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THE KENNETH M. PIPER LECTURE

THE FUTURE OF THE AMERICAN LABOR MOVEMENT:
THE ROLE OF FEDERAL LAW

HONORABLE RAY MARSHALL

DEAN COLLENS: Good afternoon. I am pleased to welcome you to the second annual Kenneth M. Piper Lecture.

This series had its germination in plans that the late Larry Doppelt, a member of our faculty, had several years ago. Acting on his suggestion, we organized this program, and we are quite pleased that Mrs. Piper was willing to underwrite the cost of this series. I am sorry that she cannot be with us today, but we certainly do appreciate her support.

I am pleased to introduce Martin Malin, who is currently a Visiting Professor here at the school. He is a member of the faculty of Ohio State University, and he will introduce Secretary Marshall and moderate our program.

PROFESSOR MALIN: Thank you. Our principal speaker today has excelled as an economist, an educator and a public servant. Dr. Ray Marshall received his B.A. from Milsaps College in Mississippi, his Masters Degree from Louisiana State and his Ph.D. from the University of California at Berkeley.

He has served on the faculties of several leading institutions of higher learning, most recently as Professor of Economics and Director of the Center for the Study of Human Resources at the University of Texas.

He has authored numerous books, articles and monographs and has lectured extensively in the area of labor economics.

On January 27, 1977, he was sworn in as our nation's Secretary of Labor. We are honored to have him with us today. Secretary Marshall will speak to us on "The Future of the American Labor Movement: The Role of Federal Law."

It is now my privilege to present to you the Honorable Ray Marshall, Secretary of Labor.

SECRETARY MARSHALL: It's a pleasure to be here and to

meet with this distinguished group. I have some appreciation for lawyers; I have 700 in the Department of Labor now, and I started out to be a lawyer. I had a wise law professor in Mississippi in 1948 when I was thinking about being a lawyer, and he asked me what kind of law I wanted to practice. I said, "I don't want to practice law, I want to be a politician." He looked at me a minute and said, "What would you say to the people of Mississippi?" And when I told him, he shook his head and said, "You better get in some other business," and that's how I switched to economics. I'm not sure yet that I made the right decision, because at least people knew what lawyers were, and I have spent the rest of my life trying to explain what an economist is. There are all kinds of jokes about what an economist is. Someone observed that if you laid all economists end to end, they'd never reach a conclusion. Somebody else said, if you laid them all end to end, it would be a good idea.

But I am pleased to participate in this seminar, and will treat it as a seminar, which means that I am not necessarily going to tell you what I definitely have concluded about things because I'm not sure about some matters; I think we need to go through a period of rethinking periodically. I think after this election is a good time to do that because many of the things we have taken for granted in the labor field are under attack, and a lot of our assumptions need to be re-examined; and I think we will go through a period of ferment and debate concerning the best ways to handle the labor problems and industrial-relations problems of the country.

There are various alternatives, and people have preferences for one or another of these alternative ways to deal with the problems. One is collective bargaining and a labor movement; another is to try to solve problems through the free market mechanism, which seems to be gaining some support among people these days. A third alternative is to try to do it through regulations, which we have been trying to do in recent times; yet another is to put together problem-solving and decision-making mechanisms of various kinds to make it possible to resolve problems that cannot be resolved through any of these others.

I think in that last category, we're going to see a lot of development in labor management committees and in tripartite committees because there are many problems that cannot be resolved through collective bargaining or by leaving things entirely to the market forces themselves.

They told me when I agreed to do this that I could talk about the

future of the American labor movement or some other topic. So I've decided to talk about some other topic because I'm less sure about the future of the American labor movement than I am about viability of the concept of collective bargaining as it relates to these other mechanisms.

But I am pleased to know that this is the second in the series of labor law lectures and panel discussions presented by the Chicago Kent College of Law. I know that John Fanning was here last year and talked about the NLRB and the challenges of the next decade,¹ so this is clearly a forward-looking seminar.

I think that it's particularly important for us to look forward this year because we are at the crossroads in a number of areas. After the recent election, anyone involved in the labor movement certainly views its future with a certain amount of trepidation. That's not new, of course, because this country's labor movement has faced struggles throughout its history, but the concern today is given special impetus because of the economic pressures America faces.

There is also fear because of statements made during and after the election campaign. I can't quote Ronald Reagan exactly, because his hardline anti-labor positions of the last two decades melted away a bit when he faced union and labor workers. And, in any case, candidates tend to reassess their historic rhetoric once they take office. But beyond President-elect Reagan, there have been a number of people inside and outside government who envision actions which would greatly affect workers. Orrin Hatch, for example, the Senator from Utah, who is the new chairman of the Senate Labor and Human Resources Committee, wants to make good on Mr. Reagan's promise of a subminimum wage for youth and he has announced that he will seek a constitutional amendment outlawing affirmative action programs.² Jake Garn, also from Utah, the new chairman of the Banking and Urban Affairs Committee, wants to do away with the Davis-Bacon Act,³ which protects the wages of building trades workers and which has been in force for half a century, since 1931. And Reed Larson, President of the National Right-To-Work Committee, has launched a campaign to insure that my successor as Secretary of Labor will be someone who shares the

1. See Fanning, *The NLRB: Challenges of the Next Decade*, 56 CHI.-KENT L. REV. 439 (1980).

2. See *The Hatch Strategy for Reining in Labor*, BUSINESS WK., Dec. 1, 1980, at 46.

3. 40 U.S.C. §§ 276a-276a5 (1976). The Act regulates the rate and method of paying laborers and mechanics employed under federal construction contracts and requires that they be paid the prevailing local trade wage.

committee's view that unions are too strong. Mr. Larson said in a letter to the committee members, and I quote him, "Everyone knows the union bosses took a real bath in the past election. We've finally got their backs up against the wall."

So it isn't paranoia which fuels the labor movement's bad dreams today. These are realistic threats, and they are threats which I don't think workers really perceived when they went to the polls. There are legitimate frustrations which led to Ronald Reagan's election, but I agree with the post-election speculation that voters inadvertently brought into power a great many people whose policies and philosophies the voters do not endorse.

One of the cornerstones of the Reagan campaign was that government should get off people's backs. Indeed, at times it seemed that Mr. Reagan was saying that all our problems, including a decade-long inflation that spans the globe, were due to Big Government. In his view, government had become—and might inherently be—a malevolent force in people's lives.

This, of course, is in great contrast to those of us who believe that government must play a positive role in helping solve problems that cannot be solved without government action and that democracy is most especially fostered when government acts to protect its most economically and socially disadvantaged. We believe there is a vast difference between the legitimate role of making government more efficient, eliminating unnecessary government regulations (as the Carter Administration has done), simplifying government and concentrating on important things, and the doctrinaire belief that government activity by its very nature is bad.

There can be no doubt as to what we found when we came into office; there were many mindless and nitpicking regulations in government that had frustrated people and had infuriated them.

In my department, for example, we found a lot of those, especially in the Occupational Safety and Health Administration where there were hundreds of regulations that had nothing to do with the safety and health of the workers. That's one of the reasons that we started working hard to eliminate those regulations and to simplify and concentrate government action on important things; and I think that we need to re-examine the effort to try to deal with problems through regulation. As I will indicate in a minute, I don't think that you can solve the safety and health problems of workers through regulation alone. Nor, however, do I believe that you'll ever do it through so-called mar-

ket forces alone because in the labor areas, market forces tend to reduce labor standards, especially when you have high levels of unemployment. That is, it is very difficult for those employers who want to maintain good labor standards to do it if some of their competitors can get an advantage by reducing those standards. And I think that's one of the main reasons it's necessary to have the standards.

So it seems to me that the question is not whether we have this array of mechanisms to deal with the problems of workers, but what combination to use and what are the advantages and disadvantages of each of them.

The economically and socially disadvantaged suffer the most when government adopts a sink-or-swim attitude, but they aren't the only ones who pay the price. When we turn to the question of workers and the labor movement today, and the role of the federal government, we sometimes hear that the unions are too strong. The perception is that an overly powerful and self-serving labor movement has caused government to adopt laws and regulations that are not in the best interests of society as a whole. One of the strains running through conservative rhetoric this year was that union and workers' rights and protections were obstacles to America's economic well-being.

