Testimony of Robert P. Hunter of the Mackinac Center for Public Policy

on

Compelled Political Speech

Before the U.S Senate Committee on Rules and Administration

April 12, 2000

Mr. Chairman: Thank you for the invitation to give the Committee my observations of Beck rights and their application to almost 1,000,000 Michigan unionized workers.

Mr. Chairman, you and your colleagues are to be commended for holding this hearing to shed some Congressional light on one of the best kept secrets in modern day labor relations—that objecting union workers have a right to protect their freedoms of speech and association by withholding some of their forced dues collected by their unions, and to be spent for non-bargaining related purposes.

This is not a business- labor issue or an anti-union – pro-union issue. Beck rights and paycheck protection proposals are about fairness, protecting workers, and making political contributions and non-workplace related spending voluntary. All Beck rights are about restoring basic democratic rights to workers.

Although "Beck Rights" of union workers are well established as a matter of American labor policy, they go largely unrealized in practice in Michigan for the following reasons:

- Most workers simply do not know that they have theses rights;
- Workers who are aware of these rights are forced to make the sometimes-untenable choice of resigning from their union in order to exercise them;
- Workers do not have recourse to an effective legal enforcement mechanism if their Beck rights are denied them by their employer or union; and
- Unions, who don't agree with the exercise of Beck rights, often engage in a variety of tactics to delay, intimidate and frustrate workers who attempt to exercise their Constitutionally protected rights.

Worker unawareness of Beck rights is what prompted almost 3000 persons to respond for more information as a result of a 1998 radio campaign in selected eastern and western Michigan media markets to inform them of these rights. If union workers are already aware of their rights as unions claim, why did thousands of them request basic information after hearing the radio ads?

Worker unawareness also prompted Michigan's Civil Service Commission to enact a written Beck policy for some 41,000 state workers operating under collective bargaining and to communicate the policy through individual notices, through workplace posters, and through individual employee e-mails. Until this policy was adopted less than 20 employees chose to be non-member agency fee payers and most of them didn't exercise their option for reduced dues. Michigan is one of the first states of the union to undertake extensive outreach to employees in an attempt to increase their knowledge awareness and opportunities to exercise Beck rights. The state's notice to classified employees is attached as Exhibit 1.

Unions continually make the claim that the employees they represent are knowledgeable about Beck, but there is no empirical evidence to support that claim. The evidence is Michigan is to the contrary. If the union movement has such compelling evidence, it ought to produce it.

That is because the union leadership fundamentally disagrees with the rationale supporting the Beck case, and often engages in a variety of tactics to delay and frustrate workers who wish to limit their dues payments. No where is this more evident than the anti-employee practices of our largest teacher union, the Michigan Education Association which represents approximately 140,000 employees, to restrict by internal rule the opportunity for teachers to resign to exercise Beck rights for only one month in a year. This is usually in August, when teachers interests are diverted to other issues and are not even back in their school workplace.

With respect to its other public municipal and county employees, our state, through its state labor board, should not continue to shirk its obligation to protect individual constitutional rights from further infringement such as presented by the MEA's desire to trap workers in unwanted union arrangements. In order for public employee union members to be free to protect their freedom of association, they must have the ability to leave the union in a timely manner when they no longer support the union's non-bargaining activities.

I predict that Beck rights will never be fully recognized by American workers because unions and employers have no incentive to comply in affording these rights. Quite to the contrary, since refunding money to objecting workers means reduced union discretionary funds to advance its non-workplace agenda.

Union advocates not only philosophically disagree with the Beck decision, but also have argued that it improperly imposes government regulation on purely private union contractual relationships with employees. That might sound somewhat appealing but for the fact it is based upon a false premise-- no collective bargaining agreement compelling a dues obligation under the National Labor Relations Act (NLRA) can rightly be considered a private, voluntary, exchange relationship in the first instance. The fact is that unions are unique institutions in our society by virtue of the privileges, immunities and power that they are granted by law; the primary of which is to the right of a union to compel an employee discharge for failure to pay union dues. In a very real sense, it equates to a private taxing power leveraged against an ability of an employee to work. This power constitutes a potent weapon unavailable to most private institutions in our society.

The two legal powers under law granted to unions which most impact the issue "compelled speech" are (1) exclusive representation, and (2) union security.

