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LABOR UNIONS AND THE PUBLIC INTEREST— PROFESSORIAL POINT OF VIEW

PROFESSOR ARCHIBALD COX

I didn't think in my opening remarks, that I had said anything that anybody could disagree with. I asked questions that were not intended as rhetorical questions, but at this stage in the discussion, I like controversy as well as the next man, and therefore I am going to take the liberty to venture a few comments on what has been said and I think you will find that we do have some points of disagreement.

As I see it, there are two kinds of questions that we have been particularly concerned with here. One is an economic problem — whether unions have too much economic leverage in the community today. And the other, I would describe as basically a human problem. Whether the leaders of unions are sufficiently attentive to the wishes of the members, the minority interests of the members or the basic personal liberties of the members — call them what you will — the things that we normally lump under the heading entitled democracy. On the first point, I think, you will find, following Mr. Christenson's advice, that my disagreement is chiefly with him. On the second point, my disagreement is with the, shall I say, silence of both speakers. That is probably unfair to Mr. Thatcher because I passed him the note to grade it down and that certainly entered into Mr. Christenson's minimizing that point. Let me talk about them a bit in that order.

First, with respect to monopolies, it is important here, as it is with the anti-trust laws, to talk a little bit about what we mean. A "monopoly" has a bad sound. We are all against a monopoly. As a matter of fact, I have a monopoly over types of speeches. So does Mr. Christenson over his speeches and Mr. Thatcher over his. Now, there were references to the monopoly power of Walter Reuther. He could make a speech in which he said "I will be good if you promise to reduce the price of cars \$100.00 a car." Well, of course, I can make a speech and say I will be good if you will reduce the price of cars \$100.00 a car, but I don't really know whether this spring Walter Reuther will have much more power to do that than I would by monopoly. The point I am trying to make is that monopoly is a relative term and when we talk about the monopoly of a union, it does, as Mr. Thatcher said, have some monopoly power that exists for the purpose of exerting monopoly power. It is also true that employers, corporate employers especially, have some monopoly power in the sense that both a union and a corporate employer can exert more power in the market than a single man could acting alone, and just as unions

sometimes have set a monopoly power over the sale of labor, so employers have a monopoly power over job opportunities. Take, as the clearest example, any one industry town — a Southern mill town if you will. The employer has what an economist would call — the monopoly, that is the sole power to buy, just as the monopolist has the sole power to sell. And I wonder, to bring the point a little further home, whether Walter Reuther really has as much control over the price of cars as General Motors has over the price of cars. So this, I think, is a relative thing and what the public is really concerned with is having a somewhere near equal power in the market between the employers and the labor unions which involves, in our modern industry, organization on both sides.

After all of the talk about monopoly, I can't resist saying one word about industry-wide strikes. It is true that John L. Lewis has the power to shut down the entire coal industry. As a matter of fact, I probably have more reason to remember that than anybody else here because I once had to make a decision on the problem in the government where if I decided one way I would shut down the entire coal industry. If I decided it the other, I wouldn't. And I assure you that is not an awfully easy kind of decision to make, especially when you wind up deciding that 350,000 men should go out on strike. But I wonder whether the anti-trust laws or talk about monopoly is really an answer to that kind of problem; fortunately it hasn't bothered us very much in recent years. But as a matter of fact, wouldn't a strike at a single utility, Consolidated Edison in New York, Detroit Edison in Detroit, confined to the size of a single employer unit, cause more damage than all the coal strikes we have had since 1940? And I think that most economists would tell you that the answer is yes. This is a problem that goes beyond industry wide organization. It is the problem of whether we can afford free collective bargaining in certain key industries where a strike will hurt the public before it brings much pressure on the parties and I doubt whether the anti-trust laws or the right to work laws will solve that problem.

