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# Constitutionality of Non-Communist Affidavit Provision of the Taft-Hartley Act - a Partial Stalemate - American Communications Association, et al. v. Douds

# CONSTITUTIONALITY OF NON-COMMUNIST AFFIDAVIT PROVISION OF THE TAFT-HARTLEY ACT — A PARTIAL STALEMATE

## *American Communications Association, et al. v. Douds*[1]

Under Section 9(h) of the Taft-Hartley Act[2] the privilege of availing itself of certain National Labor Relations Board facilities is withdrawn from any union whose officers fail to file affidavits with the Board stating (a) that they are not members "of the Communist Party or affiliated with such party", and (b) they do "not believe in", and are neither members of nor support, "any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."[3] In one of the two cases here decided, appellant union, asserting that this section violated the right of free speech filed suit to enjoin its enforcement; a statutory three-judge court granted appellee's motion to dismiss,[4] and a direct appeal was taken to the Supreme Court. In the other, the National Labor Relations Board had postponed the effective date of an order directing an employer to bargain until compliance by the union with Section 9(h)

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[1] 339 U. S. 382 (1950).

[2] 29 U. S. C. (Supp. 1950), Sec. 141, 159(h), amending the National Labor Relations Act of 1935, 29 U. S. C., Sec. 151, *et seq.*

[3] The complete section reads:

> "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 35A of the Criminal Code shall be applicable in respect to such affidavits."

[4] Wholesale and Warehouse Workers Union, Local 65 v. Douds, 79 F. Supp. 563 (D.C.S.D.N.Y. 1948), one judge dissenting on the ground that the section abridged freedom of speech and right of assembly without a showing of clear and present danger.

and was upheld on appeal;[5] certiorari was granted.[6] By a 3 to 3 vote, the judgments below were affirmed.[7]

Justice Frankfurter in a separate opinion, concurring in part, agreed that Congress could validly require disavowal of actual membership in the Communist party or of active belief in the overthrow of the government by force, but felt that to the extent that the Section went beyond this it was invalid; since the judgments below were, as he saw it, based in part on unconstitutional requirements, he thought the cases should be remanded for judgments based on the valid portions of the Section, the act being severable by its terms. Justice Jackson, in a separate opinion, concurring in part and dissenting in part, contended that Congress could validly require disclosure of overt acts of affiliation or membership in the Communist party, but not of beliefs unconnected with any overt act; he does not discuss the severability of the Section, regarding this as academic under the circumstances. Justice Black alone dissented completely, viewing the Section as in conflict with the First Amendment.

The Chief Justice traced the history of the act under attack, pointing out that the National Labor Relations Act of 1935 was an attempt to promote the free flow of commerce by removing obstructions thereto caused by industrial strikes, one means chosen by Congress to achieve this end being to strengthen employee groups while restraining employer actions regarded as detrimental. In 1947, Congress passed the Taft-Hartley Act, stating in the findings and declaration of policy that:

> ". . . certain practices by some labor organizations, their officers and members have the intent or . . . effect of . . . obstructing commerce by preventing the free flow of goods in such commerce through strikes . . . or through concerted activities which impair the interest of the public in the free flow of such commerce."[8]

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[5] Inland Steel Co. v. N. L. R. B., 170 F. 2d 247 (C. A. 7th Cir. 1948), one judge dissenting.

[6] United Steelworkers v. N. L. R. B., 335 U. S. 910 (1949).

[7] The Chief Justice, with Justices Reed and Burton held the Section wholly valid, with Justices Black, Frankfurter and Jackson dissenting either in whole or part. Justices Douglas, Clark and Minton took no part in the consideration or decision.

[8] 29 U. S. C. (Supp. 1950), Sec. 151.

