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4 MEMORANDUM

4 Re: Right of Communist Party Candidates
/ to Broadcast Time

The Federal Communications Commission has requested the views of the Department of Justice on several questions concerning the effect to be given the Communist Control Act of 1954 (Public Law 637, 83d Cong., 68 Stat. 775) in applying the statutes and regulations assuring political candidates of equal opportunity for broadcasting time. Communications Act of 1934, 47 U.S.C. 315.

The Communications Act of 1934 requires that any one holding a broadcast license who permits a person who is a "legally qualified candidate for any public office" to use broadcasting facilities

10 "shall afford equal opportunities to all
7 other such candidates for that office in the use
of such broadcasting station * * * " 47 U.S.C. 315(a)

In accord with the direction of that statute to "prescribe appropriate rules and regulations to carry out" its purposes, the Commission has issued regulations which, as here pertinent, define in detail the tests to be used in determining who is a "legally qualified candidate." 47 C.F.R. 3.190, 3.290, 3.590, 3.657/4

The Commission's regulations defining the tests of legal candidacy properly take into account the fact that political candidacy under most State electoral laws is usually achieved by the action of political parties (cf Rice v. Elmore, 165 F (2d) 387, 389), and is quite properly concerned with the effect of the Communist Control Act of 1954, enacted during the closing days of the 83d Congress. The

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1/ Each of these regulations, in defining "legally qualified candidate," is identical; the difference is that each applies to a different transmission medium, i.e., sec. 3.190 applies to AM broadcast licenses; sec. 3.290 to FM licenses, sec. 3.590 to non-commercial educational FM, and sec. 3.657 to television.

Commission is particularly concerned with the provisions of section 3 of that act declaring the Communist Party and its related organizations are entitled to none of the rights, privileges and immunities of legal organizations; and those of section 4 which prescribe certain consequences to individuals for knowing membership in such organizations.

The Commission asks:

101. Does Section 3 of the Communist Control Act of 1954, in depriving the Communist Party of the United States of "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", serve to deprive any person who is or purports to be a candidate of the Communist Party, or any state or local subdivision thereof, of the status of a "legally qualified candidate for any public office" within the meaning of Section 315(a) of the Communications Act of 1934, as amended?
102. If so, is Section 3 of the Communist Control Act applicable to candidates for state and local public offices as well as to candidates for federal offices?
103. Does Section 3 of the Communist Control Act of 1954 affect the status of persons as legally qualified candidates for public office, who are members of the Communist Party, but are running for public office not as nominees of the Communist Party but as independent candidates, or as the candidate of some party other than the Communist Party, when under the applicable state laws, they are eligible to be voted on by the electorate and to serve in the office for which they are offering themselves?
104. Do any of the provisions of Section 4 of the Communist Control Act of 1954 affect rights conferred by Section 315(a) of the Communications Act of 1934, as amended?
105. Is the implication that the Communist Party and its spokesmen may make use of broadcasting facilities, providing they do so pursuant to the conditions set forth in the Internal Security Act of 1950 (50 U.S.C. § 789), negated by Section 3 of the Communist Control Act of 1954, which deprives the Communist Party of the United States of "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"?

In considering the effect to be given in these specific instances to these sections of the Communist Control Act of 1954, it is necessary first to examine their purpose, which, to a large extent is evident from the face of the statute.

Thus, both sections 3 and 4 must be considered in the light of the extensive findings contained in section 2 of the Act. In that section, the Congress

10 "finds and declares that the Communist Party,
7 although purportedly a political party, is in fact
an instrumentality of a conspiracy to overthrow the
Government of the United States."

In support of that finding, it recites in detail the broad differences between the Communist Party and a true political party, and the

10 "clear present and continuing danger to the
7 security of the United States"
which the Communist Party represents. It concludes that the "Communist Party should be outlawed."

In the light of these findings, section 3 proceeds to declare that the Communist Party of the United States, or any of its successors

10 "are not entitled to any of the rights, privileges,
7 and immunities attendant upon legal bodies created
under the laws of the United States or any political
subdivision thereof * * * "

In short, because the Communist Party is an illegal conspiracy, and not a political party, it is not to be accorded whatever rights are usually accorded a political party as such.

Were there room for doubt that this was the specific purpose of the Congress in enacting Section 3, that doubt would be wholly dispelled by reference to the debates on the measure. 2/ The proponents and opponents of this section understood that the Congress, by section 3,

10 "exercises legislative control over the type of
7 organization which can function as a political party
* * * " (Congressman Javits speaking for the bill.
100 C.R. 13836.)

