7-1-1970

Some Aspects of the LMRDA Reporting Requirements

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COLLECTIVE bargaining became the keystone of our national labor policy with the passage of the Wagner Act[1] in 1935. The central role of this procedure was preserved in the Taft-Hartley[2] and Landrum-Griffin[3] Acts. By choosing collective bargaining as the principal instrument of labor market control, Congress sought to remove sources of industrial strife by a method which preserved private determination free from either unchecked employer power or smothering governmental control.[4] An additional attribute of this device has been pointed out by Professor Clyde Summers:

> Collective bargaining . . . was historically conceived as something more than an ingenious gimmick of economic self-regulation by countervailing power. . . .
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> Collective bargaining, as a national policy, is intended to be an instrument of industrial democracy and that national policy presupposes that the workers will have a voice through their union in determining the terms and conditions of their employment.[5]

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1 National Labor Relations Act, ch. 372, §§ 1-16, 49 Stat. 449-57 (1935), *as amended* 29 U.S.C. §§ 151-68 (1964) [hereinafter cited as NLRA].

2 Labor-Management Relations Act, ch. 120, §§ 1-503, 61 Stat. 136-62 (1947), *as amended* 29 U.S.C. §§ 141-87 (1964) [hereinafter cited as LMRA].

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining . . . .

LMRA § 1, 29 U.S.C. § 151 (1964).

3 Labor-Management Reporting & Disclosure Act, Pub. L. No. 86-257, §§ 1-707, 73 Stat. 519-46 (1959), *as amended* 29 U.S.C. §§ 153(b), (d), 158(a)(3), (b)(4), (b)(7), (c), (f), 159(c)(3), 160(*l*), (m), 164(c), 186(a)-(c), 187(a), 401-531 (1964) [hereinafter cited as LMRDA].

4 *See* LMRA § 1, 29 U.S.C. § 151 (1964).

5 Summers, *The Public Interest in Union Democracy*, 53 NW. U.L. REV. 610, 614-15 (1958). Professor Summers further pointed out that

> the underlying philosophy of the Wagner Act was to preserve free enterprise by encouraging a device which would meet the needs of adequately protecting the workers' interests with a minimum of government intervention. This serves the vital political function of creating centers of power and instruments of control

It was the industrial democracy aspect of collective bargaining that provided the main focus for the Landrum-Griffin Act. While Congress found that the quoted presupposition of our national policy was generally true—that is, "[t]he overwhelming majority [of unions] are honestly and democratically run," it also determined that internal union democracy could not be guaranteed for all unions "without the coercive powers of government . . . ."[6] Congress also found that collective bargaining was being undermined by "important sections of management [which] refused to recognize that . . . employees have a right to form and join unions without interference . . . ."[7] In essence, therefore, Landrum-Griffin was supplementary legislation designed to eliminate or prevent practices which distorted and defeated the collective bargaining policy of the Labor-Management Relations Act.[8]

It is significant that in enacting Landrum-Griffin, Congress acted within "a general philosophy of legislative restraint."[9] Insofar as internal union democracy is concerned, the Act was fashioned from the premise that "[g]iven the maintenance of minimum democratic safeguards and detailed essential information about the union, the individual members are fully competent to regulate union affairs."[10] Minimum democratic safeguards were provided in part by a union member bill of rights in Title I; by a limitation on the use of the trusteeship in Title III; and by a specification of fair election procedures in Title IV. The guarantee of "essential detailed information" was implemented, in the main, by Title II. This title requires labor organizations to file detailed reports on their financial and internal administrative affairs. It also requires disclosure by union officers and employees of situations involving a potential conflict of interests. In theory, union members, armed with this information and having the benefit of secret ballot elections, would assure the responsiveness of union officials.

The protection of collective bargaining in Landrum-Griffin goes beyond matters of internal union democracy, however. In formulating this legislation, Congress started from the premise that "if the public

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apart from the state so that the state does not become unmanageable or dangerously large. It distributes power, thereby strengthening our political pluralism.

Id. at 614.

6 1 LEGISLATIVE HISTORY OF THE LMRDA 401-02 (NLRB 1959).

7 *Id.* at 402.

8 *See* LMRDA § 2, 29 U.S.C. § 401 (1964).

9 1 LEGISLATIVE HISTORY OF THE LMRDA 403 (NLRB 1959).

10 *Id.*

has an interest in preserving the rights of employees"—that is, the right to form or join unions without interference, "then it has a concomitant obligation to insure the free exercise of them."[11] To supplement the existing protections of the LMRA, Congress chose to aid employee free choice through a system of reporting and disclosure requirements directed toward employers and employer middlemen.[12] Under LMRDA sections 203(a) and (b), reports are required as to certain arrangements and activities deemed by Congress to be relevant to employee decision making.

This statutory scheme has now been in effect for more than a decade, and the time is certainly ripe for an evaluation of the usefulness of reporting and disclosure as a control device.[13] However, that is not the purpose of this article. All that is attempted here is a first step in that process in the form of a review of how these provisions have fared in the courts since 1959. Nevertheless, some preliminary judgments may be ventured.

I. Required Reporting and the Privilege Against Self-Incrimination

Section 302(a)[14] of the LMRA makes certain payments to a union representative by an employer or an employer consultant unlawful. Section 302(b)[15] similarly proscribes the receipt of such payments by a union representative. When Congress made such payments and receipts reportable to the Secretary of Labor in LMRDA sections 203(a)(1)[16] and 202(a)(6),[17] the stage was set for a fifth amendment challenge based on the privilege against self-incrimination.

During congressional debate, the potential constitutional infirmities of these reporting provisions did not go unnoticed. In Senate consideration of the LMRDA, Senator Morse stated that "section 202(a)(6) seems to me to be plainly unconstitutional, since it is an express

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11 *Id.* at 407.

12 For a review of the legislative history of these provisions, see Beaird, *Reporting Requirements for Employers and Labor Relations Consultants in the Labor-Management Reporting and Disclosure Act of 1959*, 53 Geo. L.J. 267 (1965).

13 Such an evaluation could result from the hearings that are to be held on two House bills recently introduced to amend LMRDA § 203(a), 29 U.S.C. § 433(a) (1964). The two bills are H.R. 15427, 91st Cong., 1st Sess. (1969), and H.R. 15428, 91st Cong., 1st Sess. (1969), introduced by Congressmen O'Hara (Michigan) and Thompson (New Jersey) respectively.

14 LMRA § 302(a), 29 U.S.C. § 186(a) (1964).

15 LMRA § 302(b), 29 U.S.C. § 186(b) (1964).

16 LMRDA § 203(a)(1), 29 U.S.C. § 433(a)(1) (1964).

17 LMRDA § 202(a)(6), 29 U.S.C. § 432(a)(6) (1964).

violation of the protection against self-incrimination . . . ."[18] For the same reasons, he expressed serious doubts about the constitutionality of section 203(a)(1).[19] Various legal writers articulated a more limited concern after the LMRDA's enactment.[20]

The doubts asserted by Senator Morse were borne out almost ten years later in *United States v. McCarthy*.[21] In a thirty-eight count indictment, McCarthy, a union officer, was charged with violating both sections 302(b) of the LMRA and 202(a)(6) of the LMRDA by receiving payments from an employer consultant in 1961 and 1962 and by failing to report such payments to the Secretary of Labor. He was also charged with filing a false report in 1965. McCarthy contended that the privilege against self-incrimination barred his prosecution for failure to file the required reports. Basically his argument was that he was being charged with the crime of failing to report a crime he had committed. Federal Judge Marvin Frankel of the Southern District of New York agreed with McCarthy and held that the fifth amendment privilege provided a complete defense to a prosecution for failure to file the prescribed reports.[22] To put this decision in perspective and to evaluate its impact, it is appropriate to examine briefly the relevant fifth amendment decisions prior to McCarthy.

