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THOMAS G. S. CHRISTENSEN, EDITOR



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LANDRUM-GRIFFIN, 1965-1966: A CALCULUS OF DEMOCRATIC VALUES

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Introduction

One of the happier ironies of recent labor history can be found in the impetus given union democracy by the Landrum-Griffin Act. At the time the Act was passed, the thinking of disinterested observers had not yet crystallized on the merits of running a union's affairs democratically.¹ It is probably fair to say that the main push in Congress for

1. In 1959, the year Landrum-Griffin was enacted, a number of American and English authorities could be cited in support of the thesis that "democracy is as inappropriate within the international headquarters of the UAW as it is in the front office of General Motors." See Magrath, "Democracy in Overalls: The Futile Quest for Union Democracy," 12 *Ind. & Lab. Rel. Rev.* 503, 525 (1959). But the current trend of opinion is clearly the other way. See, e.g., Lipset *et al.*, *Union Democracy 448-63* (1956, 1962); Leiserson, *American Trade Union Democracy 53-82* (1959); Cox, "Internal Affairs of Labor Unions Under the Labor Reform Act of 1959," 58 *Mich. L. Rev.* 819, 830 (1960); Summers, "The Impact of Landrum-Griffin in State Courts," 13 *N.Y.U. Ann. Conf. on Labor* 333, 335 (1960).

Landrum-Griffin and, particularly, its Title, "Bill of Rights" came from a conservative coalition which was less concerned with promoting the individual rights of working people than with blunting the effectiveness of labor organizations.² There is hardly anything unique in such a situation; the purification of any well-established institution is likely to require a sizable (if unwitting) contribution by its enemies. Yet I suspect that today most commentators would agree the foes of unionism in the 1959 Congress performed their role in especially commendable style. By and large, the provisions of the Landrum-Griffin Act dealing with internal union affairs have significantly advanced the cause of union democracy while doing little if any damage to the structure of organized labor.³

Having sketched this rather idyllic picture, I almost hesitate to inject the serpent into the scene by stirring up old questions about the proper function of law in securing democratic procedures within labor unions. But I feel I must. For I believe that in the laudable pursuit of individual membership rights, the Labor Department and the courts have occasionally trampled upon other democratic values of an even higher order. And, if some academic critics had their way the process would be carried still further.

The past year has not been rich in landmark decisions on Landrum-Griffin. This, then, would seem an opportune time to pause for a brief reexamination of a few basic premises of national policy regarding internal union affairs. Such a reexamination should also serve to add perspective to my subsequent discussion of the major developments under Landrum-Griffin during the last twelve months.

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2. See, e.g., Dunau, "Some Comments on the Bill of Rights of Members of Labor Organizations," *14 N.Y.U. Ann. Conf. on Labor* 77-8 (1961); Cox, *supra* note 1, at 820-21, 831-33. Cf. Taft, "Reflections on the Present State of the Labor Movement," *IRRA, Proceedings 14th Ann. Meeting* 2, 6-7 (1961).
 3. I have argued elsewhere that Landrum-Griffin's Title VII amendments to Taft-Hartley tipped the scales too far against the use of union economic power vis-à-vis management. See St. Antoine, "Secondary Boycotts and Hot Cargo: A Study in Balance of Power," *40 Det. L.J.* 189 (1962). But this is not the place to resume that debate.

THE ROLE OF GOVERNMENT IN SECURING UNION DEMOCRACY

What role should government play in promoting democracy within labor organizations? Obviously, there can never be a definitive answer to a query such as that. But I think some helpful insights can be gained by breaking the issue down into three subsidiary questions: To what extent is it desirable for unions to be operated democratically? To what extent should union democracy be imposed and enforced from outside? And who is to answer those two questions, insofar as they are to be answered as a matter of federal law?

Democracy as a Goal

It would be easy to say that unions should be “completely” democratic. Even today, however, that statement probably needs a good bit of qualification in order to command general assent. Unions are not merely debating societies. They are militant organizations that must act quickly and decisively in times of crisis. I doubt that any real friend of the working man would insist that every union decision must be argued out and voted upon in town-meeting fashion. At the same time, both management and the public arguably stand to suffer from irresponsibility in collective bargaining which is a possible side effect of a massive injection of democracy into labor organizations.

Fair elections of officers are the mainsprings of union democracy. Yet, here too, there is a difference between the desirability of preventing the ballot box from being stuffed and the desirability of opening candidacies to every member, regardless of his experience or lack of experience in union affairs. I would resolve most doubts in favor of facilitating genuine contests for union office. But I think it must be conceded that, as union elections come to be more and more like two-party races for state governor and less and less like stockholders' ratifications of corporate directorships, the greater will be the danger that able young men may be de-

tered from aiming for careers as union leaders. Certainly it is understandable why several perceptive observers of the labor scene have expressed fears, for a variety of reasons, that union democracy might carry too high a price tag.⁴ At any rate, this clearly seems an issue over which the most reasonable of men could differ, especially as of 1959.

