TABLE OF CONTENTS

CITATIONS

Cases PAGE

Statutes and Legislative Debates

Miscellaneous

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 336

AMERICAN COMMUNICATIONS ASSOCIATION, CIO, JOSEPH P. SELLY, etc., et al.,

Appellants,

v.

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

BRIEF FOR APPELLANTS

Preliminary Statement

Appeal is taken from an order of the District Court for the Southern District of New York, dismissing the complaint in the case here involved on motion of the defendant, and further denying a motion made by the plaintiffs for an interlocutory injunction. The order was entered on August 11, 1948.[1]

Because plaintiffs called into question the constitutionality of an Act of Congress, the case was heard by a three-judge statutory court convened pursuant to the appropriate provision of the Judicial Code, 28 U. S. C. 2282 and 2284 (28 U. S. C. 380-a prior to the recent revision effective September 1, 1948).

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[1] Probable jurisdiction was noted on November 8, 1948.

Opinions of the Court Below

The opinions of the Court are reported at 79 Fed. Supp. 563.

Jurisdiction

The ground upon which the jurisdiction of this Court is invoked is that this proceeding raises the question of the constitutionality of an Act of Congress and therefore this Court has jurisdiction under the provisions of 28 U. S. C. 1253, 2282 and 2284.

The Statute Involved

The Act of Congress in question is the Labor Management Relations Act of 1947, 29 U. S. C. 141 *et seq.*, 61 Stat. 136 *et seq.* (hereinafter referred to as the "Act") and specifically Section 9(h) thereof. That section reads as follows:

> "9(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit 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 provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits."

Sections 1, 8(b)(4)(C), 9(a), (e), (f) and (g), 10(e) and (l) of the Act likewise have a bearing on this case and are set forth in an appendix.

Statement of the Case

The complaint alleges the following facts:

Plaintiff, American Communications Association (hereinafter referred to as "ACA"), is a national labor organization affiliated with the Congress of Industrial Organizations, having jurisdiction over employees in the communications industry (R. 1). It holds collective bargaining contracts covering such employees in New York and elsewhere throughout the United States (R. 2). Plaintiffs Joseph P. Selly and Joseph F. Kehoe are officers of ACA, and plaintiff Claudia Ezekiel Capaldo is a member of ACA and employed by Press Wireless, Inc. (hereinafter referred to as "Press Wireless") (R. 1).

The constitution of ACA provides, among other things, that there shall be no prejudice or discrimination against any member on account of race, color, sex or religious or political belief or affiliation, and all members are eligible to be elected officers of the union (R. 2).

Since 1944, ACA has been the collective bargaining agent of certain employees of Press Wireless and has entered into several collective bargaining agreements with said company since that date. The last of these agreements was entered into on or about August 13, 1947. That contract provided that it should remain in effect until August 7, 1948, and thereafter from year to year unless notice in writing be given by either party to the other of its desire to terminate not less than sixty days prior to the end of the then current term (R. 2, 3).

A substantial majority of the employees of Press Wireless covered by the aforesaid contract are members of ACA and desire to be represented by it for purposes of collective bargaining. Nevertheless, in or about the first

week of June 1948, the Commercial Telegraphers Union, a national labor organization affiliated with the American Federation of Labor (hereinafter referred to as "CTU") filed a petition for certification of representatives at the office of the National Labor Relations Board, Second Region, wherein it sought to be certified as the collective bargaining representative of the employees then covered by the contract between ACA and Press Wireless (R. 3).

The defendant, as Regional Director of the National Labor Relations Board, notified ACA of the filing of the petition and of the fact that ACA was designated as an interested party therein (R. 3). A conference was then held at the office of the defendant, at which there were present representatives of ACA, CTU, Press Wireless, and the defendant. At that time an agreement for a consent election was entered into between CTU and Press Wireless with the approval of the defendant and over the objection of ACA (R. 3, 4). ACA had filed the financial and other data required by Section 9(f) of the Act but had failed and refused to file the affidavits required by Section 9(h) of the Act (R. 5, 6).

The defendant advised ACA that since its officers had failed to file the affidavits required by Section 9(h), ACA had no right to demand a hearing, to object to the holding of an election or to appear on the ballot in the election which he intended to conduct (R. 5, 6).

ACA objected to the ruling of the defendant on the ground that the statute was unconstitutional, and on the further ground that the defendant had improperly construed and applied the Act, all to the injury of the plaintiffs. The defendant overruled the objections of ACA and proceeded with the arrangements for the conduct of an election (R. 6-9).

Proceedings in the District Court

Plaintiffs moved for a preliminary injunction, seeking to restrain the Board from holding an election (R. 10). The election having already been held, plaintiffs sought to set the election aside, and to restrain the defendant from issuing a certification or giving effect to any certification that might be issued. The defendant moved, by way of cross-motion, to dismiss the complaint on the ground that it did not state facts upon which relief could be granted.

The Court, by a two-to-one decision, denied the motion for an interlocutory decree and granted the cross-motion to dismiss the complaint (R. 19, 20). The majority of the Court relied exclusively upon the majority opinion of the District Court for the District of Columbia in *National Maritime Union* v. *Herzog,* 78 Fed. Supp. 146. The decision in that case was affirmed by this Court in 334 U. S. 854 without reaching or considering the issues presented here.[2] Judge Rifkind's dissenting opinion was as follows:

> "Insofar as Section 9(h) of the Taft-Hartley Act excludes from the facilities of the National Labor Relations Board any labor union, one of whose officers is a member of the Communist Party or affiliated therewith, it is incompatible with the First Amendment. It abridges the freedom of speech and the right of assembly without a showing of clear and present danger. Indeed, on the argument the defendant disavowed the presence of clear and present danger. I would deny defendant's motion to dismiss the complaint" (No. 336, R. 21).

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[2] In the *NMU* case, the plaintiff union had failed to comply with Sections 9(f) and (g) of the Act as well as 9(h). The defendants had urged in the District Court that the issue of the constitutionality of 9(h) need not be reached since 9(f) and (g) were constitutional and that a holding to that effect was sufficient to dispose of the case. The District Court found all three subdivisions of Section 9 to be constitutional. In a *per curiam* opinion, this Court said, on June 21, 1948, "The decision of the statutory three-judge court is affirmed to the extent that it passes upon the validity of Sections 9(f) and (g) * * *. We do not find it necessary to reach or consider the validity of Section 9(h)."

Specification of Errors

The plaintiffs intend to urge before this Court the following errors specified in the Assignment of Errors:

1. The Court erred in granting defendant's motion to dismiss the complaint and in dismissing the complaint.

2. The Court erred in failing to issue an interlocutory injunction as prayed by plaintiffs.

3. The Court erred in holding that plaintiffs Selly, Kehoe and Capaldo lacked capacity to sue.

4. The Court erred in failing to hold that Section 9(h) of the National Labor Relations Act as amended, Title 29 U. S. C. 159(h) is invalid as repugnant to the Constitution of the United States in that it constitutes an impairment of the rights of free speech and free assembly and is an infringement upon the right of the plaintiffs and of the other officers and members of the plaintiff union to associate and join together for their common welfare and for the effectuation of their common and lawful objectives and aims, and is a denial of the liberty of the plaintiffs without due process of law, all in violation of the First, Fifth, Ninth and Tenth Amendments.

5. The Court erred in failing to hold that Section 9(h) of the National Labor Relations Act as amended, Title 29 U. S. C. 159(h) is invalid as repugnant to the Constitution of the United States, in that it is vague, indefinite and uncertain and is a denial of the liberty of the plaintiffs without due process of law, all in violation of the Fifth Amendment.

6. The Court erred in failing to hold that Section 9(h) of the National Labor Relations Act as amended, Title 29 U. S. C. 159(h) is invalid as repugnant to the Constitution of the United States, in that it constitutes a bill of attainder in violation of Article 1, Section 9.

ARGUMENT

Summary of Argument

This case presents an issue of transcendent importance, and the decision of this Court may well determine the future of our democratic freedoms. For if legislation directed against one political belief is valid, legislation directed against any unpopular minority group is likewise valid, and democracy, as we understand it, no longer exists. The 80th Congress took a long step in the direction of such repression. It determined to eliminate certain unpopular minority groups wherever and however possible, and to that end Section 9(h) of the Labor Management Relations Act was enacted.

Section 9(h) requires, as a condition to a union's use of the facilities of the National Labor Relations Board, the execution by each of the officers of such union of an oath attesting to the fact that he does not maintain certain proscribed political beliefs or affiliations. Failure to take the oath, however, does not merely result in the loss of the benefits of the Act. It goes much further. For the processes of the Board, if invoked by an employer or a rival union, may be used against the non-complying union in such a manner as to deprive that union of basic rights and to make impossible performance of many of its basic functions, thus imperilling the very life of the union.

The first question posed to this Court is whether such a statute, aimed as it is against specific beliefs, deals with First Amendment rights. For if it does, the Government, in effect, concedes that it must be held unconstitutional, since it cannot meet the very strict tests applied by this Court in such cases.

Appellants contend that this statute goes to the heart of First Amendment rights. It seems clear beyond question that the First Amendment prohibits and was, in fact, de-

signed to prohibit, any governmental action which would inflict disabilities upon one because of his beliefs, speech or association. This statute does just that.

This Court has consistently held that freedom of belief is absolute, and legislation which imposes any disability based upon belief or its expression, must fall. This statute by its precise terms does effect such disability, and must, therefore, be held invalid.

The First Amendment guarantees the rights of free speech, press and assembly. These include the right of association and the right freely to select officers, establish a constitution and by-laws, and solicit members. A trade union is just such an association. Yet, should it exercise its constitutional rights of selecting a union officer who maintains the proscribed belief, the full impact of the sanctions of the Act is imposed against it, so as to frustrate the very purpose for which it was formed. The same effect is achieved if the officer of the union exercises his constitutional right to join or affiliate with the proscribed political party. Clearly, if this statute is declared constitutional, the right of association becomes a futile gesture.

The statute goes further—not only are plaintiffs' rights under the First Amendment violated by the imposition of sanctions on their exercise, but some of the very sanctions in and of themselves violate First Amendment rights. The exercise of the right of free speech and assembly, as expressed in forming an association, may result in the loss of free speech, as expressed in picketing in a labor dispute. Both are aspects of First Amendment rights and both are constitutionally protected. Under this law, a union cannot enjoy both. Yet either choice must result in a deprivation of its First Amendment rights.

It cannot be urged that Congress has here created a "benefit" and that access to that benefit can be withheld on any reasonable grounds. Access to a Government facility may *never* be conditioned upon giving up the protected

rights of free speech, press, association, religion or belief. Otherwise, these constitutional rights would have no meaning, because all Government facilities could then be granted or withheld upon condition of maintaining what the Legislature considered to be orthodox in belief, speech, or association.

The statute must be measured by the First Amendment tests set by this Court. It cannot meet those tests, for (1) there is no clear and present danger; (2) the statute is not narrowly drawn to eliminate a precise abuse causing a substantive evil. In fact, this statute neither defines nor eliminates any abuse. Instead, it imposes blanket sanctions against members of a proscribed political party, together with a broad and loosely defined group of persons based on their political beliefs or associations.

In considering this statute it must be borne in mind that statutes affecting First Amendment rights are presumed to be unconstitutional.

Second, the statute is so vague as to make it unconstitutional under both the First and Fifth Amendments.

Third, this statute also fails to meet the requirements of the Fifth Amendment in that it has no rational basis and hence cannot even meet the standards which the Government would apply. Section 9(h) adopts the arbitrary test of guilt by association and inflicts its penalties against those who are powerless to meet the conditions set by the statute.

Finally, the statute constitutes a bill of attainder in that it inflicts punishment against members of an easily ascertainable group by legislative action. The legislative history makes clear that the Act intended to inflict punishment rather than to set qualifications. In fact it used even the old form customarily adopted in legislation of this detested type—the expurgatory oath.

For the foregoing reasons, the statute is unconstitutional.

Introduction

Many times in the past generation, the American people have looked to their Bill of Rights for protection against governmental action which they felt to be oppressive and offensive to their basic rights. Often the action complained of and the damage suffered thereby seemed trivial and scarcely worth the trouble and expense of litigation to the highest court of the land. And yet, each case, whether it involved a small license tax on an itinerant preacher, a permit for a leaflet distributor, an outwardly harmless ritual for a school child, or a registration ordinance for a trade union organizer, represented a small but significant attempt to abridge fundamental rights—and the Constitution gave protection.

In the course of these cases, there evolved certain minimal tests, by which any legislation touching upon these cherished freedoms must be measured. This Court has emphatically declared that these tests must be applied in all situations: whether the issues be great or small; whether the times be calm or tense; whether the causes be loved or hated; whether the doctrine be true or false. The smallest and most unpopular minority must get the same broad protection as the dominant majority. For the Court has recognized that the history of all nations has seen shameful periods of religious and political persecution, grounded in intolerance and fear, and that the Framers of the Constitution, in writing the Bill of Rights, sought to avoid such persecution in this land. Realizing, too, that when passions run high, it is difficult to establish principles based on reason, the Court has formulated those principles in time of comparative calm against a time of deep emotion.

These basic principles are:

1. Freedom of belief is absolute, and none can prescribe what shall be orthodox in matters of opinion or thought.

2. Freedom of speech, press and assembly designed to carry out those beliefs in practice is inviolate so long as its exercise does not result in "clear and present danger" to the community.

3. In matters affecting basic constitutional guaranties, this Court will look to substance, not form, and will not suffer their abridgement by indirection.

4. Statutes which affect these basic rights must be drawn "fastidiously", and must be limited to abuses which the legislature has the right to correct.

5. The presumption which operates generally in favor of the constitutionality of a law of Congress does not apply in the instance of a statute affecting First Amendment rights; in such cases there is a presumption against constitutionality of the statute.

Any fair application of these tests must result in a decision striking down this statute as surely as this Court has stricken down other legislation where the interests involved were, perhaps, of less national moment. For "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression." [3]

Today, indeed, our country is faced with a wave of hate directed against a minority political belief. And the 80th Congress, joining in the current hysteria, has resurrected the long abhorred test oath, and has set political qualifications for those who would use Governmental facilities vital to their existence, and who would exercise other basic rights available to those who can and will take the prescribed oath.

Can the principles so firmly established in time of comparative calm give the protection for which they were created, or must they and, indeed, the entire Bill of Rights, crumble in time of great stress?

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[3] *Bridges* v. *California*, 314 U. S. 252, 269.

Our confidence in the Constitution is not easily destroyed and we believe that its Bill of Rights can withstand major assaults by Congress as it has in the past withstood minor forays by a municipal legislature.

The Nature and Effect of the Statute

The Labor Management Relations Act of 1947 made basic changes in our national policy with respect to the rights of employees to be represented by unions of their own choice, and to bargain collectively with their employers. The right to strike, recognized in this country for at least a hundred years, was severely limited. Widespread use of injunctions to prevent strikes, almost unknown in this country since the passage of the Norris-LaGuardia Act in 1932, has become the rule rather than the exception. The principle of limited union responsibility enacted by the Norris-LaGuardia Act has been substantially broadened. Damage suits have become a popular weapon in the arsenal of the employer and many such actions are now pending in the district courts.[4]

Closely integrated in the general scheme of the Act is Section 9(h). On its surface, that Section, standing alone, would seem merely to prevent a union from seeking the assistance of the National Labor Relations Board unless its officers had filed the required affidavits. In practice, however, the effect of Section 9(h) has been to impose against such "non-complying" unions the full force of the sanctions evoked by the Act. So effective are these sanctions and so devastating their use by employers and rival labor organizations that many non-complying unions have found and will in the future find it difficult, if not impossible, to survive. This is not because non-complying unions necessarily require the aid of the Board in bargaining collectively, but because the sanctions provided in the Act enable an employer or a rival complying union to use the

[4] See, for example, *Oppenheim Collins* v. *Carnes,* Civil No. 47-361, and *Schultze* v. *Strong,* Civil No. 47-637, both pending in the District Court for the Southern District of New York.

Board against a non-complying union so as effectively to prevent the latter from organizing or representing its members. This is true notwithstanding the fact that the non-complying union may represent the free choice of the employees concerned.

