amorphous dummy unspotted by human emotions a becoming receptacle for judicial power."[23] On the other hand, one state court has warned that a judge should never commit himself upon any question either of fact or of law which is likely to come before him.[24] Although most states do not enforce this strict standard,[25] some have limited judicial expression by disqualification statutes providing for automatic change of venue.[26] A more flexible view which would still provide protection for litigants was taken in *Mitchell v. United States:* "It is the duty of all courts to guard against an *appearance* of prejudice which might generate in the minds of litigants *a well-grounded belief* that the presiding judge is personally biased or prejudiced *against their cause.*"[27] This is similar to the "fair support" test in the Berger case. Such a test of sufficiency, unlike that applied by Judge Yankwich, would not preclude disqualification for prejudgment of the merits of a case.

The problem under any disqualification procedure lies in determining when the danger of a partisan trial outweighs the danger of obstructing the administration of justice. It is submitted that a litigant deserves relief whenever he can show a well-grounded belief of a lack of openmindedness by the judge, whether based on expressions of personal or of impersonal sentiments. The wording of Section 21 failed to provide such relief, according to the hardly assailable construction adopted in *Cole v. Loew's, Inc.* and supporting decisions. Instead of permitting the judge whose impartiality has been questioned to decide whether his alleged acts have demonstrated bias, a more satisfactory result could be obtained by submitting the question to a second district judge. Such a procedure is not prohibited in the act and was described in *Craven v. United States* as "a fitting and common practice."[28] Under the prevailing view a litigant in the federal courts has little hope of using the section unless he can show evidence of personal animosity, regardless of how much unfriendliness the judge has shown to his cause. The section thus applies only to a comparatively rare situation and is relatively ineffective in some cases where there is an appearance of partiality.

EFFECT OF TAFT-HARTLEY UNION REQUIREMENTS ON STATE ANTI-INJUNCTION ACT

About 100 employees of the Smith Cabinet Mfg. Co., of Salem, Indiana, went on strike to force the company to recognize Local 309, United Furniture Workers of America (CIO), as their bargaining representative. Although aware

[23] Justice McReynolds, dissenting, in Berger v. United States, 255 U.S. 22, 42 (1920).

[24] See Crawford v. Ferguson, 5 Okla. Cr. 377, 387, 115 Pac. 278, 282 (1911).

[25] Fishbaugh v. Fishbaugh, 15 Cal. 2d 445, 101 P. 2d 1084 (1940); Bradburn Motors Co. v. Moverman, 63 R. I. 67, 7 A. 2d 207 (1939); King v. Grace, 293 Mass. 244, 200 N.E. 346 (1936).

[26] Ariz. Code Ann. (1939) §§ 21–107; Colo. Stat. Ann. (Michie, 1935) c. 170 § 1; Ind. Stat. Ann. (Burns, 1933) §§ 2-1401, 2-1404, 9-1301; Mich. Stat. Ann. (Henderson, 1936) c. 27.466; Mont. Rev. Codes Ann. (Anderson & McFarland, 1935) § 8868.

[27] 126 F. 2d 550, 552 (C.C.A. 10th, 1942) (italics added).

[28] 22 F. 2d 605, 606 (C.C.A. 1st, 1927).

that the union had won a consent election, and admitting its majority status, the company refused to arbitrate or negotiate until the union was certified by the NLRB. The union, however, could not be certified because it refused to register and to file non-Communist affidavits as prescribed by Section 9(f), (g), and (h) of the Taft-Hartley Act.[1] Because of the violence which accompanied the strike the company secured a decree against the employees individually, enjoining the commission of unlawful acts in connection with the picketing. The union contended that the issuance of the injunction was prohibited by the Indiana "little Norris-LaGuardia Act,"[2] which provides that no restraining order or injunctive relief shall be granted to any complainant in a labor dispute who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery.[3]

The existence of a labor dispute within the meaning of the act and the propriety of the scope of the injunction issued were recognized by both parties. The only question was whether the registration and filing provisions of the Taft-Hartley Act affected or nullified the requirement of the Indiana statute. On appeal, the Appellate Court of Indiana held that if a union is not eligible for certification under the Taft-Hartley Act it need not be recognized as the representative of the employees, and since recognition was the employees' sole demand there was nothing to negotiate, mediate, or arbitrate.[4] Admitting that under the Wagner Act[5] the company might have been required to recognize the union even without certification, the court decided that this would be contrary to the spirit of Section 9(f), (g), and (h) of the Taft-Hartley Act and that the issuance of the injunction was therefore proper. Judge Bowen dissented on the ground that the Taft-Hartley Act has no bearing on the question of the conditions precedent to the right of the employer under the Indiana act to secure an injunction for alleged individual acts of the employees.

