

UNION DEMOCRACY AND THE LANDRUM-GRIFFIN ACT

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I

INTRODUCTION

After the massive and largely successful wave of strikes that followed World War II, the labor movement established itself as a permanent and powerful force in the United States. Once the movement's power was established, a wide-ranging debate developed over the proper role of trade unions in American life. This debate often focused on the relationship between unionism and democracy and, in particular, on the nature of internal union democracy.

During the postwar period, a broad spectrum of views on union democracy was expressed. In *American Trade Union Democracy*,¹ William Leiserson set out to "challenge common assumptions about union democracy."² Leiserson argued that the lack of democracy in certain parts of the labor movement was not aberrant, but rather an "expression[] of a trend away from American democratic principles."³ Leiserson added that "[n]o one knows enough about American union governments to give a definitive answer to the question whether organized labor is actually becoming a menace to freedom, or whether despite serious lapses among the organizations into autocratic patterns, its overall movement is toward more democracy and enlarged freedom."⁴

Max Ascoli, editor and owner of the *Reporter*, editorialized about "the limited amount of democracy organized labor can bear."⁵ Ascoli asserted that democratic principles could not be directly applied to the labor movement, adding that "democracy is weakened and defiled whenever the attempt is made to extend it beyond the range of public government."⁶ Even so, Ascoli was a strong believer in the advantages of federal intervention and of guarantees of individual rights.

Arthur Goldberg, adopting a more moderate stance, agreed that unions ought to be democratic, but insisted that most unions were already sufficiently democratic. Goldberg's conception of union democracy was narrow

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1. W. LEISERSON, *AMERICAN TRADE UNION DEMOCRACY* (1959).

2. *Id.* at 80-81.

3. *Id.* at 81.

4. *Id.*

5. Ascoli, *Union Rights and Union Wrongs*, *Reporter*, April 2, 1959, at 12.

6. *Id.*

and limited, however. In 1958, before he was Secretary of Labor, but while he was counsel for the United Steelworkers of America and for the AFL-CIO Ethical Practices Committee, Goldberg explained:

In discussion of union democracy it is often assumed that the ideal would correspond to democracy as practiced in our political institutions. . . . The absence of competitive politics at the international union level, at least in most American unions, is regarded as a symptom of a lack of democracy.

But is it true that we can uncritically transfer to unions the standards and criteria which we apply to governmental politics? I think a moment's examination will show that we cannot.⁷

Then, Goldberg expressed an idea that is often advanced to explain why too much democracy might not be a good thing for the union movement:

If there is analogy to political government, the analogy is to a political government which may simultaneously face uncertainty as to its continued existence, that is, face a revolution, and which is periodically at war. The constraints which by common consent we accept temporarily in the political arena when such conditions exist may perhaps explain and justify the existence of similar, although permanent, restraints in the practice of union democracy.⁸

In sharp contrast to any theory defending "permanent restraints" on union democracy, the American Civil Liberties Union adopted the following position: "Unions, in the exercise of these powers derived from government, should maintain the same democratic standards required of government itself."⁹ In 1947, the ACLU proposed that Congress enact a Trade Union Democracy Bill¹⁰ that would guarantee union members freedom of speech, due process, and democratic elections.¹¹

In enacting the Labor-Management Reporting and Disclosure Act of 1959 [hereinafter referred to as "LMRDA" or "the Act"],¹² Congress resolved much of the debate over union democracy by adopting many of the ACLU's proposals. In interpreting the LMRDA's election provisions, the Supreme Court in effect stated that Congress had embraced the ACLU position when it wrote that "Congress's model of democratic elections was political elections in this country"¹³

7. Goldberg, *A Trade-Union Point of View*, in *LABOR IN A FREE SOCIETY* 104 (M. Harrington & P. Jacobs ed. 1959).

8. *Id.* at 106.

9. *AMERICAN CIVIL LIBERTIES UNION, DEMOCRACY IN LABOR UNIONS* 4 (1952).

10. *Id.* at 16.

11. *Id.* at 15.

12. 29 U.S.C. §§ 401-531 (1976 & Supp. V 1981).

13. *Wirtz v. Hotel, Motel & Club Employees Union, Local 6*, 391 U.S. 492, 504 (1968).

Thanks in large part to the LMRDA, internal union democracy is more secure and robust today than at any other time in the last thirty-five years. Nevertheless, the LMRDA has not made every union a paragon of democracy.

II

THE NATURE OF UNION GOVERNMENT

One of the principal purposes of the LMRDA was to “insure union democracy.”¹⁴ In passing the Act, Congress aimed to put an end to the dictatorial fiefdoms that many union leaders had set up.¹⁵ Because many of the Act’s supporters were unhappy with the totalitarian nature of some unions, they aimed to give union members the “tools” necessary to combat their would-be exploiters.¹⁶

On the eve of the adoption of the LMRDA, William Leiserson wrote that one-party government ruled in most unions and often flourished with little opposition:

May it not be, then, that the autocratic practices which have been considered exceptional—the denial of the right to oppose the union’s administration, the expulsion of members for criticizing union officials, the granting of arbitrary authority to executives, and the tendency to govern by decree—are indications of a trend toward one-party union government in conformity with the single party concept of industrial democracy? Is there any reason to believe that a one-party system of industrial government or union government is likely to be any less disastrous in its effects on individual freedom than such systems have been under political government?¹⁷

While Leiserson saw the one-party system as a defect, some union leaders saw it as a natural, defensible aspect of the union movement. For example, in 1947, at a convention of the International Longshoremen’s and Warehousemen’s Union, Harry Bridges said:

What is totalitarianism? A country that has a totalitarian government operates like our union operates. There are no political

14. S. REP. NO. 187, 86th Cong., 1st Sess. 2, 5-7, *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 2318, 2322-24; H. REP. NO. 741, 86th Cong., 1st Sess. 2, 6-7, *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 2424, 2428-29; 105 CONG. REC. 6469-72 (1959) (statement of Sen. McClellan); *see also* 29 U.S.C. § 401(b) (1976).

15. S. REP. NO. 187, 86th Cong., 1st Sess. 5-7, 12, 16-17, *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 2322-24, 2328-29, 2333; H. REP. NO. 741, 86th Cong., 1st Sess. 6-7, 9, 13, *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 2428-29, 2431, 2435-36; 105 CONG. REC. 6469-72 (1959) (statement of Sen. McClellan).

16. 105 CONG. REC. 6476, 6478 (1959) (statement of Sen. McClellan).

17. W. LEISERSON, *supra* note 1, at 75.

parties. People are elected to govern the country based upon their records That is totalitarianism. If we started to divide up and run a Republican set of officers, a Democratic set, a Communist set, and something else, we would have a hell of a time.¹⁸

In spite of the mandate of the LMRDA, one-party union governments continue to exist in unions where the leadership is well organized but the rank and file remains a loose collection of individuals. As to this situation, Clyde Summers has observed:

[c]ompetition in a two-party system provides many checks and balances with the potentiality for self-correction. But we know from experience that in organizations such as unions, the existence of continuing opposition groups or political parties is not likely to occur. That being the case, we are confronted by a special problem of how to provide for a democratic process within what is essentially a one-party, monolithic structure.¹⁹

It is clear that the power balance in unions is overwhelmingly weighted in favor of incumbent officials and against any possible challenge from the rank and file or from the secondary leadership. I refer not to small local unions with a tiny professional staff and meager treasury, but to large unions with substantial staffs of elected and appointed officials who have substantial resources at their command.

Top union administration is organized like a political machine. There is often a large full-time staff, usually appointed, which incumbents can rely upon to create a built-in campaign apparatus. This administrative apparatus dominates election campaigning, ballot counting, and intraunion appeals procedures. Similarly, in unions where top officers are elected in national conventions, the political gatherings are closely controlled by incumbents and key staff members.²⁰

To run the union, incumbents hire or retain firms of lawyers, researchers, public relations specialists, and journalists—all of whom can be counted on to work for the administration against any challenge.²¹ Sometimes the paid union staff and outsiders on retainer openly campaign for incumbents during so-called “vacation” periods. In other cases, they campaign covertly on paid union time, a practice the Labor Department permits, so long as the campaigning is merely “incidental” to their normal union business.²² Fi-

18. S. LIPSET, M. TROW, & J. COLEMAN, *UNION DEMOCRACY* 5 (1956).

19. Summers, *Union Democracy in a One-Party Structure*, *UNION DEMOCRACY REVIEW* No. 21 at 2 (1981).

20. Note, *Union Elections and the LMRDA: Thirteen Years of Use and Abuse*, 81 *YALE L.J.* 407, 462, 465 (1972).

21. *Id.* at 454; Note, *Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections*, 13 *HARV. C.R.-C.L. L. REV.* 247, 276-280, 331 (1978).

22. 29 *C.F.R.* § 452.76 (1981).

nally, the appointed staff can be counted on to contribute substantial sums to the incumbents' campaign treasuries.²³

Like any political machine, the incumbent administration has favors to dispense and patronage to hand out to its supporters.²⁴ The administration processes grievances vigorously for favored friends. In the construction trades, it can award jobs to its supporters. It can use the union press to publicize the doings of local elected public officials who support it.