Now, Mr. Christensen says, on the problem of monopoly that he advocates a national law outlawing the union shop and, second, some kind of an anti-trust law. With respect to the union shop, I would simply like to state what the present law is because I think there is a lot of misunderstanding about it. (1) Under the present law today, an employer is free to hire anyone, union member or non-member. Indeed, if he discriminates because of a man's membership or non-membership, he violates the law and is subject to NLRB proceedings. (2) An employer and the union are free to enter into an agreement that any man after he has been working for the employer thirty days, must become a member of the labor union. Now, let me elaborate a little

bit on that "must become a member of a labor union" because that again is a subject of a great deal of misunderstanding. Actually, under such a union shop contract, under the Taft-Hartley Act today, employees are not subject to union discipline in any way whatsoever so long as they pay their dues. They may kick the union leaders in the pants, disobey their instructions to strike, go to the meetings of another union, vote for whom they please so long as they pay their dues. Equally, an employee is not obligated to go through any of the ritual or take other steps to associate himself with the labor union. He doesn't have to become a member in any sense, except that he must pay some dues. Now this, I think, bears a great deal on the question whether the union shop is truly an interference with any personal liberty in a meaningful way. Certainly, it's an interference with the pocket book. I didn't mean in stating the above that this did not subject anyone to discipline, or to suggest that the remaining question was not an important one. It's a highly important one, but it's not a matter of a man's personal freedom.

The question of whether he should be required to pay dues, as I see it, comes down to this. In industry today, the union is the organization which negotiates terms and conditions of employment. That's a time consuming and expensive proposition. You don't sit down to negotiate with any employer of any size unless you have engaged in economic studies and have lawyers and other experienced people to do the negotiating. Again the union is the organization which shares in the administration—or should I say attends to the enforcement of the collective bargaining contract. Not only that, but the union has an obligation enforceable by law and one which I would say should be enforced strictly, to represent union and non-union employees alike. It must be representative of everybody in the unit. Now what the question comes down to is whether it is fair to expect everyone that works in the bargaining unit and is represented by the union, is protected under the contract negotiated by the union, has his grievances handled by the union, to pay what is roughly his share of the cost. Well, I can't do more than pose the issue. It's one which you will decide for yourselves one way or the other, but I would insist that this is the only basic issue under our present law.

Let me come now to the matter of the anti-trust laws. Mr. Christensen says, when I ask him what he means by applying the anti-trust laws, "Oh, you're losing the forest and looking at the trees. I can't tell you just what I mean. I don't want unions to have their monopoly power. I'd put them under the Courts and let the Courts administer." Well, we have another phrase for that in my part of the country, George. We call it buying a pig in a poke. The pig is in the bag, you can't look at it, you can't see it, you don't know just what it is,

you don't know even whether there is a pig there, but you may buy it, and so here, I think, that unless this is talked about in terms of what would be the probable consequences of what you mean by applying the anti-trust laws, we won't know what the results will be.

Now, I don't mean in saying that to imply that this is not a very serious question. I think that Mr. Thatcher's quotation from Chief Justice Stone and the *Apex Hosiery* Case where Justice Stone said it was the function of every union to eliminate competition based on differences in labor standards, really misses the point. That was a case decided back in the '30's when labor unions were comparatively weak and when certainly the Justice was looking back over a period when labor unions had been very weak. To say that at that time it must be the purpose and society should encourage the purpose of eliminating all competition based on differences in labor standards doesn't mean that that is sound policy today, and so I do think that it is a very serious question here and although it is getting late, I would like to offer just a few comments upon it.