This result has been accomplished, first, by changing the eligibility requirements for certification, and second, by imposing drastic sanctions against a union which seeks to function in the face of a certification held by another union.

A brief comparison of the provisions of the old Act with those of the new will serve to illustrate. The National Labor Relations Act, prior to its amendment, provided in Section 9 that a labor organization might file a petition with the Board alleging that the organization represented a majority of the employees of an employer within an appropriate unit. The Board thereupon conducted an investigation to determine whether the petition raised a question over which it had jurisdiction. Unions, other than the petitioner, which showed an interest in the proceeding, were permitted to intervene, such intervention being automatic when the intervenor held a contract at the time the petition was filed or when it represented a substantial number of employees within an appropriate unit. When substantial issues were raised by any of the parties as to unit or other relevant matters, the Board directed that a hearing be held and that all parties be permitted to appear and participate. The Board then issued its decision and in appropriate cases directed the holding of an election. Where none of the parties to a proceeding raised a substantial issue the Board might proceed to an election either with or without the consent of the parties.[5]

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[5] Each of the Annual Reports of the National Labor Relations Board has set forth the procedure followed in great detail. See, for example, the *Eleventh Annual Report* (1946), pp. 9-23. See also *National Labor Relations Board: Organization, Regulations, Procedure* published pursuant to the provisions of the Administrative Procedures Act (Public Law 404, 79th Cong., 2d Session; 5 U. S. C. 1001) in the Federal Register on September 11, 1946 (11 F. R. 117A-619).

The new Act, in Section 9(h) provides that the Board may not investigate any question concerning representation of employees *raised by a union* unless each of the officers of *such* union and of its parent body had filed an affidavit to the effect "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 Board, in its application of the amended Act, has extended the effect of Section 9(h) to a point beyond that anywhere required by its specific language.[6] The Board has not only refused to entertain petitions filed by a non-complying union which thereby raise questions concerning representation. Where a petition is filed by a complying union, and a non-complying union seeks to intervene,

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[6] A serious issue of statutory interpretation is raised by the record, but was not included in the statement of points which appellant has heretofore filed in this Court, and will not be argued here because this Court, by inference, seemed to have decided the point adversely to the appellant in its decision in *NMU* v. *Herzog,* 334 U. S. 854. However, because that case was not argued fully before this Court and because the statutory question involved may not have been called to the Court's attention, we mention it here.

It will be noted that Section 9(h) declares that the Board shall make no investigation "of any question affecting commerce concerning the representation of employees, *raised by a labor organization* under subsection (c) of this section." (Emphasis supplied.) It nowhere prohibits the Board from permitting intervention by a union which has failed to file the affidavits required by Section 9(h) in a proceeding in which the question concerning representation was raised by a petition filed by an employer or by a rival labor organization; nor does it prohibit the Board from issuing a certification in favor of a non-complying union. In the case before the Court, the plaintiff union did not raise any question concerning representation. It did not file the petition before the Board and it did not request any action by the Board. The question concerning representation was raised by CTU. It would seem, therefore, that under a strict construction of the statute, the Board was unjustified in denying leave to intervene to the plaintiff union. The rationale for the Board's policy in denying to a non-complying union leave to intervene in a

the Board has held that the non-complying union may not do so unless it has a contract which will operate as a bar to the proceeding (*Matter of Oppenheim Collins & Co. Inc.,* 79 NLRB No. 59).[7]

Absent such a contract, the inability of a non-complying union to intervene means that it cannot secure a hearing on any issue (*Matter of Precision Castings Co.,* 77 NLRB No. 33); it cannot secure a place on the ballot (*Matter of Sigmund Cohn & Co.,* 75 NLRB No. 177); it cannot object to the conduct of an election (*Matter of Times Square Stores,* 79 NLRB No. 50); and, of course, it cannot be certified.

All of this is true even where the intervenor has for years represented the employees (*Matter of Precision Castings Co.,* supra; the situation of ACA in Case No. 336) or where the intervenor represents a clear majority of the workers.

Where, as in the case now before the Court, the intervening union has not complied with the Act, the Board holds an election with only the name of the complying union on the ballot. With their preferred candidate not on the ballot, employees who wish some union representation will, under normal circumstances, vote for the only union which is on the ballot. It becomes clear, therefore, that regardless of the fact that a non-complying union may represent the free choice of a majority of the employees involved, it may not secure certification from the Board, but

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case where the petition was filed by an employer or a rival labor organization is set forth in the Board's opinion in *Matter of Herman Loewenstein,* 75 NLRB No. 377. The Board relies, not on any provision of the Act, but on the policy which it believes Congress intended in passing the Act. Quite aside from the question presented as to how the Board knew about the unexpressed policy of Congress, we submit that no administrative agency may modify the express terms of an unambiguous statute because it believes that Congress intended such modification.

[7] Cf. *Fay* v. *Douds,* 78 Fed. Supp. 703; 79 Fed. Supp. 582, where leave to intervene was denied even though the union claimed that it had such a contract.

certification may, in that very instance, run to a non-complying union.

The issuance of such a certification brings into operation the sanctions created by other provisions of the Act. Section 8(b)(4)(C) makes it an unfair labor practice for a union to call a strike for the purpose of compelling an employer to bargain with it when another union has been certified as the collective bargaining representative of the employees of such employer. Section 10(1) provides drastic sanctions for a violation of Section 8(b)(4)(C): where a charge has been filed by an employer alleging a violation of that section, and where the Regional Director "has reasonable cause to believe such charge is true," the Regional Director *shall* petition the United States District Court for appropriate injunctive relief pending the final adjudication of the merits of the charge by the Board. *Douds* v. *Local 1250, Department Store Employees Union,* ..... F. (2d) ....., Court of Appeals, 2d Circuit, November 8, 1948, not yet officially reported (23 LRRM 2045); *Brown* v. *Oil Workers Union,* ..... Fed. Supp. ....., Dist. Ct., Northern Dist., Calif., October 27, 1948, not yet officially reported (23 LRRM 2016). Upon such final adjudication, a permanent cease and desist order may issue from the Court of Appeals pursuant to Section 10(c).

Section 303(a)(3) supplements Section 8(b)(4)(C) by giving to the employer a private action for damages against a union guilty of the unfair labor practice therein described.[8]

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[8] There are still other effects of non-compliance. A non-complying union may not file charges under Section 8(a) of the Act and hence cannot compel an employer to bargain with it. *Inland Steel Co.* v. *National Labor Relations Board,* 170 F. (2d) 247, application for certiorari now pending. A non-complying union may not file a petition under Section 9(e) of the Act, and hence may not sign a union shop contract. Such contracts have been in effect for many years in some industries, antedating the Wagner Labor Relations Act by many years. In the maritime, mining and printing industries, bitter strikes have occurred since the passage of the Act involving, at least in part, this issue. See *Evans* v. *International Typographical Union,* 76 Fed. Supp. 881; New York Times, July 6, 1948; New

The effect of the statute can best be illustrated by a consideration of the case now before the Court.

As we pointed out above, ACA had held collective bargaining rights and had in fact represented the employees of Press Wireless for years prior to the Act. After the denial of the motion for a temporary injunction in this case, the Board proceeded to hold an election, ACA not being given a place on the ballot. The employees were given a choice of voting either for or against CTU. Rather than run the risk of losing all rights to bargain collectively, the employees selected the one union appearing on the ballot, although that would not have been their free choice had such a choice been offered to them. The CTU was certified on July 30, 1948. *Matter of Press Wireless,* 2-RC-462. After that date, ACA not only was deprived of the right to act as exclusive representative of all the employees, given by the old Act to unions representing the free choice of the majority; it further lost its common law rights to represent its own members and to compel Press Wireless to bargain with it, if necessary by striking—rights which antedated the Wagner Act by many years.

Obviously an extension of the procedure followed by the Board here could easily operate to wipe out this union in short order. Indeed the exact situation presented in these cases has been repeated many times in the past year.[9]

York Times, September 3, 1948; See report of Board of Inquiry, *In re the Maritime Industry,* August 13, 1948, published at 10 L. A. 859. In the absence of authorization to sign a union shop contract under Section 9(e), there is some doubt as to the legality of a union hiring hall, and the National Labor Relations Board has so held in *Matter of National Maritime Union,* 78 NLRB No. 137. On occasion, State courts have even issued sweeping injunctions in labor disputes, on the ground that the officers of the union involved had not filed the affidavits required by Section 9(h). Plaintiff ACA has been the victim of two such decrees. *Cleland Simpson Co.* v. *ACA,* Penn. Ct. of Common Pleas, November 11, 1947, not officially reported (21 LRRM 2059); *Scranton Broadcasters, Inc.* v. *ACA,* Penn. Court of Common Pleas, November 11, 1947, not officially reported (21 LRRM 2024).

[9] See footnote on opposite page.

POINT I

SECTION 9(h) EFFECTS AN UNCONSTITUTIONAL ABRIDGMENT OF THE RIGHTS GUARANTEED BY THE FIRST AMENDMENT.

The First Amendment to the Constitution of the United States provides that Congress shall make *no* law abridging the rights of free speech, press, or assembly. It would seem clear beyond question that legislation such as that here involved, which imposes disabilities and serious sanctions against one because he maintains what Congress deems to be unorthodox in belief, association, or speech, must fall within this broad prohibition. Nevertheless, the Government here urges that First Amendment rights are not affected by this statute. In fact, it concedes that if the Court should find that this legislation does concern First Amendment rights, the statute must fall, for it admittedly fails to meet the very stringent tests placed upon such legislation.

In an effort to avoid meeting those tests, the Government seeks to whittle down the broad prohibitions of the

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[9] ACA has already suffered severe losses as a result of the operation of the Act. The following cases pending before or decided by the NLRB are substantially identical with the one before the Court: *Matter of Greater New York Broadcasting Co.*, 2-RC-612; *Matter of Wodaam Corporation*, 2-RC-743; *Matter of Triangle Publications*, 2-RC-156; *Cf. ACA* v. *Schauffler*, 80 F. Supp. 400.

The matter of *Osman* v. *Douds*, No. 404 on the docket of this Court, presents a situation similar in some respects to that before the Court here. The union involved there, Local 65, has had an even greater number of cases before the NLRB in which the same issue was raised. See *Matter of Sigmund Cohn, Inc.*, 75 NLRB No. 177; *Matter of F. W. Woolworth Co.*, 2-RC-381; *Matter of Dadourian Export Corp.*, 2-RC-647; *Matter of Defiance Button Machine Co.*, 2-RC-568; *Matter of Enright-LeCarboulec, Inc.*, 2-RC-554; *Matter of E. Feibusch & Co.*, 2-RC-579; *Matter of H. MacCanlis Co., Inc.*, 2-RC-580; *Matter of J. J. Newberry Co.*, 2-RC-609; *Matter of Acme Brands, Inc.*, 2-RC-637; *Matter of Wholesale Merchandise Corp.*, 2-RC-640; *NLRB* v. *Prosper Brozen*, 166 F. (2d) 812; *Wholesale and Warehouse Workers* v. *Douds*, 79 Fed. Supp. 563. Probable jurisdiction in *Osman* v. *Douds* has not yet been noted by this Court.

First Amendment. The Government contends that First Amendment rights are not the subject of the statute but that its subject is merely the regulation of a Government facility; therefore, Congress could condition the use of such facility on one's belief, religious or political, or on one's speech or association, should it find any rational basis for such condition.

Appellants shall demonstrate below that in so arguing the Government mistakes form for substance, for the effect and, indeed, the purpose of the statute is to limit the full exercise of rights guaranteed by the First Amendment. Therefore, the statute must be held unconstitutional.

A. Freedom of belief is absolute. Section 9(h) effects an unconstitutional infringement of that right.

The oath required by Section 9(h) comprises several elements. The affiant is required to swear

(1) that he is not a member of the Communist Party;

(2) that he is not "affiliated with" the Communist Party;

(3) that he does not *believe in* any organization that *believes in*, or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods (emphasis supplied);

(4) that he is not a member of any such organization;

(5) that he does not "support" any such organization.

The precise meaning of some of the elements of the required oath is by no means clear and, as will be pointed out in Point II, *infra,* that in itself is an element of unconstitutionality in the statute. But, whatever may be the meaning of words such as "affiliated with" or "support," it is obvious that the oath, and certainly element (3) above, constitutes an interference with freedom of belief. The affiant is not required merely to swear that he will not engage in or is not presently engaged in certain proscribed

conduct. Nor is he required merely to attest to his willingness to refrain from advocating proscribed action or teaching proscribed doctrine. He is required to attest to a specific belief; upon his inability or unwillingness to do so, the full weight of the sanctions of the Act is imposed.

The oath likewise constitutes an interference with the freedom of belief of the union, for one of the statutory standards relates to the belief of any organization (including the union itself) to which the officer may belong. Should the union itself hold and express any of the proscribed opinions, the sanctions of the Act must automatically follow, since none of its officers or members could take the required oath, whatever their personal beliefs, by reason of elements 4 and 5 of the oath.

The First Amendment "embraces two concepts—freedom to believe and freedom to act." *Cantwell* v. *Connecticut,* 310 U. S. 296, 303. Although freedom to act is subject to some limitations, there is virtual unanimity in the decisions of this Court that freedom of belief is absolute in the fullest sense of the word. "Freedom to think is absolute of its own nature; the most tyrannical government is powerless to control the inward workings of the mind." *Jones* v. *Opelika,* 316 U. S. 584, 618, dissenting opinion adopted as majority opinion at 319 U. S. 103.

See also *Minersville* v. *Gobitis,* 310 U. S. 586, dissenting opinion at page 601.

For, whatever may be the circumstances which will justify legislative interference with the freedom of action referred to by the Court, there can be no circumstances which will justify legislative interference with freedom of belief and freedom of thought. *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624.

As Thomas Jefferson aptly remarked, "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neigh-

bor to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg." [10]

He cautioned "that it is time enough for the rightful purposes of civil government, for its offices to interfere when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail if left to herself, that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate, errors ceasing to be dangerous when it is permitted freely to contradict them." [11]

While the most tyrannical government is powerless to control the workings of the mind, it is likewise true that since the dawn of civilization, tyrannical governments have made the attempt. Lacking the power to control thought, such governments have sought to do what is next best—to eliminate heretics, both religious and political. In other lands, without our tradition of democracy, imprisonment or death has often been the lot of the articulate dissenter. But man's ingenuity, whether for good or evil, is virtually limitless, and where a deep-seated democratic heritage makes such extreme measures politically impossible, more subtle forms are devised, perhaps in contemplation of the day when the walls will have been breached sufficiently to allow more effective and direct action.

The 80th Congress has here taken a long step down the road to enforced conformity. All those who seek to exercise rights which would otherwise be available to them must first attest to the orthodoxy of their political beliefs. This legislation goes far beyond that declared invalid in *West Virginia* v. *Barnette,* 319 U. S. 624. In that case, it was sought merely to compel children to affirm a belief, whether in fact they held it or not. It imposed no sanc-

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[10] *Notes on Virgina:* Writings of Thomas Jefferson, Ford, Paul L., ed. III, p. 263.

[11] Preamble to Virginia Statute for Establishing Religious Freedom, Ford, op. cit. III, 239.

tions for a false affirmation. Section 9(h) is far more restrictive. Not only must a trade union officer take an oath that he believes what he may not, in order to secure advantages which are open only to true believers, but should he swear falsely he is subject to severe criminal penalties.

Here we have the test oath "so odious in history" which even the dissenting opinion in the *Barnette* case agreed was repugnant to our Constitution.

> "* * * the oath test was one of the instruments for suppressing heretical beliefs. Saluting the flag suppresses no belief nor curbs it. Children and their parents may believe what they please, avow their belief and practice it. It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part both of the children and of their parents to disavow as publicly as they choose to do so the meaning that others attach to the gesture of salute. * * * Had we before us any act of the state putting the slightest curbs upon such free expression, I should not lag behind any member of this Court in striking down such an invasion of the right to freedom of thought and freedom of speech protected by the Constitution." (*West Virginia* v. *Barnette,* 319 U. S. 624, dissenting opinion at p. 663.)

