Union Elections and the LMRDA: Thirteen Years of Use and Abuse
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Note

Union Elections and the LMRDA: Thirteen Years of Use and Abuse:

Thirteen years ago Congress discovered violence, mismanagement, and autocratic rule in many American labor unions and responded by passing the Labor-Management Reporting and Disclosure Act (LMRDA). The Act established standards of administration for many aspects of internal union affairs, including the conduct of officer elections. Despite passage of the Act, however, allegations of unfair and fraudulent elections have persisted. The recent campaign of the late Joseph A. Yablonski to defeat United Mine Worker President W.A. Boyle, for example, raised charges of discriminatory use of union resources, intimidation of voters, and manipulation of ballots by the incumbents. The Yablonski campaign and the ensuing litigation have served to spotlight the question of whether the LMRDA actually insures honest union elections. It has resulted in a comprehensive investigation by the Senate Labor Subcommittee into the Mineworkers election and led Senator Robert Griffin, an original sponsor of the LMRDA, to conclude that the Act has not insured fair elections and that changes in its structure and enforcement are needed.

The LMRDA includes six major sections, only one of which is addressed specifically to elections, but all of which have some bearing on the fairness of election procedures. Title I is a Bill of Rights for union members, specifying voting, nominating, and free speech rights guaranteed to all members. Title II requires the reporting of union financial information to the Department of Labor (DOL). Title III provides limitations on union trusteeships, devices by which a national union takes over the operation of its locals or districts. Title IV includes specific regulations for the conduct of elections. Title V im-

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poses fiduciary responsibilities on union officials. Title VI contains miscellaneous provisions, including authority for the Department of Labor to investigate any union suspected of violating provisions of the Act and criminal penalties for any persons who prevent the exercise of LMRDA rights through force or violence. While some LMRDA guarantees are enforced by court suits brought by private parties, most of the election provisions of Title IV are enforced by an administrative scheme through which the Secretary of Labor is to bring suit in federal court to have an election set aside when violations of Title IV have occurred that "may have affected" the outcome of the election. Such a suit is to be brought only upon receipt of a complaint by an aggrieved union member who has invoked the internal appeals mechanism of his union and waited at least three months for the union's response.

This Note seeks to examine the ways in which the LMRDA, and particularly Title IV, has functioned with respect to the goal of internal union democracy. Part I explores the concept of union responsiveness and the importance of union officer elections in achieving this responsiveness. Part II draws on field interviews to delineate potential obstacles to the conduct of fair elections and analyzes the extent to which the substantive provisions of the LMRDA deal with those obstacles. Part III, also drawing on field interviews, describes the post-election process by which Title IV rights are enforced. Part IV explores the internal appeals structures of unions, upon which the LMRDA substantially relies for remedying election abuses. Finally, Part V argues that the purposes of the statute would be better effectuated by an expansion of the right of union members to obtain judicial relief before union elections are conducted.

I. Union Democracy

A. The Need for Responsiveness to the Membership

Before the advent of unionism in the United States, individual workers were largely unable to affect the terms and conditions of their employment. Through union organization and collective bargaining,

workers have been able to muster enough strength to gain some control over important features of their economic life.\textsuperscript{11} The goal of democratizing the work place cannot, however, be achieved unless the labor union is responsive to its members' needs and desires:

The effects of unionism are undoubtedly to democratize industrial management in the sense that autocratic powers of employers are restricted by rules and regulations negotiated with representatives of the workers . . . . If labor organizations also exercise autocratic powers over their members, then workers may merely be substituting dictatorial rule of union officials for the arbitrary authority of the employer or his managers.\textsuperscript{12}

Democratization of the work place has been important not only as a matter of political principle, but also as a means of fostering industrial peace. The National Labor Relations Act (NLRA) was premised on a belief that giving workers a voice in industrial governance would greatly reduce the number of economically disastrous work stoppages.\textsuperscript{13} It was assumed that workers, by participating through their union in decisions formerly made by management alone, would be more likely to obtain the terms and conditions of employment they desired—and therefore less likely to strike. The goal of labor peace through industrial democracy is thwarted, however, if autocratic union

\textsuperscript{11} Collective bargaining in the United States has been historically conceived as more than an economic device to equalise bargaining power. It has been conceived as an instrument of industrial democracy. The Industrial Commission of 1893 stated: 'By the organisation of labour, and by no other means, is it possible to introduce an element of democracy into the government of industry. By this means only can workers effectively take part in determining the conditions under which they work.' [Final Report of the Industrial Commission of 1898, at 805 (1902).] Again in 1916 the United States Commission on Industrial Relations declared: 'The struggle of labour for organisation is not merely an attempt to secure an increased measure of the material comforts of life, but is an age-long struggle for liberty . . . . Even if men were well fed, they would still struggle to be free.' [Final Report of the United States Commission on Industrial Relations, S. Doc. No. 415, 64th Cong. 1st Sess. 62 (1916).] One of the fundamental purposes of the Wagner Act of 1935, in protecting the right to organise and bargain collectively, was to give workers a voice in determining the terms and conditions of employment. Senator Wagner urged its adoption so that, 'We can raise a race of men who are economically as well as politically free.' [75 Cong. Rec. 4918 (1932).]

\textsuperscript{12} W. Leithson, American Trade Union Democracy 54 (1939).

\textsuperscript{13} National Labor Relations Act (Wagner Act) § 1, 29 U.S.C. § 151 (1970), reads in part: The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest which have the intent or the necessary effect of burdening or obstructing commerce . . . . It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate those obstructions.
leadership prevents workers from having an effective voice in union governance.\(^4\)

American labor legislation contains provisions designed both to organize the work place and to assure unions' responsiveness to their members. Organization is achieved through the recognition of exclusive bargaining representatives,\(^{15}\) and through the principle of compulsory unionism\(^{16}\) as reflected in collective bargaining agreements containing union security clauses.\(^{17}\) These devices achieve half of the goal of industrial democracy: providing workers with enough power to bargain collectively through their union. National labor policy, however, would be incomplete if it did not also guarantee workers some means of controlling their union and its agents—the union leadership.\(^{18}\) This second feature of industrial democracy was

14. It needs no argument to demonstrate the importance of free and democratic union elections. Under the National Labor Relations and Railway Labor Acts the union which is the bargaining representative has powers, in conjunction with the employer, to fix a man's wages, hours, and conditions of employment. The individual employee may not lawfully negotiate with his employer. He is bound by the union contract. In practice, the union also has a significant role in enforcing the grievance procedure where a man's contract rights are enforced. The Government which gives unions this power has an obligation to insure that the officials who wield it are responsive to the desires of the men and women whom they represent. S. REP. 187 ON S. 1555, 86th Cong., 1st Sess. 20 (1959).


16. Compulsory unionism is a firm tenet of practically all American labor unions, despite affirmations in some of their constitutions that they are voluntary organizations, and despite the fact that unions generally look upon themselves as voluntary in nature. LEISERSON, supra note 12, at 70-71.

17. Studies indicate that eighty per cent of all employees covered by collective bargaining contracts are subject to such union security clauses. See Union Security Provisions in Major Union Contracts, 1955-59, 82 MONTHLY LAB. REV. 1348, 1349-51 (1959); BNA LAB. REL. REP. (News and Background Information), 73 L.R.R. 150, 151 (1970).

Union membership may be compulsory under union shop or maintenance of membership agreements. Union shop agreements contain contract clauses which require all employees as a condition of employment or within 30 days after commencement of work to be union members (full union shop) and clauses which require all employees except those who were not members on the effective date of the agreement to be union members (modified union shop). Maintenance of membership clauses provide that employees are not required to be union members, but those who are members when the clause becomes effective, or those who choose to become members thereafter, are required to retain their membership as a condition of employment.

Union membership may also be effectively required where the union operates a hiring hall and refers its members exclusively or preferentially. The LMRA (Labor-Management Relations Act) banned closed shop agreements, stipulations that a man must be a union member before being hired. LMRA §§ 7, 8(a)(5), 8(b)(2), 29 U.S.C. 157, 158(a)(5), 158(b)(2) (1970). In practice, however, a closed shop effect is achieved in some hiring halls. See BNA LAB. REL. REP. (News and Background Information), 73 L.R.R. 150, 151 (1970).

Even where membership is not required, either explicitly or effectively, the payment of union dues may be compulsory. Id. Seventy-five per cent of these arrangements, called agency shops, were found in conjunction with other union security clauses. In 1970 a study showed that eight per cent of union contracts had an agency shop clause. BNA, LAB. REL. REP., L.R.X. 95 (§ 17A).

18. An alternate way of viewing the need for members to control their leaders is to recognize that in the performance of its many functions, the union may be regarded as
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the focus of the LMRDA. The responsiveness of union leaders to their membership is thus a cornerstone of American labor legislation.

B. Alternative Union Models

The notion that unions should be internally democratic is not unanimously held. Two other models have substantial support: the union as a "united front" and the union as an institution "responsible" to the public at large.

Unions themselves often argue that they must present a "united front" to employers and to the public. Recalling the early days when unions were struggling organizations facing powerful corporate managers and an unsympathetic public, the united front conception holds that:

Frequently workingmen are willing to resign themselves to "boss control" in their union for the sake of this liberty in the shop. In other words, they are willing to sacrifice their "political" liberty so long as they have "economic" liberty on the job.¹⁰

The united front model assumes that the primary demand on union leaders is that they "deliver the goods," in terms of high wages, short hours and good conditions. So long as they do this [members] do not care to interfere .... It really cannot be otherwise; the workers, untrained and exhausted by daily toil, cannot keep track of affairs. The officers are specialists—good talkers—and the rank and file must trust them.²⁰

a dispenser of goods. In return for these goods, members pay dues. Goods dispensers are normally controlled by consumers through a market mechanism: price and quality are regulated by consumer demand. But, because of the exclusive bargaining status of unions and the prevalence of union security clauses, there is very little market control of unions. Workers have only limited choice about whether to consume union services. Unless union policies are determined through mechanisms which provide responsiveness, workers have no control over the "price" and "quality" of the services their union is providing.

²⁰. R. Hoxie, Trade Unionism in the United States 178 (2d ed. 1926). The united front argument has been echoed by union leaders. John L. Lewis used it to explain why district autonomy in the Mineworkers was undesirable and unrelated to membership desires for more pay, pensions and better working conditions. Lewis, Futility of Union Democracy, Address before the 43rd (1969) Consecutive Constitutional Convention of the United Mine Workers, United Mine Workers J., Nov. 1, 1969, at 12, 15, excerpted in E. Barke, C. Kerr, C. Anspach, UNIONS, MANAGEMENT AND THE PUBLIC 178, 180 (3d ed. 1967).

Conflicting with leaders' calls for united fronts is the evidence that members desire a voice in the running of their unions. P. Sultan, DISenchanted UNIONist passim (1963); D. Boe & J. Dunlop, LABOR AND THE AMERICAN COMMUNITY 21 (1970).
The united front model posits a need for complete unity within the
union in order to achieve economic gains for the membership. Labor
officials sometimes employ this quasi-military view of unions under
siege to justify the suppression of internal dissent.\textsuperscript{21}

As unions have become powerful forces in the American economy,
a second model has been urged on union leaders. Under this theory,
unions are to be "responsible," placing the public interest above the
demands of union members.\textsuperscript{22} Union leaders have been asked to hold
down inflation, eliminate featherbedding, and integrate the working
place, even when such policies are contrary to their members' desires.\textsuperscript{23}

Apart from being antithetical to the conception of unions under-
lying national labor legislation, both the united front and union
responsibility models are inconsistent with broader public policy goals.
The united front model rests its case on the need for solidarity in
order to optimally serve the economic needs of the membership. How-
ever, the leadership cannot know which needs the members consider
to be most important without some internal political mechanism
through which members express their preferences. Furthermore, the
need for solidarity is the need for a united front against the employer
and \textit{not} the need for monolithic unity within the union. The felt need
for solidarity in facing the employer has been recognized by Congress
and legally assured in the form of exclusive representation. Having
been given this legal protection, unions are virtually guaranteed the
required united front against the employer without the need for sup-
pression of internal dissent.

Even were it argued that additional bargaining strength was re-
quired \textit{beyond} that provided by Congress through the device of ex-
clusive representation, it would not follow that suppression of dis-
sent within the union is justified. Factionalism within a union is often

\textsuperscript{21} Conflicting with the union self-conception as united fronts, however, is the often-
expressed proclamation by union leaders that their organizations should be democratic.
Summers, \textit{Legislating Union Democracy}, \textit{Proceedings of the Tenth Annual Meeting
of the Industrial Relations Association} 228 (September 1957).

Even those leaders indicating that democracy is unworkable and detrimental to the
workers' interests go on to say that they would prefer democracy if it would work.
(1937).

The AFL-CIO constitution declares that among its "objects and principles" is the
necessity "[t]o safeguard the democratic character of the labor movement." \textit{Constitution

\textsuperscript{22} It has been argued that the union's function is to further its members' interests
or welfare "as fairly and as effectively as possible without interfering unduly with the
interests of third parties." Bok & Dunlop, \textit{supra} note 20, at 71.

\textsuperscript{23} See the discussion of these issues, \textit{id.} at 84-99, 112-37, 281-94.
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a strong incentive for leaders to be tough bargainers, for only by being tough will the leaders be able to satisfy a majority of their members.\textsuperscript{24} Moreover, even if demands within the union are diverse, all that is really required for power at the bargaining table is the threat of united strike action. Such united action against the employer can best be achieved by membership participation in determining bargaining priorities; only if those priorities recognize the desires of the rank and file will the membership view it as in their interest to support the strike. Once having achieved this rough consensus, the few recalcitrant individuals can be held in line through the union’s authority to penalize members who break strikes mandated by the membership.\textsuperscript{25}

The argument for total internal unity is further weakened by a recognition of the status of American unionism today. Unions are no longer fighting organizations on the weak end of the bargaining table, constantly threatened by public disapproval. They are an established part of the political and economic scene, bureaucracies representing millions of workers.

The union responsibility model is weak because it seriously misconceives the role of labor unions in a pluralist political system. To be sure, any interest group with power, such as a labor union, can and does have an impact on the public at large. But if interest group politics are to function as a normatively acceptable mode of political organization, the policies advocated and implemented by various interest groups must reflect the desires of their members. Only when each institution’s leaders accurately reflect their constituency will the aggregate decisionmaking process reflect the sum of individual needs and desires.\textsuperscript{26} It is not clear that a union democracy model regularly

\textsuperscript{24} J. Seidman, J. London, B. Karsch, & D. Tagliacozzo, The Worker Views His Union 211 (1958).


\textsuperscript{26} C. Kerr, Unions and Union Leaders of Their Own Choosing 11 (1962).

Opponents of union democracy often attack the proposition that institutions in a democratic society should be democratic by pointing to the undemocratic nature of the corporation. For example, Joseph A. Beirne, President of the Communications Workers, has stated:

[\textit{L}et me note in passing that the individual union member, so poignantly depicted by some commentators as captive of the “labor bosses” has an infinitely better chance to be heard during this confrontation than all the little old ladies who hold shares but are captives of the “corporation bosses.” Union meetings are held before the event; stockholders’ meetings are held after it, and the few individual dissidents are buried under an avalanche of proxies. After all, there is no Landrum-Griffin act for management.\textit{]}

pits union members' interests against the "public interest." Nor is it clear that appeals to union members as citizens to take particular positions seemingly contrary to their short term economic interest will be consistently unavailing. If such conflicts do persist, they should be resolved by the national political process, rather than by asking the leaders of one interest group to forsake their members for the greater good of society.

A further problem with the union responsibility model is that it relies on the erroneous assumption that autocratic, non-responsive union leaders will be benevolent and act only in the "public interest." There are no clear correlations in labor union history between despotism and virtue.2 Unless it can be shown that responsive leadership fails to consider the "public interest" because it is not autocratic, there is no reason to prefer the union responsibility model to union democracy. Further, proponents of the union responsibility model, to the extent that they would countenance unresponsive leadership, fail to take account of the adverse effects of strikes occasioned by worker disenchantment with arbitrary union leadership.28

However, a minimum of responsiveness is imposed on corporations by law through proxy regulations, fiduciary duties, regulation of insider trading and self-dealing, state blue sky laws, and statutes requiring the filing of annual reports. See S. REP. No. 187 on S. 1555, 86th Cong., 1st Sess. Appendix C at 105-10, Appendix D at 111, 114-16, and statutes cited therein (1959).

Moreover, many states have passed statutes authorizing courts to enjoin and set aside corporate elections in which fraud or improper practices have occurred. See, e.g., N.Y. BUS. CORP. LAW §§ 610, 619 (McKinney 1963); DEL. CORP. LAW §§ 211, 215, 223, 235 (West 1955); CAL. CORP. CODE §§ 2232-2233 (West 1955).

27. Many practices against the public interest have been maintained by dictatorial unions. For example, "many of the railroad brotherhoods, which are much less democratic [than the International Typographers Union (ITU)] ... retain historic policies which keep more workers than necessary on the job [and the] highly dictatorial United Mine Workers Union ran more strikes during war-time than any other union." Lipset, The Law and Trade Union Democracy, 47 VA. L. REV. 1, 6 (1960).

On the contrary, it has been suggested that a "correlation can be observed between a union's commitment to large social goals and its observance of internal democratic procedures." I. Howe & B.J. Wimbck, UAW and Walter Reuther 244 (1949). However, the ITU, a reputedly democratic union, also acted against the public interest on several occasions. For example, it campaigned against permanent registration of New York voters largely because of the extra volume of printing work entailed by yearly registration and refused to abolish featherbedding practices when a leadership resolution against featherbedding was defeated by the membership. N.Y. Times, Nov. 2, 1960, at 39, cols. 2-3.

In a third category is the ILGWU, credited with being a dictatorial but corruption-free union which carries on a great deal of social work. P. Jacobs, The State of the Unions 148 (1966).

Unions, whether democratic or oligarchic, generally have not acted in the public interest with respect to racial integration at the work place. According to Herbert Hill, the NAACP national labor director, the AFL-CIO has defended discriminators. Hill, Black Protest and the Struggle for Union Democracy, 1 ISSUES IN INDUSTRIAL SOCIETY 19, 20-22 (1969).

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If we are to insist, then, on a democratic model of union governance, as is suggested by considerations of policy and required by the LMRDA, attention must shift to means for structuring internal political responsiveness. The search for such techniques must begin with some understanding of the political structure of modern American labor unions.

C. Unionism and Bureaucracy

More than twenty million American workers belong to labor unions. Three unions have more than one million members each; twenty-one others have more than 200,000 members; and another twenty-two unions have more than 100,000 members. Unions perform a wide range of services for their members in addition to collective bargaining. They administer contracts, process grievances, publish newspapers, run organizational campaigns, operate social and educational programs, own and maintain housing facilities, administer insurance and pension funds, develop medical health centers, and lobby at state and federal legislatures and administrative agencies.

To perform these functions for so many persons, national unions have developed large staffs. These staffs include lawyers, accountants, economists, journalists, hygienists, teachers, and a large number of clerks and secretaries. As the traditional function of collective bargaining has become more sophisticated, with wage packages taking a multitude of forms, bargaining staffs have also become larger and more specialized. In 1964 the 189 national unions employed more than 13,000 full-time employees at their headquarters. The Teamsters and Autoworkers each employed nearly 700 persons.

30. Id. at 69.
31. See BOK & DUNLOP, supra note 20, at 361-455.
32. Some unions may have bureaucratized themselves to force industry to be less competitive:
Unions such as the garment unions have developed highly centralized structures so as to be able to force employers to develop similar collective bargaining practices.
In some cases, the unions have been able to force bureaucratic structures on employers by forcing them to join industrial associations and set up codes of business practice. Lipset, The Political Process in Trade Unions: A Theoretical Statement, in LABOR AND TRADE UNIONISM: AN INTERDISCIPLINARY READER 216, 218 (W. Galenson & S.M. Lipset eds. 1960).
33. See U.S. DEP'T OF LABOR, DIRECTORY OF NATIONAL AND INTERNATIONAL LABOR UNIONS IN THE UNITED STATES 1965, table 15, at 63 (1966). Beyond the large number of staff employees at national headquarters, the 75,000 locals and district offices each have staffs varying in size from one part-time to fifty full-time persons. While the precise number of employees in all unions is difficult to determine,
Union affiliations tend to be relatively stable. Except for a few unions organizing teachers and farm, hospital, and government employees, organization of new members is not a pressing union concern. AFL-CIO "no-raiding" agreements have virtually eliminated rivalry for members among different unions. Although there are statutory provisions for workers to deauthorize or decertify their existing bargaining representatives, use of these mechanisms has been rare.

This stable bureaucratic character of modern unions tends to frustrate achievement of responsiveness. In many unions a great "distance" separates leaders from the rank and file. Leaders tend to have been out of the shop for many years and are generally older than their the staffs of several unions are large enough to support their own local. The IAM Representatives Association represents staffers of the IAM. (172 N.L.R.B. No. 239 (1968)); Agents and Organizers Association of the Retail Clerks Union was formed in 1962 by staff employees of the union (153 N.L.R.B. No. 15 (1965)); VARU, Variety Artists Representatives Union, represents the staffers of AGVA (162 N.L.R.B. No. 128 (1967)); the Office Employees International Union has organized the staffers of several unions, including the Seafarers (138 N.L.R.B. No. 130 (1962)), B.L.F.E. (108 N.L.R.B. No. 93 (1967)), and Chain Service Restaurant, Luncheonette & Soda Fountain Employees (132 N.L.R.B. No. 79 (1961)).

34. Total union membership has increased only about ten per cent between 1956 and 1968. At the same time, the total labor force and the total non-agricultural labor force have increased about twenty per cent and thirty per cent respectively. The percentage of non-agricultural workers belonging to unions has decreased steadily from thirty-three per cent in 1956 to just under twenty-eight per cent in 1968. 1969 Directory, supra note 29, table IA, at 67.

Another guide to the organizing efforts of unions is the changes in membership of the fifty-one unions reporting a membership of 100,000 or more in 1967. Id. at 93, Appendix D. Thirty-six of the fifty-one unions either lost members (twenty-one), or increased in membership (fifteen) at an average rate of two per cent or less per year from 1956 to 1968. Of the fifteen that increased at an average rate greater than two per cent per year, most of the largest gains were achieved by unions organizing government workers. See also M. ESTEV, THE UNIONS: STRUCTURE, DEVELOPMENT, AND MANAGEMENT 10-11 (1967).

35. The AFL-CIO no raiding agreements, BNA LAB. REL. REP., L.R.X. 336a, are credited with eliminating union rivalry among AFL-CIO affiliates. Bok & Dunlop, supra note 20, at n.167; Krislov, Organizational Rivalry Among American Unions, 13 IND. & LAB. REL. REV. 216 (1960) indicates that even before the AFL-CIO no raiding agreements, there was little rivalry among their affiliates.

36. LMRA § 9(c)(1), 29 U.S.C. § 159(c)(1) (1970), providing for NLRB supervised elections to rescind union security agreements, has been rarely used. During the first ten-year history of Taft-Hartley, less than 10,000 workers in the entire country were involved in such decertification elections. Morgan, The Union Shop Decertification Poll, 12 IND. & LAB. REL. REV. 79, 80 (1958). Less than one per cent of the cases received by the NLRB in fiscal year 1968 were decertification petitions. ANNUAL REPORT OF THE NLRB FOR 1968, table 5, at 208-09.

