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Supreme Court of the United States

OCTOBER TERM, 1949

No. 10

AMERICAN COMMUNICATIONS ASSOCIATION, C. I. O., et al.

v.

CHARLES T. DOUDS, Individually and as Regional Director of the National Labor Relations Board, Second Region.

APPELLANTS' PETITION FOR REHEARING

Appellants respectfully request that this Court reconsider its decision filed herein on the 8th day of May, 1950, and grant appellants a rehearing in this case, pursuant to Rule 33, on the grounds hereinafter set forth.

Issue Involved and Background

This case calls into issue the constitutionality of Section 9(h) of the Labor Management Relations Act (61 Stat. 136, 146, 29 U. S. C. Supp., Sections 154, 159(h)). By virtue of that section, a union may not use the facilities of the National Labor Relations Board, may not enter into a union shop contract, and, in some circumstances, loses the right to strike, unless each of its officers shall execute an oath attesting that "he is not a member of the Communist Party or affiliated with such party, and that he does not believe in and is not a member of or supports any organization that believes in or teaches the overthrow of the United States Government by force or by any

illegal or unconstitutional methods". The law further provides that Section 35(a) of the Criminal Code shall be applicable in all respects to such affidavits.

The officers of the plaintiff union had refused to sign the affidavit in the terms set forth above and, accordingly, the plaintiff union and its members were denied the right to avail themselves of the Board's facilities. The union was refused the right to a place on the ballot in an election conducted by the Board among employees who desired to be represented by it and for whom the union had previously been the sole collective bargaining representative. The employees, rather than have no union represent them, voted for a rival union which was the only union appearing on the ballot, and that union was thereupon certified as the sole collective bargaining representative of the employees in place and stead of the plaintiff union. Accordingly, the plaintiff union was further denied the right to strike (Section 8(b)(4)(C) of the Act).

With the repetition of such incidents it becomes evident that the operation of Section 9(h) makes it, at best, extremely difficult for unions to survive if their officers fail or refuse to sign the affidavit. Irresistible pressure is thereby exerted upon such unions to remove such officers, who must constitute a burden to them by virtue of the application of the Act.

As posed by this Court, "[t]he difficult question that emerges is whether consistently with the First Amendment, Congress, by statute, may exert these pressures upon labor unions to deny positions of leadership to certain persons who are identified by particular associations and political affiliations" (p. 6, Vinson, J.).*

The question posed is not only difficult but, as this Court recognized, presents constitutional issues of "manifest importance". It is submitted that an issue of such serious proportions is entitled to the fullest possible consideration.

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* All references are to slip sheet opinions.

The case was argued before only six members of the Court. Mr. Justice Clark had of necessity disqualified himself because the Department of Justice had participated in the proceedings while he was Attorney General. Mr. Justice Minton had not been sworn in as a Justice of this Court at the time of the argument and presumably he would not have participated in any event, in view of the fact that he had decided, in the lower court, the companion case of *United Steel Workers of America* v. *N. L. R. B.* Mr. Justice Douglas was unable to participate in view of illness which had necessitated his absence from the bench, but would be available on a rehearing.

Thus, the case was heard by only two-thirds of the Court. Further, despite the limited number of Judges participating, the case resulted in four separate opinions representing as many divergent views on the constitutionality of the statute as framed. Finally, we find that this statute was upheld by an evenly divided Court, since only three of the Justices participating held that it was constitutional in its entirety. Obviously, it is advisable that in considering a case of this importance, as many members of the Court participate as is possible.

I

The principal issue causing difference among the Justices of the Court arose out of the provisions of the statute which effected the specified disabilities upon mere beliefs or opinions "even though [those beliefs or opinions] may never have matured into any overt act whatever, or even been given utterance" (p. 15, Jackson, J.).

Chief Justice Vinson, with whom Justices Reed and Burton concurred, agreed that if the belief provisions of the statute "were read very literally to include all persons who might, under any conceivable circumstances, subscribe to that belief" (p. 23), the breadth of the statute would raise serious constitutional problems. To get around this difficulty they have added limiting language so as to make the statute apply to persons and organizations who believe in violent overthrow of the Government "as it presently

exists under the Constitution as an objective, not merely a prophecy". It is submitted not only that no such interpretation may be drawn by virtue of the statute itself, but that no authority appears in the legislative history of the statute which might indicate such an intent on the part of Congress.

