CIVIL COMMITMENT OF THE MENTALLY ILL

I. INTRODUCTION

Mental illness has become one of the greatest health problems facing the country today. Some startling statistics have shown the seriousness of the situation: over seven hundred and fifty thousand mentally ill patients are in hospitals on any given day and almost one-half of all the hospital beds in the nation are occupied by mental patients. The direct cost of mental illness to the taxpayers is over a billion dollars a year. It is estimated that one out of every twelve persons will spend a portion of his life in a mental institution, and about nine million people suffer from serious mental disorders.

With this widespread recognition of the problem, action has been instituted on many levels in order to devise adequate methods for the treatment and cure of mental illness. The federal government has held hearings and made grants to study the field. States are trying to expand their present mental health programs, and there are also many private and charitable groups interested in this area. The field has also become increasingly important to the legal profession because most mental patients are kept in institutions involuntarily and through legal sanction. The American Bar Association has sponsored a comprehensive survey of the law of mental illness and there have been a number of articles written in various legal periodicals. However, the medical and legal thought on the position of legislation in this area has not been in accord. The medical profession insists that the laws contain as few formalities as possible, arguing that commitment is a medical problem and that excessive legal formality is harmful to the well-being of the patient. The legal profession, recognizing this argument, still insists that there be adequate safeguards in order to protect the individual's liberties. The purpose of this Note is to examine the problem of commitment to and discharge from mental institutions of people not charged with any crime. This will be done by examining the

5. E.g., Curran, Hospitalization of the Mentally Ill, 31 N.C.L. Rev. 274 (1953); Ross, Hospitalization of the Voluntary Mental Patient, 53 Mich. L. Rev. 353 (1953); Comment, Civil Insanity, 44 Cornell L.Q. 76 (1958).
existing laws and their actual application in order to discover whether they are adequate to satisfy both medical necessity and constitutional requirements. In order to facilitate this study, investigation and analysis have been concentrated on the laws presently in force in the Commonwealth of Pennsylvania.6 The peculiar significance of this jurisdiction is that its mental health code is quite similar to *A Draft Act Governing Hospitalization of the Mentally Ill* which was suggested by the National Institute of Mental Health as a model code several years ago.7

II. GENERAL HISTORY OF MENTAL HEALTH LAWS

*Rise of Institutions and Mental Hospitals*

"In the eighteenth century, madmen were locked up in madhouses; in the nineteenth century, lunatics were sent to asylums; and in the twentieth century, the mentally ill receive treatment in hospitals."8

At common law the state was vested with the right to restrain a mentally ill person against his will without legal process whenever such action was necessary to prevent personal or property damage.9 A person thus restrained would be put in a jail, poorhouse, pen or other secure place.10

The rise of institutions for the insane came about slowly. The first hospital in America to which the mentally ill were admitted was the Pennsylvania Hospital. This was the country's first general hospital and was founded in 1756.11 The first institution exclusively for patients suffering from mental illness was an asylum established in Williamsburg, Virginia in 1773.12 It was the only state institution of its kind for over half a century. By the middle of the eighteenth century, hospitals were established by

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6. Although the Pennsylvania Mental Health Act contains provisions dealing with "epileptics," "inebriates," and "mental defectives" this study will deal only with those defined as "mentally ill." An "epileptic" is defined as "any person who is or thought to be suffering from a primary convulsive disorder or its equivalent manifestation." An inebriate is "a person who is so habitually addicted to the use of alcoholic or other intoxicating or narcotic substances as to be unable or unwilling to stop the excessive use of such substances without help. The term shall include 'dipsomaniac,' 'drug addict,' and 'habitual drunkard.'" A "mental defective" is "a person who is not mentally ill but whose mental development is so retarded that he has not acquired enough self-control, judgment and discretion to manage himself and his affairs, and for whose welfare or that of others care is necessary or advisable. The term shall include 'feeble-minded,' 'moron,' 'idiot' and 'imbecile,' but shall not include 'mental illness,' 'inebriate' and 'senile.'" PA. STAT. ANN. tit. 50, § 1072 (1954). 7. NATIONAL INSTITUTE OF MENTAL HEALTH, FEDERAL SECURITY AGENCY, *A Draft Act Governing Hospitalization of the Mentally Ill* (Public Health Service Pub. No. 51, rev. ed. 1952); Comment, 19 Geo. Wash. L. Rev. 512 (1951). 8. JONES, LUNACY, LAW, AND CONSCIENCE, 1744-1845 at ix (1955). 9. Comment, Analysis of Legal and Medical Considerations in Commitment of the Mentally Ill, 56 Yale L.J. 1185 (1947). 10. DEUTSCH, THE MENTALLY ILL IN AMERICA 418-19 (1937). 11. Weihofen, Hospitalizing the Mentally Ill, 50 Mich. L. Rev. 837, 841 (1952). 12. Ibid.
fifteen other states. These institutions were for the care of the indigent insane but more diligence was used to determine their economic status than their mental condition.

At this time the conviction that mental illness was curable became widespread. There came onto the scene a New England schoolteacher, Dorothea Dix, who dedicated her life to the reformation of the care of the insane. It was due much to her effort that all the states finally assumed the duty to provide for the insane.

One must realize that the use made of institutions in the nineteenth century was merely to keep the "insane" out of society. There was almost no attempt made to impart any therapeutic care—all the available resources were aimed at the custodial level. There was widespread use of such devices as the strait jacket, chains, and even whippings; there was no attempt at treatment. These were prisons whose inmates only crime was being ill.

Early Laws Dealing With the Insane

The earliest American laws dealing with the insane were concerned with removing them from the community. The greatest fear was that these "lunatics" would be a drain on the local economy, and there was a belief that one colony or community would foist its unwanted on another. In 1699 Massachusetts passed a statute—"An Act for the Supressing and Punishing of Rogues, Vagabonds, Common Beggars, and other Lewd, Idle and Disorderly Persons; and also for setting the Poor to Work"—which put the insane into the category in which thought of the times had long classified them. Because of this attitude it is not surprising that commitment of the insane to institutions could be readily accomplished under these early laws. All that was necessary was the desire on the part of the family to have the person in question "put away." This was not only confined to the private institutions, but it was the general rule for the early state asylums.

In the middle of the nineteenth century, several events occurred which caused most of the states to enact legislation governing commitment procedures. The most significant of these events concerned Mrs. B. P. Packard who had been confined to a mental institution in Illinois on the petition of her husband. After three years in the institution, she procured her release through a habeas corpus proceeding in which it was found

13. Lowery, Public Mental Health Agencies, State and National, 286 ANNALS 100 (1953).
14. Comment, supra note 9, at 1187.
15. Weihofen, supra note 11, at 842.
16. For a study of the changes wrought in mental hospitals, see GREENBLATT, FROM CUSTODIAL TO THERAPEUTIC PATIENT CARE IN MENTAL HOSPITALS (1955).
17. Ibid; Weihofen, supra note 11, at 842.
that she had been the victim of her husband's plot to be rid of her.\textsuperscript{20} After her release, she began a campaign to get laws passed which would protect the innocent against being "railroaded" into mental institutions. Her crusade together with several contemporary "exposé" novels, the most famous of which was Charles Reade's \textit{Hard Cash}, were instrumental in securing the passage of strict laws to govern the institutionalization of the insane.\textsuperscript{21}

For the most part, the laws enacted at this time placed a great emphasis on the judiciary. In order to protect against fraudulent commitments, the legislation provided for what amounted to a criminal trial for anyone "charged" with being insane. The jury trials which resulted were generally considered to be an inadequate method of determining the technical question of insanity. Universally condemned by the medical profession, they gradually fell into disrepute.\textsuperscript{22} Recently there has been a trend away from formal procedures, with only Texas still requiring a jury trial. In some instances only certification by private physicians is necessary.\textsuperscript{23}

\textit{The History in Pennsylvania}

As early as 1709 a proposal was made at a meeting of the Society of Friends in Philadelphia to build a hospital for the mentally ill, but no action was taken on it.\textsuperscript{24} The first public recognition of the problem of people suffering with mental illness in Pennsylvania was in the "Poor Act of 1729."\textsuperscript{25} This legislation provided that the Mayor of Philadelphia together with an alderman could compel any resident, who brought into the city "old persons, infant, maimed, lunatick or any vagabond or vagrant persons" who were likely to become public charges, to supply a sufficient sum to ship the person so imported back to whence he came. As noted earlier,\textsuperscript{26} this was in keeping with the general thought of the times and was the recognized means of solving the problem which was presented—an economic one.

In 1750 Benjamin Franklin proposed to a meeting of Philadelphians the building of a "convenient house under one Inspection and in the hands of skilful Practitioners . . . for persons disordered in their senses."\textsuperscript{27} Here again it appears that his proposal never got beyond the discussion stage.

\begin{enumerate}
\item Deutsch, \textit{supra} note 10, at 424.
\item Curran, \textit{supra} note 5, at 276.
\item \textit{Ibid.} It is interesting to note that Illinois, which was the center of Mrs. Packard's campaign, found that there were more commitments by jury trials than by previous procedures. Dewey, \textit{The Jury Law for Commitment of the Insane in Illinois}, 69 Am. J. of Insanity 571 (1913).
\item For a survey of the laws as they exist, see Dittmar, \textit{Insanity Laws} (1952).
\item \textit{Pennsylvania Mental Health, Inc., Mental Health, A Blueprint for Pennsylvania} 21 (1957).
\item 4 Statutes At Large of Pennsylvania 164 (1897).
\item See text accompanying note 18 supra.
\item \textit{Pennsylvania Mental Health, Inc., op. cit. supra} note 24, at 21.
\end{enumerate}
The constitution of the Commonwealth of 1790 invested the supreme court and the courts of common pleas with the power to care for the persons and estates of those who were \textit{non componens mentis}, in addition to all the powers formerly exercised in chancery.\textsuperscript{28} This had the effect of importing the English law on the subject. In 1836 the legislature enacted a law governing the determination of "Lunatics and Habitual Drunkards."\textsuperscript{29} This was the first legislation in the state which provided that upon the application of a blood relative the court was to appoint a commission of one or two persons\textsuperscript{30} to inquire into the competency of a party. However, it must be noted that while it gave the commission the power to determine whether or not a person was a "lunatic," its main purpose was to protect his real or personal property from being dissipated and had no detailed provisions concerning the disposition of the person so determined.\textsuperscript{31}

In 1845 a bill was passed to establish the first state asylum.\textsuperscript{32} It provided that any person charged with a crime who was insane at the time of commission of the crime and/or trial could be committed to this institution by the court having jurisdiction. Also various officials in charge of the poor could send any insane paupers within their care to the institution. Under the commission's procedures which were established by the prior 1836 act, any person could apply to a court having jurisdiction for the purpose of having another determined insane, and if the person was found to be "by reason of insanity, unsafe to be at large, or is suffering any unnecessary duress or hardship, such court shall on the application aforesaid, commit such insane person to said asylum."\textsuperscript{33} This was one of the first laws in the nation which recognized that a state hospital should also provide care for the mentally ill who were not necessarily dangerous to the community. The indigent insane were given precedence over "the rich"\textsuperscript{34} in order of admission.

The first law which outlined any detailed type of rules for commitment was enacted in 1869.\textsuperscript{35} This law provided that

"insane persons may be placed in a hospital for the insane by their legal guardians, or by their relatives or friends in case they have no guardians, but never without the certificate of two or more reputable physicians, after a personal examination, made within one week of the date thereof. . . ."

