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# Supreme Court of the United States

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JOHN F. DAVIS, CLERK

OCTOBER TERM, 1969

In the Matter of:

Docket No. 35

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HUGH BRYSON,  
                   Petitioner

vs.

THE UNITED STATES  
                   Respondent

-----X

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Place           Washington, D. C.

Date            October 14, 1969

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C O N T E N T S

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ORAL ARGUMENT OF:

PAGE

Richard Gladstein, Esquire  
on behalf of Petitioner

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Francis X. Beytagh, Esquire  
on behalf of Respondent

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REBUTTAL ARGUMENT OF:

Richard Gladstein, Esquire  
on behalf of Petitioner

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 OCTOBER TERM, 1969

3 -----  
4 HUGH BRYSON, )

5 Petitioner, )

6 VS )

No. 35

7 THE UNITED STATES, )

8 Respondent )  
9 -----

10 Washington, D. C.  
11 October 14, 1969

12 The above-entitled matter came on for argument at  
13 12:40 o'clock p.m.

14 BEFORE:

15 WARREN E. BURGER, Chief Justice  
16 HUGO L. BLACK, Associate Justice  
17 WILLIAM O. DOUGLAS, Associate Justice  
18 JOHN M. HARLAN, Associate Justice  
19 WILLIAM J. BRENNAN, JR., Associate Justice  
20 POTTER STEWART, Associate Justice  
21 BYRON R. WHITE, Associate Justice  
22 THURGOOD MARSHALL, Associate Justice

23 APPEARANCES:

24 RICHARD GLADSTEIN, ESQ.,  
25 San Francisco, California  
Counsel for Petitioner

FRANCIS X. BEYTAGH, ESQ.,  
Office of the Solicitor General  
Department of Justice  
Washington, D. C.



1 passage, nine years after this Court was persuaded to sustain  
2 it, the Congress repealed that law and replaced it with Section  
3 504 of the Labor-Management Relations Act. That section pro-  
4 vided that it was a crime for a man simultaneously to hold  
5 union office and to be a member of the Communist Party. That  
6 statute was held unconstitutional by this Court in the United  
7 States against Archie Brown, 1965.

8 In an opinion written by the Chief Justice, four  
9 other members of the Court concurring in the opinion, on the  
10 express grounds that Section 504 was an unconstitutional bill  
11 of attainder.

12 One of the questions certified in this case, is  
13 whether, in the comparative light of the American Communications  
14 Association versus Douds and the United States versus Brown,  
15 Section 9(h) is constitutional. Let me say a few words about  
16 the background of this case in order to put the other two cer-  
17 tified questions in perspective.

18 The petition here was one time the president of a  
19 small maritime labor union, numbering some 3,000 members. He  
20 served on vessels plying in and out of the Pacific Coast ports  
21 in the steward's department of those ships.

22 In 1951 he signed and filed the affidavit which was  
23 required at the time under the Taft-Hartley Law. The union  
24 was, and had been for some time, engaged in a bitter juris-  
25 dictional dispute, which ultimately led to the dissolution of

1 the organization itself.

2 Now, the affidavit that he filed was in printed  
3 form that the Labor Board supplied and it recited three basic  
4 things: it recited that the affiant at the time that he signed,  
5 did not then support any organization that advocated the over-  
6 throw of the Government by force, violence or other unconstitu-  
7 tional or illegal means. It provided second, that he said he  
8 not a member of the Communist Party, specifically naming the  
9 Communist Party in the second portion. It provided third, that  
10 he was not then affiliated with the Communist Party.

11 In 1954, almost three years after the filing of the  
12 1951 affidavit, although I should state that in 1952 Bryson  
13 filed the affidavit; he did the same thing in 1953 and again in  
14 1954, if my memory serves me correctly, even after he was  
15 indicted on the 1951 affidavit.

16 He was charged in the indictment with three counts  
17 of violations; all three, of course, all three of the portions  
18 that I mentioned. Prior to the trial, the Government dismissed  
19 the count that charged him with supporting an organization that  
20 advocated the overthrow of the Government. He went to trial on  
21 the counts concerning membership; and concerning affiliation.

22 The jury returned the verdict, holding -- I should  
23 say that this was brought under the False Statements Statute  
24 which is set forth in our brief and in the position. They  
25 returned a verdict holding that when he swore that he was not

1 then a member of the Communist Party, he was not falsely swear-  
2 ing.

3 On the other hand, it returned a verdict holding  
4 that he did violate the law when he swore that he had not been  
5 affiliated with the Communist Party. Bryson was sentenced to  
6 five years in prison at a fine of \$10,000, which was the  
7 maximum, and in addition, the trial judge provided expressly  
8 that he was subject to further imprisonment in the event that  
9 he failed to pay the fine.

10 He served nearly two years of his term and then  
11 was paroled. In the intervening years he has managed to pay  
12 \$2,000 of the \$10,000 fine, but there is a balance of \$8,000.

13 Shortly before we filed a petition in the District  
14 Court that connects the proceedings that are now here, the  
15 Government noticed the taking of Bryson's deposition in the  
16 original criminal proceedings and did take his deposition,  
17 seeking assets for the purpose of enforcing the collection of  
18 the \$8,000 balance. And thereafter, the Government filed a  
19 criminal action in the Federal District Court in San Francisco  
20 seeking judgment for the \$8,000.

21 A week or two after that, Bryson's petition was  
22 filed with the District Court seeking a writ of error coram  
23 nobis or relief under the other applicable post-conviction  
24 statutes. One of the basic grounds upon which that relief was  
25 sought was the allegation that under United States versus Brown

1 the constitutional basis of Section 9(h) had been eroded, along  
2 without being confirmed; that it should be controlled by the  
3 decision of this Court in United States against Brown and  
4 therefore, the Petitioner's original conviction had been un-  
5 constitutional. The District Judge granted the petition in  
6 all aspects except not granting a prayer for the return of the  
7 \$2,000 which Bryson paid to the Government on his fine.

