Union Corruption and Compelled Speech: The Need for Meaningful Remedies

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I am Ken Boehm, Chairman of the National Legal and Policy Center, and I appreciate the opportunity to testify before this committee. The National Legal and Policy Center sponsors the Organized Labor Accountability Project which publishes the *Union Corruption Update*, a fortnightly summary of current union corruption news. Our web page, **http://www.nlpc.org**, provides an archive of union corruption information as a resource for the media, the public and union members fighting corruption in their own locals.

Compelled Political Speech

The issue under consideration today is compelled political speech. Just as Americans enjoy First Amendment rights to free speech that are the bedrock of our free society, the same First Amendment forbids compelled political speech.

One of the greatest ironies in the current debate over campaign finance is that many of the those self-described "reformers" who would like to restrict First Amendment rights of individuals to engage in political speech appear to have no qualms about allowing compelled political speech, *i.e.*, forcing individuals to subsidize political views with which they disagree.

The notion that individuals should have their free speech rights curtailed while at the same time be forced to support political beliefs which they abhor is not new. It is the hallmark of virtually every dictatorship and police state that has ever existed.

In the context of the campaign finance policy debate, the compelled political speech issue has been most relevant in the controversy over the use of forced union dues to pay for political activities.

The federal courts have frequently had to protect the First Amendment rights of workers who did not want their forced union dues paying for political views they opposed. Fortunately, the Supreme Court has almost always decided in favor of the First

Amendment rights of individuals who did not want to be compelled to support views they opposed:

- *Abood v. Detroit Board of Education* (1977) The Supreme Court ruled that compulsory dues for political activities violated the First Amendment rights of 600 teachers who opposed being forced to pay for those activities. The Court ruled that it was illegal to withhold forced dues from dissenters beyond the cost of collective bargaining.

- *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks,* (1984) The Supreme Court ruled 9-0 that union use of forced dues for purposes other than collective bargaining was illegal under the Railway Labor Act. The decision held that the union "cannot be allowed to commit dissenters' funds to improper uses -- even temporarily."

- *Chicago Teachers Union v. Hudson* (1986) The Supreme Court ruled 9-0 in favor of extensive rights in challenging compulsive dues withheld from teachers who refused to join a union. The Supreme Court found that teachers were denied their rights under the First Amendment.

- *Communications Workers of America v. Beck* (1988) The Supreme Court held that workers covered by the National Labor Relations Act can withhold compulsory dues from the union with the exception of the documented costs of collective bargaining.

- *Lehnert v. Ferris Faculty Association* (1991) The Supreme Court provided a concrete three-prong test, based on the First Amendment, with which to judge whether union activities may be paid for with forced dues.

- *Air Line Pilots Association v. Miller* (1998) The Supreme Court held that workers who did not agree to union arbitration procedures cannot be required to exhaust the arbitration process before challenging the amount of

their fees for collective bargaining in federal court.

The Supreme Court's record on questions of compelled political speech has been guided by the traditional view of the importance of the First Amendment. The core First Amendment issues transcend divisions between liberal and conservative or management and labor. Indeed, the *Beck* decision was authored by Justice Brennan and the *Air Line Pilots Association v. Miller* decision was written by Justice Ruth Bader Ginsberg.

The consensus against compelled political speech not only transcends ideological lines, but it goes directly back to the views of the Founding Fathers. Perhaps the most enduring comment on compelled speech is from Thomas Jefferson in 1785:

> *"To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."*

The current state of the law strongly supports the view that unions may not force workers to subsidize political causes against their will. In *Bromley v. Michigan Education Association/NEA*, the U.S. Court of Appeals for the Sixth Circuit in 1996 struck down an arbitration scheme used by a teachers' union to conceal the amount of money being put into politics. The Court of Appeals recognized the arbitration scheme to be biased against the rights of teachers who did not want their fees spent on politics. Circuit Judge David Nelson cited the Thomas Jefferson comment on compelled speech and went on to state:

> *"For the government to threaten men and women with the loss of their livelihoods if they fail to remit part of their earnings to labor unions for the advancement of social and political causes they do not wish to support is not only sinful and tyrannical, it is a violation of the United States Constitution."*

Protection Against Compelled Speech: A Right Without a Meaningful Remedy

It has often been said that a right without a remedy is no right at all.