To remove the "political strike" as one such obstruction was the purpose of Section 9(h).[9]

The question is directly raised[10] whether, consistently with the First Amendment, Congress may so act, indirectly forcing labor unions to elect as officers only those who can make the required affidavit. That such is the effect of the statute is not denied. The appellants contended, that, this being a free speech case, it must be decided by applying the "clear and present danger" test,[11] but were not in agreement as to the scope and application thereof. In one case, it was contended that the Government must show that the act of joining the Communist party or expressing a belief in the overthrow of the Government by force constitutes a clear and present danger of some substantive evil. In the other, the contention was that the Government must show that political strikes constitute a clear and present danger to national security. Such matters are not to be adjudged on a metaphysical basis, said the Chief Justice. The freedoms granted by the First Amendment cannot survive without government itself surviving. Some abridgment of these rights may consequently be necessitated by legitimate efforts of government in furtherance of survival, so that freedom of speech is not to be regarded as absolute, and, indeed, has never been so regarded.[12] To take the phrase "clear and present danger" as a touchstone in a civil liberty case is entirely proper, so long as one takes along with it "the considerations that gave birth to the phrase", for only then can a valid test be made. The Court must balance against the public interest in the protection of free speech,

[9] The Chief Justice summarized briefly the evidence before Congress relative to political strikes by stating:

"... Congress had a great mass of material before it which tended to show that Communists and others proscribed by the statute had infiltrated union organizations, not to support and further trade union objectives, including the advocacy of change by democratic methods, but to make them a device by which commerce and industry might be disrupted when the dictates of political policy required such action."

[10] See Wohlmuth and Krupka, *The Taft-Hartley Act and Collective Bargaining*, 9 Md. L. Rev. 1, 8 (1948).

[11] Schenck v. United States, 249 U. S. 47 (1919).

[12] *Cf.* Justice Holmes' frequently quoted statement in the Schenck case:

"The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right."

the interest which the public has in seeing that Communists, or others believing in the overthrow of the Government by force, are not allowed to gain offices in any union where they are in a position to call political strikes directly hindering commerce and causing widespread industrial unrest. It is pointed out that the statute deals not with imaginary or fancied problems but with very real ones. The unions with their great national influence and power must realize that "power is never without responsibility." Congress has found as a fact that the effect of Communists, or others proscribed under Section 9(h), being made officials in labor unions is deleterious to interstate commerce. The statute, in attempting to remedy this situation, restrains no one from being a Communist. It says only that when, as such, he occupies a union post, that union may not claim the right to governmental protection and privileges granted to other unions for the purpose of fostering and protecting interstate commerce.

The Chief Justice discusses the dissenting arguments when dealing with the "belief" provision of the Section, the dissenting view being that the provision as to belief in the overthrow of the Government by force was too broad and involved "thought control" clearly beyond the permissible legislative area. The statute, he contends, is to be given a more narrow construction. "Congress," he says, "had as its objective the protection of interstate commerce from direct interference, not any intent to disturb or proscribe beliefs as such. Its manifest purpose was to bring within the terms of the statute only those persons whose beliefs strongly indicate a will to engage in political strikes . . . when, as officers, they direct union activities. The Congressional purpose is therefore served if we construe the (belief) clause . . . to apply to persons and organizations who believe in violent overthrow of the Government as it *presently* exists under the Constitution *as an objective*, not merely a *prophecy.*"[13] Those and those only are the ones affected by Section 9(h). So construed, the belief provision falls into the same pattern as the rest of the Section dealing with Communist membership and presents no different problem. ". . . To attack the straw man of 'thought control'," he said, "is to ignore the fact that the sole effect of the statute upon one who believes in overthrow of the Government by force and violence — and does not deny his belief — is that he may be forced to

[13] Emphasis added.

relinquish his position as a union leader." If it be a valid principle, as contended, that under no circumstances may one be required to state his beliefs on any subject nor suffer the loss of any right or privilege because of his beliefs, strange results will follow. Is it beyond the powers of Congress, he asks, to require that a Secret Service agent assigned to protect the President must swear that he does not believe in assassination of the President as a condition to his appointment.

"The circumstances under which one is asked to state his belief and the consequences which flow from his refusal to do so or his disclosure of a particular belief make a difference." The question is one of degree and to argue that, because a village constable may not be asked whether he believes in the overthrow of Government by force, the same query may not be put to a general in command of half a million men, "is to make a fetish of beliefs."

