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CASES CITED

AUTHORITIES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 336

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

v.

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

REPLY BRIEF FOR APPELLANTS

Most of the arguments made by the Government in its brief were anticipated in the brief heretofore filed by appellants and no reply is necessary. Many of the contentions of the Government, and particularly those respecting the effect of this legislation upon a non-complying union, are answered so completely by the *amicus* brief filed herein by the Congress of Industrial Organizations, that no further discussion is required. This brief will therefore be confined to the few issues on which further discussion seems necessary, to the relevant cases decided since the submission of our principal brief, and to some comment on the Government's argument that the statute meets the "clear and present danger" test, an argument made now for the first time.

POINT I

Section 9(h) restricts first amendment rights, not conduct.

The heart of the Government's argument is that "Neither membership in the Communist Party nor belief in violent overthrow of the government are, as such, targets of the statute. The target is potential *conduct* which stems from such membership or belief." (Government's Brief, p. 14; italics in original.)

But the very language of the statute and its legislative history (Appellants' Principal Brief, pp. 40-44) clearly negate this contention of the Government. Indeed, it seems presumptuous to urge upon this Court that although Congress specifically conditioned the use of the Board's facilities upon the disavowal of certain beliefs and political affiliations, Congress meant something quite different, i.e., to regulate and eliminate certain conduct of union officers which, it is alleged, such beliefs and affiliations are likely to create.

But assuming, *arguendo,* that Congress was in fact seeking to eliminate certain conduct deemed to be undesirable, under our Constitution and the cases interpreting it, Congress must then specifically legislate against that conduct. It may not make broad restrictions on our basic freedoms to eliminate the narrower abuse. Thus, for example, although the conduct of littering the streets might be an appropriate target of legislation, a legislature cannot prevent leaflet distribution to accomplish that end. *Schneider* v. *New Jersey,* 308 U. S. 147. Likewise, fraud is an abuse which legislation might properly try to eliminate, but a legislature cannot reach that end by requiring religious groups to be licensed before they may canvass from door to door. *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Jones* v. *Opelika,* 316 U. S. 584, reversed on argument, 319 U. S. 103. Therefore, even were elimination of certain improper conduct the actual aim of this legislation, imposing a dis-

ability based on one's belief or political affiliation must be held an improper and unconstitutional method of achieving that end. *Thomas* v. *Collins,* 323 U. S. 516.

To our contention (Appellants' Principal Brief, pp. 62, 64) that Congress should have legislated directly against the abuse, the Government disingenuously answers that the mere existence of alternate remedies does not make the one chosen unconstitutional. This answer fails to meet the point of appellants' argument. We do not complain because Congress chose the less desirable of several alternatives. We complain because the alternative chosen is unconstitutional—and it is unconstitutional precisely because, under our Constitution, where an evil can be prevented without interfering with First Amendment rights, the legislature may not discard such means of prevention in favor of a method which will infringe First Amendment rights.

Thus, we may not under our Constitution enjoin a paper from being published because we have reasonable grounds to believe that it may print libelous matter. We may only make the actual printing of libelous matter a civil wrong or a crime, and punish one who engages in such wrongful conduct. *Near* v. *Minnesota,* 283 U. S. 697.

It is this fundamental doctrine which was so grossly repudiated by the 80th Congress. For the First Amendment speaks unequivocally and while some limitations may, under exceptional circumstances, be imposed on the rights of free speech, press and assembly, to eliminate serious evils (see Point II below), the legislation must aim at the evil and not at the First Amendment rights. Thus, legislation which seeks to restrict or penalize beliefs or their simple expression, cannot validly be enacted. As the Circuit Court of Maryland recently stated in declaring unconstitutional the Ober Act, passed by the legislature of that state:

> "The law deals with overt acts, not thoughts. It may punish for acting, but not for thinking." *Lancaster* v. *Hammond,* The Daily Record, Baltimore, August 16, 1949.

Thus, if in fact Congress felt that those who believed in an unpopular ideology might tend toward conduct which would be harmful to our Government, or be contrary to the general welfare of our people, it may take steps necessary to prevent or punish such conduct. It may not suppress the ideology or penalize those who believe in it.

The Government urges that this statute *is* aimed at conduct. By an involved process of reasoning, with which we cannot agree (see Point II below), the Government has come to the conclusion that the conduct which Congress aimed to eliminate was unrest in labor unions and political strikes which might under some circumstances seriously injure the United States in its relations with the Soviet Union.

