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Communist-Dominated Union Problem

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THE COMMUNIST-DOMINATED UNION PROBLEM

Introduction

During the recent years in which the tensions of the "Cold War" have been with us, and especially since the beginning of the Korean affair, persistent pressures for the tightening of security and loyalty requirements in all areas of American life have increased steadily. In many cases, as some have argued, these demands for more security and greater insurance of group and individual loyalties may have seriously weakened fundamental American traditions of free thought and free speech.[1] Whatever the efficacy of that particular value judgment, it is the purpose of this article to examine another facet of the general problem of accommodating security with liberty, namely, how to eradicate Communist domination from labor unions without damaging the principle of free choice of collective bargaining representatives.

In the past, it might have been difficult to properly appraise the deep concern which many people, both within and without the labor movement, felt with respect to the disproportionate influence which the Communist Party may have exercised in the affairs of some American labor unions. This may have been due primarily to the fact that in recent years the charge of "Communist" so often had been leveled indiscriminately against all unions by opponents of an expanding American trade union movement that the task of separating the aggressive union leader from the Moscow "party-liner" was rendered very difficult, especially for the non-discerning.[2]

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1 BIDDLE, THE FEAR OF FREEDOM (1951); BARTH, THE LOYALTY OF FREE MEN (1950). For an interesting historical analogy between these times and the period of American history when the Alien and Sedition laws were in effect, see MILLER, CRISIS IN FREEDOM (1951).

2 *Hearings before the Subcommittee on Labor and Labor-Management Relations on Communist Domination of Unions and National Security*, 82d Cong., 2d Sess. 6 (1952).

However, with the worsening relations between the East and West, following their mutual victory in World War II over a common enemy, that situation changed. The unabashed parroting of the foreign policy line of the Soviet Union by a few American union leaders, right down to the last dotted ideological "i", served to eliminate any doubt that they were not sincere trade unionists but rather the political agents of a potentially hostile power.[3]

Although the infiltration of Communists never progressed far in the more conservative craft union set-up of the AF of L, the mass base industrial unionism of the CIO had afforded opportunities particularly conducive for Communists to masquerade as earnest trade unionists.[4] However, as Russian policies moved from wartime collaboration with the United States to undisguised hostility, and especially after the Soviet propaganda attacks on the Truman and Marshall plans, it became increasingly apparent to the CIO that those who gave their loyalty to the Soviet system had no useful place within a genuine American union. Beginning with repudiation of Communist leadership in various individual locals, the catharsis of suspected totalitarians reached a peak in the 1949 convention of the CIO at which time there were expelled the large and powerful United Electrical, Radio, and Machine Workers Union (UE) and the United Farm Equipment and Metal Workers Union (FE).[5] In addition, at that convention, procedures were set up for expelling other allegedly Communist-dominated affiliates. The expulsion of a number of

3 SEN. DOC. No. 89, 82d Cong., 1st Sess. 4-17 (1951).

4 Joseph Curran, leader of the Maritime Union, in his resolution before the CIO convention calling for the expulsion of the United Electrical, Radio, and Machine Workers of America, pointed out: "In the name of autonomy they seek to justify their blind and slavish willingness to act as puppets for the Soviet dictatorship and its foreign policy with all its twists and turns from the Nazi-Soviet Pact to the abuse of the veto in the UN, the Cominform attack upon the Marshall Plan, ECA, the Atlantic Treaty, and arms aid to free nations." *Committee Print of Hearings before Subcommittee on Labor and Labor-Management Relations on Communist Domination of Certain Unions,* Part II, 82d Cong., 2d Sess. 48 (1952).

5 *Hearings, supra* note 2, at 246.

other unions, in accordance with these newly devised procedures, followed quickly after the convention.[6]

The CIO pointed to this internal housecleaning as proof that American unions are equipped, by themselves and upon their own initiative, to rid themselves of Communists without the necessity of outside intervention either on the part of the government or employers.[7] Others were not so sure this self-confidence was entirely justified and pointed out that what had been done so recently should have been done a long time ago.[8] On the other hand, many who criticized in this vein were among those who had made the elimination of Communists from American unions more difficult by continuing to ignore legitimate employee grievances, based upon economic and social inequities which for a long time remained uncorrected. Whatever the merits with respect to the issue of whether American labor too long tolerated Communist leadership in its ranks, the fact remains that, despite the purge of Communists which has been effected, the Communist-dominated union still presents a threat to national security. This article will attempt to recite the problem and examine

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[6] *Committee Print, supra* note 4, at 48 *et seq.* The UE was expelled by the CIO convention action. The other international unions ousted from the CIO on the charges of Communist-domination were expelled by the action of the CIO Executive Board after receiving the reports of special committees appointed to investigate the charges against them.

[7] As the late Phillip Murray stated in a letter to Senator Humphrey: "We in the CIO yield to no group in our opposition to Communism. We have demonstrated this feeling by our actions in expelling from the CIO those unions whose leaders have sought to aid the program and purposes of the Communist Party. But, as your report shows, these expulsions were based on decisions made by the CIO as the chosen representatives of many millions of workers. Because these expulsions were the decision of the representative of the workers themselves and not a Government fiat, the unions which were expelled from the CIO have not achieved martyrdom. On the contrary, these unions have been brought into disrepute in the eyes of the workers of America and they have been losing ground since their expulsion." *Committee Print of Hearings before Subcommittee on Labor and Labor-Management Relations on Communist Domination of Certain Unions,* Part III, 82d Cong., 2d Sess. 59 (1952). The late Mr. Green, President of the AF of L, wrote to Senator Humphrey in a similar vein, pointing out "that any problem of Communism in unions is a problem that can only be handled by the membership" thereof. *Id.* at 38.

[8] In this regard, see the comment of Mr. L. R. Boulware, Vice President of the General Electric Company. *Hearings, supra* note 2, at 397.

possible solutions, legislative, administrative and otherwise, which have been suggested.

In the first place, Communist leadership is still strongly entrenched in a small number of important American unions.[9] These unions occupy strategic places in our economy. That the official strategy of the Communist International is to gain control of and utilize trade unions in order to carry out their grand plan, revolutionary, dialectical, or what have you, can not be open to doubt.[10] They have not hesitated to make this strategy apparent by their actions in France and Italy where Communists are in control of a substantial number of important trade unions.[11] It seems fairly obvious that the most powerful weapon which Communist union leaders possess is the ability to stage a political strike, perhaps accompanied by individual acts of direct sabotage. These actions, if carried on on a large scale in crucial defense industries, could seriously cripple the defense production of any

9 As the Chairman of the Munitions Board related in his testimony before the Subcommittee on Labor and Labor-Management Relations: "Recent congressional hearings with respect to the communications industry furnish an especially dramatic example of how a union allegedly under the control of officials following the Communist Party line could paralyze a critical industry of the United States. The strikes on the water fronts and docks of the west coast, carried out under the leadership of a union official whose loyalty has more than once been impugned by the Congress and the courts of the United States, should teach us another lesson in the industrial-strangulation techniques that are at the command of those who could use them to jeopardize the interests of our country.

"Finally there is the situation with which the Department of Defense is most intimately concerned. The United Electrical Workers Union is the collective-bargaining agency for many facilities working on important defense contracts in the strategically important field of electronics. Congressional reports point out that a roll call of their leadership reveals names whose affinity to the Communist Party line is no fiction but a proven fact, sufficient for the Congress and sufficient to cause their loyal brethren in the CIO to brand them as either agents or dupes of communism and to expel them in disgrace." *Hearings, supra* note 2, at 21.

10 "The evidence which the committee has gathered bears abundant testimony to the fact that throughout the years there has been a major purpose of the Communist Party to attempt to bore from within the ranks of the American labor in an effort either to turn labor organizations into political tools or to disrupt and destroy them." H.R. REP. No. 1, 77th Cong., 1st Sess. 9 (1941).

11 A recent manifestation of this strategy was the one-day political strike which the French Communist unions staged last June upon the arrest of Jacques Duclos, French Communist leader. Washington Post, June 8, 1952, § II, p. 1B. With respect to the situation in Italy, see Norman, *Politics and Religion in the Italian Labor Movement*, 5 INDUSTRIAL AND LABOR RELATIONS REVIEW 73 (1951-52).

nation against which they were employed. Available evidence indicates that the Allis-Chalmers strike (during the days of the Nazi-Russian pact) was exactly that type of political or foreign policy strike.[12] The possibility that the leadership of the United Electrical Workers, for instance, or other allegedly Communist-dominated unions, could cause severe damage to United States defense production by calling a nation-wide strike is one that must be reckoned with even though it may be a potential rather than a present danger.

