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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 336

AMERICAN COMMUNICATIONS ASSOCIATION, *et. al.*,
Appellants,

against

CHARLES T. DOUDS, Individually, etc.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Introductory Statement

This brief *amicus curiae* is filed by the American Civil Liberties Union, a nation-wide organization of individuals interested in protecting the rights of Americans by legal action and in other appropriate ways.

We have filed this brief, pursuant to leave of the Court, because we believe Section 9 (h) of the Taft-Hartley Act is unconstitutional, for the reasons that it is:

I. An unconstitutional infringement of the right of free speech, as protected by the First Amendment to the Constitution;

II. A bill of attainder in violation of Article I, Section 9, Clause 3 of the Constitution.

POINT I

Section 9(h) of the statute violates the First Amendment.

A. Freedom of speech can be subjected to previous restraint only when failure to impose controls would create a "clear and present danger" to society. Refraining from speech can never create such a danger.

This Court has consistently held that the imposition of restrictions on freedom of speech is constitutional only if it can be demonstrated that such restrictions are necessitated by a "clear and present danger" to the public welfare.

This doctrine, stemming from Mr. Justice Holmes' decision in *Schenck* v. *United States,* 249 U. S. 47, and his dissenting opinion in *Abrams* v. *United States,* 250 U. S. 616, has perhaps been most definitively formulated in *Bridges* v. *California,* 314 U. S. 252.

As stated in that opinion:

> "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. It prohibits any law 'abridging the freedom of speech and 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." (314 U. S. 252, 263.)

The doctrine has consistently been applied so as to protect the right of free speech and the corrollary right of freedom of assembly by persons of admitted Communist belief. See *De Jonge* v. *Oregon,* 299 U. S. 53; *Herndon* v. *Lowry,* 301 U. S. 242.

Moreover, this Court has in recent decisions made it clear that the usual presumption as to the constitutionality of federal or state legislation is inapplicable as applied to a statute which interferes with individual civil liberties. Instead, the presumption has been created that statutes interfering with individual civil rights are unconstitutional. As was stated in *Thomas* v. *Collins,* 323 U. S. 516.

> "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. Cf. Schneider *v.* State, 308 U. S. 147; Cantwell *v.* Connecticut, 310 U. S. 296; Prince *v.* Massachusetts, 321 U. S. 158. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice.

Compare United States *v.* Carolene Products Co., 304 U. S. 144, 152-153.

> "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. 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. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissable limitation."

It is of course clear that the First Amendment protects not only freedom of speech, but also freedom not to speak. The point was clearly made in the majority opinion in *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624, 634: "To sustain the compulsory flag salute, we are required to say that a Bill of Rights which guards the individual's right to speak his mind, left it open to public authorities to compel him to utter what is not in his mind." The *Barnette* case, *supra,* further established that ideas and opinions, as such, are not subject to any governmental control whatsoever.

Indeed, the "clear and present danger" doctrine logically invalidates any imaginable legislative (or administrative) attempt at limitation of the right to refrain from utterance. The reason for this is that the "clear and present danger" rule makes it possible to limit free speech only when that speech has the demonstrable effect of creating a danger to the public welfare. The refusal to speak, since not in any way capable of inciting other

individuals, is obviously not capable of creating a public danger.

If Congress sought to impose restrictions upon the freedom of speech of Communists, such statutes, under the Constitution, could be unheld, if at all, only if they were "narrowly drawn to cover the precise situation giving rise to the danger." *Thornhill* v. *Alabama,* 310 U. S. 88, 105.

Even a Congressional declaration that the Communist Party, as such, was engaged in activities inimical to the interests of the United States, could not justify a broadside restraint on the freedom of speech of Communists. For, as stated in *Bridges* v. *California,* 314 U. S. 252, 263:

> "* * * even the expression of 'legislative preferences or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression."

But the issues are quite different when the freedom sought to be restrained is not freedom of speech, but freedom to refrain from speech. For, as was stated by this Court in *Cantwell* v. *Connecticut,* 310 U. S. 296, 303-4, with reference to the guaranty of non-interference with freedom of speech on the part of the states, embodied in the Fourteenth Amendment:

> "Thus the Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be."

Equally, the guaranty of freedom of belief against Federal interference, as embodied in the First Amendment, is absolute. Hence Section 9(h), which seeks to interfere with freedom of belief, is unconstitutional.