A. *The Fifth Amendment Cases*

The scope of the self-incrimination problems presented by the LMRDA reporting requirements is not as great as might appear at first blush. The Supreme Court long ago decided in *Hale v. Henkel*[23] that the privilege is not available to corporations. Similarly, the Court held in *United States v. White*[24] that the privilege does not extend to

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18 105 CONG. REC. 17,871 (1959).

19 *Id.*

20 Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851, 884-86 (1960); Fisher, *Constitutional Questions Under the New Act*, 48 GEO. L.J. 209, 211-19 (1960); Smith, *The Labor-Management Reporting and Disclosure Act of 1959*, 46 VA. L. REV. 195, 211 & n.69 (1960).

21 298 F. Supp. 561 (S.D.N.Y. 1969).

22 *Id.* at 567. Judge Frankel, however, held that McCarthy had to stand trial on the charge of filing a false report. The judge reasoned that when McCarthy purported to comply with the requirement by filing a report, he waived the fifth amendment privilege. *Id.* McCarthy was later found guilty by a jury on this count, and his post-trial motions were denied. United States v. McCarthy, 300 F. Supp. 716 (S.D.N.Y. 1969). This was subsequently affirmed by the Second Circuit, which stated that "having filed a report, [McCarthy] was obliged to make it a true and complete report." United States v. McCarthy, 422 F.2d 160, 163 (2d Cir. 1970).

23 201 U.S. 43 (1906).

24 322 U.S. 694 (1944).

unions. In *White*, the Court also made clear that the privilege was not available to individuals with regard to corporate or union records even though those records might tend to incriminate them personally. These decisions therefore limit the area of constitutional concern to cases involving reports of payments made by noncorporate employers or consultants and reports of receipts accepted by union officers in an individual capacity.

United States v. Sullivan,[25] a 1927 decision, involved the prosecution of an alleged bootlegger for failing to file an income tax return. Sullivan argued that the filing of a return might incriminate him by revealing the illegal source of his income. The Court rejected this argument and held that this self-incrimination claim would not excuse a complete failure to file. The Court did suggest, however, that the privilege may have properly been asserted with respect to specific questions in the return.[26]

Cases subsequent to *Sullivan* indicated that the privilege would not excuse the omission of any information from required returns and reports or the failure to keep records required by law. In several cases during the early 1940's, the courts held that papers, records and reports required by law to be made and kept on transactions which are appropriate subjects of governmental regulation are not private but quasi-public records and therefore are not covered by the privilege against self-incrimination.[27] *United States v. Darby*[28] is representative of these cases. *Darby* involved the failure of an individual proprietor to keep records required by the Fair Labor Standards Act.[29] Answering the defendant's fifth amendment contention, the Court said: "Since, as we have held, Congress may require production for interstate commerce to conform to those conditions, it may require the employer, as a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it."[30] As one writer has pointed out, this

25 274 U.S. 259 (1927).

26 *Id.* at 263-64.

27 United States v. Darby, 312 U.S. 100 (1941); Rodgers v. United States, 138 F.2d 992 (6th Cir. 1943) (Defendant refused to file certain reports required under the Agricultural Adjustment Act.); Bowles v. Amato, 60 F. Supp. 361 (D. Colo. 1945), *aff'd sub nom.* Amato v. Porter, 157 F.2d 719 (10th Cir.), *cert. denied*, 329 U.S. 812 (1946) (Certain records kept pursuant to the Emergency Price Control Act could be subpoenaed and introduced in evidence against the person who kept them.).

28 312 U.S. 100 (1941).

29 Fair Labor Standards Act, ch. 676, §§ 1-19, 52 Stat. 1060-69 (1938), *as amended* 29 U.S.C. §§ 201-19 (1964).

30 312 U.S. at 125.

language would support a law requiring a kidnapper who has taken his captive across state lines to file a report of his activity, including a report as to the whereabouts of his victim.[31]

In 1948, the Supreme Court had further opportunity to deal with the "required records doctrine" when it decided *Shapiro v. United States*.[32] During World War II, the Emergency Price Control Act[33] required certain records to be kept by food licensees. Records had been subpoenaed from Shapiro; and on the basis of those records, he was convicted of violating the Office of Price Administration's regulations against tie-in sales by sellers of controlled articles. The Court affirmed Shapiro's conviction, ruling that since the records were required by law to be kept, they were public documents and therefore outside the protection of the privilege. In a 5-to-4 decision, the Court approved such use of records "when there is a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator."[34] Mr. Justice Frankfurter was moved to comment in dissent that "[i]f records merely because required to be kept by law *ipso facto* become public records, we are indeed living in glass houses."[35]

Fears that the privilege against self-incrimination was a dead letter where reporting was required by law were dispelled in 1965, however, when the Supreme Court decided *Albertson v. Subversive Activities Control Board*.[36] In an earlier case, the Court had sustained the obligation of the Communist Party to register with the Attorney General as a "Communist-action organization."[37] When the party failed to register, the obligation to do so then fell to the individual members. The Attorney General petitioned the Subversive Activities Control Board to obtain an order requiring two alleged members of the Party to register. The Board determined that the petitioners were Party members and ordered them to register. The court of appeals affirmed this

31 Fisher, *supra* note 20, at 214.

32 335 U.S. 1 (1948).

33 Ch. 26, § 202, 56 Stat. 30 (1942).

34 335 U.S. at 32.

35 *Id.* at 51 (dissenting opinion).

36 382 U.S. 70 (1965), *noted in* Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103.

37 Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

order, holding that the issue of privilege would be ripe for adjudication only in a prosecution for failure to register.[38] The Supreme Court reversed, holding not only that the question was ripe but also that the provision of the Subversive Activities Control Act of 1950[39] requiring registration by individual members violated the members' privilege against self-incrimination. It is interesting that the Court made no mention of *Shapiro v. United States*.[40] It did, however, distinguish the case before it from *United States v. Sullivan*.[41] Mr. Justice Brennan, writing for an unanimous Court, said:

> In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime.[42]

Thus *Albertson* served notice that the Court was prepared to reassess prior cases and give relatively more weight to the policy of the privilege as against the Government's need for information to effectuate a regulatory scheme.