Although it is encouraging to note that the French workers have been able to detect the motives of Communist leadership in calling what were purely and simply political strikes,[13] there is no assurance that loyal unionists will always demonstrate the same perceptiveness. In the complex field of labor-management relations, it is not difficult for Communist union leaders and members to seize upon ostensible grievances with which to rouse the entire membership in support of a strike which is, in reality, a political or foreign-policy strike, the actual purpose of which is to serve the interests of the Communist Party. Nor can too much comfort be taken by referring to the ineffectiveness of American Nazis in carrying out political strikes or sabotage during World War II. Nazi

12 Mr. Louis Budenz, one-time managing editor of the official Communist newspayer, The Daily Worker, and former member of the national committee of the Communist Party, testified that, to his knowledge, the Allis-Chalmers strike had been deliberately precipitated and provoked by the Communist officials of the local union on instructions from the political committee of the Communist Party, for the purpose of impeding the American program of giving aid to Britain. *Hearings before the House Committee on Education and Labor,* 80th Cong., 1st Sess. 3603-3623 (1947).

13 "Benoit Franchon heads the biggest French labor organization, the GCL-9 General Confederation of Labor, and is high in the councils of the Communist Party. He knows Frenchmen better than the Cominform or Moscow. He knew that the French worker, a rugged individualist at heart, would balk at political strikes. As long ago as January, Franchon resisted the Moscow directive that the political strike technique, mass worker demonstrations for political purposes, become the major French party effort." Washington Post, June 8, 1952, § II, p. 1B. A leading American labor leader has expressed this same confidence with respect to the ability of American workers to see through, and resist, any rash courses of action that may be urged upon them by union officials who do so out of a desire to weaken national security. Testimony of the late Allan S. Haywood, Executive Vice President of the CIO. *Hearings, supra* note 2, at 271.

agents never had much success in infiltrating the American labor movement. Their technique was to operate through the more highly skilled workers from whence they moved into management circles, especially in the chemical and mechanical industries of the country. The Communists, on the other hand have more successfully exploited the technique of operating through trade unions.[14]

A Suggested Administrative Approach

A number of Congressional committees have been looking into the extent to which Communist influence in American unions is still a factor with which to be concerned.[15] One committee already has recommended legislation which would permit the decertification, as collective bargaining agents, of unions found to be Communist-dominated.[16] The Chairman of the Senate Judiciary Committee at the last session of Congress introduced a drastic bill embracing the decertification idea.[17] At the same time, a subcommittee of the Senate Committee on Labor and Public Welfare held extensive hearings on the whole subject of Communist-dominated unions.[18] The Chairman of this Committee indicated, before the hearings commenced, that the purpose of their investigation was not necessarily to recommend legislation but rather represented

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14 The Nazi tactics during World War II and before were to have their members gain as many important positions as possible in the industries of America, so as to gain favor with management rather than working within the ranks of organized labor. H.R. REP. No. 1, 77th Cong., 1st Sess. 10 (1941).

15 In addition to the Senate Subcommittee on Labor and Labor-Management Relations, the Senate Subcommittee on Internal Security of the Committee on the Judiciary has been looking into the problem of subversive influence in certain unions. *Hearings before the Subcommittee on Internal Security on Subversive Control of the United Public Workers of America,* 82d Cong., 1st Sess. (1951). See also *Hearings before the Committee on Un-American Activities on Communism in the Detroit Area,* 82d Cong., 2d Sess. (1952).

16 *Hearings before the Subcommittee on Internal Security on Subversive Infiltration in the Telegraph Industry,* 82d Cong., 1st Sess. VI (1951).

17 S. 1975, 82d Cong., 1st Sess. introduced by Senator McCarran (D., Nev.) August 9, 1951, 97 CONG. REC. 9675 (1951). Recently, the Senator again urged the enactment of legislation embracing the decertification idea. Washington Star, Dec. 29, 1952, p. A-2.

18 *Hearings, supra* note 2.

an attempt to find out the exact nature of the problem and the remedies which might be utilized to solve it.[19] The testimony of the numerous witnesses, government, employer and union, who appeared before this subcommittee, provide an excellent picture of the great difference of opinion which exists concerning the extent of the problem, and how best to deal with it.

For example, the most vocal and aggressive pressures upon the government to do something in this field have come from the President of the International Union of Electrical Workers (IUE-CIO), Mr. James Carey. Mr. Carey's union was formed when the UE was expelled from the CIO because its leadership had been found "devoted primarily to the principles of the Communist Party and opposed to the constitution and democratic objectives of the CIO." [20] In spite of their excommunication, the UE remained strong and, while it lost many of its members to the new IUE-CIO, it still continued to win NLRB representation elections and, thus, qualified as the collective bargaining agent at a number of key defense facilities in the electronics industry.[21] Mr. Carey attributed this success mainly to the "behind-the-scenes" cooperation which industry, especially the General Electric Corporation,

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19 The questions which the Subcommittee asked of interested Government agencies and labor and management representatives were: (1) Is there an effective legislative approach to the problem of Communist-dominated unions? (2) Can you suggest the principles or statutory language which ought to be embodied in such legislation? (3) Can you suggest avenues of inquiry which the subcommittee ought to pursue, particularly those avenues which have not already been studied by other committees? *Committee Print, supra* note 4, at 2. The Committee was as good as their Chairman's word. In their report they exhorted, advised, and admonished labor, industry, and the government agencies concerned with the problem, but with respect to the question of further legislation on the subject they felt: ". . . we ought not to embark on additional or more dubious legislation until we have exhausted the lawful remedies under existing legislation." Washington Star, Feb. 8, 1953, p. A-1.

20 *Committee Print, supra* note 4, at 50.

21 "The International Union of Electrical Workers, established by the CIO to organize the electrical industry after the expulsion of UE, now numbers some 350,000 members — most of whom they picked up from the UE — but they just have not been able to win over the workers at such vital plants as General Electric's Erie and Schenectady installations, in Westinghouse's Lester and Baltimore shops, among many others." Conn, *Communist-Led Unions and US Security,* NEW REPUBLIC, Feb. 18, 1952, p. 16, col.,2.

allegedly gave UE. He claimed that this paradox of capitalistic-communistic rapprochement grew out of industry's desire to deal with a weak union and pointed out that the UE, subsequent to its expulsion from the CIO, has pursued a docile course of conduct in presenting their collective bargaining demands.[22]

Industry spokesmen replied to Mr. Carey's charges with a defense and countercharge. The tardy recognition by the CIO of the Communist influences in their affiliated unions, alleged the Vice-President of the General Electric Corporation, impeached the sincerity of that labor organization on the question.[23] Moreover, it appeared that the National Labor Relations Act would not permit an employer to refuse to bargain collectively with a union which had been certified under that statute, even though the union in question might be characterized as "Communist-dominated." [24] Mr. Carey disagreed. While he felt that legislation in this field was not only unnecessary but dangerous, he had other ideas as to how to meet the problem.[25] His plan, as outlined in testimony which he gave before the Senate Subcommittee on Labor and Labor-Management Relations, calls for the creation of a tripartite committee within the Munitions Board of the Department of Defense, composed of representatives of the military departments, employers, and labor.[26] If a union

22 *Hearings, supra* note 2, at 228 *et seq.* Again, upon the conclusion of a collective bargaining contract between the General Electric Company and UE, Mr. Carey accused GE of having a "collusive arrangement" with UE, and said that because of it the company has refused to bargain with his union. Washington Star, Sept. 13, 1952, p. 3.

23 *Hearings, supra* note 2, at 397.

24 The employer is not in a position, either as a practical or legal matter, to decide for himself an issue of whether a particular union with which he is dealing is Communist-dominated. The NLRB has ruled that, the officials of a union representing a majority of employees having filed non-Communist affidavits, the employer must bargain with the union even if he knows or suspects the union is Communist-dominated. An employer's refusal to bargain on the excuse that the union concerned was Communist-dominated was held to be an unfair labor practice. Sunbeam Corp., 93 N.L.R.B. 1205 (1951).

25 *Hearings, supra* note 2, at 193 *et seq.*

26 *Id.* at 258.

representing the employees of a present or prospective defense contractor was suspected, after investigation by representatives of the Munitions Board, of being Communist-dominated, the question would be submitted to the tripartite committee. Mr. Carey's plan contemplated that the committee also could act on its own motion. If the charges of Communist domination were substantiated in a particular case, two courses of action would be open for the Department of Defense to follow, based on provisions which the Department would have inserted as part of the security regulations of the Department and as part of all procurement contracts executed by the military services.

