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EMPLOYER AND CONSULTANT REPORTING UNDER THE LMRDA

*J. Ralph Beaird**

In 1959, Congress enacted the Labor Management Reporting and Disclosure Act (LMRDA).[1] In part, the purpose of this statute was to aid employee decisionmaking by requiring public disclosure of certain activities of unions, union officials, employers, and labor relations consultants. While the administration of the statute over two and a half decades has produced substantial reporting on the part of unions and union officials, the Act's provisions relating to employer and consultant reporting have never generated a significant degree of disclosure.[2] With the growth of a substantial labor relations consultant industry in recent years,[3] organized labor has

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[1] Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, 29 U.S.C. §§ 401-531 (1982).

[2] SUBCOMM. ON LABOR-MANAGEMENT RELATIONS, STAFF OF HOUSE COMM. ON EDUC. AND LABOR, 98TH CONG., 2D SESS., REPORT CONCERNING ENFORCEMENT OF CONSULTANT AND EMPLOYER REPORTING PROVISIONS OF THE LANDRUM-GRIFFIN ACT 9 (Comm. Print 1984) [hereinafter cited as STAFF REPORT]. In 1983, for example, the Department of Labor received over 71,000 union and union official reports made pursuant to the LMRDA's reporting provisions. *Id.* In that same year, however, the Labor Department received only 198 employer and consultant reports. *Id.*

[3] *See* SUBCOMM. ON LABOR-MANAGEMENT RELATIONS OF THE HOUSE COMM. ON EDUC. AND LABOR, PRESSURES IN TODAY'S WORKPLACE (Comm. Print 1980), *reprinted in* [March] DAILY LAB. REP. (BNA) No. 47, at D-1 (Mar. 11, 1981) [hereinafter cited as PRESSURES IN TODAY'S WORKPLACE]. Testimony at the hearings estimated that " 'there are more than 1,000 firms directly and indirectly involved in union-

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called for a review of the effectiveness of the Act's employer and consultant provisions in protecting employee free choice.

Recently, the House of Representatives Subcommittee on Labor-Management Relations has reexamined the efficacy of the Act. Between 1981 and 1984, the subcommittee issued three reports sharply criticizing the Department of Labor's interpretation and enforcement of the Act's employer and consultant reporting provisions.[4] The subcommittee admitted, however, that the lack of enforcement could be an indication of problems with the Act itself. The 1981 Report stated:

> A more plausible conclusion from the experience of the past 21 years, however, might be that the provisions have not worked. Non-enforcement of the Act has spanned six administrations of both political parties. During this period profound changes have occurred in the economy, the workplace, the labor movement, and most significantly the consultant industry itself. The statute may not only be ineffective, but also obsolete.[5]

In light of the criticisms of the House and recent constitutional objections, this article reevaluates the viability of the employer and consultant reporting provisions of the Act. Section I discusses the legislative history and purpose of the LMRDA's reporting provisions. Section II examines the courts' treatment of the provisions when attacked on constitutional and statutory grounds.

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busting activities with more than 1,500 individual practitioners engaged in the full time activity of preventing unionization efforts. Union-busting is now a major American industry with annual sales well over $1/2 million.' " *Id.* at 27, *reprinted in* [March] DAILY LAB. REP. (BNA) No. 47, at D-8. The hearings uncovered patterns of carefully organized consultant campaigns characterized by the transformation of "front-line" supervisors into instruments of surveillance and anti-union propaganda, the use of "modern persuasive techniques including the domination of the employee access to information," and "legal tactics that emphasize delay and manipulation of the procedures of the law, sometimes to the extent of advising its violation." *Id.* at 31, *reprinted in* [March] DAILY LAB. REP. (BNA) No. 47, at D-9.

[4] SUBCOMM. ON LABOR-MANAGEMENT RELATIONS OF THE HOUSE COMM. ON EDUC. AND LABOR, 98TH CONG., 2D SESS., THE FAILURE OF LABOR LAW—A BETRAYAL OF AMERICAN WORKERS (Comm. Print 1984) [hereinafter cited as FAILURE OF LABOR LAW]; STAFF REPORT, *supra* note 2; PRESSURES IN TODAY'S WORKPLACE, *supra* note 3.

[5] PRESSURES IN TODAY'S WORKPLACE, *supra* note 3, *reprinted in* [March] DAILY LAB. REP. (BNA) No. 47, at D-14.

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I. History and Purpose of the LMRDA

An essential goal of the national labor policy is to guarantee employees a reasoned choice in their selection of a bargaining representative. The National Labor Relations Act (NLRA)[6] protects the employees' right to decide in two ways. First, the NLRA empowers the National Labor Relations Board (Board) to find an unfair labor practice when any employer interferes with, restrains or coerces employees in the exercise of their protected rights.[7] Second, even if the employer's actions do not constitute an unfair labor practice, the Board may overturn an election if the employer interferes with the employees' right to make a reasoned choice.[8] In *Sewell Manufacturing Co.*[9] the Board described this broad, policy-oriented approach as follows:

> Our function, as we see it, is to conduct elections in which the employees have the opportunity to cast their ballots for or against a labor organization in an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasoned choice.[10]

In 1959 Congress supplemented the NLRA's protection of reasoned choice by enacting sections 203(a) and 203(b) of the Labor Management Reporting and Disclosure Act.[11] The initial impetus for this legislation came from the findings of the McClellan Committee,[12] which held well-publicized hearings on corrupt and unethical

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[6] National Labor Relations Act, 29 U.S.C. §§ 151-169 (1982).
[7] *Id.* § 8(a)(1), 29 U.S.C. § 158(a)(1) (1982).
[8] *Id.* § 7, 29 U.S.C. § 157 (1976).
[9] 138 N.L.R.B. 66 (1962).
[10] *Id.* at 70.
[11] 29 U.S.C. §§ 401-531 (1982).
[12] 104 Cong. Rec. 3964-65 (1958), *reprinted in* Dept. of Labor, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 8 (1964). The committee was formally titled the Senate Select Committee on Improper Activities in the Labor or Management Field. The influence and depth of inquiry of the McClellan Committee is demonstrated by the length of its service. Originally commissioned in 1957, the Committee's life was extended to January, 1960, and finally, until March of 1960. Beaird, *Reporting Requirements for Employers and Labor Relations Consultants in the Labor-Management Reporting and Disclosure*

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practices by unions, employers, and labor relations consultants. The committee concluded that objectionable employer labor practices occurred when some employers hired middlemen to interfere with their employees' right to form and join unions. The Senate Committee on Labor and Public Welfare described the McClellan Committee's findings:

> The hearings . . . have shown that employers have often cooperated with and even aided crooks and racketeers in the labor movement at the expense of their own employees. They have employed so-called middlemen to organize "no-union committees" and engage in other activities to prevent union organization among their employees. They have financed community campaigns to defeat union organization. They have employed investigators and informers to report on the organizing activities of employees and unions.[13]

The final report from the McClellan Committee included the specific recommendation to enact "legislation to curb activities of middlemen in labor-management disputes."[14]

Thus, Congress enacted the LMRDA,[15] the primary purpose of which was to guarantee American union members a system of internal union democracy. In formulating the Act, Congress at-

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Act of 1959, 53 GEO. L.J. 267, 269 (1965). During the years 1957-59, the Committee held 270 days of hearings, interrogated 1526 witnesses, and compiled a total of 46,150 pages of testimony. *Id.*

[13] S. REP. No. 187, 86th Cong., 1st Sess. 6 (1959), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING ACT OF 1959, at 402 (1960).

[14] S. REP. No. 1417, 85th Cong., 2d Sess. 184, 459 (1958).