LMRA § 9(c)(1)(A)(ii), 29 U.S.C. § 159(c)(1)(A)(ii) (1970), giving workers the opportunity to decertify their collective bargaining representatives, has rarely been invoked, and relatively few members of unions have been involved in any such elections. Krislov, Union Decertification, 9 IND. & LAB. REL. REV. 589, 590 (1956). The Annual Report of the NLRB for 1968, at 208-09, table 5, shows that less than three per cent of all cases received by the NLRB in the 1968 fiscal year involved decertification petitions.
constituents. They have higher salaries, do more interesting work, and enjoy a higher status. The leader develops a class point of view different from that of his members. It is not surprising that union leaders tend to become relatively conservative.

Responsibility sobers them. As soon as they engage in negotiations they realize the power of the employers, and the limitations of employers in the ability to meet their demands. Moreover, when the leaders get away from the bench, their environment becomes more of the character of the employer's than of the worker's.

... [A]lmost inevitably they develop something of the employer's viewpoint and feeling, and thus become unable to see things from the workers' angle and to feel with and for the workers as before.

The distance between the leadership and the rank and file may lead to a divergence between leaders' and members' perceptions of membership needs. This disparity can lead to disenchantment with the leadership.

Incumbents may feel forced by such disenchantment to change their position on significant issues facing the union. A problem with the bureaucratized union, however, is that the leadership is often able to retain office without making such changes. Through their virtual monopoly over the means of communication within the union, its physical and financial resources, and its leadership and administra-

37. A survey of national union presidents in 1965 found that the typical union leader is over fifty and had secured his first union post before reaching thirty. Perline & Mosier, Background of American Labor Union Presidents: A Preliminary Study, 49 PERSONNEL J. 329, 331 (1970). Thus, a president who had continuously held full-time elected or appointed posts would be likely to have been out of the shop for some twenty-five years. According to the 1969 Directory, supra note 29, at 83, twenty-three per cent of union members belonged to nationals whose president in 1969 had been first elected to office before 1956; forty-seven per cent belonged to nationals whose president in 1969 had first been elected in 1960 or before. Only thirty per cent belonged to unions whose president had been first elected after 1965. At most, thirty per cent of all members belonged to nationals whose president had been out of the shop for only four years or less. Moreover, several presidents were first elected in the 1930's: Joseph Curran of the National Maritime Union, Sal B. Hoffman of the Upholsterers, and Harry Bridges of the International Longshoremen were first elected in 1937; J.P. Tahney of the American Railway and Airline Supervisors Association and Eric W. Lindberg of the Machine Printers and Engravers Association assumed office in 1954. Id. at 83.


39. Id. at 221-25; Howe & Widick, supra note 27, at 248, 257.

40. See G. Tyler, The Political Imperative 285 (1968); Lester, supra note 38, at 27-29, 69, who notes union officers advance in hierarchical fashion, and those "seeking to advance to the charmed circle at the top tend to conform to the aims and viewpoints of their supervisors"; Howe & Widick, supra note 27, at 250, 257.

41. R. Hoixie, supra note 20, at 179-80. See also G. Tyler, supra note 40, at 285.
incumbents possess a significant advantage in any electoral contest.\(^4\)

The unresponsiveness engendered by union bureaucratization is made more acute by the trend toward centralization of collective bargaining.\(^4\) Labor agreements are increasingly negotiated on the regional or national level. As a consequence, the contract terms suggested by labor are being written not by local union officers, who are most closely tied to the rank and file, but by the more distant national officers and the non-elected union bureaucracy. This trend places the responsibility for determining the conditions of employment in the hands of those people least accessible to the demands of the rank and file.\(^4\)

There are indications that the resultant lack of responsiveness is an increasing problem for the labor movement. In several union elections, unsatisfied needs and demands have been a basis for opposition movements.\(^4\) Contract rejections have increased and at least one study attributes a significant number of these rejections to the leadership's failure to understand the feelings of the membership and, to a lesser extent, to their failure to keep members informed during negotiations.\(^4\)


43. The evolution of large appointed staffs also serves to insulate union leadership from rank and file pressure. A staff in effect becomes an independent constituency endowed with aims and interests of its own. R. Michels, *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy* 373, 389, 401, 405 (1915). See also Howe & Wink, *supra* note 27, at 218. Although one function of the administrative staff is to service the needs of the membership and mediate between the conflicting demands of various sub-groups within the union, staffers are not directly accountable to the union electorate and their own distinct interests may blind them to the needs of the rank and file. Taylor, *The Public Interest: Variations on an Old Theme*, PROCEEDINGS OF THE EIGHTEENTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS, 1965, at 191, 195 (1965).

44. Increasing centralization of collective bargaining has been linked to the development of regional or national product markets, thereby necessitating regional or national cooperation for effective collective bargaining. Štef, *supra* note 34, at 61-65. He notes that in the housing and construction industry, where the product market and wage competition are local, the local union remains in control of collective bargaining. See also Shister, *The Locus of Union Control of Collective Bargaining*, 60 Q.J. Econ. 513, 515-17 (1946).

Complete centralization of collective bargaining has not yet occurred. A majority of all employees in unions are covered by single plant or single employer contracts; forty per cent of collective bargaining contracts involve multiple negotiation, largely in one metropolitan area. In contrast, European collective bargaining is more centralized and tends toward decentralization. Bok & Dunlop, *supra* note 20, at 208-09.

45. A unique analysis of contract rejections in 1967 revealed that Federal Mediation Service officers thought that dissatisfaction of workers with the agreement or leadership failure to understand the members' real feelings were factors in a considerable number of rejections. Simkin, *Refusals to Ratify Contracts*, 21 IND. & LAB. REL. REV. 518, 528 (July 1968).

46. See note 49 infra.

47. Simkin, *supra* note 45, at 518, 528. An empirical connection has been shown between propensity to strike and plant size. The distance between a worker and his supervisor produces a feeling of arbitrariness and lack of confidence because managerial rep-
Wildcat strikes may be another indication of a failure of union responsiveness; many of these strikes have been attributed to membership dissatisfaction with the union's response to specific demands.\textsuperscript{48} Recent labor agitation suggests that union members are becoming less willing to defer to their leadership and are demanding greater participation in decisionmaking.\textsuperscript{49} Whether this trend will continue is uncertain, but it has already forced one major national union to shift much of the responsibility for the negotiation of its contracts to the local union level in an effort to meet the particular, non-economic demands of rank and file locals.\textsuperscript{50}

D. Achieving Responsiveness

Some students of union government have argued that responsiveness can be assured only when a functioning two-party system underlies a union's political structure.\textsuperscript{51} Yet only one major national union has such a system, and a study of that union suggests that the two-party system resulted from historical and social factors that rarely appear in other union organizations.\textsuperscript{52} If a two-party system is a prerequisite, the prospects for democratic, responsive unionism are bleak.

This study assumes, however, that a simpler mechanism can provide a sufficient measure of responsiveness within unions. The function of this mechanism would be to reconcile the divergences between membership and leadership objectives as they develop. Membership access to union decisionmaking need only be periodic to correct the priorities of leadership when they stray from the demands of the rank and file. The continuous participation of a two-party system is assumed to be unnecessary if a mechanism for such periodic entrance is available. The intervening periods of membership passivity might then be characterized not as evidence of rank and file apathy or political

\textsuperscript{48} Bok & Dunlop, supra note 20, at 77.
\textsuperscript{50} Salpukas, Steel Chief Acts to Share Burden, N.Y. Times, May 21, 1971, at 13, col. 1.
\textsuperscript{51} S. Litset, M. Trow & J. Coleman, Union Democracy passim (1956).
incompetence, but rather as intervals of trust in the existing leadership.\footnote{53} Such a mechanism should:

(1) discover the grievances and demands of the members which are not being satisfied;
(2) embrace all possible sources of discontent in this discovery process;
(3) encourage the formulation of various policy alternatives to meet these grievances;
(4) permit the expression of membership preference as to the desirability of policy alternatives;
(5) give binding force to this expression so that the leadership is obliged to act upon it; and,
(6) cause only minimum disruption of the union, labor-management relations, and the public economy.

Several institutional devices have been suggested as ways to accomplish these functions. They include informal consultation between leaders and members,\footnote{54} debate at meetings,\footnote{55} contract ratification procedures,\footnote{56} referenda on important matters,\footnote{57} and officer election and recall procedures. In addition, various non-institutional devices are available to the membership to coerce greater attention and re-

53. Members may be satisfied with the symbols or rituals of democracy without demanding the substance. Coleman, The Compulsive Pressures of Democracy in Unionism, 61 Am. J. of Soc. 519, 525-26 (1956), reproduced in Galenson & Lipset, supra note 32, at 207, 213-14 (1960). This may be the normal situation, but when an interval of dissatisfaction arises, the democratic practices otherwise exercised only ritualistically will be available for meaningful use by disgruntled members.

54. Although informal consultation may uncover sources of grievance, permit members to express their policy preferences, and cause only minimal disruption, it fails to embrace all possible sources of discontent, to encourage formulation of policy alternatives, or to give binding force to membership desires. The success of informal consultation depends completely on the competence of the leaders in seeking out public opinion. Although informal consultation has a place, it is an inadequate guarantor of responsiveness even if they drew packed houses. Debate at meetings lacks binding force and is unlikely to generate policy alternatives or to permit all members to have their preferences expressed. As with informal consultation, such debate can be valuable in maintaining a level of communication within the union, but it is inadequate to control the leadership.

55. Contract ratification votes are “yes” or “no” decisions made under the threat of strike if the “no” votes prevail. This one vote cannot express member preferences on a number of collective bargaining issues facing the union, let alone the multitude of non-bargaining questions relating to the union’s pension, recreational, educational, and other activities. Such votes are made after the fact, yet it is before bargaining begins that rank and file referenda would be most helpful in conveying membership preferences to the leadership. The opportunity for opposing views to crystallize is also very limited in the crisis environment of a strike deadline.

57. Referenda involve some of the same limitations as do contract ratification votes. Members can only express “yes” or “no” preferences as to pre-formulated policy alternatives. The impossibility of holding referenda on every policy question makes it unlikely that all grievances and demands will be discovered.
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sponsiveness from the leadership, such as low morale, absenteeism and wildcat strikes.58

Although all of the institutional devices can be useful in improving union responsiveness, the election of union officers is the single most important mechanism, because fair elections can accomplish all of the foregoing functions.59 Unlike the other institutional devices, an election campaign can raise as an issue any aspect of the conduct of union affairs, economic or non-economic. In an open campaign, candidates are forced to discuss such issues with the rank and file to determine the scope and intensity of its discontent. In this discussion, alternatives for dealing with issues are formulated by each candidate and commented upon by the membership; a candidate can then act to implement these alternatives should be elected. Even if a candidate does not gather enough support to gain office, the portion of the vote he receives will warn the elected officers of the level of concern within the union about the issues and problems he has raised.

58. Member dissatisfaction with union leadership may well be indicated by low morale, absenteeism or wildcat strikes, but these are poor means for telegraphing to leaders the desires of their constituency. Wildcat strikes are illegal; strikers may lose their jobs. Strikes and absenteeism are disruptive of labor-management relations, and the aim of labor policy should be to provide responsiveness without such side-effects. Although these indicators of discontent are dramatic, they are poor means of articulating problems; union leaders may be left perplexed rather than informed.

59. The LMRDA allows officers of intermediate labor organizations to be elected directly or by delegates elected by the members. Officers of national organizations can be elected at a convention of delegates chosen by the members, as well as by direct referendum vote of all members. LMRDA § 401(d), (a), 29 U.S.C. § 481(d), (a) (1970). National officers are elected at conventions in 138 of 189 national unions. 1969 Directory, supra note 29, at 80, table 15. This Note, however, primarily considers the LMRDA provisions as they relate to referenda, despite some evidence that convention abuses do exist. See Hearings on UMW Election, supra note 2, at 123-30, 144-47, 150 (Feb. 5, 1970) (testimony of Louis Antal and William Savitsky). Interview with union officer M.

Many union members appear to disfavor referenda because they claim their potential for splitting the union in a disruptive political battle undermines bargaining effectiveness and destroys rank and file confidence in leadership. Interviews with union attorneys U, W, and AA. On the other hand, referenda seem more likely to fulfill the responsiveness functions of the electoral process. Referenda allow candidates to bring the issues directly to the voters and provide an opportunity for insurgents to make their grievances well-known throughout the union. Interviews with union officer A and union attorney II; questionnaire from complainant union member II. This responsiveness seems particularly important if the national organization negotiates the collective bargaining agreements.

The lesser effectiveness of the Title IV enforcement mechanism in correcting campaign violations in convention elections also militates against the desirability of this election method. LMRDA § 402, 29 U.S.C. § 482 (1970) demands that violations “may have affected” the election outcome before a rerun may be ordered. Even if violations are found in a number of delegate elections, there is often little likelihood that the improper election of any one delegate would have affected the convention’s choice. Holding a new convention in the event that violations are found would often be very costly, if not impossible. Interview with union attorney X. See full discussion of the consequences of the “may have affected” test on referenda elections at pp. 515-18 infra.

Despite these apparent faults of the convention method, it is impossible to draw any conclusions about desirable legislative or judicial responses to the particular problem of convention elections without more investigation.
Unlike the non-institutional devices for insuring responsiveness, officer elections entail minimal disruption of the public economy. The work schedule of the membership is uninterrupted. Labor-management relations are disturbed only if the election happens to occur around the time of contract negotiations. An election does unsettle the internal processes of the union; but it is a disruption programmed at regular intervals, which, by airing discontent, minimizes disruption of union affairs between elections.

Officer elections appear to be the most effective means for achieving internal responsiveness. Furthermore, the other institutional devices will be adopted only when union officers are already sensitive to the need for communicating with the rank and file. Union officer elections must therefore be a central part of any mechanism designed to bring about democratic, responsive unionism.

E. Methodology

In recognition of the importance of officer elections in insuring responsiveness, Congress enacted statutory provisions, primarily in Title IV of the LMRDA, which seek to insure fair and honest elections. These provisions could fail to achieve this objective in two general ways: their coverage might exclude significant phenomena which interfere with fair elections, or the enforcement process might subvert the protections promised by substantive law. It was the object of this study to explore these possibilities with respect to the election provisions of the LMRDA. Field interviews were relied upon to obtain an understanding of the kinds of practices which may taint a union election and the way in which internal union and statutory remedies are implemented.

The effort to discover obstacles to responsiveness relied on interviews and questionnaires directed to individuals who had been parties to election disputes which later gave rise to protests of illegal conduct. Of the ninety-four Title IV election cases in which judicial decisions were rendered during fiscal years 1967-69, fifty were selected, and attempts were made to contact the four primary participants in each case: the complainant, his attorney, the incumbent union officer at the time of the challenge, and the union attorney involved in the case. This sample is not fully representative, but no attempt

60. All Title IV election cases in which a judicial decision is obtained are indicated and summarized each year in U.S. DEPT OF LABOR, COMPLIANCE, ENFORCEMENT AND RE-
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is made here to generalize as to the frequency of the abuses which were alleged. Rather, the information obtained is employed merely to delineate the kinds of problems and abuses which those close to the election process claim arise in at least some elections. This study assumes that the statutory protections can in some sense be termed inadequate if they fail to address these abuses.

Since the LMRDA relies heavily on internal union procedures and the Department of Labor for enforcement of its substantive guarantees, additional interviews and questionnaires were directed to Department officials, labor leaders, and their attorneys. A description of the Department's enforcement process was obtained by consulting Department employees in the Solicitor's Office and in the Bureau of Labor-
Management and Welfare Pension Reports (LMWP). Participants in recent Title IV cases were also surveyed for descriptions of their experiences with this enforcement. Information regarding internal union appeals procedures was obtained from interviews with union legal counsel, particularly national union counsel, and from additional mailings seeking specific information as to the disposition of election complaints within unions.

This study is not a statistical analysis of union election procedures or an attempt to make generalized statements about the frequency of election abuses, union attitudes, or the amount of sentiment which exists in favor of reform. Rather, it has sought through direct contact with those people who have had experience with the LMRDA to explore the statute's reach in light of the congressional policy of insuring fair elections, and to recommend ways in which the statutory policy might be better effectuated.

61. Officials in the central offices of these divisions were interviewed, as were selected area and regional personnel for each office. Interviews were conducted with Henry A. Queen, the head of the elections and trusteeship division of LMWP, and informally with members of his office over a two-week period. Interviews were also held with Miss Beatrice Block and Mr. Tom Barnard in the central Solicitor's Office, and with Mr. Charles Donahue, former Solicitor of Labor, and Mr. Thomas Donahue, former Assistant Secretary for Labor-Management Relations.

An attempt was made to contact all of the Area and Regional LMWP offices and Regional Solicitor's offices either by mailed questionnaire or by interview. Responses were obtained from: eight of the seventeen Area Offices (LMWP), two of the five Regional Offices (LMWP), and four of the eleven Regional Solicitor's Offices.

62. These participants were questioned both as to their specific experiences with the Department, their general evaluation of the enforcement process, and their suggestions for modification or reform. These responses form the core of the information from which the evaluation and suggestions in part III of this Note are drawn. They were, of course, supplemented by available secondary source materials regarding the activities of the DOL. In addition, various reports and records of the DOL were examined, and statistical material was developed to aid the evaluation. This material is reproduced at Appendices A-E infra.

63. Thirty-eight union attorneys were consulted through interviews or completed questionnaires. See note 60 supra. Twelve of these were national union counsel, and discussions with them covered both specific experience in election disputes with the Department and general information as to the union's own internal appeals structures.

64. Initially a general questionnaire was sent to the national president and legal counsel of 55 national unions selected at random from the list of 191 national unions listed in U.S. DEPT. OF LABOR, DIRECTORY OF NATIONAL AND INTERNATIONAL LABOR UNIONS IN THE UNITED STATES 1967 (1968). Twenty of these unions received additional questions concerning the procedures used by the national in handling pre- and post-election appeals, the frequency of receipt and disposition of such cases, and the forms of relief available to the national. Only four responses were received. A subsequent mailing was made under a cover letter from Michael Gottesman who was then preparing to represent the United Steelworkers before the Supreme Court in the case of Hodgson v. Local 6799, Steelworkers (subsequent decision at 403 U.S. 333 (1971)). A request was again made for the above information on union appeals, both to aid the instant study and to assist Mr. Gottesman in preparing his brief in the pending litigation. Responses were received from only ten nationals, but the information received, when combined with the interviews with other national union attorneys and secondary materials, furnished an adequate basis for making some assessment and recommendations regarding internal union appeals.

65. In addition to the contacts with participants in Title IV cases and with Department of Labor personnel, interviews were also conducted with persons in agencies or
II. The LMRDA and Officer Elections: Substantive Provisions

If the officer election process is to perform the responsiveness function attributed to it, elections must be fair and democratic. The following characteristics are essential prerequisites:

(a) the voting unit must be free of internal group discrimination;
(b) members must be able to participate in the process, and that participation must be free from coercion;
(c) mechanisms of communication must exist within the union to facilitate a flow of information between the candidates and the membership and among the members themselves;
(d) the campaign must be free of the discriminatory use of union resources; and
(e) the vote count must not be fraudulent.

Labor elections occur at all three levels of the typical national union: local, intermediate (district), and national; and obstacles to responsiveness may surface at each or all of these levels. This section will draw on allegations made by various participants in union elections at each level of union governance to outline particular ways in which the goal of responsiveness may be frustrated. It will also explore the relevant provisions of the LMRDA in an effort to determine which of the obstacles to electoral responsiveness can be remedied by the statute, either as currently or potentially interpreted. Where the statutory coverage appears inadequate, proposals for amended judicial construction or for legislative revision will be made.

activities involved in the union electoral process. These interviews included two regional directors of the AFL-CIO representatives of the Honest Ballot Association, the American Arbitration Association, the New York U.S. Attorney's Office, and the New York Regional Office of the NLRB. Prominent academicians in the field of union elections were also contacted, including Benjamin Aaron, Archibald Cox, Joel Seidman, Theodore St. Antoine, Clyde Summers, and Philip Taft.

66. Historically, American labor unions began as locals, organizations which brought together workers in a common trade or industry in a coherent geographic area; trade unions developed through conglomeration of locals. Today, the local is the functional unit upon which unions are built. J. Barbarash, American Unions: Structure, Government, and Politics 4 (1967).

67. The structure of intermediate bodies varies greatly among unions depending on size, worker constituencies, markets, administrative convenience, political considerations, and the collective bargaining environment. Some intermediate organizations are nationwide. Some unions have several overlapping intermediate groupings, each of which serves different goals. Intermediate functions include collective bargaining, legislative lobbying, organizing, and servicing locals. Id. at 55-68.

68. The designation "international" recognizes that many unions have Canadian affiliates, but in practice American national and international unions are similar in structure. Id. at 4-5. The term "national" will be used in this Note to refer to both types of organizations.
A. Freedom from Internal Group Discrimination

Although labor unions are typically denominated "interest groups," with members sharing similar objectives, they are often themselves coalitions of different constituencies with varying concerns. Internal political responsiveness to the demands of competing groups, via the electoral process, can be accomplished only when incumbent officers are forced to assemble coalitions to retain power. The precondition to a sub-group's continued support will be a correlation between the incumbents' policies and the group's demands. To insure that all groups within an electoral unit are included within this process of internal responsiveness, all union members must possess the franchise, so that any group within the union has the power to influence an election's outcome should its preferences be ignored.

1. Exclusion of Interest Groups

Some unions have constitutional provisions barring certain membership classes from voting. These classes include apprentices, supervisors, part-timers, and those holding membership under limiting conditions because of age, membership in another union, or employment outside the jurisdiction of the union. Employer members, including self-employed persons who still hold union membership, are also frequently denied voting rights.

Groups excluded from voting often have different economic perspectives from the remainder of the membership. Part-timers may favor

69. In considering the degree of opposition to the election of general officers within a labor union, it is necessary to keep in mind the difference between a labor union and society at large. A union, unlike civil society, is a single-purpose organization. The protection of the economic interests of its members is the principal objective of a union. Moreover, in carrying out this task, a union must be prepared to take defensive or offensive economic action involving discipline and sacrifice by its members, in contrast to society at large where there are conflicting interests that must be protected.


70. For the sources of interest group cleavage within unions, see BARBASH, supra note 69, at 127-30.

71. Id. at 134-36; A. DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 51-74 (1957); E.E. SCHATTEN-SCHNEIDER, PARTY GOVERNMENT 17-34 (1942); R. WALTON & R. McKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS 281-351 (1965).

72. Apart from excluding whole classes, the only general requirement for voting in most unions is that a member be in "good standing." Good standing normally refers to timely payment of membership dues and the absence of a disciplinary suspension. Axelrod v. Stoltz, 264 F. Supp. 536 (E.D. Pa. 1967), aff'd, 391 F.2d 549 (3d Cir. 1968). See U.S. DEP'T OF LABOR, STUDY OF UNION CONSTITUTIONS 29-33 (1965). In addition, a few unions require a specified length of membership in the union before conferring voting rights. Id. at 36-37. The DOL study examined the constitutions of seventy-three international and national unions with a combined membership of 15,600,000 workers. It collected data on requirements for local elections in national constitutions. Additional voting nomination and candidate eligibility requirements may be imposed by local bylaws.

73. For a summary of the various classes excluded from voting, see id. at 34-36.
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featherbedding and oppose automation, while full-timers would trade the inefficient employment of others for more pay. Unskilled helpers, while in the same bargaining unit as skilled tradesmen, perform tasks which are often treated differently in collective bargaining.