In contrast to these well-developed political capabilities, any insurgency from below is virtually powerless and unknown. Opposition candidates must tediously accumulate campaign funds by soliciting small donations from large numbers of union members, who are usually widely scattered geographically. Unlike the incumbents and their staff, insurgents have little regular communication with the membership, and no staff or hired experts. They face the very difficult task of campaigning against the incumbent organization while working full-time on their regular jobs.²⁵

The advantages held by union incumbents make it far more difficult to cultivate democracy within unions than within public government. These inherent advantages can be only partially offset even by the most effective of laws. Nevertheless, laws such as the LMRDA should eliminate the repressive powers of incumbency and leave incumbents with only the political advantages normally enjoyed by an elected official in a public office.

III

TITLE IV: THE EFFECTIVENESS OF THE LMRDA IN THE ELECTION CONTEXT

Despite the good intentions of the LMRDA and its ambitious language, it is not clear that the law has achieved its objectives. On the positive side, without the aid of the LMRDA, the 1964 election for the presidency of the International Union of Electrical Workers would surely have been stolen.²⁶ Without the Act, miners would not have been able to throw out a murderous dictatorship.²⁷ Were it not for the Act, steelworkers in District 31 in the early 1970's would not have been able to elect a leadership of their own choosing.²⁸ Frank Schonfeld of the Painters Union would never have been able to win the right to a fair election.²⁹ James Morrissey would have been

23. Note, *supra* note 20, at 464; Note, *supra* note 21, at 331-332.

24. See Note, *supra* note 20; Note, *supra* note 21.

25. Note, *supra* note 21, at 277.

26. U.S. DEPT. OF LABOR, FIFTY-THIRD ANNUAL REPORT 98 (1965).

27. See *Hodgson v. United Mine Workers*, 344 F. Supp. 17 (D.D.C. 1972).

28. See *Brennan v. United Steelworkers*, 554 F.2d 586 (3d Cir.), *cert. denied*, 435 U.S. 977 (1977).

29. See *Schonfeld v. Raftery*, 271 F. Supp. 128 (S.D.N.Y.), *aff'd*, 381 F.2d 446 (2d Cir. 1967).

driven out of the National Maritime Union long before he was able to wage his extended opposition campaign.³⁰ Without the Act, the right of free speech would simply not exist in some of the nation's largest unions,³¹ and many union members would be denied the right to appeal to the courts for redress against injustices inside their unions.³²

The LMRDA also has its shortcomings. The chief problem with the Act is its lack of enforcement by the Labor Department. The appointment of Arthur Goldberg as Secretary of Labor in 1960, soon after the passage of the Act, portended enforcement problems. The democratic provisions of the Act clashed with Goldberg's vision of internal union affairs, a vision that would allow "permanent restraints" on union democracy.³³ As a result, enforcement of the LMRDA under Goldberg was minimal, a problem which has persisted to this day under every administration, Republican and Democratic, and under every secretary of labor.

A. The Road to Enforcement in the Election Context

The LMRDA lays out two principal avenues of enforcement. The first is through the federal courts,³⁴ and the second is through the United States Department of Labor.³⁵ Generally, complaints concerning violations of Title IV,³⁶ which sets forth rules for union elections, must be filed with the Labor Department, which is responsible for pursuing such complaints.

The provisions of Title IV are intended to make the election of union officers fair, democratic, and honest. They require voting by secret ballot.³⁷ They provide equal treatment for all candidates,³⁸ the right of candidates to post observers at the casting and counting of ballots,³⁹ and the right to mail out campaign literature to all members.⁴⁰ In sum, Title IV aims to create "adequate safeguards to insure a fair election."⁴¹ If Title IV safeguards were actually enforced, the nature of elections would be radically transformed in many labor unions. This is a big "if," however, because the problem lies precisely in enforcement.

30. See *Wirtz v. Nat'l Maritime Union*, 284 F. Supp. 47 (S.D.N.Y.), *aff'd*, 399 F.2d 544, (2d Cir. 1968).

31. 29 U.S.C. § 411(a)(2) (1976).

32. 29 U.S.C. § 411(a)(4) (1976).

33. Goldberg, *A Trade-Union Point of View* in *LABOR IN A FREE SOCIETY* (M. Harrington & P. Jacobs ed.) (1959).

34. 29 U.S.C. § 412 (1976).

35. 29 U.S.C. § 482 (1976).

36. 29 U.S.C. § 481-83 (1976).

37. 29 U.S.C. § 481(a), (b) (1976).

38. 29 U.S.C. § 481(c) (1976).

39. 29 U.S.C. § 481(c), (e) (1976).

40. *Id.*

41. *Id.*

Except in connection with violations of the right to mail campaign literature,⁴² a union member whose Title IV rights are violated is barred from suing in court and must process any election complaint through the Department of Labor.⁴³ If the Department fails to pursue the complaint, the union member has nowhere to turn, except under very limited, difficult, and rare circumstances.⁴⁴ This dependence on the Department of Labor has severely undercut the great promise that Title IV offers union members.⁴⁵

Because of the peculiarities in the enforcement of Title IV, rights which are spelled out unambiguously in the text are often not available in actual practice. For example, opposition candidates may discover that balloting is not quite secret, that they are barred from addressing union meetings (where incumbents get free rein) or that opposition pollwatchers are prevented from functioning. All of these things clearly violate the opposition candidate's Title IV rights, yet the candidate has no way of enforcing those rights.

If the victim of an election violation complains to the Department of Labor before the balloting occurs, the Department of Labor will rarely, if ever, intervene in that election to safeguard the candidate's rights prior to the election.⁴⁶ Thus, during the campaign, a candidate has no means to enforce his or her Title IV rights because, at present, almost all Title IV remedies are postelection.

When the Department receives a complaint from a candidate after an election, it must decide whether or not it will try to void the offending election. If it finds no violation, it will dismiss the complaint. If it determines that there was a violation of Title IV, the Department will not bring a complaint against the union unless it finds that the violation or violations of Title IV could have affected the outcome of the election.⁴⁷ The complainant must demonstrate that he or she might have won the first election, had it been fair. The complainant has the heavy burden of proving this not in front of an impartial judge, but instead before the often partial Department of Labor, which for political reasons frequently seeks to cozy up to union leaders. At best, a successful complainant will win the right to a second election supervised by the Department, a rerun in which his or her Title IV rights may be protected.

42. *Id.*

43. 29 U.S.C. § 482 (1976).

44. *See Dunlop v. Bachowski*, 421 U.S. 560 (1975).

45. *See Note, supra* note 20, at 498-503; *Note, supra* note 21, at 302-308; *see also Note, Pre-Election Remedies Under the Landrum-Griffin Act: The "Twilight Zone" Between Election Rights Under Title IV and the Guarantees of Titles I and V*, 74 COLUM. L. REV. 1105 (1974).

46. *See Note, supra* note 20, at 476, 479; *Note, supra* note 21, at 293-95.

47. *See Note, supra* note 20, at 499; *Note, supra* note 21, at 302-04.

*B. Problems in the Enforcement of Title IV
Election Guarantees*

1. The Labor Department's Lack of Impartiality

Whenever a complaint alleging Title IV violations is filed with the Labor Department, the Department must make a host of judgments: whether the complaint was filed properly, whether it was timely, whether the alleged violations actually occurred, whether the verified occurrences constitute a violation of Title IV, whether they affected the election outcome, whether to cajole a union into "voluntary compliance" with the law, whether to file suit to void an election, and how to conduct a rerun election if the court grants approval in a formal enforcement action.

The detailed criteria used by local offices of the Department of Labor to make these decisions are not readily available. Therefore it is difficult to assess the degree to which local offices are partial or impartial in handling Title IV complaints. Nevertheless, the record does show that in several key cases, the higher echelons of the Labor Department have not been reluctant to slant decisions in favor of incumbents.

a. Painters Union

Between 1961 and 1967, reformers in the Painters Union in New York City repeatedly complained to the Labor Department about the incumbents' violations of Title IV.⁴⁸ The Department threw out every complaint. In 1967, the Department's determinations in Title IV cases appeared immune to judicial review. However, one federal judge agreed to review a Labor Department decision to reject an unsuccessful candidate's complaint concerning an election in Painters Local 1011.⁴⁹ The court found the Department's explanation for dismissing the complaint questionable, so it scheduled the case for trial.⁵⁰ The case was ultimately rendered moot when the complainant won a later election and dropped the earlier complaint.

Later in 1967, reformers in the Painters Union got a full court hearing in a trusteeship suit. The reformers presented sworn testimony and documentary proof of a long record of stolen elections in their union, the same evidence that they had repeatedly presented to the Labor Department. Unlike the Labor Department, the judge awarded a decision to the reformers, lifted the trusteeship, and ordered an election under impartial supervision.⁵¹

48. *How the U.S. Labor Department Whitewashed Election Fraud Despite Federal Judge and New York Grand Jury*, UNION DEMOCRACY IN ACTION Feb. 1968 at 1; see *Schonfeld v. Wirtz*, 258 F. Supp. 705 (S.D.N.Y. 1966).

