SUBJECT INDEX.

Table of Authorities Cited.

Cases.

Miscellaneous.

IN THE

Supreme Court of the United States

OCTOBER, 1948, TERM

No. 336

AMERICAN COMMUNICATIONS ASSOCIATION, CIO, JOSEPH P. SELLY, ETC., ET AL.,

Appellants,

vs.

CHARLES T. DOUDS, INDIVIDUALLY AND AS REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD, SECOND REGION.

BRIEF OF NATIONAL LAWYERS' GUILD AS AMICUS CURIAE.

PRELIMINARY STATEMENT.

This brief is submitted on behalf of the National Lawyers' Guild as *amicus curiae.* The National Lawyers' Guild throughout its existence has been actively concerned with the preservation and strengthening of the fundamental rights and liberties guaranteed by the Constitution of the United States. It therefore seeks to make known its position here.

In this case the Court is confronted with constitutional issues of the utmost gravity and national importance.

These constitutional issues are presented by Section 9(h) of the Labor-Management Relations Act of 1947—popularly known as the Taft-Hartley Act. Section 9(h) requires the filing of so-called non-communist affidavits by officers of labor organizations as an indispensable condition to use by their organizations of the facilities of the National Labor Relations Board.

It is the considered judgment of the National Lawyers' Guild that Section 9(h) constitutes a serious abridgment of the constitutionally protected rights of freedom of thought, conscience, speech and assembly, of so novel, far-reaching and grave a character as to be of the utmost national consequence.

ARGUMENT.

I.

Section 9 (h) of the Labor-Management Relations Act of 1947 Is a Bill of Attainder and Therefore Violates Article I, Section 9 of the Constitution.

Article I, Section 9 of the Constitution provides unequivocally and in absolute terms: "No Bill of Attainder * * * shall be passed." A bill of attainder is a legislative enactment, no matter what its form, that applies either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment without judicial trial. *United States* v. *Lovett,* 328 U. S. 303.

Although bills of attainder have fortunately not been frequent in our history, the danger they constitute is so very great that vigilance against them must never be relaxed. The *Federalist* (No. 44) denounced them as contrary to the first principles of the social compact and to every principle of sound legislation. By means of a bill of attainder a legislative majority, operating under conditions approaching hysteria, can punish unpopular persons or groups without hearing, without opportunity for defense, without any of the safeguards of due process of law whatsoever. As Justice Story observed:

> "Bills of this sort have most usually been passed in England in times of rebellion, or 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 to trample upon the rights and liberties of others." Comm. sec. 1344.

Section 9(h) of the Labor-Management Relations Act of 1947—popularly known as the Taft-Hartley Act—is beyond question a bill of attainder. It applies to an ascertainable group—members of the Communist Party and persons "affiliated" with it. Without judicial trial it by legislative fiat inflicts punishment on persons belonging to this group, the punishment imposed by Section 9(h) consisting in deprivation of the opportunity to hold positions of leadership and trust as officers of labor unions.

Exclusion from any of the professions or of the ordinary vocations of life for conduct is punishment. As this Court stated in *Cummings* v. *Missouri,* 71 U. S. 277, 321, 322:

> "The theory upon which our political institutions rests 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 everyone, 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."

It is significant that in each of the three leading cases striking down bills of attainder—*United States* v. *Lovett,* 328 U. S. 303, *Cummings* v. *Missouri,* 71 U. S. 277, and *Ex parte Garland,* 71 U. S. 333—the punishment imposed by legislative action consisted in barring certain named persons or members of a class from a profession or positions of employment.

Being an officer of a labor union is assuredly one of the recognized vocations of life. Among a very large section of the populace this vocation is held in highest esteem. Many union officers have given long years to the service of their organization and its members and have acquired especial skill therein. Often they have been away from

the practice of their original craft or industrial occupation so long as to have lost all skill and dexterity in it.