When a constituent sub-group is disenfranchised, it continues to pay union dues and to be represented by union leaders, but it has no control over union policies or its officers. The leadership has little incentive to respond to the interests of the group. Since members of the group have no vote, obtaining their support will not help an aspiring candidate win election. Similarly, by ignoring the group the candidate runs no risk of losing votes. There are simply no votes to be had.

Statutory Provisions. Section 401 (e) of the LMRDA provides that "every member in good standing . . . shall have the right to vote." The statute relies on the union to define its membership criteria. Once having conveyed membership status, the voting right appears to be automatic, though union constitutions are in fact permitted to

74. For example, in the early 1950's John L. Lewis decided to permit coal operators to automate. He hoped the result would be higher wages for his men, even though he knew it would mean unemployment for at least 100,000 members. While the decision may have been unavoidable, many miners have not been able to get jobs elsewhere and remained in Appalachia, willing to work but only infrequently employed. Miners with full-time jobs heavily favor continued mechanization which will increase productivity and hence wages. Part-time workers, or those in less efficient mines, resist the trend that is likely to cost them their jobs. M. BARATZ, The UNION AND THE COAL INDUSTRY 71-72 (1955); H. CAUDILL, NIGHT COMES TO THE CUMBERLANDS 278 (1963); Anarchy Threatens the Kingdom of Coal, FORTUNE, Jan. 1971, at 78.

75. One court has noted the special economic interest of semi-skilled members and in dicta suggested that a refusal to allow semi-skilled workers to vote was unreasonable. Acevedo v. Bookbinders & Machine Operators Local 25, 196 F. Supp. 308, 312 (S.D.N.Y. 1961).


77. Section 3(o) of the Act states that a “member” for purposes of the statute shall include:

any person who has fulfilled the requirements for membership in . . . [a labor] organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization. 29 U.S.C. § 402(o) (1970). The only court which appears to have passed on the issue indicated that it is not for the Court to upset such membership requirement unless it be deemed arbitrary and capricious or otherwise unreasonable.

Goldberg v. Marine Cooks & Stewards Union, 204 F. Supp. 841 (N.D. Cal. 1962). Congressman Landrum, commenting on a proposal forbidding labor organizations to discriminate in the admission of members on the basis of race, stated that:

We do not seek in this legislation, in no way, no shape, no guise, to tell the labor unions of this country whom they shall admit to unions . . .

This law is designed only to say that, if he is a member of a union, he shall have equal rights . . .

105 CONG. REC. 15722 (1959).

78. For an argument that the statute, in light of its legislative history, permits no union restrictions on the franchise of union members, see Beaird, Union Officer Election Provisions of the Labor-Management Reporting and Disclosure Act of 1959, 51 Va. L. Rev. 1306, 1313 (1965).
impose reasonable rules and regulations on the right to vote.\textsuperscript{79} The Department of Labor has defined a narrow range within which the union may exercise such authority to limit the franchise and has concluded that “a union may not create special classes of non-voting members.”\textsuperscript{80} Courts have rarely passed upon constitutional provisions barring certain membership classes from voting,\textsuperscript{81} but commentary on the Act has rightly argued that any such discriminations should be considered suspect.\textsuperscript{82}

2. Manipulation of Interest Groups

The adequacy with which the political process articulates and mediates between particular demands of competing interest groups within the union is obviously a function of the groups’ power. In several elections studied, insurgents alleged that incumbent officers had, to their own advantage, unfairly manipulated the representation afforded to various groups.

Manipulation of sub-groups was most blatant where election procedures were designed to favor a group allegedly controlled by the incumbents. In one electrical workers local, for example, two registration tables were used in the poll ballot election. One table was for transients, working in the union’s jurisdiction by permission of the incumbents. These workers were thought to favor the incum-

\textsuperscript{79} Id.

\textsuperscript{80} (a) All members in good standing are entitled to vote in required elections which are held by secret ballot. Members in good standing are persons who have fulfilled the requirements for membership and who have neither voluntarily withdrawn nor been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws. A labor organization may, however, prescribe reasonable rules and regulations with respect to voting eligibility. Thus, it may, in appropriate circumstances, defer eligibility to vote by requiring a reasonable period of prior membership, such as 6 months or a year, or by requiring apprentice members to complete their apprenticeship training, as a condition of voting. While the right to vote may thus be deferred within reasonable limits, a union may not create special classes of nonvoting members.

\textsuperscript{81} See Acevedo v. Bookbinders, 196 F. Supp. 303, 311 (S.D.N.Y. 1961), where union membership division between artisans and unskilled workers, with the latter paying lower assessments and electing only minor union officials, was declared by the court in dicta to be in violation of the LMRDA because it created a “permanent special class of membership not entitled to an equal vote . . . .” But see Williams v. International Typographical Union, 423 F.2d 1295 (10th Cir.), cert. denied, 400 U.S. 824 (1970), upholding a union’s right to classify part-time members as “not working at the trade” and, as a consequence, prohibiting them from voting on wage scales.

\textsuperscript{82} See Berchem, Labor Democracy in America: The Impact of Titles I and IV of the Landrum-Griffin Act, 13 VILL. L. REV. 1, 36 (1967); Beaird, supra note 78, at 1316. The latter article argues, based partly on LMRDA legislative history, that any restriction upon a union member’s right to vote should be struck down if it disenfranchises a large proportion of the employees who pay dues. The payment of dues is the key indication of sufficient stake in the union to warrant the franchise. Id. at 1317.
bents because of the latter's control over their job permits. The second table was for all other union members. As this was a far larger group, long lines formed at the polling place, and many of these members allegedly became discouraged and left without voting.83

A second variation of the problem of manipulation is the separation of groups within an electoral unit, either by type of employment or by geography. In the United Mine Workers, for example, pensioned miners were set up in separate locals composed exclusively of pensioners. Their ability to communicate with other locals was limited, and information on union affairs was received solely through the incumbent-controlled union newspaper.84

The third type of manipulation alleged was the use of financial incentives and sanctions to produce “safe” blocs of support. Complaining members of the Mineworkers contended that because of the pensioned miners, incumbents had the exclusive support of thirty-eight per cent of the union electorate.85 The loyalty of the pensioners was allegedly guaranteed by raising the level of pension payments shortly before the election campaign86 and by threatening to withhold individual payments to pensioners who supported the opposition.87

83. Interviews with complainant attorney Q and union attorney T.
84. Interview with complainant union members D, K, and JJ. Critics of the locals suggest merging them with working locals so that working members will be able to acquaint the pensioners with conditions within the mines. Supporters of the present system of pensioner locals argue that pensioners receive better service than they would if merged into locals with significant working membership. Interview with union officer M.
85. Pensioners comprise 70,000 out of a total UMW membership of 185,000. Letter from Harrison A. Williams, Jr., Chairman, to members of the Senate Subcommittee on Labor, June 24, 1970.
86. On June 24, 1969, just two weeks before the commencement of nominations for national officers, the pension payments to bituminous coal miners were increased $35 a month from $115 to $150. The pension fund is administered by three trustees, one from the coal industry, one independent, and one from the United Mine Workers. John L. Lewis had been the union trustee until his death on June 12, 1969. On June 25, W.A. Boyle, the president of the union, was appointed to fill the vacancy. The pension increase occurred the next day, in the absence of the neutral trustee, Miss Josephine Roche. Shortly thereafter, Boyle began his campaign for re-election. Hearings on UMW Election, supra note 2, at 7-8 (Feb. 5, 1970) (testimony of Joseph A. "Chip" Yablonski). The impact of pensioners in the electoral process was significant; the incumbents obtained eighty-seven per cent of the pensioner vote but only fifty-two per cent of the working rank and file. Id. at 525-57 (March 18, 1970) (testimony of Frederick R. Blackwell, Counsel to the Subcommittee).
87. Id. at 7-8 (Feb. 5, 1970) (testimony of Joseph A. "Chip" Yablonski).
Statutory Provisions. Where manipulation of sub-groups occurred, as indicated in the preceding examples, various members contacted suggested that the cause of the problem was the improper inclusion of the manipulated group within the union. The remedy, according to these members, was a judicial declaration compelling the exclusion of the suspect group from membership. Yet the question of membership within the union has been specifically left for decision by the union, and courts are unlikely to attempt to mediate between opposing factions in a political struggle.

There is also the related problem of the organization of local unions into larger political units at the intermediate organization level. Abuses could arise in this process analogous to conventional gerrymander problems in public sector elections. But, as with the issue of union membership qualifications, the LMRDA is silent on the matter, leaving the question of internal political apportionment to the tender mercies of the political process itself.

88. See note 77 supra.

89. The only court that appears to have been presented with such an opportunity emphatically declined. In Gurton v. Arons, 339 F.2d 371 (2d Cir. 1964), Local 802 of the Musicians had conducted a mail referendum in which the membership of 28,000 had approved a proposal to conduct all future officer elections by mail ballot by a vote of 12,654 to 2,266. Plaintiffs proposed a bylaw amendment for consideration at the next membership meeting which would have (1) rescinded the referendum and returned election of officers to voting in person, and (2) required registration at the local during business hours to qualify to vote in the mail ballot election. Plaintiffs' action reflected an attempt on the part of the full-time musicians to gain control of the local from the part-time musicians who, being employed in other lines of work, would be unable to either vote or register in person. By court action, Gurton v. Manuti, 235 F. Supp. 50 (S.D.N.Y. 1964), plaintiffs were able to force the bylaw amendments onto the agenda of the membership meeting and they were adopted by the 1500 members in attendance. The International Executive Board then intervened and declared the bylaw amendments to be null and void. The court in Gurton v. Arons refused to prevent the International from implementing its ruling and rejected plaintiffs' claim of a denial of their right to vote under § 101 of the Act. The court held that the issue of whether the full- or part-time musicians were to control the union is surely an issue for the union to decide for itself and not an issue on which the power of the courts should be enlisted on one side or the other. So long as the union in reaching its decision violates no provision of law, we judges should resolutely keep hands off.


90. In the public sector, the Supreme Court has required that constituencies be organized into electoral units on the principle of one man-one vote. See, e.g., Reynolds v. Sims, 377 U.S. 537, 562-64 (1964). Such a standard could be imposed on labor unions if courts were willing to read the one man-one vote requirement into the § 101(a)(1) guarantee of the equal right "to nominate candidates, [and] to vote in elections . . . ." 29 U.S.C. § 411(a)(1) (1970). It cannot be suggested that the authors of the LMRDA believed that § 101(a)(1) contained the one man-one vote requirement, nor can it be implied that deviation from that requirement is impermissible under the equal protection clause. What could be suggested, however, is that the congressional intention that the statute be interpreted by looking to other areas of the law, see p. 558 and note 692 infra, warrants adopting the one man-one vote requirement of the public law of elections as the proper interpretation of the "equal rights" provision in § 101(a)(1). The argument would then be that since malapportionment violates the equal right to vote in either
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What the LMRDA is designed to do, however, is to protect the integrity of that process of internal resolution—to establish fair and uniform ground rules. Through enforcement of the provisions of the Act, courts can deprive an incumbent of the tools of manipulation that serve to isolate interest groups from political currents within the union or to render them dependent on the continued favor of the incumbents:

(1) Election procedures that favor the challenged interest group, such as the two-table voting example, should be deemed contrary to the statute.91

(2) Where the challenged interest group is isolated from the rank and file due to different employment circumstances or geographic separation,92 a court should be sensitive to the need for insuring that candidates have available to them maximum access to facilities for communication with the entire membership.93

(3) Where financial devices are used to curry the support of the challenged interest group, a court should be sensitive to the political significance of the financial manipulation and be responsive to an election challenge based either on the use of union funds for campaign purposes or a breach of fiduciary duty.94

general [Reynolds v. Sims, 377 U.S. 537 (1964)] or primary elections [Gray v. Sanders, 372 U.S. 368 (1963)] protected by the Fourteenth Amendment, departure from one man-one vote similarly violates the union member's equal rights to vote and to nominate as protected by the LMRDA.

Few cases appear to have dealt even indirectly with the issue of one man-one vote in union electoral processes. In American Federation of Musicians v. Wittstein, 379 U.S. 171 (1964), the Supreme Court upheld a union's system of weighted voting under which convention delegates cast a number of votes equal to the membership of the local union they represented.

The pervading premise of both these titles [Title I and Title IV] is that there should be full and active participation by the rank and file in the affairs of the union. We think our decision today that the vote of an elected delegate may reflect the size of his constituency is wholly consistent with that purpose.

Id. at 183. A district court heard argument as to alleged malapportionment of a general grievance committee, but then dismissed that action on the grounds that the action should be resolved under Title IV where the expertise of the Secretary of Labor would be available. Spivey v. Grievance Comm., 69 L.R.R.M. 2709 (N.D. Ga. 1968). Cf. Lear Siegler, Inc. v. United Auto Workers, 287 F. Supp. 692 (W.D. Mich. 1968).

While courts could adopt the one man-one vote principle as the required guideline for the organization of constituent groups into electoral units, it has been persuasively argued that such a principle may be inappropriate to the political representation of interest groups. See A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 151-81 (1970).


92. See pp. 430-31 supra.

93. See pp. 432-60 infra.

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By depriving incumbents of the devices for manipulating groups within the union, the political process may be permitted to resolve the issues of who should be admitted to membership and how local unions should be organized into intermediate level units. The vehicle for forestalling incumbent manipulation is the Act itself. While the provisions of the statute are phrased in terms of the rights of individuals, they should be employed in this context to insure the ability of groups to participate effectively in the political process within the union.

B. Membership Participation in the Electoral Process

Union members can participate in the electoral process in a number of ways—by running for office, nominating candidates, expressing their views, and casting their ballots.95 If union restrictions or coercive practices prevent or discourage participation, the value of officer elections in achieving union responsiveness will obviously be impaired. Union election participants related a number of ways in which membership participation can be stifled.

1. Candidate Eligibility Requirements

Union constitutions and bylaws normally specify limitations on who may be a candidate, some of which overlap with restrictions on voter eligibility.96 A candidate may be required to have been in good standing regarding dues payment for some specified period, a restriction often found on the suffrage right as well.97 Members of certain sub-groups within the union, such as apprentices, supervisors, self-employed persons, or members who also belong to other unions, may be completely barred from both voting and candidacy.98 The candidacy

95. Although some theorists have stressed the importance of citizen participation in politics as a means of allowing the constituency to feel a part of the process of governance, see, e.g., Summers, The Public Interest in Union Democracy, 53 NW. U.L. REV. 610, 611-13, 622-24 (1958), the emphasis here is on participation as a way of effectuating the goal of responsiveness.

96. DOL CONSTITUTION STUDY, supra note 72, at 37.

97. Sixty-four of the seventy-three national unions in the DOL survey, covering ninety-five per cent of the total membership within the study, had provisions rendering a candidate ineligible if he was in arrears in payment of his dues for a specified period of time. Forty-six of the sixty-four also required qualified candidates to have completed a stated period of membership in the union during which they remained in continuous good standing.

If good standing is required for several years and one late payment of dues at any time during those years ruins "good standing," many members will fail to meet the requirement. Id. at 38-39, 42-43.

98. As of the 1965 study, forty of the seventy-three constitutions surveyed excluded one or more classes of members; ten million members, sixty-five per cent of those in the study, were in unions with such disqualifications. Id. at 43-48.
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restriction in such instances is justified on the theory that supervisors, self-employed persons, and members of other unions have conflicts of interest which might compromise their bargaining duties, and that apprentices are unlikely to represent the views of a majority of the members.99

Because it is believed that officers should be especially familiar with the union and its members and capable of administering and negotiating contracts,100 most unions impose on officer candidates requirements in addition to restrictions normally imposed on the suffrage right. Most unions have minimum length of membership requirements.101 Many impose minimum meeting attendance requirements or make prior office-holding a prerequisite for higher office.102 It is difficult to assess union arguments in favor of such restrictions. Al-

99. Other formal eligibility requirements exclude members affiliated with subversive organizations, convicted of crimes, or found guilty by the union disciplinary structure of violations of union rules, or those who are foreign citizens or who have worked in the local's jurisdiction for less than a minimum time. Id. at 44-49. The restrictions on members of subversive organizations and previously convicted criminals are similar to those in LMRDA § 504(a), 29 U.S.C. § 504(a) (1970). This provision was held unconstitutional as it relates to membership in the Communist Party. United States v. Brown, 381 U.S. 437 (1965).

100. Interview with union attorneys W and GG and union officers E and F.

101. Of seventy-three unions surveyed, forty-seven have length of membership requirements for local officers. The requirements range from four months to three years. All but five constitutions require one year or more of membership. DOL Constitution Study, supra note 72, at 40-43.

Length of membership requirements have not been widely challenged by the DOL. Unions insist these requirements are valid means of insuring that all candidates have a minimum acquaintance with the union and its members. If such familiarity is desired, a requirement of no more than three years seems reasonable. A three year requirement would insure that a candidate would have participated in at least one previous union election, since 29 U.S.C. § 481(b) (1970) requires that local elections be conducted at least once every three years. Also, it is likely that the member will have watched at least one collective bargaining session in three years. The "contract bar" rules of the NLRB prohibit a challenge to a unit's bargaining representative for three years if the life of a contract is for that period or longer. General Cable Corporation, 189 N.L.R.B. 1123 (1962). These contract bar rules and general industry practices have made the three year contract predominant.

However, in light of the arguments made against eligibility requirements, see pp. 436-38 infra, it is doubtful that unions can justify the imposition of any membership requirements as necessary to guarantee quality officers. If a candidate is "inexperienced," the membership should be free to make that determination at the polls. But see Wirtz v. National Maritime Union, 284 F. Supp. 47, 61-63 (S.D.N.Y.), aff'd, 399 F.2d 544 (2d Cir. 1968) (upholding a five-year membership requirement); Wirtz v. Petroleum Workers Union, 75 L.R.R.M. 2341 (N.D. Ind. 1970) (upholding three-year continuous membership requirement which excluded less than thirty per cent of the membership).

102. Fifteen unions, with one-third of the membership studied, have meeting attendance requirements. Most of the constitutions require fifty per cent attendance at the meetings held six, twelve, or twenty-four months before the nomination. DOL Constitution Study, supra note 72, at 49-50.

103. Only one national union, the International Ladies' Garment Workers, mandates prior office-holding for local office, but many have such requirements for intermediate or national office. In that union, taking a union leadership course is an alternative way to meet the requirement. Further, a random sample by DOL indicated that a few locals of other national unions had at their own initiative adopted such restrictions. U.S. DEP'T OF LABOR, QUALIFICATIONS FOR UNION OFFICE, Appendix B, tables 8-12 (1970).
though some qualifications for office are no doubt required to assure competent leadership, no one has documented the superiority of leadership in those unions with strict eligibility requirements. Candidate eligibility is sufficiently important to achieving electoral responsiveness that restrictions on candidacy must be given close scrutiny.

Statutory Provisions. Section 401(e) of the LMRDA provides that "every member in good standing shall be eligible to be a candidate and to hold office" subject to "reasonable qualifications uniformly imposed." The statute thus leaves open the most difficult question— which qualifications are "reasonable." Many eligibility requirements would probably not pass the strict scrutiny applied by the Supreme Court in Wirtz v. Local 6, Hotel Employees. In Local 6, the Court struck down as "unreasonable" a union provision which, in requiring prior office-holding experience for candidacy, had the effect of rendering ninety-three percent of the union members ineligible for office. The Court reasoned that union members could be trusted to choose competent officers without prior screening through eligibility requirements. The ruling lends credence to the belief of other...

104. In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known home address. Each member in good standing shall be entitled to one vote. No member whose dues have been withheld by his employer for payment to such organization pursuant to his voluntary authorization provided for in a collective bargaining agreement shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by members of each local labor organization shall be counted, and the results published, separately. The election officials designated in the constitution and bylaws or the secretary, if no other official is designated, shall preserve for one year the ballots and all other records pertaining to the election. The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this subchapter.


106. Id. at 502.

107. Id. at 504. In affirming the district court, the Supreme Court accepted its view that:

The philosophy adopted by Congress in the Act is well expressed in a motto used by a newspaper and said to have been inspired by, or translated from, Dante (Divine Comedy, Purgatory, canto XXII, lines 67-79): "Give light and the people will find their own way." The members of a union must have a free choice to give such weight to experience, inexperience, or to other factors as they see fit. Wirtz v. Local 6, Hotel Employees, 265 F. Supp. 510, 520 (S.D.N.Y. 1967). This principle is sound. Although the right to be a candidate is an individual right, it is also critical to all union members if they are to have a wide pool from which to
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courts,108 the DOL,109 and scholars110 that the real purpose of such requirements is to limit potential opposition to the incumbent administration.111

When courts have scrutinized other candidate eligibility requirements closely, they have often held them to be unreasonable. Requirements of pre-nomination declaration of candidacy have been disallowed, courts viewing them as devices which permit incumbents to harass prospective candidates for long periods before an election.112 Dues pre-payment requirements have been struck down as being unrelated to officeholder qualification.113

Although early challenges to the exclusion of certain sub-groups from candidacy were fruitless,114 the recent decision in Hodgson v. Local 18, Operating Engineers115 is a sensitive response to such restric-

select officers. See Summers, supra note 11, at 293. In Wirtz v. National Maritime Union, 284 F. Supp. 47, 63-64 (S.D.N.Y.), aff'd, 399 F.2d 544 (2d Cir. 1969), another prior officeholding requirement was found unreasonable.


109. DOL QUALIFICATIONS STUDY, supra note 103, at 70.


111. The DOL's test for evaluating eligibility rules has four questions: (1) What has been the effect of the rule—does it make it easy or difficult to run for office? (2) What is the union rationale for the rule and is this legitimate? (3) Is the rule realistic in terms of the normal behavior and interests of the union member? (4) Does the rule serve some positive institutional need in terms of this particular union or unions in general? DOL QUALIFICATIONS STUDY, supra note 103, at 2. These tests, particularly the last one, were argued to the Supreme Court in the Local 6 case. Brief for the Petitioner at 16, Wirtz v. Local 6, Hotel Employees, 391 U.S. 492 (1968).


113. Wirtz v. Local 9, Operating Eng'rs, 254 F. Supp. 980 (D. Colo. 1965), aff'd, 355 F.2d 911 (10th Cir. 1966), dismissed as moot, 387 U.S. 96 (1967). See also Wirtz v. Local 606, Operating Eng'rs, 254 F. Supp. 962, 965 (E.D. La. 1969); Wirtz v. Local 410, Operating Eng'rs, 242 F. Supp. 631 (N.D.N.Y. 1964), vacated as moot, 366 F.2d 438 (2d Cir. 1966). At the time of these suits only the Railway Trainmen and Locomotive Firemen had similar requirements not allowing any arrearage period. In most unions sixty to ninety days is the permissible arrearage period before a member is no longer in good standing. DOL QUALIFICATIONS STUDY, supra note 103, at Appendix B, table 3.

In addition, the DOL has announced it will not tolerate racial eligibility distinctions. The courts may soon face this question squarely. Shultz v. Local 1291, Longshoremen, 299 F. Supp. 1123 (E.D. Pa. 1969), rev'd and remanded for trial on merits, 429 F.2d 592 (3d Cir. 1970) (claim was made that officers were apportioned on the basis of race in violation of § 401(d)).