In the case at bar, indeed those who must conform are not free "to believe what they choose" or "to disavow [their oath] as publicly as they choose to do so," save on risk of being convicted of perjury.

That beliefs and opinions in the nature of things cannot be curbed has been recognized, not only by our Court, but by the Framers of the Constitution. Thomas Jefferson, in the preamble he wrote for the Virginia Statute Establishing Religious Freedom, said:

> "Well aware that the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds; that Almighty God hath created the mind free, and manifested his

> supreme will that free it shall remain by making it altogether insusceptible of restraint; that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion, who being lord both of body and mind, yet choose not to propagate it by coercions on either, as was in his Almighty power to do, but to exalt it by its influence on reason alone; * * * that the opinions of men are not the object of civil government, nor under its jurisdiction; that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous falacy, * * *." [12]

This principle of the inviolability of opinion is a constantly recurring theme, not only in the writings of Jefferson, but in those of Madison as well. In his "Memorial and Remonstrance to the Honorable the General Assembly of the Commonwealth of Virginia", he echoed Jefferson:

> "This right [to exercise his conviction and conscience] is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men:" [13]

The Virginia Report of 1799-1800 Touching the Alien and Sedition Laws reports the views of John Taylor of Caroline arguing against the Sedition Laws in the Virginia House of Delegates on December 13, 1798:

> "The right of opinion, he said should be held sacred. It ought never to be given up in any one instance. Religion was only a branch of opinion. With what propriety could that range of thought, bestowed by the Creator upon the human mind, be controlled by law? He deemed it a sacrilege for government to undertake to regulate the mind of man. It was a subject by no means within its powers. What would

[12] Ford, Paul L.: op. cit. III, 238.

[13] Hunt: Writings of Madison, II, 184.

> be the consequence of such a measure? Universal ignorance amongst the people. He then asked, if ignorance was a desirable thing? And were the free exercise of the faculties of the human mind, to be once restrained and shut up, he would ask them, then, what was man? He was therefore opposed to those laws, as being destructive of the most essential human rights." [14]

It is easy to understand the passionate feelings of the Framers of the Constitution and their contemporaries against test oaths or any other restriction or intrusion on their freedom of belief. For simultaneous with the settlement and growth of the Colonies, there was raging in England a long battle for religious and political freedom—a battle which lasted until well after the American Revolution. In the famous decision in *Edward's Case,* 13 Co. Rep. 9, 77 Eng. Rep. 1421, Lord Coke had expressed the progressive views of his time, later adopted by the Colonists. In issuing a writ of prohibition against the Ecclesiastical Courts, he said:

> "It was resolved, that the Ecclesiastical Judge cannot examine any man upon his oath, upon the intention and thought of his heart, for *cogitationis poenam nemo emeret.* And in cases where a man is to be examined upon his oath, he ought to be examined upon acts or words, and not of the intention or thought of his heart; and if every man should be examined upon his oath, what opinion he holdeth concerning any point of religion, he is not bound to answer the same; for in time of danger, *quis modo tutus erit,* if every one should be examined of his thoughts. And so long as a man doth not offend neither in act, nor in word any law established, there is no reason that he should be examined upon his thought or cogitation; for it hath been said in the proverb, *thought is free;* * * *." (Emphasis in original.)

The struggle for supremacy in England between the Stuarts and Commons was fresh in the minds of the Colonists at the time of our own Revolution. They remembered

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[14] Randolph ed. (1850), pp. 26-27.

the test oaths and bills of attainder which had been adopted by both sides as convenient methods of repression in that contest, and remnants of such evils were still in evidence and were much feared by them. They remembered, too, that the history of our own country had likewise been blackened by similar forms of intolerance. The heresy trial of Anne Hutchinson referred to by Mr. Justice Black in his dissent in *Adamson* v. *California,* 332 U. S. 46, 88, was not the only instance of its kind in New England. Roger Williams preceded her into exile; Mary Fisher, Anne Austin and scores of other Quakers followed her.[15]

Thus, the enemies of Franklin made political capital of the charge, probably ill-founded, that he intended to introduce the test oath into the Colonies.[16] Thus, Jefferson referred to the religious test oaths of Virginia as "religious slavery."[17] When in 1776 the radicals of Pennsylvania adopted a Test Act, it was generally condemned by liberals both in the Colonies and in England.[18]

Such devices are no less abhorred today, and this Court has been no less zealous and eloquent than Coke and Jefferson in condemning them.

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." (*West Virginia State Bd. of Edu.* v. *Barnette,* 319 U. S. 624, 642.)

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[15] For a thorough description of religious persecutions in New England, see Wertenbaker, Thomas J.: *The Puritan Oligarchy* (1947). As Professor Wertenbaker points out, the religious controversies in the Massachusetts Colony were inextricably interwoven with political affairs.

[16] Miller, John C.: *Origins of the American Revolution* (1943) 136; Cf. also p. 189.

[17] Notes on Virginia, Ford, Paul L.: op. cit. III, 263.

[18] Miller, John C., *Triumph of Freedom* (1948), p. 351.

B. The right of the plaintiff union and its members to organize and to select their own officers, and the right of all of the plaintiffs to express such views and join such associations as they desire, are protected by the First Amendment which guarantees freedom of speech, press and assembly. These freedoms are impaired by Section 9(h).

The right of free assembly guaranteed by the First Amendment to the Constitution encompasses the right of persons to meet together and to form associations to further their mutual interests. It is not limited to the right to meet and express views. It includes the freedom to set up organizational machinery, to adopt such constitutions and by-laws, and to elect such officers as the assembly may deem proper.

A trade union is just such an association of persons with common views and common objectives. And, indeed, in associating together for their mutual aid and in enlisting the aid of others, the members are organizing for a purpose which has long been recognized as socially useful. *United States* v. *Cruikshank*, 92 U. S. 542; *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418; *National Labor Relations Board* v. *Jones & Laughlin*, 301 U. S. 1; *Hague* v. *Congress of Industrial Organizations*, 307 U. S. 496; *Cf. American Federation of Labor* v. *Watson*, 327 U. S. 583.

Employees have as clear a right to organize and select representatives and officers of their own choosing as an employer has to organize its business and select its own officers and agents, or as farmers, educators, churchgoers, or political party members have the right to assemble and select theirs.[19] *National Labor Relations Board* v. *Jones*

[19] Pursuant to this fundamental right, the union before the Court in this proceeding, in framing its own constitution, followed in the footsteps of those who framed our national Constitution; it has provided that no person may be deprived of membership or the right to hold office because of his race, color, sex or religious or political belief or affiliation (R. 2).

& Laughlin, supra; Thomas v. *Collins,* 323 U. S. 516; *Bowe* v. *Secretary of Commonwealth,* 320 Mass. 230; *Local 309 WFUA-CIO* v. *Gates,* 75 Fed. Supp. 620.[20]

Here, Congress has abridged that right. By imposing severe penalties on what it decreed to be an improper or unorthodox selection, it has made any free choice illusory. For the penalties mean the loss of the right to represent workers in collective bargaining and to carry on other fundamental economic activities which are the basic functions of a trade union. The right "to organize, select a bargaining agent of their own choosing and elect officers of the Union have been reduced to a state of meaningless gesture" (Major, J., dissenting in *Inland Steel Workers* v. *NLRB,* 170 F. (2d) 247, 258).

Likewise, the exercise of the right of the union officer to freely assemble and join such lawful associations as he desires is seriously impaired. For should he exercise that right and join a proscribed organization, his union may be so adversely affected as to render him a burden rather than an asset to it, despite the fact that he maintains all the qualifications of good leadership. Thus, the exercise of his constitutional right may result in loss of his chosen vocation by legislative decree.

Freedom of speech and press are likewise impaired by this statute, the restraints applied being aimed primarily at free political discussion. This, despite the fact that perhaps the most fundamental purpose of the Bill of Rights was to insure free political expression. As Justice Brandeis stated in *Whitney* v. *California,* 274 U. S. 357, 375:

> "Those who won our independence * * * recognized the risks to which all human institutions are subject. But they knew that order cannot be secured

[20] See also Laski, Harold J., *Freedom of Association,* 6 Encyclopedia of the Social Sciences (1931), page 447; Wyzanski, Charles E., Jr., *The Open Window and The Open Door,* 35 Calif. Law Rev. 336.

> merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones."

In *DeJonge* v. *Oregon,* 299 U. S. 353, at page 365, the Court said:

> "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

See also: *Stromberg* v. *California,* 283 U. S. 359, 369; *United States* v. *C.I.O.,* 335 U. S. 106, concurring opinion at page 144.

As Justice Brandeis pointed out, these considerations were predominant in the minds of the Framers of the Constitution. The letter of the Continental Congress addressed to the inhabitants of Quebec on October 26, 1774, so often cited by this Court, stated:

> "The last right we shall mention regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality and arts in general, in its diffusion of liberal sentiments in the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are ashamed or intimidated into

more honourable and just modes of conducting affairs." *Journals of Continental Congress,* 1774-1789 (34 vol. 1904-1937) I, 1904, pp. 104-108.

Madison, in his report on the Virginia Resolutions against the Alien and Sedition Laws of 1798 stated:

> "Of this act it is affirmed—1. That it exercises, in like manner, a power not delegated by the Constitution; 2. That the power, on the contrary, is expressly and positively forbidden by one of the amendments to the Constitution; 3. That this is a power which, more than any other, ought to produce universal alarm, because it is levelled against that right of freely examining public character and measures, and of freely communicating thereon, which has ever been justly deemed the only effectual guardian of every other right." IV Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1836), 561.

Thus, inherent in the rights of free speech and assembly is the right freely to express views on political issues. And, in the course of the past century, the trade union movement has, to an ever increasing extent, exercised that right. As business interests have made their voice heard in politics, workers have realized their need to do the same. Just as workers have realized that they must act in concert to further their economic welfare, so have they realized that they must act in concert to most effectively express their political views. Indeed, as government participated more and more in the economic life of our country, the struggle for economic security took on a double aspect—political as well as economic. Workers most naturally turned to the organization which they had formed to further their economic interests—their trade union. Accordingly, the leaders of trade unions necessarily became participants in the political life of their community and it became increasingly common for members to choose them because of their ability on the political as well as on the economic

front. So today participation in politics has become a generally recognized and accepted aspect of trade union work. *Cf. United States* v. *CIO,* 335 U. S. 106.[21]

Obviously, however, political freedom cannot be exercised effectively if some political views are by Congressional fiat forbidden, or if those who express such views suffer the penalty of being deprived of sorely needed rights. A union which holds or expresses proscribed beliefs subjects itself to all of the disabilities and sanctions provided in the Act, for the officer of the union, being a member of it, could not take the required oath. Moreover, the right of the union officer to freely express his own political views is severely limited, for if in the exercise of that freedom he expresses proscribed beliefs, he is subject to the same penalties as he would be for joining a proscribed organization.

It should further be noted that the sanctions provided in the Act upon the exercise of these First Amendment rights are in themselves violative of the guaranties of that Amendment. For, as pointed out above, certification of a rival union is almost inevitably the result of denying a

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[21] For a general discussion of the role labor has played in politics, see:

Beard, *The American Labor Movement, A Short History* (1935), pp. 33-46, 54-61, 80-85, 103-112, 165-171; Commons and Associates, *History of Labor in the United States,* Vols. I and II (1918), Vol. I, pp. 169-335, 369, 454-471, 522, 535, 548-559; Vol. II, pp. 85-109, 124-130, 138-146, 153-155, 168-171, 240-251, 324, 341-342, 351-353, 461-470, 488-493; Foner, *Labor Movement in the United States* (1947), pp. 104-105, 130-134, 140, 149-166, 210-217, 245-248, 262-263, 334-336, 357-359, 372-373, 423-429, 475; Gaer, *The First Round* (1944); Millis and Montgomery, *Organized Labor* (1945), pp. 7, 10, 27, 29-31, 34, 42n, 51, 52n, 54-55, 57n, 62, 67, 71, 81, 91, 108-111, 118, 123-129, 141, 143, 149, 178, 181-188, 232-238, 303-305, 311, 313, 317-320, 348-349, 600, 669, 829, 890; Schlesinger, *The Age of Jackson* (1945), pp. 132-158, 180-185; Taft, *Labor's Changing Political Line,* 43 Journal of Pol. Ec. 634 (1937); Walsh, C. I. O., *Industrial Unionism in Action* (1937), pp. 248-271.

place on the ballot to a non-complying union, despite the fact that the latter may represent the free choice of a majority of the employees. Upon such certification, the non-complying union may not, under Section 8(b)(4)(C) of the Act, call upon the employees to strike or to take any collective action. The National Labor Relations Board has elsewhere urged, and at least one Court has held, that the right to picket for the purpose of publicizing the nature of the dispute is likewise prohibited. *Douds* v. *Local 1250, Department Store Employees Union,* ..... Fed. Supp. ....., October 8, 1948, not yet officially reported (22 LRRM 2601). But the action thus prohibited by the statute is itself constitutionally protected under the First Amendment. *Thornhill* v. *Alabama,* 310 U. S. 88; *Thomas* v. *Collins,* 323 U. S. 516.

Thus, one set of rights is placed in opposition to another. If a union would enjoy freedom of belief, speech and press, if it would exercise its freedom of assembly by electing its own officers, it may do so only at the risk of surrendering other equally fundamental rights—the right to organize, to picket, and to carry on other normal trade union activities. Under this statute the union may not exercise both rights. It is difficult to conceive of legislation which more effectively intrudes upon the rights included in the broad protection of the First Amendment.

Indeed, this statute not only abridges the freedoms protected by the First Amendment but it equally violates those guaranteed by the Ninth and Tenth Amendments as well. For neither Congress nor the States may deny the right of the people to engage in political activity, such rights having been specifically reserved to the people. *United Public Workers* v. *Mitchell,* 330 U. S. 75, 94; *The Federalist,* No. 84.

C. The First Amendment freedoms must be broadly construed; the Government's attempt to limit those freedoms can find no support in the history of the Amendment or the decisions of this Court.

Legislation affecting First Amendment rights is subject to severe scrutiny and is required to meet the very stringent tests set by this Court in order to be sustained. The Government, in this case, makes no effort to meet such tests. Confronted, we believe, by the fact that this requirement cannot be met here, it resorts to the sophism that this legislation does not affect rights protected by the First Amendment, claiming that the First Amendment is peculiarly limited in the protection that it gives.

While the Government urged in the Court below that the protection afforded by the First Amendment cannot be extended to cover statutes such as that here involved, it nowhere clearly defined the limits of the Amendment. In its attempt to distinguish this case from a long list of cases in which this Court has stricken legislation as violative of the First Amendment guaranties, it defined the latter cases as those "which imposed censorship upon speech or assembly, or restricted the occasion for permissible exercise of these rights, or punished individuals for having published their views, or for having joined an association." (Government brief in *NMU* v. *Herzog,* p. 46, submitted to the Court below in this case.) The Government then urged that the legislation at hand does not come within that definition.

In a later version of the same argument presented to the Court of Appeals in *Inland Steel Co.* v. *NLRB,* 170 F. (2d) 248, now No. 431 on the docket of this Court, this formulation was expanded somewhat. There the Government described the First Amendment cases it sought to distinguish as involving action "which imposed a prior restraint upon speech, press, or assembly, or which restricted the occasion for permissible exercise of these rights, or which granted facilities for the dissemination of certain

views, or for the gathering of certain associations, which were denied to others, or which punished individuals for having published their views or having joined an association." (Government brief in *Inland Steel Co.* case, p. 35.) Later in the same brief, the Government said that only statutes "which impose prior restraints upon speech, press or assembly, or which make speech, or the distribution of literature, or attendance at a meeting, or membership in an association an offense" must meet the tests applicable to statutes affecting First Amendment rights (*idem.*, p. 36).

In reciting these alleged limitations upon the operation of the First Amendment, the Government has purported to set forth a general principle of law against which all claimed violations of the Amendment must be measured. In effect, the Government says, "Thus far the Constitution gives protection, and no further." No authority is cited for any such proposition, and our research has been unable to unearth any. Indeed, the Government has done no more than to list some of the instances in which the protection of the Constitution was sought and secured, and has then made the broad assumption that its list sets forth the extreme limits of constitutional protection. The difference between the formulation in the NMU brief and the formulation in the *Inland Steel Co.* brief is evidently accounted for by the fact that in the interim some additional decisions of the Court were called to the Government's attention, and, therefore, the list had to be expanded.