In the case of a prospective contractor, the Department could refuse to give him a defense contract unless he ceased to recognize the Communist-dominated union. If the case involved a contractor who was already performing defense contracts, his contract would be cancelled unless there were no other manufacturing facilities available for the items involved. If no other facilities were available,[27] Mr. Carey would have the Munitions Board go into court and obtain an injunction to restrain the contractor from continuing to deal with the bargaining agent. Presumably, the basis of such an injunction would be the security regulations of the Department of Defense which Mr. Carey would have the Depart-

27 "MR. SMALL . . . In spite of these difficulties, there are those who suggest that the Department of Defense go off on a program of its own, in a unilateral fashion, to rescind defense contracts with manufacturers whose facilities have a Communist-dominated union as a collective bargaining agent. If we were to pursue such a course, we would have deprived the Government and the people of the United States of important weapons of defense in the fields of electronics, jet propulsion, and so on. On the other hand, assume that these suppliers were willing to comply with our order; in what position would we then have placed them? If the Communist-dominated union had won a representation election, conducted by the NLRB at the facility of our contractor, the union might immediately bring an unfair labor practice suit against the employer. Under the terms of the National Labor Relations Act, it would appear that the NLRB would have no alternative but to so find." *Hearings, supra* note 2, at 23. This is a fair statement of the possible dilemma in which the Department of Defense might find itself, if they were to demand that employers cease recognition of certified collective bargaining agents.

ment amend to provide that this action could be taken if the tripartite committee found that the union was Communist dominated.

The Lilienthal Case

While this plan is a novel one, it is not entirely without an analogous, if somewhat limited precedent. This is the bold action which the Atomic Energy Commission took with respect to UE back in 1948.[28] On November 1st of that year, after considerable investigation and after the UE leadership had been given the opportunity to present themselves for an AEC security clearance, the Commission directed the General Electric Company to withdraw and withhold recognition from UE with respect to General Electric employees working in Atomic Energy Commission owned or based installations in Schenectady. At the time this action was taken, a collective bargaining contract was in existence between General Electric and UE. However, the company complied with the request. UE brought suit in a Federal District Court for an injunction to require the Commission to revoke its instructions to the company. The suit was dismissed and a memorandum opinion gave the rationale — the Atomic Energy Act authorized the action of the Atomic Energy Commission; it was within their administrative discretion; it was not arbitrary or capricious; and the Administrative Procedure Act was not applicable so as to require a formal administrative hearing as a prerequisite to the action taken.[29] The *Lilienthal* case was advanced as a precedent for the Department of Defense to establish the tripartite committee which Mr. Carey advocated.[30] However, the Chairman of the Munitions Board pointed out significant differences existing between what the

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28 UEW CIO v. Lilienthal, 84 F. Supp. 640 (D.D.C. 1949). Interestingly, the CIO, Mr. Carey included, supported the action which UE brought in this case. Of course, at that time the UE was still, at least technically, in the good graces of the CIO.

29 For a complete discussion of what AEC did, and why, with respect to removing UE representation from its facilities, see *Committee Print, supra* note 4.

30 *Hearings, supra* note 2, at 285.

Atomic Energy Commission did in one isolated instance and what Mr. Carey would have done on an across-the-board basis with respect to all defense contractors.[31]

In the first place, Section 4(c)(2) of the Atomic Energy Act is quite specific in directing the Atomic Energy Commission to include, in any contract for the production of fissionable material, provisions ". . . obligating the contractor . . . to comply with all safety and security regulations which may be prescribed by the Commission." [32] Secondly, Section 4(c)(1) vests in the Commission a virtual monopoly in the production of fissionable material.[33] In addition, the legislative history of the Atomic Energy Act further supports the conclusion that Congress intended to vest the Atomic Energy Commission with very broad authority in the field of security.[34] The statutory authority of the Department of Defense, on the other hand, is much more diffused when it comes to giving power to promulgate security regulations which affect parties outside the Department. The head of each government department has authority to prescribe regulations for the protection and preservation of the records appertaining to it.[35] However, while this may sanction a program which requires clearance for individual employees of private contractors who work on classified contracts,[36] it does not meet the problem of the Communist union leaders where it exists, since the danger from that source does not lie in the access to classi-

31 *Hearings, supra* note 2, at 23-24.

32 60 STAT. 759, 42 U.S.C. § 1804(c)(2) (1946).

33 60 STAT. 759, 42 U.S.C. § 1804(c)(1) (1946).

34 SEN. REP. No. 1211, 79th Cong., 2d Sess. 14-15 (1946).

35 "The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it." REV. STAT. § 161 (1875), 5 U.S.C. § 22 (1946).

36 The Department of Defense has an elaborate program for clearing individual employees and contractors for work on classified material. Persons denied access are given the right to appeal to an Industrial Employment Review Board where they are entitled to a hearing. The Board is composed of representatives of the three military departments with a civilian chairman, and is under the supervision of the Munitions Board, Department of Defense. *Hearings, supra* note 2, at 27-36.

fied military information but in their direction and control over the membership whom they could deceive into initiating a political or foreign policy strike. To illustrate the point, all the individual members of UE who presently are working on classified defense contracts have been cleared through the Department of Defense security procedures.[37] Nevertheless, the UE is still under the control of an allegedly Communist-inclined group of union officials.

In addition to the more limited statutory authority which the Department of Defense would seem to have to deal with suspect unions, there are other significant differences which distinguish the isolated action of the Atomic Energy Commission from attempts to apply it on an across-the-board basis. At the time the Atomic Energy Commission ordered the non-recognition of UE, that union was without resort to the procedures normally available under the National Labor Relations Act.[38] The officials of the UE at that time had not signed the non-Communist affidavit as required by 9(h) of the National Labor Relations Act.[39] Therefore, they were not able to bring an unfair labor practice charge against General Electric but were forced to resort directly to the courts. In view of the presumption of the validity of administrative

[37] The Atomic Energy Commission pointed this up in its brief before the District Court in the *Lilienthal* case. Although all the individual members of UE who were working on classified atomic energy projects have been cleared by the AEC, the Commission recognized that any subversive union officers of UE "exercising administrative, negotiating and disciplinary authority over members working on atomic energy projects could, if they were so disposed, affect the labor relations on an atomic energy project so that the work could be slowed down or curtailed." The Commission called the court's attention to the fact that "a union officer or one who was not loyal to the interests of the United States could precipitate a strike actually in the interests of a foreign power, but avowedly for legitimate trade union purposes and accepted as such by the union members." *Committee Print, supra* note 4, at 37.

[38] In directing the General Electric Company to cease recognition of UE as a bargaining agent, the Chairman of the Atomic Energy Commission noted "that UE officers have failed to comply with the section of the Labor Management Relations Act, 1947, which provides for filing of affidavits that they are not members of the Communist Party or affiliated with such party." *Committee Print, supra* note 4, at 14.

[39] 61 STAT. 146 (1947), 29 U.S.C. § 159 (h) (Supp. 1952).

action,[40] and considering the broad provisions of the Atomic Energy Act, discussed above, it is a fair statement to say that the non-availability of a judicial remedy in UE's law suit does not necessarily have as a corrollary the premise that an unfair labor practice charge also would not have been open to them to pursue. Since the district court decision in the *Lilienthal* case, the officials of the UE have signed the non-Communist affidavit and, presumably, now might be successful in bringing an unfair labor practice charge against a contractor who ignored their status as a collective-bargaining agent upon the directive of a military department.

There are two parts to the question of the authority of the National Labor Relations Board in this area. One is whether the Board, under its parent statute, can revoke or ignore their own certification previously made to a union which a security agency of the government subsequently alleges is Communist-dominated.[41] Second, and perhaps a less doubtful question, is whether the National Labor Relations Board could condition the granting of a certification in a collective bargaining election, upon the union's compliance with the security regulations of the agency that may be involved. These two questions were the subject of extended examination by the Department of Defense, the Atomic Energy Commission, and the National Labor Relations Board.[42] The Department of Defense, quite naturally, felt that it did not wish to promulgate security regulations under which contractors could be directed to cease bargaining relations with unions, unless there were some insurance that the National Labor Relations Board would honor the directive, and not rule that an unfair labor practice had been committed when the contractor attempted to comply with their security prerequisites.

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40 The Supreme Court has consistently held that judicial judgment should not be substituted for, and the Court should not overturn, administrative action or judgment with respect to questions within the agencies' statutory power of rule making. *See, e.g.*, SEC v. Chenery Corp., 332 U.S. 194, 207 (1946).

41 49 STAT. 453 (1935), 29 U.S.C. § 159 (1946).

42 *Hearings, supra* note 2, at 24.

