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AMERICAN LEGISLATION FOR UNION DEMOCRACY

In the early days of 1957 the United States Senate created a special committee to study "improper practices in the field of labour management relations or in groups or organisations of employees or employers." For months the committee paraded across the public stage a series of sordid spectacles of union corruption and oppression.¹ These disclosures triggered a nearly irresistible demand for legislation which two and a half years later found expression in the Labor Management Reporting and Disclosure Act of 1959.²

The dominant theme of the investigation was the misuse of union office for financial gain either by diverting union funds for personal use, profiting on transactions with the union, or receiving benefits from employers with whom they bargained collectively. Among the endless variations on this dominant theme was the

¹ The committee heard more than 1,500 witnesses and took over 46,000 pages of testimony. More than half of all of the hearings was devoted to the International Brotherhood of Teamsters, and its officers at both the national and local level. Other unions in which corruption or improper practices were found included the Bakery & Confectionery Workers, Carpenters, Hotel & Restaurant Employees, Meat Cutters, Operating Engineers and United Textile Workers. The findings of the committee are set forth in three reports: Interim Report, 85th Congress 2nd session, Report No. 1417 (1958); Second Interim Report, 86th Congress, 1st session, Report No. 621 (1959); Final Report, 86th Congress, 2nd session, Report No. 1139 (1960).

² 73 Stat. 519 (1959), 29 U.S.C., ss. 153, 158-160, 187, 401-531 (Supp. 1961). Leading articles analysing the statute and its legislative history include Aaron, "The Labor-Management Reporting and Disclosure Act of 1959" (1960) 73 Harv.L.R. 85 → Smith, "The Labor-Management Reporting and Disclosure Act of 1959" (1960) 46 Va.L.Rev. 195; Cox, "Internal Affairs of Unions under the Labor Reform Act of 1959" (1960) 58 Mich.L.Rev. 819. For a massive collection of articles of uneven quality, see Slovenko, *The Labor-Management Reporting and Disclosure Act of 1959* (Tulane, 1960). All of the proposals and the congressional debates are reproduced in *Legislative History of The Labor-Management Reporting and Disclosure Act of 1959*, published by the National Labor Relations Board and printed by the U.S. Government Printing Office (hereinafter cited as N.L.R.B., *Legislative History of L.M.R.D.A.*, 1959).

attraction into the labour movement of criminal elements whose ultimate purpose was exploitation of union office for self-enrichment. A wholly subordinate theme was the destruction of the democratic process within the unions—and this was almost always presented as but one piece of the pattern of exploitation. The committee hearings disclosed numerous instances of corrupt or dictatorial international³ officers crushing opposition at the local level by appointing trustees to take over rebellious local unions. Apart from this, evidence pointed to but a handful of irregular or fraudulent union elections, and only scattered instances of arbitrary expulsions, unfair trial procedures, or encroachments on the democratic rights of union members.

The initial proposals for legislation reflected the pattern of testimony before the committee and focused primarily on financial abuses, but as the legislation evolved it increasingly emphasised protection of democratic processes within the union. Thus, Senator Kennedy's initial proposal emphasised financial reporting, with some limitations on the trusteeship device.⁴ To this the Senate first added substantial provisions to help ensure honest and democratically conducted elections,⁵ and then added a broadly worded "Bill of Rights" for union members guaranteeing equal rights to participate in union affairs, freedom of speech and assembly, protection of the right to sue, and the right to a fair trial prior to discipline.⁶ The central thrust of the statute was no longer the prevention of financial malpractices but the protection of union democracy.

The legislation as it finally evolved was not directly responsive to the committee's findings, for in spite of only fragmentary evidence before the committee, the statute focused primarily on dominant theme of the hearings and the central thrust of the the unions' governmental process. The wide gap between the statute suggests that the sources of the statute lay much deeper than the committee's disclosure. To understand the statute and measure its significance we need to see these deeper sources which provided the powerful undercurrent of demand for legislation.

³ In the United States the branches of a union are known as "locals." The union as a whole is referred to as the "international union" because many unions extend to Canada as well as the United States. If the "international" takes over the administration of a "local" it is said to put it under "trusteeship"—(*Editor's footnote*).

⁴ S. 3454, 85th Congress, 2nd session, 1958.

⁵ These were added by the Senate Committee on Labor in 1958. This Bill (S. 3974) passed the Senate, but was strangled by procedural rules in the House of Representatives. When Senator Kennedy reintroduced it the following year the Senate Committee further elaborated the election provisions. S. 1555, 86th Congress, 1st session, 1959.

⁶ Senator McClellan proposed the Bill of Rights on the floor of the Senate during debate, and it was adopted with some modifications. 105 Cong.Rec. 6476 (1959) and 105 Cong.Rec. 6729 (1959); 2 N.L.R.B., *Legislative History of L.M.R.D.A.*, 1959, pp. 1118 and 1239.

SOURCES OF THE STATUTE

The forces which shaped the statute were highly complex, but we are primarily concerned with those which redirected the statute toward imposing standards of democracy in the unions' governmental processes. What were the sources of this strong sense that the public had an interest in union democracy? What factors undermined the arguments against legal intervention in the internal affairs of private associations?

The Democratic Function of Collective Bargaining

Collective bargaining in the United States has been historically conceived as more than an economic device to equalise bargaining power. It has been conceived as an instrument of industrial democracy. The Industrial Commission of 1898 stated:

"By the organisation of labour, and by no other means, is it possible to introduce an element of democracy into the government of industry. By this means only can workers effectively take part in determining the conditions under which they work."⁷

Again in 1916 the United States Commission on Industrial Relations declared:

"The struggle of labour for organisation is not merely an attempt to secure an increased measure of the material comforts of life, but is an age-long struggle for liberty. . . . Even if men were well fed, they would still struggle to be free."⁸

One of the fundamental purposes of the Wagner Act of 1935, in protecting the right to organise and bargain collectively, was to give workers a voice in determining the terms and conditions of employment. Senator Wagner urged its adoption so that, "We can raise a race of men who are economically as well as politically free."⁹

Collective bargaining can serve this purpose of industrial democracy only if the union is democratic; the worker gains no voice in the decisions of his industrial life if he has no voice in the decisions of the union which speaks for him. Legislative proposals for protecting union democracy responded to the felt need to fulfil the ultimate goals of unionisation and collective bargaining. The strongest support for legislation came from those who believed most deeply in collective bargaining and its democratic function.¹⁰

⁷ Final Report of the Industrial Commission of 1898 at p. 805 (1902).

⁸ Final Report of the United States Commission on Industrial Relations, S.Doc. No. 415, 64th Congress, 1st session, 62 (1916).

⁹ 75 Cong.Rec. 4918 (1932).

¹⁰ See, for example, Cox, "The Role of Law in Preserving Union Democracy" (1959) 72 Harv.L.Rev. 609; Hardman, "Legislating Union Democracy," *New Leader*, December 2, 1959, p. 3; Kerr, *Unions And Union Leading of Their Own Choosing* (Fund for the Republic, 1957). Among the earliest proponents for legislation protecting the democratic rights of union members

President Meany of the AFL-CIO, in adamantly resisting any legislation, accurately identified the source demanding minimum democratic standards when he in anger and frustration declared, "God save us from our friends."¹¹

The Democratic Ethic of Unions

Unions have traditionally built themselves on the democratic model, and union constitutions create a framework of representative, if not direct, democracy. Officers are elected by the members, issues are discussed in union meetings, decisions are made by majority vote, and ultimate power to determine policy is vested in the members. Unions have insisted that this is more than form, that internal democracy is a fundamental ethic. The AFL-CIO, in its constitution stated as one of its objectives: "To safeguard the democratic character of the labour movement." In its Ethical Practices Code On Democratic Process it declared:

"Freedom and democracy are essential attributes of our movement. Labour organisations lacking these attributes are unions in name only. Authoritarian control is contrary to the spirit, the tradition and the reasons which should guide and govern our movement."

The unions' protestations created a public expectation that they would fulfil their own image.

