H.R. 992, H.R. 993 AND H.R. 994

HEARING

BEFORE THE

SUBCOMMITTEE ON EMPLOYER-EMPLOYEE RELATIONS

OF THE

COMMITTEE ON EDUCATION AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

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C O N T E N T S

H.R. 992, H.R. 993 AND H.R. 994

Tuesday, June 24, 2003

U.S. House of Representatives

Subcommittee on Employer-Employee Relations

Committee on Education and the Workforce

Washington, DC

The Subcommittee met, pursuant to notice, at 2:11 p.m., in room 2175, Rayburn House Office Building, Hon. Sam Johnson [Chairman of the Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce] presiding.

Present: Representatives Johnson, Ballenger, Tiberi, Wilson, Kline, Andrews, Tierney, Wu, and McCollum.

Staff present: Kevin Frank, Professional Staff Member; Parker Hamilton, Communications Coordinator; Jim Paretti, Professional Staff Member; Deborah Samantar, Committee Clerk/Intern Coordinator; Stephen Settle, Professional Staff Member; Kathleen Smith, Professional Staff Member; Tylease Fitzgerald, Minority Staff Assistant; Margo Hennigan, Minority Legislative Assistant/Labor; Peter Rutledge, Minority Senior Legislative Associate/Labor.

Chairman JOHNSON. Well, as you can see, we are one witness short, but we are going to go ahead and not waste your time or ours. Quorum being present, the Subcommittee on Employer-Employee Relations of the Committee on Education and the Workforce will come to order.

We are going to hear testimony on union democracy reforms to the Labor Management Reporting and Disclosure Act, H.R. 992, The Union Members' Right-to-Know Act, H.R. 993, The Labor-Management Accountability Act, and H.R. 994, the Union Member Information Enforcement Act.

Under Committee Rule 12(b), opening statements are limited to the Chairman and Ranking Minority Member of the Subcommittee. Therefore, if other Members have statements, they may be included in the hearing record. With that, I ask unanimous consent for the hearing record to remain open 14 days to allow Members' statements and other extraneous material referenced during the hearing to be submitted in the official hearing record. Hearing no objection, so ordered.

STATEMENT OF HON. SAM JOHNSON, CHAIRMAN, SUBCOMMITTEE ON EMPLOYER-EMPLOYEE RELATIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Well, I am glad to see you all this afternoon, and as Yogi Berra once said, "It's deja vu all over again." I'm sure that's how some of us feel, sitting here today, as we hold the first hearing in this Congress to reform the Labor-Management Reporting and Disclosure Act, which is LMRDA.

It's deja vu, because the bills that have been introduced to address certain flaws in LMRDA are not new to most Members on this Subcommittee. More troubling, however, is we have been here before.

We have heard about the failure of too many unions and employers to file timely financial disclosure forms. We have heard about structural flaws in the LMRDA that prevent the Department of Labor from enforcing the law, and we have heard about glitches that prevent rank and file union members from getting timely access to the information to which they are legally entitled.

Indeed, we have heard ample testimony about how LMRDA is simply failing to accomplish the goal of union democracy and fairness. Unfortunately, a little more than a year later, there is little sign that this has changed, which means that legislative reforms are needed, more than ever.

Before we get into the substance of these bills and the testimony before us, I think it's important to discuss what LMRDA is and why it was created. The cornerstone of union member rights in America is LMRDA, also referred to as the Landrum-Griffin Act.

Written by then-Senator John Kennedy, and enacted in 1959, the LMRDA was intended to guarantee that rank and file union members have a fully, equal, and democratic voice in union affairs. It allows for democratic participation by members, and requires union financial matters to be publicly disclosed. It also protects workers' rights to free speech and assembly, and to nominate candidates and vote in union elections. Simply put, it ensures freedom and justice for all.

It is clear that Congress expected through the passage of LMRDA to ensure union democracy would be the first line of defense against union corruption, and that armed with knowledge, union members would elect leaders who work in their best interest, and rid themselves of corruption.

Since 1959, the American workforce has changed. However, LMRDA has not. The erosion of union democracy continues to be a problem, and should not be taken lightly. A union, after all, belongs to its members, and the bottom line for any labor organization should be the will of its membership.

Union members and leaders should respect the law, and the U.S. Department of Labor, which is responsible for putting teeth into LMRDA, should aggressively enforce it. Unfortunately, neither has been the case. Indeed, our own Committee, just last week, heard extensive testimony about how union leaders profited and enriched themselves at the expense of rank and file shareholders and union pension funds in the ULLICO scandal.

It's not my intent to explore the details of that situation today, because we would be here all afternoon. But the point is noting

that union members deserve to know, as both a legal and ethical matter, how their hard-earned union dues are spent by the union leaders who are supposedly there to represent their members' interests. That brings us to today's hearing. And again, I think a little historical perspective is important.

In 2001, my colleagues and I on the Education and Workforce Committee began to examine how well union financial disclosure requirements are met and enforced by the Department of Labor. What the Department reported back to us was less than impressive.

The Department of Labor data from 2002 shows that 43 percent of unions either file their forms after the deadline or not at all, both of which are illegal. It doesn't take a rocket scientist to see that there is a problem when more than one-third of the unions are breaking the law. Can you imagine what the IRS would do if one-third of the working Americans didn't file their tax forms?

It is our responsibility to exam the lack of compliance and transparency of labor organizations, the lack of information for thousands of rank and file union members. Let me be clear. I am not suggesting that we should go after the majority of law-abiding unions, but shore up loopholes for those one-third of union members who are not getting what they are entitled to: fair, accurate, and full disclosure of the facts as required under law.

Today's hearings will focus on three pieces of legislation which I have sponsored: H.R. 992, the Union Members' Right-to-Know Act, which would require unions to inform rank and file members of their rights guaranteed to them under LMRDA; H.R. 993, the Labor-Management Accountability Act, which would close an important gap in LMRDA's remedial scheme, and for the first time, allow the Department of Labor to assess several penalties against unions and employers who fail to file the financial disclosure forms required; and H.R. 994, The Union Member Information Enforcement Act, which would allow the Secretary of Labor to bring suit on behalf of union members who are denied access to their basic LMRDA rights but may fear to do themselves, because of retaliation.

Finally, I expect we will hear discussion of the proposed reforms of the financial reporting forms required under the LMRDA, proposals I am pleased to support, and which we heard in a ULLICO hearing last week would serve to hold labor organizations to similar standards to which we hold large public corporations.

I welcome our witnesses here today, and look forward to their testimony, and hope that yours will arrive very shortly. With that, I yield to my colleague from New Jersey, a great American, Mr. Andrews, for an opening statement, whatever you wish to make.

[The prepared statement of Chairman Johnson follows:]

Statement of Hon. Sam Johnson, Chairman, Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce

Good afternoon.

As the great Yogi Berra said, "It's déjà vu all over again."

I'm sure that's how some of us feel sitting here today, as we hold the first hearing in this Congress to reform the Labor-Management Reporting and Disclosure Act (LMRDA).

It's déjà vu because the bills I have introduced to address certain flaws in the LMRDA are not new to most of the members on this Subcommittee.

More troubling, however, is that we've been here before.

We've heard about the failure of too many unions and employers to file timely financial disclosure forms; we've heard about the structural flaws in the LMRDA that prevent the Department of Labor from enforcing the law; and we've heard about the glitches preventing rank-and-file union members from getting timely access to the information to which they are legally entitled.

Indeed, we have heard ample testimony about how LMRDA is simply failing to accomplish the goal of union democracy and fairness.

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It allows for democratic participation by members and requires that union financial matters be publicly disclosed.

It also protects workers' rights to free speech and assembly, and to nominate candidates and vote in union elections.

Simply put . . . it ensures freedom and justice for all.

It is clear that Congress expected through the passage of the LMRDA to ensure that union democracy would be the first line of defense against union corruption, and that, armed with knowledge, union members would elect leaders who work in their best interests, and rid themselves of corrupt union officials who serve their own interests.

Since 1959, the American workforce has changed. However, the LMRDA has not.

The erosion of union democracy continues to be a problem and should not be taken lightly. A union, after all, belongs to its members, and the bottom line for any labor organization should be the will of its membership.

Union leaders should respect the law—and the U.S. Department of Labor, which is responsible for putting teeth into the LMRDA, should aggressively enforce it.

Unfortunately, neither has been the case.

Indeed, our own Committee just last week heard extensive testimony about how union leaders profited and enriched themselves at the expense of rank-and-file shareholders and union pension funds in the ULLICO scandal.

Now it's not my intent to explore the details of that situation today—because we'd be here all afternoon—but the point is worth noting that union members deserve to know, as both a legal and ethical matter, how their hard-earned union dues are spent by the union leaders who are supposedly there to represent their members' interests above all others.

That brings us to today's hearing, and again, I think some historical perspective is important. In 2001 my colleagues and I on the Education and Workforce Committee began to closely examine how well union financial disclosure requirements are met and enforced by the Department of Labor.

What the Department reported back to us was less than impressive: DOL data from 2002 shows that 43 percent of unions either filed their forms after the deadline or not at all—both of which are illegal.

It doesn't take a rocket scientist to see that there is a problem when more than one-third of the unions are breaking the law. Can you imagine what the IRS would do if one-third of working Americans didn't file their tax forms?

It is our responsibility to examine the lack of compliance and transparency of labor organizations and the lack of information for thousands of rank-and-file union members. Let me be clear: I am not suggesting that we should go after the majority of law-abiding unions, but shore up loopholes for those one-third of union members who are not getting what they are entitled to: fair, accurate, and full disclosure of the facts as required by law.

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H.R. 993, the Labor-Management Accountability Act, which would close an important gap in the LMRDA's remedial scheme, and for the first time allow the Department of Labor to assess civil penalties against unions and employers who fail to file the financial disclosure forms required under the LMRDA; and

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to their basic LMRDA rights, but who may fear to do so themselves for fear of retaliation.

Finally, I expect we'll hear discussion of the proposed reforms of the financial reporting forms required under the LMRDA—proposals I am pleased to support and which, as we heard in the ULLICO hearing last week, would serve to hold labor organizations to similar standards to which we hold large public corporations under our corporate and securities laws.

I welcome our witnesses here today and look forward to their testimony.

STATEMENT OF HON. ROBERT E. ANDREWS, RANKING MEMBER, SUBCOMMITTEE ON EMPLOYER-EMPLOYEE RELATIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Mr. ANDREWS. Thank you, Mr. Chairman.

Thanks for your customary kindness, and the opportunity to work with you. I appreciate it very much. I appreciate you very much.

I would like to welcome back the witnesses that are returning to us, welcome the new witnesses as well, and we appreciate hearing what you have to say.

It is true that a lot of what you said last year you are going to repeat, but I am sure there are some new insights and new angles that we all can learn from, and we are glad that you are back.

Let me be clear. There is no disagreement over the basic principle that unions should be transparent organizations, which is to say that any individual with a stake in the business of that union—a member of the union, in particular—ought to be able to ascertain in a clear, prompt way, what is going on in his or her union, ought to be able to learn how the money is being spent, how decisions are being made, and have all of the information necessary to exercise his or her rights within a union democracy, so he can run for office, vote for the people you support, oppose the people you do not support, and so forth. There is no disagreement about this.

I suspect that there will be continued disagreement over two issues, although I am interested in hearing what the witnesses have to say.

The first is the scope and the import of the non-reporting problem. We, again, hear this assertion about 43 percent late or not filed. I think, again, this year the record will show that that is a rather significant exaggeration of the scope of the problem when one looks at it more carefully.

And second, is the import of the late filing, what it precludes from being learned by whom, how often, and so forth. There is a problem, no question about that. The question is what the scope and the import of the problem is.

The second issue is what is the proper response to the problem? More specifically, whether the tools that the law presently gives the Department of Labor, and presently gives members of unions are adequate to address the problem that exists, or whether those tools are inadequate.

We would not take the position that it is not a serious matter for a union not to file a report. We have this in the law for a reason. These pieces of data, this information, should be available. There is no disagreement about that.

But before we go off in a direction where we institute a new bureaucracy with civil fines and civil penalties, and before, as the administration has done in its executive order, we go off in a direction of disclosure in incredibly —I think stupifyingly—specific degrees, we ought to take a look at what the consequences of that would be.

I am not one who believes in a reflexive answer to public problems. When our colleagues on the other side bring us a problem and argue that small businesses overburdened by too many regulations and too much disclosure, I am not one that automatically rejects that argument out of hand.

Now I am willing to look at ways that we can help small businesses spend less in order to do more, which is why I supported the Portman-Cardin pension legislation that came through the Committee a few years ago—and will probably come through again—because that would help small business people run pension plans better.

I think the same standard, though, ought to apply when it comes to labor unions. We ought to take a look at whether any public gain that is realized by increased reporting requirements or by increased disincentives against filing, whether any public gain that is realized by that is justified in terms of the cost that that imposes upon these labor organizations, many of which are very small, many of which do not have the employees of any full-time nature, where unions are run out of the back of someone's truck or in very small numbered members.

So we want to take a look at the practical impact of what these proposed changes would be. And with that, Mr. Chairman, I look forward to hearing from the witnesses.

Chairman JOHNSON. Thank you, Mr. Andrews. I appreciate that. And by the way, he is one of the guys that—he and I can talk about these issues without getting upset, and make rational decisions, believe it or not.

Mr. ANDREWS. I am usually the right one, but—

Chairman JOHNSON. I didn't hear that.

[Laughter.]

Chairman JOHNSON. I would like to introduce the witnesses at this time. Mr. Lary Yud has served as deputy director of the Office of Labor-Management Standards, OLMS, since December 2001. Mr. Yud administers the Secretary of Labor's responsibilities under the Labor-Management Reporting and Disclosure Act, and related laws.

Prior to being selected as deputy director, Mr. Yud served in a number of positions with OLMS, including chief of the division of enforcement, area administration, Washington, D.C. and Los Angeles field offices. Mr. Yud began his career with the Department of Labor as a management intern in 1966. Mr. Yud received his bachelor of arts and master of business administration degrees from Northwestern University.

A second witness, Mr. Paul Huebner, is a carpenter, a member of the union local 1110, United Brotherhood of Carpenters and Joiners of America, Washington, D.C. He has worked as a carpenter in the Washington area since 1974, served in the local's organizing and executive committees, and worked as financial secretary and treasurer from 1998 to 2001. Mr. Huebner holds a bach-

elor's degree from the University of Maryland at College Park, and has testified before us before. Thank you for being back.

Mr. Paul Rosenzweig is a senior legal research fellow at the Heritage Foundation Center for Legal and Judicial Studies. In addition to time spent in private practice, Mr. Rosenzweig previously served in government as senior practicing counsel to the office of the independent counsel as chief investigative counsel for the House Transportation and Infrastructure Committee, and in the Justice Department's Environmental Crime section.

He received his bachelor's degree from Haverford College, his master's degree from the University of California, San Diego, and his law degree from the University of Chicago.

They are all well-qualified witnesses. Before the witnesses begin their testimony, I would like to remind Members we will ask questions after the entire panel has testified.

In addition, Committee Rule 2 imposes a 5-minute limit on all questions. And I think all of you have been familiar with the light system we use here, which—we ask you to try to keep your opening statement to 5 minutes, if you would.

I thank you for joining us today, and Mr. Yud, you may begin your testimony.

STATEMENT OF LARY YUD, DEPUTY DIRECTOR, OFFICE OF LABOR-MANAGEMENT STANDARDS, EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEPARTMENT OF LABOR, WASHINGTON, D.C.

Mr. YUD. Well, thank you, Mr. Chairman. Mr. Chairman, Members of the Subcommittee, I am pleased to appear before the Committee today to provide a general overview of the Labor-Management Reporting and Disclosure Act, or LMRDA, which is centered on two fundamental goals: promoting union democracy, and ensuring union financial integrity.

The Office of Labor-Management Standards administers and enforces the provisions of the LMRDA that are within the jurisdiction of the Department of Labor. These include civil and criminal provisions that provide standards for union democracy, and protect the financial integrity of labor organizations that represent private-sector employees.

OLMS also administers and enforces provisions of the Civil Service Reform Act of 1978, and the Foreign Service Act of 1980, which applies similar standards to Federal sector unions.

The rights of union members and important union responsibilities are set forth in five titles of the LMRDA, and I will just briefly touch on those.

Title I of the LMRDA creates a bill of rights for union members. Every union member has an equal right to nominate candidates for a union office, to vote in union elections, and to attend and participate in union meetings.

There are other rights specified in Title I, but basically, the Department of Labor has enforcement responsibility only for one provision of Title I, which deals with the rights of union members to get copies of collective bargaining agreements.

Title II of the LMRDA requires reports from unions, union officers and employees, employers, labor relations consultants, and

surety companies. The Department of Labor has authority to enforce these reporting requirements, and the LMRDA provides for the public disclosure of the reports.

Title III of the LMRDA deals with trusteeships.

Title IV of the LMRDA deals with union elections, and the Department of Labor has important enforcement responsibilities with respect to investigating and taking action on union members that complain about violations of those provisions.

Finally, Title V of the LMRDA establishes financial safeguards for unions. It imposes fiduciary responsibilities on labor union officials, a union officer or employee who embezzles or otherwise misappropriates union funds or assets, commits a Federal crime that is punishable by fine or imprisonment.

In the last five fiscal years, my agency, OLMS, has conducted approximately 750 election investigations under Title IV, and supervised 173 union elections. We have completed 75 trusteeship cases, and nearly 2,000 criminal investigations, primarily involving embezzlement of union assets and related reporting violations.

During this period, the Department's investigative efforts resulted in 726 criminal indictments, and 639 convictions, or approximately 11 convictions per month. In addition to these enforcement activities, OLMS carries out an extensive program of compliance assistance, beginning with offers of assistance to all officers of newly formed unions. We publish a wide variety of compliance assistance materials, and every one of our field offices has an active program of compliance assistance seminars. Much of the focus of this assistance is on the reporting requirements.

Many observers believe that OLMS does not have sufficient enforcement tools to protect and inform union members. For example, a significant number of unions consistently fail to comply with the statutory requirements that they file annual financial reports with the Department of Labor. These unions are either delinquent in providing mandated financial information, or even worse, they fail to file all together.

In report year 2000, 41 percent of required union filers were either untimely in filing, or have not filed to date. Report year 2001 saw a non-compliance rate of over 61 percent, but that may have been affected by the mailing problems due to the Anthrax situation. In report year 2002, over 43 percent either were late or have yet to file to date.

I am sorry to say that past strategies have done little to improve the timeliness of unions' financial reporting. In an effort to get unions to file their reports timely, OLMS routinely takes a number of actions, including sending out notices, filing reminders, additional notices, and so on, and eventually we would send a field investigator around to knock on their door. However, very little of these efforts have worked well.

If the union does not file the required report after receiving a delinquency notice, OLMS may ask the Department of Justice to seek a mandatory injunction, requiring the union to file. Of course, OLMS notifies the union that it intends to take this action. Time spent by the lawyers within the Department of Labor and the Department of Justice reviewing the file and preparing the necessary papers is wasted, however, if the union finally files the report be-

fore a complaint requesting injunctive relief is filed in the district court.

The result is that even though the report may be filed months beyond the due date, there is no penalty for the delay.

To improve compliance, the President's 2004 budget includes a proposal to authorize OLMS to impose civil money penalties on unions and others that fail to file their required reports on a timely basis. The intent is to increase compliance, not penalize inadvertent lapses in filing reports.

On this issue, the administration supports the concepts embodied in H.R. 993, The Labor-Management Accountability Act. The Department is also closely reviewing the Act to determine whether additional authorities would help facilitate compliance and protect union members.

The Department appreciates the interest of the Subcommittee in the LMRDA, and looks forward to working with you on this issue that is critical to ensuring union democracy and fiscal integrity. Thank you again for giving me the opportunity to address this important law, and I would be pleased to answer your questions.

[The prepared statement of Mr. Yud follows:]

Statement of Lary F. Yud, Deputy Director, Office of Labor-Management Standards, Employment Standards Administration, U.S. Department of Labor, Washington, DC

Mr. Chairman and Members of the Subcommittee: I am pleased to appear before the Committee today to provide a general overview of the Labor-Management Reporting and Disclosure Act (LMRDA), which is centered on two fundamental goals—promoting union democracy and ensuring union financial integrity.

The Office of Labor-Management Standards (OLMS) administers and enforces the provisions of the LMRDA that are within the jurisdiction of the Department of Labor. These include civil and criminal provisions that provide standards for union democracy and protect the financial integrity of labor organizations that represent private sector employees. OLMS also administers and enforces provisions of the Civil Service Reform Act of 1978 and the Foreign Service Act of 1980, which apply similar standards to federal sector unions.

The rights of union members and important union responsibilities are set forth in five Titles of the LMRDA.

Title I of the LMRDA creates a "bill of rights" for union members. Every union member has an equal right to nominate candidates for union office, to vote in union elections, and to attend and participate in union meetings. Title I provides that unions may impose assessments and raise dues only by democratic procedures, and contains safeguards against improper disciplinary action by unions. Title I also requires that every labor organization inform its members about the provisions of the LMRDA and establishes the right of members and employees to copies of collective bargaining agreements.

Title II of the LMRDA requires reports from unions, union officers and employees, employers, labor relations consultants, and surety companies. The Department of Labor has authority to enforce these reporting requirements and the LMRDA provides for the public disclosure of the reports. In addition, members have the right to examine union financial records, but only by demonstrating just cause. Although the statute gives a union member the right to sue in federal court to enforce that right, neither records nor attorney's fees are available if the court does not agree that just cause has been demonstrated.

Title III of the LMRDA governs trusteeships imposed by a parent union over a subordinate body. Under Title III, a parent union may impose a trusteeship only for certain, legitimate purposes, for example, to correct financial malpractice or to assure the performance of a collective bargaining agreement. Title III is enforceable by the Department of Labor, on the written complaint of a union member.

Title IV of the LMRDA governs the election of union officers. It requires that elections be held periodically—at least every three years for local unions, at least every four years for intermediate bodies, and at least every five years for national and international unions. It also creates election-related rights and safeguards. For ex-

ample, all members in good standing have the right to vote and be candidates, subject only to reasonable rules uniformly imposed. Further, subject to certain time limits and a requirement to pursue internal remedies first, union members may file complaints with the Department protesting violations of any provision of Title IV. The Department must investigate such complaints, and take action to remedy material violations, within 60 days.

Finally, Title V of the LMRDA establishes financial safeguards for unions. It imposes fiduciary responsibilities on labor union officials. A union officer or employee who embezzles or otherwise misappropriates union funds or assets commits a federal crime that is punishable by fine or imprisonment. Title V establishes bonding requirements for union officers and employees, and prohibits persons convicted of certain crimes from holding union office or employment for up to 13 years after conviction or the end of imprisonment.

In the last five fiscal years (FY 1998 to FY 2002), OLMS has: conducted 752 election investigations and supervised 173 elections; completed 75 trusteeship cases; and conducted 1,994 criminal investigations, primarily involving the embezzlement of union assets and related reporting violations. During this period, the Department's investigative efforts resulted in 726 criminal indictments and 639 convictions, or approximately 11 convictions per month.

In addition to these enforcement activities, OLMS carries out an extensive program of compliance assistance, beginning with offers of assistance in understanding and complying with the law to all officers of newly formed unions. OLMS publishes a wide variety of compliance assistance materials, and every OLMS field office has an active program of compliance assistance seminars. Much of the focus of this assistance is on the statutory reporting requirements.

Many observers believe that OLMS does not have sufficient enforcement tools to protect and inform union members. For example, a significant number of unions consistently fail to comply with the statutory requirements that they timely file annual reports with DOL detailing their finances. These unions are either delinquent in providing mandated financial information, or even worse, they fail to file altogether. In report year 2000, 41 percent of required union filers were either untimely in filing their submissions or have not filed a report to date. Report year 2001 saw a noncompliance rate over 61 percent, due in part to mail delays related to the anthrax screening. In report year 2002, over 43 percent either were late or have failed to file to date for that year.

I am sorry to say that past strategies have done little to improve the timeliness of unions' financial reporting. In an effort to get unions to timely file their reports, OLMS routinely takes a number of actions including sending out letters to unions that were delinquent filers the prior year and asking that they timely submit for the current year; sending out reminder letters to all unions about 30 days before their annual financial reports are due; and sending out delinquency notice letters to those unions that have not timely filed their current report. However, very little of these efforts have worked.

If a union does not file the required report after receiving a delinquency notice, OLMS may ask the Department of Justice to seek a mandatory injunction requiring the union to file. Of course, OLMS notifies the union that it intends to take this action. Time spent by lawyers within the Department of Labor and the Department of Justice reviewing the file and preparing the necessary papers is wasted, however, if the union finally files the report before a complaint requesting injunctive relief is filed in district court. Even though the report may be filed months beyond the date it is due, the union will suffer no penalty for the delay. Obviously, there are no significant disincentives inherent in this system that might deter a union that is inclined to delay filing until the last possible moment. Because the resources required to seek injunctive relief may be expended for nothing, such action is generally taken only if a union has a history of serious delinquencies. Even then, the additional time provided while OLMS warns the union of its intent to seek injunctive relief and lawyers prepare the necessary papers may be enough to allow the union to act without even incurring the cost of litigation. The end result is that unions may ignore the statutorily—imposed deadline, filing the report months after it is due, without consequences.

To improve compliance the President's 2004 Budget includes a proposal to authorize OLMS to impose civil money penalties on unions and others that fail to file their required reports on a timely basis. The intent is to increase compliance, not penalize inadvertent lapses in filing reports. On this issue the Administration supports the concepts embodied in H.R. 993, the Labor Management Accountability Act. The Department is also closely reviewing the Act to determine whether additional authorities would help facilitate compliance and protect union members.

The Department of Labor appreciates the interest of the Subcommittee in the Landrum-Griffin Act and looks forward to working with you on this issue that is critical to ensuring union democracy and fiscal integrity. Thank you again for giving me the opportunity to address this important law and I would be pleased to answer your questions.

Chairman JOHNSON. Thank you for being with us. That is a great testimony, and we appreciate it. Mr. Huebner, you may begin your testimony now.

STATEMENT OF PAUL HUEBNER, TAKOMA PARK, MD

Mr. HUEBNER. Good afternoon, Mr. Chairman and Members of the Committee. I want to thank you very much for the opportunity to speak at this hearing. I am a little nervous, so if I stumble a bit, please excuse me.

My name is Paul Huebner, and I am a rank-and-file union carpenter of Carpenters' Local 1110 in Washington, D.C. I served my local as trustee, as financial secretary, and I am now serving as one of the local's two elected delegates to the regional council.

Over the last past several years, I have also networked with carpenters and other union members around the country. I am a member of Carpenters for a Democratic Union, and we have been fortunate to get the assistance of the Association for Union Democracy.

What I want to say this afternoon is based either on direct, personal experience, or what I have learned, networking with others. While my comments here are focused on the three bills you are considering at the moment, the larger part of my concern extends beyond these bills to the concrete day-to-day impact they would have on the working lives of my union brothers and sisters and myself.

These concerns are also reflected in the written statements by other union members that have been, and still may be submitted for inclusion in the record.

The LMRDA is now over 40 years old. From the union member's perspective, the LMRDA is absolutely critical. It is the last line of defense in keeping our elected union officials honest and accountable to us.

The problem is that in a number of key respects, it is not working in the way in which I think it was originally intended. If union members would hold their officers accountable to them in periodic elections, members need to understand that they enjoy a number of rights as union citizens, and that their officers have a duty to conduct themselves in accordance with a number of standards contained in the LMRDA.

Many union members are generally aware that their union constitution and bylaws give them rights, duties, and procedures they must uphold and follow. But only a small fraction of the members are aware of their democratic, civil rights, and their officers' obligations under the LMRDA.

This is an absolutely central issue today to the members of my local, who are battling, as I speak, to regain the right to ratify our own collective bargaining agreement, a right that seems to be disappearing within the new restructuring climate of the carpenters' union.

Local 1110 members need to know their rights and the recourses they can legally expect under the LMRDA. They need to know there is an LMRDA.

Section 105 says unions are supposed to inform members about their rights and their officers' responsibilities under the LMRDA. What have union officers done to comply with that section? Nothing.

For the past 43 years, since the law was enacted, union officials have simply ignored the provision. The way the law is currently written, only union members can sue to enforce an LMRDA provision. Several years ago, a few machinists, with help from the Association for Union Democracy, were able to bring a lawsuit against their union, and win a decision ordering that union to take concrete steps to comply with 105. I am referring to the Thomas v. Machinists case.

But how many members of local unions are going to be willing and able to sue their unions to make them educate all their members about the LMRDA? Precious few. Few union members have the resources needed to sue, and very few members feel they can weather the harassment, intimidation, economic retaliation and formal disciplinary measures that can be wielded by union officialdom when they are challenged.

In fact, I appear before you today with some apprehension. Several weeks ago at our June council delegates meeting, right after I requested that council delegates be allowed to examine the bills of the council, it was mentioned by the CEO/EST, as an aside, that someone had testified before members of Republican Committee that are not our friends. I presume that to be a reference to my testimony last year before this Committee. I understood it as an attempt to intimidate me.

One reason the LMRDA hasn't worked the way it was intended is because even union officers, who are entrusted with the responsibility for enforcing many of its provisions, don't know of its existence. The only way all union members across the Nation are going to learn about it will be if the Labor Department tells each and every one of the unions exactly what they must do to inform their members about the LMRDA, and then forces them to do so.

That's what I understand H.R. 992, The Union Members' Right-to-Know, and H.R. 994, The Union Member Information Enforcement Act, would make possible. It would correct a major oversight. Congress needs to tell the Labor Department that its mission is not just to require unions to give their members some sort of legal notice of the LMRDA, but to educate union members about its provisions in a meaningful, responsible way.

I am a little less familiar with the rationale underlying H.R. 993, Labor-Management Accountability Act, but as a former local financial secretary-treasurer, I am familiar with the obligations of unions to prepare and file annual LM-2 financial statements with the Labor Department.

When in office, I prepared and filed them in a timely manner for my local. I see LM-2 reports not just as paperwork filed with some government agency, but as an essential financial information about my union that will prevent both me and other union members to hold elected officers financially accountable.

For example, right now, I and many other union members of local 1110 want to know why our union working dues have doubled at the same time that our council officer salaries have tripled without disclosure—or a vote, I might add.

Access to information on union revenues and expenses seem to me a necessary and fundamental right for union members seeking to monitor the course of their own organization. If the SEC can require corporations to submit various filings, why shouldn't the Labor Department be given some legislative tool to make union officials file their annual LM-2 reports by their deadlines. Currently, I understand that the Labor Department has no such tool. H.R. 992 would simply remedy that oversight.

There was one other thing I wanted to add, and that is that the current environment has been created by a circumvention of the law itself, where our union, in particular, has taken an exculpatory phrase about intermediary organizations, and entirely reorganized our union, such that the regional council with 50 delegates can raise our dues—I have a paycheck in my pocket where I paid $780 worth of dues this year with no vote, except by 50 delegates who don't know me, my trade, or my members, and it is done by a small group of officers.

And the ultimate legislative relief that we need is going to be with this restructuring issue. I hope that this Committee and the Congress will deal with that at some later date. And I very much appreciate your valuable time, and your thoughts on this important issue. Thank you very much.

[The prepared statement of Mr. Huebner follows:]

Statement of Paul Huebner, Takoma Park, MD

Good Afternoon.

Mr. Chairman, members of the committee, I would like to thank you for the opportunity to speak at this hearing.

My name is Paul Huebner. I am a rank-and-file union member of Carpenters' Local 1110, in Washington, D.C. I have served my local as trustee, as financial secretary and I am now serving as one of the local's two elected delegates to the regional council. Over the past several years, I have also networked with carpenters and other union members around the country. I am a member of Carpenters for a Democratic Union and we have been fortunate to get the assistance of the Association for Union Democracy. What I want to say this afternoon is based either on direct, personal experience or on what I have learned networking with others.

While my comments here are focused on the three bills you are considering at the moment, the larger part of my concern extends beyond these bills to the concrete, day-to-day impact they would have on the working lives of my union brothers and sisters and myself. These concerns are also reflected in the written statements by other union members that have been and may still be submitted for inclusion in the record.

The LMRDA is now over 40 years old. From the union member's perspective, the LMRDA is absolutely critical. It is the "last line of defense" in keeping our elected union officials honest and accountable to us. The problem is that in a number of key respects, it is not working in the way in which I think it was originally intended.

If union members are to hold their officers accountable to them in periodic elections, members need to understand that they enjoy a number of rights as "union citizens," and that their officers have a duty to conduct themselves in accordance with a number of standards contained in the LMRDA. Many union members are generally aware that their union constitutions and by-laws give them rights, duties and procedures they must uphold and follow. Only a small fraction of the members are aware of their democratic, civil rights and their officers' obligations under the LMRDA. This is an absolutely, central issue, today, to the members of my local union, who are now battling, as I speak to regain the right to ratify their own collec-

tive bargaining agreement; a right that seems to be disappearing within the new "restructuring" climate of the Carpenters' Union. Local 1110 members need to know their rights and the recourses they can legally expect under the LMRDA. They need to know there is an LMRDA.

Section 105 says unions are supposed to inform members about their rights and their officers' responsibilities, under the LMRDA. What have union officers done to comply with that Section? Nothing. For the past forty-three years, since the law was enacted, union officials have simply ignored the provision.

The way the law is currently written, only union members can sue to enforce an LMRDA provision. Several years ago, a few Machinists, with help from the Association for Union Democracy, were able to bring a lawsuit against their union and win a decision ordering that union to take concrete steps to comply with Section 105. I'm referring to the *Thomas* v. *Machinist* case. But how many members of local unions are going to be willing and able to sue their unions to make them educate all of their members about the LMRDA? Precious few.

Few union members have the resources needed to sue. And, very few members feel they can weather the harassment, intimidation, economic retaliation and formal disciplinary measures that can to be wielded by union officialdom when they are challenged. In fact, I appear before you today, with some apprehension. Several weeks ago at our June Council Delegates' Meeting, right after I requested that council delegates be allowed to examine the individual bills of the council, it was mentioned by the CEO/EST, as an aside, that "someone," had testified before members of a Republican committee that are not our friends. I presumed that to be in reference to my testimony last year before this committee. I understood it as an attempt to intimidate me.

One reason the LMRDA hasn't worked the way it was intended is because even union officers, who are entrusted with the responsibility for enforcing many of its provisions, don't know of its existence. The only way all union members, across this nation, are going to learn about it will be if the Labor Department tells each and every one of the unions exactly what they must do to inform their members about the LMRDA, and then forces them to do so. That's what I understand H.R. 992 (Union Members Right-to-Know) and H.R. 994 (Union Member Information Enforcement Act) would make possible. They would correct a major oversight. Congress needs to tell the Labor Department that its mission is not just to require unions to give their members some sort of legal notice of the LMRDA, but to educate union members about its provisions in a meaningful, responsible way.

I am less familiar with the rationale underlying H.R. 993 (Labor Management Accountability Act). As a former local financial secretary/treasurer, I am familiar with the obligations of unions to prepare and file annual LM–2 financial statements with the Labor Department. When in office, I prepared and filed them in a timely manner for my local. I see LM–2 reports, not just as paperwork filed with some government agency, but as essential financial information about my union, that will permit both me and other union members to hold elected union officers financially accountable. For example, right now, I and many other union members of Local 1110, want to know why our union working dues have doubled at the same time that our council officers' salaries have tripled (Without disclosure, or a vote, I might add). Access to information on union revenues and expenses, seems to me, a necessary and fundamental right for union members seeking to monitor the course of their own organization.

If the SEC can require corporations to submit various filings, why shouldn't the Labor Department be given some legislative tool to make union officials file their annual LM–2 reports by their deadlines. Currently, I understand that the Labor Department has no such tool. H.R. 993 would simply remedy that oversight.

That concludes what I have to say. If you have any questions, now or later, I'd be happy to answer them.

Chairman JOHNSON. Thank you for your testimony, sir. We appreciate that, as well. Mr. Rosenzweig, you may begin your testimony.

STATEMENT OF PAUL ROSENZWEIG, SENIOR LEGAL RESEARCH FELLOW, CENTER FOR LEGAL AND JUDICIAL STUDIES, HERITAGE FOUNDATION, WASHINGTON, DC

Mr. ROSENZWEIG. Thank you, Mr. Chairman, for again inviting me to talk with you today. As I begin all of these I note that,

though I work for the Heritage Foundation, I testify as an individual, and the Heritage Foundation has no corporate position on any of these issues.

The humorous part of me wants—well, I see Mr. O'Brien is here. The humorous part of me was going to ask whether or not civil penalties might have brought him here sooner, since that is the question before us, because, clearly, nobody would—

Mr. ANDREWS. Maybe Amtrak would have brought him here sooner.

Mr. ROSENZWEIG. Clearly, nobody would have put him in jail for failing to show today. But I would like to take seriously Congressman Andrews's questions about the effectiveness of the current LMRDA reporting requirements, with a specific focus on H.R. 993.

And you asked two questions about the scope of the problem, and whether the costs of the new proposed reinforcement regime would give us the right sorts of gains. And I thought that, rather than talk about philosophy and, you know, the concept of graded punishments, we could really actually use this time to talk on a more effectiveness goal.

You're right, that combining late filers with non-filers is putting two different numbers together. To my mind, late filing is equally a problem, in that it delays—and in many instances, obscures—the reporting. But the core problem is non-filing.

And in that regard, the number of unions that are non-filers, according to the latest Labor information, is 14.8 percent for last year, 2002. To give you a scope, that's approximately 10 times more than the non-filing amongst individual taxpayers that the IRS reports, at least that I can pull off their website. And this is all stuff that I found, just looking through the IRS.gov.

That strikes me as asserting that there is some scope to the problem, since I think the individual taxpayer compliance rate gives us a particularly useful baseline of what we can expect of the average American.

The non-reporting—the non-filing number for large unions, unions making more than $1 million, that we would hope would be the group that would be most in compliance, is 3.3 percent, which is roughly double the individual taxpayer rate. So that suggests to me that there is some room for improvement, and that the fact of non-filing is larger, for some reason, in the union context, than it is in the individual taxpayer context.

