H. R. 5852).

Indeed the entire principle of requiring registration as a condition to the exercise of freedom of speech or assembly even when done only for the purpose of identification without invidious characterization is violative of the Bill of Rights. As the Supreme Court said in *Thomas v. Collins*, 323 U. S. 516, "As a matter or principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of free speech and free assembly."

2. UNLAWFUL AGREEMENTS (Section 4(a))

Section 4(a) of the bill makes it unlawful for persons knowingly to conspire or agree "to perform any act which would substantially facilitate or aid in the establishment within the United States of a totalitarian dictatorship, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization or foreign individual." "Totalitarian dictatorship" is defined as a non-representative form of government characterized by the existence of a single political party, which is for all practical purposes identical with the Government, all other parties being prohibited.

In short, this subsection would punish a person for conduct which was not intentionally in aid of totalitarian dictatorship and which would not involve otherwise unlawful conduct, if only a court should find that an innocently done act in fact contributes to the establishment of the dictatorship. All that need be shown is that two or more people agree to do something which a court might find substantially aids in the result.

The phrase "any act which would substantially facilitate or aid" is without clear meaning. However, according to the definitions in Sections 2 and 3 the Communist Party and the other proscribed groups seek to establish a "totalitarian dictatorship" in the United States under foreign control or function primarily to that end. Hence any cooperation with them in furtherance of common objectives, including acts which are constitutionally protected, is readily construable as

an act or agreement to commit an act which "would substantially facilitate or aid" the establishment of such a dictatorship.

This sub-section also contains words other than "substantially facilitates or aids," which have no clearly defined meaning, such as "direction and control of which is to be vested in, or exercised by or under the domination or control of . . .," and "characterized by."

In the light of the foregoing analysis, sub-section 4(a) is unconstitutional for the following reasons:

1. Under the guise of punishing attempts to establish a totalitarian dictatorship in the United States dominated from abroad, it permits the punishment of peaceful advocacy and assembly as distinguished from acts and incitements threatening the immediate destruction of our government. Accordingly, it violates the First Amendment, which denies to Congress the power to make any law abridging freedom of speech or assembly.

2. It violates the due process clause of the Fifth Amendment because it defines a crime in terms so vague and indefinite that an ordinary citizen cannot know from reading it what conduct is prohibited.

The three distinguished lawyers whose opinions on the constitutionality of last year's Mundt-Nixon bill were sought and secured by the Senate Judiciary Committee had this to say about the corresponding section of that bill which was substantially the same as the present section 4(a):

Charles Evans Hughes, Jr.:

"The question of the validity of this bill turns principally on that of its compatibility with the first and fifth amendments to the Constitution.

"In my opinion, section 4 of the bill offends both of these principles. . . . (*Stromberg v. California*, 283 U. S. 359 (1931); *Herndon v. Lowry*, 301 U. S. 242, 249-250, 255, 260-261 (1937). See *Schneiderman v. United States*, 320 U. S. 117, 137-138 (1943).)" (Page 416 of Hearings on H. R. 5852).

Attorney General Tom C. Clark:

"From the language of the bill, it appears uncertain whether mere membership in a Communist organization as defined in section 3, would constitute a violation of section 4. The principle that a criminal statute must be definite and certain in its meaning and application is well established; a principle which may not be satisfied by the definitions and criteria of the bill, *Connally*

v. General Construction Company (269 U. S. 385); *Lanzetta v. New Jersey* (306 U. S. 451).

"It is also doubtful whether or not this proposal will meet the requirements of due process under the Fifth Amendment. A statute which would define the nature and purposes of an organization or group by legislative fiat is likely to run afoul of the due process requirements. *Manley v. State of Georgia* (279 U. S. 1 (1929))." (Page 424 of Hearings on H. R. 5852).

John W. Davis:

"It may well be that some or all of the evils with which the bill purports to deal are not susceptible of more precise description. But that which cannot be defined cannot be criminally punished under our conception of law." (Page 421 of Hearings on H. R. 5852.)

It may be asked why, if the bills are so patently unconstitutional, we cannot leave it to the court to throw out any such measure, should it be enacted. The principal reasons are that ordinarily it takes years for a case to reach the highest court, and, in the meantime, many perfectly lawful organizations could be destroyed, while millions of Americans would fear to exercise their constitutional rights of freedom of speech and association; that judges are but men, and subject to the pressures of national hysteria. The very indifference of the people could influence their judgment.

THIS LEGISLATION IS UNNECESSARY

What is the justification offered for the introduction of these repressive bills? It is said that such legislation is needed "to preserve the sovereignty of the United States" (Section 2(11)).