If a union has failed to comply with Section 9(f) and (h) of the Taft-Hartley Act, the NLRB is prohibited from investigating disputes concerning representation, receiving petitions concerning elections, or issuing complaints pursuant to charges of unfair labor practices at the behest of the union. Failure to comply with Section 9(g) is similarly penalized and in addition renders the union ineligible for certification.

Despite the specific nature of the sanctions imposed by the Taft-Hartley Act, in some respects the majority view in the instant case is persuasive. The anti-Communist temper of the 80th Congress is apparent in many of its actions, and it is fair to assume that the purpose of Section 9(h) of the Taft-Hartley Act was to eliminate or at least to minimize the influence of Communists in the

[1] Labor Management Relations Act § 9(f), (g), (h), 61 Stat. 143 (1947), 29 U.S.C.A. § 159 (Supp., 1947).

[2] Ind. Stat. Ann. (Burns, 1933) §§ 40–501 to 40–514. [3] Ibid., at § 40–508.

[4] Fulford v. Smith Cabinet Mfg. Co., Inc., 77 N.E. 2d 755 (Ind. App., 1948).

[5] National Labor Relations Act, 49 Stat. 449–57 (1935), 29 U.S.C.A. §§ 151–66 (1947).

labor movement. The apparent intent of Section 9(f) and (g) was to provide some regulation of the internal affairs of unions. To allow an injunction against a union which had not complied with these provisions, without requiring the employer first to negotiate, would increase the pressure on the union to qualify, and thus further the aims of the provisions. To deny the injunction and require the employer to negotiate first would enable the union to bargain without complying, and thus tend to defeat the congressional policy. There can be little doubt that the 80th Congress would applaud the attitude of the company in this case.

While there is no conflict between the express provisions of the two acts, there does appear to be a conflict between the underlying policies where, as in the instant case, a non-complying union is involved. In dealing with federal statutes reflecting conflicting policies the United States Supreme Court has restricted the application of one act in order that the policy of the other should not be frustrated.[6] Where a state act and a later federal statute are involved, the policy behind the federal statute carries added weight. This consideration, combined with a recognition of the anti-Communist policy underlying Section 9(h), lends some force to the argument that the policy of the Indiana anti-injunction act should be subordinated to the policy behind the registration and filing provisions of the Taft-Hartley Act, and that therefore the protection provided by the pertinent section of the Indiana act should be limited to certified unions.[7]

The jurisdictional relationship of the NLRB and state agencies lends support to the argument that the federal policy should prevail. Whenever the NLRB either acts or specifically refuses to act, it has assumed jurisdiction,[8] and that jurisdiction is exclusive. Thus, state conciliators and labor boards have

[6] Southern Steamship Co. v. NLRB, 316 U.S. 31 (1941), provides an example of such judicial accommodation. In that case, a strike which had resulted in the subsequent discharge of the striking seamen was held to be mutiny under Sections 292 and 293 of the Criminal Code. The NLRB was held powerless to order the reinstatement of the strikers under the Wagner Act. Justice Byrnes said: ". . . the Board has not been comissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another." Ibid., at 46; cf. United States v. Hutcheson, 312 U.S. 219, 229 (1941).

[7] This argument is somewhat attenuated by the fact that the policies of Section 9(f), (g), and (h), if given the strength which the court in the instant case accords them, are themselves in conflict with some of the more general policies of the Taft-Hartley Act, which favor peaceful settlement of labor disputes through mediation and administrative determination. The Taft-Hartley Act, moreover, must be read in conjunction with the Norris–La Guardia Act. While certain sections of that federal anti-injunction law conflict directly with, and are therefore superseded by, provisions in the more recent Taft-Hartley Act, the basic policy of the Norris–La Guardia Act is still in effect. An important element of that policy is to encourage collective bargaining through representatives freely chosen by the workers. 47 Stat. 70 (1932), 29 U.S.C.A. § 102 (1947).