It is respectfully submitted that it is not the function of this Court to alter the language of a statute in order to "force" it into constitutionality. Thus, Mr. Justice Frankfurter, who is well known to have consistently made every rational effort to favor the constitutionality of legislative enactments, indicated that he, too, could sustain the validity of the statute by eliminating certain portions thereof and rewriting others. However, he made clear that by virtue of the language of this statute and its background such a course was impossible because "what Congress has written does not permit such a gloss nor deletion of what it has written" (p. 7). Mr. Justice Jackson, in discussing the limitations read into the statute by the prevailing opinion, asserted that the limitations thus effected did not render it constitutional but merely rendered it so vague as to compound the invalidity of the statute. Mr. Justice Black likewise agreed that the belief provision of the law exceeded the permissible area of congressional action by virtue of the provisions of the First Amendment to the Constitution and, indeed, our entire historical background and way of life.

For, as pointed out by the dissenting Justices, belief is not a proper subject for legislative action. Thus, Mr. Justice Jackson stressed that "While the Governments, State and Federal, have expansive powers to curtail action, and some small powers to curtail speech or writing, I think neither has any power, on any pretext, directly or indirectly to attempt foreclosure of any line of thought. Our forefathers found the evils of free thinking more to be endured than the evils of inquest or suppression. They gave the status of almost absolute individual rights to the outward means of expressing belief. I cannot be-

lieve that they left open a way for legislation to embarrass or impede the mere intellectual processes by which those expressions of belief are examined and formulated. This is not only because individual thinking presents no danger to society, but because thoughtful, bold and independent minds are essential to wise and considered self-government" (p. 21).

Indeed, this abhorrence of "thought control" is not new. Not only was it completely and absolutely rejected by those who founded this country and its Constitution, but, prior to this decision, by our courts as well. To step back now and to permit any civil disability based upon mere thought, absent any overt act (which is what the decision of the Court here effects), not only discards that which this Court has heretofore adhered to as within the command of our Constitution, but indeed flies in the face of its previous warnings.

Cantwell v. *Connecticut,* 310 U. S. 296;
Jones v. *Opelika,* 319 U. S. 103;
Minersville v. *Gobitis* dissent, 310 U. S. 586;
West Virginia v. *Barnette,* 319 U. S. 624;
Stromberg v. *California,* 283 U. S. 359;
Bridges v. *California,* 318 U. S. 252;
Thomas v. *Collins,* 323 U. S. 516.

The decision of the Court seeks to justify this interference with the heretofore inviolate right of belief by arguing that the holding of the particular belief is not "punished" or "forbidden" by the statute. It urges that one merely loses his position thereby, and that loss of a particular position is neither loss of life nor liberty (it does not mention property), the distinction being one of degree. Further, the Court points out that Section 9(h) touches only a relative handful of persons, leaving the great majority of those of the identified affiliations and beliefs completely free from restraint.

But this Court has long held that loss of the right to pursue one's vocation *is* punishment and, indeed, loss of liberty as well as property.

> *Allgeyer* v. *State of Louisiana,* 164 U. S. 578;
> *Meyer* v. *N. L. R. B.,* 262 U. S. 390;
> *United States* v. *Lovett,* 328 U. S. 303.

Indeed, such punishment to the individual holding the belief is so great that the alternative facing him must be "between the rock and the whirlpool", as the earlier reasoning of the decision makes clear. He must either give up his chosen vocation or forswear his belief. It is to quibble to argue that the belief is not thereby punished or forbidden.

Also, the fact that the harm or interference may possibly be considered less in degree than direct punishment or prohibition of the belief, or that it affects only a "handful" of people is hardly availing to make the interference permissible under our Constitution. The decisions of this Court in the past have spoken unequivocally on this subject. There shall be *no* interference. Freedom of belief is inviolate. Our courts have heretofore stressed that the protection of the Constitution is afforded to *all.* For only in that way can democracy be guaranteed. It is precisely in this fundamental regard that we differ from other nations and therein "lies the security of our nation".