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\textsuperscript{28} Pa. Const. art. V, § 6 (1790).
\textsuperscript{29} 1835-1836 Laws of Pa. 589.
\textsuperscript{30} Nothing was said as to the requirements for the members of the commissions to have any special qualifications.
\textsuperscript{31} The court could at its discretion turn over the care and custody of the individual to the commission.
\textsuperscript{32} 1845 Laws of Pa. 440.
\textsuperscript{33} \textit{Id.} at 442 (§ 14).
\textsuperscript{34} \textit{Id.} at 442 (§ 15).
\textsuperscript{35} 1869 Laws of Pa. 78.
\textsuperscript{36} \textit{Id.} at 78 (§ 1).
\end{flushleft}
Under another provision of this act, any judge could place a person in a hospital. By this procedure application for the commitment had to be made by any "respectable person." Then the judge was to appoint a commission to inquire into the matter. The commission was to consist of three persons, one of whom had to be a lawyer and one a physician. The person against whom the application was made or his counsel had a right to testify. If after ascertaining the facts, the commission was satisfied that the person should be confined, then the judge could issue a warrant and place him in a mental hospital.

This act also contained a provision that, if in an application made by any "respectable person" a patient was alleged to be unjustly confined in an institution, the judge was to issue a writ of habeas corpus; and at the hearing the onus of proving the alleged lunatic to be insane was on those persons who were restraining him. A patient could also be removed from any hospital, if someone offered to be responsible for the insane person's expenses. It was declared a misdemeanor for any official or employee of a hospital to interfere with or intercept any written communication made by a patient to his counsel.

As will be discussed below, this legislation was the forerunner of the current mental health laws. The next major enactment occurred in 1883 which spelled out in more detail the procedures governing commitment and discharge. Also, for the first time there was a provision governing the voluntary admission of patients to state hospitals. The only other important change in the Pennsylvania law was made in the 1923 codification. All references to "insane", "lunatics" and "insanity" were deleted and in their place "mental disease" and "mental illness" were substituted.

III. THE PENNSYLVANIA MENTAL HEALTH ACT OF 1951

In 1951 all the laws concerning mental health were collected and codified under a single title. The purpose of this act was to make it easier for the existing laws covering the entire problem of mental illness to be amended; therefore it must be born in mind that this act is merely a codification of prior existing law which had been enacted and amended since 1836.

37. This would seem to imply that the writ could not be brought by the inmate himself; however, there was a further provision that nothing in the act was to abrogate the prior existing right to the writ. Id. at 80 (§11).
38. 1883 Laws of Pa. 21.
40. Pennsylvania was the first state to modify its laws in this way. Comment, supra note 9, at 1200 n.107.
42. See Statement of Senator Walker, who was one of the sponsors of the bill, 2 PA. LEGISLATIVE J. 2023 (1951).
Admission Procedures

Under the act, mental illness is defined as "an illness which so lessens the capacity of a person to use his customary self-control, judgment and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under care." A person falling within this definition may be admitted to a mental institution in any one of four ways: voluntarily, by temporary or emergency detention, by certification by two physicians, or by judicial commitment.

Voluntary Admission

Any person who believes himself to be mentally ill may make application for admission in writing to a superintendent of any mental hospital. The superintendent who receives the application then is to examine the patient. If he finds that the applicant is of sufficient mental competence to make the application and is in need of care, he may admit him to the hospital. Any person who is so admitted cannot be detained for more than ten days after he gives a written notice of his desire to leave the institution. If the superintendent thinks that it would be inadvisable to discharge the patient, he is to notify the person's relatives, friends or other persons liable for his support. If these people favor release of the patient, then the only way in which the superintendent can detain him is by means of a judicial commitment.

Temporary or Emergency Detention

An application may be made to any mental hospital by a relative, guardian or friend of a person thought to be in need of immediate temporary care. This application must be accompanied by the certificate of any qualified physician. Upon receipt of these documents, a superintendent may receive the patient and detain him for a period of no more than twenty-one days. During the detention period, the patient is to be examined for purposes of determining further disposition. If after the examination the superintendent is convinced that the patient does not need the temporary care, he is to discharge him. If, on the other hand, he is convinced that the patient is in need of more protracted treatment, he may either admit the patient on a voluntary application or take the necessary

45. Although there is a section of the act which states that discharge is in the discretion of the superintendent (see note 60 infra), there is a specific clause which states that "no person voluntarily admitted shall be detained for more than ten days after he has given written notice . . . of his intention or desire to leave . . . ." Pa. Stat. Ann. tit. 50, § 1164(a) (1954).
steps to have the people who made the temporary application have the patient committed by certificate or by order of a court.

Admission on the Certification of Two Physicians

Any person "who happens to be mentally ill or in such condition as to need the care required by persons who are mentally ill" 48 may be admitted against his will on the application of his relatives, friends, guardian or any other responsible person together with a certificate of two "qualified physicians." 50 The application must be made within thirty days after the examination made of the patient by the certifying physicians. These physicians cannot be related to the patient or connected with the institution to which admission is sought. Upon this application, the patient may be received and detained by the institution to which such application is made. 51 If any physician makes a sworn certificate falsely for pecuniary reward he is guilty of a misdemeanor.

Judicial Commitment

Here, for the first time in the act, the term "commitment" is used. A petition may be made by any responsible person to any court having jurisdiction to commit a person who is mentally ill, or who is thought to be mentally ill and in need of observation, diagnosis and treatment. The application must be accompanied by sworn statements of two qualified physicians that such commitment is necessary and that the patient has been examined by them within two weeks prior to the petition. Since commitment might be immediately effected on this two physician certificate as just discussed, it would seem that the only reason for resort to the more rigorous judicial commitment would be that some relatives or friends objected to the institutionalization sought. Inasmuch as such disputants would be likely to institute immediate proceedings for habeas corpus, 53 judicial inquiry could not be avoided. After the petition is filed, the court may appoint a commission to inquire into the facts of the case. 54 This commission is to be composed of three people, two qualified physicians 55 and an attorney-at-law, with power to serve notices, compel appearances and hear evidence. Although the person alleged to be mentally ill is

50. See text and notes accompanying notes 82-83 infra.
51. Even though there is nothing in the act which provides the power to apprehend the individual and transport him to the institution after certification, it seems to be a common practice. Interviews With Several Psychiatrists in Philadelphia, Oct. & Nov. 1958.
53. See text accompanying notes 62-63 infra.
54. There is no language in the act that would make the appointment of the commission mandatory, but it does seem to be the general practice.
55. Again there is no need of any psychiatric training.
56. Nothing is said as to whom notice must be given.
notified of the proceedings and has the opportunity to appear, it has been held that it is discretionary with the commission as to whether it is necessary to actually examine and question him.\footnote{Commonwealth v. Simpson, 21 Pa. Dist. 513 (C.P. 1911).} Upon receipt of the report of the commission, the court may hold a hearing with or without the person sought to be committed present, and either make an order committing the individual if it finds it necessary or discharge him. Any person who is committed by the court to an institution for "observation, diagnosis and treatment" must be so committed for a definite period not to exceed ninety days.\footnote{PA. STAT. ANN. tit. 50, § 1201 (d) (1954).} The superintendent of the hospital is required to make a report to the court concerning the patient's condition during this period after which the court shall either discharge him or make other disposition for his care.

There is a further provision whereby any judge of a court, or a magistrate in Philadelphia, to whom it appears that a person should be committed, can order his restraint in Philadelphia General Hospital or any state hospital for examination.\footnote{PA. STAT. ANN. tit. 50, § 1301 (1954). In order to discharge such a patient they must give notice to the Department of Welfare.} The period of such restraint is not to exceed six hours prior to the examination and twenty-four hours thereafter.

\textit{Discharge and Release}

Any superintendent or the trustees of a hospital may discharge a patient if, in their opinion, "no harm" will arise from the action. They may not peremptorily discharge a person who is thought to be homicidal or otherwise dangerous.\footnote{PA. STAT. ANN. tit. 50, § 1304 (1954).} Any court which has committed a patient also has the right to review his record and, if it feels that he is no longer in need of further care, to order his discharge.\footnote{PA. STAT. ANN. tit. 50, § 1481 (1954).}

One of the most confusing aspects presented by the 1951 codification is that there are two separate provisions dealing with the right to a writ of habeas corpus. The first one merely states that every commitment can be appealed by writ of habeas corpus.\footnote{PA. STAT. ANN. tit. 50, § 1206 (1954).} This would put the burden on the person seeking the writ to prove that he is being detained illegally. The other provision states that any patient or someone acting on his behalf may petition for a writ and the burden of proving that the patient is in need of further detention shall be on the persons responsible for his continued hospitalization.\footnote{PA. STAT. ANN. tit. 50, § 1482 (1954).}

\textit{Rights of Patients}

The act has one section which deals with the personal rights which are guaranteed to patients in mental hospitals.\footnote{PA. STAT. ANN. tit. 50, § 1241 (1954).} The inmates are to have the
right to communicate with counsel and the court which committed them, if any. Writing materials are to be furnished for communication with any person outside of the institution at the discretion of the superintendent. They are also entitled to religious freedom and opportunity to be visited by physicians. Mechanical restraints can be placed on a person only if it is deemed "to be for his medical needs." The practical operation of these provisions is discussed in a later section.

The Constitutionality of the Act

The generally accepted view is that procedural due process does not require proceedings of a judicial nature; however, it does require "that there shall be a regular course of proceedings in which notice is given and an opportunity afforded to defend against it." There is no doubt that the procedures outlined for judicial commitment satisfy these requirements, since notice is given to the person sought to be committed and he has the opportunity to appear before the court-appointed commission or the judge even though his presence is not required. However, there is serious doubt as to whether this is true of the procedures outlined in the act by which two physicians may commit a person for an indefinite period.

The only time that the constitutionality of this type of commitment has been expressly raised under the Pennsylvania act was in the case of Hammon v. Hill decided in 1915 by the United States District Court for the Western District of Pennsylvania. In that case Hammon sought a writ of habeas corpus from a mental hospital where he had been kept for two years after two physicians certified that he was insane. He had sought a writ of habeas corpus earlier, and at the hearing which resulted was adjudged insane. The relator in the subsequent case did not again raise the issue of insanity, but argued that he was committed without due process of law because he had not been given notice of a hearing or an opportunity to defend against the original commitment and detention. The court held that, since this act had not been declared unconstitutional by the courts of Pennsylvania and the writ of habeas corpus is available to a patient, the requirement of due process was satisfied.

In a case attacking a similar law in the District of Columbia, the court of appeals in Barry v. Hall held that this method of commitment was a violation of due process. The court stated:

66. See text accompanying notes 80-96 infra.
68. Id. at 437.
70. Id. at 1000.
71. Id. at 1002.
72. 98 F.2d 222 (D.C. Cir. 1938).
"To treat such a writ of relief as a writ of original adjudication would be to deny to one confined the very type of hearing, the absence of which is the very basis of relief when a writ of habeas corpus is directed to the invalidity of the original confinement, and would amount to legal condonation of the initial introduction into a mental hospital and confinement there without the statutory adjudication until the time of the habeas corpus hearing." 73

The latest case to raise this question was *State ex rel. Fuller v. Multinas*, 74 decided by the Supreme Court of Missouri in 1954. The Missouri law in question required more in the way of formalities than the one in Pennsylvania. It contained a provision that the certificates of the two physicians must state that the person was mentally ill and "because of his illness is likely to injure himself or others if allowed to remain at liberty." 75 It further provided for a hearing or appeal after commitment if demanded by either the patient, guardian, or relative. The court, however, held that the statute violated due process in denying the individual his right to a hearing and notice before commitment. In deciding that a hearing on a writ of habeas corpus was not sufficient, the court said:

"It will be seen that admission to a mental hospital under the non-judicial procedures here attacked could always result in indeterminate confinement. . . . This could be accomplished without the proposed patient's knowledge that impairment of his mental condition was even suspected. Then for want of subsequent action (however induced) on the patient's part, or on his behalf, . . . such hospitalization might conceivably continue for the remainder of the patient's life." 76

The Pennsylvania law only requires that in the opinion of the certifying physicians "the patient is or thought to be mentally ill . . . or is in need of and will be benefitted by care and the admission applied for." 77 There is ample authority for the proposition that a person who is dangerous to himself or others by reason of insanity may be restrained temporarily without formal legal process. 78 However, in the act as it now stands not only is there no requirement of danger or potential harm, but the length of commitment is indefinite and not for a fixed period such as might be required by an emergency. There is no requirement that any notice be given to the patient as to the reason for his examination (which is performed by the certifying physicians) nor is the patient given any opportunity to defend.