[8] Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767 (1947); Labor Management Relations Act § 10(a), 61 Stat. 143 (1947), 29 U.S.C.A. § 160(a) (Supp., 1947); see Overlapping Federal and State Regulation of Labor Relations, 15 Univ. Chi. L. Rev. 362 (1948).

been held powerless to act where the NLRB had refused to act because of a union's non-compliance with the registration and filing requirements of the Taft-Hartley Act.[9] In the present case the NLRB had held a consent election before the effective date of the Taft-Hartley Act. If the election constituted a taking of jurisdiction, state machinery for arbitration would not be available. But the employer could still comply with the Indiana act, which does not restrict peaceful settlement to the use of governmental machinery. The alternative statutory requirement of private negotiation would remain open.

In *Scranton Broadcasters, Inc. v. American Communications Association (CIO)*,[10] a Pennsylvania court of common pleas reached the same result as the Indiana court on substantially identical facts. Most of the force of that decision is lost, however, because the opinion seems to have been motivated by an unbridled antagonism toward Communism and labor unions rather than by any reasoned conclusion as to the relationship of the acts in question.[11]

The considerations supporting the majority view in the instant case are more than balanced by the arguments on behalf of the minority position. While the few analogous cases also allowed injunctions to issue, they are distinguishable because they involved efforts by the unions to force employers to engage in unlawful activities.[12] In *Simons v. Retail Clerks' Union*[13] the defendant union, which had not complied with the registration and filing requirements of Section 9(f), (g), and (h), picketed the plaintiff's store demanding a closed shop and the right to represent the employees as bargaining agent. The NLRB, as required by Section 9(f), (g), and (h), had refused an earlier petition of the employer to determine whether this union was the proper bargaining agent. Since the closed shop is outlawed by the Taft-Hartley Act[14] and since there was no assurance that the union had in fact been selected by a majority of the employees, any compliance by the employer with the union demands would have been illegal. Similarly, in a pre-Taft-Hartley Indiana case, *Roth v. Local Union No. 1460, Retail Clerks' Union*,[15] an injunction was issued at the request of an

[9] Linde Air Products Co. v. Johnson, 77 F. Supp. 656 (Minn., 1948); In re Eau Claire Press Co. and Eau Claire Typographical Union (unaffiliated), 21 L.R.R.M. 1085 (Wis. ERB, 1947).

[10] 21 L.R.R.M. 2024 (Pa. Ct. Com. Pl., 1947).

[11] The judge declared that the state anti-injunction statute was no longer necessary in view of the organization of Soviet espionage and the standing instructions of Communist agents to bore from within labor unions. After he took judicial notice that the Soviet power is an enemy of the United States, the judge incorporated the Christian religion into the common law and invoked the constitutional guarantee of the republican form of government and the proscription of treason as the bases for his decision.

[12] Simons v. Retail Clerks' Union, 21 L.R.R.M. 2685 (Cal. Super. Ct., 1948); Roth v. Local Union No. 1460, Retail Clerks' Union, 216 Ind. 363, 24 N.E. 2d 280 (1939); American News Company, Inc., and Magazines, Mailers' & Deliverers' Union of North Jersey, 55 N.L.R.B. 1302 (1944), commented on in Availability of NLRB Remedies to "Unlawful" Strikes, 59 Harv. L. Rev. 747, 765 (1946).

[13] 21 L.R.R.M. 2685 (Cal. Super. Ct., 1948).

[14] 61 Stat. 140 (1947), 29 U.S.C.A. § 158(a) (3) (Supp., 1947).

[15] 216 Ind. 363, 24 N.E. 2d 280 (1939).

employer who had complied with all the requirements of the law. None of his employees wished to strike or to join the union which was picketing the employer in an effort to force him to accept a closed shop. The court interpreted the Indiana anti-injunction act as outlawing the closed shop, so that compliance with the union's demands would have been in violation of the act.

The instant case does not involve any attempt to compel the employer to engage in any unlawful activities. There was no demand for a closed shop, and the union was selected by a majority of the employees as their bargaining representative in an NLRB election. The General Counsel of the NLRB has stated that under the Taft-Hartley Act the employer is free to negotiate about representation with an uncertified union even though it cannot be certified.[16] In a memorandum to the Secretary of Labor, the Solicitor of Labor declared that Section 9(f) and (h) has no application to a union which voluntarily determines that it does not need or desire to use NLRB machinery.[17] Unions may continue traditional and legitimate trade-union activities without recourse to the remedies and procedures of the National Labor Relations Act, as amended by the Taft-Hartley Act. Not only is the employer free to bargain with uncertified unions, but to a limited extent certain facilities of the NLRB and other government agencies are available to such unions.[18]

[16] The statement of the General Counsel was made in a letter concerning an NLRB dismissal of two petitions of Remington Rand for representation elections. The dismissal was based on the fact that the previously certified union, not having qualified under Section 9(f) and (h) of the Taft-Hartley Act, could not be placed on the ballot. Compare H.R. Rep. 245, 80th Cong. 1st Sess. (1947).