As so aptly stated by the late Justice Rutledge in *Thomas* v. *Collins,* 323 U. S. 516, page 530:

> "The restraint is not small when it is considered what was restrained. The right is a national right federally guaranteed. There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth which no state, nor all together, nor the nation itself can prohibit, restrain or impede. If the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow.

> This fact can be no more plain than when they are imposed on the basic rights of all. Seedlings planted in that soil grow great, and growing, break down foundations of liberty."

Nor is it accurate to state that only a "handful" are affected by this restriction on belief. Not only the individual officers are so affected but also the entire membership of the union which desires to be represented by those officers and to enter into certain contracts and engage in certain strikes.

Thus the Court was faced with a statute which raises questions of serious and basic importance. Only three Justices have concurred in a decision which has the effect of upholding this statute. This decision is at variance with the express language of the Constitution and a host of authorities on the question of belief. Even these three Justices arrive at their conclusion by refusing to read "very literally" the language of the statute—conceding that otherwise its breadth is beyond what is constitutionally permissible. We submit that under such circumstances, bearing in mind the serious nature of the issues involved and their tremendous importance, the decision of the Court herein should be reconsidered and a rehearing granted.

II

The vagueness and potential scope of the oath which the Court has validated is far beyond that heretofore deemed permissible under the due process clause of the Constitution. We submit that Mr. Justice Frankfurter has correctly termed portions of the section as an indiscriminate net bringing within its sweep the surrender of freedoms so undefined as not fairly to disclose what is proscribed. We fully concur that those portions of the section thus criticized are constitutionally defective for the reasons stated.

However, we must go further. For we are at a loss to see how any affiant might with any fair degree of

accuracy determine what is "an organization that is in fact a controlled cover for that Party" (p. 7, Frankfurter, J.). Mr. Justice Jackson in a footnote has recognized and deplored the current pernicious idea that every radical measure is "Communistic" or every liberal-minded person a "Communist" (p. 18). Indeed, the Attorney General has formulated a list of over seventy-five organizations which he deems "subversive". Is the affiant to consider his membership in any of those organizations as within the proscribed area? Are they to be considered "covers" for the Communist Party? Are they "affiliated" therewith? The Court, in *Bridges* v. *Wixon,* 326 U. S. 135, as pointed out in our original brief, had a great deal of difficulty with that term and we submit that we too are faced with that difficulty as lawyers in trying to advise our clients. The position of an affiant in reaching the proper solution is obviously still more difficult and hazardous.

Must a person, to be certain in his oath, sever any connection with any of those organizations even though some are primarily insurance groups and others are groups interested in but a very narrow sphere of our political life? And must a leader avoid any connection with the innumerable other organizations on which indiscriminate labels of "Communist" have been placed upon risk that a jury might find that he wilfully committed perjury?

Such proscriptions must run into sharp conflict with the First and Fifth Amendments. It is most certainly true that such statutes as were stricken by this Court in *Musser* v. *Utah,* 333 U. S. 95, and *Winters* v. *New York,* 333 U. S. 507, "appear trivial by comparison with what is here involved" (p. 6, Frankfurter, J.).

We ask the Court to reconsider its ruling in this regard, particularly in view of its previous holdings that statutes which touch on First Amendment rights must be fastidiously drawn and must define the conduct proscribed specifically "so that the person or persons affected remain secure and unrestrained in their rights to engage in activi-

ties not encompassed by the legislation". *United States* v. *C. I. O.*, 335 U. S. 106.

See also:

Winters v. *New York*, 333 U. S. 507;
Small Co. v. *American Sugar Refining Co.*, 267 U. S. 233;
Connolly v. *General Construction Co.*, 269 U. S. 385.

III

It must further be realized that although two of the Justices talk of severing certain portions of Section 9(h), the plaintiffs here were given the option only of signing an affidavit in the precise words of the statute (including both those pertaining to belief and affiliation) or of suffering the disabilities consequent on not signing at all. Therefore, even were it possible to sever the provisions of 9(h) and to preserve a section thereof as constitutional, the judgment of the Court below would need be reversed.