While it is true that the legislation at hand is invalid even under either of the Government's definitions, by virtue of the fact that the statute does punish plaintiffs by imposing disabilities and sanctions upon them for their exercise of First Amendment freedoms, we will not urge that upon this Court. We are not disposed to measure this legislation or, indeed, any other legislation involving the freedoms of religion, speech, press or assembly by so artificial and inaccurate a test. For it would be difficult to fit into that definition some of the leading cases decided by this Court in the last decade, and the protection of the

Amendment could be easily destroyed by an executive or a legislature which was ingenious enough to find new and devious techniques to restrict those freedoms.[21a]

Does the Government urge that the decision in *West Virginia* v. *Barnette,* 319 U. S. 624, should be reversed? There, this Court applied the First Amendment's protection by striking down legislation which required children to affirm a belief and perform a rite or gesture which ran contrary to their religious scruples. Children who refused to do so were deprived of the right or "privilege" of attending the public schools, although private schools were available to them. Here, the statute did not impose "a prior restraint upon speech, press, or assembly." It did not restrict "the occasion for permissible exercise of these rights." It did not grant "facilities for the dissemination of certain views, or for the gathering of certain associations, which were denied to others." It did not punish "individuals for having joined an association." It fits within none of the categories listed by the Government. Nevertheless, this Court held that such legislation did abridge the First Amendment freedoms in that it imposed sanctions on belief.

Again, in *Hannegan* v. *Esquire,* 327 U. S. 146, this Court made clear that the First Amendment prohibitions would not tolerate a denial of the use of the second class mails to a periodical whose articles or views did not meet certain esthetic or other prescribed standards. There, it should be noted, there was no prior restriction as to what the

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[21a] "I cannot consider the Bill of Rights to be an outworn 18th Century 'strait jacket' * * *. Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many. In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new devices and practices which might thwart those purposes." (Black, J., dissenting in *Adamson* v. *California,* 332 U. S. 46, at p. 89.)

periodical might say. Nor was there any punishment in the nature of criminal penalties imposed. The periodical was not even deprived of the use of the mails. It might still use first or third class mail. It was merely deprived of the "benefit" of using the second class mails, a government "privilege" created by Congress. Nevertheless, this Court, relying on the dissent by Mr. Justice Brandeis in *Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407, pointed out that denial of the second class mails based on political or economic views would effect an abridgement of the constitutional rights of free press. Surely, free speech and association must receive that same broad protection. Obviously, the principle cannot be limited to use of the mails; any statute which denies the use of any government facility vital to one's existence, must likewise fall if such use is conditioned upon restrictions on speech or association. *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 226; *Danskin* v. *San Diego,* 28 Cal. (2d) 536.[22]

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[22] Regulation of government facilities so as to restrict the exercise of First Amendment rights has in the past been the subject not only of judicial decision, but of Congressional debate as well. This Court, in an extensive footnote to its decision in *Hannegan* v. *Esquire, supra,* in discussing the power of Congress to regulate the contents of matter passing through the mail said:

> "But that power has been zealously watched and strictly confined. See, for example, S. Rep. 118, 24 Cong., 1st Sess., reporting adversely on the recommendation of President Jackson that a law be passed prohibiting the use of the mails for the transmission of publications intended to instigate the slaves to insurrection. It was said, p. 3:
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> "'But to understand more fully the extent of the control which the right of prohibiting circulation through the mail would give to the Government over the press, it must be borne in mind, that the power of Congress over the Post Office and the mail is an exclusive power. It must also be remembered that Congress, in the exercise of this power, may declare any road or navigable water to be a post road; and that, by the act of 1825, it is provided "that no stage, or other vehicle which regularly performs trips on a post road, or on a road parallel to it, shall carry letters". The same provision extends to packets, boats, or other vessels, on navigable

It would profit us nothing to further enumerate the various cases where the Amendment offers protection, or to define the limits of this protection, for this Court has never attempted to do so. The best statement of the extent of the protection can be found in the First Amendment itself. "Congress shall make no law * * * abridging the freedom of speech or of the press, or the right of the people peaceably to assemble * * *."[23] As stated by this Court in *Bridges* v. *California,* 314 U. S. 252, 265, "* * * the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society." Judge Cooley, too, emphasized the broad scope of the First Amendment: "The evils to be prevented were not the censorship of the press merely, but any action of the Government by means of which it

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> waters. Like provision may be extended to newspapers and pamphlets; which, if it be admitted that Congress has the right to discriminate in reference to their character, what papers shall or what shall not be transmitted by the mail, would subject the freedom of the press, on all subjects, political, moral, and religious, completely to its will and pleasure. It would, in fact, in some respects, more effectually control the freedom of the press than any sedition law, however severe its penalties. The mandate of the Government alone would be sufficient to close the door against circulation through the mail, and thus, at its sole will and pleasure, might intercept all communications between the press and the people * * *.'"

[23] The Declaration of Human Rights, adopted by the General Assembly of the United Nations on December 10, 1948, was obviously greatly influenced by our own Constitution. Thus Article 19 of the Declaration reads: "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 reads: "1. Everyone has the right to freedom of peaceable assembly and association. 2. No one may be compelled to belong to an association" (New York Herald-Tribune, Dec. 11, 1948).

might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." (Cooley, *Constitutional Limitations,* 8th ed. p. 886.) *Cf. Near* v. *Minnesota,* 283 U. S. 697; *Grosjean* v. *American Press Company,* 297 U. S. 233.

This broad concept of the First Amendment is corroborated by a consideration of its history. Jefferson had sworn eternal hostility to *all forms* of tyranny over the minds of men,[24] not merely to those forms which might fall within the Government's limited definition. Other contemporary sources likewise disavowed any such limits upon the First Amendment.

The first test met by the First Amendment arose out of the Alien and Sedition Laws of 1798 and the debate both in Congress and in the public press indicated clearly the point of view of the progressives of that era. The remarks of Albert Gallatin, Jeffersonian leader in the House of Representatives, during the debate on the Alien and Sedition Laws, are illustrative. His comments in the House on July 10, 1798 are reported as follows:

> "It appeared to him that it was an insulting evasion of the Constitution for gentlemen to say, 'We claim no power to abridge the liberty of the press; *that,* you shall enjoy unrestrained. You may write and publish what you please, but if you publish anything against us, we will punish you for it. So long as we do not prevent, but only punish your writings, it is no abridgment of your liberty of writing and printing.' Congress were by that amendment prohibited from passing any law abridging, &c.; they were, therefore, prohibited from adding any restraint, either by previous restrictions, or by subsequent punishments, or by alteration of the proper jurisdiction, or the mode of trial, which did not exist before; in short, they were under an obligation of leaving that subject where they found it—of passing no law, either directly or indirectly, affecting that liberty." (*Annals of Congress,* 5 Congress, 1797-99; Emphasis in original.)

[24] Letter, Jefferson to Benjamin Rush, Sept. 23, 1800.

Another associate of Jefferson, George Nicholas, stated, in discussing the Alien and Sedition Laws:

> "What has been said must prove that the liberty of the press ought to be left where the Constitution has placed it, without any power in Congress to abridge it; that if they can abridge it, they will destroy it; and that whenever that falls, all our liberties must fall with it. I cannot close this part of the subject better than by copying what was said respecting it by our late envoys; their expressions on this occasion are so just and forcible as to give real cause to lament that their abilities *are not oftener exerted* in illustrating and enforcing republican principles. They say 'the genius of the Constitution and the opinions of the people of the United States cannot be overruled by those who administer the government. Among those principles deemed sacred in America; among those sacred rights considered as forming the bulwark of their liberty, which the government contemplates with *awful reverence,* and would approach only with the most *cautious circumspection,* there is none of which the importance is more deeply impressed on the public mind than the liberty of the press. That this liberty is often carried to excess, that it has sometimes degenerated to licentiousness, is seen and lamented; but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied: perhaps it is a shoot which cannot be stripped from the stalk *without wounding* vitally the plant from which it is torn. * * * ' " [25] (Emphasis in original.)

Even Federalists took up the cudgels against the Alien and Sedition Laws. General John Armstrong, a leader of the Federalist Party in Pennsylvania, protested these laws:

> "To accomplish these [the objects set forth in the preamble to the Constitution], it became necessary to

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[25] Letter from George Nicholas of Kentucky to his friend in Virginia (Lexington, Kentucky, Bradford Ed., 1798). Convenient text may be found in Bernard Smith, *Democratic Spirit* (1946), page 161.

enjoy certain duties, and to prohibit certain acts. Among these *prohibited acts* is the exercise of that very power we complain of, *'Congress shall make no law abridging the freedom of speech or of the press.'* A prohibition more express can scarcely be devised; and yet, extraordinary as it may appear, there is a portion of the national legislature who have contended that the law in question does not infringe this prohibition. The argument most relied upon in defence of their construction, may be thus concisely stated: 'The constitution indeed prohibits the passing of any law which shall abridge the freedom of speech and of the press. But the law in question does not abridge the *freedom* of either, it but prevents their *licentiousness.'* The fact however is, that this defence turns, not on a logical distinction, not on a clear and well marked difference, but on a mere quibble. It supposes that liberty and licentiousness are two things totally different; whereas they are the same thing under different modifications and degrees. In like manner, fanaticism does not cease to be religion, though it may adhere to forms and profess tenets, which the major part of mankind think ridiculous and extravagant." (Emphasis in original.) [26]

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[26] Armstrong, John; To the Senate and Representatives of the United States (1798). Numerous other authorities could be quoted to the same effect. Thus, Madison inveighed against indirect infringements upon free speech, saying: "It would seem a mockery to say, that no laws should be passed, preventing publications from being made, but that such might be passed, for punishing them in case they should be made * * *. This security of the freedom of the press requires, that it be exempt, not only from previous restraint by the executive, as in Great Britain, but from legislative restraint also; and this exemption, to be factual, must be an exemption, not only from the previous inspection of licenses, but from the subsequent penalty of laws." (Report on Virginia Resolutions, 1799. 4 Elliot Debates, 1836, pp. 572 ff.)

George Hay, a prominent Jeffersonian lawyer, expressed most eloquently the liberal thought of his time in an essay entitled "Liberty of The Press," published in 1799. That document, which is included in the Freedom Train collection of American historical material now on exhibition throughout the country, is too long to set forth in full herein. Extensive excerpts are contained in an Appendix. It will be noted that Hay felt that freedom as the word is used in the First Amendment is the power, belonging to man "uncontrolled by law, of doing what he pleases, provided he does no injury to any other individual."

Thus we see that the Government's contention, that the First Amendment offers protection only in the limited circumstances defined by it, is untenable. That contention is without authority in the history of the Amendment or the decisions of this Court. On the contrary the only conclusion which both history and the cases permit is that this Amendment must receive the broadest interpretation possible within an orderly society. Clearly, therefore, the legislation at hand, which imposes disabilities and serious sanctions upon the exercise of the rights of free speech, press and assembly, must fall within the broad coverage of the First Amendment.

D. The statute is not a general regulatory one, but is aimed specifically at members of the Communist Party and others holding unorthodox beliefs.

The statute in question is not a general regulatory one, which incident to its operation and due to some peculiarity in an individual's religious or political belief or practice, adversely affects him in the exercise of that belief or practice. Rather it is a statute which is directly aimed against the exercise of First Amendment freedoms. Here, indeed, Congress has aimed against a particular political belief and its expression. The statute is thinly disguised in the form of a regulatory statute to accomplish a purpose which could not be accomplished by direct legislation.

Even a cursory examination of the legislative history of Section 9(h) makes clear that its aim was to drive from the trade union movement persons holding certain proscribed political beliefs.

H. R. 3020, the predecessor of the Act, introduced in the House of Representatives by Representative Hartley, Chairman of the House Committee on Education and Labor, on April 10, 1947, provided in Section 9(f)(6):

> "(6) No labor organization shall be certified as the representative of the employees if one or more of its national or international officers, or one or more of

> the officers of the organization designated on the ballot taken under subsection (d), is a member of the Communist Party or by reason of active and consistent promotion or support of the policies, teachings, and doctrines of the Communist Party can reasonably be regarded as being a member of or affiliated with such party, or believes in, or is 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."

Debate in the House on this proposal was extensive and the purpose of the legislation was made apparent. For example, Congressman Kersten, one of the majority members of the House Committee and one of the principal proponents of the bill said, on April 16, 1947:

> "One high-ranking officer of the United Electrical Workers in testifying before our committee brazenly stated to the committee that his was the most democratic union in the country because they accepted all shades of political belief. He openly stated that they accepted Communists on the same basis as people holding any legitimate different political belief. * * *
>
> " * * * We have got to keep communism out of the American labor unions. This bill does that." (93 Cong. Rec. 3577, April 16, 1947.) [27]

On April 17, 1947 the House had under consideration a proposal to amend Section 9(f)(6) to apply to persons who are or ever have been members of the Communist Party. Congressman Hartley, Chairman of the House Committee, speaking in opposition to that motion, said:

> "Mr. Chairman, it is with very great reluctance that I oppose the amendment which has just been offered. I understand thoroughly the purpose of the amendment, and I want just as much as the gentleman who offered it to drive Communists out of our labor organizations, but I do not want to deprive one who has seen the light

[27] All references to the Congressional Record are to the daily unbound edition.

> and who has made an honest reform of the right to be a member of a labor organization." (93 Cong. Rec. 3705.)

On the same day, Congressman Rankin, another supporter of the bill, said:

> "While we are challenging the spread of communism abroad, we should drive this vicious influence from American soil by forcing every Communist off the Federal pay roll, out of our educational institutions, off the radio, out of labor unions, and from every other position of trust or confidence which they can use to spread their poisonous propaganda." (93 Cong. Rec. 3708.)

No equivalent provision is found in the companion bill, S. 1126, introduced into the Senate on April 17, 1947. However, the House provision was incorporated into the Senate bill on May 9, 1947, through an amendment sponsored by Senator McClellan. In support of his bill, Senator McClellan said:

> "* * * I believe that the great majority of laboring men and women of this country, if they could be here tonight and express themselves, would want the aid of the Congress in helping them to rid their organizations of Communistic influence, an influence which often they are unable to cope with or fight against effectively under the laws as they now are." (93 Cong. Rec. 5096.)

Section 9(h) took its present form in conference. When the conference report was reported out, Congressman Case of South Dakota said:

> "There is a provision to protect labor organizations from having officers who are members of the Communist Party. It relieves the National Labor Relations Board from investigating matters raised by labor organizations unless the organization has on file an affidavit that its officers are not members of the Communist Party and have not been within the preceding 12 months. Surely the rank and file of sturdy Amer-

> ican workers will welcome that protection and the President will hardly deny it to them by vetoing the bill because that is offered." (93 Cong. Rec. 6438, June 3, 1947.)

On June 4, 1947, Congressman Engel, in summarizing the conference report, said:

> "Sixth. The provision to keep communists out of leadership of unions, which was merely a catch-all club in the Hartley bill, appears in the conference bill to have been made workable." (93 Cong. Rec. A2808.)

On June 5, 1947, in presenting the conference report to the Senate, Senator Taft said:

> "* * * There is nothing new. We changed the provision regarding Communist officers. The Senate adopted an amendment which provided that no union could be certified if any of its officers were Communists. That seemed to us impracticable. With the agreement of all the conferees we provided that the union must file an affidavit that none of its officers are Communists, or whatever the language may be. Otherwise, the way it was passed by the Senate, the whole certification might be tied up for months while determination was made as to whether a man was a Communist. Today it is provided that officers shall file statements to the effect that they are not Communists. If a man who files such a statement tells an untruth he is subject to the same statute under which Marzani was convicted last week. That seemed a fair modification to make, although it was not in the House bill. But there is no provision as to that subject that was not in one bill or the other." (93 Cong. Rec. 6604.)