8 The Government took an appeal to the Court of  
9 Appeals and that Court, in returning a decision, reversed,  
10 holding that Bryson was precluded from bringing his petition by  
11 reason of a petition of this Court in Dennis versus the United  
12 States. That case was a case in which this Court declined to  
13 review a challenge against the constitutionality of Section  
14 9(h) on the ground that the petitioners in that case were shown  
15 to have been engaged in a conspiracy to deceive and to defraud  
16 the Government and therefore, that they had lost standing.

17 The Court of Appeals, holding that Dennis presented  
18 an insuperable obstacle to us, declined to pass on the other  
19 questions and did reverse.

20 The other two questions presented and certified here,  
21 then, are: one, whether the petitioner is precluded by reason  
22 of this Court's decision in Dennis, from attacking the constitu-  
23 tionality of 9(h). The other is whether the petitioner quali-  
24 fies, regardless of Dennis, upon the ground that it is in-  
25 applicable, inasmuch as this is a post-conviction proceedings



1 and under the oral writs section and the other section provid-  
2 ing for such relief, he would qualify for this relief.

3 Q When you talk about the constitutionality of  
4 9(h), it's really whether 9(h) was constitutional, because the  
5 section is no longer on the books.

6 A Yes, I know. I concede that; yes, Your Honor.  
7 However, the vitality of it here affects Bryson. And as I  
8 hope to argue, also affects to its detriment, the bill of  
9 attainder provision in our Constitution.

10 Now, let me say something about the petitioner.  
11 and the evidence here, because I suppose, in the last analysis,  
12 this Court is not going to look merely at forms, as the Govern-  
13 ment invites it to do and say, "Well, in Dennis there was a  
14 conspiracy to defraud and in Bryson's case the jury found that  
15 he lied about whether or not he was affiliated with the Com-  
16 munist Party, therefore they are on a par," this is the  
17 Government's position.

18 I would suppose that if Dennis lays down a rule,  
19 Court-created, by which the Court will determine in its own  
20 discretion whether or not a particular person is entitled to  
21 be heard, has standing to be heard, one must look at the charac-  
22 ter of the particular petitioner, insofar at least, as the  
23 record and the evidence would seem to show.

24 In Petitioner's case the facts are these: There is  
25 no question that for a period of ten years, from 1937 to 1947,

1 he was a member of the Communist Party. He was an officer of  
2 that Party. He was an officer on what is called the waterfront  
3 section level in San Francisco, and he was an officer on a  
4 state level -- state committee.

5 There is no suggestion in this record that Bryson  
6 ever attempted to conceal the fact of his membership or hold-  
7 ing office in the Communist Party when he was a member of it.

8 Now, in 1947 he terminated his association and there  
9 is no evidence -- there was no evidence at the trial to sustain  
10 any charge that there was an active relationship between him  
11 and the Party thereafter. The evidence upon which he was con-  
12 victed, not of membership, but of affiliation.

13 It was summarized by the Government in its brief,  
14 and I assume that they have recorded from it as much as there  
15 is, and that this is what it amounts to and is found on Pages 5  
16 and 6 of the Government's brief.

17 First they said that in 1949 at an open union conven-  
18 tion he -- I quote what they say: "premised -- he refused to  
19 seat a delegate at the union convention premised on the dele-  
20 gate's failure to accept an opportunity to join the Communist  
21 Party. Now, not only was that two years before he filed the  
22 affidavit in this case, but I mention that this is the type of  
23 evidence on which the affiliation count was based.

24 Q But is it not after he now says that he ter-  
25 minated his membership?

1           A       There was no announcement; there was a  
2 cessation of all relationships -- of all active relationships --

3           Q       In '47?

4           A       In 1947.

5           Q       This event that you have just described,  
6 out of the Government's brief, was two years later.

7           A       This, and two or three other statements, were  
8 attributed to him; one in '49 and several in 1951, one of  
9 which, as the Government correctly points out, was two months  
10 after he had filed this affidavit in 1951. He then, it was  
11 testified that he said in the course of an argument between him  
12 and one of the men who was forming a dual union -- a rival union  
13 was in the organization, this man testified that Bryson said to  
14 him in the course of an angry exchange, "If you are referring  
15 to me, I'm still a Communist, and proud of it."

16           There is another piece of testimony that was given  
17 by another person who, was expelled from the union or was in  
18 the process of being expelled. It was an argument about whether  
19 or not Bryson was discriminating against him or ordering him to  
20 be discriminated against regarding getting union jobs. And the  
21 man testified: "What do you have to do to get a job around  
22 here, be a Party member or something," and he said, That might  
23 help."

24           And his reply to another question that Bryson said  
25 when he was accused: "Are you still a member?" And he said,

1 "Yes, and proud of it." That's the evidence.

2 Now, the District Court told the jury, based on the  
3 record, what the kind of evidence was, that existed when Bryson  
4 was a member of the Party and he told the jury that they should  
5 take into consideration whether or not he held office or  
6 official position in the Communist Party; whether he had ever  
7 attempted to participate in Communist Party meetings; whether  
8 or not he took instructions from Communist Party leaders;  
9 whether he participated in distributing literature; whether he  
10 solicited members for the Party; whether or not he cooperated  
11 closely with and worked for their benefit, and so on.