One of the first things I'd like to say is that it is crucially important that we re-emphasize the value of a free labor movement in this country. We must recognize a basic lesson of history: You cannot have a free and democratic society without a free and democratic labor movement. It's pretty shocking—and hypocritical—that some of the people cheering the loudest for the workers' rights movement in Poland are those who would restrict workers' rights in this country. A free labor movement and the right of workers to choose whether or not they will be represented by unions in collective bargaining is the best guarantee we have that all workers will be adequately represented in government and at the workplace.

I believe there are many misperceptions about government and about the labor movement, and unless we dispel those misperceptions, this country will pay a stiff price. It is true that, in simpler days, we succeeded with a simpler government. But we shouldn't romanticize that era.

The successes we have achieved in protecting workers were not without great cost, and the course of our development did not always run smoothly. Many of those who labored in our mines, on our farms and in our factories to build the prosperity which we now enjoy were

never permitted to share in those benefits. Many were afforded a vision of the "Promised Land," but they were never permitted to enter. The poor, the disadvantaged, minorities, women, children and successive waves of immigrants who came to our shores in search of a better life often became the victims of the system rather than its beneficiaries.

These inequities became a source of social unrest and even violence. Labor organizations were formed to serve the interests of those who lacked the bargaining power to achieve their just aspirations. However, these organizations were at first not accepted as legitimate channels for worker protest. Industrial strife continued and intensified. If we had failed to deal with this problem, it could well have threatened the very benefits which our new industrial order had brought about.

In the 1930s, this nation came to the realization that there must be a better way to deal with industrial strife. Congress enacted the National Labor Relations Act,⁴ which sought to substitute free collective bargaining for the industrial strife of the preceding era. Over the years, this law has been amended and modified, but its basic structure remains intact.

The enactment of the NLRA in 1935 was the culmination of a century-long struggle over the rights of workers to join unions of their choice and to engage in peaceful collective bargaining. The system of collective bargaining promoted by this statute is one of the finest social inventions of the twentieth century. It has moderated the harsh, often brutal, consequences of the Industrial Revolution and enriched participatory democracy by providing millions of American workers an opportunity to have a direct voice in setting their own wages and working conditions.

Besides maximizing opportunities for worker self-expression, the NLRA has proven to be of considerable benefit to the public as a whole. The Act lays down fair rules for the conduct of organizational and recognition activities. This has served to bring order and stability to the conduct of labor-management relations. Before the NLRA, such matters were too often settled by protracted, bitter, and sometimes violent industrial strife. Such disputes not only hurt the people involved but also undermine the fabric of our society.

This is not to argue, of course, that collective bargaining is not without its limitations, because there are many limitations; that is one of the reasons that the collective bargaining system has to be supplemented by other devices. To mention a few things that I think we have

4. 29 U.S.C. §§ 151-169 (1976) [hereinafter referred to as the NLRA].

to grapple with in order to make the collective bargaining system more effective and improve it: First, there is no guarantee in the bargaining system that whatever the public interest is determined to be will be protected. This is a particularly serious problem at a time when we have to be concerned with inflation, for example, and to be sure that the outcome of the bargaining process doesn't damage the whole society. We also have to be concerned about protecting the workers from the union itself, and from their own organization; that's the reason we have defined the rights of members of unions and one reason that we have applied the anti-discrimination laws to unions as well as to companies.

There is also a problem of coverage, because many workers are not covered. Two groups today cause the most question with respect to coverage. First, there are state and local government employees.⁵ Federal employees have been covered and now have a law—not the National Labor Relations Act—but the Civil Service Reform Act, Title 7,⁶ which was passed during the Carter Administration. The other main excluded group tends to be very low-wage workers, agricultural workers especially, who could benefit from collective bargaining in some cases, but who are not covered by the National Labor Relations Act itself.⁷

Another troublesome area for collective bargaining is the scope of the bargain itself. There are many important issues which cannot be resolved through collective bargaining and cannot be resolved by the parties to collective bargaining. That means that somehow other mechanisms have to be put in place in order to resolve those problems.

Tripartite committees of various kinds can help with that. We experimented during this administration with tripartite committees in the steel industry. The first problem that could not be solved by the parties was the problem of foreign imports. Therefore, unless the government was involved there, there could be no solution.

We also had a number of construction tripartite committees. In fact, the first one was in Chicago; and now there are six of those. We tried to resolve the basic problem of seasonal unemployment, a prob-

5. Section 2(2) of the NLRA, 29 U.S.C. § 152(2) (1976), provides:

The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any State or political subdivision thereof.

6. Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified in scattered sections of 5, 10, 15, 28, 31, 38, 39, 42 U.S.C.).

7. Section 2(3) of the NLRA, 29 U.S.C. § 152(3) (1976), provides:

The term "employee" . . . shall not include any individual employed as an agricultural laborer.

lem that the parties to collective bargaining themselves could not resolve. We had a tripartite committee in the coal industry because one of the reasons that we had the very long, 111-day coal strike during 1977-78 was that the parties were trying to settle through collective bargaining the wildcat strike problem, which was the kind of problem that could not be resolved through collective bargaining. A tripartite committee worked with the parties in that industry and helped solve some of the problems they could not solve, and, in that process, strengthened collective bargaining.

We had also established a tripartite pay advisory committee to deal with inflation problems which, I think, was successful in dealing with the problems it was designed to handle. It didn't prevent inflation, but the main reason for that is that inflation is caused by factors beyond the control of the committee itself. There are an endless number of problems, like the problem of declining productivity, which require this tripartite approach to problem-solving. I think that a lot of experimentation needs to take place in that area in order to overcome the defects of the collective bargaining system itself.

We have, as a result of these defects, established and strengthened other legal safeguards intended to protect the legitimate interests of American workers. We have enacted laws to protect workers against discrimination on the basis of their race, religion, national origin, sex or age. Basic minimum wage standards have been provided. Income and other protections have been enacted to assist the unemployed, the poor, our retired citizens and those who experience work-related medical problems. We attempt to protect workers against the perils of occupational diseases and injuries. We provide opportunities for job training and public service work for those who are unemployed. We have enacted a variety of other laws to assure fair treatment for those with special needs.

All of these other mechanisms, regulations, the tripartite committees and the market can be used effectively to make the collective bargaining system work better; but they are not substitutes for it. It's unfortunate that relations between labor and management in the private sector have become more polarized in recent years. The labor movement was put on the defensive as it tried to keep its status and position in society and industry from eroding further. This polarization tended to limit the ability of many parties to try new approaches to dealing with common problems at the workplace.

This polarization was perhaps even more evident in the political

arena. The political stalemate that developed between business and labor made it almost impossible to move any type of labor legislation through Congress, whether supported by labor (*e.g.*, labor law reform) or business (*e.g.*, repeal of the Davis-Bacon Act or enactment of a flexible minimum wage). Policy development on labor issues, therefore, has recently been at a standstill. Both labor and management have been strong enough to block efforts by the other (or by federal officials) to initiate changes, but neither has been able to forge a broad enough coalition to make positive changes in labor legislation.

With the election, it is possible that this stalemate may be broken, but an assault on worker and union rights and protections is hardly a remedy for our economic problems. Indeed, a starting point for resolving those problems should be the recognition that a strengthened labor movement, coupled with innovative and less adversarial labor-management relations, is a key to improving our productivity.

Viewed from a broad perspective, productivity is not the simple result of quantitative changes in capital or other physical factors. Productivity is the product of all human interaction. It results from such "intangibles" as national will and mood, the nature of relations between different groups in society—workers, management and government—and institutional behavior, including the role of the government.

Poor labor relations have often been mentioned as a cause of reduced productivity growth. In our traditional framework, we measure industrial relations by the number of work stoppages. However, in terms of total impact on the economy, the effect of strikes is minimal, averaging only about .2% a year.⁸

More important in terms of productivity performance are the general rules defining relationships between labor and management, many of which are not readily or easily measured. Furthermore, the traditional approach focuses exclusively on the productivity losses from bad labor relations. It ignores important potential productivity gains that could result from better labor-management relations.

The traditional assumption of economic analysis in the United States is that regulations, strikes and behavioral factors can reduce productivity, but can do very little to increase it. This asymmetrical view

8. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 2070, HANDBOOK OF LABOR STATISTICS 415 (1980) [hereinafter cited as LABOR STATISTICS]. Tentative figures for 1979 show that only .15% of total estimated working time was directly affected by work stoppages. However, this figure does not reflect the secondary effect such stoppages have on other businesses. See Fullerton, "Total Economy" Measure of Strike Idleness, 91 MONTHLY LAB. REV. 54 (1968).

is due to the static assumption that productivity is the consequence of changes in factor proportions, as well as the assumption that competition forces all companies to operate at the peak of efficiency. This bias in our analysis probably is one of the reasons that, relative to other industrialized countries, Americans have devoted little attention to process innovation. This is particularly true if you compare the United States to Japan as well as to Germany, but especially to Japan.