A law restricting free speech because it tends to create unrest, as this Court has but recently pointed out, would be unconstitutional. *Terminiello* v. *Chicago,* 337 U. S. 1. As to the elimination of political strikes, if that was what Congress sought to eliminate, it might easily have so stated. For in the past, Congress found no difficulty in framing legislation which prevented or punished conduct which it found to constitute substantive evils in this and related fields. As the Court said in *Lancaster* v. *Hammond, supra:*

> "Many penal statutes are now on the law books dealing with such activities, as for example, acting as agent of a foreign government without notification to the Secretary of State, 18 U. S. C., section 951; possession of property in aid of a foreign government for use in violating any penal statute or treaty rights of the United States, 18 U. S. C., section 957; espionage activities, 18 U. S. C., sections 793-797; inciting or aiding rebellion or insurrection, 18 U. S. C., section 2384; advocating overthrow of the government by force, 18 U. S. C., section 2385; treason, 18 U. S. C., section 2381; misprision of treason, 18 U. S. C., section 2382; undermining loyalty, discipline or morale of armed forces, 18 U. S. C., section 2387; sabotage, 18 U. S. C., section 2156; importing literature advocating treason, insurrection or forcible resistance to any fed-

> eral law, 18 U. S. C., section 552; injuring federal property or communications, 18 U. S. C., section 1361, Organizations engaged in civilian military activity, subject to foreign control, affiliated with a foreign government, or seeking to overthrow the government by force are subject to registration requirements under the Voorhis Act, 18 U. S. C., section 2386. And we have the general law of conspiracy, a powerful weapon in the hands of a skillful prosecutor."

This listing barely scratches the surface. There are innumerable others, such as 18 U. S. C. 953, which regulates correspondence between a private citizen and a foreign government; 18 U. S. C. 954, concerning the wilful making of any untrue statement which will influence a foreign government in its relations with the United States; 18 U. S. C. 955, which regulates dealing in the securities of a foreign government; 18 U. S. C. 961, relating to the strengthening of an armed vessel of a foreign nation; 18 U. S. C. 967, which regulates departure of vessels from the United States during a war in which the United States is a neutral nation; 18 U. S. C. 2152, which prohibits sabotage to fortifications or harbor defenses; 18 U. S. C. 2153, which prohibits the destruction of war material; 18 U. S. C. 2154, which prohibits the production of defective war material; 18 U. S. C. 2155, which prohibits the destruction of national defense materials; and 18 U. S. C. 2383, which prohibits anyone from engaging in a rebellion or insurrection against the United States. And if the prohibition of political strikes is the evil which Congress here sought to eliminate, it has precedent in the Espionage Act of the first World War (40 Stat. 533), the Act under which the convictions were obtained in *Abrams* v. *U. S.*, 250 U. S. 616. See also the War Labor Disputes Act of 1943 (Public No. 89, Ch. 144, 78th Congress, 1st Sess.).[1]

The distinction between conduct and the expression of ideas, and the degree to which each is subject to govern-

[1] Appellants, of course, do not express any opinion with reference to the merits of any of the statutes referred to.

mental restriction was fully discussed by the several opinions of this Court in *Terminiello* v. *Chicago,* 337 U. S. 1. While the Court split on the precise issues there presented, both the majority decision and the dissent of Mr. Justice Jackson (concurred in by Justices Frankfurter and Burton) expressed disapproval of legislation such as is presented in the instant case.

The majority emphasized, and indeed it may well bear emphasis in these days when civil rights have been subject to attacks on all fronts, that "The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in *DeJonge* v. *Oregon,* 299 U. S. 353, 365, it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is affected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes." Justice Douglas continues:

> "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, *Chaplinsky* v. *New Hampshire, supra,* pp. 571-572, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. See *Bridges* v. *California,* 314 U. S. 252, 262; *Craig* v. *Harney,* 331 U. S. 367, 373. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

> "The ordinance as construed by the trial court seriously invaded this province. It permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand."

How indeed, then, can the Government hope to justify this legislative edict which seeks to eliminate from the trade union movement those of a particular belief, even were the Government's explanation of the rationale of the law accepted, i.e., that Communists might tend to cause unrest in labor unions. For Mr. Justice Jackson agreed with the general principles of the majority in *Terminiello,* but felt that they were not applicable because the behavior of the defendant, under all of the circumstances there presented, were provocations to violence and incited riot. The dissent condemned this "concrete behavior" of the defendant and held that it was not entitled to constitutional protection. But this legislation does not even contain a reference to concrete behavior, much less a prohibition. On the contrary, it employs the very tactic of suppression which the *Terminiello* dissent deplored:

> "* * * Suppression has never been a successful permanent policy; any surface serenity that it creates is a false security, while conspiratorial forces go underground. My confidence in American institutions and in the sound sense of the American people is such that if with a stroke of the pen I could silence every fascist and communist speaker, I would not do it. * * *"

Justice Jackson further stressed that:

> "It is the legal right of any American citizen to advocate peaceful adoption of fascism or communism, socialism or capitalism. He may go far in expressing sentiments whether pro-semitic or anti-semitic, pro-negro or anti-negro, pro-Catholic or anti-Catholic. He is legally free to argue for some anti-American system of government to supersede by constitutional methods the one we have. It is our philosophy that

> the course of government should be controlled by a consensus of the governed. This process of reaching intelligent popular decisions requires free discussion. Hence we should tolerate no law or custom of censorship or suppression."