In the debate over the President's veto, the purpose of the legislation was similarly clearly expressed. Thus, in the House, Congressman Robison said:

> "* * * The union cannot have so-called subversive union officers. It is found that Communists and other subversive groups have wormed their way into Government offices, the churches, labor unions, and other

> American organizations. This would mean the Congress is trying to aid the unions in ridding themselves of Communists." (93 Cong. Rec. 7507.)

Similarly, in the Senate, Senator Ball, one of the principal proponents of the law, said, on June 21, 1947, in commenting on the President's veto:

> "It is astonishing to find the President objecting to the section which attempts to prevent Communists from being officers of labor unions." (93 Cong. Rec. A3232.)

After the passage of the bill, the National Labor Relations Board recognized that the purpose of the law was to drive Communists from positions of leadership in the trade union movement quite regardless of what the membership of those unions may have felt. This purpose has been frequently commented on by the Board. For example, in its decision in *Matter of Northern Virginia Broadcasters, Inc.*, 75 NLRB No. 2, the Board said:

> "The assumption is that if the facts are made known through this filing procedure, union members * * * will soon remove Communists from leadership rather than allow themselves to be precluded from enjoying the benefits of the Act."

Regulatory statutes, designed for a proper purpose, which incidentally come into conflict with the peculiar political or religious beliefs or practices of a particular party or sect have on occasions been held valid. For this Court has said "* * * we do not intimate or suggest * * * that any conduct can be made a religious rite and by the zeal of the practitioner swept into the First Amendment." (*Murdock* v. *Pennsylvania,* 319 U. S. 105, 109.) *In re Summers,* 325 U. S. 561, and *Hamilton* v. *Board of Regents,* 293 U. S. 245, strongly relied upon by the Government here, come within this category. Cf. *Ballard* v. *United States,* 322 U. S. 78. Even in such cases the Court has often been sharply divided.

But we know of no case, and none has thus far been cited to us, in which a statute directed against a First Amendment freedom has been held to be constitutional, regardless of its form, save in the presence of "clear and present danger" which is concededly absent in this case. *A fortiori,* a statute directed against a particular political belief must fall.

Illustrative of this principle is the decision in *Grosjean* v. *American Press Co.,* 297 U. S. 233. The State argued in that case that the statute imposed a tax on the business of "selling or making any charge for advertising or for advertisements" and also that it was not essential to liberty of speech and press that profit be derived from the exercise of those rights. The Court in striking down the legislation stated at page 250:

> "The tax here involved is not bad because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

In *Minersville* v. *Gobitis,* 310 U. S. 586, this Court sustained legislation general in scope (unlike that in the case at bar) which incidentally affected adversely a particular religious sect. Mr. Justice Frankfurter, speaking for the Court, said:

> "The religious liberty which the Constitution protects has never excluded legislation of a general scope *not directed against* doctrinal loyalties of particular sects. * * * Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law *not aimed* at the promotion or restriction of religious beliefs." (Emphasis supplied.)

The instant legislation could not be sustained even under the criteria set in that case which this Court has since, in *West Virginia* v. *Barnette,* 319 U. S. 624, held does not give sufficient protection. For this is legislation "directed against doctrinal loyalties" of a particular political party.

In *Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288 (1913), cited below by the Government, a statute required periodicals, before using the second class mails, to file information with the Government disclosing the names of its stockholders, stating what portion of the periodical was devoted to advertisements and setting forth much other statistical information.

The Court in sustaining the validity of the legislation pointed out that there was an " * * * absence of anything justifying a surmise * * * that Congress was intentionally exercising power not delegated to it, and consciously violating an express prohibition of the Constitution, and for that reason clothed its exertion of power in the disguise of postal legislation."

The principle that the Court will look to the purpose of the legislation and will not permit an improper purpose to be masked in a general regulatory statute is not unique to cases involving the First Amendment; it has been applied to legislation effecting deprivation of rights under the Fifth and Fourteenth Amendments as well.

In *Frost Trucking Co.* v. *Railroad Commission,* 271 U. S. 583, the Court acknowledged that a state might properly regulate its highways, but pointed out that where the statute was aimed against certain carriers, then, of course, it could not be considered a general regulatory statute at all, but simply a statute which sought by indirection to secure what it could not by direct methods. The Court invalidated the statute, saying that if such legislation were to be sustained, we might thus be stripped of our constitutional guaranties. The Court said, at page 591:

> "It is very clear that the act, as thus applied, is in no real sense a regulation of the use of the public high-

> ways. It is a regulation of the business of those who are engaged in using them. Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions."

See also *McFarland* v. *American Sugar Refining Co.,* 241 U. S. 79.

The Government urges that this Court has in the past sustained legislation enacted by Congress under its delegated powers, the effect of which was to induce voluntary action which Congress could not, because of the Tenth Amendment, compel directly, and cites in support thereof *Steward Machine Co.* v. *Davis,* 301 U. S. 548, *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, *U. S.* v. *Bekins,* 304 U. S. 27, and *Oklahoma* v. *Civil Service Commission,* 330 U. S. 127. None of these cases are apposite to the statute at hand. For in the *Steward* case the Court specifically found that the purpose of the legislation was not an unconstitutional or improper one because the Tenth Amendment did not prohibit the national government and a state government from entering into a pact for the lawful purpose of sharing the burden of unemployment relief; the Court further specifically found that the State there was not coerced or unduly influenced to yield any of its rights by the threat of sanctions. The Court there indicated that had such coercion been applied, a contrary decision would have resulted. In the statute at bar, on the other hand, the purpose was improperly directed against rights guaranteed by the First Amendment, and failure to yield those rights results in the imposition of serious sanctions. The *Alabama Power, Bekins* and *Oklahoma* cases are similarly distinguishable. In none of them was the purpose of Congress to cause the surrender of rights guaranteed by the Constitution, and in none of them were sanctions applied for failure to yield those rights.

The basic failure of the Government's argument here is that it has mistaken form for substance. In judging the

validity of any statute "the Court has regard to substance and not to mere matters of form * * * in accordance with familiar principles the statute must be tested by its operation and effect." *Near* v. *Minnesota,* 283 U. S. 697. See also *Oyama* v. *California,* 332 U. S. 633, 636. It is because of this fundamental, although not infrequent, error that the Government has cited cases such as those distinguished above. They bear little enough resemblance to the case at bar, even as a matter of form; they bear not the slightest resemblance as a matter of substance.

The facts presented to this Court in *Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407, are more in point. There, an administrative regulation was aimed against the expression of certain ideas advanced by a particular newspaper. It effected the suppression of that idea by denying the newspaper the use of the second class mails. There, as here, the Government urged that it merely was regulating the mails in the exercise of its postal police power and therefore the regulation did not effect an abridgment of First Amendment freedoms. The Government pointed out that no direct restrictions were imposed and that the newspaper might still avail itself of the first and third class mails. These arguments were rejected in the dissenting opinion of Mr. Justice Brandeis which was quoted with approval by this Court in *Hannegan* v. *Esquire,* 327 U. S. 146. Said Mr. Justice Brandeis at page 430:

> "Congress may not, through its postal police power, put limitations upon the freedom of the press which, if directly attempted, would be unconstitutional. * * * It is argued that although a newspaper is barred from the second-class mail, liberty of circulation is not denied; because the first and third class mail and also other means of transportation are left open to a publisher. Constitutional rights should not be frittered away by arguments so technical and unsubstantial. 'The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name.' *Cummings* v. *Missouri,* 4 Wall, 277, 325, 18 L. ed. 356, 363."

The above quotation applies with equal force to the case at hand. For in both cases an attempt was made to eliminate views which were currently in disfavor and in both cases the most effective method was chosen by depriving the group with the proscribed view from availing itself of a government facility vital to its existence. In the *Burleson* case an attempt at suppression was disguised in the form of a statute regulating government mails. In the case at hand, the suppression takes the form of a regulation of the National Labor Relations Board. In each case it was urged by the supporters of the regulation that First Amendment rights were not directly restricted nor the subject of the legislation. In the *Burleson* dissent this view was rejected, as it must be in the case at bar. In substance, both cases dealt with First Amendment rights and it is the substance of the statute as well as its purpose and effect which this Court will consider in determining the validity of a statute.

As a matter of fact, this Court has held in no uncertain terms that even a statute which is regulatory or a legitimate attempt to exercise police power (unlike the statute at hand) must be held invalid if inherent in its operation there is a deprivation of First Amendment rights. Such regulations were involved and stricken in the cases of *Schneider* v. *New Jersey,* 308 U. S. 147; *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Hague* v. *C.I.O.,* 307 U. S. 496; *Jones* v. *City of Opelika,* 316 U. S. 584, 319 U. S. 103; *Thornhill* v. *Alabama,* 310 U. S. 88; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Lovell* v. *Griffin,* 303 U. S. 444; *Martin* v. *Struthers,* 319 U. S. 141; *Saia* v. *New York,* 334 U. S. 558, and many others.

The Government here urges that this statute is a regulatory one and therefore may be sustained if there is a rational basis for the legislation, regardless of the discrimination or the denial of rights affected. In each of the cases above cited such, indeed, was the contention made by the proponents of the legislation. In so arguing, there-

fore, the Government is following in the footsteps of scores of unsuccessful litigants who have without avail urged that the particular statute then before the Court had a "reasonable basis" or that it was a "reasonable exercise of police power" or that it constituted a "proper regulation by municipal authorities of their streets and public places." But in each of these cases the contention was stricken because a deprivation of First Amendment rights was inherent in the regulation. In *Thomas* v. *Collins,* 323 U. S. 516, where a similar contention was made, the Court pointed out that where "the indispensable democratic freedoms secured by the First Amendment" are involved, "dubious intrusions will not be permitted." The Court made it clear that in judging such legislation "it is the character of the right, not of the limitation, which determines what standards govern the choice." Thus the Court found that: "The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice," where any attempt is made to restrict First Amendment liberties.

It is for these reasons that the cases cited by the Government, such as *Dent* v. *West Virginia,* 129 U. S. 114; *Hawker* v. *New York,* 170 U. S. 189; *Clark* v. *Deckebach,* 274 U. S. 392; *Kotch* v. *Pilot Commissioners,* 330 U. S. 552; and *Hirabayashi* v. *U. S.,* 320 U. S. 81,[28] are in-

[28] The Government relies to a considerable extent on the *Hirabayashi* case in support of the proposition that even such a "neutral fact" as race may on occasion be a "rational basis" for legislation. Aside from the fact that the *Hirabayashi* case did not involve First Amendment freedoms, we must note that the regulation was a wartime measure, and it was the imminent threat to our very national existence which justified the very extreme legislation there upheld. The decision in that case makes it perfectly clear that such legislation would not be countenanced in time of peace, and as Mr. Justice Murphy pointed out, even in time of war the case brought us "to the very brink of constitutional power". 320 U. S. 81, 111. Any effort to extend that case beyond the exigencies of a war situation inevitably brings us well over that brink. See *Ex parte Endo,* 323 U. S. 283, and dissenting opinions of Justices Murphy and Jackson in *Korematsu* v. *U. S.,* 323 U. S. 214.

apposite. In none of these cases was there any issue of a denial of the First Amendment rights of belief, speech, press, association or religion. Rather, those cases concerned the other rights and freedoms which fall within the scope of the due process clause of the Fifth and Fourteenth Amendments only. This Court has held that the constitutional due process requirement for a deprivation of such rights is met by legislation which bears a reasonable relation to the valid objects of the regulation.

The First Amendment, on the other hand, provides that there shall be *no* abridgement of the freedoms therein defined and, accordingly, the courts have held that a rational basis is insufficient to support a regulation which affects or abridges those rights. The legislation at hand, dealing as it does with belief, speech and association, falls within the latter classification, and under the cases cited, must be held repugnant to the dictates of the First Amendment.

E. Congress may not make the use of a Government facility dependent upon the surrender of any constitutional right. 9(h), however, conditions the use of the National Labor Relations Board upon the surrender of First Amendment rights.

It was further argued in the Court below that the legislation at hand concerns merely the regulation of a Government "benefit" or "privilege" which might be granted or denied upon any basis, including religious or political beliefs, expressions, or affiliations, provided there is some rational basis therefor.

This contention is an inaccurate one and finds no support in the cases. It should be noted, first, that the statute does not merely grant a benefit or privilege, which a union is free to accept or reject. As discussed above, it concerns a Government facility which may be so used by others under the statute as to deprive plaintiffs of fundamental rights. Second, the object of the legislation is not mere regulation of a facility, but the elimination of a belief.

However, even disregarding these elements, the Government's contention is without merit. For Congress may not condition the use of a Government facility upon surrender of First Amendment freedoms.

The Government, in urging a contrary principle, falls into the same error here as it does in its contention concerning general regulatory statutes. For, just as this Court has held that the rational basis argument is unavailing to sustain the validity of regulatory statutes which affect First Amendment rights, so too it has held that a rational basis is insufficient to support legislation which conditions use of a government facility upon surrender of First Amendment freedoms. *West Virginia* v. *Barnette,* 319 U. S. 624. See also *Danskin* v. *San Diego,* 28 Cal. (2d) 536. Indeed, there would be little point in establishing the very strict requirements to protect those freedoms if they might be so easily circumvented.

It is true that use of a government facility, or the grant of a benefit or privilege, may be conditioned upon the deprivation of certain of one's property rights, or, indeed, upon certain restrictions on one's liberty, provided, of course, that such rights and freedoms are not First Amendment rights, but the other rights which fall within the scope of the due process clause. For, as indicated above, the due process requirement there is satisfied upon the showing of a rational basis for the legislation. The rule is a simple one and has been affirmed and reaffirmed by this Court. Use of a government facility or the granting of a benefit or privilege may not be conditioned upon the surrender or deprivation of constitutional rights. If the condition affects property rights or liberties other than the basic ones within the First Amendment, then the due process test of "rational basis" must apply; if the condition affects First Amendment rights, a rational basis is clearly insufficient.

Were it otherwise, governments in an effort to curb unpopular minority beliefs, might deny to persons who ex-

press such beliefs, the use of the schools, the roads, the railroads, the mails, and an infinite number of other government facilities or "privileges" which vitally affect the very existence of the average citizen today, just as the use of the National Labor Relations Board may vitally affect the life of a trade union and its members today. Here again we must be careful not to confuse substance and form.

We had thought that there was nothing left today to the argument that government facilities constitute a "privilege" (as distinguished from a public right), which might be granted or withheld by a government at will. Such, indeed, was the opinion of the majority of the Court in *Milwaukee* v. *Burleson,* 255 U. S. 407, but it may safely be said that the dissenting opinion of Mr. Justice Brandeis at page 433 more correctly states the law as this Court sees it today:

> "The contention that because the rates are non-compensatory, use of the second-class mail is not a right, but a privilege, which may be granted or withheld at the pleasure of Congress, rests upon an entire misconception, when applied to individual members of a class. The fact that it is largely gratuitous makes clearer its position as a right; for it is paid for by taxation."

Again, more recently, the Supreme Court had an opportunity to give consideration to this problem in *Hannegan* v. *Esquire,* 327 U. S. 146. Mr. Justice Douglas, speaking for the Court, stated, at page 156, as follows:

> "But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. See the dissents of Mr. Justice Brandeis and Mr. Justice Holmes in United States ex rel Milwaukee S. D. Pub. Co. v. Burleson, 255 U. S. 407 * * *. Under that view the second class rate could be granted on condition that certain economic or political ideas not be disseminated."

The extreme possibility which Mr. Justice Douglas foresaw and warned against is precisely what the legislation at hand effects. Access to the National Labor Relations Board is, by virtue of this statute, granted on condition that one shall not maintain certain economic or political ideas.

West Virginia v. *Barnette, supra,* concerned an ordinance which would deny the "privilege" of attending the public schools to one who could not attest to certain beliefs. The Court there pointed out that the "privilege" of attending the public schools might not be denied to one because of his religious beliefs, such right being protected by the First Amendment.