The purpose of Section 9(h) is only too clear. Congress intended to drive Communists from positions of responsibility in the labor movement. The National Labor Relations Board has itself so construed the provision in determining the cardinal question of whether or not the officers of the parent bodies, the A. F. L. and the C. I. O., need comply:

> "The assumption is that if the facts are 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."—*Northern Virginia Broadcasters, Inc.*, 75 N. L. R. B. No. 2.

The pressure on non-complying unions and their members is tremendous. In elections held by the Board to determine collective bargaining agents, names of non-complying unions cannot appear on the ballot. They are powerless to seek redress for unfair labor practices committed by employers or other unions. Unless their officers sign they are, to all intents and purposes, outlaws—fair game for employer or rival union. It is no accident that despite their bitter opposition to Section 9(h) the overwhelming majority of unions have complied and that unions which did not comply are increasingly being forced to do so.

That the process of removing Communists from official positions in the labor movement is somewhat indirect does not render it any the less effective. When a union complies, union officers who cannot or will not sign the required affidavit lose their positions. They are effectively barred from union office. The punishment follows immediately upon the refusal to sign the expurgatory oath.

The majority of the three-judge district court below in

holding Section 9(h) valid adopted the reasoning of the majority of the three-judge district court in *National Maritime Union* v. *Herzog,* 78 F. Supp. 146 (D. C., D. C.; June 21, 1948), subsequently affirmed by this Court without consideration of the question of the validity of Section 9(h), 68 S. Ct. 1529. The bill of attainder argument was there disposed of by Judge Miller, writing for the majority, on the ground that "it is not punishment to withhold the grant of a privilege from one who cannot or will not meet the valid conditions upon which it is afforded." (164)

Such reasoning is, we submit, unrealistic. The privilege withheld—the privilege of using the facilities of the National Labor Relations Board—if that is only a privilege—is a *privilege available to unions and the employees whom they represent.* But the vice of Section 9(h) as a bill of attainder is its *punishment of union officers.* This distinguishes the instant case from the several decisions upholding the validity of legislative imposition of conditions upon the pursuit of a specified profession or employment. The strongest of these cases is probably *United Public Workers* v. *Mitchell,* 330 U. S. 75, where the majority of a closely divided court held constitutional the Hatch Act forbidding government employees to engage in political activity, admittedly a right protected by the First Amendment. There the favor bestowed was governmental employment, and the persons in question had the choice between accepting the favor and foregoing the right to engage in political activity, or in declining the favor and exercising the right. There the condition attached to the privilege could be met at the discretion of the person who sought to become the recipient of the favor. But here discretion as to the exercise of the "privilege" is lodged not in the person whose occupational rights are impaired, who is punished, but in others—the union and its members.

It is absurd to attempt to equate the instant situation with the constitutional power of a State to bar persons previously convicted of a felony from the practice of a profession, which is affirmed in such cases as *Hawker* v. *New York,* 170 U. S. 189.

As was noted in the dissenting opinion of Judge Major in *Inland Steel Company* v. *N. L. R. B.,* 170 F. (2d) 247 (C. C. A. 7th; September 23, 1948), the other leading case concerned with the validity of Section 9(h), the legislative history of the Act demonstrates—and it was so admitted in the brief filed by the Board in that case—that Congress recognized that some labor organizations with Communist officials were willing and able to cooperate in effectuating the policies of the Act, but that despite this the Congress placed such Unions in the same category with those whose officials were unwilling to do so, and denied to each class alike the benefits and facilities which Congress had provided. Judge Major remarked:

> "The legislative fire * * * was not directed merely at those whom it intended to disable. The range included a scope of far greater area. It encompassed what it recognized as good Communists as well as the bad. And of more importance it included countless patriotic employees and Union officials who carried no taint of Communism. All alike were made to suffer the same fate and required to answer for the sins of a few, even one." (261)

It is not surprising, therefore, that one of the principal studies of Section 9(h) finds that "Perhaps the most conspicuous trait of the provision is that it is clearly a 'bill of attainder,'" Barnett, "The Constitutionality of the Expurgatory Oath Requirements of the Labor-Management Relations Act of 1947" 27 Ore. L. Rev. 85, 88 (1948).