The 80th Congress felt otherwise. It would serve us little to urge such principles as the basis upon which our democracy rests were we to approve legislation which so ruthlessly deprives those of a particular political sentiment of the use of a vital facility open and available to all others. For the 80th Congress, in its desire to silence a view which it regarded as offensive, overlooked or cast aside this policy upon which our democracy is founded.

Appellants would like to call the Court's attention to two other matters:

1. In appellant's Principal Brief it was argued that the statute was unconstitutionally vague and that it constituted a bill of attainder. We also noted at that time that such defects were not merely incidental, but were basic to this kind of legislation. Confirmation of this may be found in the decision mentioned above, declaring the Maryland Ober Act to be unconstitutional. That Act placed restrictions on "a member of a subversive organization" and "the World Communist Movement." Not only did the Court there find that the Act was a violation of the freedom of speech provisions of both the United States and Maryland Constitutions, but it further found that the statute was void both for vagueness and because it was a bill of attainder. *Lancaster* v. *Hammond, supra.*

2. The appellants would like further to call the Court's attention to an argument made by the Government at page 60 of its brief, that "Certainly Congress has the power to require the disclosure by those who compete for employees' support, of information which the employees might consider highly relevant to their choice. * * *"

Such a hypothetical statute is, of course, not before us, since Section 9(h) is not a disclosure statute at all, but imposes disabilities on persons with proscribed beliefs and affiliations. We would not consider the matter worthy of comment were it not for the fact that the District Court in *National Maritime Union* v. *Herzog,* 78 F. 2d 146, 163 *et seq.,* was apparently under the impression that Section 9(h), like Sections 9(f) and (g), is a disclosure statute. It will be remembered that the Court below in this case relied exclusively on *NMU* v. *Herzog* (R. 20).

However, we should not like to allow the Government's general contention with respect to disclosure statutes to pass without comment. We emphatically deny, for example, that Congress might compel a union officer to disclose his religion, whether or not the employees might consider it relevant, and we seriously question Congress' right to compel disclosure of one's political beliefs. Such a requirement is but one step removed from a requirement that those of certain political or religious beliefs wear distinctive armbands. The assurance with which the Government makes its contention is but a further indication of the extent to which it has gone in approving government control and interference with belief and other civil liberties.[2]

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[2] The wide gulf between our thinking on this subject and that of the Government's is perhaps best illustrated by the hypothetical case appearing on page 94 of the Government's brief. It is there contended that a person who believed that one might take whatever one wants, wherever one finds it, could constitutionally be prohibited from being employed as a bank guard or bank president. We would seriously question the constitutionality of such a statute. One might well believe certain steps to be desirable without ever intending to act upon that belief.

POINT II

The "clear and present danger" test is inapplicable.

The Government, realizing the tenuous nature of its principal argument (See Point I, above) has here, for the first time, taken refuge in the contention that a clear and present danger warranted the legislation.[3]

The expression "clear and present danger of a substantive evil which Congress has the right to prevent" has never been closely defined and is probably not susceptible of exact definition. But its general import had been made fairly clear by a long series of decisions concerning civil liberties.

As the First Amendment speaks unequivocally in denying Congress the right to make laws abridging the freedom of speech, press and assembly, it is only in the most extreme of cases and where absolutely necessary to preserve national safety or peace and order that the courts will countenance any invasion of those rights. The "substantive evil" may not be extended to cover *any* undesirable state of affairs which needs correction, or the language of the First Amendment would be rendered meaningless. It must be an evil which "rises far above public inconvenience, annoyance, or unrest." *Terminiello* v. *Chicago,* 337 U. S. 1.

Analysis of the cases reveals that there are but two general classes of evils which are so substantial and serious that the courts have felt that, when imminent, they warrant a temporary exception to the all-inclusive provisions of the First Amendment. The first group is that which imperils the security of our Nation and is therefore

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[3] The Government (Brief, p. 52) disavows any intention of having conceded in the Court below that there was no clear and present danger, and alleges that Judges Rifkind and Major (and, we might add, Judge Prettyman) all "misunderstood" the Government's contention. We regret that we, with the three dissenting Judges, likewise misunderstood the Government's position.

peculiarly within the area in which the national Congress acts, although State sedition laws come within the same category. *Schenck* v. *U. S.,* 249 U. S. 47; Holmes, J., dissenting in *Abrams* v. *U. S.,* 250 U. S. 616; *Herndon* v. *Lowry,* 301 U. S. 242. The second is the obscene, the libelous, the "fighting words" which incite to violence; in short, the type of conduct which normally comes within the jurisdiction of the state police in their function of preserving law and order. (*Chaplinsky* v. *New Hampshire,* 315 U. S. 568.) These evils must be real, not speculative; they must be imminent (*Bridges* v. *California,* 314 U. S. 252)—indeed, so imminent that discussion or appeal to reason would prove unavailing to prevent them. (Brandeis, J., concurring in *Whitney* v. *California,* 274 U. S. 357.)