[15] So quickly, in fact, that the initial efforts to pass remedial legislation stalled in the House when the Speaker took the vote under a "suspension of the rules" in which no amendments were permitted and in which debate was strictly limited. 104 CONG. REC. 18,260, 18,268-88 (1958). Representative Griffin stated:

> On a take-it-or-leave-it basis, the Kennedy-Ives bill has been thrust before us . . . .
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> . . . .
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> While there are many sound and constructive provisions in the Kennedy-Ives bill, which should be adopted if they could be considered separately on their own merits, unfortunately the bill, in its present form, also includes a number of bad and harmful provisions which should not become law.

Id. at 18,268.

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tempted to meet two basic goals. First, Congress felt that the internal union democracy should be consistent with the democratic principles and values embraced by the community at large;[16] and second, "[g]iven the maintenance of minimum democratic safeguards and detailed essential information about the union, the individual members [were] fully competent to reglate union affairs."[17] At the same time, Congress wanted to avoid direct governmental regulation and instead provide employees with sufficient information so they could initiate corrective action through self-help measures.[18] Congress, therefore, structured sections 203(a) and 203(b) to maximize employee access to relevent information.[19]

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[16] S. REP. No. 187, 86th Cong., 1st Sess. 6 (1959), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING ACT OF 1959, at 402 (1960).

[17] *Id.* at 7, *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING ACT OF 1959, at 403 (1960).

[18] *Id.*

[19] Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, § 203(a), (b), 29 U.S.C. § 433(a), (b) (1982). Section 203(a) sets forth reporting requirements applicable to employers:

> SEC. 203. (a) Every employer who in any fiscal year made—
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> (1) Any payment or loan, direct or indirect, of money or other thing of value (including reimbursed expenses), or any promise or agreement therefor, to any labor organization or officer, agent, shop steward, or other representative of a labor organization, or employee of any labor organization, except (A) payments or loans made by any national or State bank, credit union, insurance company, savings and loan association or other credit institution and (B) payments of the kind referred to in section 302(c) of the Labor Management Relations Act, 1947, as amended;
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> (2) any payment (including reimbursed expenses) to any of his employees, or any group or committee of such employees, for the purpose of causing such employee or group or committee of employees to persuade other employees to exercise or not to exercise, or as the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing unless such payments were contemporaneously or previously disclosed to such other employees;
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> (3) any expenditure, during the fiscal year, where an object thereof directly or indirectly, is to interfere with, restrain, or coerce employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing, or is to obtain information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding;
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> (4) any agreement or arrangement with a labor relations consultant or other independent contractor or organization pursuant to which such

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The challenge facing Congress was to develop legislation that would effectively inform employees of certain activi-

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person undertakes activities where an object thereof, directly or indirectly, is to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing, or undertakes to supply such employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding; or

(5) any payment (including reimbursed expenses) pursuant to an agreement or arrangement described in subdivision (4);

shall file with the Secretary a report, in a form prescribed by him, signed by its president and treasurer or corresponding principal officers showing in detail the date and amount of each payment, loan, promise, agreement, or arrangement and the name, address, and position, if any, in any firm or labor organization of the person to whom it was made and a full explanation of the circumstances of all such payments, including the terms of any agreement or understanding pursuant to which they were made.

Id. § 203(a), 29 U.S.C. § 433(a) (1982).

Section 203(b) sets forth reporting requirements applicable to labor relations consultants:

(b) Every person who pursuant to any agreement or arrangement with an employer undertakes activities where an object thereof is, directly or indirectly—

(1) to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing; or

(2) to supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding;

shall file within thirty days after entering into such agreement or arrangement a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing the name under which such person is engaged in doing business and the address of its principal office, and a detailed statement of the terms and conditions of such agreement or arrangement. Every such person shall file annually, with respect to each fiscal year during which payments were made as a result of such an agreement or arrangement, a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing a statement (A) of its receipts of any kind from employers on account of labor relations advice or services, and (B) of its disbursements of any kind, in connection

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ties[20] of their employer or a labor relations consultant,[21] thus allowing the employees to take remedial actions. Unlike the case of internal union abuse, employees have no self-help device, such as elections, to correct management abuses. Section 203 was designed to provide a corrective mechanism. Basically, this section requires public disclosure of certain employer and consultant activities.

Congress concluded that publication of the information would best serve the purpose of the legislation for three reasons. First, employees will be aware of the source and method of employer attempts to sway their opinion and, therefore, will be able to give appropriate credence to its effect on their decisions. Second, reporting to the Department of Labor provides enforcement machinery to ensure the availability of information to employees and provides the avenue by which the public may access this information. Third, exposure of this information to the public is necessary, "for if the public has an interest in preserving the rights of employees then it has a concommitant obligation to insure the free exercise of them."[22]

To ensure employee free choice, the reporting requirements were not limited to only illegal or immoral activities. Rather, reporting was aimed at activities that "may corrupt or weaken rights of employees generally, the integrity of unions, freedom of organization and the collective bargaining process."[23] As stated in a report by the Senate Committee on Labor and Public Welfare:

> All the activities required to be reported by this section are not illegal nor are they unfair labor practices. However,

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with such services and the purposes thereof. In each such case such information shall be set forth in such categories as the Secretary may prescribe.

Id. § 203(b), 29 U.S.C. § 433(b) (1982).

[20] The term "persuader activity" as used in this discussion refers to those activities that trigger reporting under sections 203(a) and (b) of the LMRDA. The scope of the term "persuader activity" as judicially developed is examined *infra* Part II, B.

[21] Section 3(m) defines "labor relations consultant" to mean "any person who, for compensation, advises or represents an employer, employer organization, or labor organization concerning employee organizing, concerted activities, or collective bargaining activities." 29 U.S.C. § 402(m) (1976).

[22] S. REP. No. 187, 86th Cong., 1st Sess. 11 (1959), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 407 (1960).

[23] Lang, *Reporting Requirements In General*, in SYMPOSIUM ON THE LMRDA 369, 370 (1961).

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> since most of them are disruptive of harmonious labor relations and fall into a grey area, the committee believes that if an employer or consultant indulges in them, they should be reported. This public disclosure will accomplish the same purpose as public disclosure of conflicts of interest and other union transactions which are required to be reported in sections 101 and 102 of this bill.[24]

But, it was not the intention of Congress to require employer reports on legitimate payments made simply to foster good employee relations.[25]

There was much congressional debate regarding the appropriate statutory means to achieve these ends. These debates included accurate prophecies of future problems. Senator Morse argued that certain of the reporting provisions were unconstitutional because they violated the fifth amendment's protection aginst self-incrimination.[26] A House version of the bill criticized and attempted to narrow the overbroad scope of reporting requirements that resulted from the description of reportable activities as "persuader activities."[27] It was argued that a broad definition of persuader activities might include activities protected by the constitutional guarantee of free speech.[28] The final version of the bill became law on September 14, 1959, without fully addressing these issues.

II. JUDICIAL INTERPRETATION OF LMRDA REPORTING PROVISIONS

The majority of the problems with litigation in the past twenty-five years concerning section 203 falls within one of two general categories. The first category includes issues regarding the constitutionality of the reporting requirements. The fifth amendment attacks have centered on the reporting provisions in section 202, not 203. But, since 202 and 203 are basically identical in this respect, the same principles apply. Presently, most of the constitutional issues are well settled; however, in recent litigation, innovative argu-

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[24] S. REP. No. 187, 86th Cong., 1st Sess. 12 (1959), *reprinted in* 1 NLRB, LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 408 (1960).

[25] 104 CONG. REC. 17,919-20 (1958).

[26] 105 CONG. REC. 17,871 (1959).