As the long list of Supreme Court cases affirming the First Amendment right against compelled speech in union cases indicates, there clearly is a right for workers not to be forced to fund political causes with which they disagree. The remedy of seeking recognition of that right before a federal court can be costly and time consuming. Harry Beck was in litigation for twelve long years leading up to the Supreme Court's 1988 vindication of his rights in *Communications Workers of America v. Beck*.

Put simply, the current state of the law is that there is an undeniable First Amendment right for workers to not be compelled to fund political causes with their union fees, but there are few meaningful remedies for the host of obstacles put in the path of workers seeking to assert their rights. Supreme Court decisions are not self-enforcing.

Unions have effectively thwarted the First Amendment rights of workers against compelled speech through the use of complicated procedures for rebates, creative accounting and systematic intimidation of workers who do not want to be forced to subsidize the union's political agenda.

Accounting Schemes

While workers may not be forced to finance political activities of unions, there is no independent accounting information available to workers showing what percentage of fees goes for such activities. Unions have exploited this problem by misrepresenting political expenditures in order to limit the amounts due to workers who don't want to be forced to pay for the political activities.

Example: In the 1991 Supreme Court case *Lehnert v. Ferris Faculty Association*, the teachers union claimed only 17% of the group's expenses were not attributable to contract administration, grievance adjustment and

collective bargaining. Through discovery, it was learned that 90% of the union's expenses could not be attributed to contract administration, grievance adjustment and collective bargaining.

Example: In the 1988 Supreme Court case *Communications Workers of America v. Beck*, it was learned that 79% of union expenses could not be attributed to core workplace functions.

The lack of strict accounting standards and disclosure of accounting information that plays such a major role in the current wave of union corruption has also acted to frustrate workers seeking to assert their First Amendment rights against compelled speech.

Lack of Information on Workers' Rights Against Compelled Speech

A 1997 National Voter Survey poll showed 67% of union members were unaware of the Supreme Court's *Beck* decision. A national survey by Lutz Research in 1996 found 78% of union members were unaware of their right to a refund and dues adjustment for the portion of their dues spent on non-workplace activities.

There is no independent source of such information in the workplace. One modest effort to remedy this problem, President Bush's 1992 Executive Order 12800 requiring federal contractors to inform their employees of the rights under the *Beck* decision, was repealed by President Clinton.

Given the implacable opposition of unions to the rights of workers in the *Beck* decision combined with the lack of any adequate notice to workers of their rights, it is not surprising that workers are not aware of their rights against compelled speech.

Intimidation

Rep. William F. Goodling, Chairman of the House Education and the Workforce Committee, held a series of hearings in recent years focusing on problems encountered by workers trying to assert their rights in the workplace. In a statement released on November 3, 1999, he summarized the results of those hearings by stating:

"We heard worker after worker testify about the incredible burdens they have faced trying to exercise their rights under current law and trying to recover their money."

Rep. Goodling went on to state that the testimony of the workers:

"... often described stonewalling, harassment, coercion, and intimidation of workers who tried to recover what is rightfully theirs."

The testimony of one worker, aircraft mechanic Kerry Gipe, at a March 18, 1997 hearing set forth the specifics of the intimidation he faced when he tried to assert his rights:

"the union began an almost immediate smear campaign against us... portraying us as scabs and freeloaders... We had our names posted repeatedly on both union property and company property accusing us of being scabs. We were thrown out of our union hall, and threatened with physical violence... We were accosted at work, we were accosted on the street. We were harassed, intimidated, and threatened. We were told our names were being circulated among all union officials in order to prevent us from ever being hired into any other union shop at any other location."

As a practical matter, the burden is on workers who wish to assert their First Amendment rights and not on unions who have a financial motivation for denying the workers' First Amendment rights.

Procedural Hurdles

Aside from outright intimidation, unions bent on thwarting First Amendment rights of workers have resorted to a tangle of procedural hurdles to make it burdensome for workers to enforce their *Beck* rights.

Among the tactics employed have been one-sided arbitration requirements, limited windows of time each year for workers to exercise their rights, delays, and refusals of union officials to respond appropriately to requests submitted by workers.

Time and again, efforts by unions to frustrate the First Amendment rights of workers through procedural hurdles have been found to be unconstitutional. In a 1998 case in the Fifth Circuit, *Shea v. Machinists,* the Court found that the union's requirement of an annual objection by workers, whereby they can opt out of full union membership only if they notify the union in writing each year during a 30-day window of time, violated the First Amendment.