From *Albertson* it was indeed a short step to *Marchetti v. United States*,[43] *Grosso v. United States*,[44] and *Haynes v. United States*,[45] all decided on the same day. *Marchetti* and *Grosso* both involved the federal wagering tax provisions,[46] which impose a system of taxes with related registration requirements. An excise tax is imposed on persons engaged in the business of accepting wagers.[47] These persons are also subject to an annual occupational tax.[48] Those liable for the occupational tax must register each year with the director of their local internal revenue district by submitting a form indicating that they

38 332 F.2d 317 (D.C. Cir. 1964).
39 50 U.S.C. §§ 781-98 (1964).
40 335 U.S. 1 (1948).
41 274 U.S. 259 (1927).
42 382 U.S. at 79.
43 390 U.S. 39 (1968).
44 390 U.S. 62 (1968).
45 390 U.S. 85 (1968).
46 INT. REV. CODE of 1954, §§ 4401-23.
47 *Id.* § 4401.
48 *Id.* § 4411.

are in the business of accepting wagers.[49] Those liable for the excise tax are required to keep daily records of wagers accepted,[50] to permit inspection of their account books[51] and to file monthly reports of their wagering activities.[52] In addition, it is specifically provided that the payment of the wagering tax confers no immunity from federal or state prosecutions for engaging in unlawful activities.[53] When *Marchetti* and *Grosso* were decided, registrants also were required to post revenue stamps denoting payment of the occupational tax "conspicuously" in their place of business.[54] Furthermore, principal revenue offices had to keep for public inspection a list of registrants and to provide certified copies of the list to any state or local prosecuting officer.[55]

Marchetti had been convicted of failure to register and pay the occupational and excise taxes.[56] Grosso had been convicted of failing to pay the occupational and excise taxes.[57] The Court, in two 7-to-1 decisions, reversed the convictions to hold that in these situations the federal gambling tax and registration requirements are inconsistent with the fifth amendment privilege, since compliance with these provisions creates real and substantial hazards of incrimination. Mr. Justice Harlan, speaking for the Court in both cases, distinguished the "required records" doctrine on the basis of the "three principal elements" of the doctrine as described in *Shapiro*. Justice Harlan found first that the requirements at issue in *Marchetti* and *Grosso* were not imposed in "an essentially noncriminal and regulatory area of inquiry" but rather were directed to a " 'selective group inherently suspect of criminal activities.' "[58] This distinction was really drawn in *Albertson*[59] rather than in *Shapiro*.[60] Second, he found that "what-

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49 *Id.* § 4412.

50 *Id.* § 4403.

51 *Id.* § 4423.

52 Treas. Reg. § 44.6011(a)-1(a) (1959).

53 INT. REV. CODE of 1954, § 4422.

54 Act of Aug. 16, 1954, ch. 736, § 6806(c), 68A Stat. 831, *as amended* INT. REV. CODE of 1954, § 6806.

55 Act of Aug. 16, 1954, ch. 736, § 6107, 68A Stat. 756, *repealed*, Act of Oct. 22, 1968, Pub. L. No. 90-618, § 203(a), 82 Stat. 1235.

56 United States v. Costello, 352 F.2d 848 (2d Cir. 1965).

57 United States v. Grosso, 358 F.2d 154 (3d Cir. 1966).

58 390 U.S. at 57, quoting Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 79 (1965).

59 *See* notes 36-42 and accompanying text *supra*.

60 *See* notes 32-35 and accompanying text *supra*.

ever 'public aspects' there were to the records at issue in *Shapiro*,"[61] there were none to the information demanded from Marchetti and Grosso. Justice Harlan was quick to point out that information does not become "public" merely because it is demanded by statute since "if this alone were sufficient, the constitutional privilege could be entirely abrogated by any Act of Congress."[62] Third, he ruled that Marchetti was not being required "to keep and preserve records 'of the same kind as he customarily kept.' "[63] This element, however, "seems to add little to the 'public aspects' element and seems to bear no relation to the values protected by the fifth amendment."[64]

In determining the scope of the fifth amendment privilege, two things seem clear from *Marchetti* and *Grosso*: records do not become public records merely because they are required by law to be kept, and an important factor in these cases is the group at which the reporting requirements are directed.

Haynes v. United States,[65] decided the same day as *Marchetti* and *Grosso*, involved a prosecution for violation of the tax provisions[66] of the National Firearms Act. The Act requires the possessor of a defined firearm to register the weapon, unless he made it, or acquired it by transfer or importation and complied with the Act's requirements as to transfers, markings and importations.[67] Haynes was convicted of knowingly possessing a defined firearm which had not been registered.[68] The Court, again speaking through Mr. Justice Harlan and employing the same reasoning it had in *Marchetti* and *Grosso*, reversed Haynes' conviction. It held that a proper claim of privilege provides a full defense to any prosecution either for failure to register possession of a firearm or for possession of an unregistered firearm, two offenses the Court believed could not be properly distinguished.

B. *Applying the Fifth Amendment to Section 202(a)(6)*—United States v. McCarthy

It was against this backdrop of cases that Judge Frankel came to consider John P. McCarthy's contentions that his privilege against

61 390 U.S. at 57.

62 *Id.*

63 *Id.*

64 *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 202 (1968).

65 390 U.S. 85 (1968).

66 INT. REV. CODE of 1954, §§ 5841, 5851.

67 INT. REV. CODE of 1954, § 5841.

68 Haynes v. United States, 372 F.2d 651, 652 (5th Cir. 1967); *see* INT. REV. CODE of 1954, § 5851.

self-incrimination barred, at the threshold, his prosecution for failing to file reports required by section 202(a)(6) of the LMRDA. Relying on *United States v. Sullivan* and *Shapiro v. United States*, the Government's argument supporting the validity of the reporting requirements was based on a contention that "the essential thrust of the reporting requirements is public disclosure to aid the internal regulation of union affairs, and not to aid criminal prosecution of union officers."[69] The Government also pointed out that not all payments required to be reported by section 202(a)(6) would constitute violations of LMRA section 302. These arguments, however, failed to impress the court.

Judge Frankel first looked to the statutory scheme. He pointed out that it is a federal crime for a union officer to receive payments from a labor consultant of an employer who employs members of the officer's union. Furthermore, these payments are required to be reported, and failure to comply with the reporting requirements is also made a criminal offense. This alone was enough to convince Judge Frankel that "it would be difficult to state a more literally apt occasion for assertion of the privilege defendant McCarthy invokes."[70] However, he looked beyond the statutory terms and found that legislative history "buttress[ed] the conclusion that seemed necessary in any event."[71] Thus he held that a proper claim of the privilege by those at whom the reporting sections are principally directed provides a full defense to prosecutions for failure to file reports required by section 202(a)(6).

In the light of prior cases, the court's holding appears appropriate. Of primary importance when determining the applicability of the fifth amendment privilege is the locus of inquiry of the reporting require-

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69 Gov't's Memorandum of Law in Support of Its Contention that Title 29 U.S.C. § 432(a)(6) Is Constitutional, United States v. McCarthy, 298 F. Supp. 561 (S.D.N.Y. 1969). Also, the Government attempted to draw the following distinctions between the LMRDA and the statutes involved in *Marchetti*, *Grosso*, *Haynes* and *Albertson*:

(a) [T]here is no statutory requirement in Landrum-Griffin mandating the turning over of reported information to Federal and state prosecuting officials.

(b) [U]nlike wagering, Communist activities, and Firearms control, financial transactions between labor and management per se cannot reasonably be said to be widely prohibited by State and federal law, nor an area permeated with criminal statutes.

(c) [U]nlike the wagering statutes, etc., not every portion of the report requires the reporting of incriminating information.

(d) [T]he Landrum-Griffin reporting requirements . . . are directed at a far larger class of people not suspected of criminal activities.

Id.