The official view of the National Labor Relations Board seems to be that the National Labor Relations Act does not permit revocation of a certificate on the say-so of the Department of Defense.[43] On the other hand, in at least one case involving the Atomic Energy Commission, the Board has declared that it would condition any certification resulting from elections at Atomic Energy installations at Schenectady, New York, upon compliance with the security requirements of the Atomic Energy Commission.[44] However, that condition was never tested since the UE failed to win the representation election in that particular case. The NLRB has held that a certification may be revoked for any reason that would have justified the Board in refusing to issue it originally.[45] Therefore, it has been argued that since the Board has determined that compliance with federal security requirements is a prerequisite to a union's capacity to act as a collective bargaining representative, it follows that the Board can vacate the certification of a union which could not meet appropriate security requirements.[46] Doubt has been expressed with respect to the validity of this argument by the Chairman of the NLRB,[47] although from a strictly legal point of view it might have merit if it is assumed that the NLRB does have authority to grant conditional certifications of the type it did in the *General Electric* case. However, the cases which hold that the NLRB may revoke a certificate for non-compliance with conditions, the failure to comply with which would have justified the non-issuance of a certificate originally, involved specific statutory provisions requiring that certain conditions be met by any bargaining agency. As a matter of fact, the cases dealt with the non-Communist affidavit provisions of

43 *Hearings, supra* note 2, at 25.

44 *Committee Print, supra* note 4, at 6-7. The Board has since adopted a policy of inserting a security proviso in certificates of bargaining representatives at Atomic Energy installations, as requested by the AEC. See also General Electric Co., 89 N.L.R.B. 726, 789 n. 56 (1950).

45 See Lane Wells Co., 79 N.L.R.B. 252, 256 (1948).

46 *Hearings, supra* note 2, at 288.

47 *Hearings, supra* note 2, at 96.

the Labor Management Relations Act of 1947.[48] It is one thing to say the NLRB may revoke the certification of a union which is revealed, upon later evidence, to have failed to comply with Section 9(h) of the Act; it is quite a different matter to argue that the NLRB may revoke the certificate of a union which fails to comply with the security regulations, administratively promulgated by another agency of government. In one case the parent statute has provided specific authority to impose a condition precedent; in the other, any authority that exists to insert conditions does so only inferentially.

The difference between the authority of NLRB to require petitioning unions to satisfy Section 9(h) and the doubt which surrounds their right to demand that unions measure up to administratively-imposed security requirements may be more fully appreciated by recalling briefly the legislative history of Section 9(h) itself. The Section, as it emerged, was much more restrained in scope than some of the proposals which had been introduced in the 80th Congress to deal with alleged Communists in American unions. The House of Representatives actually passed a provision which would have banned Communists from holding union offices. This provision was deleted in the conference committee, after many critics had pointed out the staggering load which would be placed on the NLRB if it were to become law.[49] Section 9(h) was the acceptable compromise. The NLRB was not intended to act as a detective agency to look behind the oaths taken. That was left to the Department of Justice and the

48 Thus, in *Lane Wells Co.*, 79 N.L.R.B. 252 (1948) the Board was concerned with the question of continued compliance with the registration requirements of the Taft-Hartley Act, 61 STAT. 146 (1947), 29 U.S.C. § 159(h) (Supp. 1952).

49 In explaining why the affidavit technique was relied upon instead of the more extreme suggestions for disqualifying unions whose officers might be regarded as Communists, Senator Taft (R. Ohio) pointed out that this had been done to prevent endless delays. Under both the original Senate and House bills, the Senator observed, the certification proceedings of the NLRB could have been indefinitely delayed while it investigated and determined Communist Party affiliation. 93 CONG. REC. 6444 (1947).

deterrent efficacy inherent in the law of perjury.[50] Therefore, it is difficult to sustain the argument that the Labor Management Relations Act of 1947 implies authority in NLRB to go beyond Section 9(h) in handling the problem of the Communist union officer. Congress has acted in specific fashion in this field and, in fact, has rejected suggestions to do directly by statute what Mr. Carey of the IUE and others would have NLRB, acting in conjunction with other agencies, do indirectly by administrative action.[51]

A Canadian Solution

The legislative history of the Taft-Hartley Act also supplies an answer to other commentators on the subject of the Communist-dominated union who have urged a parallel, but broader technique of decertifying Communist unions, than that proposed by Mr. Carey. These observers urge use of the "decertification by definition" technique employed by the Canadian Labour Board on December 7, 1950,[52] when it found that the Canadian Seaman's Union was not entitled to be certified as a bargaining agent of employees under the

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[50] The NLRB attempted to require several union leaders, who had refused, on the grounds of self-incrimination, to answer questions put to them before a grand jury concerning their membership in the Communist Party, to reaffirm their non-Communist affidavits. A district court held that NLRB had no jurisdiction to require the officials to file affidavits concerning the veracity of their non-Communist oath. The court referred to the legislative history of the Taft-Hartley Act in pointing out that the bill origanally would have given NLRB the power to investigate unions who sought to use the facilities of the Board. However, Section 9(h) was specifically substituted for this authority. United Electrical, Radio & Machine Workers v. Herzog, 110 F. Supp. 220 (1953). Of course, where a conviction has been obtained in a perjury proceeding the case would be different since the oath would be clearly of no validity. To this extent the Board can protect its own processes from abuse and treat a perjured oath as no oath at all. *In re* Consolidated Cigar Corp., 21 U.S.L. WEEK 2310 (NLRB Dec. 30, 1952).

[51] Nevertheless, sections of the responsible press of the country still feel the Carey proposal has great merit and that the technical legal objections to it, which the Department of Defense and NLRB have made, have failed to convince them that something should not be done along the lines suggested by the president of the IUE CIO. N.Y. Times, Oct. 10, 1952, p. 24 col. 3-4. For the view that nothing at all should be done by anyone outside the unions themselves, see Eggleston, *Labor and Civil Liberties,* 174 THE NATION 647 (June 1952).

[52] Branch Lines Ltd. v. Canadian Seamen's Union (1951), 51 LAB. GAZ. 190 (Can. Lab. Rel. Bd.) *aff'd* [1951] O.R. 178, 2 D.L.R. 356.

Canadian Industrial Relations and Disputes Investigation Act.[53] The ground upon which this decision was based was that the union involved was not a "trade union" within the meaning of the Canadian statute. The evidence in support of it lies in the circumstance that the union concerned, during a strike, enlisted the support of reputed Communist groups in various countries to assist them. The Canadian Labour Board also gave weight to the fact that the union had been expelled from international union organizations for its alleged Communist tendencies. The short answer to this novel approach to the problem is provided by referring again to the legislative history of the Taft-Hartley Act, discussed above, which spells out the possible outer limits of the authority which the NLRB was given by Congress to deal with the Communist-dominated union. There are other significant differences between the powers available to the NLRB and those which the Canadian Labour Board apparently may exercise under Canadian law. In the first place, the definition of a "trade union," as described in the Canadian Act, is much narrower than the analogous definition of "labor organization" as used in the National Labor Relations Act.[54] Secondly, that latter definition has been administratively and judicially construed in terms of the widest latitude which would make it difficult to delimit it narrowly now without legislative change. Finally, certain provisions of the Canadian Industrial Relations and Disputes Investigation Act vest very wide powers of administrative discretion in receiving evidence and deciding on the basis of it.[55] In contrast, the Administrative Procedure Act and Section 10(e) of the Taft-Hartley Act restrict the NLRB in this regard, although to precisely what extent it is not easy to generalize.[56]

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53 1948 REV. STATS. Canada, c. 10.

54 49 STAT. 450 (1935), as amended, 29 U.S.C. § 152(5) (1946).

55 See discussion of action by Canadian Labour Board in *Committee Print, supra* note 4, at 9.

56 NLRB v. Pittsburgh S.S., 340 U.S. 498 (1951); Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). See also DAVIS, ADMINISTRATIVE LAW 917 (1951).

It may be, all things considered, and starting with a clean slate, that the Canadian precedent would furnish the neatest and most logical avenue of legal solution to the problem of the Communist-dominated union. It should be noted, however, that this would go beyond what the Carey proposal contemplated, *i.e.*, denying Communist unions the right to represent employees working on defense contracts. "Decertification by definition," as it were, would prohibit a union found to be Communist-dominated from using any of the privileges granted by the National Labor Relations Act, as amended. It would bar them from acting as a collective bargaining agent in all cases when interstate commerce was involved. Presumably, to the extent that it went beyond the Carey proposals, even the advocates of the tripartite committee suggestion seem to be opposed to it as unnecessary.[57]

Policy Considerations

Perhaps the strongest arguments against decertification of Communist-dominated unions, either on a limited defense basis or on an over-all scale by means of statutory definition of the term "labor organization," are those of a policy rather than of a purely legal nature. Certainly the CIO and AFL, despite Mr. Carey's enthusiasm for government action in this delicate field, have shown no eagerness to solicit official assistance in their own private war on Communist unions.[58] In fact, the CIO participated in the case brought against the Atomic Energy Commission and protested the action which the Commission took in directing General Electric to cease recognizing UE as a collective bargaining agent in AEC owned facilities.[59]

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57 "MR. SIGAL. . . . We feel that the laws that are on the books are sufficient to meet whatever problems arise outside of defense plants. There is the over-all problem of to what extent the Government should interfere with the right of employees to make a free choice of their collective-bargaining agent . . . . We think there should be no interference with that choice, except on very strong justification. We think that justification does not exist outside of the defense or the security problem. . . ." *Hearings, supra* note 2, at 291.