By contrast, just, you know, to be fair, over in the political action committee context, the non-filing rate that the FEC reported about 3 years ago was 18 percent, which is about the same as the unions. It has dropped to 15 percent in the last 3 years, and that is in part, I think, because they have adopted a new administrative fines program, a kind of modest fines program that acts through the administrative process, not even through the civil process that H.R. 993 would bring forward.

When you ask about whether or not that kind of gain—and I think 3 percent is an improvement, and it's a brand-new program, so we will have to see how it takes effect in the FEC as it goes along—when you ask whether or not that kind of gain is worth the cost, you start asking questions about cost of compliance in small unions, particularly.

There are two things about the FEC program that I think merit the attention of the Committee. One is that the program expressly contains graded penalties, and they fine smaller PACs and campaign committees less than they do big ones. That would be something I would commend to either the Committee in legislation, or the Department of Labor and Regulation, when and if this ever became implemented.

But the other thing is that if you review the enforcement actions that are taken at the FEC, it seems that they are mostly directed at very modest levels, at very small PACs, and campaign committees.

I pulled off the list of the most recent group, Witkowski for Senate, a $4,000 civil penalty for being late. Maximus Political Action Committee, a $650 penalty for being late. The City Political Action Committee, $900 for not filing at all. The Hudson Valley Political Action Committee, $1,300 for not filing. A Montana for Johnson, $2,000 for not filing.

Mr. ANDREWS. Not this Johnson.

Mr. ROSENZWEIG. Oh, no, no. Montana for Johnson. I mean, unless it's—Keyes 2000, $900—

Chairman JOHNSON. We don't do that in Texas.

[Laughter.]

Mr. ROSENZWEIG. Of that list, I mean, the only one I recognize—and I am not totally with it—is Alan Keyes's name. The rest of them seem like pretty small organizations. And the fines are pretty modest. The average fine at the FEC runs about $1,400 per nonfiling or late filing.

And it strikes me that if that proves to be an effective response, that's a good model. That gives them a new tool that is useful, where the gains seem to be coming, and the costs, in terms of—you know, the direct costs are relatively modest, and I would suspect that the direct cost to the organizations that are actually complying with the laws are fairly comparable to the LM-2 reporting requirements.

We can talk more about these. My time has already run out, but I think it is a good, useful idea to ask that question, and I think that the comparisons that you can find in other areas are instructive.

[The prepared statement of Mr. Rosenzweig follows:]

Statement of Paul Rosenzweig, Senior Legal Research Fellow, Center for Legal and Judicial Studies, The Heritage Foundation, Washington, DC

Good morning Mr. Chairman and Members of the Subcommittee. Thank you for again giving me the opportunity to testify before you today on the topic of Union Reporting and Disclosure Requirements and, particularly, the utility of adding civil penalties to the Labor-Management Reporting and Disclosure Act ("LMRDA").

For the record, I am a Senior Legal Research Fellow in the Center for Legal and Judicial Studies at The Heritage Foundation, an independent, nonpartisan research and educational organization. I am also an Adjunct Professor of Law at George Mason University where I teach Criminal Procedure and an advanced seminar on White Collar and Corporate Crime. I am a graduate of the University of Chicago Law School and a former law clerk to Judge Anderson of the U.S. Court of Appeals for the Eleventh Circuit. For much of the past 15 years I have served as a prosecutor in the Department of Justice and elsewhere. During the two years immediately prior to joining The Heritage Foundation, I was in private practice representing criminal defendants. I have been at The Heritage Foundation since April 2002.

I should note, at the outset, that I had the pleasure of testifying regarding H.R. 4054 almost exactly one year ago, when the Subcommittee was considering that bill during the 107th Congress. While I certainly enjoy the pleasure of appearing here, I do hope that it will not become an annual event. As I testified last year, the current proposal in H.R. 993, which is virtually identical to the one we discussed last year, is, in my judgment, well thought out and deserving of your consideration. Nothing has changed in the past year to modify my conclusion in that regard. Therefore, with your permission, I am constrained to say that the Members of the Subcommittee may find my testimony somewhat repetitive—I can only hope that familiarity does not breed boredom.

As the Subcommittee will recognize, my perspective on the proposed legislation is different than that typically brought to the Subcommittee. I understand and appreciate the values of labor democracy and managerial transparency that animate the LMRDA. Certainly knowledge and information are among the most powerful tools in a democracy and union members are entitled to information about the activities of the organization to which they belong—just as the American public is entitled to information about Congress and shareholders are entitled to information about a corporation. But whether the particular substance and form of the reporting requirements of the LMRDA are good policy or not is a question I am, candidly, not qualified to answer.

The question I can answer, from the perspective of a former prosecutor and one who writes and teaches regularly on the criminal law, is the one that is the focus of today's hearing: Assuming that current (or proposed) LMRDA reporting and disclosure requirements are appropriate, what is the best means of enforcing those requirements and ensuring that labor unions and others obliged to report under the law comply with the law's requirements? That question is both normative and utilitarian—it asks both what is a just, or proper, method of enforcement for this type of law and also what method of enforcement will work most effectively. On both grounds the current structure of the LMRDA is wanting.

"JUST DESERT" AND THE CONCEPT OF CRIMINAL PUNISHMENT

The LMRDA is unusual (and, as far as I can tell, unique) in its enforcement structure—it authorizes the Secretary of Labor to seek civil injunctive relief or to refer matters for criminal prosecution (pursuant to section 209 of the Act, (29 U.S.C. § 439)) but it does not, presently, contain any provision authorizing the imposition of civil monetary damages (either in federal court or administratively) for violations of the Act.

With this structure, the LMRDA is different from virtually every other regulatory statute. Typically, regulatory statutes have a graduated enforcement scheme that provides for administrative enforcement by the regulatory agency, civil enforcement actions in federal district court, and, for the most egregious offenses, criminal prosecution. Thus, the Occupational Health and Safety Act provides for both civil and criminal penalties, as do all of the environmental statutes, the antitrust laws, and the other regulatory statutes that have become common in American governance. Indeed, though it is always difficult to prove a negative, in the time I have had to conduct research on the question I have found no other regulatory statute with criminal enforcement provisions that does not also contain civil enforcement penalty provisions. In other words, the LMRDA is exceedingly unusual—and frankly, one can offer no rational explanation for the structure.

As a matter of theory the current structure of the LMRDA is normatively objectionable. Put most succinctly, government properly imposes criminal liability only on those who commit acts of misconduct with bad intent, and not on those merely accused of negligence or mistake. This is the fundamental moral component of the criminal law—the "just deserts" aspect of punishment—and it is trivialized when the criminal law is used to address conduct that is not intentionally wrongful. The criminal law in a free society must be carefully crafted to target wrongful conduct, and not be used simply to ameliorate adverse consequences attributable to non-criminal conduct. The public interest is vindicated not based on successful prosecutions, but on successful administration of justice. Criminal sentencing should reflect society's collective judgment about the kind of conduct that warrants the most severe condemnation, seizure of property, and loss of liberty and life.

The LMRDA's criminalization of an essentially regulatory scheme is, in one sense, part of broad pattern diverging from this model of criminal sanctions. Increasingly, we are seeing across the spectrum of federal regulatory systems prosecutions for offenses that are better handled as civil matters. In modern America, as the regulatory state has grown, the number of such criminal offenses has grown apace. These types of criminal offenses are different from the classic frauds and personal

wrongs that ought to be the focus of criminal law. This new type of offense involves the criminalization of conduct that, in most instances, is not inherently wrongful in the same way that fraud and bribery are. The growth in this form of regulatory criminal offense is, as Professor John Coffee has said, the "technicalization" of crime.

Consider: In 1999, the ABA Task Force on the Federalization of Criminal Law noted that there were now more than 3,500 federal criminal offenses. Those offenses incorporate either directly or by reference prohibitions contained in more than 10,000 separate regulations. Remarkably, nobody knows the exact number either of criminal statutes or criminal regulations. They are so diverse and so widely scattered throughout the federal code that they are literally uncollectable. I am told that, when it was recently asked to undertake the project, the Congressional Research Service said that the task was virtually impossible. This, too, breeds disrespect for the law and disaffection from the judicial system: When those who make the laws cannot themselves identify all the laws they have made, it borders on the arbitrary and capricious to allow prosecutors to select from among those laws and to criminalize conduct that, in the eyes of others, might warrant only civil sanctions.

This trend is exacerbated in the context of the LMRDA. The failure to timely file a required disclosure report is precisely this sort of technicalized offense and is inappropriately treated as a crime. The reporting requirements of the LMRDA, while certainly of great significance and importance to union democracy and the efficacy of the Act, are not the sort of requirement for which criminal sanctions are typically thought necessary. With the exception of situations in which a union official, for example, willfully and deliberately violates his known legal duty to report society ought not impose criminal sanctions.

The current LMRDA criminal provisions are not, however, completely objectionable. In one important sense section 209(a) is consistent with the general principle of criminal law. It punishes only those who act willfully. And, as the Second Circuit construed the statute more than 25 years ago, in *United States* v. *Ottley*, 509 F.2d 456 (2d Cir. 1975), an act in violation of the statute is done willfully only if it is done with a wrongful purpose—that is, if the defendant knew what the law required and failed to comply with it or was willfully blind to its requirements.

It is useful to note, parenthetically, that as a practical matter this standard is difficult for a prosecutor to prove—and deliberately so. It reflects a judgment (in my view a correct one) that the criminal sanctions should be rarely imposed and only on those who deliberately and willfully refuse to conform their conduct to societal norms.

But this does not, of course, exhaust the scope of appropriate governmental sanctions. Social behavior in a free society is governed by governmental norms that broadly distinguish between two kinds of wrongful acts: Crimes, which typically require such elements as malicious intent and harm, and deal with offenses against the state rather than merely against an individual; and civil wrongs, which are torts against persons or property, or violations of regulatory requirements, which are more loosely defined, typically carry lesser penalties or no penalties, and are adjudicated under less-rigorous procedural rules.

In the absence of applicable civil penalties, the LMRDA's structure leaves the latter category of wrongful conduct unaddressed. Just as it is inappropriate to criminalize conduct for which there is no deliberate wrongful act, it is equally inappropriate for the civil law to ignore the wrongful act and the civil harm that flows from the act in those situations where the wrongful act is the product of mistake, accident, neglect of a legal duty or otherwise non-willful conduct. Imagine a world in which there were only criminal law and no tort system to redress civil wrong. Surely we would not think that structure well designed—yet that is precisely how the LMRDA works.

During testimony and hearings last year on H.R. 4054, some objections to the provision of civil penalties were raised. The most salient of these were ones offered by Mr. Robert O'Brien: He argued that the provision of possible civil penalties would discourage individuals from holding positions of trust within a union. In his view, the possibility that civil fines might be imposed would deter individuals from participating in union democracy for fear of being held liable for an inadvertent mistake and might also require the development of a new insurance system, akin to director and officer polices in corporations, that would increase the costs of holding office. He also argued the imposing civil liability on the union directly would impose costs on the union and divert resources from union functions hurting members who have done nothing wrong.

It is fair to say that these concerns are realistic—but it is also fair to say that they are not a sufficient ground for opposing this legislation. First, and most prominently, the exact same arguments can be made for virtually every other entity par-

ticipating in the American economic system—including small business practitioners who have equally limited budgets, and small private partnerships whose members are equally effected financially by the errors of a few within the group. Not to mention the far heavier reporting burdens (accompanied by the threat of civil penalty) that apply to every American taxpayer. The proposition that union officials should be exempt from the same enforcement regime that applies to small businesses, taxpayers, and all other participants in the economy is, in my view little more than a version of special interest pleading. I know of no normative theory that suggests that the same enforcement incentives act differently in the context of unions than in the context of any other economic actor—to the contrary all economic theory suggests that it does not. Thus, absent some argument convincingly distinguishing unions from, say, small businesses, I can see no reason why on the same analysis, those supporting this position would not also support elimination of civil tax penalties for individuals or civil fines for small businesses that fail to report minor housing code violations.

Second, I wonder at the seeming inconsistency inherent in the assessment of the magnitude of the problem by those opposing civil penalty provisions. On the one hand, they argue that the current enforcement system works and there is little need to change it—but if this is so, then the addition of civil penalties will have little, if any, effect on union officer recruitment since the current set of "good practices" will serve to conclusively insulate officers and unions from civil liability. On the other hand if the addition of civil penalties to the statute results in a significant number of new civil cases that ultimately result in the imposition of significant civil fines, then the underlying premise of opposition to changes in the enforcement system—that is, the premise that all is well and no change is needed—will have been proven demonstrably false. In either case, I see little normative basis for opposing the use of less severe sanctions when more severe criminal sanctions already are on the books.

In sum, as a matter of just deserts the current structure of the LMRDA is simply flawed. It is necessary to recapture the balance between criminal and civil law by providing an alternate civil sanction in those situations where enforcement is necessary but criminal prosecution is simply inappropriate.

EFFECTIVE DETERRENCE

Now, I turn to the second aspect of the inquiry in today's hearing—the question of effectiveness. As Horace Mann said, "The object of punishment is the prevention of evil." We might tolerate an oddly structured enforcement system, however philosophically objectionable, if it were effective. But—contrary to the seeming premise I've just identified—it seems to me evident that the present enforcement regime is not as effective as it ought to be.

In report year 2002, the most recent year for which data are available from the Department of Labor, 43% of all unions either filed their LM–2s late or failed to file them. Over 4,000 unions (4,238) failed to file at all—that is 14.8% of the total number of filers (29,178). Even if one focuses on only the large unions—that is unions with receipts greater than $1,000,000—where one would expect compliance to be more complete, the numbers are still poor. Thirty six percent file late or not at all, and of that number 3.3% (65 out of 1947) don't file.

Moreover, the problem seems to be getting worse. If, for example, we look at filing year 2000, the overall late and/or fail to file rate was 34%. The comparable rate of 43% today is a 26% increase in just two years.

Imagine if 43% of all corporations failed to file their SEC disclosure forms timely (or at all). Or if 43% of production plants in America didn't file their pollution monitoring reports on time. In those contexts that rate of noncompliance would be a scandal. The only explanation for this rate of noncompliance that one can posit is that the absence of a sure and certain enforcement regime causes a failure in deterrence and thus a lack of incentive to comply.

This is not pure supposition—the limited data available support the conclusion. Because of their draconian nature, the criminal sanctions of the Act are rarely utilized. As the GAO reported in 2000, Department of Justice officials are (appropriately) reluctant to prosecute cases criminally where reporting violations are the only basis for the case. An electronic database search reveals approximately 50 cases in the last 43 years prosecuted under section 209 of the Act. And of these, the vast majority of the reported cases were prosecutions for knowing false statements on required forms—that is deliberate willful lies. Typically these frauds were in service a larger criminal enterprise—they were, for example, used for the purpose of concealing some other substantive crime (e.g. embezzlement of union funds).

Indeed, my research disclosed only one case—*United States* v. *Spignola*, 464 F.2d 909 (7th Cir. 1972)—involving a pure willful "failure to file" case, without any indicia of personal benefit to the union official or union who failed to file the requisite forms. And that case resulted in a reversal of the conviction.

Plainly this search may understate the instances of criminal enforcement of the Act under section 209—not all criminal cases brought are reported in the electronic databases. But I think it is fair to say that the criminal enforcement authority of section 209 is rarely used. And this is understandable—the criminal sanction is the societal blunderbuss reflecting, as I've already noted, a high degree of moral opprobrium. Criminal penalties are not appropriate in most failure to file cases and the Departments of Labor and Justice are rightly hesitant to seek criminal penalties for such conduct.

But in the absence of alternative civil sanctions, as the GAO noted, when criminal penalties are not appropriate the Secretary is reduced to hoping for the voluntary compliance of unions with their LMRDA reporting obligations. There is no middle ground sanction to be applied between the blunderbuss of criminal law and the paring knife of voluntary compliance. In effect, the substantial and serious penalties attending criminal sanctions make them effectively unusable for the run-of-the-mill case where a reporting requirement is not met.

COMPARING REGULATORY ENFORCEMENT STRUCTURES

It is also useful I think to offer some comparisons to other regulatory agencies on a practical level. So I asked a question—how does the LMRDA enforcement structure compare with other regulatory programs? Given the limits of data availability, I chose three comparisons—the IRS' individual taxpayer program; the FEC's political committee reporting program; and another program within Labor involving pension fund ERISA reporting—for comparison. I also chose these because all three involve areas where there are some large participants but where there are also a significant number of small participants (individual taxpayers, small PACs, and small businesses) who would, presumably, be subject to many of the same incentives and have many of the same concerns regarding the use of civil enforcement that small unions might have.

IRS—Here is what my inquiry discovered for tax year 2002 for the IRS:

Number of individual tax returns filed 130,904,889
Number of Non-filers 1,963,000
Rate of Non-filing 1.5%

[The number of non-filers is taken from the IRS non-filer program in which the IRS uses information from third parties to create substitute returns for the purpose of assessing taxes.]

While, admittedly, a somewhat indefinite number, this rough analysis suggests that the non-filing rate among even the largest unions is more than twice as large as that for the smallest individual taxpayers. And if we include (as I believe is a more valid comparison) all unions, then the non-filing rate is roughly 10 times greater for unions than for individual taxpayers. In other words Teamster-size unions are twice as bad at reporting as Ma and Pa Taxpayer, while the small unions are 10 times as bad.

It is, obviously, almost impossible to be certain why this is so—far more data would be necessary for a statistically valid regression analysis. But I found it notable that the mix of civil and criminal enforcement is vastly different at the IRS than at Labor. In 2002, the IRS initiated just over 1000 criminal investigations and, ultimately, just fewer than 500 indictments and informations (472) were returned. Of these, 144 cases were charges against "non-filers." By contrast, the IRS assessed civil penalties in just over 18 million cases.

Perhaps of more significance to the question presented in this legislation, the IRS assessed civil penalties against over 2 million individual tax filers who were delinquent in their filing (that is, either late or failed to file altogether). The disparity between the number of civil and criminal actions is stunning. Though, as I said, proof of a connection is not conclusively possible on this record, my understanding of the concepts of deterrence reinforces my instinct that the significant use of civil sanctions is the driving force behind the lower rate of non-filing exhibited by the IRS statistics.

FEC—Recent changes at the FEC are also somewhat instructive in assessing the merits of the proposed legislation. Prior to 2000, the FEC lacked a significant administrative civil penalty program—to secure fines for late filing the FEC was obliged to proceed by way civil complaint. In other words the FEC stood in relation to political committees that filed late or not at all almost exactly as the Department of Labor would stand with respect to unions who file LM–2s if H.R. 993 becomes

law. It, in effect, had the civil authority that H.R. 993 would give Labor. Yet even that modest enforcement mechanism was found too cumbersome and too significant a drain on FEC resources.

As a consequence, with Congressional authorization, in 2000 the FEC began an administrative fine program that routinely, and almost mechanically, imposes civil administrative financial penalties on campaign committees and PACs (many of whom are quite small) that fail to file or file their required disclosure forms late. The FEC administrative mechanism is particularly instructive because among the factors taken into account by the FEC in assessing the civil fine is the size of the entity whose failure is at issue—political committees with less than $50,000 in activity are fined as lower rates than larger organizations. Since the program was initiated in 2000, the FEC has imposed administrative fines in 602 cases. Fine amounts are modest—the total amount collected is $838,000, or roughly $1,400 per case.

There is some evidence that this new administrative program has influenced the timely filing of FEC reports. In 1999–2000, 36,568 reports were filed with 6,684 or 18% late- or non-filings. In 2001–2002, the first year after the new program went into effect, 34,472 reports were filed with 5,129 or 15% late- or non- filing. According to the FEC, the number of late or non-filers continues to decline in the current cycle, though no data is yet available.

ERISA—Under the Employee Retirement Income Security Act (ERISA) the Department of Labor receives approximately 1.3 million Form 5500 and Form 5500–EZ filings per year. The Department has statutory authority to assess civil penalties up to $1,000 per day (now $1,100 with inflation adjustment) against plan administrators who fail to file complete and timely annual reports.

The Employee Benefits Security Administration (EBSA) and its predecessor agency have used their authority to administratively reduce penalties in a variety of initiatives designed to provide incentives for compliance with the filing requirements. These initiatives seem to have been quite successful. For example, during the Clinton Administration a March 1992 "grace" period resulted in the filing of 40,000 Form 5500 and Form 5500–EZ reports and the collection of approximately 40 million dollars.

In March of 1995 DOL established the Delinquent Filer Voluntary Compliance Program (DFVC). This program resulted in approximately 1,000 new filers per month. To promote voluntary compliance this program administratively reduces fines so that the most a DFVC late-filer is fined is $4,000. EBSA of course retains the discretion to seek stronger enforcement for those who it deems worthy of more significant punishment.

The EBSA experience is not directly applicable to the LM–2 question before you, as EBSA has the civil authority that the LMRDA enforcement branch lacks. Still, it seems to me that the EBSA program is evidence of the converse proposition: that an agency with an enforcement structure including strong statutory civil fining authority may be empowered, thereby, to implement a program of lesser fines and sanctions as an incentive to obtain compliance with filing requirements. The combination of power to impose a large fine and administrative ability to impose lesser sanctions appears to provide an agency with the greatest capacity to craft incentives to insure timely filing—which, after all, is the true goal

The lack of such authority in the LM–2 filing context is palpable: With no fear of the blunderbuss that is never used and no other incentive for voluntary compliance, unions have no reason to act vigorously to ensure compliance with the LMRDA. The civil sanctions proposed in H.R. 993 are tools appropriate to the enforcement task and commensurate with the scope of the regulatory injuries they seek to address.

H.R. 993

Finally, let me turn to the text of the bill before you. In general it is a salutary effort to remedy the flaws in the current enforcement structure of the LMRDA. By giving the Secretary of Labor civil authority to secure monetary penalties from delinquent or deficient unions the legislation will give the Secretary an important, indeed, essential tool for achieving compliance with the reporting requirements of the Act.

It is highly likely that the imposition of civil penalties will have a deterrent effect of precisely the sort that is necessary. The structure for the administrative penalties chosen is both moderate and measured. The bill requires the Secretary to take into account the nature of the violations involved; the revenues of the violator; and the violator's prior enforcement history. Thus, it focuses accurately on questions of the

magnitude of the harm and recidivism that are commonly understood as the appropriate metrics for calibrating punishment.

If I could offer one suggestion concerning this bill it would it would be to explicitly incorporate a graduated civil sanction based upon the intentional nature or scienter of the conduct in question—accidental violations or those arising through neglect ought to result in fines less severe that those arising from gross negligence or deliberate but non-willful conduct. Perhaps that is what the bill intends to capture by specifying that the Secretary take account of the "nature of the violations involved" but greater clarity on the issue would be welcome. Such a modification would also address the concerns of some that penalties for an "inadvertent mistake" would potentially bankrupt a union.

Mr. Chairman, thank you for the opportunity to testify before the Subcommittee. I look forward to answering any questions you might have.

Chairman JOHNSON. Thank you very much. Since Amtrak was late, our other witness is from Mr. Andrews's district. Would you care to introduce him?

Mr. ANDREWS. I would. I would like to welcome Mr. O'Brien back to the hearing. Same subject as we had last year. Mr. O'Brien has extensive experience in representing labor unions, labor organizations. He has negotiated collective bargaining agreements, counseled labor unions through both good times and bad, and I suspect deals with this issues every day of his practice.

I know him to be a person of not only great insight, but great integrity, and I welcome him here to the Committee today.

STATEMENT OF ROBERT F. O'BRIEN, ESQ., O'BRIEN, BELLAND, AND BUSHINSKY, NORTHFIELD, NJ

Mr. O'BRIEN. We dialoged the last time at some length, I think, Mr. Johnson. You and I talked about the Landrum-Griffin Act back in 1959, when Bobby Kennedy and the Select Committee on Improper Activities in the labor-management field recommended passage of the statute.

And the last time we talked about it, I think I opined that it was a statute that was working very, very well, and I would be loathe to make any amendments to that statute, or change the statutory scheme in any way, simply because the provisions in there, particularly the union democracy provisions and other provisions seem like, as a Federal statute over the last, what, 43 years, have been working fairly well.

A year has elapsed since we last talked together. Interesting things happening, at least from a local practitioner's point of view. We are seeing an uptake in the last 12 months in Labor Department activity, relative to timely filing of LM reports.

A number of unions we represent have gotten communications where prior to the last 12 months they have not gotten communications from the DOL, talking about what's in the LM, about timely filing of the LMs, and things of that nature.

As the AFL-CIO points out, the problem is somewhat limited, and the problem seems like it's one that is more proportionate to smaller unions.

Many of the unions, as we again talked about last year, many of the unions that we represent are small labor organizations. Contrary to the idea of monolithic full-time employees with large salaries, many of the unions that I represent and that exist in the

country are smaller unions with part-time officers who work for various employers.

What concerns me is the scheme which—the statutory scheme—which would be put into effect, which would require that civil penalties be imposed on certain filers of a late or a non-filing nature.

Again, the problem remains the same as it has been for many, many years in labor unions, trying to get the very best people to run for office. I am very concerned that if we pass legislation which is going to put some more burdens on being a local union office, or being a local union secretary-treasurer, that, indeed, we have taken people out of the area of running for local union office who don't want to have these kinds of strictures put on them.

I believe the DOL in the last year—and I would be interested to see their 2002/2003 statistics on late filers and non-filers. As the Committee knows, there is not that many international unions anymore. I think we're down to 70 or so. And as the AFL-CIO has pointed out, of the 30,000 labor unions that need to file reports, only 5,400 of those have more than $200,000 in income.

I think that is very, very relevant. We find ourselves often times counseling local union secretary-treasurers how to fill out the LM form, what to put in, what to put out, what needs to be said, what needs not to be said. And as you know, there is legislation and changes afoot to substantially amend that LM form.

The question becomes more disclosure is good in many instances. We have talked about—last year, we talked about the SEC requirements which now must be personally signed off by a number of corporate officers.

The question is, however, this is not a publicly—they are not publicly traded companies, in many instances, they are small organizations which, essentially, have come into existence over many, many years, and the paramount idea here is when the folks passed Landrum-Griffin, when John Kennedy and the others passed Landrum-Griffin, they put strong, strong language in that statute that said labor unions should be left to administer their own affairs as far as statutorily possible.

And they really stressed that labor unions are best left alone. The legislation they did pass put into effect the LMs, put into effect and resolved the worst abuses. And the Labor Department, I think—particularly the agency—the Office of Labor-Management Standards—charged with enforcing the statute, has done—actually, even in the last year—a pretty decent job of making sure the late filers and the non-filers get corrected.

But to tinker with this statute 40 years out is something that I think we should best leave it alone. Again, the idea of not encouraging people to run, putting more statutory schemes on people who work full-time elsewhere and are part-time union officers, in the 25,000 labor unions that have less than $200,000 a year in income is really ill-advised. Thank you for hearing me.

Chairman JOHNSON. Thank you. I am glad you made it.

Mr. Rosenzweig, I would like to ask you, you know, last year you summarized the problem that we are here to address today as one of being late without an excuse, kind of like kids going to school and the principal finds they are tardy, they do not kick them out of school, but they do punish them in some way. And we have no

punishment device. And the one you suggested is actually what our bill does, in effect.

But I like unions, you know, and I think we ought to protect them, and especially the smaller ones. So the purpose of the Department of Labor—and I think all of us in the Congress—is to make sure that it functions properly.

And your suggestion of an IRS enforcement model, I think, is a good one. I wonder if you could help us understand those comparisons a little better.

I might add that, Mr. O'Brien, the small unions are not the whole problem. The large unions are, too. And as a matter of fact, just in 2002, there were over 400 small unions—actually 300—large unions, excuse me. The LM-2 form, in other words, that were not filed.

And I would like to make the distinction that the law says you file on a certain time. And filing late is not filing on time. And taxpayers get penalized for that, and there isn't any reason that, you know, you say everything is working rosy, but if they are not filing when they are supposed to, it's not rosy.

Mr. Rosenzweig, would you care to comment on that?

Mr. ROSENZWEIG. Well, I certainly think your analogy to children in school has some instruction. I mean, plainly, we do not kick students out for tardiness.

What that embodies is the sensible realization that the punishment ought to fit the crime, or the offense, and that is a principle that we have used in every other regulatory regime that I am aware of. I hesitate to say there are no others, because that purports to be comprehensive knowledge. But every other one of our regulatory regimes has systems that involve both administrative, civil, and criminal sanctions.

I kind of draw two lessons from that, or two different things. The first is that I think that the incentive structure that Mr. O'Brien is talking about, about discouraging union member participation probably is a realistic one, but it is not unique to unions. It is—it happens in every regulated structure, small businesses, large businesses.

I mean, we have certainly seen lots of people bailing out of director and officer positions after Sarbanes-Oxley for the very real reason that they now fear going to jail. So there is absolutely no denying that the incentive structures that you put in place affect behavior.

But I have yet to hear an argument either from the economics or from the structure, about why that set of incentives operates differently in the union environment than it would anywhere else.

The other—the flip side of that is that when we look at other areas—and the one that I chose here, particularly, was the IRS—we see that, in general, there is a heavy reliance on civil sanctions and administrative sanctions, in preference to criminal sanctions, for the act of non-filing, for the very good reason that we recognize that the act of non-filing is a lot less significant than the act of filing a false report, or lying, hiding money, stealing.

The IRS brought 144—I think that's the number I cited in my testimony—criminal prosecutions for non-filing last year, and took more than 2,000,000 civil and administrative actions against late,

or delinquent, filers who were late or non-filing. They do not split it up, so I cannot tell. That strikes me as a hallmark of an effective regime.

And the last point I would make is that to the extent that you worry about the authority being used to discourage people, we have seen models where the presence of the authority, combined with forgiveness, delinquent filer programs and the such, is what achieves what we're all actually going for, which is compliance. We want the student to come to school; we don't want to punish him.

Chairman JOHNSON. Yes, thank you. Mr. Yud, it is not often we have the administration here, and I would like you to comment, if you care to, on his comments.

Mr. YUD. Well, I think we agree in a lot of respects. The purpose of the LMRDA, as has been mentioned here, was to allow union members, basically, to govern their unions, to encourage self-governance, to encourage transparency. And if union members can't get the information they need in a timely fashion, then that information is of no use to them.

I mean, the law allows the union currently 90 days from the close of its fiscal year to file its reports. So there is a 90-day period built in there. And then as months pass after that, the information gets, of course, dated, and it becomes much less useful.

And as I say, we have tried for—we have had 40 years of experience in trying to get through a variety of means to encourage and get these reports filed on time. And I have to tell you that we have not achieved great success.

Chairman JOHNSON. Thank you, sir. Mr. Andrews?

Mr. ANDREWS. Thank you. Mr. Yud, last year—am I pronouncing your name correctly?

Mr. YUD. Yes.

Mr. ANDREWS. Thank you. Last year, we had the Deputy Secretary of Labor Findlay testify on this subject. And as we went through the testimony, we established that for reports that had to be filed in the year 2001 by March 31st, deadline of March 31st, of the 30,000 or so filers, by August 15th, there were 4,025 filers that had not yet filed. So, in other words, if you take all the unions that should have filed by March 31, 2001—about 30,000 and some—that by August 15, 2001, all but 4,025 of them had filed.

Now, this hearing took place in April of 2002. Just to refresh the timelines again, the reports were due March 31, 2001, the letter that was written to the Committee by the Secretary was as of August 15th, and the hearing took place in April of 2002.

In April of 2002, I asked Mr. Findlay how many of those 4,025 unions had filed by April of 2002. He didn't have the answer at that time, and I asked him if he would supplement the record by answering that question in writing, which, to my knowledge, in looking at the record of the hearing, he did not.

I would renew the—I don't expect you to know the answer on the top of your head—but I renew the request today. Of the 4,025 organizations that were supposed to file in 2001 who had not filed by August 15, 2001, how many of them have since filed for 2001? Do you know?

Mr. YUD. You are correct, that I do not have the answer with me here, Congressman. But do I understand, you are talking about the

labor organizations that had a report —or a fiscal year ending in 2001, and what was the status as of August 2002?

Mr. ANDREWS. No, these are reports that were due for the 2001 year as of 3/31/2001.

Mr. YUD. Right.

Mr. ANDREWS. And we went through this testimony, and Mr. Findlay's testimony was there were 4,025 delinquent filers as of August 15th, meaning 8 months or so after the deadline.

I asked him how many of those 4,000 were still delinquent as of April of 2002. He didn't know, and promised to supplement the record.

The reason I bring that up is to get to the scope of the problem again. In your testimony, you—on page four—you say in the report year 2002, over 43 percent were either late or failed to file for that year. How many failed to file?

Mr. YUD. I don't have that figure. I would have to look that up and provide it for the record, sir.

Mr. ANDREWS. Well, with all due respect, don't you think that that runs the risk of being a bit misleading? Because what we found out in 2001—and we can quibble, we can argue over the importance of a late filing, and I think it does have some significance—but to lump together, as Mr. Rosenzweig said, to lump together the late filers with the no filers is kind of misleading.

What we found out in 2001 was that we were told, I think, that 42 percent did not file, or were late, but the truth was that about 14 percent had not filed as of August, about 28 percent had filed late, and the remainder had filed on time. Do you know what that number is for 2002?

Mr. YUD. I don't think I can provide that right now, sir. But I would like to respond—

Chairman JOHNSON. Well, let me interrupt.

Mr. YUD. Because—

Chairman JOHNSON. Let me interrupt.

Mr. ANDREWS. Well—

Chairman JOHNSON. I am going to give you a copy of the existing numbers. We wrote those percentages in there—that is 2 days old—for 2002.

Mr. ANDREWS. Well, I would ask the source of this document—did the Department choose to share it with the Minority as well as the Majority, or—

Chairman JOHNSON. I just got it myself, today.

Mr. ANDREWS. OK. I appreciate the point. Here is the point that I want to make. We can use statistics to make any point that we want. And to consistently say that something like over 40 percent are not complying with this law, I think, is a misleading statement.

What would be more accurate would be to say that a certain percentage file on time, a certain percentage file tardy, and then we can have a discussion as to the costs and consequences of that tardy filing—and I think there are some—and then another percentage don't file at all.

But it is rather compelling that an administration that supports this legislation because there is such a non-compliance problem can't tell us what the non-compliance problem is. Right?

Mr. YUD. Well, I am looking at figures, I guess, that were just furnished to you, and I think these figures do provide some of the answers—

Mr. ANDREWS. Well, what is the answer to my question about 2001?

Mr. YUD. Well, Congressman Andrews, you use a lot of numbers, but some of the numbers don't square with what I understand. First of all—

Mr. ANDREWS. They are from the Secretary's testimony.

Mr. YUD. Yes, they are, but I don't think you are interpreting them correctly.

Mr. ANDREWS. No, they are literally—I can read you the Secretary's testimony. It is his testimony from 2002.

Mr. YUD. I understand, sir, but again, I would respectfully disagree with some of the statements you are making. You refer to 30,000 filers. That is all of the unions that have to file during a year. All those reports are not due by March 31st the following year. Some of those reports—

Mr. ANDREWS. No, these were the ones that were due some period in the 12 months leading up to that.

Mr. YUD. Well, but what that means is that by August, some of those might be over a year—

Mr. ANDREWS. You should quarrel with Secretary Findlay, since I am using his words and his numbers. I am just curious as to why it took—it has taken 14 months for the Department to answer a question I submitted in writing at the last hearing. Is there a reason for that?

Mr. YUD. Well, Congressman Andrews, I will apologize for that. As far as I know, we made an effort to respond to every question that we were asked. And if for some reason—

Mr. ANDREWS. Now, if you would like to see the record of the hearing, the Secretary—Mr. Findlay's comments—here is the entire record, included the appendices submitted after the hearing. It is not in here.

Mr. YUD. Well, I am sure we would like to correct that and provide an answer.

Mr. ANDREWS. When would we get the answer by, Mr. Yud?

Mr. YUD. As soon as I could get it out. Now, I am not totally in control of getting that answer out, but I would say to you that I think, you know, if you have a question that—

Chairman JOHNSON. Can you give us an answer in less than 30 days?

Mr. YUD. Mr. Chairman, I can certainly try—

Mr. ANDREWS. I assume the Department would have had it in April of 2002, when we had the hearing. It is not a—

Chairman JOHNSON. His point is well taken, though, Mr. Andrews. The times for unions vary around the year, and they have got 90 after the—

Mr. ANDREWS. I think Mr. Findlay's testimony accounted for that. It doesn't account for the fact that it has taken 15 months to answer a question.

Chairman JOHNSON. Well, this is a point in time right here, that I just gave you. It is not—you know, so—

Mr. ANDREWS. Well, I look forward to reading it for the first time. Thank you.

Chairman JOHNSON. Well, they are just a bunch of statistics, but the numbers, I think, are compelling, because 29 percent are late filers. And if you look at that, 1,700 of them were $200,000 or more, and only 298 are—which is a number I quoted you a minute ago—are not received at all.

Mr. ANDREWS. Well, Chairman, not received, what is the date of this chart? It is as of June 24, 2003?

Chairman JOHNSON. Yes. I ought to have a date on it; it does not.

Mr. ANDREWS. OK.

Chairman JOHNSON. You want to—

Mr. ANDREWS. My time is up.

Chairman JOHNSON. Thank you. The Chair recognizes Mr. Wilson for 5 minutes.

Mr. WILSON. Thank you, Mr. Chairman, and Mr. Yud, I want to thank you for working with the Congressman from New Jersey.

I think part of the confusion has to be about the failure to comply, the 42 percent, the 28 percent late, the 14 percent that hadn't filed. If there just were compliance—and my interest is the LM forms themselves. Are they difficult to fill in?

Mr. YUD. Congressman Wilson, I would say that the forms themselves are, in my opinion, not particularly difficult.

I mean, for 80 percent of the unions, there is a more or less simplified report. For unions with 10,000 and less in receipts, it is basically a front and back of one page, and you only have to put in four or five total figures of assets, liabilities, receipts, and disbursements.