The fact that unions asserted the importance of internal democracy would itself add little momentum to proposals singling them out for regulation—other private associations, from social clubs to political parties, clothed themselves in the trappings of a democratic structure; even corporations claimed to provide a "shareholders' democracy." Unions were singled out because it was recognised that their role in collective bargaining made them unique. In bargaining, the union speaks on behalf of the employees and the individual has no voice except through the union. The collective agreement legislates terms and conditions of employment which govern the working life of all within its reach. The individual has little practical choice whether he shall be governed by the union, and the union's power over him is both broad and deep.¹² One of the assumptions in allowing unions to

was the American Civil Liberties Union, which had long fought for the rights of workers to organise and bargain collectively. This proposal along with others is discussed in Aaron and Komaroff, "Statutory Regulation of The Internal Affairs of Unions" (1951) 44 Ill.L.Rev. 631.

¹¹ Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, U.S. Senate, 85th Congress, 2nd session 85 (1958). President Meany was referring specifically to an advisory committee used by Senator Kennedy to prepare recommendations for legislation and which President Meany had earlier recognised as even "friendly disposed toward the things that labour aspires to," *ibid.* at p. 67.

¹² The worker has little real choice between unions, for in spite of historic rivalries, there are seldom two effective unions available from which to choose. The very nature of modern industry drives toward standardisation of terms

exercise this governing power has been that unions are democratic, that their decisions are responsive to the desires of their members. Thus the democratic ethic of unions interlocked with the conception of collective bargaining as an instrument of industrial democracy. Together they created a nearly irresistible demand that unions observe minimum standards of internal democracy.

Legal Status of Unions

The catalyst which transformed the demand for union democracy into legislative imposition of democratic standards was the legal status of unions. The Wagner Act affirmatively protected the right to organise and thereby encouraged unionisation. More importantly, it made the majority union the sole bargaining agent, vesting in it exclusive power to represent all employees in the bargaining unit. Employers were not only compelled to bargain with the majority union but also prohibited from bargaining with individuals or minority groups.¹³ The individual lost all freedom of contract, for he was compulsorily bound by the union's contract.¹⁴ This was indeed the power to govern. In the words of the Supreme Court:

"Congress has seen fit to clothe the bargaining representatives with powers comparable to those of the legislative body both to create and restrict the rights of those it represents."¹⁵

The conclusions to be drawn from this were bluntly stated by the Senate Committee on Labor in recommending regulation of union elections:

"The Government which gives unions this power has an obligation to insure that the officials who wield it are responsive to the desires of the men and women whom they represent."¹⁶

This simple statement carried two sweeping implications. First, the legal status of unions undercut all arguments against legal encroachments on union autonomy—the government had an obligation to intervene. Second, the purpose of intervention was to make unions responsive to their members, just as democratic government is responsive to its citizens.

The logic was more appealing than conclusive. The democratic

and conditions of employment, and the standard is set by the dominant collective agreement. Although the worker may leave the union he does not escape the practical reach of the union's power.

¹³ *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332 (1944). The same majority rule principle applies under the Railway Labor Act. *Order of Railway Telegraphers v. Railway Express Agency Inc.*, 321 U.S. 342 (1944). The implications of the union's legal status has been discussed more fully by the author in "Union Powers and Workers' Rights" (1951) 49 Mich.L.Rev. 805.

¹⁴ In practice, the union's power extends to applying the contract to the individual worker, for the union effectively controls the grievance machinery and appeals to arbitration.

¹⁵ *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 201 (1944).

¹⁶ S. Rep. No. 187, 86th Congress, 1st session, p. 20 (1959).

values in union autonomy do not depend on the source of union power. The fact that union powers are derived from government does not make unions a part of government, nor require that unions exercise these powers through governmental type structures. The compelling reasons for encroaching on union autonomy and imposing democratic standards lay in the fact of union power and the function of collective bargaining. The legal status of unions provided a catalytic metaphor which speeded the reaction.

Failure of Union Self-Correction

The arguments for union autonomy presuppose that unions can maintain their own house in tolerably decent order, for the claims for autonomy rest not on the right to be lawless but the right to be self-regulating. The McClellan Committee hearings undermined this presupposition, for they revealed intolerable conditions in a number of major unions. Developments demonstrated that unions were incapable of cleaning their own house. The AFL-CIO adopted Codes of Ethical Practices and expelled several international unions which violated these codes. These measures, however, proved inadequate. The expelled Teamsters prospered, and few of the others changed their ways. Further expulsions threatened to destroy the Federation, and discipline was replaced with admonitions.¹⁷ In the end, the labour movement was forced to confess its failure and support legislation to aid in combating corruption.¹⁸ Although evidence of abuses of democratic processes was more fragmentary, the inadequacy of self-regulation was even more apparent. In the face of demands for assurance that democratic standards be maintained, arguments for union autonomy lost persuasiveness.

Other forces added their pressures to the demand for legislation regulating internal union affairs. Among the most powerful were the forces of anti-unionism, led by employers' organisations which sought to weaken unions. In part, they hoped that internal democracy would reduce the effectiveness of unions economically and politically—a hope encouraged by the unions' extravagantly expressed fears. In part, they hoped to use the momentum of such legislation to curb the unions' economic weapons—a hope realised in provisions added to Title VII restricting picketing and boycotts. In part it was simple anti-unionism which measured the value of provisions by the vigour of union opposition. Thus, those who resisted collective bargaining and denied the democratic contribution of unions joined with those whose basic belief was in the value

¹⁷ The Carpenters, for example, defied the Ethical Practices Committee but no action was taken to expel them. The Operating Engineers made only minor changes and escaped all discipline.

¹⁸ See Testimony of President Meany of the AFL-CIO in Hearings before the Subcommittee on Labor of Committee on Labor and Public Welfare, U.S. 85th Congress, 2nd session, p. 1344–1346 (1958).

of unions and who sought to fulfil the democratic function of collective bargaining. In political terms, the statute was a product of historically hostile but momentarily converging forces.

The demands for legislation, however, were not unlimited, for there remained clear recognition of the dangers inherent in government control of internal union affairs. One of the accepted principles was "the desirability of minimum intervention by government" and that "great care should be taken not to undermine union self-government."¹⁹ Paradoxically this very principle supported legislation directed towards protecting the democratic process. In the words of the Senate Committee on Labor:

"Given the maintenance of minimum democratic safeguards and detailed essential information about the union, the individual members are fully competent to regulate union affairs."²⁰

Senator McClellan, in urging that a Bill of Rights be added, made even more explicit this reasoning:

"If we want fewer laws—and want to need fewer laws—providing regulation in this field, . . . we should give union members their inherent constitutional rights and . . . protect union members in those rights. By so doing we will be giving them the tools they can use themselves. That is all I propose to do by this amendment."²¹

Thus, guaranteeing democratic rights was limited intervention, for it promoted self-correction; it did not destroy union autonomy but rather protected the union members' right of self-government.

Even in protecting the democratic process, the articulate principle was to limit intervention. Only basic rights were to be safeguarded and minimum standards enforced. Within these limits, unions were free to design their own structure of government, and through democratic procedures unions were free to make their own substantive policy.

THE COMMON LAW BASE OF LEGISLATION

These sources of the statute, deeply rooted as they were in prevailing social attitudes and policies, had made their imprint on the common law, for judges had not been wholly unaware of the economic facts nor totally insensitive to the underlying values. The path of the law, though vagrant and indistinct, had led toward increasing judicial regulation of internal union affairs. The statute was not a break with the past but was built on a common law base.

Although courts termed unions voluntary associations, judges

¹⁹ S. Report No. 187, 86th Congress, 1st session, p. 7 (1959).

²⁰ *Ibid.*

²¹ 105 Cong. Rec. 6476 (1959); N.L.R.B., *Legislative History of LM.R.D.A.*, 1959, p. 1103.

increasingly recognised that the union's role in collective bargaining made it unique.²² Union membership involved economic and social interests more substantial, though less tangible, than ordinary "property rights." Although reluctant to intervene in internal disputes, refusal to do so would leave the member's rights subject to the decisions of union officials or tribunals, and the courts lacked confidence that those decisions would be free from arbitrariness. Thus, the courts intervened to protect not only the member's right to union funds, but also his right to remain a member, to attend meetings, and to have an election of officers.

In measuring the members' rights, the courts' articulate standard was the union constitution, denominating it "a contract which defines the privileges secured and the duties assumed by those who have become members."²³ The contract theory purports to make the union constitution the governing law and to limit the court to enforcing the union's own rules. In practice, however, the union constitution proved to be an ambiguous and incomplete standard; judges rejected the neutral role and superimposed their own standards. Ambiguous provisions were interpreted to conform to judicial policies, gaps were filled with judge-made law, and ambiguities or gaps were found in the most clear and complete clauses. Judicial rewriting of the constitution extended beyond "interpreting" to boldly excising provisions by declaring them "void as against public policy" or "contrary to natural justice."