One reason a great many people are suspicious or have misgivings about this notion of putting the unions under the anti-trust laws is that they're familiar with what that meant in the past. The Sherman Act, for example, provides that every contract or combination or conspiracy in restraint of trade among the several states is declared to be unlawful. There are a number of cases in which the Sherman Act was applied in the past — I overstated myself — there is one but it has never been overruled, which held that a shipper's strike for higher wages that interrupted the shipment of goods from New Orleans to other states was a violation of the Sherman Act. Well, is that what Christensen means when he espouses putting unions under the anti-trust laws? Again, the word conspiracy was brought up. A conspiracy, if you will forgive me for acting like a law professor, is a combination to accomplish an unlawful objective or to accomplish a lawful objective by unlawful means. Well, nobody can object to that, of course, as it stands. But the catch is, what is a lawful objective, or rather what is an unlawful objective? What are lawful and unlawful means? That was left entirely in the hands of individual judges to decide according to their concept of social and economic policy, and I think most people think today that the judges in the past did a pretty poor job of it. The Norris-LaGuardia Act that Mr. Christensen quoted from was passed to take that power away from judges, so that when people say let's turn the application of the anti-trust laws, the determination of whether unions are monopolies, back to the courts, it makes one nervous as to whether one isn't simply turning the clock back somewhere from 30 to 40 or 50 years. Maybe not, maybe the courts would do better, but then we get to the question, well what would they do? How would it work out? What does this

new delegation mean? I want to see the pig before I buy it or at least have some notion as to what it would be. There are a few other comments that might be made on this problem although the burr in the bottom of the box is that we need to do a lot more thinking about it and a lot more studying of it.

Let us assume for the moment that unions do have their tendency to force wages and prices up somewhat above the rate at which our per man hour productivity increases. I just assume it. You can get figures either way. This game of comparing the increase in earnings to the increase in the price level all depends on where you start. I have played this game lots of times and I have had industry and labor play it with me, and it all normally depends on where you start and then you can prove it either way. But let's assume that they have that effect. As Professor Slichter said, "If they don't have that effect, they have been cheating their members for fifty years." But I would at first ask this question. Where do we find the big unions whose monopoly powers people talk about? Now the two places we find them them predominant are these. First, we find them in industries with the poor little fellows like U. S. Steel and General Motors; to put the bite the other way, the big unions that by and large bargain on an industry wide basis and insist upon uniform wage increases are in industries where there appears to be very little price competition, certainly industries that are characterized by three or four or five industrial giants. Now the other place we find unions is the intensely competitive industries, industries like bituminous coal or the garment industry where they are very small employers and many marginal employers, and by bringing the unions down to the size of each employer, it would break them down so that they scarcely existed at all. You may draw your own conclusions but I think that that's an accurate observation.

The second question that I have asked myself in trying to think about this problem is what is the situation in industries where there are a number of rival unions? There are such industries. The non-ferrous metals is one of them. The air frame industry is another where you have four or five competing unions. Another is the North West lumber industry with two competing unions; aluminum has four which are significant. You really don't find any less pressure on wages and price in those industries than you do in industries where there is just one union so that I query whether breaking the automobile workers into half a dozen unions would really accomplish anything. I think the reason you don't find any difference, but this is just speculation, is this: Union don't compete with each other by trying to underbid each other in selling labor. They compete with each other by trying to bid more than the other union, by making more aggressive demands, by proving

that they've got something bigger than the other union so that really their competition may well make the more pressure on the wage level rather than less. Certainly, in the days of the Wage Stabilization Board, the one thing that we could all agree on was that if one union leader got a certain wage increase every other fellow would be pounding on the door to get at least as big or bigger one.

We approach the third and last question on this point of talking about breaking unions down to the size of employers. I can't imagine a union the size of General Motors being altogether impudent, but when you get down to the small companies, I would really feel seriously concerned as to whether a union limited to the size of the company, with the dues that its members could pay, could have the officers, the experienced bargainers and the skilled staff necessary to carry out the four purposes of labor unions as I tried to outline them in the beginning.