So, I would say that the forms—for 80 percent of the unions that have to file them, the forms are fairly simple. The LM-2, which is the larger form for the 20 percent that are over $200,000, is somewhat longer, but I would contend that it's not a particularly complicated form.

Mr. WILSON. And it has been pointed out that this has been in place for 40 years. And so could it possibly be that people not understand they need to fill the form in, or have it filed?

Mr. YUD. Well, I think the great, great majority of union officials are familiar with the form. We engage in a lot of compliance assistance, we work with internationals to try to help them advise their affiliates.

So I would say that, you know, it is certainly possible that a new union official out there, an isolated minority, might not immediately know, but they will soon know about it.

Mr. WILSON. And then is there any way that this could be made enforceable by regulation, rather than additional legislation?

Mr. YUD. No, sir. I think the statute does not give the Secretary of Labor authority to impose fines. And my belief is that it cannot be done without legislation.

Mr. WILSON. And Mr. Huebner, in your testimony, you touched on something that troubles me a great deal. You mentioned that when you requested to examine the bills of your council, that you felt that there was an effort to intimidate, or even threaten you, and that other of your rank and file brothers similarly feel harass-

ment, intimidation, economic retaliation, and formal disciplinary action when they seek to exercise their rights.

As the sponsor of legislation designed to—which is in addition to the bills before us today—to address the threats of union violence, I am very concerned that what we are hearing here is that union members who try to exercise their democratic rights are subject to harassment, retaliation, maybe even threats of violence.

Can you tell us more about what happened to you, and what you know of what has happened to others? Are we really hearing that union members are being subject to threats and intimidation?

Mr. HUEBNER. First of all, a number of years ago, probably 1998, the recording secretary of our local was passing out copies of the labor bill of rights in the workplace, and he was threatened—he was removed from the workplace, and he was also physically threatened. He subsequently, within a year, left the union, and is a successful entrepreneur right now. That is one example.

Another example would be the issue that he and I went through at the same time. There were approximately five of us on the executive committee on our local when they started the restructuring at the district council level before they went to a four-state council.

Because we would not comply with their wishes to change our bylaws that gave the financial control to the council over our $250,000 local, they had us removed as shop stewards, the five of us, and my income went from $42,000 that year to $17,000 the next year. Two of the other brothers could not sustain the kind of economic loss, and left the industry.

In terms of physical intimidation, at that time there was a business agent, notorious to this day, who did physically threaten people. He has been subsequently removed, but I believe that the union now is being run by a more sophisticated group of individuals.

The reason this came up at the council meeting was the council bylaws—which I have a copy here—say that they have to—that the EST—he calls himself the CEO, because he is the chief executive officer—he is the ruler of the land. He—it says the EST will submit the bills to the trustees for review, and they should be submitted to the delegates for approval.

So, I asked to see the bills. I said, "In 2 years and eight meetings, we have never seen the bills. I would like to see the bills." "Well, they are way too cumbersome, they are as thick as a phone book. They take hours." I said, "I got time." You know?

So then, he said he didn't want to release them because if they were to go out to the members, that there were people that were using this information and taking it to—and I quote—"working with Republican committees who are not our friends."

To me, it could be no more direct. My fellow delegate is here, and he was sitting as far as you and I are, and he got the same impression. This was a definitive reference to my testimony before the Congress, and I will not yield or bend on my rights as an American citizen, no matter what they say.

Mr. WILSON. And one final question, Mr. Chairman, and that is that you indicated concern about your dues being increased precipitously, and also about the pay for the union officials increasing at an even greater rate.

Is there any provision for you, as a member, to petition for a general meeting to review this situation?

Mr. HUEBNER. Our local union made a written request as per constitution, for a special meeting with the executive secretary-treasurer, who negotiated our contract, promised us continuously we would have the right to vote on it, and then pulled the rug out from under us on a Saturday morning after lobbying the people that were on his payroll to vote against me.

I spoke in Williamsburg and said that Jefferson would be turning over in his grave when they took the right of ratification away from our members.

They passed it, and he has, to this date, not replied to the membership about this call for a special meeting about our contract.

In terms of executive compensation, the levels of compensation have never been voted on in council. I was asked to run, and ran as a delegate, because I know now that this is where the money is—$15 million strong for 12,000 members with 50 delegates, half of whom are on the payroll of the regional council, and work directly at the behest of this CEO/EST.

They are so far beyond our control, the absolutely opposite of what the general present statement to this Committee years ago was, that it is preposterous. I won't belabor the point too much, but we can speak volumes to this issue.

Our members are incensed. We have circulated and have petitions signed by over 500 members out of 700, demanding our right to ratify. They sit here, coming from work, sacrificing their time and their money, as do I, to say that they double our dues—I paid $780 in dues—and this guy makes $166,000 in 9 months. He is untouchable. I am sorry, I don't mean to—

Mr. WILSON. No, well, I think we got the message, and we appreciate your providing the information.

Chairman JOHNSON. The gentleman's time has expired. The Chair recognizes the gentlelady from Minnesota, Ms. McCollum.

Ms. MCCOLLUM. Thank you, Mr. Chair. To the gentleman from the carpenter's local, your statements reflect that of your carpenter's local 1110 in Washington, D.C., and you're not speaking on behalf of the carpenters from Minnesota, or anything, you're just speaking about your local?

Mr. HUEBNER. I wouldn't presume to speak as directly for them, though I have met with them often.

Ms. MCCOLLUM. I meet with them often.

Mr. HUEBNER. There is a guy named Tom Crofton who is a carpenter in Wisconsin.

Ms. MCCOLLUM. Sir, I said Minnesota. And you are speaking of the actions in your local.

Mr. HUEBNER. No, in terms of—no, I would just beg to differ with you. I can cite numerous circumstances in Atlanta, where—

Ms. MCCOLLUM. Sir, I asked you if you were speaking on behalf—I didn't ask you to cite circumstances. You are speaking on behalf of your—the experiences you directly had in your local, correct?

Mr. HUEBNER. And experiences that have been conveyed to me—

Ms. MCCOLLUM. Thank you.

Mr. HUEBNER.—by other union members.

Ms. MCCOLLUM. Thank you. Mr. Chair, I am going to make more of a comment than I really have a question.

This was really strange. As I was reading through this testimony—and I did step out of the room for a few minutes, there is a hearing going on in International Relations, and I wanted to hear the president, who came all the way from Mali, Africa—about not timely filings, people not being able to have their day in court.

Boy, it sounded like a lot of people I work with back in Minnesota and here in Congress, when dealing with the EPA with pollution, when dealing with OSHA standards. No timely investigation, no open reporting, no civil penalties, no penalties taken.

If this is a model that we are going to be looking at seriously here, then I think it is a model that I would like to look at for OSHA, and for the EPA, because what I am hearing here is the same thing as I have heard in testimony from groups in environmental hearings and the rest.

So, I want to know if the administration is looking forward to being as enforcing on corporate polluters as the potential problem that they think that they might have uncovered with some of the unions with late filings. Mr. Chair, that is all I have to say.

Chairman JOHNSON. Thank you, ma'am, for your comments. The Chair recognizes Mr. Kline for 5 minutes.

Mr. KLINE. Thank you, Mr. Chairman, and thank you, gentlemen, for being with us today.

I think I would like to—I am new to Congress and to this Committee, and so I don't have the advantages of previous Congress's hearings and discussions.

We are looking at a way to give union members more visibility into the actions of the union, and make sure that their rights are being protected. And as I understand, what we are doing here today—and we have three pieces of legislation, H.R. 992, 993, and 994—and I think the question would be to Mr. Rosenzweig.

You, obviously, are familiar with these pieces of legislation. Can you tell us—tell me, help me better understand—why we need the three pieces, and how that will better accomplish what we are trying to do here?

Mr. ROSENZWEIG. Congressman, I am going to focus on 993, which is the one that I know best about. H.R. 992 and 994 are a little out of my area of expertise, though I can speak to them just a bit.

With respect to 993—and I think it's actually a useful sort of response to the observations of Ms. McCollum —that is going to be giving the Secretary of Labor tools that the administrator of EPA already has, in terms of civil enforcement. It is intended to give the Secretary of Labor tools that she already has, in terms of enforcing OSHA.

Now, it may be that she doesn't—that they don't use those tools effectively yet—though my own experience in the environmental area, for example, is that the instances of non-filing are less—I confess I looked and couldn't find any statistics on the EPA website, so I offer that only as an anecdote, not as any concrete—and perhaps that is a useful comparison you ought to ask about.

But clearly, the Environmental Protection Agency and OSHA have a very active civil program. There is an entire section of the

Department of Justice that civilly enforces the law. So this is giving the Secretary of Labor, in this context, a tool that the other regulatory agencies all have already.

And to my mind, there is—I have yet to hear a reason why the same incentive structure would not function as well in this context as in others. H.R. 992 and 994—well, I think I will defer to someone else on those who knows them better than I.

Mr. KLINE. All right, thank you. Mr. Yud, would you like to take that? We are looking at three separate pieces of legislation here, and I am trying to understand why—what we gain out of the three separate pieces.

Mr. YUD. Well, sir, the administration has only taken a position with respect to one of those, and that is the same one Mr. Rosenzweig was talking about, which is the Labor-Management Accountability Act.

And the President, in the 2004 budget, did include a proposal to—for civil monetary penalties, so that some effort and enforcement action could be taken to ensure that the reports that the Act requires are filed in a timely fashion.

Mr. KLINE. OK.

Mr. YUD. I am taking a position with respect to the other proposals.

Mr. KLINE. Well, it is clear to me that Mr. Huebner has a concern about the members' right to know. Would you like to address that in 992 and 994?

Mr. YUD. Well, as I said, there is no formal position that the administration has taken on those particular proposals.

Mr. KLINE. No, I meant—I am sorry, I thought I was shifting my—

Mr. YUD. Oh, I am sorry.

Mr. KLINE.—my focus, if you will, to Mr. Huebner. We have had pretty good responses on 993. Can you talk to 992 and 994 for just a minute?

Mr. HUEBNER. In terms of 992, informing the members of their rights, I think that the strength in that one is the statement that says—and I have a website download, you know, that's the best I could do—it says to periodically —"labor organization shall provide such information periodically to all members in a manner which the Secretary of Labor determines will promote a fuller understanding."

I have in my hand a folder that is currently being passed out by our counsel. And in this folder that's given out to new members, there is a brief history of the union, there is an organizational chart, the officers of the council, even five statements called a bill of rights. But there is not one reference to the LMRDA.

This is the perfect place for it. Put their rights in here. Put a copy of the law in here. Put the bylaws in here. We don't even know the rules. The Secretary could potentially determine—and I'm not a lawyer, so I don't want to get into the minutiae of it—the secretary could determine that since they are to be filed with the Secretary of Labor, they should also be given out to members.

We present sit here, 4 months after a contract was ratified by 50 delegates at regional council outside of our control, and we have no contract. Nobody has even seen it. We don't even have a contract

yet. That is in the law, that they have to do it. What are we supposed to do? By the time we beat down Labor's door, they will have typed something off, merged our local, and gotten rid of me.

Mr. KLINE. OK. Thank you very much. And I see my time has expired, and we are being called to vote. I yield back.

Chairman JOHNSON. Yes, the gentleman's time has expired. I propose that we break for a vote and come back, unless you want to ask a quick question, Mr. Tierney.

Mr. TIERNEY. Mr. Chairman, I would like to do my 5 minutes, if I could. I have another Committee meeting going on that I have been waiting patiently here to get my turn so I could go to that Committee—

Chairman JOHNSON. Mr. Tierney, you are recognized.

Mr. TIERNEY. Thank you very much. I appreciate the courtesy.

Now, Mr. Yud, back in 1998, Congress asked the Department to post the LM-2 reports online. In April of 2002, Labor officials told us that they hope to have those online by June of that year. My understanding is we are still waiting. Is that correct?

Mr. YUD. No, sir, Congressman Tierney. Those—there is a disclosure site, and I think in June—at least since June of 2002—we have been publishing the LM reports on that site.

Mr. TIERNEY. And are people able to get most of the information that they need under your new regulations on that site?

Mr. YUD. I am not sure what you mean by the new regulations. There are no regulations—I mean, that site is up and running, and when we get an LM report, we post it on that site.

So, instead of having to come in for a paper copy, they can go into that site. And assuming the report has been received, they can go to that site to view it.

Mr. TIERNEY. And that has been up since what date, now?

Mr. YUD. June of 2002.

Mr. TIERNEY. OK.

Mr. YUD. Reports which aren't received, of course, are not on that site.

Mr. TIERNEY. That is pretty obvious.

Mr. YUD. Yes, sir.

Mr. TIERNEY. Thank you for that. Now, back—a while back in 2001, Don Todd, who was then the deputy assistant secretary, told us that, "Since few of the recordkeeping violations are considered intentional, however, the Department uses its audits and compliance assistance programs to educate union officers about their recordkeeping obligations, and thereby enhance compliance. Civil litigation is also available for unintentional violations of the recordkeeping requirements, and willful violations are also subject to criminal prosecution."

Mr. O'Brien, has it been your experience that that progression is a fairly effective way to approach this problem?

Mr. O'BRIEN. I think it is, Congressman. I might say this to you quickly.

The injunctive provisions in Landrum-Griffin allow the Secretary of Labor to go after a union that doesn't file. They have injunctive relief already. The labor-management, or the labor community, is a fairly tight knit one. I, frankly, do not know of non-filers. And if, indeed, the Secretary of Labor is interested in making an exam-

ple out of someone, they simply need go in and obtain an injunction.

Mr. TIERNEY. Well, I spent a lot of time on one of my other Committees dealing with people that were interested in the Small Business Paper Reduction Act. And I see an analogy here, whatever. I mean, I don't think we want to burden unions any more than we want to burden small businesses with this. So the Internet is one good way to deal with this. The other is to try and give businesses or unions an opportunity to rectify something that is unintentional.

So, it seems to make sense to me that the first thing is to educate them for compliance assistance, and to move on with the unintentional one, and then to proceed up the line, either with a fine through a civil action, or if it's a willful action, to take a criminal action on that.

I am a little troubled with the concept of a department that is apparently overburdened and unable to do the number of audits that they need to make these determinations, is now going to be able to just simply make a fine. You agree with that point?

Mr. O'BRIEN. Fines are totally unnecessary. Considering the tools they already have, particularly injunctions—we're trying to compel compliance, as Congressman Johnson pointed out, we're not trying to punish people here.

You can compel compliance with an injunction action which is already in the statute. You want to make an example out of somebody who doesn't file year after year, all you need do is sue them in the Federal district court. You will get their attention, yet, the Labor Department doesn't seem like it uses that remedy.

Mr. TIERNEY. To your knowledge, Mr. O'Brien, is the Labor Department still having difficulty having the number of people working with them doing audits to keep up with their work load?

Mr. O'BRIEN. As you point out, Congressman, they have a right to randomly look at these unions. The number of investigators seems like it is less and less actually coming in to do the investigations, at least in our geographic area.

Mr. TIERNEY. OK. Well, I don't think I need to belabor this, Mr. Chairman. It seems to me that we are—I think everybody wants the members, the rank and file, to have the information they need. And hopefully, the Internet is going to move in that direction.

In terms of getting these things filed, it is important to know how many are willful and how many aren't, and why the Department of Labor isn't exercising the tools that are available to it now to get people to file on time and to take whatever actions are there.

I think giving them more responsibility when they can't keep up with their current load is an open invitation for some arbitrary action. I would rather seem them go through the deliberative process they have to go through now and have a modicum of fairness, than to assume they're going to be understaffed and just start slapping fines, willy nilly.

Mr. ANDREWS. Will the gentleman yield?

Mr. TIERNEY. I will be happy to.

Mr. ANDREWS. I just wanted to supplement. The document the Chairman handed me a few minutes ago about 2002 indicates that for unions with receipts equal or greater than $1 million a year, there is a 3.3 percent delinquency rate, which I think Mr.

Rosenzweig made reference to earlier. And for all LM-2s, it is 5.5 percent.

I would like to ask the Department if they can supplement later the record by telling us how delinquent each of these reports is under the not-received-to-date category, how many days delinquent it is. And I would yield back to Mr. Tierney.

Mr. TIERNEY. Thank you, Mr. Chairman. I will yield back. And thank you again for the courtesy.

Chairman JOHNSON. Thank you. I think there is no further questions on either side, and I would like to, at this time, just tell you that the—that we did receive a letter from Cameron Findlay, Deputy Secretary of Labor, and he presented a chart with data in it.

Mr. Andrews says it didn't totally answer his question, so—

Mr. ANDREWS. If the Chairman would yield?

Chairman JOHNSON. Yes.

Mr. ANDREWS. With all due respect, it doesn't answer my question at all. And I have read the letter, and I appreciate the effort, but it is not responsive to the question.

Chairman JOHNSON. Well, but earlier, we indicated there was no response at all, and there was a response. So, if you would help us, Mr. Yud, in that regard, I would appreciate it.

Mr. YUD. Thank you, Mr. Chairman.

Chairman JOHNSON. And I thank the witnesses, all of you, for being here. We sometimes sound like we are grousing, but we are not. We are all on the same team. And I thank you for your valuable time and participation.

If there is no further business, the Committee stands adjourned.

[Whereupon, at 3:27 p.m., the Subcommittee was adjourned.]

[Additional material submitted for the record follows:]

SUBMITTED FOR THE RECORD, LETTER TO CHAIRMAN SAM JOHNSON, FROM DEPUTY DIRECTOR LARY YUD, "RESPONSES TO QUESTIONS FROM CONGRESSMAN ANDREWS AND CONGRESSMAN TIERNEY", SEPTEMBER 23, 2003

U.S. DEPARTMENT OF LABOR,
OFFICE OF LABOR-MANAGEMENT STANDARDS,
Washington, DC, September 23, 2003.

Hon. SAM JOHNSON,
Chairman, Subcommittee on Employer-Employee Relations, Education and the Workforce Committee, U.S. House of Representatives Washington, DC.

DEAR CHAIRMAN JOHNSON: Thank you for the opportunity to testify before the Subcommittee on Employer-Employee Relations on July 24, 2003, to discuss the Department of Labor's enforcement of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA).

Enclosed for the record are my responses to questions posed by Subcommittee members at the hearing. Please do not hesitate to contact me at (202) 693–1265 if you have any further questions or need additional information.

Sincerely,

LARY YUD,
Deputy Director.

Enclosure.

RESPONSES TO QUESTIONS FROM CONGRESSMAN ANDREWS AND CONGRESSMAN TIERNEY

Question from Congressman Andrews: [From the Hearing transcript] Congressman Andrews: Thank you. Last year, we had the Deputy Secretary of Labor Findlay testify on this subject. And as we went through the testimony, we established that for reports that had to be filed in the year 2001 by March 31st, deadline of March

31st, of the 30,000 or so filers, by August 15th, there were 4,025 filers that had not yet filed.

* * * * * * *

In April of 2002, I asked Mr. Findlay how many of those 4,025 unions had filed by April of 2002. He didn't have the answer at this time, and I asked him if he would supplement the record by answering that question in writing, which, to my knowledge, in looking at the record of the hearing, he did not.

I would renew this—I don't expect you to know the answer on the top of your head—but I would renew the request today. Of the 4,025 organizations that were supposed to file in 2001 that had not filed by August 15, 2001, how many of them have since filed for 2001? Do you know?

Answer: This question was answered in May 17, 2002 letters from Deputy Secretary Findlay to Subcommittee Chairmen Congressman Sam Johnson and Congressman Charles Norwood. That letter contained the following question and answer:

> How many of the 4,025 delinquent filers for FY 2000 have now filed?
>
> A total of 1,872 unions are still considered delinquent for FY 2000 reports. At the time of the Department's August 15, 2001 letter, a total of 4,025 filers were considered delinquent. Many of those unions have since filed reports, however, the figure has also been adjusted to correct processing errors. Further, the total number of filers was understated in the August 15 letter because information for unions that terminated subsequent to that year was not included.

I would also note that as of September 10, 2003, 1064 unions are still considered delinquent for FY 2000 reports.

Questions from Congressman Tierney. Mr. Tierney: Mr. Yud, I understand that unions currently have the option of filing their LM forms with the Department of Labor either by paper or on-line through the Department's website.

Question. Since the on-line filing system became available, approximately what percentage of unions have switched to that option and have begun filing their forms electronically?

Answer. Approximately 76% of unions filing Form LM–2 have used the electronic forms software to complete their FY 2002 reports. To date, 64 electronic signatures have been purchased by union officials and two unions have filed reports electronically.

Question. What is the average turn around time between the time unions submit paper forms and the on-line posting of the paper forms?

Answer. The turn-around time for posting copies of paper reports on the OLMS Website varies based on the volume of reports to be processed (approximately 66% of all unions have fiscal year ending dates of December 31 and OLMS, therefore, receives the largest volume of reports in late March). Currently, OLMS is posting Form LM–2 reports received during the month of June 2003 on the Website. Prior to posting paper reports on the OLMS Website, OLMS must prepare the reports to be sent to an offsite contractor for electronic imaging and keypunching and conduct a quality control review of the electronic data prior to posting the report images and data on the Website. Reports that are submitted to OLMS electronically are posted within three to five days of receipt by OLMS.

SUBMITTED FOR THE RECORD, "UNION REPORTING RATES FOR YEAR: 2002", AND "2002 DEPARTMENT OF LABOR DATA FOR LABOR ORGANIZATION ANNUAL REPORT FILINGS"

UNION REPORTING RATES FOR YEAR: 2002

Filer Type	Received On Time	Late Filers	Not Received To Date	Total Filers	% Received Late or Not to Date
REPORTING RATES FOR ALL UNIONS					
LM–2 ($200,000 or more)	3,379	1,713	298	5,390	37.31
LM–3 ($10,000 -$199,999)	6,604	3,867	1,794	12,265	46.16
LM–4 (Less than $10,000)	4,815	2,585	1,939	9,339	48.44
Simplified	1,711	266	207	2,184	21.66
Totals	16,509	8,431	4,238	29,178	43.42

UNION REPORTING RATES FOR YEAR: 2002—Continued

Filer Type	Received On Time	Late Filers	Not Received To Date	Total Filers	% Received Late or Not to Date
UNIONS WITH RECEIPTS EQUAL OR GREATER THAN $1,000,000					
$1,000,000 or More	1,238	644	65	1,947	36.41
REPORTING RATES FOR UNIONS WITH FISCAL YEAR ENDING IN DECEMBER					
LM–2 ($200,000 or more)	2,577	939	261	3,777	31.77
LM–3 ($10,000 -$199,999)	5,236	2,445	1,575	9,256	43.43
LM–4 (Less than $10,000)	2,889	1,514	1,504	5,907	51.09
Simplified	335	266	92	693	51.66
Totals	11,037	5,164	3,432	19,633	43.78

2002 DEPARTMENT OF LABOR DATA FOR LABOR ORGANIZATION ANNUAL REPORT FILINGS

[Report Year 2002]

Form Type	Received on Time	Late Filers	Not Received	Total Filers	% Received Late or Not at All
LM–2	3,379	1,713	298	5,390	37.31
LM–3	6,604	3,867	1,794	12,265	46.16
LM–4	4,815	2,585	1,939	9,339	48.44
Simplified	1,711	266	207	2,184	21.66
Total	16,509	8,431	4,238	29,178	43.42

SUBMITTED FOR THE RECORD, STATEMENT CONCERNING H.R. 992, 993 AND 994, SUBMITTED ON BEHALF OF THE "TWO-HATTERS COALITION", ADELE L. ABRAMS, ESQ., JUNE 24, 2003

Chairman Johnson and members of the committee: This statement is being submitted for the record of the June 24, 2003, hearing on H.R. 992, 993 and 994, various legislation dealing with the rights of union members and relations between unions and management. We represent the "Two-Hatters Coalition" ("THC" or "Coalition"). The THC is a group of men and women who are paid union firefighters in their full-time jobs, and who volunteer as unpaid firefighters in their local communities during their days off from work. The members of the Coalition provide critical emergency services at a time when local fire departments and paramedic teams are vastly underfunded.

We believe that there is a significant issue concerning the First Amendment rights of union members to provide volunteer services, which also has public safety and homeland security implications. Although this issue is not specifically addressed in your legislation, we hope that you will consider the need for congressional intervention and perhaps hold an oversight issue to ensure that the safety and health of the American public is not sacrificed in order to advance the self-interests of unions.

As Congress looks for solutions to the crisis in emergency response, we wish to point out current developments that serve only to exacerbate this problem. In certain areas including, but not limited to, the Washington, DC metropolitan area, Rochester, NY, and Michigan, these "Two-Hatters" are being brought up on charges by their unions because of their unpaid volunteer activities at local volunteer fire departments ("VFDs").

In the Washington area, Two-Hatters currently face trial board charges in Washington, DC, Arlington, VA, Montgomery County, MD, and other jurisdictions. These Two-Hatters face expulsion from the union unless they agree to cease their volunteer firefighter activities. The International Association of Firefighters, and some of its locals, have deemed volunteer fire departments to be "rival" labor organizations. As the IAFF noted, in correspondence to its members on this issue:

> The IAFF Constitution makes it clear that IAFF members can be subject to charges and internal discipline if they serve as volunteers.* * * all too often, jurisdictions rely upon the services of volunteers to undermine the efforts of our own members to obtain the resources necessary to support a

> properly staffed and adequately equipped full time career fire department. As a union representing the interests of paid professional fire fighters, we can and must promote the interests of our members by strongly advocating career fire departments across North America.[1]

There are economic consequences for the Two-Hatters, regardless of whether they opt to "walk the plank" by leaving the union or resigning as volunteer firefighters. But, more critically, there are public safety consequences arising from this attempt to deplete the ranks of volunteer fire departments in order to protect union interests.

Local communities depend heavily on volunteer firefighters, and can ill-afford to create paid firefighter positions to replace those Two-Hatters who may be forced to withdraw from participation in these VFDs. Some of the Two-Hatters now being brought before trial boards are the same individuals who were involved in rescue operations at the Pentagon and who, as volunteers, provide emergency support to departments in Prince George's County, MD,[2] that serve as backup for emergencies on Capitol Hill and the federal agencies in Washington. Following the September 11, 2001, events at the World Trade Center, hundreds of volunteer firefighters and volunteer fire chiefs worked alongside of and supported career firefighters in New York City. It is incredible that these same individuals are now being viewed as "the enemy" by their own unions simply because of their volunteer activities.

Today, nearly 50 percent of some VFDs' firefighters are "Two-Hatters" and in most cases, these volunteers serve the VFDs during key evening and weekend shifts, while paid firefighters work a more regular weekday schedule. These volunteers are extremely skilled, well-trained and physically fit.[3] How quickly such VFDs could find and train comparable replacement volunteers who are not career firefighters and who are willing and available to work these less-desirable shifts (much less find the revenue to fund such positions) is unknown. But, given our current state of alert, it is not a risk worth taking for our communities. A selection of recent news reports on this issue can be found at *http://www.twohatters.org*. In addition, this issue was also addressed recently by the House Science Committee, in its June 4, 2003, hearing concerning H.R. 1118.

Action to prohibit continuation of volunteer services by Two-Hatters is occurring across the United States because the International Association of Firefighters is condoning such action. The rationale is that if these "two hatters" are forced to stop volunteering, more "paid" positions will be created by the counties and municipalities. To fund that, there will be an increase in taxes to pay for the newly hired firemen and emergency medical staff. But the harsh truth is that there is no money to create new paid positions. Thus, the end result will be a reduction in force at volunteer departments and a diminution of public safety and ability to respond to emergencies. Moreover, those Two-Hatters who have refused to bow to union pressure face on-the-job harassment, disparagement, threats—all of which raise concerns about their own personal safety in the event that they need backup from those union members who oppose Two-Hatters.

As was noted in a recent Bowie (MD) Blade editorial: "It is beyond comprehension why the International Association of Fire Fighters would severely penalize a member of its union for unselfishly volunteering his services, during his off work hours from a fire department in Virginia, to the Bowie Volunteer Fire Department. This draconian action by the national firefighters union also lays the groundwork for substantial damage to local firefighter organizations."[4]

The International Association of Fire Chiefs has estimated that two-thirds of American fire departments do not meet minimum staffing requirements. We agree. The IAFC has noted that 75,000 new firefighters are needed to bring these departments into compliance. We agree. We respectfully suggest that the United States needs more, not fewer, volunteers to maximize our homeland security efforts. The discrimination in employment against individuals who are union members BY their

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[1] September 20, 2002, letter to IAFF Affiliate Presidents from Harold A. Schaitberger IAFF General President.

[2] About 200 volunteer firefighters in Prince George's County, MD, are "Two-Hatters" and, therefore, the ranks would be depleted by this number of individuals if the firefighter union is successful in forcing out these individuals under threat of financial sanctions and/or union expulsion.

[3] The resume of one of the "Two-Hatters" who is currently faced with union trial board charges because of his volunteer firefighter activities, is attached as an illustration of the qualifications that will be lost to our communities if such discrimination against Two-Hatters is permitted to continue.

[4] Bowie Blade editorial, March 27, 2003.

own unions, simply because they elect to answer President Bush's call to serve their country as volunteers, must end.

The IAFF's war on volunteer firefighters also impermissibly interferes with these union members' First Amendment rights of Freedom of Association and should be deemed unconstitutional. Whatever their full-time job, no one should be adversely treated on-the-job or face financial penalties because they choose to volunteer their services in protection of their community.

As a solution to this issue, and in support of strengthening emergency response teams, we propose that Congress consider legislation to ensure that persons who volunteer as emergency service providers will not be subject to adverse employment action as a consequence of their volunteer activities.

Thank you for your consideration of our concerns.

SUBMITTED FOR THE RECORD, WRITTEN STATEMENTS OF UNION MEMBERS: JAMES LYNCH, PHILIP LAVALLEE, CHUCK CANNON, MICHAEL BILELLO, ROBERT L. CARLSTON, GREGG SHOTWELL, MIKE GRIFFIN, TOM CROFTON, DARRELL J. ZUBE, THOMAS J. VERDONE, DAVID JOHNSON, JACKIE FITZGERALD, MARTIN CONLISK, MICHAEL LIVINGSTON

STATEMENT OF JAMES LYNCH, DOCK BUILDERS LOCAL 1456, NEW YORK, NY

I have been a member of Dock builders Local 1456, NYC, NY (United Brotherhood of Carpenters) for 29 years. I am currently retired.

In New York, Union Carpenters (as in the rest of the United States and Canada) face many problems. In the past 11 years we have had a court appointed monitor, a court appointed Investigation and Review Officer, a Trusteeship by our International Union, and an introduction to the Brave New World of Corporate Unionism.

The monitor was a New York lawyer charged with identifying and rooting out corruption. In three plus years he and his staff billed our District Council several million dollars, removed one business agent for corruption, and failed to preserve the promised anonymity of complaining members.

The IRO was a retired Federal judge, appointed as part of a Consent Decree which settled a RICO suit. He and his staff were paid over $1,000,000 a year of members money. He served 63 months of what was to be a 30 month tenure, and he also managed to remove one business agent.

The Trusteeship which under the LMRDA must last no longer than 18 months lasted 43 months. It began when a NONUNION security firm was paid several million dollars to seize our Council at gunpoint and maintain a one week siege. During the Trusteeship money Managers were hired and paid exorbitant fees, while managing to little more than break even during the best stock market and economic boom in the nations history, members were virtually stripped of effective democratic rights, and our leaders became accountable to the UBC and not the members.

Under the Trusteeship, the Welfare Fund Trustees (headed by General President Douglas McCarron) declared that our Welfare Fund was nearing insolvency and retired members must now pay part of their health Benefit costs. These benefits had been unofficially guaranteed to retirees and were traditionally considered part of their retirement package.

A group called MACOUT (a retirees advocacy group, of which I am an Executive Committee member) was formed and instituted a lawsuit to regain free health benefits for retirees.

During the course of the suit it was revealed that the Fund was more than adequately funded. It was also discovered that the actuaries had "mistakenly" undervalued the fund by $7,000,000.

Although they denied the lawsuit had anything do with their decision, the Trustees restored free medical coverage to all retirees.

This is what our Union has become; an undemocratic, corporate philosophy minded entity, led by people totally out of touch with working members; whose members are forced to sue their own Union to gain what is rightfully theirs.

As long as human beings run unions, the temptation to abuse power will exist. What Union members need are strong labor laws guaranteeing democracy. What any proposed change to the LMRDA needs is a focus on the democratic rights of the rank and file.

However, laws without enforcement are meaningless. Stronger enforcement, along with the budget and manpower to make it viable are urgently needed. The Labor

Department is woefully understaffed and under-funded. To effect meaningful change, this issue must be addressed. Thank you.

STATEMENT OF PHILIP LAVALLEE, CARPENTERS LOCAL 225, ATLANTA, GA, VICE PRESIDENT, CARPENTERS FOR A DEMOCRATIC UNION INTERNATIONAL

Currently, the LMRDA does not have enough bite in it for the changing society of today. The DOL should have more authority to enforce provisions for the filing of forms as some unions seem to feel that they are above the law.

Locally, in Atlanta, Ga., Carpenters Local 225 was put in trusteeship and the law requires that a form LM–15 be filed within 30 days of establishment of a trusteeship. The UBC did not file the form for almost 60 days. This left a large number of members without a clue why the trusteeship had been imposed and, with the loss of autonomy, unable to get answers, and without the means to challenge the trusteeship. Yet the membership was still responsible for the payment of dues.

The law must be amended such that union leaders are held accountable to the membership.

In particular, the LMRDA should be amended to include a requirement that a parent union demonstrate it to be valid with a preponderance of evidence either before imposing it, or in the case of an emergency trusteeship, within 90 days—not 18 months later. Also, the only to assure a fair hearing would be to have a genuine neutral, such as a DOL representative, participate in any hearing to determine whether to impose or continue a trusteeship. This will show rank and file members that there will be some impartiality on the hearing committee.

And, the elected officers of the local put in trusteeship who have not had charges filed against them should be reinstated to finish their term if the term has not expired. After all, they were duly elected by the membership.

Also, in the Carpenters union, the right to vote on collective bargaining agreements has been taken away from the rank and file members. This I feel is a monstrous injustice. We pay dues for a say in our livelihood and in the workplace. Therefore all collective bargaining agreements should be voted by the affected members in good standing in a secret ballot referendum. In turn, any union official who negotiates or enforces our labor agreements should be elected by the same process.

I hope you look into these issues and make the necessary changes to ensure a fairness to all working Americans.

STATEMENT OF CHUCK CANNON, RETIRED 50-YEAR UBC MEMBER, UBC PILE DRIVERS LOCAL 34

I write to share some information and my concerns about the UBC.

People whom I refer to as the "business-unionism partners" have, in my opinion, taken over the Carpenters Union to satisfy their own brand of corporate greed; from an insurance company's plan to increase its Taft-Hartley plan market share, to satisfying contractors' desires for cheap skilled workers. They are high-level labor officials, executives of pension fund administration firms, investment houses, construction businesses, and financial organizations with interconnecting interests. They are all employers of building trades workers and have combined all of their political expertise and power to dominate union workers.

In the world of Wall Street, taking over a targeted business can cost hundreds of millions of dollars. The shareholders of the targeted company are legally entitled to receive fair value for their equity and they dance all the way to the bank.

Taking over a labor union with billions in assets is a much cheaper operation. Even though the members are the creators and the rightful owners of billions of dollars in equity, they don't legally own any claim to a damn thing. No one has ever converted the value of union equity into shares of stock or some other form of legal ownership. Instead of mounting an expensive proxy war, all the wellplaced predator has to do is to trick the members into political disenfranchisement to install his own hired managers. The business-union is then functionally, if not literally, his. As long as he can keep the members thinking that his acts are concerned with organizing and other traditional labor concerns, the majority will never wake up to the fact that the union is a valuable financial asset and has been stolen for that reason. The piracy is perfectly legal if the members cannot prevent it.

The predator is almost always a highly-paid union official whose job it is to protect and represent the members. His method of usurpation is invariably the same: employ every tricky device possible to deny the rank-and-file member an effective means of self-defense and democratic remedy. Unfortunately, labor has a long history of endemic corruption. Laws that encourage the application of democratic principles and practices must be supported.

Amendments to the UBC Constitution (similar to those in boldface text throughout) to enhance democracy in the Carpenters Union were officially proposed to the 2000 Chicago United Brotherhood of Carpenters' General Convention. None were adopted.

Title I—Bill of Rights of Union Members

Location in Official Constitution: BOARD OF TRUSTEES
Page #23 Paragraph E Section: 15

Reasons for inclusion to Amendments

To make new provisions for the management and control of the Headquarters and real estate of the United Brotherhood of Carpenters and Joiners of America in the City of Washington D.C. and elsewhere. The intent is to re-structure the Carpenters' Union into a democratic members' union, by the creation of an Asset Trust under which all vested members would be direct owners/beneficiaries in their own names by implication, of the tangible assets of the United Brotherhood of Carpenters. This is the membership's takeover of the International Union.

The Asset Trust shall hold all property, real estate, and other tangible assets for the sole purpose of assigning the advantages, benefits, and responsibilities of ownership of the assets to the union members and to their direct control. This amendment would make the union's members, whose investment of money and labor created the union's wealth, the true legal owners of their international union's assets. The value of Carpenter real estate, including a new headquarters building in Washington D.C., which alone will generate millions of dollars annually in rent and lease revenues, can be measured in the billions of dollars.

Original, official text as amended January 1, 1996

> E Section 15. The title of the Headquarters and real estate now held by this United Brotherhood, or which may be hereafter acquired, shall be vested by proper conveyance in said Board of Trustees and their successors in office, to be held by said Board of Trustees in trust for the sole use, benefit and behalf of this United Brotherhood of Carpenters and Joiners of America.