12 There was evidence that during the period of his  
13 active membership -- of his membership between 1937 and 1947  
14 there was evidence that these are the activities in which he  
15 engaged. There was no evidence, I might say, that he ever ad-  
16 vocated or was ever present when there was advocated, or  
17 whether he ever understood in whatever portion of the Communist  
18 Party he was associated with, that there was forbidden doctrine  
19 or policy advocated to further or that he himself believed in  
20 the overthrow of the Government of the United States by force  
21 or violence and of course, there is no evidence in the case  
22 itself offered by the Government to establish what the teach-  
23 ings of the Communist Party were; what their doctrines were;  
24 what their policies were; what their objectives were.

25 The case went to the jury on the sole question of

1 whether or not he was a member or affiliated with the Communist  
2 Party, without any evidence to indicate either what he under-  
3 stood it to be, based on his associations, or what the Party  
4 itself stood for, in fact, from the viewpoint of the Government.

5 Q Well, aren't those arguments that were ad-  
6 dressed to the Court when the case was tried?

7 A All of the arguments that are offered now  
8 were addressed to the Court when the case was tried. We ad-  
9 dressed these arguments on appeal to the Court of Appeals. The  
10 Court of Appeals rejected the arguments. This Court did not  
11 grant a position for certiorari we sought twice; first, after  
12 the original conviction was upheld, and I should say, that in  
13 the petition for rehearing that we filed with the Court of  
14 Appeals was calling their attention to the fact that in their  
15 first decision we thought they were establishing novel law(?)  
16 they reiterated and they said, and I have copied out a sentence  
17 from their opinion, which is referred to in our brief and as  
18 well as in the Government's. They answered us by saying that  
19 although it was true that there was no evidence in the case of  
20 active affiliation, they didn't have to be in. They said that  
21 affiliation, and this is a quote: "Affiliation is a relation-  
22 ship that can exist even when not manifested by an activity."

23 As to the argument that we advanced that there had  
24 to be some showing of what the Communist Party stood for, either  
25 calling political strikes, which was the purpose of Section 9(h),

1 according to the legislative history. The Congress wanted to  
2 inhibit the threat that strikes might be called in the labor  
3 movement. There was no evidence of anything of that sort,  
4 either as to Bryson, or as to the Party, but specifically as  
5 to Bryson. Never had he advocated or suggested or anything  
6 of that sort. Although he was being found, in effect, guilty  
7 because Congress assumed that anybody found to have been  
8 affiliated with the Communist Party, necessarily presented a  
9 threat to the country in which he would throw the country into  
10 political strikes.

11 The Court of Appeals answered that argument by  
12 saying that the requirement of adherence to Communist Party  
13 purposes was covered by the instruction to the jury that said,  
14 in effect, affiliation is a very difficult concept to define.  
15 I tell you in essence, that it's everything but membership in  
16 name only, and suggested that it is comparable to a relation-  
17 ship between a man and woman who are not married. There was no  
18 instruction to the jury advising that affiliation would be  
19 found only if there was some evidence that Bryson adhered to  
20 some forbidden doctrine, or that he advanced some policy or  
21 believed in some policy, whether it be the overthrow of the  
22 Government by violence, or the calling of political strikes.

23 Now, this was the evidence against the man, and  
24 nothing else. He didn't take the stand. We have tried to show  
25 in our brief why. It was the practice then, and it may be

1 still be, that in cases of this kind, or any kind, perhaps,  
2 if a person has been a member of the Communist Party, it is  
3 uniformly practiced through the prosecutor to inquire on cross-  
4 examination for the names of other persons who were in the  
5 party at the time that the witness was.

6           It was clear at the time, and we have set forth in  
7 detail the reasons, that if he were asked questions of that  
8 kind and if he declined to become an informant on persons he  
9 had known long years ago in the Communist Party, he would be  
10 sentenced to a jail term for contempt of court by the trial  
11 judge and, of course, that would take place in the presence of  
12 the jury, and if he had any chance of becoming acquitted he  
13 would lose it with a thing like that happening, as well as  
14 gaining a jail term.

15           But there are some things to some men that are even  
16 more important than the risk of spending a term of years in  
17 prison and one of them is a matter of honor. Bryson chose not  
18 to testify in order to avoid being placed in this dilemma of  
19 having to become either an informer or showing disrespect for  
20 the court by declining to answer questions that he would be  
21 ordered to answer.

22           In the absence of Bryson's testimony, because he  
23 couldn't, under those circumstances he was not a free agent to  
24 get up and either deny those statements that he claimed had not  
25 been made that were attributed to him or if he made some of them,

1 to explain the context in which they were made so that the  
2 jury could know what he was doing and what he was saying. In  
3 the absence of his own ability to testify; in the presence of  
4 no evidence by the prosecution at all, concerning associational  
5 activities; association of ties of any kind to the party, we  
6 did what we considered the next best thing:

7 Fourteen witnesses -- reputable people from various  
8 walks of the community were called to testify that he enjoyed  
9 an excellent reputation for truth, honesty and integrity. His  
10 record of having sailed at seas for many, many years, and being  
11 subject to the United States Coast Guard regulations, of course,  
12 was a fact that he had never been arrested on any charge,  
13 either a charge of violating a regulation or for that matter, a  
14 violation of any law.

15 We also --

16 Q I have trouble understanding, Mr. Gladstein,  
17 what the relevance of all this is to the issues now here before  
18 the Court. After all, the jury did convict him under instruc-  
19 tions that have been expressively approved by this Court, as I  
20 understand it, of being affiliated with the Communist Party at  
21 a time he said and swore under oath that he was not so  
22 affiliated. That's a finding of his appeal; that's a finding.  
23 That's water over the dam; he was convicted.

