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IN THE

Supreme Court of the United States

October Term, 1948

No. ——

UNITED STEELWORKERS OF AMERICA, *et al.*,
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

United Steelworkers of America, CIO, *et al.*, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit entered on September 23, 1948, insofar as it, in enforcing an order of the National Labor Relations Board, sustained a condition, which the Board had attached, that the order become effective only upon compliance by the Union with Section 9 (h) of the National Labor Relations Act.[1]

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[1] The decree below was entered in two separate proceedings for review of the Board's order, which were consolidated in the court below (Company App. 401). One of these proceedings (No. 9612 below) was brought by Inland Steel Company to review the order of the Board directing it to bargain collectively with respect to its pension and retirement policies. The other proceeding (No. 9634 below) was brought by United Steelworkers of America, CIO, by its President, Philip Murray, Local Unions No. 1010 and 64, United Steelworkers of America, CIO, and members of United Steelworkers of America, CIO (herein collectively called the Union), to review the provision which the Board attached to its order, conditioning its effectiveness upon compliance by the Union, within thirty days of the date of the order, with the requirements of Section 9 (h) of the Act.

The record in this Court consists of three volumes, these being the appendices which were filed in the court of appeals by, respectively, Inland Steel Company, the Union, and the Board. In this petition the appendix filed by the Union will be referred to as Union App.; the appendix filed by Inland Steel Company will be designated as Company App.; and the appendix filed by the Board will be designated as Board App. The proceedings in the court of appeals have been printed and bound in with the appendix filed by the Company.

OPINIONS BELOW

The opinion of the Court of Appeals (Company App. 406) has not yet been reported. The findings of fact, conclusions of law, and order of the Board are set out at Union App. 1 and at Company App. 56.

JURISDICTION

The decree of the Court of Appeals was entered on October 28, 1948 (Company App. 442). The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254, and under Sections 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

Whether Section 9 (h) of the National Labor Relations Act, which withholds from a union the remedies otherwise available under the Act for infringement of its rights, and makes illegal a union shop contract, unless each officer of the union has filed a non-communist affidavit, is unconstitutional, for any one of the following reasons:

(1) Because it deprives unions, union officers, and members of unions, of freedom of thought, speech, and assembly, in violation of the First Amendment of the United States Constitution.[2]

(2) Because it is not narrowly drawn to meet the evil purportedly aimed at, while invading as little as possible the guarantees of the First Amendment, but invades basic rights whose impairment is unnecessary to the provision's claimed purpose, in violation of the First and Fifth Amendments.

(3) Because it is vague and indefinite, and imposes tests of guilt by association, all in violation of the First and Fifth Amendments.

(4) Because it constitutes a bill of attainder, within the meaning of Article I, Section 9, Clause 3 of the Constitution.

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[2] The case also presents the related question whether Section 9 (h) interferes with the freedom of unions, officers and members to engage in political activity, in violation of the Ninth and Tenth Amendments. See *United Public Workers* v. *Mitchell*, 330 U. S. 75, 94-95. For brevity, this issue is not separately discussed in this petition, but it will be argued if the the petition is granted.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Statement.

STATEMENT

Upon the basis of an amended charge filed on August 16, 1946, the National Labor Relations Board issued a complaint, dated August 19, 1946, against Inland Steel Company, alleging that the Company had engaged in and was engaging in certain unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act.

On January 8, 1947, the Trial Examiner issued his Intermediate Report finding that the Company had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, including bargaining collectively, upon request, with the Union as the exclusive representative of the employees in the appropriate bargaining unit.

The Taft-Hartley Act, the "Labor Management Relations Act, 1947" (Public Law 101, 80th Congress, 1st Sess., 61 Stat. 136, 29 U.S.C.A. Sec. 141 *et seq.*) became effective on August 27, 1947. It re-enacted and amended the National Labor Relations Act. Among the provisions thus added to the old Act by the Taft-Hartley Act are Sections 9 (f), (g) and (h). Section 9 (h) provides as follows:

> (h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government

> by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.[3]

Section 9 (f) and (g), which are not directly involved in this case, impose upon labor organizations certain obligations, subject to the same sanctions as are imposed by Section 9 (h), to file information with the Secretary of Labor relating to the finances of labor organizations, their internal affairs and structure.