B. Section 9(h) attempts by indirection to impose invalid restraints on freedom of speech.

Section 9(h) does not directly deny the right of persons who refuse to sign the test affidavits to hold offices in unions, nor does it expressly prevent unions, having officers who decline to sign such affidavits, from bargaining collectively. Such a direct restriction would, of course, be unconstitutional.

Instead, Congress sought to accomplish by indirection what admittedly could not be done directly.

Section 9(h) attempts to prevent the election of Communists, or other persons who for any reason refuse to sign the test affidavits, as union officers, by denying to unions having such persons as officers, benefits freely available to all other unions, i.e., the facilities created by the National Labor Relations Act. Thus the Section attempts to exert economic pressure to attain a forbidden end.

The debates on Section 9(h) in the Senate clearly indicate that the purpose of the statute was to deny Communists the right to hold offices in trade unions. This was explained clearly by Senator McClellan, as follows:

> "* * * for that reason, as the Senator from Ohio (Taft) has said, the House bill contains a provision prohibiting the certification for bargaining purposes of unions whose officers are Communists or engaged in Communist activities." (93 *Congressional Record* 5082, May 9, 1947.)

In the House of Representatives, Congressman Hartley, the co-sponsor of the bill, gave the following explanation with respect to Section 9(f)(6)—the predecessor of 9(h) (see 93 *Congressional Record,* 3533):

> "It prohibits certification by the Board of labor organizations having Communist or subversive offi-

> cers. If anyone doubts the need of that in the bill all you have to do is to read the testimony taken by our sub-committee in connection with the Allis-Chalmers strike in Milwaukee and you will understand that section of the bill is most in order."

The indirection of the Congressional plan does not save its constitutionality. It is surely obvious that Congress cannot indirectly vitiate civil rights, which may not constitutionally be subject to direct destruction.

This Court has always held that neither Congress nor the states could circumvent limitations upon their constitutional powers by "the pretense of regulation." As was stated in *Frost* v. *Railroad Commission,* 271 U. S. 583, 593 (where the exercise of state power was under consideration):

> "There is involved in the inquiry not a single power, but two distinct powers. One of these, the power to prohibit the use of the public highways in proper cases, the state possesses; and the other, the power to compel a private carrier to assume against his will the duties and burdens of a common carrier, the state does not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guarantees, 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, expect a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden."

The same doctrine has been applied by this Court in several situations where the states, under the guise of regulation, sought to impose restrictions on freedom of publication. As was said in *Near* v. *Minnesota,* 283 U. S. 697, 708:

> "With respect to these contentions it is enough to say that in passing upon constitutional questions the court has regard to substance and not to mere matters of form, and that, in accordance with familiar principles, the statute must be tested by its operation and effect."

See also *Grosjean* v. *American Press Publishing Company,* 297 U. S. 233.

In an effort to save the constitutionality of Section 9(h) the Government has argued that the Section constituted merely a qualification of a privilege, i.e., the rights conferred upon unions by the National Labor Relations Act. Congress has the undoubted right to pass or not to pass, to repeal or not to repeal, the Wagner Act, as it sees fit. However, it does not constitutionally have the right to condition the availability of rights created by the Wagner Act as it sees fit. Specifically, it can neither make those privileges available only to persons who adhere to political or other beliefs accepted by a majority, nor deny those rights to individuals who belong to an unpopular minority.

The doctrine that the power completely to withhold a privilege does not subsume the power to create uncon-

stitutional conditions upon its exercise has been most fully developed in the cases dealing with the regulation by the several states of foreign corporations. It has consistently been held that, while the several states were free to regulate foreign corporations or indeed to deny them absolutely the right to conduct business within their borders, they were not free to make the right to conduct business dependent upon unconstitutional conditions. See *Western Union Telegraph Company* v. *Massachusetts,* 125 U. S. 30; *St. Louis S. W. Railway Company* v. *Arkansas,* 235 U. S. 350.

Attempts by the Federal Government to circumvent the First (and Fifth) Amendment by imposing unconstitutional conditions on the availability of so-called privileges have in recent years consistently been struck down by this Court.