The mere holding of a belief of whatsoever nature, without more, clearly could not constitute such a clear and present danger of a substantive evil. Thus, to punish or impose disabilities for the holding of a particular belief could, under no circumstances, be valid. Likewise, the mere expression of an opinion or the peaceful exchange of ideas, no matter how abhorrent, could not constitute such danger. Indeed, it was precisely to encourage such an exchange that the First Amendment was written. It is the preservation of such rights which the courts have zealously guarded because it is only such free interchange of ideas that can prevent intolerance, violence, and other menaces to peace and order.

It is only where the particular utterance is in a context of disorder or where it involves the safety of our country that the question of censorship or suppression may be raised. As stated by Mr. Justice Jackson in his dissent in *Terminiello* v. *Chicago, supra*:

> "Law is so indifferent to subjects of thought that I can think of none that it should close to discussion. Religious, social and political topics that in other times or countries have not been open to lawful debate may be freely discussed here."

Thus, it is doubtful whether Congress could ever censor any political utterance, except in time of war or grave national emergency. In each of the cases where such a law was passed and such an utterance was punished, the Court has gone into the question in detail to determine whether in fact the utterances made were "in such circumstances" and "are of such nature" as to result imminently in danger to national security.

In cases where the state (as distinguished from Congress) has limited the absolute right of free speech, it has been in exercise of its police power to prevent breaches of peace, where in particular circumstances, a precise utterance was part of an act of force or violence, obscenity or libel. In these cases, too, censorship or punishment is inflicted only after a full and fair trial in which the court likewise must find that the particular utterance did in fact give rise immediately and directly to the violence or other substantive evil. (*Herndon* v. *Lowry,* 301 U. S. 242.)

Let us turn now to the statute at hand to determine whether the clear and present danger test can possibly be applied in the case before this Court.

The first question which confronts us is as to the nature of the "substantive evil" which Congress here sought to eliminate. Neither the statute itself, nor its legislative history make mention of any such evil. (See Appellants' Principal Brief, pp. 40-51, 57-64, *infra,* pp. 15, 16).

But, for the moment, let us assume as the Government urges, that Congress enacted the statute to correct what it considered a substantive evil, namely, "the danger of harmful obstruction to interstate commerce which is likely to result if Communists are in control of labor organizations" (Government's Brief, p. 56). This is elsewhere further amplified, but in substance, the sum total of the Government's contention is that the obstruction referred to is political strikes which it alleges Communists are likely to call.[3a]

[3a] An interesting commentary on the Government's contention that the danger sought to be eliminated by Section 9(h) is the tendency

But it can hardly be claimed that every political strike under all circumstances can meet the clear and present danger test. For the cases make clear that when we are discussing Congressional action, the evil the Supreme Court talks about must be of such a nature that there is "a reasonable apprehension of danger to organized government" (*Herndon* v. *Lowry,* 301 U. S. 242) and must be so imminent that the evil "may befall before there is an opportunity for full discussion." (Brandeis, J., concurring in *Whitney* v. *California,* 274 U. S. 357.)

While it may be true that the conditions obtaining in some strikes, political or otherwise, may meet this test, clearly it cannot be true of all. For example, a nation-wide railroad strike in time of war may constitute a clear and present danger to our national security, but can the same be said of a local strike in time of peace in the office of a retail chain store? The railroad strike is hypothetical, but the strike in the retail store is not, and is the subject of *Osman* v. *Douds,* No. 404 on the docket of this Court. A nation-wide telephone strike in time of war might be the emergency the Court speaks about in the cases cited, but the same can hardly be true of a strike in a small press communications service in time of peace.

But this is not the only problem posed by the Government's contention as to the purpose of this legislation. Just as there is no foundation for the contention that all political strikes, under all circumstances, constitutes a substantive evil, so there is no justification for the broad in-

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of Communists to call political strikes is furnished by the recommendation of the Joint Committee on Labor Management Relations, the Chairman of which was Senator Ball, the Vice-Chairman of which was Congressman Hartley, and which included among its members Senator Taft. That Committee recommended that Section 9(h) be amended to include the requirement that employers file a similar oath (Report of the Joint Committee on Labor Management Relations, 80th Congress, 2d Sess., Report 986, Part 3, December 31, 1948, p. 6). The Wood bill, passed by the House in the 81st Congress, contained such a provision (H. R. 4290). If Congress intends to punish Communists, as we argue, the rationale of this suggestion is self-evident. But if Congress intended to prevent political strikes, how does the Government explain this latest proposal?

clusion of all Communists within the prohibition of the statute, on the ground that all would bring about the evil Congress seeks to correct. Do all Communists call political strikes? The Government has never taken that position, and we do not understand that it takes it now. On the contrary, the Government's argument in *NMU* v. *Herzog,* which it repeated in the Court below in this case, specifically disavowed any such contention. Judge Prettyman, in his dissent in the *NMU* case, commented extensively on this fact. 78 Fed. Supp. 146, 181, 182; Appellants' Principal Brief, pp. 60-62.