Democracy and the Law

Assuming we set aside the qualms of the faint-hearted (or hard-headed, as you will) and opt for union democracy in some degree or another, how are we to secure it? In this day and age, one response can be expected almost as a reflex action—through federal law. The suggestion has much to recommend it. Inertia or worse may stall union efforts at self-reform.⁵ While state common law courts can usually enforce membership rights spelled out in an organization's constitution, they are hard put to write minimum guarantees from scratch.⁶ Federal regulation can ensure that at least certain minimal standards will be observed by all unions. On the other hand, government intervention inevitably poses something of a threat to healthy union self-rule.⁷ Moreover, the uniformity which law naturally tends to produce may impair an organization's ability to tailor its internal processes to its own peculiar needs. So, on the means of achieving union democracy, as on the merits of the end itself, reasonable men have differed.

Regulation and Governmental Restraint

I take it all would agree, in principle, that the place of federal law in this field must basically be determined by

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4. See, e.g., Dunlop, quoted in Cox, *supra* note 1, at 829-30; Taft, *supra* note 2, at 7; Magrath, *supra* note 1, at 523-25, citing various authorities.
 5. Cf. Kerr, *Unions and Union Leaders of Their Own Choosing* 5 (1958); Cox, "The Role of Law in Preserving Union Democracy," 72 *Harv. L. Rev.* 609, 610 (1959).
 6. Cox, *supra* note 1, at 843; Summers, *supra* note 1, at 344-46.
 7. Cf. S. Rep. No. 187, 86th Cong., 1st sess., 7 (1959); Cox, *supra* note 1, at 831, 845.

Congress. I am not so sure everyone is prepared to accept the implications of that principle. Justice Frankfurter once noted, in construing Taft-Hartley, that the Act was "to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views," and he drew from this a counsel of "wariness in finding by construction a broad policy against [certain union conduct] when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law."⁸ The same can be said of Landrum-Griffin. It too was the product of "strong contending forces." Much more than now, there were "deeply held views" on the merits and demerits of union democracy, and on the merits and demerits of enforcing it through federal law. The statute that was hammered out was of the essence of compromise. I therefore find it vaguely disquieting to see the best of scholars decrying a "narrow and niggardly judicial approach" to the Act, and urging detours around its "awkward wording."⁹ I'm inclined to interpret these statements, perhaps uncharitably, as pleas that the statute be applied more in accord with the heart's desires of the commentators than in accord with the legislative mandate.

While I do not wish unduly to dramatize the situation, it seems to me that an overeagerness to expand the scope of Landrum-Griffin, however well-intentioned, represents at least a small betrayal of a democratic value that far transcends union democracy in importance. I would hold with Justice Cardozo:

When the legislature has spoken, and declared one interest superior to another, the judge must subordinate his personal or subjective estimate of value to the estimate thus declared.

8. *Carpenters Local 1976 v. NLRB*, 357 U.S. 93, 99-100 (1958).

9. See Aaron, "The Union Member's 'Bill of Rights': First Two Years," *Industrial Relations* (February 1962) 47, 70; Summers, "Pre-emption and the Labor Reform Act—Dual Rights and Remedies," 22 *Ohio State L.J.* 119, 136, 138, n. 89 (1961).

He may not nullify or pervert a statute because convinced that an erroneous axiology is reflected in its terms.¹⁰

Is it unrealistic to talk of the "legislature speaking" or of "legislative purpose"? I think not. Naturally, when a statute says something is to be done "reasonably" or "fairly," it is foolish to contend that Congress has done more than deputize the courts to legislate meaning into those protean terms. But when the statute deals with whole areas of jurisdiction or procedure as when it says, for example, that one type of right shall be vindicated by private suit and another type by administrative action,¹¹ or when it says a union member must first pursue intra-union remedies before seeking legal relief,¹² I believe a definite congressional judgment has been expressed and a judge's or administrator's personal notions must yield.

In addition, there may be more general guidelines which must be honored. In reporting out the Kennedy bill, the Senate Labor Committee emphasized the "desirability of minimum interference by Government in the internal affairs of any private organization," and cautioned that "in establishing and enforcing statutory standards great care should be taken not to undermine union self-government."¹³ This philosophy was somewhat diluted when the original McClellan "Bill of Rights," sponsored by persons who doubtless did not share the Committee's concern about union autonomy, was added on the Senate floor.¹⁴ But, thereafter,

10. Cardozo, *The Growth of the Law* 94-5 (1924). To anyone who thinks that an appeal to legislative purpose is passé in a time of free-wheeling judicial policy determinations, I suggest perusal of *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195 (1962), and *Calhoon v. Harvey*, 379 U.S. 134 (1964). Some of the more celebrated torturings of legislative intent by the Supreme Court in recent years are probably attributable to lurking constitutional questions. See, e.g., *Machinists v. Street*, 367 U.S. 740 (1961); *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58 (1964).

11. See discussion of *Calhoon v. Harvey* and related cases, *infra*, nn. 17-19 and accompanying text.

12. See discussion of the *Operating Eng'rs. Local 9* and *Operating Eng'rs. Local 406* cases, *infra*; notes 62 & 63 and accompanying text.