73. *Id.* at 229.
74. 364 Mo. 858, 269 S.W.2d 72 (1954).
75. *Id.* at 863, 269 S.W.2d at 74.
76. *Id.* at 866, 269 S.W.2d at 76-77.
78. See note 9 *supra*. 
The only opportunity for a hearing available to a person sought to be committed under this procedure is after he has already been admitted to a hospital. This can only be accomplished through the writ of habeas corpus. To say that this writ is a substitute for an original adjudication would be to condone deprivation of liberty at least up to the time a writ can be issued. The argument most often advanced by proponents of the informal procedure is that the confinement is only temporary and is necessitated by the nature of the patient’s illness. However, there is nothing in the act which limits the application of this section to those cases in which immediate action is required because of the patient’s condition. Also, the argument that the hospitalization is only temporary depends on the ability of the patient to secure the writ, this being the only way in which a final adjudication of sanity may be secured.

It is likely that were the question to arise again in Pennsylvania the private commitment procedure would not survive constitutional attack. The strength of the early Pennsylvania precedent of the Hammon case is suspect not only in view of the more recent Barry and Fuller cases but also because the court in Hammon was acting on the petition of a patient who had actually been adjudged insane at a hearing on a prior writ.

**Practical Application of the Act**

After making several visits to state and city hospitals and interviewing psychiatrists and officials, it became readily apparent that many abuses could and sometimes do result under the Mental Health Act of 1951. In the first place, of all admissions, both voluntary and involuntary, to the state's eighteen public mental hospitals in the last year, over three-fourths were made by the certification of two physicians without any judicial process whatsoever. Although there were no statistics available, this percentage is probably higher in regard to admissions to private institutions. It must be pointed out that the act only requires the certification of two “qualified physicians.” This means that any two medical or osteopathic doctors who are licensed by the state and have practiced for over three years can commit a person to a public or private institution for an indefinite period—the length of time for which care is required. The possible abuse here is quite apparent. A great many doctors, other than qualified psychiatrists, have had little or no training or experience in the detection or care of mental health problems.

79. In re Rowdell, 169 Mass. 387, 47 N.E. 1033 (1897). “The traumatic effects of this procedure, which is intended to protect them, may require a great deal of care and treatment to overcome.” Curran, supra note 5, at 277. See also Group for the Advancement of Psychiatry, Report No. 4, at 2 (1948).

80. The total number of admissions to the hospitals for the year ending May 31, 1958 was 8,287. Of this total, 6,300 were by the standard nonjudicial method. Letter from Robert P. Wray, Director of Program Research and Statistics, Department of Public Welfare, Commonwealth of Pa., to the University of Pennsylvania Law Review, Nov. 4, 1958, on file in Biddle Law Library, University of Pennsylvania.


illness. This is especially true of the older practitioners who attended medical schools when little or no psychiatric training was given. It hardly seems reasonable to invest these men with the power to deprive a person of his liberty because of a determination which they might make in good faith, but for which they have little qualification. While general practitioners may have been the most desirable authorities in an earlier period, there is no justification today for failure to demand examination by psychiatrists whose training has been primarily directed toward mental disease.\footnote{83}

Most psychiatrists connected with state hospitals state that very few, if any, people are ever falsely committed under this process.\footnote{84} They usually argue that the problem only exists in the motion pictures and novels. This may be and probably is true as concerns state hospitals. However, the possibility of this happening in the private hospitals is all too real. These hospitals are licensed by the state and possess the same power to hold a patient as those publicly operated.\footnote{85} One must keep in mind when concerned with this problem that these institutions are not supported by state funds and they depend on the fees received for the care and maintenance of patients for their very existence. The subconscious desire on the part of the staff would be quite strong to try to detain a patient who is not seriously ill or who is a borderline case. Whenever a doubt as to a patient's condition would arise, it would probably be resolved in favor of his further detention. This is a situation which has arisen more than once.\footnote{88}

In Philadelphia there is a state-operated Reception Center which is the only one of its kind in the state.\footnote{87} Anybody may come to the Center for diagnosis and out-patient treatment. It has approximately forty beds which are to be used for the diagnosis of people in order to determine what further disposition is necessary. Judges or magistrates may send people to the Center for examination under the emergency commitment procedures in the act.\footnote{88} However, personal investigation revealed a general disregard for the letter of the law by the Center's staff in the admission

\footnote{83} "While physicians are better qualified to testify to a diseased condition than are laymen, their testimony upon the subject of the mental capacity of an individual whom they have been privileged to observe is not entitled to any greater weight than that of a layman." Tyler v. Tyler, 401 Ill. 435, 82 N.E.2d 346 (1948). "The courts in general assume that any physician is competent to testify on any topic in the field of medicine. This is certainly unrealistic, especially with regard to psychiatry, in view of the wholly inadequate training in psychiatry which until very recently was given to medical students, and the general lack of interest of the medical profession in the subject of mental disorder." Overholser, \textit{Psychiatric Expert Testimony}, 42 J. Crim. L., C. & P.S. 283, 295 (1951).

\footnote{84} Interview With Commissioner of Mental Health, City of Philadelphia, Nov. 4, 1958. This view was shared by a great many of the other psychiatrists interviewed.

\footnote{85} The definition of "institution" in the act includes "any State or licensed place, public or private, for the care of patients." \textit{Pa. Stat. Ann.} tit. 50, § 1072(8) (1954).

\footnote{86} Interviews With Several Philadelphia Attorneys, Oct. & Nov. 1958, who told of many experiences in securing the release of patients from private institutions.

\footnote{87} Interview With Staff Psychiatrists, Commonwealth of Pennsylvania Mental Health Center, Oct. 24, 1958.

\footnote{88} See note \textit{59} supra.
and detention of patients. According to the act the only patients who may be held against their will are those who have been sent by the courts or certified by physicians as outlined above. However, the general practice is for police to pick up an individual who is creating a disturbance of some kind and to bring him directly to the Center without first getting a magistrate's order. Further, the act provides that the Reception Center may only hold a person against his will six hours prior to and twenty-four hours after an examination. The length of stay for most patients who have been admitted involuntarily, however, is two weeks and sometimes as long as forty or fifty days. The questionable legalistic justification offered for such a practice is that, although there is a maximum time for detention before and after the examination, there is no maximum time fixed for the length of examination.

Similarly, improper detention procedures were discovered to exist in the psychiatric section of the Philadelphia General Hospital. This institution is city-operated, and its psychiatric section has over four hundred beds. They take cases sent to them by either the courts or the Reception Center together with those generally admitted. It was surprising to note that, aside from those few patients who have been placed there by court order, there are no commitment papers of any kind for the patients. The usual procedure is to have the patient or his relatives sign a regular hospital admission form. The staff officials declare that they will not hold a person against his will if a friend or relative seeks their release, except in those cases where they think he is dangerous and formal commitment procedures are warranted. However, it is doubtful if patients who are without friends or relatives are accorded the same treatment. Staff officials state that their main purpose is to treat those people who can be cured in a short time, but some of their patients are kept as long as two years without any type of commitment procedure.

Although it was stated earlier that very few if any people are falsely committed to state institutions, another problem exists in these places which tends to impair the rights of the individual. There are only a few of these hospitals that are not grossly overcrowded. Because of this situation periodic examinations are not given and as a result many patients who have become well and fit enough to be returned to society are kept there long after their recovery.

90. Ibid.
91. Interview With Staff Psychiatrist, Philadelphia General Hospital, Oct. 21, 1958.
92. Ibid.
93. In 1957 there were only three hospitals which were not overcrowded. However, in those that are, the overcrowding ranges from 11% to 70%. Pennsylvania Mental Health, Inc., Mental Health, A Blueprint for Pennsylvania 14 (1957).
94. Interview With Psychiatrist, who was formerly on staff of Pennsylvania state hospital, in Philadelphia, Nov. 4, 1958.
The writ of habeas corpus does not seem to be readily available to protect those who are not released when well or who are improperly committed. It has been estimated that there are no more than one or two commitments a year to the state's eighteen mental hospitals which are appealed by a writ of habeas corpus. The infrequency of appeal indicates that this writ is not easy to procure by a patient in a mental hospital. If he has no friends or relatives on the outside who would be willing to seek his freedom, it would be almost impossible for a patient to obtain a lawyer or even to get an independent psychiatrist to make an examination in order to determine his condition. This is especially so since most lawyers or doctors who receive communications from patients in mental institutions have a tendency to discount their credibility.

IV. Recommendations for Revision of the Present Mental Health Laws in Pennsylvania

No matter what might be said by psychiatrists, when a person is placed in a mental institution against his will he is being deprived of his liberty. Such a harsh procedure should only be justified when the physical safety of the patient and the public would be protected by his institutionalization. However, under the present law this is not the case. The following recommendations are suggested in order to provide the medical profession with the means to combat mental illness while at the same time affording the individual the utmost protection of his civil liberties.

In the first place, there should be no involuntary commitments by any process whatsoever unless the condition of the individual is such that "he is a danger to himself or to others." There is no reason for a person to be restrained in his personal liberty merely because he is "a proper subject for care" or "will be benefited by care" or "is in need of observation, diagnosis and treatment." Just because a person's ailment is mental rather than physical is no reason for the state to take away his freedom unless it can be shown that by reason of his mental disorder he is a serious threat to the safety of his person or to others. However, since psychiatrists say that there can be no clear, concise definition of which mental illnesses are dangerous, the act of necessity must be drafted in more general terms, permitting involuntary commitment only of those persons who "by reason of mental illness are dangerous to themselves or to others."

95. Letter From Robert P. Wray, supra note 80.
100. The only time that a state is permitted to restrain an individual's liberty is when there is a threat to public safety. This has long been the view as regards the state's right to quarantine an individual who is suffering from a communicable disease which would endanger the health of the community. For a complete discussion of this field see 18 Fla. L.J. 13 (1944); 15 Ga. B.J. 215 (1952).
Secondly, there should be no involuntary commitments merely on the certification of two physicians. In the place of this procedure, it is suggested that each of the state's eighteen public mental hospitals set up a reception center patterned after the one in Philadelphia. To these places any licensed medical or osteopathic physician could send a person who is in need of emergency care. The reception centers could then detain these people for the purpose of examination for a period of not more than five days. Such a time limit should afford reasonable opportunity for the staff to perform their necessary diagnostic investigation while not being subject to interpretation as authority for almost indefinite detention—as has been the case under the present vague standard of six hours prior to and twenty-four hours after the examination. If psychiatric examination should indicate that further hospitalization is necessary for proper treatment, the officials of the center could either encourage the patient to seek voluntary admission or, if he is dangerous to himself or to others, take the steps necessary for formal involuntary commitment.

It is also recommended that the only way in which a person could be committed involuntarily would be by the judicial process now in existence with some refinements. By this method a petition would be filed after which the court must appoint a commission (as opposed to the existing law which leaves the appointment to the discretion of the court) consisting of two psychiatrists and an attorney. This commission would hold a hearing which could be informal in nature so as to protect the well-being of the one sought to be committed. Not only should notice and an opportunity to be heard be given the patient or his counsel or relatives, but a personal examination of the patient by the commission should be required. In this way neither juries nor medical doctors, neither of whom are qualified to make a determination as to an individual's mental state, would have the power to deprive a man of his liberty. Instead, the determination would be made by those who are best qualified to do so. After the commission's investigation a report of its finding together with any recommendation should be filed with the court. The court then would have the power to review only those findings which include a recommendation of hospitalization; and, if the court finds an abuse of discretion, it would not be bound to follow such a recommendation. In this way a person would be assured of some form of hearing prior to his commitment.