58 *Hearings, supra* note 2, at 272 *et seq.*

59 *Committee Print, supra* note 4, at 15-16.

The Department of Defense can be pardoned for being skeptical concerning suggestions that they go it alone and set up a tripartite agency to do the same thing on a larger scale when such an attempt by another government agency on a more restricted basis had already been protested by Mr. Carey's parent labor organization. Furthermore, experienced labor and management witnesses alike have pointed out to a Senate subcommittee the disadvantages which would inhere in any tripartite set-up.[60] Tripartite committees, composed of the representatives of management, labor and the public, may act effectively in adjusting conflicting claims of wages, pensions, seniority and other issues pertaining to labor-management relationships. On the other hand, the question of whether a union is or is not under the domination of the Communist party is not one to be decided on the basis of compromise or adjustment of industrial differences. Moreover, the industrial, economic, and political pressures which would infect labor and management members of any such tripartite commission raise serious doubts as to the efficacy of securing objective, judicial decisions on the question from such a tribunal. Some management representatives still can not see much difference politically between Mr. Carey and his allegedly "Red" opponents in the UE.[61]

Additionally, whenever a suggestion is made to the effect that legislation may be needed to effectively eliminate the Communist unions still left on the collective bargaining reservation, the immediate and collective response of most union leaders is an emphatic negative. They feel, and with some justification, that the moment that there is set up an agency with the authority to decertify unions on the grounds of their alleged affinities with Communism, we may have opened up a Pandora's box; and the possibilities of abuse, bias, and arbitrary decision which will then be sanctioned, or at least be made possible by statute, would create the gravest threat

60 *Committee Print, supra* note 7, at 7-8.
61 *Hearings, supra* note 2, at 202-3.

to all American trade unions, especially those characterized by the vigor and militancy with which they pursue their trade union objectives.[62] Theirs may be a fearful and fanciful projection of a *reductio ad absurdum*; nevertheless, it contains the kernel of a hard fact. The power to draw the line between orthodoxy and subversion is always an awesome one; the power to do it in the controversial field of labor relations is that much more difficult. Therefore, for those who hold such views, to urge that the power of such a weighty decision be given to a tripartite commission operating under a military agency or to a civilian agency, not trained to recognize the varying symptoms which distinguish Communism from socialism, populism, liberalism, Catholic Actionism, or "Fair Dealism", is to relinquish the principle for a procedure that could negate it.

Authority of the NLRB

Assuming, however, that the Department of Defense was willing to overlook whatever strong policy objections stand in the way of administrative action directing defense contractors to cease collective bargaining relations with a union, the international officials of which are alleged to be poor security risks, there still remains substantial doubt as to whether such a maneuver could be executed successfully from a legal point of view. In such a case, and upon refusal of the contractor to bargain further with the union, the union undoubtedly would claim that the contractor has unlawfully refused to bargain in violation of the National Labor Relations Act, as amended by the Taft-Hartley Act.

Although there are no decisions directly in point in connection with this assumed situation, there are several analogies which bear on it. One of the major factors in a finding of a refusal to bargain is the good faith of the employer.[63] The

62 *Id.* at 280.

63 NLRB v. American National Ins. Co., 343 U.S. 395 (1952); NLRB v. Norfolk Shipbuilding & Drydock Corp., 195 F.(2d) 632 (4th Cir. 1952); NLRB v. Whittier Mills Co., 123 F.(2d) 725 (5th Cir. 1941).

NLRB has admitted, if presented with an unfair labor practice charge of the type we are concerned with, they would give much weight to the official directives issued by the Department of Defense or to any other responsible security agency of the government.[64] This would mean that the "good faith" issue ought to be easily determined in such cases. Moreover, there is at least one Supreme Court decision stressing the necessity for the NLRB to accommodate the policies of its parent statute with other equally important congressional objectives as enumerated in other statutes.[65] Although, in that particular decision, the statute to be accommodated was the Federal Mutiny Act, presumably the same rationale would be applicable in the case of other federal legislation. Certainly, the important Atomic Energy Act would be entitled to a liberal and careful construction by the NLRB, and the *Lilienthal* case furnishes some evidence that the federal courts would agree.[66] However, for the reasons indicated herein,[67] the statutory authority of the Department of Defense is a more diffused power; and the possibilities that a court might find an over-extension of the administrative security authority, if used as suggested to interfere with the collective bargaining relationship among defense contractors and their employees, are quite substantial. This is especially the case since, where Congress intended administrative authority over security matters to be broad, as in the Atomic Energy Act, it said so in express and comprehensive terms. In view of this, and because of other grounds of distinction averred to above, this writer feels that the legal basis for saying that the NLRB may ignore an unfair labor practice charge, pressed by a union which has been ousted of collective bargaining rights upon the say-so of the Department of Defense, is difficult to spell out. It lies, however, in an area where the cold war

64 *Hearings, supra* note 2, at 25.

65 Southern S.S. v. NLRB, 316 U.S. 31 (1942).

66 UEW CIO v. Lilienthal, 84 F. Supp. 640 (D.D.C. 1949).

67 See note 35 *supra* and accompanying text.

atmosphere may have permeated the collective judicial minds of the federal bench sufficiently to cause them to decide otherwise.

Finally, it is possible that the dichotomy of organization, which Congress has erected between the NLRB and its General Counsel, might provide an alternative method for avoiding successful unfair labor practice actions against defense contractors in the situation which we have been examining. Under the Taft-Hartley Act, the General Counsel was given a status independent of that of the Board and invested with a broad discretionary authority with respect to the institution of unfair labor practice complaints against both employers and unions.[68] A recent federal circuit court decision has held that the dismissal by the General Counsel of an unfair labor practice charge is not a final order of the NLRB judicially reviewable under Section 10(f) of the Taft-Hartley Act.[69] The court observed that while Section 3(d) of that Act gave the General Counsel final authority with respect to the investigation of unfair labor practice charges and the issuance of complaints in connection therewith, no provision was made for judicial review of his action in this field.[70]

There is, then, some legal authority upon which to rely in arguing that the General Counsel of the NLRB, taking into account the security regulations and the specific directive of the Department of Defense to one of its defense contractors, would have the authority to refuse to issue a complaint on the request of a union whose officials have been determined by the Department of Defense to be poor security risks. This theory might be relied upon in a case-by-case basis, although the General Counsel of the NLRB seems to have agreed with the Board that any general position to this effect, that might be taken on this question, could only be reached after specific

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68 61 STAT. 139 (1947), 29 U.S.C. 153(d) (Supp. 1952).

69 Manhattan Const. Co. v. NLRB, 198 F.(2d) 320 (10th Cir. 1952).

70 *Id.* at 321.

amendment of the legislative authority now on the books.[71] Moreover, if the assumption indulged in previously is valid, *i.e.*, that the National Labor Relations Act does not grant the power to deny statutory collective bargaining rights merely upon the security findings of other agencies, then it seems that it would be possible to have the General Counsel's refusal to issue an unfair labor practice complaint judicially reviewed. Section 10(a) of the Administrative Procedure Act [72] provides, with certain exceptions, for judicial review of "any agency action." The General Counsel of the NLRB fits within the definition of "Agency" as used in the Administrative Procedure Act. If so, it would seem that the Act authorizes review of the General Counsel's action by the federal courts, since there then would be presented a question of statutory interpretation.[73]

However, there is one recent decision of the General Counsel of the NLRB which demonstrates that he can look the other way in the case of a discharge of an individual for alleged Communist activities, where the union supports the action of the employer, and where no fundamental disruption of the collective bargaining contract between the employer and the union as a whole is involved.[74] In the case referred to, the discharged employee had been active in circulating the Communist-inspired "Stockholm Peace Pledge." The fellow

71 *Hearings, supra* note 2, at 25.

72 60 STAT. 243, 5 U.S.C. § 1009 (1946).