To sum up, even though the Congress has power to impose certain conditions on the use of the Board's facili-

ties, it cannot impose conditions which operate, even though circuitously, to punish by legislative fiat without judicial trial members of an ascertainable class.

Oyama v. *California,* 332 U. S. 633, 636:

> "In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect."

The pattern of expurgatory oath embodied in Section 9(h) could, if permitted to continue, be followed to bar millions of citizens whose political views are unpopular from any and all kinds of gainful employment. Recently there have been localized instances of industrial workers being given this arbitrary "sign the oath or else" treatment, on pain of loss of employment and blacklisting in the community. In the highest levels of the motion picture industry a tendency in the same direction is observable. School teachers, lawyers—even corporation executives, travelling salesmen and farmers—may be next.

The National Lawyers' Guild urges this Court to strike down Section 9(h) for what it is—a thoroughly reprehensible bill of attainder.

II.

Section 9 (h) Violates the Most Fundamental of All Freedoms—Freedom of Thought and Conscience—Guaranteed by the First Amendment.

The words of Mr. Justice Jackson in *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624, 642, are already classic:

> "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."

No one can candidly deny that Section 9(h) is designed to compel the disclosure of political belief and opinion. In the very words of the Board itself in *Northern Virginia Broadcasters, Inc.*, 75 N. L. R. B. No. 2, it is "Pressure * * * to stand up and be counted." It is true that union officials are not thereby forced to declare their political philosophy and affiliations under pain of imprisonment. But union officers by Section 9(h) are given a clear alternative: to comply by permitting this invasion of the privacy of their personal convictions or, according to the analysis of Section 9(h) made by the National Labor Relations Board itself, to invite being driven from office as a consequence of their refusal to comply. Exclusion from the recognized vocation of being a labor union officer is, as has been shown above, punishment. And to compel action under pain of punishment is coercion.

Thus the 80th Congress imposed, under the guise of regulating commerce, a political and intellectual orthodoxy for union officers. The test of orthodoxy is the so-called non-communist affidavit, by which the individual swears that he is not a member of the Communist Party or affiliated with that party and *that he does not believe in* and is not a member of or supports any organization that believes or teaches the overthrow of the government by force or by any illegal or unconstitutional method.

It is important to note that the affidavit proscribed requires an oath that one does not believe in certain things. As was noted by Mr. Justice Murphy in his dissenting opinion in *Jones* v. *City of Opelika*, 316 U. S. 584, 618, which subsequently became a majority opinion of this Court in 319 U. S. 103:

> "Freedom of speech, freedom of the press, and

> freedom of religion all have a double aspect—freedom of thought and freedom of action. Freedom to think is absolute of its own nature."

Despite the law against seditious acts, simple belief in the desirability of the overthrow of the government is not illegal. It is of course well known that Thomas Jefferson considered a revolution now and then highly desirable. He even wrote, perhaps in jest, but surely as expressing his convictions if only by way of hyperbole:

> "God forbid we should ever be twenty years without such a rebellion. * * * What signify a few lives lost in a century or two. The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is its natural manure." (Letter to Wm. S. Smith, 1787.)

Abraham Lincoln, in his First Inaugural Address, gave us these oft-repeated words:

> "This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their constitutional right of amending it, or their revolutionary right to dismember or overthrow it."

The orthodoxy which the 80th Congress sought to impose by means of Section 9(h) is not concerned with what one may do or say. *The orthodoxy of Section 9(h) relates to what one may think.* Section 9(h) is thought control for union officers and would-be union officers.

Under the Bill of Rights belief is not subject to restriction, no matter how unpopular the particular belief may be. The thoughts, opinions, beliefs, faith, conscience of each individual are inviolable—they cannot be invaded or even pried into by agents of government; they cannot be forced into the open through such a device as the expurgatory oath; they cannot be punished. *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624; *Stromberg* v. *California,*

283 U. S. 359. Indeed, the words of this Court in *Cummings* v. *Missouri,* 71 U. S. 277, 318, condemn Section 9(h) no less than the test-oath involved in that case:

> "The oath is directed not merely against overt and visible acts of hostility to the government, but is intended to reach words, desires, and sympathies, also."