[17] "The inability of a union to secure Board certification because it has not filed the affidavits and organizational and financial statements provided for in Section 9(f) and (h) of the Act does not disqualify the union from acting as the bargaining representative of the employees, and does not, therefore, bar the employer from bargaining with the union." C.C.H. Lab. L. Serv. ¶ 8465 (1948). It might even be argued that it is an unfair labor practice for an employer to refuse to bargain with a union chosen by the employees as their bargaining representative, even though the union has not complied with the qualifying provisions for certification. Refusal by an employer to bargain collectively with the representative of his employees is made an unfair labor practice under Section 8(a) (5) of the Taft-Hartley Act, subject to the provisions of Section 9(a), which provides only that the representative selected by the majority of the employees shall, with certain exceptions, be the exclusive bargaining representative. The provision is not made subject to Section 9 as a whole, which would include the registration and filing requirements. Of course an uncertified union could not appeal to the NLRB for enforcement of its rights as bargaining representative. Negotiation between such a union and the employer, however, would clearly involve no illegal act.

[18] The NLRB ruled that it has the power to order an employer to deal with a non-certified union which has not met the qualifications for certification. Considering such an order tantamount to certification, however, the NLRB conditioned its order on the union's meeting the qualifications within a specified period. Marshall and Bruce Co. and Nashville Bindery Workers Union No. 83, International Brotherhood of Book Binders (AFL), 21 L.R.R.M. 1001 (NLRB, 1947). Unqualified unions with existing contractual interests have been allowed to intervene in NLRB determinations and to have their names on representation ballots. Bush Woolen Mills and Textile Workers Union of America (CIO), 21 L.R.R.M. 1218 (NLRB, 1948); Marine Iron Bridge and Ship Building Co. and International Brotherhood of Boilermakers, Iron Ship Builders, and Helpers of America, Local No. 415 (AFL), 21 L.R.R.M. 1258 (NLRB, 1948). Similarly, unions which had previously been certified have been placed

Little mention of the provisions of Section 9(f), (g), and (h) is found in the legislative history of the Taft-Hartley Act, and where they are discussed they are consistently referred to merely as prerequisites for certification.[19] Congress could have provided that no Communist could be an officer of a labor organization or that no union which failed to meet all the prerequisites could act as bargaining representative for any group of employees.[20] Instead of thus outlawing non-complying unions, the Act provides very specific sanctions, which in effect deny certain facilities of the NLRB to unions which have not filed the prescribed reports and affidavits. This denial, while not an extremely severe punishment,[21] does impose a number of significant disadvantages on unions which do not qualify, particularly if such unions are new or weak. The denial results in a loss both of powerful legal weapons and of bargaining power. The sanctions imposed are probably sufficient to induce most unions to meet the requirements. Carried to its logical conclusion, the approach adopted in the instant case leads to a virtual outlawing of non-complying unions. Since Congress has chosen specific inducements to secure compliance with the requirements of the Act, it is not for the courts to create new and greater penalties.

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on decertification ballots even though they have not complied with the registration and filing provisions, and the NLRB has stated that it would announce the arithmetic result of the elections should the non-complying union win. Harris Foundry & Machine Co. and United Steelworkers of America, 21 L.R.R.M. 1146 (NLRB, 1948).

Local unions which have qualified for certification have been allowed access to NLRB machinery although sister locals had not qualified and although the AFL or CIO, with which they were affiliated, had failed to comply. Northern Virginia Broadcasters, Inc., Radio Station WHRL, and Local Union No. 1215, International Brotherhood of Electrical Workers (AFL), 20 L.R.R.M. 1319 (NLRB, 1947). It has been suggested informally by Associate Counsel Brooks of the NLRB that the NLRB would act on discrimination charges, but not on charges of refusal to bargain, when made by an individual member of an uncertified union. This distinction was drawn in an effort to prevent use of this device to avoid the necessity of union registration entirely. Mulroy, The Taft-Hartley Act in Action, 15 Univ. Chi. L. Rev. 595, 624 (1948).