73 Judicial review under Section 10 of the Administrative Procedure Act is applicable "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion —." The right of an agency, other than the NLRB to order an employer to cease recognition under the NLRA, would seem to present a question of statutory interpretation not vested in the discretion of the General Counsel. Moreover, the Taft-Hartley Act, a statute enacted subsequent to the Administrative Procedure Act, would have to be taken into account when considering the availability of judicial review of any discretion which the General Counsel of the NLRB allegedly has to ignore a certified collective bargaining agent, by refusing to issue a complaint of an unfair labor practice upon a charge that the collective bargaining status has been rejected by an employer, who must observe it under the terms of the basic statute.

74 Administrative Decisions of the General Counsel, NLRB, Case No. 72, March 30, 1951.

employees of the petitioner had demonstrated bitter resentment against him, with some threatening violence because of his efforts in circulating the "Pledge." Upon request of the union, the company discharged the individual because of his propaganda activities. After the Regional Director refused to issue complaint of an unfair labor practice against the company, the petitioner appealed to the General Counsel alleging, *inter alia,* that his political views and activities were not relevant to the question as to whether he had been discharged illegally under the National Labor Relations Act. The General Counsel upheld the decision of the director, determining that the underlying reason for the discharge was the individual's suspected Communist activity, which was resented by the employees and the union, and was a subject of concern to the employer since it caused considerable unrest among the employees. These activities were not protected by the Act, and a discharge based on them is not an unfair labor practice. Under the statute, the petitioner could not be afforded relief since, in the opinion of the General Counsel, discharge of the petitioner was for a cause unrelated to protected activities.

Nevertheless, the case seems distinguishable from a situation where a large number of union employees would be penalized by being deprived of representation rights guaranteed them by the statute, merely because international officers may not satisfy the security standards of another agency of government. In addition the representation case, as mentioned previously, would raise a question of law, not of fact. Moreover, the NLRB, as its chairman has testified,[75] would be thwarted in any attempt to carry out its functions if representation proceedings and unfair labor practice complaints brought by unions against employers were subject to diversions, upon request of the employer, into the collateral and complex fields of Communism and subversion. To whatever

[75] *Hearings, supra* note 2, at 89 *et seq.*

extent collateral issues may be raised in proceedings involving the alleged unfair discharge of individuals, it seems fair to observe that the legislative history of the Taft-Hartley Act, as well as obvious limitations on the administrative process, argue against the projection of the Communist question into disputes between employer and union, which already are replete with emotional, economic, and evidentiary antagonisms.

Section 9(h) of the Taft-Hartley Act

The legal and policy obstacles involved in any attempts to authorize the National Labor Relations Board and the Department of Defense to decertify Communist-dominated unions make it necessary to examine alternative approaches. It has been suggested in some quarters that the non-Communist oath provisions of the Taft-Hartley Act could be amended to take care of the problem.[76] This suggestion is of doubtful validity, however, since the experience up to now with Section 9(h) can only lead to the conclusion that it largely has failed as a statutory instrument in preventing the Communist-dominated union from remaining active on the collective-bargaining scene of the nation.

Detailed testimony from many quarters, including the Chairman of the NLRB, labor representatives and management, document this conclusion.[77] In the first place, there are several defects in the wording of Section 9(h) itself which restrict its application. It speaks in the present tense and Communist union officials have found it fairly easy to adopt the "resign and sign" technique, whereby they formally resign from the Communist Party and thus are able to take the oath prescribed by 9(h).[78] While it is true that Section 9(h) also requires the affiant to swear that he does not *believe* in the overthrow of the government by force, the difficulties of proof

[76] *Committee Print, supra* note 7, at 76.

[77] *Id.* at 3-13, 51.

[78] *Hearings, supra* note 2, at 54-8.

(in cases where he has sworn falsely) are obvious. As a result, it is not surprising that the Department of Justice has been able to successfully indict and convict only one union leader of perjury.[79] Moreover, that department probably is not anxious to reveal confidential sources of information by divulging them in the course of perjury proceedings.[80] There are other disadvantages in connection with the 9(h) provision. Some unions have not found it difficult to curtail the number of union officers and thus do away with the necessity of taking the oath.[81] On the administrative side, it has proved an obstacle to the speedy processing of NLRB proceedings. Officers of local unions keep changing constantly, and it appears that keeping the compliance affidavits current with the movement of local officials in and out of offices is no mean clerical task.[82]

There are other fundamental objections to using Section 9(h) as a club against Communist unions. It is fair to assert that the non-Communist affidavit is really serving no practical purpose at this time. As indicated above, notorious Communist union officials have found it easy enough to either sign or circumvent the affidavit. Moreover, to the extent that they have signed it, the Communist-dominated union has been elevated to the same plane of respectability occupied by the great majority of local American unions.[83] Upon signature

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79 United States v. Valenti, 106 F. Supp. 121 (D. N.J. 1952). The one year conviction was followed by the imposition of a five year prison sentence. Washington Post, Dec. 1, 1952, p. 8. See also *Hearings, supra* note 2, at 52-4, 79.

80 N.Y. Times, Feb. 16, 1953, p. 18 col. 4.

81 *Committee Print, supra* note 7, at 6-8.

82 *Committee Print of the Staff Report to the Subcommittee on Labor and Labor-Management Relations on the Problem of Delay in Administering the Labor-Management Relations Act,* 82d Cong., 2d Sess. 6 (1952). See also Washington Post, Aug. 8, 1952, p. 8.

83 "The very act of certification gives the Communist-dominated unions legal standing and respectability which they would not otherwise have. This has the effect of not only influencing the rank and file who support the Communist leadership in certain unions but also conditions the attitude of employers toward these unions. As a result, any employer who finds it advantageous to deal with a Communist-dominated union uses the law as an excuse for doing so. Likewise, an employer who would prefer to deal with a bona fide union has no easy way of doing so." *Committee Print, supra* note 7, at 36.

of the affidavit, there has been bestowed an imprimatur of the United States which aids the Communist union official in persuading his membership that he is pure; and, to that extent, partially explains the continuing strength of unions like the UE among loyal American working people. Section 9(h), as it now stands, is deeply resented by the great majority of unions. They feel it is unnecessary, impractical, unfair, and insulting. The intensity of their opposition to it further argues against utilizing it in connection with the Communist union problem.[84]

However, there are some who believe that Section 9(h) could be amended so as to provide an effective means to eliminate Communist leadership. There are several versions of how this could be done. It has been suggested by the former General Counsel of the National Labor Relations Board that the adoption of a broader definition of the term "union officer" would render Section 9(h) more effective.[85] This seems dubious, however, since the technique of formal resignation from the party would still be available and limitations on the effective introduction of evidence in perjury prosecutions would still inhibit the Department of Justice. Representative Barden (D.,N.C.) recently introduced a bill to amend Section 9(h) in a different way.[86] The Barden proposal would require the union official to affirm that he is not a member of the Communist Party and does not believe in the overthrow of the Government by unconstitutional methods, and "that for the proceeding 12-month period he has not been a member of the Communist Party, or affiliated with such party, and has not believed in or been a member of or supported any organization that believes in or teaches the overthrow" of the Government by force, etc. This proposal seems to be open

84 *Committee Print, supra* note 7, at 38, 59. The House Un-American Activities Committee recently recommended its repeal. Washington Star, Dec. 29, 1952, p. A-2.

85 *Committee Print, supra* note 7, at 10.

86 H.R. 4680, 82d Cong., 1st Sess. (1951). The Attorney General strongly recommended adoption of this proposal. *Hearings, supra* note 2, at 6-8.

to objections previously discussed in connection with the present wording of Section 9(h).[87] Furthermore, it adds another fundamental hurdle to be overcome; namely, the Barden bill raises a serious question as to whether or not the constitutional prohibition against bills of attainder would be violated. Recent decisions in the Supreme Court upholding loyalty and security oaths, such as Section 9(h), involved oaths framed in the present tense.[88] If the Court were to adhere to earlier precedents,[89] any language which would give Section 9(h) a retroactive effect and require an oath with respect to the affiant's past membership or beliefs, or at least penalize the affiant because of such past conduct, would raise a very serious constitutional question; and, in the opinion of this writer, the Supreme Court probably would find that a bill of attainder had been imposed or that due process had been denied those upon whom the prohibition was laid retroactively.[90]

A Secretary of Labor has taken a slightly different slant in recommending legislation which would bar all Communists or those believing in unconstitutional overthrow of the Government from holding any union office, important or minor.[91] To give the job of policing such a provision to the NLRB

87 See notes 78, 79, and 80 *supra* and accompanying text.

88 American Communications Ass'n, CIO v. Douds, 339 U.S. 382 (1950) (sustaining the constitutionality of the anti-Communist affidavit as required by Section 9(h)); Garner v. Board of Public Works, 341 U.S. 716 (1951) (sustaining the validity of a city ordinance requiring an oath disaffirming membership in subversive organizations as pre-requisite to public employment); Gerende v. Board of Supervisors of Elections, 341 U.S. 56 (1951) (upholding the right of a state to require an oath to be taken by candidates as a condition precedent for seeking public office). These cases, either expressly or impliedly, seem to reaffirm the proposition; that if the oath had been applied retrospectively so as to impose penalties because of past conduct there would have been a different answer given by the Court.