24 Now, what questions as to why he might not have  
25 testified and what his motivations have been are of interest,



1 but I don't see what relevance they have to the issues now here  
2 before this Court and this is --

3 A I'm sorry. I failed to make myself suf-  
4 ficiently clear. It's because the Government relies on the  
5 decision in Dennis to constitute a barrier to Bryson having  
6 standing in this case to be heard that I considered important  
7 for the Court -- I know I can't attack the finding of guilt,  
8 and I am not doing that; I'm not seeking that. Nothing like  
9 that is being done, but I would think that it is relevant to  
10 the exercise of discretion, if that's what's involved; if  
11 Dennis is a relevant decision to consider here, it would be  
12 important to consider what the record was, whatever the jury  
13 found, what the record was concerning Bryson so as to deter-  
14 mine whether he compares with or contrasts with the defendants  
15 in the Dennis case.

16 I wanted to wind up with one more thing concerning  
17 what happened and that was this:

18 We called as a witness for the defense, the agent  
19 of the Federal Bureau of Investigation that was in charge of  
20 the prosecution against Bryson and he testified that under  
21 cover informants and agents of the FBI were and had been,  
22 throughout this period, before and after 1947, within this group  
23 that Bryson at one time had been a member of; that none of his  
24 informants and none of his agents testified and nobody came  
25 forward to testify against Bryson. Now, I realize that's

1 consistent with a policy, a decision of the FBI that it did not  
2 want, for reasons of its own, that it has the right to make,  
3 did not want to reveal the identity of someone who was in that  
4 section. But it is also consistent with the assertion that  
5 Bryson has steadfastly made from the beginning and has never  
6 deviated from that he was innocent; that he was neither a  
7 member or affiliated with the Communist Party at any time after  
8 1947.

9 Q As Mr. Justice has suggested, isn't that the  
10 issue that has long since been settled and disposed of. You  
11 have spent most of your time and haven't yet suggested any  
12 reasons why, for example, the United States against Kapp  
13 doesn't apply.

14 Q If we overrules Doubs, we would have to over-  
15 rule Kapp also, wouldn't we?

16 A No, I think that the basic distinction between  
17 those cases and this are that those are cases that deal with  
18 money transactions. We are talking here about a statute that  
19 involves the political liberties of the individual. We are  
20 talking about rights of the caliber that the First Amendment  
21 protects; rights that are embraced within the provision that  
22 prohibits -- absolutely prohibits the passing of bills of  
23 attainder.

24 I do not think that this Court's decision can  
25 possibly equate cases like the Kapp and those decisions which

1 we treat in our brief, at all with what this Court again and  
2 again has said to be rights that are enshrined.

3 I didn't realize that I was taking up so much time.  
4 I am sorry about that, but I'd better make my points rather  
5 fast.

6 This case, I think, is controlled by Brown; the  
7 United States against Brown. This statute, as we took pains  
8 to show in our brief, by coming from the Government's brief  
9 in Brown, there the Government argued that 9(h) and 504 were  
10 enacted to serve the same purpose, the same substance, only a  
11 little difference in form and there were things to show that  
12 the force exerted on 9(h) was just as forceful, just as effec-  
13 tive, just as punitive as 504. If that was true then, it is  
14 equally true today. 504, I submit, is controlled. Dennis, for  
15 the reasons that I am sorry I took so much time to try to  
16 develop, would not on the facts of this case, warrant or would  
17 not justify the Court in preventing Bryson from being hurt.

18 And, moreover -- moreover, in any event,  
19 the post-conviction statutes which entitle him by Congressional  
20 enactment.

21 MR. CHIEF JUSTICE BURGER: Mr. Beytagh.

22 ORAL ARGUMENT BY FRANCIS X. BEYTAGH, ESQ.

23 ON BEHALF OF THE RESPONDENT

24 MR. BEYTAGH: Mr. Chief Justice, and may it please  
25 the Court, with all respects to the positions of the several

1 parties in this case, it is something like ships passing in the  
2 night. Counsel started with the proposition that the basic  
3 question here is the constitutionality of Section 9(h) to the  
4 Taft-Hartley Act, repealed some ten years ago and then pro-  
5 ceeded to spend, as Mr. Justices pointed out, most of his time  
6 seeking, it seemed to me, to reopen and discuss again the  
7 basic underlying facts which had been found against the  
8 Petitioner at his jury trial of some 15 years ago.

9 We look at the case somewhat differently. As we  
10 understand it, the basic question here is the basic issue that  
11 the Court of Appeals thought it was faced with and the principle  
12 on which it decided this case had to do with the question of  
13 whether the rationale of this Court in Dennis versus the United  
14 States, decided several terms ago, applies here.

15 In short, that rationale is simply this: that one  
16 fains or purports to comply with the law, by taking some sort  
17 of action as required by the Government of him, but in fact, is  
18 proceeding falsely or fraudulently in so-doing, lacks standing  
19 when he is discovered to have acted fraudulently, to challenge  
20 the law that he purported to comply with.

21 That principle was not established in Dennis. It  
22 goes back to earlier cases of this Court, such as Kay and Kapp.  
23 It has been accepted by every circuit, to my knowledge, that has  
24 considered it.

25 It's simply, it seems to me, a basic principle of

1 judicial administration. Any other rule would breed, I would  
2 suggest, disrespect for law; it would invite avoidance --  
3 attempted avoidance of the orderly processes of law when one  
4 took it upon himself to proceed fraudulently and then said,  
5 "Well, yes, I did that, but it's justifiable because the  
6 statute, you see, is involved."

7 Now, as we understand it, principally from  
8 Petitioner's brief, we suggest that there are several respects  
9 in which Dennis is distinguishable. He says first that Dennis  
10 involved a conspiracy and this case does not. Well, that's  
11 true.

12 As the Court, however, noted in Dennis, some of the  
13 petitioners involved in the conspiracy there charged, which  
14 was a conspiracy to defraud the United States by doing exactly  
15 the same thing that Petitioner did, filed false affidavits  
16 under Section 9(h) of Taft-Hartley.