Frost v. *Railroad Commission,* 271 U. S. 583, again demonstrates that one's constitutional rights may not be abridged by the indirect method of purporting to regulate a government facility or "privilege." There property rights under the Fourteenth Amendment were involved. The Court vehemently rejected the argument that by creating what was termed a "privilege", the State might require the surrender of constitutional rights as a condition to the use of the same. There, the State had urged that it had the power to grant to its citizens the privilege of using its public highways on such conditions as it saw fit to impose, a carrier being free to accept or reject. The Court there found against such a contention, pointing out that the choice offered to the carrier was an illusory one. As the argument advanced by the state there was so similar to that advanced by the Government here and the comments of the Court so pertinent, we have taken the liberty of quoting therefrom, at page 593, at length:

> "May it [the constitutionally prohibited act] stand in the conditional form in which it is here made? If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion. Having

> regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood, or to submit to a requirement which may constitute an intolerable burden.
>
> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

See also *Danskin* v. *San Diego,* 28 Cal. (2d) 536 (where it was claimed that use of schools for public meetings was a "privilege"); *Western Union* v. *Kansas,* 216 U. S. 1 (where it was claimed that the right of a foreign corporation to do business within a state was a "privilege"); *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 226 (where it was claimed that the right to operate a broadcast station was a "privilege").

Nor does the case of *United Public Workers* v. *Mitchell,* 330 U. S. 75, hold otherwise. Examination of that case discloses that it concerned not the use of a public facility, but rather qualifications for government employment. The Government, in its brief there, pointed out that the legal

restrictions there involved were "not more severe than the conventional restraints which attaches to numerous public and private employments. The fact that it is embodied in a statute need occasion no surprise and gives rise to no problem; for the conditions of public employment are normally specified by law instead of by contract. As to government service, therefore, statutory provisions may fix terms which legislation could hardly impose upon private employees. That there are constitutional limits to such restrictions may be conceded; but the power of the Government as employer has broader scope than its regulatory authority." (Government brief in *Mitchell* case, p. 33). The Court accepted that argument of the Government. However, it made clear that Government employment could not be extended on condition of surrendering basic First Amendment rights. Said the Court:

> "Appellants urge that federal employees are protected by the Bill of Rights and that Congress may not 'enact a regulation providing that no Republican, Jew, or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.' None would deny such limitations of congressional power * * *."

Yet that is precisely what the legislation here effects as a condition to the use of a government facility. In the *Mitchell* case, it should be noted, the Court goes further to point out that what was required as a qualification for employment was merely that employees not actively participate in political work for any political party. The statute did not seek to regulate belief or membership in political parties. Moreover, the Court was careful to secure to government employees their right of "expressions, public or private, on public affairs, personalities, and matters of public interest, not an objective of party activity."

It is clear, therefore, that First Amendment rights are here involved, and that the free exercise of those freedoms

are seriously curbed by the statute at hand. Therefore, the statute must be measured in terms of the tests which this Court has applied to legislation which restricts such First Amendment liberties. We turn, therefore, to a consideration of those tests.

F. 9(h) cannot meet the strict requirements imposed upon legislation which affects First Amendment rights.

> "The power of a state to abridge freedom of speech and assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government." *Herndon* v. *Lowry,* 301 U. S. 242, 258.

This limited exception to the broad protection of the First Amendment was first enunciated by this Court in *Schenck* v. *United States,* 249 U. S. 47, 52, where the Court said:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

See also *Stromberg* v. *California,* 283 U. S. 359; *West Virginia Bd. of Education* v. *Barnette,* 319 U. S. 624; *Thornhill* v. *Alabama,* 310 U. S. 88.

In *Bridges* v. *California,* 314 U. S. 252, this Court considered at some length the meaning of this language in the *Schenck* case. The Court pointed out that

> " * * * the likelihood, however great that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantial,' Brandeis, J. concurring in Whitney v. California, supra, 274 U. S. at page 374, 47 S. Ct. at page 647, 71 L. Ed. 1095; it must be 'serious,' Id., 274 U. S. at page 376, 47 S. Ct. at page 648, 71 L. Ed. 1095. And even the expression of 'legislative preferences or beliefs' cannot transform minor mat-

> ters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. Schneider v. State, 308 U. S. 147, 161, 60 S. Ct. 146, 151, 84 L. Ed. 155.
>
> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

There is no such "clear and present danger" in the instant case as could justify the legislation. In fact, such legislation could not possibly, under any circumstances, meet the clear and present danger test applied by this Court. Belief could never constitute such a clear and present danger. It is difficult, if not impossible, to conceive how the expression of belief, or the joining of a political party, without more, could ever constitute such a danger.

This Court has never clearly defined the precise limits of the clear and present danger doctrine. A recent statement of the law may be found in the concurring opinion in *Musser* v. *Utah,* 333 U. S. 95, where Justice Rutledge (Justices Murphy and Douglas concurring), said:

> "The Utah statute was construed to proscribe any agreement to advocate the practice of polygamy. Thus the line was drawn between discussion and advocacy.
>
> "The Constitution requires that the statute be limited more narrowly. At the very least the line must be drawn between advocacy and incitement, and even the state's power to punish incitement may vary with the nature of the speech, whether persuasive or coercive, the nature of the wrong induced, whether vio-

> lent or merely offensive to the mores, and the degree of probability that the substantive evil actually will result."

Twenty years ago Mr. Justice Brandeis had similarly expressed his view of the extent of the clear and present danger doctrine in his concurring opinion in *Whitney* v. *California,* 274 U. S. 357, 376:

> "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burned women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by reaching syndicalism increases it. Advocacy of lawbreaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated."

There is no reason to attempt any complete definition of the limits of that doctrine in this case. In the first place, it is clear that in so far as the statute affects belief or its expression, it would fall by any definition. In the sec-

ond place, the Government here makes no claim that there is a clear and present danger. In fact, it specifically disavowed the presence of any such danger in argument before the Court below as the dissenting Justice noted. 79 Fed. Supp. 565. Evidently, the same concession was made in argument before the Court of Appeals in the *Inland* case, causing Judge Major to note: "The Board in substance concedes that the section cannot be justified by what the Supreme Court has characterized the 'clear and present danger' rule." 170 F. (2d) 247, 257. See also the dissent of Judge Prettyman in the *NMU* case, 78 Fed. Supp. 146, 177.

Similarly, there is no hint either in the statute itself or in the reports of the Congressional committees which considered the bill, that the legislature found any such danger. In fact, the record is barren even as to the nature of the substantive evil to which Congress addressed itself in passing this statute. The Government, faced with the necessity of finding such an evil, has conjured up one for the Court. To accomplish this, it has been compelled to rely not only on the legislative history of this statute, but on a wide variety of other documentary material ranging from Gitlow's book published in 1940, to newspaper stories published months after the statute was passed. Thus the most favorable case possible for the statute has been presented, through the use of alleged documentation, the bulk of which is of extremely questionable character, and most of which is not even shown to have been before Congress when the statute was passed. The sum total of this falls far short of a clear and present danger of any substantive evil.

Judge Prettyman, in his dissent in *NMU* v. *Herzog, supra,* at pages 181, 182, summarized the Government's contention as follows:

> "* * * It says that Congress has concluded that Communists in labor organizations might use the strike for political purposes and might use their power to stir up strife instead of promoting peace, and that

this conclusion is sufficient to support the interdiction. The 'might' in this part of its contention is intentional. The brief never makes any contention except that Communists 'might' do these things; it never asserts that the evidence before Congress shows that they *would,* or that they *probably* would. That this was the full extent of its position was made clear and emphatic by counsel upon the oral argument. Counsel for the Board said:

> 'There is, we believe, adequate evidence upon which Congress could conclude that part of the philosophy and program of the Communist Party is to regard labor unions as political rather than economic instrumentalities. We believe that Congress could further conclude and it did conclude that membership in the Communist Party or support of an organization dominated by the Communist Party gave reason to believe that an individual might—not necessarily must, but might—if he became an officer of a labor organization or was such an officer, be influenced by the doctrine of the organization of which he was a member and utilize or tend to lead his organization into paths of political action in the interest of the Communist Party rather than in the paths of economic action that Congress wanted to promote.'

"And again he said:

> 'The connections that are important are whether Congress could view the doctrine of the Communist Party with reference to labor organizations, their purposes and their uses, whether it could take cognizance of the view of the Communist Party in that field and whether it could say that we believe that some people who are members of the Communist Party may, by virtue of that fact—not must and not all—but that some may by virtue of that fact utilize their positions in labor organizations to turn them into political weapons to support the Communist Party doctrine, or causes, or programs, or policies, rather than to foster collective bargaining as a friendly method of adjustment of disputes, rather than utilization of their labor organizations as purely an economic weapon to raise the wages and

> hours and working conditions of the laborers underneath. That, Your Honor, is the position we take here.'
>
> "Thus, the question posed by the contention as actually made by the Government, is whether Congress may deny a Government facility to all members of a named organization because it finds that some such persons might—not all such persons but some, and not must but might—use the facilities for an undesirable end. * * *" (Italics in original.)

At most, therefore, the Government makes the contention that *some* members of the Communist Party might be guilty of acts which *might* have a *tendency* to create an evil. That such a remote possibility could not justify this type of legislation was stressed in *Bridges* v. *California, supra,* where the Court said: "* * * the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press." And again "In accordance with what we have said * * * neither 'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression." (314 U. S., at 262 and 273.)

Not only must the evil which Congress seeks to prevent be imminent, but the legislation must be narrowly drawn against that evil if the law is to be upheld. "* * * legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed." *DeJonge* v. *Oregon,* 299 U. S. 353, 364. Here the abuse is not even defined, much less dealt with, and *only* the rights are curtailed. For Congress, in lieu of defining and prohibiting an abuse, has leveled a broad prohibition against members of a named political party together with a loosely defined class described as "affiliates" of that party and others holding proscribed beliefs. That an abuse or practice of which a political party may be guilty cannot be imputed to its members has been clearly established by this Court and will be more fully discussed in Point III of this brief. Moreover, the very

breadth of the language of the statute is such that it is difficult to ascertain precisely whom it encompasses and the statute is, for that reason, likewise, invalid, as will be discussed more fully in Point II.

Such sweeping interdiction of a broad class of people can hardly stand in the face of the Court's repeated warnings that "Ordinances that may operate to restrict the circulation or dissemination of ideas on religious or other subjects should be framed with fastidious care and precise language to avoid undue encroachment on these fundamental liberties." Dissenting opinion in *Jones* v. *City of Opelika,* 316 U. S. 584, 611, adopted as the majority opinion at 319 U. S. 103.

The Court has on occasion considered statutes which were so sweeping in their language as to penalize the peaceful exercise of the rights of free speech and assembly, merely because some of the persons exercising those rights might elsewhere have been guilty of activities which could have been prohibited, or because the assembly was held under the auspices of an organization, some of whose activities might be criminal. The Court has held such statutes invalid because they dealt with and penalized the exercise of the right rather than the elimination of the abuse. *Herndon* v. *Lowry,* 301 U. S. 242.

So, this Court has said:

> "* * * peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purposes; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public

> peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge." *DeJonge* v. *Oregon,* 299 U. S. 353, 365.

Contrary to the warnings of this Court, the statute aims directly at the exercise of rights and penalizes them. It makes no attempt to eliminate an evil. It is indeed difficult to conceive of a statute more broadly drawn or which makes less effort to meet the constitutional requirements here considered.

G. In statutes which affect the First Amendment, the usual presumption of constitutionality does not apply. On the contrary, there is a presumption of unconstitutionality.

First Amendment rights occupy "a preferred position," and freedom of speech, press, assembly and religion are jealously guarded by this Court. *Murdock* v. *Pennsylvania,* 319 U. S. 105, 116; *Marsh* v. *Alabama,* 326 U. S. 501, 509; *Follett* v. *McCormick,* 321 U. S. 573, 575. When a statute is challenged as impinging on those rights, the Court will examine the legislation with the greatest care "to determine whether it is so drawn as not to impair the substance of those cherished freedoms in reaching its objective." *Jones* v. *Opelika,* dissenting opinion, 316 U. S. 584, 611, adopted as majority opinion at 319 U. S. 103.

The presumption of constitutionality, which normally operates in favor of a statute is balanced, and indeed reversed, by the preferred place given to these rights. *Thomas* v. *Collins,* 323 U. S. 516; *Thornhill* v. *California,* 310 U. S. 88; *Schneider* v. *New Jersey,* 308 U. S. 147.

As the concurring opinion in *U. S.* v. *C.I.O.,* 335 U. S. 106, 140, stated:

> "As the Court has declared repeatedly, that [legislative] judgment does not bear the same weight and

> is not entitled to the same presumption of validity, when the legislation on its face or in specific application restricts the rights of conscience, expression and assembly protected by the Amendment, as are given to other regulations having no such tendency. The presumption rather is against the legislative intrusion into these domains. For, while not absolute, the enforced surrender of those rights must be justified by the existence and immediate impendency of dangers to the public interest which clearly and not dubiously outweigh those involved in the restrictions upon the very foundation of democratic institutions, grounded as those institutions are in the freedoms of religion, conscience, expression and assembly. Hence, doubtful intrusions cannot be allowed to stand consistently with the Amendment's command and purpose, nor therefore can the usual presumptions of constitutional validity, deriving from the weight of legislative opinion in other matters more largely within the legislative province and special competence, obtain."

Professor Robert E. Cushman of Cornell University, discussing civil liberties decisions by this Court in the ten-year span between 1937 and 1947, said:

> "* * * the four liberties protected by the First Amendment are so indispensable to the democratic process and to the preservation of the freedom of our people that they occupy a preferred place in our scheme of constitutional values. * * * This priority was, of course, recognized in the action of the Court, beginning with the Gitlow case back in 1925. * * * The Court, however, did not stop here, but moved on to the second principle, which is that freedom of speech, press, religion and assembly are so vitally important that the usual presumption of constitutionality will not attach to a statute which on its face appears to abridge any of them. On the contrary, such a statute will be presumed to be unconstitutional. * * * The new doctrine, then, is that freedom of speech, press, religion and assembly are so uniquely important that legislative restrictions upon them will be presumed to be unconstitutional unless shown to be justified by a clear and present danger." (XLII American Political Science Review, pp. 37, 42.)

The basis for the presumption of the unconstitutionality of statutes affecting First Amendment freedoms has been enunciated as follows:

> "The presumption of validity which attaches in general to legislative acts is frankly reversed in the case of interferences of free speech and free assembly, and for a perfectly cogent reason. Ordinarily, legislation whose basis in economic wisdom is uncertain can be redressed by the processes of the ballot box or the pressures of opinion. But when the channels of opinion and of peaceful persuasion are corrupted or clogged, these political correctives can no longer be relied on, and the democratic system is threatened at its most vital point. In that event the Court, by intervening, restores the processes of democratic government; it does not disrupt them." (Jackson, Robert H., *The Struggle for Judicial Supremacy* (1941), p. 285.)

POINT II

SECTION 9(h) IS SO VAGUE AND INDEFINITE AS TO RENDER IT UNCONSTITUTIONAL UNDER THE FIRST AND FIFTH AMENDMENTS.

The oath prescribed by the statute recites that the affiant "is not a member of the Communist Party or affiliated with such party, and that he does not believe in, or 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." There is no statutory definition provided for any of the terms contained in the oath. It is submitted that the words "affiliated with," "supports," and "unconstitutional methods" (as opposed to force) are so vague and indefinite as to conflict with both the First and Fifth Amendments to the Constitution.

A statute, the terms of which are so vague and indefinite "that men of common intelligence must guess as to its

meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Construction Co.,* 269 U. S. 385, 391; *Small Co.* v. *American Sugar Refining Co.,* 267 U. S. 233. This is particularly true where misconstruction of the terms of a statute may result in the imposition of criminal penalties. *Lanzetta* v. *New Jersey,* 306 U. S. 451. So, too, this Court has cautioned that legislation which seeks to curb any of the First Amendment freedoms must likewise be narrowly drawn and the conduct proscribed defined specifically "so that the person or persons affected remain secure and unrestrained in their rights to engage in activities not encompassed by the legislation. Blurred signposts to criminality will not suffice to create it." *United States* v. *C. I. O.,* 335 U. S. 106. This statute fails to meet these elementary tests. The affiant is placed in a position by the statute whereby he must take the required oath if he is to avoid the severe sanctions of the Act being applied against him and his union. The subject of the oath concerns his First Amendment freedoms, and for any misinterpretation of the terms of the oath he is subject to criminal penalties. Indeed, this case falls squarely within the principle set forth in *Winters* v. *People of the State of New York,* 333 U. S. 507:

> "The appellant contends that the subsection violates the right of free speech and press because it is vague and indefinite. It is settled that a statute so vague and indefinite, in the form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment. *Stromberg* v. *People of State of California,* 283 U. S. 359, 369, 51 S. Ct. 532, 535, 75 L. ed. 1117, 73 A. L. R. 1484; Herndon v. Lowry, 301 U. S. 242, 258, 57 S. Ct. 732, 739, 81 L ed. 1066. A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment violates an accused's rights under procedural due process and freedom of speech or press."