Finally, in order to do away with the present difficulty of obtaining a writ of habeas corpus, two things are recommended. Primarily, with the above outlined procedure as regards formal involuntary commitment, the commission which made the original finding as to the patient's hospitaliza-

101. The five-day period was suggested during interviews with officials and psychiatrists in Philadelphia, Oct. & Nov. 1958, who stated that this would be the most feasible time necessary to conduct a proper examination allowing for the situations when work may backlog.

102. See text accompanying note 90 supra.

103. See note 54 supra.
tion should review the case of every such patient at least once a year. This would insure that a complete examination is given each patient periodically, and that some authority outside of the institution in which he is kept is aware of his situation. Although this would entail great administrative expense and burden, it seems fully justified. At the very minimum, knowledge that an independent body is going to examine the situation of the patients periodically would probably act as an inducement for the hospitals to keep closer checks on their patients. An alternate procedure is that recommended by the English Commission which recently studied English mental health laws.\textsuperscript{104} It proposed that there should be an independent roving board of examiners who would periodically visit the mental institutions,\textsuperscript{105} especially those privately maintained, and hear the case of any patient who desires such a hearing. This would afford a less expensive means of providing patients who do not have anyone on the outside desirous of their release with a forum in which to be heard.

V. Conclusion

The Mental Health Act was enacted in order to provide a single act to govern commitment and treatment and thus to make amendment easier. As was pointed out above, a number of defects are apparent as the act now stands; but since 1951 no significant amendments have been adopted. It is suggested that the time has come for a close reappraisal. If the recommendations for a change in the definition of those people who may be involuntarily committed, for involuntary commitment by judicial proceedings only, and for more adequate provisions for review are followed, it would be more difficult for people to be institutionalized against their will. It might be argued that this would hamper the proper hospitalization, treatment and cure of the mentally ill. However, this is not necessarily the case. When a person is dangerous or an emergency occurs, commitment can be accomplished immediately in an informal manner. By eliminating informal processes of permanent commitment, practitioners would be encouraged to have their patients seek voluntary admission to mental hospitals. This in itself would be a desirable result since a person who has placed himself in a hospital is more likely to respond to treatment.\textsuperscript{106}

\textit{H. J. J.}


\textsuperscript{105} \textit{Id.} at 148-53.

\textsuperscript{106} This was the view expressed by practicing psychiatrists during interviews in Philadelphia, Oct. & Nov. 1958.
THE KENNEDY-IVES BILL: AN ANALYSIS OF SUGGESTED LABOR LEGISLATION

Problems involving internal union organization recently brought to the forefront by the investigations and hearings of the McClellan Committee have long been ignored as subjects of legislative regulation. While the hearings centered mainly on the activities of five organizations, only a segment of American unionism, the practices discovered were apparently considered sufficiently widespread and indicative of a sufficiently serious threat to the proper conduct of interstate commerce to bring forth dramatic legislative response. The administration recommended specific legislation, and a number of bills were introduced in Congress. One of these efforts, the Kennedy-Ives Bill, passed the Senate by a vote of eighty-eight to one and narrowly failed to attain a majority vote in the House. The official title of the Kennedy-Ives Bill, "The Labor-Management Reporting and Disclosure Act of 1958," is hardly suggestive of its extensive coverage. The bill attempted to deal with a variety of distinct problems only some of which involved reporting and disclosure by the labor organizations. In other areas covered by the bill—elections, embezzlement of union funds, union employment of persons with criminal records—specific governmental regulation and administration were provided.

The significant success of the bill in the Senate together with announcement of its support by organized labor itself indicates that it or similar

1. The Senate Select Committee on Improper Activities in the Labor or Management Field was set up pursuant to Senate Resolution 74 of the first session of the 85th Congress which authorized and directed the committee, "to conduct an investigation and study of the extent to which criminal and other improper practices or activities are, or have been, engaged in in the field of labor-management relations or in groups or organizations of employees or employers, and to determine whether any changes are required in the laws . . . in order to protect such interests against the occurrence of such practices or activities." Interim Report of the Select Committee on Improper Activities in the Labor or Management Field, S. Doc. No. 1417, 85th Cong., 2d Sess. (1958) (hereinafter cited as Interim Report).

2. Testimony heard by the committee directly involved five unions: the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; the Bakery and Confectionery Workers International Union of America; the United Textile Workers of America; the International Union of Operating Engineers; and the Allied Industrial Workers of America (formerly the United Automobile Workers, AFL). A number of other unions, including the building-trades union and barbers, were also touched on. The committee also heard testimony concerning various management consultants and employers. Ibid.


4. While the bill was pending in the House Committee, the following telegram was sent to congressional leaders: "Need for passage of effective legislation in fight against corruption in labor-management relations is acute. Sincerely trust House will pass Kennedy-Ives bill, S. 3974, under suspension of rules. It is only effective measure now pending in Congress. Trust you will use your good offices to insure such vote. George Meany." 104 Cong. Rec. 16832 (daily ed. Aug. 18, 1958). This approval was given despite the amendments adopted on the Senate floor which, in the opinion of the AFL-CIO "will prove unworkable; provisions which we know are unwise; provisions which are clearly unfair and unduly repressive." 104 Cong. Rec. 16824 (daily ed. Aug. 18, 1958).
legislation is likely to be enacted by the 86th Congress. The purpose of this Note is to analyze the provisions of the Kennedy-Ives Bill along with other proposed legislation from the standpoint of an inquiry into the efficacy of the provisions in view of their purported objectives.

I. Background

A survey of prior state treatment of labor problems suggests that local legislators have neither the desire nor the ability to deal with the problems of internal union organization which gave rise to the Kennedy-Ives Bill. Self-imposed limitations have prevented state courts from aiding internal reform\(^5\) and on the legislative level only a scattering of states have enacted comprehensive labor laws dealing with unfair labor practices and representation elections.\(^6\) Statutes in other states are narrower in scope,\(^7\) often dealing only with isolated problems such as excessive initiation fees, election safeguards, and internal union business practices. Some of these laws have been held unconstitutional by state courts as violative of the federal or state constitutions. In *AFL v. Mann*,\(^8\) a Texas statute requiring unions to submit a detailed annual financial report to state officials was invalidated as being "an unwarranted and unreasonable requirement, imposing undue burdens upon unions not demanded by the public interest. . . ."\(^9\) In Colorado the provisions of a statute requiring union financial reports and regulating union elections were held to be "so inseparably intertwined with and predicated upon the [compulsory union incorporation requirement, itself unconstitutional as a prior restraint on picketing] as to be unable to stand without it."\(^10\) Statutes which have

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\(^5\) See cases cited note 44 infra; Forkosch, *Internal Affairs of Unions: Government Control or Self-Regulation?*, 18 U. Chi. L. Rev. 729, 735 (1950). "Courts have generally permitted union interpretation and enforcement of their own constitutional provisions, even though the result may be to limit a member's freedom of action or his union constitutional rights." *Ibid.*

\(^6\) Colorado, Connecticut, Kansas, Massachusetts, Michigan, Minnesota, New York, Oregon, Pennsylvania, Rhode Island, Utah, Wisconsin, the District of Columbia, Hawaii, and Puerto Rico have such statutes. See *Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 85th Cong.*, 2d Sess. 1429-42 (1958) (hereinafter cited as *Subcommittee Hearings*), where these statutes are collected.


\(^8\) 188 S.W.2d 276 (Tex. Civ. App. 1945).

\(^9\) 188 S.W.2d at 282. The court also held the provisions to be unnecessary to the operation and enforcement of the valid provisions of the act requiring unions to keep accurate books and to itemize receipts.

\(^10\) *AFL v. Reilly*, 113 Colo. 90, 100, 155 P.2d 145, 150 (1944). An Idaho statute which sought to regulate a variety of union activities including picketing and boycotting fell afoul of a state constitutional provision demanding that each act must embrace but one subject which must be expressed in the title. *AFL v. Langley*, 66 Idaho 763, 168 P.2d 831 (1946).
survived the constitutional attacks often are grossly inadequate, usually because of limited coverage. Thus, it has been said that "these states which have attempted to regulate the internal administration of labor unions have almost without exception enacted laws which offer insufficient protection to individual employees and unduly restrict union activities." The absence of reported decisions involving statutes of a more formidable nature would seem to indicate that these enactments are not vigorously enforced. Finally, local regulation suffers from the limited jurisdiction allowed to states by our federal system of government. In *Hill v. Florida* the United States Supreme Court held that a Florida statute which required the licensing of union business agents was invalid under the supremacy clause of the Constitution because of a conflict with the National Labor Relations Act. Although the federal legislation did not cover the specific area with which the Florida statute was concerned, the Court decided that the statute prevented the union and its selected representatives from functioning as collective bargaining agents except upon conditions fixed by the state, and thus the local law interfered with the full freedom of employees under the Wagner Act to select bargaining representatives of their own choosing.

Prior federal treatment of these problems has been similarly deficient. The Taft-Hartley Act does require filing of union financial statements and reports of business practices and procedures, but the information thus compiled was never made public, nor was it ever used for any purpose. The act also imposes criminal sanctions on employers who pay, and union officials who receive, money or other things of value; however, the provision does not appear to be aggressively enforced, perhaps because of the difficulty of detection.

II. UNION FILING

Concerned primarily with more spectacular areas, the Select Committee only incidentally inquired into matters of internal union organization such as regular auditing, accounting procedures and authorization for disbursements. Consequently in this area the extent to which undesirable practices exist is an unknown quantity. The Kennedy-Ives Bill, however, 

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14. One explanation for state reluctance to more aggressively enact labor legislation has been suggested by Professor Cox of Harvard: "The [federal] Government has this duty [of regulating unions] because labor unions enjoy their present power by virtue of federal statutes . . . ." *Subcommittee Hearings* 344. (Emphasis added.)
16. See text accompanying notes 91-92 *infra*. 
undertook to require that there be filed with the Secretary of Labor detailed statements concerning

“procedures followed with respect to qualifications for or restrictions on memberships . . . calling of regular and special meetings, levying assessments, impositions of fines . . . authorizations for disbursements of union funds, audit of union financial transactions . . . expulsion of members and grounds thereof . . .” 17

and an annual financial statement adequate to disclose the financial condition and operation during the preceding fiscal year. 18 Required in detail were salaries, loans to business enterprises and the security thereof, and other disbursements of any kind and the purposes thereof. 19 The bill required that copies of these reports be furnished by the union to members free of charge and to others at cost, 20 presumably by the Commissioner of Labor Reports, an office provided for in the bill. 21 The filing requirements were adopted in preference to a suggested code 22 which would have, inter alia, provided a limit on initiation fees, required a stated number of meetings, and forbidden expense allowances unless approved by the union electorate. The imposition of a detailed code would require a revision by many unions of their constitutions without an adequate showing of necessity. Such a code would also ignore the fact that widely varied rules and procedures can be equally necessary and satisfactory depending upon the particular circumstances of the union. The approach of the Kennedy-Ives Bill is based on the supposition that the most desirable immediate approach would be to require filing by the unions of periodic reports as to their practices and procedures. The information which would

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17. S. 3974, supra note 3, § 101.
18. These sections are taken verbatim from the Labor Management Relations Act of 1947 (Taft-Hartley Act), 61 Stat. 143, 29 U.S.C. § 159 (1952) (hereinafter cited by U.S.C. section only). However, the Secretary of Labor had no power to question the validity of these reports and their accuracy was not checked. Subcommittee Hearings 43.
19. Specific abuses in the handling of union funds were alleged by witnesses at the hearings. For example, the Senate Committee reported that Frank Brewster (chairman of the Western Conference of Teamsters) persuaded the “secretary-treasurer of local 690 . . . to make loans of union dues money . . . for the operation of a gambling establishment; to . . . a notorious . . . gambler and underworld figure, for the payment of his income taxes; and to . . . a close personal friend of Dave Beck, for the purchase of a bar in Seattle.” Interim Report 39. In addition to improper loans, there was evidence of questionable expenditures. For example, James Hoffa allegedly expended “some $174,870 for the legal defense of union officials accused of extortion, dynamiting, and accepting bribes . . .” and made further payments to some of these officials while they were serving penitentiary offenses. Id. at 252. “Brewster poured some $440,000 into a dying Canadian truck line. . . . [T]he clear fact is that the teamsters put up this large sum of money at great risk that they would never get it back. . . .” Id. at 60. See also id. at 441.
20. S. 3974, supra note 3, § 104.
21. This was a floor amendment to the bill. The Commissioner was to perform duties delegated by the Secretary of Labor. 104 Cong. Rec. 10074 (daily ed. June 14, 1958).
thus be compiled would enable Congress at a later date to decide, on an informed basis, whether a need exists for imposition of a code of union business practices and what particular requirements would most efficiently cure the diversity of problems that may be revealed. Furthermore, by making these reports available to union members, doubtful practices would be brought to the attention of the individuals most directly affected and encourage them to vote miscreants from office. While publicity was a purpose sought by the bill, it would seem that detailed filing could create tremendous administrative obstacles to the attainment of this end. Further, the filing of an excessive number of documents would render difficult any attempt to compile statistics on the types and prevalence of undesirable practices. The filing required under the Kennedy-Ives Bill, while free of the unnecessary detail present in some alternative proposals, would still result in the filing of voluminous documents.