But legislation, in order to meet the clear and present danger test, must be narrowly drawn. Further, the circumstances of each particular case must be judged on its own merits, as Mr. Justice Holmes made so clear in his original formulation of the test.

Let us apply these principles to the case at hand. The plaintiffs whose First Amendment rights have been abridged by this legislation are the plaintiff union, the plaintiff officers, and the plaintiff member. There are no facts in the record before this Court from which a finding could conceivably be made that any of these three plaintiffs would, or would even be likely to, create a clear and present danger by the exercise of their First Amendment freedoms. What is the danger to our Government which the record shows would result if the union were to exercise its right to elect whatever officers it pleases; if the plaintiff officers were to entertain the proscribed beliefs or affiliations; if the plaintiff member were to exercise her right to vote for whomsoever she pleases for union office? How would the national interest be adversely affected in any way if the plaintiff union continued to represent the employees of Press Wireless, Inc., for purposes of collective bargaining?

The record here reveals no such danger. Yet each of the plaintiffs has been deprived of his rights without his day in court.

Is it not incumbent upon the Government, before limiting one's speech or affiliation, or punishing one therefor,

to establish that the particular speech or affiliation of that person, in the circumstances in which it was made, constitutes a clear and present danger? Can the rights of anyone so injured be summarily disposed of on a motion such as was made in the instant case, without a trial of the relevant facts in his case? We know of no case in the history of our law, and the Government cites none, which sustained such a principle and which punished a person for his speech or affiliation, without a determination, after full consideration of the facts, as to whether his *particular* speech or affiliation, *in the context made,* could constitute a clear and present danger.

Possibly, indeed, the reason this Court has not hitherto had occasion to consider this problem is because since the Civil War, and until a few years ago, legislatures rarely leveled their prohibitions against a named group. Normally, and properly, they define the conduct or type of speech which they find constitutes the danger, and the burden is then upon the Court to determine whether any individual made such a speech, and if in the circumstance made, it did constitute such a clear and present danger. This is not only because the theory of our law is that guilt is personal (Appellants' Principal Brief, Point II, p. 74) and because of the limitations imposed by Article I, Section 9 of the Constitution forbidding bills of attainder (Appellants' Principal Brief, Point IV, p. 82), but also because our First Amendment rights are so fundamental to our democracy that our courts permit of no broad suppressions but only necessary and limited restriction of speech which would in the particular circumstance immediately result in the clear and present danger of which this Court speaks.

We have assumed, for the purpose of the foregoing discussion, that Congress made the finding which the Government urges. In truth, however, there is no basis for the Government's contention to be found in the statute or in its legislative history. The only fact which the record reveals

is the hatred and the desire to punish which motivated Congress. But even if there had been the finding urged, "the judgment of the legislature is not unfettered", and the Court must review the basis therefor. (*Herndon* v. *Lowry,* 301 U. S. 242, 258). Accordingly, we turn to the evidence which the Government claims supports its contention that Congress made a finding, and that the finding had a basis in fact.

The Government submits the following in support of its contention that Congress found a clear and present danger of the substantive evil above referred to (*supra,* p. 12):

(a) The findings in Section 1 of the statute (Government's Brief, p. 18);

(b) A statement in a Committee Report that "Communists use their influence in unions * * * to promote dissension and turmoil" (Government's Brief, pp. 21-22) and a comment by Congressman Hartley to the same effect (Ibid., p. 22);

(c) The comments of "numerous Congressmen" that such leaders "might" promote political strikes (Government's Brief, p. 22);

(d) A comment by Representative Kersten that Communists use labor unions to advance their doctrines (Government's Brief, p. 22);

(e) A comment by Senator McClellan that such leaders use their power to subvert the Government (Government's Brief, p. 23);

(f) Statements by Senator Morse and President Truman that Communism must be stamped out of the labor union movement (Government's Brief, p. 24); and

(g) A comment by Congressman Hartley that Section 9(h) was prompted by testimony relating to the Allis-Chalmers strike of 1940 (Government's Brief, p. 28).

The findings in Section 1 obviously refer to the various inhibitions upon union practices which were introduced into the Labor Relations Act by Section 8(b) of the Act. They first appear in S. 1126, the Senate version of the bill, which had no provision corresponding to Section 9(h), and hence could not refer to any alleged practices of Communists.

Items (c) and (d) above are mere random statements made by various Congressmen, expressing no opinion but their own; these, as well as items (b) and (e), are precisely those "opprobrious epithets" against which we were warned in the first *Carolene* case, 304 U. S. 144. Item (f) comes from two opponents of the legislation; their statements certainly are not evidence of Congressional intent.