[27] H.R. 4473, 86th Cong., 1st Sess. (1959).

[28] 104 CONG. REC. 18,269 (1958).

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ments have posed new challenges to the reporting requirements.

The second category includes issues of statutory construction. These issues have retained a greater degree of volatility. Even though a number of statutory interpretations have found general acceptance, issues involving "direct" persuader activities and the "split income" theory of wage reporting remain unresolved.[29]

A. Constitutional Issues

1. *Questions of Self-incrimination.* One of the first constitutional attacks made on the LMRDA's reporting provisions involved section 202(a)(6).[30] In *United States v. McCarthy*,[31] a union officer challenged the reporting requirement in section 202(a)(6) on the ground that it violated his fifth amendment protection against self-incrimination. McCarthy argued that he was being charged with the crime of failing to report a crime he had committed. The court held that in this case the reporting requirements violated the fifth amendment's protection against self-incrimination. The court, how-

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[29] *See* PRESSURES IN TODAY'S WORKPLACE, *supra* note 3, at 43-50; DAILY LAB. REP. (BNA) at D-13 to D-18; FAILURE OF LABOR LAW, *supra* note 4, at 6-10; STAFF REPORT, *supra* note 2, at 10.

[30] This section applies to officers and employees of labor unions and requires them to report certain payments made to them directly by an employer or through a labor relations consultant. Section 202(a)(6) states:

> (a) Every officer of a labor organization and every employee of a labor organization (other than an employee performing exclusively clerical or custodial services) shall file with the Secretary a signed report listing and describing for his preceding fiscal year—
>
> . . . .
>
> (6) any payment of money or other thing of value (including reimbursed expenses) which he or his spouse or minor child received directly or indirectly from any employer or any person who acts as labor relations consultant to an employer, except payments of the kinds referred to in section 186(c) of this title.

LMRDA, § 202(a)(6), 29 U.S.C. § 432(a)(6) (1982). The same activity triggers employer reporting under section 203(a)(1).

[31] 298 F. Supp. 561 (S.D.N.Y. 1969), *aff'd* 422 F.2d 160 (2d Cir.), *cert. dismissed*, 398 U.S. 946 (1970). Prior to *McCarthy*, Supreme Court decisions had substantially limited the availability of the constitutional protections against self-incrimination. In Hale v. Henkel, 201 U.S. 43 (1906), the Court held the protections to be unavailable to corporations. Subsequently, in United States v. White, 322 U.S. 694 (1944), the Court held the protections unavailable to unions. Therefore, in the context of § 203, the self-incrimination protections are only available to unincorporated employers and labor relations consultants and union officials acting in an individual capacity.

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ever, upheld the reporting provisions as constitutional because they were broader in scope than the provisions of the criminal statute under which McCarthy was charged.[32] Thus, acts within the purview of section 202(a)(6) that are also illegal under a criminal statute are privileged from reporting under the fifth amendment. Acts within section 202(a)(6) that are not criminally punishable are not privileged and must be reported.[33]

No court has yet decided the self-incrimination issue in the context of employer reporting, but due to the reciprocity of sections 202(a)(6) and 203(a)(1),[34] application of the same constitutional principles would lead to the same result.[35]

2. *First Amendment Issues.* Although the Bill of Rights includes no separate guarantee of freedom of association, the Supreme Court has held that associational rights are protected by the first amendment's guarantee of freedom of speech.[36] The rationale for providing first amendent protection is that group advocacy is an important component of the system of freedom of expression.[37] Thus, laws compelling organizations to disclose their membership lists or their lists of financial contributors can violate the associational rights of

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[32] *McCarthy*, 298 F. Supp. at 566-67. The district court declined to dismiss a charge against McCarthy for filing a false report, however. *Id.* at 567. Although McCarthy would have been privileged not to file the report under the fifth amendment, by filing the report he waived that privilege and was obligated to file a true report. *Id.*; *see also McCarthy*, 422 F.2d at 163 (court interprets blank as an affirmative misrepresentation instead of an omission).

[33] *See McCarthy*, 422 F.2d 160.

[34] *Compare* § 203(a)(1), *supra* note 19, *with* § 202(a)(6), *supra* note 30.

[35] *But see* Craver, *The Application of the LMRDA "Labor Consultant" Reporting Requirements to Management Attorneys: Benign Neglect Personified*, 73 Nw. U.L. REV. 605, 612 (1978) (asserting without discussion that "[t]he fact that the LMRDA requires the reporting of activities that may be violative of the NLRA does not infringe the fifth amendment privilege against self-incrimination since the NLRA imposes no criminal sanctions.") (footnote omitted). The only case considered by a court under § 203 that included an employer defense based on the self-incrimination protection was Harvey Aluminum, Inc. v. Ragsdale, Civ. No. 62-1480-Y (S.D. Cal.), *rev'd.*, Order Reversing Judgment of District Court, No. 19,573 (9th Cir. 1965). This case, however, was settled prior to decision on grounds not involving the constitutional issue.

[36] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1975). The Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble." U.S. CONST. amend. I.

[37] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 65 ("group association is protected because it enhances '[e]ffective advocacy.' " (citation omitted)).

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the members or contributors. For example, in the landmark associational rights case of *NAACP v. Alabama ex rel. Patterson*,[38] the Court held that an Alabama state court judge could not constitutionally issue a discovery order requiring the NAACP to disclose its membership lists.

In reaching the decision, Justice Harlan employed a balancing test that weighed the potential harm to the organization against the interests of the state. The Court placed considerable emphasis on the fact that the NAACP had made "an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members [had] exposed [those] members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[39] On the other hand, the Court could identify no governmental interest sufficient to outweigh the likely harm to the NAACP's ability to remain an effective advocate for civil rights.[40]

In other contexts, however, the Supreme Court has held that disclosure of membership lists does not violate constitutionally protected associational rights. In *Buckley v. Valeo*,[41] the Court upheld provisions of federal election reform legislation that required political committees and candidates to report the names of many of their contributors. The Court ruled that the government's interests were sufficiently strong to survive the "exacting scrutiny"[42] mandated by *NAACP* and later cases and that there was a "relevant correlation" or "substantial relation" between those interests and the strategy of compelled disclosure.[43] Perhaps most significantly, the Court found that the record included only "highly speculative" claims that compelled disclosure would affect the behavior of contributors.[44]

In *Buckley*, the Court also set out a standard for measuring the adequacy of the record evidence of a hypothesized threat to associational rights, stating: "The evidence offered need show only a reasonable probability that the compelled disclosure of a party's

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[38] 357 U.S. 449 (1958).
[39] *Id.* at 462.
[40] *Id.* at 463-66.
[41] 424 U.S. 1 (1975).
[42] *Id.* at 64.
[43] *Id.* at 64-68.
[44] *Id.* at 70-72.

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contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties."[45] The opinion stated that "[w]here it exists the type of chill and harassment identified in *NAACP* . . . can be shown."[46]

In three recent decisions, the Fourth, Sixth, and Seventh Circuits have rejected the contention that the consultant reporting provisions of the LMRDA violate the associational rights of employers or consultants. In the Fourth Circuit case, *Master Printers of America v. Donovan* (*Master Printers*),[47] a national printing industry trade association of nonunion companies claimed the government could not constitutionally force it to reveal its membership lists. The association argued that disclosure would impair its ability to attract new members and to retain current members because many employers could not afford to be linked publicly to an avowedly anti-union trade group.[48] In the Sixth Circuit case, *Humphreys, Hutcheson & Moseley v. Donovan*,[49] a law firm representing management clients argued that it would be deterred from making persuader speeches for its clients if, as a consequence of such speeches, the firm were required to disclose its relationship with all of its labor clients.[50] The firm argued that the reporting provisions therefore infringed its free speech and associational rights. Finally, in the Seventh Circuit case, *Master Printers Association v. Donovan* (*Master Printers Association*),[51] an Illinois association of nonunion printing companies advanced an argument similar to that made in *Master Printers*. The association claimed that in order to protect its members from unwanted publicity, the association would be forced to insulate itself from the consultant reporting requirements by ending its persuader activities conducted on behalf of some association members.[52] The association claimed that this reporting would infringe its own first amendment right to engage in such persuader activities.