On April 12, 1948, the Board sent to the parties by mail its decision and order (Union App. 1; Company App. 56). The Board's order is prefaced by the following statement:

> "The Union has not complied with the provisions of Section 9 (f), (g) and (h) of the amended Act. Our remedial order therefore shall be in part conditioned upon its complying with that section of the amended Act, within 30 days from the date of the order herein." [4]

The order, in brief summary, requires the Company to bargain collectively with the Union with respect to its pension and retirement policies if and when the Union shall have complied, within 30 days from the date of the order, with Section 9 (f), (g) and (h). The Company is likewise ordered, subject to the same condition, to refrain from making any unilateral changes affecting the employees represented by the

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[3] Section 9 (c), referred to in Section 9 (h), is the section in the Act providing for the holding of elections by the Board upon petition by labor organizations, individuals, employees, groups of employees and employers.

Section 9 (e), referred to in Section 9 (h), provides for the holding of an election for the purpose of determining whether a majority of the employees authorize the bargaining agent to negotiate an agreement with the employer making union membership a condition of employment. In the absence of such an authorization, the negotiation of such an agreement is made illegal by Section 8 (b) (1) of the Act; cf. Section 8 (a) (3).

Section 10 (b), referred to in Section 9 (h), is the provision of the Act authorizing the Board to issue complaints that unfair labor practices have been committed.

[4] In thus conditioning its order the Board cited *Matter of Marshall & Bruce Co.*, 75 N.L.R.B. 90, where the Board held that, while the failure of a union to comply with Section 9 (f), (g) and (h) of the Act in a case based upon a complaint issued before the passage of the Act does not impair the power of the Board to issue remedial orders in view of the prospective language of the amendments to the Act, an order requiring an employer to bargain collectively with a labor organization looks toward a future relationship and is tantamount to

Union in its pension and retirement policies, without prior consultation with the Union. The Company is also required by the Board's order to post certain notices for a period of 30 days following the receipt of said notices and, in event of compliance by the Union, for 30 days thereafter.

On May 14, 1948, the Union filed with the Board a document (Union App. 56) entitled "Return by United Steelworkers of America to Conditional Order of National Labor Relations Board," in which the Union recited that it had complied with Section 9 (f), (g) of the Act, as amended, within the time limitations prescribed in the Board's Decision and Order of April 12, 1948, and its Rules and Regulations. The Union further recited in its Return that it had not complied with the requirements of Section 9 (h) of the Act, as amended, for the sole reason that the provisions of Section 9 (h) are illegal, unconstitutional and void and that said section violates Article I, Section 9 (3) of the Constitution of the United States and the First, Fifth, Ninth and Tenth Amendments to the Constitution of the United States. The Union therefore requested the Board to make its decision and order of April 12, 1948, unconditional in form and effect on the ground that the Union had complied with all of those provisions of Section 9 of the National Labor Relations Act, as amended, which are not illegal or unconstitutional.

Thereafter on May 17, 1948, the Board issued an order (Union App. 62) denying the Union's request that the Board's

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a certification. The Board held therefore that it would not effectuate the policies of the Act to place the union in the position of a newly certified bargaining representative unless and until it qualifies for certification. Of significance here is the Board's statement that:

"We are convinced that Sections 9 (f), (g) and (h) not only provide procedural limitations upon the Board's power to act with respect to cases arising after the effective date of the amendment, but also embody a public policy denying utilization of the Board's processes directly to aid the bargaining position of a labor organization which has failed to comply with the foregoing Sections. We cannot believe that Congress intended the full force of Government to be brought to bear upon an employer to require him to bargain in the future with a Union which we now lack the authority to certify. Therefore, inasmuch as this Union has not complied with Section 9 (f), (g) and (h) and is not presently qualified for certification as bargaining representative, our remedial order in this proceeding shall in part be conditioned upon compliance by the Union with that Section of the amended Act, within 30 days from the date of the order herein."

decision and order of April 12, 1948, be rendered unconditional in form and effect. On June 10, 1948, the Union filed in the court below a petition to review the Board's orders of April 12, 1948 and May 17, 1948, insofar as their effectiveness was conditioned upon prior compliance by the Union with Section 9 (h) (Company App. 389). The Company likewise petitioned to review and set aside the Board's order insofar as it imposed obligations upon the Company (Company App. 1). Thereafter the court below ordered the cases consolidated (Company App. 401).

On September 23, 1948 the court below rendered a decision upholding the order of the Board in all respects (Company App. 406). The court was unanimous in sustaining the order insofar as it directed the Company to bargain collectively with the Union with respect to its pension and retirement policies, to post notices, etc. As respects the provision of the Board's order conditioning its effectiveness upon compliance by the Union with Section 9 (h) of the Act, Judges Kerner and Minton held that the statutory provision is constitutional, while Judge Major (who spoke for the court on the balance of the case), was of the view that Section 9 (h) is unconstitutional. The reasoning of both the majority and the dissent is more fully developed under Reasons for Granting the Writ.