Moreover, it is submitted that Section 9(h) is incapable of being severed. It should be noted first that there was no agreement as to the portions which might be severed. Mr. Justice Frankfurter felt that only the portion of the oath which referred to membership in the Communist Party was valid. Mr. Justice Jackson expressly declined to define his views on this subject, as such definition was not necessary to a decision.

But this is not the sole difficulty to be encountered. For a law may be severed only where the deletion of the invalid portions leaves the balance complete and unchanged in meaning. However, this may not be done where the clause excised intimately inheres in the scheme of the law within which it is incorporated. For where the vice of a provision runs through the whole of it, courts may not, by lopping and paring away, create a new law which the structure and context of the statute shows the Legislature did not

intend to enact. *Watson* v. *Buck,* 313 U. S. 387; *United States* v. *Shoreline Cooperative Apts.,* 70 S. C. 246; *Reitz* v. *Mealey,* 313 U. S. 542. Further, a separability clause in a statute, while giving rise to a presumption of divisibility, is not an inexorable command. It does not permit a Court to so rewrite the statute as to give it an effect altogether different from that intended by Congress. *Railroad Retirement Board* v. *Alton,* 295 U. S. 330.

It seems clear that Congress never considered Section 9(h) as comprising a series of separable provisions such as would permit of severance, but rather that it was contemplated as an entirety. Thus, to delete any clause thereof would alter the intent and aim of Congress in enacting it. There was no debate in Congress as to whether certain portions of the section ought to be added or eliminated. Debate was limited rather between those who felt the entire section unconstitutional in its purpose and effect and those who favored it in its entirety. The sole discussion as to any particular clause was with reference to whether the section should include an "or ever has been" clause (see original brief, pp. 86-88). It seems clear, therefore, that Congress never intended the section to be severable, and hence under the authorities any severance thereof would be improper.

IV

The departure of the Court from its previous decisions is possibly most sharply demonstrated by its rejection of the doctrine that "guilt is personal". Whether it be called an "epithet" or a "slogan", we submit that such doctrine, similar to the doctrine that "a man is innocent until proven guilty", or indeed that "each man is entitled to his day in court", goes to the very root of our democracy. True, as Mr. Justice Jackson points out, a man may be guilty by his participation in a conspiracy, but certainly under our form of government it is not for *Congress* to charge

and find such a conspiracy. That is the function of our courts.

It is a further function of our courts, and a most critical one, to reject any attempt by Congress to find anyone or any clearly ascertainable group guilty of an illegal conspiracy and to punish them therefor.* Yet this is the fundamental premise which has been discarded by the Court's decision herein.

We realize, as the Court itself indicated, that these are emotional times and that all must be influenced somewhat thereby. However, it is submitted that while all others may yield and give way, it is incumbent upon this Court to resist the passions of the time, to maintain judicial calm, and to abide by the strict legal reasoning which it evolved in more peaceful times against this later need. For our way of life and its safeguards have proven adequate to any situation which has faced this country and it is only by further strict adherence to them that we can avoid the errors and dismal failures of other countries.

The Communist Party is not a new organization. Its methods of operation are not noticeably different from those utilized by it seven years ago when this Court rendered its decision in *United States* v. *Schneiderman,* 320 U. S. 118. If the alleged principles of the Communist Party could not then constitutionally be imputed to all of its members, we submit they cannot be so now. For our Constitution has not changed as to this fundamental principle. Further, it should be noted that in the *Schneiderman* case the views of the Communist Party were the subject

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* In fact, any legislation which effects punishment as a result of a finding by Congress of an illegal conspiracy constitutes a bill of attainder. Mr. Justice Jackson, in his decision, apparently agrees that Congress, in enacting 9(h), has made just such a finding of conspiracy. It seems clear, therefore, that as argued in our original brief, 9(h) must constitute a bill of attainder. We submit that the prevailing opinion is in error in holding that a bill of attainder refers to punishment for only past acts. See *United States* v. *Lovett,* 328 U. S. 303. That requirement is one inherent in only ex-post-facto legislation. See discussion, original brief, pp. 83-92.

of a judicial trial. Here, we have only a determination by Congress, based on evidence most of which would be of doubtful admissibility or credibility in a judicial proceeding, as Mr. Justice Jackson notes.