70 United States v. McCarthy, 298 F. Supp. 561, 564 (S.D.N.Y. 1969).

71 *Id.*

ments, a factor first mentioned in *Albertson*. Concededly, the payments required to be reported by section 202(a)(6) are not necessarily illegal.[72] However, as Judge Frankel noted, legislative history makes perfectly clear that the crux of matters required to be reported by union officers reflects bribery, conflicts of interest or, at a minimum, "questionable" dealings.[73] This shows, according to the court, that the requirements at issue in *McCarthy* were "aimed with candid deliberateness at 'a group inherently suspect of criminal activities,' " rather than imposed as a "broad, relatively neutral . . . 'regulatory' system . . . ."[74] The fact that not all transactions required to be reported are illegal does not seem to matter. The Government had emphasized in *Haynes v. United States* that registration under provisions of the National Firearms Act would not invariably be indicative of a violation of the Act's requirements. In reply, the Supreme Court had noted that "the correlation between obligations to register and violations can only be regarded as exceedingly high, and a prospective registrant realistically can expect that registration will substantially increase the likelihood of his prosecution."[75] With this in mind, it is difficult to disagree with Judge Frankel's conclusion in *McCarthy* that as a result of section 202(a)(6)'s reporting requirements, union officers face "real and appreciable" hazards of self-incrimination.

In addition to the group at which the reporting requirements are directed, two other elements must be considered in applying the "required records" doctrine as reformulated in *Marchetti* and *Grosso*. Not only must the reporting requirements be directed in an essentially non-criminal and regulatory area of inquiry, but the records demanded must have "public aspects" and must be "of the same kind as [are] customarily kept."[76] While the absence of any one of these three criteria apparently negates the applicability of "the required records" doctrine, it is difficult to identify with certainty the presence of any of them in *McCarthy*.

The teaching of *Marchetti* and *Grosso* is that records do not become "public" merely because they are demanded by statute. However, Mr. Justice Harlan offered no guidelines, in those decisions, as to when records come to have "public aspects." It has been suggested that the

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72 *Id.* at 565.
73 *Id.* at 565-66.
74 *Id.* at 566 (citations omitted).
75 390 U.S. at 97.
76 *Id.* at 57.

application of the phrase may depend on the answer to the question whether the records are already publicly available.[77] This could not be said of the information demanded of McCarthy. A related question is whether the records are of a kind customarily kept. This element stems from *Shapiro*, where the defendant was required by Office of Price Administration regulations to maintain ordinary sales records.[78] It seems unlikely that a union officer would customarily keep records of payments required to be reported by the LMRDA.

An appropriate question at this point is where do these cases leave reporting and disclosure as a public policy control device? What these cases reflect initially is that in their efforts to reconcile the Government's need for information with the individual's privilege against self-incrimination, the courts have begun to show more sensitivity for the values which the latter protects. This does not mean, however, that this changing judicial attitude has endangered record keeping and reporting requirements in general. As Justice Brennan pointed out in his concurring opinion in *Grosso*, "Congress is assuredly empowered to construct a statutory scheme which either is general enough to avoid conflict with the privilege, or which assures the necessary confidentiality or immunity to overcome the privilege."[79] With respect to LMRDA sections 202(a)(6) and 203(a)(1), the choice now seems legislative. Which way can these undesirable activities best be controlled—by direct regulation through prosecutions authorized by LMRA section 302, or by indirect regulation through reporting and disclosure and reliance upon self-help actions available to the union rank-and-file? The latter would seem to be more in keeping with the major premise of the LMRDA.[80] Valuable suggestions to restructure LMRA section 302 to relieve its rigidity have already been made.[81]

II. Employer Reporting and Constitutional Radiations

Unlike sections 202(a)(6) and 203(a)(1), apparently there were no doubts concerning the constitutionality of sections 203(a)(3), (4) and (5)[82] during congressional consideration of the LMRDA. Under section 203(a)(3) an employer must report any expenditure an object of

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77 *The Supreme Court, 1967 Term, supra* note 64, at 201.

78 *See* notes 32-35 and accompanying text *supra*.

79 390 U.S. at 72 (concurring opinion).

80 *See* text accompanying note 10 *supra*.

81 *See generally* Note, *Effect of Section 302(c)(5) Trust Fund Restrictions on Labor-Management Cooperation*, 1 GA. L. REV. 78 (1966).

82 LMRDA §§ 203(a)(3), (4), (5), 29 U.S.C. § 433(a)(3), (4), (5) (1964).

which was either to interfere with, restrain or coerce employees in the exercise of their protected organizational and bargaining rights, or to obtain information concerning the activities of employees or a union in connection with a labor dispute involving such employer. (However, a report need not be filed where the information is obtained solely for use in conjunction with an arbitral or legal proceeding.) Similarly, an employer is required, under section 203(a)(4), to report any agreement or arrangement with another person and, under section 203(a)(5), to report any payment pursuant thereto whereby the other person undertakes activities an object of which is to persuade employees with respect to their protected rights or to obtain information of the type described above. It is apparent, therefore, that reports are sometimes required concerning activities which constitute unfair labor practices under section 8(a) of the LMRA.

Despite Congress' confidence in their legality, a constitutional challenge to these provisions came in *Harvey Aluminum, Inc. v. Ragsdale.*[83] The National Labor Relations Board issued a complaint charging Harvey Aluminum with the commission of unfair labor practices. It was alleged that the company had hired a detective agency to maintain surveillance of the union activities of its employees. Harvey admitted the surveillance but insisted that its sole object was to detect and prevent pilferage of company property.

Following the issuance of the unfair labor practice complaint, the Secretary of Labor, through Area Director Ragsdale, made a written demand upon Harvey Aluminum to file a report pursuant to section 203(a) of the LMRDA. Prior to the ultimate determination of the unfair labor practice charge by the NLRB, the company filed suit against area director Ragsdale, and others, seeking declaratory and injunctive relief. Harvey asked that sections 203(a)(3), (4) and (5) be declared unconstitutional in that they violated its rights under the due process clause of the fifth amendment. It also sought temporary and permanent injunctions against enforcement of the Act and the empaneling of a three-judge district court to hear and determine the case.

The employer argued that these sections were unconstitutional because requiring the filing of a report admitting an unfair labor practice, while a Board proceeding on that precise issue was pending, would operate to deprive the employer of the right to deny those

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

charges in a fair trial before the Board.[84] So, Harvey reasoned, the Act required it to give up its due process right to a day in court.

On June 18, 1964, District Judge Yankwich denied Harvey Aluminum's motion to convene a three-judge court because "the plaintiff has not presented any valid grounds seeking to convene a 3-Judge court on the question of the unconstitutionality of the statute under which this action is brought."[85] For the same reason he denied the employer's motion for summary judgment requesting injunctive relief. Harvey appealed, and the Court of Appeals for the Ninth Circuit reversed the district court and ordered that a three-judge panel be convened.[86] However, before the constitutional questions could be resolved, the parties agreed to a stipulated dismissal of the action, under which the company's duty to file reports was made contingent upon the outcome of the Board proceeding.[87] The company promised that if the final determination of the Board, including all appeals provided for by the LMRA, resulted in the charges against Harvey Aluminum being sustained, then a report would be filed. Conversely, if the unfair labor practice charges were dismissed, the Labor Department agreed to take no further action to require reports of the transaction in question.

Thus this stipulation reflected a decision by the Labor Department to delay its actions under section 203 when unfair labor practice charges are involved until issues under the LMRA have been resolved by the Board. In view of the scheme of our national labor policy, this deference to the NLRB is appropriate.

Admittedly, there may be some elements of unfairness inherent in

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84 Plaintiffs' Reply Memorandum in Support of Their Motion for Convening a Three-Judge Court, Harvey Aluminum, Inc. v. Ragsdale, Civil No. 62-1480-Y (S.D. Cal. 1965). The plaintiffs also urged that section 203(a) was an unconstitutional abridgment of their fifth amendment privilege against self-incrimination in that:

(1) A report would constitute at least a prima facie case that they had wilfully failed to report, a crime under LMRDA section 209;

(2) A report would constitute an admission of willful failure to keep records, a crime under LMRDA section 209;

(3) A report would constitute an admission of a crime under LMRA section 302.