It is submitted that under the standards adopted by this Court, at least three of the terms contained in the statute are so vague and indefinite as to violate the requirements of both the First and Fifth Amendments. And since the affiant must swear concerning all three terms, vagueness as to any one of them will be sufficient to invalidate the law.

A. "Affiliated with."

The Act contains no statutory definition of the term "affiliated with" nor does there appear any clear definition of the term in the Committee Reports or the Congressional debates on the floor of Congress. The debates indicate what Congress had in mind, but paradoxically the legislative intent here serves to increase the indefiniteness of the statute rather than assist the Court in ascribing any clear meaning to it. For it was obvious that Congress intended to bring within the scope of the statute a large group of persons holding a variety of beliefs whose only common characteristic was that in one respect or another their policy coincided with that of the Communist Party.

For example, House Report No. 245 on H. R. 3020 uses at one point the expression "Communist or subversive officers." In another passage that report refers to "unions whose officers are Communists or follow the party line." Still again it refers to "Communists and fellow travelers." And a few pages further, to "front organizations."

In the course of the debates various Congressmen similarly referred to a general broad group as within the coverage of this provision. Congressman Kersten referred to an officer who "is a member of the Communist Party or a party-liner," and later to "Communists and their fellow travelers." And once again to "party-line officers." (93 Cong. Rec. 3577, April 16, 1947.)

Congressman Lesinski, on June 19, 1947, in discussing the bill which had just been vetoed by the President, in discussing Section 9(h), referred to labor organizations

which have "Communist or subversive officers." (93 Cong. Rec. 7494.)

Debate in the Senate showed the use of similarly general terms. Senator Wiley urged the trade union movement to "cleanse its own house of Communists, subversive alien-minded saboteurs." (93 Cong. Rec. A. 1100, March 17, 1947.)

In view of the activity over the past few years of various Congressional Committees and the indiscriminate name-calling which has recently characterized not merely Congressional debate, but discussion in the public press and elsewhere, the fears of a trade union officer that he might be regarded as "affiliated with" the Communist Party because he agrees with some of the program of the Communist Party can hardly be regarded as unfounded.

Most C.I.O. unions and their officers have been active in the Political Action Committee of the Congress of Industrial Organizations. The Un-American Activities Committee of the House of Representatives, in various reports and public hearings, has described the Political Action Committee as being under the domination of an entrenched Communistic leadership. A prudent trade union officer who had been a member of that committee or who had given it active support might well hesitate to sign such an affidavit, lest his membership or activity be deemed to constitute affiliation with the Communist Party. (Un-American Activities Committee, House Report No. 1311, 78th Congress, Second Session, March 28, 1944; Cong. Rec., March 9, 1944, page 2438; Public Hearing by the House Un-American Activities Committee, Vol. 17, October 5, 1944.)

The limited judicial discussion on the concept of affiliation likewise offers little help in determining the meaning of the words used here. The principal decision considering the meaning of the word "affiliation" is, of course, *Bridges* v. *Wixon,* 326 U. S. 135. However, the statute before the Court in that case contained a statutory definition

which the Court found necessary to an intelligent discussion of the meaning of the word. Said the Court:

> "The legislative history throws little light on the meaning of 'affiliation' as used in the statute. It imports, however, less than membership but more than sympathy. By the terms of the statute it includes those who contribute money or anything of value to an organization which believes in, advises, advocates, or teaches the overthrow of our government by force or violence. That example throws light on the meaning of the term 'affiliation.'"

In that case the Court considered the meaning of the term at some length. As Judge Major pointed out in his dissent in the *Inland Steel* case, *supra,* "The court's discussion [in *Bridges* v. *Wixon, supra*] is convincing that its meaning would be quite beyond the reach of the ordinary citizen."

The decision in the *Bridges* case was the culmination of years of litigation over the proposed deportation of Bridges. James N. Landis, former Dean of Harvard Law School, had first considered the matter and had reached one definition of the term "affiliated with" (see *In the Matter of Harry R. Bridges, Findings and Conclusions of the Trial Examiner,* pp. 10, 11). After the amendment of the statute the matter was referred to Charles B. Sears, former Judge of the New York Court of Appeals. He reached a somewhat different definition of the meaning of the term. Judge Sears was reversed by the Board of Immigration Appeals. Attorney General Francis Biddle disagreed with the Board of Immigration Appeals and agreed with Judge Sears. This Court found that both Judge Sears and Attorney General Biddle had given the term "a looser and more expansive meaning than the statute permits" (326 U. S. 144).[29]

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[29] Judge Chase, in *United States ex rel. Kettunen* v. *Reimer,* 79 F. (2d) 315, refused to give a comprehensive definition of "affiliation" as used in the deportation statute, saying: "Very likely that is as impossible as it is now unnecessary."

In view of this record of sharp disagreement between men of more than common intelligence, who clearly differed as to the application of the term in a case where they had the assistance of a statutory definition, we may well agree with Judge Major when he said, "The facts required to be stated in the affidavit [required by Section 9(h)] are of such an uncertain and indefinite nature as to afford little more than a fertile field for speculation and guess" (170 F. (2d) 247, 262).

B. "Supports."

Much of what we have said above in connection with the term "affiliated with" is applicable to the word "supports." If anything, that term is even broader than and more general in its scope than "affiliated with." The term may include financial support and perhaps other methods of support as well. But here again the trade union official, faced with the necessity of signing an affidavit, must determine, perhaps at the peril of his liberty, how broad the statute is. Does it include support of clearly lawful objectives (such as public housing) of an organization which believes in unlawful overthrow of the Government? If a trade union official signs a petition circulated by such a proscribed organization in support of part of its program, is he thereby supporting the organization? If he attends meetings or engages in private conversation which show his agreement with some of the activities of the proscribed organization, does he thereby come within the statutory prohibition?

C. "Illegal or Unconstitutional Methods."

The difficulties faced by a trade union leader in determining whether the proposals he advocates for reform of the United States Government are "illegal or unconstitutional" are substantial. For eminent lawyers have frequently differed on what is or is not unconstitutional,

and it has happened not infrequently that even members of this Court have differed among themselves on constitutional problems. "These are matters which perplex the Bench and the Bar, and the diversity of opinion among judges as to what is illegal and unconstitutional often marks the boundary line between majority and dissenting opinions" (Major, J., at 170 F. (2d) 262).

The Government has not in any of the cases heretofore argued in the lower courts made any serious argument that this statute is not vague. Instead it attempts to excuse the statute's vagueness by urging that since Section 35-A of the Criminal Code applies only to wilful violations, a trade union officer who signs the affidavit need not fear prosecution if he acts honestly. We can formulate no better answer to this proposition than that urged by Judge Major in his *Inland* dissent. He stated that the substance of the argument was:

> " * * * that an officer of a Union need not be too much concerned about the truthfulness of the affidavit which he makes because he can only be convicted under Sec. 35-A of the criminal code for 'knowingly and wilfully' making a false affidavit. In the Board's own words, 'Clearly, no affiant could successfully be prosecuted under this section for filing a false affidavit under Sec. 9 (h) unless it could be proved that he knowingly lied in making the averments contained in his affidavit.' This statement, so I think, could be made concerning every prosecution for perjury. The Board makes the further puerile suggestion that an affiant need not be afraid of a groundless prosecution because 'our law provides adequate modes of redress to victims of malicious prosecution.'
>
> "To me, this argument is shocking and should be repudiated in no uncertain terms. Bluntly stated, it means that an officer of the Union who makes the affidavit need not be concerned with the sanctity of his oath because of the unlikelihood of conviction in case of a prosecution for perjury. He need not be afraid

> because the only danger which he assumes is the hazard of a prosecution which when unsuccessful leaves him as the possessor of a damage suit against his accuser in an action for malicious prosecution. This argument is a persuasive indication that the section should be invalidated because of its vagueness and uncertainty" (170 F. (2d) at 263).

Still another answer can be made to the Board's contention that an honest trade union official has nothing to fear, since he can always try the issue of his wilfulness before a jury. If that argument were sound it would be applicable to every vague criminal statute, since in every case criminal intent is an element. But reliance upon a jury in cases such as this affords small comfort to a prospective affiant. The definition of Communism varies greatly, depending on who gives it. We might note just in passing that George Fitzhugh characterized the Abolitionists as Communists in the pre-Civil War period;[30] that Joseph Choate, in arguing *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, before this Court, stated that if the income tax law were held unconstitutional "Communism is on the march";[31] and that Judge Samuel Seabury, in arguing the constitutionality of the New York State Labor Relations Act before the New York Court of Appeals, stated that the law contained "the essential principle of that species of Communism upon which the present Russian dictatorship is founded."[32]

If a prominent writer of the 19th Century could come to the conclusion that opposition to Negro slavery was Communism; if an eminent jurist at the close of the century could come to the conclusion that the income tax law

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[30] Fitzhugh, George: Cannibals All! (1857), pp. xvi; 154.

[31] Closing argument by Mr. Choate, on behalf of Complainants, in Support of the Contention that the Income Tax Law of 1894 is Unconstitutional, p. 6.

[32] Brief for appellants in *Metropolitan Life Ins. Co.* v. *N. Y. State Labor Relations Board,* 280 N. Y. 194, p. 44.

represented Communist ideas; and if one of the leaders of the New York Bar could come to the conclusion that the State Labor Relations Act was Communist in its conception, a trade union officer might well hesitate in putting before a relatively untrained jury the issue of whether his belief in equal rights for Negroes, higher taxes or collective bargaining, might not constitute "affiliation with" the Communist Party.

The admonition of General John Armstrong in the document already quoted at page 43, *supra,* is apt:

> "The genius of this law pervades all its details, the crime is so defined, that we know not when we become guilty of it; for in the wide range of political opinion, how many things may be innocently said, how many even usefully suggested, which may be so construed as to incur these penalties? With a jury of partisans, warmed by zeal, and heated by contention, selected by an officer in the appointment of the President, and holding that appointment during the pleasure of the President, what opinion can be safe?"

POINT III

SECTION 9(h) IS ARBITRARY IN THAT IT ADOPTS THE TEST OF GUILT BY ASSOCIATION AND HAS NO RATIONAL BASIS.

As the discussion in Point I, *supra,* demonstrated, a rational basis is insufficient to justify any invasion or abridgement of rights guaranteed under the First Amendment. And although it is clear that the case at hand is concerned primarily with the abridgement of those guaranteed rights, it likewise violates the due process clause of the Fifth Amendment in that it is arbitrary and has no rational basis. We shall at this time address ourselves to that aspect of its unconstitutionality.

It is a basic tenet of our law and of the constitutional rights guaranteed by the Fifth Amendment that, in enact-

ing legislation affecting a deprivation of liberty or property, the means adopted must be reasonably related to a legitimate end within the delegated powers of Congress. *Railroad Retirement Board* v. *Alton,* 295 U. S. 330; *McFarland* v. *American Sugar Refining Co.,* 241 U. S. 79.

Any analysis of the statute in question reveals that it fails utterly to meet this basic test.

We turn first to a consideration of to what legitimate end Congress was legislating, and what evil it sought to eliminate by effecting the restrictions and sanctions contained in and necessarily resultant from Section 9(h). A reading of Section 9(h) itself affords no clue and so we are obliged to examine the balance of the statute and the committee reports of both House and Senate, as well as arguments and comments made on the floor of Congress which might show the considerations that influenced the legislation. *Carolene Products Co.* v. *U. S.,* 323 U. S. 18.

We turn then to the statute in question which was enacted supposedly under the delegated power of Congress to regulate commerce. The purpose of the original National Labor Relations Act as specifically set forth in Section 1 thereof, was to promote the full flow of commerce and to set forth the rights of employers, employees and labor organizations with the view to the elimination of strikes, industrial strife and unrest which have the necessary effect of burdening or obstructing commerce. Toward this end the statute proclaimed that the policy of the United States shall be achieved by "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of employment or other mutual aid or protection."

The National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, reiterated that purpose and added thereto the following finding:

> "Experience has further demonstrated that certain practices by some labor organizations, their officers and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the full flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights guaranteed herein."

We shall for the moment assume, because it is the Government's contention here, that Section 9(h) was intended to eliminate such "practices." However, Section 9(h) on its face neither defines, describes or prohibits any such practices, nor does it set forth any punishment for the same. Nor does any section of the Act make clear just what practice or abuse Section 9(h) was intended to eliminate. In lieu thereof, Section 9(h) has condemned a named political party and punished those who are members of or are "affiliated with" that party, or who hold other forbidden beliefs. But obviously a currently unpopular political party or those maintaining currently unpopular political beliefs cannot themselves properly constitute an evil which Congress has a right to correct or prevent in the exercise of its delegated power under the commerce clause. It is only wrongful acts or practices which could constitute an evil, and it is only to eliminate or prohibit those acts or practices that Congress can legislate, provided, of course, that the means used could reasonably achieve the end, and provided, also, that the end is one which it is within the delegated powers of Congress to secure.

We turn then to the committee reports, and the debates on the floor of Congress. The conference committee in reporting the bill as it was finally enacted gave no hint as to the evil which Congress sought to eliminate by Section 9(h). Earlier, the Senate Committee on Education and Labor, in reporting the bill to the upper chamber, had been

silent on the entire subject. The House Committee, in reporting H. R. 3020, likewise nowhere makes clear what practice this section sought to curb, merely commenting that "Communists use their influence in unions not to benefit workers, but to promote dissension and turmoil." (House Report 245 on H. R. 3020, 80th Congress, First Session.)

Debate on the floor of both Houses likewise did not make clear the abuse which the legislation was to correct; it consisted for the most part of invective levelled against Communists showing intense dislike by the legislators for that group, but indicated no specific activities which Congress sought to curb.

There is thus no finding, as the Government would have us believe, either in the Act or in any committee report, that the platform, practice or policy of the Communist Party is to foment strikes for political purposes, or that such party subverts or misuses the National Labor Relations Board.

But even assuming, for the moment, that Congress, after an exhaustive investigation into the facts (which does not appear on the record), determined that the Communist Party advocated such a policy and effectuated it in the past (which also does not appear on the record), nevertheless, Section 9(h) could not constitute a reasonable means of effecting a cure of that evil. On the contrary, it constitutes an arbitrary and unreasonable deprivation, effective against members of the proscribed party. For this Court has held time and again that "under our traditions, beliefs are personal and not a matter of mere association, and that men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles." *Schneiderman* v. *U. S.*, 320 U. S. 118, 136. Accordingly, Congress could not reasonably attribute to any member of the Communist Party by virtue of his membership alone, any of the principles of the Communist Party, assuming such principles were established, and use that imputation as

a basis of denying to him any right or liberty to which he would have otherwise been entitled.

But this Act goes further. It imputes guilt to persons who are not even members of the Communist Party, but who merely are "affiliated with such party." If no imputation can be made that any particular policy of a political or other organization is that of any one of its members, clearly Congress cannot reasonably impute such policies to persons who are less than members but who merely chance to be "affiliated" with such organization. Even more clearly does this run counter to our basic concept that guilt is personal and that before one may be punished or deprived of his liberty or property, he personally is entitled to a trial to determine his rights. See *Herndon* v. *Lowry,* 301 U. S. 242; *DeJonge* v. *Oregon,* 299 U. S. 353.