Outraged by this assault on their personal liberties, outstanding union leaders noted for their anti-Communism have refused to comply.

It should be noted, furthermore, that under Section 9(h), if one officer of a union were in good faith to swear that he is a member of the Communist Party, but does not believe in overthrow of the United States Government by force or other illegal or unconstitutional means, his union would be denied recourse to the facilities of the Board. This would occur despite the fact that the Communist Party, though subject to widespread hostility and profound antipathies, is a legal political party which in some places in the United States not only runs candidates for public office, but occasionally succeeds in electing them. As a political party it enjoys, together with its members, all the rights which every other legal political party enjoys. *Communist Party* v. *Peek,* 20 Cal. (2d) 536, 127 P. (2d) 889; *Feinglass* v. *Reinecke,* 48 F. Supp. 438.

In the perspective of constitutional law, to make a labor union's access to the facilities of the National Labor Relations Board conditional upon its officers' filing affidavits that they are not members of the Communist Party is no more valid than it would be to make it conditional upon their filing affidavits that they are not members of the Democratic Party or the Republican Party.

The system of democratic liberties we prize so highly cannot long survive this forcing men to disclaim "dangerous thoughts". Indeed, John Milton placed at the very

beginning of his "Areopagitica", which is one of the primary sources of our constitutional liberties, the following quotation from Euripides:

> "This is true liberty, when free-born men
> Having to advise the public may speak free,
> Which he who can, and will, deserves high praise,
> Who neither can nor will may hold his peace;
> What can be juster in a State than this?"

The 80th Congress has flouted the First Amendment in enacting Section 9(h). It is, we submit, the solemn duty of this Court, painful though it be, to correct this grave error.

III.

Section 9 (h) Violates the Constitutionally Protected Freedom of Workers to Assemble in Unions, and to Select Officers of Their Own Choosing.

Free speech and free assembly are of the very essence of the rationale of labor organizations, which have been formed out of the necessities of the employer-employee relationship in modern society. Such associations of individuals for a common purpose are expressions of the rights of free speech, press, assembly and petition, thought and conscience guaranteed by the First Amendment.

This was specifically recognized by this Court in the great historic case of *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33, where it said: "Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers." And in *Thomas* v. *Collins*, 323 U. S. 516, 546, 547, Mr. Justice Jackson, in concurring, wrote:

> "The necessity for choosing collective bargaining representatives brings the same nature of problem to

> groups of organizing workmen that our representative democratic processes bring to the nation. Their smaller society, too, must choose between rival leaders and competing policies. * * * If free speech anywhere serves a useful purpose, to be jealously guarded, * * * it would be in such a relationship. * * * Free speech on both sides and for every faction on any side of the labor relation is * * * a constitutional and useful right."

"It cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind, through regulating the press, speech and religion. In this field every person must be his own watchman for the truth." *Thomas* v. *Collins,* 323 U. S. 516, 545.

"Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624, 642.

It is for the members of the union, not the members of Congress, to determine who shall and who shall not preside at a union meeting, safeguard the union funds, and organize a strike. Judge Prettyman, in his dissent in *National Maritime Union* v. *Herzog,* 78 F. Supp. 146, has aptly described the manner in which Section 9(h) affects labor unions:

> "It is directed to the union and not to the individual. It provides, in effect, that if the union wishes to become the exclusive bargaining representative of its members, it cannot use the services of persons who belong to the proscribed political party, and the persons who belong to that party cannot become union

> officers. This is an abridgement of the rights of the members of the union to select their officers. Since the officers are, realistically and in common practice, the managers of the affairs of the organization and the spokesmen in its behalf, limitations upon their selection are limitations upon the speech and assembly of the members. Certainly the selection of officers is an essential element of an assembly and also of mass speech by a group of individuals." (178)