(NEW) proposed amended text

> E Section 15. The title of the Headquarters and real estate now held by this United Brotherhood, or which may be hereafter acquired, shall be vested by proper conveyance in THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA BENEFICIAL REAL ESTATE, PROPERTY AND ASSETS TRUST, a non-profit trust, to be managed by said Board of Trustees in trust for the sole purpose of inuring a beneficial interest in all said real estate, property and other tangible assets to the members of the United Brotherhood of Carpenters and Joiners of America. THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA BENEFICIAL REAL ESTATE, PROPERTY AND ASSETS TRUST (hereafter referred to as the "Asset Trust"), is the entity which holds the common assets of the persons named in the membership rolls who have been members in good standing for five cumulative years of the United Brotherhood of Carpenters and Joiners of America (hereafter referred to as the "Members"), and who are in fact, the titular and beneficial owners of the Asset Trust, by necessary implication. Said Members shall be the vested, beneficial owners-in-common of all its assets. This beneficial ownership shall be computed upon the total number of accumulated years of membership, plus a fraction of any year exceeding a 0.25 fraction of any partial year of membership. The ownership rights shall not be voided or otherwise lost by a lapse in membership subsequent to becoming a vested Member. There shall be three classes of beneficial ownership: Class A Members (as defined above), in good standing shall have voting rights. Class B Owners (Members not in good standing and former Members of the Carpenters Union), shall have no voting rights. Class C Successors (those persons who have received a beneficial interest by bequest or gift), shall have no voting rights. Each Member shall have the right to bequeath or convey his/her ownership rights to a Successor. This right of ownership shall be transferable by bequest or gift only by the Member and the Owner, and not by any Successor in title; except, that the Successor may sell his/her interest to the Asset Trust. The Member, Owner, and Successor may each sell or encumber by way of loan for consideration, but only to the Asset Trust. Rights of ownership shall not otherwise be transferable. Unclaimed and ex-

pired rights of ownership shall revert to the Asset Trust. An account separate from the General Fund account shall be established in the Asset Trust's name which shall be the repository of all revenues deriving from rents, leases, sales, and all receivable due the Asset Trust. The Asset Trust may receive funds from other United Brotherhood accounts and resources. However, the Asset Trust accounts and funds shall not otherwise be co-mingled with any other accounts or funds of the United Brotherhood of Carpenters and Joiners of America. The Trustees shall within 60 days of the adoption of this amendment proceed to put its provisions into effect. The Trustees shall submit all subsequent transactions which require a change of title or deed to a Members vote. This vote shall be decided by a majority union membership vote, by secret ballot. The Trustees shall engage the services of an independent auditor to distribute, receive, count, and report on all ballot votes by the Members on matters which involve the Asset Trust. (end of E_____ Section 15)

The exercise of freedom of speech, or of the right to publish, or of the right of members to peaceably assemble, or to form political caucuses or political slates which may express ideas, positions, or philosophies contrary to official union policies; shall not be the subject to, or cause for censorship, or penalties. Further, members shall enjoy the right to post documents, handbills or other such informational materials upon union property, in a prominent place which shall be provided for such purposes.

The affected Rank-and-File members represented by and subordinate to the contract negotiating authority, whether it be a Local Union, District Council, State Council, Regional Council or Provisional Council, shall have the unrestricted right to ratify all contracts and contract changes by secret ballot. The right to vote to approve all Bylaws, Bylaw changes, dues or other monetary assessments by secret ballot shall be inviolable.

Title II—Reporting Requirements

We are members of a labor union. But our pension plans transform our unions into much, much more. Pension funds are, in reality, mutual funds. Money is deposited into an account established for us in our names to be invested for our benefit at retirement. Union pension fund participants are denied most of the rights and privileges afforded regular mutual fund participants, such as monthly or quarterly account statements, quarterly investment manager's reports, annual reports, annual stockholder's meetings, and the right to vote directly for officers and directors of the fund. We are as dispossessed in this regard as we are unrepresented as union members.

In addition to being shareholders in union mutual funds and being institutional investors, union pension fund participants are, unknown to them, also members of a very elite club of merchant bankers. Many mutual funds are, in fact, merchant banks, or function as merchant banks through their investments in the real estate markets, venture capital investments and other money-lending practices.

Our pension fund/merchant banks have introduced a new layer of complexity into their operations that are the outgrowth of business-unionism's Private Equity investments. We now have gatekeepers, general partners, limited partners, and advisors who advise advisors. Pension fund operations are a daunting challenge for even a financial expert to clearly understand, and hopeless for the average union member to understand, yet this is precisely the area that is readily open to opportunistic pension fund abuse. Congress must guarantee that the sun shines on this issue and all of its operations.

Title III—Trusteeships

In early 1997 Local 34 received a letter instructing it selected officials to resign their local union positions and become paid appointed employees of the Regional Council. Many local unions all over America must have received similar letters. These messages were the precursors of a carefully hatched plot to eliminate and transfer the historical power base of the union to the office of General President from its business agents and other locally-elected officials. This action, directed by GP Douglas McCarron, was supposedly based upon constitutionally, mandated Bylaws. An examination of the Carpenters constitution discloses no such Bylaws. Using this fictionally constructed code, McCarron created the Northern California Carpenters Regional Council (NCCRC) and other councils by fiat. The NCCRC then invited GP McCarron to intervene and annul all democratic rights held by the Council's union members and to institute a complete dictatorship. Pile Drivers Local

Union 34 vigorously resisted McCarron and was placed under a court-approved trusteeship later the same year.

Prior to instituting the trusteeship a hearing was conducted for the stated purpose to "determine why Local Union 34 should not be placed in trusteeship." UBC International Representatives strongly attempted to elicit testimony from members pertaining to knowledge of malfeasance by officials of Local 34. No member presented testimony alleging improper conduct.

The International's agents' first attempt to seize our union hall was thwarted by courageous local officials and members who prevented their entry into the hall. Had the seizure been successful there is good reason to believe that the "books would have been cooked" to fraudulently manufacture evidence of malfeasance that the International sought to find in its fishing expedition during the hearing.

Any new amendments to this section of law should contain due process language that establishes protection against the possible abuses mentioned above, such as:

The taking possession of said records by the Trustee or his deputies shall not occur until said records have been first sealed in a manner according to civil law, under the observance of a legal Notary Public, or other similarly recognized Official, who shall witness the taking possession of said records, and shall deliver to the representative of the Local Union, District Council, State Council or Provincial Council a signed receipt for all documents and records seized. Representatives of the Local Union, District Council, State Council or Provincial Council being trusteed shall be permitted to be present when the records are sealed and unsealed, in the presence of a Notary Public or other similar Official, and may make and take possession of copies, photographs, or other forms of duplicate records, for the purpose of protecting the interest of all parties. The General president or his representative shall bear the expense of this seizure until the Local Union, District Council, State Council or Provincial Council is found guilty of violating civil or federal laws or of violations of the Constitution of the United Brotherhood; upon the establishment of guilt, the Trustee may recover the costs from the appropriate source(s).

The presumption of validity of a trusteeship during the period of eighteen months from the date of its establishment shall not apply to any trusteeship established in whole or in part to directly enforce, compel, or accomplish a merger, affiliation, or takeover of the labor organization under trusteeship with or by another labor organization unless such organizational change has been approved in a secret ballot vote by the members of the trusteed labor organization. If a trusteeship is established for such purposes without the approval of the membership, it shall be presumed invalid in any proceeding challenging the trusteeship and its discontinuance shall be decreed unless the labor organization imposing trusteeship shall show by clear and convincing evidence that the trusteeship is necessary for a purpose allowable under section 462 [29 USC:462] of Title III.

Title IV—Elections

McCarron's disenfranchisement of union members' voting rights through the gimmick of transferring power to regional councils from local union members, is a deft piece of smoke and mirror magic calculated to fool members and to provide a plausible excuse for Department of Labor complicity. But, thanks to the *Harrington* vs. *Chao* (DOL) case, it may not work according to plan and may force the DOL to adhere to its own precedents.

Has the U.S. Department of Labor (DOL) become a covert player in an endeavor to deregulate laws protecting union democracy that prevent labor union privatization? Is the DOL a knowing participant carrying out undeclared policies or an unwitting dupe involved through McCarron's political connections? Either way, the DOL's original finding for the UBC International can be construed as deregulation of the laws protecting the democratic rights of union members.

Harrington vs. *UBC http://laws.findlaw.com/1st/1011577.html:* "Thomas Harrington, a member of the United Brotherhood of Carpenters and Joiners of America, alleges that the functions and purposes traditionally accorded to local unions in the New England Region of the UBC are now served by the New England Regional Council. That Council, he says, must be treated as a local union and not as an intermediary body. Consequently, Harrington argues, the officers of that Council must be elected in the manner that the LMRDA prescribes for local unions, that is, by direct election by secret ballot among the union members rather than by vote of delegates who are elected from the local unions, as the UBC has chosen to do for the Council. Id. ? 481(b), (d) (1994). Harrington filed a complaint with the Secretary of Labor asking her to require the Council to hold a new election as a local union. The Secretary declined for reasons stated in a brief Statement of Reasons.

"Harrington sued under the LMRDA. On motion by the Secretary, the district court dismissed his suit. See *Harrington* v. *Herman*, 138F. Supp. 2d 232 (D. Mass. 2001). Because the Statement of Reasons is insufficient to permit meaningful judicial review, we reverse the district court, vacate the Secretary's Statement of Reasons and remand the case to the district court with instructions to remand to the Secretary. We do not now decide whether any refusal by the Secretary to bring suit as sought by Harrington would be arbitrary or capricious."

In reversing and vacating the DOL's and the lower court's decision and remanding it back to the DOL, Judge Lynch writes for the majority: "We are confronted here with a different problem than was faced in Bachowski, created by what appears to be an inconsistency between the Secretary's approach and her regulation and prior decisions, which may represent an about-face by the Secretary. And, "The Secretary denies there has been any change in interpretation or policy, but it is far from evident that this is so, and the Statement of Reasons does not adequately address this topic." In other words, Judge Lynch is saying, What's going on here?

In fact, Judge Torruella for the minority, in stronger language, concurs, "we should set aside her decision as 'arbitrary and capricious'" and, "the secretary has stated her present interpretation of the Act with reasonable clarity and her present interpretation does not gibe with the readily discernible past policy and practice."

He also says, "Since my view does not command a majority of this panel, I must await, with morbid curiosity, a persuasive clarification of the reasons for the Secretary's decision that could not be articulated in the original Statement of Reasons, the Secretary's thirty-one page brief, or the fifteen page submission of the amicus union."

I would like to think that the Harringtons case will reverse the UBC's attempted end-run around the LMRDA. However, I doubt that it will succeed without Congressional intervention. Union members simply must be on guard against other attempts, and further must actively lobby for the direct increased oversight, expansion of regulation and enforcement by the DOL of the laws pertaining to union democracy.

All union labor organizations, including International Unions, State or Provincial Councils, Regional Councils, District Councils, and Local Unions, shall elect their officers by direct secret ballot vote. (One person, one vote.)

Title V—Safeguards For Labor Organizations (Pension Funds)

In 1959, when the Labor Management Reporting and Disclosure Act became law, only a few financial visionaries might have conceived of labor unions becoming merchant banks. Very few union members know what a merchant bank is and they are presently unaware of the tremendous potential of their pension funds. Even though the term business-unionism is increasingly being used when describing restructuring and changes in labor organizations, most of us still don't understand what it is.

What is business-unionism?

Leo Gerard, International President, United Steelworkers of America states in the foreword of WORKING CAPITAL: The Power of Labor's Pensions. "The use of worker's capital is one of the key challenges facing the labor movement today. Our deferred wages underpin capital markets in the United States and around the world. Although we have paper ownership of $7 trillion of deferred wages in the form of U.S. pension fund assets, this fact has not altered financial markets in any significant way. All too often, investments made with our savings yield only short-term gains at the expense of working Americans and their families. Destructive investment practices that rely on layoffs, mergers and acquisitions, plant closures, and offshore job flight can create quick profits and short-term stock price increases, but over time these practices erode America's wealth. The challenge for labor is to find ways that align workers' savings with workers' values. We need to invest our deferred wages in companies that provide good jobs in stable, strong communities. We want to reward companies that value all stake-holders in the enterprise, not just their shareholders. Our capital is patient and long term, and our challenge is to develop a capital strategy that moves our savings beyond the quick saccharine highs of destructive corporate behavior. . . ."

http://www.heartlandnetwork.org/links.htm (contains chapters of Working Capital) Chapter [V] page 93 "Building On Success Labor Friendly Investment Vehicles and the Power of Private Equity" by Michael Calabrese: a series of papers presented by scholars and academics on the subject of "creating conceptual, financial, and educational tools for capital strategies that will advance labor's agenda in the twenty-first century." The book makes the case for and describes in essence what business-

unionism is, in relation to labor's pension fund investments, the financial markets and the expected social benefits.

However, the book does not expound on the inevitable conflicts of interest and potential abuses that are inherent in the developing partnerships. Working Capital also does not illuminate the obvious, that the failure of labor's advocacy for union jobs has led to an attempt to buy, through the lending of pension funds to employers, what it could not obtain through the diminished status of the unions.

The creative uses of Private Equity and Economically Targeted Investments (ETIs) as sources of union jobs, pose the risk of reliance on their uses as acceptable adjuncts of or substitutes for traditional organizing efforts. The business partners attempt to create an illusion in the minds of members that the pension fund fiduciaries and gatekeepers who manage the investments are doing the members a great service, and maybe some are. But, in reality, pension fund management and gatekeeping are very lucrative businesses beyond the revenue earned from management fees. Some pension funds' fiduciary-managers wear multiple hats, giving rise to the potential for conflict of interest, corruption and possibly illegal abuses. Testimony to this fact can be gleaned from the Enron and ULLICO/Global Crossing scandals that are referred to in the Committee on Education and the Workforce's own introduction to "Suggested Reforms to Title II of the LMRDA" by Phillip B. Wilson, Esq.

Ralph Nader asks in an article in Business Week, "Is Wall Street Corrupt?" Inside, the reporters showed the answer to be "yes, yes, yes!"

The business-unionism concept establishes an alarmingly attractive and friendly environment for the propagation of corrupt abuses and corporate greed. If Mr. Gerard's vision for ethical investing of labor's assets is to stand a chance of succeeding, vigorous regulation and oversight of all forms of pension fund investments is necessary. LMRDA must be amended and strengthened to take into account institutions and practices that were not previously anticipated. Provisions must be enacted that guarantee a paper trail traceable to every entity that is involved in the flow of assets, identifying the owners of any assets produced through use of the funds. This information must be accessible to any person who wants to research the investment trail.

There is a correlation between the easing in 1994 of ERISA rules, the establishment of pension investment funds dedicated to Private Equity and ETI investments, the undemocratic takeover and restructuring of the Carpenters Union, and to ULLICO and its investments. We live in an age where deregulation and privatization are capitalist mantras, a panacea for all that ails world economies. With membership in American unions in a free-fall, one must suspect that privatization of unions is on somebody's mind, not far behind Social Security.

The ex-President of the AFL–CIO, Robert Georgine, and the business interests of the company that he now heads, ULLICO, formerly Union Labor Life Insurance Company, have vital interests in maintaining the continuance of pension funds. If the decline in union membership is threatening to the vitality of the AFL–CIO, then the membership decline must really unsettle executives whose businesses are built upon an organized union member base. They could be expected to employ all of the usual business strategies to turn their situation around.

ULLICO has been maneuvering for a number of years to increase its share of the Taft-Hartley plan market. Some sources estimate its current share at ⅓ or more of the Taft-Hartley plan market (*1999 Best's Insurance Reports—Life/Health; and 1999 Best's Insurance Reports—Property—Casualty).

McCarron has been and may still be a member of ULLICO's board as well as the boards of Perini Corp (Ron Tutor), and PB Capital (Richard Blum). To suspect the exercise of its influence and concomitant conflict of interest in UBC politics is reasonable. The company may possibly have been a helping architect of the 1994 ERISA prudent investment rule changes and the Carpenters Union's authoritarian takeover by McCarron. If McCarron is the horse, could ULLICO be a rider? If it is, it's not bragging about it, but it certainly has expertise and some urgent motives. McCarron's Carpenter Union takeover and similar takeovers of other unions could also be ULLICO's ticket to a much greater share of the Taft-Hartley plan market.

Restructuring the union will concentrate diverse Carpenter pension funds into fewer, but bigger, investment funds sponsored by Regional or Super-Regional Councils, that under McCarron's control someday may become one big megafund. The many and diverse northeastern states' Carpenter pension funds now are reportedly being coalesced into fewer, larger units. Bigger investment units may be desirable, but the methods being used to accomplish the mergers gives rise to a concern for their safety and future security.

Since the 2000 Chicago Carpenters' General Convention, rank-and-filers have narrowly won back two Regional Councils. But their control over the Councils is indirect, i.e., through their elected delegates who may eventually become, yet again, po-

litically and financially beholden to the new leadership which, without democratic accountability checks, may drift into an autocratic state. Other Carpenter locals have been placed in trusteeship because of their opposition to McCarron and his actions. It is imperative that labor law is amended to favor the growth of union democracy and that rank-and-file union members are provided with an effective means of defense against the potential for business-unionism abuses and Wall Street corruption.

STATEMENT OF MICHAEL BILELLO, CARPENTERS LOCAL 157, NEW YORK, NY

My name is Michael Bilello, I am a member of Carpenters Local 157, in New York City. Local 157 is part of the New York District Council of Carpenters. The following is one example of why changes to the LMRDA are needed.

The New York District Council of Carpenters was put into trusteeship in June of 1996 by the United Brotherhood of Carpenters and Joiners of America (UBC). The trusteeship was lifted in January of 2000. When the UBC pulled out, they had put in place uniform bylaws to govern the New York District Council, as well as other councils around the country.

One section of the New York District Council Bylaws relevant to the LMRDA is Section 21C: "The Council may establish monthly dues or increase working dues payable to the Council by a majority vote of the Delegates voting at a Special Convention of the Council held upon not less than 30 days written notice to the principle office of each Local Union."

This language was written into the Bylaws to impose monetary assessments on the membership, without a rank and file vote, while supposedly satisfying the requirements of Section 101(a)(3)(B)(i) of the LMRDA. The so-called "special convention" was merely a regular monthly meeting of delegates with the exception of a letter that was sent to each delegate, titling the meeting a "special convention" and informing them that a vote will be taken to impose the assessment.

Anyone familiar with the Carpenters Union knows the term "convention" refers to the "General Convention" which is held every five years, and that we specially elect delegates to attend that convention, and vote for General Officers and on various issues. The delegates are elected solely to attend that one single convention. I have been a member since 1975 and have only seen a "Special Convention" held once, in 1995, when the Department of Labor ordered an election overturned, and there had to be a new election (and therefore a new election of local delegates to attend). The language in 21C was purposely written into the Bylaws to circumvent the LMRDA.

The rank and file were not aware of the impending assessment prior to the vote and they had no way politically to weigh in on the subject. They were not given the opportunity to advise their delegates of their views or to instruct them how to vote.

The delegates voting on the assessment were by and large, full-time, appointed, paid staff of the District Council who were politically and financially beholden to the Council leadership that wanted the assessment. Any opposition to the wishes of the administration could result in the termination of the delegates full-time (and lucrative) appointed position. The vote was not by secret ballot. Several full-time staff people who were not "team players" had been fired since elected, full-time, salaried positions, were changed to appointed positions. The majority of the remainder, were unpaid delegates, who thought they stood a chance to be hired on staff, with the additional monies brought in by the assessment.

The majority of the membership did not find out about the assessment until they received their vacation fund check (the mechanism used to collect the money from the member) six months later. There is no bylaw or federal law in place to prevent the same delegate body from increasing the assessment at any given time.

STATEMENT OF ROBERT L. CARLSTON, MEMBER, UBC LOCAL 1977, LAS VEGAS, NV

My name is Robert L. Carlston. I have been a member of the Las Vegas, NV UBC local(s) for 30 years. I served three terms as Trustee for Local 1780 and one term for Local 719, now defunct. I was a charter delegate to the Silver State District Council (defunct) and served one term & one year as a charter delegate to the Southern California—Nevada Regional Council (now Southwest Regional Council).

I write to share with the reader a saga of political manipulation by the UBC, and what I consider to be blatant abuse of trusteeship power in order to prevent politically independent persons from coming to power even though they had the democratic support of the membership.

Prior to 1994, there was one independent Carpenter's local in Las Vegas, Local 1780. In March of 1993, the International Brotherhood of Carpenters and Joiners of America (UBC) imposed a trusteeship over Local 1780, allegedly to correct polit-

ical unrest caused by the actions of an inexperienced elected Business Representative. The membership repeatedly pointed out that the regular election, scheduled to be held in just three months, would correct any problem. All members and officers pleaded with the UBC to allow the elections to proceed but they were rebuffed. After imposition of the trusteeship, all officers and representatives of the Local were removed from office (with one exception) and the operation of the Local was placed in the hands of two International Representatives (Wright & Dunford). All membership meetings were suspended and membership participation in the local was forbidden despite language in the UBC constitution to protect the rights of the membership. The trustees unilaterally signed and modified labor agreements, fired secretarial staff, attempted to deny one secretary (Bernadine Montoya) earned pension benefits, and threatened the employment of members who dared protest.

After 18 months, steps were initiated to lift the trusteeship; an executive committee was appointed for the Local and tightly controlled membership meetings were allowed; however, Wright & Dunford remained in total control. After two months it was announced that the UBC was forming the Silver State District Council of Carpenters and that Local 1780 would be broken into four small locals (Local 719, Local 817, Local 857, & Local 1780). These small locals along with Local 971 (Reno) and Local 1827 (millwrights) would form the new District Council. Dana Wiggens, who had been appointed Business Representative for Local 971, was appointed Executive Secretary/Treasurer (EST). The Executive committees of the various locals were likewise appointed, as were the delegates to the Council (I represented Local 917). While the small locals were forced to hold meetings in small rented warehouses, the hiring hall remained at Local 1780, as did all other activities. Wright and Dunford were retained to supervise the District Council, though no Trusteeship officially existed.

During this period, it was discovered that approximately $350,000 in funds were unaccounted for and every member had lost ½ to 1 pension credit. The members protested the changes to the UBC General Executive Board (GEB); three members were selected to present the case (myself, Roger Tufaro, & Richard Russo). General President Lucassen told us that he had the power to do anything he wished and that we wouldn't have a union in Las Vegas if he so decreed. The only member of the GEB to oppose Lucassen was 2nd Vice-President McCarron who stated that he saw no reason for such extreme action. Wright & Dunford testified that the breakup was necessary because the "activist element" in Las Vegas couldn't be controlled otherwise. They further stated that the lost pension credits were caused by embezzlement by a Trust fund secretary; to this day the funds have never been accounted for, no charges of embezzlement were ever brought, and as far as I know no claim was ever made against the bonding company to recover the money.

Soon afterwards the Department of Labor decided that General President Lucassen had violated Federal law during the prior convention and set aside his election. A new convention was ordered; it was held in Las Vegas. Wright & Dunford first tried to prevent the Las Vegas locals from conducting delegate elections and attempted to appoint delegates. Both attempts were forbidden by the Department of Labor which had to step in, order and supervise elections of officers and executive committees for the new Las Vegas locals. Despite D.O.L. supervision several questionable practices were allowed to take place (officers with keys to the ballot box, unaccounted for ballots, and counts conducted by involved parties). Protests were turned aside because, we were told, if they were upheld, given the time constraints, the Las Vegas locals would have no representation at the convention. The D.O.L. also decreed that EST Wiggens must stand election by the entire membership before the end of the year.

Douglas McCarron was selected the new General President and soon after met with delegates from Locals 719 and 817 who requested that they be allowed to return to Local 1780. General President McCarron denied the request on the grounds that Local 1780's Executive Committee didn't want to have to face election by the entire Las Vegas membership. In November, General President McCarron and several International Representatives entered the union hall and forcibly removed EST Wiggens. The membership was told that Wiggens had attempted to use pension fund monies to buy doctor's accounts receivables and pocket $1.8 million in finder's fees.

Rick Whilkening, who was the only Business Representative retained when the trusteeship was originally imposed, was appointed EST and elections were cancelled.

Three months later Herman Bernsen, president of the Southern California District Council was the featured speaker at a pin party held to honor long-time members. Bernsen's speech was an announcement that General President McCarron was combining Locals 719 and 817 into a new local (Local 1977), dissolving the Silver

State District Council and forming the Southern California—Nevada Regional Council. Marc Furman (former head of organizing for the International) was named Administrative Assistant and given sole and absolute control over the Nevada Carpenters. All of this was done without notice to or consultation with either the membership or delegates.

I was appointed a delegate to the Council representing Local 1977; one of our first duties as delegates was to approve bylaws for the Council. The Nevada Delegates were instructed by the membership to oppose several clauses in the bylaws. At the meeting all delegates who also held staff positions stated that it would cost their jobs to oppose the provisions. It was left to the six rank and file delegates to vote nay (we were joined by the five delegates from the Pile-drivers local). Those eleven of us who had voted nay were forced to stand in order to vote. During the 4½ years I served as a delegate, we were never called on to approve one item of business. Mr. McCarron claims that the delegates operate similar to Congress, but I can vouch that that is not the case. The delegates meet every three months, minutes of the Executive Board meetings and a list of political contributions are read; there is no discussion and no vote. All decisions are made by the EST, approved by the Executive Board, and merely read to the delegates.

I'm bringing this to your attention because the Southern California—Nevada Regional Council of Carpenters was the prototype for the Regional Councils the UBC has formed across the country. The modus operandi has been similar in every case I'm aware of; trusteeship, denial of membership participation, followed by unilateral imposition of a Regional Council with appointed officers and the authority to perform the representational functions previously performed by Locals headed by officers actually elected by the members. I might add that the term or entity, "Regional Council," was not even added to the UBC Constitution until five years after the first one was formed.

The clearest example I can give of the effects of General President McCarron's actions is that of local elections. Prior to the trusteeship, 50% to 75% of the Local 1780 members voted in elections. In the last election conducted before the trusteeship, 890 of 1500 members voted in an off-year election to fill a relatively insignificant position—trustee (I won over two other candidates by 687 votes). Similarly, the last contract ratification vote saw over 90% participation by the membership. Local 1977 recently held an off-year election for trustee, two delegate positions, and two executive committee positions (two Executive Committee member/delegates had resigned after the last election). I chaired the election committee; of a total eligible membership of 3575, only 107 voted.

Thank You.

STATEMENT OF GREGG SHOTWELL, DELEGATE, UAW LOCAL 2151

I attended the UAW 33rd Constitutional Convention in Las Vegas, June 3–6, as an elected delegate. It was held at the MGM—but Circus Circus would have been more appropriate. According to our constitution, delegates are theoretically "the highest tribunal in the UAW" but we were treated like a captive audience and browbeaten with speeches by politicians and dignitaries with no connection to the UAW other than the stipends they received. Delegates were given very limited opportunities to debate issues relevant to our union, controversial topics were cut short, and Robert's Rules of Order were honored at the whim of the ruling party. In a word, the Convention was totally "engineered."

The power of the incumbent administration in a one-party democracy is such that all International officials were elected by a voice vote of acclamation. There was only one snafu when the delegates from Region 2 rubber-stamped the wrong guy. The Administration Caucus was so incensed that they retaliated with a constitutional amendment to dissolve Region 2. You can well imagine the power implicit in retroactive redistricting. It would be as if Democrats upset about the election results in Florida resolved to dismember the state by giving the panhandle to Alabama, the northern trunk to Georgia, and the toe to Puerto Rico.

Rather than raise our dues, the Administration Caucus absconded with $75 million from our strike fund by passing a constitutional amendment. And you thought you knew something about fast track.

UAW International leaders do not feel accountable to the members because the members do not elect them in a one member/one vote, secret ballot election. All members of the UAW's ruling caucus are initially appointed and they are accountable only to those who appointed them, not the members they are supposed to represent. Americans take one member/one vote secret ballot elections for granted. We consider it an inalienable right, but we are denied this right by the ruling party

of our union which behaves like a dictatorship. We need direct election of all International officials who represent us by one member/one vote secret ballot elections.

I understand that you are interested in making unions more accountable by enforcing stricter adherence to LM–2 reports. The UAW is way ahead of you.

Nineteen cents for each hour worked is deposited in a fund administered by a separate non-profit, tax deductible corporation. International UAW officers, and corporate officials sit on the board and control all expenditures. There is no accountability to the members and no requirement to report on an LM–2. This is in effect a dues assessment, and de facto taxation without representation. These funds also enable the International to appoint members in local unions to sinecures, thus securing their influence at the local level as well. In a one party state the power to appoint trumps the power to elect.

STATEMENT OF MIKE GRIFFIN, DECATUR, IL

CARPENTER DICTATORSHIP OUT OF CONTROL

For the hundreds of thousands of Carpenters and Millwrights who make up the UBC [United Brotherhood of Carpenters and Joiners of America], democracy and fundamental union values, are but fleeting segments of the union that once was. Systematically stripped of the right to elect who represents them, to vote on contracts, and any credible voice over union affairs, many are left shaking their heads in disbelief. Much in the style of Corporate America, the international union has used, District and Regional Councils as Storm Troopers to consolidate locals, seize local membership funds, and initiate questionable trusteeships to intimidate locals who dare resist. All of these actions continue to alienate the rank and file and in some cases, force members to travel hundreds of miles to attend local union meetings.

Under the pretext of "representative democracy", delegates attend District Council meetings where the dictates of the Secretary Treasurer are thrown out for a vote that has never been placed before any membership tribunal. Many of the delegates are Business Agents who are employed by the District Council and can be fired by the council Secretary Treasurer. That is mirrored in conventions as well, and as a result of that dictatorial forum, UBC International President Douglas McCarron, without consulting rank and file members, pulled the UBC out of the AFL–CIO.

Amid a barrage of smoke and mirrors from the UBC headquarters, the truth behind McCarron's actions are revealed in letters exchanged between McCarron and John Sweeney, President of the AFL–CIO. McCarron's demands center on suspending provisions of the AFL–CIO constitution concerning jurisdiction. Under the guise of dissatisfaction with organizing, McCarron is demanding the right to raid work under other union's jurisdiction and in Nevada, that theory is tested by the existence of a new UBC contract laying out the pay and conditions for a "Concrete Specialist and Helper".

Just as disturbing, is what McCarron has to say before his Contractor Friends. In Hawaii, before the National Erectors Association, McCarron said, "You need the freedom to assign the work based on what makes sense, what makes us competitive on the job. If there is a dispute, let the owner settle it. It's his job and his money". That outrageous response represents a far cry from basic union representation and respecting the jurisdiction of other unions, and in fact, calls for violating the AFL–CIO constitution. McCarron goes on to tout his views as similar to Jack Welch, former CEO of General Electric, and refers to union members as "strong product".

In an L.A Times interview, McCarron called those in the UBC who oppose his dictatorship, "selfish bureaucrats, deranged loners and communists". "God bless them, they are very hateful people". I suppose this author will have to re-think his position on democracy. I never understood until McCarron pointed it out, that standing against tyranny, dictatorship, and struggling for democracy were communist ideals. Thanks to McCarron, I now understand that the overwhelming majority of UBC members, who want the right to vote and elect their representatives, are communists, deranged loners, and hateful people.

It was that same description that was applied to UBC members in British Columbia. So upset by McCarron's attempt to apply his dictatorship in that Canadian province, B.C. carpenters walked out of their hall and turned out the lights, leaving a rejected McCarron sitting alone in the dark. BC leaders polled their members and with overwhelming support, pulled out of the UBC. McCarron, after calling them brothers for years, called them communists. Is it really McCarron, or McCarthy?

McCarron's obsession with power has moved far beyond his dictatorship of the UBC, with the stakes much higher and far more damaging to an already struggling labor movement. Another of McCarron's demands for UBC re-affiliation, is the res-

ignation of the current President of the Building Trades and dismantling that division of the AFL–CIO. McCarron's demands would weaken the Building Trades and make it ineffective and unable to deal with the nation's hostile employers. Employers, who McCarron views as his friends and whose business style he has eagerly sought to imitate. Another principle demand is that voting in the Trades be conducted based on the size of the affiliated union, guaranteeing the UBC even greater power to influence how the Trades function; a possibility that could have disastrous consequences. McCarron's far right, business union mentality could destroy smaller unions and distance greater numbers of current union members who believe in fundamental union values. McCarron is not alone in his efforts. Several other Trades unions are poised to join his efforts and the fear of permanently damaging the union movement is most certainly on the minds of AFL–CIO leaders who have laboriously negotiated to settle the issues and bring the UBC back into the fold. Unfortunately, giving into McCarron's demands will not resolve McCarron's thirst for power and will not work in the interest of union members or of the movement as a whole. It is no accident that business publications are praising McCarron for his antics and his "business acumen". It is unfortunate for union members who work for a living, there are many in union leadership positions that mirror McCarron and have the same regard for members and member's rights.

To add insult to injury, McCarron and soul mate James Hoffa Jr., have been publicly wallowing with labor's most ardent enemy, George Bush. Bush, who has spent more time bashing workers rights than starting wars, has seized the opportunity to use McCarron and Hoffa to drive a wedge into the house of labor. One theory is that Hoffa and McCarron have a common agenda by sucking up to the Bush administration. Hoffa wants rid of federal oversight and McCarron wants assurances the labor department won't interfere with his plans to gut members' rights in the UBC. Both unions are rampant with corruption.

For AFL–CIO leadership, the loss the hefty per capita payments once paid by the UBC and the power of such a huge membership, have proven to be a stunning loss. At a time when regaining control of the House of Representatives for Democrats, McCarron's open defection could not be more damaging. Just as damaging, McCarron's willingness to openly divide not only the Building Trades, but also the entire labor movement, has made the process of unification difficult, and for some AFL–CIO Executive Board members, impossible. A few board members are speaking out, but in limited circles and with few details on McCarron's thirst for power and pro-business agenda. It is past time to take the gloves off and deal with McCarron, but that will not happen.

Make no mistake, it is the business union model based on cooperation with employers, top down control of nearly all present day unions, and the denial of union democracy, that has brought the house of labor to its current level of relevancy. While the political climate and increasingly hostile employers have contributed, it is undemocratic and corrupt leadership that has done the most damage.

McCarron's rise to power was supplemented by lawsuits centered on Carpenter pension funds and the lack of fiduciary responsibility by UBC bureaucrats in southern California. Ron Tutor, owner of Tutor-Saliba Construction and fellow trustee of the fund, aided his efforts. After catapulting himself to power on the heels of Sig Lucassen, former President of the UBC in what the labor department determined was a rigged election, McCarron's handling of the funds proved to be just as inept and questionable. Heavy investments in Perini Construction cost the fund 22 Million in a single day loss when Perini stock took a nosedive as Perini prepared for bankruptcy. McCarron held a paid board seat on Perini. That activity sparked a lawsuit by retirees, led by Horacio Grana, who has recently died. Questions raised by the suit are not only the losses, but also fees charged by investor and McCarron crony, Richard Blum; husband of Senator Diane Feinstein. Blum took 54 million for himself on investments that earned 459 million; Blum handled only a small part of that fund.

Currently, McCarron is among those being investigated in the ULLICO [Union Labor Life Insurance Company] scandal. It is alleged that McCarron and other ULLICO board members profited personally while membership retirement funds did not fare as well. With the consolidation of hundreds of locals into Regional councils, UBC members should have new fears. What happens to local pension funds and who oversees them? With billions in UBC pension funds, can this dictatorship be trusted? There are currently, many retired members who have lost all they worked most of their lives for.

More questions are raised by the Mayoral election in Los Angeles. Without rank and file approval, tens of thousands of dues dollars were given to the election of James Hahn. Why would UBC members in Illinois, Michigan and eastern states care about the Mayor of Los Angeles? They don't! Through the Carpenters Contrac-

tors Cooperation Committee, the money was funneled to the Hahn campaign. Ron Tutor is a member of the executive board and its' Executive Director is listed as Bill Luddy, McCarron's 129,000 dollar a year assistant. According to the LA Times, When Hahn became mayor; he assumed the role of the most powerful member of the Metropolitan Transportation Authority Board [MTA]. With Hahn's election, four members of that board are about to change.

Tutor-Saliba was charged by the MTA with filing false claims and fraudulently billing for work on a massive subway project. Tutor-Saliba has been barred from bidding on future public works projects, which makes up the bulk of Tutor-Saliba contracts. According to the Times, the walls of the tunnel built by Tutor-Saliba were thinner than required and two of the three workers killed on the project were Tutor-Saliba employees. Tutor spent more than a hundred thousand dollars on the election. Tutor remains a member of the executive board of the Carpenter pension fund.

Inside the UBC, fear and intimidation reign. For working Carpenters and Millwrights, speaking out can be hazardous to your health; being starved into submission is common. With a wink and a nod from the Business Agent {BA} to some contractors, you can find yourself unemployed. "Piss off your BA and see the USA" is a common term, which means you will have to travel far and wide to find work. When you refuse to accept the intimidation, charges are filed and your membership will be taken. Contractors will refuse to hire you in some cases. In some areas, the threat is much more physical. The second phrase heard is, "I just want to make it to retirement and get out of this mess".

In this "Brotherhood" nepotism and corruption are rampant. Out of work lists are only for show for the Department of Labor. It is difficult to envision a Brotherhood where some members make 75,000 dollars a year and others make 10,000; where members fear their own leaders and have no voice. A Brotherhood where members are increasingly assigned to perform the work of other crafts and work for 90% or less of scale. A Brotherhood where organized breaks have been negotiated away and where representation of the membership is non-existent. The Steward and supervisor positions often are rewards for representing the contractor and union hall, rather than the membership. When Stewards do attempt to represent the members, they run up against a brick wall and find themselves replaced. It is a Brotherhood where contractors can hire and fire at will for no reason. A Brotherhood that refuses to honor picket lines and dispatches its members to replace striking and locked out workers. A Brotherhood based on an incestuous relationship.

We have asked hundreds of UBC members across the country, "What kind of union do you have when you fear your own leadership and you have no voice"?

The answer is always the same; "there is no union, it is gone". That disillusionment is the norm in the UBC, but it is not spoken in union meetings or in front of leadership where retaliation is certain and out on the jobsites, it is spoken cautiously. That fear became a reality for John Reimman, a California carpenter involved in a wildcat strike involving Tutor-Saliba and in opposition to a contract members were refused the right to vote on. Reimman was ultimately expelled from the UBC in spite of the fact the strike forced another vote and thousands of union members joined the protest.