In making the fifth amendment arguments, Harvey Aluminum seemed to overlook the holdings of *Hale v. Henkel* and *United States v. White* (see notes 23 and 24 and accompanying text *supra*).

85 Civil No. 62-1480-Y (S.D. Cal. 1965).

86 Order Reversing Judgment of District Court, Harvey Aluminum, Inc. v. Ragsdale, No. 19,573 (9th Cir. 1965).

87 Stipulation and Agreement, Harvey Aluminum, Inc. v. Ragsdale, No. 19,573 (9th Cir. 1965).

placing an employer in the position of defending an action under section 203 while, at the same time, compelling him to contest basically the same issues in a Board proceeding.[88] However, the real reason for the Department's decision to defer to the Board appears to lie in the recognition that the LMRDA is, in this respect, mere supplementary legislation to the LMRA. As the Supreme Court has pointed out several times, "labor legislation is peculiarly the product of legislative compromise of strongly held views"[89] and should be read " 'mindful of the manifest purpose of the Congress to fashion a coherent national labor policy.' "[90]

Section 8(a)(1) of the LMRA[91] makes it an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of their rights to organize and bargain collectively. When a charge alleging that an employer has engaged in such an unfair labor practice is filed, the National Labor Relations Board, through the General Counsel, has the power to institute proceedings. The Supreme Court has described the nature of the Board's jurisdiction in the handling of these cases as follows:

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity

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88 In Palko v. Connecticut, 302 U.S. 319, 328 (1937), the Court pointed out that "attempt[s] to wear the accused out by a multitude of cases" may be inconsistent with the fundamental fairness required by due process. Also, Mr. Justice Douglas, dissenting in Cuicci v. Illinois, 356 U.S. 571, 573 (1958), stated that due process prevents "the prosecution being allowed to harass the accused with repeated trials and convictions on the same evidence." *Cf.* Ashe v. Swenson, 38 U.S.L.W. 4295 (U.S. Apr. 7, 1970).

89 NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 179 (1967) (citation omitted).

90 *Id.* at 79-80, quoting NLRB v. Drivers Local 639, 362 U.S. 274, 292 (1960).

91 29 U.S.C. § 158(a)(1) (1964).

> of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.[92]

Thus in creating the NLRB, Congress gave it primary responsibility to hear and adjudicate the factual and legal issues involved in cases of this kind. As a result, the expertise which the NLRB has developed over the subject matter of unfair labor practices makes it, rather than a United States district court, the more appropriate forum. If the Labor Department, therefore, attempted to require employer reports while NLRB proceedings were pending, the district courts would be given an opportunity to decide issues which Congress, in the LMRA, committed to the NLRB. By permitting the NLRB to exercise its primary responsibility and then relying on the doctrine of collateral estoppel as a basis for enforcing the supplementary reporting obligations of the LMRDA, the Department of Labor has acted mindful of the fact that section 203(a) "is only one of many interwoven" aspects of a complex policy.[93] This position, however, brings into play the proper relationship between the NLRB's determination that an unfair labor practice has been committed and what the Labor Department must show in a subsequent action seeking to require an employer to file a report of the transaction in question.

Wirtz v. National Welders Supply Co.[94] was an action against an employer whom the NLRB had previously found to have engaged in unfair labor practices. In 1958 the International Union of Operating Engineers began a campaign to organize National Welders' employees. About the same time, the company entered into an arrangement with, and made expenditures to, two labor consultant firms. As a result of the activities of these firms, a complaint was issued by the NLRB. In the subsequent proceeding, the Board found that the labor consultants, acting as National Welders' agents, had undertaken a campaign of interrogating employees concerning union membership, threatening them with discharge for engaging in union activity, requesting that they report any union activities of their fellow employees and instructing them not to join the union. Based on these findings, the Board concluded that National Welders had interfered with, restrained and

92 Garner v. Teamsters Local 776, 346 U.S. 485, 490-91 (1953). *See also* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

93 *Cf.* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 179 (1967); NLRB v. Drivers Local 639, 362 U.S. 274, 292 (1960).

94 254 F. Supp. 62 (W.D.N.C. 1966).

coerced its employees in violation of section 8(a)(1) of the LMRA.[95] The company did not seek review of the Board's decision.

The Secretary of Labor then brought an action under section 210 of the LMRDA to compel National Welders to file a true and accurate report concerning these activities under LMRDA sections 203(a)(3), (4) and (5). National Welders admitted that it had entered into arrangements with, and had made payments to, the labor consultant firms. However, it denied that "an object" of the arrangements or payments was of the character specified in these sections. The Secretary of Labor moved for summary judgment, relying in the main on the doctrine of collateral estoppel. This doctrine operates, following a final judgment, to conclusively establish a matter of fact or of law determined in an original action for purposes of a later lawsuit on a different cause of action between the parties to the original action or those in privity with them.[96] The Secretary contended that the Board's findings with respect to interference, restraint or coercion and the existence of the arrangement should be adopted by the court. The amount of the expenditure was established through discovery. The Secretary then took the position that these facts were sufficient to permit the inference of the necessary object under section 203(a) and that additional evidence on that point should not be required. This was simply an application of the oft-stated proposition that "[i]n the absence of admissions . . . of an illegal intent, the nature of acts performed shows the intent."[97] Judge Craven, however, denied the motion for summary judgment. He stated that "[*w*]*hat* has been done with respect to the

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95 National Welders Supply Co., 132 N.L.R.B. 660 (1961).

96 For a general discussion of the doctrine of collateral estoppel, see F. JAMES, CIVIL PROCEDURE 575-84 (1965).

97 Local 761, IUE v. NLRB, 366 U.S. 667, 674 (1961), quoting Seafarers Union v. NLRB, 265 F.2d 585, 591 (D.C. Cir. 1959).

The term "object" as used in the LMRA had a well-defined meaning. *See* Local 357, Teamsters v. NLRB, 365 U.S. 667, 675 (1961); Radio Officers' Union v. NLRB, 347 U.S. 17, 45 (1954); New York Mailers' Union No. 6, ITU, 136 N.L.R.B. 196, 197-98 (1962). In *Local 357, Teamsters v. NLRB, supra*, the Court pointed out that "[s]ome conduct may by its very nature contain the implications of the required intent; the natural foreseeable consequences of certain action may warrant the inference." 365 U.S. at 675. The Board explained the meaning of the term in the following way:

> The Respondent equates "an object" . . . with a specific intent to accomplish the action complained of. Respondent regards intent as synonymous with the *scienter* or *mens rea* of criminal violations. This is not, however, the type of intent which the Act requires to be proved. Rather, "in the absence of admissions . . . the nature of the acts performed shows the intent."