13. S. Rep. No. 187, 86th Cong., 1st sess. 7 (1959).

14. For an account by a close observer, see Cox, *supra* note 1, at 831-33.

moderate forces under the leadership of Senator Kuchel worked out a compromise substitute that replaced Senator McClellan's rather vague and sweeping guarantees with a series of "specifically enumerated rights," and reasserted a union's authority to impose "reasonable" qualifications on membership rights.¹⁵ So even in the "Bill of Rights" the principle of limited encroachment on union autonomy was largely respected. No general commission was issued to the courts to "go and do justice!"

I have painted with a broad brush long enough. It is time to get down to specific cases.¹⁶ As in previous years, Title I ("Bill of Rights") and Title IV (Elections) were the principal storm centers of Landrum-Griffin litigation in 1965-1966 and my survey will focus on these two areas. I will also briefly mention some significant developments regarding the anti-Communist ban, Labor Department investigations, bonding requirements, and the duty of attorneys to report under the Act.

TITLE I

Jurisdiction

The relationship of the "Bill of Rights" (enforceable by private suit) to Landrum-Griffin's elections provisions (enforceable by the Secretary of Labor), to state law and to Taft-Hartley continues to trouble the courts. As could be expected, a more restricted reading of Title I's scope has followed in the wake of the 1964 decision in *Calhoon v.*

15. 105 Cong. Rec. 6717-26 (1959); H. Rep. No. 741, 86th Cong., 1st sess. 95 (1959).

16. It is only fair to note that before donning the academic toga, I participated, directly or indirectly, as union counsel in several of the cases I am to discuss. I do not think my association has greatly colored my judgment. Some of the union positions I will endorse; some I will reject; and some find me unable to form any firm opinion.

Harvey.¹⁷ There, you will recall, the Supreme Court held that the disqualification of a candidate presents issues to be decided only under Title IV's eligibility standards and not under Title I's guarantee of an equal right to nominate even when a union uses a self-nomination procedure. District courts have since held that Title IV rather than Title I governs a local's procedure for nominating delegates to an international convention¹⁸ and an international's voiding of a local election.¹⁹ But Title I jurisdiction has been sustained where "associate members" were allegedly denied the "equal right" to vote and nominate candidates even though the relief requested included the setting aside of elections already conducted, a remedy within the exclusive domain of Title IV.²⁰ The court explained that at least some relief would be available under Title I.

Title I jurisdiction depends upon the claimed violation of one or more of a limited set of specified rights. Nonetheless, the Second Circuit last year upheld a federal court preelection action to enforce a union's constitution (apparently deemed a contract under state law) on the theory of "pendent jurisdiction" after the intervening decision in *Calhoon v. Harvey* destroyed the original Title I basis of the suit.²¹ This ruling seems *sui generis*, not to be applicable where a federal claim under Title I is plainly nonexistent at the time suit is brought.²² On an issue which the Supreme Court must eventually resolve, the Sixth Circuit and the Pennsylvania Supreme Court held (correctly, I believe) that a claim of discrimination in employment because of ouster from union

17. 379 U.S. 134 (1964). This apparently is a case which there's no use arguing about. Everyone sees immediately that it's clearly right or clearly wrong. I think it's clearly right. Last year's commentator went the other way. Murphy, "Major Developments of the Year Under the Landrum-Griffin Act," 18 *N.Y.U. Ann. Conf. on Labor* (1966).

18. *Paravate v. Insurance Workers Local 13*, 59 LRRM 2169 (W.D.Pa. 1965).

19. *Carpenters Local 115 v. Carpenters*, 247 F. Supp. 660, 60 LRRM 2518 (D. Conn. 1965).

20. *O'Brien v. Paddock*, 246 F. Supp. 809, 61 LRRM 2429 (S.D.N.Y. 1965).

21. *Libutti v. DiBrizzi*, 343 F.2d 460, 58 LRRM 2846 (2d Cir. 1965).

22. See *Wittstein v. Musicians*, 59 LRRM 2335 (S.D.N.Y. 1965); *McCarthy v. Machinists Lodge 9*, 61 LRRM 2652 (E.D. Mo. 1966).

membership is subject to exclusive NLRB jurisdiction, and may not be the ground of a Landrum-Griffin action.²³

Substantive Rights

Equal Rights

Substantive interpretations of the "Bill of Rights" during the past year were largely refinements of previously established principles. Again emphasized was the limitation of Section 101 (a) (1)'s "equal rights" protection to the specifically listed guarantees of voting, nominating candidates and so on. Thus, a union was held not guilty of contempt in refusing to accept transfers of *membership* from a sister local despite a court order requiring it to accord transferees "equal rights."²⁴ And, absent voting discrimination, the reasonableness of convention procedure for passing a resolution was held not subject to general review under Section 101 (a) - (1).²⁵ But union members were declared entitled to vote on the ratification of a union contract if the question is properly before a membership meeting.²⁶

Free Speech

The courts reaffirmed that the "free speech" guarantees in Section 101 (a) (2) prevent union penalties even for false or libelous statements about fellow members or union officials.²⁷

23. *Knox v. UAW*, 351 F.2d 72, 60 LRRM 2253 (6th Cir. 1965); *Spica v. ILGWU*, 61 LRRM 2649 (Pa. 1966). *But cf. Figueroa v. NMU*, 342 F.2d 400, 58 LRRM 2619 (2d Cir. 1965). See also Arlook, "Federal Preemption and Landrum-Griffin," 13 *N.Y.U. Ann. Conf. on Labor* 89 (1960).