The issue has perhaps been most clearly posed in the cases dealing with the withdrawal by the Postmaster General of the second-class mail rate (39 U.S.C. Section 226). *U. S. ex rel. Milwaukee Social Democratic Publishing Company* v. *Burleson,* 225 U. S. 407 (1921) involved the revocation of the second-class mail privilege by the Postmaster General on the ground that the newspaper in question had violated the Espionage Act of 1917 (40 *Stat.* 217), by publishing material detrimental to the war efforts of the United States. The Court majority held that such action constituted only a constitutionally valid withdrawal of a privilege created by and subject to Congressional control.

In a dissenting opinion in which Mr. Justice Holmes joined, Mr. Justice Brandeis demonstrated the invalidity of the so-called "privilege" doctrine:

> "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 by taxation" (225 U. S. 407, 433).

The minority views of Justices Brandeis and Holmes in the *Burleson* case were adopted by the majority of this Court in *Hannegan* v. *Esquire,* 327 U. S. 146, where it was stated:

> "But grave 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 Publishing Co.* v. *Burleson,* 255 U. S. 407, 421, 423, 430, 432, 437, 438. * * * Under that view the second class rate could be granted on condition that certain economic or political ideas not be disseminated. * * *"[1])

Even in such traditional fields of allegedly plenary Federal authority as the exclusion of aliens and the importation of literature into the United States, the courts in recent years have held that the statutes could not be employed so as to abridge civil rights protected by the First and Fifth Amendments. See *Schneiderman* v. *United States,* 320 U. S. 118 (1943); *Kessler* v. *Strecker,* 307 U. S.

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1. The Court by-passed the constitutional question in the *Esquire* case by its interpretation of the statute.

In its earlier decision in *Ex Parte Jackson,* 96 U. S. 727, 733, upholding Federal legislation prohibiting the use of the mails by lotteries, this Court stated:

> "Nor can any regulations be enforced against the transportation of printed matter in the mail, which is open to examination, so as to interfere in any manner with the freedom of the press."

22 (1939); *Bridges* v. *Wixon,* 326 U. S. 135; *Parmelee* v. *United States,* 113 Fed. (2d) 729 (App. D. C.).

Closely apposite to the statute at bar was the statute presented for judicial scrutiny in *Danskin* v. *San Diego Unified School District,* 23 Cal. (2nd) 536, 546. That statute prohibited the use of public school buildings by any group which had as an object the overthrow of the government. In its decision overthrowing the statute, the California court pertinently observed that:

> "When one searches deeper for the reason that motivates the prohibition of such meetings, there is no escaping the conclusion that the Legislature denies access to a forum in a school building to 'subversive elements', not because it believes that their public meetings would create a clear and present danger to the community, but because it believes that the privilege of free assembly in a school building be denied to those whose convictions and affiliates it does not tolerate. * * *
>
> "The State is in no duty to make school buildings available for public meetings * * *. If it elects to do so, however, it cannot arbitrarily prevent any members of the public from holding such meetings" (citing *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, and *Marsh* v. *Alabama,* 326 U. S. 501), and "Since the State cannot compel 'subversive elements' directly to renounce their convictions and affiliations it cannot make such a renunciation a condition of free assembly in a school building."

It is too obvious to require extended argument that what Congress can neither do directly by regulatory legislation nor indirectly by withholding of so-called "privileges" cannot be done by economic pressure exerted through withholding benefits made freely available to others.

United States v. *Butler,* 297 U. S. 1, involved an attempt by Congress to restrict crop production, by inducing farmers to reduce their own output in return for payments. The Government argued that the statute created an entirely voluntary scheme and was a constitutional exercise of the Government's planning power. It contended that a farmer was free to accept or reject the Government payments; but that if he wished to obtain them, he was required to comply with the conditions upon which they were granted.

This Court held that the statute at bar in the *Butler* case was unconstitutional. Looking behind the shadow of voluntarism, to the substance of economic coercion, it was stated:

> "The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation. The power to confer or withhold unlimited benefits is the power to coerce or destroy." (*ibid.* at 70).
>
> "It is an established principle that the attainment of a prohibited end may not be accomplished under the pretense of the exercise of powers which are granted." (at 68).

The parellelism to the instant case is obvious. Section 9(h) does not make it illegal for Communists to be union officers or for unions to have officers who are Communists. It does not purport to punish union officers who are Communists, nor to punish unions for having Communist officers. However, the statute seeks, and was intended to seek, this forbidden objective by economic coercion.