49. *Id.*

50. *Id.*

51. *Schonfeld v. Raftery*, 271 F. Supp. 128 (S.D.N.Y.), *aff'd*, 381 F.2d 446 (2d Cir. 1967).

b. United Mine Workers

When Jock Yablonski was campaigning for the presidency of the United Mine Workers in 1969, one of his meetings was disrupted by thugs. At another, he was knocked unconscious by a blow to the neck. During the campaign Yablonski's attorney, Joseph Rauh, filed three complaints with the Labor Department that presented evidence of threats of violence and violations of the law by the UMW administration.⁵² The Labor Department simply refused to exercise the powers granted it under LMRDA section 601(a), which empowers the Department to investigate persons who have violated the Act. After Yablonski was murdered, Rauh charged that the Department's "icy indifference" had "contributed to the death" of Yablonski by leading "the most lawless elements to believe that the Yablonski group was defenseless."⁵³

Only under the pressure of a Congressional investigation and of a national scandal did the Labor Department sue to void the 1969 election.⁵⁴ And thanks to the reformers' victory in *Trbovich v. United Mine Workers*,⁵⁵ complainants won the right to intervene in Department of Labor election suits. As a result, the rerun election, held under court order, was one of the most democratic elections in labor history. Later, Joseph A. Yablonski, an attorney and son of the slain Mine Workers candidate, wrote:

The struggle by UMWA members to overturn tyranny in their Union was a lonely and difficult one in part because of apathy and indifference, if not outright prejudice against them, by the officials within the United States Department of Labor Too often, union reformers have found the Department of Labor allied with the union incumbents against their interests.⁵⁶

c. National Maritime Union

After a group of NMU members protested a 1966 union election, the Department of Labor filed suit to demand another election.⁵⁷ In supervising the rerun election, however, the Department abandoned its impartial status and functioned in effect as a propaganda instrument for the incumbents. A single incident is illustrative of the Department's stance.

52. *Yablonski Murders Point Up the Need for a Look at the U.S. Labor Department*, UNION DEMOCRACY IN ACTION, Feb. 1970.

53. *Id.*

54. DEPT. OF LAB. ANN. REP., COMPLIANCE ENFORCEMENT AND REPORTING IN 1970 12-14.

55. 404 U.S. 528 (1972).

56. Brief of United Mine Workers as Amici Curiae at 3, *Dunlop v. Bachowski*, 421 U.S. 560 (1975).

57. *NMU Reformers Present Election Case Against U.S. Labor Department*, UNION DEMOCRACY IN ACTION, Oct. 1969 at 1.

A few days before the balloting, the Department dealt the insurgent slate a damaging blow. In making endorsements for the ninety-odd posts up for election, the insurgents had endorsed five incumbents because seamen considered them to be worthy representatives. The insurgents exhausted their campaign treasury by printing 50,000 handbills containing the ballot numbers of all the candidates they supported.⁵⁸ No doubt under pressure from the union administration, the opposition-endorsed incumbents rejected the endorsement and filed a complaint with the Labor Department. Although candidates of one party may endorse candidates of rival parties in public elections, the Labor Department held that the insurgent slate's endorsement of the five incumbents was impermissible.⁵⁹ The Department posted bilingual notices at the union hiring hall and on the union's bulletin boards stating that the endorsements were unauthorized. The Department also prohibited the insurgents from distributing the literature bearing the disputed endorsements. Desperately in need of campaign material, the insurgents blacked out the ballot numbers of each of the endorsed incumbents and again tried to distribute their literature. They were prohibited from doing this by the Labor Department because it ruled that it was still possible to make out the printed numbers beneath the blackened spots.⁶⁰

The Labor Department's poor record in enforcing the LMRDA demonstrates its reluctance to perform what it views as an unwelcome task. Part of the reason for this reluctance is that the Department's responsibility to enforce the Act runs counter to its principal function. Generally, the Labor Department's responsibility is to serve labor, much as the Department of Commerce is supposed to serve business.⁶¹

In order to avoid strikes and foster friendly relations between unions and management, the Department tries to maintain cooperative and amicable relations with labor leaders. Moreover, the desire of the Secretary of Labor to remain on the good side of union leaders may be political: unions may help to reelect the President under whom the Secretary serves. This motivation on the part of the Secretary plays a significant role in shaping Department of Labor policies. An added complication is that, among secretaries identified with unions, some are actually former union officials.⁶² It is

58. *Id.* at 3.

59. *Id.*

60. *Id.* at 3-4.

61. See 29 U.S.C. § 551 (1976) ("The purpose of the Department of Labor shall be to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment.").

62. BIOGRAPHICAL DICTIONARY OF AMERICAN LABOR LEADERS, 32, 126-27 (G. Fink ed. 1974). The Secretary of Labor has, periodically, been formerly associated with a union. For example, Peter Brennan, Secretary of Labor under President Nixon in 1973, had been president of the Construction Trades Council of Greater New York. Arthur Goldberg, Secretary of Labor in 1961-62, had been special counsel to the AFL-CIO.

paradoxical that the Department which is compelled to maintain close ties with union leaders is also expected to adopt an adversarial position toward them in enforcing the LMRDA. It is this confusion of roles that renders the Department of Labor unreliable as the LMRDA enforcement agency.

In a 1976 report commissioned by the Department of Labor,⁶³ two Michigan State University researchers found that the attitude of career staff in the Department often differs from that of the Department's political appointees.⁶⁴ In some election cases, compliance officers in regional offices—normally career employees—will recommend court action to overturn illegal elections, only to see their recommendations vetoed by political appointees in the Department's Washington headquarters.⁶⁵ The rate at which such recommendations are rejected is estimated to be as low as ten percent in some areas and as high as sixty-five percent in others.⁶⁶

According to the report, many of the Labor Department's employees suspect that these vetoes are politically motivated.⁶⁷ Staff members told the researchers that top Department officials are political appointees and remain in office only so long as they make correct political decisions,⁶⁸ i.e., consider the interests of union leaders who control the union's campaign contributions and who may have a great influence over how union members vote in national elections. The authors state that many regional compliance officers believe that Department officials in Washington are more concerned with their relationships with union leaders than they are with properly run elections or the rights of the rank and file members.⁶⁹

The same subject was touched upon in an earlier *Yale Law Journal* study:

There is a common perception among both attorneys for Title IV complainants and union counsel that "political influence" is brought to bear on this [Departmental] decision [on whether to proceed with the litigation]. Complainants and their attorneys tended to view this influence as being exerted in specific instances to forestall litigation—by the national union to protect an incumbent local officer, or by the AFL-CIO to defend a national official. It is, however, virtually impossible to evaluate or document such asserted political bias.

Union attorneys suggested a systematic bias in favor of incumbents resulting from the fact that the Department, and specifically

63. D. McLAUGHLIN & A. SCHOOMAKER, *THE LANDRUM-GRIFFIN ACT AND UNION DEMOCRACY* (1979) is the final product which grew out of this report.

64. *Id.* at 46, 49-51.

65. *Id.* at 49.

66. *Id.* at 6.

67. *Id.* at 49.

68. *Id.*

69. *Id.* at 50.

the Assistant Secretary for Labor-Management Relations, depends upon good relations with labor leaders in order to deal with them in labor-management disputes. While proof is difficult to obtain, it does not seem implausible to suspect that on occasion litigation to vindicate that statute may be sacrificed by the Department to preserve these relationships.⁷⁰

Not only does the Department often have a pro-incumbent, anti-insurgent bias in considering election complaints filed by insurgents, it also has systematically tried to block insurgents' access to the courts. In every major court case involving the right of complainants to seek direct recourse in court to assert their LMRDA rights, the Department has favored restrictions on that right. In *Calhoon v. Harvey*,⁷¹ the Department successfully argued that complainants' only recourse for election violations was through the Department of Labor. In *Trbovich v. United Mine Workers*,⁷² the Department unsuccessfully sought to prevent complainants from being allowed to intervene in suits brought by the Department. In *Dunlop v. Bachowski*,⁷³ the Department sought to bar all judicial review of its decisions in election cases. The Supreme Court, however, ruled against the Department and held that Department dismissals of complaints could be reviewed to the extent that they were arbitrary and capricious.⁷⁴ *Bachowski* forced the Department to abandon its practice of dismissing election appeals with vague, uninformative memos to complainants and instead required the Department to submit a reasoned explanation of its decision. Most recently, the Department sought to turn back the clock by barring the award of attorneys' fees to intervenors in Title IV suits. In *Brennan v. United Steelworkers of America*,⁷⁵ the Third Circuit held that attorneys' fees could be awarded in such cases at the discretion of the lower courts.⁷⁶

What is more, although the Supreme Court indicated in *Trbovich* that the Labor Department is required to serve in part as the complainant's attorney in Title IV cases,⁷⁷ in reality the Department shows a continuing resistance to its putative role of advocate for the complainants. In light of the Department's usual tilt toward incumbents, its disinclination to fulfill its role as attorney for the complainants should come as no surprise.