EXCLUSIVE REPRESENTATION

When a union is elected to represent employees in an "appropriate" unit of workers, the union alone has the legal authority to speak for all employees, including those who neither voted nor joined the labor organization. No other union, individual, or representative may negotiate terms and conditions of employment. The individual employee is effectively deprived of the opportunity to represent his or her own interests.

Under the doctrine of exclusivity, the interests of union officials win out over the interests of nonunion workers. The NLRA and related labor laws are usually portrayed as benefiting employees, but the laws take away legally and, in practical terms, an individual's right to price his or her own labor and to work under conditions which are personally agreeable. The sale of an employee's labor is private, non-governmental activity. Unions are voluntary, private organizations clothed by law with the legal power to advance their interests, even when the union's interests conflict with the personal goals of those employees whom they exclusively represent.

Collective bargaining involves a trade off of individual interests so that the group as a whole may benefit. Unions typically defend exclusivity by promoting it as a principle of majority rule. A member of the House

of Representatives represents all citizens in a district, not just those who voted for the representative, so the argument goes.

The democratic majority rule argument may sound good, but with exclusive representation it is not an apt comparison. Unions are private institutions. Unions make decisions in private, non-governmental matters. Unions are private organizations operating in the workplace that are granted exclusive bargaining status by government. In other countries, notably, France, exclusivity is not mandatory and several unions may compete in the same workplace. Majority rule is less burdensome to individual workers in places where exclusivity is not mandated.

Freedom for individual employees demands a bright line of distinction between private and governmental actions. Individuals should be empowered to make choices in accordance with their best interests - to go along with the majority or not – exercising either choice without penalty. But under the NLRA , collective bargaining contracts penalize a worker, who refuses to side with the majority, under the threat of losing his or her job. Exclusive representation is equivalent to granting governmental coercive power to unions, even in circumstances where an individual employee might be harmed.

UNION SECURITY

Union Security provisions generally refer to those clauses of a labor contract which protect the union's status under the agreement. Such contract clauses are not compelled under the law, but they are negotiable

between an employer and a union. They bind individual employees only when an agreement is reached between a worker's employer and union. They are the norm in compulsory union states, including Michigan.

A union shop requires employees to join the union within a specified period of time and remain members "in good standing". Thus, an employee need not be a member of the union to be hired. Collective contracts usually say that as a condition of continued employment, however, the employee must join the union within a designated period. This period is generally 30 days for industry, 60 days for railroad and airline employees, and 7 days for construction work. Under the law, the requirement to "join a union" and to remain a member "in good standing" under a union shop clause has largely meant that the employee must tender regular dues and initiation fees, according to U.S. Supreme Court interpretation.

An employee who refuses to voluntarily join the union or to pay dues under a union security agreement must be discharged upon the union's request to the employer. Nonetheless, an employee who offers to pay dues and the appropriate fees but is denied union membership for any reason has satisfied the prerequisites of the law under a union shop proviso. Such an employee cannot be discharged because of his or her non-membership in the union.

The Supreme Court in the NLRB v General Motors Corp, 373 US 734 (1963), defined the extent of union membership that could be required under the NLRA's authorized union shop agreements.

The Court held that that law in section 8(a)(3), allowing the employer and the union to condition continued employment of the employee on union membership, was limited to requiring the payment of union membership fees. Thus an employee who pays union fees as a non-member is entitled to keep his or her job as if he or she were a full member. So long as union fees are paid, the employee cannot be discharged for any other union-imposed obligation. The only obligation for membership that can be placed upon an employee under Section 8(a)(3) is financial membership. The Court held that the term "membership" is, at its core, financial support of a union.

The union shop agreement is an exception to the freedom granted an employee under the NLRA, Section 8(a), to join or not to join a labor organization. Adoption of the union shop between an employer and a union is made subject to state law under Section 14(b) of the Taft-Hartley amendments of 1947. Thus, the union shop, the agency shop and other forms of union security provisions are lawful, provided that they are not prohibited by state statute. Twenty-one states, mostly in the South and West, have enacted laws prohibiting labor agreements that compel union membership. States with such laws are commonly referred to as right-to-work states. Michigan is not among them.