24. *Ferger v. Iron Workers Local 483*, 356 F.2d 854, 61 LRRM 2244 (3d Cir. 1966).

25. *Wittstein v. Musicians*, *supra* note 22. See also *Hurwitz v. Directors Guild*, 60 LRRM 2359 (S.D.N.Y. 1965) (anti-Communist oath as reasonable condition of continued membership), *Rev'd* 62 LRRM 2653 (2d Cir. 1966).

26. See *Arnold v. Meat Cutters Local 653A*, 60 LRRM 2013 (D. Minn. 1965).

27. *Boilermakers v. Rafferty*, 348 F.2d 307, 59 LRRM 2821 (9th Cir. 1965). *Cf. Farowitz v. Musicians Local 802*, 241 F. Supp. 895, 59 LRRM 2749 (S.D.N.Y. 1965).

A member making statements discreditable to his union, however, may possibly be subject to discipline for violating his responsibility "toward the organization as an institution."²⁸ Union officers, incidentally, may rely on the "free speech" provision to protect their status not only as members but also as officers.²⁹

Dues and Assessments

In accord with Supreme Court philosophy,³⁰ the courts have exhibited a liberal attitude in upholding the validity under Section 101 (a) (3) of union financial exactions. For example, a local labor organization was lawfully obliged to pay dues to a union coordinating body,—which the international executive board had compelled the local to join—, once the statutory requirement of approval of the dues levy by a "convention" of the coordinating body was fulfilled.³¹ A musicians' engagement tax, authorized by a local's bylaws, was upheld against an attack claiming it constituted an "assessment" imposed without a membership vote.³² And the "reasonable notice" requirement of the statute, applicable when local dues are increased at a membership meeting, was found inapplicable when an increase was voted on through a referendum.³³

Hearing Procedures

The year's trail-blazing "Bill of Rights" litigation involved Section 101 (a) (4), which provides that "[n]o labor organization shall limit the right of any member" to institute judicial or administrative proceedings. A proviso states that

28. *Deacon v. Operating Eng's Local 12*, 59 LRRM 2706 (S.D. Calif. 1965). A proviso to section 101 (a) (2) authorizes a labor organization "to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution."

29. *Lamb v. Carpenters Local 1292*, 59 LRRM 2250 (E.D.N.Y. 1965).

30. See *Musicians v. Wittstein*, 379 U.S. 171 (1964).

31. *King v. Randazzo*, 346 F.2d 307, 59 LRRM 2412 (2d Cir. 1965).

32. *Denov v. Davis*, 61 LRRM 2203 (N.D. Ill. 1966).

33. *Jennette v. Ammons*, 60 LRRM 2154 (M.D. Tenn. 1965).

a "member may be required to exhaust reasonable hearing procedures" within the union for a period not exceeding four months. In *Ryan v. IBEW*³⁴ and *Roberts v. NLRB*,³⁵ two courts of appeals concluded the proviso does not authorize a union to discipline a member for suing or filing charges without first pursuing internal remedies. The proviso was apparently read as authorizing only a *court* or *agency* to require exhaustion. An argument can obviously be made that *any* restriction imposed by a private body on a person's access to a public tribunal is contrary to public policy, and should be prohibited.³⁶ For a number of reasons, however, I am persuaded that Congress intended in Section 101 (a) (4) merely a partial, not an absolute, prohibition.

First, the general prohibitory language of Section 101 (a) - (4) is directed at a "labor organization." The most natural interpretation of the exception contained in the proviso is that it, too, applies to a "labor organization." The authorization for a requirement that members pursue internal remedies for four months would thus be an authorization for such a requirement to be imposed by *unions*.

Second, in reporting on the conference agreement, Senator Kennedy as floor manager said flatly that the four month limitation in the House bill also related "to restrictions imposed by unions rather than the rules of judicial administration or the action of Government agencies."³⁷

Third, during the passage of the bill, the maximum allowable exhaustion period was reduced from six months to four to meet an objection by Senator Goldwater. Since Taft-

34. 62 LRRM 2339 (7th Cir. 1966), *affirming* 241 F. Supp. 489, 59 LRRM 2300 (N.D. Ill. 1965).

35. 350 F.2d 427, 59 LRRM 2801 (D.C. Cir. 1965) (fine for filing charges with NLRB without exhausting internal remedies an unfair labor practice).