If, as the preamble to the bill claims, there exists a conspiracy in this country seeking to destroy our national security and subject us to a foreign dictatorship, then such activity can be prosecuted under existing criminal legislation, which is adequate for that purpose. Aside from numerous State statutes, there are Federal criminal statutes which punish the following activities among others:

Acting as agent of a foreign government without notification to the Secretary of State (18 U. S. C., section 951); possession of property in aid of foreign government for use in violating any penal statute or treaty rights of the U. S. (18 U. S. C. section 957); espionage activities (18 U. S. C. sections 793-797); inciting or aiding rebellion or insurrection (18 U. S. C., section 2383); seditious conspiracy (18 U. S. C., section 2384); advocating overthrow of the government by

force (18 U. S. C., section 2385; treason (18 U. S. C., section 2381); misprision of treason (18 U. S. C., section 2382); undermining loyalty discipline or morale of armed forces (18 U. S. C., section 2387); sabotage (18 U. S. C., section 2156); importing literature advocating treason, insurrection or forcible resistance to any federal law (18 U. S. C., section 552); injuring federal property or communications (18 U. S. C., section 1361); conspiracy against the constitutional rights of citizens (18 U. S. C., section 371). Organizations engaged in civilian military activity, subject to foreign control, affiliated with a foreign government, or seeking to overthrow the Government by force, are subject to registration requirements under the Voorhis Act (18 U. S. C., 2386).

While some of these Acts may themselves be in part unconstitutional as punishing mere advocacy of ideas, they do not differ in that respect from this proposed bill. If some of these Acts have technical deficiencies these can be remedied by technical amendments.

The purpose and effect of the Mundt-Nixon bill, however, is not to avert danger to our government and democratic institutions. Instead, it is, as appears from the foregoing analysis, designed to suppress or punish dissenting political expression or assembly under the pretext that such expression or assembly constitutes a conspiracy to establish a totalitarian dictatorship under foreign control. This purpose the bill would accomplish by permitting an administrative determination of a treasonable status on the basis of standards and proofs which are relevant not to treasonable activities but to the expression of dissenting opinion.

THE BILLS THREATEN SELF-GOVERNMENT

It is the essence of our democracy that the people shall govern themselves. Their only hope of doing so wisely lies in the collective wisdom derived from the fullest possible information, and the fair presentation of differing opinions. Without such information our people cannot find their way intelligently to the policies and candidates who suit their wishes and needs and our government cannot be made responsive to their will.

Because in a democracy the people must have the right to choose the good from the bad ideas, no governmental authority "can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." (*Board of Education v. Barnette*, 319 U. S. 624, 641, 642.) Indeed, the Supreme Court has said, "The very purpose of the First Amendment is to preclude public authority from assuming a

guardianship of the public's mind through regulating press, speech and religion. In this field every person must be his own watchman for truth, because the forefathers did not want any government to separate the truth from the false for us." (*Thomas v. Collins*, 323 U. S. 511, 545).

This freedom to speak, to write, to hear, to choose, without governmental interference, must carry with it the effective right to persuade to action. "The First Amendment is a charter for government, not for an institution of learning. 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." (*Rutledge, J. In Thomas v. Collins*, supra, page 537). And "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." (*Jackson J., In Board of Education v. Barnette*, supra, page 642).

If these democratic principles are to be made effective, the people must be free to organize into associations, whether political, religious or economic, without governmental restraint. For it is only through such associations, that the will of the people can be brought to bear upon the market place of ideas, and upon the governmental authorities.

Because these bills would deny that freedom of association and expression to all who fail to meet the criteria of political orthodoxy which they prescribe, the bills strike at the very foundation of democratic government in the United States. For they sweep within their ambit the liberties of all Americans, making the exercise of liberty subject to the constant surveillance of a governmental commission clothed with almost limitless power.

There is a painful incongruity between these bills and the principles of freedom for which our representatives at the United Nations and in many foreign lands purportedly stand. The United States had a leading part in sponsoring the Universal Declaration of Human Rights which has been approved by the General Assembly of the United Nations. Article 19 of the Declaration states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Article 20 provides in part: "Everyone has the right to freedom of peaceful assembly and association." In our view it is impossible to square these bills with our moral obligations under the Universal Declaration of Human Rights.

CONCLUSION

At a time when many Americans find themselves in active opposition to certain governmental policies, both domestic and foreign; when intense indignation exists as the rights of the Negro people are neglected by Congress; when labor remains burdened with the infamous Taft-Hartley law still on the books; when unemployment rises and the spectre of depression haunts the nation; when the threats to peace become more imminent, the proponents of the Mundt-Ferguson bills evidently seek to stifle protest, to suppress opposition, to compel conformity. We are asked to abandon our constitutional safeguards, to shut the mouths and minds of dissenters.

We are a nation of protest and dissent. Most of our people have shown that they favor social change; they mean to strive for a better life. The right to think and speak freely are fundamental to us, recognizing as we do, that free thought and free speech are the indispensable conditions for every other freedom we enjoy. All of this the enactment of the Mundt-Ferguson bills would destroy. Whether this occurs depends upon the vigor with which an aroused liberty-loving people asserts itself now.

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