STATEMENT OF ARTHUR L. FOX ON BEHALF OF
THE ASSOCIATION FOR UNION DEMOCRACY

before the

Subcommittee on Health, Employment, Labor and Pensions
of the
COMMITTEE ON EDUCATION AND THE WORKFORCE

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Thank you for inviting the Association for Union Democracy to testify today. By way of background, the Association ("AUD") is a non-political organization that seeks to promote democracy in unions as a means of strengthening the union movement among workers and the public. AUD believes that a strong labor movement is an essential element in American democracy. It seeks to educate members concerning their rights under the Labor Management Reporting and Disclosure Act ("LMRDA") and to defend members, regardless of their politics, against abuses by their union officials. Its Board of Directors includes persons who are eminent in the field of union democracy law and related issues. Until his demise some months ago, law Professor Clyde Summers, a co-founder with Herman Benson and the draftsman of LMRDA's Title I, served on the Board along with labor law Professors Michael Goldberg and Alan Hyde. Experienced public interest litigators Paul Alan Levy, Barbara Harvey and myself, who have devoted much of their professional careers to representing individual union members and caucuses seeking to reform unions, also sit on the Board. Another distinguished Board member is James McNamara, former consultant on labor racketeering to the Manhattan District Attorney's office.

Founded shortly after enactment of the LMRDA, AUD has been, over the past 50 years, in touch with tens of thousands of unionists, individual rank and filers, organized caucuses, elected officers in most major unions in our country, and members who have been engaged in battles against corruption or authoritarianism in their unions, a number of whom have become targets, or victims, of unlawful and undemocratic repressive tactics by their union officials. It is on the basis of this experience that AUD has participated over the years in a dialogue with Congress over the extent to which the LMRDA has succeeded in promoting Congressional objectives, and how it has fallen short and is in need of being strengthened.

The overriding objective of the LMRDA was to rid the union movement of corruption and tyranny. Congress chose to achieve this objective by giving union members the means to clean up their unions from within by bestowing on members a host of democratic rights. Of course, and as many LMRDA scholars as well as a number of courts have noted, the cornerstone of any democracy is ***information*** without which the right to vote is meaningless – a "naked right." Accordingly, when enacting Title II, Congress charged the DOL with responsibility for promulgating rules requiring unions to become financially transparent entities such that their members would be able to detect, *inter alia*, conflicts of interest and financial abuse by their elected officials whom they could then vote to remove from office, and perhaps even sue for breach of fiduciary duty under Title V. Or, as set forth in S. Rep. No. 187 on S. 1555 at 9, Vol. 1, NLRB Legis. Hist. of the LMRDA 405, this Title was intended to "insure[] that union members [would] have all the vital information necessary for them to take effective action . . . [such] that union members armed with adequate information and having the benefit of secret elections . . . would rid themselves of untrustworthy or corrupt officers." *See also* March 17, 1999 Testimony of Professor Clyde Summers before the Committee on Education and the Workforce, Report No. 106-11 at p. 8 (Addendum H, attached hereto).

Sadly, this informational cornerstone has yet to be fully realized. A few years ago, the Labor Department's Office of Labor-Management Standards ("OLMS") did take steps to improve union financial reporting requirements. While some of the proposed changes to the LM-2 and T-1 reporting requirements under the LMRDA's Title II would arguably have been unduly burdensome for unions and of little value to members, many others would have been of great value to members, enabling them more accurately to understand how their dues are being spent, as well as to detect conflicts of interest by their elected officers that could lead to, or already had resulted in, political, contractual, or financial abuse. Not only would the more detailed reporting requirements have enabled union members to hold miscreant union officers accountable for their misdeeds, in all likelihood they would have had an important prophylactic effect by discouraging illicit behavior in the first place.

Unfortunately, rather than fine-tuning these new reporting requirements, after the change of administrations in January of 2009, OLMS rescinded wholesale the prior administration's more detailed reporting requirements. I am attaching for the record, as Addenda A-C, the comments AUD has filed over the past two years on this and related OLMS agenda items.