36. See Cox, *supra* note 1, at 839.

37. 105 Cong. Rec. 17899 (1959). Representative Griffin seems to have disputed Senator Kennedy's contention that the proviso would have no effect at all on the traditional judicial doctrine of exhaustion of remedies. See 105 Daily Cong. Rec. A7915 (Sept. 10, 1959). But he did not deny that the proviso was applicable in any event to union-imposed restrictions.

Hartley's "statute of limitations" is six months, the Senator pointed out, a parallel six months exhaustion requirement under Landrum-Griffin would place a union member in a dilemma. If he pursued intra-union relief for six months, the NLRB would refuse to process any subsequent unfair labor practice charge. If he filed before six months to escape the Taft-Hartley time bar, the union "may discipline him for having filed the charge."³⁸ The Goldwater complaint and the Congressional response to it make no sense except on the hypothesis that the proviso permits union discipline of members not pursuing intra-union remedies for four months. Although the proviso explicitly authorizes an exhaustion requirement before initiation of "administrative proceedings" as well as court actions, the NLRB, unlike the courts, has never applied an exhaustion of remedies doctrine and the proviso's four (or six) months limitation was not intended to inhibit action by the NLRB.³⁹ Therefore, only union rules, not agency rules, could have been the target of the proviso battle.

Fourth, to construe the four-months proviso as regulating agency conduct rather than union conduct leads logically to the incongruous result that the NLRB would have to defer to intra-union procedures for four months before it could process charges.⁴⁰ As previously indicated, this has never been the law.

Fifth, union discipline for failure to exhaust internal remedies before seeking legal relief has long been an ac-

38. 105 Cong. Rec. 10095 (1959). See also 105 Cong. Rec. 14344-45 (1959) (Reps. Landrum and Griffin).

39. See 105 Cong. Rec. 17899 (1959) (Sen. Kennedy); 105 Cong. Rec. 15835 (1959) (Rep. McCormack); 105 Daily Cong. Rec. A7915 (Sept. 10, 1959) (Rep. Griffin).

40. In *Roberts v. NLRB*, *supra* 350 F.2d at 430, the court came close to espousing this view. Cf. *Cox*, *supra* note 1, at 840.

I have considered the possibility the proviso allows a union to establish an exhaustion requirement, but allows only a court or agency to implement it (by declining jurisdiction). Such a separation of the rule-making and rule-enforcing functions, however, seems sufficiently anomalous to be discounted, in the absence of a much clearer indication that it was the congressional intent. Cf. *Retail Clerks Local 1625 v. Schermerhorn*, 375 U.S. 96, 99 (1963).

cepted practice in the labor movement.⁴¹ While this of course is not controlling, it suggests how the custom of resolving disputes within the confines of an organization could be considered as possessing enough claim to legitimacy to justify retention of the exhaustion requirement in a modified form.

For me, the force of those arguments, especially their cumulative force, has never been satisfactorily countered. The courts, it seems, have simply extended a policy beyond the point where Congress deliberately stopped.

Exhaustion of internal remedies has been dispensed with as a prerequisite to suit where union disciplinary action was "void" because based on an offense not specified in the union constitution,⁴² or where exhaustion was deemed "futile" because of union hostility toward the member.⁴³ Appellate relief must be pursued if there is no showing of prejudice, however, or else the court will decline jurisdiction.⁴⁴

Disciplinary Proceedings

In assessing the fairness of union disciplinary proceedings under Section 101 (a) (5), the courts are rightly less concerned with form than with substance. Informality or minor departures from prescribed procedures are not fatal defects as long as there is adequate notice of charges and a full opportunity to be heard.⁴⁵ As just mentioned, discipline to be valid must be grounded in an offense listed in the organiza-

41. Sixty-four international constitutions make failure to exhaust a punishable offense. U.S. Dept. Labor, Bur. Lab. Stat. Bull. No. 1350, *Disciplinary Powers and Procedures in Union Constitutions* 28 (1963). In *Musicians v. Wittstein*, 379 U.S. 171, 178, n. 6 (1964), the Court expressly relied on the established practices of a substantial body of American unions in determining what was allowable under rather ambiguous statutory language.

42. *Simmons v. Textile Workers Local 713*, 350 F.2d 1012, 60 LRRM 2131 (4th Cir. 1965).

43. *Farowitz v. Musicians Local 802*, 241 F. Supp. 895, 59 LRRM 2749 (S.D.N.Y. 1965).

44. *Hopkins v. Daley*, 59 LRRM 2622 (S.D.N.Y. 1965).