17 The Court noted there that at least some of the  
18 petitioners could have been charged under the False Statement  
19 Act that Petitioner himself was discharged under, 18 U.S.C.  
20 1001. I take it the reason they weren't was because some of  
21 the petitioners who allegedly and were found to have engaged  
22 in a conspiracy there were not, themselves, union officers  
23 required to file these affidavits, but instead, participated  
24 with union officers in the conspiracy to file them.

25 We can't really see that the fact that the

1 conspiracy was charged and was involved in Dennis that makes  
2 the case of substantial difference. There is some language in  
3 the Court's Opinion in Dennis that refers to the fact of  
4 conspiracy, but as we understand it, that language related  
5 basically to the threshold issue in Dennis as to whether the  
6 indictment was appropriate there. And the Court concluded that  
7 it was appropriate, over strenuous arguments made to the con-  
8 trary and in the course of that, noted a conspiracy was in-  
9 volved.

10           Petitioner also notes that the case is now on  
11 collateral and not direct review, and in that respect, differs  
12 from Dennis and for some reason that this presents a different  
13 situation.

14           Now, we're quite aware of the increasing breadth  
15 and the scope of collateral review, but we have not thought that  
16 we have reached the point where collateral was broader than  
17 direct. And it seems to us that it's a rather difficult  
18 lesson to accept that Petitioner is in better position with  
19 respect to the basic rationale that the Court relied in Dennis  
20 than the individuals involved in Dennis, because he is now on  
21 collateral and not on direct.

22           The Petitioner also suggests and at great length,  
23 that the facts are different than the facts in Dennis. Well,  
24 frankly we don't quite understand that. In his brief he relied  
25 extensively on an affidavit that he filed on a later collateral

1 proceeding and here he has noted that Mr. Bryson terminated all  
2 relationships with the Communist Party in 1947, at least in  
3 his view. Now, of course that was one of the issues that the  
4 jury had to resolve, and as I have indicated, the jury  
5 resolved against him.

6 Insofar as he seeks to reopen and relitigate those  
7 facts, it seems to us that's not an appropriate question as  
8 presented to this Court.

9 The question of supposed ambuity in the notion of  
10 affiliation is also raised by Petitioner. There may well be  
11 contexts in which the notion of affiliation with the Communist  
12 Party or some other organization would be a difficult and  
13 dubious thing to present to a jury. But as Mr. Justice  
14 Stewart noted, in the context here under a very narrow and  
15 limited instruction which is set out in the Government's brief,  
16 which followed and was confirmed by this Court's decision in the  
17 Killian case, Pages 6 and 7 in the Government's brief, Note 5,  
18 we set out the basic instructions. The jury was told that in  
19 order for Petitioner to have been affiliated with the Communist  
20 Party, he must have been a member in everything but name. And  
21 as the Chief Justice has indicated, the fact as developed for  
22 the jury trial, indicated that various incidents in the evidence  
23 were related, which indicated the Petitioner had continued to  
24 maintain at least some connection with the Party. Connection  
25 in the sense that the jury could find that he was affiliated

1 with the Party when he filed the false affidavit in 1951.

2 I think that any analysis of the Dennis opinion  
3 makes it rather clear that it's difficult, if not impossible  
4 for Petitioner to say that the Court of Appeals erred in  
5 concluding that Dennis was controlling here. Dennis said  
6 petitioners are in no position to attack the constitutionality  
7 in 9(h) because they sought to circumvent the statute; not to  
8 challenge it.

9 Ways are open to challenge the validity of statutes  
10 like 9(h) of Taft-Hartley. It was challenged in the Doud case  
11 but it was upheld. As we indicate, and as the facts before the  
12 Court of Appeals indicated, a number of union men, after the  
13 passage of -- union officers, after the passage of Section  
14 9(h), who were members of the Communist Party, determined that  
15 the best course of action was for them to formally disassociate  
16 themselves with the Party and then file, when and if necessary  
17 those affidavits that Section 9(h) required.

18 As the facts also indicate here, in 1950 a juris-  
19 dictional dispute in the union that Petitioner was president  
20 of and petitioner then took it upon himself to file this affi-  
21 davit that the jury found to be false.

22 Douds was decided in 1950. This affidavit was  
23 filed less than a year later. I think that the situation is  
24 not at all dissimilar from that that the Court referred to in  
25 Dennis. In Dennis the Court said that "In view of these



1 circumstances" -- what Petitioner did there was to flout --  
2 not simply overlook the law. The Court in Dennis further noted  
3 that there are appropriate and inappropriate ways to challenge  
4 the validity of a statute and that even though in some cir-  
5 cumstances it may be necessary to violate a statute, in order  
6 to challenge its constitutionality; that a person who fails to  
7 comply with it, who purports to act consistent with it, cannot  
8 then later be heard to challenge it when he's discovered to  
9 have acted fraudulently.

10 It seems to me that there --

11 Q (Inaudible)

12 A Yes, Your Honor.

13 Q As I understand it you are saying that where a  
14 man commits perjury, where a statute requires that oath be made,  
15 that if that statute is itself voided, he is barred from  
16 raising any question.

17 A I would say yes, with the exception of your  
18 use of the term "void," Your Honor.

19 Q Well, isn't that the challenge that he's  
20 making; that it's unconstitutional?

21 A Well, he is seeking to challenge Section 9(h).  
22 It has not been held unconstitutional.

23 Q Well, it has not been held unconstitutional,  
24 but he's challenging it as unconstitutional. As I understand  
25 what you are saying is when a man has been forced to swear

1 to something under a law which is unconstitutional, he is  
2 barred from raising the question of that constitutionality,  
3 he is prosecuted for perjury?