115. 440 F.2d 485 (6th Cir. 1971).
The case involved workers who, although long-time union members, did not belong to the "parent branch," the only branch whose members were allowed to be candidates. The other branches of the union included members who did not choose to pay the high initiation fee required to join the parent branch or who worked in trades excluded from it. The court held that neither the failure to pay the higher initiation fee nor the different trade classification was a "reasonable" ground for disqualification. 116

Meeting attendance requirements, however, have not been classified unreasonable. Courts have struck down these requirements only when they disqualify an undue proportion of the membership. 117 While this test offers some protection for potential candidates, it avoids the question of whether meeting attendance has any rational relation to candidate competency. One court, for example, upheld a Steelworkers meeting attendance requirement that did not result in widespread disqualification largely because a liberal work excuse provision gave members credit for meetings they could not attend. 118 Yet, if meeting attendance has any relation to preparing potential candidates for officership, members who have not attended meetings because of work are no better qualified to be officers than those who have been absent for other reasons. While meeting-goers are likely to be initially more familiar with union procedures, it would seem that others could acquire a similar familiarity in a very short time. Meeting attendance requirements should therefore be viewed with the same skepticism as other eligibility restrictions. Eligibility requirements should be found reasonable only if they can be shown to have a direct relationship with officer competency. Otherwise, it should be left to the membership to weed out incompetent candidates at the ballot box. 119


119. If this standard is the rule to be applied after the Local 6 case, it will be nearly impossible as a practical matter for any union to meet the burden of proving that an eligibility requirement is necessary to guarantee quality officers. This rule, however,
2. **Fraudulent Disqualification of Candidates**

Eligibility under good standing or meeting attendance requirements is determined by the union election committee based on records kept by the incumbents. Two types of abuses were alleged. First, records of an insurgent candidate can be altered to keep him from satisfying eligibility requirements. Second, ineligible insurgent candidates may be disqualified while equally ineligible administration candidates are allowed to run.

**Statutory Provisions.** Section 401(e) of the LMRDA states that "every member in good standing shall be eligible to be a candidate" subject to "reasonable qualifications uniformly imposed," and § 101(a)(1) grants every member "equal rights . . . to nominate candidates." Both provisions would appear to be violated if a qualified candidate is declared ineligible or if unions discriminate in their treatment of ineligible candidates. Courts have reversed discriminatory denials of eligibility in both Title I and Title IV suits.

But, although statutory provisions prohibiting fraudulent exclusions of candidates exist, complainants face difficult proof problems. The
unions will probably have sole possession of the records necessary to show discrimination. This circumstance could be accommodated by a judicial willingness to put upon the union the burden of proof that its eligibility requirements were *not* discriminatorily applied. Such a shift would also be an effective judicial response to the suspect quality of meeting attendance and dues payment requirements and to the incumbents' incentive to disqualify prospective opponents.

3. *Barriers to Nomination*

Nominations for local offices are normally accepted from the floor in a regular or special meeting of the local's membership. A number of methods may be employed to prevent members from exercising their rights at these local nomination meetings. Members may be denied adequate notice of the time and place of nomination proceedings. In some unions, allegations were made of even more blatant conduct. In one instance, the meeting was held during a work shift to exclude certain members' attendance.

Local nomination meetings are important not only for selecting candidates for local office but also for selecting intermediate and national level candidates. To gain nomination for such higher offices, a candidate is often required to obtain the endorsement of the membership of a specified number of local unions. Names of prospective candidates are placed in nomination, and the local membership votes among them. The winner is the local's endorsed candidate.

The same abuses which disrupt the nomination of local union candidates may also plague the endorsement process, which is often conducted at the same meeting of the local. Additional allegations were heard, however, in connection with local meetings held exclusively for the purpose of endorsing candidates for higher office. In one in-

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126. A candidate is usually nominated by the simple act of having his name advanced and seconded. However, a few unions require a greater showing of support. The Ladies' Garment Workers national permits its locals to require that a candidate be endorsed by a specified number—no more than five per cent—of the members at the meeting. *DOL Constitution Study, supra* note 72, at 51-52.


128. Interview with complainant union member HH.

129. See *DOL Qualifications Study, supra* note 103, at Appendix B, table 15, for local endorsements required for candidacy in referenda for national offices. Endorsements of locals for officer candidacy in district referenda were required in the districts of six officers in three national unions interviewed. The prime example is the Steelworkers. To be nominated for district office, a candidate must win at least five locals plus one for every 10,000 members in the district. Interview with union officer A.
stance, the time of the endorsement meeting was changed without notice. In more extreme instances, tactics have allegedly included such successful devices as setting the meeting hall clock forward and holding the meeting before insurgent supporters arrived, hiring thugs to push insurgent supporters back into their seats when they rose to make a nomination, and failing to inform the national of a local’s endorsement of insurgent candidates until after the filing deadline. An additional objection was that prospective candidates were denied information as to the time and place of endorsement meetings, thus depriving them of the opportunity to insure the presence of their supporters, send observers, or speak on their own behalf.

Even if the endorsement meetings are procedurally fair, candidates for intermediate or national level office can be effectively excluded by varying the number of local endorsements required for nomination. Exclusion can also be accomplished by giving equal weight in the nomination process to locals of varying size. An intermediate level organization requiring a fixed number of local endorsements may have one or two dominant locals containing the bulk of the membership. There, a candidate favored by one of these large locals may not be nominated—even though he may be the choice of a majority of the membership—unless he can also win the endorsement of some of the smaller locals.

To obtain such endorsements, a prospective candidate must be allowed to solicit support, a task which can become impossible if potential nominees are unable to send campaign literature to the members. Yet many unions refuse to give prospective candidates copies of the union membership list.

Statutory Provisions. While the LMRDA does not explicitly demand notice to the membership of nomination or endorsement meetings,

131. Id. at 439-41 (Sept. 9, 1970) (testimony of Julius Savitsky).
133. Rauh-Shultz letter, supra note 130.
134. Interview with union officer O; Hearings on UMW Election, supra note 2, at 12-13 (Feb. 5, 1970) (testimony of Joseph A. “Chip” Yablonski), indicating that in addition to the difficulty in getting a list of local nomination meetings, “The Secretary-Treasurer of the UMW organization didn’t know how many locals he had, didn’t know how many members he had, didn’t maintain a list of members, as the Landrum-Griffin Act required him to do for ten years.”
Title IV requires "reasonable opportunity . . . for the nomination of candidates," and Title I guarantees "equal rights . . . to nominate candidates." The DOL has interpreted the statute to require "reasonable notice . . . of the time, place, and proper form of submitting nominations." There is thus a statutory basis for challenging a lack of proper notice to the membership.

Nowhere in the LMRDA, however, is there recognition of the candidate's need for such information in intermediate or national level nomination proceedings. The DOL has formally considered this problem only once. In reaching a consent agreement with the Steelworkers to rerun a district election, the DOL insisted that any candidate meeting eligibility requirements be provided with the names and addresses of local union recording secretaries, from whom he could request information regarding endorsement meetings. The difficulty of qualifying as a candidate without such information suggests that a right to obtain it should be read into the LMRDA provision for a "reasonable opportunity . . . for the nomination of candidates."

Manipulation of nomination or endorsement meetings appears even more clearly to be a violation of the equal right to nominate guaranteed by Title I and the reasonable opportunity to nominate candidates provided by Title IV. Courts dealing with challenged nomination procedures should be careful to scrutinize their actual effects on the can-

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136. 29 U.S.C. § 481(e) (1970). Wirtz v. Local 30, Operating Eng'rs, 242 F. Supp. 631 (S.D.N.Y. 1965), vacated as moot, 356 F.2d 438 (2d Cir. 1966), held that the union's failure to give notice about the need for a pre-nomination declaration of candidacy was a § 401(e) violation of the right to a reasonable opportunity to nominate, but because no outcome effect was demonstrated did not order a rerun. Inadequate § 401(e) notice of the actual election was found in Shultz v. Independent Employees Union of Packerland Packing, 74 L.R.R.M. 2157 (W.D. Wisc. 1970) (mere posting in plant is insufficient notice) and Wirtz v. Local 1622, Carpenters, 285 F. Supp. 455 (N.D. Cal. 1968) (notice to only 2319 of the 2700 members in the local was insufficient), but denied in Wirtz v. Local 9, Operating Eng'rs, 28 L.R.R.M. 2250 (D. Colo. 1965), aff'd, 366 F.2d 911 (10th Cir. 1966), vacated as moot, 387 U.S. 96 (1967) (not sending notice to 141 members whose addresses were not known is not a violation). For further discussion, see NYU Note, supra note 119, at 339-40.


138. 29 C.F.R. § 452.8 (1971).

139. This right is now included in United Steelworkers, International Union Elections Manual, Part II §§ F and G (1968).

140. Incumbent candidates normally have a list of the time and place of all nomination meetings. Unless other candidates are given the list, there would seem to be a violation of the § 401(e) requirement that "every member in good standing shall be eligible to be a candidate . . . subject . . . to reasonable qualifications uniformly imposed," 29 U.S.C. § 481(e) (1970), since denial of the list to the candidate might be held to be a non-uniform application of a qualification.
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didates seeking nomination. Nomination procedures which seem perfectly reasonable on their face are often in fact quite burdensome for some candidates. Courts in Title IV cases can fashion an adequate remedy for these situations by reading the Title I equal rights notion into the Title IV reasonableness standard.141

Exclusion of candidacies at the intermediate or national level through the device of strict endorsement requirements is open to challenge under both the § 401(e) right to nominate and the § 101(a)(1) equal rights provisions. Both sections contain a reasonableness standard. In considering the reasonableness of a challenged endorsement requirement, courts should examine the amount of support received by an unsuccessful candidate. If the candidate received nomination votes amounting to a significant proportion of the votes cast in the last union election, then the endorsement requirement should be considered unreasonable.142 The union's legitimate interest in eliminating insignificant candidacies would be protected by the requirement of a substantial amount of support. While further study would be required to decide what should count as a “significant proportion of the votes,” it would seem that any candidate who can attract five to ten per cent of the votes cast in the last election possesses enough support to be allowed to run for office.143

It should also be noted that by employing the concept of reasonableness to disallow endorsement requirements which are too restrictive due to the equal weighting of locals of widely disparate sizes, courts would in fact be nudging nomination procedures in the direction of the one man-one vote principle.144

141. A good example of the need to read the equal rights provision into the reasonableness standard is in Wirtz v. National Maritime Union, 284 F. Supp. 47, 59-60 (S.D.N.Y.), aff'd, 399 F.2d 544 (2d Cir. 1968). In dealing with a requirement that insurgents, but not incumbents, had to personally circulate nominating petitions, the court found that the one month period in which to get petitions signed was not unreasonable under § 401(e) because there was no showing that it imposed hardships on any candidates. The court nonetheless struck down the requirement under § 401(c) because to require the petition procedure of insurgents and not incumbents imposed unequal burdens to nomination. Thus the court read the equal rights language of § 101(a)(1) into the reasonableness requirement of § 401(e).

142. The turnout in the last election is suggested as a base rather than the total membership of the electoral unit because the former figure more accurately reflects the number of people in the union actively interested in its affairs and the number who are likely to vote in the upcoming election.

143. Five to ten per cent may be too high given the fact that many fewer people are likely to vote in a primary than in a regular election. This is especially true if nominations are decided at nomination meetings rather than by poll ballot, as attendance at meetings is often quite low.

144. For a fuller discussion of the possible application of the one man-one vote principle to unions, see note 90 supra.
Sensitivity to the problem of gaining endorsements from dispersed locals was demonstrated in *Yablonski v. United Mine Workers* in granting a potential nominee mailing rights under § 401(c). Relief of this kind had been denied in previous cases on the grounds that the statute provided mailing rights only to "bona fide candidates." Relying on the DOL’s Interpretive Manual which states that potential nominees qualify as "candidates," *Yablonski* held that the endorsement phase in intermediate or national elections was sufficiently critical that the same communication rights granted during the actual campaign must be afforded.

4. Coercion in the Exercise of Rights

Participation in the electoral process can be greatly impaired if the membership is subject to coercion during the nomination process, the campaign phase, or in the formal balloting. Although actual coercion may be infrequent, mere fear of reprisal may cause individuals to withdraw from the electoral process or to hide their actual preferences. Field interviews suggest that candidates and their supporters may be subjected to two types of coercion: financial and physical.

146. Every national or international labor organization, except a federation of national or international labor organizations, and every local labor organization, and its officers, shall be under a duty, enforceable at the suit of any bona fide candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution. Every bona fide candidate shall have the right, once within 30 days prior to an election of a labor organization in which he is a candidate, to inspect a list containing the names and last known addresses of all members of the labor organization who are subject to a collective bargaining agreement requiring membership therein as a condition of employment, which list shall be maintained and kept at the principal office of such labor organization by a designated official thereof. Adequate safeguards to insure a fair election shall be provided, including the right of any candidate to have an observer at the polls and at the counting of the ballots. LMRDA § 401(c), 29 U.S.C. § 481(c) (1970).
149. Interviews with complainant union members A, F, and N and union officer G.
150. A third variety of coercion can take the form of union discipline for comments critical of incumbents. Because the case law seems to adequately protect member free speech, this Note did not focus on the free speech problem. A look at the case law, however, demonstrates the ability of courts to fashion LMRDA remedies in areas where familiar adjudicative standards are involved.
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A frequently encountered allegation was that potential candidates were offered money or high-salaried union positions to abandon plans to run against incumbents.\(^{151}\) Supporters of Joseph Yablonski in the 1969 Mineworkers campaign were allegedly induced to change their allegiance by offers of union jobs, lucrative part-time positions with minimal responsibilities, lobbying trips that were actually paid vacations, and cash payments.\(^{152}\)

When positive inducements fail, some incumbents may induce employers to fire opposition members and "blackball" them from getting subsequent employment. Complainant union members indicated that this was the most frequent form of political intimidation.\(^{153}\) Most often, this coercion was directed against the dissident candidate himself;\(^{154}\) but supporters have also had their jobs threatened.\(^{155}\)

Coercion


Although union officers complain that Salzhandler and the cases following it have undermined unions at the bargaining table, they cannot relate any examples of union loss of effectiveness because of an abundance of free speech. Interview with union attorney W. See also AFL-CIO MARITIME TRADE DEPARTMENT, A REPORT AFTER EIGHT YEARS OF THE LANDRUM-GRIFFIN ACT 3 (1967).

\(^{151}\) Interviews with complainant union members I and N and complainant attorney G; Verick, Rebel Voices in the NMU, New Politics, Summer 1965, at 35.


\(^{153}\) Eleven of the thirty-one complainant union members contacted suggested that candidates were subjected to threats of the loss of their jobs either when announcing their candidacy or during the campaign. Eight of the thirty-one suggested that a candidate's supporters were subject to the same harassment. Fourteen complainant union members said job discrimination and other forms of intimidation discouraged union members from being candidates themselves or actively supporting candidates of their choice.

\(^{154}\) Complainant union member F contended that two men on his slate would not participate in the DOL-sponsored rerun because of violence in the first election.

\(^{155}\) Interview with complainant union members H, I, L, and S. Three members alleged it was relatively easy to single out key supporters by looking at nominating petitions.
of this type can be most effective when the member's job depends on a hiring hall or an informal referral system where a company comes to the union for employees. Employers may be willing to cooperate with such union intimidation because they view insurgent candidates as trouble-makers or they do not wish to impair relations with existing incumbents. More subtle discriminations against opposition candidates may take the form of transfers to a different work shift, which prevents the candidate from attending union meetings, or the union's deliberate failure to process a prospective candidate's grievances.

If the candidate or his supporters are union staff members, as often is the case in intermediate or national elections, they may lose their jobs. Candidates may alternatively be transferred to an area or activity which separates them from rank and file contact.

156. M. Schimpff, Brotherhood of Painters, District Council 9: Case Study 79 (1963) (unpublished student essay in Yale Law School Library) [hereinafter cited as Painter's District 9 Study]; interviews with complainant union member L and union attorney O.

Four of twenty union officers who responded believed such harassment might be a problem at times. Complainant union member I summarized the effect of losing a job on election campaigns: "Every working stiff is two weeks from being broke."

The great potential for discrimination in hiring halls was stressed in interviews with complainant union members H and O. One union member filed suit with the NLRB. The NLRB trial examiner concluded that the sole reason for his dismissal was that he dared oppose the incumbents. Initially, the union attempted to dissuade him with threats and later with an actual beating. It was found that this conduct violated his rights. See text of the Trial Examiners Report in Daily Labor Reports, March 7, 1969, § A, at 13-17.

Member H's income varied from $18,000 to $1800 per year depending on whether he was in active opposition to the incumbents. He too went to the NLRB, but without relief.

Union officer B, the leader of a large building trades association, conceded that business agents may give the best jobs to their supporters. He believes the NLRB has investigated complaints about this practice, but rarely if ever files suit. Complainant union member A noted that in his union, fellow union members do the hiring. As a consequence, insurgents often find it difficult to find work. Complainant union members H and S raised much the same problem in their construction unions.


158. Interview with union officer N.

159. Interview with complainant union member H.

160. Interview with complainant union member G; Hearings on UMW Election, supra note 2, at 9-10 (Feb. 5, 1970) (testimony of Joseph A. "Chip" Yablonski), discussing his father's dismissal from a union job after announcing his candidacy for national president: "[T]he union's International Executive Board ... passed a resolution, a resolution granting Tony Boyle the authority to discipline my father in any way he saw fit." Boyle said Yablonski was unable to carry out the union's policies. Id. at 210 (March 18, 1970).

Even if the firing will not take place until after the election, staff members will hesitate to support an insurgent if they fear re-election of the incumbent will mean dismissal from their jobs. See Local 648, Retail Clerks v. Retail Clerks Union, 299 F. Supp. 1012 (D.D.C. 1969).

161. Interview with union officer N and complainant union member G. Member G had a major staff position with his national but was suddenly demoted to a minor job that kept him tied to one office when he announced his candidacy for national president. He has not been reinstated. For charges of politically motivated demotions, transfers and
Physical coercion may also interfere with membership access to the electoral process. While several persons interviewed claimed to have been victims of brutal physical violence, the more usual complaint was that threats of violence were used to intimidate candidates and their supporters. In one such instance, threats were allegedly employed against a newly elected local officer to force him to resign in favor of his opponent. The prospect of violence was dramatically underscored by the deaths of Joseph Yablonski, his wife and his daughter, shortly after his unsuccessful campaign for the presidency of the Mineworkers. Allegations of union complicity in the murder were numerous. Nor was this the first time that an insurgent candidate had been murdered. The union members surveyed who complained

reassignments of staff members supported by the evidence, see Cefalo v. District 50, Mineworkers, 311 F. Supp. 946 (D.D.C. 1970).

162. Although most coercion in union campaigns takes the form of attacks on persons, we found evidence of several other forms of coercive harassment. One candidate for national office found an envelope containing marijuana in his post office box; he immediately turned it in to postal inspectors who found it was part of an attempted frame-up. Verick, supra note 151, at 30. Another candidate's wife who received threatening phone calls suffered a nervous breakdown. Interview with complainant union member N. An insurgent attorney's summer home was blown up shortly after he began work on an election complaint. Interview with complainant attorney J. In yet another election, the candidate and his supporters had their automobile windshield wipers and antennae broken, tires slashed and brakelines cut. Interview with union officer N.

163. James Morrissey, candidate for Secretary-Treasurer of the National Maritime Union, was attacked on leaving the union hall on September 14, 1966, by three men armed with lead pipes wrapped in brown paper bags. His skull was fractured and his leg badly injured. Verick, supra note 151, at 30. Gaston Firmin-Guyon, running for New York Port Patrolman on the same ticket, was beaten in the union hall. Interview with complainant union member O.

A candidate for district office in a large industrial union was punched and later his car was followed by three "henchmen." The FBI investigated the incident and while affirming its occurrence, concluded that it was merely a "private altercation." Grand jury inquiry into the event was abandoned, allegedly due to the influence of the district attorney, a friend of the incumbent. Interview with union officer N.

164. Interviews with complainant union member N and complainant attorneys J and Q. Six of the thirty-one complainant union members indicated that both the candidate and his supporters were subject to physical threats and intimidation. However, of the twenty union officers contacted, only three suggested that such intimidation might be directed against a candidate or his supporters. Seven indicated that there was no intimidation or harassment of any kind during election campaigns.

165. The officer-elect was kept in the union hall and not permitted to see any visitors or make any phone calls to his family or supporters. The threat of physical harm was not explicit, but was felt by the individual to be implicit in his captivity. He was also threatened with union discipline and with the suggestion that the national union would withdraw the charter of the local if he should take office. Interview with complainant union member F.

166. See B. Hume, DEATH AND THE MINES 245-50 (1971). One person has pleaded guilty and two others have been convicted to date for the Yablonski murder, but no connection of the union to his death has been proven. N.Y. Times, March 2, 1972, at 13, col. 1; id., March 5, 1972, § 1, at 50, col. 3; id., May 1, 1972, at 1, col. 2.

167. Dow Wilson, reform leader of Painters Local 4 in San Francisco, and his collaborator, Lloyd Green of Local 1178, were murdered in April and May, 1966. Tried for both murders were convicted to date were Painters' District 15 Secretary-Treasurer Ben Rauchacker. Testimony of Rauchacker that he indicated the murders were planned to destroy the insurgent movement. Union Democracy in Action, April, 1966, at 1, col. 1; May, 1966, at 1, col. 1; July, 1967, at 1, col. 1.
of campaign abuses indicated that physical coercion, real and threatened, is the greatest single obstacle to honest elections.\textsuperscript{168}

Although physical coercion can have an impact at any point in the electoral process, a particular problem may exist at the nomination stage. Both typical nomination methods—petitions and nomination at local union meetings—reveal an insurgent's supporters and leave them open to reprisals.\textsuperscript{169}

Statutory Provisions. LMRDA provisions exist which substantively meet the problems of financial and physical coercion. A buy-off which used union funds would constitute a violation of § 401(g).\textsuperscript{170} A complainant may have great difficulty, however, in proving the violation. Even when direct cash payments are made, it may be exceedingly difficult to trace the money back to the union treasury. If the buy-off takes more subtle forms, such as a paid vacation, the difficulty for the complainant will come in proving that the trip was not made for legitimate union purposes. Furthermore, as compared with negative coercion, complainants are likely to have difficulty finding people who are willing to testify about being the subjects of a buy-off. It is not surprising, therefore, that there has been virtually no judicial or administrative action with respect to buy-offs.

Several provisions of the LMRDA deal with negative coercion aimed

\textsuperscript{168} Complainant union members were asked to indicate the abuses which they felt most influenced the outcome of union elections. Seventeen of the thirty-one members contacted indicated that intimidation or discipline of members for supporting the candidates of their choice were most influential.

\textsuperscript{169} In one union surveyed, a member complained that he had great difficulty finding anyone to sign his nominating petitions because people were afraid of possible reprisals by the incumbent officers. The man had previously received considerable support in the local's elections and expected to find the necessary signators. Interview with complainant union member O. Intimidation of members who voted in a show of hands primary was claimed in \textit{Hearings on UMW Election}, \textit{supra} note 2, at 11 (Feb. 5, 1970) (testimony of Joseph A. "Chip" Yablonski).

\textsuperscript{170} LMRDA § 401(g), 29 U.S.C. § 481(g) (1970) prohibits use of union funds to support any candidate:

No moneys received by any labor organization by way of dues, assessment, or similar levy, and no moneys of an employer shall be contributed or applied to promote the candidacy of any person in an election subject to the provisions of this subchapter. Such moneys of a labor organization may be utilized for notices, factual statements of issues not involving candidates, and other expenses necessary for the holding of an election.