Section 9(h) is an obvious attempt to punish Communist and other individuals, who for any reason whatsoever, decline to sign the affidavits therein required. This Court, concerned with realities rather than the technicalities of form, cannot but hold the statute unconstitutional as a violation of the First Amendment.

POINT II

Section 9(h) is unconstitutional as a bill of attainder.

A. The constitutional provision involved and its historical background.

Article I, Section 9, Clause 3 of the Constitution contains the following unequivocal restriction on the powers of Congress:

> "No bill of attainder or ex post facto law shall be passed."

An almost identical prohibition on action by the states is contained in Article I, Section 10, Clause 1 of the Constitution.

The classic interpretation of the term "bill of attainder" as used in the Constitution is contained in the decision of this Court in *Cummings* v. *Missouri,* 4 Wall. (U. S.) 277:

> "A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties" (at page 323).

Although in use since the Thirteenth Century, bills of pains and penalties and even bills of attainder with a death penalty sentence came into common use in Great Britain as a weapon against political dissenters during the reign of Henry VIII and remained in use throughout the Seventeenth and early Eighteenth Centuries. See I *Cooley, Constitutional Limitations* (8th Ed.), 297, 547. Sometimes the attainders were directed at named individuals; included in this category were bills issued by the Cromwellian Parliament against various counsellors of Charles I and those brought by the House of Commons against Tory leaders under Queen Anne. See E. G. FEILDEN, *Constitutional History of England* (4th Ed., 1911), 153; IV Howell, *State Trials* (octavo edition) 598-9, XV *ibid.*, 1002-12, XVI *ibid.*, 644. In some instances these attainders were enacted after the failure of prior attempts at impeachment.

Frequently the basis for the attainder was the frank charge of "subverting the government", or, as in the 1641 case of the Earl of Strafford, on the ground that he had endeavored to "subvert the ancient fundamental laws and government". XVII Car. 1. Certain of the English political bills of attainder were directed not at specifically named individuals, but at all members of an allegedly subversive group. In this category must be included the bill enacted in 1661 by the restored Charles II, against a group excluded from the general pardon accorded to Cromwell's supporters. XIII Car. II c. 15.

Acts of attainder had also not been uncommon in the American colonies. Perhaps the most famous example is the bill passed by the General Assembly of Virginia in 1676, inflicting punishment on the principal leaders of Bacon's rebellion against Governor Berkeley, but including within the scope of the act, the large group of uniden-

tified persons who had allegedly aided and abetted the plotters. See II HENNING (Va.), STAT. AT LARGE, 373-4; II STORY, *op. cit. supra,* at 212. Bills of Attainder were also much resorted to by the Colonial legislatures during the American Revolution, in an attempt to eliminate Tory opposition. See Thompson, *Anti-Loyalist Legislation During the American Revolution* (1908), 3 ILL. L. REV. 81, 147 *et seq.* It has been said that "some of the best patriots and most eminent statesmen of the period defended them as being wise and necessary." II *Story, op. cit. supra,* n. 1, at 211.

The available records of the debates in the Constitutional Convention indicate that the prohibition against Bills of Attainder was passed virtually without discussion and with unanimous approval. Similarly, there was little or no discussion of this prohibition in the debates in the various states on ratification of the Constitution. See V ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION (1845), 462-463; II FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 (1934), 376, III *ibid.* 165; HUNT AND SCOTT, MADISON'S DEBATES (Int. Ed.) 449, 479.

The unanimous approval of the prohibition on Bills of Attainder by the Founding Fathers and the Ratifying Conventions reflected their full appreciation, predicated upon their knowledge of Colonial and English legal history of the dangers of legislative punishment, inflicted without judicial trial, upon named individuals or easily ascertained members of a minority group. See II STORY, THE CONSTITUTION, (4th Ed., 1873) 210; COOLEY, CONSTITUTIONAL LIMITATIONS (2d Ed., 1891) n. 48 at p. 295.

To the Founding Fathers their experience during the period of the American Revolution was the conclusive demonstration of the necessity of imposing an absolute pro-

hibition on bills of attainder. Their view point is exemplified by the statement made by John Jay, the first Chief Justice of the United States and one of the authors of *The Federalist,* on hearing of the enactment of a New York bill of pains and penalties:

> "If truly printed, New York is disgraced by injustice too palpable to admit even of palliation." 1 *Jay, Correspondence and Public Papers* (1890) 315.