4 A Well, Your Honor, you say he is forced to  
5 take --

6 Q By statute. The statute said he had to do it,  
7 didn't it?

8 A That's correct.

9 Q And he had to do it. As I understand it, you  
10 say that even though that statute is unconstitutional, and  
11 therefore, as I always understood it, has no effect you could  
12 prosecute? He is barred from raising the question when he is  
13 charged with perjury?

14 A Well, with all due respect, Your Honor, I  
15 don't think the statute is its simply no effect.

16 Q Suppose it's unconstitutional?

17 A Well, that's the judgment, of course, this  
18 Court has to make.

19 Q It can't make it; this man can't raise it.

20 A It can't make it at the instance of this par-  
21 ticular individual because what he has sought to do --

22 Q I can't agree. He's the one that's caught in  
23 the pinch.

24 A But he had ways available to him.

25 Q He had other ways also, but how can the

1 Government in good faith and good conscience and not in --  
2 attempt to prosecute him for perjury under a statute which, by  
3 the oath that is charged to have perjured himself on, is un-  
4 constitutional? It looks to me like the Government's more at  
5 fault there than he is.

6 Q Isn't the answer to that in part, at least,  
7 Counsel, that if you answer the questions for the Government  
8 you make an election. You may elect not to answer at all and  
9 challenge the constitutionality of the statute by that course,  
10 but if you answer you must answer truthfully or take the  
11 penalties of perjury. That's what this Court's held; hasn't  
12 it?

13 A Yes, Your Honor.

14 Q And there were ways and are ways open to --

15 Q Which case did it hold it in?

16 A The Court has held this, Your Honor, as far as --

17 Q Which case did it hold that in?

18 A In the Kapp case; the Kay case and in the  
19 Dennis case.

20 Q Which Dennis case?

21 A The one decided three terms ago in 384 U.S.  
22 855, Your Honor.

23 Q Well, your point is, Counsel, that -- it  
24 doesn't make any difference whether the statute is unconstitu-  
25 tional.

1           A       No, I really don't think it makes any dif-  
2           ference.

3           Q       Isn't that what you say Dennis holds? That  
4           it just doesn't make any difference even if the statute is  
5           unconstitutional.

6           A       Well, in one of the cases that we referred to,  
7           the Kapp case, the Agricultural Adjustment Act had already been  
8           held unconstitutional and the Court still applied it as a  
9           principle.

10          Q       That's right. As I read your brief, whichever  
11          way the constitutional question is decided, his conviction for  
12          making a false statement would stand. And that's the basis for  
13          the "no stand" issue, isn't it, rather than --

14          A       That's right. But I am suggesting that in  
15          the circumstances here we don't even have that extreme a  
16          situation, because as the situation exists right now the  
17          statute was upheld in Douds.

18          Q       And that's going beyond Dennis?

19          A       Well, that's one way of looking at it. It's  
20          not even reaching the problem presented, if you assume the  
21          unconstitutionality.

22          Q       Are there any cases around here that you know  
23          of that support this present theory of standing you are pro-  
24          moting; because he really was a bad fellow, he hasn't got  
25          standing to raise this argument?

1           A       I didn't think I was suggesting it was because  
2 he was a bad fellow.

3           Q       That's the way it sounded to me.

4           A       It's simply that he violated a False Statement  
5 Act. That's what he was charged with violating, and that's  
6 what he was convicted on.

7           Q       But because he told a lie he shouldn't be  
8 able to challenge the constitutionality of the statute?

9           A       Well, because he purported to comply with the  
10 statute and now he is seeking to turn around when he's caught  
11 in complying with it in a fraudulent manner.

12          Q       Well, would you make that argument if it were  
13 really true and -- if it would make a difference under the  
14 False Statement Statute, whether the statute was unconstitu-  
15 tional or not? Would you still make this standing argument?

16          A       I'm not sure that I understand. I agree with  
17 you that it doesn't matter whether the statute's unconstitu-  
18 tional or not.

19          Q       Well, assume that it did make a difference  
20 whether the statute was constitutional or not. Would you say  
21 that he would be barred from raising this constitutional ques-  
22 tion just because he told a lie?

23          A       But I think that's an entirely different  
24 situation, and that's the situation we had in Dennis and the  
25 situation here don't involve that.

1 Dennis stated in conclusion, that the governing  
2 principle is that a claim of unconstitutionality will not be  
3 heard to excuse a voluntary, deliberate and calculated course  
4 of fraud and deceit. One who elects such a course as a means  
5 of self-help cannot escape the consequences by urging that his  
6 conduct be excused because the statute which he sought to  
7 evade was unconstitutional.

8 As I have indicated, the Government feels that there  
9 are policy considerations that support the rationale of Dennis,  
10 as well.

11 If the law were otherwise, it seems to me it would  
12 be but an open invitation to individuals to seek to circumvent  
13 a law by purporting to comply with it in the course of which  
14 they would commit a violation of the statute, such as the  
15 False Statement Act.

16 Q The conviction in this case was what, a  
17 violation of Title 18, 1001?

18 A Yes, Your Honor.

19 Q Which is not, itself, 9(h), of course.

20 A Right. As I pointed out earlier, the charge  
21 here was not that the Petitioner had violated the very statute  
22 he is seeking to challenge as unconstitutional, but in the course  
23 of purporting to comply with that statute which he now says is  
24 unconstitutional. He violated a general statute applicable to  
25 a variety of circumstances by filing a false affidavit.

1           There are analogies that exist in the law, apart  
2 from Dennis, Key and Kapp. It's long been established, as  
3 held in the Williams case, one who takes the stand and commits  
4 perjury in the course of a prosecution later held invalid,  
5 can be tried for that perjury.

6           Moreover, the Government needs statutes like  
7 Section 10001 in order to fulfill its very obligations of  
8 obtaining information in order to carry on a variety of pro-  
9 grams.