There remains only the statement of Congressman Hartley that Section 9(h) was justified by the testimony relating to the Allis-Chalmers strike. We do not believe that one ambiguous sentence, even when spoken by the sponsor of the bill, constitutes the Congressional finding required by the clear and present danger test. Against that statement must be weighed the dozens of statements by other members of Congress cited by both appellants and appellee in their principal briefs, conclusively demonstrating that Section 9(h) was designed to punish Communists for being Communists.

The evidence relied upon by the Government to establish that such alleged findings had a basis in fact consists of the following:

(1) A report and a pamphlet issued by the House Committee on Un-American Activities [4] (Government's Brief, pp. 24, 32). The irresponsibility of this Committee is so notorious that we feel it unnecessary to cite extensive authority to that effect. See, for example, Gellhorn: "Report on a Report of the House Committee on Un-American Activities", 60 Harvard Law Review 1193 (1947).

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[4] One document was issued in 1941, six years before the law was passed; the other in 1948, a year after the law was passed.

(2) A report of a sub-committee of the House Committee on Education and Labor [5] (Government's Brief, pp. 30, 32). This report is based on the testimony of James Carey and Dr. Joseph B. Matthews which will be discussed below.

(3) The opinions of noted political opponents of the Communist Party. Some of these statements are those of persons who are literally professional anti-Communists, i.e., persons who make their living from the dissemination of their anti-Communist views, by writing or by lecture (Gitlow, Government's Brief, p. 43; Budenz, ibid., p. 26; Matthews, ibid., p. 31). Others are the statements of trade trade union leaders engaged over some years in bitter political struggles with so-called "left-wing" groups in their respective unions (Dubinsky, ibid., p. 39; AFL resolutions, ibid., pp. 34-36). We submit that action involving basic questions of constitutional liberty cannot be supported upon such evidence.

(4) The opinions of Philip Murray, James Carey, Joseph Curran and Roger Baldwin (Government's Brief, pp. 30, 31, 36-39, 41, 42, 44). Murray, Carey, Curran and Baldwin apparently all believe in the doctrines enunciated by Jefferson and Holmes, that the best test of truth is its ability to get itself accepted in the competition of the marketplace of ideas. Although these men oppose the policies of the Communist Party, they equally oppose the legislation now before the Court. Murray is a plaintiff in *Inland Steel* v. *NLRB.*, No. 431 on the Docket of this Court; Curran was plaintiff in *NMU* v. *Herzog,* 334 U. S. 854. Murray and Carey are officers of the CIO which has submitted an *amicus* brief to this Court in support of the position of appellant. Baldwin is Director of the American Civil Liberties Union which has similarly submitted such a brief. The Government may think that a clear and pres-

[5] Published in 1948, after the passage of the law.

ent danger justifying this legislation may be deduced from the statements of Murray, Curran, Carey and Baldwin, but evidently those gentlemen most vigorously disagree. In this respect their opinions stand in support of appellants' position, not the Government's.

(5) The opinion of Harold W. Storey, an employer then engaged in a bitter strike against a union which he claimed to be Communist-led (Government's Brief, p. 27); and an excerpt from a book by Professor Philip Taft of Brown University, which states nothing beyond the patent fact that Communists do not consider their trade union as an object of "ultimate loyalty." [6]

(6) The experience of other countries (Government's Brief, pp. 45-48). It is sufficient answer to this "evidence" that trade union traditions on the Continent have always included the use of strikes as political weapons—regardless of the political affiliation of the trade union leader.[7]

The quality of the "evidence" may perhaps be seen by analyzing the material submitted to support the contention that Communists cause "political strikes". This contention was made by Mr. Budenz in his testimony before a Congressional Committee concerning the Allis-Chalmers strike of 1941. His testimony was sharply contradicted at the

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[6] Many persons other than Communists have ultimate loyalties to organizations other than their trade unions. Would the Government contend that Section 9(h) could be extended to apply to members of the Association of Catholic Trade Unionists?

Some of these statements, such as Taft's, Dubinsky's, Carey's, Curran's, Murray's and Matthews', were made after the Act was passed, and could not have influenced Congress. Others were made as early as 1934 and 1935, and could hardly be said to relate to a "clear and present" danger. Even Budenz's and Storey's testimony was as to events in 1940.

[7] Perhaps foreign experience is relevant to the proposition that after legislation levelled at Communist trade union leaders comes legislation levelled at the liberties of every citizen; such, at least, was the experience of Nazi Germany, Vichy France, Fascist Italy and Fascist Spain.

hearings by other witnesses. This assertion of Mr. Budenz was repeated by Mr. Storey (who cited Mr. Budenz as authority) in the hearings, likewise by Congressman Hartley and Kersten on the floor of the House (Government's Brief, p. 27), and by the Committee on Un-American Activities (Government's Brief, p. 33). This constituted the only evidence of a political strike before Congress or to which any Congressman alluded.[8] There were 42,045 strikes from 1937-1947, inclusive (21 LRRM 25 (1949)). Would a reasonable man have come to the conclusion that Communists "tend" to promote political strikes on the basis of such evidence of one alleged political strike, considering that the Government itself alleges that some twenty unions "in key industries" have Communist leadership "strongly entrenched"—during a period of years in which the Communist Party supported the foreign policy of the Administration for but a few years out of the decade involved?