Workers in right-to-work states have the ability to completely escape from being forced to subsidize a union's political speech or its non-union bargaining agenda. Unions justify imposing mandatory financial burdens on all workers, whether members or not, on the theory that unions have a legal obligation to represent all workers in the bargaining unit by law. They argue that the protections and benefits the union negotiates benefit all, and it is only fair that each employee pay for the costs of this representation. This is the so-called "free rider" argument.

Unions will often acknowledge that they lobbied for and ultimately won the right of exclusive representation. This is an important institutional goal because it immunizes the labor movement from competition from other organizations and persons desiring to become workplace employee agents. Without exclusive representation, there could be no free riders because employees could choose whether to be represented or not. The burdens unions claim resulting from exclusive representation ring hollow in light of their overriding institutional interests to be free from competition. Forced dues payments are equally likely to create as "forced riders"-- those employees whose individual interests are sacrificed for the sake of the collective good. Forced workers are compelled to subsidize union activity and contribute to policies and decisions that they may find harmful.

What the Beck decision does is mitigate against an otherwise intolerable circumstance for dissenting workers created by government in the first instance through the imposition of exclusive representation and

union security which cloak unions with extraordinary powers against the dissenting individual worker. Beck is recognition that there are limits in our society as to what citizens can be compelled to do: that we are a nation dedicated to defending freedom and individual liberty. Congress should be the primary defender of these principles.

WORKERS MUST RESIGN FROM THEIR UNIONS TO EXERCISE BECK RIGHTS

Employees who eventually learn of their Beck rights and want to exercise them are routinely required by their unions to resign their memberships. Because the Beck decision did not address whether an employee can be required to resign from his union in order to exercise his rights, unions impose this condition to discourage their members from pursuing Beck opportunities. Unions should, however, rethink this policy, it makes little sense to force people out when the strength of the labor movement is declining.

Forced resignation is a powerful deterrent to employees seeking to exercise their rights. Given a labor union's legally enforced status as exclusive employee representative, an employee's sole means of control is to influence his union's internal processes. The only effective way to do that is for him to become or remain a union member and participate in its governance. Depending on the employee's level of participation, he can influence critical decisions about negotiation strategies and goals, how the collective bargaining agreement will be enforced, and which grievances should be taken to arbitration. Participation in strike votes, ratification or rejection of contract terms, and union elections are also important rights of union membership that many Beck objectors must forgo. Of course, unions play this up "big time" in an

effort to convince employees to remain union members. Because Beck objectors pay for financial core representation it is questionable as to whether they should be legally deprived of participation in crucial workplace decisions such as voting on a new contract which will control their future working conditions.

Exercising Beck rights in the workplace has other effects. Peer pressure and bullying from within union ranks often discourages members from exercising their rights. Employees who object to paying full union dues may experience a hostile work environment and tension among co-workers who support the union's political and ideological causes. Other members may feel that Beck objectors want to shrink the full payment of dues while accepting the benefits of union representation.

In truth, however, non-members must pay for exactly those services the union renders, according to the duty of fair representation, to all dues payers. More often than not, the primary reason that rank-and-file union members do not exercise Beck rights is simply because they are pressured to avoid "rocking the boat" by engaging in a disloyal act against union leadership interests.

The realization of Beck rights by workers is unlikely to change unless public-and private-sector bargaining laws are amended to place an affirmative requirement on both unions and employers to notify dues-payers of their Beck rights. The government should protect the rights of employees to decide whether they wish to withhold the portion of their dues used for "extracurricular" union activities such as lobbying, electoral politics, image building, etc. *before* dues are collected by the labor organization. These proposals are generally referred to as "paycheck protection" laws. Reforms of these types would reinforce each

employee's Constitutional rights to freedoms of speech and association and help prevent the misuse of union funds. They would put all employees back in control as to how their dues are spent –a profoundly moral, legal and ethical result.

A paycheck protection law should be coupled with a requirement that when written authorization is requested by a labor organization it shall account for and report fees and expenses in enough detail as necessary to allow employees to determine the proportionate costs of collective bargaining, contract administration and grievance adjustment, and the costs o other activities.

Presently, workers cannot find out from their unions, how their dues money is being spent. Full disclosure will provide for informed workers' consent whether they decide to contribute or not. Required detailed reporting would eliminate the number one complaint from workers—to know with certainty where their dues dollars are going.