89 United States v. Lovett, 329 U.S. 303 (1946); Ex parte Garland, 4 Wall. 333 (U.S. 1867); Cummings v. Missouri, 4 Wall. 277 (U.S. 1867).

90 *Hearings, supra* note 2, at 273. The fact that the legislative sanction does not impose a criminal penalty and, in fact, may be only the denial of a statutory privilege which Congress itself has granted, should not serve to take the case out of the bill of attainder category if *past* membership is still the only basis for *present* exclusion from enjoyment of the right or privilege.

91 *Hearings, supra* note 2, at 122-3. Secretary Tobin's recommendation would also seem to suffer from the possible constitutional defects discussed in the cases cited in note 89 *supra*.

would be to inflict upon the Board complex and time-consuming administrative burdens which Congress previously thought should not be so imposed. Moreover, there still would be the same difficulties of proof and other procedural obstacles in the way of successful perjury prosecutions which already circumscribe the present non-Communist oath. Furthermore, even if the actual Communist Party members could be routed out from union offices in the manner of Secretary Tobin's proposal, there still would remain the union official who, for reasons of union politics, is quite willing to "ride the tiger" and cooperate with the Communists in his union.[92] While the number of union officials who are willing to play this risky role is decreasing, there remain substantial numbers who are willing to collaborate with the Communists as far as union affairs are concerned, and who would not be touched by legislation of the type proposed by the Secretary of Labor.

As far as this writer has been able to observe, neither Section 9(h), as it now exists, nor any of the proposed amendments to it, provide an effective mechanism for eliminating the Communist and Communist-minded union official. About the only substantial compliment that could be paid Section 9(h) is to say that its passage may have furnished some provocation to American unions to institute a house cleaning program of their own, through which Communist influence in their ranks and among their officers has been quite effectively curtailed, if not yet successfully eliminated in all cases.

Internal Security Act

Some consideration may have been given to using the powers and procedures prescribed by the Internal Security Act of 1950 (McCarran Act)[93] against Communist-dominated

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92 *Hearings, supra* note 2, at 313.

93 64 STAT. 987 (1950), 8 U.S.C. §§ 137 to 137-8, 156, 456-7, 704-5, 725, 729, 733-5; 18 U.S.C. §§ 793, 1507; 22 U.S.C. §§ 611, 618; 50 U.S.C. §§ 781-826 (Supp. 1952).

unions. However, the application of that Act to the problem at hand would seem to promise little. The Internal Security Act of 1950, *inter alia,* established a Subversive Activities Control Board with the authority to determine, after investigation and hearing, whether particular organizations may be classified as Communist "action" or "front" organizations.[94] Upon such a finding by the Board, with respect to any organization, certain legal consequences follow,[95] among which (relevant for the purposes of this article) is the barring of any member of a Communist "action" organization from employment at a "defense facility." "Defense facilities"

94 64 STAT. 997 (1950), 50 U.S.C. § 791 (Supp. 1952).

95 64 STAT. 992-3 (1950), 50 U.S.C. § 784 (Supp. 1952). "SEC. 5. (a) When a Communist organization, as defined in paragraph (5) of section 3 of this title, is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful —

(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final —

(A) in seeking, accepting, or holding any nonelective office or employment under the United States, to conceal or fail to disclose the fact that he is a member of such organization; or

(B) to hold any nonelective office or employment under the United States; or

(C) in seeking, accepting, or holding employment in any defense facility, to conceal or fail to disclose the fact that he is a member of such organization; or

(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility.

(2) For any officer or employee of the United States or of any defense facility, with knowledge or notice that such organization is so registered or that such order has become final —

(A) to contribute funds or services to such organization; or

(B) to advise, counsel or urge any person, with knowledge or notice that such person is a member of such organization, to perform, or to omit to perform, any act if such act or omission would constitute a violation of any provision of subparagraph (1) of this subsection.

"(b) The Secretary of Defense is authorized and directed to designate and proclaim, and from time to time revise, a list of facilities, as defined in paragraph (7) of section 3 of this title, with respect to the operation of which he finds and determines that the security of the United States requires the application of the provisions of subsection (a) of this section. The Secretary shall cause such list as designated and proclaimed, or any revision thereof, to be promptly published in the Federal Register, and shall promptly notify the management of any facility so listed; whereupon such management shall immediately post conspicuously, and thereafter while so listed keep posted, notice of such designation in such form and in such place or places as to give reasonable notice thereof to all employees of, and to all applicants for employment in, such facility.

"(c) As used in this section, the term 'member' shall not include any individual whose name has not been made public because of the prohibition contained in section 9(b) of this title."

would be designated by the Secretary of Defense by publication in the Federal Register. In the case of organizations found to be Communist "fronts," the prescription against employment would not be applicable, but any member of such an organization would have to reveal that fact upon applying for employment at a "defense facility."

The procedures thus established are subjected to two infirmities, one being legal and the other (apparently) administrative. In the first place, the definitions of the terms Communist "action" and "front" organizations, as used in this statute, both require that the organization be operated *primarily* to advance the objectives of a world Communist movement.[96] This would seem to raise severe doubt whether a labor union, devoting substantial time and effort to collective bargaining activities, could fall within the definitions of Communist "action" or "front" organizations, as used in the Internal Security Act. If active unions could not be so classified, the statute clearly is of no utility in reaching the Communist-dominated unions, since the latter primarily, or at least publicly, do devote their efforts to carrying on their collective bargaining functions, regardless of what their secret conspiritorial political objectives may be.[97] In addition to the legal difficulties raised by the statutory language, the Subversive Activities Control Board has not yet proved itself as a model of administrative speed and dispatch. Nearly two and one-half years passed before a final determination was made by the Board that the Communist Party itself is a Communist-action organization under the statute.[98] *A fortiori,* even assuming the statutory language could be so interpreted, the chances that they would find that any particular union could be classified as Communist-dominated would seem quite remote, at least until the proceedings of the Board can be expedited in a manner which has not yet been achieved.

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96 64 STAT. 989-90 (1950), 50 U.S.C. § 782 (3) (4) (Supp. 1952).
97 *Committee Print, supra* note 7, at 43-44.
98 21 U.S.L. WEEK 2530 (April 28, 1953).

But, even in the unlikely event that, after a long period of time has passed, the Subversive Activities Control Board would designate certain unions as Communist "action" or "front" organizations, that decision would not necessarily clear up the situation. If a union were designated as a Communist "front" organization, it would merely mean that certain members of such a union would then have to reveal the fact of their membership upon application for employment at defense facilities. This would add little to, and in fact would be a less reliable index of, security than that which is now obtained through the individual security clearance program which the Department of Defense carries on with respect to any employees in defense facilities who are to work on classified government contracts or have access to classified information in connection therewith. For instance, there are thousands of individual members of UE who today are working on important classified contracts in the field of electronics. These union members have made no secret of the fact that they are connected with UE. Nevertheless, upon extensive investigation, they have been found not to be security risks. Even if UE were classified as a Communist "front" organization, it is difficult to see how that fact alone would change the status of individual members who have been cleared on a case-by-case basis. It may be that the odium that might attach to UE in the event that the Subversive Activities Control Board were to brand them as a Communist "front" organization would speed up the exodus from that union. If the Board were to go one step further, which seems hardly likely in view of the restricted definition in the Internal Security Act, and brand a union as a Communist "action" organization, then members thereof would be barred from employment at defense facilities. This would appear to be an unnecessarily harsh result and would be penalizing the members themselves who are not poor security risks. (One of the assumptions that this writer makes is that potentially dangerous and subversive activities of union leadership are to be

guarded against; but, at the same time, the individual rights of the great majority of loyal Americans who happen to be members of unions under subversive control at the top still are to be protected).

There is another section of the Internal Security Act which provides a very extreme method for dealing with the Communist leadership of unions within certain sensitive defense segments of the economy. This is Section 103,[99] permitting the Attorney General to apprehend and detain potential saboteurs or spies when there is a state of internal security emergency proclaimed by the President; and which results either from the invasion of the United States or insurrection therein, or a declaration of war by Congress. Since none of the conditions precedent have occurred, this Section at the present time, could not be utilized in apprehending or detaining dangerous Communist leaders. However, at the last session of Congress, Senator Eastland, (D. Miss.), introduced a resolution which would activate Section 103 by declaring an internal security emergency to be now in effect.[100] Passage of this amendment would permit the Attorney General to proceed without delay, as authorized, in apprehending and detaining potential saboteurs.