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[45] *Id.* at 74.

[46] *Id.*

[47] 751 F.2d 700 (4th Cir. 1984), *cert. denied*, 106 S. Ct. 63 (1985).

[48] *Id.* at 703.

[49] 755 F.2d 1211 (6th Cir. 1985).

[50] *Id.* at 1219-20.

[51] 699 F.2d 370 (7th Cir. 1983) (adopting the opinion of the district court reported at 532 F. Supp. 1140 (N.D. Ill. 1981)), *cert. denied*, 464 U.S. 1040 (1984).

[52] *Master Printers Ass'n v. Donovan*, 532 F. Supp. 1140, 1148 (N.D. Ill. 1981), *aff'd*, 699 F.2d 370 (7th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

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All three courts rejected the associational rights argument. They emphasized that the consultants had not offered any substantial evidence in support of their theory that compliance with the Act's reporting requirements would affect their relations with employers. The Fourth Circuit in *Master Printers* did not accord much weight to the prediction that the national trade association's compliance with the reporting requirements would cause employers to abandon their association membership rather than have the membership revealed.[53] The court found it difficult to accept such a claim in light of the fact that most knowledgeable persons in the printing industry already knew which shops were unionized and which were not. The Sixth Circuit in *Humphreys, Hutcheson & Moseley* also concluded that the consultant law firm had failed to offer any substantial evidence that compliance would affect the firm's relations with its management clients.[54] Finally, the Seventh Circuit, adopting the opinion of the district court in the case, was "somewhat skeptical of the 'fears' claimed by the [Illinois trade association]."[55]

Although all of the courts were unimpressed with the consultants' claim of a threat to associational rights, they did not dispose of the constitutional claims on that ground alone. Rather, these courts went on to apply the rest of the *Buckley* balancing test. The Fourth and Sixth Circuits concluded that the trade associations' claims, while not substantial, also were not entirely inconsequential.[56] The court in *Master Printers Association* actually accepted arguendo the substantiality of the trade association's allegations but upheld the consultant reporting provisions anyway because the government's interests weighed heavier in the balance.[57]

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[53] *Master Printers*, 751 F.2d at 704-05. The court also noted that it was unlikely that a competitor of an MPA member could derive useful information from the amount of dues an employer paid to the MPA. Finally, the court pointed to MPA's own concession that the affiliation of employers who participated in the Craftsmanship Program, the subject of the reporting dispute, was already known to their employees. *Id.* at 705.

[54] *Humphreys, Hutcheson & Moseley*, 755 F.2d at 1221.

[55] *Master Printers Ass'n*, 532 F. Supp. at 1148 & n.11 ("At most what defendant has alleged is that its members fear criticism of their business practice of dealing with a labor relations consultant and possible economic harm (though they have not indicated its source).").

[56] *Humphreys, Hutcheson & Moseley*, 755 F.2d at 1221; *Master Printers*, 751 F.2d at 705.

[57] *Master Printers Ass'n*, 532 F. Supp. at 1148.

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Applying the balancing test, the three courts concluded that the consultant reporting provisions of the Act serve governmental interests important enough to survive "exacting scrutiny." The Fourth Circuit extensively reviewed the legislative history of the Act, including the findings of the McClellan Committee. The court found that the reporting provisions serve two compelling interests—deterrence of actual corruption and enhancement of the government's ability to investigate allegations of wrongdoing in the labor-management field.[58] The Sixth Circuit recognized a substantial federal interest in "maintaining harmonious labor relations."[59] And, in the district court opinion adopted by the Seventh Circuit in *Master Printers Association*, Judge Marshall emphasized that the context was the "unique and pervasively regulated area of labor relations law," a context in which "[t]he Supreme Court has recognized that even first amendment rights may be required to yield . . . ."[60]

Finally, all three courts ruled that the Act's consultant reporting provisions are closely related to the governmental interests underlying the Act. The Sixth Circuit stated the conclusion most succinctly: "[T]he disclosure requirements aid employees in understanding the source of the information they receive, tend to discourage abuse, reduce the appearance of impropriety and supply information to the Secretary [of Labor] that will aid in detecting violations."[61] The Fourth Circuit quoted *Buckley* which in turn quoted Professor Brandeis: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light is the most efficient policeman."[62]

Thus far no successful free speech challenge has been made by a person charged with violating the reporting requirements of section 203.[63] Yet, a successful challenge was made in an action disputing

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[58] *Master Printers*, 751 F.2d at 707.

[59] *Humphreys, Hutcheson & Moseley*, 755 F.2d at 1221-22.

[60] *Master Printers Ass'n*, 532 F. Supp. at 1148.

[61] *Humphreys, Hutcheson & Moseley*, 755 F.2d at 1222.

[62] *Master Printers*, 751 F.2d at 707 (quoting *Buckley*, 424 U.S. at 67 (quoting L. BRANDEIS, OTHER PEOPLE'S MONEY 72 (1933))); *see also* Wirtz v. Fowler, 372 F.2d 315, 334 (5th Cir. 1966) (summarily dismissing first amendment challenge by attorneys charged with failing to report under § 203(b), relying upon United States v. Harriss, 347 U.S. 612 (1954), which upheld the disclosure provision of the Federal Regulation of Lobbying Act).

[63] *Humphreys, Hutcheson & Moseley*, 775 F.2d at 1222-23 ("every court that has

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the Secretary of Labor's investigative powers under the LMRDA in *Marshall v. Stevens People & Friends For Freedom.*[64] In *Marshall*, the Secretary of Labor attempted to enforce a subpoena against an "employee persuader committee." The subpoena was issued pursuant to an investigation being conducted to determine if J.P. Stevens, the employer of several of the committee members, had complied with section 203(a) reporting requirements.[65] The subpoena requested the committee to furnish the names of all members and contributors to the committee. The Fourth Circuit held that the subpoena was not enforceable to the extent that the subpoena required the names of J.P. Stevens' non-supervisory employees associated with the committee as members or contributors.[66] The rationale was that the Secretary failed to show a substantial relationship between the government's interest in enforcing the Act and the information identifying non-supervisory employees who were exercising rights protected under section 7 of the National Labor Relations Act.[67] Therefore, the non-supervisory employees' first amendment rights of speech and association prevailed and prohibited enforcement of the subpoena.

The narrowness of this ruling is indicative of the importance the court placed on the government's interest in enforcing the reporting provisions. The court admitted the need for flexibility, though, by commenting that if a "chilling" effect is produced that deters certain groups of contributors from supporting employee groups, the subpoena power under the LMRDA may need to be restricted further.[68]

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considered the [first amendment] issue has held that the report requirements contained in section 203(b) are constitutional").

[64] 669 F.2d 171 (4th Cir. 1981), *cert. dismissed sub. nom.*, J.P. Stevens Employees Educ. Comm. v. Donovan, 455 U.S. 930, *cert. denied*, 455 U.S. 940 (1982).

[65] *Id.* at 173. For a detailed account of the protracted J.P. Stevens anti-union litigation, see Kovach, *J.P. Stevens and the Struggle for Union Organization*, 29 LAB. L.J. 300 (1978); *see also* Bethel, *Profiting from Unfair Labor Practices: A Proposal to Regulate Management Representatives*, 79 NW. U.L. REV. 506, 514 n.36 (1984) (listing more than forty published opinions concerning the J.P. Stevens litigation).