The judge-made standards superimposed on the union constitution were commonly concealed by language of contract and protestations of judicial neutrality. The failure to articulate standards inevitably led to erratic results and further obscured the predominant pattern. However, closer examination of the cases to see what the courts did, in contrast to what they said, reveals that the courts were in fact giving substantial protection to the democratic rights of union members.²⁴

The most openly expressed judicial standard was protection of

²² The classic statement of judicial doctrines is Chafee, "Internal Affairs of Associations not for Profit" (1930) 43 Harv.L.Rev. 993. The special application of these doctrines to cases involving unions is discussed in Grodin, *Union Government and the Law: British and American Experience* (1961); Summers, "Legal Limitations on Union Discipline" (1951) 62 Harv.L.Rev. 1049; Tureen, "Judicial Intervention in Internal Union Affairs to Protect the Rights of Members" (1954) Wash.U.L.Q. 440; Comment, "Civil Liberties within the Labor Movement" (1959) 34 Notre D.L. 384.

²³ *Polin v. Kaplan*, 257 N.Y. 277, 281; 177 N.E. 833, 834 (1931).

²⁴ The pattern of judicial action, based on a study in depth of internal union disputes coming before the courts, has been described by the author in "The Law of Union Discipline: What the Courts Do In Fact" (1960) 70 Yale L.J. 175 and "Judicial Regulation of Union Elections" (1961) 70 Yale L.J. 1221. Other studies showing judicial protection of democratic rights within unions are Aaron, "Protecting Civil Liberties of Members Within Trade Unions" (1949) 3 *Proceedings, Industrial Relations Research Association* 28; Witmer, "Civil Liberties and the Trade Union" (1941) 50 Yale L.J. 6 → Wollett and Lampman, "The Law of Union Factionalism—The Case of the Sailors" (1952) 4 Stan.L.Rev. 177, and the writings cited in the preceding note.

procedural due process in union discipline and other judicial type proceedings. Consistently and without apology or disguise, the courts imposed a standard of fairness or "natural justice" until it became a fundamental principle of near-constitutional quality. The minimum standard of fairness included generally the right to notice of the charges, the right to present evidence, the right to hear and cross-examine witnesses and the right to an unbiased tribunal.

A second judicial standard, less explicitly defined and consistently applied, was protection of the right of union members to exercise their rights of citizenship outside the union. Thus, courts early held that a union rule prohibiting members from petitioning the legislature to oppose laws supported by the union was against public policy and void.²⁵ Nor could a member be expelled for supporting candidates for public office opposed by the union.²⁶ In a recent case the California court held that the expulsion of those who publicly campaigned for so-called "Right to Work" laws unreasonably restrained free speech, even though the union considered such laws a threat to its very existence.²⁷ Among the protected rights of citizenship is access to the courts, and union rules punishing members for suing the union were generally voided by the courts.²⁸ The member was said to have an "absolute right" to bring the suits even though it could not be sustained as he had not exhausted appeals within the union.²⁹

The most important, though often least articulate, standard superimposed by the courts was protection of democratic processes within the union. Few courts have been as forthright as the Ohio court in *Crossen v. Duffy*:

"We recognise that it is not generally the function of courts to control the policies or internal affairs of labour unions, but the courts may and should protect the democratic processes within unions by which union policies and their leaders are determined. . . ."

Viewing the important role of labour unions in this era, a court may well determine in a particular case that protection of their democratic processes is essential to the maintenance of our democratic government."³⁰

Study of the cases suggests that most courts in fact enforced this

²⁵ *Spayd v. Ringing Rock Lodge*, 270 Pa. 67; 113 Atl. 70 (1921); *Abdon v. Wallace*, 95 Ind.App. 604; 165 N.E. 68 (1929).

²⁶ *Morgan v. Local 1150, United Electrical Workers*, 16 L.R.R.M. 720 (Ill.Super.Ct. 1945). But compare *Pfoh v. Whitney*, 62 N.E. (2d) 744 (Ohio App. 1945).

²⁷ *Mitchell v. International Association of Machinists*, 49 L.R.R.M. 2116 (Cal.Dist.Ct. of App. 1961).

²⁸ *Collins v. International Alliance of Theatrical Stage Employees*, 119 N.J.Eq. 230; 182 Atl. 37 (1935); *Armstrong v. Duffy*, 90 Ohio App. 233; 103 N.E. (2d) 760 (1951).

²⁹ *Polin v. Kaplan*, 257 N.Y. 277, 284; 177 N.E. 833, 835 (1931); *Angrisani v. Stearn*, 167 Misc. 728, 3 N.Y.S. (2d) 698 (1938).

³⁰ 90 Ohio App. 252; 103 N.E. (2d) 769 (1951).

standard but under the guise of interpreting the union's rules, reweighing the evidence or discovering defects in the union's procedure. Judicial protection reached two crucial areas. The first was freedom of speech, including the right publicly to criticise union policies, to distribute circulars accusing officers of misconduct and to organise opposition groups within the union. In an unusually articulate opinion, the New York court declared:

"If there be any public policy touching the government of labour unions, and there can be no doubt that there is, it is that traditionally democratic means of improving their unions may be freely availed of by their members without fear of harm or penalty. And this necessarily includes the right to criticise current union leadership and, within the union, to oppose such leadership and its policies."³¹

The second crucial area was protection of the election process, including the right to have an election, the right to be a candidate, the right to vote and the right to have the ballots accurately counted. Here protection was almost always cloaked in terms of enforcing the union's rules, but many courts did not hesitate to read those rules as requiring a democratic election regardless of what might otherwise have been considered their plain meaning.

Judicial intervention was limited by the traditional doctrine that the courts would not intervene until all appeals within the union had been exhausted. This doctrine echoed the values of union autonomy, for it gave the union primary responsibility for correcting its own mistakes. This rule, however, was not absolute; for exhaustion was not required if the appeal was unduly burdensome, unreasonably delayed or obviously futile. To these exceptions some courts added the all-consuming exception that if the union's proceedings were defective they were "void" and there was no decision from which to appeal. In practice, the doctrine undoubtedly had a restraining effect but provided little or no obstacle to immediate intervention when the judge felt so impelled.

The statute followed, in many respects, this evolving pattern of judicial protection.³² Some provisions, such as those imposing fiduciary obligations on union officers and requiring a fair hearing in discipline cases, were little more than restatements of the common law rules. Others, such as those guaranteeing freedom of speech and assembly, made articulate the protection which a few courts had declared but many had in fact given. Protection of the election process was made much more complete, with the statute reaching details seldom if ever reached by the courts. Some provisions, such as those requiring votes on dues increases, added wholly new rights and obligations.

More importantly, this body of common law created by the state

³¹ *Madden v. Atkins*, 4 N.Y. (2d) 283, 293; 151 N.E. (2d) 73, 78 (1958).

³² Earlier state statutes regulating unions and the impact of certain provisions of the Taft Hartley Act are fully discussed in Aaron and Komaroff, 'Statutory Regulation of Internal Union Affairs' (1949) 44 Ill.L.Rev. 425, 631.

courts was not supplanted by the statute; rather the federal law was added onto it. When Senator McClellan proposed his Bill of Rights, Senator Kennedy objected that it might wipe out protection presently given union members by state laws which were in certain respects broader than the Bill of Rights. To prevent this there was included a provision expressly preserving all "rights and remedies of any member of a labour organisation under any State or Federal law."³³ The union member is now protected by two bodies of law—the common law protection continues and is supplemented by the statutory protection.³⁴ The regulation of elections, however, is an exception. The statutory standards for elections were expressly made exclusive, and the common law protections were wholly supplanted.

With this perspective of the sources of the statute and with the common law base upon which it is built, we can now inquire more specifically into the reach of its provisions. Because its central thrust is the protection of the democratic process and the individual rights of union members, first attention will be given to the two key titles; Title I: The Bill of Rights; and Title IV: Elections. Only secondary attention will be given other parts particularly those parts relating to financial practices.