Theoretically, upon passage of the Eastland resolution, the means would have been provided for rounding up, among others, suspected Communist labor leaders. However, there are the gravest arguments against resort to the severe methods inherent in such a "round up" technique. The practical argument against it is the realization of the fact that rounding up suspected subversives would mean that the Department of Justice would have to pick up and detain many about whose presence they already now know, and whom they wish to remain unapprehended in order that these identified subversives may provide the clues which will lead to the

99 64 STAT. 1021 (1950), 50 U.S.C. § 813 (Supp. 1952).

100 S.J. RES. 121, 82d Cong., 2d Sess. (1952).

detection of even more important agents of a foreign power. If they are forced to apprehend, on a wholesale basis, suspected Communists including labor leaders, these advantages would be lost.

Moreover, the constitutionality of this resolution, taken at its face value, is apparently doubtful. During World War II, the Supreme Court reluctantly approved the exclusion from the West Coast and the detention of Japanese-Americans by Executive Order. The Court sustained these actions solely, and with great misgivings of their judicial consciences, on the basis of necessary war measures.[101] These decisions represent the outer limits to which the detention power has been pushed with Supreme Court approval. Even under the security pressures of these times, it still would seem fair to say that the Supreme Court would not sanction the apprehension and detention, without formal charge against them, of alleged potential saboteurs during any period short of actual war, insurrection, or invasion. The practical and constitutional objections to Senator Eastland's resolution make it very unlikely that it will be approved as a means to be used in solving the Communist-dominated union problem specifically, or more generally, to be utilized in protecting against the potential dangers of subversion and sabotage inherent in the Communist threat.

Decertification Legislation

As of the date of this article, a bill has been introduced in Congress which is directed at the decertification of labor organizations represented by, or having officers who are members of, Communist organizations, including any Communist "front" organization or Communist "action" organization, as those terms are defined in the Internal Security Act of

101 Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

1950.[102] The proposed bill would make it unlawful for a member of a Communist organization to act as a collective bargaining representative under appropriate provisions of the National Labor Relations Act, as amended. Furthermore, the bill would provide authority to void any NLRB certification that might have been issued to a union which had members of Communist organizations as officers or collective bargaining representatives. In the first place, it is phrased in terms of the present tense and would void only certifications of labor unions who have as an officer or representative a person who "*is* a member of a Communist organization." Paralleling their action in response to Communist affidavit requirements of the Taft-Hartley Act, all that subversive union leaders would be called upon to do, in order to avoid coming within this prohibition, would be to resign their membership in any organization which the Subversive Activities Control Board previously had found to be a Communist "front" or "action" organization. A second disadvantage of the proposed legislation is that, by making the decertification of the union dependent upon previous action by the Subversive Activities Control Board, it is subject to the same administrative delay which, up to now, has been characteristic of the Board. For these reasons, the decertification legislation proposed would seem to avail little in providing a statutory mechanism through which the Communist-dominated union might be reached.

Conclusions

In summary, this examination of the Communist-dominated union problem leads to several conclusions. In the first place, while the great majority of American unions are loyal

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[102] See note 18 *supra* and accompanying text. Two similar bills were also proposed in the 83d Congress: S. 1254, 83d Cong., 1st Sess. (1953) (introduced by Senator Goldwater (R. Ariz.); and S. 1606, 83d Cong., 1st Sess. (1953) (introduced by Senator Butler (R. Md.).

from top to bottom and have done an excellent job in ferreting out Communists and Communist-sympathizers who might have infiltrated their ranks, nevertheless, there is a small but strategic percentage of the economy where unions under Communist leadership are in collective bargaining positions which could be used to the severe disadvantage of the nation were the opportunity to present itself. Any attempts to establish preventive techniques, either through legislative or administrative action, raise grave hazards. The field of labor management relations is complex in its own right and replete with deep emotional antagonisms on both sides. Labor's feeling that anti-Communist union legislation could soon be utilized as just anti-union legislation is not an entirely imaginary one. On the other hand, to continue to rely on the self-discipline of American unions to finally eliminate Communists and fellow travelers from positions of control and influence is slightly sanguine. While this method would avoid making martyrs of Communist union leaders in the eyes of the members, it is not too easy to apply in those cases where the leaders accused have a reputation of being vigorous champions of the collective bargaining rights of their members, whatever tinge their political philosophy might have. Moreover, the administrative control which these union officials have over the affairs of the union, plus the parlimentary difficulties which present themselves under the constitutions of the unions and during their convention proceedings,[103] furnish further obstacles to any successful democratic revolt by the members against suspected subversive union leaders.

The legislative authority which now exists to deal with the problem is ambiguous at best and deficient at worst. The National Labor Relations Act, as amended by Section 9(h) of the Taft-Hartley Act, would seem to rule out administrative collaboration between the NLRB and other agencies of the

[103] *Hearings, supra* note 2, at 163.

government in decertifying or refusing to recognize the Communist-dominated union, except perhaps in a very extreme case, and on an emergency or interim basis. The Internal Security Act of 1950, likewise, offers no solution and if utilized might be a dangerous blunderbuss in the area which demands the most careful pin-pointing in drawing the line between subversion and old fashioned, vigorous trade-unionism.

While existing authority is not enough, most suggestions for rectifying this omission seem also to offer little promise of a solution. Nevertheless, this writer agrees with Senator Morse's admonition that the public interest in this problem is too great to allow it to be the exclusive project of labor and management.[104] Recognizing that any legislation in this area would be open to the possibilities of misinterpretation and misapplication, nevertheless, it is felt something should be done, if even on a stand-by basis. Perhaps the best solution would be to veer away from any "guilt by association" assumptions, which might be inherent in decertification legislation, under which the vast majority of union members would be penalized because of the activities of their leaders. It would appear to be the better course to make the suspected subversive tendencies of the individuals concerned the crucial objective at which to direct attention.

Legislation which would prohibit the holding of union office by persons concerning whom there is good cause for the belief that they might commit sabotage, espionage, or any other willful act intended to disrupt the national defense, appears as the more efficacious way to deal with the problem. This kind of legislation could also be used in removing individual employees from defense facilities when the suggested criteria were satisfied.[105] Legislation of this type would, at least, con-

[104] *Id.* at 290.

[105] *Committee Print, supra* note 7, at 13.

fine the problem to individual cases. It seems to this writer that the proponents of decertification legislation, who rest their case on the analogy of the company union, may have relied on false premises. The problem of proving whether a union is under the domination of a certain employer is usually confined to a fairly restricted set of facts. The question of whether a certain union is under the control of individuals who themselves are Communists presents fact questions of the broadest possible scope, not related to any employer-employee relationship, at any particular time, nor at any particular place, but spilling over into the broad avenues of political philosophy. To proceed there would be a very difficult and possibly dangerous adventure.

The writer concludes, possibly where he began, recognizing the threat which the Communist-dominated union will continue to pose as long as it maintains collective bargaining strength in strategic areas of American industry; but, nevertheless, aware of the difficulties which any attempt to deal with the problem presents.[106] If legislation is absolutely necessary, it would appear better to have legislation aimed directly at the suspected individual union leaders; and not to place the great majority of loyal members on a contingent liability basis, whereby they may be penalized for the actions of their

[106] There is some evidence that the NLRB may try to work out a partial solution within the collective bargaining framework. The Board held in Stewart-Warner Corp., 94 N.L.R.B. 607 (1951), that an employer cannot assist one union on the pretext that its rival is Communist-dominated. However, recently a trial examiner of the Board held that an employer may properly demand, in the collective bargaining process, that there be safeguards in the contract made with a union where it "had reasonable grounds to believe" that the union was Communist-dominated. *Re* Square-D Co., 21 C.A. 1106 (1952) [Unreported trial examiner's report from the San Francisco Regional Board]. In the *Square-D* case, the company had demanded the right to ask non-Communist oaths to be taken by the local and international union representatives who deal with the company, as well as a "right to fire" clause which would cover employees found to be Communists. If the NLRB were to go along with this trial examiner's decision, it would seem to be doing exactly what its Chairman had previously testified to before Congress as being beyond its proper function in the light of Section 9(h) of the Taft-Hartley Act, and contrary to its decision in the *Sunbeam* case, note 24 *supra*.

leaders over whom, for all practical purposes, they may have no control. Such an approach, while still open to some of the criticism discussed herein with respect to other suggested remedies, would seem to better preserve the dual objective of maintaining security within the bounds of liberty.

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