McCarron has boasted the hiring of 600 organizers and bringing in thousands of new members, but even there smoke and mirrors prevails. From our experience locally and those we have contacted nationally, the thrust of organizing has consisted of swaying employees of non-union contractors to join the UBC without bringing in the contractor. The result has been to divide up what little work we have among members and often the new members are worked ahead of longterm members to keep them interested. Ultimately, many of them go back nonunion to earn a living. The UBC controls the information and Carpenter magazine is nothing more than the voice of McCarron, who has little credibility in or out of the UBC. When you do the math, the cost of 600 organizers versus the figures on new members, the cost is prohibitive. In a letter to the entire membership, McCarron denied he was building UBC Inc., a wall-to-wall agency that mirrors nonunion shops, but experience indicates that is the direction of the UBC.

A few bright spots have developed where members have shown the courage to fight back, in spite of overwhelming odds. CDUI {Carpenters for a Democratic Union International} has formed as national caucus and a few locals have fought back against illegal trusteeships. In Boston, a Business Agent fired for supporting the right to elect leadership, is now the Secretary Treasurer of the District Council. In Atlanta, members who elected a rank and file leadership in opposition to McCarron have successfully fought back against the illegal trusteeship imposed by McCarron.

CDUI national organizer, Ken Little, of Seattle, has felt the wrath of the UBC. While touring the country building support for one member one vote, Little stopped off at the Carpenter's hall in St Louis Mo. He was ordered to stop giving flyers to

fellow members and when he stood for his rights, the local BA called the police and had him escorted from the hall. Members and delegates to the last convention fared no better. When they arrived at the convention, they were met by dozens of Chicago police. Though eventually allowed into the convention, they were refused the right to pass out literature supporting the right to vote and "Goons" were assigned to follow caucus members. Controlling the UBC membership is such a high priority of the current dictatorship, members rights have been obliterated.

Strangely enough, what was once one of America's biggest unions, solidarity, democracy, and representation have been destroyed. Nearly all of the actions of current leadership mirror our corporate enemies and can only be viewed as antiunion. We can only hope the AFL-CIO leadership will recognize the futility of giving into McCarron's demands and show the testicle fortitude it takes to put the house of labor in order. In the UBC, it is the responsibility of the members to take their union back and replace all their top leadership.

STATEMENT OF TOM CROFTON

The UBC intervened in a contract negotiation in Madison, WI, in 1999. After a 2–1 vote of the membership to reject the first proposal, the local officers, and District Council Staff did not follow through on their responsibility to give management a five day notice of a possible strike. We later learned that the management representatives called the International, and asked them to intervene. The International reps told the District Council to wait a few weeks. The members used this time to spend their vacation funds on their planned purchases, instead of saving them for a possible strike fund. Almost a month with no negotiations ended with a new vote, on the same contract. This vote occurred after the most intimidating and contentious meeting witnessed up to that time. The union staffers did not allow members to speak for their constitutionally promised 5 minutes. Every paid staffer spoke for the contract. Questions from the floor were not answered. The fact that the contract was already signed was not denied. Later, we found out that the union left 25 cents an hour on the table, proving that they were out to show they could control the members. We started a rank and file caucus as a result. In connecting with other caucuses around the continent, we discovered similar problems in other areas. Many others had long experienced International meddling in their affairs. One result of connecting was to join an effort to pass a constitutional amendment that would allow direct election of the top officers of the UBC, by the rank and file. This was called the Christie Amendment, after the pseudonym of the author. In attempting to follow the letter of the law, I personally tried to get a special meeting set, to consider this proposal. Positive votes at special meetings, in a specified number of local would insure that the resolution would be considered at the upcoming election. My local voted 66–1 to have a special meeting for this purpose. The officers of our local, in conjunction with the District Council (some positions overlapping) did not send out the required notice. When the time for receiving notice had elapsed, I filed a grievance with the General President, as required by the Constitution. I never received acknowledgment of that grievance. At the next regular meeting, the officers explained that they thought it was an advisory motion, and they decided not to do it. They then had minutes passed to reflect their changing history. Near the end of the meeting, I officially withdrew my grievance, as the basis for proving it correct had evaporated. At the next meeting, I attempted to bring up a motion to approve the amendment, without a special meeting, and was ruled out of order. This was illegal, because I was in order.

I was elected to witness the Convention 2000, in Chicago, where approximately 10 million dollars of the members' funds were spent to further reduce their rights in running the organization. I witnessed the most corrupt political machine in my experience spend a week intimidating the handful of serious rank and file reformers present. Our speeches are available if you are interested in seeing where we stood on the issues. Following the convention, every reformer was attacked as retribution for standing up. Some locals who had won their offices where put under supervision. Some individuals were not given work assignments. The three locals in the lower half of Wisconsin were merged into one, and joined into the Northern Wisconsin Regional Council of Carpenters without any member involvement. Our monthly local meetings were canceled. Our dues were raised. Our delegate count was reduced. A member was threatened with violence for resisting. The driving time for our delegates to attend meetings went up from an hour average to three hour average. The delegate meetings are held during the day, requiring delegates to take two days off to attend. Few employers can accept that. Only the union can afford to let its people take off that much time, which disenfranchises the ranks that much more.

In short, a corrupt political machine has installed itself in the place where brother/sisterhood is supposed to feel safe, to work for common good. Collective bargaining is replaced by high paid agents forcing contracts on disenfranchised dues payers. Our local covers 25,000 square miles and has 2,000 members. Direct elections and votes on issues by the members, have been replaced by rubber stamping, all expense paid staffers, who elect their boss, so he can hire them back.

The working people of this society need unions, but they need to retain real, functional control of them.

This synopsis can be documented, and fleshed out in greater detail. Please feel free to ask for more.

STATEMENT OF DARRELL J. ZUBE, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS

Given the recent examples of corporate misdeeds in the financial arena, can we reasonably expect full time employees in supervisory positions to stand up to the highest levels of management for what is right and honest?

Where are any checks and balances for the "CEO's" and "Boards of Directors" of labor unions, should they ever lead their organization astray?

Will there ever be any protection at all for the whistleblowers, that almost everyone hopes would come forward and tell of the misdeeds and misuse of power and position?

Will there ever be true accountability to the full membership that finances these organizations? Members who only ask that their concerns get addressed and not just to be dragged down a path that that the clear majority disagrees with, but the minority upper echelon want to go.

I am a member of The United Brotherhood of Carpenters and Joiners (UBC), and I believe this organization has taken this misuse of power to new depths, and I for one am not afraid to speak out about it.

At the Carpenters General Convention in 2000 (where the incumbents set the rules that governed the process and procedures for that convention) the Constitution and the rules for the Subordinate Bodies (i.e. Locals and Regional Councils) were drastically changed. And rules that had been in effect for more than one hundred years were changed, without prior notification of the membership, or providing the opportunity for a referendum vote. Changes altering the basic structure of the organization were never voted on by the full membership. None of this was done to further empower the membership, but rather gave grossly disproportionate power to the incumbents. (Note: The US Court of Appeals for the First Circuit is waiting for a reply from the Secy. of Labor on why suit was not brought against the UBC for some of this)

All of the changes were voted for by delegates largely (estimates of 65% to 70%) consisting of full-time Regional or International employees, or those who owed their employment to the power brokers. These delegates that are employees are not elected by the membership, but "appointed" by Regional or International operations. Did any full-time employees like these prevent the disasters at ENRON, World-Com, Xerox, or even Arthur Anderson? And what happened to any unfortunates that did speak up?

Other Delegates to this Convention, even if coming from the rank and file, can be highly influenced by the "appointed" representatives. This is because the appointed employee can influence the job assignments and opportunities of independently elected member-delegates. In a labor force that works from one short job to the next, these assignments determine how much work and what kinds of work any other delegates are likely to receive. So there is a perceived, and frequently real, threat to their ability to earn a livelihood and support their families.

The voting membership, which pays all of the full-time salaries, currently has no direct, even by recall vote, of influencing the "appointed" officials imposed on them, or even the elected representatives—until the next election. You should also be aware that the "appointed" official has power over the access of work of anyone who would dare speak against the current system.

The full membership of my local union, by a large margin, elected delegates who they trusted would speak out against the sweeping changes that were being proposed. All four delegates ran, and were elected, on this platform. The International immediately contested this election and made the local union hold it again. The results were that the same four delegates were elected by an even wider margin of victory.

I was one of those delegates, and spoke out at each Caucus at the August 2000 convention, and at the Main Speakers platform. I believe my dissension was duly

noted. But at this Convention, the incumbents held the stage, set the rules and controlled the microphones, so equal time for discussion was not granted.

Our delegates were informed in private that our local union would probably face trusteeship (imposed supervision by the International organization) when we returned.

Upon returning, The Executive Board, of which I was President, contacted the Dept. of Labor requesting classes and instructions on our rights and how best to avoid meeting the criteria for supervision, which is the imposition of trusteeship by the UBC International. Our Executive Board was given a training session by a Mr. Chuck Logan of the Dept. of Labor. The Board informed Mr. Logan then (Sept. 2000) that we believed the International was soon going to try to put us under supervision. A hearing (which our legal counsel was barred from attending) was held in February 2001, and in March, we were placed under trusteeship, approximately six months after standing up for the voices of the rank and file members at the Convention.

We appealed to the Dept. of Labor, which investigated but came to no conclusion. I was informed that the courts routinely allow eighteen months trusteeship, but was told at a meeting at the Wash. D.C. office of Dept. of Labor, to call them after eighteen months and one day had passed, and possibly something could be done then. Phillip Lavallee and myself attended this meeting, as he was also on the local Executive Board, and had been a Delegate to the General Convention also.

While in Wash. DC at this same time, Mr. Lavallee, and myself met with representatives of the Education and Workforce Committee. We both gave information on how unfair the current system in our union was to rank and file members, and how unlikely it was that the International would willingly give back any of it's newly gained power and control. Upon returning to Atlanta, immediately before attending our next union meeting, we were both asked by an International supervision employee "how our trip to Washington was". It was obvious to us both, even though we shared the information of our trip with very few people that the International union had found out about our meeting.

And now, as no surprise to anyone, with the imposed trusteeship coming on the seventeenth and eighteenth month, charges have been brought against Mr. Lavallee and for myself for actions taken under the last two Executive Boards. The charges brought against us have been placed by an International Vice-president, which means only full-time employees of the International will be on the Trial Committee. And if the current affairs in the financial world are any indication at all, You can bet any full-time employee is not going to stand up to upper management when their job may be on the line.

Now just so you don't think this is some small coincidence, out of the possible eighteen people on the last two Executive Boards, only Mr. Lavallee and myself were the only ones brought up on charges.

This Committee will not be able to do anything to help protect Mr. Lavallee or myself, and once again, we will probably be barred from having our counsel present. A "fair" trial will be the one where only full-time employees of the International, behind closed doors, with no outside witnesses, can come to the determination that both of us can be expelled for life, and the appeals process only goes to more full-time employees. Not to any impartial and qualified judge or jury, which most Americans would assume we would have a right to.

But possibly, in the near future, safeguards can be put in place. Where maybe some other two people can come before this committee, tell of injustices within their own organizations, and then have some protections against risking their whole livelihoods, for stating their opinions and standing up for what they know is right.

Thank You.

STATEMENT OF THOMAS J. VERDONE, FORMER RECORDING SECRETARY, MILLWRIGHT LOCAL 1693, CHICAGO, IL

My name is Thomas J. Verdone.

I was, up until this month, the Recording Secretary of Millwright Local 1693 which is one of an estimated 30+ union locals that make up the Chicago and Northeast Illinois District Council of Carpenters which in turn is a subordinate body of the United Brotherhood of Carpenter's and Jointers of America. I was elected by members looking for some accountability and democracy which has been in short supply in local 1693. I started my term off by basically observing the operations of the local executive board and to my surprise and dismay I found that the EB led by full time staffers of the district council in the capacity of appointed business representatives and organizer were consistently involved in widespread malfeasance and fraud. These same individuals (at staff salaries paying in the area of

$100,000.00 per yr.) also double as part time President, Vice President, and Financial Secretary/Treasurer collecting from the local approximately $2500./year for serving on the Local's Executive Board.

I made an inquiry into the lack of financial reporting by the Financial Secretary/Treasurer and trustees. According to the U.B.C. constitution, they were in clear violation of their responsibilities by not reporting to the members the numerical and financial status of the local etc. My inquiry was met with mostly ambiguous rhetoric, double talk, and obstinate silence at that executive board meeting. In my capacity as recording secretary I brought this issue to light at the following monthly meeting by reading the minutes as my position requires. As a result, I was brought up on fraudulent charges of causing dissension which have up until this point been supported by the governing district council despite my consistent inquires for any proof of wrong doing. I believe from my research the money is being funneled from the local in what I believe is a scheme to draw as much money from the local as possible without the members' knowledge.

In discussing this issue in great detail with the Department of Labor, they've stated that they can only pursue this issue if it's a matter embezzlement for personal gain and that diverting money from one organization to another, be it improper, is not a crime.

Also there has been, with our most recent election, a plethora of procedural violations pertaining to election guideline also as outlined in the UBC Constitution:

Members making nominations who were on the Ultra list* who should not have been on the Ultra list (violating Section 31)

Members making nominations who were not on the Ultra list (violating Section 31)

Retires appointed to serve on election committees (violating Section 31, Paragraph D)

A candidate on a ballot who served on the election committee counting ballots (violating Section 31, Paragraph G)

The Financial Secretary/Treasurer campaigning instead of tending to the books (violating Section 31, Paragraph G)

Campaign literature containing false and misleading instructions in regards to voting requirements

Campaign literature that falsely and maliciously singles out individuals and a specific contractor implying collusion (section 51A–1)

Contractor members on the Ultra list of members able to vote, be nominated, and run for office who should not be on the list (violating section 44, paragraph G)

Contractor members voting in the election (violating section 44, paragraph G)

The improper removal of a candidate three days before the election. In approaching the Department of Labor on these blatant violations, their response was less than enthusiastic due to the stringent guidelines they have to follow and the very limited powers allowed them in intervening during such corrupt situations. It is my hope and that of many union persons around the country that the U.S. Government step in and help the average worker from being exploited by the same organization which was established to protect them in their livelihood.

We need laws to help us reform labor organizations that have gotten completely out of control.

STATEMENT OF DAVID JOHNSON, CARPENTER'S UNION LOCAL 44, CHAMPAIGN, IL

My name is David Johnson. I have been a member of Carpenters Union 44 in Champaign, Illinois since 1977.

For those of you who are not familiar with what a union is SUPPOSED to be, a union is a voluntary association of people of the same occupation or who work in the same industry. The members of a voluntary association, or union, pay dues money to support the functioning of their organization and to hire people to; represent them, and to perform clerical and administrative functions to support the organization. The members of a union are very similar to shareholders of a company, who decide who their executive officers and management are, and what policies and actions should be done to further their interests.

What has happened in the Carpenter's union during the last several years has been an almost complete disenfranchisement of the dues paying membership in deciding; who our representatives are, what policies and actions should be done, how our pension fund monies and health insurance should be administered, and in many local unions, the right to decide what our working contract should contain and the right to approve it.

By using loopholes in the current laws, and at times flagrantly disregarding the law, the bureaucrats of the Carpenters union have achieved this disenfranchisement

and in addition have pursued a policy of intimidation, slander, interfering with the ability of Carpenters to obtain employment, and at times even used the threat of physical violence against individual Carpenters who have questioned and/or criticized actions and policies of the "leadership". Union officials who are paid with OUR dues money to represent us (and under the current law, required to represent us), have often times persuaded contractor employers to not hire critics and/or political opponents by slandering our abilities as craftsmen and/or have stated to management personnel that we are "troublemakers", implying that we will cause problems on jobsites.

In my particular case, I began publishing a newsletter for working Carpenters in February 2000, and in August 2000, ran as a candidate against an incumbent vice president of our international union at the Carpenter's convention. Since then I have only worked an average of two to three months a year, when in the past I worked six to eight months a year on average.

Fellows Carpenters who have witnessed the collusion between officials of the Carpenters union and management personnel of contractors, in preventing many Carpenters from being hired by various contractors, are frightened to come forward as witnesses and signing depositions out of fear of losing their current jobs and suffering a similar fate of long-term harassment and denial of future employment.

When large numbers of Carpenters have attempted to make changes at their union meetings, the will of the majority has been totally disregarded, Roberts rules of order ignored, and the meeting adjourned against the vote of the majority of members present.

When elected representatives of the membership have questioned policy and certain expenditures of funds at regional council meetings, they have been routinely shouted down and insulted by paid staff members of the council.

Many of us Carpenters fear that with the current situation of unaccountability of union officials to the membership, that it is only a matter of time until we will lose our pension fund monies and become another ENRON scandal. A situation that would be devastating to hundreds of thousands of hardworking tax-paying carpenters, who do not want to end up dependent upon public aid, but instead proud self-sufficient retirees.

In conclusion, I would like to urge the committee in the best interests of fairness and a free democratic society, to increase the enforcement and penalties of current laws and enact new laws to enable all union members to hold their leadership and staff people accountable to the membership and to allow us the ability to govern ourselves without fear of reprisals and intimidation.

Thank you.

STATEMENT OF JACKIE FITZGERALD, UTU RAILWAY WORKER

I have worked for the railroad for 4 years, and I have never been able to vote for officials. Railroading is a 24/7 type business, and you can only elect officials when you attend meetings. The meetings have been held during times that are only accessible to older workers, thus creating an imbalance of power which favors the older worker.

Recently, after having read the LMRDA, I found my union was conducting elections illegally and were keeping the younger railroaders from voting. I had discovered the LMRDA on the internet, and so I challenged my union. I immediately began telling all of my coworkers about our rights as workers, and found that they were very unaware of their LMRDA rights. I was able to cite the law to the international and it forced my local to change the way they handle elections. Unfortunately, the way the elections have been handled had hurt the younger worker severely.

I also feel that union officials should have to be accountable for every day they lay off for union business. Too many officials take advantage of their positions for personal agendas.

I also feel that my labor union in particular (UTU) has gotten into the practice of bargaining for groups of workers and not the whole. We will never be democratic if our elected officials continue to bargain on behalf of one group, while leaving out the other. This had truly divided railroaders against one another, thus leaving more power to the carriers. As a rank and file member of the UTU, I truly feel that they have lost their cause. We should be able to bring charges against our unions for lack of representation. I also feel that an employer should be able to ask a labor union to divide it's workforce. It is discrimination based on age.

If you want more inputs, I could go on forever. The struggle I have been through with my union has encouraged me to pursue a law degree in labor. Workers have rights, and we need more lawyers on the workers side.

STATEMENT OF MARTIN CONLISK, IBEW NO. 134

I am a 23-year member of the International Brotherhood of Electrical Workers, a journeyman wireman by trade in the construction industry. I am also a registered Democrat, vote for their candidates in every election. Only Allah knows why, since they won't even back their own candidates. Bush stole the election. Period.

I am going to sign my name to this even though it will put me on another blacklist. I've been dogged by mysterious removals from the jobsite for many years. I am not a paranoid slacker, but I am a vocal proponent of democratic action and worker control. This same government of ours threw people like me in jail—remember the Palmer Raids? Well, many good citizens are suffering through the Ashcroft raids. I wouldn't doubt you'd advance my name to Homeland Security. Put me on another list, what the hell.

So do I really think appealing to a bunch of millionaires to change the Law is going to help the average drone? Your bank accounts are full because of exploited labor. To see a group complain that they are exploited by their Boss AND their "union" has got to set you off rolling in the aisles with laughter. No, I don't expect anything from you.

I stand with the men and women who came forward because that is where Right is. They are as lost and delusional as the rest of America, thinking that the government belongs to them. That may be a rough statement directed at my cocomplainers, but the fact that their hearts and minds continue to struggle for justice makes me want to help. Many tactics and battles have to be joined to achieve success. This is just the most distasteful to me personally. They are men and women with guts, willing to fight, no matter the odds. They are the light bearers in the dark world of organized labor. People like this are my friends. That is why I'm entering this statement, foolish or not.

Currently, there is a civil lawsuit that has passed the 5 1/2 year mark with definitive proof my so-called "leaders" took over 411,000 dollars from employers (*Chathas* v. *Local 134*, NE Illinois, Case No. 99C 0400, Judge Zagel). They will not release 16 months of records, so the number is much higher. The case is still grinding away until the time is right to let them go. I have no faith in the judicial system. The suit was filed under Section 501 of the LMRDA. If you make the laws enforce them because during this time our hard fought legacy of over 100 years has been sold, stepped on, been thrown out the window. My inalienable civil rights were taken away by these people when a group called "the Alliance" something they joined me to, makes me give them my body fluids on demand or face unemployment (with continuing dues payments, of course). I'm sure a judge somewhere will back them up, too. The lawyers get rich, the workingman loses. I forget, most of you are lawyers—another funny joke. And my Business Manager is a lawyer!!!—it's all just so down right hilarious. I get most of my mail from another group I never joined, an IBEW/NECA—becoming partners with the businessman, this is what is considered unionism today. I must be cracking you up, I know.

I hold no illusions that however you twist the verbiage of this legislation it is somehow going to help working people in this country. They have to do it themselves and, more than likely, they are going to collide with the forces of the government you represent. I know what side of the police line you will be on. I will be with my friends there, too, looking at you.

STATEMENT OF MICHAEL LIVINGSTON, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 157, NEW YORK, NY

Good day honorable committee members.

My name is Michael Livingston. I am a carpenter out of Local Union 157 United Brotherhood of Carpenters and Joiners of America. My Local operates in Manhattan, New York.

I am making this statement because I believe that it is of extreme importance to amend the LMRDA and restore democracy to the members of all local unions. Recently our members, U.S. and Canada, have been restructured into a smaller group of district and regional council's throughout our countries. Our General President Douglas McCarron has appointed his people to head these councils, many of them to appointed paid staff positions and delegate spots. The People appointed by McCarron in New York are at best questionable. Before I tell you about them, I would like to refer back to the Statement of Douglas McCarron before the Subcommittee on Employer-Employee Relations U.S. House of Representatives on Thursday June 25, 1998.

In this 36 page statement McCarron goes into detail about the need to restructure our union and eradicate corruption. McCarron uses New York in particular to emphasize how pervasive the corruption and organized crime influence is in New York.

He goes on to make examples of all the different crime families that had a grip on union carpentry and the steps needed to cleanup the union. Much of McCarrons testimony is true. However, He handed over the New York City District Council to many of the same people that he claimed he needed to remove. McCarron fired honest people and kept the corrupt. He did this to further his own agenda knowing he couldn't be stopped because the membership could not elect their own Business agents and organizing personnel. See related articles marked exhibit A–D. Getting back to the questionable appointments that I referred to earlier, I would like to start with Mike Forde. Forde was appointed Business Agent by McCarron despite McCarron's knowledge of his involvement with organized crime. McCarron refused to intervene even after Forde was indicted in September of 2000 on charges of enterprise corruption. Forde is currently the elected EST of the NYC District Council of Carpenters in NY and still awaiting trial. Martin Devereaux was another BA appointed by McCarron. Devereaux and Forde were both involved in the same conspiracy to defraud the UBC. Devereaux was charged and found guilty by the court appointed Internal Review officer but McCarron refused to take disciplinary action. Martin Devereaux is still a paid Business agent. I ask this committee to consider why McCarron refused to impose a trusteeship on NY in light of the corrupt circumstances while he indiscriminately imposed a trusteeship on Local 225 in Atlanta after two failed attempts to install his own people? See testimony of Phillip Lavallee and Darrel Zube. In closing McCarron stated that he believed there was no need to amend the LMRDA sugar coating his methods while basically disenfranchising the members. He has complete control over the hiring and firing of Business Agents, Organizers and Labor Management staff, the majority of whom decide what happens to our union. I could tell you many stories of the corruption in New York, I have documented many cases. I have provided a copy of the Statement of Doug McCarron and news articles regarding some of the corruption that still exists. Please remember McCarron controls our political contributions but he can't control our vote. Thank you for taking the time to read this statement.

SUBMITTED FOR THE RECORD, LETTER TO CHAIRMAN SAM JOHNSON, FROM ARTHUR L. FOX II, LAW OFFICES OF LOBEL, NOVINS & LAMONT, WASHINGTON, DC, JUNE 24, 2003

LAW OFFICES OF LOBEL, NOVINS & LAMONT,
Washington, DC, June 24, 2003.

Hon. SAM JOHNSON,
House of Representatives,
Rayburn Office Building, Washington, DC.

Re H.R. Nos. 992, 994.

DEAR CONGRESSMAN: I write to furnish background information concerning Section 105 of the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA") with which to assess the need to amend existing law.

First, so as to enable you to assess my own bona fides and ability to speak knowledgeably on the subject, I should explain that I have been practicing public interest labor law in Washington, D.C., for 35 years, 4 years with the Office of General Counsel of the National Labor Relations Board, 19 years with the Public Citizen Litigation Group, and the past 12 years in "private" practice, primarily representing "dissident" union members and caucuses attempting to reform and democratize their unions. I am one of a scant handful of lawyers in the nation who has extensive experience litigating under, and attempting to breathe life into, the LMRDA.

During most of my career, I have served on the Board of Directors of the Association for Union Democracy ("AUD"), whose principles and objectives mirror my own. I believe that a strong, healthy, and robust union movement enhances not only the economic welfare of its members and working men and women more broadly, but also the health of our nations' democracy by helping to give voice to a major and very important segment of our society.

After many years of attempting to educate union members about their rights, and their union officers' responsibilities, under the LMRDA, and realizing that most union members were totally unaware of this statute, due in part to their unions' utter failure to comply with the Section 105 duty to inform their members about it, AUD launched a campaign to obtain union compliance with that duty in the mid-1990's.

In fairness to unions, while Section 105 requires them "to inform [their] members concerning the provisions of [the LMRDA]," Congress provided no guidelines; it failed to specify "when," "where," or "how" unions would be expected to fulfill their

duty to inform. Indeed, immediately after enactment of the LMRDA in 1959, there was much discussion and inconclusive debate as to what would constitute compliance. A number of unions reproduced the text of the entire Act in their membership newspapers. Thereafter however, over the next 40 years, no union took any additional steps to inform its members about their rights under the LMRDA.

The primary reason for this hiatus—apart from the statute's vagueness—lies with the fact that the Section 105 duty to inform is part of Title I, a hastily drafted portion of the statute which was appended to the Senate Bill at the 11th hour, as a floor amendment that was subsequently adopted pro forma by the House. And, with one minor exception, union members were assigned the exclusive right, and responsibility, for enforcing virtually all of Title I, including Section 105, by filing individual lawsuits in federal courts against their unions to remedy infractions. This enforcement scheme prompted Professor Archibald Cox, counsel to the Senate Committee, to express concern:

> The effectiveness of the new law will depend largely upon the initiative and energy of union members. * * * [T]here is the danger, often expressed in the past, that individual employee's suits are neither an effective sanction nor a practical remedy. Workers are unfamiliar with the law and hesitate to become involved in legal proceedings. The cost is likely to be heavy, and they have little money with which to post bonds, pay lawyer's fees and print voluminous records. * * * Even if the suit is successful, there are relative few situations in which the plaintiff or his attorney can reap financial advantage. Most men are reluctant to incur financial cost in order to vindicate intangible rights.

Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 852–53 (1960).

This prophecy certainly held true insofar as Section 105 was concerned. It was not until the late 1990's that a Machinist by the name of Keith Thomas, aided by AUD and a pro bono attorney with a large New York law firm, filed the very first lawsuit against a union seeking to compel it to comply with the Section 105 duty to inform. See *Thomas* v. *IAM*, 201 F.3d 517 (4th Cir. 2000). As that Court noted:

> The LMRDA's protections are meaningless if members do not know of their existence. Simply put, if a member does not know of his rights, he cannot exercise them. This is where section 105 kicks in. Section 105 is the statute's informational lynchpin, requiring labor organizations to inform members what rights Congress granted them. Moreover, section 105 mandates notification not only of the provisions of Title I, but of all the rights found in the LMRDA.
>
> Section 105, in addition to informing union members of their substantive rights under the LMRDA, also notifies them of provisions authorizing causes of action against unions for infringements of these substantive rights.

201 F.3d at 520. The appellate court remanded the case to the district court which ultimately entered an order (attached as Addendum A), negotiated by the parties, requiring the Machinist Union to publish a one-page outline of the LMRDA in its magazine, to furnish new members with a copy of that outline, and to post it on its website.

Subsequently, given that *Thomas* is binding only on the IAM, most other unions have continued to ignore the Section 105 duty to inform their members about the LMRDA. Only when a member, most often with my assistance, sends his or her union a "demand letter" insisting that the union comply with the duty to inform, has a union done anything, and then only begrudgingly. Indeed, AUD recently compiled a Section 105 union-compliance "score card" which I am attaching as Addendum B.

Only one other court has issued a decision interpreting Section 105. In *Callihan* v. *United Assn Plumbers*, another district court rejected the plaintiffs' argument that furnishing members with a 1-page outline at a single point in their lifetime as a union member failed to inform them of their rights under the LMRDA since the odds were that few members would have much interest in the subject they encountered some difficulty, e.g., running for office, voting, discovering some new dues exaction, or defending against internal disciplinary charges. The plaintiffs demonstrated with a wealth of expert testimony that, at a bare minimum, unions should append a summary of the LMRDA at the rear of their constitutions which serve as the members' "Bible" which they must consult to become informed of their rights and duties as members, and the procedures which must be followed to secure those rights. That decision (Addendum C) is currently on appeal before the U.S. Court of

Appeals for the District of Columbia. Copies of the parties Briefs, but not the lengthy Appendix including expert testimony, are attached as Addendum D–F.

Whatever the ultimate outcome of the *Callihan* case, while it may provide "guidance" to other unions headquartered in Washington, D.C., it will be binding on just one more union, the Plumbers and Pipefitters, in a universe that includes hundreds of national unions, and thousands of other union entities. If experience is a guide, many, if not most of these unions will do nothing to comply with Section 105 until it becomes enforceable, in a practical sense. As Professor Cox noted, union members simply cannot be expected to file hundreds of lawsuits. Moreover, there exists the potential in the relatively few lawsuits that do get filed for other courts, located elsewhere in the country, to render still other, possibly inconsistent, interpretations of the Section 105 duty to inform in those relatively rare instances where members are able to obtain competent legal counsel to sue unions headquartered elsewhere to obtain compliance with the duty.

This "state of affairs" does not, in my view, serve the public interest, the interest of union members, and not even the legitimate interests of unions, themselves. There needs to be a single, uniform, set of standards, guidelines, or procedures setting forth specifically what unions must do, when, where, and how, to fulfill their Section 105 duty to inform their members about their rights, and their officers' duties, under the LMRDA, and how to enforce those rights and duties. While Congress could attempt to agree upon, and then to enact a statute prescribing standards and procedures, I submit that a wiser and more expedient course for filling the Section 105 statutory void would be to delegate that responsibility, via rulemaking, to the Department of Labor, and to confer upon it the right to initiate legal actions to exact compliance with its rules. And that is precisely what H.R. 992 and 994 are intended to accomplish; no more, and no less.

Thank you for making this submission a part of the hearing record on these two important bills. If you or any other Member should have any questions or desire additional information, I would be happy to be of assistance.

Respectfully,

ARTHUR L. FOX, II.

Attachments A–F.

ADDENDUM A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

KEITH THOMAS, et al., Plaintiffs, v. THE GRAND LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, et al., Defendants.

Civil No. PJM 97–2001

FINAL ORDER

Upon consideration of the parties' written proposals and the hearing held August 28, 2000, on the notification to be made by Defendants to comply with § 105 of the Labor-Management Reporting and Disclosure Act of 1959 (the "LMRDA"), 29 U.S.C. 415, it is

ORDERED that the summary of the LMRDA annexed as Attachment 1 to Defendants' letter to the Court dated May 26, 2000 (the "LMRDA Summary"), is, with the following revisions, hereby deemed adequate information concerning the provisions of the LMRDA: (1) the third and last sentence of the first paragraph ("For more information contact the nearest OLMS field office listed on the reverse.") shall be deleted; and (2) the name and address of the U.S. Department of Labor at the bottom of the Attachment shall be replaced by the following: "The above is only a summary of the LMRDA. The full text of the Act, which comprises Sections 401–531 of Title 29 of the United States Code, may be found in many public libraries, by writing the U.S. Department of Labor, Office of Labor-Management Standards, 200 Constitution Ave., N.W., Rm. N–5616, Washington, DC 20210, or on the Internet at www.dol.gov." The IAM may, if it chooses, state on the LMRDA Summary that the Summary is being published pursuant to the Court's order, that the Summary is not the editorial product of the IAM, or words to similar effect. In each instance where the IAM publishes the LMRDA Summary pursuant to this Order, the format of the LMRDA Summary shall, except where expressly noted in this Order, be substantially identical to the abovementioned Attachment 1; and it is further

ORDERED that each new member of Defendant Grand Lodge of the International Association of Machinists and Aerospace Workers (the "IAM" or "union") shall receive a copy of the LMRDA Summary as part of the "IAM Owners Manual" annexed in draft form as Exhibit A to Defendants' letter to the Court dated July 31, 2000.

The LMRDA Summary shall be as similar as practicable in format to Defendants' Attachment 1 to their letter of May 26, 2000, allowing that the IAM Owners Manual may be printed in a format with pages smaller than 8.5 x 11 inches. The LMRDA Summary shall be listed in the Table of Contents to the IAM Owners Manual in a manner similar to the listings for its other sections or parts; and it is further

ORDERED that the IAM shall publish the LMRDA Summary in three issues of the IAM Journal, to wit, one issue each to be published (i) within six months of the date of this Order, (ii) in the calendar year 2004, and (iii) in the calendar year 2008, but such publication shall not be made in an issue that also includes the IAM's notice pursuant to Beck v. Communications Workers of America, 487 U.S. 735 (1988). Each such notice shall be listed in the Table of Contents to the IAM Journal in a manner similar to the listing for other articles or items published in the same issue; and it is further

ORDERED that the IAM shall post the LMRDA Summary continuously on the home page of its website on the Internet/World Wide Web under the title "Union Member Rights and Officer Responsibilities Under the LMRDA." Said posting shall be in a typeface and style no less prominent than any other optional link.

PETER J. MESSITTE,
United States District Judge,
September 19, 2000.

ADDENDUM B

IS YOUR UNION IN COMPLIANCE WITH SECTION 105 OF THE LMRDA?

Unions covered by the Labor Management Reporting and Disclosure Act (LMRDA) are required to notify members of their rights under the law. Section 105 of the LMRDA states: "Every labor organization shall inform its members concerning the provisions of this Act."

SECTION 105 COMPLIANCE SCORECARD

When the LMRDA was first adopted in 1959, a few unions—very few—took a limited one-time step to comply. Forty years pass. An old generation of unionists is replaced by a new one. Unions ignore the law. With one minor exception, there is no compliance until September 2000 when two machinists are successful in their federal lawsuit to compel their union to comply.

On this scoreboard, to be updated from time to time, AUD will record the story of Section 105 compliance—or evasion. To get your own national or international union on the list, you must begin by formally requesting it to comply. For further information, contact AUD. We are currently assisting members of a number of unions with Section 105 cases.

Compliance:

• MMP. Masters, Mates, and Pilots: An exceptional case. Several years ago, when Arthur Holdeman was MMP vice president for the Gulf, he reprinted the Act and distributed copies to all licensed deck officers in his constituency at his own expense. Some years later, even before the court's decision in the IAM case, the MMP national office published a summary of the Act in its newsletter.

• IAMAW. International Association of Machinists: After losing a lawsuit in federal court, the union agreed to permanently post a summary of the Act on its website, to distribute a copy to new members, and to publish it in the IAM Journal in the years 2000, 2004, and 2008.

Partial Compliance:

• UAW. United Auto Workers: In December 2002, seemingly on its own in initiative, it posted the full text of the Act on its website with a prominent paragraph on its home page directing readers to it. No publication or other distribution of the summary, however.

• UA. United Association of Plumbers and Pipefitters: Faced with a lawsuit filed by two members, the UA agreed to publish a summary of the Act in its Journal in 2001, 2004, and 2008 and to distribute the summary to new members. When the district court ruled that these actions constituted sufficient compliance, attorney Arthur Fox appealed and asked the Federal Circuit Court to go beyond the Machinist standard and require the UA to append the summary at the rear of its constitution booklet as well as to post it on its website.

• HERE. Hotel Employees and Restaurant Employees: In a February, 2002 letter to Arthur Fox, HERE President John Wilhelm promised to publish the full text of the Act in its magazine once every year in order to avoid a threatened lawsuit.

• SIU. Seafarers' International Union: In response to a threatened lawsuit, it began publishing a summary of the Act as part of the President's "Know Your Rights" column that appears in every issue of its newspaper.

Limited and Evasive Compliance:

• Ironworkers Union: After being threatened with a lawsuit, it published the summary in the June, 2001 issue of the Iron Worker magazine. Nothing More.

• UTU. United Transportation Union: After being threatened with a lawsuit, it promised to abide by the Machinist decision and promptly posted the summary on its website and published it once in its magazine. However, it subsequently removed the website notice, thereby casting doubt on its readiness to remain in continuing compliance.

• UBCJ. United Brotherhood of Carpenters: In an apparent effort to forestall a threatened lawsuit, it printed a summary of the Act in an issue of its Journal on dark blue paper which cannot be photocopied. Nothing more.

• NALC. National Association of Letter Carriers: In response to a member's demand and a threatened lawsuit, it published a summary of the Act in the February, 2002 Postal Record. Nothing more.

Non-Compliance:

• IATSE. International Alliance of Theatrical and Stage Employees: At its 2001 convention, a group of delegates introduced a motion to require the union to post a summary of the Act on its website. Motion defeated.

• NTEU. National Treasury Employees Union: In rejecting a member's demand in 2001, NTEU President Colleen Kelley asserted that because her union represented government employees, it was exempt from any duty to inform its members about their statutory, democratic protections.