Recent research by labor economists suggests that good labor-management relations pays substantial productivity dividends. These productivity gains are realized through a variety of mechanisms that affect work force efficiency and improve channels of communication and cooperation: increased managerial efficiency and quality of the work force, lower quit rates, reduced absenteeism, better training, improved motivation and morale of workers, labor-management cooperation and industrial stability. For example, there is no clear understanding of why you find this result, but there have been a number of studies made which show that if you compare union and nonunion situations, productivity is on the average twenty to thirty percent higher in union firms than in otherwise comparable nonunion establishments.⁹

It should be noted, however, that these estimates do not mean that unionism always increases productivity. Unionism does not necessarily translate into good labor-management relations. Indeed, a study of industrial relations in the bituminous coal industry found substantial productivity losses as a result of a deteriorating labor climate in union mines in the late 1960s and 1970s,¹⁰ which apparently has been reversed by better labor relations in recent years.

Since significant portions of the nonunion sector also exhibit good industrial relations systems, the actual productivity gain from effective industrial relations is much higher than the measured twenty to thirty percent union advantage, given the diffusion of effective labor relations practices into the nonunion sector.

In summary, the evidence suggests that a potentially important avenue for improving productivity in the 1980s may rest with a strategy that focuses on improving labor-management, and labor-management-government cooperation. These programs already constitute an impor-

9. Brown & Medoff, *Trade Unions in the Production Process*, 86 J. POL. ECON. 355, 367-68 (1978). See also S. SLICHTER, J. HEALY & R. LIVERNASH, *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT I* (1960); Clark, *The Impact of Unionization on Productivity: A Case Study*, 33 INDUS. LAB. REL. REV. 451 (1980).

10. COMMERTON, FRIEMAN & MEDOFF, *PRODUCTIVITY AND INDUSTRIAL RELATIONS: THE CASE OF BITUMINOUS COAL* (1979).

tant new trend in United States industrial relations, a trend that I hope continues to grow because we have a lot of room for improvement through processes. I think we are moving in the right direction, and that's why it's disconcerting to hear recent rumblings about anti-union moods and the plans to roll back and eliminate government programs which also have helped improve labor relations. These plans seem to be based on shortsighted analysis and again on the idea that government protections are either ineffectual or unnatural.

For example, we are told that Davis-Bacon is inflationary. But there's no real proof that is so. True, we know that if you eliminate Davis-Bacon, you lower wages, but what is the overall effect? The system we have has given us a pool of some of the most highly-skilled workers in the country, built up over a long period of time. Davis-Bacon is a major element of stability, attracting workers into that pool, making it attractive for them to undergo training of three, four or five years in apprenticeship in order to gain those skills. The questions that you have to raise are: If you did away with the Davis-Bacon Act and depressed those wages, would you still have that system? Are the wages of construction workers so much higher relative to people with comparable skills that you would cause people not to go into the construction industry if the wages were lower? And what effect would that have on productivity?

If we are to improve productivity, then we must strengthen our government programs by eliminating those that have outlived their usefulness, improving the others through simplification and concentrating on important, rather than trivial, objectives. And while that goes beyond federal law, as I'll discuss in a moment, one law would certainly help: labor law reform.¹¹

I believe that labor law reform would have helped improve the national labor system that we have now in two ways: One, by stiffening the penalty so that calculations could no longer be made that it was cheaper to disobey the law than to obey it; and two, by improving the processes in order to prevent legal maneuvers that made it possible to delay workers' rights under the law. I know that's a risky statement to make to lawyers because there is a lot of business for lawyers in those

11. H.R. 8410, 95th Cong., 1st Sess. (1977) would have sped up NLRB processing of representation elections and unfair labor practice charges and increased penalties for unfair labor practices; the bill provided for double back pay awards to wrongfully discharged employees and empowered the government to bar flagrant violators of the labor laws from receiving government contracts. For an account of the struggle over H.R. 8410 and its eventual demise, see XXXIV CONG. Q. ALMANAC 284-87 (1978).

delays, but I don't think it improves the labor relations process to make it possible for nonsubstantive delays to take place. You can always argue, of course, about what is a "nonsubstantive" delay.

If we look to the future, the question we will be concerned with will be well beyond the federal law. President-elect Reagan and his policymakers face a major political choice as we enter the 1980s. They must decide whether to expand the social utility of collective bargaining and actively seek to improve it and make it more compatible with other labor policy objectives or to allow it to remain and continue to erode and decline in importance and perhaps in effectiveness. I think the consequences of these two alternatives are very important for the country. Efforts to weaken the collective bargaining system by ideologically-inspired opposition to unions in collective bargaining are likely to cause the labor movement to put up more defense and a negative outlook.

Furthermore, that approach is likely to produce a greater separation and potential conflict between the policies that regulate industrial conflict and promote industrial peace and direct efforts to modify outcomes and effects of the system to make them more responsive to public concern. In other words, it makes these tripartite approaches to problem-solving more difficult. I believe the alternative strategy would reverse this trend and explore ways for better utilizing the industrial labor system to help achieve national labor policy objectives.

I think it's important, however, for us to learn from our mistakes about regulations. I don't think that we can assume that regulations can solve all our problems, either. I think an area where we learned how to try to better relate the collective bargaining system with regulations is in occupational safety and health. We will never solve the occupational safety and health problems of workers through regulations. We will simply never have enough regulators. You can inspect a job today and workers can get killed on it tomorrow. Therefore, the direction in which I think we need to move is towards giving workers on-the-job responsibility and power to work with management on the job to regulate their own safety and health conditions. We have some experiments under way which I hope will continue in order to deal with those problems.

Let me conclude by saying that I believe the labor policies developed over the last fifty years, especially collective bargaining and growth of a free labor movement, are essential to protect workers and promote political, economic and social stability and progress. How-

ever, collective bargaining and market forces alone cannot solve all the problems confronting workers. These mechanisms have been supplemented by labor, management and tripartite committees and by laws and regulations, each of which has advantages and disadvantages.

We must continue, through a process of experimentation, trial and error, to improve these mechanisms; but we should not let problems with any one of them lead to the conclusion that one should be abandoned in favor of exclusive reliance on the others. The viability of collective bargaining will depend heavily on public support and understanding and on the ability of this mechanism to adapt to other decision-making processes as they attempt to grapple with depressing problems confronting American industrial relations during the 1980s. These problems include the following: inflation, the internationalization of the American economy—making rules for fair trade and international labor standards much more important than they have been—immigration (legal and illegal), improved worker participation and the quality of working life, improving productivity, dispute settlement in plant closings and economic dislocation. I believe the basic principles underlying our collective bargaining policies are sound and that this mechanism will continue to be an important component of our labor system.

The rise in the 1970s of aggressive employer strategies to suppress and substitute for unions has once again led to questions regarding the costs such strategies impose on society. Wherever the attention of labor and management is fixed on battles over union recognition, it will be difficult to make progress on the substantive economic and social problems.

As I said at the beginning of my talk, the fears that workers in the labor movement have about their future are legitimate. But there exists, too, a glimmer of hope, the hope that those in government will recognize that the time is gone when we can afford shortsighted, easy or unilateral decisions. Necessity may yet force us to discover the common good that is industrial democracy. And it is, after all, only proper that we should discover this: "Industrial democracy," Supreme Court Justice Louis Brandeis once noted, "should ultimately attend political democracy."¹²

PROFESSOR MALIN: Thank you very much, Mr. Secretary.

12. *Quoted in THE WORDS OF JUSTICE BRANDEIS* 99 (S. Goldman ed. 1953).

We are privileged to have a very distinguished panel with us today who will offer their comments on the Secretary's address. At this point, I will ask each of the panelists in turn to step to the podium and offer some formal remarks. Following those formal remarks, we will have an informal panel discussion, and will open the floor up to questions from the audience.

Our first panelist today is Lawrence Cohen. Mr. Cohen received his Bachelor's Degree from the University of Michigan and his law degree from the University of Chicago. From 1962 until 1966, he was an attorney with the National Labor Relations Board, and since 1967, he has been a partner in the firm of Fox & Grove, specializing in representing management interests. He is an arbitrator affiliated with the Federal Mediation and Conciliation Service and the American Arbitration Association; and he is an adjunct member of the faculty here at Chicago Kent College of Law. Mr. Cohen.