Advantages of paycheck protection:

- All employees continue to be represented by the union;
- All workers are compelled to pay for union representation services from which they gain a financial benefit but they are free to decline to contribute to candidates or causes they find repugnant;
- All workers are free to choose to support the entire union non-bargaining agenda;
- The union is able to continue spending on matters it deems important - but only with dues money consciously and voluntarily contributed by its dues payers;

- Union members and non-member forced dues payers are treated equally – no member is compelled to resign to protect his dues and can continue to participate in workplace decisions affecting their livelihood such as strike votes, contract ratification votes, collective bargaining strategy, etc.
- At the time contributions are solicited, unions are obligated to provide all employees with a detailed financial accounting as to how annual dues are spent;
- Paycheck protection – coupled with more rigorous enforcement of Beck rights- is a practical and balanced solution which fully safeguards worker freedoms of speech and association when requesting and receiving a partial refund of involuntarily taken union dues.

Several states, including Idaho and Washington, have enacted a version of "paycheck protection" to remedy the current lack of worker Beck rights enforcement. The virtue of these proposals lies in requiring unions to obtain up-front, written approval from individual workers before they collect dues money for political or other non-workplace relates activities. It took a law, the NLRA, to create compelled speech problems for workers; it will take a law to remedy them. Several of the states are recognizing their inequities and acting to address them.

Michigan has already taken a significant, though limited, step in this area by enacting Public Act 117 of 1994. Under this legislation, payroll dues deductions may be used for political action fund contributions only after individual workers grant their consent each year. Full paycheck protection would extend these

requirements to cover all union non-workplace related dues expenditures, which represent a substantial portion of employee dues.

MICHIGAN STATUTES REGULATING POLITICAL CONTRIBUTIONS OF EMPLOYEES ACCOMPLISHED BY PAYROLL DEDUCTION

A. 1995 PA 278 – amends Sec. 7 of Payment of Wages and Fringe Benefits Act

MCLA 408.477

Sec. 7 (I) Except for those deductions required or expressly permitted by law or by a collective bargaining agreement, an employer shall not deduct from the wages of an employee contribution to a separate segregated fund established by a corporation or labor organization under section 55 of the Michigan campaign finance act. Act No. 388 of the Public Acts of being section 169.255 of the Michigan Compiled Laws, 1976, *without the full, free and written consent of the employee, obtained without intimidation or fear of discharge for refusal to permit the deduction.*

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As used in this section, "employer" means an individual, sole proprietorship, partnership, association, or corporation, public or private, this state or an agency of this state, a city, county , village, township, school district, or intermediate school district, an institution of higher education, or an individual acting directly or indirectly in the interest of an employer who employs 1 or more individuals.

B. 1994 PA 117 – amends Michigan Campaign Finance Act

MCLA 169.255

Sec. 55. (I) A corporation organized on a for profit or nonprofit basis, a joint stock company, or a labor organization formed under the laws of this or another state or foreign county may make an expenditure for the establishment and administration and solicitation of contributions to a separate segregated fund to be used for political purposes. A separate segregated fund established under this section shall be limited to making contributions to, and expenditures on behalf of, candidate committees, ballot question committees, political party committees, political committees, and independent committees.

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(4) Contributions for a separate segregated fund established under this section by a labor organization may be solicited from any of the following persons or their spouses:

(a) Members of the labor organization who are individuals.

(b) Officers or directors of the labor organization.

(c) Employees of the labor organization who have policy making, managerial, professional, supervisory, or administrative non-clerical responsibilities.

(5) Contributions *shall not be obtained* for a separate segregated fund established under this section by use of coercion, physical force, or as a condition of employment or membership or by using or threatening to use job discrimination or financial reprisals. A corporation organized on a for profit or nonprofit basis, a joint stock company, or a labor organization shall not solicit or obtain contributions

for a separate segregated fund established under this section from an individual described in subsection (2). (3). or (4) *on an automatic or passive basis including but not limited to a payroll deduction plan or reverse check-off method.* A corporation organized on a for profit or nonprofit basis, a joint stock company, or a labor organization may solicit or obtain contributions for a separate segregated fund established under this section from an individual described in subsection (2). (3). or (4) on an automatic basis, including but not limited to *a payroll deduction plan, only if the individual who is contributing to the fund affirmatively consents to the contribution at least once in every calendar year.* (6) A person who knowingly violates this section is guilty of a felony punishable, if the person is an individual, by a fine of not more than $5,000.00 or imprisonment for not more than 3 years or both or if the person is not an individual,, by a fine or not more than $10,000.00.