BILL OF RIGHTS FOR UNION MEMBERS (TITLE I)³⁵

When the Senate Committee on Labour in 1959 presented its recommendations for legislation to the Senate, the proposed bill included provisions regulating union elections, limiting trusteeships and requiring reporting. On the floor of the Senate, Senator McClellan proposed that there be added a "Bill of Rights for Union Members." The breadth and depth of his proposal was made plain:

"It would bring to the conduct of union affairs and to union members the reality of some of the freedom from oppression that we enjoy as citizens by virtue of the Constitution of the United States."³⁶

³³ "Section 103. Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization." An even broader savings clause applicable to the whole statute was also included in s. 603.

³⁴ The problems created by providing two levels of protection in all areas but the election area are complicated by the fact that the common law is state law and the statute is federal law. The interplay of these two bodies of law within the federal system is discussed by the author in "Preemption and the Labor Reform Act-Dual Rights and Remedies" (1961) 22 Ohio St.L.J. 119.

³⁵ For detailed discussion, see Aaron, "The Union Member's Bill of Rights: The First Two Years" (1962) 15 Ind.Lab.Rel.Rev.; Hickey, "Bill of Rights for Union Members" (1959) 48 Geo.L.J. 226; Rothman, "Legislative History of the Bill of Rights for Union Members" (1960) 45 Minn.L.Rev. 199; Sherman, "The Individual Member and the Union" (1960) 54 N.W.U.L.Rev. 803.

³⁶ 105 Cong.Rec. 6472 (1959); N.L.R.B., *Legislative History of L.M.R.D.A.*, 1959, p. 1098.

Union members were conceived as citizens within their union government and the law should guarantee the basic democratic rights of union citizenship.

“ Let us define those rights; let us say what they are, just as the rights of the American people are set forth in the Bill of Rights of the Constitution.”³⁷

The force of this argument carried the day and a Bill of Rights became Title I of the statute. In its final form it provided four broad guarantees: (1) equal rights for all union members, (2) freedom of speech and assembly, (3) the right to resort to judicial, administrative, or legislative process outside the union, and (4) the right to a fair trial in union disciplinary proceedings. Also included was a discordant provision requiring voting on increase of union dues.

The rights guaranteed by Title I are neither specific nor absolute, for they are stated in broad terms and subject to undefined qualifications. Thus, every union member is entitled to “ equal rights ” within the union, but “ subject to reasonable rules ” in the union’s constitution; members have the right of free speech and assembly, but subject to “ reasonable rules as to the responsibility of every member toward the organisation as an institution ”; and a member who is disciplined must be given “ a reasonable time to prepare his defence ” and “ afforded a full and fair hearing.” It was left to the courts to determine what was “ reasonable ” and thereby give content to these rights. The legislative history gave little specific guidance, but the context made clear that the courts should apply standards analogous to those used in protecting constitutional rights.

The impact of Title I can be better measured by examining separately the reach and limitation of each of the protected rights. The most that can be done here is to sketch the outlines and suggest some of the more significant problems which have evolved.

1. *Equal Rights*³⁸

The most obvious purpose of this provision was to outlaw various forms of second-class membership. Several unions relegated large groups of members to “ Class B ” or “ Junior ” membership with no voice or vote in the union and admitted only a favoured minority to the governing class. Other unions shunted Negroes to “ auxiliary locals ” which were wholly controlled by white locals.

³⁷ *Ibid.* at 6478; and 1104.

³⁸ s. 101 (a) (1): “ Equal Rights—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization’s constitution and bylaws.”

Such classifications obviously cannot qualify as "reasonable rules" ³⁹; although restricting the participation rights of apprentices and newly admitted members may be valid.

The "equal rights" clause, however, reaches far beyond such discriminatory treatment; it protects every member in the exercise of his right to participate in union government. Thus, the shouting down of a member who attempted to speak at a union meeting,⁴⁰ and the arbitrary ruling that a motion was out of order and refusing to put it to a vote have been held to deny the member's equal right "to participate in the deliberations and voting upon the business of such meetings."⁴¹ A referendum ballot which lumped together several proposed amendments to the constitution violated the member's right "to vote in . . . referendums" of the union,⁴² and a nomination meeting held without adequate notice and at a time when a third of the members were working deprived members of their right "to nominate candidates."⁴³ The union remains free to choose whether decisions shall be made at union meetings, by referendum, through delegate bodies or through elected officers.⁴⁴ But the process cannot be so ordered or administered as to deprive any member of his right to full and free participation. This does not, of course, define the outer boundaries of the right, but it does emphasise that the right protected is the right to participate.

Logically, equal rights should extend to all persons governed by the union's decisions. Since demands for union democracy had their source in the union's control over terms and conditions of employment, every person for whom the union bargains should have full rights of participation. The statute, however, protects only "members," and a number of unions exclude Negroes and other minority groups from membership. When amendments were proposed prohibiting such discrimination, they were rejected with a miscegenation of political forces.⁴⁵ The right to participate, however, is so basic not only to the "equal rights" clause but to the

³⁹ *Acevedo v. Bookbinder Local 25*, 196 F.Supp. 308. (S.D.N.Y. 1961).

⁴⁰ *Allen v. Bridge, Structural and Ornamental Iron Workers, Local 92*, 47 L.R.R.M. 2214 (N.D.Ala. 1960).

⁴¹ *McFarland v. Building and Material Teamster Local 282*, 180 F.Supp. 806 (S.D.N.Y. 1960).

⁴² *Young v. Hayes*, 195 F.Supp. 911 (Dist.Col. 1961).

⁴³ *Mamula v. United Steelworkers*, 198 F.Supp. 652 (W.D.Pa. 1961).

⁴⁴ For example, collective contracts need not be submitted to a vote of those affected or to a vote by the union, but may be ratified by the union officers if the constitution so provides: *Cleveland Orchestra Committee v. Cleveland Federation of Musicians*, 193 F.Supp. 647 (N.D. Ohio 1961).

⁴⁵ Southern congressmen, who were generally hostile to unions and who did not want to establish a precedent for prohibiting racial discrimination and segregation, joined forces with northern congressmen who generally supported civil rights legislation but who feared that including such a provision would defeat the entire Bill. The amendment was supported by those who had most vigorously insisted that the law should not regulate internal affairs and who otherwise argued that unions should not be told who must be admitted.

entire statute that the force of its thrust may overcome the legislative history and shape the words to fit the need.⁴⁶

2. Freedom of Speech and Assembly⁴⁷

These rights are nerve centres of the democratic process, and the protection granted here is broad. Union officers can be freely criticised and union policies freely discussed, and this right is not confined to the cloisters of the union meeting.⁴⁸ Union members can carry the debate outside the union hall to the shop or the public arena making speeches, circulating leaflets or publishing letters in the public press and not be punished, as members have in the past, on charges of "disloyalty," "disclosing union business" or "bringing the union into disrepute."⁴⁹ The right to assemble includes the right to organise clubs within the union to oppose administration policies or support rival candidates and not be charged with "creating dissension" or "dual unionism."⁵⁰

This clause of the Bill of Rights protects not only the member's political freedom within the union, but also his political freedom outside the union. His right is "to express any views, arguments and opinions," and the legislative history makes reasonably clear that this includes full freedom to debate the public issues of the day. The union cannot curtail this basic right of citizenship.

Defining the limits of this right is difficult, for the words of the qualifying provisos give little guidance in difficult cases. A member who urged a "wildcat strike" could be expelled by the union for "conduct that would interfere with its performance of its legal or contractual obligation." Urging workers to return to work during a strike probably violates "the responsibility of every member toward the organisation as an institution," but advocating that a strike be called off is probably protected even though it weakens

⁴⁶ One court has already pointed the way by holding that a person is a "member" when he has fulfilled the requirements for membership whether he has been admitted or not: *Hughes v. Local 11, Int. Association of Bridge Workers*, 287 F. (2d) 810 (3rd Cir. 1961). It has been argued that arbitrary exclusion, particularly because of race is illegal and void: *Givens, "The Enfranchisement of Employees Arbitrarily Rejected for Union Membership"* (1960) 11 Lab.L.J. 809.

⁴⁷ s. 101 (a) (2): "Freedom of Speech and Assembly—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations."

⁴⁸ See 105 Cong.Rec. 6718 (1959); N.L.R.B., *Legislative History of L.M.R.D.A.*, (Daily Ed. April 25, 1959).

⁴⁹ Summers, "Disciplinary Powers of Unions" (1950) 3 Ind.Lab.Rel.Rev. 483.