MR. COHEN: I don't know if these are formal remarks, and I have been told that the reason I am speaking first is because my name begins with C. I think the real reason is because as a labor lawyer representing management, I have more reason to disagree with some of the statements that were made by the Secretary than some of the other speakers.

I have two major disagreements with the Secretary's comments. I would agree that there has been increased polarization between labor and management in recent years. I think, however, that (although I don't profess to speak for all management) most management does not take issue with the fact that there should be a viable labor movement in this country or that there should be a viable labor law in this country. Where we disagree is that under our labor law the basic choice should be with the workers. The employee should be entitled to make a free choice as to whether he or she wants to become represented or not represented. I think that when we talk about labor reform, which I would prefer to call union organizational reform, we should realize that the thrust of what Congress attempted to do in the last administration was to make it easier for unions to organize employees.

The reason that there was a desire for labor reform and a bill brought before Congress was, as the Secretary indicated, because labor was concerned about losing its status and losing its place, and they were losing elections. More and more employees were deciding year in and year out that they didn't wish to be organized. As a result, a bill was

proposed which would have simplified the process.¹³

Now, you will hear much comment that the bill wasn't designed to protect against delay; it was designed to impose harsher penalties. I submit that the real thrust of the bill was to hasten elections to a point where the workers would not hear both sides of the story, to have elections where the unions were given access to the workplace, to give penalties such as treble damages to anyone who was suspected of being terminated during an organizational campaign. The real thrust of the bill was to make it easier for unions to organize. That was why there was a filibuster and that was why there was polarization.

Now, the unions may not have liked the fact that management didn't want to get organized, but that was not the source of the problem.

There is a second area where I would disagree with the Secretary. Bargaining, where there is a represented work force, is not an institution that needs to be overhauled. What needs to be overhauled perhaps is government interference with the free collective bargaining process.

When you talk about something like the Davis-Bacon Act, what you are talking about is a law which creates artificial wage rates and prevents the marketplace from taking effect. When you talk about the minimum wage, which is increasing each year, you are talking about, again, the government dictating what should be the result of collective bargaining. If there is anything that's made the United States different from other countries of the world, it's the fact that we have a free collective bargaining system without government regulation. To the extent that the government becomes involved in that process and dictates what should be the result of collective bargaining, then what you have is a situation where you do not have free collective bargaining. To the extent that the government makes it easier for unions to organize and indicates that a labor movement is a necessary part of the working environment, then the government is also interfering in the process. And what the government has done by labor law reform is to cause there to be the very conflict which the Secretary professes to dislike—namely, a conflict over recognition of rights.

I submit that we have a law that's now been on the books for many years. There are many things that management certainly doesn't like about the law, but if we are going to have a situation where labor and management can get together and really work together for greater productivity and the other legitimate goals that the Secretary has spoken

13. H.R. 8410, 95th Cong., 1st Sess., 123 CONG. REC. 23712-14 (1977).

about, then I think it can be achieved with less government interference and more of an impetus and a desire to try and influence the government into giving the employees the choice as to whether they wish to be recognized.

PROFESSOR MALIN: Thank you, Mr. Cohen.

Our next speaker, Jim Freeman, brings to this panel a wealth of experience as a union organizer. He has just recently assumed the position of Director of Region One for the AFL-CIO. He has been a member of the AFL-CIO field staff for some thirteen years. Prior to coming to Chicago, he was area coordinator for the Industrial Union Department in Mississippi. Mr. Freeman.

MR. FREEMAN: I am glad to be with you. I do have some comments, and I agree ninety-eight percent with what the Secretary of Labor has had to say to you. Before I make those remarks, I would like to make a public statement concerning him.

The Secretary of Labor in years past has been, as certain labor people term it, the "anti-Secretary of Labor." We just didn't have a man who was conscious of the labor problems and who came to grips with them. And in Ray Marshall, we found that man. We have to say good-bye to him, and I want to say to Ray that you're a jewel in our eyes, and we thank you very much.

Mr. Cohen used the term "viable labor law." I think that to answer that statement you need to look to Deering Milliken in Darlington, South Carolina where they closed the plant twenty-four years ago to keep the union out. The employer admitted that's why he closed the plant. The plant is closed today.¹⁴ The employees have never been made whole for that abuse; so how viable is the law?

The term "suspected" was used when Mr. Cohen was speaking of penalties within the proposed labor law reform bill. He said penalties would be imposed on employers who were suspected of violating the law, and, of course, the law does not penalize a person because he is suspected of violating the law. Only those who were found guilty of violating the law would have received that penalty.

On the question of subminimum wage,¹⁵ I think we need to ask: Is

14. In *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), the Supreme Court held that Deering Milliken, the Darlington Mill's owner, did not violate § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3) (1976), by closing down the entire enterprise after the union organized its employees, even if the total shutdown was motivated by anti-union animus.

15. See, e.g., *Minimum Wage Controversy*, DUN'S REV., Oct. 1980, at 114.

it going to create jobs? I don't think so. We are talking about the people who work in McDonald's or Burger King, where the real competition is today. A subminimum wage is not going to create jobs. What it's going to do is displace workers who are marginal anyway, who may be disadvantaged because of economic and educational backgrounds, who are going to suffer greater hardship because their age is going to end up knocking them out of another job.

I think when you consider the question of labor law reform, you have to ask yourself, "How strong are unions really in this country?" We had a reform package that was sorely needed. I think we made a tactical error, whoever made it—I didn't—but labor put too much emphasis on J.P. Stevens and probably Deering Milliken, when there were abuses—flagrant abuses—in every congressional district in this country. That's what we tried to do in the South where I was working on labor law reform, to pin violations down to that particular area and take the focus off of one lawbreaker. J.P. Stevens has been penalized by allowing the union to go into the plants.¹⁶ But that was a special remedy designed for that particular case when, in fact, we should have had equity for all the workers in all those situations that had developed.

I think really, to be frank with you, labor has reached a point of sophistication, and that is dangerous. We made gains originally out in the street. We may need to get out in the street again.

The Secretary did a beautiful job of researching and giving you the chronology of how the labor law developed, that is, the original labor law. To me, it was to create industrial peace and, as he said so well, "to protect the public interest and workers." And I think everybody needs to realize why we have unions in the first place. It wasn't because some people in Washington got together and said this is a good idea, this needs to be done. It was done because people were in the street.

There were spontaneous strikes, nasty situations, and I am sure we can all agree that's the worst kind of situation that anybody could be involved in. You need to bear that in mind when you consider the question of what should be done with the law. Should we chuck it?

16. In *J.P. Stevens & Co. v. NLRB*, 106 L.R.R.M. 2145 (4th Cir. 1980), the Fourth Circuit took note of J.P. Stevens' "long and substantial history of repeated significant violations of the Act," *id.* at 2147, and referred to its "unrivaled willingness to violate the law." *Id.* The court approved the extraordinary remedies fashioned by the NLRB, which included a company-wide cease and desist order, union access to plant bulletin boards and an opportunity for the union to attend and respond to any company speeches concerning unionization.

Should we let the labor movement become neutralized to the point of being ineffective, or should we just can the whole thing? Some very serious considerations need to be made.

I think in the future, when you start considering the question of unions and representation situations, you are going to see the union organizer analyze the situation and consider striking for recognition, like I've done already and will continue to do, and will be encouraging the staff of this region to do.

If you have the people, you don't need the law. When the law is ineffective to the point of circumventing your ability to organize, then you don't need the law.

When you are striking for recognition, you work a hardship on the employer, but I think you are going to see a lot of that, and you are going to see people back out in the street again before you see the industrial peace that we have been striving for for thirty-five or forty-five years.

The solution to the major problems in this country, as I see it, is to find a method to implant a conscience into the multinational companies who have no true allegiance or feeling to an area or their employees. They think nothing of going South; they think nothing of going to the islands; they think nothing of taking our union people's pension funds and investing them in foreign operations and sucking up our jobs with them. It's a serious problem, one we need to come to grips with.

MR. MALIN: Marvin Gittler received his Bachelor's Degree from Syracuse University and his law degree from the University of Chicago. Formerly an attorney with the NLRB, he is currently a partner in the firm of Asher, Goodstein, Pavalon, Gittler, Greenfield & Segall, a firm that specializes in representing labor organizations. He is a past chairman of the Labor Law Committee of the Chicago Bar Association and is also an adjunct member of the faculty at Chicago Kent. Mr. Gittler.