70. Note, *supra* note 20, at 499-500 (footnotes omitted).

71. 379 U.S. 134 (1964).

72. 404 U.S. 528 (1972).

73. 421 U.S. 560 (1975).

74. *Id.* at 572-74.

75. 554 F.2d 586 (3d Cir. 1977), *cert. denied*, 435 U.S. 977 (1978).

76. *Id.* at 608.

77. 404 U.S. at 539 (citing 104 CONG. REC. 10947 (1958) (remarks of Sen. Kennedy)).

2. The "Affecting the Outcome" Rule

Before it will move to upset a challenged election, the Department of Labor must find not only that there were violations of Title IV in that election, but also that these violations may have affected the outcome of the election.⁷⁸ Unfortunately, as the following statement indicates, the Department has no clear standards for determining whether violations might have affected the outcome of an election.

Although the investigation may disclose violations of Title IV, the Secretary will not institute court proceedings unless he finds probable cause to believe that the violations "may have affected the outcome of the election." . . . The Secretary's finding of probable cause is dependent not only upon the particular violation alleged, but also upon the facts and circumstances which have been developed by the investigation in each case. Since each complaint filed under section 402 is investigated and reviewed individually, the Department has not issued any guidelines, standards or directives.⁷⁹

Without guidelines, Department decisions become not only unpredictable, but also erratic. The lack of established standards makes every Department decision seem arbitrary and capricious.

This is particularly true in cases involving election violations that cannot be expressed in mathematical terms but nevertheless debase the overall voting process. Noteworthy examples are the failure to provide a secret ballot or denying insurgents the right to post observers at the polls and at the counting of the ballots. The effect of insufficient rules is illustrated by the Department's reasons for rejecting the insurgents' complaint against the 1977 national Steelworkers election:

The denial of the right to an observer is plainly a violation of the Act. But there must also be some evidence that the violation may have affected the outcome of the election. This possible effect cannot be shown if the investigation disclosed that the election was otherwise properly conducted.⁸⁰

This kind of standard (or nonstandard) is useless. The essential purpose of guaranteeing candidates the right to post observers is to prevent opponents from stealing an election. However, a candidate cannot gather evi-

78. 29 C.F.R. § 452.136 (1981).

79. Letter from U.S. Dep't. of Labor to Association for Union Democracy (December 17, 1976) (on file at N.Y.U. Review of Law & Social Change).

80. Office of Labor Management Standards Enforcement, U.S. Dep't of Labor, Statement of Reasons for dismissing Complaint Alleging Election Violations by the United Steelworkers (Nov. 11, 1977) (on file at N.Y.U. Review of Law & Social Change).

dence of improper practices at the balloting and counting which may affect the outcome of the election if he or she is prevented from posting observers.

The Department's method of determining whether violations of Title IV's secret ballot provisions⁸¹ have affected the outcome of an election is also unsatisfactory. In rejecting the opposition slate's demand to overturn the Steelworkers' 1977 national elections, the Department explained how it assesses the impact of such violations: "When a violation casts doubt upon the validity of a local election as a whole (e.g., inadequate balloting safeguards or lack of secrecy), all votes cast were regarded as void."⁸² Although this practice has a surface plausibility, when examined closely it reveals itself as being irrational, arbitrary, and arithmetically absurd. It serves to protect local elections, but is inadequate in the case of international elections.

To make this point simpler and clearer, consider an international union election involving only two locals. In Local 1, where the administration candidate has strong support, the reported vote is 1,000 for the administration candidate and 900 for the opposition candidate. No violations are reported in the local, and the vote is tallied and later accepted as valid by the Labor Department.

But in Local 2, where the opposition has strong support and where the administration controls the election committee and vote counters, the administration deliberately runs an illegal election. Administration personnel violate ballot secrecy, intimidate the opposition's observers, and burn some ballots after the count. After all these violations, the reported tally in Local 2, the opposition's stronghold, is 1,000 votes for the administration candidate and 900 votes for the opposition.

The official tally thus gives the administration candidate 2,000 votes and the opposition just 1,800. The opposition candidate will understandably file a complaint. When this is done, the Labor Department will accept the vote in Local 1 as legitimate and find the vote in Local 2 improper. It will count the votes in Local 1 and throw out the votes in Local 2. According to the Labor Department, the result will be 1,000 votes for the administration candidate and 900 for the opposition. The Department will then dismiss the opposition's complaint on the basis that the violation of ballot secrecy could not have affected the outcome.

Such a procedure is preposterous. If there had been a secret ballot and an honest count in Local 2, where the opposition is popular, the opposition candidate may have carried Local 2 by 1,100 votes to 800. Tallying together the votes for Locals 1 and 2, the opposition candidate would obtain 2,000 votes and the administration candidate, 1,800. This demonstrates that the violations in Local 2 might have affected the election outcome. The problem

81. 29 U.S.C. § 481(b) (1976).

82. U.S. Dep't of Labor, *supra* note 80, at 7.

is, however, that the Labor Department has devised a method of tallying that ignores this unpleasant fact. Unfortunately, the Department's system of tallying gives candidates with control over the electoral machinery a tremendous incentive to perpetrate outrageous frauds in locals where their opponents have strong support.

3. Campaigning by the Union Staff

Incumbent candidates for national union office have an enormous advantage over their rank and file opponents in that the incumbents have at their disposal an extensive staff of full-time employees who readily work for their reelection and take donations to their campaign coffers.⁸³ It is impossible to offset this advantage completely, but in section 401(g), the LMRDA seeks to place certain limitations upon it. The section provides:

No moneys received by any labor organization by way of dues, assessments, or similar levy, and no moneys of an employer shall be contributed or applied to promote the candidacy of any person in an election subject to the provisions of this subchapter.⁸⁴

By prohibiting union funds from being used to promote any union candidate, section 401(g) is aimed in part at limiting the use of paid union staff for union candidates' campaigns.

Nevertheless, campaign work done by staff members remains one of the most valuable resources available to incumbent candidates,⁸⁵ because staffers generally campaign for incumbents without regard for the law. They have been able to do so because it is difficult for opposition candidates to check whether the staff is improperly campaigning on union time. Worse still, the Labor Department has now made effective monitoring of the staff's role in campaigning well-nigh impossible by issuing a regulation stating that campaigning by union officials and employees which is "incidental in union business" does not violate section 401(g).⁸⁶ Further, in dismissing the insurgents' complaint against the 1977 Steelworkers' national elections, the Labor Department took a broad view of the meaning of "incidental":

The investigations revealed that Staff Representatives campaigned on their own time and in many cases took vacations in order to have time available to work for McBride [the administration-backed candidate]. The nature of staff representatives' work is such that distinctions between union time and personal time are

83. See Note, *supra* note 20, at 462-65; see also Note, *supra* note 21, at 281-82, 331.

84. 29 U.S.C. § 481(g) (1976).

85. Note, *supra* note 20, at 462-63; Note, *supra* note 21, at 277-78.

86. 29 C.F.R. § 452.76 (1981).

difficult to make. The duties of visiting local unions allowed them to distribute campaign literature and speak to local officers about the campaign in the course of their union business. Such activity is often incidental to their union work.⁸⁷

By interpreting the meaning of "incidental" so broadly, the Labor Department has virtually obliterated the distinction between paid union time and personal time, and has thus made it impossible to enforce the provisions of section 401(g) that should forbid staff members from campaigning on union time.

In contrast to staff employees who were also members of the union and therefore had the right to campaign on their own time, those who are not union members but who are employed by the union as clerks or professionals or are retained by the union as lawyers, public relations experts, or researchers are precluded from engaging in any campaign activity. Presumably, it should thus be easier to detect violations of section 401(g) by this group. However, these persons have been able to serve as campaign staff, section 401(g) notwithstanding. One established practice for evading the application of section 401(g) to this group is for these staff people to take vacations with union permission during the election, or for specialists on retainer to go off the union payroll while they campaigned full-time for the incumbents. Once the election was over, of course, they return to the payroll. In its findings in the 1977 Steelworker case, the Department found this a perfectly permissible practice because the campaigners for the administration candidates are not being paid by the union during this period and are working for the administration presumably on their own time.⁸⁸

Unfortunately, the Department's conclusion ignores reality. It permits the entire staff and the retainers to become a campaign army in reserve, available at a moment's notice. These individuals have honed their talents, perfected their knowledge of union affairs, and gained experience at union expense. They then bring this union-financed resource to the aid of administration candidates in their race against insurgents. These staffers and retainers are perfectly willing to turn off the tap of union money for the brief campaign period, because they know it will be turned on again if the administration candidates win the election.