NEEDED LMRDA REFORMS

The OLMS Political Tightrope

Indeed, while OLMS' critical role in developing and enforcing democratic standards under the LMRDA has generally improved over the past half century, the Office suffers from an endemic political problem. Residing as it does within the Department of Labor, which serves as every administrations' liaison to the incumbents within the institutional labor movement, OLMS suffers from an institutional conflict of interest. While many union officers have learned to live with the LMRDA and the political vicissitudes that are the hallmark of any democracy, very few union officials genuinely support the law and most would be thrilled to see it weakened if not repealed outright. As a consequence, as AUD has pointed out on numerous occasions over the years, the Labor Department is simply not an ideal home for OLMS given its responsibility for promoting Congress' objectives embodied in the LMRDA and enforcing many of its provisions ***against*** unions and their incumbent officials. This fundamental problem has been identified on a significant number of occasions in the past by AUD. *See, e.g.,* October, 1994 memorandum, originally prepared for the Dunlop Commission, entitled "Proposals of AUD for Strengthening The Rights of Union Members," p. 15, submitted to Congressman Ford (Addendum D, attached hereto); Herman Benson June 25, 1998 testimony before House Committee on Education and the Workforce, Report No. 105-125, at pp. 8-9 (Addendum E, attached hereto), and his accompanying Statement at 4 (Addendum F, attached hereto); March 17, 1999, Hearing Report No. 106–11 of the Committee on Education and the Workforce, Benson Testimony at p. 18, Professor Clyde Summers Testimony at p. 28, Chairman Boehner concluding remarks at p. 29: "I am one who believes that the best disinfectant is sunlight. And having reviewed some LM2s . . . over at the Department of Labor, I would agree that they are almost useless." (Addendum H, attached hereto). As mentioned, while OLMS did subsequently promulgate regulations modifying the LM-2 and T-1 forms to require unions to report more useful detail, those regulations have now been rescinded, most likely as a consequence of the sort of political pressure that conflicts with OLMS' statutory mission.

Quite apart from the adequacy of the content of financial reports mandated by the LMRDA and promulgated by OLMS, there exists a serious problem with respect to their preparation and submission by unions to OLMS that was the subject of hearings before the Committee on Education and the Workforce in 2002 and 2003. In a June 24, 2003

Statement submitted by OLMS' Deputy Director (Addendum J, attached hereto), "a significant number of unions consistently fail to comply with the statutory requirements that they timely file annual reports with the DOL. * * * In report year 2002, over 43 percent [of unions] either were late or have failed to file. . . for that year." He went on to explain that OLMS' only recourse was to ask the Department of Justice to sue the non-reporting unions for injunctive relief, a very time-consuming activity for DOJ to undertake – indeed, a task that has rarely, if ever, been undertaken. As a consequence, a Bill was introduced to give OLMS the authority to impose civil fines on non-reporting unions (Addendum K, attached hereto) which, unfortunately, was never enacted.

While AUD has, over the years, identified a number of weaknesses in the basic provisions of the LMRDA, unions have also been creative in finding ways to circumvent them that AUD has brought to Congress' attention. Thus, for example, while the statute requires all *local* unions to have periodic, secret-ballot elections directly among their members, it permits the indirect election of intermediate and national union officers by convention delegates rather than by members. *See* 29 U.S.C. § 481. Similarly, while the statute gives members a secret-ballot right to vote for dues increases, it permits delegates at intermediate and national union conventions to approve dues increases under the watchful eyes of the unions' top officers, individuals who will have the power of the purse strings and the ability to visit various forms of reprisal, political and/or financial, on subordinate "delegates" who fail to "vote the 'one-party' line." *See* Summers, "Democracy in a One-Party State: Perspectives from Landrum Griffin," 43 Maryland L. Rev. 93 (1984). *See also* Addendum E, Benson Testimony at 34-35.

UBC Eviscerates Members' Democratic Rights via District Councils.

In the 1990's, the United Brotherhood of Carpenters ("UBC") devised a mechanism which has been successful in eviscerating its members' democratic rights under the LMRDA by creating and then transferring to "intermediate" District Councils 95 percent of the authority previously exercised by local unions, including the right to negotiate and enforce collective bargaining agreements and to raise dues. And after creating these new District Councils, and ordering a bunch of locals within various defined geographic areas to affiliate with them, the UBC president appoints the Councils' all-powerful CEO who then hires as business agents those local union Council "delegates" who demonstrate their fealty to him – a classic "I scratch your back, and you scratch my back by electing me several years after my initial appointment to continue as the Council CEO." For all intents and purposes, the rank and file in the UBC have been

written out of the democratic process and their local unions have been reduced to social clubs which are even prohibited from hiring any elected officers or staff other than a single secretary to accept members' dues.