136 N.L.R.B. at 197-98.

employment of Lee Associates does not appear to be seriously controverted; *why* it was done appears to be a genuine issue as to a material fact, and not *res judicata*."[98]

After a trial on the merits in which the only new evidence regarding object was a disclaimer by Welders, the district court held that the doctrine of collateral estoppel was not operable in this case and dismissed the Secretary's complaint. The court's reasoning is best summarized by the following passage from Judge Craven's opinion:

> The questions [on the report which the Secretary sought to have answered correctly] relate to the state of mind of the management of Welders. That issue was not squarely presented to the Hearing Examiner in the unfair labor practice proceedings. Performing the forbidden acts, either itself or through Lee Associates, is not the same thing as employing Lee Associates *for the purpose* of accomplishing such forbidden acts. Imputing the conduct of Lee Associates to Welders does not necessarily determine that Welders' *purpose* in employing Lee Associates was unlawful.[99]

Judge Craven conceded that the findings of fact and conclusions of the Labor Board were "enough to engender strong suspicion as to Welders' motive in employing Lee Associates," but he felt this was "not enough to carry the issue by the greater weight of the evidence in the face of the oral testimony of denial offered by Welders."[100]

National Welders had also advanced what is basically a first amendment argument. The company contended that section 203(a) cannot require an employer to file a report admitting that it was guilty of violating the LMRA merely because the Labor Board had found against it in the 8(a)(1) proceeding, when, in fact, it had denied before the Board, and continued to deny, that it had committed an unfair labor practice. The company relied on a line of cases denying the NLRB authority to order employers to post notices that they will cease and desist from unfair labor practices of which they have been found guilty. In these cases the courts avoided constitutional problems through statutory construction, typical of which was Judge Learned Hand's statement in *Art Metals Construction Co. v. NLRB*:[101]

98 Memorandum Opinion and Order Denying Motion for Summary Judgment, Wirtz v. National Welders Supply Co., Civil No. 1725 (W.D.N.C., filed Mar. 30, 1965).

99 254 F. Supp. at 65 (emphasis by court).

100 *Id.* at 66.

101 110 F.2d 148 (2d Cir. 1940). Likewise, in Hartsell Mills Co. v. NLRB, 111 F.2d 291, 293 (4th Cir. 1940), the court disapproved "an order which in effect requires the

> Forcibly to compel anyone to declare that the utterances of any official, whoever he may be, are true, when he protests that he does not believe them, has implications which we should hesitate to believe Congress could ever have intended. At any rate, until the Supreme Court speaks, we will not so construe the statute . . . .[102]

Although the court in *National Welders* did not base its holding on this contention, it did show sympathy toward it.[103]

In summary, *National Welders* would seem to indicate that the Secretary will have to relitigate under section 203(a) matters previously litigated before the NLRB. Even this might not be enough since the decision, in this context, requires the Secretary to prove by independent evidence that "an object" of an employer, in making a payment or entering into an agreement with a labor consultant, was to engage in a reportable activity. Furthermore, the decision may also mean that even if the Secretary could offer such proof, he could not compel a denying employer to file a report. Whatever *National Welders* means, however, the Court of Appeals for the Fifth Circuit six months later in *Wirtz v. Ken Lee, Inc.*[104] effectively undermined the reporting requirements of section 203(a).

In late 1959 and early 1960, the International Ladies Garment Workers Union conducted an organizational campaign at the Ken Lee textile sewing plant located in Atlanta, Georgia. The campaign and subsequent representation election held by the NLRB resulted in the filing of unfair labor practice charges against the employer. After a hearing, the Board found, among other things, that Kenneth Jackson, the owner and president of Ken Lee, had paid an employee ten dollars to attend a union banquet and to report the names of Ken

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employer to confess publicly a violation of the law which he denies, and has the right to deny, even though he may have been guilty of the violation." What bothered the court was the "unnecessary humiliation" inherent in such an ordered confession. *Id.*

This same argument of employer humiliation was recently raised in connection with Board remedies in J.P. Stevens & Co. v. NLRB, 380 F.2d 292 (2d Cir.), *cert. denied*, 389 U.S. 1005 (1967), *enforcing as modified* 157 N.L.R.B. 869 (1966). In an unfair labor practice proceeding, as part of its remedy, the Board ordered Stevens company officials to read the notice to its employees. The Second Circuit modified this part of the Board's order to give the company the alternative of having the notice read by Board representatives, rather than by its own officials. The court felt that there was an element of humiliation in having company officials read the notice. 380 F.2d at 304-05.

102 110 F.2d at 151.

103 *See* 254 F. Supp. at 66.

104 369 F.2d 393 (5th Cir. 1966).

Lee employees attending the dinner. At the hearing, Jackson and his wife, the other principal officer of the company, admitted that they had given the employee the money, but they testified that it was a loan and denied that it was intended as compensation for surveillance activity. The Board's decision against Ken Lee was later enforced by the Court of Appeals for the Fifth Circuit.[105] Thus the Fifth Circuit agreed there was substantial evidence that Ken Lee, Inc., had made an "expenditure . . . an object [of which was] . . . to interfere with, restrain, or coerce employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing . . . ."[106]

Armed with these findings and the doctrine of collateral estoppel, the Secretary of Labor instituted a civil action under section 210 of the LMRDA against the company and the Jacksons. The complaint alleged that the defendants had failed to report an expenditure as required by section 203(a)(3). The Secretary moved for summary judgment; the defendants made a cross-motion for summary judgment and moved to dismiss the action.

At the hearings on these motions, counsel for the Secretary made it clear that he did not seek to require the Jacksons to admit or deny, on the report form provided by the Secretary, that the money had been paid for the purpose of union surveillance. Rather, he requested that the district court, applying collateral estoppel, make findings to the effect that the defendants had, in fact, hired an anti-union spy and paid her ten dollars, and suggested that it would meet the requirements of the Act if the defendants were ordered to file a report repeating these findings.

In denying the Secretary's motion for summary judgment and in granting the defendants' motion,[107] the district court held that there was no need to grant the relief requested by the Secretary because "[i]t is obvious that the Secretary has the facts which he seeks, and that the purposes of the Act have been fulfilled."[108] The amount of the expenditure was clearly also a factor in the decision, since in his opinion Judge Morgan stated that "the Court is not concerned with trifles . . . ."[109]

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105 Ken Lee, Inc. v. NLRB, 311 F.2d 608 (5th Cir. 1962), *enforcing* 133 N.L.R.B. 1598 (1961).

106 LMRDA § 203(a)(3), 29 U.S.C. § 433(a)(3) (1964).

107 Wirtz v. Ken Lee, Inc., Civil No. 8620 (N.D. Ga., filed Apr. 12, 1965).

108 *Id.* at 3.

109 *Id.* Judge Morgan appears to have placed too much reliance on the fact that the spy worked cheap. As Chief Judge John Brown of the Fifth Circuit has pointed out, in

The Secretary appealed and, on oral argument, modified his position to a contention that the defendants could be required to file a report repeating, in reply to the questions on the form supplied by the Secretary, the findings of the Board in the unfair labor practice case.[110] The Fifth Circuit, however, in a per curiam opinion, affirmed the judgment of the district court.[111] It held that the type of report requested by the Secretary, both before the district court and before the Fifth Circuit, was "outside the scope of the Act."[112]

The court obviously felt that the only type of report contemplated by section 203(a)(3) of the LMRDA is one *admitting* an expenditure of the type described in that section. However, it did seem to accept the applicability of the doctrine of collateral estoppel to situations of this kind when, in rejecting the reasoning of the district court, it stated that

> absent the circumstances of the denial of the payment by appellees . . . the report would have been due. The intent of Congress . . . is that reports be made in every case of payment, both by the payor and payee, and that these reports be maintained in a central public record center.[113]

But the court also said that in a case such as *Ken Lee,* where the defendants denied in the Board proceeding and continue to deny that a reportable expenditure was made, requiring the type of report contemplated by the Act "would be tantamount to requiring the admission of perjury in the unfair labor practice proceeding, or the filing of a false statement under § 209(b) of the Act."[114]

The consequences of *Ken Lee* seem to be that employers may not be required to report whenever they have denied in a Board hearing or judicial proceeding factual matters found to be otherwise by the adjudicative body. This position seems to result from considerations of both the fifth amendment's "privilege against self-incrimination" and the first amendment's protection of "freedom of speech." While admittedly there may be circumstances in which the fifth amendment privilege comes into play, it is clear that in this instance Ken Lee,

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the "field of labor relations what is small in *principal* is often large in *principle* . . . ." Jenkins v. United Gas Corp., 400 F.2d 28, 32 (5th Cir. 1968) (emphasis added).

