

AMENDING SUBVERSIVE ACTIVITIES CONTROL ACT OF 1950 1367

court, declaring the provision under which the indictment was found to be, as previously stated, in violation of Robel's first amendment "right of association."

In affirming the dismissal of the indictment, Chief Justice Warren, for the majority, said:

"That statute casts its net across a broad range of associational activities, indiscriminately trapping membership which can be constitutionally punished and membership which cannot be so proscribed. It is made irrelevant to the statute's operation that an individual may be a passive or inactive member of a designated organization, that he may be unaware of the organization's unlawful aims, or that he may disagree with those unlawful aims. It is also made irrelevant that an individual who is subject to the penalties of §5(a)(1)(D) may occupy a non-sensitive position in a defense facility. Thus, § 5(a)(1)(D) contains the fatal defect of overbreadth because it seeks to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment rights. * * *

Mr. Justice Brennan, concurring in the result, said that he was "not persuaded" that section 5(a)(1)(D) was fatal for "overbreadth" as he had agreed was the case in other contexts, particularly in *Aptheker v. Secretary of State*, 378 U.S. 500, by which the Court struck down section 6 (passport prohibitions) of the act on the same ground now applied by it to section 5(a)(1)(D). He pointed out that "Congress often regulates indiscriminately, through preventive or prophylactic measures" and that such regulation has been upheld even where fundamental freedoms are potentially affected. He said that we may assume that Congress may have been justified in its conclusion that alternatives to section 5(a)(1)(D) were inadequate for the safeguarding of essential defense facilities against espionage and sabotage, and therefore the Congress could constitutionally exclude *all* party members from employment in them.

Mr. Justice Brennan said that his quarrel with the provision was based on the fact that the Congress gave the Secretary of Defense no meaningful standard to govern his designation of defense facilities, thus creating a danger of an arbitrary application of criminal sanctions in an area of protected freedoms. The absence of adequate standards, he said, reflected the failures of Congress (1) to make a legislative judgment on the extent to which the prophylactic measure should be applied, (2) to assure respect for constitutional liberties because of the absence of any type of administrative hearings, public or private, on the Secretary's designation, or the review thereof, and (3) to give adequate notice to persons affected by criminal sanctions as to whether the Secretary is acting within his authority, so that they may determine whether or not to risk disobedience.

Relevant provisions in H.R. 15626

The bill so narrows the type of facilities which may be designated as such by the Secretary of Defense that all positions of employment therein may reasonably be said to be sensitive. Moreover, section 5(a)(1)(D), which establishes criminal sanctions, has been amended so as to require (1) proof of membership in a Communist-action organization, plus (2) proof of such member's *actual* knowledge or notice of the final order of the Board determining it to be an organization of that type,¹ plus (3) such member's *actual* knowledge or notice of the designation of the facility as a defense facility.

In addition, the bill remedies the objections raised by Mr. Justice Brennan in his concurring opinion, by establishing a meaningful standard for the designation of defense facilities by the Secretary of Defense, with provisions reflecting (1) a legislative judgment as to the extent to which the prophylactic measure is to be applied, (2) procedural safeguards assuring respect for constitutional liberties, and (3) adequate notice to persons affected by the criminal sanctions as to whether the Secretary is acting within his authority.

¹The bill amends section 13(k) of the act by repealing clauses imputing ("constructive") notice to members of Communist organizations on publication of the Board's final orders in the *Federal Register*. In *Aptheker v. Secretary of State*, supra, Mr. Justice Goldberg, for the majority, noted that section 13(k) of the act provided that publication in the *Federal Register* of the fact of the Board's final order "shall constitute notice to all members of such organization that such order has become final," pointing out that the terms of section 6 (passport prohibitions) applied whether or not the member *actually* knew or believed that he was associated with a Communist organization.