As most buy-offs involve manipulation of union job opportunities to gain support for the incumbent, they involve use of union funds. However, cash buy-offs may involve use of funds from sources outside the union; the LMRDA does not explicitly make bribery illegal, although bribery could be considered within an expansive reading of § 401(e), 29 U.S.C. § 481(e), which grants a “right to vote for or otherwise support the candidate or candidates of his choice, without being subject to... improper interference.” \textit{See also} pp. 465-68 \textit{infra}. 

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at the employment status of non-staff union members. Section 401(e) guarantees members the right to campaign and vote without being subject to reprisals,\(^{171}\) and § 609 explicitly prohibits fines, expulsion, or other discipline for the exercise of LMRDA rights.\(^{172}\) In a number of cases, courts have deferred to the NLRB on questions of rank and file job discrimination, shifting the question to one of fair representation under the NLRA.\(^{173}\) But none of these cases involved § 609 allegations. The job dismissals in question in these cases were not alleged to be connected with political discrimination,\(^{174}\) and the cases should not be given preecedential weight in adjudication of claims of job discrimination brought under § 609 for infringement of voting, nominating, or free speech rights.\(^{175}\)

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\(^{172}\) It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter. The provisions of section 412 of this title shall be applicable in the enforcement of this section.


\(^{174}\) The cases involving deference to the NLRB were all brought solely under various provisions of Title I. It is unclear whether these decisions hold that Title I is to be construed narrowly such that the job discrimination claim is not a Title I violation at all, or that when a Title I claim overlaps with an NLRA unfair representation claim jurisdiction is in the NLRB. See Knox v. Local 900, Autoworkers, 351 F.2d 72 (6th Cir. 1965); Barunica v. Local 55, Hatters, 321 F.2d 764 (8th Cir. 1963); Green v. Local 705, Hotel Employees, 220 F. Supp. 505 (E.D. Mich. 1963); Rinker v. Local 24, Lithographers, 201 F. Supp. 204, 206 (W.D. Pa. 1962); Beauchamp v. Weeks, 48 L.R.R.M. 3048 (S.D. Cal. 1961); Allen v. Armoured Car Chauffeurs, 185 F. Supp. 492 (D.N.J. 1960).

The narrow reading of Title I in these cases has been approved, but the deference to NLRB jurisdiction criticized. See Thatcher, supra note 172, at 361-62.

\(^{175}\) In a case which was brought under § 609, and which involved intra-union political disputes, the court found no reason to defer to the NLRB in disposing of job discrimination claims. Parks v. Int'l Bhd. of Electrical Workers, 314 F.2d 886, 920-23 (4th Cir.), cert. denied, 372 U.S. 976 (1963). Even in the absence of a § 609 claim, a court assumed jurisdiction over a job discrimination claim under § 101(e)(5) in Rekant v. Shoctay-Gasos Local 446, Meatcutters, 320 F.2d 271 (3d Cir. 1963).

Although the policy of judicial deference may be wise in the absence of a § 609 claim that LMRDA voting, nominating or free speech rights are being infringed through job discrimination, the policy is not wise when such claims are made. The Board can be expected to view the problem in the context of collective bargaining between union and employer, ignoring the fact that the discrimination may have been motivated by internal union political disputes. Section 609 exists specifically to take into account such discriminatory actions which have a coercive effect on the responsiveness of electoral politics.

Several individuals complained of bringing job intimidation suits to the NLRB without success. Interviews with complainant union members H, L, and O, complainant attorney L, and union attorney AA.
Courts already appear quite willing to intervene under § 609 to protect union staff employees from negative job sanctions imposed because the staffer has exercised his LMRDA rights.\(^{176}\) Section 609 has been applied to shield staff members from politically inspired job dismissals\(^ {177}\) and transfers that undermine the staffer's ability to campaign for the candidate of his choice.\(^ {178}\) Despite the appointive nature of most staff positions, courts have not permitted the union staff to become an exclusive resource of the incumbents. Job dismissals are tolerated only when true misfeasance can be proved.\(^ {170}\)

The LMRDA also contains substantive protections from physical coercion. Section 610 makes it a criminal offense to use violence or the threat of violence to intimidate union members.\(^ {360}\) While there have been some prosecutions under § 610,\(^ {181}\) they have been rare enough
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to persuade the union members interviewed that the statute does not deter campaign violence.\textsuperscript{182}

Coercion during the nomination process might be minimized through the use of secret ballots when a vote is required to select candidates\textsuperscript{183} as, for example, in the process of endorsing candidates for intermediate or national office. Secret ballots at the nomination stage are not, however, required by the statute.\textsuperscript{184} Coercion during the election campaign is even less amenable to statutory control.\textsuperscript{185} Alleged violations of § 610 are now referred to the Justice Department and are pursued independently of the DOL's investigation of other aspects of a challenged election.\textsuperscript{186} This separation of the inquiry may obscure the impact of coercion on the electoral process, and the question of physical coercion may be ignored by the DOL in determining whether to sue to compel a rerun.\textsuperscript{187} The DOL has also exhibited some insensitivity to the impact of physical coercion on the electoral process. Commenting on a DOL finding that an assault on Joseph Yablonski during the 1969 Mineworker election did not constitute a violation of § 610,\textsuperscript{188} Secretary of Labor Shultz stated that the violence was an "individual, spontaneous" act.\textsuperscript{189} The Secretary noted that the Department considered the statute to be violated only if the assault were made with an intent to interfere with a right protected by the LMRDA.\textsuperscript{190} A narrow construction of this kind, no less than an inefficient investigative arrangement between the DOL and the Justice Department, may serve to vitiate the protection from coercion provided by the Act.

\textsuperscript{182} Interview with complainant attorney E. See also pp. 447-48 and note 168 supra.
\textsuperscript{183} See the discussion of secret voting at pp. 468-72 infra.
\textsuperscript{185} A barrier to use of Title I suits in seeking injunctions to prevent intimidation or violence in elections comes from the holdings in Tomko v. Hilberg, 288 F.2d 625 (3d Cir. 1961) and Kalish v. Hosier, 256 F. Supp. 853 (D. Colo. 1966), aff'd, 364 F.2d 829 (10th Cir. 1966), cert. denied, 386 U.S. 944 (1967), that only unions, or union officers acting under color of their office, can be sued in Title I litigation. See the criticism of these decisions in Thatcher, supra note 172, at 341. But see Johnson v. Local 58, IBEW, 181 F. Supp. 734 (E.D. Mich. 1960), where the court refused to dismiss a suit for an injunction against intimidation of union members who were holding political meetings.
\textsuperscript{187} This need not necessarily be the result, as, at least formally, the results of the Justice Department investigation are reported to the DOL. Hearings on UMW Election, supra note 2, at 342, 359-63 (May 4, 1970) (testimony of George P. Shultz).
\textsuperscript{188} In June, 1969, Yablonski was attacked and knocked unconscious at a meeting in Springfield, Ill. Id. at 10, 35-36 (Feb. 5, 1970) (testimony of Joseph A. "Chip" Yablonski).
\textsuperscript{189} Id. at 359-60 (May 4, 1970) (testimony of George P. Shultz).
\textsuperscript{190} This interpretation of the statute was criticized by the chairman of the Senate subcommittee conducting the UMW investigation. Letter from Harrison A. Williams, Jr., Chairman, to members of the Senate Subcommittee on Labor, June 24, 1970.
C. **Mechanisms of Communication**

Communication is at the heart of electoral responsiveness. The function of opening the leadership to membership demands can only be performed through a flow of information between the aspiring candidates and the rank and file. Regardless of which candidate is elected, an election characterized by a substantial amount of communication regarding union policies should indicate to the victor the sources and depth of rank and file discontent and the level of existing support for alternative policies. Despite this importance of communication, the problems detailed below were found in almost all unions. Unlike some abuses discussed in the previous section, communication failures existed in "clean," honest unions as well as in those where "dirty," unfair politicking was the norm.

In local union elections, the most important campaigning device is face-to-face contact between officer candidates and union members.\(^{191}\) In most industrial locals and those craft locals organized around a few central work areas, candidates are able to talk with members as they enter and leave work.\(^{192}\) Face-to-face campaigning is often supplemented by inexpensive leaflets which can be distributed by the candidates themselves.\(^{193}\) Field interviews revealed no special problems for candidates in securing access to these modes of communication.\(^{194}\) Union meetings are also a potential vehicle for communication,\(^ {195}\) but few unions structure local meetings to permit much campaign debate, and meetings are typically not well attended.\(^ {196}\)

At the intermediate level, face-to-face contact between the candidate and the membership is also important;\(^ {197}\) but such contact becomes very difficult to achieve at this level (or in large locals, for that mat-

\(^{191}\) Interviews with complainant union members F, N, and R and union officers B and C. Thus, the members most likely to become candidates are those who are free to move around while on the job. L. SAYLES & G. STRAUSS, THE LOCAL UNION 83-84 (1967).

\(^{192}\) Interviews with complainant union member R and union officers D, I, and J. In addition, several candidates attributed their success to having organized supporters within each plant or worksite in the local. Interviews with complainant union member F, complainant attorney I, and union officer J.

\(^{193}\) Interviews with complainant union members F, N, and R and union officer D.

\(^{194}\) The only allegation concerning the prevention of handbill distribution was that management permitted incumbent candidates to take literature into the plant, while dissidents had to distribute literature outside the plant gate. Interview with complainant union member N.

\(^{195}\) Union meetings were used for political discussion in several locals. Interviews with union officer B, complainant union members A, H, and R, and complainant attorney I.

\(^{196}\) Interviews with union officers I and H, and complainant union member A.

\(^{197}\) Interviews with union attorney AA and union officers A and O.
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Consequently, mailings must be relied upon as an important means of communication. Depending on the size of the electoral unit, however, mailings can become prohibitively expensive for poorly-financed candidates. One way to reduce the cost of mailings would be for the candidate to obtain a copy of the union's membership list, particularly if the list indicates the member's local affiliation or place of employment. Candidates could use such lists to concentrate their mailings and build support among particular, favorable constituencies. Lists are also necessary to build worksite organizations, which can wage face-to-face and telephone campaigns. Although a few unions provide candidates with copies of the membership list, most officially bar its use by any candidate. Both dissident candidates and union officers interviewed, however, reported that incumbents often have informal access to the list.

When the cost of a general mailing is prohibitive and copies of the membership list are unavailable, the only means of communication available may be the union newspaper. Some unions have recognized

198. The largest craft locals are in the IUOE. Its Local 12 embraces 20,000 members and covers southern California and southern Nevada. The problems of communication in such a local are similar to those in industrial districts. A typical Steelworkers district will contain 100 locals and 35,000 members.

199. Interviews with complainant union member A and union officers C and H.

200. Interviews with complainant union members I and S, union officers F and B, and union attorney AA.

201. The importance of the mailing list as a campaign tool is noted in Cox, Internal Affairs of Labor Unions under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 844 (1960) and in Summers, supra note 11, at 293.

202. A recent candidate for national office stated that he would have liked to supplement his advance publicity with special messages, but had no way to do so without sending a mailing to his entire national. Interview with complainant union member G. Large craft locals which stretch across several states make complete mailings futile, since candidates must spend great amounts of money to send the mailings to areas where they can garner few votes. Interview with complainant union member L.

203. Interviews with complainant union member A and complainant attorney I.

204. Three union officers indicated that each candidate had a right to possess and use a membership list during the campaign beyond the use that is implied in the right to mailings guaranteed by § 401(c). (See pp. 455-60 infra.) Seven officers indicated that candidates had no such right. Only one of the thirty-one complainant union members indicated that the list was available for campaign purposes; eleven indicated that it was not available. In one local a complete mailing list is published and given out as a directory. During the election, the union prints a set of membership tags and sells them to any candidate for $11 per set. Interview with complainant union member A. In another local, the membership votes before each election to determine whether the list should be available to candidates. Interview with complainant union member R and questionnaire from complainant union member C.

205. Eight of the thirty-one complainant union members alleged that incumbents had access to the membership list during the campaign. Incumbent access to the list was confirmed in interviews with union officers D and N. For illustrations of how incumbents can discriminatorily use the list, see Wirtz v. Guild of Variety Artists, 267 F. Supp. 527 (S.D.N.Y. 1967) and Yablonski v. United Mine Workers, 71 L.R.R.M. 2606 (D.D.C. 1969).
this fact and provide free space in the paper to all candidates, ranging from relatively small articles to “battle pages” on which candidates are given equal space during the campaign. This equality of treatment, however, is far from universal. Most union newspapers are controlled by the incumbents who appoint the editors, author articles, and are the subject of most of the newspaper's material. Some papers are nothing more than partisan pamphlets for administration-supported candidates. Newspapers of general circulation usually do not have enough labor coverage to make up for the one-sided coverage in the union newspaper.

206. Interviews with union officers E, G, and I, and complainant union member A. Battle pages have been used in some locals of the American Federation of Teachers, the American Federation of Musicians, the United Auto Workers and the United Steelworkers. Functioning battle page arrangements are used at the national level in the American Federation of Teachers and the International Typographical Union. Interviews with union attorney X and union officer H.

207. The DOL has approved of battle pages and does not consider them illegal expenditures under § 401(g) of LMRDA. They are a logical extension of U.S. Dep't of Labor Release, BLMR-41/USDL-4438 (Mar. 14, 1961), which approved the spending of union funds to promote debate between candidates. The battle page may function to legitimize opposition, a necessary step if responsiveness is to be enhanced. The union in which this legitimation is most apparent is the International Typographers Union. See generally S. Lipset, M. Trow, & M. Coleman, Union Democracy (1954).


209. Not all locals have newspapers although they usually appear when the local reaches a substantial size. Most intermediate organizations have such publications. Interviews with union officers A, B, C, D, E, M, and P and questionnaires from union officer R, and complainant union members H, T, and U. Even if the editor is elected by the membership, the local or intermediate level president can retain control over the newspaper's content by retaining for himself the associate editor post. Interview with union officer O. The primary function of such papers for incumbent officers is to provide a vehicle for reaching non-meeting-going members. Its value is indicated by the fact that one officer suggested that incumbents in his district will print local papers at substantial financial losses to the union, sometimes amounting to as much as $75,000 a year. Interview with union officer O.

210. Complainant union members almost uniformly criticized the domination of union papers by the incumbents. Interviews with complainant union members A, I, M, and S, and questionnaires from complainant union members X, Y, and CC. While some union officers contended that the paper could remain neutral (interviews with union officers A, C, and P), others suggested that the papers became propaganda organs for the incumbents. Interviews with union officers B, D, and O.

Political theory on the formation of public opinion demonstrates the effectiveness of communication media like the union newspaper. Political scientists have found that: (a) repetition of a name or of an opinion is an effective means of forming favorable opinion, L. Doob, Public Opinion and Propaganda 317-18, 348-49 (1948), V.O. Key, Public Opinion and American Democracy 402-03 (1961); (b) propaganda printed in a form of straight news is very effective, Doob, supra at 323-30; and (c) propaganda disseminated between elections when the constituent defenses are down is apt to be more effective than campaign literature, Key, supra at 403. However, some public media newspapers are distrusted by the readers, and to the extent this is true of union papers, the three effects above may be reversed. Key, supra at 355-56.

211. At least one union member interviewed suggested that union incumbents had sufficient power to compel the local media to exclude information about insurgent candidates' campaigns. Interview with complainant union member M.
Mailings and the union press are also the most important communications devices in national elections. The problems of access are even more onerous for candidates at this level because campaign costs in a large national are enormous. A mailing in a large national can cost between $60,000 and $80,000. The need for fair coverage by the union newspaper is thus even greater than at the intermediate level, but allegations of one-sided coverage were common. Particularly important and controversial national elections attract coverage by the general news media, but that coverage rarely centers on campaign issues and is no substitute for intra-union communications.

Statutory Provisions. Several LMRDA provisions protect campaign communications. The Title I freedom of speech and assembly rights assure access to face-to-face campaigning, leaflet distribution, and campaign discussions at union meetings. The minimal amount of litigation regarding these modes of communication suggests that candidates do not usually encounter difficulties in pursuing them. The lack of cases involving union meetings, however, may be due to the minimal use of such meetings as campaign communication devices. Nevertheless, it would be advisable for unions to institute special meetings for candidate debate, in order to facilitate upward as well as downward communication within the union.

The critical importance of mailings is recognized by § 401(c) of...
the LMRDA.\textsuperscript{219} That section requires unions to mail campaign literature at the candidate's expense,\textsuperscript{220} and further provides that when the union mails literature for one candidate, a similar distribution at equivalent cost must be made for all other candidates.\textsuperscript{221} Courts have become increasingly sensitive to the importance of these provisions. Section 401 (c) rights have been granted to prospective candidates actively seeking nomination even when the union constitution has sought to restrict the term "candidate" to only those members already nominated for office.\textsuperscript{222} Another court insisted that distribution be effective and refused to accept distribution by incumbent local officers rather than through the mails, in view of a history of union opposition to insurgent candidates.\textsuperscript{223}

Courts have not yet addressed the question of whether § 401 (c) provides for selective mailings. As noted above, the ability to mail to selected constituencies within the union membership may figure importantly in the success of a poorly-financed candidate. The critical question in interpreting the statute will be whether such a request is "reasonable," for it is only "reasonable requests . . . to distribute . . . campaign literature" which the union must recognize. It would seem that, unless the mailing list is kept in such a way that the particular sample sought is unobtainable, a request for a selective mailing should be reasonable per se. Candidates already pay for the mailing expenses the union incurs on their behalf, and they could be required

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\item \textsuperscript{219} 29 U.S.C. § 481(c) (1970).
\item \textsuperscript{220} Courts ordered the union to mail literature at candidate's expense in Yablonski v. United Mine Workers, 71 L.R.R.M. 2606 (D.D.C. 1969) and ordered insurgents be allowed to use union mailing plates in Antal v. District 5, Mineworkers, 64 L.R.R.M. 2222 (W.D. Pa. 1966). A court enjoined an election because the union had refused to mail out candidate literature in Backo v. Local 281, Carpenters, 438 F.2d 176 (2d Cir. 1970), \textit{cert. denied}, 404 U.S. 858 (1971), \textit{aff'd} 308 F. Supp. 172 (N.D.N.Y. 1969). For many candidates, it is necessary that the union mail literature because the union may have the only existing membership list, and the candidates have no right to it under § 401 (c).
\item \textsuperscript{221} In Backo v. Local 281, Carpenters, 438 F.2d 176 (2d Cir. 1970), \textit{cert. denied}, 404 U.S. 858 (1971), \textit{aff'd} 308 F. Supp. 172 (N.D.N.Y. 1969), the court enjoined an election when one of the charges was that the union had sent out literature of one candidate but had refused to do the same for plaintiff. In Antal v. District 5, Mineworkers, 64 L.R.R.M. 2222 (W.D. Pa. 1966), the court order that plaintiff be allowed to use the union addressograph seemed to be aimed at giving plaintiff the same treatment as incumbents. And, in Yablonski v. United Mine Workers, 305 F. Supp. 868 (D.D.C.), \textit{order clarified}, 305 F. Supp. 875 (D.D.C. 1969), the court found discriminatory use of the mailing list through inclusion of campaign propaganda in the union newspaper. However, relief has been denied where actual, not just potential, discrimination could not be proven. Conley v. Aiello, 276 F. Supp. 614 (S.D.N.Y. 1967); Litch v. United Steelworkers, 69 L.R.R.M. 284 (W.D. Pa. 1968). For an election declared void in a post-election suit for discriminatory use of the mailing list, see Wirtz v. Guild of Variety Artists, 267 F. Supp. 527 (1967).
\item \textsuperscript{222} See pp. 441, 444 and notes 135, 145-48 supra.
\item \textsuperscript{223} Antal v. District 5, Mineworkers, 64 L.R.R.M. 2222 (W.D. Pa. 1966).
\end{enumerate}
\end{footnotesize}
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to absorb whatever additional costs might attend selective mailings.\(^{224}\)

Candidates could conduct their own selective mailings if they were given copies of the union membership list. Such provision, however, is not contemplated by the statute. Although § 401 (c) prohibits discriminatory use of the membership list, candidates have a right only to inspect the list, and then only once within the thirty days just prior to the election. The right of inspection does not include the right to copy the list.\(^{223}\) This limited right of access indicates a congressional desire to keep the membership list out of the hands of partisans in an election campaign.\(^{226}\) In view of the importance of the membership list to candidates, however, the statute appears inadequate as to this feature of the conduct of responsive elections.\(^{227}\)

Although the LMRDA does not directly define the proper role of the union newspaper, several of its provisions appear to be applicable. Because the newspaper is normally mailed through use of the union membership list, one-sided coverage in the union newspaper is arguably a violation of the § 401 (c) ban on discriminatory use of member-

\(^{224}\) LMRDA § 401(c), 29 U.S.C. § 481(c) (1970) gives all candidates the right to sue the union to compel it "to comply with all reasonable requests to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization." Although the statute speaks of mailings to "all members," it seems clear that the statutory purpose is to require mailings to all members if the candidate wishes, but not to limit the candidate to mailings to all members.\(^{225}\) 29 U.S.C. § 481(c) (1970). See Conley v. Aiello, 276 F. Supp. 614 (S.D.N.Y. 1967) and cases cited therein. See also note 637 infra.

\(^{226}\) The list inspection provision was a compromise to adjust several competing interests. Congress recognized that the list was a vital aid in a campaign. As Senator McClellan believed that incumbents were likely to be able to use the list, he saw no alternative to giving the list to all candidates. The rest of Congress, however, largely accepted the arguments of organized labor that freely dispensing the list opened the door to abusive use of the list by employers, communists and unscrupulous hucksters. 105 CONG. RAC. 6031-32 (1959).

\(^{227}\) The possibilities for stimulating campaign communication far outweigh the traditional evils feared by union officials and Congress. The alleged danger of employee coercion is obviously mooted by the fact employers already possess names of all employees covered by the union security agreement. Raiding by other unions or communist subversion is highly unlikely. And the incremental burden of additional junk mail, if third parties obtain the lists, would be small. In three unions where such lists are provided, none of the members interviewed complained of any invasions of privacy as a result. Cf. Excelsior Underwear Inc., 156 N.L.R.B. 1236 (1966). The use of membership lists is sufficiently important for Congress to reconsider its 1959 deletion of such a right from Title I. As proposed in the original McClellan amendment, § 101(a)(7) read:

Any candidate for office in any such labor organization or his agent shall have the right to inspect and reproduce, for purposes relating to his candidacy, a list of the names and last known addresses of all members of such organization. Such list shall be maintained at the principal place of business of such organization by a designated official thereof.

If Congress is still concerned about misuse of the list, it could make the use for other than campaign purposes a federal crime and a basis for disqualification under LMRDA § 504, 29 U.S.C. § 504 (1970), which provides for the disqualification for five years from union office of persons convicted of various felonies.
ship lists. This was precisely the basis of decision in *Yablonski v. United Mine Workers*. Alternative statutory bases for reaching discriminatory use of the union newspaper are § 401(g), which prohibits use of union funds to promote a particular candidate, and, arguably, § 501, which imposes a fiduciary duty upon union officials to spend union funds only for the benefit of all the members.

In *Yablonski*, five campaign issues of the union paper contained 166 references to and sixteen pictures of incumbent candidate W.A. Boyle, as compared to only one reference to his opponent Joseph Yablonski.