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4/ 2/ Sections 2, 3 and 4 were added as the result of floor action, and there are no committee reports explaining its purpose. 100 Cong. Rec. 13834, 14090, 14332. All references to the Congressional Record are to the daily edition.

Congressman Celler, opposing this section of the bill as drawn, agreed that was the purpose:

10 "You say in effect that the Communist Party
7 cannot appear on the ballot, can have no legal
standing, cannot appear in elections * * * "
(100 C.R. 13837). 3/

In the Senate, Senator Butler, one of the principal proponents of the measure, in offering minor amendments to the findings in section 2, stated that

10 "The whole purpose of the findings in this section
7 is to make it clear that the Communist Party is not
a true political party * * * ." 100 C.R. 13987.

Senator Kefauver, expressing his doubt as to the measure, asked Senator Butler, as to the effect of the bill on the Communist Party:

10 "In other words, it could not be placed on the ballot,
7 it could not be sued, it could not sue, it could not
enjoy the privileges the other parties enjoy. Is that
correct?" 100 C.R. 10482.

Senator Butler agreed. Id. Senator Humphrey, contending for an amendment to the bill to make Communist Party membership a crime, noted that section 3

10 "went only so far as to make it clear and unmistakable
7 that the Communist Party, insofar as the apparatus is
concerned, has no legal standing in any area of American
life." 100 C.R. 10485.

Senator Ferguson, Chairman of the Majority Policy Committee, and as such in a position to speak authoritatively as to the purpose of the majority's bill, analogized the effect of the legislation to the effect of state corporation statutes which withdraw legal rights and privileges from corporations failing to comply with statutory requirements. 100 C.R. 14087. In particular, he referred to the right of the Communist Party to use the courts as an immediate problem, since

10 "In my own State the Communist Party did it when it was
7 prohibited from putting its name on a ballot as the Com-
munist Party." Id.

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3/ To similar effect see the statements of Congressman Hyde, 100 C.R. 13838, and of Congressmen Dodd, Javits and Evins, 100 C.R. 13840.

In his view, this demonstrated the correctness and utility of the section as added by the House. Id.

At the same time it was made abundantly clear that, even as section 3 was directed at the Communist Party organization, it did not deal with the individual Communist's conduct. Indeed, the whole thrust of the debate in both House and Senate dwelt with the adequacy or inadequacy of section 3 standing alone to deal with what the Congressmen saw as the immediate problem, and led to the adoption of section 4. This issue is accurately set forth in the statement of Senator Smathers, questioning

10 "the logic of saying, as the House bill does, that the
7 men who get together to organize the party and direct
the party, and have control of the party, are not guilty,
although what they do and what they organize is illegal."
100 C.R. 14085. /4/

It was in large part on the basis of this argument that section 4 was added to the bill. See, for example, the statement of Congressman Dies, 100 C.R. 14333.

From these statements, echoed by majority and minority, there is ample corroboration of the purpose of the bill appearing on its face, that it was intended to remove from the Communist Party any of the attributes of a legal organization, in particular to declare that it was not to be treated as a valid political party comparable to true political parties participating in an election campaign, and that, as to section 3, it did not deal with the conduct of individual Communists.

In considering the manner in which this statutory declaration is to operate in conjunction with section 315(a) of the Communications Act of 1934, it is necessary to dwell again upon the fact that the Communications Act and the Commission's regulations do not directly deal with the rights of political parties, but rather with the rights of political candidates. Ordinarily, any "rights" to broadcast time depend entirely on statutory grant, and no violation of freedom of speech is involved in a refusal of such time. McIntire v. Wm. Penn Broadcasting Co., 151 F.(2d) 597. See also, National Broadcasting Co. v. United States, 319 U.S. 190, at 226. It has been held that the right to demand equal time under the statute is limited to the candidate himself, and does not extend to requests by his supporters, even though the latter act with the concurrence of the candidate and for the purpose of advancing his campaign. Felix v. Westinghouse Radio Stations, Inc., 186 F.(2d) 1 (C.A.3, 1951); cert. den., 333 U.S. 876.

However, under federal, state and local laws relating to elections, candidacy in practice is usually restricted to those persons selected by political parties. See Mr. Justice Pitney, concurring, in Newberry v.

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See also, Congressman Javits, 100 C.R. 13836, supra page 3, and Congressman Celler, 100 C.R. 13837.