MR. GITTLER: Historians suggest that when Christopher Columbus left the Old World, he did not know where he was going; when he got to the New World, he did not know where he was; and when he returned home, he did not know where he had been; and he did all of this with government money.

The attitude that government interference is good or bad, I think, is a reaction to the times in which we live. These times are signified by, among other things, the rhetoric of signal words, rhetoric such as "bus-

ing,” rhetoric such as “reverse discrimination,” rhetoric such as “government interference.”

The government is a part of our culture and of our society, and as such, it has a role. I agree with the essential point, if it is the Secretary’s essential point, that the political decisions that will be made this year and hereafter will evolve into whether or not the system should be developed and refined or abandoned.

I do not necessarily agree that there is the kind of separation and inconsistency between what is called the “free market,” on the one hand, and collective bargaining on the other hand. The free market notion has become one of those signal words with a meaning inconsistent with collective endeavors.

I do not agree. If one wanted to use a free market analysis, one could conclude that labor is a resource and labor has the right to sell itself through an effective spokesman. That is all that a strong labor movement means. That is all it has meant in this country.

To suggest that the limits on the collective bargaining system now are inadequate, is not, as the Secretary pointed out, to suggest that the system ought be abandoned. It is, I think, an inducement to refine and improve the system. Of the four points mentioned by the Secretary, I have had great difficulty in determining the role of the so-called public interest at the bargaining table. I cannot suggest to you that there is a role for the public interest at the bargaining table.

If we view the collective bargaining system as adversary only in the sense that we view the judicial system as adversary, an adversary relationship is not a bad thing. To strive for perfection, I think, is wasting resources. We will not attain perfection.

I believe that as to the scope of the National Labor Relations Act, which remains the backbone of our labor policy, I would agree that the maximum coverage of that law would be designed to bring more within the law. To exclude governmental employees at the beginning of the decade of 1980 is, to me, an economic and social absurdity. One-third of the work force in this country is now employed by governmental employers at some level. To deny to these individuals the right to participate in decisions affecting their work life is a social as well as an economic absurdity.

Perhaps a definition of what public interest is will help to define the role of the public interest at the bargaining table. I cannot today suggest that definition. It’s something that the audience may consider.

To protect the workers from the union as an institution, we have

developed in this country a unique system of law, ranging from the statutory to the common law, so-called duty of fair representation. I know of no other economic entity except for the labor movement in this country that has been subjected to as much judicial intrusion and regulation and yet has survived.

The labor movement, like the phoenix, throughout history has risen from its ashes. It will occur in this country as well. I think, in agreement with the Secretary, it would be shortsighted to abandon a system which frankly has served well.

In response to Professor Cohen's remarks, perhaps the notion of signal words is an effective response. The fact remains that labor law reform was not defeated because of any fear of statutory organizing. The major funding in opposition to the labor law reform came from those segments of industry which are already organized. It was the attempts of that proposed legislation to eliminate the delays in the exercise of the workers' rights to select a representative that led to the downfall of labor law reform. It was the provision of that statute which gave teeth to the law which led to the downfall of that statute.

To suggest that the statute, which did no more than to effectively insure that *NLRB v. Gissel*¹⁷ would be viable in the future, is ineffective as a union organizing technique is merely to buy the signal words of a management lawyer.

Government interference with collective bargaining, which is so repulsive to management, in my eyes stands on no different level than government inducement to companies to improve their own so-called profitability. I believe we ought to recognize that the most valuable resource that this country has is, has been and will remain its labor, its people. The collective bargaining system does no more than create effective spokesmen for that segment of the economy. Whether on a political level or from a narrow management point of view, I think it will not serve the interests of this country to abandon a system which has worked well and has worked for many years.

I would also point out to Larry Cohen that the Davis-Bacon Act, which is causing so much fuss, has been on the books for fifty years; and we have done very well with it, creating what is recognized as the most skilled group of construction workmen in the world. That did not happen by chance, and it did not happen by management largess. It

17. In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court held an employer who commits serious unfair labor practices tending to undermine the election process may be ordered to bargain with the union without an election being held.

happened because of an understanding that there must be some regulation within which the parties can operate.

The realities, nevertheless, are confronting the labor movement. We have heard the rhetoric of the new administration; we must be prepared to deal with it. The story is told of a professor of law who was traveling through Lake County, Indiana. He was a professor not from this school, but from the University of Chicago. A man who was a legend in his own mind. While traveling through Lake County, Indiana, he was stopped by a state trooper who gave him a ticket for speeding; and as was the practice, he took the professor in front of a local justice of the peace. After the state trooper stated his case, the professor asked the justice of the peace whether he got any remuneration if the professor got a ticket. The justice of the peace explained that under the practice of the area, he would get a portion of the fine. Whereupon the professor moved to dismiss the complaint against him, citing the case of *Tumey v. Ohio*,¹⁸ which stated the proposition that an individual who had an interest in the outcome of the proceeding ought not be the trier of fact.

When the motion to dismiss was presented, the justice of the peace looked at the professor and said, "What court is that from?" The university professor said, as only a university professor can say, "*The United States Supreme Court*." The justice of the peace said, "Where is that?" The professor said, "Washington, D.C." The justice of the peace said, "This is Lake County, Indiana—fifty bucks."

PROFESSOR MALIN: Thank you, Mr. Gittler.

Our fourth panelist, Richard Laner, did his undergraduate work at the University of Illinois and Northwestern University and received his law degree from Northwestern. He is a partner in the firm of Dorfman, Cohen, Laner & Muchin, specialists in representing management. He has chaired the Chicago Bar Association's Labor Law Committee and the Chicago Association of Commerce and Industry Committee for establishing a collective bargaining ordinance in Chicago. He is a member of the Business Advisory Council at Northwestern University. Mr. Laner.

MR. LANER: Thank you very much.

Although I would like to join the battle over labor reform and respond to the mini revival meeting that we had from Jim, I think I

18. 273 U.S. 510 (1927).

would rather move on to areas more within the jurisdiction of the Secretary of Labor.

I think there are three significant issues that the Secretary talked about: unemployment, productivity, and the impact of inflation on the labor movement and the federal labor laws. Some observations ought to be made about those subject matters.

We ought to recognize that the work force and people's attitude toward work, I think, are going through some significant changes. We are told that the projected work force is going to grow at a much slower rate in the '80s. In the last ten years, it grew at about two and a half percent a year. In the next ten years, growth is projected at about one and a quarter to one and a half percent per year.¹⁹ This means fewer people are going to enter the labor market, which will have an impact on productivity.

Further, a recent Harris Poll showed that American workers today want to trade current and future income for more leisure time, longer vacations and sabbaticals.²⁰ There is a different work ethic, a different lifestyle. Yet, from my experience, unions are not interested in trading wage gains for more free time. By and large, they want both, and I don't think that industry today is geared to give them both. The semi-skilled and skilled labor shortage in American industry is appalling, and to grant more free time is not something that's going to be quickly agreed to unless there is some countervailing force to provide for that. We are going to see a conflict, I believe, on that subject.

Productivity is down, or certainly not growing at a very great rate. And, as the Secretary noted, there are a lot of reasons for that. I think that government regulation and the extent of it is one of the reasons why productivity is down. OSHA is cited as a prime example. I reject any serious argument that OSHA ought to be scuttled, but I do think that there is a need for less cumbersome bureaucratic administrative regulations that cover the most insignificant items, while hazardous industries are not getting the proper utilization of the Department of Labor manpower. Businesses with good safety records are audited as frequently as businesses with bad safety records, and that doesn't seem right.

We are also dealing with a change in employee attitudes, including employee attitudes towards labor relations. I think that, too, has an impact on our low productivity. There is the recent study that the Sec-

19. See LABOR STATISTICS, *supra* note 8, at 147.

20. DAILY LAB. REP. (BNA), July 31, 1980, at A-1.

retary pointed to that union shops have greater productivity, but an important factor was left out in his remarks. That is the fact that union shops have lower profit margins; and with higher productivity and lower profits, we do not see the advantage in more utilization of capital and growth that we need in this country.

Overtime has become a dirty word. People feel that working forty hours is enough, and when there is a need because of customer demand to work more or to work harder or to work beyond that forty hours, we are getting a rejection by the workers. We have recently seen a major manufacturer, International Harvester, shut down for many weeks primarily because they simply wanted workers to work a reasonable amount of overtime to satisfy customer demands and the workers refused.