This undemocratic "business model," conceived and implemented by the UBC, a model other unions particularly in the construction trades had begun to adopt, was the subject of the 2008 and 2009 hearings before the Committee on Education and the Workforce. *See, e.g.,* Addendum E, Hearing Report at pp. 23, 40; Addendum F, Statement of Herman Benson at 3; Addendum G, Statement of Clyde Summers; Addendum I at p. 2. And while AUD proposed, and Bills were introduced to give union members (particularly including Carpenters) the direct right to vote in secret-ballot elections for the officers responsible for negotiating and/or administering their collective bargaining agreements, whether holding office in a local or a regional or District council, *i.e.,* a "intermediate" union entity as defined in 29 U.S.C. § 402, remedial legislation has yet to be enacted. *See, e.g.,* Addendum N, attached hereto, and discussion *infra at* p. 8. Indeed, as recently as by letter from Herman Benson to Speaker Boehner, dated March 27, 2011, AUD stressed the urgency of Congress' enacting relief from the UBC's "autocratic mold."

Political Restructuring via Mergers and Acquisitions

Politically re-engineering union structures through mergers and acquisitions is by no means unique to the UBC. In recent years, unions have consolidated at both the national and local levels via affiliations and mergers at the national level, and the mergers of locals which have, in most instances, resulted in substantial alterations in both the structure and governance of the affected unions. In every instance, the changes have been either negotiated or engineered by officers with little or no input from affected members whose ability to participate in the democratic governance of their unions is, as a consequence, often diluted or otherwise eroded substantially by the merger/affiliation agreements and/or new, or substantially modified constitutions.

So also has there been a movement within a number of unions, particularly including the Service Employees International Union ("SEIU"), to consolidate "subordinate" locals. Indeed, some national union officers have largely abandoned the use of trusteeships as a device for retaliating against dissident local officials and manipulating the political landscape, opting instead to utilize their constitutional authority unilaterally to redefine the jurisdiction of subordinate union entities to reward loyal local

officials with more members, a stronger financial base, and greater authority, while shrinking the authority, membership, and finances of dissident locals and their democratically elected officers. In a number of cases, national union officials have revoked local charters altogether, issued new local charters, and transferred members into newly created locals whose officers were appointed by the national, rather than elected by the locals' members. *See generally* Steve Early, Civil Wars in U.S. Labor (Haymarket Books 2011); Addendum D, Dunlop Memo at p. 9. While some of these consolidations have been necessitated by economic considerations, often they have been utilized to retaliate against dissident locals and their democratically elected officers.

To curb such abuses as well as to promote the underlying democratic objectives of the LMRDA, members affected by significant structural changes of their unions caused by mergers, affiliations, or jurisdictional changes should be given the right to ratify them by secret ballot vote on either a union-by-union, or local-by-local basis.

Members Need The Right to Ratify Collective Bargaining Agreements.

Of great importance to all workers are the wages, and other terms and conditions of their employment. While some union constitutions grant their members the right to ratify collective bargaining agreements, many more do not. The LMRDA is silent on the subject and should be amended to guarantee to all union members a right to ratify the collective bargaining agreements under which they work. *See, e.g.,* Addendum D, Dunlop Memo at p. 3.

Members' Right Under Title I to Vote on Dues and Fees Has Disappeared.

Section 101(a)(3) currently provides that members have the right to vote by secret ballot on proposed local dues increases while per capita taxes and/or dues collected by intermediate and national unions are allowed to be raised by other means. As a consequence, over the years unions have amended their constitutions to withhold authority from local and their members to establish and raise dues and placed it in the hands of intermediate and national executive boards and conventions that are not directly accountable to members. To restore to members the right to determine how much of their money they are willing to pay in union dues, section 101(a)(3), 29 U.S.C. § 411a)(3), should be amended to read:

"All dues and initiation fees payable by members of any labor organization in

effect on the date of enactment of this Act shall not be increased, and no general or special assessments shall be levied upon such members, except by majority vote by secret ballot of the members in good standing."

Abusive Trusteeships Need to be Curbed.

Over the years, AUD has called Congress' attention to the ease with which national, parent unions have been able to get around the intended restraints of LMRDA's Title III when imposing trusteeships on politically recalcitrant locals. *See, e.g.,* Addendum D, Dunlop Memo at pp. 10-11; Addendum E, testimony of Herman Benson at p. 9; Addendum I, Statement of Herman Benson at p. 2; Addendum N, Bill to Amend Title III of the LMRDA.