Now, let me turn again for just a moment to the other aspect or other problem that I tried to suggest, the human problem. And if you will, I would like a minute to answer my own question since nobody else was willing to do it. It does seem to me that the central problem today is the problem of the relationship between the union and the individual workers or the problems of encouraging and maintaining union democracy. I am not so naive as to think that you can make people go to union meetings by law or that you can create a true participation by all workers simply by passing laws about it. But you can at least give them the opportunity, and it seems to me that this is in human terms one of the central problems in appraising labor unions in the public interest. It is sometimes a little discouraging to contemplate whether anything will be done about it. The labor union officials who speak for them in Congress are opposed to it. The business organizations don't have that much interest in it, because it won't affect them one way or another. That leaves only the aliens like myself, and we don't have many votes so that we can't affect the Congressmen one way or the other. It does seem to me that something could be done, though, along these lines. First, I would think that there should be legislation guaranteeing every member, every employee in a bargaining unit, that is, a group represented by a labor union, an opportunity to join the union. It seems to me shocking that unions should be able to keep people out even though they're bargaining for labor because they don't like the color of their skin or they don't like their religion or their sex or because they didn't join the union back ten years ago when it was organized, or maybe just because they don't like the individual. I don't mean to imply that a union shouldn't have the right to keep out a man whom it has reason to suspect will actually work to break it up if he is admitted or who has recently been a company spy. But the person who has done or committed no offense against

the union, I should think should have the right to be a member and that isn't the law today. Second, I should think that the right of the man who has become a member should be given efficient protection by the government, perhaps under the National Labor Relations Act in the same way that employees are safeguarded in their right to organize against company reprisals. The law is a good deal better today, but the theoretical protection doesn't seem very practical and perhaps it could be improved in that manner. Now, I don't mean to suggest that there are very many instances of unfair exclusion or very many instances of people being unfairly expelled from unions, but we all know of some, and it doesn't seem to me that it is a very good reason to repeal the laws against wife beating because not many men beat their wives or to repeal the laws against murder because not many men commit murder. Even the few offenses in this area are something that ought to be prevented.

Second, membership alone, of course, is not sufficient. To be a member of a union that never holds any elections, that never has any meetings, is only an opportunity to pay dues, and even though I am in favor of the union shop, I don't put much value on the opportunity to pay dues in a non-democratic organization. Would it not be well, therefore, to have a statute which insured a certain minimum election process in every union representing employees under the National Labor Relations Act? Shouldn't it guarantee, for example, regular elections of perhaps once every four years, either by secret ballot or by a convention of delegates in the case of an international union, with the delegates chosen by secret ballot? Shouldn't there be guarantees of a fair opportunity to vote, not only notice but protection against coercion and other forms of interference? And shouldn't there be a fair count of the ballots? Personally, I think that if a statute laying down those requirements were enacted one could control the conduct of the elections and insure the labor unions themselves. We certainly don't want to get the government into conducting labor union elections, and when I had spoken earlier, Mr. Christensen, of any union laws, it is independence I had in mind. The argument that the first step in Argentina of the Peron Government was to take over the labor unions and make them part of the state machine, is an argument that has been made in Washington a good deal in recent months against this kind of proposal, and while I don't think that it has merit, it was one that I thought ought to be considered.

There is one other problem in this area, and that is the point of receivers taking over and administering the affairs of local unions. As we said, they can conduct the affairs of a union without meetings, they can oust the existing officers, take over the treasury, pipe the delegates to a convention without an election and so forth, and in a

few unions unfortunately this is done all too often. It is hard to draw a specific remedy for this abuse because there is no doubt that some receiverships are very proper. They are necessary to prevent embezzlement of local union funds; they are necessary to prevent disintegration of the local on occasion; they are necessary sometimes to make the local live up to its collective bargaining agreements and carry out its other commitments. Thus there is a line to be drawn here between the good and the bad and it's very hard to formulate a test. Just as a suggestion I would say that perhaps a start could be made by laying down a presumption that for the first year a receivership should be presumed to be in accordance with the union's constitution and by-laws and not otherwise against the policies of the government. I'd put the burden on anyone who wishes to show that the receivers were appointed for an improper reason, making him prove his case and prove it convincingly. After a year I would think that the burden ought to run the other way. Would it not be fair to say to the international officers at the end of the year, unless you propose some good reason, a very good reason, for keeping the local union in receivership the government is going to step in and oust the receivers?