The Secretary refers to some changes that have to be made in the attitude of industry toward the American worker, and I agree with him. In Japan, productivity is moving forward, while in this country it is not. Why? In Japan, employee input and participation in decisions are welcomed and encouraged. I don't think management does enough of that in the United States.

One subject that was not mentioned by the Secretary in much detail, I think, is worthy of a great deal more discussion; and that is, we now have an epidemic of undocumented workers in this country illegally. And I question, why not? It's the best place to work. There certainly are much greater wages and benefits and working conditions here than wherever these people come from. And, as a practical matter, nobody is complaining because there are simply not enough people to fill the so-called menial jobs that many of these people fill.

So, frankly, it seems to me that we ought to consider changing the law to get closer to reality, to consider the possibility of legalizing the present undocumented workers, to possibly open up the flow of more of them with stricter controls and sanctions for those employers who violate the law.

The American labor movement has not been very successful in recent years in organizing, as the comments you have heard show. Twenty-five years ago, a third of the work force was unionized. Now, if we believe the statistics, it's only around twenty percent.²¹

As a management representative, I don't believe that we should avoid having a strong labor movement, but I don't think unions are

21. See LABOR STATISTICS, *supra* note 8, at 412 (in 1978, 19.7% of the total work force was unionized).

doing the job. The unions argue that this is because of management union-busting. Management, I think, says that they are simply communicating better the choices between union or no union. But whatever the reason, I think the real question is whether the labor movement is going to continue to play a significant role in the future. Unions seem to be, and maybe properly so, more intent on achieving their goals in Congress than at the bargaining table, whether we are talking about a national health program or pension reform or those job security issues that are tied into plant shutdowns and relocations.

Yet, more and more employers are substituting capital for people because it's so darn frustrating for management to have to continuously fight the unions' contrary efforts to save jobs and not try to help in increasing productivity and in reducing unit costs.

The labor movement ought to face up to another fact, and that is, if they have any future, they ought to start giving greater recognition, as industry is doing, to a place in the power leadership for blacks and women and Hispanics. I think labor unions need to do a great deal more in their own affirmative action programs.

Finally, we keep waiting for the unions to change their style and go where the action is. The blue collar jobs are declining. Service jobs and the public employment sector and white collar and technical workers are the growing trend today.

But the unions haven't done enough, I think, to relate to this new work force and this new attitude. The same union representative is still organizing, but organizing a different kind of person. And I think that makes management's job easier among those employers who want to remain union-free.

I suppose the answer will be like the situation in industry. There will be more mergers of unions and a better allocation and utilization of union assets, and maybe one of the real sleepers on the horizon is the tremendous importance that pension plan assets have in our future. The real power, perhaps, is in the likelihood that unions in the future are going to ask for a greater role in the investment of their pension funds in our economy. I think that's where the impact is.

The new administration promised less government, and I suppose the mood of the country is to that effect. That's probably good, we would all agree. But since, for the last forty years, we have had a tidal wave of government regulation in every place in labor relations, I really expect that—other than a few streamlined regulations in some of

the administrative agencies—the future of the labor movement is going to be to want and to get more federal labor law and federal governance.

SECRETARY MARSHALL: Let me make my responses as briefly as possible in order to give more time to hear from you.

With respect to Mr. Cohen's comments, obviously we disagree on what labor law reform was all about. I think that we do agree on what it ought to be about: that the choice ought to be the workers' and not management's.

We passed a law in 1935 to make it possible for workers to organize and bargain collectively or to refrain from organizing. But that choice ought to be theirs, and what we did in that law was to make it possible for the workers to get the information to make the choice. And that's what we were trying to do: to create a situation with labor law reform that would make that possible and also to make the penalties sufficiently strong so that employers would not illegally deny workers their rights under the law.

Now, some employers have found it cheaper to disobey the law than to obey it; most don't do this, but what happens if some do is that you undermine the support for the law. We also disagree on whether you need legislation to supplement the market. I agree completely that the government ought to stay out of collective bargaining as much as possible. That was the main policy of the Carter Administration. We tried to strengthen collective bargaining by staying out of it except for national emergencies and the mediators and conciliators. We, therefore, involved ourselves possibly less than any administration in recent times. We did get involved in two cases: One was the coal strike and one was the railroad strike that became nationwide after it started from a local incident.

We didn't pass the Davis-Bacon Act. But we did fight off repeated attacks—nine times, as a matter of fact—on that law. The basic reason is that we do not believe that there is a free market for labor when the government can use its vast economic power to depress wages. And that's what Davis-Bacon was designed to prevent. Government is such a powerful force that you don't get the economists' condition for free competition; and if you don't have that, it would be very easy, and even inviting, for the government to bid wages down.

But the danger is that if government can do that it will upset a system that has made it possible for us to maintain a fairly high level of productivity in the construction industry. So I think that Davis-Bacon

is necessary because the market cannot accomplish all of these things in the labor market.

We need minimum wage statutes for similar reasons. The minimum wage is as much a moral and ethical question as it is economic. There are about five million people at the bottom of our economic ladder who are not members of unions, who have limited skills, and the only way they get adjustments in their wages is when we increase the legislated minimum. Since the collective bargaining system and the market have failed those people, I think it is necessary to have some labor standards. I agree with Mr. Gittler that it is important to recognize that you will not get perfection in these mechanisms, but that what you can do is to build in mechanisms that make it possible to continue to improve the process and to adapt collective bargaining and the regulations to changing circumstances.

One of the problems with regulations is that it's difficult to change them. I agree with Mr. Laner that we had a lot of nitpicking regulations in OSHA that didn't have anything to do with the safety and health of workers. While workers were getting killed on the job and getting exposed to toxic substances, the OSHA inspectors were out looking for split toilet seats and measuring how high the fire extinguishers were from the floor. That's the reason that we did away with those regulations and we have concentrated more on the safety and health of the workers. But we also don't believe that you can solve the problem that way either.

The workers at the work site have to be given more responsibility for safety and health. I think that this is an important point to make about regulations: that regulations protect employers as much as they do workers. They keep some employers from acquiring unfair competitive advantages; and that's the basic rationale.

Now, with respect to the problem of productivity, I think regulations have played a role in declining productivity. I think it's a relatively minor role and that part of it is a measurement problem. That is to say, if you measure the impact of OSHA regulations, it was always costly to our society for workers to get killed on a job and to get cancer and to get black lung and to get brown lung, but we have not always counted that as a cost of doing business; that cost was borne by workers and the whole society. Now that we have internalized that cost of safety and health within the firm through OSHA, it looks like productivity has gone down because we now count a cost that we used to not count. But that doesn't mean that productivity has really gone down.

It could very well be that if you have a preventive health system, it's much better to try to prevent cancer, black lung, or brown lung than it is to try to cure it. Even if you ignore the important human terms, it's simply better in terms of the economics of it.

Industrial accidents and diseases cost us twenty-five billion dollars in lost work time, and if we can prevent that, then it's good business. I agree also that we can learn a lot from Japan. I think it's important to put that in perspective. Productivity is much higher here than it is in Japan, but they are closing the gap. Their productivity growth has been high. Right after World War II, it was about 35 percent of ours. Now, it's over 80 percent of ours.²² The same is true with Germany. The problem we have faced is the relative slowdown in the growth of productivity, and I think that, as I mentioned, the Japanese have been able to gain a lot more from their workers; they have more unity in the work place. But they have done some other things also. One is that their employers have tended, in the steel industry for example, to be much more willing to invest in their own industry. It's partly because our people tend to take a shorter-run view and to concentrate on profit maximizing. U.S. Steel is investing in chemicals because the shorter-run rate of return is higher. The German and Japanese companies tend to take the longer perspective and reinvest in their own industries and, therefore, stay competitive. What we need to do, and what we are trying to do, with our steel policy is to cause investment in the steel industry to happen. The other thing that Japanese employers do that I think improves productivity and makes it possible to get those recommendations from workers is to guarantee those workers a job for life. They don't adjust to trouble by laying off workers. Now, if you have that security, then you are quite ready to help the employers improve productivity as much as you can.

The undocumented worker problem is another very serious problem in this country. I don't agree that undocumented workers only take jobs that you cannot fill with people already here. I think that the ready availability of foreign workers sets in motion a process that causes employers to prefer the foreign workers to those who are already here legally, and that tends to make it more difficult for domestic workers to be hired. But I don't think you'll ever answer the question of whether American workers are displaced or whether foreign workers

22. For 1978, the per capita gross national product of the United States was \$9,644 and that of Japan was \$8,432. Japan's figure thus represents 87.4% of the United States figure. See UNITED STATES DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 898 (1979).

take jobs that Americans won't until we legalize the immigration process, and I agree that legalizing illegal immigration is one of the most important things we can do, partly because we don't know how many people we are talking about who are here illegally. The estimates vary from four to twelve million. We don't even know how many people come in each year; probably a million, but nobody knows that.