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231. See the court's description of the aim of § 401(g) as prevention of entrenchment of incumbents in *Retail Clerks v. Retail Clerks Union*, 299 F. Supp. 1012, 1023 (D.D.C. 1969). However, in *Shultz v. Local 1299, Steelworkers*, 324 F. Supp. 750, 757-58 (E.D. Mich. 1970), aff'd, Nos. 71-1293, 71-1297 (6th Cir., filed Dec. 29, 1971), no violation of § 401(g) was found although the union newspaper, which was published for the first time in five years right before the election, included many pictures of the incumbent officers, and although the court found "the motive of the officers may not have been the best."
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This was held to be a clearly partisan use of the newspaper. Although the court did not articulate standards for determining what constituted "partisanship," two criteria appear to have been employed. The first looks to quantitative imbalance in the amount of material published regarding the various candidates; the second examines imbalances in editorial fairness.

The Yablonski court merely enjoined future biased coverage and ordered the union to send a copy of the court opinion to all its members. The court refused to order publication of material dealing with Yablonski's campaign, reasoning that to do so would violate the First Amendment and LMRDA § 401 (g). Also, the court found that § 401 (c) did not authorize such relief. The court appears to have misconstrued the two LMRDA provisions. The DOL has specifically ruled that § 401 (g) only prohibits discrimination in the use of union funds. Because the union in Yablonski had already favored the incumbents in the pages of the newspaper, an order to print pro-Yablonski material would have merely compensated for past discrimination. Moreover, it appears that § 401 (c) requires such relief. The excessive coverage of incumbents in the Yablonski case effectively turned the newspaper into campaign literature distributed at union expense. The statute provides that:

whenever such labor organization or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate . . . similar distribution at the request of any other bona fide candidate shall be made . . . with equal treatment as to the expense of such distribution.

The Yablonski court's analogy to the First Amendment protection of newspapers also seems inapoposite. Unlike the public media of general circulation, union newspapers have no effective competition. Hence it cannot be assumed that untruths conveyed by them will be corrected by other information sources. Also, union newspapers are not established by private parties to serve the public, but by labor unions to serve the union membership. Officers run the newspapers

233. Id. at 875-76.
234. Id. at 872. See also Cefalo v. District 50, Mineworkers, 74 L.R.R.M. 2045 (D.D.C. 1970).
only as fiduciaries for the members. Because union newspapers have a "natural monopoly" on the communication of intra-union news, it seems more appropriate to analogize them to the airwaves, which are subjected to public regulation because of the scarcity of space on the electro-magnetic spectrum. If this analogy is correct, the Yablonski court should not have rejected the FCC "fairness doctrine" as a model on which to fashion full and free discussion of important issues. On this basis, the court should have ordered inclusion of pro-Yablonski material in the UMW Journal.

In order to avoid court battles over the newspaper, unions would be wise to institute battle pages. Although many union people deplore them as a waste of both space and money, their operation in the few unions which have them appears beneficial. As devices for facilitating communication and legitimizing opposition, battle pages are valuable tools in achieving responsiveness.

D. Discriminatory Use of Union Resources

The responsiveness function of officer elections can be significantly hindered if one candidate has at his disposal a disproportionately large share of campaign resources. In public elections disparities in available campaign resources have been a source of deep concern, and Congress

237. Expenditures for, and control of, the newspaper should fall within the fiduciary duty imposed on union officers to expend union funds "solely for the benefit of the organization." LMRDA § 501, 29 U.S.C. § 501 (1970). See further discussion at p. 465 infra.


239. Yablonski v. United Mine Workers, 305 F. Supp. 868, 872 (D.D.C. 1969). The court said the doctrine was inapplicable because union papers, unlike the airwaves, are not part of the public domain and have a specialized circulation. But the union newspaper is part of the union domain, and union internal activities are regulated by the LMRDA for the protection of the specialized audience, the members, who read and through their dues pay for the paper. The fairness doctrine was approved in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375 (1969). The doctrine, 47 U.S.C. § 315 (1970), reads in part:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station.

240. In addition to the general complaint that members do not read the newspaper (interviews with union officers A and H and union attorney P), at least one local officer indicated that in his union the candidates were too numerous to permit use of this device. Interview with union officer G. Perhaps for this reason, one district officer indicated that while several locals within his district had used the battle page at one time, the institution had not "caught on." Interview with complainant union member Q.

241. One district official noted that the battle page constituted the first place dissent had been officially recognized in his union. He added that it was better to have discontent debated openly than left unarticulated. Interview with complainant union member Q.
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has recently acted to limit campaign spending. In union elections, these disparities normally arise from the incumbent's control of union resources. Like the problems found in the communications area, the problems detailed here existed in almost all unions surveyed.

At the local level, where face-to-face campaigning and leafletting are the norm, the cost of campaigning is minimal, and the candidates' relative strength in resources and funds is unlikely to skew the electoral process. It has been alleged, however, that incumbent-supported candidates can cut leafletting costs considerably by using union duplicating machines or by using union funds to pay printers.

In larger locals and at the intermediate level, where campaign costs may run to several thousand dollars, the problem of incumbents using union facilities is more serious. Many of the candidates interviewed had relied primarily on their own salaries and savings to finance their bid for office. Campaigns financed in this way are clearly no match for an incumbent who, in addition to enjoying the usual benefits of being better known, may meet his campaign needs free of charge by using union facilities. Moreover, an incumbent comes into con-

243. Unions often permit candidates for office to freely use xeroxers, addressographs and other facilities for printing campaign material. Of the twenty union officers, five suggested this was established practice, and five indicated it was expressly prohibited. Of the thirty-one complainant union members, seven indicated the availability of these facilities, but twelve indicated they were "off limits" to the candidates. In those cases where use of the facilities by candidates generally was prohibited, five complainant union members indicated that incumbents nonetheless used these facilities in their campaigns. More covert practices were alleged in two instances. In one, the incumbents avoided using their own local facilities by taking material for printing to a nearby local. When the other local had its election, the favor was returned. Interview with complainant union member D. In a second local, printing was done privately and allegedly paid for with union funds drawn not from the incumbent's local, but from the funds of a sister local. The advantage of this practice is that the expenditure never shows on the first union's book if the election should be challenged for § 401(g) violations. Interview with complainant union member N.
244. While in most local elections candidates tended to spend between $300 and $500, in larger locals costs range from $1500 to $12,000. The primary expense is postage for mailing literature. Interviews with union officers D, E, F, G, and O and complainant union member H. District costs are likely to be $10,000 to $20,000. Interviews with union officers A, M, and N and complainant union member M.
245. Seventeen of the thirty-one complainant union members indicated that money comes mainly from the wages and savings of the candidate himself; seven indicated that money was voluntarily contributed by other union members. Of the union officers contacted, nine stated that personal sources predominated, and four acknowledged contributions from supporters. Ten of the thirty-one complainant union members indicated that their resources were inadequate. Six suggested that these sources were fully adequate. While insurgents suggested that incumbents had access to union funds, see note 246 infra, some union officials indicated that insurgents may also have outside fund sources. Such sources allegedly include other unions, criminal racketeers, and employers. Interview with union attorney HH; questionnaire from union attorney G.
246. Ten of the thirty-one complainant union members also alleged that incumbents had direct access to union funds to finance their campaign at the district or local level. Five of the twenty union officers indicated that union funds were used in the election contest, but three stated that the funds were used to benefit all candidates by financing a newspaper battle page or use of the union hall for campaign meetings. Interviews
tact with many members as part of his job and can campaign, in effect, on union time, while a non-incumbent candidate usually must continue working to be able to pay for his campaign.247

The most significant resource bias at the intermediate level, however, comes from campaign participation of the union staff. Staffers are hired for secretarial and clerical chores, for specialized work as in accounting and law, and to service the needs of the local unions. The service staff is often made up of former local officers who have proved themselves to be effective and popular with the rank and file. They are each given a small group of locals which they provide with administrative advice, information on district activities, and assistance in processing grievances. This role brings the service staff into continuous contact with local officers and members.248

It is thus not surprising that union service staffs tend to dominate intermediate level politics. Opposition to incumbent intermediate officers will normally come from either staff members or a local president.249 Unless the local is unusually large, however, local officers do not pose a serious threat to incumbents, since they are rarely known outside of their own constituency. The staff member, on the other hand, has a base of support in the cluster of locals he serves. His contact with other staffers allows him to build a coalition to support a bid for office.

Obtaining the support of a staff coalition is important for any can-

with union officers A, G, and I. Only two of the union officers suggested that funds had been used exclusively for the incumbent's benefit. In both instances, the union placed on its payroll persons allegedly performing legitimate part-time jobs who were in fact campaigning full-time. Interviews with union officers N and O. For a discussion of the related problem of union loans to candidates, see NYU Note, supra note 119, at 349-50.

247. Interview with complainant union member M. This problem was mitigated in one case where a successful candidate for district president arranged to have his vacation just prior to the election. Interview with union officer O. See Daniels, Union Elections and the Landrum-Griffin Act, 13 N.Y.U. CONF. ON LAB. 317, 321 (1970).

248. District organizations which "service" locals in negotiation of contracts and administration of grievances, as found in the Autoworkers and Steelworkers, are only one of three types of intermediate bodies. Intermediate organizations in unions such as the Operating Engineers and Retail Clerks serve only as information clearing houses. The third type of intermediate, evidenced in the Teamsters and Carpenters, is a legislative lobbying organization. Barbash, supra note 66, at 63. Despite the fact that staffs in "non-service" intermediate organizations may be separated from members and play only a small role in union politics, many such unions have medium or large sized locals with substantial staffs. These local staffs play a significant role in local and intermediate level politics. Interviews with complainant union members H and I and union officer G. In a large local, service staffers may be given sub-units of the local for which they perform these services. See a description of such an arrangement in M. Harrington, The Retail Clerks 49-51, 61-62 (1962). Because the size of these locals approaches that of many districts, local staffers play political roles similar to that of district staffers. See G. Marcom, The Operating Engineers 229-30 (1964).

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didate. A candidate who can organize a face-to-face campaign by having union staff working for him in every local will have a tremendous advantage over the candidate who has no campaign organization and is unable to personally meet the union electorate. The effectiveness of union staff support is indicated by the recurring pattern in at least one union of the local officers supporting the choice of their staff member, and the local membership voting accordingly. The pivotal role of the service staff in an election campaign becomes a serious problem for electoral responsiveness if staff sympathies tend to systematically favor incumbents. This seems often to be the case, as staff members are generally appointed and owe their jobs to the incumbent. An insurgent must present a very credible challenge indeed before he can amass substantial support among the service staff.

Union politics at the national level also centers substantially on the union staff, with intermediate level officers becoming crucial participants. Most opposition to national incumbents comes from such officers, who can build on the power base within their own constituency and seek support from other intermediate level executives. The power of such officers will vary with the way in which their position is achieved. If appointed, such an officer risks loss of his job and thus is unlikely to oppose the incumbents. But if elected, and particularly if elected by a geographical subdivision rather than on a national basis,

250. Interviews with union officers A, F, N, and P.

251. One district president suggested that the staff felt their jobs were dependent on the district director being re-elected and were usually willing to work for his re-election. Interview with union officer N. As another district president said, "The staff owes me allegiance, and they campaign like hell or I would fire them." Interview with union officer F. Complainant union members at both the local and district levels stated that staff were very active in the election campaign. While one member indicated that staff were prohibited from campaigning and two suggested that staff preferred not to do so, eleven complainant union members alleged that the staff campaigned, sometimes while performing union business, and eleven more indicated that staffers campaigned full-time during the election period and used union printing and telephone facilities to aid the campaign. Staff participation in the election campaign was confirmed by eight of the twenty union officers.

252. Interview with union officer N. The importance of service staffers in forming voter opinions within constituent locals is not surprising if one accepts the "two-step" theory of public opinion. Political scientists have found that public opinion is normally formed, not through direct reading or viewing of the media, but through the influence of persons with great knowledge of community affairs who act as conduits. See, e.g., V.O. Key, supra note 210, at 359-66.

253. In three of the four unions studied, opposition to an incumbent national president came from either a district director or a lesser national officer. In the 1965 Steelworkers campaign the victor J.W. Abel had been Secretary-Treasurer of the national and a district director. In the 1969 Mineworkers election, Joseph A. Yablonski, International Executive Board member and chief of the union’s legislative lobbying organization, ran against the incumbent W.A. Boyle. Yablonski had been President of District 5 of the UMW. In the 1964 International Union of Electrical Workers election, Paul Jennings successfully opposed the incumbent Edward Carey from his position as Executive-Secretary of District 3. See also Bok & Dunlop, supra note 20, at 56.
the intermediate level officer is freer to align himself with an insurgent candidate. This alignment tends to filter down within the subdivision. In the national election of one industrial union, which is subdivided into geographical districts, a majority of members voted against their district director's candidate in only five of twenty-nine districts.

Union staff not only contribute their time during campaigns, but they are also substantial financial contributors. Staff support also decreases the costs of campaigns by providing campaigners who make free use of intermediate level offices' printing, telephone, mailing, and transportation facilities. An additional bias alleged most frequently at the national level, although it was also claimed occasionally in intermediate elections, is the direct use of union funds, as distinguished

254. This pattern is best exemplified in the 1965 Steelworkers election: "Each director is politically independent of the president, having his own political base, this arising not only because the district directors are elected, but also because the election is confined to the district involved, as opposed to being union-wide. In addition, most of the district directors are politically secure in their districts, not only because there are relatively few challenges to an incumbent director, but also because there are even fewer overthrows of incumbents." Orr, The Steelworker Election of 1965—The Reasons for the Upset, 20 LAB. L.J. 106 (1969). Usually the district staff will follow the lead of the director, but occasionally the staff may be strong enough to force the adoption of their preference among the various candidates. Interview with union attorney AA.

255. 1965 USWA Study, supra note 214. After the 1969 defeat of Joseph A. Yablonski, his supporters continued to function as an established opposition group within the Mineworkers under the name "Miners for Democracy." They considered their most important objective the capturing of control of district level positions in order to build an organization which would have a chance to capture national offices. For this reason, they focused on the election in District 5, the largest working member district in the UMW, and contended the continuing trusteeships exercised by the international over most other UMW districts. Interview with complainant attorney M.

256. In the 1969 United Mine Workers election, Boyle's incumbent ticket is estimated to have spent in excess of $1,000,000. Yablonski, running without significant staff support, allegedly spent only $60,000. Yablonski supporters alleged that there was an understanding among union employees that if they would contribute to the Boyle campaign, he would raise their salaries upon re-election. Hearings on UMW Election, supra note 2, at 18-24 (Feb. 5, 1970) (testimony of Joseph A. "Chip" Yablonski). The salary increases did occur but Boyle answered Yablonski's charge by stating that the raise was consistent with the union policy of granting raises after collective bargaining increases had been gained for the miners. The bituminous miners had received such a raise just before the election. Id. at 210-12 (March 18, 1970) (testimony of W.A. Boyle).

Sometimes both candidates may have staff financial support. In the 1965 Steelworkers election, incumbent McDonald suggested to staffers that they contribute $100 down and $100 per month during the three-month campaign; clerks and secretaries were asked for $25 down and $25 per month. His opponent Abel's campaign committee solicited $2,000 contributions from district directors and $200 from district staffers. National staffers contributed greater amounts. 1965 USWA Study, supra note 214.

257. Allegations of staff use of district and local facilities were made in all four of the national union elections examined. Interview with complainant union member P; Hearings on UMW Election, supra note 2, at 24-26 (Feb. 5, 1970) (testimony of Joseph A. "Chip" Yablonski); 1965 USWA Study, supra note 214; IUE Interim Report, supra note 256.

258. See note 246 supra.
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from use of union facilities. Allegations in one national election centered on hiring popular rank and filers for part-time union work, which was effectively payment for full-time campaigning. Statutory Provisions. The LMRDA provides a basis for policing candidate use of union funds or facilities. Section 401(g) prohibits use of union funds "to promote the candidacy of any person." Section 501 also prohibits such use of funds or facilities by making union officials fiduciaries in the handling of union money and property. Presumably it is a violation of a fiduciary duty to spend funds illegally. Despite these statutory provisions, scholars have questioned whether campaign expenditures can ever be policed because of the difficulties in detecting and proving impropriety.

259. Hearings on UMW Election, supra note 2, at 138-39 (Feb. 6, 1970) (testimony of Louis Antal). Secretary of Labor Shultz acknowledged that such part-timers had been employed by the union during the election period. He refused to find the practice a violation of the LMRDA because, "[a]lthough some of them did, at times, campaign, there was no evidence that they engaged in campaigning to the exclusion of, or, in such manner as to interfere with, their regular assigned duties." Id. at 346 (May 4, 1970) (testimony of George P. Shultz). Shultz ignored evidence that the part-timers were hired primarily where Yablonski was strong and not in pro-Boyle areas, and that union organizers were added to Yablonski's home territory in western Pennsylvania, which was predominantly organized, but not in areas where many unorganized mines existed.


262. The legislative intent behind § 501 stresses the duty of the union officer to act within the union officer and bylaws. See U.S. Code Cong. & Ad. News, 1959 (86th Cong. 1st Sess.) at 2480. It would be unlikely that a union officer charged with spending union funds on an election campaign could point to union endorsement for this explicit violation of the LMRDA. Moreover, it might be argued that the very fact that Congress has determined that such expenditures are not in the interest of all union members and hence has outlawed them is enough to defeat any claim by the officers that the expenditures are "solely for the benefit of the organization and its members" as § 501 requires. Cf. NYU Note, supra note 119, at 349.

263. Cox, supra note 201, at 844; Summers, supra note 11, at 294; Daniels, supra note 247, at 321; NYU Note, supra note 119, at 356.

264. Membership access to union records for "just cause" is provided by the statute, LMRDA § 201(c), 29 U.S.C. § 431(c) (1970); but several candidates complained that unions employed complicated clearance procedures before opening their books for inspection. Interview with complainant union members H and I and complainant attorney I. Another administrative difficulty encountered in some unions was that some members were not allowed to bring accountants to help them inspect the books. Courts have struck down such ground rules, holding that the only way to fulfill congressional purpose was to permit union members as much assistance and time as they needed to carry out a reasonable review. Antal v. District 5, Mineworkers, 451 F.2d 1187 (2d Cir. 1971); Local 1419, Longshoremen v. Smith, 301 F.2d 791 (5th Cir. 1962); Coratella v. Roberto, 56 L.R.R.M. 2038, 2071 (D. Conn. 1964); Deacon v. Local 12, Operating Eng'rs, 256 Cal. App. 2d 302, 46 Cal. Rptr. 11 (Cal. Super. Ct. 1965), cert. denied, 383 U.S. 103 (1966).

Even if problems of access do not arise, it may be difficult to sort out improper from proper expenditures. Where incumbents have hired supporters for part-time union jobs, for example, the money paid those employees will appear on the records as a simple salary expense. One avenue of inquiry for the DOL or a court in weighing a complaint of improper expenditures should be the timing of expenditures. Unions might be made to produce justifications for sudden increases in expenses during campaign periods.

265. Any Title IV litigation, including § 401(g) violations, must meet the § 402 requirement that reruns will be ordered only if the illegal expenditure "may have affected" the election outcome. (See full discussion of this standard at TAN 481-85 infra.)
The LMRDA provides no solution, however, to the more serious problem of the bias imported into the officer election process by a service staff loyal to incumbent officers. A staff member campaigning on union time would appear to violate § 401 (g),266 and any officer who orders such activity would arguably be in violation of his fiduciary duty under § 501.267 These violations would be virtually impossible to prove, however, as the legitimate function of the service staff is to circulate among the membership. Indeed, the most difficult aspect of the problem posed by the service staff is that their function is unavoidably political. In fact, responsiveness in non-election periods will depend on an interplay among the membership, leadership, and service staff.

In the public sector, the problem of campaigning by federal government employees is met by an attempt at de-politicization. Employee Union officials and lawyers contend that requiring a showing that the illegal use of funds may have affected the outcome is proper because the union should not be forced to undergo a new election for inadvertent expenditures, which may be made frequently. However, to place on enforcement officials the burden of discovering illegal expenditures and proving that they "may have affected" the outcome would make their task almost impossible, as they have great difficulty finding and relating expenditures to specific member votes. LMWP officers tend to regard any illegal expenditures uncovered as just the "tip of the iceberg," believing that if they find such violations there are probably more to be discovered.

Courts have two possible approaches to the problem. One is the Local 6 device of shifting the burden of proof to the union once a violation of speculative effect has been proven. The union would then have to show that the expenditure did not affect the outcome. The other approach, adopted in Shultz v. Local 6799, Steelworkers, 403 U.S. 333 (1971), would ascertain how many possible ballots the expenditure could have affected and, if that number is more than the margin of victory, order a rerun. This approach presumes an ability to measure an effect which in fact cannot be measured. In that case a $13 expenditure for 1200 handbills was the basis for overturning an election where the victory margin was considerably less than 1200 votes. Yet it is not clear that 1200 handbills had affected 1200 votes. Handbills may be read by no one, or by two or three people each. With expenditures for items such as paid campaigners being even less quantifiable, the test makes almost no sense. Therefore, the Local 6 test, which makes no pretense to mathematical accuracy, may in the end be fairer to the union.


266. Only one court has explicitly accepted the argument that paid staff campaigning on union time is an illegal expenditure of union funds. See Shultz v. Local 6799, Steelworkers, 71 L.R.R.M. 2820 (C.D. Cal. 1969), aff'd on other grounds, 426 F.2d 960 (9th Cir. 1970), aff'd, 403 U.S. 333 (1971), where "secretarial help" to a candidate was part of an illegal expenditure of union funds. However, the logic seems rather compelling, and the fact that no other court has dealt with the issue would thus appear to suggest the difficulty in bringing such actions rather than anything about their intrinsic validity.

267. See note 262 supra.
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campaigning is illegal under the Hatch Act. A similar statutory solution might be feasible in the union context, at least for the professional members of union staffs. These employees might be barred from partisan election activities and protected from political reprisals. If the bureaucratic nature of unions were so recognized by protecting the professional staff from union politics, union administrative and bargaining expertise might be enhanced.

A solution which insulated the professional staff from union politics, however, would cope with the least important part of the problem. The service staff, whose regular contact with the membership makes them the more politically potent group of union employees, should not be de-politicized. The service staff is often a source of opposition to incumbents, and is especially well situated to focus membership discontent and suggest alternative policies to the leadership. A promising statutory alternative might be to broaden the definition of "officer" to include the service staff, thereby making all service staff positions elective.


This conflict of fundamental interests is much less significant in unions, where professional employees are usually not union members, unlike government employees who are also citizens of the town, state, or nation for which they work.

270. Several of the union officials in this study suggested that the union may at times be "outgunned" at the bargaining table by the management collective bargaining team. Interviews with union attorney W and complainant union member H. Provision for expert staff would also mitigate the union criticism of governmental limitations on permissible eligibility requirements for office, for knowledge of contract matters would be less important for the elected officers since an experienced staff would be present to provide expertise. Elected officials would then be the prime vehicles for electoral responsiveness, and the professional staff the source of technical expertise.

For further discussion of the need for more professionals in unions, see WILENSKY, supra note 268, and Beirne, supra note 26, at 135, 195.

271. (n) "Officer" means any constitutional officer, any person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive functions of a labor organization, and any member of its executive board or similar governing body.