⁵⁰ See *Johnson v. Local 58, Int. Brotherhood of Electrical Workers*, 181 F.Supp. 734 (E.D.Mich. 1960).

the union's will and ability to resist. Joining or supporting a rival union probably can be punished, but organising an opposition group to work within the processes of the union is within the protected right. The line is inevitably indistinct, to be pricked out by the courts case by case, but the qualifying provisos were not intended to change the basic guide—the right of freedom of speech and assembly in a democratic society.

The most difficult problem arises when a member is expelled for "slandering a union officer." Union debates are characterised by vitriol and calumny, and campaigns for office are salted with overstated accusations. Defining the scope of fair comment in political contests is never easy, and in this context is nearly impossible. To allow the union to decide this issue in the first instance is to invite retaliation and repression and to frustrate one of the principal reasons for protecting this right—to enable members to oust corrupt leadership through the democratic process. The statute does not by its terms permit discipline for defamation; and accusations made in good faith do not necessarily violate the member's responsibility to his union as an institution. The thrust of the statute may prohibit discipline for defamation and limit the union officer who claims he is defamed to the normal legal remedies in the courts.

3. *The Right to Resort to Legal or Legislative Proceedings* ⁵¹

Under the misleading heading "Protection of the Right to Sue," the statute protects a much broader range of rights. It provides that no union shall limit the right of any member to (1) institute an action in any court or administrative agency, (2) appear as a witness in any judicial, administrative or legislative proceedings, or (3) petition any legislature or communicate with any legislator. It thus explicitly protects basic rights of citizenship outside the union which the courts had generally protected at common law. Those rights encompass free access not only to judicial and administrative processes but also the legislative process.

The most difficult problems of this section arise from its dangling provisos which are attached with the logic of a tail pinned on the donkey. The first proviso states that a member may be required

⁵¹ s. 101 (a) (4): "Protection of The Right to Sue—No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator; *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition."

to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within the union before bringing suit. Its placement in this section suggests that a union can limit the right to sue to this extent and expel members who prematurely resort to the courts. So interpreted, a member who brought suit without waiting four months could be expelled if he mistakenly believed that the available appeals were unreasonable. This clause, however, may be viewed simply as creating a more definite and limited rule of exhaustion of internal remedies. So interpreted, the union could not limit the right to sue, but the court would refuse to hear the case during the four-month period if reasonable appeals were available. The legislative history unhelpfully points both ways, but the courts have followed the second interpretation, thus preserving for the individual all the protection provided at common law, and preserving for the courts and the unions the essential values of the exhaustion rule.⁵² The courts must still, as at common law, decide what are "reasonable hearing procedures," but the four-month maximum reduces uncertainty and greatly eases their task.⁵³

The second proviso is intended to bar employers from financing or encouraging suits by members against their unions and thereby prevent employer harassment and intrusion in internal union affairs. However, its vagrant words go much further, for it does not distinguish between the member's resort to legal processes and his resort to legislative processes, and clumsily uses the same words to bar the employer's aid in both. It would thus appear to encroach on the valuable democratic right to join forces freely with any other individuals or groups for particular political purposes. Freedom of assembly includes the right in politics to make strange bedfellows.

4. *The Right to a Fair Trial* ⁵⁴

This section tersely provides that no member may be disciplined "unless he has been (a) served with written specific charges; (b) given a reasonable time to prepare his defences; (c) afforded a full and fair hearing." Except for requiring that the charges be written and specific, this adds nothing to the standard of fair procedure long enforced by the courts. The statute leaves unsolved the problem which has plagued the courts—the built-in bias in union tribunals. The great majority of litigated discipline cases are

⁵² *Detroy v. American Guild of Variety Artists*, 286 F. (2d) 75 (2d Cir. 1961); *Johnson v. Local 58* (note 50, above). But see *Smith v. General Truck Drivers Union, Local 467*, 181 F.Supp. 14 (S.D.Cal. 1960).

⁵³ The court may require the member to exhaust appeals available within the four months, even though no final review is available within that time: *Sheridan v. United Brotherhood of Carpenters*, 191 F.Supp. 347 (D.Del. 1961).

⁵⁴ s. 101 (a) (5): "Safeguards Against Improper Discipline—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for non-payment of dues by such organization or by any officer thereof unless such member has been (a) served with written specific charges; (b) given a reasonable time to prepare his defense; (c) afforded a full and fair hearing."

rooted in factional struggles within the union or involve non-conformist individuals who are ready targets for their more conforming brothers. Whether the union trial board is the local officers, a special committee, or the local union, it is inevitably influenced by political pressures and popular prejudice.⁵⁵ The courts invalidated discipline when the bias was obvious, such as trial of a member for accusing an officer of dishonesty before a committee appointed by the officer,⁵⁶ or trial of a member who claimed an election was fraudulent by the officers who had been elected.⁵⁷ However, more subdued prejudice or subtle devices have proven difficult to detect.⁵⁸ The right to a "full and fair hearing" under the statute clearly includes the right to an unbiased tribunal, but the dangers of unprovable bias remain inherent in the nature of union trial bodies. Senator McClellan would have required that the union provide an appeal to an impartial person in the nature of an arbitrator, but this was eliminated in the final draft.⁵⁹ The burden still rests on the courts to protect the disciplined members against bias as best they can.

5. Voting on Union Dues and Assessments ⁶⁰

Some of those supporting legislation sought to put control over major decisions directly in the hands of union members. They would have required votes on strikes and contract ⁶¹ approvals, and would have required all officers to be elected by popular vote. Such notions of direct democracy, however, were overcome by the principle of autonomy—that unions should be left free to choose the structures and processes through which particular decisions should be made. The requirement of voting on increases in dues and assessments is the sole survivor, and even it allows the international union to increase its dues by vote of a delegate convention.

The impact of the Bill of Rights depends not only on the scope of the rights guaranteed but the legal remedies provided to enforce

⁵⁵ Summers, "Disciplinary Procedures of Union" (1950) 4 Ind.Lab.Rel.Rev. 15.

⁵⁶ *Gaestel v. Brotherhood of Painters*, 120 N.J.Eq. 358; 185 Atl. 36 (1936).

⁵⁷ *Cohen v. Rosenberg*, 262 App.Div. 274; 27 N.Y.S. (2d) 834 (1st Dept. 1941).

⁵⁸ In *Reilly v. Hogan*, 32 N.Y.S. (2d) 864 (Sup.Ct. 1942) the court invalidated the expulsion of a leader of a minority group who was tried in a union meeting by the hostile majority faction. But in *Dragwa v. Federal Labour Union*, 136 N.J.Eq. 172, 41 A. (2d) 32 (1945) the court upheld the expulsion of a member who was disliked because she worked too fast. The local meeting voted her guilty of "unbecoming conduct" and the court found no proof of bias.

⁵⁹ The Auto Workers in 1957 created a Public Review Board, made up of impartial outsiders, to which appeals within the union can be taken. It has received much favourable public comment, but has not been copied by other unions. For analysis of this device, see Oberer, "Voluntary Impartial Review: Some Reflections" (1959) 58 Mich.L.Rev. 52; *Democracy and Public Review* (Fund for the Republic, 1960).

⁶⁰ s. 101 (a) (3). The practical impact of this section is negligible, for it requires no more than was required by almost all union constitutions.

⁶¹ Collective agreements are in the United States referred to as "contracts"—(Editor's footnote).

those rights. Enforcement of this Title is limited to private suits of union members, and has all the strength and weakness of such suits. The full range of legal and equitable remedies is available, and these have proven to be extremely broad. Constitutional amendments adopted in an improper referendum have been nullified,⁶² illegally called meetings have been enjoined,⁶³ and a union president was ordered to entertain a motion and put it to a vote at the next meeting.⁶⁴ Wrongfully expelled members obtain damages and reinstatement in the union,⁶⁵ and an officer who is removed from office for suing a member can enjoin the holding of an election for a replacement.⁶⁶

The primary weakness of the individual suit by a union member is the cost of litigation which may amount to thousands of dollars. Monetary damages are seldom enough even to pay the lawyer's fee, so that a member often cannot afford to insist on his rights no matter how valuable in personal terms they may be.⁶⁷ The ability to sue, in practical terms is limited largely to those who are supported by a substantial faction within the union and whose case is a part of the factional struggle.