REASONS FOR GRANTING THE WRIT

The issue involved in this case is the constitutionality of Section 9 (h)—the so-called non-communist affidavit provision—of the Act. The constitutional questions presented are of great importance, not only to labor unions and their members, and to employers, but to the country as a whole, and should be passed upon by this Court. That the constitutional issues are substantial, as well as important, will fully appear from the discussion below.

The validity of the non-communist affidavit provision is already before the Court in *American Communications Association* v. *Douds,* No. 336 this Term, probable jurisdiction noted November 8, 1948. That is a suit by a union, the officers of which have not filed the non-communist affidavits required by the Act, to enjoin its exclusion from the ballot in an election

under the Act to select a bargaining representative. The present case presents the constitutional issues in a different context: here the sanction for non-compliance with the affidavit provision is that the Board and the court below have withheld the remedies against an unfair labor practice which they would otherwise afford. To have the present case before the Court, in addition to the *American Communications Association* case, would therefore facilitate fuller understanding of the impact upon unions of the non-communist affidavit requirement, and of the relation of that impact to the constitutional issues. Also, it may be advantageous to have before the Court a case which comes up in the regular manner, upon a record made before the Labor Board and upon petitions to enforce or set aside a Board order. It is therefore requested that, if the Court grants this petition, it put the case down for argument at the same time as the *American Communications Association* case.

1. The contention that the statute deprives unions, union officers and union members, of freedom of thought, speech, and assembly, in violation of the First Amendment, presents a substantial and important issue which should be reviewed by this Court.

The statutory provision in question, Section 9 (h) of the Act, withholds from labor unions the remedies otherwise available to them under the Act for the prevention or redress of unfair labor practices by employers,

> "unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

Not only does Section 9 (h) withhold unfair labor practices remedies from a union any of whose officers fails to file the affidavit, but it deprives such a union of the opportunity to become a collective bargaining representative through the processes of the Act, and it makes illegal a union shop contract

between an employer and a union any of whose officers has failed to file the required affidavit.[5]

If the Act directly provided that a labor union could not select as an officer a member of the Communist Party, or a person who was affiliated with that party, or who believed in, or was a member of or supported an organization which believed in, the overthrow of the United States Government by force or by any illegal or unconstitutional methods, such a provision would, under the decisions of this Court, be unconstitutional as a deprivation of freedom of thought, speech, and assembly, in violation of the First Amendment. The Constitution bars curbs on opinion or belief. *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624; *United States* v. *Ballard,* 322 U. S. 78, 86; and see *Minersville School District* v. *Gobitis,* 310 U. S. 586, 606 (dissenting opinion of Stone, J.); *Jones* v. *City of Opelika,* 316 U. S. 584, 608, 618 (dissenting opinions of Stone and Murphy, J J., which were adopted as the Opinion of the Court in 319 U. S. 103). Yet that is exactly what this statute seeks to do. And, in contrast to non-discriminatory statutes of general application which incidentally collide with opinion or belief, this statute expressly singles out for attack the opinions and beliefs of particular groups.

In addition, advocacy or expression may be curbed only if it presents a clear and present danger to a substantial interest which the State or Nation has a right to safeguard. *Bridges* v. *California* 314 U. S. 252, 263; *Thornhill* v. *Alabama,* 310 U. S. 88, 104. No showing of clear and present danger has been made or attempted in the present case. "The Board in substance concedes that the section cannot be justified by what the Supreme Court has characterized as the 'clear and present danger rule.'" (Major, J., dissenting, Company App. 422). Nor did the majority below seek to uphold the statutory provision on this basis.

What the Board argues, and what the majority below held, is that the remedies afforded to unions by the Act are accorded by Congress and not by the Constitution; that Congress can

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[5] Section 9 (h) imposes certain important additional disabilities and handicaps upon unions whose officers fail to conform to its requirements. These are not enumerated or discussed here, in the interest of brevity.

make such merely statutory rights available, or can withhold them, on any basis it sees fit, without raising a question under the First Amendment; and that therefore the only constitutional test which Section 9 (h) must meet is that the condition it imposes be reasonably related to the effectuation of a policy which Congress is free to adopt.