Nor have workers found the National Labor Relations Board very receptive to complaints that their *Beck* rights have been violated. Raymond LaJeunesse, Jr., an attorney with the National Right to Work Legal Defense Foundation, has litigated many cases on behalf of the rights of workers. His view of the NLRB is that provides very little protection to the worker. In a 1998 speech on the issue, he stated:

"*Perhaps the most egregious problem with the [National Labor Relations] Board is its delay of decisions of* Beck *enforcement cases for protracted periods. For example, the Board took eight years to issue its first post-Beck decision in* "California Saw and Knife." *I am now handling a case that has*

been pending before the Board for ten years."

Compelled Speech and the Current Wave of Union Corruption

The parallels between the problems of compelled political speech and what the *New York Times* has recently called the "wave of union corruption" are striking.

Both problems have their greatest impact on workers, involve the misdirection of many millions of dollars annually, and persist despite numerous court decisions underscoring the rights of the workers. In cases involving compelled speech as well as corruption, workers have found they have little meaningful access to union financial records with workers often learning after the fact, if ever, that huge sums of union money has been spent in ways never revealed to or approved by the workers.

The high-profile corruption involving major unions and their leaders is beyond debate:

Teamsters Election stolen - along with over $885,000 in union funds

- 1996 reelection of Teamster President Ron Carey was accomplished through the looting of $885,000 in Teamster funds
- six Carey cronies were convicted or pled guilty to crimes that furthered the laundering money to finance the re-election
- Teamster political director William Hamilton was convicted on six counts and sentenced last month to three years in prison
- AFL-CIO secretary-treasurer Richard Trumka has repeatedly pled the Fifth Amendment on his role in the scheme

LIUNA President Coia resigned, agreed to plead guilty to mail fraud related to union corruption

- Coia defrauded government of approximately $100,000 in taxes

Longtime President of Hotel Employees and Restaurant Employees Union, Ed Hanley, forced to resign by federal monitor

- Hanley led union from 1973-98, entire term shrouded in scandal

- 1977 Department of Justice report said HERE was a classic case of organized crime's control over a union, asserting that Chicago mob helped Hanley get the presidency

- court-appointed monitor alleged corruption including use of phantom local to allow union officials to charge vacation costs as union expenses

American Federation of State, County and Municipal Employees District Council 37 scandal

- New York City's largest municipal union has had over two dozen of its officials and vendors indicted on corruption charges

- the president of one of the locals was ousted when it was learned he embezzled more than $1.7 million

- January 21, 2000 *New York Times* article cited leaked internal AFSCME document showing "extensive corruption" in the union as shown by $4.6 million in claims AFSCME made to its insurance company on a policy covering fraud, with about half the problems stemming from the corruption in New York

Union officials of international unions affiliated with the AFL-CIO who have pled guilty to, been convicted of, been indicted for, and/or been removed from office in the past two years because of union corruption:

- Gus Bevona, International Vice President, Service Employees International Union (SEIU)

- Albert Diop, International Vice President, American Federation of State, County and Municipal Employees (AFSCME)

- Peter J. Fosco, International Vice President, LIUNA

- Thomas Hanley, Director of Organization, Hotel Employees and Restaurant Employees Union (HERE)

- Fred G. Summers, Director of Organizing, International Association of Bridge, Structural and Ornamental Iron Workers

- Joseph C. Talarico, International Secretary-Treasurer, United Food and Commercial Workers

The union corruption cases cited above are just the tip of the iceberg. Union corruption at the state and local level is virtually a daily news story. The fortnightly *Union Corruption Update* published by the National Legal and Policy Center has documented hundreds of accounts of such corruption with each account having one thing in common: the financial victims of the corruption are American workers who fund the union treasuries, pension funds and other accounts being looted.

Meaningful Remedies

The twin problems of compelled speech and union corruption will not be solved with yet another Supreme Court case stating the First Amendment rights against compelled speech or a federal statute outlawing embezzlement. Those steps have been taken, yet the problems persist.

The parallels between the problems extend to the remedies needed.

The common denominators of meaningful reform for both problems include federal legislation that increases the rights of all workers to accurate, independently audited accounting information subject to standards which are designed to detect corruption and document expenditures associated with contract administration, grievance adjustment and collective bargaining.