110 Wirtz v. Ken Lee, Inc., 369 F.2d 393, 394 (5th Cir. 1966).

111 Wirtz v. Ken Lee, Inc., 369 F.2d 393 (5th Cir. 1966).

112 *Id.* at 395.

113 *Id.* at 394.

114 *Id.*

a corporation, is outside the scope of its protections.[115] Also, while the first amendment "guards the individual's right to speak his own mind" and limits the power of public authorities "to compel him to utter what is not in his mind,"[116] the court was not required to meet either of these constitutional issues head-on. In *Ashwander v. TVA*,[117] Justice Brandeis pointed out that "[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."[118] Avoidance of constitutional issues through statutory construction, as suggested in *Ashwander*, has been quite prevalent with respect to labor legislation.[119] This opportunity was clearly present in *Ken Lee*, since the statutory language in section 203(a)(5) provides that the reports shall be filed with the Secretary "in a form prescribed by him." Obviously when the Secretary asked that the reports be filed in terms of district court findings and not in terms of belief, he was asserting authority contained in the literal language of the Act. Also, he was resolving doubts consistent with prior experience in the labor field.[120] More importantly, however, he was adopting a position which protects individual rights yet accords with the central purpose of Congress—that is, making facts relevant to employee decision making available "in a central public record center."[121]

III. "PERSUADER" REPORTS[122]

Section 203(b)[123] requires reports from persons who, pursuant to an agreement or arrangement with an employer, undertake activities an object of which is to persuade employees in the exercise of their right to organize and bargain collectively, or to supply an employer with information about the activities of employees or a union in connection with a labor dispute involving the employer. However, a re-

115 Hale v. Henkel, 201 U.S. 43 (1906).

116 West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 634 (1943).

117 297 U.S. 288 (1936).

118 *Id.* at 347 (concurring opinion).

119 *See, e.g.*, Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

120 *See* note 101 and accompanying text *supra*.

121 A recent California case is illustrative of the balancing of the individual's constitutional rights against the state's interest in regard to disclosure of a candidate's or office holder's financial affairs. *See* City of Carmel-by-the-Sea v. Young, 85 Cal. Rptr. 1, 466 P.2d 225 (Sup. Ct. 1970).

122 A "persuader" has been defined by the Fifth Circuit as "any person who enters into an 'agreement or arrangement with an employer' an object of which is" prescribed in LMRDA section 203(b). Price v. Wirtz, 412 F.2d 647 n.2 (5th Cir. 1969).

123 LMRDA § 203(b), 29 U.S.C. § 433(b) (1964).

port need not be filed if the information is supplied solely for use in an arbitral or legal proceeding. Otherwise, the agreement or arrangement must be reported by the "persuader" within thirty days of its consummation. A second report disclosing certain receipts and disbursements must be filed annually. There are, however, some limitations on these reporting requirements.

No reports are required covering services by reason of giving advice to an employer; representing an employer before any court, administrative agency or arbitration tribunal; engaging in collective bargaining on behalf of an employer or negotiating agreements; or agreeing to perform any such activities.[124] Attorneys who are members in good standing of the bar of any state are not required to include in any report information lawfully communicated to them by their clients in the course of a legitimate attorney-client relationship.[125] Finally, section 203(b) neither amends the free speech proviso of the LMRA nor modifies the rights protected thereby.[126]

Litigation under section 203(b) has revolved around two basic questions. One deals with the impact of its provisions on attorneys; the other concerns the scope of the annual financial report. Whether attorneys who engage in "persuader" activities must report was one of the issues faced by the Court of Appeals for the Fifth Circuit in *Wirtz v. Fowler*.[127] The attorneys' activities in this case included making speeches to employees, interrogating employees as to their union sympathies and generally conducting anti-union campaigns for four clients. An action was filed in federal district court seeking a declaratory judgment that these activities did not give rise to a reporting obligation. The attorneys conceded that they had engaged in "persuader" activities as defined by LMRDA section 203(b). However, they contended that reports were precluded by sections 203(c) and 204 in that their activities were undertaken in connection with judicial or administrative proceedings and were of the type normally performed in an attorney-client relationship. They further argued that if these provisions did not exempt their activities from the reporting requirements, then the Act, as applied to attorneys, was unconstitutional. Subsequently, a counterclaim seeking reports was filed by the Secretary of Labor.

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124 LMRDA § 203(c), 29 U.S.C. § 433(c) (1964).
125 LMRDA § 204, 29 U.S.C. § 434 (1964).
126 LMRDA § 203(f), 29 U.S.C. § 433(f) (1964).
127 372 F.2d 315 (5th Cir. 1966).

On cross-motions for summary judgment, the district court granted the plaintiffs' motion, holding that the activities performed by the attorneys were nonreportable by virtue of sections 203(c) and 204.[128] The court reasoned that if the plaintiffs had acted as "hidden persuaders," rather than as attorneys for disclosed principals, the reporting requirement of 203(b) would have been applicable.[129] But the court felt that the Act was not designed to reach activities of persons who act openly with full disclosure of their clients and the purpose of their representation.[130] Thus the court found it unnecessary to pass upon the Secretary's contention that once a "persuader" had engaged in activity which triggered the thirty-day report, he must then file an annual report of all his receipts from *all* employers on account of labor relations advice or services and disbursements of any kind made in connection with those services.

The Secretary appealed to the Fifth Circuit, which reversed in part, affirmed in part and remanded the case.[131] After reviewing in some detail the attorneys' activities on behalf of their clients, the court stated:

> Without belaboring the point, we think it clear beyond doubt that Appellees pursuant to arrangements with their four employer-clients undertook, and, in fact, performed, activities with the object—and it is difficult to conceive of a case where the object could be more "direct"—of persuading the employees not to join the unions.[132]

The court then held that attorneys who engage in such activities are subject to the reporting requirements of section 203(b) and are not exempt by virtue of sections 203(c) or (f) or 204. The court first rejected the appellees' argument that section 203(b) was not intended to reach contemporaneously disclosed and open persuader activity. It stated that the purpose of the LMRDA was to expose "persuaders" to publicity. This exposure was intended to include not only the fact that the "persuader" was paid by management, but also why he was paid, how much, and the activities engaged in to earn the fee. "The District Court wrongly concluded," said the Fifth Circuit, "that disclosure . . . is a substitute for what Congress expressly required—reporting."[133] The

128 Fowler v. Wirtz, 236 F. Supp. 22 (S.D. Fla. 1964).
129 *Id.* at 33.
130 *Id.*
131 Wirtz v. Fowler, 372 F.2d 315 (5th Cir. 1966).
132 *Id.* at 324.
133 *Id.* at 325.