These "facts" and "evidence" are submitted in support of the Government's four major conclusions, as follows:

> (1) That Communists advocate their political doctrine in their trade unions;
>
> (2) That Communist leaders of trade unions promote "strife";
>
> (3) That such leaders "tend" to call political strikes;

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[8] The North American Aviation Company strike was so briefly touched upon by Budenz that Congress could hardly have acted upon such information.

There are a few other instances of political strikes which the Government fails to mention. In 1948, the strongly anti-Communist AFL longshoremen's union refused to load a relief ship for Yugoslavia, because the latter country was thought to be Communist. And in the same year, the equally anti-Communist Transport Workers Union struck in New York to compel the Public Service Commission to authorize a fare increase. Do these examples help to justify Section 9(h)?

(4) That such leaders would "tend" to use their power in the interests of Soviet Russia rather than the United States.

It should be noted that these very conclusions themselves clearly establish that First Amendment rights are here involved. Under the cases, none of them would justify an intrusion into the First Amendment guaranties. On the contrary, it would be difficult indeed to square a determination that such "facts" could constitute a clear and present danger justifying invasion of First Amendment freedoms with the decisions of this Court.

Bridges v. *California,* 314 U. S. 252;
Cantwell v. *Connecticut,* 310 U. S. 296;
Terminiello v. *Chicago,* 337 U. S. 1;
DeJonge v. *Oregon,* 299 U. S. 353;
Herndon v. *Lowry,* 301 U. S. 242;
Thomas v. *Collins,* 323 U. S. 516;
Thornhill v. *Alabama,* 310 U. S. 88.

We repeat that if these "facts" and this "evidence" are sufficient to admit of a finding of clear and present danger, then there is in fact no requirement of clear and present danger. If it were necessary to engage in a dispute concerning the validity of these facts, affirmative evidence is available that Communist-led unions not only do not "tend" to engage in the practices described in the Government's brief, but that they are very frequently able and effective trade union instruments which have raised living standards of their members.[9] But it is unnecessary to adduce such factual material beyond the example set forth in the footnote, for the "evidence" which the Government has submitted is patently invalid.

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[9] The only International Union unquestionably led by members of the Communist Party is the International Fur and Leather Workers Union, CIO. A report of a special sub-committee of the House Committee on Education and Labor (H. Rep. No. 19, 80th Cong., 2d

Further, it must be considered, that the Government has the affirmative duty to prove that such a clear and present danger does exist, for the presumption is against it (see Appellants' Principal Brief, p. 64).

To hold that the Government has here established the existence of a "clear and present danger" would be to set a pattern by which any legislation restricting First Amendment rights might be sustained. For inevitably, feelings on political issues run high, and it is thus always possible to draw from partisan sources impassioned arguments in support of one political belief or party as against another. Arguments proclaiming the necessity and urgency of legislation to suppress or eliminate a disliked tenet or belief may readily be found on any subject of public interest. To permit such statements to satisfy the clear and present danger requirement would be to make of that requirement a chimera.

Sess.)—the very Committee which originally advocated the adoption of Section 9(h)—comes to the following conclusion, *inter alia:*

> "1. There can be no question but that the International Fur and Leather Workers Union (CIO) is dominated by members of the Communist Party. * * *
>
> * * * * * *
>
> 7. The wage scales of the fur workers are as high or higher than in any other industry, and the union is largely responsible for increasing the wage rates and lowering the hours of work to their present standard."

At page 4 of this report, it is stated that "There has been but little labor-management difficulty in the dressing and dyeing segment of the industry during the past 10 years."

POINT III

The decisions in the *Steward*, *Summers* and *NMU* cases are inapplicable and irrelevant to this case.

The Government has attempted to force this statute within the narrow coverage of the *Steward* (301 U. S. 548) case. But the limited principles therein enunciated cannot be so extended without ignoring or perverting the basic premises on which that case rests. Appellants' principal brief analyzed those differences to some extent, but as the Government still urges their applicability to the case at hand, we are expanding somewhat upon our argument.

The *Steward* decision stands for the simple proposition that it is not a violation of the Tenth Amendment for a state to enter into an agreement with the Federal Government whereby the former agrees to enact certain legislation in return for payments of money. Mr. Justice Cardozo in the *Steward* case made clear that such payments, while they might have constituted a "temptation", did not amount to "coercion". As he pointed out, the failure to distinguish between the two is to "plunge the law into endless difficulties". Here the failure of the Government to draw that line has indeed resulted in confusion in its argument.