Under the best of circumstances, then, the role of the staff is difficult to police. Currently, the Labor Department defines the role of the staff and interprets the law to permit incumbents to make maximum use of the staff for their personal political purposes. Staff members can be relieved of this pressure to serve as a pro-administration political machine—a role that they

87. U.S. Dep't of Labor, *supra* note 80, at 9.

88. *See id.* at 13.

might not want to play but might be forced to in order to keep their jobs⁸⁹—only if the staff is treated as a species of civil service separated from the union power apparatus by a “union Hatch Act,” which would prohibit union employees from engaging in campaigning and other political activities.

4. *The Regulation of Contributions by Employers and Outsiders*

In sharp contrast to its sympathetic and lenient attitude toward union staff support of incumbents is the Labor Department’s consistently strict interpretation of LMRDA provisions that undercut the ability of insurgents to raise campaign funds, especially that portion of section 401(g) which bars “employer” contributions in union elections.

The key question under section 401(g) is, What precisely is an employer? Interested employers, i.e., those who have some obvious collective bargaining stake in the outcome of a union election, should be barred from donating money or giving other kinds of support to candidates. If that type of support could be eliminated, union democracy would benefit.

It is common knowledge, however, that employers are often eager to support incumbent union officials, with whom they have established amicable working relations, against challenges from insurgents. In some industries, especially in the building trades, employers maintain close, illicit ties with union officials and support union administrations in power through outright bribes, testimonial dinners, and secret illegal campaign contributions.⁹⁰ The official labor movement has admitted its inability to deal with this danger and has called on the government to do the job.⁹¹ Even though this kind of employer influence is illegal,⁹² it seems to remain impervious to law.

There are other types of “employers” who contribute to campaigns. For example, a candidate may obtain loans or donations from members of his or her family who have no connection whatsoever to collective bargaining in the industry, but who may be lawyers, insurance brokers, store owners, etc., and who may actually hire a few employees in their businesses.

89. See Note, *supra* note 20, at 463 n.251; cf., e.g., *Grand Lodge of the International Association of Machinists v. King*, 335 F.2d 340 (9th Cir. 1964) (plaintiffs discharged from union offices for supporting challenger).

90. Oreskes, *Corruption is Called a Way of Life in New York Construction Industry*, N.Y. Times, Apr. 25, 1982, at A1, col. 1; Raab, *Irregularities in Concrete Industry Inflate Building Costs, Experts Say*, *Id.*, Apr. 26, 1982, at A1, col. 2; Oreskes, *Construction Corruption Inquiry Hampered by Fears of Retaliation*, *Id.*, Apr. 27, 1982, at A1, col. 5.

91. *Government’s Ability to Combat Labor Management Racketeering: Hearing on S. 1785 Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Affairs*, 97th Cong., 1st Sess. 162-77 (1981) (statement of Lane Kirkland, President, AFL-CIO).

92. 29 U.S.C. § 481(g) (1976).

The Labor Department has adopted the strict position that section 401(g) bans support from even these disinterested "employers."⁹³ The Labor Department asserts that anyone who can be defined as an employer, regardless of how remote from the collective bargaining relationship, is barred from giving any kind of material support to union candidates. In one case, *Marshall v. Teamsters Local 20*,⁹⁴ the Department sued successfully to overturn a local election on the ground that the victorious insurgents had received money from "employers," none of whom employed Teamsters. Interpreting section 401(g) literally and inflexibly, the Sixth Circuit affirmed the district court and upheld the Department's position.⁹⁵ The issue never went to the Supreme Court because the insurgents managed to win the rerun election and were not interested in pursuing the case.

It is certainly legitimate to ask whether section 401(g) is being interpreted properly when that interpretation cuts off many union candidates from harmless sources of funds that they need in order to mount effective campaigns against incumbents.⁹⁶ At some point, the Supreme Court will have to decide whether the Sixth Circuit's interpretation of section 401(g) is overly literal and overbroad, and therefore unconstitutionally violates the associational freedoms of union members and outsiders, and whether such an interpretation improperly undercuts the LMRDA's aim to enable challengers to mount effective campaigns against entrenched incumbents. It is suggested that the Supreme Court should interpret section 401(g) so that it applies to interested employers only.⁹⁷

While entrenched incumbents can rely on the donations of time and money from the union staff, rank and file insurgents are unable to take advantage of such sources and must therefore raise money through small donations.⁹⁸ One important source of support for insurgents has been sympathizers outside the union. For example, it would have been impossible for the United Mine Workers [UMW] reform group, Miners for Democracy, to oust the murderous Boyle regime from the leadership of the UMW without such outside support.⁹⁹ If this kind of support is banned, union democracy will suffer.

93. 29 C.F.R. § 452.78(b) (1981).

94. 101 L.R.R.M. 2195 (N.D. Ohio), *aff'd*, 611 F.2d 645 (6th Cir. 1979).

95. 611 F.2d at 650-52.

96. See Note, *supra* note 20, at 460-68; Note, *supra* note 21, at 276-83.

97. Cf. the proviso of § 101(a)(4), 29 U.S.C. § 411(a)(4) (1976): "no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition." (emphasis added); see also *Farowitz v. Musicians, Local 802*, 241 F. Supp. 895, 908-09 (S.D.N.Y. 1965).

98. See Note, *supra* note 20, at 460-65; Note, *supra* note 21, at 276-83.

99. Brief of United Mine Workers, *supra* note 56, at n.12; see Note, *supra* note 21, at 331.

Such innocent outside support has been banned by one union. Recognizing that outside sympathizers—I am talking about outsiders who are not employers—can provide much-needed support to insurgents, the United Steelworkers of America have amended their constitution to prohibit union candidates from receiving any material support, even from candidates' friends and family.¹⁰⁰

The Steelworkers' "outsider" rule was voided by the district court and the District of Columbia Circuit Court.¹⁰¹ Recognizing the fundamental issues at stake, the circuit court stated that "[t]he LMRDA's guarantee of freedom of expression"¹⁰² also includes the freedom to associate. The court found that the Steelworkers' rule was antithetical to both of these rights.¹⁰³

Demonstrating its awareness of special problems in attaining union democracy, the court noted that "[e]ven without contribution limitations, challengers to the union leadership face substantial barriers, especially the electoral power of the union staff. Union democracy can only occur if effective challenges can be made to the often-entrenched union leadership."¹⁰⁴

The court held that the Steelworkers' rule "could unquestionably operate to prevent candidates, at least those facing the electoral power of entrenched union staffs, from 'amassing the resources necessary for effective advocacy.'" ¹⁰⁵ Nothing, the court added, "would do more to inhibit union democracy than to prohibit insurgent candidates from receiving financial support from those outside sources that are not prohibited by the statute."¹⁰⁶ Enforcement of the rule "would leave union members practically at the mercy of every entrenched group of incumbents."¹⁰⁷

The Supreme Court will soon hear the Steelworkers' appeal of the circuit court decision.¹⁰⁸ In their joint brief to the Supreme Court, the Steelworkers union and the AFL-CIO national office insist that in order to thwart the sinister aims of outsiders who have self-seeking designs upon the labor movement, it is necessary to bar candidates for national union office from accepting legal campaign contributions from nonmembers. Their pro-

100. UNITED STEELWORKERS OF AMERICA INTERNATIONAL CONSTITUTION, Art. V, sec. 27 ("No candidate . . . may solicit or accept financial support, or any other direct or indirect support of any kind . . . from any non-member.").

101. *Sadlowski v. United Steelworkers of America*, 645 F.2d 1114 (D.C. Cir. 1981), *rev'd*, 102 S. Ct. 2339 (1982). [Ed. note: In June, 1982, three months after the colloquium, the U.S. Supreme Court reversed the Circuit Court and upheld the Steelworkers' prohibition against outside contributions.]

102. 29 U.S.C. § 411(a)(2) (1976).

103. *Sadlowski v. United Steelworkers of America*, 645 F.2d at 1121-22.

104. *Id.*

105. *Id.* at 1122.

106. *Id.* at 1123.

107. *Id.* at 1125.

108. *See supra* note 101.

posed remedy for a nonexistent problem does nothing to deal with the real evils that do in fact threaten the labor movement, namely, the massive infiltration of unions by racketeers and the collusive arrangements between corrupt union officials and dishonest employers at the expense of workers.

If there is legitimate concern that outsiders who donate large sums of money might unduly influence union elections, that concern can be allayed by setting certain conditions and limitations upon contributions. A ceiling might be established on the amount of money that could be donated by any single source outside or inside the union.¹⁰⁹ Open disclosure might be required of all sources of contributions so that union members could know where a candidate's money comes from and who may be trying to influence the candidate. Any disclosure requirement would, however, have to furnish some protection to the anonymity of individual union members who could be harassed by incumbents for having contributed to insurgents.¹¹⁰

In defending the Steelworkers' wholesale ban on nonmember contributions, the Steelworkers and the AFL-CIO would seek to destroy the alliance between union reformers and civil libertarians and would threaten the progress made in the union democracy field since the LMRDA was enacted in 1959. The legitimate stake of outsiders in union affairs was noted long ago by the Labor Committee of the Twentieth Century Fund:

To contend that no "outsiders" should be permitted to interfere with the internal affairs of unionism is to dodge the reality of what unionism means today. The unions cannot claim public protection under the Wagner Act, and similar legislation, and in the same breath deny that the public has no legitimate concern with the way they are run. Unions are no longer strictly private, voluntary associations which a worker may or may not join. They have become semipublic, sometimes compulsory bodies. Their operation in the civil and economic spheres is unequivocally "affected with a public interest," quite as much as the sale of stocks and bonds now regulated by the Securities and Exchange Commission.¹¹¹

C. Proposed Reforms for Title IV Enforcement

When Congress enacted the National Labor Relations Act in 1935, it recognized that an impartial enforcement agency was needed to deal with

109. *Cf. Buckley v. Valeo*, 424 U.S. 1, 35 (1976).