The statute also provides criminal penalties for restraining or coercing any person from exercising his rights by force or violence, but this adds little practical protection of the democratic process or individual rights.⁶⁸

UNION ELECTIONS AND OFFICERS (TITLE IV) ⁶⁹

The statute is built on the basic premise that control of the union belongs to the members. The purpose of this Title is to assure that union officers, whose day-by-day decisions are the building blocks of union policy, shall be responsive to the will of the members.⁷⁰ The right to union office must, therefore, rest on the vote of the

⁶² *Young v. Hayes* (note 42, above).

⁶³ *Connor v. Teamster, Local 560*, 45 L.R.R.M. 2165 (D.C.N.J. 1959). ("Enjoined" = prohibited by injunction—*Editor's footnote*.)

⁶⁴ *McFarland v. Building and Material Teamster, Local 282*, 180 F.Supp. 806 (S.D.N.Y. 1960).

⁶⁵ *Nelson v. Brotherhood of Painters, Local 386*, 41 C.C.H. Labour Cases, p. 23, 870 (D.Minn).

⁶⁶ *Sheridan v. United Brotherhood of Carpenters, Local 626*, 191 F.Supp. 347 (D.Del. 1961).

⁶⁷ Senator McClellan's proposal provided for enforcement by suits for injunctions brought by the Secretary of Labour. After enthusiastically voting for this, many southern senators realised that it would set a precedent for protecting the voting rights of Negroes by similar enforcement procedures. They hastily joined forces with those who wanted to temper McClellan's Bill of Rights for union members (including many who had sought such protection for Negroes). In an unusual parliamentary manoeuvre, the previously adopted provisions were rewritten and the final version provided only for private suits. 105 Cong.Rec. 6716-6726 (1959); N.L.R.B., *Legislative History of L.M.R.D.A.*, 1959, pp. 1229-1239.

⁶⁸ s. 610.

⁶⁹ Detailed aspects of this Title are discussed in Daniels, "Union Elections and the Landrum-Griffin Act" (1960) 13 Ann.Conf. On Lab., N.Y.U. 817.

⁷⁰ The substantive provisions regulating elections make up seven subdivisions of s. 401. The broad protections of the Bill of Rights overlap some, but not all

members—and within our political tradition, though not always within the union tradition, this means by secret ballot. Thus, the statute requires all officers of local unions to be elected by secret ballot, and though officers of international unions or intermediate bodies can be chosen by delegate bodies, the delegates must be elected by secret ballot.

The provisions of the statute make clear that guaranteeing a democratic election requires much more than giving each member a right to vote, and insuring an honest count of the ballots. The election process is actually a series of processes which may begin with the naming of an election committee, and move by successive stages through nominating procedures, campaign activities, balloting, and finally end with the tabulation of the votes. Every stage is a complex of details which, if mishandled, may cause the process to go astray.⁷¹ The statute, as it finally evolved, sought to protect the entire election process, reaching into every stage of that process.

The statutory standards regulating union elections have three distinct levels. First, the statute requires that: "The election shall be conducted in accordance with the constitution and by-laws of such organisation in so far as they are not inconsistent with the provisions of this title." The union's own rules thus provide the main body of governing law, providing the framework and regulating most of the details of the election process. Secondly, the statute prescribes certain minimum standards or safeguards which the union must observe at some of the most crucial points in the election process. Finally, there is included an umbrella clause requiring that "Adequate safeguards to insure a fair election shall be provided." Discussion here is focused on the second level—the minimum standards—for they suggest the scope of the problem, measure the guarantees provided, and give some guide as to what the statute conceives as a "fair election."

The minimum standards or safeguards imposed on unions, though jumbled together in the statute, fall generally into four separate categories:

1. *Frequency of Elections*

Responsiveness of a union officer to the will of the members depends in part on the frequency with which he must stand for re-election; but too frequent elections may make the officer too submissive to vocal pressure groups or transitory interests, create instability

of these more specific provisions. For example, denying members the right to make nominations violates s. 401 (e) and the Equal Rights clause in s. 101 (a) (1), but the right to be a candidate is protected only by s. 401 (e). Confusion has been added by providing different methods for enforcing the two Titles, and the courts have not yet unsnarled the tangle of rights and remedies. See *Johnson v. San Diego Waiter Union, Local 500*, 190 F.Supp. 444 (S.D.Cal. 1961); *Mamula v. United Steelworkers*, 198 F.Supp. 652 (W.D.Pa. 1961).

⁷¹ See Summers, "Judicial Regulation of Union Elections" (1961) 70 Yale L.J. 1221.

and confusion within the union, and in the case of an international union impose a substantial financial burden. In balancing these competing interests, the statute fixed a minimum with which almost every union already complied—three years for local officers, four years for officers of intermediate bodies, and five years for officers of international unions.

2. *Honesty in Balloting*

Stuffing the ballot-box or fraudulently tabulating the votes has not been unknown in American unions, but it has not been a common problem and the statute suggests that it is the evil most easily reached. Primarily reliance is placed on the opponents' policing each other, and the statute expressly guarantees "the right of any candidate to have an observer at the polls and the counting of the ballots." To reinforce that right, particularly as to a dishonest count, as well as to aid the courts in adjudicating a contested election, the statute requires that the ballots and all records be preserved for one year. As an additional device for discovering miscounting, the statute requires that when international officers are elected by referendum, the votes from each local must be counted and the results published separately. Any serious dishonesty either at the local or international level will thus be more difficult to conceal than if all the votes are lumped into a single total.

3. *Political Rights of Members*

Most denials of a free and democratic election are accomplished prior to the balloting by frustrating or stifling members in the free exercise of basic political rights at earlier stages in the process. This Title gives specific protection to these basic rights at those points where experience demonstrated the process was most vulnerable. The right to present an opposition candidate is protected by requiring that "reasonable opportunity shall be given for the nomination of candidates," and the right to campaign for him is protected by the declaration that

"every member shall . . . have the right . . . to support the candidate . . . of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind."

The precise reach of these rights is, of course, uncertain, but the courts in defining their limits will be guided by the same considerations as in defining equivalent rights under the Bill of Rights.

The right to vote is more specifically defined and protected. Without any qualification, this Title declares that "Each member in good standing is entitled to one vote,"⁷² and must be notified

⁷² In spite of the statutory words, the Secretary of Labor has ruled that the union may prescribe "reasonable rules" deferring eligibility to vote by requiring six months' membership or requiring apprentices to finish their training: 29 C.F.R., s. 452.10 (Supp. 1961). This has not yet been tested in the courts.

of all elections at least fifteen days in advance by a notice mailed to his last known home address.

The right to be a candidate is not unqualified, but can be subject "to reasonable qualifications uniformly imposed," there is no legislative or judicial light on what are "reasonable qualifications" and this can pose difficult problems for the courts, especially when rules reasonable on their face work to bar all but incumbent officers and a few others.⁷³ The guiding principle is freedom of the political process, and the underlying right is not so much that of the would-be candidate as the right of the union members to have full freedom of choice in selecting their officers.

4. *Equal Rights for Candidates*

The greatest distortion in the election process comes from the advantages which incumbent officers have over challengers who would unseat them. The incumbents have opportunities to contact the members, control the channels of communication within the union including the union newspaper, and create an administrative bureaucracy which provides a ready-made political organisation. The statute seeks to reduce this advantage and give the opposition some measure of equality at least during the period of the campaign. The union is required "to comply with all reasonable requests of any candidate to distribute . . . at the candidate's expense campaign literature . . . to all members in good standing." It further requires that no candidate shall be discriminated against with respect to the use of lists of members or distribution of campaign literature.⁷⁴ Again the boundaries of the right are blurred by "reasonable requests," but the clear purpose is to guarantee the opposition a substantial opportunity to get its views before the voters and at least "equal time" during the campaign.

Practical politics requires that the candidate know who are potential voters so he can personally solicit their support. In many unions, such as construction, restaurant, trucking,⁷⁵ and maritime, the members are widely scattered and largely unknowable to opposition candidates. Access to membership lists is then crucial to a free and open election. Unions, however, cling to the myth of secrecy, claiming fears that such lists will be used by hostile employers, rival employers, Communists or commercial advertisers. The compromise was a token clause giving candidates a right to "inspect" (not copy) once within thirty days prior to the election, a list of those under union security agreements. The back-door,

⁷³ Requirements that candidates must have attended more than half of all membership meetings in the previous two years may in some unions effectively obstruct opposition candidates. Requirements that the candidate must have been "in good standing" for one year can disqualify all but the most cautious if there is no warning of rigid enforcement. If the employer is to "check off" dues, the employer may co-operate by forgetting to deduct it one month from the cheques of those the union suggests are trouble-makers.