court next considered appellees' argument that section 203(c) precluded reporting since "all their activities took place 'while' administrative, judicial, or collective bargaining proceedings were occurring with regard to their employer-clients" and "all of their activities were within the legitimate practice of labor law."[134] Looking to legislative history, the court concluded that Congress viewed the exertion of persuasion on employees as inherently different from other forms of labor relations services, and that attorneys who engaged in persuader activity would not be exempt from reporting by virtue of section 203(c). Construing the 203(c) exemption as applying to "who" must report rather than to "what" must be reported, the court said:

> Almost consistently, the purpose of § 203(c) was explained not to carve out a broad exemption of activities which would otherwise be covered by § 203(b), but to make explicit what was already implicit in § 203(b), to guard against misconstruction of § 203 (b). . . . § 203(c) was inserted only to remove from the coverage of § 203(b) those grey areas where the giving of advice and participation in legal proceedings and collective bargaining could possibly be characterized as exerting indirect persuasion on employees . . . not to remove activities which are directly persuasive . . . .[135]

It was likewise held that the attorneys' reliance on section 204 was misplaced, since section 204 relates to "what" is reported and comes into play only once a report is required to be filed. The court did, however, express its view on the scope of that section's privilege. Since the privilege is limited to confidential information communicated from client to attorney, it would not prevent reporting of the client's name, the receipts and disbursements pursuant to the arrangement and the general nature of the activities undertaken on behalf of the client. Section 204 was construed "to protect only that information which the *employer* is not required by § 203(a) to report" since "it would be

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134 *Id.* at 325-26.

135 *Id.* at 330 (footnotes omitted). The court further commented:

> For the purposes of this case, it is unnecessary for us to ascertain the precise location of the line between reportable persuader activity and nonreportable advice, representation, and participation in collective bargaining. We conclude only that not everything which a lawyer may properly, or should, do in connection with representing his client and not every activity within the scope of the legitimate practice of labor law is on the nonreportable side of the line. At least some of Appellees' activities on behalf of each of their four clients—no matter how traditional, ethical or commendable—were those of a persuader.

Id. at 330-31 (footnotes omitted).

meaningless to allow the attorney to keep secret what his client must report . . . ."[136]

The Fifth Circuit, unlike the district court, was unimpressed with the constitutional issues raised by the appellees. The appellees contended that a construction of the statute requiring them to file reports of their activities would be unconstitutional as violative of their first and fifth amendment rights. Their first amendment argument was that to require the filing of reports concerning activities which are neither unlawful nor illegal would constitute a deprivation of their right to free speech. The court stated that this challenge was foreclosed by *United States v. Harriss*,[137] a case which involved the reporting requirements of the Lobbying Act.[138] In response to a claim that to require reports of lobbying expenditures would violate free speech rights, the Supreme Court had answered:

> Hypothetical borderline situations are conjured up in which such persons choose to remain silent because of fear of possible prosecution for failure to comply with the [Lobbying] Act. . . . But even assuming some such deterrent effect, the restraint is at most an indirect one resulting from self-censorship, comparable in many ways to the restraint resulting from criminal libel laws. The hazard of such restraint is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power and is designed to safeguard a vital national interest.[139]

In rejecting the attorneys' fifth amendment argument that section 203(b) was void for vagueness, the *Fowler* court merely noted that this was "not a criminal prosecution for wilful failure to report and . . . Appellees' conduct clearly was that of a persuader . . . ."[140]

Since the Fifth Circuit was of the opinion that the attorneys' activities were reportable under section 203(b), it was necessary for the court to face one further question. It had to decide whether or not, once an annual report is required to be filed, that report must include not only receipts and disbursements in connection with persuader clients but also all receipts and related disbursements for non-persuader labor relations advice and service for non-persuader clients. Declining to

136 *Id.* at 333.

137 347 U.S. 612 (1954).

138 Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-70 (1964).

139 347 U.S. at 626.

140 372 F.2d at 334-35.

follow the holdings of the Court of Appeals for the Fourth Circuit in *Douglas v. Wirtz*[141] and the District Court for the Northern District of Texas in *Price v. Wirtz*,[142] the Fifth Circuit held that services performed for non-persuader clients did not have to be reported. Subsequently, however, in its en banc consideration of *Price*,[143] the Fifth Circuit rejected its position in *Fowler* and adopted the view taken by the Fourth Circuit in *Douglas*.

The attorney-litigants in all of these cases urged that section 203(c) exempts from reporting anything pertaining to non-persuader labor relations activities for non-persuader clients. The Secretary's position was that the effect of this section is merely to specify those activities or arrangements which will not trigger the reporting requirements of subsection (b). The controversy centered on the phrase "by reason of" in section 203(c). To repeat, subsection (c) provides that no person shall be required to file a report covering services "by reason of" such person performing non-persuader labor relations activities. The Secretary interpreted this section as providing that "no person need file a report *because of* his giving or agreeing to give advice . . . ." On the other hand, the attorney-litigants would view the statute as providing that "no person need file a report *with reference to* his giving or agreeing to give advice . . . ."

Drawing from both the statutory language and legislative history, the Fourth and now Fifth Circuits have adopted the Secretary's construction. The court in *Douglas* undertook the following analysis, which was reemphasized in *Price*. The annual report must designate both the source and amount of "receipts of any kind from employers on account of labor relations *advice* or services . . . ."[144] Since the definition of a persuader does not include one who gives labor relations "advice," *Douglas* emphasized that the "language literally requires a report of payments for other advice unless the requirement of the annual report is narrowed by § (c)."[145] The court read subsection (c) as not narrowing the filing requirement, reasoning that "[u]nless 'advice' in [section 203(b) (A)] embraces independent advice, it has no meaning whatsoever."[146]

141 353 F.2d 30 (4th Cir. 1965), *cert. denied*, 383 U.S. 909 (1966).
142 58 L.R.R.M. 2607 (N.D. Tex. 1965), *aff'd*, 412 F.2d 647 (5th Cir. 1969) (en banc).
143 412 F.2d 647 (5th Cir. 1969) (7-5 decision).
144 LMRDA § 203(b)(A), 29 U.S.C. § 433(b)(A) (1964) (emphasis added).
145 353 F.2d at 32.
146 *Id.*

The concluding language of the court's opinion in *Price* best summarizes the holdings in these cases:

> It boils down to this. As long as the attorney limits himself to the activities set forth in § 203(c), he need not report. Engaging in such advice or collective bargaining does not give rise to a duty to report. No report is set in motion "by reason of" his doing those things. What sets the reporting in motion is performing persuader activities. Once that duty arises, § 203(c) does not insulate from reporting the matters in § 203(b) for non-persuader clients.[147]

IV. Conclusion

Whether or not the objective of strengthening collective bargaining through informed employee choice has been accomplished by the legislative scheme reflected in LMRDA sections 203(a) and (b) is debatable. While the "persuader" reporting provisions have received meaningful construction in the courts, eleven years of litigation have produced nothing in the way of a viable employer reporting requirement. Problems such as the form of the report aside, restricting employer reporting to expenditures or arrangements with specified objects will always present difficult problems of proof. To get effective employer reporting, therefore, Congress may have to completely restructure section 203(a). One possibility is to simply require an annual employer report covering expenditures for all labor relations advice and services. This may have the advantage of being general enough to avoid conflict with the fifth amendment privilege. Something along this line was proposed initially in the Kennedy-Ives bill. Since the employee decision generally most affected by employer activity is that which arises during an organizational campaign, it may be appropriate to limit such reporting to periods when a question regarding representation has been raised. In any event, the effectiveness of these provisions should be reviewed.

147 412 F.2d at 651.