110. *Cf. id.* at 235-41 (Burger, C. J., dissenting in part) (discussing possible problems of disclosing names of members of unpopular political groups); *see also* Note, *supra* note 20, at 444-51.

111. LABOR COMMITTEE, TWENTIETH CENTURY FUND, TRENDS IN COLLECTIVE BARGAINING 247 (1945).

unions and employers. Congress did not select the Department of Labor to enforce the NLRA; it instead created the National Labor Relations Board.¹¹² When Congress passed the LMRDA in 1959, it should have recognized that whatever agency enforced the Act had to remain impartial towards union leaders, on the one hand, and rank and file members, especially dissidents, on the other. Unfortunately, Congress lacked the foresight to provide for such an impartial enforcement agency. Instead, it gave a large measure of the enforcement power and responsibility to the Department of Labor. That oversight remains the primary obstacle to effective enforcement of the LMRDA. With this in mind, I present the following suggestions:

1. Relieve the Department of Labor of its LMRDA enforcement responsibilities and turn those responsibilities over to a special, impartial LMRDA enforcement agency.

2. As is the case with Title III provisions,¹¹³ the election provisions of Title IV should be enforceable either by filing a complaint with the government enforcement agency or by bringing a private suit. Critics of this proposal express fears that the courts would rapidly become clogged with election suits, but the high cost of unsuccessful litigation would discourage most frivolous and trivial suits. It might also be possible—as is the case with section 501(b)¹¹⁴—to require leave of the court to bring a private suit.

3. Preelection remedies should be made available to complainants in election cases. This would avoid the intolerable aspects of existing enforcement procedures under which a union member must go through an illegally conducted election before being able to seek effective recourse and then faces having his or her complaint dismissed unless he or she can meet the heavy burden of showing the violations might have affected the outcome.

4. The conditions for voiding elections should be expanded so that elections can be overturned in either of two circumstances: first, where purely technical violations could have affected the outcome of the election and, second, where the violations, regardless of effect on outcome, were so egregious that they vitiated the democratic character of the election process.

5. In elections supervised by the Labor Department, a union member who contends that such an election was illegally conducted should have direct recourse to federal court.

6. Because of the biased nature of the Department of Labor and because of the paramount importance of the right to have elections conducted fairly, courts reviewing Labor Department decisions to dismiss election complaints should use a “reasonableness” standard of review, rather

112. J. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD* 132 (1974).

113. 29 U.S.C. § 464 (1976).

114. 29 U.S.C. § 501(b) (1976) (suits against union officials charging violations of their fiduciary duties).

than an "arbitrary and capricious" standard.¹¹⁵ Although the *Bachowski*¹¹⁶ decision was a major step forward, the "arbitrary and capricious" standard that it employed¹¹⁷ makes it almost impossible to hold the Labor Department accountable for its decisions.

7. The definition of the term "employer" in section 401(g)¹¹⁸ should be narrowed so that it covers interested employers as in section 101(a)(4).¹¹⁹

8. Judges should be authorized to award attorneys' fees in private Title IV suits, and such awards should also cover time spent handling internal union appeals.

115. *Cf.* Administrative Procedure Act, 5 U.S.C. § 706 (1976).

116. *Dunlop v. Bachowski*, 421 U.S. 560 (1975).

117. *Id.* at 575.

118. 29 U.S.C. § 481(g) (1976).

119. *Id.* § 411(a)(4).

RESPONSES*

MICHAEL GOTTESMAN†

If you asked any union officer—"union democracy, fear it or cheer it"—he is unlikely to come up here and make a speech entitled, "union democracy, fear it." While everyone can agree with the sentiments that Mr. Benson has suggested, there are two things that I think need to be said. First, he has stated the problem far too broadly, that is to say that the things he described do exist but they are not generally what happens in unions: it wasn't that way in '59 and it isn't that way today. Second, in addressing these problems, we have to understand certain factors unique to the labor movement. While everyone endorses the principle that unions should be democratic, there aren't any agreed-upon models of the kind of democracy that should prevail in the labor movement. No one disputes that we want workers and members to be free to decide who among their ranks should lead their union. But there are legitimate disputes about the procedural mechanisms by which that decision is made. Many of these procedural issues were raised in the 1977 Steelworkers election. How these issues are resolved will affect the union's capacity to deal with employers, Congress and all of the other institutions that it must deal with.

Back in 1959, there certainly were unions that had the very vices that Herman described. The Senate committee's report on the Landrum-Griffin Act began by saying in essence: We have found terrible vices in what happens to be a minority of the unions in this country. We want to emphasize that our findings are that with respect to the great majority of unions, they are democratically run, they are honest, and, indeed, the legislation that we have got to adopt to deal with the vices that we have uncovered has to be carefully drawn so that it doesn't destroy the viability of that majority of unions who, from our findings, have been doing fine.¹ I will cite one example, it's the only example I know well enough and so it's the one that I'll refer to. Prior to 1959, the Steelworkers union did hold conventions every two years, they did hold elections regularly, more regularly than the Landrum-Griffin Act later required them to. There were contests for office. Incumbents were frequently defeated, although not as frequently as they are in more recent years as a result of Landrum-Griffin. The Landrum-Griffin Act merely required a handful of minor procedural changes in the way the

* Ed. Note: The responses of Messrs. Feller and Gottesman consist of extemporaneous remarks given following Mr. Benson's condensed, oral presentation of his paper.

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1. SENATE COMMITTEE OF LABOR AND PUBLIC WELFARE, LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1958: REPORT, 85th Cong. 2d Sess. (1958), *reprinted in U.S. DEPT. OF LABOR, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959*, at 24 (1959).

Steelworkers union conducted elections; it used to post notices of elections in the plants, Landrum-Griffin said you had to mail them to the home of each member. Apart from such relatively minor procedural changes, the provision of the Landrum-Griffin Act simply echoed what the union constitution already provided. That was also true for the other major industrial unions. There were unions prior to 1959 that had racketeers in them, some that were riddled with criminals. The Steelworkers union has never had either an officer or even a staff employee charged with committing a crime.

In 1959, Senator McClellan stated the mindset of Congress most broadly: unions began as good institutions, as institutions run by workers, and as long as they remained that, they were worthy institutions. But because these institutions get to exercise a lot of power, power that impacts on other people in society apart from their own members, they became attractive vehicles to other elements of society who looked at these unions and said, "there is a reason to make an impact on the government of these unions because these unions influence more lives than the lives of their workers. We ought to get control of them."² Racketeers had, in his words, infiltrated the labor movement. The principal function of Landrum-Griffin was to enable the members to kick them out.

There were still in the Congress of 1959 those who had been consumed by the great threat from "the left" during the McCarthy era, and who recalled that since 1917, it had been a part of the Soviet Government's interest to take over the American labor movement. There was, in Senator McClellan's eyes, a terrible institutional vulnerability of unions to being taken over by outside elements who wanted to use unions for their own political purposes. He saw Landrum-Griffin as the remedy for both the racketeers and the political intruders who would take over unions. Landrum-Griffin was the remedy because if you put control of the union in the hands of the workers, they would, by their selection of officers, assure that only people beholden to the workers would in fact control their unions.

In the 1977 Steelworkers election, there was an enormous influx of money to one of the candidates, Ed Sadlowski, from people outside the union. The banner under which this money was given was not "Ed Sadlowski needs money to run and to have a fair election." The banner was that liberal Democrats should have a real interest in who gets elected president of the Steelworkers because the Steelworkers union had traditionally been within the Democratic party, and as the biggest union within the AFL-CIO, could under more "liberal" leadership alter the Federation's position within the Democratic Party and on a number of social issues.

The principle fundraiser was John Kenneth Galbraith. A number of other leading members of the Democratic party's liberal wing were actively

2. See *Investigation of Improper Activities in the Labor or Management Field, Hearings before the Senate Select Committee on Improper Activities in the Labor or Management Field*, 85th Cong., 1st Sess. 1 (1957) (opening statement of Sen. McClellan).

involved. And the effort was "let's pour money into this election to get our guy elected to change the political stance of the Steelworkers union." This became a major issue in that election. The election was a landslide. Not surprisingly, the members of the union didn't think it was in their interests for the outsiders to try to elect the president of the union.