Shortly before the effective date of 1994 PA 117 (March 31, 1995), the Federal District Court for the Eastern District of Michigan enjoined certain provisions of that enactment, including the annual employee consent requirement, as being contrary to the mandates of the First Amendment.

The United States Court of Appeals for the Sixth Circuit reversed, concluding that the District Court had applied an incorrect level of constitutional analysis. The Sixth Circuit rejected the union's allegation that the annual consent requirement for political deductions unduly interfered with the rights of labor organizations to solicit funds in furtherance of speech protected by the First Amendment.

The Court determined that the Michigan Legislature's adoption of the annual consent requirement was intended to preserve the right of individuals not to contribute to advocacy of a political message, a right accorded the same constitutional status as the right to solicit political funds. Even though 1994 PA 117 regulated political speech, the Court found that the annual affirmative consent provisions were content neutral. The statute serves to remind individuals that they are giving money for political purposes and, according to the Court, "…counteracts the inertia that would tend to cause people to continue giving funds indefinitely even after their support for the message may have waned." According to the Court, 1994 PA 117 results in the exercise of informed choice by individuals rather than governmental suppression of political advocacy.

Finally, the Court determined that the additional administrative burden upon the unions imposed by the annual consent provision in 1994 PA 117 would not be "substantial". Consequently, the preliminary injunction issued by the District Court was vacated and the dispute remanded for further proceedings. Michigan State AFL-CIO et al v Miller, et al, 103 F3d 1240 (CA 6, 1997). A petition for en banc rehearing was denied on March 19, 1997.

Another positive development for Michigan workers is the announcement by the Speaker of the Michigan House of Representatives, Charles R. Perricone, of a Union Workers' Bill of Rights, which incorporates the recognition of Beck rights and protections for workers to decide before dues are

deducted –if a labor organization can spend their money on non-collective bargaining activities. Statewide hearings have been held on these, and other proposals, but it is unknown whether these ideas will translate into legislative action in the near term.

My experience has shown that these issues resonate positively among union workers and the general public so they will be with us for the foreseeable future.

ANSWERS TO COMMON CRITICSIMS OF PAYCHECK PROTECTION

Labor unions and some business groups have criticized paycheck protection for different reasons. Some of the most common criticisms with my response to each are as follows:

1. **"PAYCHECK PROTECTION IS A BUSINESS-MOTIVATED EFFORT TO SILENCE WORKERS BY DEPRIVING THEM OF THEIR VOICE IN THE POLITICAL PROCESS."**

   Paycheck protection merely respects each employee's individual right to decide if he wants money deducted from his paycheck for non-workplace union activities. Paycheck protection does not inhibit a union's ability to solicit contributions and donations voluntarily by convincing workers that the union's political activities are in their best interests. Union politics are not necessarily compatible with those of individual employees, who should have ultimate control over their own money.

2. **"PAYCHECK PROTECTION IS UNFAIR IF IT IS NOT APPLIED TO CORPORATIONS OR OTHER MEMBERSHIP ORGANIZATIONS THAT SPEND MONEY IN POLITICS."**

Labor unions are granted by federal law, and sometimes state law, a unique "taxing" power not available to any other organization, which enables them to end the livelihood of any worker who refuses to or cannot pay union dues and fees. Employers do not normally deduct money from employees without permission. Corporations can neither force individuals or workers to invest in them or their causes, nor prevent them from selling their stock when those individuals disagree with corporate political spending. The coercive power of a union exercising a discharge action makes this concern a deeply flawed comparison. Even-handedness would suggest that if employers could deduct workers' wages for politics without employee consent, the same paycheck protections should apply to them.

3 **"PAYCHECK PROTECTION WILL INTERFERE WITH THE EMPLOYEE'S OTHER PAYROLL DEDUCTIONS, SUCH AS THOSE FOR HEALTH CARE, 401(K) PLANS, OR UNITED WAY CHARITABLE CONTRIBUTIONS."**

Paycheck protection applies only to union dues paid through payroll deduction, any part of which will be used by the union for political campaigns or for social causes that an employee may deem objectionable. As such, it will have no bearing upon other matters such as voluntary charitable contributions or any other category or payroll deduction unrelated to mandatory union dues.