The Federal Mediation and Conciliation Service has made its facilities available in cases where the Service would otherwise assume jurisdiction even though the union has not filed its registration statements and non-Communist affidavits. "The filing requirements in Section 9(f) and (g) specifically relate to the availability to unions of remedies afforded by Title I of the LMRA. They do not constitute a restriction upon the mediation and conciliation activities of the Service which is under a statutory obligation to make its facilities available in the public interest in the types of labor disputes described in Title II." C.C.H. Lab. L. Serv. ¶ 9003 (1948).

In view of the foregoing materials, the statement in Simons v. Retail Clerks' Union, 21 L.R.R.M. 2685 (Cal. Super. Ct., 1948), that the Taft-Hartley Act in effect outlaws non-certified unions must be discounted.

[19] H.R. Rep. 510, 80th Cong. 1st Sess. (1947); 93 Cong. Rec. 5081–86 (1947); 93 Cong. Rec. 5095–96 (1947).

[20] Whereas the registration and filing provisions are located in Section 9, which deals with representation and elections, the appropriate place for an outlawing provision would be Section 7, which concerns employees' rights.

[21] Comments, The Labor-Management Relations Act of 1947, 42 Ill. L. Rev. 444, 487–91 (1947). Some legislators felt that denying the use of NLRB machinery to non-complying unions would be an inadequate sanction. 93 Cong. Rec. 6381, 6388, 6455, 6497 (1947).

The provisions of Section 9(f), (g), and (h) of the Taft-Hartley Act, then, are really quite limited in their applicability. While intended to increase governmental control over internal union administration and discourage Communism in American labor, they impose only certain limited disabilities on unions which do not comply with their requirements. They are therefore quite unrelated to the Indiana "little Norris-LaGuardia Act." The policy of the Indiana statute is not only to settle labor disputes peaceably whenever possible, but to allow the use of injunctions only as a last resort.

As Judge Bowen pointed out in his dissent,[22] the Indiana Act applies to all labor disputes, regardless of whether a union is involved. On the other hand, Section 9(f), (g), and (h) of the Taft-Hartley Act relates only to unions. Yet the complaint in the instant case named a large number of individuals as defendants, and the result of the majority decision was to enjoin these individuals from mass picketing and certain other specified acts.

Even if the injunction in the instant case were directed only at the union, the decision of the court would not seem justified. Registration and filing of non-Communist affidavits entitle the union to certain advantages under the Taft-Hartley Act. Indiana's "little Norris-LaGuardia Act" provides certain prerequisites for the granting of an injunction in a labor dispute. If the union wishes to use the facilities of the NLRB, let it comply with the prerequisites of registration and filing. If the employer wishes to secure an injunction from an Indiana court, let him comply with the prerequisites of first making a reasonable effort to settle the dispute by whatever means are available. Section 9(f), (g), and (h) of the Taft-Hartley Act does not justify the issuance of an injunction in the face of a state anti-injunction statute requiring negotiation as a prerequisite to the granting of an injunction in a labor dispute.

PROPORTIONATE RECOVERY AS INSURER'S REMEDY FOR FRAUD CAUSING UNDERESTIMATION OF RISK

The defendant laundry company insured customers' goods in its possession under a bailees' customer policy taken out with the plaintiff insurance company. When a fire destroyed the laundry company's plant, customers claimed losses of goods amounting to $211,410.56, of which the insurance company paid $209,103.56. The policy provided that the insured was to keep accurate records of its business and was to report its total gross receipts to the insurer monthly. It was a relatively new type of policy, giving the insured complete coverage[1] but allowing for variation in the premium payments according to the amount of business during the period. On the basis of actuarial experience the insurer

[22] Fulford v. Smith Cabinet Mfg. Co., Inc., 77 N.E. 2d 755, 757 (Ind. App., 1948).

[1] In addition "[t]he policy was a continuing contract, subject, however, to cancellation by either party by the giving of 15 days' notice in writing." Automobile Ins. Co. v. Barnes-Manley Wet Wash Laundry Co., 168 F. 2d 381, 382 (C.C.A. 10th, 1948), cert. den. 69 S. Ct. 132 (1948).