United States, 256 U.S. 232. Terry v. Adams, 345 U.S. 461. Rice v. Elmore, supra. Since, under section 3, the Communist Party, or any Communist organization, may not be legally considered as a political party, it follows that any person asserting that he is legally a candidate for office as the result of action by the Communist Party or such other organization, may not be deemed to be a "legally qualified candidate" in any federal, state or local election, as that term is used in the Communications Act.

In reaching this result, it is unnecessary to consider whether the Congress is authorized to override state election laws as to the qualifications of candidates in purely state and local elections. For we are not concerned with the state election laws; rather, the problem is to construe one federal law, the Communist Control Act of 1954, in conjunction with another Federal law, the Communications Act of 1934, cf. Newberry v. United States, 256 U.S. 232. In holding that the Communist Control Act, as later in time, purposefully, even if by implication, withdrew rights under the Communications Act from candidates qualified by Communist organizations, we need only be concerned with the fact that Congress has plenary control over the subject matter of the latter Act. It has been held that no person has a right to use radio transmission facilities except as may be provided by the Federal statute. McIntire v. Wm. Penn Broadcasting Co., supra, 183 F. (2d) 497. The privileges granted to the candidate representatives of political parties under section 315(a) have been withdrawn under the Communist Control Act.

Note may here be taken of the constitutional arguments to be anticipated, that the action of the Congress in effectuating its purpose concerning the Communist Party as a legal political organization might be a violation of the First or Fifth Amendments, or the bill of attainder clause of Article I, section 10. These questions are not here before us, in view of the normal presumption of the constitutional validity of deliberate legislative action. If they are raised in the future, it will be in litigation, at which time each such case can be appraised on its particular merits.

However, while broadcast licensees would not be bound under the statute to give equal time to candidates whose legal qualification as such depends upon Communist Party action, it does not follow that they may refuse that privilege to an individual Communist who qualified as a candidate other than by Communist Party action. Section 4 of the Communist Control Act specifically provides for the consequences of Communist membership, and those consequences do not include barring such individuals from the ordinary privileges accorded citizens, other than those specifically enumerated in the Internal Security Act of 1950, as amended, none of which are here relevant. 64 Stat. 987.

None of the enumerated privileges withdrawn from individual Communists, however, include the privilege of equal time either by express

provision or by implication. Accordingly, any person, even though a Communist, whose qualifications as a candidate do not depend upon treating Communist Party action as political action, would not be excluded by the Communist Control Act from the privileges of section 315(a) of the Communications Act.

The last of the Commission's questions concerns the effect of section 3 of the Communist Control Act upon the implied permission to Communist groups to make properly labeled broadcasts, under section 102 of the Subversive Activities Control Act of 1950. (50 U.S.C. 789). The latter statute provides that it shall be unlawful for a Communist organization required to register under that Act, to make any radio or television broadcast unless the broadcast is preceded by a statement, with the name of the organization in place of the blank, that

10 "The following program is sponsored by _____,
7 a Communist organization."

Under other circumstances, the plain intent of the Congress that the Communist Party was not to be treated as a legal organization would seem to compel a conclusion that this permission to use broadcasting facilities would be withdrawn. However, section 3 of the Communist Control Act contains the following proviso:

10 "Nothing in this section shall be construed as
7 amending the Internal Security Act of 1950, as amended."

And it could therefore be argued that the permission to broadcast implied from the Internal Security Act was left untouched by the Communist Control Act.

This apparent conflict between the two statutes, however, does not require resolution at the present time. The pertinent provision of the Internal Security Act relates to "any organization which is registered under section 7" of that Act, or which is subject to an order requiring it to register under that Act. 50 U.S.C. 789. The Communist Control Act relates specifically to the "Communist Party, or any successors of such party", and that organization is not yet an organization registered or required to register under that Act, even though ultimately it may be subject to this requirement. And it may therefore be concluded that the Communist Control Act, if construed to prohibit broadcast licensees impliedly from contracting for air time with the Communist Party, since it is an illegal organization, would involve no implication of an amendment to the Internal Security Act. Whether or not the operation of the Communist Control Act withdraws from the Communist Party the privilege of making properly labeled broadcasts after it comes within the terms of section 10 of the Internal Security Act by registering or being required to register is a question which may quite properly be left for discussion until such time as the Internal Security Act procedures reach a more final stage.

Accordingly, it is our view that the Communist Party under section 3 of the act may not be regarded as a legal organization for purposes of using broadcast facilities licensed under the Communications Act of 1934, at least until such time as they qualify under the terms of section 10 of the Internal Security Act.