For here Congress did not merely "tempt" the appellants to surrender their First Amendment rights. It sought to coerce them by depriving them of rights they have long enjoyed. (See *amicus* brief submitted by C.I.O.)

It is also important to bear in mind that the nature of the rights which the appellants are asked to yield are First Amendment rights. Legislation which calls for a surrender of such rights must rest on firmer ground and meet more stringent tests than legislation involving other constitutional rights.

Finally, we must never forget that this statute affects basic First Amendment freedoms, and that the Constitu-

tion stands as a staunch guardian of those freedoms. In the *Steward* case the objectives of Congress were unquestionably socially desirable. The denial of First Amendment rights to anyone is never socially desirable, and when such denial is permissible at all, it is only to avoid the most serious danger to our national welfare.

The Government has claimed that *In re Summers,* 325 U. S. 561, establishes the validity of the statute at hand. While we feel that that case did to some extent encroach upon our basic freedoms, we submit that the facts there differ substantially from those at bar. In that case, petitioner was merely required to take an oath as a lawyer to support the constitution of Illinois—an oath which makes no reference to and was not calculated to interfere with any beliefs, religious or otherwise. Indeed, the case specifically noted that "under our constitutional system, one could not be excluded from the practice of law or indeed from following any other calling simply because they belong to any of our religious groups, whether Protestant, Catholic, Quaker or Jewish, assuming it conceivable that any state of the Union would draw such a religious line."

The state constitution of Illinois required men of petitioner's age group to serve in the militia in time of war. The petitioner testified specifically that he would not serve in the armed forces. Therefore, on the record in that case Summers clearly could not have taken the required oath, and the committee in the state which passed on the matter held that he could not be admitted to practice.

This Court pointed out that the provision of the Illinois statute was a valid one and did not aim at any particular religious group or belief. Accordingly the ruling of the State of Illinois was sustained. The Court merely held that where it appears on a record that a lawyer is required to support his state constitution and its valid provisions, but would not, on his own testimony, do so, he could not in good faith take the required oath and therefore it is not

improper to refuse to permit him to practice. The oath there was not addressed to belief, but to specific conduct. The fact that such conduct might be at variance with the petitioner's religious beliefs was merely incidental, and as we pointed out in our principal brief, not all conduct can be made a religious rite and by the zeal of the practitioners swept into the First Amendment. *Murdock* v. *Pennsylvania,* 319 U. S. 105, 109. The constitutional provision and the corresponding oath in the *Summers* case was clearly not aimed to eliminate those of any specific religious belief from their calling. If it had been, the Court makes clear, it would have been unconstitutional.

The required oath in the case at bar is clearly not analogous. It calls for no support of our constitution or our laws. It is not an oath in which appellants swear to perform any acts which might validly be required of a union officer, or to refrain from performing any specific acts which might obstruct commerce, as for example political strikes. It is merely the disavowal of a particular political belief and affiliation, the holders of which Congress sought to punish. This can hardly be compared to the oath to faithfully support the constitution called for in the *Summers* case.

Further, unlike *Summers,* there was no determination made after a full hearing on all the relevant facts that appellants here could or could not in good faith take any oath which concerned any conduct or requirement of their calling.

We should like also to note that the *Summers* case placed great reliance upon the cases of *United States* v. *Schwimmer,* 279 U. S. 644, and *United States* v. *McIntosh,* 283 U. S. 605. As this Court is aware, those cases were subsequently disapproved by the decision of this Court in *In re Girouard,* 328 U. S. 61, and might serve to cast grave doubt upon the validity of the *Summers* case.

The Government in its brief (pp. 75-76) has stated that the decision of this Court in *NMU* v. *Herzog,* 334 U. S. 854, "is dispositive of appellants' claim that denial of the bene-

fits of the Act to unions which do not comply with conditions validly imposed by Congress invades the rights of such unions to function or the right of employees to bargain collectively through such unions". But appellants have made no such claim. On the contrary, our position is based on the very fact that the conditions contained in 9(h) are *invalidly* imposed. We do not urge, as the Government would have this Court believe, that all trade union functions are immune from legislative regulation. For example, we have not contended that the right to act as exclusive collective bargaining agent falls within the protection of the First Amendment. We have urged, however, that the right of a trade union to meet and select its own officers is protected by that Amendment.

What appellants have urged is that use of government facilities may *not* be conditioned upon surrender of the First Amendment freedoms of belief, speech or assembly. Section 9(h) (as distinguished from 9(f) and (g), which we concede to be valid regulations and which have no relation to First Amendment freedoms) requires the surrender of the freedoms of belief, speech, press and association, protected by that Amendment, and hence the legislation may not be sustained save in the presence of a "clear and present danger".*

CONCLUSION

The decision of the Court below should be reversed.

Respectfully submitted,

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* Another instance in which the Government seeks to answer an argument, nowhere advanced by appellants is that "the classification is unreasonable and therefore invalid because employers are not required to file similar affidavits (see p. 62). But see footnote, pages 12-13, supra.