The real problem is the *fact of illegality*. Once we deal with the problem of illegality, we will be able to know more about the magnitude of the problem, rather than having a large group of people in our society, as we do now, who live outside the protection of our laws and who tend to work scared and hard.

The pension fund issue is one that unions are concerned about and are going to use more, I think, in the future. There are \$600 billion there and that's a major source of investment funds and a major source of economic power for the unions to use. Right now under ERISA, the Employee Retirement Income Security Act,²³ there is a question as to the extent to which those funds can be used.

PROFESSOR MALIN: Let's open it up for questions from the audience. Feel free to address your questions to our speakers generally or to any one speaker in particular, and let me ask the members of the panel to feel free to jump in.

SPECTATOR: I would like to ask Secretary Marshall if he thinks that the unions today should demand as a part of collective bargaining that profits should be reinvested in capital equipment and the like.

SECRETARY MARSHALL: Yes, I think they can demand it. The question is, I think, whether workers have an important interest in investment; and there is a question, of course, of whether they can get that done. It's done in other countries. The Land Organization, which is the main labor organization in Sweden, had a bargaining strategy some years ago where they would say to the employers, "We will take a lower wage if you will invest more in plant equipment because that is what we are really interested in, real wages." So I think unions will increasingly become concerned about real wages and investment. That's part of the reason that the United Steelworkers joined with us in the steel tripartite committee, for example, in developing a process that would make it possible for the steel industry in the United States to be

23. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified in scattered sections of 5, 18, 26, 29, 31, 42 U.S.C.).

more inclined to invest in itself. That's what the refundable target of tax credit is all about, which is what the unions support.

So I think it is a thing that unions are likely to be concerned about. I doubt, however, that we will see much movement during this decade to the kinds of things you see in Europe where, for example, in Germany, with co-determination workers serve on the board of directors in order to try to affect the investment decisions. There is a movement under way in Scandinavia to do that. I have not detected much interest among unions in this country, except for the Chrysler Corporation where Doug Fraser serves on the board of directors. That is, I think, a unique situation.

MR. LANER: I would like to mention as a management representative that I vigorously reject such a concept. I think that free collective bargaining in this country historically has grown and survived and reached the status it has because of the adversary relationship involved. It has many faults, but I think that's a great asset; and the minute there is sharing in such questions as investment at the bargaining table, you are going to have to have an entirely new national policy towards collective bargaining.

MR. GITTLER: I think the point raised generally is an excellent one. There are several reasons why I agree, however, with the Secretary's conclusion that it's not a viable proposal.

First, and technically, it would be what is considered to be a non-mandatory subject of bargaining, so that we could talk about it. But, except for the Chrysler kind of situation where there was a tie-in between Mr. Fraser's appointment and the granting of a loan, I don't think the unions could get anywhere.

Secondly, if any unions I represent made such a proposal at the bargaining table and the employer were represented by the likes of Mr. Laner or Mr. Cohen, they would have cardiac arrest right there.

I think one point was mentioned, and that has to do with the so-called ERISA question of investment of pension monies. The law as it is now stated, unfortunately, I believe, effectively precludes serious consideration of what may be the new signal word that has come out: selfish investment. That is investment of worker monies in capital projects which are going to benefit those workers. As the law now stands, that cannot be done. I think, however, that pressures are building in that limited area, and we may see some realistic reappraisal of the limits

placed on labor's use of capital. It would, I believe, take legislation, however, to do it.

SECRETARY MARSHALL: There are lawyers, in fact, working on that now because we had a question before ERISA raising that issue, that is, whether the law requires that the pension funds be used for the sole benefit of the beneficiary. The question is: What do you mean by benefit? If you invest, say, in an industry that they are employed in or only in the union's employer, is that for their benefit?

I might also note that this was one of the issues that was to be considered by the Tripartite Economic Revitalization Board that President Carter had appointed as part of the economic renewal. The unions have placed that issue on the agenda, and the other parties agreed to discuss the extent to which pension funds could be used.

MR. LANER: Mr. Secretary, your lawyers had better work fast; they only have two months.

MR. MARSHALL: Well, they can do it in two months, and it would take ten years to undo it.

MR. FREEMAN: We are right back to the question of short-term versus long-term economic outlook. That's the worker's interest, you know. Is the worker's interest served by short-term when, over a period of years, his whole economic well-being may be at stake? It's a question that the courts are going to have to look very deeply into.

MR. COHEN: I suppose I ought to get my two cents in. The difficulty in bargaining, in my experience, is that the membership interest at present is economic gain—"I want money in my paycheck today." The union leadership interest has been in things like union security clauses and contributions to pension and welfare plans. No one is paying attention to the future of the work force, what is going to happen to the company, how we are going to keep jobs and how we are going to get greater productivity. I think the difficulty is that it's a matter of the union educating its membership before the negotiation as to where its real stake is going to lie.

SPECTATOR: I would ask that the panel discuss the positive and/or negative effects on the growth of the labor movement of the possible future appointments by the new administration to different agencies and the Supreme Court.

SECRETARY MARSHALL: To show you how much I have

learned in four years, it could have a great impact, especially appointments to the Supreme Court, because those may be for twenty-five years or more. I think we can get some signals about which direction President-elect Reagan wants to go. I don't think it's predetermined because, as I mentioned in my remarks, I think he moved away from some of the harsh anti-union statements that he had made earlier, like wanting to use the anti-trust laws against unions.

The anti-trust laws already apply to unions, and, therefore, it's hard to know what you would get from that. I think that no appointments will be made to the NLRB for a while, but that will also be a signal. Whoever gets to be Secretary of Labor will make a lot of difference. It may be somebody who is sympathetic to the preservation of the institution of collective bargaining, which I hope will be the case. There have been Republican Secretaries of Labor, of course, who have strongly defended the institution—that has not endeared them to the right wing of the Republican Party—and that's part of what you have to watch: How much will the anti-union elements in the Republican Party dominate labor policy?

It is not inconsistent to say that the Carter Administration was determined to stay out of collective bargaining. However, I do not believe it's possible for the government to stay completely out of collective bargaining. I think you can stay out of the process, but we obviously have to be concerned about the outcome. In the public interest, we cannot permit the collective bargaining process to agree to illegal acts. And it's not inconsistent to say that collective bargaining cannot agree to perpetuate racial discrimination. Or, of course, the Taft-Hartley Act²⁴ was the first departure from the Wagner Act's basic approach to bargaining. Taft-Hartley says you cannot agree to a closed shop,²⁵ and that prohibition has been determined to be in the public interest. We interfered in that sense, but that is not interference with the process. That is, we are not interfering with the bargaining, but the bargaining has to take place within the framework of the law.

Another interference that was not direct, but was nevertheless an important part of the framework, helps indicate the dilemma. We had a voluntary pay standard. At first it was not voluntary. The one that is in effect now was put together by representatives of labor, management and the public, not the government; that was a standard that in some

24. Labor-Management Relations Act, ch. 120, 61 Stat. 136 (1947) (codified in scattered sections of 18, 29 U.S.C.).

25. 29 U.S.C. § 158(a)(3) & (b)(2) (1976).

sense impinged on collective bargaining. Employers and unions didn't have to observe it, but there was an agreement by the labor representatives on the Pay Advisory Committee that this is what the standard would be. Now, of course, there is a recognition that the collective bargaining process can lead to inflationary outcomes, and, therefore, to deal with inflation, governments all over the world have experimented with different kinds of income policies that infringe on collective bargaining.

The Pay Advisory Committee has recommended that the system be terminated. It was always considered to be a temporary process, but it's a problem that governments and all the industrial market economies have had to grapple with. Will you permit so-called free collective bargaining if that free collective bargaining leads to inflationary wages and price spirals? That's a tough one. I don't know anybody in the world who has been able to solve that problem effectively. Every time we think somebody has solved it, their system comes unglued. But the basic answer is that you always recognize that there are public interests which condition the bargaining.

MR. GITTLER: I should say up front, I am not so sure that I personally share the view of comparable worth as now being espoused by some administrative agencies and even some trade unionists. I see that as essentially a policy issue. But in the sense that a comparable worth pronouncement is a value judgment to be placed on particular jobs, that is no more inconsistent with collective bargaining than minimum wage, civil rights laws, or any other law, as the Secretary has said, which gives us the framework for bargaining.