As offered to the Senate the bill also provided that loans of union money to union officers and employees would have to be reported. During the Senate debates this was amended to forbid such loans in excess of $1,500 yearly. Why loans should be treated differently from other practices is unclear. If filing is deemed adequate to deter or remedy other practices, then it should be at least equally effective when union funds are disbursed.

Experience under the Taft-Hartley Act indicates that sufficient criminal sanctions for noncompliance with the filing requirements would need to be provided to insure union cooperation. While that law requires unions to file annual reports of most of the practices covered by the Kennedy-Ives Bill, no such criminal penalty for failure to do so is prescribed and a number of unions have disregarded the demand. Although

23. Evidence that this may have been the senatorial intent may be derived from such provisions as § 403 requiring the Secretary of Labor to report on the act stating the conclusions drawn from the filing after a three year period, and § 401 of the bill which expressly states the desirability of unions and management adopting ethical codes conforming to the guarantees in the bill. However, provisions such as §106 exempting small unions from filing suggests a permanent nature since in an interim period it would be desirable to collect detailed information on the procedures of all unions.

24. "It is the intent of this proposal to bring union-employer financial transactions into the open light of day, where conflict of interest, bribes, and collusion cannot long exist." Subcommittee Hearings 27. The same reasoning is applicable to the filing of union practices and procedures. See discussion in text accompanying note 86 infra as to union apathy.

25. An example of a bill which would have greatly burdened the Commissioner of Labor reports was a proposal, in the administration's bill, that there be filed "copies of the constitution and by-laws of the labor organization and of every amendment to them, and of every separate rule, resolution, minute, or other official document which governs membership . . . ." Subcommittee Hearings 1466.


27. 29 U.S.C. § 159 (1952). The filing requirements of this act were upheld as constitutional in National Maritime Union v. Herzog, 78 F. Supp. 146 (D.D.C), aff'd, 334 U.S. 854 (1948), thus laying to rest the doubt as to such provisions expressed in AFL v. Reilly, 113 Colo. 90, 155 P.2d 145 (1944).

28. Subcommittee Hearings 49.
this sanction is justified, other means of punishing noncompliance which were proposed do not appear to be as well advised. The administration bill provided that unions violating the statute should forfeit their tax-exempt status. Other proposals suggested the withdrawal of antitrust and injunction immunities, and loss of access to the National Labor Relations Board. The failing of these suggestions lies in the fact that their effect would be upon the union membership, whom the act is seeking to protect, and not upon the wrongdoers.

A hopeful sign of acceptance by the unions of their own responsibility in this matter is indicated by the recently adopted AFL-CIO Code of Ethical Practices which establishes minimum practices and procedures to be followed by its affiliated units. Should the labor groups effectively police their own ranks, interference by the government would be unnecessary. The filing requirements would aid in the program of self-regulation by disclosing abuses to the membership, and at the same time provide an impetus for union action by impressing them with the fact that the trend of future legislation will depend in great part on their efforts.

III. EMBEZZLEMENT

As passed by the Senate, the Kennedy-Ives Bill provided that embezzlement, stealing, or unlawful conversion of union funds by a union employee would be punishable by a $10,000 fine or five years imprison-


30. See remarks of Senator Knowland explaining these proposals. Subcommittee Hearings 184.

31. Access to the NLRB for certification as collective bargaining agent was denied to unions whose officers failed to file non-communist affidavits under Taft-Hartley, 29 U.S.C. § 159 (1952). For a discussion of the advantages inhering in certification see General Box Co., 82 N.L.R.B. 678 (1949). However, the real effect of this sanction has been questioned. See WOLLET, LABOR RELATIONS AND FEDERAL LAW 34 (1949).

32. The Code was approved in sections by the AFL-CIO Executive Council and affirmed by the vote of the Second Constitutional Convention at Atlantic City in December 1957. "The six ethical practice codes deal with paper local (locals without members); health and welfare funds; racketeers, crooks, Communists, and Fascists; investments and business interests of union officials; financial practices and proprietary activities of unions; minimum accounting and financial controls; and union democratic practices." Letter From George Meany to Presidents of Affiliated National and International Unions, Feb. 7, 1958. All unions were required to adopt the Code by April 15, 1958. For a copy of the Code see Subcommittee Hearings 91-109.

"Responsible trade unionists concerned with the abuse of power on the part of a few individuals have promulgated excellent codes of self-regulation which would to a large extent clean up the problems which have arisen. These AFL-CIO codes of ethical practices, following the recent action of the executive council, are now applicable to all unions affiliated with the AFL-CIO." Remarks of Senator Kennedy, Subcommittee Hearings 2.

33. See Aaron & Kamaroff, supra note 7, at 649. The desirability of any bill "must be tempered by the recognition of... two basic criteria... : first, the importance of holding governmental interference to a minimum, and second, the desirability of inducing unions to assume the chief responsibility for maintaining democratic organizations."
While the hearings uncovered many practices which, if proven in a court of law, would be covered by this provision, it is significant to note that a statute proscribing the embezzlement of private funds is a radical departure from prior federal legislation. Heretofore all such statutes were concerned with misappropriation of federal funds or embezzlement by federal officers of funds entrusted to the Government. The direct injury to the federal government resulting from such conduct amply justifies federal criminal jurisdiction over its funds. The misappropriation of private property, however, only indirectly affects the interests of the federal government, and, as the conduct is criminal by state law, the creation of federal jurisdiction will frequently result in the imposition of a double penalty for a single criminal act. Lack of local enforcement indicates that this harsh procedure may be justified here. For example, it is noted that all the alleged misappropriations disclosed at the hearings were uncovered by committee investigators, and, although some were of spectacular character, not one resulted from independent investigations by state authorities. Perhaps this is illustrative of the attitude, expressed by some, that labor problems are federal problems. Furthermore, the lack of deterrent effect of the state embezzlement laws is indicated by the fact that some union officials do not even appear to realize the gravity of misuse of union funds. Perhaps it was this reason that prompted some influential union leaders to support this provision.

34. S. 3974, supra note 3, § 108.

35. The Committee reported that Frank Brewster used union funds to finance his racing stables and other personal items. "This personal appropriation of funds even extended to the $4,000 downpayment on Brewster's Palm Springs home, which was paid with a check drawn on the local 174 'special fund.'" Interim Report 59-60. "Dave Beck took, not borrowed, more than $370,000 in union funds. . . . When confronted by an investigation by the Internal Revenue Service, Mr. Beck began restitution which even at the time of the committee hearings, some 3 years later, had not been completed." Id. at 85. See also id. at 129, 159, 439.

36. See BURDICK, LAW OF CRIME 568 (1946) for a collection and discussion of these statutes.

37. Id. at 575-75h.

38. The findings of the Select Committee stated that "some law-enforcement officers have shied away from active investigation of labor-management violence because of fear of offending either side in the dispute." Interim Report 6. The refusal to interfere in union matters may extend to embezzlement as well.

39. See note 13 supra.

40. The fact that some union officials fail to realize the seriousness and responsibility of their union position is borne out by this testimony in reference to the embezzlement provision: "Let's take a poor fellow working as a janitor in a railroad office down in Mississippi. He is the secretary of the local union. Now, he goes home at night and the kids need some medicine. He has collected the month's dues that day from some members. He goes down to the drug store and pays for the medicine. He intends to pay it back payday. Payday comes along and he does not put it back. Our auditor comes in and finds him technically short in his accounts. Are you going to send him to the penitentiary for 5 years and fine him $10,000? How are you going to get anybody to act as secretaries? They do not want the job anyway." Subcommittee Hearings 1213.

41. George Meany, speaking for the AFL-CIO, suggested that embezzlement of union assets be made a federal crime. Subcommittee Hearings 1347.
At any rate, if effective investigation need be undertaken by federal authorities, it would seem desirable to provide for enforcement in the federal courts.

IV. ELECTIONS

While the McClellan Committee revealed a number of instances of undemocratic union election practices, it might be thought that the limited scope of the Committee investigation would not justify the imposition of government regulation on private union elections. The provisions dealing with election safeguards, however, may be characterized as the very heart of the legislative measure. Although some particular practices and procedures were to be specifically regulated by the provisions of the bill, its main thrust was directed toward public disclosure of union practices in the hope that the membership itself would undertake aggressive house-cleaning. The information thus made available would hardly be efficacious if the membership were unable to effectively cast their ballots without fear of coercion and without manipulation of the tallying. Furthermore, judicial construction of federal legislation, depriving individual workers in a recognized bargaining union from negotiating with management as to conditions of employment, indicates a need to protect the right of individuals to exert effective control over their bargaining representatives. Judicial safeguards have not been completely adequate since some courts have been reluctant to interfere when there has been even a semblance of compliance with union procedure.

The Kennedy-Ives Bill would have required periodic elections, use of a secret ballot, notice of elections, and opportunity to nominate. It would have guaranteed the right to vote to every member, and forbidden the use of union money to promote the cause of any candidate. It has been suggested that the obvious defect of the bill lies in its failure to impose criminal sanctions on violators, which would seem to be the most efficacious means of dealing with individuals who would deny to others their electorate rights.

The secret ballot provision has been objected to as an imposition on a large number of unions not presently requiring such a procedure, with-

42. For example, in Scranton Local 229 (Teamsters) it was found that rigged elections and multiple voting were prevalent. Interim Report 105. In New York all garbage dealers were made to join the union, but since they were employers they were denied the right to vote. Id. at 329.
44. Gray v. Reuther, 201 F.2d 54 (6th Cir. 1952); Stanton v. Harris, 152 Fla. 736, 13 So.2d 17 (1943); State ex rel. Givens v. Superior Court, 233 Ind. 235, 117 N.E.2d 553 (1954).
45. S. 3974, supra note 3, § 301.
46. Ibid.
47. "If it is a proper function of Government to require regular union elections by secret ballot, the Government should lay down the Rules and punish violators . . . ." Testimony of Professor Archibald Cox, Subcommittee Hearings 357.
48. "[O]nly 17½ percent of the 194 international unions with a total membership of 17½ million have constitutions which specifically provide for the use of a secret ballot." Subcommittee Hearings 200.
out an adequate showing of necessity. The justification for it emerges from the inherent weaknesses in other methods of voting, not present in the secret ballot. However, even the secret ballot has apparently been abused by some unions, e.g., by stuffing ballot boxes, permitting multiple voting by some members. To be effective, legislation should not only prescribe the form of voting, but also provide criminal sanctions for fraudulent operation of it.