45. *Null v. Carpenters Dist. Council of Houston*, 239 F. Supp. 809, 59 LRRM 2645 (S.D. Tex. 1965); *Anderson v. Carpenters*, 59 LRRM 2684 (D. Minn. 1965).

tion's constitution.⁴⁶ Furthermore, charges must be drafted with reasonable particularity as to time, place, and circumstances.⁴⁷ Fighting city hall is always a ticklish matter but there is no deprivation of a fair hearing merely because the accusers are business agents.⁴⁸

Remedies

Most courts hold punitive damages are not to be awarded in Landrum-Griffin actions.⁴⁹ My feeling is that this is sound. Giving "smart money" in a labor context just seems out of place, at least in the ordinary case. There is something of a conflict regarding damages for mental anguish. They have been allowed in conjunction with damages for injured reputation⁵⁰ and disallowed when standing alone.⁵¹ Title I, by the way, has been held to permit a damage action only against a union or union officers acting in their official capacity and not against members or officers acting as private individuals.⁵²

TITLE IV

Election Standards

During the past year, for the first time, a significant number of court rulings on the "reasonableness" of union election qualifications and procedures issued in a series of actions

46. *Simmons v. Textile Workers Local 713*, *supra*.

47. *Jacques v. ILA Local 1418*, 246 F. Supp. 857, 60 LRRM 2320 (E.D. La. 1965).

48. *Cornelio v. Carpenters*, 243 F. Supp. 126, 59 LRRM 2722 (E.D. Pa. 1965), *aff'd* 61 LRRM 2688 (3d Cir. 1966).

49. *Keenan v. Carpenters Dist. Council of Philadelphia*, 59 LRRM 2510 (E.D. Pa. 1965); *Magelssen v. Plasterers Local 518*, 240 F. Supp. 259, 59 LRRM 2725 (W.D. Mo. 1965). *Contra*, *Farowitz v. Musicians Local 802*, 241 F. Supp. 895, 59 LRRM 2749 (S.D.N.Y. 1965).

50. *Simmons v. Textile Workers Local 713*, 350 F.2d 1012, 60 LRRM 2131 (4th Cir. 1965).

51. *Boilermakers v. Rafferty*, 348 F.2d 307, 59 LRRM 2821 (9th Cir. 1965).

52. *Keenan v. Carpenters District Council of Philadelphia*, *supra* note 49.

brought by the Secretary of Labor under Title IV. A variety of conditions on eligibility for union office were found unreasonable and invalid, at least where they had the effect in actual operation of disqualifying a substantial portion of a union's membership. These included: (1) a requirement that quarterly dues be paid in advance, on or before the first day of each quarter, during the entire year preceding the election;⁵³ (2) a requirement that a declaration of candidacy be filed four months prior to the nominating meeting;⁵⁴ (3) a requirement of attendance at 75 percent of the union's meetings during the two-year period since the last election;⁵⁵ (4) a requirement of membership on the union's board of directors for at least six months;⁵⁶ and (5) a requirement that a member prove his eligibility for an officer's bond of the type prescribed by Section 502 of the Landrum-Griffin Act.⁵⁷

Some of these qualifications may be interpreted either as efforts to ensure that candidates will be well-versed and active in a union's affairs or as efforts to deter dissidents and benefit incumbents. Since Section 401 (e) guarantees "every member in good standing" the right to be a candidate, subject to "reasonable qualifications uniformly imposed," a court is probably on sound legal (as well as practical) grounds in appraising most restrictions with a skeptical eye, demanding a demonstrably good reason before allowing any limitation to qualify as "reasonable" and thereby erode the "prima facie" right of "every member" to run for office.⁵⁸ At any

53. *Wirtz v. Operating Eng'rs Local 9*, 58 LRRM 2550 (D. Colo. 1965) (87% of membership ineligible).

54. *Wirtz v. Operating Eng'rs Local 30*, 242 F. Supp. 631, 59 LRRM 2654 (S.D.N.Y. 1965).

55. *Wirtz v. Glass Bottle Blowers Local 153*, 244 F. Supp. 745, 60 LRRM 2020 (W.D. Pa. 1965) (only 2.2% of membership eligible).

56. *Wirtz v. Office Employees*, 60 LRRM 2215 (N.D. Ind. 1965).

57. *Wirtz v. Carpenters Local 559*, 61 LRRM 2618 (W.D. Ky. 1966).

58. I would exempt from my strictures such traditional requirements as completion of a minimum period of membership, or graduation from apprentice to journeyman status. Cf. 29 C.F.R. §§ 452.7 (b), 452.10 (a) (1965). And special circumstances, naturally, may call for special qualifications.

rate, it is in areas like this where terms like "reasonable" and "fair" must be applied, that the courts are plainly entitled to exercise the widest range of discretion.

Under Section 402 (c), an election is to be set aside if a statutory violation "may have affected the outcome." Some courts have reached the rather startling conclusion that the disqualification of a candidate does not necessarily mean the outcome of an election may have been affected.⁵⁹ Sound policy suggests that certain violations, such as disqualification of a candidate or failure to provide a secret ballot, should be deemed *per se* to be violations that may have affected the election's result.⁶⁰ To argue that a given candidate in a given election has no earthly chance of winning (but who can tell?) is beside the mark. Election campaigns serve a valuable educational function, apart from anything else; opposition must start somewhere, and it needs a rallying point; and the notion that even a sure loser can be disqualified with impunity is offensive to the whole concept of a fair election.