While a mandated accounting system subject to independent auditing is a key to meaningful reform, the disclosure of that information is equally important. Justice Louis Brandeis' famous dictum that "Sunshine is the best disinfectant" is especially applicable to reforming a system in which accountability to workers is all too often thwarted by a wall of secrecy. With both corruption and compelled speech, it is workers' hard-earned money that is being misdirected to uses with which the workers disagree. It is only logical that workers should have strong, meaningful access to information as to how their money is being spent as a deterrent to the abuse of that funding.

When it comes to issues of corruption and compelled speech, the remedies should apply to both private sector and public sector unions. Corruption affects both types of unions and the First Amendment rights against compelled speech are no different for public employees than private employees.

The law which sought to combat corruption by strengthening workers' rights, the Labor-Management Reporting and Disclosure Act of 1959 (also known as Landrum-Griffin) is in need of its first major change since its enactment. Senator John McClellan, whose Senate hearings into union corruption, paved the way for Landrum-Griffin, understood the legislation was not the final remedy to the problems his committee exposed. He later wrote:

"The Landrum-Griffin Act was ... a step in the right direction.
But it is imperative to remember that the foes of labor reform are
politically powerful. They are militant in opposition to the execution
of the law. They make every effort to hinder and obstruct its
enforcement, to impair its effectiveness, and to discredit its probity
...Even though the law isn't strong enough, it is a just and fair
measure."

The long-overdue strengthening of worker rights as a bulwark against corruption
can be accomplished through a reform of Landrum-Griffin.

Michael Nelson, Director of National Legal and Policy Center's Organized Labor Accountability Project, has reviewed a series of possible reforms in a law review article to be published in the forthcoming Spring issue *George Mason Law Review* entitled "Slowing Union Corruption: Reforming the Landrum-Griffin Act to Better Combat Union Embezzlement." The comment has received the Adrian S. Fisher Award for best student article at George Mason University School of Law, 1999-2000.

The reform proposals include:

Require Annual Audits and Quarterly Reports

Amending Landrum-Griffin to require annual audits and quarterly reports similar to those of the Securities Exchange Act of 1934 (SEA) would increase the probability of detecting embezzlement as well as acting as a deterrent. Union financial reports modeled after the Securities and Exchange Commission's Form 10-K would have to be certified by an independent public accountant and unions would be required to undergo an annual audit conducted under generally accepted auditing standards. Illegal acts uncovered by auditors would have to be reported to the union, its board and the Department of Labor. Quarterly reports, the equivalent of the SEC's unaudited 10-Q form, should supplement the flow of unions' financial information disclosures.

Landrum-Griffin Should Be Expanded to Cover All Labor Groups

Congress should amend Section 3(e) to cover all public sector unions and Section 3(i) to cover the AFL-CIO's state and local central bodies. In the wake of the AFSCME District Council 37 scandal in New York and numerous other corruption cases in public sector unions not covered by Landrum-Griffin, a strong case can be made that this expansion of coverage is long overdue.

Improved Enforcement

Landrum-Griffin has long had enforcement deficiencies. In 1999, Rep. John Boehner, Chairman of the House

Education and the Workforce Committee's Employer-Employee Relations Subcommittee called on the General Accounting Office to conduct a thorough review of the enforcement of Landrum-Griffin. One measure to strengthen enforcement would be to allow the Department of Labor to sue under Section 501(b). Currently, union members are granted a cause of action to sue when union officials breach their fiduciary duties under Section 501(a). This reform would allow the Department of Labor to proceed when union members are reluctant or unable to pursue their causes of action.

Support for this proposal can be found in the testimony of Kurt W. Muellenberg, the court-appointed monitor of the Hotel Employees and Restaurant Employees International Union from 1995 to 1998. On July 21, 1999, he testified before Rep. Boehner's subcommittee, stating:

> *"My experience as a Monitor suggests that the LMRDA's reliance on private suits by members to compel adherence to Section 501(a) is impractical. Few members have the interest, tenacity, sophistication and wherewithal to investigate and assemble the circumstantial evidence necessary to pursue a claim under Section 501(b).*

Congress should also consider amending Section 205(b) to improve the distribution of union reporting forms on the Internet. One way to facilitate the electronic distribution of union reports is to emulate the SEC's EDGAR Database of Corporate Information. Presently, union LM-2 forms are kept on file in Washington in non-computerized files making disclosure problematic for those without a great deal of time to spend.