• US DOL. United States Department of Labor: it does not have authority to compel unions to comply with Section 105, one reason unions have been able to ignore their duty to inform members about their rights under the LMRDA for the past 40-plus years. (A bill is pending in Congress to give the DOL enforcement authority.) However, the DOL does have responsibility under the Civil Service Reform Act of 1978 for protecting the rights of federal unionists, rights that parallel those in the LMRDA. And, for the past 25 years, the DOL has failed to compel federal unions (including NTEU) to inform their members about their democratic rights. In the Spring of 2002, AUD petitioned the DOL to promulgate a new rule that would mimic section 105 and require unions representing federal workers to inform their members about their rights (see below). DOL has not responded to the petition.

ADDENDUM C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CHARLES CALLIHAN, et al., Plaintiffs, v. UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY, et al., Defendants.

Civil Action No. 00–2988 (JR)

MEMORANDUM

On March 6, 2002, I issued an order declaring Section 199 of the Constitution of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry inconsistent with 29 U.S.C. § 411(a)(2) and therefore invalid, together with a memorandum explaining that ruling. On March 14, 2002, I implemented that ruling with an order requiring the defendants to publish the March 6 memorandum and order in the U.A. Journal in no less than 11 point type under a specific heading in 22 point bold and to include a reference to the memorandum and order in the table of contents. The memorandum and order were printed in the June issue of the U.A. Journal, but without the heading or the reference in the table of contents. Plaintiff has moved to compel full compliance with the March 14 order.

The Union's position that it "substantially complied" with the March 14 order is rejected. The order very specifically required a heading, in boldface, 22 point type, and a reference in the table of contents. The Union will have to do it again, and do it correctly.

The parties' dispute about Section 199 of the U.A. Constitution was only one of two discrete disputes presented by the complaint in this case. The other one, which concerns the adequacy of the Union's compliance with section 105 of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"); 29 U.S.C. § 415, is now ripe for decision, having been fully briefed by both parties on cross motions for summary judgment.

Prior to this lawsuit, the Union had promulgated the contents of the Landrum-Griffin Act to its membership only once in 42 years—when it was first enacted. The plaintiff by his insistent demands has succeeded in achieving publication of a one-page summary of union member rights and officer responsibilities under the LMRDA in the U.A. Journal in March 2001; modification of the welcome letter distributed by U.A. locals to new members to include a summary of provisions of the Act; and Union agreement to republish the summary in the U.A. Journal again in 2004 and 2006. Not satisfied with those concessions, however, he prays for injunctive relief.

Section 105 of the Landrum-Griffin Act provides that "[e]very labor organization shall inform its members concerning the provisions of this chapter." Plaintiff insists that Union membership is not "informed" by periodic or obscure publications of the Act, or by the publication of a summary of the Act prepared by the United States Department of Labor. In the record of this case, plaintiff has adduced expert testimony (by affidavit) of a number of distinguished scholars, union leaders, union newspaper writers, and others for the proposition that union members are generally uninformed about the contents and the significance of the. Landrum-Griffin Act, and even about its existence. The point of this expertise is clear and persuasive—but it is not susceptible of a judicial remedy.

The Department of Labor has never issued regulations implementing § 105, and it is undisputed that the Department "neither possesses nor asserts the authority to direct labor unions to use any particular means in carrying out their statutory duty to 'inform.'" Def. Mem. at p. 7. The only legal (as distinct from scholarly and political) authority for plaintiff's position is found in the Fourth Circuit's decision in *Thomas* v. *Int'l Assoc. Machinists*, 201 F.3d 517 (2000). In that decision, the Fourth Circuit held that a one-time notification of members in 1959 by the International Association of Machinists "did not inform a large portion of those individuals who by definition are 'members' of the union" today, id. at 519. The Fourth Circuit did not say how today's union members were to be informed (although it did observe that the inclusion of some protections of the Landrum-Griffin Act in the union constitution and in a pamphlet was not satisfactory, because those IAM materials did not contain all of the Act's protections and virtually none of the rights listed by those documents were presented as requirements of federal law, id. at 521). Instead, it remanded the case for the district court to fashion an appropriate remedy. The district court's final order provided, essentially, that the Labor Department's summary, revised only to state that the full text of the Act is available elsewhere, is adequate information concerning the provisions of the LMDRA; that the summary is to be sent to new members of the IAM; that the summary is to be published in three issues of the IAM Journal, in 2001, 2004 and 2008; and that the summary is to be published continuously on the IAM's website. Final order of 9/19/00, Afft. of Arthur L. Fox, Ex. B.

Except for website publication, which is a good idea and which common sense commends to every union having a website, those provisions are virtually identical to what will be done here under the agreement that plaintiff has extracted from the Union. Nothing further is required to achieve compliance with the command of the statute.

An appropriate order accompanies this memorandum.

JAMES ROBERTSON,
United States District Judge,
Dated: August 12, 2002.

ADDENDUM D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02–7111

CHARLES CALLIHAN, et al., Plaintiff-Appellants. v. UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY, et al., Defendant-Appellees.

APPELLANTS' BRIEF

JURISDICTION

Plaintiff-appellants are union members seeking to remedy their union's 42-year failure to inform its membership about their rights, and their officers' responsibilities, under the Labor-Management Reporting and Disclosure Act of 1959 (herein, "LMRDA"), as required by Section 105. 29 U.S.C. § 415. Jurisdiction in the District Court was predicated on 29 U.S.C. 412, and 28 U.S.C. 1331.

The District Court denied plaintiff-appellants' motion for summary judgment, granted defendant-appellees' cross-motion, and entered a final judgment dismissing this action on August 13, 2002. Notice of appeal was filed on September 12, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the UA's publication of a one-page summary of the LMRDA in the UA Journal, and inclusion in the welcome packet sent to new members, satisfies its obligation under Section 105 to inform its members concerning the provisions of the Act.

STATUTES AND REGULATIONS

Section 105 of the LMRDA provides: "Every labor organization shall inform its members concerning the provisions of this Act." 29 U.S.C. § 415.

STANDARD OF REVIEW

Because this appeal is from a decision granting summary judgment, review by this Court is de novo. See, e.g., *Grilvin* v. *Fire*, 259 F.3d 749, 756 (D.C. Cir. 2001).

STATEMENT OF THE CASE

Procedural History

After exhausting intra-union appeals for more than four months and obtaining no meaningful relief, plaintiff appellants filed a two-count complaint on December 13, 2000, alleging (1) that a provision in the constitution. of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry (herein, "UA") mandating the expulsion of members "found guilty of sending out circular letters of falsehood and misrepresentation" unlawfully chilled and infringed their LMRDA Title I free speech rights, 29 U.S.C. 411(a)(2), and (2) that the UA had, for the previous 42 years, failed and refused to inform its members about their rights, and their officers' responsibilities under the LMRDA, also in violation of Title I of that Act, 29 U.S.C. § 415. Docket No. 1.

On March 6, 2002, the district court entered a memorandum opinion and order granting plaintiff-appellants' motion for partial summary judgment on their free speech claim, finding the challenged constitutional restraint on member speech to be unlawful and ordering the UA to remove it from its constitution and to inform its members that the provision had been judicially invalidated. Docket Nos. 24, 28.

Thereafter, at an April 2, 2002 status conference, counsel for the UA informed the court that it had recently published a one-page summary of the LMRDA in the UA Journal and had begun sending a copy of the Summary to new members. Counsel contended that, by these actions, the UA had brought itself into full compliance with Sectiou 105. Although no discovery had been conducted, no record developed, and no briefs filed, the court opined that

> it is not the province of this Court to fine tune [the Section 105 duty] so as to decide [that an LMRDA summary] has to be on the [union] website or printed on the back of the constitution [as plaintiffs requested] . . .
>
> Publication in a journal that is sent to every dues-paying member plus the issuance to every new member of a one-page summary seems to me to be adequate compliance with the bare bones—with the very bare bones statutory provision.
>
> Now I'll rule that way and put together a very short memorandum, and you can take that up if you want to see if you can get a different ruling from our circuit or a split in the circuits, Mr. Fox; or, if you choose, one side or the other can launch another whole series of motions, and I'll decide them.

JA 108. When plaintiffs' counsel responded that he wanted "to develop [a] record in the form of affidavits at a bare minimum," the court promptly directed, "you file your motion for summary judgment since the facts are undisputed." Id.

Subsequently, plaintiff appellants filed a motion for summary judgment supported, inter alia, by a number of affidavits from labor union experts, a PhD thesis examining union official (as opposed to member) knowledge and awareness of the LMRDA, and empirical evidence of recent actions by other unions to bring themselves into compliance with Section 105. True to its word, the court promptly denied the motion, dismissed the Section 105 claim, and entered final judgment on August 13, 2002. In its opinion, the court noted that

> plaintiff has adduced expert testimony (by affidavit) of a number of distinguished scholars, union leaders, union newspaper writers, and others for the proposition that union members are generally uninformed about the contents and the significance of the Landrum-Griffin Act, and even about its existence. The point of this expertise is clear and persuasive—but it is not susceptible of a judicial remedy.

JA 10.[1] After briefly reviewing the final order issued in the only other case of record where a union member sued his union to gain compliance with Section 105, the court below held:

> Except for website publication, which is a good idea and which common sense commends to every union having a website, those provisions are virtually identical to what will be done here under the agreement that plaintiff has extracted from the Union. Nothing further is required to achieve compliance with the command of the statute.

JA 11.

Statement of Facts

The plaintiff-appellants are members of the United Association ("UA"). JA 14 (¶¶ 1–2). Prior to the filing of this lawsuit in December of 2000, the UA had not informed its members, including appellants, concerning their rights, and their officers' duties, under the LMRDA since October of 1959, when it published the entire text of the LMRDA in the UA Journal. JA 14 (¶ 3). Thus, during the balance of the 20th Century, the UA took no further steps systematically to inform its membership concerning the provisions of the LMRDA. JA 14 (¶ 4), 18–19.

After the Fourth Circuit ruled in. *Thomas* v. *Int'l Ass'n of Machinists,* 201 F.3d 517 (2000), that the Section 105 duty to inform members about the provisions of the LMRDA was a continuing duty, not satisfied by a one-time publication of the Act in 1959, plaintiff Callihan sent a letter, dated May 24, 2000, to UA General President Maddaloni informing him about the *Thomas* decision and demanding that he bring the UA into compliance with Section 105. JA 14 (¶ 5), 22 (¶ 5), 25. Four months later, having received no response from Maddaloni, Callihan sent a second demand letter, dated September 24, 2000, in which he requested that Maddaloni furnish him with a response no later than October 20, 2000. JA 14 (¶ 6), 22 (¶ 5), 26–27. When Maddaloni still had not replied by December 13, 2000, Callihan filed this action, inter alia, to compel. the UA to comply with Section 105. JA 15 (¶ 7), 22 (¶ 5).

Thereafter, in a letter to plaintiffs' counsel dated January 29, 2001., UA counsel represented that the Union would publish in its membership media organ, and distribute to new members, a one-page Summary, captioned "Union Member Rights and Officer Responsibilities Under the LMRDA." JA 15 (¶ 8), 87. That Summary was, in fact, published in the March 2001 UA Journal which was sent to all members. JA 15 (¶ 10). The UA also modified the "Welcome Letter" distributed to new members to include the following language: "Finally, we enclose a summary of provisions of the Labor Management Reporting and Disclosure Act." JA 15 (¶ 11), 98. And, after a further exchange of correspondence between counsel, the UA agreed to republish the Summary of the LMRDA in the VA Journal again in 2004 and 2008. JA 15 (¶ 12), 94.

Although plaintiffs' sought to have the UA post the Summary on its website and append it at the back of its printed constitution booklet, the UA refused to do so absent a court order which was not forthcoming.

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[1] The experts included: Professor Clyde Summers, who was at Yale Law School when he served as an advisor to Senator John F. Kennedy who floor-managed the Senate's Bill which became the core of the LMRDA (JA 38, 40), and who drafted Title 1, see *Brown* v. *Lowen,* 857 F.2d 216, 218 (4th Cir. 1988), aff'd en banc, 889 F.2d 58 (1989), aff'd sub nom, *Masters, Mates & Pilots* v. *Brown,* 498 U.S. 466 (1991); Herman Benson, founder of the Association for Union Democracy, who has worked with thousands of unionists, academics, and union officials to promote the goals of the LMRDA since it was enacted (JA 44); William Fletcher, who has held a number of key organizing and education positions in various unions, most recently, Education Director of the AFL–CIO where he also served as Special Assistant to President John Sweeney (JA 55–56); Martin Fishgold and Andy Zipser, editors of union publications (JA 58, 62); and Ken Paff, who has been at the center of the movement to reform and democratize the Teamsters Union since its inception in the mid-1970's (JA 64–65).

Citations to their testimony herein will not only identify the appropriate page in the Joint Appendix ("JA"), but also the affiant and specific paragraph in his affidavit.

SUMMARY OF ARGUMENT

When enacting the LMRDA, Congress intended to create within labor unions a new regime of individual rights, democratic governance and ethical practices. And it assigned to union members a central role not only in the governance of their unions, but also in the enforcement of the LMRDA. Section 105 is not just an integral part of that scheme, it is the cornerstone of the Act. If members are not informed of their rights as well as their officers' obligations under the Act, they can hardly be expected to play the role Congress assigned to them.

Perhaps realizing that this case would likely be appealed, whatever the outcome, the district court gave it short shrift. In doing so, the court construed Section 105 narrowly, ignoring legions of caselaw holding that, as a remedial statute, the LMRDA. must be construed broadly in order to achieve Congress' overriding, democratic objectives.

UA members did not become informed about the Act upon receipt of what amounts to a one-time legal notice. Rather, the Section 105 duty to inform members can only be met if the UA furnishes its members, on an ongoing basis, with a Summary of their LMRDA rights which is readily available to them on those occasions when they have reason both to need and to want to learn about their rights, and bow to enforce them. That obligation can only be net by appending the Summary to the UA Constitution booklet which serves as the members' legal bible, and by posting the Summary on the UA website.

ARGUMENT

Introduction

To understand why the UA's alleged compliance does not fulfill its statutory obligation under Section 105, it is first necessary to review the political framework Congress established through the LMRDA and the role of Section 105 within it. Thereafter, we will consider what constitutes compliance with Section 105 and whether, as the district court concluded, the Section is merely a "bare bones," legal-notice-type requirement, or something more useful and informative.

A. The LMRDA Was Intended To Create A New Political Order of Union Democracy, Ethical Practices and Member Enforcement

Through the LMRDA, Congress created a political order within labor unions based on democracy, disclosure, ethical practices, and accountability. Congress' "primary objective" in passing the Act was to "ensur[e] that unions would be democratically governed and responsive to the will of their memberships." *Finnegan* v. *Leu,* 456 U.S. 431, 436 (1982). Its enactment followed two years of highly publicized hearings on union corruption by the Senate Select Committee on Improper Activities in the Labor-Management Field, chaired by Senator John McClellan. *Wirtz* v. *Local 153, Glass Bottle Blowers Ass'n.,* 389 U.S. 463, 409–70 (1968). The McClellan Committee heard voluminous testimony concerning: union racketeering and the oppression of union members by autocratic officials; the misuse of union funds; reprisals, including violence, against members for expressing their views, seeking union office, or otherwise participating in union affairs; the imposition of trusteeships over local unions for the purpose of manipulating politics and suppressing dissent; and all sorts of electoral chicanery. S. Rep. No. 1417, 85th Cong., 2d Sess. (1958) (interim report); S. Rep. No. 1139, 86th Cong., 2d Sess. (1960) (final report).

1. The LMRDA

The LMRDA established a detailed, albeit limited, scheme to regulate labor organizations; it conferred upon members, and sought to protect, various democratic rights. Title 1. which contains Section 105, is captioned the "Bill of Rights of Members of Labor Organizations." It guarantees members a right to equal participation in union affairs, 29 U.S.C. §411(a)(1), to free speech and assembly, 29 U.S.C. §411(a)(2), to a democratic voice when raising dues and other financial assessments, 29 U.S.C. §411(a)(3), to seek judicial relief, 29 U.S.C. §411(a)(4), to fundamental due process in disciplinary proceedings, 29 U.S.C. §411(a)(5), to enforce their Title I rights through civil actions in federal court, 29 U.S.C. §412, to receive a copy of their collective bargaining agreements, 29 U.S.C. §414, and, in Section 105, to be informed by their unions concerning the provisions of the entire Act, 29 U.S.C. §415.

Although it most directly addresses the entitlements of union members, Title I is not the only portion of the Act which secures their rights or is otherwise of keen interest to them. For example, Title II mandates extensive reports by unions concerning their organization and finances, 29 U.S.C. §431, and their officers' potential conflicts of interest, 29 U.S.C. §432. In particular, it requires unions to make their

disclosures available to their members, and allows those members to seek judicial authorization to examine the books and records upon which their union's reports are based. 29 U.S.C. § 431(c).

Title III prohibits unions from placing local unions or other subordinate bodies in. trusteeship in order to suppress democratic movements, and allows both the Secretary of Labor and union members to enforce this prohibition by civil action in federal court. 29 U.S.C. § 4G4(a).

Title IV sets standards for union officer elections. It requires that union elections be held by secret ballot and at certain minimum frequencies, 29 U.S.C. § 481(a)(b) & (d), that unions allow members reasonable opportunity to run for, and to nominate candidates for, union office, 29 U.S.C. § 481(e), and it mandates that campaigns and elections be run fairly and democratically, 29 U.S.C. § 481(c), (e) & (g). It obliges the Secretary of Labor to seek to overturn elections where, after investigating the complaint of an aggrieved union member, probable cause of a violation has been found. 29 U.S.C. § 482.

Title V, "Safeguards for Labor Organizations," creates a fiduciary duty for union officers and agents, 29 U.S.C. § 501(a), and allows any member to sue for appropriate relief to remedy fiduciary violations where the union, itself, has failed or refused to hold its officers accountable for fiduciary violations, 29 U.S.C. § 501(b).

Title VI bars reprisals against union members for exercising any right under the Act, 29 U.S.C. § 529, creates a federal cause of action for members injured by such reprisals, and creates criminal penalties for using or threatening to use force or violence against any member for exercising any right secured by the Act, 29 U.S.C. § 530.

Thus, the LMRDA, taken as a whole, sets forth a scheme for regulating and monitoring unions in the interest of their members and the public. Various of its Titles define union members' rights and authorize members to sue to enforce those rights; other Titles authorize or oblige the Secretary of Labor to act upon member complaints, or otherwise to establish regulatory and disclosure requirements that express the congressional policy of union democracy and ethical practices.

Importantly, the Title I "Bill of Rights"—which includes the members Section 105 right to be informed about the provisions of the entire Act—was offered as a floor amendment by "legislators [who] feared that the [Senate Committee's] bill did not go far enough because it did not provide general protection to union members who spoke out against the union leadership." *Sheet Metal Workers' Int'l Ass'n* v. *Lynn,* 488 U.S. 347, 352 (1989) (quoting *Steelworkers* v. *Sadlowski,* 457 U.S. 102, 109 (1982)). In offering the first version of Title I on the floor of the full Senate, Senator McClellan recalled his prior statement to the Committee on Labor and Public Welfare when it first began to consider the issues brought to light by his investigative committee:

> At that time I made the statement, "I believe that if you would give to the individual members of the unions the tools with which to do it, they would pretty well clean house themselves."
>
> If we want fewer laws—and want to need fewer laws providing regulation in this field, we should start with the basic things. We should give union members their inherent constitutional rights, and we should make those rights apply to union membership as well as to other affairs of life. We should protect the union .members in those rights. By so doing we will be giving them the tools they can use themselves. That is all I am proposing to do by this amendment.

105 Cong. Rec. 6476 (1959), reprinted in II NLRB, Legislative History of the Labor Management Reporting and Disclosure Act of 1959 at 1102–03 (1985) [hereinafter "Leg. Hist."].

By thus empowering union members, Title I's "pervading premise" was to assure "full and active participation by the rank and file in the affairs of the union." *American Fed. of Musicians* v. *Wittstein,* 379 U.S. 171, 182–83 (1964). See also *Burroughs* v. *Operating Engineers Local Union No. 3,* 686 F.2d 723, 727 (9th Cit. 1982) ("The evident purpose of [LMRDA's] bill of rights is to safeguard and preserve actual union democracy [and] to shield the union membership from arbitrary, autocratic, and despotic control by union officers and leaders").

2. Section 105—The Cornerstone for Effectuating the Goals of the LMRDA

Because this case presents an issue of statutory construction., we begin with the language of the statute:

> Every labor organization shall inform its members concerning the provisions of this Act.

29 U.S.C. § 415. Unfortunately, Congress did not elaborate, or specify the manner or means by which unions would be expected to comply with this mandate. And, largely because the provision was added at the 11th hour as part of a floor amendment, there is no specific legislative history from which to draw guidance.

This problem is not, however, unique to Section 105. As the Supreme Court observed in *Local 82, Furniture Movers* v. *Crowley,* 467 U.S. 526 (1984), when construing another provision in Title I:

> we have previously "cautioned against a literal reading" of the LMRDA. Like much federal labor legislation, the statute was "the product of conflict and compromise between. strongly held and opposed views, and its proper construction frequently requires consideration of its wording against the background of its legislative history and in light of the general objectives Congress sought to achieve."

467 U.S. at 541–42, quoting from *Wirtz* v. *Glass Bottle Blowers Ass'n,* 389 U.S. 463, 468 (1968).[2]

Indeed, as we shall see, Section 105 is the cornerstone that supports the LMRDA as a whole and gives vitality to the rights of union members enumerated in the rest of the Act. Cf. *Knox County Local* v. *Natl. Rural Letter Carriers' Assn.,* 720 F.2d 936, 939 (6th Cir. 1983) (recognizing importance of the right of union members "to receive information, without which they would be unable to exercise fully their right to participate in deliberations in union affairs").

The language of Section 105 is simple, unambiguous and mandatory. Section 105's affirmative duty flows directly from the central role Congress contemplated for union members in the reform and governance of their unions. As we have seen, Congress sought to assure the "full and active participation by the rank and file in the affairs of the[ir] union[s]." It is axiomatic that without knowledge of their rights under the LMRDA, and assurance of their protection, union members will be reluctant or even incapable of fulfilling that role.

The importance of Section 105 in achieving democracy within unions, as well as the reluctance of unions to honor its mandate, is underscored in an insightful article by the draftsman of Title l. See n. 1, supra. Professor Clyde Summers has observed that unions generally function as "one-party political states," were the incumbent leadership has control over a substantial administrative apparatus, including appointed union officials, the union press, and the agenda and conduct of meetings. Summers, Democracy in a One-Party State: Perspectives from Landrum-Griffin, 43 Md. L. Rev. 93, 97–98 (1984). Unlike our larger political system, within the union "state," competing political parties and the scrutiny of the press are generally absent. Id.

> [One] source and instrument of oligarchic control [by the incumbent officers] is domination of the channels of communication. Control over the union journal, with its adulation of incumbent officers, unqualified support of their policies, and exclusion of effective presentation of other positions, is only the most obvious instrument . . . [Accordingly, t]he function of the law must be to loosen the grip of oligarchy so that those opposed to the incumbents can make their voices heard and the weight of their opposition felt."

Id. at 97–99. See also *Donovan* v. *CSEA*, 761 F.2d 870, 875 (2d Cir. 1985).

Unfortunately, precious few union members, in the UA and elsewhere, are aware of the LMRDA. One scholarly survey found only meager knowledge of the LMRDA, even among union officials. Dennis D. Strouble, A Study To Evaluate the Current Attitudes Toward the Effectiveness of the Labor Management Reporting and Disclosure Act in Texas (1984) (unpublished D.B.A. dissertation, Texas Tech University), JA 73–82. More significantly, the union officials surveyed unanimously believed that

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[2] See also *Mallick* v. *IBEW,* 749 F.2d 771, 776 (D.C. Cir. 1984); *Navarro* v. *Gannon,* 385 F.2d 512, 517–18 (2d Cir. 1967), cert. denied, 390 U.S. 989 (1968) (J. Lombard noted: "The Bill of Rights that appears as Title I of the Act was hastily drafted and included without much debate . . ., Without any express indication of congressional intent, we must . . . consider the broad purposes of the Bill of Rights"); Archibald Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev, 819, 852 (1960) ("The [LMRDA] contains more than its share of problems for judicial interpretation because much of the bill was written on the floor of the Senate or House of Representatives and because many sections contain calculated ambiguities or political compromises essential to secure a majority. Consequently, in resolving them the courts would be well advised to seek out the underlying rationale without placing great emphasis upon close construction of the words"), quoted approvingly in *Glass Bottle Blowers,* supra, 389 U.S. at 468 n.6, *Sadlowski,* supra, 457 U.S. at 111, and *Crowley,* supra 467 U.S. at 542 n.17.

most of their own members were ignorant of the LMRDA's protections of individual members' rights. JA 83. Nevertheless, since shortly after the LMRDA was enacted, no union surveyed had made, or was planning to make, any effort to comply with Section 105. JA 76. The net result of these unlawful failures has been that the self-policing regime contemplated by the Act has been substantially frustrated. JA 44–46 (Benson ¶¶ 4–13), 38 (Summers ¶ 8).

Section 105 was intended to make the LMRDA's system of union democracy and disclosure effective by engaging the active support and involvement of union members who are not only the Act's intended beneficiaries but, in very large measure, its indispensable guardians as well. In this manner, by obviating the need for the union member "to have to read about his rights in the Harvard Law Review," *Nelson* v. *Johnson*, 212 F. Supp. 233, 261 (D. Minn. 1962), Section 105 strengthens the tendency of labor organizations to be responsive to their members. See *Mallick* v. *International Bhd. of Electrical Workers*, 749 F.2d 771, 777 (D.C. Cir. 1984) (finding Title I aims to end operation of unions as "private fiefdoms . . . 'by placing the ultimate power in the hands of the members, where it rightfully belongs, so that they may be ruled by their free consent, [and] may bring about a regeneration of union leadership'," (quoting 105 Cong, Rec. 6472 (remarks of Sen. McClellan)).

This remedial view of Section 105 was recently embraced by the Fourth Circuit in *Thomas* v. *IAM*, 201 F.3d 517 (2000), the first case in which the courts were called upon to enforce Section 105:

> The LMRDA's protections are meaningless if members do not know of their existence. Simply put, if a member does not know of his rights, he cannot exercise them. This is where section 105 kicks in. Section 105 is the statute's informational lynchpin, requiring labor organizations to inform members what rights Congress granted them. Moreover, section 105 mandates notification not only of the provisions of Title 1, but of all the rights found in the LMRDA.
>
> Section 105, in addition to informing union members of their substantive rights under the LMRDA, also notifies them of provisions authorizing causes of action against unions for infringements of these substantive rights.

201 F.3d at 520. After analyzing the means of enforcing many of the Act's provisions, and noting Senator McClellan's observation that by giving "members the tools with which to do it, they would pretty well clean house themselves," the Court held that, in order for "members to be able to do that job, they must first be made aware of the Act's enforceability provisions." Members, the court held, are "not only the beneficiaries of the LMRDA but in many instances its sole guardians." Id. While the court did not resolve the issue before this Court concerning "*how* . . . union members were to be informed" of their rights, JA. 11, it did observe that

> [m]aintaining honest democratic governance of unions is surely an *ongoing* effort that would seem perforce to require some *ongoing* method of notification.

201 F.3d at 520 (emphasis added).[3]

"Section 105 is, therefore, a cornerstone of the LMRDA which should be read to require labor organizations to take effective steps to keep their members informed about their rights under that Act on an ongoing basis. Conversely, unions should not be allowed to get away with symbolic acts and empty gestures, posturing compliance with Section 105 while purposely failing, actually and effectively, to inform their members about the provisions of the Act." JA 46 (Benson ¶ 15), emphasis in original. See also JA 39 (Summers ¶ 9).

B. The Authority and Responsibility of the Courts under Section 105

Section 102 of Title I authorizes courts to grant "such relief (including injunctions) as may be appropriate" to remedy violations of Title I. 29 U.S.C. § 412. Significantly, as the Supreme Court has noted, while other LMRDA titles

> deal with narrowly defined problems under the Act, and specifically authorize . . . limited remedies . . . [b]y contrast, § 102 was premised upon the fact that Title I litigation necessarily demands that remedies "be tailored to fit facts and circumstances admitting an almost infinite variety," and § 102 was therefore cast as a broad mandate to the courts to fashion "appro-

[3] The circuit court remanded the action to the district court to determine "how" the Machinist Union could bring itself into compliance with Section 105. On remand, rather than develop a record, as here, and litigate that issue, the parties negotiated what amounted to a consent order. See JA 105.

> priate" relief. Indeed, any attempt on the part of Congress to spell out all the remedies available under § 102 would create the "danger that those [remedies] not listed might be proscribed with the result that the courts would be fettered in their efforts to 'grant relief according to the necessities of the case.'"

Hall v. Cole, 412 U.S. 1, 10–11 (1973). See also Knox County Local, supra, 720 F.2d at 939 ("The latitude granted to [the courts] by Title I . . . clearly permit[s] judicial intervention to protect the right of union members to free speech and to receive information."). Thus, Section 102 is an unusually broad mandate for courts to craft meaningful and effective remedies for any and all violations of Title I, including Section 105.

The legislative history of the LMRDA supports this view. While the predecessor of Section 105, Section 508 of the Kennedy-Ervin bill, called for the Secretary of Labor to prescribe the manner and means by which unions would be required to inform their members about their rights, and officers' duties, under the LMRDA, 105 Cong. Rec. 5981 (1959), I Leg. Hist. 391, that provision was deleted from later versions of the LMRDA introduced in the House and subsequently passed both by it and by the Senate. I Leg. Hist. 633, 702. In addition, while Senator McClellan's bill of rights would also have assigned to the Secretary authority to enforce all of its provisions, 105 Cong. Rec. 6475 (1959), II Leg. Hist. 1102, Senator Kuchel's substitute amendment, proffered to eliminate "the extremes raised by the [McClellan] amendment," 105 Cong. Rec. 6722, II Leg. Hist. 1234 (Sen. Cooper), removed the Secretary of Labor from the Title I enforcement scheme and reassigned that authority, with one exception,[4] to "[a)ny person whose rights secured by the provisions of this title have been infringed." 105 Cong. Rec. 6694 (1959), II Leg. Hist. 1220.[5] The Kuchel, substitute was approved by a vote of 77–14, 105 Cong. Rec. 6727, II Leg. Hist. 1239; shortly thereafter, the "House bill, which contained a 'Bill of Rights' identical to that adopted by the Senate, was quickly approved." *United Steelworkers* v. *Sadlowski*, 457 U.S. 102, 110 (1982).[6] Accordingly, with the single exception of Section 104, Congress assigned to the courts responsibility for construing and enforcing Title I which, of course, includes Section 105.

Indeed, the Department of Labor ("DOL") has consistently subscribed to this view as well. Shortly after the LMRDA's enactment, several DOL officials stated that the Secretary lacked the power to determine precisely what would constitute compliance with Section 105 since that responsibility had been assigned to the courts exercising jurisdiction over claims brought by members under Section 102. JA 129–30, 133–34. And in 1989, the Assistant Secretary of Labor principally responsible for LMRDA enforcement reaffirmed that Section 105 is only enforceable by private suit filed by a union member, leaving the task of fashioning appropriate relief to the courts. JA 50 (Benson ¶ 14), 52. See also *Thomas* v. *IAM*, supra, 201 F.3d at 520, and 29 U.S.C. § 521(a).

While the district court was reluctant to engage in a process it may have perceived to be akin to rulemaking, i.e., to flesh out the particulars of the Section 105 statutory mandate, Congress nonetheless assigned that task to the courts. We respectfully submit that the absence of any Congressionally prescribed criteria, manner or means for complying with Section 105 constitutes no obstacle to the courts when called upon to frame and grant appropriate relief under Section 102. But see JA 10, where the district court held below that "it is not susceptible of a judicial remedy."

We begin with the proposition: where persons have a right to be informed of certain facts, the law generally requires that the person under an obligation to furnish information do so in a manner "reasonably calculated, under all the circumstances," to accomplish that end in fact. *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306,

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[4] Section § 104, 29 U.S.C. 414, gives the Secretary power to enforce the requirement that unions make copies of collective bargaining agreements available to members.

[5] See also II Leg. Hist. 1113 (Sen. Kennedy), II Leg. Hist. 1223 (Sen. Johnston), II Leg. Hist. 1232 (Sen. Kuchel), II Leg. Hist. 1233 (Sen. Clark: Kuchel Amendment "takes the Federal bureaucracy out of this bill of rights and leaves its enforcement to union members, aided by the courts"), and ii Leg. Hist. 1238 (Sen. Kefauver).

[6] This modification prompted Professor Archibald Cox, counsel to the draftsmen, to express concern: "The effectiveness of the new law will depend largely upon the initiative and energy of union members. * * * [T]here is the danger, often expressed in the past, that individual employee's suits are neither an effective sanction nor a practical remedy. Workers are unfamiliar with the law and hesitate to become involved in legal proceedings. The cost is likely to be heavy. . . . * * * Most men are reluctant to incur financial cost in order to vindicate intangible rights." Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 852–53 (1960). The fact that no union member sought to enforce Section 105 for more than 40 years would appear to validate Professor Cox's concern.

314–315 (1950). While absolute assurance that the information has actually been received and understood is not required, a "mere gesture" will not suffice. Id. at 315. The standard should be the commonsensical one that the method or methods used are reasonable and not substantially less effective than other methods reasonably available. Id.

Congress, state legislatures, and administrative agencies face such tasks regularly, and resolve them, in ways tuned to the nature of the information to be conveyed and the practical realities of the situation at hand. See, e.g., 42 U.S.C. § 2000e–10 and 29 C.F.R. § 1601.30 (requiring posting of notices of Title VII); 29 U.S.C. § 627 and 29 C.F.R. § 1627.10 (same as to the Age Discrimination in Employment Act); 29 U.S.C. § 1022(a) (requiring trustees of ERISA pension plans to furnish participants periodically with summary plan descriptions which "shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan").

This Court should construe Section 105 broadly in order to give effect to Congress' general remedial objective when enacting the LMRDA. See *Jefferson County Pharmaceutical Assn.* v. *Abbott Labs.*, 460 U.S. 150, 159 (1983). After all, the LMRDA is a remedial statute aimed at "afford[ing] necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations * * * [and] its proper construction frequently requires consideration of . . . the general objectives Congress sought to achieve." *Glass Bottle Blowers*, 389 U.S. at 468, 470. See also *Masters, Mates & Pilots* v. *Brown*, 498 U.S. 466, 476 (1991) (holding that "[a] broad interpretation of the candidate's [LMRDA] right to distribute literature is consistent with the statute's basic purpose").[7]

For the reasons that follow, we submit that the district court erred when concluding that the Section 105 duty is "bare bones" and static, and that it is met by furnishing members with one single notification of their rights under the LMRDA during their working lifetime affiliation with the Union.[8] Rather, the LMRDA's remedial scheme can only be furthered if Section 105 is construed to impose an ongoing duty on unions to inform their members concerning their rights, and their officers' duties, in an effective and meaningful manner. Indeed, while the district court found the unanimous and uncontested record testimony of appellants' experts supporting the latter view to be "clear and persuasive," the court erred when ruling that "it is not susceptible of a judicial remedy." The court's cramped and narrow construction of both Section 105, and its remedial authority under Section 102, is at odds with Congressional intent.

In fact, appellants demonstrated in the proceeding below, without contradiction, that the steps taken by the UA have not, and will not, operate to inform the UA membership concerning their rights under the LMRDA. Yet, while the UA moved to strike virtually all of this evidence and expert opinion, not only did the court not grant its motion, it made no attempt to challenge, much less refute, appellants' evidence, thus leaving an uncontested record. Accordingly, as we shall now show, it cannot be said that the steps taken by the UA constitute "adequate compliance" with, Section 105.[9]

C. The UA's Conduct Does Not Constitute Compliance With Section 105

As appellants demonstrated below, the UA's failure to comply with Section 105 for more than 40 years has undermined their efforts to participate actively in their Union, a Clear Congressional objective. Most UA members are unaware of the provisions of the LMRDA and the system of union democracy it was designed to assure,

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[7] Lower courts have similarly recognized that, as remedial legislation, the LMRDA provisions are entitled to liberal construction to effectuate Congress' objectives. See, e.g., *McGinnis* v. *Teamsters Local, 710*, 774 F.2d 196, 199 (7th Cir. 1985) ("courts have focused on the broad remedial purpose of the Act rather than its literal language"); *Mallick* v. *IBEW*, 749 F.2d at 776 (courts must be "leery of interpreting the LMRDA based on uncertain inferences from word-by-ward parsing of the statute"); *Knox County Local* v. *NRLCA*, 720 F.2d at 938–39.

[8] While the UA did commit to republish the one-page summary again in 2004 and 2008, thereafter, notification will be made solely via inclusion of that summary in the mailing sent to new members when they first join the UA. However, this method of alleged compliance is, as we shall see presently, about as likely to inform members of their LMRDA rights as would a "legal notice" published in the classified section of a newspaper.

[9] To the extent that the court's construction of Section 105 must be guided by a factual inquiry concerning the manner and means available to the UA to comply with Congress' informational mandate, the district court was obliged to evaluate the record evidence in the light most favorable to the plaintiff-appellants inasmuch as they were the non-moving party in the summary judgment motion which the court granted. *Anderson* v. *Liberty Lobby*, 477 U.S. 242, 247 (1986). This, the district court most assuredly did not do; rather, it simply overlooked or ignored the evidence.

event after the UA's one-time publication of the one-page LMRDA Summary in the UA Journal in the Spring of 2001. JA 22 (Callihan ¶¶ 4, 6, 8). The lack of such information and understanding is a significant cause of the apathy among their fellow members and of their reticence to become more actively involved in the democratic process of the UA. JA 22 (Callihan ¶ 8), 38 (Summers ¶¶ 7–8), 46 (Benson ¶¶ 13, 16), 65 (Paff ¶¶ 8–11), 53–54, 59 (Zipser ¶ 9).[10]

Appellants' interest in a democratic, open, vigorous union depends on their fellow members being informed of their rights, and willingness to participate in its affairs for their common good. See *Hall* v. *Cole,* 412 U.S. 1, 8 (1973) (deeming rights created by Title I "vital to the independence of the membership and the effective and fair operation of the union as the representative of its membership") (internal quotation marks omitted). If Section 105 is to achieve Congress' objective, if union members are to serve as guardians of democracy and officer accountability within their unions, they must actually, not symbolically, be informed about their LMRDA rights and the means by which. those rights may be enforced.