There is no doubt that the views and philosophy of the Communist Party are in many quarters today unpopular, and that the members of this Court may disagree with those views most violently. But, as stated by Mr. Justice Holmes in his decision in *United States* v. *Schwimmer,* 279 U. S. 644, 654, 655:

> "If there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate."

Absent incitement, this principle holds equally true for freedom of speech.

As Mr. Justice Black points out, "Laws aimed at one political or religious group, however rational in their beginnings, generate hatred and prejudices which rapidly spread beyond control" (p. 4). It is hardly an answer to state, as the prevailing opinion indicates, that we will not retreat one step more "while this Court sits". For the Court has in this very decision gone much further than anyone had a right to expect by virtue of its previous decisions. We have here seen an attack on freedom of belief and on the doctrine that guilt is personal. The principle that legislation must be carefully drawn so that one might safely know from what conduct he is proscribed has apparently been rejected. The basic premise that guilt in an illegal conspiracy is one which may be only judicially determined has been clearly discarded and the heretofore equally clear premise that legislation must deal only with abuses, leaving the freedoms of speech and press guaranteed by our Constitution unimpaired save in the instance of a "clear and present danger" has been cast in doubt.

Moreover, unless Judges are to be guilty of that very naivete against which Mr. Justice Frankfurter protests, this Court must realize that by refusing to hold fast to the doctrines previously enunciated by it, it is giving impetus to the current trend against free thought which must have serious repercussions throughout the land. The indiscriminate pinning of labels upon persons who evidence any liberal sentiment, the loss of rights and positions on the mere charge of unorthodox beliefs and affiliation, are unfortunately rampant today and in fact have received, in part, governmental sanction. Teachers in various States have already been obligated to take an oath similar to the one prescribed here.* All public employees in the State of Maryland, excluding laborers, likewise are required to take such an oath.†

Nor does this affect merely government employees. The Coast Guard has but recently held that no one may be employed as a radio operator on any privately-owned merchant ship if he is affiliated with or "sympathetic" to the principles of any "disloyal" or "subversive" organization, including any organization appearing on the Attorney General's list. A District Court in the District of Columbia has sustained this administrative ruling on the basis of an argument by the Government that such action was found legal and proper in the decision of the lower Court in the instant case upholding the validity of Section 9(h).‡

Literally hordes of persons have been called before Congressional Committees and questioned as to their belief and affiliations. Those who refused to answer have been held for contempt. Others who deny irresponsible and unsus-

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* Subversive Activities Act, also known as the "Feinberg Law", Chapter 360 of the Laws of 1949 of New York.

† Sedition & Subversive Activities Act, also known as the "Oler Bill", Chapter 86 of the Acts of the General Assembly of 1949, Maryland.

‡ *Gove* v. *Farley,* Civil No. 4596-49, presently pending in the Court of Appeals, District of Columbla.

tained charges against them have been subjected to perjury trials. Still others, on the basis of such unfounded public charges which they have been given no opportunity to answer, have lost their employment, even in private industry, and have been subjected to public disgrace.

Many injured persons will never get an opportunity to have their wrongs adjudicated by this Court. Others must wait years. Meanwhile they must suffer irreparable injury of a type which our Constitution was designed to prevent. To rule, therefore, that but a limited number were affected by the statute in question is to ignore this vast and expanding attack on the principle of free thought and speech of which this statute represents but a small and integral part. It is only by a reaffirmation of those basic principles at this time that this tide might be stemmed.

CONCLUSION

We should like to note in conclusion that this petition for rehearing highlights only some of the aspects of the unconstitutionality of Section 9(h). We believe, as originally argued by us, that the evils of 9(h) permeate its entirety and that the statute is based on a concept completely alien to our Government and its Constitution. We submit that the forthright and penetrating opinion of Mr. Justice Black ably sets forth the invalidity of the statute, and with that opinion we fully concur.

Respectfully submitted,

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Certificate of Counsel

I, VICTOR RABINOWITZ, do hereby certify that I am attorney for the appellants herein, and that this petition for rehearing is presented in good faith and not for delay.

May 23, 1950.

VICTOR RABINOWITZ.