Impose Civil Money Penalties

Congress should consider amending Landrum-Griffin to allow the Department of Labor to recover civil money penalties for breaches of fiduciary duty (Section 501(a)) and

violations of the disclosure measures (Title II). These reforms are modeled after the SEC's rule, 15 U.S.C. § 78u-2, which penalizes willful violations of the statute, inducing or procuring violations by any other person, and the willful making of false statements. Under this rule, penalties are established based on the gravity of the violation.

Expand "Appropriate Relief"

Amending Section 501(b) to expand the definition of "other appropriate relief" would allow certain recoveries of funds from convicted embezzlers which are presently not available. In *Guidry v. Sheet Metal Workers Nat'l Pension,* the Supreme Court held that "other appropriate relief" did not include a union official's pension . The official in question had stolen over $377,000 from the union but was able to prevent a constructive trust against his pension by arguing that the "other appropriate relief" described in Landrum-Griffin was outweighed by the specific ERISA anti-alienation provisions. Simple justice should dictate that a union official who steals from his or her union should not be able to shield his or her pension from attachment to recover the stolen funds.

Meaningful remedies for workers whose First Amendment rights against compelled speech are threatened should start with the premise that the burden should not be on the worker to defend his or her First Amendment rights but rather on the union seeking to justify taking funds for political purposes with which that worker disagrees.

Notice and Disclosure

Just as other worker rights are posted in the workplace, unionized employers would be required to post a notice informing workers of their rights. Unions would be required to provide information their workers need to determine what portion of dues is being used for collective bargaining purposes.

Prior Approval

Unions would be required to obtain written approval from

each worker prior to the use of any fees or dues for non-collective bargaining purposes.

Participation in Union Decisions

Workers who pay for the cost of union representation must be allowed to participate in union decisions regarding representation. Workers who exercise their *Beck* rights while continuing to pay agency fees should still be allowed to exercise such rights as voting to ratify contracts or approve strikes.

Independent Audits to Calculate Proper Amount of Agency Fees

Workers are not in a position to make reliable decisions as to their *Beck* rights without trustworthy information as to what amount of fees or dues are earmarked for collective bargaining expenses. Those whose money funds the unions are certainly entitled to an honest, independent accounting of how those funds are spent.

Constitutional Rights of Private and Public Sector Workers Are Identical

The long line of Supreme Court cases on the First Amendment rights against compelled speech make no distinction as to citizens having different rights contingent on whether they are in the private sector or public sector. Any meaningful remedy should treat all workers equally.

Civil Action/Remedial Relief

Any union that fails to secure the required authorization should be liable to the affected worker for damages equal to two times the amount of the dues or fees accepted in violation of the law. The worker should be entitled to recover reasonable attorney's fees and costs.

Protection of Workers From Retaliation or Coercion

It should be unlawful for a labor union or its agents to intimidate or retaliate against a worker for exercising his or her rights under the legislation.

Conclusion

Workers who belong to unions or pay agency fees have a fundamental right to know how those funds are spent. They have a First Amendment right against being compelled to support political causes with which they disagree.

But rights, like the Supreme Court decisions that support them, are not self-enforcing. In the absence of meaningful remedies to ensure those rights are honored, recent history suggests that those whose interests are threatened by workers exercising their rights will do their utmost to undermine those rights.

The weight of evidence suggests that "the wave of union corruption" described by the *New York Times* is occurring because of weaknesses in the system of laws meant to prevent, detect and punish those crimes. Workers whose hard-earned money is being stolen through union corruption deserve the protection of the law. No credible argument can be made that workers should have less legal protections against corruption than shareholders have against unscrupulous
corporate officers. The policies modeled after the Securities and Exchange Commission's safeguards will promote more disclosure, better accounting and a more credible deterrent to union corruption than presently exists.

The Supreme Court decisions repeatedly recognizing the rights of workers against compelled political speech are the law of the land, yet the rights are elusive without meaningful remedies. Workers who have no access to reliable information as to what portion of the funds they provide to unions go for collective bargaining as opposed to politics are poorly equipped to exercise their First Amendment rights, especially in the face of harassment, retaliation and and the studied indifference and delay of government bureaucracies to their plight. Congress has the power to provide a workable, reasonable mechanism to ensure that the Constitutional rights of workers are honored. It just needs the will and the political leadership.

If the First Amendment, which represents the heart and soul of our political freedoms, is not worth protecting with legislation, what is?