The thought, in '59, was, as Herman Benson described it, that union officers ought to be beholden to the members, not to outside interests, and that thought was echoed in the 1977 Steelworkers election, sending enormous shockwaves through the union. Its first manifestation was in the election itself; an election that was supposed to be close turned out to be a landslide. Its second manifestation was a postelection membership demand that the Steelworkers abandon referendum elections of top officers, and elect their officers, as most unions do, at conventions. When you elect officers at a convention, there isn't much need for candidates to have money; everybody's in one room. The Steelworkers union is the only really large union in the country that elects by referendum vote. But whatever the virtues of referendum elections, they are more expensive for candidates.

The solution that emerged in the next Steelworkers convention (1978) was not abandonment of the referendum, but a rule which forbids the contribution of money by outsiders. It was carried overwhelmingly at the convention. Its stated purpose, as voiced by the delegates, was "to preserve the union for ourselves. We will not allow outsiders, by giving money to candidates, to control the union."

That's an important interest; however, a few lower courts have held that the rule violates the free speech rights of candidates, that if they can't get money from outsiders, to that extent their capacity to speak is reduced, and it violates the free speech provisions of Landrum-Griffin.³ The Supreme Court has granted certiorari to review this issue.⁴ I have confidence that the outcome of that case will be that Landrum-Griffin does give members the right to make this decision. Such a result is consistent with the philosophy of the Act.

Unions clearly do impact on people beyond their members. Does that give society the right to meddle with the internal election process of the union? No one has gone so far as to say that everybody in society should be allowed to vote for the president of the union. But it's only a difference in degree to say that nonmembers can influence the union's policy by financing candidates in the hope that those candidates will be beholden to the financiers in the way they lead the union. The broad policy question of whether a

3. See, e.g., *Sadlowski v. United Steelworkers of America*, 645 F.2d 1114 (D.C. Cir. 1981) *rev'd* 102 S. Ct. 2339 (1982).

4. *U.S. Steelworkers v. Sadlowski*, 454 U.S. 962 (1981) (certiorari granted); *United Steelworkers v. Sadlowski*, 102 S. Ct. 2339 (1982) (rule barring outside contributions to union election campaign funds did not violate free speech rights of members). [Ed. note: The Supreme Court decision in *Sadlowski* was issued after the colloquium was held.]

ban on outsider contributions is a good idea is not going to be answered by the Supreme Court. The Court will decide only whether the law permits unions to adopt such a rule. But there is, I think, much justification for the rule as a matter of trade union policy. There are few unions today that aren't fairly viable in their electoral process and that can't be made more so by the existence of candidates who avail themselves of their legal rights. There is no need for the compromise of membership control of their unions that inevitably occurs when outsiders contribute heavily to union election candidates.

DAVID FELLER†

I am in favor of democracy and I am against corruption. But it seems to me that those two slogans don't really solve the problem, and neither does Michael Gottesman's response. I happen to think that the system of elections for national office in the Steelworkers is an atrocity. I think it's an atrocity because it's a referendum vote.

Herman began by saying that the democratic process in unions should be made analogous to the democratic process in government, in society. I want to question that. Just picture the position of two candidates for president of the Steelworkers union. When we elect a president of the United States, we all get, or hope we get, some notion of what each man looks like, what he sounds like. If people want debates, we have debates. They're carried live, on television. Daily newspapers have the reports of the correspondents who cover each of the candidates, what he has said, what he has not said, long answers he's given to questions when he's off guard, what's in his position papers. We get some sense of what kind of a person he is and that's important. In the states, when you elect a governor, the newspapers and television in that state will pay some attention. When you elect a mayor in New York, I imagine the candidates get a chance to exhibit themselves in public.

What happens when candidates are running for president of the Steelworkers union and you are in a little steel mill in Pittsburgh? What is the source of your information about the candidates? It is virtually nil. Indeed, the notion that the electorate of the Steelworkers union can make an informed opinion as to the qualities of the person standing for election is highly doubtful. This is not equally true among the Mineworkers, who have the same system, because mineworkers tend to be in mineworker communities. But the Steelworkers union has over 1,300,000 members, spread thinly over the entire population of the United States. Their source of real information about the candidates is virtually nonexistent. It seems to me that saying you want to elect by referendum vote because that's the most democratic way is to place a premium on the uninformed vote much greater than in our political systems.

In the election of the Steelworkers President in 1956, I think there is grave doubt whether the man who was declared the winner actually won. I'm talking about the time that Don Rarick ran against David J. McDonald. I have seen Don Rarick. I have heard Don Rarick. I can tell you that he couldn't possibly have gotten more than ten percent of the vote if the voters had ever seen or heard him; but in '56, he was reported to have gotten a majority. There was no Landrum-Griffin, so there is no way of knowing how many votes he really got.

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If you want to talk about the Abel-McDonald election, I don't know who gained the most votes. I think Abel did, but I'm not sure. The pattern is much clearer if you look at the local tabulations. For instance, where the district director favored Abel and there were no McDonald observers at the polls, then you find in one local something like 1100 for Abel and two for McDonald. You go to the locals that McDonald had in Florida and it came out equally unbalanced in McDonald's favor, except they were smaller locals.

I think that there were grounds on which the Secretary of Labor could have invalidated that election, just looking at those election numbers alone. The Secretary did not intervene. Indeed, McDonald elected not to contest the election, because there were collective bargaining agreements with big steel companies coming up at about the same time and the effect of an election contest would have been that no agreement could be signed and a strike could have occurred because there was no leadership in place to settle.

Now, as I said, I'm not in favor of corruption and I am in favor of democracy. Today we know politicians have problems raising money to communicate, even given the media coverage that they have access to without cost. That problem is magnified a hundred-fold, a thousand-fold, where there is no media coverage. I'm not so sure how you solve that problem other than getting rid of the election system that creates it and substituting for it a form of representative democracy.

I don't think you can just take the analogy to political systems and apply it to union democracy. I want to urge anybody who's really interested in the subject to read the piece by Arthur Goldberg called *The Trade Union Point of View*,¹ in which many of the arguments I don't have time to make here as to why the analogy is not proper are examined. Landrum-Griffin provides remedies for union elections that are not available in referendum elections. If you find that there was an error in the election procedure that could have affected the results, you rerun the election. That is not true in our political elections.

For example, a man then nicknamed "Landslide" Johnson managed to get elected to the Senate of the United States by sixty-odd votes. The claim was made that blacks were denied the right to vote, as they had been. The courts said they had no jurisdiction to order that election rerun. You can rerun a union election when you find sufficiently serious errors. You don't rerun a political election.

There are a lot of unions, democratic unions, in which the national leadership is elected in the way the founding fathers thought the United States should elect its president, before the days of the mass media—by a

1. Goldberg, *A Trade-Union Point of View*, in *LABOR IN A FREE SOCIETY* 104 (M. Harrington & P. Jacobs, ed. 1959).

vote of elected delegates in a position to know and evaluate the candidates. The emergence of the party system doomed that concept in elections for President of the United States. It still makes sense to me for unions, where there is no established party system and no effective media coverage.

Furthermore, unions are subject to much more important democratic controls than those expressed in the election process. You just have to look at what happened to General Motors and Ford. General Motors started negotiations with the UAW for concessions. But they were called off. Why? Because the assumption was that if the UAW leadership reached an agreement, the membership would turn it down. So, then they went to Ford, where they were able to muster majority support for a settlement.

The question of whether to go out on strike is made in many unions by majority vote. Indeed, whether you have a vote often doesn't matter. You have to have the people who decide to go out on strike and put their wages and their jobs on the line. No union that I know of willingly calls a strike over an offer, unless there's the true kind of democracy that anticipates that the leaders will be supported by the members. In societies at war, societies that are engaged sometimes in battles for existence, like modern international unions and certain locals in certain situations, rights are restricted. We do impose restrictions on democracy in political societies at war, and perhaps some restrictions on democracy in unions in some situations are appropriate. I'm not saying that there should not be democracy. I'm simply saying that full scale transplanting of the electoral notions of the political society to unions, like wholesale application of those notions to corporations, is not necessarily correct.

Above all, I want to make it clear that it is not true that corruption and democracy are the same issue. You can have corrupt leaders democratically elected. The fight against corruption is not the same thing as the fight for union democracy. These are different problems and have to be dealt with differently.

DISCUSSION

MICHAEL GOTTESMAN: Finally, there's a speaker who said something I can sink my teeth into, and that is my mentor, David Feller. I wasn't around during these iniquitous elections he described. Certainly elections have not been conducted in that fashion during the period that I have been there. But what I want to respond to is the so-called Goldberg model, that David Feller adverted to: that a union is a society constantly at war, and should be governed by a system which, like our national system, in time of war restricts civil liberties.