B. Expansion of the definition and application of the term "bill of attainder" by the courts of the United States.

The first explicit discussion of the term "Bills of Attainder" in the federal courts came in the period immediately after the Civil War. During the reconstruction era, both Congress and many of the state legislatures enacted statutes requiring, as a condition precedent to the exercise of certain political or civil privileges, the taking of an oath to the effect that an applicant had not participated in the "recent rebellion". In some of these statutes, participation was defined so as to include, not only actual service in the Confederate armies, but also "sympathizing with" or "aiding" those forces.

Before this Court passed upon the constitutionality of this type of legislation, three cases had arisen in the lower Federal courts. They tested the validity of the statute providing that no attorney could practice in the Federal courts, without taking a test oath. In all three cases, the act of Congress imposing the test oath [12 Stat. 502 (1862) repealed, 23 Stat. 22 (1884)] was held unconstitutional, for the reason, among others, that it was a Bill of Attainder. *In re Shorter,* 22 Fed. Cas., 16, No. 12811 (D.C. Ala.); *in re Baxter,* 2 Fed. Cas. 1043, No. 1118

(D.C. E.D. Tenn.); *Ex Parte Law,* 15 Fed. Cas. 3, No. 8126 (D.C. S.D. Ga.).

Finally, in 1867 this Court in twin cases passed upon the constitutionality of the previously cited federal attorneys' test oath statute and of the test oath clause of the Missouri Constitution. *Ex Parte Garland,* 4 Wall. (U. S.) 333 and *Cummings* v. *Missouri,* 4 Wall. (U. S.) 277, respectively.

Cummings v. *Missouri* was an appeal from the conviction of a preacher who had failed to take the test oath required by the Missouri constitution, as a prerequisite to functioning in the state as attorney, teacher, clergyman, corporate official, or in various other capacities. The oath required individuals to swear *inter alia* that they had never engaged in any past conduct hostile to the United States, or expressed any disloyal sentiments, or aided and abetted enemies of the United States.

The state of Missouri argued that this requirement did not constitute a bill of attainder since it did not inflict any punishment. In support of this contention it was urged that "to punish one is to deprive him of life, liberty, or property, and to take from him anything less than this is no punishment at all * * *" (4 Wall. 277, 320). This contention was effectively refuted by this Court, in an opinion pointing out persuasively that any deprivation of rights freely available to others constituted punishment. The Court's opinion read in part:

> "The learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law. He does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the

> source of the highest emoluments and honors. *The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.* Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment. (Italics supplied.)
>
> * * * * *
>
> "The theory upon which our political institutions rest is, that all men have certain inalienable rights —that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined." (*Id.*, at pp. 3207).

In the *Garland* case, *supra,* the Court was required to pass on the constitutionality of the previously cited statute excluding from practice in the federal courts attorneys who had not taken an oath as to their past loyalty to the United States. The Court held that this statute was also unconstitutional as a Bill of Attainder, pointing out that deprivation of the liberty of practicing before the federal courts could "be regarded in no other light than as punishment * * *" (4 Wall. 333, 377).

The same type of issue was presented to the Court in *Pierce* v. *Carskadon,* 16 Wall. (U. S.) 234. The state of West Virginia had enacted a statute providing that access

could not be had to its courts by any person who had failed to take an oath that he had not participated in or given support to the Confederates. This statute was held to be unconstitutional *per se,* as a Bill of Attainder. See also *Drehman* v. *Stifle,* 8 Wall. 595, 601.

The clear meaning of the line of cases cited above is to establish that any statute which deprives a class of persons of rights ordinarily available to other individuals in the community, as a consequence of a failure to take an oath of past or present political allegiance, is a bill of attainder. The reason for this is that such deprivation of ordinarily available civil rights in effect constitutes punishment, without judicial trial.