[66] *Marshall*, 699 F.2d at 177-78.

[67] *Id.* at 177. Section 7 of the National Labor Relations Act assures nonsupervisory employees the right to refrain from any union organizational activities and the right to engage in concerted activities for their mutual aid. NLRA § 7, 29 U.S.C. § 157 (1982).

[68] *Id.* at 180.

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3. *Vagueness and Search and Seizure.* Two additional constitutional attacks on section 203 have recently been argued. In *Master Printers Association*,[69] an industry trade association that had engaged in persuader activities reportable under section 203(b) raised a fifth amendment due process challenge to that provision. The association claimed that section 203(b) was impermissibly vague in defining to whom the reporting requirements applied.[70] The Seventh Circuit rejected the argument because the language of the statute was sufficiently specific to enable the Department of Labor to determine congressional intent.[71]

More recently, in *Donovan v. Rose Law Firm*,[72] attorneys subject to the reporting provisions of section 203(b) argued that this section violated their fourth amendment protections against unreasonable search and seizure. The attorneys submitted that the disclosure requirements posed an unreasonable burden on them, but the court summarily dismissed the argument without comment.

B. Issues of Statutory Interpretation

1. *Collateral Estoppel and Enforcement Under Section 203(a)(3).* In *Harvey Aluminum v. Ragsdale*[73] the Secretary of Labor estab-

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[69] 699 F.2d 370 (7th Cir. 1983) (adopting district court opinion at 532 F. Supp. 1140 (N.D. Ill. 1981)), *cert. denied*, 464 U.S. 1040 (1984).

[70] 532 F. Supp. 1140, 1152 (N.D. Ill. 1981), *aff'd*, 699 F.2d 370 (7th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). The vagueness issue was rejected by the court in Wirtz v. Fowler, but there the court based its decision on "the fact that this is not a criminal prosecution for wilful failure to report and that [the labor consultant's] conduct clearly was that of a persuader . . . ." *Fowler*, 372 F.2d 315, 334-35 (5th Cir. 1966). No additional comment was made construing the constitutionality of the language used in § 203.

[71] *Master Printers Ass'n*, 532 F. Supp. at 1152-53.

[72] 116 L.R.R.M. 3406 (E.D. Ark. 1984); *see also Master Printers Ass'n*, 532 F. Supp. at 1152-53. In *Master Printers Ass'n*, the defendant also argued that the reporting requirements constituted an unlawful search and seizure. Citing California Bankers Ass'n v. Schultz, 416 U.S. 21, 67-70 (1974), the district court noted that for profit-oriented businesses, "[t]he fourth amendment simply requires that the reporting scheme imposed by the statute bear a reasonable relationship to a permissible subject of governmental inquiry and not place an undue burden on the defendant." 532 F. Supp. at 1153. The court found that there was nothing unreasonable about the LMRDA's reporting and disclosure provisions, and rejected the fourth amendment argument. *Id.*

[73] Civ. No. 62-1480-Y (S.D. Cal.), *rev'd.*, Order Reversing Judgment of District Court, No. 19,573 (9th Cir. 1965).

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lished the policy of allowing a National Labor Relations Board unfair labor practice proceeding to conclude before bringing an action under section 203 when both actions involved the same operative facts. This policy avoids putting the employer in the position of defending against essentially the same claim in two separate actions at the same time.[74] In light of this deference to the Board,[75] the Secretary must determine when to bring an action under section 203 after the Board's final determination. The Secretary's decision to act is dependent upon the Board's findings and upon the application of the doctrine of collateral estoppel.

The most significant judicial decision construing section 203 and employing the policy of deference is *Wirtz v. National Welders Supply Co.*[76] The specific language at issue in that case was the phrase "an object" in section 203(a)(3). The provision requires an employer to report:

> (3) any expenditure, during the fiscal year, where *an object* thereof, directly or indirectly, is to interfere with, restrain, or coerce employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing, or is to obtain information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding.[77]

In *National Welders*, the Secretary attempted to apply the doctrine of collateral estoppel by instituting an action, based on Board findings, seeking to require an employer to report under section 203(a). The Secretary argued that since a prior Board decision found

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[74] *Id.*

[75] The Secretary's deference to the Board's final determination is supportable on two grounds. First, the Board has greater expertise in the field of labor-management relations. Second, deference is consistent with the "recognition that the LMRDA is, in this respect, merely supplementary legislation to the [Labor Management Relations Act]." Beaird, *Some Aspects of the LMRDA Reporting Requirements*, 4 GA. L. REV. 696, 710 (1970) (explaining the "real reason" for the Department of Labor's deference to the National Labor Relations Board).

[76] *National Welders*, 254 F. Supp. 62 (W.D.N.C. 1966).

[77] 29 U.S.C. § 433(a)(3) (1982).

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that the employer had committed an unfair labor practice under section 8(a)(1)[78] of the NLRA,[79] collateral estoppel operated to preclude the employer from denying the Secretary's claim.[80] The district court, however, held that collateral estoppel did not apply.[81] The court reasoned that the issue before the Board was a section 8(a)(1) violation. Section 8(a)(1) requires a determination that the employer's act simply has the requisite "effect" to find an unfair labor practice. But, under section 203(a)(3) evidence must prove the employer's "purpose in acting"—that is, "an object" of his actions was to achieve the resulting improper effect.[82] Since the Board's policy is that specific intent be proven from the nature of the acts performed, this ruling did not seem to present an insurmountable barrier.[83] The court, however, did not draw this inference and instead required proof of specific intent. In effect, the *National Welders* holding requires an outright admission by the employer.

Subsequently, in *Wirtz v. Ken-Lee, Inc.*,[84] the Secretary again attempted to enforce section 203(a) reporting requirements on the basis of the Board determination that an employer had committed an unfair labor practice. The Secretary argued that the employer was collaterally estopped from defending against the charge. Prior to the district court's ruling, though, the Secretary changed his position.[85] The Secretary's final position was that the employer could be required to file a report repeating the findings of the Board regardless of the fact that the employer consistently denied the allegations. The United States Court of Appeals for the Fifth Circuit refused the Secretary's enforcement request on the basis that section 203 contemplated the filing of reports in regard to "payments." The court, however, found that the Secretary was requesting a report related to "Board findings" and, therefore, the request was "outside the

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[78] Section 8(a)(1) states: "(a) It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . . ." § 8(a)(1), 29 U.S.C. 158(a)(1) (1982).

[79] *National Welders*, 254 F. Supp. at 64-65.

[80] *Id.* at 65-66.

[81] National Welder's Supply Co., 132 N.L.R.B. 660 (1961).

[82] *National Welders*, 254 F. Supp. 62, 65 (W.D.N.C. 1966).

[83] New York Mailers' Union No. 6, 136 N.L.R.B. 196, 197-98 (1962).

[84] 369 F.2d 393 (5th Cir. 1966).

[85] *Id.* at 395.

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scope of the Act."[86] The effect of this decision is that an employer may not be required to report pursuant to section 203 on the basis of a prior determination where the employer consistently denies in Board hearings factual matters found to be otherwise by the adjudicative body.

In February 1984, a staff report from the House Subcommittee on Labor-Management Relations[87] criticized the Department of Labor for its lack of enforcement under section 203. In particular, the report criticized the Secretary's change in departmental policy defining the acceptable source for the initiation of new cases under section 203. The change resulted in limiting new cases to those received by the Department through filed complaints. The staff report suggested that the Secretary develop additional sources.[88] In particular, it was recommended that one of these sources could be developed through coordination with the National Labor Relations Board. The report concludes that tracking cases before the Board which involve section 8(a)(1) type activities, would reveal an obvious source of potential cases warranting enforcement. Upon final Board determination, cases could be reviewed to find if the employer had complied with section 203. If not, action then should be taken to ensure compliance with the reporting provisions.