The remedy provided by the bill was invalidation of improperly conducted elections. The bill would have allowed any union member who had exhausted his internal remedies, or who had invoked the available remedies without obtaining a final decision within four months after their invocation, to file a complaint with the Secretary of Labor within one month thereafter alleging the violation of any election provision. The Secretary was then to investigate the complaint, and, if he found probable cause to believe that a violation had occurred, he was to bring a civil action against the union in the federal district court to set aside the invalid election. If upon a preponderance of the evidence the court found that conduct in violation of the bill's provisions had been established, the court was to declare the election void and direct the Secretary of Labor to hold one under his supervision. If the complaint alleged that there had been a failure to hold an election, the Secretary, after investigating, was to petition the court to allow him to conduct an election under his supervision. While this would seem to be a salutary measure, it is noteworthy that under many constitutions the union can fine, expel from the union, or otherwise discipline a member who engages in conduct deemed by the officers to be anti-union. To be effective, it would seem that the Kennedy-Ives Bill should have prohibited unions from disciplining members who petition the Secretary in good faith. The possibility that a court might later afford protection to the member by ordering reinstatement or removal of the fine is at best an expensive and uncertain remedy. Requiring a union member to protect his rights in a law suit, without a legislative guaranty, could result in many individuals refraining from petitioning the Secretary.

Another Senate proposal would have required the Secretary to supervise an election whenever a petition of ten per cent of the union mem-

49. The president of the Bakers Union was able to perpetuate himself in office by discarding the constitutional requirement for a secret ballot and making delegates vote by a show of hands method. Interim Report 128-31. Hand and voice votes can be, and have been, arbitrarily judged. Id. at 271.

50. "Swanson [manager of San Francisco Local 3 of the International Union of Operating Engineers—IUOE], without any feeling of guilt, admitted the rigging of an international election by the stuffing of ballot boxes . . . in a mountain cabin hideaway. . . . His justification [was] that he was only doing what everybody else in the international was doing. . . ." Id. at 439.

51. See note 45 supra.

52. S. 3974, supra note 3, § 302.

53. Subcommittee Hearings 244.

54. See Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, 1068-69 (1951), and cases cited therein.

bers requested it. This provision recognized the desirability of having elections supervised instead of later trying to investigate alleged illegal practices. However, if supervision were constantly sought, the expense and burden on government facilities could be tremendous.

One method of having supervision without overburdening government would lie in the voluntary establishment by unions of impartial tribunals composed of citizens of respectable stature, unassociated with the appointing union or any other, to exercise supervisory authority over union elections. The original Kennedy Bill included a provision for having such groups supervise trusteeships, and during the Senate debates a proposal which would have established supervisory election boards representing all factions in the union was rejected by a single vote. Such a provision would be desirable not only because it would alleviate the burden on government but self-regulation would also be a more acceptable procedure to the unions themselves. Establishment of such tribunals would create little procedural difficulty within the framework of the bill. Unions could simply request exemption from government supervision of their elections upon presentation to the Secretary of Labor of a list of the proposed members of the tribunal, a statement as to their union affiliations, and a description of the powers with which they are to be vested to effectuate election supervision. Exemption should not be granted unless the tribunal's powers are commensurate with those which might have been exercised by the Secretary. A right of appeal to the Secretary by union members should be preserved only for charges of fraud or gross misconduct on the part of the private supervisory tribunal.

It is interesting to note that the Upholsterers and the United Auto Workers have recently instituted such a procedure, and as to these it has been said: "These boards have broad jurisdiction, including the power to review internal disciplinary proceedings. There is every reason to expect

56. See text accompanying note 68 infra.

57. The proposal introduced on the Senate floor was defeated by a vote of 45-44, 104 Cong. Rec. 10361 (daily ed. June 17, 1958). In its labor union "Bill of Rights" the American Civil Liberties Union provided that on petition of 10% of the membership an election must be supervised by an impartial outside agency. Subcommittee Hearings 1118.

58. A Review Board was established by the Upholsterers in 1954. Appointees to the Board at that time were Archibald Cox of Harvard Law School, Chairman; Nathan Feinsinger, University of Wisconsin Law School; Paul Herzog, then Assistant Dean of the Harvard School of Public Administration; Father Leo C. Brown, S.J., of St. Louis University; J. Benton Gillingham, Assistant Director of the University of Washington Institute of Labor Economics; Father Dennis J. Comey, S.J., of the Institute of Industrial Relations at St. Joseph's College; Clark Kerr, Chancellor of the University of California; Curtis J. Bok, President Judge of Court of Common Pleas No. 6, Philadelphia; and Joseph D. Lahman, Former Chairman of the Illinois State Parole Commission.

The United Auto Workers' Appeal Board was created in April 1957. The appointees to the Board were Rabbi Morris Adler of Detroit; Monsignor George Higgins of Washington, D.C.; Clark Kerr; Edwin Witte, University of Wisconsin; Wade McCree, Judge of the Detroit Circuit Court; and Bishop G. Bromley Oxnam of Washington, D.C.
that both of these private boards will offer the union member protection comparable to any that might be provided by legislation." 59

V. TRUSTEESHIPS

The trusteeship is a device provided for in most union constitutions whereby the international assumes the management of a local when it feels that the local is not being properly operated. This right of visitation and taking over of union finances is omnipotent if the constitution provides for it and is usually judicially impregnable. 60 The findings of the Senate Committee suggest that the device has been employed at times to foster corruption, to keep in office those friendly to the international, 61 and to exert a continuing dominion over the local. 62 Since the trusteeship is a valuable device for regulating a local union which is not performing the duties owed to the membership or which is in an unsound financial condition, it should be regulated rather than forbidden. To this end the Kennedy-Ives Bill required that when a trusteeship was created the international should file a report of the purposes of the trusteeship and make semi-annual reports thereafter until the trusteeship is ended. 63 Experience has shown that mere disclosure of purpose is insufficient to prevent either long reigns of trusteeships or misappropriation of funds. 64 To prevent the latter the bill provided that during the period of the trusteeship the removal of funds to the inter-


60. FörkösCh, Labor Law 333 (1953), and cases cited therein.

61. "When the membership revolted against four officials of a local in Pontiac, Mich., after they had been accused of extortion, the international put the local under trusteeship, making Jimmy Hoffa the trustee. He then turned around and appointed two of the same men as business agents to run the affairs of the local." Interim Report 448.

62. "Trusteeships have been imposed—for no apparent reason—as a means of continuing domination over the affairs of a number of locals of the [IUOE]. . . . Two locals in Chicago . . . have been under trusteeship for 29 years." Id. at 438. "Trusteeships . . . have been imposed on 12 IUOE locals representing about one-fifth of the total membership . . . . Of the IUOE locals now so saddled, 7 have been under trusteeship for at least 10 years . . . ." Id. at 371. "Some 13 percent of all the locals in the teamsters union are under trusteeship, teamster officials have admitted . . . . that they do not know the reason why some were put under trusteeship or why they remain in that state at the present time. Some of the locals have been under trusteeship for 15 years." Id. at 448. The findings of the committee report that "a Chicago local of the Bakery Workers Union placed under trusteeship was looted of $40,000. Some $13,000, appropriated for a 'joint organizational drive' was used for the purchase of two Cadillacs for International President James Cross and International Vice-President George Stuart. Another $10,500 was spent by Stuart in an 'organizational drive' which was . . . . non existent . . . ." Subcommittee Hearings 247.

63. S. 3974, 85th Cong., 2d Sess. § 201 (1958). Section 202 provides that "trusteeships shall be established and administered by a national or international labor organization over a subordinate body only in accordance with the constitution of such organization and for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements, . . . . restoring democratic procedures or otherwise carrying out the legitimate objects of such labor organization."

64. See Subcommittee Hearings 352.
national was forbidden. The bill, however, failed to demand an accounting of the local's funds at the institution and termination of the trusteeship which would seem to be necessary to prevent a clandestine removal of funds. To insure against extended impositions it was provided that trusteeships were presumed valid for eighteen months and invalid thereafter. The use of a presumption creates a desirable flexibility since a trusteeship can be ended in a shorter time if feasible to do so, while allowing it to exist longer than eighteen months if circumstances demand it. The bill also provided that a court might end the trusteeship at any time on proof that it was "not established in good faith for a purpose allowable under [the act]."

The establishment of impartial boards to supervise the duration and functioning of trusteeships can be employed as an alternative to a judicial appeal provided the outside group has the power to end invalid trusteeships. Besides the advantages inherent in self-regulation, such a procedure would avoid additional burdens on already overcrowded court calendars and have the advantage of prompt action which courts can rarely offer. Such an approach was embodied in the original Kennedy Bill. The legislative history is silent as to why this procedure was not adopted, but it was omitted in the Kennedy-Ives Bill presented to the Senate. It is significant that the AFL-CIO took the position that if trusteeships were to be regulated, the only acceptable approach would be a bill allowing for alternative regulation by impartial outside groups.

65. S. 3974, supra note 63, § 203.
66. Id. § 204.
67. See note 63 supra.
68. "The Kennedy bill also provides an elaborate alternative to Federal regulation and Labor Board enforcement, as follows: an international union may apply to the Secretary of Labor for a certificate exempting it from Labor Board enforcement of these provisions, sections 204-206. In order to secure such an exemption, an international union must establish an independent and impartial appeal board, with jurisdiction to make final decisions upon the institution and continuance of trusteeships, section 204a. The appeal board must be composed exclusively of members drawn from a panel established by the Secretary of Labor. Appeal board members must be appointed for a minimum of 2 years, and no one may be a member who 'has served or intends to serve as an arbitrator in any proceeding,' involving the international union or any local, section 204b. "The Secretary of Labor may not grant a certificate unless he finds that 'minimum protection' afforded local unions by the provisions of the international union constitution and bylaws under which the appeal board will operate 'will be substantially as great' as the protection available through the National Labor Relations Board, section 204. An exemption certificate is valid for 2 years, and the Secretary of Labor's decision to grant or deny it is final, section 204." Subcommittee Hearings 69-70. It should also be noted that as presented to the Senate the Kennedy-Ives Bill provided for appeals to the Secretary of Labor who, upon a showing of probable cause of violation, would institute action in the courts to end the trusteeship. As the above statement illustrates the original Kennedy Bill provided for Labor Board enforcement. The omission of this Board enforcement apparently resulted from the evidence presented at the hearing of the heavy workload of the Board. See Subcommittee Hearings 803-20.
69. Id. at 70 (statement of George Meany).
VI. Convicts

The presence of persons with criminal records serving as officers in some unions provided one of the spectacular highlights of the hearings. It is not without significance that the unions charged with the most abusive practices were the unions where employment of such persons flourished. The congressional desire to regulate this practice in order to protect the membership evoked the provision that

"No person who, by reason of conviction of any felony, is ineligible to vote in any election held under the laws of the state of his legal residence shall serve as an officer, director, or trustee, member of any executive committee or similar governing body, business agent, manager, or paid organizer of a labor organization engaged in an industry affecting commerce." 73

The inadequacy of the awkward qualification, that no one can hold a union position if his prior crimes prevent him from voting in the state of his residence, readily appears from an examination of state statutes. All states impose some voting disqualifications but the laws vary greatly, particularly with respect to the crimes on which they are conditioned. For example, in some states only those convicted of violating election laws are denied the right to vote; others refer to treason and bribery and crimes deemed infamous at common law. 74 Under a statute of the latter type an

70. "If an occasional law violator had found his way into the teamster organization, this might be a noble sentiment. But on the basis of these hearings, it appears to the committee that a criminal background was a prerequisite for job placement and advancement within the teamster firmament." Interim Report 449.

71. "Between them [John Dioguardi and Anthony Corallo] they brought 40 men into the labor movement in positions of trust and responsibility—men who, among them, had been arrested a remarkable total of 178 times and convicted on 77 of these occasions for crimes ranging from theft, violation of the Harrison Narcotics Act, extortion, conspiracy, bookmaking, use of stink bombs, felonious assault, robbery, violation of the gun laws, being an accessory to murder . . . . [A]fter going to work for Dioguardi and Corallo in the New York labor movement, 25 of these men were convicted or indicted for extortion, perjury, bribery, and forgery." Interim Report 218. Other instances of widespread but less spectacular criminal infiltration were uncovered during the course of the hearings. See, e.g., Interim Report 367, 440.