This attempt at intellectual guardianship of workers and their unions is not rendered less offensive to the Constitution by its mask of indirection. Counsel for the Board, in defending Section 9(h), has taken the position that Section 9(h) does not deny any constitutional right, but merely imposes a condition by which a union officer by his own voluntary act may deprive his union, not of a constitutional right, but of the statutorily created privilege of using the facilities of the National Labor Relations Board, a privilege to which, so it is argued, Congress may validly attach conditions bearing a reasonable relationship to the public policy of the Act, which it is argued, is simply to promote the free flow of commerce by lessening industrial disputes. Judge Major, dissenting in *Inland Steel Company* v. N. L. R. B., 170 F. (2d) 247, subjected this strained rationalization to what is, we submit, irrefutable criticism:

> "It is well to keep in mind * * * what the Board appears to overlook, that is, that employees have certain constitutional rights irrespective of any benefit bestowed by the Wagner Act or its successor. (Citing *N. L. R. B.* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 33, and *Thomas* v. *Collins,* 323 U. S. 516, 539, as quoted above.) * * * And as employees have a constitutional right to organize, to select a bargaining agent of their own choosing and, if members of a Union, to elect the officials of such Union, so I would think that the bargaining agent when so selected had

a right of equal standing to represent for all legitimate purposes those by whom it had been selected. The employees in the instant situation have availed themselves of constitutional rights in selecting the Union as their bargaining agent and in the election of its officials.

"At this point it is pertinent to observe that the Wagner Act was enacted primarily for the benefit of employees and not for Unions. The latter derive their authority from the employees when selected as their bargaining agent, rather than from the law. * * * This was not a Congress-created right but the recognition of a constitutional right, which Congress provided the means to protect. * * *

"In my view, the condition attached to the Board's order in the instant case is a direct and serious impairment upon these constitutional rights of both employees and the Union. The rights of the former 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." (258)

Section 9(h) is inevitably working fundamental changes in the functioning of labor organizations, making them no longer freely responsive to the freely expressed decisions of their members. Qualifications for office are now secondary to the all-important affidavit of orthodoxy. Judge Major has also forcefully stated this (at page 259):

"The upshot of the whole situation is that employees when members of a Union are under a continuing compulsion to elect officers who will meet the congressional prescription in order that their Union may remain in the good graces of the Board, and they must do this even though it be contrary to their belief, conscience and better judgment. Experience, ability, honesty and integrity of candidates for official positions in the Union must be cast aside."

The National Lawyers' Guild respectfully urges the Court to afford these violated rights of union members the full protection of the First Amendment by striking down Section 9(h).

Conclusion.

The preferred place given in our scheme of government to the great, indispensable democratic freedoms secured by the First Amendment gives these liberties a sanctity and a sanction not permitting dubious intrusions. Therefore, whereas statutes are ordinarily presumed to be valid unless violation of the Constitution is proven beyond all reasonable doubt, when a law appears to encroach upon a civil liberty or a civil right—particularly freedom of thought and conscience, religion, speech, press and assembly—the presumption is that the law is invalid. *Thomas* v. *Collins,* 323 U. S. 516, 529, 530; *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152; *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624.

The several considerations set forth above exhibit Section 9(h) of the Labor-Management Relations Act of 1947 as encroaching upon fundamental civil liberties with clarity far more than sufficient to bring into operation this presumption of unconstitutionality.

Section 9(h) violates the Constitution in several other grave particulars—by the vagueness of its terms and by its employment of the illegitimate device of guilt by association, especially. We have, nevertheless, sought to conserve the time of the Court by limiting this statement of the position of the National Lawyers' Guild to the three grounds which it considers most novel, significant and ominous.

The National Lawyers' Guild most strongly urges this Court to declare Section 9(h) null and void as being in violation of the Constitution of the United States.

Respectfully submitted,

NATIONAL LAWYERS' GUILD,
ROBERT W. KENNY, of Los Angeles,
President.
ROBERT J. SILBERSTEIN,
of Washington, D. C.,
Executive Secretary.

By RICHARD F. WATT,
of Chicago,
Chairman, Labor Law Committee,
and
EDMUND HATFIELD,
of Chicago,
Attorneys for National Lawyers' Guild.