While this Title was enacted to curb politically abusive trusteeships by national union officers, the presumption of validity accorded by it to trusteeships for a period of 18 months has operated to make it extraordinarily difficult as a practical matter to challenge abusive trusteeships. While AUD supports outright elimination of this presumption, if any presumption of legitimacy is to remain in the statute, it should be shortened to 6 months. Whatever the problem that may arguably have necessitated imposition of a trusteeship, it can invariably be remedied within that shorter time frame, after which the trusteeship should be presumed to be unlawful and the burden of proof shifted from those challenging trusteeships to those imposing them to demonstrate by a preponderance of the evidence that the trusteeship was, and its continuance is, necessary for a purpose sanctioned by the statute. *See* proposed language in Section 4 of Addendum N, attached hereto.

However, even these changes would be meaningless if local members are effectively deprived of the financial means judicially to challenge trusteeships. By seizing control of the local treasury when imposing trusteeships, the parent union can deprive members of access to their own dues without which they may be unable to retain legal counsel to preserve their democratic rights and their local's autonomy. Hence, Title III should be amended specifically to grant courts to authority to order trustees to provide plaintiff members sufficient funds to retain legal counsel on a preliminary showing of good cause that the trusteeship may be unlawful. Thereafter, if and whenever the court should become satisfied that the trusteeship is lawful, the court would be authorized to withhold further funding of plaintiff-members' legal expenses.

Title IV – Officer Elections

AUD has long been championing amendment of LMRDA's Title IV which confers exclusive authority on OLMS to enforce the statute's officer election requirements. *See, e.g.,* Addendum D, Dunlop Memo at 12-15; Addendum E, Testimony of Herman Benson at 9.

To assure that union officers are democratically accountable to those members whose lives and welfare they are empowered to impact via the collective bargaining process, the following provision should be added to Title IV, 29 U.S.C. § 481:

> "In the event that officers of any intermediate union body, are responsible, in whole or in part, for the negotiation, administration or enforcement of collective bargaining agreements, or who exercise control over the finances or other major functions of local unions, such officers shall be directly elected by secret ballot among all members in good standing of all local unions affiliated with the intermediate union body, such as general committees, system or joint boards, district or joint councils, in which they hold office. Officers of other intermediate bodies may be elected by representatives of such local members who have been elected by secret ballot."

This amendment would, for example, restore democracy to the UBC.

Further, section 402(c)(2), 29 U.S.C. § 482(c)(2), should be amended by striking "affected the outcome of an election" and inserting "substantially understated or overstated the support of one of the candidates for office such that the democratic process was undermined." The "affected the outcome" language has been construed over the years to impose on OLMS a burden of mathematical proof to demonstrate that the outcome of a given election would very likely have been different but/for a specific violation of Title IV. Given the difficulty of meeting this burden, only a small percent of Title IV violations get remedied and the overwhelming majority are effectively pushed under the rug, thereby giving encouragement to incumbent union officers to improve their odds of getting re-elected by violating Title IV.

See also Addendum N, Section 5.

The Duty To Inform Members of Their Rights Under the LMRDA

The last area of concern at AUD that I will highlight in this Statement is the failure of unions to inform their members about the rights conferred upon them by the LMRDA, as mandated by Section 105 of the Act, 29 U.S.C. § 415. The Employer-Employee Subcommittee of the Committee on Education and the Workforce conducted an exhaustive hearing, Report No. 108-22, on this problem and reported out of Subcommittee two remedial Bills (H.R. 5373 and 5374) which, like so many other Bills to remedy deficiencies in the LMRDA also died on the legislative vine. *See, e.g.,* Addenda H and L, attached hereto. While AUD has done its best over the past half century, through its publications, website, conferences, letters and telephone conversations, to inform union members of their LMRDA rights, the only way to get this job done is to have unions, themselves, undertake this task as Congress mandated in the statute. Why is it that after more than a half century since enactment of the LMRDA compliance by unions with this statutory mandate is only occasional and sporadic? An enforcement mechanism clearly needs to be built into the statute.

INDEX TO ADDENDA

penalties on unions failing to file financial reports mandated by LMRDA Title II

L Press Release, dated September 18, 2002, by the Employer-Employee Relations Subcommittee announcing passage of two Bills (attached) to ensure enforcement of LMRDA Section 105, and the earlier passage of H.R. 4054.

M Letter from Herman Benson to Speaker John Boehner, dated March 27, 2011, calling his attention to the urgency in dealing with the Carpenters' District Council end-run around the LMRDA

N AUD publication announcing introduction of H.R. 4963 entitled the "Democratic Rights for Union Members Act of 2000, and setting forth the language in the Bill