Among the means available to the UA for fulfilling its Section 105 obligation axe: a membership mailing list, the UA Journal published monthly and sent to all members, the UA Constitution booklet distributed to members upon request, and a website. As we have seen, it lies with the courts to fashion appropriate relief utilizing some or all of these informational vehicles.[11]

After this lawsuit was filed, the UA published a one-page Summary of the LMRDA in the March, 2001 UA Journal, and it has offered to republish it twice again—in 2004 and 2008.[12] In addition, the UA began to furnish a copy of that Summary to new members when they first join the Union. The UA contends that these actions constitute full compliance with Section 105 and has refused to publish the Summary more frequently, to post it on its website, or to append it to its constitution. As we have seen, the district court was satisfied that the UA's plan to notify each member once in his or her lifetime constituted "adequate compliance" with the "bare bones" requirement of Section 105.

In fact, the record below contains uncontested testimony by a number of prominent experts who were unanimous in their view that most union members do not bother to read their union publications which are perceived to be little more than propaganda vehicles promoting the incumbent leadership. They uniformly discredit national union media organs as reliable sources of information, or channels for effective member communication. They explain why the typical union member is not likely to be interested in, or to pay much attention to, his or her union magazine, much less the short Summary of LMRDA rights that might be contained therein, before discarding it because, inter alia, not only are they filled with puffery and propaganda, they are boring. Moreover, and most importantly, members typically have little interest in their LMRDA rights except during brief moments in their lifetimes as union members, e.g., when, they attempt to run for office, or to defend against disciplinary charges and suddenly need to know, and will become interested in, and try learn about, their LMRDA rights. JA 47–48 (Benson ¶¶ 21–23), 53–54, 59–60 (Zipser ¶¶ 8–15), 63 (Fishgold ¶¶ 115, 7), 38 (Summers ¶ 9), 56 (Fletcher ¶ 9), 66 (Paff ¶ 14), 22 (Callihan ¶¶ 6–8). See also Summers, 43 Md. L. Rev 97–99. And the record testimony uniformly refutes the notion that publication of the DOL Summary three times over a seven-year period, as the UA has proposed to do, will succeed at informing the UA membership concerning their rights under the LMRDA; rather, it would have to be published at least annually, if not more frequently. Id. As Callihan put it, "the UA is going to have to do a lot more informing . . . before . . . the members will become informed." JA. 22 (¶ 6).

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[10] See also Callihan's First Aff. ¶¶ 9–10 and Moore Aff. ¶¶ 5–6 (.Docket No. 6).

[11] In an informal letter to the Machinists' Chief Counsel shortly after enactment of the LMRDA, the Acting Solicitor of Labor opined that "merely posting a copy of the Act on the bulletin board would be insufficient [compliance]. If, in addition, the members were notified where the copy or copies [of the Act] could be examined, there still may be a question of sufficiency . . . [in terms of] getting the information to the members. If by this means, together with other methods, a union's total program for informing its members concerning the provisions of the Act is one that may reasonably be expected to succeed in providing them with the necessary information under the condition[s] known to exist with respect to the members of the particular union, it is possible, in our opinion, that the union's program for doing this would be regarded as adequate compliance with section 105." JA 130–31 (emphasis added).

[12] The UA's response may be juxtaposed against the responses of other unions. For example, the Seafarers International Union has agreed to publish "the DOL Summary in every issue of its monthly publication, the *Seafarers Log*." JA 67 (Fox Aff. ¶ 4), 85. And the Hotel Restaurant Employees Union has agreed to publish "the full text of the LMRDA once each year in the *Catering Industry Employee,*" its membership media organ. JA 68 (Fox Aff. ¶ 5), 86.

The undisputed record testimony supports a requirement that the UA post a link to the LMRDA Summary on the home page of its website—an undertaking that would cost the Union almost nothing. JA 39 (Summers ¶ 10), 23 (Callihan ¶¶ 11–12), 48 (Benson ¶ 25), 56 (Fletcher ¶ 10), 60 (Zipser ¶ 13), 66 (Paff ¶ 13).[13]

Even more importantly, the uncontested record evidence overwhelmingly establishes that it is to the union constitution that members look to inform themselves concerning their membership rights; and the undisputed consensus of opinion holds that the LMRDA Summary must be appended at the rear of the constitution booklet if the UA is to succeed at informing its members of their rights under the LMRDA—the Union's responsibility pursuant to the mandate of Section 105.

As Professor Summers explained, union constitutions are printed in "small booklet format so that members can easily carry them in their pockets for ready reference," JA 39 (Summers ¶ 11).[14] While "union journals are readily discarded," constitutions are not. Id. Moreover, it is not until the member finds himself in some sort of a jam with his union that he has any reason to be interested in his legal rights as a member, or a frame of reference within which to understand and appreciate those rights; and when that occurs, "the constitution becomes the controlling document [for both members and officers], and it is to the constitution that they first turn. It is their reference manual, their legal bible." Id.

Similarly, Callihan testified that the UA Constitution "is our union bible. Members are led to believe that it is the sole source of their rights and that in order to enjoy those rights, they must follow the procedures in the Constitution to the letter. So when a member wants to know about his membership rights in the UA, and how to secure them, he refers to the Constitution. * * * Appending the summary of the LMRDA at the back of the UA Constitution would ensure that members could become aware not only of their constitutional rights, but also their rights and the responsibilities of their officers under the LMRDA." JA 23 (Callihan ¶ 9). See also JA 48 (Benson Aff. ¶¶ 24, 26), 65 (Paff Aff. ¶¶ 11–12), 60 (Zipser Aff. ¶ 13), 56 (Fletcher Aff. ¶ 11—constitution "is the most logical, and likely to be the most effective means of informing members about their rights under the LMRDA").

To summarize, the actions which, the UA contends, constitute full compliance with its Section 105 duty to inform its membership about their rights, and the UA officers' responsibilities, under the LMRDA were seemingly calculated to create the appearance of compliance, but not the reality—a symbolic, but empty gesture.[15] They have not, and will not, overcome the near total ignorance among the UA membership about this critical piece of legislation intended by Congress to result in an informed membership participating actively in the internal, democratic affairs of their union. "[After more than 40 years of silence, and keeping the UA membership in the dark about their LMRDA rights, the UA is going to have to do a lot more informing . . . before the message will sink in." JA 22 (Callihan ¶ 6).

The UA's one-time publication of the LMRDA Summary in the March 2001 issue of the UA Journal simply has not accomplished what Congress intended when enacting Section 105. See Callihan ¶¶ 6–8, JA 22. More needs to be done if, in Professor Summers' words, the "iron grip of oligarchy" within the UA is to be "loosened, and the democratic process strengthened." 43 U. Md. L. Rev. at 105. While a UA member here, and another there, may be knowledgeable about the LMRDA, "the health of democracy, in unions as elsewhere, depends not on that rare bird, but on the average citizen." JA 48 (Benson ¶ 25). Or, as Callihan put it, "Our union will not become democratic, nor will our officers be accountable to the membership, if only a couple of activists members, myself included, stick out our necks. The entire membership needs to know that it is OK, or legally safe, for them to begin participating actively in the internal affairs of their union as well." JA 23 (¶ 8).

In fact, it is in the nature of any democratic polity that the level of information, interest, motivation and participation of citizen-members generally has a substantial impact on the ability of each member to gain an audience among his peers, win adherents to his point of view, and thereby influence the direction of his organiza-

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[13] The *Thomas* order requires the Machinist Union to post the Summary on its website. JA 84. Even though this outreach method is likely to be, at least in the near future, of only limited usefulness, even the district court below embraced its use "which common sense commends to every union having a website." JA 11. A copy of the UA's website "Home Page" appears at JA 103.

[14] The UA Constitution is published in booklet form; it is 180 pages in length including a 12-page alphabetized topical index. JA 68 (Fox Aff. ¶ 10), 102.

[15] Cf. *Retail Clerks Local 648* v. *Retail Clerks Intl Ass'n,* 299 F. Supp. 1012, 1020 (D.D.C. 1969) ("Where a union policy and practice is promulgated in order, among other things, to place obstacles in the way of effective union democracy and appears to have this effect, . . . the Court cannot give that policy any recognition as it offends both equity and the provisions of the LMRDA").

tion, community or nation. This self-evident principle is certainly no less applicable in the union context, where Congress found substantial and widespread problems in observing democratic norms, including significant problems with intimidation of, and reprisals against, outspoken dissidents. See, e.g., II Leg. Hist. 1096–1104. If members are to become "active participants in the governance of their unions," as Congress intended, they most assuredly do need to be informed that it is "OK, or legally safe" for them to do so. The ability of appellants to exercise their LMRDA rights depends in no small measure on the awareness of other UA members of their rights and protections under the LMRDA.

Accordingly, in order to effectuate the remedial objectives of the LMRDA, we respectfully submit that the Court should construe Section 105 to require the UA to inform its membership about the provisions of the LMRDA on an ongoing basis, rather than just once in a member's working lifetime. That result can be accomplished if the UA were to post the Summary prominently on its website. And, most importantly, the UA needs to append the Summary at the rear of its constitution booklet, and to reference its key provisions in the General Index.[16] Realistically, UA members will only become informed concerning their rights under the LMRDA once they have ready and ongoing access to the Summary of their statutory rights in the very same constitution booklet where they are accustomed to researching their membership rights, and of the procedures they must follow to secure those rights as UA members, at that point in time when they are in need of, and interested in, learning about their legal rights. Until that occurs, the UA will continue to be in violation of Section 105.

CONCLUSION

For the foregoing reasons, we respectfully submit that the district court erred by adopting a narrow, "bare bones," or minimalist construction of Section 105, and upholding the UA's symbolic compliance with the informational mandate of that provision. This Court should, accordingly, reverse and remand this case to the district court to frame a remedy consistent with this Court's opinion.

Respectfully submitted,

ARTHUR L. FOX, II (No. 58495),
Lobel, Novins & Lamont, Attorney for Appellants,
January 15, 2003.

ADDENDUM E

No. 02–7111

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES CALLIHAN AND WILBUR M. THOMAS, Plaintiffs-Appellants, v. UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY AND MARTIN J. MADDALONI, UA GENERAL PRESIDENT, Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF APPELLEES

I. Jurisdictional statement

The claim at issue in this appeal was brought under Section 105 of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 415. The District Court, therefore, had jurisdiction to hear this case pursuant to 29 U.S.C. § 412 and 28 U.S.C. § 1331. The District Court denied Plaintiffs' motion for summary judgment, granted Defendants' cross-motion for summary judgment and entered a final judgment dismissing this action on August 12, 2002. Notice of appeal was timely filed on September 12, 2002. Accordingly, this Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291.

II. Statement of the issue

Whether the Union's publication of a court-approved one-page summary of members' LMRDA rights in its magazine sent to all members in March 2001, its provision of that summary to every new member joining the Union since April 2001, and

[16] In the meantime, because it is unlikely the UA will be reprinting its Constitution prior to its next quinquennial convention in 2006, it should republish the Summary in its Journal, at least annually, until copies of its constitution booklet with the Summary appended become available.

its commitment to republish the summary in the membership magazine in 2004 and 2008, satisfies LMRDA §105's requirement that the Union "shall inform its members concerning the provisions" of the LMRDA.

III. Statement of the case

The instant lawsuit was filed in December 2001. The District Court granted Plaintiffs' motion for summary judgment on the first count of Plaintiffs' complaint on March 6, 2002. The court thereafter indicated, at an April 2, 2002 status conference, that it was prepared to rule in favor of Defendants on the second count because the actions taken by the Defendant Union constituted adequate compliance with Section 105. (JA 108.) Counsel for Plaintiffs nonetheless sought leave of court to brief the issue, and the court permitted Plaintiffs to file a motion for summary judgment, which they did. Defendants then filed a cross motion for summary judgment, and the District Court thereafter ruled in favor of Defendants on both motions, finding that nothing further than the measures taken and committed to by the Union was required in order to achieve compliance with the statute. (JA 11.)

IV. Statement of facts

In 1959, Congress passed the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. §401, et seq. Section 105 of the Act stated that "[e]very labor organization shall inform its members concerning the provisions of this chapter." 29 U.S.C. §415. Immediately following the enactment of the LMRDA in October 1959, the Defendant Union (also referred to as the "UA" or the "United Association")[1] published the entire text of the LMRDA in its monthly magazine, the UA Journal. (See JA 14, ¶3.) Most other unions apparently took similar steps in response to the mandate of Section 105.

In the ensuing forty years, there were no court decisions substantively construing the nature of a union's obligation to "inform" under Section 105.[2] In particular, no court addressed the question of whether Section 105 imposed a duty on unions to republish notice of the Act's provisions over time. Apparently (according to Plaintiffs), most unions did not republish the Act, but relief on their one-time publication in 1959 to satisfy the requirement of Section 105.

In 1999, in the first case to address the issue, Judge Messitte of the United States District Court for the District of Maryland held that a union which had published the Act in its entirety upon its enactment was not required to republish the material in order to inform new members of the Act's provisions. *Thomas* v. *Grand Lodge of Int'l Ass'n of Machinists,* 40 F. Supp. 2d 737 (D. Md. 1999). The Fourth Circuit later reversed Judge Messitte's decision, holding that while "Section 105 does not dictate a specific method of compliance," the statute "require[d] at a minimum that each individual, soon after obtaining membership, be informed about the provisions of the LMRDA." *Thomas* v. *Grand Lodge of Int'l Ass'n of Machinists,* 201 F.3d 517, 521 (4th Cir. 2000). This was the first decision of any court requiring a union to update its compliance with Section 105 for the benefit of new members. Judge Messitte's final order on remand in *Thomas* was issued on September 19, 2000. (JA 84.)

On September 24, 2000, Plaintiff Callihan wrote to the Union's General President proposing that the Union publish a one-page summary of the LMRDA in the UA Journal and that the Union post the text of the Act on the Union website.[3] (JA 26.)

The instant lawsuit, including the Plaintiffs' claim that the Union was in violation of Section 105, was filed in December 2001. Prior to service of the complaint on Defendants, Plaintiffs' counsel was notified that the Union's general counsel was undertaking to advise the Union concerning actions to be taken in light of the *Thomas* decision. (JA 106–07.) Subsequently, prior to any litigation of the Section 105 claim in this case, the Union published a comprehensive summary of the Act ("LMRDA Summary" or "Summary") in the March 2001 UA Journal, a magazine which is sent to all active members and retirees. (JA 15. ¶10; see also JA 96–97, 109–10.) Plain-

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[1] The full name of the Defendant Union is the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO. In the record and in the court below, it was referred to as the "UA" or the "United Association."

[2] See *Thomas* v. *Grand Lodge of Int'l Ass'n of Machinists,* 40 F. Supp. 2d 737, 741 & n.2 (D. Md. 1999), rev'd, 201 F.3d 517 (4th Cir. 2000).

[3] Earlier, on May 24, 2000, Plaintiff Callihan had sent the General President a copy of the Fourth Circuit's *Thomas* decision (which did not specify a specific method of compliance) and inquired "[w]hen does the UA plan to comply with the Act?" (JA 25.)

tiffs concede that the content of the Summary adequately informs members of the provisions of the Act. (JA 107.)[4]

Since April 2001, the Union has also mailed a personal copy of the same comprehensive Summary to each new member, along with a letter welcoming the member to the Union and enclosing his or her membership card. (JA 98–99, 110.) The Union has also made a commitment to republish the LMRDA Summary in the UA Journal in the calendar years 2004 and 2008. (JA 15, ¶ 12.)[5]

V. Summary of argument

Section 105 of the LMRDA requires unions to "inform [their] members concerning the provisions of [the] Act," but does not specify a particular method by which that information is to be conveyed. The Union has complied with this requirement by (1) publishing the entire text of the Act in its membership magazine, the UA Journal, shortly after the Act's passage; (2) publishing the LMRDA Summary in the UA Journal in March 2001; (3) commencing in April 2001, sending a copy of the LMRDA Summary to each new member; and (4) committing to re-publish the Summary in the UA Journal in 2004 and 2008. The Union's actions satisfy the plain language of the statute and conform to past interpretations of Section 105 by several authoritative sources.

Plaintiffs' contention that Section 105 further requires all unions to post a summary of LMRDA rights on their websites and to append such a summary to their constitutions finds no support in the law or in the record. The affidavits of Plaintiffs' putative experts, who profess no knowledge whatsoever about the particular Union Defendant in this case, request the Court to impose on all unions requirements not found in the Act itself. It is not the proper function of expert witnesses to advise the Court on the meaning of the law, and the views of these individuals on what the law should be are even less relevant to this proceeding.

Plaintiffs stress that the Court possesses broad remedial power under the LMRDA. But, because Plaintiffs cannot show a violation of the Act, there is no occasion for the Court to exercise that remedial power. Accordingly, the Court should affirm the judgment of the District Court.

VI. Argument

A. Plaintiffs' Burden of Proof

Plaintiffs assert in their appeal that the Union is currently in violation of Section 105 of Title I of the LMRDA, despite having taken the actions described above. (Plaintiffs-Appellants' Brief ("Appellants' Br.") at 20–21.) In *Carothers* v. *Presser,* 818 F.2d 926, 931 (D.C. Cir. 1987), this Court described "the proper role of a court in litigation under Title I of the LMRDA" as follows:

> First and foremost, the court must determine whether the union's conduct deprived the Plaintiffs of a right specifically enumerated in the statute . . . Once it has made a particularized finding that the union violated a right specifically enumerated in the statute, the court may fashion a remedy tailored to the violation.

Accordingly, a Title I plaintiff must first demonstrate by a preponderance of the evidence that the union deprived him of a "right specifically enumerated in the statute." Id.; see also *Gilvin* v. *Fire,* 259 F.3d 749, 761 (D.C. Cir. 2001). Only after the court has made a particularized finding that the union has violated a specifically enumerated right can the court proceed to fashion appropriate relief.

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[4] The Summary was originally prepared by the Department of Labor, and was specifically approved by Judge Messitte in the *Thomas* case as sufficient in substance to inform members of the provisions of the LMRDA. (See JA 84.) This was the same Summary that Plaintiff Callihan asked the Union to publish in the UA Journal, in his letter of September 24, 2001. (JA 26.)

[5] The Union has also publicized information concerning the LMRDA in other ways. For example, the Union's training seminars, given on a regular basis for local union business managers and financial secretary-treasurers, include presentations on the obligations of the UA and affiliated local unions under the statute. Those seminars occur on an annual basis except during Convention years. Copies of the entire text of the Act are obtained from the Department of Labor and distributed to the individuals attending these training seminars. (JA 110, ¶ 7.)

Moreover, in October 2000, at the request of United Association Local Union 286, representatives of the Union conducted a seminar for Local 286 members at the UA Local 286 union hall in Austin, Texas. The seminar included a detailed presentation regarding rights conferred by the LMRDA, along with presentations regarding other statutes and union-oriented topics such as organizing. (JA 111, ¶ 8.)

In addition, numerous provisions of the UA Constitution incorporate substantive requirements imposed by the LMRDA. (JA 19, ¶ 13.)

B. Section 105 Imposes a Single Duty; the Duty To Inform

1. Title I Imposes Specific Requirements on Unions; Courts Are Not Authorized To Impose Additional Requirements Simply Because They May Be in Furtherance of Perceived Notions of Union Democracy

As Plaintiffs repeatedly emphasize, Congress did indeed enact the LMRDA with the objective of ensuring that unions would be "democratically governed." (Appellants' Br. at 8, quoting *Finnegan* v. *Leu,* 456 U.S. 431, 436 (1982).) However, as this Court has likewise stressed, Congress did not vest the federal courts with open-ended discretion to fashion the components of that democratic governance; instead, the statute sets forth its own "specific regulations governing internal union affairs." *Carothers,* 818 F.2d at 929. In the words of the Court,

> "democracy" under the LMRDA is not merely a boundless ideal to be defined by the whim of any dissident voice; rather, the statutory notion of internal union democracy is precisely limited by the scope of the protections codified by Congress in the LMRDA.

Id.

Congress also fully intended that the goal of democratic governance "was to be achieved within 'a general philosophy of legislative restraint' to avoid unnecessary governmental intrusion into union affairs." S. Rep. No. 187 in I Leg. Hist. at 403, quoted in *Thomas,* 40 F. Supp. 2d at 742. The Act embodies a Congressional recognition of "the inadvisability and injustice of compelling unions to conform to a uniform statutory rule with respect to unimportant details of administration." Id.

As Plaintiffs also stress in their brief, Section 102 of the Act confers on the courts considerable discretion to grant appropriate relief. See 29 U.S.C. § 412. However, as this Court has emphasized, that discretion is triggered only after the violation of a specific statutory right has been established. *Carothers,* 818 F.2d at 929. Absent such a finding, the exercise of the Section 102 remedial discretion would be inappropriate and "totally divorced from the essential predicate of a statutory violation." Id. at 931. See also *Gilvin* v. *Fire,* 259 F.3d at 760–61 (upholding Rule 12(b)(6) dismissal of LMRDA claim for failure to articulate deprivation of specifically enumerated right).

Thus, any review of the claims in this case must be guided by this Court's words in *Carothers:*

> Title I is not a mandate for courts to impose on labor unions whatever procedures or practices they regard as "democratic." Although the enactment of Title I was certainly propelled by a congressional intent to broaden the democratic features of union governance, Congress did not embrace an amorphous and boundless notion of democracy. Rather, it enumerated specific rights designed to ensure that unions adhere to certain basic democratic principles. Those principles must be gleaned from the statute itself; they may not be derived from a court's perception of what internal union procedures are necessary to guarantee [in *Carothers*] a "fully informed vote."

818 F.2d at 934.

2. Section 105 Requires Only That Unions "Inform" Members Concerning the Provisions of the Act

Section 105 states in its entirety that "[e]very labor organization shall inform its members concerning the provisions of this chapter." 29 U.S.C. § 415 (emphasis added). The term "inform" simply means to give or impart information.[6] This Court has construed a federal agency's statutory duty to inform, for example, as being fulfilled by the placing of a communication in the mail.[7] *Town of East Hartford* v. *Harris,* 648 F.2d 4, 9 (D.C. Cir. 1980).

There are no regulations implementing Section 105. As Plaintiffs concede, the Department of Labor neither possesses nor asserts the authority to direct labor unions to use any particular means in carrying out their statutory duty to "inform." (Appellants' Br. at 18.)

Likewise, there is seemingly no legislative history specifying any particular method unions must employ to inform members regarding the provisions of the Act. See

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[6] Webster's Dictionary defines "inform" as "1: to impart information or knowledge." Merriam-Webster's Collegiate Dictionary (10th ed. 2001).

[7] By sending the LMRDA Summary to each existing member and each new member who joins the union at the member's home address, the UA has clearly satisfied that construction of its duty.

discussion of legislative history in *Thomas,* 40 F. Supp. 2d at 741. Contemporaneous commentary by counsel involved in drafting the Act and early correspondence from Department of Labor officials indicated that unions could comply with Section 105 by various means, including publishing the text of the Act in union publications distributed or reasonably available to union members,[8] providing members with summaries of the Act's provisions,[9] posting copies of the Act on bulletin boards,[10] or perhaps simply advising members where they could find copies of the Act available for examination.[11] Seemingly, many unions—including the UA—simply complied with Section 105 upon its enactment by publishing the text of the Act in a union magazine. (JA 14, ¶ 3.)

It was not until 1999, in the *Thomas* case, that any court had occasion to address questions about how a union was supposed to carry out its duty to "inform" under Section 105 of the Act. The issue posed in *Thomas* was whether a union's one-time publication of the Act in 1959 constituted compliance with Section 105, or whether the union, was obligated on an ongoing basis to inform new members of the provisions of the Act once they joined the union. See *Thomas,* 40 F. Supp. 2d at 740; see also *Thomas,* 201 F.3d at 518. The District Court held that unions were not required to inform new members regarding the provisions of the Act; the Fourth Circuit later disagreed and held that they were.

Neither Judge Messitte nor the Fourth Circuit held that any particular form of notice was required by the Act. To the contrary, the Court of Appeals stated that "Section 105 does not dictate a specific method of compliance." 201 F.3d at 521 (emphasis added). All that is specifically required by the Fourth Circuit's decision is that "each individual, soon after obtaining membership, be informed about the provisions of the LMRDA." Id. The Court of Appeals held that, on remand, the district court retained discretion with respect to implementation of the notice requirement, and it commented, inter alia, that publication in a form not known to be widely circulated would not suffice. Id. (since "it is at best unclear" how widely circulated the union constitution is, "something more" would be required to satisfy Section 105).

On remand (according to Plaintiffs' counsel herein), Judge Messitte expressed reluctance to engage in "rulemaking" with regard to the implementation of Section 105. (JA 105.) Accordingly, the parties in *Thomas* entered into what was in effect a consent order. (JA 84, 105.) In that order, the Machinists Union agreed to provide each new member a copy of the LMRDA Summary (the same summary published in the UA Journal and now sent to all new UA members); to publish the same Summary in three issues of the IAM Journal, the first no later than March 2001, the second in calendar year 2004 and the third in calendar year 2008; and to post the Summary on the home page of its website. (JA 84.)[12] The order does not state that the Machinists—or any other union—were required to take each of these particular steps; as Plaintiffs' counsel describes it, and as appears from the face of the order itself, the order represents a negotiated resolution of the remedy issue approved by

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[8] See discussion in *Thomas,* 40 F. Supp. 2d at 741. See also Arthur J. Goldberg, Analysis of Labor-Management Reporting and Disclosure Act of 1959, Industrial Union Department, AFL–CIO (1960), at 10–11. A copy of relevant portions of this analysis, authored by Arthur J. Goldberg, then AFL–CIO special counsel and a member of a non-partisan blue ribbon committee employed as a consultant by the Senate Labor Committee, is at JA 112–17. See also Letter from Assistant Secretary of Labor to James C. Paradise of 11/9/59 (JA 124–25); Letter from Commissioner John L. Holcombe to Walter M. Colleran of 2/13/60. (JA 126–27.)

[9] See Letter from Assistant Secretary of Labor to James C. Paradise of 11/9/59, (JA 124–25.)

[10] See National Labor Relations Board, Legislative History of the Labor Management Reporting and Disclosure Act of 1959. vol. 11, at 1825 (comments of Michael J. Bernstein, counsel to the Senate Labor Committee involved in drafting the Act). But see Letter from Acting Solicitor of Labor to Plato E. Papps of 5/27/60 (JA 130–31) (bulletin board posting may not be sufficient).

[11] See Letter from Assistant Secretary of Labor to James C. Paradise of 11/9/59 (JA 124–25); Letter from Commissioner John L. Holcombe to Walter M. Colleran of 2/13/60 (JA 126–27); Letter from Commissioner Holcombe to Richard M. Reinke of 5/16/60 (JA 128–29); Letter from Acting Solicitor of Labor to Plato E. Papps of 5/27/60 (JA 130–31); Letter from Acting Solicitor of Labor to S. C. Lippman of 10/20/60 (JA 132–33).

[12] Since the Fourth Circuit's decision in *Thomas,* only one other published case appears to have addressed a claim that a union has failed to fulfill its Section 105 obligation. In *McGovern* v. *Local 456, Int'l Bhd. of Teamsters,* 107 F. Supp. 2d 311 (S.D.N.Y. 2000), aff'd, 2001 U.S. App. LEXIS 28459 (2d Cir. Feb. 14, 2001), the plaintiff members claimed that their union had violated Section 105 when it failed to respond to their request for copies of documents related to negotiation of a concessionary provision in a collective bargaining agreement. Id. at 323–24. The plaintiffs argued that the union had failed to advise and assist them in protecting their rights, in violation of Section 105. Id. The court held that the plaintiffs had failed to state a claim under Section 105 inasmuch as the union "has no duty under [S]ection 105 to advise or assist members of the Union." 107 F. Supp. 2d at 324.

the district court as sufficient to comply with Section 105 and the Fourth Circuit's opinion.

In summary, all that can be gleaned from the language of Section 105, or from any authoritative interpretation thereof, is that unions must in some fashion "inform" members concerning the Act's provisions—Nowhere is it written that unions must force members to read the information sent to them, or that unions must train members to understand or remember the sections of the LMRDA, or that unions must advise or assist members in enforcing their rights under the statute. See, e.g., *McGovern* v. *Local 456, Int'l Bhd. of Teamsters,* 107 F. Supp. 2d at 324 (Section 105 does not require union to "advise or assist members"), aff'd, 2001 U.S. App. LEXIS 28459 (2d Cir. Feb. 14, 2001). Moreover, Section 105 does not state that unions must prominently post copies of the Act or maintain and make available information concerning the statute, notwithstanding that Congress well knew how to draft and impose such requirements. See discussion Section VI(C)(4)(a), infra. No more can be read into Section 105 than that a union has a simple duty to convey the relevant information to its members.

3. Plaintiffs' Request That the Court Require All Unions To Post the LMRDA Summary on Their Websites and To Append It to Their Constitutions Is Contrary to the Law of This Circuit

Significantly, Plaintiffs' brief contains no mention of *Carothers* v. *Presser,* 818 F.2d 926 (D.C. Cir. 1987), clearly a seminal case in this Court's LMRDA jurisprudence. In a reply brief in the court below, Plaintiffs argued that *Carothers* was inapposite because they, unlike the *Carothers* plaintiffs, were not asking the Court to infer or imply a right not specifically provided for in the Act, but were rather seeking to enforce the "'specifically enumerated' right to be informed" about the LMRDA. (Reply in Support of Plaintiffs' Motion for Summary Judgment, filed June 21, 2002, p. 2.) They also contended that the Fourth Circuit in *Thomas* rejected "the identical argument." (Id.) They are wrong on both counts.

Plaintiffs are not simply seeking to require that the Union inform its members of the provisions of the Act, for that the Union has surely already done. Rather, Plaintiffs are asking the Court to compel this Union—and ultimately all unions—to post the LMRDA Summary on their websites and to append the Summary to their constitutions. In that quest, Plaintiffs are no longer moored in the actual words of the statute but are, by their own admission, seeking to enforce what they view as the overarching purpose of the Act. Yet, the *Carothers* court explicitly rejected a "notion of union 'democracy' [that] is cut loose from its statutory moorings," and warned of the "mischief that is likely to result. . . ." 818 F.2d at 934.

Plaintiffs are not seeking to uphold a specifically enumerated right. Rather, they are seeking to do precisely what the *Thomas* court expressly rejected, namely, "involv[ing] the courts in internal union management" by asking the Court to prescribe particular means that unions must use to inform their members. 201 F.3d at 521. The *Thomas* court made clear its belief that, while a union's duty to inform under Section 105 extends to all members, not just those who belonged to the union in 1959, Section 105 "does not dictate a specific method of compliance." Id.

Carothers, and this Court's later decision in *Gilvin* v. *Fire,* 259 F.3d 749 (D.C. Cir. 2001), are clearly on point in this proceeding. In *Carothers,* the plaintiffs contended (and the district court initially found) that a right of access to a union's mailing list was embodied in the "equal rights" provisions of Section 101(a)(1) of the LMRDA and the "freedom of speech and assembly" provisions of Section 101(a)(2). *Carothers,* 818 F.2d at 927 n.4, citing 29 U.S.C. §§ 411(a)(1) and (2). In *Gilvin,* the plaintiff claimed that his suspension and removal from office because of his active criticism of the union president violated his Section 101(a)(1) right to participate in deliberations at membership meetings. *Gilvin,* 259 F.3d at 760. Accordingly, the plaintiffs in *Carothers* and *Gilvin* both cited specific provisions of the statute which, they contended, should be construed to impose certain obligations on their unions.

In both cases, this Court found that the plaintiffs were attempting to obtain, in the guise of interpretation, protections that were not embodied in the statute itself. *Carothers,* 818 F.2d at 929–33; *Gilvin,* 259 F.3d at 760–61. The Court specifically declined to infer rights based on the general statutory purpose of furthering union democracy, when those rights were not specifically enumerated in the statute itself. *Carothers,* 818 F.2d at 933–34.

Likewise, in the case at bar, Plaintiffs invite the Court to infer a right to website postings and appendices to union constitutions from the straightforward language of Section 105. As will be discussed in later sections of this brief, when Congress has intended to impose requirements pertaining to website or other postings, or to the content of union constitutions, it has done so in clear and specific terms. Under *Carothers* and *Gilvin,* and indeed under the Fourth Circuit's decision in *Thomas*, the

Plaintiffs' attempt to graft these specific obligations onto the unadorned language of Section 105 should be rejected.

C. The Undisputed Record Evidence Demonstrates That the Union Has Complied With Section 105

As previously stated, the Union has published the LMRDA Summary in the UA Journal, which was sent to all UA members. (JA 15, ¶ 10.) It is sending and will continue to send a copy of the LMRDA Summary to all new members. (JA 98–99; JA 110, ¶ 4.) And it has agreed to again publish the LMRDA Summary in the UA Journal in the calendar years 2004 and 2008. (JA 15, ¶ 12.)

Clearly, by sending a concededly adequate summary of LMRDA rights to each current and new member at his or her home address, the Union has satisfied the plain language of Section 105's duty to inform.

1. The Steps Taken by the Union Are Consistent With, and Fully Satisfy, Longstanding Interpretations of Section 105 by Authoritative Sources

The Union's steps to comply with Section 105 are fully consonant with the announced understanding of counsel involved in drafting the Act. Special Counsel Arthur J. Goldberg (who later became a Justice of the Supreme Court) opined—and advised AFL–CIO affiliates—that publication of the Act in a reasonably accessible union publication would fulfill the requirements of Section 105. (See JA 117 and note 7, supra.) As Mr. Goldberg stated. "[p]resumably, publication of the text of the Act in a union's newspaper or any other publication which is reasonably available to all of the union's members will be sufficient to satisfy the requirement contained in Section 105." (JA 117.) See also discussion in *Thomas,* 40 F. Supp. 2d at 741–42.

Moreover, the Union's recent actions are exactly the steps described as satisfactory in written advice of Department of Labor officials to unions immediately following the enactment of the LMRDA. (See discussion notes 7–10, supra, and accompanying text.) In those letters, sent between November 1959 and October 1960, officials advised unions that providing each member with a copy of the Act, or with an adequate summary of the Act, would be sufficient to comply with Section 105. (JA 124–35.) The letters also commented—with seeming approval—that a number of unions had already taken exactly such steps. (Id.)

The steps taken by the Union also fall well within the range of the Fourth Circuit's opinion in the *Thomas* case. The sole issue in *Thomas* was whether a union which had complied with Section 105 at the time of the LMRDA's passage had to continue to inform new members of the Act as they joined the union. Having answered that question in the affirmative, the court went on to comment that "Section 105 does not dictate a specific method of compliance" and that "[a]ll the LMRDA directs is that [a union] afford notice of the LMRDA's provisions to any individual who meets the statutory definition of 'member.'" 201 F.3d at 521. Thus, in the view of the Fourth Circuit, Section 105 requires, at a minimum, that "each individual, soon after obtaining membership, be informed about the provisions of the LMRDA." Id. This is exactly what the Union is now doing, and what it has been doing since March 2001, six months following entry of the final order in the *Thomas* case.

The Union's actions prior to the Fourth Circuit's decision in *Thomas* were consistent with the prevailing understanding of the Act's requirements, including that of the district court in *Thomas*. Soon after the Fourth Circuit ruled that additional actions were necessary, the Union took the additional actions suggested by the court's analysis, without waiting to see if that analysis would be adopted by the other circuits. As the court below correctly concluded, the steps taken by the Union are sufficient to comply with Section 105.

2. The Court Below Correctly Found Plaintiffs' Affidavit Evidence To Be Unpersuasive and Immaterial

Based upon the undisputed facts that the Union has published the LMRDA Summary in a union magazine sent to all members, that it has promised to repeat this step in 2004 and in 2008, and that it is sending a copy of the Summary to each new member upon initiation, the district court correctly determined as matter of law that the Union was entitled to summary judgment in its favor. Plaintiffs' affidavit evidence, consisting primarily of the opinions of union democracy advocates, was deemed by the court below to consist of matter "not susceptible of a judicial remedy." (JA 10.) In other words, the views of the affiants were not material to the central legal question before the court: whether the Union had satisfied its Section 105 duty to inform.