⁷⁴ s. 401 (c).

⁷⁵ i.e., road haulage—(*Editor's footnote*).

however, may be more open than the front, for every candidate is entitled by the preceding clause to equal access to the membership list, and it would seem difficult for the incumbents to insist that they did not have access.

The advantages of incumbents are further curbed by prohibiting the use of union dues money "to promote the candidacy of any person" in a union election, but such funds can be used for "notices," or "factual statements of issues not involving candidates."⁷⁶ This bars the blatant use of the union newspaper for campaign propaganda and the exploitation of the union's administrative machinery or personnel for vote getting. But promotion of candidacy shades off into promotion of union policy, and campaigning for office may be inextricably interwoven with administering the union, and the courts must ultimately draw the line. Some unions have long used their newspapers' forums for debate between rival candidates, and myopic reading of the statute would prohibit this. However, the purpose of this and other provisions is to encourage free discussion on a basis of equality. Sponsoring an open and fair debate should not be viewed as promoting any candidate, but as promoting a more democratic contest.

These provisions are among the most remarkable in the entire statute, for they focus on factors in union government which even in the most respectable unions sap the vitality of the democratic process and deprive members of any real choice of officers. They do not, of course, eliminate the inherent advantages of the administration in power, but they do give the opposition a measure of equality and increase the vulnerability of entrenched bureaucracy.

Remedies for enforcing the election article take two distinct forms depending on whether they are sought prior to the balloting to correct violations or are sought after the election to set it aside and obtain a new election. The post-election remedy is clearly spelled out in the statute.⁷⁷ A member must first resort to internal appeals for three months and then file a complaint with the Secretary of Labor. The Secretary must then investigate the complaint and if he finds probable cause to believe a violation has occurred must bring an action in the civil courts to set the election aside. If it is set aside the new election is conducted under the supervision of the Secretary. This provision has proven of limited value. Out of more than a dozen suits filed, none has yet come to trial. Court delays, unavoidable or induced, work to the advantage of the officers whose election is challenged, for they continue in their posts pending outcome of the case and may defer any final adjudication until their terms expire.⁷⁸

⁷⁶ s. 401 (g).

⁷⁷ s. 402 (a).

⁷⁸ *Department of Labor Release*, No. 4508, May 4, 1961, and No. 4581, June 9, 1961. The Commissioner administering the statute has stated that the election provisions are being nullified by manoeuvres to defer action in the courts until the contested term has expired: 48 L.R.R.M. 92-93.

Pre-election remedies, which were added almost as an afterthought, permit the member or candidate to bring suit directly without intervention of the Secretary.⁷⁹ These remedies, regularly used in common law cases, provide the most effective protection of the election process. Candidates wrongfully disqualified can be restored to the ballot, campaign literature can be ordered sent out, and misuse of the union newspaper is enjoined. Correcting such defects prior to the election gives the members the fair election to which they are entitled, saves the union the costs and disruptions of a second election, and frees the court from having to determine whether the violations "may have affected the outcome of the election."⁸⁰

Through the statute runs a curiously ambivalent attitude toward the rights of union officers. The election provisions were built on the premise that officers were to be the voice of union members, but other provisions reflected the temper of the McClellan hearings that officers were the main malefactors and their removal should be facilitated. Injected into the election article was a discordant provision that if a union lacked an "adequate procedure for removal of an elected officer guilty of serious misconduct" the Secretary of Labor should provide for a hearing and secret ballot or removal.⁸¹ The Bill of Rights guarantee of a fair hearing was declared by Senator Kennedy not to apply to removal of a union officer because summary action was often necessary to prevent misappropriation of funds.⁸² The removal of an elected officer, however, deprives the members who elected him of their rights, for it nullifies the election and undercuts the democratic process. Reconciling the rights of members with the vulnerability of officers is yet to be worked out by the courts.

The attitude that internal union problems were the product of evil officers is most clearly reflected in provisions barring from positions of union responsibility any person who in the previous five years has been a member of the Communist Party⁸³ or imprisoned for arson, burglary, rape or certain other relevant

⁷⁹ Pre-election remedies are expressly provided in the second sentence of s. 403, and also in s. 401 (c). However, the effectiveness of this remedy has been dulled by the ambiguity of the statute as to whether it is available in state courts, in federal courts, or both. See *Colpo v. Local 107*, 49 L.R.R.M. 2295 (D.Del. 1961). These complexities are discussed in Summers, "Preemption And The Labor Reform Act—Dual Rights And Remedies" (1961) 22 Ohio St.L.J. 119, 135-140.

⁸⁰ This is the test prescribed in s. 402 (c) for setting aside an election and ordering a new one.

⁸¹ s. 401 (h).

⁸² 105 Cong.Rec. 17,899 (1959); N.L.R.B., *Legislative History of LMRDA, 1959*, p. 1433. See also Conference Report of House Managers, H.R.Rep. No. 1147, 86th Congress, 1st session, 31 (1959).

⁸³ There was no evidence in the hearings that Communist officers had engaged in corruption, election frauds, or oppression of members' rights. This provision replaced the one in the Taft-Hartley Act requiring union officers to sign a non-Communist affidavit for the union to have access to the procedures of the National Labor Relations Board.

felonies.⁸⁴ The democratic process is not to be trusted, Congress has made the choice. This has proven to be as futile as it is repugnant.⁸⁵

REPORTING AND DISCLOSURE (TITLE II) ⁸⁶

The reporting requirements of the statute are aimed primarily at financial malpractices and seek to curb abuses by disclosing them. Simply conceived, the "goldfish bowl" theory assumes that public disclosure will tend to discourage questionable practices by exposing miscreants to public condemnation—an assumption of doubtful validity in the jungle world of union corruption. Public disclosure, however, has a sharper bite, for it may provide evidence for civil suits against delinquent officers, or supply clues of criminal conduct—including income tax violations. Over a period of time, the collection of information may provide guides for further legislation. The statute aims at all of these: the reports filed with the Secretary of Labor are public information⁸⁷; they are examined to discover suspicious items and amounts; they are used for general studies; and one of the purposes of requiring reports on trusteeships was to enable the Secretary to report to Congress the operation of that title.⁸⁸ The reporting requirements have had a broader impact of compelling many unions to improve their record keeping simply to obtain the data which must be reported and to fulfil the requirement of keeping detailed records from which the reports can be verified.

Reporting is also conceived as an element of the democratic process and helps discourage financial abuses by informing the members so they can take corrective action. To this end, the union must not only make available to members the information required to be filed, but is under a duty to permit the member "for just cause" to examine any records "necessary to verify this report."⁸⁹ The right of the member to inspect has not been narrowly construed by the courts. He need not claim any violation of law or that the report is inaccurate, but only that it is too vague and general to give complete information.⁹⁰ This still falls

⁸⁴ s. 504.

⁸⁵ This provision was aimed primarily at the Teamsters union which, it was claimed, had become a haven for criminals under the leadership of James Hoffa. However, the statute has caused the Teamsters to dismiss less than a dozen officers or employees, all holding only minor positions.

⁸⁶ For detailed analysis of this title, see Naumoff, "Reporting Requirements Under L.M.R.D.A." (1961) 14th Ann.Conf. on Lab. 129.

⁸⁷ s. 205 (a): "The contents of the reports and documents filed with the Secretary pursuant to sections 201, 202 and 203 shall be public information, and the Secretary may publish any information and data which he obtains pursuant to the provisions of this title. The Secretary may use the information and data for statistical and research purposes, and compile and publish such studies, analyses, reports, and surveys based thereon as he may deem appropriate."
⁸⁸ s. 305. ⁸⁹ s. 201 (c).

⁹⁰ *Rekant v. Rabinowitz*, 194 F.Supp 194 (E.D.Pa. 1961); *Allen v. Bridge, Structural and Ornamental Iron Workers, Local 92*, 47 L.R.R.M. 2214 (N.D. Ala. 1960).

short of a free right to inspect but probably gives suspecting members adequate opportunity to discover misuse of funds, and enables opposition groups to question the incumbent's financial management.