4. **"PAYCHECK PROTECTION DOESN'T GO FAR ENOUGH IN RELIEVING AN EMPLOYEE FROM THE COERCIVE ASPECTS OF COMPULSORY UNIONISM."**

While paycheck protection does not address all facets of the special powers, privileges, and immunities granted to labor unions under the law, it does make a positive impact enabling workers to control the expenditures of some of their dues. Any move toward greater employee freedom and increased union accountability represents a more balanced approach under the labor laws and, as a matter of public policy, is worthy of widespread support. Paycheck protection must be couple with rigorous enforcement of Beck rights.

5. "THE PROCEDURES OF WRITTEN ANNUAL CONSENT FROM EACH EMPLOYEE MAKE IT VIRTUALLY IMPOSSIBLE FOR LABOR UNIONS TO COLLECT DUES SUFFICIENT ENOUGH TO ALLOW THEM MEANINGFUL PARTICIPATION IN POLITICAL AFFAIRS."

There is no doubt that annual written consent will dramatically change the ways unions currently relate to their dues payers. But from a worker's perspective, this change is totally positive. Unions will have to use the power of persuasion in direct dealings with employees to convince them that their money is worthy of contribution to the union. While unions may find this more cumbersome, the recent successful attempt by the Michigan Education Association to get its members signed up as PAC contributors demonstrates that written permission and face-to-face solicitation is a workable system.

A corollary to this criticism of paycheck protection today is this: Any union that finds itself unable to persuade members to voluntarily provide funds for meaningful political participation should ask itself whether it is truly acting in the best interests of workers.

6. "PAYCHECK PROTECTION LAWS WON'T WORK BECAUSE THE UNIONS WHO DISAGREE WITH THEM WILL FIND WAY TO CIRCUMVENT THEM."

Undoubtedly, some unions will attempt to circumvent the intent of paycheck protection by raising money from union employees by other means. Unfortunately, laws alone cannot insulate employees against every potential union effort to maximize dues collection. Laws alone are not guarantors of liberty. Individuals must be allowed to take personal responsibility for their freedom.

Paycheck protection would allow workers the freedom to preserve their civil rights without sacrificing their economic interests or infringing upon the speech or association rights of other union members. It would guarantee a workers' right to withhold his dues at their source, before they are transmitted to the union. Prudent regulation of the collection process will do far more to prevent union misuse than will simply attempting to regulate how unions may spend the dues after they have been collected.

7. "UNION POLITICAL SPENDING FROM EMPLOYEE DUES OUGHT TO BE ACCEPTABLE IF FIRST DETERMINED BY MAJORITY VOTE OF THE MEMBERS."

In the context of Beck rights, and similar protections for public employees, the U.S Supreme Court has clearly stated that dues protections are very much a matter of individual choice because

they are grounded in Constitutional guarantees of First Amendment freedoms of speech and associations. Accordingly, individually expressed "civil rights" are not appropriately subject to alteration, modification or waiver based upon any union principle of majority rule. "To compel a man to furnish contributions of money for the propaganda of opinions which he disbelieves", wrote Thomas Jefferson in 177. "is sinful and tyrannical." Union majority rule does not alter the wisdom of Jefferson's statement.

CONCLUSION

Mr. Chairman, in conclusion, paycheck protection is not a cure-all for workers who are trapped in compulsory union arrangements because it does not erode law created union privileges that subordinate workers' individual rights to the so-called "collective good" as largely determined by the union's leadership. What the Beck decision does, in fact, is mitigate an otherwise intolerable situation brought about by government in the first place. Paycheck protection is a more balanced pro-worker approach because it fulfills better that any alternative I know of, the promise the U.S. Supreme Court made to America's union workers in 1988. Paycheck protection is about fairness, protecting workers and making political and ideological contributions voluntary.

I associate myself with the comments in a January 26, 1997 Detroit News editorial on the subject of the Beck decision, which stated:

"We are not among those who worry about an "excess" of money in politics. Money can help fuel legitimate debate. But the union workers should have the right to individually control how their money is used. Unions that stand in the way of that simple principle can be called pro-Democratic. But they can hardly call themselves democratic."

Thank you