The staff report, however, ignores the effect of the *National Welders* and *Ken-Lee* decisions. In a statement before the House Subcommittee Richard Hunsucker,[89] Director of the Office of Labor-Management Standards Enforcement, explained the critical weakness of a methodology of requiring the review of NLRB decisions:

> First, any reports obtained as a result of reviewing NLRB cases usually will be received years after the events occurred and years after the facts have been disclosed in the NLRB decisions. Further, the Department cannot rely

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[86] *Id.*

[87] STAFF REPORT, *supra* note 2.

[88] *Id.* at 7.

[89] *Oversight Hearings on Landrum-Griffin Act, Hearings Before the Subcomm. on Labor-Management Relaltions of the Committee on Educ. and Labor, House of Representatives*, 98th Cong., 2d Sess. 335 (1984) (statement of Richard G. Hunsucker, Director, Dept. of Labor Office of Labor-Management Standards Enforcement) [hereinafter cited as *Director's Statement*].

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> solely upon an NLRB finding that an employer committed an unfair labor practice as a basis for compelling a report from that employer.
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> The employer and consultant reporting provisions of the LMRDA require not only the finding that certain activities were undertaken but also that the object or purpose of the employer or consultant was to undertake these reportable activities. Thus, while the NLRB merely has to prove that an unfair labor practice was committed, the Department of Labor has to show, in addition, that the employer intended to commit the unfair labor practice. This often would necessitate a new time consuming and expensive investigation by the Department.[90]

Evidently, the debilitating effect of the *National Welders* and *Ken-Lee* decisions on section 203 enforcement will continue for the foreseeable future.

2. *"Indirect" Activity*. The statutory language of sections 203(a)(4), 203(a)(5), and 203(b) makes persuader activities reportable when the "object" of the activity operates against employees either "directly" or "indirectly."[91] Enforcing the reporting requirements against "direct" persuader activities has not presented a problem to the courts. For example, in *Wirtz v. Fowler*, attorneys hired by the employer went to the employer's premises and spoke directly to employees about union organizing and its adverse consequences.[92] The attorneys also reported employee reactions to the speech to their client-employer. The Fifth Circuit did not hesitate in finding these activities "direct."[93] The court described a persuader activity as one in which the object is to supply the client-employer with information concerning the union activities of the employees.[94]

The scope of "indirect" activity, though, was not defined. Its meaning is complicated by language in section 203(c) which exempts consultant reporting if only advice is given.[95] Therefore, if a con-

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[90] *Id.* at 344.
[91] *See supra* note 19.
[92] 372 F.2d 315, 320-23 (5th Cir. 1966).
[93] *Id.* at 324.
[94] *Id.*
[95] Section 203(c) states:

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sultant's activities consist *only* of giving advice, no reportable activity occurs. The problem is in determining the difference between "indirect" activities and advice.

Two recent cases offer some guidance regarding the distinctions between direct and indirect activity on the one hand and indirect activity and advice on the other. In *Master Printers of America v. Marshall*,[96] a trade association serving member-employers in the printing industry was found to have engaged in "direct" persuader activities. The association's activity consisted of sending a trade publication to employees of the member-employers in recognition of excellent job performance. The individual employer designated the employees. On occasion, the publication included articles which were clearly anti-union. The court, using a three step analysis, found the association to have engaged in reportable activity. First, the trade association was a "person" as defined by the Act and was therefore within the Acts purview. Second, a "persuader agreement" existed by virtue of the membership agreement and the member-employers' knowledge of the persuader activities.[97] Third, the association had engaged in persuader activities by producing a magazine with anti-union articles and sending the magazine *directly* to the employees designated by the member-employers. Therefore, any communication flowing directly from the consultant to the employee is deemed a "direct" persuader activity. The court did not distinguish "indirect" activities.

One year later, *Donovan v. Master Printers of America*[98] again raised the issue of whether a trade association's activities were re-

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> Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer or representing or agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any question arising thereunder.

29 U.S.C. § 433(c) (1982).

[96] 620 F.2d 293 (4th Cir. 1980) (mem.).

[97] *Id.* at 296. The case was remanded, overruling the district court's granting of summary judgment on the basis that evidence was presented relating to the existence of an "agreement" as required in section 203(b). On remand, the district court heard evidence and found that such agreement did exist. Master Printers of America v. Marshall, 105 L.R.R.M. 2996, 2998 (E.D. Va. 1981).

[98] 108 L.R.R.M. (BNA) 2050 (E.D. Va. 1981).

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portable under section 203(b). This case, however, was distinguished from the prior case because here the association sent the publication directly to the member-employers. The employers then distributed the magazines directly to their own employees. The court found that the association had not engaged in any persuader activity and that "this sort of activity was not the kind that the reporting requirements of the Act were intended to illuminate."[99] Rather, this activity was "advice" within the section 203(c) exemption.[100] The court cited the Labor Department's Interpretive Manual, consisting of the Secretary's operational policies, to suggest that if the employer is free to accept or reject written material prepared for him and absent any deceptive arrangement with the consultant, the consultant's activities are classified as advice.[101] The question left unanswered is what type of activity *does* fall within the scope of "indirect activity." It is reasonable to conclude from the *Donovan v. Master Printers of America* opinion that the term "indirect" has very little meaning.

The staff report to the House Subcommittee on Labor-Management Relations criticizes the Department of Labor's lack of enforcement of indirect activities. The report cites the Department for "arbitrarily" narrowing the interpretation of reportable activities under section 203.[102] The report is most critical of the Labor Department's failure to classify consultant activities consisting of direct contact with first-line supervisors as reportable activity.[103] The report notes that both the Act and the Department's Interpretive Manual recognize reportable "indirect" persuader activities. The report, however, also cites two unreported district court cases as allegedly supporting this position because the consultants were compelled to report in both cases.[104] In fact, both cases were settled prior to a court decision through the consent of the parties in-

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[99] *Id.* at 2051.
[100] *Id.* at 2052.
[101] *Id.*
[102] *See* STAFF REPORT, *supra* note 2, at 9. The report accuses the Department of Labor of "ignor[ing] the plain meaning of the statute, revers[ing] long-standing agency policy, and implicitly reject[ing] the Subcommittee's recommendations in its 1980 report." *Id.*
[103] *Id.* at 10.
[104] *Id.* at 9.

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volved. As stated by Mr. Hunsucker in his testimony: "[T]here are no court decisions regarding the validity of the [indirect] theory."[105] He indicated, though, that given a case in which a consultant has engaged in both "direct" and "indirect" activities, the Department may be willing to litigate both issues.[106]

The staff report also criticizes the Secretary for his failure to properly adhere to the limited reporting exemption defined in section 203(e), which creates a regular wage exemption.[107] This provision exempts from the reporting requirements payments made in the form of compensation to officers, supervisors, and employees for performance of their regular duties. The "split income" theory urged by the staff report, requires that only those payments for "regular duties" be exempted and that payments compensating for activities that constitute unfair labor practices must still be reported. An example is the salary paid to a supervisor for time spent interrogating an employee about his union sentiments.