Enforcement

Section 402 of the Landrum-Griffin Act provides for enforcement of its election safeguards, with minor exceptions, through post-election suits by the Secretary of Labor in federal district court. The Secretary may act only in response to a complaint filed with him by a member who has first pursued any available intra-union remedies for three months. In some respects the Labor Department's enforcement of Title IV may be too zealous and in other respects too lax.

59. *Wirtz v. Operating Eng's Local 30*, *supra* note 54; *Wirtz v. Operating Eng's Local 410*, 61 LRRM 2396 (N.D.N.Y. 1965). After this paper was delivered, the district court's judgments were vacated as erroneous but the complainants were ordered dismissed on the ground that intervening union elections had rendered the cases moot. 62 LRRM 2777 (2d Cir. 1966).

60. *Wirtz v. Carpenters Local 559*, *supra* note 57; *Wirtz v. Office Employees*, *supra* note 56. Cf. *Wirtz v. Hod Carriers Local 125*, 62 LRRM 2141 (N.D. Ohio 1966) (allowing substantial number of persons to vote who were ineligible because of nonpayment of dues may have affected outcome). See also Note, 78 *Harv. L. Rev.* 1617, 1632 (1965).

Although the Secretary may look upon himself as a roving defender of a public right, Congress did not see it quite that way.⁶¹ Due regard for the Congressional goal of fostering union self-regulation and meaningful recognition of the statutory requirement of exhaustion of internal remedies call for the Secretary to confine his election challenges, in general, to matters previously covered in the member's protest to the union. It therefore seems out of order for the Secretary to try to set aside an election on a ground which the union has never had the chance to pass upon⁶² or to try to set aside the elections of all officers in a union when only one office has been the subject of a member's grievance.⁶³ The district courts are divided on this question.⁶⁴ I would agree, of course, that a member should not be bound by the niceties of legal pleading in preparing his complaint to the union or to the Secretary.⁶⁵

Contrasting with this diligence in ferreting out grounds on which to contest elections is an apparent lack of vigor by the Labor Department in the actual prosecution of suits. Now,

61. See S. Rep. No. 187, 86th Cong., 1st sess. 21 (1959): "In filing a complaint the member must show that he has pursued any remedies available to him within the union and any parent body in a timely manner. This rule preserves a maximum amount of independence and self-government by giving every international union the opportunity to correct improper elections."

62. *Wirtz v. Operating Eng'rs Local 406*, 62 LRRM 2309 (E.D. La. 1966). (holding against Secretary).

63. *Wirtz v. Operating Eng'rs Local 9*, *supra* note 53 (holding against Secretary).

64. For citations, see *Wirtz v. Operating Eng'rs Local 406*, *supra* note 62. For a good defense of the Secretary's position, see Beard, "Union Officer Election Provisions of the Labor-Management Reporting and Disclosure Act of 1959," 51 *Va. L. Rev.* 1306, 1326-31 (1965).

No sound analogy can be drawn from cases holding the NLRB's General Counsel may include in his complaint allegations not contained in the charge filed with him. Unlike the Landrum-Griffin Act, the National Labor Relations Act has no exhaustion of remedies requirement.

On a somewhat related procedural issue, it has been held that a member must comply with a union's reasonable time limits on election protests in order to be entitled to file a complaint with the Secretary. *Wirtz v. Masters, Mates, and Pilots Great Lakes Dist. Local 47*, 61 LRRM 2010 (N.D. Ohio 1965) (10 days reasonable).

65. *Wirtz v. Hod Carriers Local 169*, 246 F. Supp. 741, 60 LRRM 2540 (D. Nev. 1965).

armchair criticism like mine is easy; the able public servants who administer this novel statute in a highly sensitive area of labor relations, undoubtedly face operational problems I know nothing about. Nevertheless, something is amiss when delay in pressing suits to void elections forces the Secretary to defend against a flurry of mootness motions by officers whose two- or even three-year terms are expiring prior to final court action.⁶⁶ The average time in court for a case is about fifteen months.⁶⁷ This means the candidates who are declared the winners by the union in a disputed election which eventually is set aside may run the organization for all or most of their terms before they are replaced by lawfully elected officers. Surely that is a situation where there is peculiar aptness in saying justice delayed is justice denied.

After an election has been conducted, the Secretary of Labor has exclusive authority to challenge it. Individual members may not sue or even intervene in a Title IV action brought by the Secretary.⁶⁸ Section 403, however, also provides that "Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this title." Before an election, therefore, a private action may be maintained to ensure compliance with an organization's own electoral rules. Academic commentators have argued that the union constitution is to be interpreted as a matter of federal substantive law in pre-election suits.⁶⁹ The centripetal pull of federal law in the labor field cannot be gainsaid.⁷⁰ Nonetheless, the courts to date apparently have assumed that pre-election suits to enforce a union's constitution are governed by state substantive

66. See, e.g., *Wirtz v. Carpenters Local 559*, 60 LRRM 2522 (W.D. Ky. 1965); *Wirtz v. Operating Eng'rs Local 410*, *supra* note 59; *Wirtz v. Operating Eng'rs Local 825*, 60 LRRM 2092 (D. N.J. 1965). (The mootness motions were denied.)

