late 13th Century have virtually always been a means of punishment of political offenders, whose views were obnoxious to the dominant party. See Creasy, E. S., *Rise and Progress of the English Constitution* (3d ed. 1856) p. 252; Adams, Geo. B., *Constitutional History of England* (Schuyler rev. 1934) pp. 228-229, 280; *Naismith, English Public Law* (1873) p. 153; Stephens, *History of Criminal Law of England* (1883) Vol. 1, pp. 160-161; Anson, *Law and Customs of the Constitution* (5th ed. 1922) Vol. 1, p. 362; Story, *Commentaries on the Constitution* (5th ed. 1891) Sec. 1344; Medley, *English Constitutional History* (6th ed. rev. 1925) p. 167.

"Subverting the government" was a common charge in the late modern period when, at the close of the long quarrel between Commons and the Stuarts, bills of attainder had a brief renewal of popularity. Notorious among the English attainders by Act of Parliament was that of the Earl of Strafford, counsellor of Charles I, on the ground that he had endeavored "to subvert the ancient fundamental Laws and Government." 17 Car. 1. *DeLolme on the Constitution* (1838 ed.) Vol. 1, p. 400; Hume, *History of England* (Brewer ed. 1880) pp. 183 *et seq.*; Medley, *supra,* p. 167; Feilden, Henry, *Constitutional History of England* (4th ed. rev. 1911) p. 153. Similarly in 1645 a preliminary impeachment against Archbishop Laud was converted into an attainder for attempting to alter the religion and fundamental laws of the realm. Howell, *State Trials,* Vol. IV, 598-599. See Feilden, *ibid*; Medley, *ibid.* See also Hallam's discussion of the origin of the idea of constructive treason. *Constitutional History of England.* (Henry VIII through Geo. III) (5th ed. 1870) p. 576n. In 1715, the "Jacobite" Lords Bolingbroke and Ormond were impeached for acts prejudicial to the national welfare, i.e., their share in the peace of Utrecht, and later attainted on failing to surrender. 1 Geo. I, cc. 16, 17, Howell, *State Trials,* Vol. XV, 1002, 1012. See, Feilden, *supra,* p. 156; also, note 36 *supra.*

Statutes of this kind were passed in practically every state during and immediately after the revolutionary period in our own country. See Thompson, *Anti-Loyalist Legislation During the American Revolution,* 3 Ill. Law Rev. 81, 153; Hamilton, *History of the Republic of the United States,* Vol. III, pp. 23-40.

Not only have bills of attainder been directed in almost every case at political offenses, but they have reappeared on the historical scene almost exclusively in times of political intolerance and hysteria. In such times normal judicial methods of punishing persons who are supposed to be guilty of offenses is often considered inadequate, either because the conduct of the accused violates no existing law, or because sufficient proof could not be adduced in a court of law to find the accused guilty of existing offenses. And so the legislature takes the most expedient path—creates the offense and finds guilt. Judge Story warned against precisely such action in his Commentaries:

> "In such cases, the legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency and too often under the influence of unreasonable fears, or unfounded suspicions. * * * Bills of this sort have been most usually passed in England in times of rebellion, or of gross subserviency to the crown, or of violent political excitements; periods in which all nations are most liable (as well the free as the enslaved) to forget their duties, and trample upon the rights and liberties of others * * *" (Commentaries on the Constitution, Sec. 1338).

It is likewise characteristic of bills of attainder, that being almost always political in their nature and being by

definition arbitrary, they invariably constitute violations of the First and Fifth Amendments of the Constitution as well. For, as James Madison stated in writing about bills of attainder and other prohibited types of legislation in The Federalist, No. 44, " * * * one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding."

It is therefore not surprising that the 80th Congress, sitting in an atmosphere of unreserved hysteria, and enacting legislation attacking our other basic rights of free speech, assembly and belief, should have compounded its offenses, by enacting a bill of attainder.

CONCLUSION

The statute now before the Court cannot properly be viewed as an isolated phenomenon. On the contrary, Section 9(h) is a direct reflection of a widespread and bitter attack upon the civil rights of Americans—an attack which has received an all-embracing official sanction.