But while Congress can unquestionably repeal the National Labor Relations Act, that surely does not answer the question whether it can make rights under the Act conditional upon the acceptance of restrictions which the constitution forbids. This Court has held many times and in a variety of circumstances that the Government cannot exact the surrender of constitutional rights even as the price for the enjoyment of privileges which it is free to withhold completely. Thus this Court has repeatedly stricken down infringements of civil rights which were sought to be imposed in connection with the use of facilities whose use could have been entirely and unconditionally withheld. Such cases have involved denial of the use of the mails (*Hannegan* v. *Esquire*, 327 U. S. 146), the public parks (*Saia* v. *People of New York*, 334 U. S. 558), the public schools (*West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624; *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203), and public thoroughfares and highways (*Hague* v. *C.I.O.*, 307 U. S. 496; *Marsh* v. *Alabama*, 326 U. S. 501). Not only these but even cases involving only property rights (see, for example, *Frost* v. *Railroad Commission*, 271 U. S. 583, 593) make it clear beyond question that it is no defense to a denial of constitutional guarantees that the denial has been accomplished by the withdrawal of a facility.

United Public Workers v. *Mitchell*, 330 U. S. 75, relied on by the majority below, is readily distinguishable, on each of two grounds. In the first place, government employees, according to the four majority justices, occupy a special relation with respect to the government, which permits the latter to regulate their political activities within reasonable limits. It can hardly be thought that union officials owe, or can have imposed upon them, any similar duty to be politically neutral. In the second place, the Hatch Act, involved in the *Mitchell*

case, regulated only political activities, while Section 9 (h) deals with thoughts and beliefs as well; and it was on the basis of precisely this distinction that the Hatch Act was upheld. See 330 U. S. at 100.

Moreover, the effect of the non-communist affidavit provision is not merely to withhold from unions rights which they would not have anyway but for the National Labor Relations Act. On the contrary, it leaves non-complying unions worse off than they would be if the Act had not been passed, and deprives them of basic rights which long antedated the Act. For example, the Act outlaws the closed shop, but permits the union shop if certain onerous requirements are met. But even a union shop is forbidden if any officer of the union has failed to sign the non-communist affidavit. This is not the withholding from unions of a statutory privilege or remedy: it is the taking away, if they do not surrender basic civil rights, of other rights which they have long enjoyed.

Again—

> "to deny a union the opportunity to appear before the Board and have its name put on the ballot in a representation proceeding does not merely withhold a benefit, but sets in motion restrictions which would not exist if the Board had not been established. A union which is able to meet the requirements of 9 (h) will have the field to itself in a representation proceeding, and its name alone will appear on the ballot, even though another unqualified union previously represented, or was seeking to represent, the same employees. The practical advantage which this would give the qualified union is obvious. Moreover, if it won the election, its unqualified competitor would no longer be free to bargain even for its own members, and if the competitor took economic action to secure recognition, it would be guilty of an unfair labor practice preventable by injunction under 8 (b) (4) (C). In short, the combined effect of all these related provisions is to put unqualified unions in a worse position than if there were no NLRB."

Cox, Some Aspects of the abor Management Relations Act, 1947, 61 Harvard Law Review 1, 35.

2. Even apart from the government's failure to make any showing of clear and present danger, such as would support

some curb upon the freedom of speech and assembly normally protected by the First Amendment, Section 9 (h) does not meet the standards with which legislation restricting civil rights must comply. It is not narrowly drawn to meet the evil purportedly aimed at; it strikes at opinions and beliefs, and not merely at advocacy or expression; and it is vague and indefinite. These deficiencies present substantial issues under the First and Fifth Amendments, which this Court should review.

Statutes restrictive of civil rights protected by the Constitution are to be upheld, if at all, only if they are "narrowly drawn to cover the precise situation giving rise to the danger." *Thornhill* v. *Alabama,* 310 U. S. 88, 105; *Schneider* v. *New Jersey,* 308 U. S. 147, 162. The evil to which section 9 (h) is directed is, according to the Board, the utilization of labor organizations, by officers of such organizations holding the proscribed political beliefs, to foment industrial strikes for political purposes. But the legislation does not, in fact, direct itself to this claimed danger. This is not a statute which regulates, limits or prohibits a particular kind of strike. Unions, whether they file the affidavits or not, are left free to conduct political strikes—that is one of the few rights left them. The statute attacks belief, not conduct.