This holding was plainly correct. The professed experts whose views are pressed upon this Court make no claim to familiarity with the Union Defendant herein. (JA 37–39, 55–56, 58–59, 62, 64.) They assert no knowledge of the Union's structure,

its political processes, its Constitution, or the method by which it communicates information to its members. (Id.) Indeed, not one of these individuals claims ever to have conducted any serious study—scholarly or otherwise—on the methods by which unions generally communicate with their membership and/or the relative effectiveness of such methods.[13]

None of these putative experts, moreover, professes to have any familiarity with the effects of recent steps taken by this Union and others to renew their compliance with Section 105 of the Act in light of the Fourth Circuit's holding in *Thomas*. In short, none of these individuals offers specialized knowledge that would in any way assist the Court in understanding the evidence in this case or in determining any fact in issue. See Fed. R. Evid. 702.[14] Accordingly, these declarations were correctly not deemed persuasive below, and should be disregarded by this court.[15]

Several courts of appeal, including this Court, have recognized that expert opinion testimony may not be admitted for the purpose of advising the Court on the meaning of the law. See, e.g., *Burkhart* v. *Washington Metro. Area Transit Auth.,* 112 F.3d 1207, 1212–14 (D.C. Cir. 1997) (reversible error to allow an expert in police practices to opine on whether police officers' efforts in communicating with a deaf plaintiff were enough to satisfy federal disability statutes); *Snap-Drape, Inc.* v. *Commissioner,* 98 F.3d 194, 197–98 (5th Cir. 1996) (trial court properly excluded taxpayer's expert reports as containing nothing more than legal arguments concerning the tax treatment of certain dividends); *Berry* v. *City of Detroit,* 25 F.3d 1342, 1353–54 (6th Cir. 1994) (finding inadmissible the comments of an expert in police practices on the meaning of the legal term "deliberate indifference" in a civil rights case); *Aguilar* v. *Int'l Longshoreman's Union, Local #10,* 966 F.2d 443, 447 (9th Cir. 1992) (testimony of purported expert—that workers reasonably and foreseeably relied on Defendants' promises—addressed "matters of law for the court's determination" that were "inappropriate subjects for expert testimony"); *Specht* v. *Jensen,* 853 F.2d 805 (10th Cir. 1988) (en banc) (reversible error to allow an expert witness who was an attorney to give his opinions on what was required to make consent to a search effective); *Adalman* v. *Baker, Watts & Co.,* 807 F.2d 359, 368 (4th Cir. 1986) (testimony of expert regarding legal requirements of disclosure under securities laws deemed inadmissible); *Marx & Co.* v. *Diners' Club, Inc.,* 550 F.2d 505 (2d Cir. 1977) (securities lawyer, called as an expert, could not testify to the legal obligations created under a contract). As the Seventh Circuit stated in *Minaslan* v. *Standard Chartered Bank, PLC,* 109 F.3d 1212, 1216 (1997), "An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process."

The affidavits relied on by Plaintiffs clearly suffer from the same failing: they are an attempt to urge upon the Court a particular reading of the law. (See, e.g., JA 39, ¶ 12; JA 48–49, ¶ 26; JA 56–57, ¶¶ 8–12; JA 60–61, ¶¶ 13–15; JA 63, ¶¶ 4, 6; JA 65–66, ¶¶ 12–13.) Indeed, the affidavits are a step further removed from the "bottom line" opinions rejected in the cases above. The affiants herein seek to instruct the

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[13] Ironically, the author of the one study cited in Plaintiffs' brief reaches an ultimate conclusion which is substantially at odds with the contentions pressed by Plaintiffs and their experts on this Court. The author of the unpublished dissertation discussed at page 9 of Plaintiffs' brief studied six unions in Texas in the early 1980s, and he did indeed find that "Generally, the union officers interviewed in this survey were not aware of the requirements of Landrum-Griffin." (JA 139–40,) Significantly, the author went on to state: "However, there were no indications of serious problems in any of the areas covered by the Act. This could mean that the Act is accomplishing its purpose and has caused the international union to change its rules and to monitor the local unions very closely. On the other hand, it could mean that the Act was not needed within these particular unions." (Id.)

Moreover, according to the author, his findings "suggested that rights of members are being protected (and) that democratic practices are being followed," whether as a result of the Act or of other forces in society. (JA 138.) This is a far cry from the extremist views expressed in Plaintiffs' brief and in some of their experts' declarations, which would have the reader believe that union abuse of democratic procedures was and is widespread and chronic. (See, e.g., Appellants' Br. at 13, 26 (espousing the view of Mr. Summers that union members are in the "iron grip of oligarchy").)

[14] The Rule states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Fed. R. Evid. 702.

[15] The Union adequately preserved its position on this issue by its detailed objections to the affidavits in the court below. (See Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Cross Motion for Summary Judgment, filed June 13, 2002, pp. 14–21.) See *Perez* v. *Volvo Car Corp.,* 247 F.3d 303, 315 (1st Cir. 2001) (by making detailed objections in court below, defendant preserved right to challenge affidavit on appeal).

Court on what the law should be,[16] rather than on what it actually is.[17] This is of no assistance in this proceeding, and the testimony was correctly deemed unpersuasive below.

The material facts in this proceeding are undisputed, and the proffered views of Plaintiffs' experts fail to assist the Court in determining those facts. Significantly, Plaintiffs failed to incorporate the content of these affidavits in their Local Rule 7.1(h) Statement of Material Facts. (JA 14–16.) Defendants agree that the affidavits are not material to the resolution of the legal question now before this Court, and further submit that the testimony seeks improperly to invade the province of the Court.

3. Even Probative Evidence That Union Members Remain "Uninformed" About Their LMRDA Rights Would Not Establish That the Union Had Violated Its Section 105 Duty To Inform

The major thrust of Plaintiffs' argument, and the complaints of their experts, is that union members as a group are not sufficiently aware of their rights under the Act.[18] However, a union that has taken adequate steps to provide members with information about the LMRDA cannot be held responsible for what members thereafter do with that information. A union cannot force its members to read or retain information on LMRDA rights, not is it required to do so. As long as it provides the information to its members, its Section 105 duty is satisfied.

Plaintiffs seemingly confuse the verb "inform" contained in Section 105 with the adjective "informed."[19] The Act requires unions to take a specific, verifiable action: to "inform," i.e., to notify, their members of the provisions of the Act. Section 105 does not and cannot further hold the unions to the lofty ideal of an "informed" membership that knows the statute chapter and verse.

The Union in this case has taken appropriate and reasonable actions that have provided its members with information concerning the provisions of the Act. The statute does not require more.

4. Plaintiffs Have Not Established, and Cannot Establish, That Website Posting and Attachment to the Union Constitution Are Mandated by Section 105, or Indeed That Such Steps Would Have Any Appreciable Effect

Plaintiffs contend that the Union is in violation of Section 105 because it has not (1) posted the LMRDA Summary on its website; and (2) agreed to publish the LMRDA Summary as an Appendix to the UA Constitution.[20] Notably, they make this argument on the basis of *Mullane* v. *Central Hanover Trust Co.,* 339 U.S. 306,

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[16] See JA 39 (Summers Aff. ¶ 12); JA 46–47 (Benson Aff. ¶¶ 14–20, 26); JA 56–57 (Fletcher Aff. ¶¶ 8–12); JA 60–61 (Zipser Aff. ¶¶ 12–13, 15); JA 63 (Fishgold Aff. ¶¶ 4–7); JA 65–66 (Paff Aff. ¶¶ 11–14).

[17] Likewise, the six declarations are replete with inadmissible hearsay (JA 38–39 (Summers Aff. ¶¶ 8–9, 11)), conclusory assertions for which no adequate factual basis is provided (JA 44–48 (Benson Aff. ¶¶ 5, 10, 12, 14, 16–17, 22–24); JA 56–57 (Fletcher Aff. ¶¶ 11–12); JA 59–61 (Zipser Aff. ¶¶ 11, 15); JA 63 (Fishgold Aff. ¶¶ 5, 7); JA 65–66 (Paff Aff. ¶¶ 8–12, 14)), and bald speculation and surmise (JA 38–39 (Summers Aff. ¶¶ 7–12); JA 44, 46–48 (Benson Aff. ¶¶ 6, 12–25); JA 56–57 (Fletcher Aff. ¶¶ 9–12); JA 38–39 (Summers Aff. ¶¶ 9–10, 12); JA 44, 46–48 (Benson Aff. ¶¶ 5, 12–13, 15, 17, 19–22, 24–25); JA 56–57 (Fletcher Aff. ¶¶ 9–12); JA 59–60 (Zipser Aff. ¶¶ 10–14); JA 63 (Fishgold Aff. ¶¶ 5–7); JA 65–66 (Paff Aff. ¶¶ 8–14)). Moreover, significant portions of the declarations recite facts about other unions, facts that have no bearing whatsoever on any issue now before this Court, rendering them inadmissible under Fed. R. Civ. P. 56(e). (JA 38 (Summers Aff. ¶ 6); JA 45–48 (Benson Aff. ¶¶ 7–12. 22–23); JA 55–56 (Fletcher Aff. ¶¶ 3–6).)

[18] The vast majority of Plaintiffs' affidavit evidence on this point pertained to union members at large, and not to members of the Defendant Union herein. The primary exception is the bald assertion of Plaintiff Callihan that "as a result of my conversations with other UA members, primarily in my local, and my observation of members during union meetings, it is clear that no one has any recollection of the contents of the one-page Summary of Union Member Rights published in the Journal a year ago." (JA 22, ¶ 8.) Mr. Callihan established no proper foundation for this broad and conclusory assertion, which rests on speculation and inadmissible hearsay. Such testimony would not be admissible at trial and fails to comply with Fed. R. Civ. P. 56(e). See, e.g., *Perez* v. *Volvo Car Corp.,* 247 F.3d 303, 316 (1st Cir. 2001) ("Statements predicated upon undefined discussions with unnamed persons at unspecified times are simply too amorphous to satisfy the requirements of Rule 56(e), even when proffered in affidavit form by one who claims to have been a participant.").

[19] "Informed" is an adjective meaning "having or based on much information, knowledge or education." Webster's New World Dictionary 693 (3rd ed. 1988).

[20] Plaintiffs also seek annual publication of the LMRDA summary in the UA Journal (not just in 2004 and 2008 as the UA has committed to do) until 2006 when the UA is next scheduled to re-publish its constitution. (Appellants' Br. at 27 n.16.) This demand seems to run counter to a main thrust of Plaintiffs' argument that publication in the UA Journal is an "empty gesture" because the magazine is "boring." (Appellants' Br. at 23.)

314–35 (1950). (Appellants' Br. at 18–19.) *Mullane* concerned what form of "notice" was required before an individual could be denied a property right consistent with the due process clause of the Fourteenth Amendment, which would seem to be a more stringent requirement than Section 105 of the LMRDA. Nevertheless, the Court held in *Mullane* that the sending of the notice to the affected individuals by "ordinary mail" to their "record addresses" was sufficient to meet the constitutional requirement. Id. This is precisely what the Union has done in publishing the LMRDA summary in the UA Journal, which is sent to all active members' record addresses by ordinary mail, and in mailing the summary to new members with their membership cards. Thus, *Mullane* provides no help to Plaintiffs.

Plaintiffs' arguments in favor of requiring that the LMRDA Summary be posted on the Union's website and appended to its Constitution as mandatory components of compliance with the Act are unsupported in the record or in the law. As has been discussed, the measures sought by Plaintiffs are not grounded in the language of the statute.[21] Moreover, the record does not indicate that the measures sought by Plaintiffs would operate to communicate LMRDA information to a significantly greater number of union members. Finally, the measures sought by Plaintiffs could and would have been spelled out in the statute itself had Congress meant to require them.

a. The Failure To Post the LMRDA Summary on the Union's Website Is Not a Violation of Section 105

Plaintiffs premise their claim of a Section 105 violation in part on the Union's failure to post the LMRDA Summary on its website. Once again, it is significant that commentary by a drafter of the Act, and contemporaneous opinions of Department of Labor officials, found publication of the Act in a union magazine to completely satisfy a union's obligation under Section 105.[22] Needless to say, the 1959 Congress cannot have intended that website publication be a mandatory component of compliance with Section 105.

Plaintiffs apparently feel that the virtue of a website posting (which, according to one of Plaintiffs' experts, has been done by only a few unions[23]) is that it would provide a readily available source of information to members on an ongoing basis. However, Section 105 does not require unions to make the LMRDA accessible to members on an ongoing basis; it simply requires that a union "inform" its members concerning the provisions of the Act.

In arguing for a requirement that unions make LMRDA information available on a continuing, or ongoing, basis, Plaintiffs seemingly misapprehend the Fourth Circuit's use of the word "continuous" in its opinion in the *Thomas* case. The court stated:

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[21] Absent a violation of Section 105, Plaintiffs' motion for summary judgment was properly denied. However, Defendants would further stress that even if Plaintiffs had been able to establish a Section 105 violation, the measures sought by Plaintiffs would not be an appropriate exercise of the Court's remedial discretion. See, e.g., *Local No, 82, Furniture & Piano Movers* v. *Crowley,* 467 U.S. 526, 538 (1984) (Section 102 "explicitly limits the relief that may be ordered by a district court to that which is 'appropriate' to any given situation"). The Union herein promptly published the text of the LMRDA within a month of its enactment, fulfilling all contemporaneous pronouncements regarding the Section 105 obligation, and indeed fulfilling the initial pronouncement of the district court in the *Thomas* case. (JA 14, ¶ 3.) Until the Fourth Circuit's decision in *Thomas,* the Union had every reason to believe it had fully complied with the requirements of Section 105. Six months following the consent order in Thomas, the Union commenced substantive actions to inform all current and new members of the Act's provisions, irrespective of the possibility that the Fourth Circuit's view might not find favor in other Circuits. The Union has acted reasonably and with due diligence and, accordingly, the extraordinary measures proposed by Plaintiffs would not be justified even in the exercise of the Court's remedial powers.

[22] Plaintiffs' contention that publication in a union journal, standing alone, is insufficient is also belied by decisions regarding the sufficiency of a union's efforts to notify employees of their right to become agency fee objectors under *Communications Workers of Am.* v. *Beck,* 487 U.S. 735 (1988). In *Nielsen* v. *Int'l Ass'n of Machinists,* 94 F.3d 1107 (7th Cir. 1996), for example, the plaintiff argued that publication of the Beck notice in the union magazine was done "in a manner which discourages employees from actually seeing it." Id. at 1115. The court disagreed, noting, inter alia, that the plaintiff was on the magazine's subscription list, that the notice was well-marked, listed in the table of contents, and printed in legible type. If publication in the union magazine is deemed sufficient to give notice to employees of their window period for filing objections to the payment of particular fees, it would seem readily to fulfill a union's obligation to inform members of the LMRDA.

[23] (JA 39) (Summers Aff. ¶ 10).) The fact that the Machinists agreed to such a measure does not make it mandatory under the Act. Other unions, according to Plaintiffs' counsel, have not agreed to a website posting. (See JA 67–68. 85–86 (Fox Aff. ¶¶ 4–5 & Exs. C–D).)

> Given the statutory definition of "member," the continuous nature of the notification duty is evident. Union membership is not static—the membership changes as some individuals retire and others join. Many, if not most, of the current members of the IAM were not members in 1959 and thus have never been informed by the IAM of the provisions of the LMRDA. The IAM's single act of notification in 1959 did not inform a large portion of those individuals who by definition are "members" of the union. It is therefore clear that the IAM is out of compliance with the mandate of Section 105.

201 F.3d at 519.

Clearly, the Fourth Circuit's concern was with the "continuous" flow of new members into the union, an issue the Union herein has now addressed by sending the LMRDA summary to all new members commencing in April 2001. The Fourth Circuit in *Thomas* was not announcing a new rule of law that required unions to make the LMRDA continuously available to members by a posting or some similar means. Indeed, in its comments regarding the implementation of the notice requirement on remand, the Fourth Circuit expressed no concern about the text of the Act being posted or otherwise continuously available.

Section 105, by its terms, does not require a continuous posting or publication of the Act. In contrast, the immediately preceding section of the Act requires unions to maintain copies of collective bargaining agreements and to make them available for inspection by employees whose rights are affected by the agreements. See 29 U.S.C. § 414. Likewise, under Section 206 of the Act, unions are required to maintain—and keep available for examination—records on which their financial reports to the Department of Labor are based. See 29 U.S.C. § 436. Clearly, then, when the drafters of the LMRDA intended to require unions to maintain documents or information for consultation by union members on an ongoing basis, they specified that requirement in clear and specific terms.

Similarly, Congress knew how to draft a statute requiring unions to post provisions of law in a prominent place easily accessible to members.[24] In Title VII of the Civil Rights Act of 1964, for example, Congress specified that labor organizations

> shall post and keep posted in conspicuous places on its premises where notices to . . . members are customarily posted a notice to be prepared or approved by the [Equal Employment Opportunity] Commission setting forth excerpts from, or summaries of, the pertinent provisions of this subchapter and information pertinent to the filing of a complaint.

42 U.S.C. § 2000e–10(a). As this Court held in similar circumstances in *Carothers,* this is powerful evidence against implying a posting or similar requirement in Section 105. See *Carothers,* 818 F.2d at 930 ("Where Congress intended to create a right of access to a union's mailing list . . . it said so explicitly.")

Interestingly, Plaintiffs expressly conceded in the court below that website publication "would only be of limited usefulness." (Plaintiffs' Memorandum in Support of Motion for Summary Judgment filed May 16, 2002, p. 18.) Five of Plaintiffs' affiants concede the same point. (JA 39, ¶ 10; JA 48, ¶ 26; JA 56, ¶ 10; JA 60, ¶ 14; JA 66, ¶ 13.) There are undoubtedly many potential mechanisms for "informing" members that would likewise be only of limited utility. The contention that a union's failure to employ such a mechanism places it in violation of Section 105 is simply untenable.

b. The Failure To Append the LMRDA Summary to the UA Constitution Is Not a Violation of Section 105

In the most extreme of their arguments, Plaintiffs seek to premise a Section 105 violation on the Union's failure to publish the LMRDA Summary as an appendix to its Constitution. Neither the comments of the drafters of Section 105, the simultaneous advice of Department of Labor officials, nor the Fourth Circuit's decision in *Thomas* lend any support to Plaintiffs' claim that appending the LMRDA Summary to the union's constitution is a mandatory component of compliance with Section 105. Moreover, this was not even mentioned in the consent order resolving the *Thomas* case.

This is a remarkably intrusive suggestion. The Union's Constitution—like that of most labor organizations—comprises the internal governing laws of the organization. See, e.g., *Stevens* v. *Northwest Ind. Dist. Council, United Bhd. of Carpenters,*

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[24] Indeed, Congress has demonstrated its ability to draft a statute requiring a website posting. See 42 U.S.C. § 13218(b)(3)(A) (requiring federal agencies to place certain reports on publicly available websites on the Internet).

20 F.3d 720, 732 (7th Cir. 1994) (recognizing union constitution as internal governing document, which, under doctrine of exhaustion, union should be given opportunity to interpret in first instance). Plaintiff Callihan characterizes it as the Union's "Bible." (JA 23 (Callihan Aff. ¶ 9).) The UA Constitution, by law, is a contract between the International Union and its affiliated Locals. See *United Ass'n of Journeymen and Apprentices* v. *Local 334, United Ass'n,* 452 U.S. 615, 619–20 (1981).

The LMRDA and regulations thereunder leave unions nearly unfettered discretion in deciding what topics to cover or not to cover in their constitutions. The only requirements imposed by law, in Section 201(a) of the LMRDA, are that each union adopt a constitution and that it file a copy of its constitution with the Department of Labor, See 29 U.S.C. § 431(a). While provisions of the UA Constitution may be suspended in the event they are held unlawful by a court of competent jurisdiction, (Perno Decl. Ex. C § 220),[25] it would be highly unusual for a court to order this Union—or any union—to add particular material to a constitution.[26] Indeed, such a ruling, if applicable, would likely place every single American labor organization in instant violation of Section 105. Section 201(a), enacted simultaneously with Section 105, imposes no such requirement and it can be fairly assumed that Congress—which was well aware in 1959 of the existence and significance of union constitutions—did not intend to impose one.

Moreover, the record suggests that adding the LMRDA Summary to the Union's Constitution would not have the effect of more widely disseminating the document than does present practice.[27] Whereas the UA Journal is sent to all new members, the UA Constitution is not. Copies of the Constitution are provided to members on request (JA 110 (Perno Decl. ¶ 5)), which is all that is required by the Act. See *Donovan* v. *Local 1235, Int'l Longshoremen's Ass'n,* 715 F.2d 70, 75 (3d Cir. 1983). Interestingly, Plaintiff Callihan's declaration appears to suggest that—if the Court were to order the LMRDA Summary appended to the Constitution—Plaintiffs would then make a "bootstrap" claim that the UA had to send the Constitution to all members because it contained the LMRDA Summary. (JA 23 (Callihan Aff. ¶ 9).) Yet, as the Third Circuit held in the *Local 1235* case, the law does not impose such an obligation on unions. 715 F.2d at 75.

Significantly, when Plaintiff Callihan wrote to the Union's General President, following the final order in the *Thomas* case, and requested that the Union take particular steps to comply with Section 105, he sought only a one-time publication of the LMRDA Summary in the UA Journal, and a website posting. (JA 26.) Mr. Callihan did not request that the Union append the LMRDA Summary to its Constitution, and it undoubtedly did not occur to him to do so. In these circumstances, it would be grossly unfair to hold the Union in violation of the Act because of its failure to initiate such a highly unusual, indeed unprecedented, action.

VII. Conclusion

Plaintiffs have failed to satisfy their burden of establishing that a violation of a specifically enumerated LMRDA right has occurred. Since there is no violation of the Act, there is no basis for the Court to order a remedy. Accordingly, Appellees urge the Court to affirm the judgment of the court below.

Respectfully submitted,

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Dated: February 14. 2003. +

ADDENDUM F

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02–7111

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[25] Perno Declaration Exhibit C is the text of the UA Constitution which was admitted to the record in the District Court but omitted from the Joint Appendix in the interest of brevity.

[26] The UA Constitution can be changed only at the Union's quinquennial convention, or by referendum vote conducted pursuant to extensive and detailed procedures. (Perno Decl. Ex. C, §§ 217–18.)

[27] Indeed, the *Thomas* court rejected the IAM's post-1959 inclusion of some LMRDA protections in its constitution as evidence of its compliance with Section 105 at least in part because it was "at best unclear how widely circulated" the IAM Constitution was. 201 F.3d at 521.

CHARLES CALLIHAN, et al., Plaintiff-Appellants, v. UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY, et al., Defendant-Appellees.

On appeal from the United States District Court for the District of Columbia

APPELLANTS' REPLY BRIEF

In its Brief, the UA does not take issue with appellants' discussion of the legislative history of Title I, or Congress' objectives and overriding goals when enacting the LMRDA, or the fact that it is a remedial statute which must be interpreted broadly to effectuate those goals, or that Congress intended for the courts to determine the manner or means by which unions would comply with Section 105. Nor does the UA inform the Court that it would be impossible, or unduly burdensome, or even just difficult, for it to afford any component of the relief appellants contend is necessary to remedy the UA's 40-plus years of non-compliance with the Section 105 informational mandate.

Rather, the UA's defense of the district court's decision below is built almost entirely upon this Court's opinion in *Carothers* v. *Presser,* 818 F.2d 926 (D.C. Cir. 1987). In that case, union members asserted an LMRDA Title I right of access to their union's mailing list in order to distribute literature opposing ratification of a collective bargaining agreement, a right allegedly "derived from subsection 101(a)(1)" which "flows from subsection 101(a)(2)." Id. at 930. The Court found no such right "specifically enumerated in the statute" and refused to infer or imply such a right based upon the "equal right to participate in union affairs," conferred by § 101(a)(1), or the "free speech right," conferred by § 101(a)(2). However, the Court did hold that "access to a union's mailing list may . . . be granted in appropriate circumstances as a *remedy* for an independent violation of the statute." Id. at 928 (emphasis in original).

In the case at bar, plaintiff-appellants are asking the Court to remedy a violation of Section 105. They are not asking the Court to infer or imply a right to be informed by their union about the LMRDA, or to create a new substantive right. Section 105 already imposes on unions a clear duty to inform their members about the provisions of that Act; conversely, members have a "specifically enumerated" right to be informed concerning their rights, and their officers' responsibilities, under the LMRDA.[1] As a consequence, *Carothers* is inapposite and the Union's legal defense against plaintiffs' summary judgment motion accordingly collapses.[2]

Indeed, in *Thomas* v. *IAM,* 201 F.3d 517 (4th Cir. 2000), the IAM also argued that the plaintiffs were asking the "court to create rights and remedies that Congress never authorized." Id. at 520. In rejecting the argument, the Fourth Circuit observed:

> The plaintiffs in this case are not asking this court to construct a right out of the penumbras of related provisions. Rather, they are asking the court to perform the most traditional of judicial functions—to give effect to the plain language of section 105.

Id. at 521. Here too, we are asking the Court to give meaning and effect to the plain language of Section 105 by crafting an appropriate remedy.

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[1] We readily concede that Section 105 does not explicitly confer on plaintiffs a right to have the entire text of the LMRDA, or just a summary, posted on bulletin boards, or published periodically in their Union's magazine, or as an appendix to their Union's constitution, or on its website, or disseminated by some other means; these are, however, means by which the Court may remedy the UA's 40–plus-year violation of Section 105.

[2] If, as the UA contends, *Carothers* is so relevant, one would think that the district court would at least have referred to it in its decision below. Throughout its brief, the UA also cites *Gilvin* v. *Fiore,* 259 F.3d 749 (D.C. Cir. 2001), in tandem with *Carothers.* However, in *Gilvin,* this Court merely noted that the plaintiff had "failed to articulate how he was deprived of any of the specific rights protected by § 101(a)(1) [of the LMRDA]" while conceding that he had, in fact, been allowed to exercise each and every one of the rights set forth in that subsection. Accordingly, having failed to state a claim, the Court upheld dismissal of this one claim. In doing so, the Court happened to cite *Carothers,* but *Gilvin* simply does not afford any support for the UA's claim that plaintiff-appellants are seeking to have this Court infer a member right to be informed that is not already contained in Section 105.

Similarly, the UA's reliance on *McGovern* v. *Teamsters Local 456,* 107 F.Supp. 2d 311 (S.D.N.Y. 2001), is misplaced. In that case, the court dismissed a Section 105 claim because the complaint merely alleged that the union had failed to furnish requested information relevant to contract negotiations, and plaintiffs proffered no evidence that the union had failed to advise them of their rights under the LMRDA.

There simply is no dispute that for more than 40 years the UA ignored its Section 105 duty to inform its membership about the provisions of the Act.[3] Thus, what is at issue at this stage of the proceeding is not whether the UA violated Section 105, but rather what relief will function to remedy that violation, i.e., what steps the UA must undertake that will operate to inform its members concerning their rights, and their officers' duties, under the LMRDA, and how to enforce them. Having done so, the Court can then decide if the UA has afforded complete relief. In fact, no court has yet to address this issue and frame appropriate relief for exacting union compliance with Section 105's informational mandate.[4]

Even the UA concedes, as it must, Br. at 7–8, once a violation of Section 105 has been found, responsibility for shaping the remedy lies within the considered discretion of the Court. And this discretion should be exercised in light of the teachings of *Hall* v. *Cole,* 412 U.S. l, 10–11 (1973), and *Masters, Mates & Pilots* v. *Brown* 498 U.S. 466, 476 (1991).

While the district court could have framed relief in an informational vacuum, plaintiff-appellants thought that the wiser course would be to develop a record that would enable the court to consider all of the different means available to the UA for meeting its Section 105 duty so as to facilitate its framing appropriate relief that would promote Congress' objectives. Toward that end, plaintiffs adduced helpful information and expert opinion concerning the efficacy of various different means by which unions generally, and the UA in particular, could "inform" their members about the LMRDA. The UA chose not to challenge the exceptional credentials of, much less any of the information or opinion proffered by, plaintiffs' experts. Rather, they asked the district court to blind itself by striking virtually all of this useful information and opinion. The district court declined to grant the UA's motion which the UA has essentially renewed in this Court, citing case law to the effect that expert testimony "may not be admitted for the purpose of advising the Court on the meaning of the law." Br. at 16–20. However, the UA's argument flies wide of its mark since plaintiff-appellants' affidavits were offered not to instruct the court on the meaning of the law, but rather to assist the court in framing appropriate relief.

Although the UA complains that plaintiffs' experts have not, in its view, established their familiarity with the internal workings and governing structure of the UA, it does not challenge the applicability of their opinions to the UA.[5] Importantly, the UA does not challenge the proposition that few of its members read the UA Journal and thus that its 2001 publication of the LMRDA Summary in its Journal accomplished little to nothing in terms of informing its membership about the LMRDA. Nor does it challenge the axiom that its members are generally unconcerned about their LMRDA rights until they actually need their protection as a consequence of some unlawful action taken by their Union's officers. Nor does the Union take issue with the fact that its members are essentially required to, and do typically refer to, the UA Constitution when it becomes necessary to learn about their rights as members, or citizens of the union state, and particularly how to secure or enforce them, i.e., when the Union infringes their constitutional or statutory rights.

Rather, the UA contends that plaintiff-appellants "are seeking to do precisely what the *Thomas* court expressly rejected, namely, 'involv[ing] the courts in internal union management' by asking the Court to prescribe particular means that unions must use to inform their members." Br. at 13. To the contrary, what the *Thomas* court actually said was: "Granting plaintiffs the relief to which they are statutorily

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[3] See JA 14 ¶ 4, Plaintiffs' Statement of Material Fact: having published the text of the LMRDA in 1959, "during the balance of the 20th century, the UA took no further steps systematically to inform its membership concerning the provisions of the LMRDA." While the UA responded that it had "given seminars on a regular basis for the business managers and financial secretary-treasurers of UA Local Unions, including presentations of the obligations of the UA and Local Unions under the LMRDA," Perno Declaration ¶ 7, informing only the UA's top officers concerning their obligations under the LMRDA is a far cry from informing the entire UA membership concerning their rights under the LMRDA. See also UA Br. at 4 n.5. There simply is no dispute as to this one and essentially only material fact.

[4] In the *Thomas* v. *IAM* litigation, neither the Fourth Circuit, nor the district court, had a record or developed information which would have allowed the framing of appropriate relief. Rather, as acknowledged by the UA, Br. at 11, the parties effectively negotiated a consent order which the district court entered.

[5] Inasmuch as many unions are headquartered in the District of Columbia, we acknowledge that the Court's decision in this case will provide important guidance, and may have a significant impact on compliance with Section 105 by other unions. However, a remedial order in this case will not serve to establish, or to enumerate, any specific statutory rights applicable to all unions, for all time to come. But see UA Br. at 12.

entitled need not involve the courts in internal union management." 291 F.3d at 521.[6]

In a similar vein, quoting from S. Rep. No. 187, I NLRB Legis. Hist. at 403, the UA contends that Congress intended its goal of democratic governance "to be achieved within 'a general philosophy of legislative restraint' to avoid unnecessary governmental intrusion into union affairs." Br. at 7. But, the quoted language was merely the Committee's explanation, when reporting its bill to the full Senate, for having chosen not to regulate unions more extensively. In fact, the full Senate did not share, and affirmatively repudiated, its Committee's "philosophy" when amending the Committee's bill to include all of Title I. See Cox, Internal Affairs of Labor Unions Under The Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 845 (1960); *Masters, Mates & Pilots* v. *Brown,* 498 U.S. 466, 477–78 (1991)("policy of avoiding unnecessary intervention in internal union affairs . . . reflected in several provisions," is "notably absent in § 401(c)"); *Wirtz* v. *Glass Bottle Blowers,* 389 U.S. 463, 473 (1968). Moreover, the Committee's Report was certainly not intended to counsel judicial restraint when fashioning relief for violations of those incursions into union autonomy which Congress did ultimately consider necessary to enact, including Section 105.

A more accurate and fair statement of the philosophy of the full Congress would be that it was careful to avoid undue regulation of unions that might compromise their essential independence or autonomy as collective bargaining representatives of workers.[7] However, the specific provisions of the LMRDA constitute the exceptions to this "hands off" policy; and where a violation is established, the courts must "interfere" in order to provide a remedy, so long as that remedy does not undermine the union's autonomy. See *Brock* v. *UAW,* 682 F.Supp. 1415, 1421 (E.D.Mi. 1988), vacated on procedural grounds, 889 F.2d 685 (6th Cir. 1989); *Wirtz* v. *Glass Bottle Blowers,* supra, 389 U.S. at 471.

The UA contends, Br. at 26–27, that plaintiff appellants make a "remarkably intrusive suggestion" that the Court require it "to add particular material to [its] constitution" since Congress intended to give unions "nearly unfettered discretion in deciding what topics to cover or not to cover in their constitutions." Suffice it to say, plaintiff-appellants are not asking the Court to order the UA to amend its organic laws to include the LMRDA Summary within, or to make it part of, the UA Constitution. Rather, for the many reasons contained in the affidavits filed below, they seek only to have the Union append a copy of the Summary at the back of the booklet in which the UA Constitution is reproduced.

The UA's argument, Br. at 12, 22, 24–25, that Congress knew how to spell out specific reporting and disclosure requirements as evidenced in other LMRDA Titles fails to take into account the fact that the other Titles were carefully constructed in committee, while Title I had no such deliberative history.[8] Rather, Title I, which includes Section 105, was thrown together at the 11th hour and added as a floor amendment during the debate before the full Senate. As a consequence, as we demonstrated in our opening Brief, pp. 16–21, Congress granted the courts unusually broad discretion to frame appropriate relief for violations of Title I, including Section 105.[9]

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[6] While the court did not actually determine what relief would be appropriate on remand, it did suggest possible inclusion of the LMRDA Summary in the union's constitution as one appropriate form of relief but suggested that "something more will [also] be required." 201 F.3d at 521. Contrary to the UA's contention, Br. at 10, 15, the court did not hold that furnishing a copy of the Summary to new members at the time they first join the union would satisfy the Section 105 informational mandate.

[7] In fact, by closely examining S. Rep. No. 187 p. 7, I Leg. Hist. at 403, we discover a more balanced philosophy articulated by the Senate Committee:

"Given the maintenance of minimum democratic safeguards and detailed essential information about the union, the individual members are fully competent to regulate union affairs. The committee strongly opposes any attempt to prescribe detailed procedures and standards for the conduct of union business. Such paternalistic regulation would weaken rather than strengthen the labor movement; it would cross over into the area of trade union licensing and destroy union independence."

"Remedies for the abuses should be direct. Where the law prescribes standards, sanctions for their violation should also be direct."

"The test of a sound bill in this complex and relatively new legislative area is whether it is workable and will produce the desired results without destroying valued free institutions."

[8] This UA argument amounts to a claim that since Congress did not enumerate specific steps required to comply with Section 105, Congress must have intended there to be none. An absurd conclusion.

[9] As the Supreme Court explained in *Hall* v. *Cole,* 412 U.S. 1, 11 (1973): "any attempt on the part of Congress to spell out all of the remedies available under [Title I] would [have] create[d] the danger that those [remedies] not listed might be proscribed . . .." Congress' wisdom was pre-

In essence, the UA contends that Section 105 only requires it to furnish its members with the one-page LMRDA Summary once during their careers in the plumbing and pipefitting industry. By publishing the Summary in the UA Journal, the UA contends that it has informed its existing members concerning the Act, and by furnishing a copy to new members at the time they join the Union, the UA contends that it will satisfy its ongoing Section 105 duty.[10] We respectfully disagree. The *Thomas* court rejected the notion that Congress "was perfectly willing to let ignorance reign for . . . forty years" when holding that "maintaining honest democratic governance of unions is surely an ongoing effort that would seem perforce to require some ongoing method of notification." 201 F.3d at 520. Contrary to the UA, Br. at 8 n.7, 10, 15, there is nothing in the Fourth Circuit's opinion to suggest that the UA's one-time notification given to members would fully discharge its Section 105 informational mandate. To the contrary, the *Thomas* court in 2000, and the Acting Solicitor of Labor in 1960, both suggested that a variety of means for informing members might be necessary to satisfy the Section 105 informational mandate. 201 F.3d at 521; JA 130–31.

For the reasons set forth in our opening brief, pp. 21–28, and more fully amplified in affidavits submitted by plaintiff-appellants and their experts, JA 21–66, we respectfully submit that the UA must be required to undertake additional steps to inform its members concerning the provisions of the LMRDA on an ongoing basis if Congress' objective of enlisting their active support in enforcing the Act is to be met. UA members simply cannot be expected to remember the contents of an informational notice they were furnished years or decades earlier when they had no interest in its contents. It is only when the member suffers an injustice at the hands of his Union officials that the member needs access to information concerning his LMRDA rights and how to secure them. Of course, it is also at that point in time that his Union is most anxious that he be, and remain, ignorant of his rights. However, if union members are to function, as Congress intended, "not only [as] the beneficiaries of the LMRDA, but [also] in many instances [as] its sole guardians,"[11] they need ready access to information about the Act on an ongoing basis.[12]

CONCLUSION

For the foregoing reasons, we respectfully submit that the UA has failed to demonstrate that it has fully remedied its 40-plus years of failure to comply with Section 105 and the district court erred by summarily denying plaintiff-appellants motion for summary judgment.

Respectfully submitted,

ARTHUR L. FOX, II, No. 58495.
Lobel, Novins & Lamont, Washington, DC, Attorney for Appellants.

CERTIFICATE OF SERVICE

The undersigned certifies that on this date he served two copies of Appellants' Reply Brief by depositing them in the mail, first-class postage prepaid, addressed to: Sally M. Tedrow, Esq., O'Donoghue & O'Donoghue, 4748 Wisconsin Ave, NW, Washington, DC 20016.

ARTHUR L. FOX, II,
Dated: March 7, 2003.

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scient given, for example, that the internet and union websites did not exist in 1959 when the LMRDA was enacted. In the 21st Century, a website posting of the LMRDA Summary, particularly as UA members become more sophisticated in surfing the web, will become one ideal method by which the UA can inform its members about the LMRDA, as required by Section 105.

[10] See, e.g., UA Br. at 14 where the UA contends that "by sending a concededly adequate summary of LMRDA rights to each current and new member at his or her home address, the Union has satisfied the plain language of Section 105's duty to inform." See also Br. at 8 n.7, 10, 23.

[11] See *Thomas,* 201 F.3d at 520.

[12] In the *Beck* setting, see UA Br. at 23 n.22, courts and the NLRB have, in fact, imposed on unions a continuing or recurring obligation to notify non-member fee-payers concerning their expenditure of funds for non-collective bargaining purposes as frequently as the fee-payers are required by the union affirmatively to "opt out" of paying full dues, generally on a yearly basis. See e.g., *L.D. Kichler Co.,* 335 NLRB No. 106 (2001); *Tierney* v. *City of Toledo,* 824 F.2d 1497, 1506 (6th Cir. 1987).

In the LMRDA setting, a member's "need-to-know" about the provisions of the Act generally does not arise when the member first joins the union; rather, it arises years or decades later when some injustice is imposed on the member by her union officers. As in the *Beck* setting, whenever the union precipitates a need-to-know, it should be required contemporaneously to furnish the member with needed information.