LMRDA § 3(n), 29 U.S.C. § 402(n) (1970). Union officers must be elected. LMRDA §§ 401(a), (b), (d), 29 U.S.C. § 481(a), (b) (d) (1970). The DOL has interpreted § 3(n) to exclude "professional and other staff members . . . who do not determine the organization's policies and who are employed to implement policy decisions and managerial directives established by the governing officials." 29 C.F.R. 452.4(e) (1970).
If service staff members were elected by their constituent locals, each would be dependent for support on the members he serves. This would probably improve the responsiveness of the staff to the rank and file. The stratum of service staff employees would also be likely to develop as a fertile ground for opposition candidates, since staffers would enjoy a measure of independent political power within the union. Although intermediate and national candidates might run on tickets with service staff candidates, the independent local strength of incumbent staffers would make it difficult for a "machine" to develop. Even if service staffers were elected not by their constituent locals but on an intermediate or district-wide basis, and staff tickets resulted, strong support in the staffer's own locals might overcome the strength of an opposing slate candidate. Aggregate internal responsiveness might well be enhanced.\textsuperscript{272}

E. Fraudulent Tally of Votes

Fraud in the tally of ballots represents an obvious perversion of the electoral process. Methods of election fraud have been widely documented in public sector election studies\textsuperscript{273} and need not be extensively rehearsed in the union context. The occurrence of these practices would appear to be limited to those few union organizations properly characterized as "corrupt."

Courts have construed the statute in three cases. Welfare fund trustees were found not to be officers because they lacked "executive functions" in Tucker v. Shaw, 308 F. Supp. 1, 3 (E.D.N.Y. 1970); business representatives were found to be officers because they served on the union's executive committee in Sheridan v. Local 626, Carpenters, 194 F. Supp. 664, 665 (D. Del. 1961), rev'd on other grounds, 306 F.2d 192 (3d Cir. 1962); and field patrolmen, branch agents and port patrolmen, all union men in charge of their respective ports with duties not strictly ministerial, were found to be officers in Wirtz v. National Maritime Union, 284 F. Supp. 50, 67-68 (S.D.N.Y.), aff'd, 399 F.2d 544, 551-52 (2d Cir. 1968).

In McCarthy v. Wirtz, 65 L.R.R.M. 2411 (E.D. Mo. 1967), the DOL concluded that the Directing Business Manager of a district of the International Association of Machinists was not an officer. The decision came as a great shock to the insurgent who thought he was running for the most powerful position in the district and to the incumbent who, believing that the insurgent's victory would be a severe blow to the affiliation of the district, had waged a bitter electoral struggle. Interview with complainant attorney I.

272. In discussing the necessary elements of a democracy, V.O. Key, supra note 210, at 536-43 notes several factors relevant to the union political process. He notes a need for a lack of cohesion among the activist elite; without division and competition, the democratic process cannot occur. To make competition possible, he sees a need for a multiplicity of leadership and political activity, including jobs for those out of power. There must also be ease of access to politics and to leadership posts. In one-party unions, cohesion, multiplicity of power bases and jobs, and easy access to politics are often lacking. However, if staff posts were made elective on a local electoral unit basis, cohesion might be lessened and power bases increased.

273. See, e.g., J. Harris, Election Administration in the United States (1934); E. Logan, Supervision of the Conduct of Elections and Returns (1927).
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Unions typically employ either mail or poll balloting techniques. Mail balloting raises two major problems. First, there is little visible control of the ballots between the time they are sent to the members and the time of their return. Concern was expressed by some interviewees that ballots could be collected and marked by one individual—the mail ballot equivalent of ballot stuffing. Second, despite use of a double-envelope ballot, some members voiced doubt about the secrecy of their votes; fear of this kind could prevent voters from expressing their true preferences. Although the DOL has approved the double-envelope method as an adequate means of insuring secrecy, the fact that members must put their names on the outside envelope raises the possibility that ballot counters will be able to trace how various members voted.

The integrity of poll balloting can be insured by competent election observers. Observers oversee checking of voter eligibility, depositing of ballots in the voting box, counting of ballots, and marking of tally sheets. Observers, however, have sometimes been unable to perform these tasks because of harassment or exclusion from voting areas. In some instances candidates were not informed of the time or place of balloting and thus could not send observers. Union rules

274. A third possible method is voting at union meetings. DOL CONSTITUTION STUDY, supra note 72, at 58. However, as LMRDA §§ 401(a) and (b), 29 U.S.C. §§ 481(a) and (b) (1970), require that non-convention balloting be done by secret ballot, a show-of-hands vote is illegal. Voting procedures at union meetings therefore must be much the same as those at a polling place. For this reason, the comments made about poll balloting are applicable to meeting votes.

275. One union member indicated the various steps in the balloting process at which abuse could occur: when the ballots are mailed, filled out by the voter, collected at a post office box, or trucked to the union for counting. Interview with complainant union member S.

276. Interview with complainant union member I.

277. Interviews with complainant union members H, L, and S, complainant attorney M, and union attorney BB.

278. See U.S. DEP'T OF LABOR, ELECTING UNION OFFICERS BY MAIL: SUGGESTIONS FOR SAFEGUARDS 5 (1965). This method calls for the union to send out ballots with two return envelopes. The voter returns his ballot inside an unmarked envelope which is enclosed in another envelope, on which the voter puts his name. Upon receipt, the union checks the name on the outer envelope against its voter register and places the unmarked envelope in a container with other returned ballots. A union bent on identifying how specific voters cast their ballots could look at the ballot inside the inner envelope before putting it in the container.

279. The effectiveness of election observers is dependent upon their sensitivity to the means by which the integrity of the process can be compromised. In one national election the salutary function of an observer was vitiated when the observer willingly left the polls during ballot counting, at a local incumbent officer's suggestion, to get a cup of coffee. Interview with complainant attorney E.


that observers must be union members may also penalize minority candidates who are unable to find enough members to staff all polling places with observers.\textsuperscript{282}

Statutory Provisions. The LMRDA requires that "adequate safeguards to insure a fair election" be provided, and gives candidates the right to have observers at the polls and the tally.\textsuperscript{283} The Act also requires that secret ballots be used\textsuperscript{284} and that votes be tabulated and published separately for each local.\textsuperscript{285}

The broad LMRDA mandate leaves substantial freedom to courts to fashion safeguards appropriate to the needs of particular elections. Courts have not, however, consistently sought to construe the statute in a way which minimizes the opportunity for fraud and coercion. Regarding the secrecy of ballots, for example, the DOL position has been that a ballot is "secret" in the sense required by the statute\textsuperscript{286} only if it is impossible to identify the voter.\textsuperscript{287} Yet some courts have required proof that ballots were actually identified before deeming

\textsuperscript{282} Restrictions on who can be an observer take two forms. The most stringent requires that the observer be a member of the local he is to observe. A less restrictive rule, still considered by complainants to be too inhibiting, requires only that the observer be a member of the union. Complaints against these restrictions were made primarily at the national union level. Interview with complainant union attorney E; letter from James Morrissey to William J. Usery, March 25, 1969; 1965 USW Study, supra note 214.

Complaints of other election day abuses were made by participants in national or intermediate level elections. Some contended that delivery of excess ballots to the polling place raised an inference of fraud. This practice was justified by union personnel on grounds that extras were required to account for changes in local membership since the last membership list had been submitted to the national and to substitute for ballots which might be damaged. Another charge was that disparity in returns between those locals where a candidate had his observers and those in which he had none indicated possible fraud. Yet, to the extent that candidates sent observers only to locals where they could count on large support, this disparity is not a reliable basis for inferring fraud.

At the local level, several complainant members suggested that it was important to have supporters on the election committee. If committees were controlled by incumbents, rules unfair to insurgents could be made or rules uniform on their face could be applied only against insurgents. Interviews with complainant union members I and L and with complainant attorney L. See also Summers, Judicial Regulation of Union Elections, 70 YALE L.J. 1221, 1228-30 (1961).

\textsuperscript{283} 29 U.S.C. § 481(c) (1970).

\textsuperscript{284} LMRDA § 401(a), (b), (d), 29 U.S.C. § 481(a), (b), (d) (1970).

\textsuperscript{285} 29 U.S.C. § 481(e) (1970). One seasoned national campaigner emphasized that this was the most important election safeguard in national and district level elections. If there is any tampering with the local returns at district or national headquarters, it can easily be discovered by the local when results are published. 1965 USWA Study, supra note 214.

\textsuperscript{286} "Secret ballot" means the expression by ballot, voting machine, or otherwise, but in no event by proxy, of a choice with respect to any election or vote taken upon any matter, which is cast in such a manner that the person expressing such choice cannot be identified with the choice expressed. LMRDA § 3(6), 29 U.S.C. § 402(3) (1970).

\textsuperscript{287} See Wirtz v. Local 11, International Hod Carriers, 211 F. Supp. 408, 413 (W.D. Pa. 1962); Beaird, supra note 78, at 1309-11.
the secret ballot provision to have been violated. This narrow interpretation overlooks the substantial psychological coercion that may occur if voters even suspect that their votes can be identified.

Courts anxious to protect against election day abuses might require any union with sufficient funds to employ an accounting firm or a neutral third party to send, collect, and count ballots in the case of a mail ballot election. If that is not feasible, unions might be required to have neutral third parties present at all times when mail ballots are in the union’s possession.

In poll ballot elections, it is crucial that observers be adequately trained to detect improper practices. Full and effective safeguards might require unions to provide observers with a manual on election

288. In Wirtz v. Local 11, Hod Carriers, 211 F. Supp. 408 (W.D. Pa. 1962) the court found that there was no violation of the secret ballot provision although the number of each member’s ballot was recorded next to his name in the dues ledger, and the opposition poll watcher recorded the identity of each voter in numerical order. The Department argued unsuccessfully that the mere possibility of discovering the way a man voted was a sufficient violation of the law, and that the word “cannot” in § 3(k) of the law suggested that the right was absolute. In Shultz v. Local 420, Aluminum Workers, 74 L.R.R.M. 2281 (N.D.N.Y. 1970), the court also refused to find a breach of the secret ballot provision even where men had marked their ballots in the open without the use of voting booths.

289. Absentee ballots may be necessary if members who live far from the polling place are to be given a reasonable opportunity to vote. Thus courts have found Title IV violations when absentee ballots were not provided for members at sea during an election. Wirtz v. National Maritime Union, 284 F. Supp. 47 (S.D.N.Y.), aff’d, 399 F.2d 544 (2d Cir. 1968); Goldberg v. Marine Cooks Union, 294 F. Supp. 844, 845 (N.D. Cal. 1962); contra, Wirtz v. Local 169, Hod Carriers, 246 F. Supp. 741 (D. Nev. 1965) (members living 80 to 350 miles from polling place found not guaranteed a right to absentee ballots); Hodgson v. Local 920, Teamsters, 327 F. Supp. 1284 (E.D. Tex. 1971) (holding polls open for three days found preferable to providing absentee ballots).

Complainant union members H, I, and S claimed members casting absentee ballots were often intimidated by union officials when they obtained the ballots. Similar problems were found in the 1970 United Mine Workers’ District 5 election, N.Y. Times, Feb. 20, 1971, at 52, col. 1. Even if members are not intimidated on receipt of the ballot, they may doubt the secrecy of their vote once the ballot is returned and thus fear to vote against incumbents: Interview with complainant union attorney M. The possibility of tampering with returned ballots is high as with all mail ballots; the DOL found many questionable absentee ballots in the 1970 District 5 election. N.Y. Times, Feb. 20, 1971, at 52, col. 1. Thus, the precautions against misuse of mail ballots, as outlined at p. 469 and note 278 supra, are also relevant to absentee ballots.

290. Use of third parties to oversee election procedures is of limited utility in unions where supposedly neutral third parties are distrusted. Although some interviewees (complainant union member B and union officers B and K) trusted organizations such as the Honest Ballot Association or American Arbitration Association or the union bank or accounting firm, others (complainant union members I and S, union attorneys M, O, and II and union officers M and N) thought these groups were often either incompetent or in league with incumbent officers. For two cases involving misdoing by third parties conducting elections, see Wirtz v. Guild of Variety Artists, 267 F. Supp. 527 (S.D.N.Y. 1967) and Vestal v. Teamsters Union, 245 F. Supp. 623, 624-25 (M.D. Tenn. 1965). This distrust led union officer M and union attorney II to prefer government supervision. One interviewee (complainant union member A) noted, however, that an election in his union was handled very satisfactorily by the industrial relations department of Loyola University. When third parties cannot be trusted in running an election, it seems necessary to allow observers of all candidates to be available at all points in the ballot process.
Finally, non-union members should be permitted to act as observers.

III. Administrative Enforcement of LMRDA Rights

In designing a structure to enforce the election rights provided by the LMRDA, Congress was presented with a number of alternatives. It could have relied upon the union, an administrative agency, or the courts. Relief could have been made available either before or after the election was completed. Responsibility for uncovering and alleging violations could have been given to union members or to government overseers.

To some extent, Congress adopted all of these approaches. With respect to enforcement of Title IV, which provides the major electoral safeguards, a structure was created in which an aggrieved union member, upon completion of the election and after first exhausting the appeals process of his union, complains to the Department of Labor which then has the exclusive authority to sue in federal court to have the election set aside. The court, upon a finding of statutory violations and a determination that those violations "may have affected" the election outcome, will invalidate the challenged election and order a new election under departmental supervision.

291. In the 1969 Mineworkers election, the Yablonski forces attempted to train their observers by printing a booklet on election day procedures and conducting classes for observers. They printed their own booklet after they were unable to get an adequate number of copies of the DOL publication. This may indicate that DOL was not aware of the potential use of the manual as a handbook for observers. Interview with complainant attorney E.

292. The DOL has approved but not required this practice. U.S. Dep't of Labor Release, BLMR-41/USDL-4438 (March 14, 1961).


(a) A member of a labor organization—

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body; or

(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation, may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 481 of this title (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote...
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Congressional adoption of this administrative-judicial mechanism for enforcing Title IV election rights involved a balance between two sets of competing interests: first, the conflict between effective governmental intervention and comprehensive union self-governance; second, the conflict between the individual interests of union members and the public interest in honest but effective unionism.

upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this subchapter and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

(c) If, upon a preponderance of the evidence after a trial upon the merits, the court finds—

(1) that an election has not been held within the time prescribed by section 481 of this title, or

(2) that the violation of section 481 of this title may have affected the outcome of an election,

the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. The Secretary shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization. If the proceeding is for the removal of officers pursuant to subsection (h) of section 481 of this title, the Secretary shall certify the results of the vote and the court shall enter a decree declaring whether such persons have been removed as officers of the labor organization.

(d) An order directing an election, dismissing a complaint, or designating elected officers of a labor organization shall be appealable in the same manner as the final judgment in a civil action, but an order directing an election shall not be stayed pending appeal.

294. The findings of labor corruption and autocratic rule made by the McClellan hearings in 1957-58 convinced Congress that some form of federal intervention was required. Senate Comm. on Improper Activities in the Labor or Management Field, First Interim Report, S. Rep. No. 1417, 85th Cong., 2d Sess. (1957); Second Interim Report, S. Rep. No. 621, 86th Cong., 1st Sess. (1959). Yet there was great concern that such intervention not undermine union independence. The Senate report accompanying a bill which served as a precursor to the LMRDA stated that there were three principles followed in writing the legislation. The first was:

The committee recognized the desirability of minimum interference by Government in the internal affairs of any private organization. Trade unions have made a commendable effort to correct internal abuses; hence the committee believes that only essential standards should be imposed by legislation. Moreover, in establishing and enforcing statutory standards great care should be taken not to undermine union self-government or weaken unions in their role as collective bargaining agents.


295. Initially the DOL was to act merely to vindicate the statutory rights of individual union members. This was the position adopted in the debates by Senator John F. Kennedy:

In the bill we provide the right to appeal to the Secretary of Labor, whenever a member believes that his rights, as provided in the bill in the case of an election, have been denied to him. Then the Secretary of Labor in effect becomes the union member's lawyer. Such a provision is infinitely stronger than any provision now in effect.

104 Cong. Rec. 10947 (1958). But very quickly, at least some members of Congress began to foresee that the Department would be responsive to broader public interests which might conflict with those of the individual complainant. Senator Goldwater, commenting on public enforcement of Title IV, stated:

Since the election standards are designed to insure honest elections for the benefit of all union members as a matter of public policy, their violation is a matter of public rather than exclusively individual concern . . . .

The enforcement structure in § 402 of the Act accommodates these competing considerations in uneasy compromise. The tension between union self-correction and government intervention is reflected by the fact that the DOL cannot sue for a new election until after the internal remedies within the union have either been exhausted or invoked for three months without obtaining a final decision on the complaint. The tension between individual rights and the public interest is theoretically reconciled by providing for DOL action, but only after a request by an individual union member.

In operating this enforcement structure, a natural reluctance of the DOL to engage in formal litigation has tipped both of these delicate balances. The Department has adopted an administrative stance which emphasizes negotiated compliance with LMRDA requirements. The Department's procedures place far greater reliance on the internal union appeals process than on litigation and emphasize promotion of the DOL's conception of the public interest rather than enforcement of individual rights.

An analysis of the Title IV enforcement process can best be conducted by describing the procedures involved at each of the six stages of a Title IV suit. These stages are: (a) the initiation phase, in which a union member brings a violation to the attention of his union; (b) the exhaustion phase, in which the union deals with the complaint through its established appeals structure; (c) the investigation phase, in which the DOL intervenes to find evidence of violations and to seek a voluntary settlement with the union if the allegations are confirmed; (d) the prosecution phase, in which the DOL determines whether litigation is appropriate if voluntary settlement has not been achieved; (e) the adjudication phase, in which the litigation is terminated either by stipulation between the parties or by court decision; and (f) the remedial action phase, in which the DOL supervises a new election pursuant either to stipulation or court decision.

A. The Initiation Phase

The LMRDA designates the individual member as the initiator of a § 402 action. The forum to which his protest is directed is the

297. Id.
298. The statute specifies merely that "a member of a labor organization" may bring such a complaint. 29 U.S.C. § 482(a) (1970). The published regulations of the Department, 29 C.F.R. § 452.15(a) (1970), rephrase this to read "any member" of a labor
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union itself. Although the statute specifies no role for the DOL in this initial phase of the enforcement process, the Department may nonetheless become involved.

The administrative authority under the statute, vested in the Secretary, has been delegated within the Department primarily to the Office of Labor-Management and Welfare Pension Reports (LMWP), headed by a Director and under the general supervision of the Assistant Secretary for Labor-Management Relations. The LMWP has established a field staff of twenty-four Area Offices and twelve Resident Compliance Offices, grouped administratively under six Regional LMWP Offices. These offices are the focus of DOL activities during the initiation phase.

1. Pre-Election Advisement of Complainants

When violations of Title IV become apparent before balloting, a union member may file a pre-election protest with the union. In addition, he may independently consult the nearest LMWP field office for advice. The Area LMWP Offices in fact receive many pre-election organization, and the DOL Interpretative Manual specifically rejects limiting complainant status to members who voted in contested elections, members who were candidates for office, or members who were actually deprived of Title IV rights. U.S. DEPT. OF LABOR, LMRDA INTERPRETATIVE MANUAL §§ 473.650, 474.202 (1970). This position has been affirmed in the courts. Wirtz v. Local Union 57, Operating Eng'rs (unreported case cited in INTERPRETATIVE MANUAL, supra, at § 474.202); Wirtz v. National Maritime Union, 284 F. Supp. 47, 58 (S.D.N.Y.), aff'd, 399 F.2d 544 (2d Cir. 1968). In addition, courts have extended the right to bring a complaint to members on leave from the union, Wirtz v. Independent Petroleum Workers, 307 F. Supp. 462, 468 (N.D. Ind. 1969), and members unlawfully expelled before the contested election, Wirtz v. Local 1377, IBEW, 40 L.R.R.M. 2029, 2031 (N.D. Ohio, 1966). The Interpretative Manual extends this latter ruling to include members suspended and expelled from membership after the contested election as well. INTERPRETATIVE MANUAL, supra, at § 474.200.


300. By delegation from the Secretary, the Director is authorized to “issue interpretations on the advice of the Solicitor, with respect to those sections of the Act for which the Secretary of Labor has responsibility and with respect to regulations which the Secretary has promulgated thereunder; authorize and institute investigations and inquiries the Secretary is empowered to institute with respect to violations of the Act; to issue orders to compel the attendance and testimony of witnesses or the production of documents; and to make findings of fact and decisions necessary to carry out the duties and functions vested in him.” SUMMARY OF OPERATIONS, 1960, supra note 299, at 54.

301. An Area LMWP Office may have anywhere from three (Seattle) to thirty-four (New York) professionals attached to it. See LMSA Field Office Staffing, June 14, 1970 (on file at U.S. Dept of Labor, Office of LMWP, Silver Spring, Md.).

302. A Resident Compliance Office contains a single professional staff member. Such an office is established in an area where there is not sufficient activity to require an Area Office, yet the presence of a professional staff person is required to handle any investigations that may arise. Interview with Department of Labor Official A.

303. For the location of the various LMWP Field Offices, see LMWP—Field Directory (1970) (on file at U.S. Dept of Labor, Office of LMWP, Silver Spring, Md.).
protests. The standard LMWP practice is to advise the complainant that the Department cannot act until the election has been held and the complainant has complied with the statute's exhaustion requirement. If the protest involves rights that may be enforceable before the election under other sections of the statute, the complainant will be so informed. But no legal advice is given by the Department. Instead, the complainant is referred to the local bar association for further information or legal counsel.

The LMWP field personnel also respond to such complaints by notifying the union that a charge of improper conduct has been received. The usual procedure is for the Area LMWP Office to send a formal letter to the union referring the union to the election requirements of Title IV of the Act. In some cases the union is contacted informally and advised of the specific charges. The frequency of this informal communication depends on the nature of the violation alleged and the degree of contact that has previously existed between the union and the Area Office.

304. Six of the eight Area LMWP Offices contacted indicated that such pre-election protests were received. One office stated that it received "quite a few" such complaints and a second suggested that it received them "whenever there is a contest." Fewest complaints were received at an office with over 3,700 labor organizations in the area—only five complaints annually. Other offices indicated greater pre-election involvement. One with 600 elections annually received twelve complaints in 1969. A second with 800 labor elections within its geographic area received sixty to eighty pre-election protests. A third area office with about 500 elections annually received 100 complaints in 1969.

305. All eight of the Area LMWP Offices contacted indicated that this was the standard practice as regards the complaining party. None of the offices indicated that it would go farther and conduct a preliminary investigation to determine if the complaint had any merit. One office did indicate that it would aid the complainant in formulating his objections to the election in legal terms, but this was the extent of any LMWP involvement at this stage.

306. Notification is prescribed as standard procedure by the Department's LMWP Field Staff handbook. Interview with Department of Labor Official A.

307. The letter has the following form:

We understand that your organization is conducting an election of officers in the near future. As you know, such elections must conform to certain provisions of the Labor-Management Reporting and Disclosure Act of 1959.

The enclosed booklet, Electing Union Officers, has been prepared by our Technical Assistance Division to explain the requirements of the law. It also contains a number of the Department's interpretations of the Act's election provisions.

You may be particularly interested in the Election Procedures Check List on pages 54-55. This will help your organization to determine if all the requirements of the law have been met.

We will be happy to answer any questions you may have concerning the provisions of the Act.

308. Several offices indicated that this procedure would be resorted to only when the violation alleged involved a substantial violation of the statute, one that would effectively be per se and clearly warrant a rerun election if a post-election complaint were raised. Election day procedures employing unreasonable requirements that denied people the right to vote or failed to insure a secret ballot were suggested as such per se violations. Informing the union gives the union a chance to "head off" the violation and to avoid the cost and embarrassment of a rerun election. A regional LMWP office suggested
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Whether the union is notified by formal or informal contact, the Area Office will offer its "technical assistance." This offer is accepted in a minority of cases and in any event involves only informal advice on proper conduct of the election. Occasionally the office will seek to mediate the protest and meet with the parties to the dispute either separately or in joint conference.