Finally, we wish to urge that Section 9 (h) is so vague in describing the political beliefs which it proscribes as to violate the due process clause of the Fifth Amendment; and that even if it is not, viewed as a regulatory measure, so vague as to fall within the ban of the due process clause, its vagueness nevertheless condemns it under the stricter standards of definiteness which the First Amendment imposes on statutes restrictive of free speech and which the due process clause requires of criminal statutes. *Winters* v. *New York,* 333 U. S. 507, 509-510. For brevity we do not fully develop this point here, but will urge it if the petition is granted. Likewise we wish to reserve the right to argue that Section 9 (h) violates the First and Fifth Amendments by using the standard of guilt by association, *i.e.,* membership, affiliation, or support.

3. The contention that Section 9 (h) constitutes a bill of attainder, within the meaning of Article I, Section 9, Clause 3

of the Constitution, presents a substantial and important issue of constitutional law which should be reviewed by this Court. The decision of the majority below, rejecting the contention, is, moreover, in conflict with the principles laid down by this Court long ago in *Cummings* v. *Missouri,* 4 Wall. 277, and *Ex parte Garland,* 4 Wall. 333, and recently reaffirmed in *United States* v. *Lovett,* 328 U. S. 303.

Here, just as in the *Cummings* and *Garland* cases, persons engaging in a particular occupation are required to take an expurgatory oath. And here, just as in those cases, the requirement was imposed by Congress for the purpose of driving out of the occupation in question those who would not, or could not without subjecting themselves to prosecution, take the oath.[6] Again, here, as in those cases, the oath is addressed to opinions, beliefs and sympathies.

That the statute operates by putting pressure on union members to remove the proscribed officials, rather than by banning them directly, does not take it out of the class of a bill of attainder. For the earmark of an attainder is punishment by legislative fiat, without judicial trial. To make decisive whether the punishment is imposed directly, or through others who are coerced into administering it, would exalt form at the expense of substance. The assertion of the majority below that Section 9 (h) "operates not to impose punishment but to safeguard important public interests against potential evil" (Company App. 440) could with equal justification have been made of the expurgatory oath requirements involved in the *Cummings* and *Garland* cases. That exclusion from a particular profession is a "punishment" which may be imposed, if at all, only by courts and not by legislatures was the precise holding of those cases, and of the *Lovett* case as well.

4. While no conflict of decisions has yet arisen, the cases thus far decided show considerable diversity of opinion among lower court judges on the constitutionality of Section 9 (h). In the present case two judges (Minton and Kerner) upheld

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[6] "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 statute, while Judge Major thought it unconstitutional. The *American Communications Association* case was heard before a three-judge district court (S.D.N.Y.), with two judges (Swan and Coxe) upholding the constitutionality of 9 (h), and one judge (Rifkind) holding it to be unconstitutional. In *National Maritime Union* v. *Herzog,* 78 F. Supp. 146 (Dist. Col.), also, two of the judges (Miller and Laws) of the three-judge district court upheld the statute, while the third (Pretty-man) was of the view that it is unconstitutional. This Court affirmed the *Herzog* decision *per curiam,* without ruling upon the validity of Section 9 (h). 334 U. S. 854.

5. The issue of the constitutionality of Section 9 (h) is of great importance to unions and union members. Among the unions which have not complied with Section 9 (h), as of November 22, 1948, are:

	Estimated membership [7]
United Steelworkers (CIO)	928,670
United Mine Workers (Ind.)	600,000
Electrical, Radio & Machine Workers (CIO)	505,000
United Mine, Mill & Smelter Workers (CIO)	108,625
International Typographical Union (AFL)	92,530
United Public Workers of America (CIO)	86,000
Longshoremen's & Warehousemen's Union (CIO)	75,000

Thus more than 2,000,000 union members are at the present time being denied the protection of the National Labor Relations Act, and subjected to other disadvantages heretofore discussed, because one or more of the officers of their union has refused to file the non-communist affidavit. In the present case Philip Murray and other officers of the Union have refused, as a matter of principle, and pending a decision of this Court, to comply with the statutory requirement, because they think it violates important constitutional rights of unions, their officers and members.

This uncertainty as to the provision's status, with the consequent loss of rights under the National Labor Relations Act,

[7] These figures are taken from Bulletin No. 937, U. S. Dept. of Labor, Bureau of Labor Statistics (June, 1948), with the exception of that for the United Electrical, Radio and Machine Workers, which is that union's own estimate given to counsel for petitioners.

should be dispelled as soon as possible by a decision of this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted; and it is further requested that this case be set down for argument at the same time as *American Communications Association* v. *Douds*, No. 336, this Term.

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November, 1948.