Looking then at these circumstances — balancing the deference due congressional judgment as to the need for protection of interstate commerce against obstructions caused by political strikes and the practical effect of the statute upon First Amendment rights, — he concludes that the Section does not unduly infringe those rights, saying:

> "Those who, so Congress has found, would subvert the public interest cannot escape all regulation because, at the same time, they carry on legitimate political activities . . . To encourage unions to displace them from positions of great power over the national economy, while at the same time leaving free the outlets by which they may pursue legitimate political activities of persuasion and advocacy, does not seem to us to contravene the purposes of the First Amendment. That Amendment requires that one be permitted to believe what he will. It requires that one be permitted to advocate what he will unless there is a clear and present danger that a substantial public evil will result therefrom. It does not require that he be permitted to be the keeper of the arsenal."

The argument that the statute is unconstitutionally vague is disposed of briefly by stating that the objection of vagueness may only be raised when one is tried for an offense of whose nature he is given no fair warning, and that here there is no criminal punishment except where a false affidavit is knowingly and wilfully made. Where

punishment is restricted to acts done with knowledge that they contravene the statute, the objection of vagueness is untenable. To the argument as to bill of attainder, the short answer is made that the term may be applied accurately only to punishment for a past offense, and that here the possible loss of position results not because of past conduct but because such beliefs may be transformed into future conduct.

Justice Jackson in his separate opinion concurs with the Chief Justice as to the validity of the Section so far as it requires disclosure of overt acts of affiliation or membership in the Communist party but dissents as to the belief provisions thereof. Labor union officers may constitutionally be required to take the non-Communist oath to the extent indicated because of the peculiar composition and objectives of that party as compared with any other politically important party in this country. Setting out five conclusions which Congress could reasonably reach from information before it,[14] he states graphically the major aims of the Communist Party as they could reasonably be found to impinge on the labor picture today. "I cannot believe," he concludes, "that Congress has less power to protect a labor union from Communist Party domination than it has from employer domination." The fact that labor union leaders may complain of being forced to make such an affidavit is not sufficient reason for overthrowing the requirement. To carry one's sense of personal dignity to such extremes is to be unrealistic in the world of today, and dignity of the individual must give way before the very real necessity of preventing Communists from gaining that very domination which they desire and seek.

As far as the belief provision is concerned, however, he feels that though Government has "expansive powers to curtail action, and some small powers to curtail speech or writing," it has no "power, on any pretext, directly or indirectly to attempt foreclosure of any line of thought . . . Thought control is a copyright of totalitarianism, and we have no claim to it . . . I think that under our system, it is

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[14] These conclusions are: (1) The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate; (2) the Communist Party alone among American parties past or present is dominated and controlled by a foreign government; (3) violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party's goal; (4) the Communist Party has sought to gain this leverage and hold on the American population by acquiring control of the labor movement; (5) every member of the Communist Party is an agent to execute the Communist problem.

time enough for the law to lay hold of the citizen when he acts illegally, or in some rare circumstances when his thoughts are given illegal utterance. I think we must let his mind alone." He argues that it is too difficult a task for any court to determine the state of a man's mind when it has not been manifested by overt acts, and his fear, that in an attempt so to pry into men's minds there may be set up processes closely akin to those used in ancient heresy trials, leads him therefore to regard the Section as invalid in this respect.

Mr. Justice Frankfurter for his part concurred with the Chief Justice save only as to the charge that the section was unconstitutional as being too vague. He agreed with Mr. Justice Jackson that the statute prys into men's minds, and such trespass is to him *per se* unconstitutional. In concluding that part of the statute was too vague and should be ruled invalid, he said:

> "To ask avowal that one 'does not believe in, and is not a member of or supports any organization that believes in . . . the overthrow of the United States Government . . . by any illegal or unconstitutional methods' is to ask assurances from men regarding matters that open the door too wide to mere speculation or uncertainty. It is asking more than rightfully may be asked of ordinary men to take oath that a method is not 'unconstitutional' or 'illegal' when constitutionality or legality is frequently determined by this Court by the chance of a single vote. . . . The hazards that were found to be fatal to the legislation under review in Winters v. New York, 333 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840, appear trivial by comparison with what is here involved."