The reporting device is extended to requiring union officers to report certain transactions in which their personal financial interests may conflict with their duties to their members.⁹¹ Almost all of these involve private business dealings with the union, or with employers with whom the union bargains, and constitute crimes or violations of fiduciary obligations under other sections of the statute. Apart from raising serious constitutional questions of invading the privilege against self-incrimination,⁹² requiring such public confession of personal sin has revealed few sinners.

In a gesture of even-handedness, employers were also required to file reports, but these were limited to payments to union officers or transactions to interfere with employees' free exercise of their right to organize.⁹³ This requirement was never seriously considered to have practical value, but served only as a political palliative against the complaint of unions that they were being "singled out" for special legislation.

Financial abuses were so much the central theme of the McClellan hearings, that Congress was unwilling to rely solely on disclosure and the democratic process. In addition to adding cumulative criminal provisions for bribery, embezzlement and other financial crimes,⁹⁴ there was incorporated during the Senate debate a major section on the fiduciary obligations of union officers.⁹⁵ Whether it imposes on union officers any obligation other than they would have at common law is unclear, for it incorporates the principles stated in the *Restatement of Agency* and adds "taking into account the special problems and functions of a labor organization"—another elastic term for the courts to test.⁹⁶ More critically, the statute clouds the relationship between this fiduciary obligation and the democratic process. In principle the wisdom of expenditures and transactions is for the union to decide through its governing body, but can the union executive board approve a transaction entered into by the president which otherwise is in violation of his fiduciary obligations? ⁹⁷ The McClellan hearings

⁹¹ s. 202 (a).

⁹² See Fischer, "Constitutional Question Presented by L.M.R.D.A." (1960) 48 Geo.L.J. 209, 213-219.

⁹³ s. 203.

⁹⁴ ss. 503, 505 and 602.

⁹⁵ s. 501.

⁹⁶ For analysis of this section, see Dugan, "Fiduciary Obligations Under the New Act" (1959) 48 Geo.L.J. 277; Wollett, "Fiduciary Problems Under Landrum-Griffin" (1960) 13 Ann.Conf. on Lab., N.Y.U. 267.

⁹⁷ The courts have enjoined the use of union funds to pay the legal expenses of an officer accused of misappropriating union funds, even though such expenditures were voted by the local union or other appropriate governing body: *Highway Truck Drivers v. Cohen*, 284 F. (2d) 162 (3rd Cir. 1960); *Moschetta v. Cross*, 48 L.R.R.M. 2669 (D.C., 1961). The Teamsters have now amended their constitution expressly to permit such expenditures.

made clear that such approval was often forthcoming, and the more systematic the corruption the more ready the ratification. Common law principles of full disclosure and consent have limited validity in the context of union political structures. The statute prohibits "general exculpatory provisions," but is silent whether specific ratification will cleanse a polluted transaction.

The remedy for violations of fiduciary obligation is the commonplace one of suit for damages and accounting. It can be brought by a member only if the union or its officers fail to sue within a reasonable time after being requested to do so by the member, and the member has obtained leave of the court.⁹⁸ The prosecuting member is entitled to lawyers' fees out of any amount recovered in the suit.

INVESTIGATIONS

Although enforcement of the statute is ultimately through the courts, either by civil or criminal proceedings, the Secretary of Labor can exercise constant supervision and informal policing through his power to investigate. Those powers were deliberately made extremely broad—in practice, nearly unlimited.⁹⁹

First, the Secretary's power is not limited to his participation in suits to enforce the statute. He can investigate:

"when he believes it necessary in order to determine whether any person has violated or is about to violate any provision of this Act (except Title I . . .)."

Even though he has no power to enforce the fiduciary obligations of union officers, he has full power to investigate possible violations. His role in enforcing election provisions is limited to post-election proceedings but he can investigate at pre-election stages. He is specifically barred from investigating violations of the Bill of Rights,¹ but this restriction has limited practical effect, for other provisions overlap the Bill of Rights or are so closely intertwined that the investigation of violations under other titles in fact reaches many violations of Title I.

The purpose of the investigative power is not merely to aid litigation but to supplement disclosure. This is made plain by the provision that

"the Secretary may report to interested persons or officials concerning the facts required to be shown in a report . . . or any other matter which he deems to be appropriate as a result of such an investigation."

⁹⁸ The requirement that internal remedies available within four months must be exhausted has been applied to such suits: *Penuelas v. Morena*, 198 F.Supp. 441 (S.D.Calif. 1961).

⁹⁹ s. 601. During the first eighteen months of the statute, the Department of Labor began 4,521 separate investigations. Most of these arose from complaints by union members, but several hundred were the result of defective reports, and about 200 were initiated by the Department itself.

¹ This restriction was inserted by southern congressmen to avoid setting a precedent for protecting the civil rights of Negroes.

This clearly includes informing union members of conditions discovered within the union so that they may take action either within the union or in the courts.

Secondly, the Secretary need not wait for a complaint from a union member, but can himself initiate an investigation. Moreover, under the broad grant of the statute he need not show probable cause to believe that a violation has occurred nor offer any evidence to establish the reason or basis of the investigation, but can investigate merely to discover whether there has been a violation.² This means that, armed with the subpoena power, he can make spot checks of reports or initiate an investigation on mere suspicion that something is amiss within the union. The Secretary has thus far made little use of his initiating power beyond checking reports required under the statute, but it remains available for policing purposes.

Thirdly, the investigation can reach all evidence, documentary or otherwise, which is potentially relevant to the matters under inquiry. In checking financial reports, the Secretary can subpoena all of the union's financial records, including expense vouchers, dues, receipts, cancelled cheques and other supporting documents.³ In investigating elections he could compel delivery of all ballots, voting lists, minutes of meetings and other union records, and in investigating trusteeships he could inquire into all the circumstances of their creation and continuation.

Such sweeping investigating powers can be an effective instrument of enforcement, apart from collecting evidence for criminal prosecution or civil enforcement actions. The desire to avoid investigation encourages unions to avoid even the appearance of a violation, and the mere beginning of an investigation may lead to a correction of questionable conduct.⁴ The power of the Secretary to report any facts found enables him to focus all of the pressures of disclosure on specific practices in specific unions. These strengths are also dangers, for they can be used to harass unions or insist on standards and procedures beyond those required by the statute. There is no effective judicial control, but only the political check on the Secretary. This is little or no protection for unions such as the Teamsters which are politically fair game.

The democratic process gives investigation an additional troublesome dimension. The mere arrival of an investigator at a union office creates suspicions and feeds rumours directed against the officers. When the investigator leaves there remains behind a cloud of doubt. Political factions in unions may instigate investigations prior to an election to achieve just this result. There has been

² *Goldberg v. Truck Drivers Local Union No. 299*, 293 F. (2d) 807 (6th Cir. 1961).

³ The breadth of the subpoena is illustrated in the case cited in the preceding note.

⁴ Many of the violations may be due to lack of understanding of what the statute requires and voluntary compliance is quickly achieved in such cases.

demand by some unions and union officers that the Secretary give a "clean bill" when no violations are discovered, but this has not proven practical except in limited circumstances.⁵

CONCLUSION

The broad compass of the statute obscures that at its centre it preserves the central value of union autonomy—the right of union members to govern their union. The statute does not prescribe union structures, nor does the government promulgate union policies. Unions remain self-governing. The statute requires only that the union in designing its structure and determining its policies shall observe certain minimum standards of the democratic process—autonomy is limited only by prohibiting autocracy. The law, by protecting democratic rights within the union, not only adds to the members' freedom, but also reinforces the union's claim to remain free, for its decisions are validated by the democratic process. The statute does not open the door to further intervention but rather safeguards autonomy by giving union self-government added legitimacy.

The law does not, of course, ensure union democracy for this must ultimately rest on the will and desires of the members. The goals of the statute are much more limited. It seeks only to safeguard the basic rights essential to the life of union democracy so that when union members do have the will and desire they will also have some small measure of opportunity. It seeks to keep ever-present the rudimentary instruments of self-government and to protect those who would assert their rights of citizenship within the union.

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⁵ The investigation may be incomplete or it may find some evidence of violations but not enough to warrant taking any action—a "clean bill" would mislead the members. Publication of non-criminal deficiencies might create more difficulties than they would cure, both for the government and the officers. However, the Secretary will give a carefully guarded statement of the results of this investigation upon the written request of an individual who feels he has been adversely affected.

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