But this statute goes further still—it does not merely apply the sanctions to the persons to whom guilt is thus wrongfully imputed. It applies those sanctions to members of the union of which such persons are officers. Thus the members of a union are punished because its officers may be "affiliated" with an organization to which Congress has ascribed certain unspecified and undescribed but presumably wrongful purposes. Thus, Congress has punished the members for guilt by association twice or thrice removed.

Nor is this an end to the absurdities of the statute. In most unions, officers are chosen either on a geographical or departmental basis. Thus a union member, residing in New York, might find that he and the union of his choice are affected by the sanctions of the Act because a vice-president of the union, elected by the union members in California, and over whom the New York members have no control, refused to take the required oath; or, likewise, a union member working in a wholesale establishment can no longer vote for a union of his own choosing in a labor board election because employees working in the warehouse

department of the union had elected a single officer whose beliefs are such that he might be deemed to be "affiliated" with the Communist Party. Thus, not only are the officers "affiliated" to the proscribed party and those who elected him to office, affected, but the sanctions of the Act are equally applied against members who had, and who could have no control as to whether he continue in office. A more arbitrary or irrational method of eliminating a wrongful practice, nowhere defined in the Act, becomes difficult to imagine, particularly where the stated policy of the Act is to promote the free choice by employees, of a union of their own choosing.

Nor can this Court give any weight to the argument of the Government that Congress could think of no more effective method to eliminate political strikes. As simply and effectively stated by Justice Roberts in *Schneider* v. *State of New Jersey,* 308 U. S. 147, 162, in a case where the evil practice complained of was littering the streets:

> "There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets."

So, too, here, assuming that the practice which Congress sought to eliminate was that of fomenting political strikes, and assuming also that Congress had the power to eliminate such strikes, an obvious method of preventing that practice would be to prohibit it and punish those who actually are guilty of violating that prohibition. But this it has failed to do. Possibly because Congress did not intend to eliminate political strikes at all, but to eliminate unpopular political belief.

Animosity towards a particular class of persons has more than once found its way into legislation, though it had no rational relation to any legitimate end.

In *Takahashi* v. *Fish & Game Commission,* 334 U. S. 410, as a result of the general hostility towards the Japanese prevailing in California, the State passed a law

providing in substance that no commercial fishing license might be issued to alien Japanese. The Court declared the law unconstitutional as violative of the Fourteenth Amendment. In the concurring opinion by Mr. Justice Murphy, with whom Justice Rutledge agreed, the issue was squarely presented as follows:

> "Even the most cursory examination of the background of the statute demonstrates that it was designed solely to discriminate against such persons in a manner inconsistent with the concept of equal protection of the laws. Legislation of that type is not entitled to wear the cloak of constitutionality."

And, again:

> "'* * * this discrimination constitutes an unequal exaction and a greater burden upon the persons of the class named than that imposed upon others in the same calling and under the same conditions, and amounts to prohibition. This discrimination, patently hostile, is not based upon a reasonable ground of classification and, to that extent, the section is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, * * *'
>
> "We should not blink at the fact that Section 990, as now written, is a discriminatory piece of legislation having no relation whatever to any constitutionally cognizable interest of California. It was drawn against a background of racial and economic tension. It is directed in spirit and in effect solely against aliens of Japanese birth. It denies them commercial fishing rights not because they threaten the success of any conservation program, not because their fishing activities constitute a clear and present danger to the welfare of California or of the nation, but only because they are of Japanese stock, a stock which has had the misfortune to arouse antagonism among certain powerful interests."

See also *United States* v. *Schneider,* 45 Fed. Supp. 848.

The courts therefore must look to the claimed abuse or evil, and legislate directly against that abuse. As pointed

out by Mr. Justice Hughes in the *DeJonge* case, *supra,* at page 364, even the rights of free speech or press or assembly could be abused by inciting to felonies or crime and the legislators might protect themselves against the abuse. "But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed."

Here Congress has not legislated against a particular abuse. It has named no abuse. It has sought to punish both the officers and their labor organizations for what, so far as the record shows, can be only peaceable political activity.

The policies of the Act as set forth therein make the legislation at hand even more unlikely to accomplish the ends therein stated of protecting "the exercise by workers of full freedom of association, self organization and designation of representatives of their own choosing." On the contrary, without any rational basis Congress has denied the benefits of the Act to union members who have freely chosen officers who cannot swear to the affidavit required. They are deprived of a representative of their own choosing because that officer has been held to be guilty by association, a standard thoroughly discredited and condemned by our system of jurisprudence.

Also, the findings and policy of the National Labor Relations Act, as amended, make clear that strikes have the necessary effect of burdening or obstructing commerce, and therefore it is to elimination of the causes of strikes that the Act is directed. Yet, in withdrawing the facilities of the Act from certain unions and depriving them of rights which they previously enjoyed, it forces upon that union and the employees who desire to be represented by it, the necessity of resorting to strikes to protect themselves.

Thus, where a non-complying union represents a majority of the employees in any given shop, it is forced to resort to strike to secure recognition from a recalcitrant

employer, the facilities of the Board being unavailing, to establish its majority representation. Also, such a union cannot well afford to delay, for there is always the fear that another union may enter the picture, and through their use of the Board, eliminate the non-complying union. Similarly, where recognition is secured, the only method of forcing the employer to bargain collectively with it in good faith is through strike. Thus, 9(h) encourages the very thing which the Act is designed to eliminate.

For all of the reasons above set forth, this section cannot be deemed to be resting on any rational basis, but must be considered arbitrary and in violation of the Fifth Amendment.

POINT IV

SECTION 9(h) CONSTITUTES A BILL OF ATTAINDER.

The cases have been few in which this Court has been called to pass upon legislation in the nature of a bill of attainder. Possibly the repetition of such instances was sharply curtailed by the forthright and courageous manner in which the Court has dealt with such legislation when presented, despite the fact that the issue has inevitably arisen in times of deep emotion. This Court has asserted in terms clear beyond question that it would suffer no abridgement of the denial set forth in Article 1, Section 9 of the Constitution, and that the people would always be guaranteed freedom from any legislation of such infamous character, abhorred and declared prohibited for all time by the Framers.

But it is inevitable, once Congress starts down the road of oppression, denying the basic rights of free speech, assembly and political thought and imposing in lieu thereof its determination of what shall be orthodox in such matters, that it should end up with this most detested of all statutes—a bill of attainder.

In a discussion as to what constitutes a bill of attainder within the meaning of the constitutional prohibition, this Court in the most recent case involving such a bill (*U. S.* v. *Lovett,* 328 U. S. 303), unequivocally stated its adherence to the decisions rendered in the earlier cases which "* * * stand for the proposition that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." The decisions have also made clear that while historically, and prior to the execution of the Constitution, a bill of attainder imposed the penalty of death, while legislation which imposed lesser punishments was in the nature of bills of pains and penalties, the prohibition contained in the Constitution encompassed all forms of punishment. Thus, the cases make clear that a legislative decree of exclusion from a chosen vocation may constitute such punishment.

Another principle, which was unequivocally established in the early case of *Cummings* v. *State of Missouri,* 4 Wall. 277, 71 U. S. 277, is that this prohibition includes punishment indirectly imposed if, in fact, punishment be the intent. As stated by Judge Field, at page 325:

> "The existing clauses presume the guilt of the priests and clergymen, and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath—in other words, they assume the guilt and adjudge the punishment conditionally. The clauses supposed [that Mr. Cummings, or all clergymen in the state of Missouri were guilty of armed hostility against the United States and therefore should be deprived of his or their right to teach or preach in the state] differ only in that they declare the guilt instead of assuming it. The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the law maker in the case supposed would be openly avowed; in the case exist-

> ing it is only disguised. The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, and not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizens should be secured against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

And, again, at page 327:

> "* * * they [the clauses in the Missouri Constitution] were intended to operate by depriving such persons [who had directly or indirectly aided the rebellion] of the right to hold certain offices and trusts, and to pursue their ordinary and regular avocations. This deprivation is punishment; nor is it any less so because a way is opened for escape from it by the expurgatory oath. The framers of the Constitution of Missouri knew at the time that whole classes of individuals would be unable to take the oath prescribed. To them there is no escape provided; to them the deprivation was intended to be and is, absolute and perpetual. To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition, and such denial, enforced for a past act, is nothing less than punishment imposed for that act. It is a misapplication of terms to call it anything else."

The remarks of Judge Field apply with equal force to the case at hand. For here, indeed, the statute presumes the guilt of the Communist Party, a clearly ascertainable group, and adjudges the deprivation of their right to pursue their lawful chosen vocation as trade union officials, unless the presumption be first removed by their expurgatory oath, an impossible oath for members of this group.

It cannot be contended that the legislation here merely set qualifications, as distinct from imposing punishment. Similar arguments were made and rejected in the *Cummings* case, *supra*, and in *Ex Parte Garland,* 4 Wall. 333,

71 U. S. 333. Justice Field in the *Cummings* case pointed to the fact that the oath was not required "as a means of ascertaining whether parties were qualified or not for their respective callings * * *." And in *Garland, supra,* the Court stated: "The question, in this case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution."

Here, it might be noted that on the face of the statute in question here it sets *no* qualifications for the position of trade union officials. Other legislatures, faced with the desirability of setting reasonable qualifications for doctors, lawyers, real estate brokers, insurance agents, or police officers, have found no insurmountable difficulty in so doing. But Congress did not even make the effort—possibly because members of the proscribed group might meet those qualifications. Rather Congress enacted legislation designed to secure by indirection the result which it openly stated it desired—removal of members of the proscribed group from their jobs. Thus Congress discarded the traditional guaranties of due process. It nowhere defined any harmful practice or abuse which it sought to eliminate; nor did it prohibit any such practice or abuse or provide appropriate penalties for violation, permitting of charges and trial to determine guilt. Rather, by enacting Section 9(h) they have usurped the judicial function; they have presumed and found certain ascertainable persons guilty of wrongful acts—a most circumspect method of setting qualifications, and one more consistent with an attempt to punish.

As a matter of fact the Congressional Record discloses that members of this named group were characterized in the course of the debates as disloyal, subversive, hated, as having no respect for their oath and, indeed, as believing in the violent overthrow of the Government, by force and violence. (e.g. 93 Cong. Rec. 3533, 3705, 3706, 5083, 5095.)

Indeed, these comments were so prevalent and the talk of punishment so constant as to cause Senator Aiken in the course of the debates to make the following remarks:

> "I was merely going to say that if one advocates the overthrow of our Government by force, or if one puts the aims and desires of another country ahead of those of the United States, while living here as a citizen, as I understand the law, such a person is *guilty of treason*; and I submit that throwing him out of a labor union is hardly a fit *punishment* for the crime. Is it not a fact that we have laws which inflict *very serious punishment* upon one who advocates the overthrow of the Government by force, or who owes allegiance to a foreign country instead of the country of which he claims to be a citizen?" (93 Cong. Rec. 5085, May 9, 1947; emphasis supplied.)

And, again:

> "Mr. Aiken: I do not know about that, but what prompted me to rise was the statement that persons were advocating the overthrow of the United States Government by force. It seems to me that expulsion from a labor union is hardly *fit punishment* in such a case." (93 Cong. Rec. 5085, May 9, 1947; emphasis supplied.)

It is interesting to note that H. R. 3020 as originally passed by the House specifically contained a retrospective provision. It provided:

> "No labor organization shall be certified as the representative of employees if one or more of its national or international officers, or one or more of the officers of the organization designated on the ballot * * * is *or ever has been* a member of the Communist Party * * * *" (Emphasis supplied.)

There was much discussion concerning these words "or ever has been" in both House and Senate, primarily with reference to whether this provision was fair to members of the Communist Party who had since "purged" themselves.

> "Mr. Hartley: * * * Mr. Chairman, it is with very great reluctance that I oppose the amendment which has just been offered. I understand thoroughly the purpose of the amendment, and I want just as much as the gentleman who offered it to drive the Communists out of our labor organizations, but I do not want to deprive one who has seen the light and who has made an *honest reform* of the right to be a member of a labor organization." (93 Cong. Rec. 3705, April 17, 1947; emphasis supplied.)

And Mr. Potts, in that same discussion:

> "Mr. Chairman, I hold no brief for the Communists, but I know there are a number of people all over the country today who are making mistakes and I want to give them the chance to *repent.* Members of the American Youth for Democracy, that Communistic organization which I deplore, comprise many of those young people. I do not want to deprive the members of that group who subsequently *repent of their wrong,* from ever earning a living in any field of proper endeavor. I think the amendment is wrong for this reason." (93 Cong. Rec. 3706, April 17, 1947; emphasis supplied.)

Mr. Mundt then suggested a modification by substituting for the words "or ever has been" the words "or has within five years immediately preceding the date." After discussing at some length how men who were once Communists have reformed and dedicated themselves to fight Communism, he added:

> "For that reason I have offered this amendment to bar from holding offices in labor unions any one connected with the Communist Party at any time within five years preceding the day the case is brought up for consideration. To attempt *to punish* a man for his entire lifetime for a mistake which he has publicly admitted and corrected, however, seems to be unnecessarily drastic and punitive, and I believe it would be less effective than setting up some such effective date as I propose." (93 Cong. Rec. 3707, April 17, 1947; emphasis supplied.)

However, these amendments were eliminated by the conference committee, and Conference Report No. 510 on H. R. 3020 reads as follows:

> "The 'ever has been' test that was included in the House bill is omitted from the conference agreement as unnecessary, since the Supreme Court has held that if an individual has been proved to be a member of the Communist Party at some time in the past, the presumption is that he is still a member in the absence of proof to the contrary."

The House Minority Report No. 245 on H. R. 3020 stated:

> "* * * No one abhors Communists or Communism more than we. However, it is clear that this provision is *designed to penalize* not only members of the Communist Party or those affiliated with them, but equally to penalize by denying their union the right to exist, those persons within the trade union movement who have been most active in seeking to rid the trade union movement of Communist influence. Its effect by placing all members of the union under the same penalties as its Communist members or officers would be to strengthen rather than weaken Communist trade union infiltration." (Emphasis supplied.)

A reading of these debates and reports clearly demonstrates that the intent of Congress in enacting Section 9(h) and the atmosphere attendant on its passage was one to "punish" rather than to regulate or set legitimate qualifications for the vocation of trade union officer. While the record is replete with talk of penalties, punishment, disloyalty, subversive, purge, etc. (*cf. United States* v. *Lovett, supra,* p. 314), in relation to this named group, it is barren concerning appropriate qualifications for the position of trade union officer or a prohibition or even a definition of any abusive practices by such trade union officers.

Section 9(h) in depriving the members of the proscribed political party from using Government facilities and in seeking and indirectly causing its members to be driven

from their jobs can be held no more valid than if that section had provided that specifically named Communist officials such as William Z. Foster, Eugene Dennis and John Williamson not be permitted to use the facilities of the Board, and not be permitted to hold office as labor union officers because of their "subversive" activities. Could it be doubted that such a statute would constitute a bill of attainder and would amount to punishment by legislative act of named persons? The decision in the *Lovett* case, *supra,* makes this clear. However, as it is not of the essence of a bill of attainder that individuals be named specifically, but merely that it apply to easily ascertainable members of a group, the law being invalid when applied to one must be equally invalid when applied to the other. For clearly members of the Communist Party are easily ascertainable members of a group.

It should be noted that the statute at hand goes further than that in the *Lovett* case. In fact it meets the specific requirement which the concurring opinion described as one of the elements historically inherent in bills of attainder. For here "Refusal to take a prescribed oath operated as an admission of guilt and automatically resulted in the disqualifying punishment." *Lovett* case, concurring opinion, page 327.

It is for the above reasons that the cases cited by the Government, such as *Dent* v. *West Virginia,* 129 U. S. 114, or *Hawker* v. *New York,* 170 U. S. 189, are completely inapposite. In those cases the legislation dealt with general qualifications for a particular job and was addressed to particular evils. It applied to no one person or group of persons, nor was it aimed against or intended as punishment of any one person or group of persons. A basic distinction must be drawn between legislation (such as the *Dent* case) which is aimed against the evil, and legislation (such as that at hand) which is aimed against the person or members of the proscribed group.

It is significant to note that bills of attainder from the earliest recorded instances of their use in England in the