67. Note, 78 *Harv. L. Rev.* 1617, 1633 (1965).

68. *Wirtz v. Operating Eng'rs Local 825*, *supra* note 66.

69. See, e.g., Summers, *supra* note 9, at 136-138; Note, 78 *Harv. L. Rev.* 1617, 1630 (1965); Note, 74 *Yale L. J.* 1282, 1293-94 (1965).

70. Cf. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

law.⁷¹ While an opposing policy argument can be made, the courts' reading appears more in accord with the Congressional design.⁷²

OTHER DEVELOPMENTS

Let me finish off with a quick rundown of several other noteworthy Landrum-Griffin developments of the past year.

Section 504

In *United States v. Brown*,⁷³ the Supreme Court held, with four justices dissenting, that Section 504 of the Act, which makes it a crime for a Communist Party member to be an officer or employee of a union (other than a clerk or custodian), is unconstitutional as a bill of attainder. Although the Court made no reference to Section 504's similar disqualification of persons convicted of any of various enumerated criminal offenses, its emphasis on the evils of proscribing persons simply on the basis of membership in a "political group" suggests that *Brown* would not be dispositive of the constitutionality of the section's anti-convict ban.

Investigatory Authority

Perhaps the most persistent personal grievance of union leaders against Landrum-Griffin is that random—but full-scale—investigations by the Labor Department into an organization's books and records are conducted in the absence of any complaint or suspicion of wrong-doing and constitute

71. *Libutti v. DiBrizzi*, 343 F.2d 460, 58 LRRM 2846 (2d Cir. 1965); *Wittstein v. Musicians*, 59 LRRM 2335 (S.D.N.Y. 1965); *McCarthy v. Machinists Lodge 9*, 61 LRRM 2652 (E.D. Mo. 1966).

72. See, e.g., S. Rep. No. 187, 86th Cong., 1st sess. 49, 104 (1959) ("under State or local law"; "no Federal remedy" prior to election); 105 Daily Cong. Rec. 5820 (April 22, 1959) (Sen. Kennedy: "Prior to the day of an election an individual can sue in a State"). Cf. Cox, *supra* note 1, at 846: "... section 403 preserves state remedies prior to an election."

73. 381 U.S. 437 (1965).

an unnecessary source of inconvenience and embarrassment. One knowledgeable union attorney of my acquaintance insists that Parkinson's Law is at work here. The Secretary's investigative staff, not having enough genuine complaints to look into, has got to do *something* to keep busy. While I have a certain sympathy for any union official whose office is torn apart for two or three weeks and who worries about the political capital his opponents may be able to wring from any investigation, however routine, I cannot become very excited about his predicament. Business had to get used to investigations under the Fair Labor Standards Act and taxpayers have to put up with the agents of the Internal Revenue Service. Susceptibility to government inquiry is an occupational hazard of important institutions in modern society. In any event, the courts have continued to read broadly the Secretary of Labor's investigatory powers under Section 601 of the Act. For example, a subpoena was sustained for the purpose of investigating an alleged misuse of union funds in violation of Section 501 (a) even though Section 501 is enforceable by private parties or the Attorney General and not by the Secretary.⁷⁴ And, regardless of the allowable scope of an action by the Secretary to invalidate an election, his investigation is not restricted to the matters complained about by a member.⁷⁵

Bonds

Public Law 89-216,⁷⁶ approved and effective September 29, 1965, amended Section 502 of Landrum-Griffin to authorize union personnel handling organizational funds to be covered by a standard "honesty" bond rather than by the more expensive "faithful performance of financial duties" bond formerly required. The amendment also permits the use of a wider range of surety companies.

74. *Teamsters v. Wirtz*, 346 F.2d 827, 59 LRRM 2081 (D.C. Cir. 1965).

75. *Operating Eng'rs Local 57 v. Wirtz*, 346 F.2d 552, 59 LRRM 2310 (1st Cir. 1965).

76. 79 Stat. 888 (1965), amending 29 U.S.C. § 502.

Reporting

The Fourth Circuit has held that any attorney who undertakes for an employer to persuade employees how to exercise their right of self-organization becomes subject to a broad reporting obligation under the Act. He must disclose to the Secretary of Labor his receipts and expenditures and the names of his clients in connection with *all* his labor relations advice or services.⁷⁷

CONCLUSION

Proper administration of the Landrum-Griffin Act by the Secretary of Labor and the courts requires, in my view, the judicious ordering of a whole hierarchy of democratic values. Certainly, union democracy is a worthy value and entitled to much weight. But I should think it a sorry issue of this venture in mandatory democracy if a single-minded pursuit of that objective were to blind the Act's administrators to the competing right of a union to regulate its own affairs or to the overriding right of Congress to determine where union autonomy ends and federal controls take over.

77. *Douglas v. Wirtz*, 353 F.2d 30, 60 LRRM 2264 (4th Cir. 1965).