That model is not the model that is adhered to by the present leadership of the Steelworkers union. If Lynn Williams (Secretary of the Steelworkers and the official in charge of election procedures) were here today, he would be fighting with David Feller about that. In part, it may be that these are people who were elected twenty-three years after Landrum-Griffin, who have managed to go through the process that Landrum-Griffin describes. Some of them started out as opponents of top officers of the Steelworkers union; they went to the Labor Department to get their rights enforced in order to get themselves elected to top offices. These people really believe that union elections ought to be modelled after our political institutions in this country and they really believe in the referendum election. They could have, I think, converted to convention election at the last Steelworkers convention. They didn't propose it and indeed they resisted such proposals. There is a perception among union members that they ought to have a direct voice in the election of their leaders, and the Steelworkers officers felt that to do it through some kind of convention mechanism in which members would lose that voice would create a perception that members had lost control over their trade union's destiny. The Steelworkers officers may be right or wrong about that. There's certainly a lot more unseating of incumbents in the Steelworkers with referendum than in most large unions that elect at convention. Whether there's a cause and effect explanation for that I don't know.

HERMAN BENSON: There are 5,000 locals in the United Steelworkers Union. The Sadlowski forces, even with the support of those horrible outside agitators, like the Association for Union Democracy, managed to organize 800 of the locals. What do you think happened in the other 4,200 locals, in a union where they have a long record of vote stealing?

Mr. Gottesman says this didn't happen in his time; this happened only in the bad old days of David McDonald, who, by the way, was very closely associated with Abel, who happened to be his secretary-treasurer at the time. The two of them together were running the union, and when McDonald disappeared, Abel became the president. The present administration of the union is part of the Abel administration. So, are we supposed to sit back confidently and say, sure we're for democracy, just like they have in the United Steelworkers? I don't see that at all.

In 1973, when the new regime was in office, one of the members of the Steelworkers staff was caught red-handed stealing votes. They had to do something about it. He finally resigned, but here's the statement he made after they caught him red-handed:

The constitution calls upon us to preserve, protect, unify and solidify our international union. In the heat of a bitter election to preserve the principles I took an oath to uphold, I did what I thought was right. I dedicated myself to prevent the destruction of our organization by individuals who I personally assessed to be extreme radicals seeking only to infiltrate into positions of leadership in our union, to cause disillusion in the labor movement with their subversive propensities.

In other words, to uphold the great principles of American labor, he stole votes. That's not 1969, or 1965, that was 1973.

One of the problems that I see in labor is that of corruption. At the laborers' union, Dennis Ryan, a delegate to the convention, tried to get nominated for president of the carpenters' union, and was beaten up on the floor. This is just last year. At the carpenters' convention, John Ryman, a delegate from the West Coast, decided to run for office. He had a whole group of carpenters around him who were going to nominate him and support him. They threatened him with death. They threatened to beat up every man that was supporting him, and so he decided not to run for office. This is not a little passing problem; this is a deep-rooted, deep-seated problem in the labor movement. All these fairy stories that the Landrum-Griffin Act was adopted because of the danger of communism are just tales. It was not communist unions that were pilloried before the McClellan Committee. It was the Teamsters, it was the Operating Engineers, it was the Bakery Workers, it was the Laundry Workers, all the great, red-blooded, American unions.

The problem is that Mr. Gottesman and Mr. Feller and people like them are sitting in their union offices all day long doing fine things. They are negotiating with employers, trying to solve grievances and trying to uphold the standard of living of the American working class. That is their day, except for these little aberrations now and then. And here I am sitting in my office getting a totally different picture of life. I get the guy who calls me up from Charlotte, North Carolina, and he tells me the guy he nominated for business agent two days later was found in the alley with his throat cut. I get a call from the sheet metal worker in Phoenix, Arizona who tells me he passed out a leaflet at an executive board meeting, and now they have brought him up on charges and are about to expel him. This is only in the last couple of weeks, I'm not talking about my historical record. I got a call from a member of a carpenters' local in Los Angeles, who's a business agent of that local. He told me that the president of that local tried to do something because the business manager was manipulating and passing out

money illegally. They brought the president of the local up on charges, fined him \$200 and removed him from office. They stopped him from running for office for two to five years. So, I get a totally different picture of some of the problems of the labor movement. The difference between us, however, is not that we have these different pictures. I sit in my office and get all these grim stories, but I know that what unions are doing is a necessary and wonderful thing. I know that the labor movement is doing something to advance and protect the rights of the American working class. The trouble with them sitting in their office is that they try to gloss over the things I know are true and say they are exaggerations; that's the difference.

What we are talking about here is the great paradoxical character of the American labor movement: on the outside, it is the force for democracy, social justice and human freedom; but on the inside, it tends to be autocratic. These are the two different sides of the American labor movement. One cannot ignore the realities of the inside, by pointing to the great things that unions are accomplishing on the outside. There is no reason for those of us who support the American labor movement to fall into that trap.

In order to make the labor movement more effective in carrying out its great goals, we have to make sure there are honest elections and democracy. The Steelworkers contend that it's necessary to keep outsiders from coming in and taking over this labor movement. I don't think that's a real problem. Even if it's a hypothetical problem, I agree it should be dealt with. What, however, is their solution?

In order to stop the Rockefellers and the Association for Union Democracy, and all counter-culture forces from manipulating their union, they adopted election rules that make it illegal for Edward Sadlowski's father, who is a retired steelworker, to donate a dollar to his son's campaign. If a member gives a mere \$5 or more to a candidate, he has to have his name recorded on a roll. So that if I, a member of the Steelworkers, give my money to an insurgent, it has to be recorded somewhere. In other words, the effect of their election rules, even from their own standpoint, goes further than excluding outsiders who are trying to take over this labor movement. It destroys the ability of candidates to get support from people who have legitimate interests. Furthermore, their election rules, as they were originally adopted, would have the union leadership, through a whitewash committee that they had chosen, decide when it is and is not proper for a candidate for office to file suit in an election campaign. They would decide whether or not it was a genuine suit. Is this to say that it is a democratic procedure to have the administration decide whether its opposition is properly filing a suit to defend its rights?

DAVID FELLER: What I'd like to suggest is that the problem is not an easy one that can be solved simplistically. There are difficult problems and I just want to illustrate the nature of the problem. You recognize that unions do these good things on the outside. You recognize at the same time that there is very little turnover in union office, and somehow you have to ask your-

self, "why is that?" And just to add a little footnote, if the Landrum-Griffin Act had been in effect in 1926, John Brophy would have become, I am satisfied, the president of the United Mine Workers, and that great enthusiasm you had when John Lewis created the CIO, would unfortunately have not existed, because I don't think John Brophy would ever have created the CIO.

AUDIENCE COMMENT: My name is Bonnie Anchor; I'm with the International Ladies Garment Workers Union. I'm also troubled by a lot of what I see going on inside of unions. It's much more interesting in many cases to be a union official than to be in the shops, or whatever. Someone who has had the taste of what it's like to do a varied sort of job, a variety of administrative tasks, almost in a sense becomes a manager, with a sense of more control over their day and more interesting decisions to make, and can feel threatened. The fear of having to go back to a really boring, mundane job at a very low pay, makes a lot of union officials really fight. They'll do anything to keep the jobs they have, partly because it's impossible to transfer. They're not going to be able to get an equivalent position in another union. Most of the time they're not going to find jobs in the companies, so very often they feel stuck. It's this, or it's nothing. And you create a group of really desperate people.

HERMAN BENSON: You're absolutely right. If I were in that position, I'd be pretty desperate myself. It's a big part of the problem. The fact is that you have leaders who have a terribly important vested interest in their jobs. They not only want to do great services for humanity, they want to stay in office. OK, that's how it is in all spheres of life, and that's why you need democracy. In other words, precisely because you have that layer of the union movement, desperate to hold that job, you have to protect the rights of those down below to insure their democratic right to get rid of the leadership. And it's a tragic thing that a man who devotes years and years of his life to the union, is defeated. Well, what do you propose, that they get lifetime jobs? That problem exists in every field of life. In a democratic society we solve it by protecting the rights of the individual, by having whole layers of constitutional rights to make sure that people are protected; the labor movement does not have it. We've got to see that they obtain those rights.

DAVID FELLER: It's a very wise comment, the question from the floor. I have seen it happen. In political life, almost every defeated senator stays and maintains an office in Washington because there are lots of people who want to use his services for lobbying and other purposes. A corporation president can get fired from one corporation but get an executive job with another corporation. One of the problems for the labor movement is that union leadership, because of the tradition of the trade union movement, cannot transfer to another union. If you were an officer of the Ladies Garment Workers Union, you could not get a job in the Steelworkers. If you're an officer in an automobile manufacturing company, you can get

another job if you don't do well, in an executive capacity, in some other business. And that is one of the reasons that's created the problems that Mr. Benson has rightly directed his attention to. Phil Murray, who was president of the Steelworkers Union and the CIO, was idolized by everyone. There was no chance in the world that anybody would ever run against him, but he was scared to death that somebody would. He had seen how they had deposed John L. Lewis as head of the CIO, and he believed that if that could be done to John L. Lewis then he was always vulnerable. Murray did some things that I don't think either Herman or I would approve, because he was scared to death.

It is a terrible problem; I don't know how you solve it, but I'm not sure that the blanket approach that Herman takes is right. Union officers have nontransferable skills; it is death to lose that office because there's no place to go.