Committees established by the 80th Congress, notably the Un-American Activities Committee, and the Committee on Education and Labor have become the self-appointed guardians of political thought. They have pinned badges of disloyalty on large numbers of patriotic citizens who have advocated political, economic or social reforms, which do not meet the approval of members of those Committees. Indiscriminate character assassination of well known leaders in Government, the liberal arts and sciences have become a regular feature of the daily press. Notorious are the attacks on such men as Dr. Edward U. Condon and the late Dr. Harry B. White. Hundreds of persons have been called before the Committees which have demanded that they disclose to all the world their political beliefs and associations, and those of their friends. Throughout the land, bigotry has been made not only respectable but noble.

These facts need no extensive documentation, as they are well known to the Court. Indeed, this Court need only consider the cases now on its docket and those in the lower Federal courts to see how widespread is the attack on non-conformists. Dr. Edward Barsky, John Howard Lawson, Gerhart Eisler, and many others, stand convicted of contempt of Congress. Several persons in Colorado have been convicted of contempt of a Federal court for refusal, on asserted constitutional grounds, to answer questions put by a grand jury, and had to appeal to a Justice of this Court to get bail. Carl Marzani's conviction for violation of the False Claims Act has already been decided by this Court. Twelve leaders of the Communist Party are about to be tried for violation of the Alien Registration Act. Irving Potash, Michael Obermeier and other leading trade unionists face deportation to foreign lands they left twenty to forty years ago. Scores of similar instances could easily be added. They will occupy our courts for years to come.

Indeed, the principles of fear and intolerance which we fought a war to destroy in other lands, seem to have taken root in our own. We might, with profit, reflect on the words of Thomas Jefferson in his first inaugural address that

> "* * *, we have yet gained little if we countenance a political intolerance as despotic, as wicked, and capable of as bitter and bloody persecutions. During the throes and convulsions of the ancient world, during the agonizing spasms of infuriated man, seeking through blood and slaughter his long-lost liberty, it was not wonderful that the agitations of the billows should reach even this distant and peaceful shore; that this should be more felt and feared by some and less by others; that this should divide opinions as to measures of safety. But every difference of opinion is not a difference of principle. We have called by different names brethren of the same principle. We are all republicans—we are federalists. If there be any among us who would wish to dissolve this Union or to change its republican form, let them

> stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."

More recently and in times not unlike our own, Justice Holmes reaffirmed this principle, so necessary to the survival of our democracy:

> "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas,—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes can be safely carried out. That, at any rate, is the theory of our Constitution" (*Abrams* v. *U. S.*, 250 U. S. 616).

It is respectfully submitted that the judgment of the Court below should be reversed.

Respectfully submitted,

NEUBURGER, SHAPIRO, RABINOWITZ & BOUDIN,
Attorneys for Appellants,
76 Beaver Street,
New York 5, New York.

VICTOR RABINOWITZ,
LEONARD B. BOUDIN,
BELLE SELIGMAN,
of Counsel.

APPENDIX A

Text of Provisions of the Labor Management Relations Act Referred to Herein

SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strike or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences

as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

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 free 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 herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred 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 their employment or other mutual aid or protection.

SEC. 8(b)(4)(C): It shall be an unfair labor practice for a labor organization or its agents * * * to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of Section 9 * * *.

* * * * * *

SEC. 9(a): Representatives designated or selected for the puropses of collective bargaining by the majority of

the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

(e)(1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9(a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

(f) 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 such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and by-

laws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such

receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f)(A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f)(B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9(e)(1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

SEC. 10(e): The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order,

and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by

the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

SEC. 10(1): Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 9(b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant

testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2)in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D).

APPENDIX B

Excerpts from an Essay on the Liberty of the Press (1789)

By GEORGE HAY

"To ascertain what the 'freedom of the press' is, we have only to ascertain what freedom itself is. For, surely, it will be conceded, that freedom applied to one subject, means the same, as freedom applied to another subject.

"Now freedom is of two kinds, and of two kinds only: one is, that absolute freedom which belongs to man, previous to any social institution; and the other, that qualified or abridged freedom, which he is content to enjoy, for the sake of government and society. I believe there is no other sort of freedom in which man is concerned.