72. In AFL v. Mann, 188 S.W.2d 276, 288 (Tex. Civ. App. 1945), a Texas statute prohibiting a convicted felon from holding union office was upheld as constitutional.

73. S. 3974, supra note 63, § 305. This provision was a floor amendment offered by Senator McNamara. 104 Cong. Rec. 9886 (daily ed. June 12, 1958).

74. MASS. ANN. LAWS ch. 55, § 37 (1958) (persons found guilty of corrupt election practices shall be disenfranchised for three years from date of conviction); N.H. REV. STAT. ANN § 69:13 (1955) (persons convicted of treason, bribery, or any willful violation of the federal or New Hampshire election laws shall be disenfranchised unless restored to the privilege of an elector by the Supreme Court on notice to the Attorney General).

75. R.I. CONST. amend. 24, § 1 (no person convicted of bribery or of any crime deemed infamous at common law is permitted to vote until he is expressly restored to the right to vote by act of the General Assembly). KY. CONST. §§ 145, 150 (persons convicted of a felony shall be excluded from the right of suffrage, but persons excluded may be restored to their civil rights by executive pardon).
embezzler\textsuperscript{76} would not be denied the right to vote and thus could hold union office even though such a person might be the very type who is to be most feared in a position of trust. The variations among the states also extend to the procedure by which voting rights are reacquired,\textsuperscript{77} a further reason for casting doubt on the wisdom of the bill as passed. The original Kennedy-Ives Bill would have forbidden convicts from being employed by unions for a period of five years after their conviction.\textsuperscript{78} It is interesting to note that in this area the AFL-CIO Code goes further than either bill. Under the Code not only convicts are excluded from union employment but also those "showing an interest in corrupt purposes,"\textsuperscript{79} whether actually convicted or not.\textsuperscript{80}

On analysis it seems that both of the Senate bills are inadequate. The bill as passed hardly affords an efficient standard for judging the worth of individuals. Furthermore, the bill is inherently incapable of affording to all convicts uniformity of treatment—a suggested justification for federal legislation. The five year proviso of the initial Kennedy-Ives Bill would have allowed convicts to resume union positions regardless of their undesirability.

The bill, as approved by the Senate, was helpful in that it delineated the offices which are to be withheld from such persons. The bill forbade convicts from serving as an officer, director, trustee, member of any executive committee or similar governing body, business agent, manager or paid organizer. A broad denial of employment to any union job, \textit{e.g.}, clerical work, would serve no useful purpose.

The prime criticism to which the Senate proposals are subject lies not in their drafting, but rather in the proposals themselves. A federal statute limiting employment accessibility to convicted persons appears to be both undesirable and unnecessary. Such a statute would embody the congressional attitude that convicted persons are per se unworthy. Though the bill would be limited to union employment its indirect effect could be far greater. Prospective employers in any trade might well adopt this attitude, thus further constricting the employment opportunities for persons with criminal records. At the very least such a statute could seriously hinder conscientious and worthwhile rehabilitation programs. This is not to suggest that the problem need be ignored. Rather it appears that the means for adequate treatment already inhere in the bill. The hoped-for result of the filing requirements and election safeguards is that, through a proper functioning of the two, conscientious and able

\begin{footnotes}
76. Embezzlement was not a common-law crime. \textit{Burdick, Crimes} 564 (1946).
77. See notes 74, 75 supra.
78. S. 3974, \textit{supra} note 63, § 305, as offered to Senate for approval.
80. As passed by the Senate the bill imposed no criminal sanction on union violence. The attempt to regulate the employment of convicts, who were often hired for this purpose, may explain this omission.
\end{footnotes}
officials will attain the leadership of unions. If this result follows then provisions dealing directly with convicted persons seem superfluous, since persons likely to violate the rights of the membership will not be elected to positions of leadership or put in positions of trust by those so elected. If these convicted persons have not been engaged in these activities then there would be no need to end their employment. Allowing individual unions to deal with the problem provides for a measure of fairness and obviates any need which might exist for legislation.

VII. CONFLICTS OF INTERESTS

The Kennedy-Ives Bill\(^\text{81}\) required union officials to file with the Secretary of Labor personal statements listing all loans and salaries and income received from employers whose employees are represented by such union, together with records of all stock held in such company and business transactions with such employer.\(^\text{82}\) If the payment or business transaction was made to or involved the wife or minor child of the union official, instead of the official himself, this would also be reported.\(^\text{83}\) The choice not to impose criminal sanctions \(^\text{84}\) on this type of conflict of interest resulted from the fact that such situations were not always harmful, but their tendency to become so, due to the less than arm's-length atmosphere which might arise between employer and union bargaining agent, necessitated some form of control. Filing would serve the purpose of bringing the existence of such situations into the open, and exposing them to the membership.\(^\text{85}\) With this information the membership could vote those people from office. It is recognized that many persons doubt the realism of relying on voluntary union action as a forceful sanction. It is not infrequently asserted that voluntary union action is either inadequate or nonexistent. While union apathy unquestionably exists, the

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81. S. 3974, \(\text{supra}\) note 63, § 102.
82. It was reported that the "business manager of Local 825 of the International Union of Operating Engineers, secured a one-eighth interest in Public Constructors, Inc., in exchange for a loan of $2,500. Public Constructors, Inc., did business in the territorial jurisdiction of Local 825 and had collective bargaining agreements with that union. On September 30, 1957, the book value of the shares was $108,677." \(\text{Subcommittee Hearings}\) 348. James Cross, president of Bankers Union negotiated a sweetheart contract with Zion Industries. Prior to this the President of this company reportedly loaned $100,000 to Cross. \(\text{Interim Report}\) 122-24. See also \(\text{id.}\) at 250, 372, 442.
83. "Mrs. Dave Beck purchased 40 percent of the stock of K & L Distributing Co. which distributed beer for Anheuser-Busch, Inc., a majority of whose employees are members of the ... Teamsters. The territory of K & L was enlarged and it received preferential shipments of beer as a result of Dave Beck's influence. Later the investment was sold at a 60% profit." \(\text{Subcommittee Hearings}\) 348.
84. Failure to file or false filing warranted a fine of $10,000 or imprisonment of one year. S. 3974, \(\text{supra}\) note 63, § 107.
85. An apparent oversight of the lawmakers was to fail to provide for copies of this particular filing to be sent to the membership whereas all other filing would have been sent to them.
86. See President's 1958 Labor Message, \(\text{Subcommittee Hearings}\) 3.
prime reason for it may well be attributable to the fact that heretofore union members, if they wished to act, had to uncover the facts for themselves often at substantial personal risk\textsuperscript{87} and without adequate means for doing it. The great value in requiring that copies of statements filed by the officers be given to members is that it would enable members to face elections with knowledge of admitted instances of violations of union trust. With this knowledge and fortified by the other safeguards of the act, such as free elections and recall,\textsuperscript{88} it is likely that the membership will elect more desirable officers. The argument that members will not act when informed is not based on experience, since never before have union members been informed as they would be under such a law, nor have the members had the procedure to effectuate reform without subjecting themselves to personal intimidation. Although Taft-Hartley requires the filing of certain information as to internal practices, these reports have not been made available to union members.\textsuperscript{89}

87. The presence of violence is not the only risk. Many unions discipline their members for any act unbecoming a union member or contrary to the interests of the union. Often this takes the form of limiting the right of members to criticize their union officers. A few unions prohibit the organization of groups within the union if they are intended to shape union policy or influence the selection of union officers. Subcommittee Hearings 224. Recently courts have been more willing to intervene in internal affairs, and in cases involving union discipline the courts now seem to favor the individual if the issue is criticism of the organization or its leadership. See Sanders v. International Ass'n of Bridge Workers, 130 F. Supp. 253 (W.D. Ky. 1955) (life expulsion from union too severe a penalty); Pierson, The Government of Trade Unions, 1 IND. & LAB. REL. REV 593, 601 (1948). But when legal action against unions or its officers is sought the courts demand that internal remedies be exhausted unless it would be futile. Johnson, Government Regulation of Internal Union Affairs, 5 LAB. L.J. 807, 809 (1954). But see Summers, Legal Limitations on Union Discipline, 64 HARV. L. REV. 1049, 1092 (1951), suggesting that the doctrine of exhaustion of remedies in this context exists in name only. See Mooney v. Bartenders Union, 48 Cal. 2d 841, 313 P.2d 857 (1957) (mandamus proceedings to compel union to let members see books and inspect records permitted without exhaustion of internal remedies).

88. While the original Kennedy-Ives Bill contained no recall provision, various proposals were offered on the Senate floor. The bill finally adopted allowed recall on vote of a majority of the membership. The failing of the bill was that it would have also required a majority of the members in order to petition for a recall vote. 104 Cong. Rec. 10106 (daily ed. June 14, 1958). A more efficacious and practical measure would have been to allow a recall vote if 20% of the members petition for it, but requiring a majority vote of the membership for passage. See id. at 10107. The arguments against recall, e.g., harassment, could all be satisfied by proper drafting; thus, recall should only be allowed when the officer is involved in a situation likely to be detrimental to the interests of the members. The value of recall lies in providing a procedure for ending the term of office of such people quickly, and possibly before the conflict has resulted in any actual harm. This is not a revolutionary measure; many unions already provide for recall. Subcommittee Hearings 183. The Senate proposal would require that the election be held under the auspices of the Secretary of Labor, thus preventing the intimidation present when such elections are held by the union. The Secretary could also judge whether the recall election was for an allowable purpose. If, however, the union had an impartial tribunal as suggested in text accompanying note 56 supra, the Secretary might be relieved of his duty.

89. The Secretary of Labor "has not been permitted to make these reports public, and the legislative history when the Taft-Hartley law was passed in Congress indicated clearly that these reports were to be made available only to the chairmen of the appropriate committees of Congress, and this is what has been done." Testimony of Secretary of Labor Mitchell, Subcommittee Hearings 43. See Killings-
The filing required of union officials under the bill also included all other income and payments received from an employer.\textsuperscript{90} Though such payments are illegal under Taft-Hartley,\textsuperscript{91} the existence of other conflicts of interests and the presence of "sweetheart" contracts \textsuperscript{92} suggest that the act is being ignored. The inadequacy of the Taft-Hartley remedies, which make it criminal for employers to give payments and for union officials to receive them, appears to lie in the difficulty of enforcing them. Unlike normal criminal activity where there is a noticeably aggrieved victim, the injured party in this case is the union member whose subtle injury appears, if at all, by way of sub-standard collective bargaining. The difficulty arises from the fact that this no more indicates that union leaders have been bribed than that there is inefficient union leadership or merely an inequality of labor-management bargaining strength. The obvious purpose of filing is to provide the heretofore unavailable means of enforcement. However, the mere demand for a report of illegal payments provided in this bill is of doubtful efficacy. It is unrealistic to expect that a person, undeterred by the sanctions provided for taking the bribe, would shrink from unlawfully failing to report it. The filing requirement would seem to take on meaning only if it included a detailed report of all the assets and income of each union official, instead of requiring, as the bill would have, a statement consisting solely of the financial conflicts of interests in which the official might be involved. This data would be more readily subject to check by the federal enforcement officers. Failure to report bribes would be suggested, for example, by a disproportion between income and reported assets or between apparent opulence and reported financial status.

\textsuperscript{90} S. 3974, \textit{supra} note 63, § 102. This was not provided for in the original Kennedy Bill.

\textsuperscript{91} 29 U.S.C. § 186 (1952): "(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value. . . . (d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both." In United States v. Ryan, 350 U.S. 299 (1956), it was held that this section outlaws all payments, except those exempted, between employers and representatives and is not aimed solely at welfare fund payments.