SPECTATOR: Would the panel see any specific legislation coming in the next few years which is directed at management consultant firms, and what form would that take, if any?

MR. GITTLER: I would like to see the reinstatement of the Star Chamber for some of them. If the Secretary doesn't mind, one of the positive steps that we believe has been taken by the present administration, particularly the Secretary, is the announcement in the relatively near past that for the first time since 1959, the provisions of Title II of Landrum-Griffin²⁶ will, in fact, have resources devoted to it and will be enforced. The demands that organized labor is making with reference

26. Title II of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 431-441 (1976), mandates the reporting and public disclosure of various activities of both em-

to the so-called management consultant are really no more than demanding that Title II be complied with and that penalties be asserted or, at least, that some relief be given for management's failure to comply with a law that has been on the books for over twenty years. Notwithstanding the fact that our next President was at one time a union officer, as I think one commercial mentioned, I do not foresee realistically that the philosophies he has thus far espoused are going to suggest any more stringent regulations on the kind of individual that you are mentioning. I do believe that for our purposes, the solution essentially boils down to full disclosure. If we could get those facts, if the law presently on the books is enforced, we believe that with those facts, the workers will be able to make an informed judgment as to who is trying to influence them; and, frankly, that's all we have been seeking.

SECRETARY MARSHALL: I expect more to see that question resolved through mediation. I think the immediate thing will be litigation which is already in progress, as well as regulations. Then, depending on the outcome of that litigation, you might see some move for legislation; but I don't expect that to happen. I think that it will be resolved more through litigation and regulations.

MR. COHEN: The difficulty, I believe, with what you are saying is that there is an attempt by labor to blame successful management consultants for the fact that the unions are not winning elections. There are regulations on the books that do require reporting. What labor is now saying is that, "We don't like the regulations," because they enable management consultants to get away with advising employers as long as they don't actively participate in the campaigns.

What the unions want is something that says, "If we lose, there must be something illegal that management is doing to cause us to lose." But, in reality, the employees who are getting the information and finding out reasons are voting against labor.

What legitimate management consultants are doing is helping management in many cases learn how to communicate the message concerning the disadvantages of unions, the same way unions have for many years been communicating the advantages of unions. And, to

employers and labor unions. Employers are required to reveal any payments to unions and those made to individuals or groups for the purpose of fostering anti-union activity.

that extent, I don't see the need for new legislation or a need for different regulations.

MR. GITTLER: Title II also requires that labor officials report the same data that we are seeking from management consultants. What labor is seeking is merely enforcement—for the purpose of obtaining data—of legislation which is on the books.

MR. FREEMAN: You are talking about getting to the management consultant, the union-buster; and we used to call them labor consultants. What we are trying to get to is the question of their counseling and encouraging employers to break the law, and we know it happens. We have it documented, and we are trying to appeal to the Bar Association, which has what I consider to be a beautiful code of ethics in every aspect, except where labor law is concerned.

It seems to be all right to fire people. It seems to be all right to threaten them; it's almost accepted. Since I was a little boy, it's been a known fact that you can get fired for messing with the union. That shouldn't be. The law of the land is that the people are protected in their right to organize, and yet this segment of lawyers feels that there is nothing wrong with counseling and encouraging violations of the law itself. The AFL-CIO is actively pursuing this with the Bar Association, trying to get them to police themselves to stop that tactic.

SPECTATOR: I have a question for Mr. Laner. Did you suggest or are you suggesting that labor follow the example of big business in terms of affirmative action for women and minorities?

MR. LANER: Yes, it is our observation that in the hierarchy of labor, you do not have a significant representation of Hispanics, blacks and women, and that the impetus has been mostly in industry. They are a long way away from handling the job, that's for sure, in the labor movement.

MR. FREEMAN: To respond to the other question, the right wing element within the country is expecting great things to happen with the new administration; and as Dick mentioned, we have a couple of months to get our act together, and then it's all going to change.

PROFESSOR MALIN: I think we just have a couple of minutes left. What I would like to do is ask our speakers if they have any concluding remarks. Let's go to each person. Mr. Laner.

MR. LANER: I really don't—I think I said everything at the beginning, so I think I'll just move it along.

MR. GITTLER: I can't resist. If I understood the last question properly, Dick Laner is suggesting that labor take the same approach to affirmative action as big business has done. I now understand why he is a management lawyer!

In response to some of the remarks being made, it is frankly a depressing time for representatives of organized labor. I don't think, however, that you ought count us out. I don't think that the working man will be influenced by the kind of espousals I heard today from Mr. Cohen and Mr. Laner.

The notion that labor is looking in the wrong direction is belied by the facts that surround us right here in Chicago, where in this year alone, the organization of public employees and white collar workers has reached well over 10,000. One example that comes immediately to mind, of course, is the Chicago policemen.

I agree with what I consider to be the Secretary's ultimate statement, that the policies that the Reagan administration will be setting in the near future will amount to a decision either to chuck the system—which, I agree with the Secretary, would be an economic and social disaster—or to attempt to refine it. Unless that occurs, the battle will continue and I believe it will become more violent and heated, but it will continue. It will continue so long as you have working people who need an avenue of expression; and the trade union movement in this country, I believe, is the only effective and fair force to do that.

MR. FREEMAN: Just one thought. I know there are those who would like to see the labor movement destroyed completely, but I want you to ask yourself: Could we live with what would replace a strong, viable labor movement?

MR. COHEN: Well, I don't think that any enlightened management person of any respect is out to destroy the labor movement. I don't think anyone is advocating that management lawyers or consultants run out and start telling their clients to immediately break the labor movement. I don't think anyone has stated that we ought to repeal the National Labor Relations Act. What we are saying, and the message is important, is that if unions have lost membership, lost status, lost prestige, the fault lies with the labor movement and not with the laws of the country. The fault lies with the fact that the unions

have not been doing the job of organizing; and the message that the employees have been repeatedly getting is that they don't need a union to have effective representation, to get good wages, to get good benefits and good working conditions.

That can be done, and is being done, by many, many companies who do not have unions. It is not true, and has never been true, that a union is the only vehicle for workers to get representation. It is a vehicle that works well in some situations; it doesn't work well in others. And where it doesn't work well, it is not necessarily a fault of the law, but a failure of unions and management to deal with each other.

SECRETARY MARSHALL: Well, let me say that I agree that it's not necessarily the fault of the law, but I think it's both. That is to say, the law, in my judgment, is not the basic determinant of what happens to the labor movement. As Jim Freeman said, we had a labor movement before we had the law. The question is, does the labor movement go back to using the strike and organizational picketing and the like as a way to try to get recognition, or do we do that through law? I believe we have to make some modest improvements in the law in order to make it possible for the workers to have better information and power to make that choice.

I also agree that the labor movement has to deal with the problems workers have with the really changed demographic characteristics of the work force. It has happened so fast that a lot of people don't know about it. In 1950, for example, seventy percent of all households were headed by men who were the only source of income. Today only seventeen percent of households are. That's a dramatic transformation in the work force—and the composition, the age, the education, and all the rest are things that the labor movement has to adjust to if it's going to continue. I think it will continue to be a viable force. I think it's also easy to be deceived about the strength of the labor movement because there are a lot of organizations that we don't count as unions which are becoming unions, like the police organization here. My union is the American Association of University Professors, which at one point was not a bargaining organization, but it is now. The National Educational Association was not a bargaining organization, but it is now. If you add up all those organizations, the organized work force is much larger than just the affiliates of the AFL-CIO or the Teamsters, the United Automobile Workers or the United Mine Workers; and, therefore, organization is not declining. It's not even declining absolutely in the

traditional unions. It's declining as a portion of the total work force, but it is growing as the union membership is growing.

A final comment I would like to make about the public interest is, I think it's in the public interest to have a strong and economically viable labor movement, a free labor movement. But it is not necessarily in the public interest that workers be members of those unions. I think that the public interest is served by the workers being able to make the choice themselves, and that's what the public purpose ought to be: to preserve the ability of workers to make the choice. If they decide freely, without duress, not to, then that's their choice to make; and we'll get competition between unions and employers to improve the conditions of the workers. But if they do not have that free choice, that is, if they can be intimidated, if they are unable to get adequate information or the representation can be delayed for a long time, then it's hard to say that the workers are free to make that choice.