Mr. Hunsucker argues to the contrary. He explained that bringing cases solely on the "split income" theory is neither workable nor practicable for two reasons. First, the statutory purpose is not furthered since wage payments are known facts. Second, implementation of the theory would require tracking the NLRB decisions long since litigated and remedied. He also noted that like "indirect" activity, there is no court decision supporting the "split income" theory.[108]

The question of what constitutes "indirect" persuader activity and whether reporting is required under the "split income" theory may soon be resolved. In *International Union UAW v. Brock*[109] the District of Columbia Circuit recently held that while the Administrative Procedure Act precluded judicial review of the Labor Department's

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[105] *See Director's Statement, supra* note 89, at 342.

[106] *Id.*

[107] Section 203(e) states:

> (e) Nothing contained in this section shall be construed to require any regular officer, supervisor, or employee of an employer to file a report in connection with services rendered to such employer nor shall any employer be required to file a report covering expenditures made to any regular officer, supervisor, or employee of an employer as compensation for service as a regular officer, supervisor, or employee of such employer.

[108] *See Director's Statement, supra* note 89, at 9-10.

[109] 783 F.2d 237 (1986).

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nonenforcement decision in employer and consultant reporting cases, it did not preclude review of new statutory interpretations announced by the Department in support of its enforcement decision. The court remanded to the district court to resolve the question of whether a law firm's activities to persuade plant supervisors to work against unionization comes within the advice exception of 29 U.S.C. § 433(c) and whether an employer is required to report regular wages paid to supervisors and other employees who commit unfair labor practices. The Labor Department explained its changed position on "indirect" persuader activity during this litigation as follows:

> An activity is characterized as advice if it is submitted orally or in written form to the employer for his use, and the employer is free to accept or reject the oral or written material submitted to him. . . . Thus, with respect to the consultant, although the law firm advised the employer (*including supervisors*) regarding anti-union activities during the UAW organizing campaigns, *these activities did not constitute persuader activities under the Act, and do not require reports by the consultant.*[110]

In addition, the Secretary addressed the "split income" theory question:

> Early in the administration of the Act it had been considered that a prorated share of regular salaries and wages paid to supervisors or other employees who engaged in conduct referred to in sections 203(a)(2) and (3) of the Act, 29 U.S.C. § 433(a)(2) and (3), might be reportable by the employer. This was known as the "split income theory.". . . In recent years, a large number of complaints were filed with the Secretary on this theory, and an examination of the many different fact situations presented by these complaints caused the Department of Labor to reexamine the split income theory and its relationship to section 203(e) of the Act. Reviewing legislative history, it was found that "[u]nder section 203(e) . . . none of reporting requirements are applicable when the services are

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[110] *Id.* at 243.

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> rendered by a regular officer, supervisor, or employee of the employer." (Barry Goldwater, Analysis of the Labor-Management Reporting and Disclosure Act of 1950, Cong. Rec. 19749-62, Oct. 2, 1959). Given the ambiguity of the language of section 203(e) together with the purpose of the Act to expose hidden amounts of money spent by the employer in his attempts to convince his employees not to unionize, and given that wage payments are known facts, *it is the Department's view that employers are not required to report regular wages paid to regular supervisors and other employees.*[111]

3. *Scope of the "Advice" Exemption for Consultant Reporting.* Under section 203(b), if a labor relations consultant for an employer attempts either to "persuade" employees or to supply the employer with information about the activities of employees, then the consultant must file two kinds of reports with the Secretary of Labor.[112] First, within thirty days after entering into an agreement with an employer to engage in persuader or surveillance activities, the consultant must file a report with the Secretary setting out the terms and conditions of the agreement.[113] Second, in any year in which a consultant receives payments pursuant to such an agreement with an employer, the consultant must file an annual report showing receipts and disbursements "from employers on account of labor relations advice or services."[114]

A hypothetical illustrates the problems with such reporting requirements. Suppose that in a particular year, a management law firm represents two employers, Acme Products and Baker Products. For Acme Products, the firm's lawyers engage in two sorts of activities. First, the lawyers make speeches directly to Acme employees advising the employees to vote against the union. Second, they advise Acme management on legal and policy matters. For Baker Products, the lawyers engage in no persuader or surveillance activity, but do advise management on legal and policy matters. Undoubtedly, the law firm must file a thirty-day report detailing the

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[111] *Id.* (quoting Secretary Brock).
[112] 29 U.S.C. § 433(b) (1982).
[113] *Id.*
[114] *Id.*

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persuader agreement with Acme Products and must include receipts and disbursements pursuant to that agreement in an annual report to the Secretary. But must the annual report also include nonpersuader receipts and disbursements in connection with the Acme representation, and, even more importantly, must the law firm include anything at all in the annual report about the firm's work for Baker Products?

During the nearly three decades since the enactment of the Landrum-Griffin Act, the position of the Secretary has remained the same: if a labor relations consultant receives persuader payments from any employer in a year, then the consultant must report receipts and disbursements for all of its labor relations advice or services for all employers during that year.[115] Thus, in the above hypothetical the management law firm must include in an annual report to the Secretary all of its receipts and disbursements (both persuader and nonpersuader) in connection with its work for Acme Products and all of its receipts and disbursements in connection with the work for Baker Products, even though the law firm did no persuader work for Baker Products during the year.

As an intepretation of section 203(b) standing alone, the Secretary's view would be relatively uncontroversial. The provision requires the annual reporting of receipts and disbursements from "employers" (in the plural) on account of labor relations "advice" or services. There is no indication in the language of 203(b) that "advice" has some meaning other than its ordinary meaning. Section 203(b), however, must be considered with section 203(c) of the Act. Section 203(c) states that nothing in section 203 "shall be construed to require any . . . person to file a report covering the services of such person by reason of his giving or agreeing to give advice to [an] employer . . . ."[116] Subsection (b), then, requires consultants to file annual reports detailing receipts and disbursements on account of "advice" given to employers. But subsection (c) seems to

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[115] *See* Donovan v. Rose Law Firm, 768 F.2d 964, 966 (8th Cir. 1985); Humphreys, Hutcheson & Moseley v. Donovan, 755 F.2d 1211, 1214-15 (6th Cir. 1985); Price v. Wirtz, 412 F.2d 647, 649 (5th Cir. 1969) (en banc); Douglas v. Wirtz, 353 F.2d 30, 30-31 (4th Cir. 1965), *cert. denied*, 383 U.S. 909 (1966); Donovan v. Master Printers Ass'n, 532 F. Supp. 1140, 1144 (N.D. Ill. 1981), *aff'd*, 699 F.2d 370 (7th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

[116] *See supra* note 95.

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exempt from all of the Act's reporting requirements any services rendered by a consultant "by reason of giving or agreeing to give advice."

The Secretary's consistent view has been that section 203(c) protects only the consultant who does not engage in persuader activities for any employer at all during a reporting year.[117] Therefore, a consultant who engages in any activities for any employer during a reporting year sufficient to trigger the requirement of a thirty-day report under section 203(b) may not rely on section 203(c) for that year. Instead, the consultant must file an annual report under subsection (b) detailing receipts and disbursements "on account of labor relations advice or services" with respect to all of the consultant's employer clients. This requirement even applies to clients for whom the consultant has not engaged in persuader activities during the year.

Fourth,[118] Sixth,[119] and Seventh Circuit[120] panels, and the Fifth Circuit[121] en banc have sustained the Secretary's reading of the Act (although only the Seventh Circuit decision was unanimous).[122] Writing for the Fifth Circuit's en banc majority in *Price v. Wirtz*, Chief Judge Brown justified the Secretary's broad construction of the section 203(b) reporting requirement on the ground that Congress meant to discourage the persuader business:

> [D]isclosure for all labor relations clients is the price the Attorney-persuader must pay if he wishes to engage in

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[117] *See* Donovan v. Rose Law Firm, 768 F.2d 964, 966, 976 (8th Cir. 1985); Humphreys, Hutcheson & Moseley v. Donovan, 755 F.2d 1211, 1215-16 (6th Cir. 1985); Price v. Wirtz, 412 F.2d 647, 649-66 (5th Cir. 1969) (en banc); Douglas v. Wirtz, 353 F.2d 30, 30-31 (4th Cir. 1965), *cert. denied*, 383 U.S. 909 (1966); Donovan v. Master Printers Ass'n, 532 F. Supp. 1140, 1144 (N.D. Ill. 1981), *aff'd*, 699 F.2d 370 (7th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

[118] Douglas v. Wirtz, 353 F.2d 30 (4th Cir. 1965), *cert. denied*, 383 U.S. 909 (1966).