\textsuperscript{92} A sweetheart contract is one arrived at through collusion of the union and management, containing such sub-standard provision as: "1. A wage scale of a few cents above the legal minimum of $1 an hour, or a weekly average of $40 to $42 a week; 2. Two to four holidays; 3. No sick leave; 4. Little or no vacation pay; 5. No welfare benefits; 6. No seniority; and 7. A promise—always fulfilled—no enforcement." \textit{Interim Report} 183. Employer justification for such contracts was phrased in terms of "we have to make the best deal we can." \textit{Id.} at 219. A variation of this is where a sufficient contract has been negotiated but favored employers are allowed to disregard it. IUOE officials reportedly allowed some contractors to pay as much as $1 an hour less than the wages prescribed in the union contract. \textit{Id.} at 372.
It was argued during the senatorial debates that obligatory reporting of criminal activity required by such reports would be an unconstitutional requirement of self-incrimination. Whether such a statute would be violative of the fifth amendment guarantees needs to be explored. The reports required by the Kennedy-Ives Bill demand disclosure of personal records, normally within the protection of the privilege. However, a doctrine has been developed by the courts to the effect that, when the legislature constitutionally requires a class of persons to maintain certain records, they may lose their private privileged character and be subject to governmental examination even though they include material tending to incriminate the record-keeper. Originally, this “public records” doctrine was restricted to the records of governmental agents, or persons engaged in businesses regulated or licensed by the Government because of their tendency to “endanger the public health, morals, or safety,” e.g., junk dealers or druggists who sold intoxicants. These private entrepreneurs were said to become “public officers” by virtue of the record requirement. In recent years the doctrine has been extended to situations where the activity regulated does not fall in either of the above categories. Thus in Shapiro v. United States a divided Supreme Court held that records required to be kept under regulations issued by the Office of Price Administration (as provided for in the statute) became public records; and, consequently, in an action to convict petitioner of violating the regulations by alleged tie-in sales, the records would have to be produced without resort to the privilege against self-incrimination. Here the public danger arising from an inflationary economy justified the regulation of the whole retail industry; and, since the regulation treated the merchants as licensees, they could be required to maintain records of their transactions for the information of the Government. Employers’ records required to be kept to aid in the enforcement of the Fair Labor Standards Act have been held to be similarly unprivileged. What may be operative in these decisions is the notion that under modern government’s mass regulation of industries, the distinction between that which is wholly private enterprise and that which exists solely by license of the government may no longer be limited to those few enterprises dealing in goods of an inherently hazardous nature.

94. People v. Coombs, 158 N.Y. 532, 53 N.E. 527 (1899) (coroner’s records).
95. Shapiro v. United States, 335 U.S. 1, 65 (dissent of Justice Frankfurter).
96. City of St. Louis v. Baskowitz, 273 Mo. 543, 201 S.W. 870 (1919); State v. Legora, 162 Tenn. 122, 34 S.W.2d 1056 (1930).
97. State v. Smith, 74 Iowa 580, 38 N.W. 709 (1888); State v. Donovan, 10 N.D. 203, 86 N.W. 709 (1901).
98. State v. Donovan, supra note 97.
100. 335 U.S. at 9, 10, 11, 15.
101. Durkin v. Fisher, 204 F.2d 930-32 (8th Cir. 1953). The Shapiro rule has also been applied to records required to be kept under the Wool Products Labeling Act. United States v. Fishman, 15 F.R.D. 151 (S.D.N.Y. 1951).
The same need for effective and efficient law enforcement that the government has in requiring recordation of sales of intoxicants by druggists exists in relation to enforcement of other more complex business regulation. While the limits of the Shapiro doctrine have not been indicated by the Court, it is not to be expected that Congress will be permitted absolutely to repeal the privilege of the fifth amendment, as applied to written documents, by the simple expedient of requiring records to be maintained by all those who might break the law. At some point a distinction must be made between requiring "public" records to be maintained by a regulated industry to aid in administration of the law and a demand that certain criminals, e.g., bank robbers, confess their antisocial conduct by periodic reports. In United States v. Ansani \(^{102}\) one district court viewed as the latter type a federal law which required dealers in gambling instruments to file reports of their shipments in interstate commerce with the federal government. As construed by the court, the filing required was exclusively of acts expressly declared to be federal crimes. This was deemed to be similar to a requirement that burglars periodically report their criminal activity to the police, \(^{103}\) and was therefore held unconstitutional. On analysis, the requirement involved in Ansani is not greatly dissimilar to that considered in Shapiro. Although in the latter case the Government required all sales, legal and illegal, to be reported, the Government had genuine interest only in the reported illegal conduct. If there is a valid distinction between the cases, it may lie in the notion that in Ansani government regulation took the form of absolute prohibition of certain conduct while in Shapiro the scheme of regulation was directed towards controlling the manner of performance of an essentially lawful enterprise, in the course of which regulation certain conduct was proscribed. Such a rationale would indicate that a requirement of filing financial reports by union officials as part of a general scheme of regulation of labor organizations in interstate commerce may not be subject to successful attack. However, the dearth of cases and the failure of the Supreme Court to fashion limits to the rule of Shapiro renders uncertain, at best, any attempt to apply it to other situations.

Another possible approach, and one which would avoid this controversy, would be to repeal the criminal sanctions of Taft-Hartley and require the reporting of all conflicts of interests together with financial statements, thus making evasion more difficult. Since Congress can forbid the basic activity, it would follow that if the criminal sanctions were repealed filing could be required as an exercise of congressional investigative power. No valid objection to the imposition of a sanction to assure accurate reporting could be raised since none would be imposed. The information thus obtained would then be forwarded to union members who could vote miscreant officials from office.\(^{104}\)

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103. Id. at 454.
104. See text accompanying note 86 supra for discussion of member apathy.
VIII. MIDDLEMAN-EMPLOYERS

The Taft-Hartley Act imposed criminal penalties on an employer who makes payments or gives things of value to any representative of his employees.\textsuperscript{105} An employer, as defined by the act, "includes any person acting as an agent of an employer, directly or indirectly. . . ."\textsuperscript{106} With the passage of the act employers sought a means of avoiding the criminal penalty by procuring the services of labor consultants.\textsuperscript{107} These labor consultants, or middlemen, acting in the interests of the employer, have allegedly been utilized as the means through which employer payments to union officials have been channeled.\textsuperscript{108} While there would appear to be no difficulty in imposing criminal sanctions on an employer when a labor consultant has perpetrated such deeds at the direction or with the knowledge or acquiescence of the employer, there is some question\textsuperscript{109} whether the employer or labor consultant will be criminally liable should the latter make such payment without the consent of the employer. While the NLRB and the courts have not applied stringent standards in determining the existence of an agency relationship when cease and desist orders against an employer are involved,\textsuperscript{110} it would seem that the precepts of criminal law should demand actual direction or acquiescence by an employer for him to be criminally responsible. To cover cases where the labor consultant might escape liability for improper payments to union officials, the Kennedy-Ives Bill would have amended the Taft-Hartley Act so as to make illegal payments by labor consultants, as well as by employers.\textsuperscript{111}

In dealing with employers generally the bill provided that every employer who expended more than $5,000 in the preceding fiscal year for

\textsuperscript{105} 29 U.S.C. § 186 (1952) : "(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce."

\textsuperscript{106} 29 U.S.C. § 152(2) (1952). The Wagner Act, ch. 372, 49 Stat. 450 (1935), defined "Employer" to include those "acting as an agent of the employer." The change of language in Taft-Hartley was to establish that "both employers and labor organizations will be responsible for the acts of their agents in accordance with the ordinary common law rules of agency." Legislative History of the LMRA, H.R. CONFIRMANCE REP. No. 510, 80th Cong., 2d Sess. 540 (1947). However, the test for determining the agency relationship since 1947 is virtually the same as that previously applied. See Abercrombie Co., 83 N.L.R.B. 524 (1949).

\textsuperscript{107} It has been estimated that there are 800 such associations in New York alone, though the vast majority are not performing acts which would be illegal if middlemen were construed to be employers under Taft-Hartley. Subcommittee Hearings 615. The findings of the McClellan committee emphasized that many illegal union activities would not have been possible without the assistance of certain companies and individuals. Interim Report 86.

\textsuperscript{108} Id. at 299.

\textsuperscript{109} It has been suggested that the Taft-Hartley Act may not include the activities of middlemen. Testimony of Secretary of Labor Mitchell, Subcommittee Hearings 39. See also Interim Report 452.


\textsuperscript{111} S. 3974, supra note 63, § 608.
activities intended to influence or affect employees in the exercise of rights guaranteed by section 7 of Taft-Hartley must file an annual report listing "any payment, directly or indirectly, of any money or other thing of value, to any labor organization or any officer or employee of any labor organization . . . ." Middlemen who were used by such employers were obliged also to file reports of their activities. Thus, an employer would have been required to file reports of illegal payments he made, as are union officials required to file accounts of the receipt of such payments. The constitutional problems discussed in connection with requiring union officials to file are similarly applicable here.

An ancillary problem involves employer payments to union officials to prevent unionization. The Taft-Hartley Act, in only forbidding payments to the representative of employees, has been held not to cover this situation. The Kennedy-Ives Bill dealt with this problem by a clause which made illegal payments "to any labor organization or any officer or employee thereof which represents, seeks to represent or would admit to membership any of the employees of such employer. . . ."

IX. CONCLUSION

If any criticism can be directed at the Kennedy-Ives Bill certainly its most vulnerable feature was the failure to asseverate a basic policy. Many features of the bill suggested a congressional reliance on voluntary union action. Yet other provisions, notably those dealing with convicts, seemed to be borne of an implied distrust in the efficacy of this self-regulative force. The failure to provide for the creation of impartial tribunals, proposed as an alternative to governmental supervision, further illustrates this attitude. If this distrust is warranted, then providing, as the bill did, for an extensive informing of the membership would prove futile as a check on union officials. Certainly many of the bill's provisions were creatures of inconsistent philosophies.

112. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." 29 U.S.C. § 157 (1952).
113. S. 3974, supra note 63, § 103. Criminal penalties were provided for non-compliance. Id. § 107.
114. Id. § 104.
116. S. 3974, supra note 63, § 608. Section 609 prohibits the receipt of payments made illegal under § 608. Examples of such conduct were reported by the Committee, e.g., several Flint, Michigan businessmen were picketed by the teamsters in an organization movement, but after payments to a person "in apparent collusion with teamster officials" the pickets were withdrawn. Interim Report 299.
117. It cannot be gainsaid that there is some support for this view. For example, in one case a court intervened to end the reign of officials who had suspended meeting and misappropriated funds, but when an honest election was held the same officers were re-elected. Local 11 v. McKee, 114 N.J. Eq. 555, 169 Atl. 351 (Ch. 1933). However, this occurred in an era when union distrust of the protections afforded by the judiciary was prevalent.
The haste associated with the drafting of the bill was saliently evidenced by many of its provisions. To properly administer the filing demanded of the numerous local unions alone would necessitate a sizeable clerical force. While Congress may deem that the necessity for acquiring such information overrides the concomitant expense, the fact that the Senate debates were noticeably devoid of concern over the expense and administrative burden involved suggests an inadequate consideration of the problem by the draftsmen.

The commendable feature of the proposed legislation was that in some respects it did adopt the suggestion of self-regulation. A proper functioning of the interrelated filing requirements and election safeguards would result in ending the reign of any officials whose espousal of the principles of unionism was not supported by their deeds. The hoped-for effect will then be that an informed membership will elect responsible officials who will adequately fulfill the positions entrusted to them, and that self-imposed reforms will come from within the unions. Furthermore, allowing for self-regulation would seem to be the only practical way since it is unlikely that Congress would wish to dictate to union members whom they may choose to represent them. However, if voluntary union action fails to attain the congressional objective then governmental licensing of unions and officials may be the next step. This possibility should provide a further impetus for unions to properly regulate themselves.

J. T. M.