"The absolute freedom then, or what is the same thing, the freedom, belonging to man, before any social compact, is the power, uncontrolled by law, of doing what he pleases, provided he does no injury to any other individual. If this definition of freedom be applied to the press, as surely it ought to be, the press, if I may personify it, may do whatever it pleases to do, uncontrolled by any law, taking care however, to do no injury to any individual. This injury can only be by slander or defamation, and reparation should be made for it in a state of nature, as well as in society.

"But freedom in society, or what is called civil liberty, is defined to be, natural liberty, and so far restrained by law as the public good requires, and no farther. This is the definition given by a writer, particularly distinguished for the accuracy of his definitions, and which perhaps cannot be mended. Now let freedom, under the definition, be applied to the press, and what will the freedom of the press amount to? It will amount precisely to the privilege of publishing, as far as the legislative power shall say, the public good requires: that is to say, the freedom of the press will be regulated by law, in the same manner

as freedom on other subjects is to be regulated by law. If the word freedom was used in this sense, by the framers of the amendment, they meant to say, Congress shall make no law abridging the freedom of the press, which freedom, however, is to be regulated by law. Folly itself does not speak such language.

"It has been admitted by the reader, who has advanced thus far, that the framers of the amendment meant something. They knew, no doubt, that the powers granted to Congress, did not authorize any control over the press, but they knew that its freedom could not be too cautiously guarded from invasion. The amendment in question was therefore introduced. Now if they used the freedom under the first definition, they did mean something, and something of infinite importance in all free countries, the total exemption of the press from any kind of legislative control. But if they used the word freedom, under the second definition, they meant nothing, or nonsense, which is worse than nothing; for if they supposed that the freedom of the press, was absolute freedom, so far restrained by law as the public good required, and no farther, the amendment left the legislative power of the government on this subject, precisely where it was before. But it has been already admitted that the amendment had a meaning: the construction therefore which allows it no meaning is absurd, and must be rejected.

"This argument may be summed up in a few words. The word 'freedom' has a meaning. It is either absolute, that is, exempt from all law, or it is qualified, that is regulated by law. If it be exempt from the control of law, the Sedition Bill which controls the 'freedom' of the press, is unconstitutional. But if it be regulated by law, the amendment which declares that Congress shall make no law to abridge the freedom of the press, which freedom however may be regulated by law, is the grossest absurdity, that ever was conceived by the human mind.

"That by the words 'freedom of the press' is meant a total exemption of the press from legislative control, will further appear, from the following cases, in which it is

manifest, that the word freedom is used with this signification and no other.

"It is obvious in itself, and it is admitted by all men, that freedom of speech, means the power uncontrolled by law, of speaking either truth or falsehood at the discretion of the individual, provided no other *individual* be injured. This power is, *as yet,* in its full extent in the United States. A man may say every thing which his passion can suggest, he may employ all his time and all his talents, if he is wicked enough to do so, in *speaking* against the government matters that are false, scandalous, and malicious, but he is admitted by the majority of Congress to be sheltered by the article in question, which forbids a law abridging the freedom of speech. If then freedom of speech means, in the construction of the constitution, the privilege of speaking *any thing* without control, the words freedom of the press, which form a part of the same sentence, mean the privilege of printing *any thing* without control.

"Happily for mankind, the word 'freedom' begins now to be applied to religion also. In the United States it is applied in its fullest force, and religious freedom is completely understood to mean the power uncontrolled by law of professing and publishing any opinions on religious topics, which any individual may choose to profess or publish, and of supporting those opinions by any statements he may think proper to make. The fool may not only say in his heart, there is no God, but he may announce if he pleases his atheism to the world. He may endeavor to corrupt mankind, not only by opinions that are erroneous, but by facts which are false. Still however he will be safe, because he lives in a country where religious freedom is established. If then freedom of religion will not permit a man to be punished, for publishing any opinions on religious topics, and supporting those opinions by false facts, surely freedom of the press, which is the medium of all publications, will not permit a man to be punished for publishing any opinion on any subject, and supporting it by any opinion whatever."