[119] Humphreys, Hutcheson & Moseley v. Donovan, 755 F.2d 1211 (6th Cir. 1985).

[120] Master Printers Ass'n v. Donovan, 699 F.2d 370 (7th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

[121] Price v. Wirtz, 412 F.2d 647 (5th Cir. 1969) (en banc).

[122] In the Fourth Circuit decision, *Douglas v. Wirtz*, Judge Lewis dissented without opinion. 353 F.2d 30, 32 (1965) (Lewis, J., dissenting). In the Fifth Circuit's en banc decision in *Price v. Wirtz*, the vote was 7-5, with Judges Gewin, Coleman, Ainsworth, Godbold, and Dyer dissenting. 412 F.2d 647, 651. Judge Pell dissented from the Seventh Circuit panel decision. *Master Printers Ass'n v. Donovan*, 699 F.2d 370, 371 (1983) (Pell, J., dissenting), *cert. denied*, 464 U.S. 1040 (1984). *See supra* notes 109-14 and accompanying text.

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> [persuader] activities. The legislative judgment that one who engages in the persuader business must be subjected to the pressure of revealing publicity is amply justified by the difficulty in distinguishing between those activities that are persuader activities and those that are not, and by the opportunity for misleading concealment of the true nature of such Attorney's work in situations involving intricate corporate conglomerate associates, or, equally pressing, industry-wide labor controversies. Behind this argument, of course, was the congressional conviction that quite without regard to the motives or methods of particular individuals engaging in it, the persuader business was detrimental to good labor relations and the continued public interest. Since a principal object of LMRDA was neutralizing the evils of persuaders, it was quite legitimate and consistent with the Act's main sanction of goldfish-bowl publicity to turn the spotlight on the lawyer who wanted not only to serve clients in labor relations matters encompassed within § 203(c) but who wanted also to wander into the legislatively suspect field of a persuader.[123]

On the other hand, Judge Pell, dissenting from the Seventh Circuit panel decision in *Master Printers Association v. Donovan*, called the Secretary's construction of the Act "weird."[124] He urged adoption of the view that a consultant is not required to report receipts and disbursements with respect to nonpersuader clients, even if the consultant has done persuader work for other employers during a reporting year.[125]

Recently, in a two-one decision, an Eighth Circuit panel adopted Judge Pell's construction of the statute.[126] Judge Bowman offered three reasons for the holding. First, he observed that the Secretary's narrow construction of section 203(c) seemed inconsistent with the Conference Committee Report on the LMRDA, which had characterized subsection (c) as a "broad exemption" from the reporting

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[123] *Price*, 412 F.2d at 650 (footnotes omitted).

[124] *Master Printers Ass'n*, 699 F.2d at 372 (7th Cir. 1983) (Pell, J., dissenting), *cert. denied*, 464 U.S. 1040 (1984).

[125] *Id.* at 373.

[126] Donovan v. Rose Law Firm, 768 F.2d 964 (8th Cir. 1985).

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requirements set out in subsection (b).[127] Second, Judge Bowman noted that the Secretary's construction departed from a "congruity" otherwise present in the legislation. He cited various LMRDA provisions requiring the parties to certain arrangements to file reports, but then observed that under the Secretary's construction of section 203, a consultant was obligated to report arrangements with nonpersuader clients, even though those clients had no parallel obligation.[128] Finally, Judge Bowman invoked the "cardinal principle" that a court, if possible, should construe a statute in a way that avoids constitutional questions.[129]

The legislative history of the LMRDA does not help answer the question of the scope of the section 203(b) consultant reporting requirements. The issue has divided nearly every appellate court that has faced it. Still, one may well question whether the Eighth Circuit panel majority should have rejected the construction placed on the legislation by the agency charged with its enforcement, particularly in view of the fact that the Secretary's position has remained constant for over two decades and has not been overridden by Congress.

A novel argument attempting to find inclusion within the section 203(c) exemption was presented to the court in *Humphreys, Hutcheson & Moseley v. Donovan*.[130] In this case attorneys were required to report persuader activities in which they had been engaged. The attorneys argued, however, that they were released from the reporting requirements of section 203(b) because of prior disclosure to the employees that they were speaking on behalf of management. The court rejected the argument as unsupported by the statutory language since no such statutory exemption provides that prior disclosure to a client's employees releases the labor relations consultant from reporting otherwise reportable activities, and the section 203(c) exemption simply does not apply.[131]

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[127] *Id.* at 967-69.
[128] *Id.* at 973-75.
[129] *Id.* at 975.
[130] 568 F. Supp. 161 (M.D. Tenn. 1983), *aff'd*, 755 F.2d 1211 (6th Cir. 1985).
[131] *Id.* at 168. Affirming the district court's judgment, the Sixth Circuit explained that "[w]hen enacting the LMRDA, Congress did not distinguish between disclosed and undisclosed persuaders or between legitimate and nefarious persuasive activities. Rather, Congress determined that persuasion itself was a suspect activity and con-

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III. CONCLUSION

The time has come for Congress to reexamine the consultant reporting provisions of the LMRDA. The provisions were primarily designed to supplement the NLRA's protection of employee freedom of choice on the question of union representation, but there is substantial evidence to support the view that the provisions have not been particularly effective. The Department of Labor has brought relatively few consultant reporting cases in the two-and-a-half decades since Congress enacted the LMRDA. Presumably this inaction reflects the fact that benefits of requiring reporting in a particular case are not generally worth the substantial litigation costs involved in proving a violation of the reporting provisions. One predictable consequence of this lack of vigorous enforcement is a lack of compliance.

A Labor Department policy of vigorous enforcement of the reporting provisions would not satisfy some of those who are critical of the provisions, however, because section 203 as currently structured does not require the reporting of certain consultant activities that labor finds most objectionable. Under the Secretary's interpretation of the statute, consultants who work only with management to help orchestrate union election campaigns have not engaged in either direct or indirect persuader activities and therefore are not required to file reports. Some advocates for organized labor, though, have characterized such efforts as "union busting" and have called for reporting. It is not at all clear, however, that management consultants should be treated any differently from consultants in other contexts, such as those in political campaigns, so long as those consultants do not engage in behavior that amounts to an unfair labor practice. One commentator has suggested that the solution to organized labor's concerns about consultant activities might be to include consultants as well as employers in unfair labor practice proceedings.

Finally, in deciding whether the consultant reporting provisions of the LMRDA should be retained in any form, Congress should consider the empirical work done by Getman, Goldberg, and Her-

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cluded that the possible evil could best be remedied through disclosure." *Humphreys, Hutcheson & Moseley*, 755 F.2d 1215 (6th Cir. 1985).

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man,[132] which suggests that a substantial percentage of American workers pay little attention to persuasive activities by either management or labor in deciding which way to vote in an NLRB election. The Getman study supports the view that the information provided by employer and consultant reporting, even if made available in advance of an election, would have little value in protecting the employees' reasoned choice.

[132] Getman, Goldberg & Herman, Union Representation Elections: Law and Reality (1976).

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