10           Q       There that would apply to all kinds of cases,  
11 with reference to the False Statement. You said in order to  
12 obtain the necessary information. The First Amendment has  
13 some rights in the country still, doesn't it? Doesn't it  
14 bestow some rights on the people?

15           A       Of course, Your Honor.

16           Q       With reference to exposing their political  
17 views? Telling them to have one political view, rather than  
18 another?

19           A       What we're maintaining, Your Honor, is --

20           Q       What was this an oath about?

21           A       In order to be a member -- in order to hold  
22 office in the union under this statute -- it has been repealed  
23 some ten years ago -- an officer had to file an affidavit to  
24 the effect that he did not support the Communist Party and was  
25 neither or a member nor affiliated with the Communist Party.

1           The purpose of the Congress in enacting that  
2 provision, as Counsel has indicated --

3           Q       Suppose he had to make an oath that he was  
4 not affiliated with the Republican Party, and had not cast a  
5 vote for it? Would that be required of him?

6           A       I would have more difficulty with that, Your  
7 Honor, in light of the --

8           Q       Why would you?

9           A       Because --

10          Q       They are both political.

11          A       Because the Congress made a number of findings  
12 on which it premised its legislative judgment here.

13          Q       The Congress hasn't made any findings yet, as  
14 far as I am concerned, would justify interfering with a man's  
15 political faith in view of the First Amendment. And could not  
16 make any findings, in my judgment. What he's trying to do is  
17 to challenge prosecuting him for making that statement.

18          A       Yes, Your Honor. We are suggesting that there  
19 were ways that he could have properly proceeded to challenge  
20 this law, but he didn't do that. Instead, he filed this  
21 affidavit which purported to comply with it, and which the jury  
22 found was false.

23          Q       You were trying him -- on his grounds, you  
24 were trying him for making the statement which could not be  
25 required of him constitutionally under the law. And you want to



1 prosecute him for it.

2 A Well, again, Your Honor, the Douds case the  
3 Court held that --

4 Q Which Douds?

5 A The American Communications Association versus  
6 Douds, decided in 1950, just prior to the filing of this false  
7 affidavit, held that the statute, Section 9(h) was valid and  
8 was --

9 Q Do you have to stand on Douds?

10 A No, we don't have to stand on Douds, Your  
11 Honor. We --

12 Q I wouldn't want to, myself.

13 A Well, we suggest in our brief that there are  
14 ways of distinguishing the Court's holding in Brown which held  
15 the successive statute, Section 504 of Landrum-Griffin,  
16 invalid. Ways of distinguishing Brown and --

17 Q Well, isn't your basic -- (inaudible) --  
18 even if Douds ought to be overruled, nevertheless that's not  
19 the issue th 's involved here. The issue here is whether  
20 9(h) was constitutional or not. Even if it was unconstitutional,  
21 we are dealing with an indictment under a different statute.

22 Q I just wonder why you argue in defense of  
23 Douds. You don't have to, do you?

24 A I'm seeking to respond to Mr. Justice's  
25 inquiry. We're not willing to concede that Douds has been

1 overruled.

2 A I would prefer to rely on the elaboration in  
3 our brief, however, rather than on any more of oral argument.

4 Q Well, you are the one that mentioned Douds.

5 A But you are the one that mentioned that the  
6 statute was unconstitutional, and I suggested that the Court  
7 is right.

8 Q But you mentioned Douds, that's what he was  
9 asking about and then you had to defend it.

10 A Douds was the case that held to the contrary  
11 of your supposition here.

12 As Your Honors have suggested, we feel that the  
13 Petitioner's conviction should be upheld regardless of whether  
14 the Court feels that Douds should be reached and overruled  
15 here or not.

16 Section 9(h) is no longer on the books; it hasn't  
17 been for ten years. Petitioner is asking this Court to reach  
18 back and hold unconstitutional an Act that Congress itself has  
19 repealed some ten years ago.

20 Petitioner is also asking the Court, as we under-  
21 stand it, to apply the decision in United States versus Brown  
22 retroactively. He's not suggesting any compelling reasons for  
23 doing so, but he seems to assume that that should be done.

24 Moreover, statutes that are enacted and later held  
25 invalid -- or repealed, do have as the Court held in

1 the Tri-County Drainage District case and has held over and  
2 over again, they do have an operative effect. And they are  
3 of some significance for the time that they are in existence.

4 It seems to us that, as Mr. Justice Brennan pointed  
5 out, since there is no element of a separate crime of  
6 violating 18 U.S.C. 1001, the False Statement Act, involved in  
7 the matter relating to the validity of Section 9(h), that  
8 Petitioner's conviction is a valid one and should be upheld.

9 Basically, as has been indicated, we stand on the  
10 Dennis rationale and we suggest to the Court that the Court of  
11 Appeals properly concluded that Dennis controlled here unless  
12 this Court is willing to overrule Dennis, we think the  
13 Petitioner's conviction was properly upheld below and that  
14 the judgment of the Court of Appeals should be affirmed.

15 Q Are you arguing that the Dennis case should be  
16 overruled?

17 A Of course not, Your Honor.

18 Q That his contention is still wrong?

19 A I suggested, Your Honor, that even if the  
20 Dennis case is overruled, there are circumstances in this par-  
21 ticular situation here which, it seems to me, don't warrant the  
22 Court's exercise of its power to reach these questions as  
23 raised here.

24 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Beytagh.

25 Mr. Gladstein, you have three minutes left.

1 REBUTTAL ARGUMENT OF RICHARD GLADSTEIN

2 ON BEHALF OF PETITIONER

3 MR. GLADSTEIN: I will try to take less.

4 I think the basic inquiry was answered, I hope, in  
5 our briefs.

6 My inquiry is this: Does Congress have to pay  
7 attention to the Constitution of the United States? Congress  
8 makes the laws. It has the right to make laws of general  
9 application. It has the right and it does have the duty to  
10 pass those laws and they ought to be general laws. What right  
11 does Congress have at any time, under any guise, to --

12 Q (Inaudible) . . . . . all these things when  
13 you were trying this case 15 years ago? And weren't they  
14 passed on?