Justice Black alone regards the Section as unconstitutional in its entirety, saying: ". . . Beliefs are inviolate. Today's decision rejects that fundamental principle." The Section, as interpreted by the Court, does more, he contends, than merely to bar Communists from holding union offices, for by the same reasoning the Court could uphold statutes barring Communists from any gainful occupation, a conclusion which seems to overlook the necessity under the Chief Justice's opinion of establishing a causal relation between any such proscription and the protection of interstate commerce. He is not satisfied by the assurance that there will be no undue expansion of such regulation of thought and belief "while this court sits," as he feels that

that expression has no place in the situation under review, predicated as it is upon the assumption that thought and belief may be regulated whenever the majority of the Court so agree. This postulate he rejects entirely. The fact that it is Communists who are proscribed here seems to him only fortuitous, and his fear is that by the same reasoning any other group could be similarly harried should the occasion arise. ". . . The postulate of the First Amendment is that our free institutions can be maintained without proscribing or penalizing political belief, speech, press, assembly, or party affiliation. This is a far bolder philosophy than despotic rulers can afford to follow. It is the heart of the system on which our freedom depends."

Less than a month after this 3 to 3 decision, this time with eight justices sitting, the Court handed down a *per curiam* opinion in another case presenting the same issues as here involved and again was evenly divided as to the constitutionality of the belief provisions of Section 9(h).[15] The Justices aligned themselves here just as they had previously done, and each side gained one vote when Justice Minton joined in the views expressed by the Chief Justice, while Justice Douglas agreed with Justices Frankfurter, Jackson and Black that the belief provisions were invalid and, feeling that these were not separable, deemed it unnecessary to determine the constitutionality of the remainder of the Section.

The several opinions in the instant case bring out once more the fact that when such ideological matters are involved in cases presented for decision, sharp differences in the personal views and philosophies of the Justices are sharply developed. Justice Frankfurter's words in his separate opinion are apposite, when he says: "When we are dealing with conflicting freedoms, as we are on the issues before us, we are dealing with large concepts that too readily lend themselves to explosive rhetoric. We are also dealing with matters as to which different nuances in phrasing the same conclusion lead to different emphasis and thereby may lead to different conclusions in slightly different situations. From my point of view, these are issues as to which it would be desirable for the members of the Court to write full length individual opinions. The Court's business in our time being what it is precludes this." All here agree as to the basic problem at issue;

[15] Osman v. Douds, 339 U. S. 846 (1950). Justice Clark took no part in the consideration or decision of the case.

the point of divergence comes, as it must, with the solution. Justice Jackson states the Courts' problem broadly thus:

> "The Court's day to day task is to reject as false, claims in the name of civil liberty which, if granted, would paralyse or impair authority to defend existence of our society, and to reject as false, claims in the name of security which would undermine our freedoms and open the way to oppression."

In the instant case the question then becomes: Do those challenging the validity of the "belief" provisions of the Section make false claims in the name of civil liberty, or did Congress in enacting it make a false claim in the name of security which should be struck down? That question had to be faced by each and every one of the Justices in making his decision for no way is open by which the question can be by-passed and there are no objective tests capable of application in making answer. One may state the results and the variant positions taken, but to attempt to rationalize or reconcile would seem futile and would be perhaps misleading; the differences in view and in underlying philosophies seem both great and irreconcilable. Personal views of the Justices as to the dignity to be accorded the individual, the respect and deference due Congressional findings, the reality and gravity of the threat of Communist domination of labor unions, the authority of Congress over all these areas of conflict, can perhaps never be reconciled. We seem to have here an unalterable alignment of views and, as Justice Clark's prior activities as Attorney General of the United States may well result in his continued non-participation in cases raising similar issues it seems that a continued deadlock is to be expected for a somewhat indefinite period.