It was urged by the state of Missouri in the *Cummings* case, *supra,* that the test oath provision then at bar did not purport to assert the guilt of any individuals nor to impose any direct punishment upon them. The Court pointed out that it was not the form of the statute, but its effect that was controlling, stating:

> "The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure 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" (4 Wall. 277, 325).[1]

1. Of course, statutes which attempt to prescribe qualifications for particular professions or positions may be applied retroactively without violation of the Constitution, providing that there is no intention to punish, and further providing that the qualifications bear a reasonable relation to the profession or position regulated. Compare *Hawker* v. *New York,* 170 U. S. 189 and *Collins* v. *Texas,* 223 U. S. 288 with *In the Matter of Dorsey,* 7 Porter Rep. 300 (Ala. 1838) and *Gaines* v. *Buford,* 1 Dana 481, 510 (Ky., 1833).

The latest landmark in the elaboration of a realistic definition of "punishment" for purposes of the prohibition of Bills of Attainder is the decision of this Court in *Lovett et al.* v. *United States,* 328 U. S. 303. Section 304 of the Emergency Appropriations Act of 1943 (57 STAT. 431, 450) provided that none of the funds therein appropriated could be used to pay salaries to three named individuals. As this Court stated, the purpose of Section 304 was:

> "* * * to 'purge' the then existing and all future lists of Government employees of those whom Congress deemed guilty of 'subversive activities' and therefore 'unfit' to hold a federal job." 328 U. S. 303, 314.

It was argued that Section 304 was not a Bill of Attainder since it was merely a means of effectuating Congress's power to determine the conditions of employment in the federal government and that denial of such employment did not constitute a "punishment".

This Court held that Section 304 was unconstitutional. It held that the determination of "unfitness" to hold federal office because of alleged political subversion by legislative fiat constituted punishment. It further stated that:

> "* * * legislative acts, no matter what their form, when applied * * * to able 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." (328 U. S. 303, 315.)

C. Section 9(h) is a bill of attainder as that term has been defined by the courts of the United States.

As was demonstrated in Point I of this brief, Section 9(h) has the following effects:

1. It denies the benefits of the National Labor Relations Act to all unions whose officers decline, whether because they are Communists or not, to sign the test affidavits, even though those benefits are otherwise made freely available to all other unions.

2. It thereby makes it difficult for persons who refuse to sign the test affidavits, whether because of their own Communistic faith or for other reasons, to secure or retain positions as officers of trade unions. The reason for this is that unions who have such persons for officers suffer an economic detriment in being denied the benefits of the National Labor Relations Act.

In other words, Section 9(h) denies to the trade unions specified in Paragraph 1 above the benefits of legislation made available to all other unions on an equal basis, and it makes it more difficult for the individuals specified in Paragraph 2 above to secure or retain officerships in unions.

It is clear that, judged by the judicial standards set forth in Subsection B of this point, Section 9(h) inflicts punishment upon certain types of unions and certain types of individuals, by depriving them of opportunities or making it more difficult for them to attain rights made available to others. That such deprivation was the intention of Congress has been demonstrated in Point I of this brief.

It follows that Section 9(h) constitutes an intentional infliction of punishment upon easily ascertainable individuals and groups, by legislative fiat and without judicial

trial. That the punishment is not denominated as such is of course irrelevant. For the reasons pointed out in Point I B of this brief, it is equally irrelevant that the punishment takes the form of the withholding of "rights" or "privileges" accorded by Congressional legislation.

As was stated long ago in *Ex parte Law, supra*:

> "When it (federal legislation) is so plainly observable that by its own inherent force it effects the destruction of the rights of a large order of persons and is substantially and in effect a bill of pains and penalties, I know of no other term (than bill of attainder) adequate to express it." (15 Fed. Cas. 3, 10.)

The inevitable conclusion is that Section 9(h) is unconstitutional as a deliberate bill of attainder.

Article I, Section 9, of the Constitution was written into the Constitution against the backdrop of the frequent use of legislative punishments without judicial trial during the English political struggles and in the colonies themselves. The language of the prohibition against bills of attainder was deliberately made clear and unequivocal. For the Founding Fathers knew, to quote Cooley,[1] that:

> "* * * what might take place at the will of a king, under a monarchy, might also happen at the demand of an excited and passionate majority at some time in the history of a Republic."

It is respectfully submitted that this Court, always the protector of the civil rights of the American people, should

1. Cooley, *Constitutional Limitations,* (2nd ed. 1891) 295.

hold that Section 9(h) is unconstitutional, as an unmistakable bill of attainder.

CONCLUSION

The statute being unconstitutional, the judgments of the court below should be reversed and the entry of an injunction directed.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

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