15 A Well, I can't recall, Your Honor, whether they  
16 were all presented. I am sure they were; I am sure they were  
17 all rejected, in the District Court and in the Court of  
18 Appeals. They never were heard here. This Court never granted  
19 a petition for certiorari.

20 Congress passed a law that we suggest clearly  
21 violated the provision against bills of attainder. Now, if  
22 that's true, if that law was unconstitutional, or for other  
23 reasons, for instance the Fifth Amendment which we argued,  
24 then it seems to me the threshold inquiry is where is where  
25 you stop the minute you determine that Congress has offended the

1 Constitution. If that's true, then Congress's enactment  
2 should be nullified and it doesn't matter at all what the  
3 citizen is required to do under the coercion of an unconstitu-  
4 tional statute.

5 It was suggested that suppose Congress did this to  
6 the Republican Party and Counsel said he'd have more trouble.  
7 Suppose they did it to the Socialist Party? Mr. Justice  
8 Jackson in the Douds case said, "I have no trouble saying that  
9 the Congress can't do this with the Republican Party or the  
10 Democratic Party or the Socialist Party. We know from history  
11 that the Socialists were expelled after being lawfully elected  
12 in the New York Legislature.

13 Congress have no more right and the the state have  
14 no more right to pass a bill that lumps all of the people in  
15 a political group, no matter what their opinions are, and  
16 precisely because they are unorthodox, hated, unpopular;  
17 precisely those are entitled to the protections of the Bill of  
18 Attainder of the First Amendment and it must have been for  
19 those reasons that the framers of the Constitution put those  
20 provisions in there.

21 Q All that Congress has done is say that  
22 citizens when dealing with the Government, can't lie.

23 A Your Honor is talking about Section 1001.  
24 But this case is based upon -- the underlying statute is 9(h).  
25 Without Section 9(h) or some other section of the law, without

1 some other section of law, 1001 has no meaning in itself.  
2 Congress can't just pass laws saying -- answering any question  
3 that anybody ever asked. It must be connected to some power  
4 that Congress has.

5 In this case, utilizing the Congress's power, or  
6 purporting to do so, Congress passed Section 9(h) and then it  
7 simply used it as an alternative method of permitting prosecu-  
8 tion or enforcement, the use of 1001.

9 It could just as easily have put such a provision  
10 in 9(h). It does it all the time.

11 Q I don't think that is an accurate way of  
12 looking at it. All that the Congress has done here is to say:  
13 Irrespective of whether -- to translater it a little bit --  
14 irrepective of whether what we did in Section 9(h) is good or  
15 bad, if you are dealing with the Government you cannot lie to  
16 the Government as a means of avoiding Section 9(h). If you  
17 want to attack it; go and attack it in another way.

18 A I submit that the more basic question is  
19 that when dealing with its citizens, Congress has no right to  
20 enact a statute which deprives them of their constitutional  
21 liberty, particularly in the field of politics.

22 Q May I ask you one other question?

23 A Yes, Your Honor.

24 Q About the lying business. Suppose Congress  
25 passes a series of laws, as it might well do sometimes, making

1 you file all kinds of affidavits, with reference to your  
2 political beliefs and persuasions and what you have done. Is  
3 the man then to be denied the privilege of challenging that  
4 law on the grounds that he lied?

5 A That's what they say, and if this Court should  
6 ever close its doors in that kind of a situation, then the  
7 Constitution will have lost its vitality for many, many people  
8 in --

9 Q That's a pretty broad statement.

10 A Is it, Your Honor?

11 Q I think it's a pretty broad statement. I would  
12 suppose the Government's position would be the same on Mr.  
13 Justice's hypothetical. If it passes a law that violates the  
14 First Amendment and the prosecution is for lying about -- to  
15 an agency that has jurisdiction, whether it's the Republican  
16 Party, the Democratic, Communist Party or anything else,  
17 Congress is well within its power in doing that.

18 A Mr. Justice, haven't you assumed in your state-  
19 ment when you said an agency that has jurisdiction --

20 Q Well, I am using jurisdiction in the broad  
21 sense: punitive, I'm not using it in any technical sense.

22 A It is my contention that there just isn't any  
23 jurisdiction if the statute upon which power is being exerted  
24 is itself, violating the Constitution.

25 Q May I suggest to you that a Congress can do

1 that whenever it gets heated up over some political question  
2 it has a way of setting millions of traps for citizens who  
3 ought not to be convicted by it.

4 A Well, history shows that the bills of  
5 attainder in England and in the colonies were precisely used,  
6 and that's the one distinguishing feature of them; they were  
7 all politically inspired and utilized against political groups.

8 Q Is there anything, Mr. Gladstein, in any of  
9 these hypothetical situations that you have suggested that  
10 would prevent a citizen from challenging the constitutionality  
11 on First Amendment grounds? Is there any other ground when he  
12 refuses to comply with the law? Anything at all?

13 A Well, the Court has reviewed cases of both  
14 types in the United States against Brown to show their un-  
15 constitutionality. But here, of course, we are told by Counsel  
16 that a year before my client filed the affidavit, this Court  
17 had that 9(h) was constitutional.

18 MR. CHIEF JUSTICE BURGER: Mr. Gladstein and Mr.  
19 Betagh, we thank you for your submission in the cases sub-  
20 mitted.

21 (Whereupon, at 1:40 o'clock p.m. the oral argument  
22 in the above-entitled matter was concluded)