2. Pre-Clearance of Union Procedures

Several union attorneys indicated that they contact LMWP prior to the institution of a new electoral procedure to insure that it does not violate the statute. While the LMWP does not consider the opinions it gives in such situations binding, Area Offices will render advisory opinions and may encourage pre-clearance. While some pre-clearance occurs at the local union level, with advice given by the appropriate Area LMWP Office, most of it is handled by the national union counsel directly contacting the main LMWP Office in Washington.

that such informal consultation was more common where the offending union had previously had contact with LMWP. No consultation or clearance from either the Regional or Washington offices of LMWP is required before an area office undertakes such informal advisement.

309. In one Area Office the offer of technical assistance was accepted only about twenty per cent of the time.

310. Only one Area LMWP Office contacted indicated that it used this practice to help settle disputes, and there separate conferences were employed. But the two regional offices contacted suggested that all the Area Offices within their jurisdictions resorted to this approach, though infrequently. The office is more likely to involve itself in this way if it has had prior contact with the union involved and the union is located nearby, so that transportation is not a burden to the union officers or the complainant. The absolute amount of this mediation by the Department is apparently quite small. Only four of the thirty-five union attorneys contacted indicated that the Department was willing to contact the parties involved in an election dispute and mediate the problem.

311. Thirteen of the thirty-five union attorneys contacted indicated that the Department of Labor was willing to give informal advice on the proper conduct of an upcoming election. Three indicated that the Department would go further and give a formal advisory opinion on the legality of a particular procedure.

312. In one region, the Regional Director of LMWP met with many of the labor lawyers in the area and encouraged them to consult the Department on the legality of specific electoral procedures. Interview with union attorney O. But in at least one area, the LMWP office involved has refused to pre-clear election procedures. Interview with union officer K. Seven of the eight Area LMWP Offices contacted indicated that they give technical assistance to the union before an election; five indicated that they clear certain procedures before they are used in an election; and three indicated that they aid in the actual drafting of bylaws concerning election or equivalent constitutional provisions regarding elections.

313. Where pre-clearance is sought from an Area LMWP Office, that office may on its own initiative contact the Regional or Washington office if it is uncertain as to the legality of a particular practice. Much of the pre-clearance is, however, taken directly to the Washington LMWP Office, usually by counsel to the national union.

Where a local union retains its own attorney, a question on election procedure may be brought to him, and he in turn will usually consult the appropriate Area LMWP
The role which the Department has adopted in the pre-election phase is consistent with its general negotiated compliance approach to Title IV enforcement. Both devices give the union an opportunity to avoid questionable election procedures and later suits to set aside the election. The notice given to the union is informational in tone—the union is not threatened with either a pre-election investigation or a post-election suit if corrections are not made.\textsuperscript{314} No effort is made by the Department to ascertain whether remedial action has been taken by the union subsequent to the notice. Information from the pre-election complaint is placed in a separate file which is elevated to the status of a formal case file only if a valid complaint is received by the Department after the election.\textsuperscript{315} If no such complaint is received, the case is not re-opened.\textsuperscript{316}

3. \textit{Pre-Election Investigation}

The DOL has adopted a rather passive pre-election stance, but there exists a statutory basis for a much more active role. Although the statute provides for an investigation by the Secretary as part of the standard § 402 enforcement mechanism,\textsuperscript{317} there is an independent basis for an investigation as well. Section 601 of the statute permits the Secretary to investigate "when he believes it necessary in order to determine whether any person has violated or is about to violate any provision of the Act."\textsuperscript{318} This section would permit investigation

Office. If the local does not have an attorney, then the question will most likely be referred to the local's national union representative who in turn will consult the national's legal counsel. His contact will most likely be with the Central LMWP Office in Washington. Interviews with union attorneys X, Y, and AA.

314. The most stringent warning given, and this only informally, is that the union is possibly in violation of the Act and that if there is a post-election complaint, it may lead to an investigation and perhaps a court suit to overturn the election. No pre-election investigation is threatened because the Department's position is that it has no power to conduct such an investigation. See pp. 478-80 infra. No post-election investigation is threatened because the Department will conduct such an investigation only upon receipt of a valid formal complaint, and such a complaint may not be forthcoming. See pp. 485-86 infra.

315. Three of the eight Area LMWP Offices contacted indicated that this was standard practice for pre-election complaints.

316. Interview with Department of Labor Official A.


318. The Secretary shall have power when he believes it necessary in order to determine whether any person has violated or is about to violate any provision of this chapter (except subchapter II of this chapter) to make an investigation and in connection therewith he may enter such places and inspect such records and accounts and question such persons as he may deem necessary to enable him to determine the facts relative thereto. The Secretary may report to interested persons or officials concerning the facts required to be shown in any report required by this chapter and concerning the reasons for failure or refusal to file such a report or any other matter which he deems to be appropriate as a result of such an investigation. LMRDA § 601(a), 29 U.S.C. § 521(a) (1970).
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of a possible Title IV violation without a prior complaint by a union member during any phase of the election process. Although the Secretary could not bring a § 402 enforcement proceeding based directly on his findings, the § 601 provision does permit disclosure "to interested persons" of the results of the investigation. Such publication might lead to self-correction by the union, or prompt a union member to initiate a formal post-election complaint satisfying the requirements of § 402. Information obtained from a prompt pre-election investigation might also aid the DOL in its later determination of whether or not to sue under § 402.

The DOL, however, has taken the position that an election investigation will not be initiated until the prerequisites of § 402 have been satisfied—the filing of a complaint by a union member who has exhausted his internal remedies.319 This stance precludes pre-election intervention, since the exhaustion requirement has been construed to refer exclusively to post-election invocation of the union appeals structure.320

The DOL position of pre-election abstention has recently come under criticism. In 1969, Joseph A. Yablonski asked the Department to investigate under § 601 alleged pre-balloting violations of the LMRDA by his opponent, W.A. Boyle.321 The Department refused. In defending this refusal before the Senate Subcommittee on Labor, then Secretary of Labor George P. Shultz emphasized the DOL's consistent practice of refusing to investigate prior to balloting. While he admitted that such abstention had previously been considered a matter of policy subject to exception, the Secretary now asserted that it was required by "sound statutory construction" and "consistent application of the principles that guided the Congress in enacting the statute."322 Shultz

319. Interview with Department of Labor Official A.
320. Various courts have restricted the exhaustion of remedies required by the statute to the exhaustion of post-election remedies. Wirtz v. National Maritime Union, 284 F. Supp. 47, 58 (S.D.N.Y.), aff'd, 399 F.2d 544 (2d Cir. 1969); Wirtz v. Local 73, Teamsters, 257 F. Supp. 784, 792 (N.D. Ohio, 1966); Wirtz v. Local 30, Operating Eng'rs, 242 F. Supp. 631, 633 (S.D.N.Y. 1965), vacated as moot, 366 F.2d 438 (2d Cir. 1966). A similar position is taken by the Department of Labor, LMWP. "The three months start to run from the time the member sends his appeal to the union. He must have waited until the election was held, and the result announced before his complaint was filed with the union, under the Department's rules." Interview with Henry Queen, as reported in Daily Labor Report, Washington Daily Reporter System, March 22, 1965, No. 54:A-2.
321. The request for an investigation was made on the grounds that only by such an investigation could the Department "discourage further illegal conduct, and obtain evidence which would be necessary to petition a court to set aside the election if its outcome were subsequently found to be affected by improper activities." Hearings on UMW Election, supra note 2, at 1 (Feb. 5, 1970) (statement of Senator Williams).
322. Id. at 339-40 (May 4, 1970) (testimony of George P. Shultz).
maintained that DOL investigation prior to balloting would influence the outcome of the election because it would “publicize the activities of one faction in an election in order to assist the campaign of the other,” and that such influence was beyond the scope of the “limited intervention policy” of § 402 and “repugnant to a healthy independence of unions from governmental interference in their internal affairs.”

The Secretary nevertheless suggested that a § 601 investigation might be permissible in cases where the investigation would not “unduly influence” the election outcome.

_Evaluation and Recommendations._ Preventing a violation of the LMRDA election provisions is clearly preferable to remedying a breach, and the pre-clearance and technical assistance activities of DOL are perhaps its best opportunity to insure union compliance with Title IV guarantees. These activities, currently conducted informally and with varying degrees of zeal, should be expanded; individual area offices should attempt to cultivate the kinds of informal contacts with union officials which facilitate such consultation.

One problem that might attend expanded use of these procedures is a lack of uniformity in the informal opinions of the LMWP Area Offices. This can be remedied by improving communication between the Washington office and the various LMWP field staffs and by referring the more difficult problems to Washington. Since the primary advantage of the pre-clearance process is its informality, the forum of consultation should remain at the Area Office level; decentralization would appear crucial to achieving maximum consultation with minimum delay.

Simple notice to the union that a complaint has been received by an LMWP office may encourage voluntary corrective action. At least some complainant union members, however, viewed the notice not as a means of settling disputes but as a warning to the union to “cover its tracks.” For this reason, notice should be supplemented by con-

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323. _Id._ at 340.
324. A limitation of our investigative power under section 601 in election cases to circumstances which will not unduly influence the outcome of the election is a rational harmonizing of these two different provisions of the statute [the procedural requirements for an investigation under § 402 and the investigatory authority in § 601]. _Id._
325. Informal pre-clearance may be encouraged by the recent reorganization of the Labor-Management Services Administration (LMSA) of which LMWP is a part. Now the area administrator, in addition to his LMWP duties, will have responsibility for other labor activities which will bring him in increasing contact with union officials. Interview with Department of Labor Official E.
326. Interviews with complainant union members M and N, and complainant attorney E. One of the complainants alleged that an LMWP office, in contacting the union, dis-
ferences with union officials, either alone or with the complainant, to encourage the resolution of election disputes. Both attorneys and union members expressed confidence that there was a substantial potential for settlement of such disputes before the election.

In these ways, the Department could extend its activities prior to a formal complaint without departing from its general reliance on union remedial processes. Intervention under § 601, however, would begin to move the Department outside this role, and this is the stated reason for avoiding such pre-election activity. Even accepting Secretary Shultz's rationale for not using the Department's full enforcement powers, "undue influence" in favor of particular candidates could be precluded by limiting pre-election action to situations where a request for intervention is made by both sides. This intervention could take two forms. First, the Department could agree to supervise an election upon joint request of the principal contestants. Second, the Department could, on joint request, limit its role to one of observation.

closed the complainant's identity to union officials. The Department's policy is that the name of the complainant is never disclosed. Interview with Department of Labor Official A. This is crucial, for if the identity of the complainant is revealed, he may become the object of coercion or intimidation.

Such joint conferences between LMWP, the complainant, and union officials would not be possible if the complainant objected to his identity being revealed to the union or if there were a danger of reprisal being directed against him.

Nine of the twenty union officers contacted indicated a willingness to settle disputes concerning election rights and remedies. Two more suggested there were some matters which they would not be inclined to settle. Union attorneys also indicated that the leadership would settle such matters. Nineteen of the thirty-five interviewed indicated a positive willingness to settle, and none indicated adamant opposition. The complainant union members contacted were more skeptical, with only two indicating that union leaders were willing to settle election disputes and two more stating that the union would settle only certain questions. However, nine of the complainants suggested that, while reluctant to settle election questions, union leaders could be pushed to comply voluntarily. Only eleven indicated that union officials adamantly opposed any settlement of election matters.

The prospect of settling an issue pre-election within the union may be somewhat dependent on the nature of the violation. If it is a non-constitutional issue of procedure, caused by ignorance on the part of the union officials, then the prospects of settlement are high. If it is a constitutional issue requiring formal amendment procedures, or if the practice is inspired by malice rather than neglect, then the prospects of pre-election resolution are small.

However, all requests for supervision by the DOL personnel have been turned down on the grounds that "it has been the Department's consistent policy not to become involved in the initial conduct or supervision of an election of labor organization officers." On August 17, 1970, Mr. Michael Budzanoski, President of District 5 of the United Mine Workers, addressed a request to the DOL for supervision of the upcoming district election. His request was rejected in a letter dated August 26, 1970, from W. J. Usery, Jr., Assistant Secretary of Labor, from which the above quotation was taken.

Such supervision might be advisable if requested independently by a significant portion of the union membership. A provision authorizing Department supervision in such circumstances was proposed by Rep. Braden in 1959, H.R. 4473, 86th Cong., 1st Sess. § 101(a)(9)(A). This provision would have permitted outside supervision of union elections if requested by ten per cent of the members.
both to gather evidence for a possible post-election suit and, hopefully, to deter violations of the Act by its presence.331 Both activities would appear to be permissible even under Secretary Shultz's standard, if in response to a joint request by the contestants.332 The term "investigation" in § 601 would have to be read broadly to cover actual supervision, but it would seem clearly to cover the more limited role of departmental observation.

Without a joint request, the Department should nevertheless consider intervention on a showing of a high probability that the statute is being violated in a fashion that will inevitably taint the election to a degree sufficient to satisfy the "may have affected the outcome" test.333 Such intervention should follow more conventional notions of "investigation." The policy of § 402 can be respected by waiting until a request for pre-election intervention has been made by a complaining union member, by notifying the union that such action is under consideration, and by offering the advice and technical assistance

331. If the Department were concerned that its supervision would not be complied with voluntarily by the union candidates, it could limit its role to providing observers. Such a request was made to the Department in connection with a recent election of officers for District 50 of the Mineworkers. This request was also denied, on the grounds that the Department had no business intervening in an election prior to its conduct, even to the extent of providing observers, and even when so requested by both candidates for the principal office. Interview with Department of Labor Official A. Other requests for such pre-election intervention have been made in the past and rejected. Interviews with complainant attorneys I and O, and union attorney T.

332. The concern of the Secretary was that intervention would redound to the benefit of one or the other of the candidates. See p. 480 supra. Yet any factual discoveries made by the Department could be withheld until after the election so that any adverse impact upon the election outcome from this source could be forestalled. The Secretary's intervention could still bias the election if the mere presence of DOL personnel caused the rank and file to react unfavorably to the complaining party or his opponent. If both candidates request the intervention, however, this source of bias is eliminated.

One complaint expressed by members of the Department was that pre-election supervision or observation would put too great a strain on their manpower resources. Yet by limiting such intervention to closely contested elections, the Department would probably be merely anticipating later Title IV investigation, litigation, and supervision of a rerun. In both the District 50 and the District 5 cases, where the Department declined to supervise or observe the election, a Title IV action has resulted. Interview with Department of Labor Official A.

333. This was also the position taken by the Chairman of the Senate Labor Subcommittee upon conclusion of the UMWA election hearings:

While I can understand the Department's long-established general policy of not conducting such investigations in advance of an election, it seems to me this policy permitted an investigation when information brought to the Secretary's attention indicates a pattern of irregularities which, if allowed to continue, will inevitably taint the election. In such cases, even though the Secretary could not actually go to court until after the election, a display of the Department's concern, manifested through investigative activity, may well serve to discourage continued violations of the law, as well as prepare evidence for later use in court, should that be necessary.

I do not believe that Congress intended that the Secretary's hands should be tied in the fashion of the Secretary's current interpretation.

Letter from Harrison A. Williams, Jr., Chairman, to members of the Senate Subcommittee on Labor, June 24, 1970.
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of the Department to aid in voluntary self-correction. Only when these efforts give no indication of remediing the abuse should the Department intervene.\textsuperscript{324} The Department's desire to avoid influencing the outcome of an election is legitimate, but it should not be assumed that it consistently prevails over other concerns.\textsuperscript{335} The investigatory presence of the DOL may be the most effective means of discouraging Title IV violations, in which case the outcome will be influenced in the direction of fairness. Pre-election investigation may also be the only way to garner sufficient evidence for a subsequent \textsection{402} suit.

B. \textit{The Exhaustion Phase}

A member may be permitted by union bylaws to initiate an election appeal within his union prior to actual balloting;\textsuperscript{326} but to be eligible to file a formal complaint with the Secretary of Labor under \textsection{402}\textsuperscript{337} the member must invoke the appeals structure of the union again after the election.\textsuperscript{338} After a final decision on his post-election appeal to

\textsuperscript{324} Union attorneys generally disliked \textsection{601} intervention. Sixteen of the thirty-five union attorneys contacted opposed pre-election investigation by the Department, and only seven favored it.
\textsuperscript{335} Even if the request is made by only one of the candidates, the effect it will have on the outcome is problematical. The complaining candidate will benefit from any suspicion of wrongdoing cast upon his opponent by the intervention, but he is also the victim of a general distaste among the rank and file for resort to an "outsider" to settle an internal election dispute. Although our results are sparse on this question, they indicate that the complaining candidate may on balance be harmed by a pre-election appeal to the Department. Five of the thirty-one complainant union members indicated that the rank and file would react adversely to resort to an "outsider," and only three stated that this tactic would aid the complaining candidate by casting suspicion of wrongdoing upon his opponent. Three said that the intervention would have no effect. Five of the twenty union officers indicated that such intervention would have no effect on the membership; four stated that it would hurt the complaining party; and only two suggested that it would hurt the non-complaining candidate.

This finding, if generalizable, would indicate that the complaining party undergoes a great risk in requesting intervention by the Department of Labor. This risk would serve to deter intervention requests in all but the most serious instances in which the complaining party foresees little chance of obtaining a fair election. Thus the danger that the Department would become a "political football" for intervention-minded candidates seems small.

\textsuperscript{336} See pp. 531-33 \textit{infra}.

\textsuperscript{337} 29 U.S.C. \textsection{482} (1970).

\textsuperscript{338} Exhaustion of pre-election remedies will not satisfy the requirements of \textsection{402(a)}.

"There is nothing in Title IV of the Act that requires a union member to wait until an election has been held before invoking internal remedies. However, once the election is completed the member must again invoke his internal remedies." \textit{Interpretative Manual}, supra note 298, at \textsection{474.305}.

By "completed," the Department means that the complainant "must have waited until the election was held, and the result announced." Only then may he file his complaint with the union and have it considered an "invocation" of union remedies within the meaning of \textsection{402(a)}. Interview with Henry Queen, Chief of LMWP's Branch of Elections and Trusteeships, reported in \textit{Daily Labor Report}, \textit{Washington Daily Reporter System}, March 22, 1965, No. 54:A-1, at A-2.
the union, or after having waited for such disposition for three months, the complaining party has one month in which to file with the DOL.\textsuperscript{330}

For at least three months after the election,\textsuperscript{340} then, a complaint initiated by a union member remains exclusively within the province of the union appeals structure.\textsuperscript{341} During this period of internal union disposition, the activities of the Department are minimal. If a complainant comes to an LMWP office during the exhaustion phase he will be informed of his rights under the LMRDA and advised that he must exhaust his union remedies.\textsuperscript{342} The appeal requirements in the union's constitution may be interpreted to the complaining party, and LMWP

\begin{itemize}
\item \textsuperscript{339} The Department has narrowly construed these alternative requirements of internal exhaustion. Thus when the initial three months requirement has passed, the complainant must decide either to file with the Secretary within one month's time or wait until completion of the internal exhaustion. Once four calendar months have passed from the time of invocation of the internal union remedies, the complainant is barred from filing with the Secretary until the gamut of internal appeals has been run—often including even an international convention which may be many years in the future. See note 580 infra. Only then does the complainant get a second opportunity to file with the Secretary, and then within the same one calendar month time limit. 29 C.F.R. § 452.15(b) (1970); INTERPRETATIVE MANUAL, supra note 298, at § 474.500.
\item \textsuperscript{340} The one calendar month within which the complaint must be filed with the Secretary has been construed to be "the time from any day of any of the months . . . to the corresponding day (if any; if not to the last day) of the next month." \textit{Id.} at § 474.520. Provision is made for extending the time of filing if the last day falls on a non-business day to the next regular business day. Wirtz v. Local 169, Hod Carriers, 246 F. Supp. 741, 751 (D. Nev. 1965). The date of receipt of the complaint "into the custody of an employee of the Department of Labor in the mail room" is controlling in determining the timeliness of the filing. \textit{Id.} The Department has declared untimely any complaints that fall outside the one month limit as thus construed. "Thus where a complainant invoked his internal union remedies on September 26, 1962, and, not having obtained a final decision within three calendar months thereafter, mailed a formal letter of complaint to the Secretary on January 25, 1963, which was received on January 28, 1963, It was concluded that the complaint was untimely filed." INTERPRETATIVE MANUAL, supra at § 474.510. See also Shultz v. District 19, Steelworkers, 319 F. Supp. 1172 (W.D. Pa. 1970).
\item \textsuperscript{341} Should the union give a final decision within the three-month time period, a complainant would then be free to appeal to the Department. But rare is the case when such prompt response is obtained from the union. Most internal appeals are painfully protracted, and the apparent futility of receiving a final decision within the statutory three-month period, does not permit the Secretary to entertain the complaint prior to the expiration of the three-month minimum time span. INTERPRETATIVE MANUAL, supra note 298, at § 473.200.
\item The Act does not specify a time limit within which the complainant must initiate his internal union post-election remedies, but on the basis of a "Congressional intent that election protests be expeditiously resolved," the Department has imposed a requirement that a complainant initiate internal remedies within a "reasonable time." \textit{Id.} at § 472.100. Further, failure to invoke internal remedies within a time limit specified by the union has been held to bar the Department from taking cognizance of the complaint where the delay was not caused by fraud or misrepresentation on the part of the union. \textit{Id.} at § 472.105.
\item To the extent that the complainant delays in bringing his complaint to the attention of the union, within the implied "reasonable time" of the statute or within the specific time limit of the union constitution, the minimum period of exclusive union disposition is extended.
\item \textsuperscript{342} This was the standard practice of the eight Area LMWP Offices contacted.
\end{itemize}
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personnel may aid him in perfecting his complaint. As with a pre-election complaint, information obtained from the complaining individual will be kept in a separate file to be used only if a valid formal complaint is subsequently received. No attempt is made to follow up on a pre-exhaustion complaint if no subsequent formal protest is filed.

During the exhaustion phase, the union appeals structure is permitted to operate without the slightest interference. Early in the history of LMRDA enforcement, the Department began its investigation on the basis of a pre-exhaustion "protest" challenging a union election as long as the election had been completed. After only one year, however, this policy was altered and LMWP began requiring a "valid formal complaint" which met the exhaustion requirement before intervening. This change in policy may have been part of the decision to refrain from exercising the broad discretionary powers of § 601 in favor of the narrower investigatory powers of § 402. Two reasons were given for this self-limitation: (1) Investigations based on mere "protests" were not disclosing violations actionable under § 402, either because no violations were found or because the viola-

343. Two of the eight LMWP offices contacted indicated that they assisted the complaining union member in this way. The courts have permitted this type of DOL activity. In two cases defendants pleaded unlawful solicitation of complaints from the objecting union members because compliance officers aided the complainants in perfecting their appeals internally and to the Department. Both arguments failed. Wirtz v. Local 1622, Carpenters, 285 F. Supp. 455 (N.D. Cal. 1968); Wirtz v. Local 169, Hod Carriers, 59 L.R.R.M. 2286 (D. Nev. 1965). In the former case, the compliance officers actually drafted the complaint to the Secretary of Labor.

344. Nor is any attempt made to follow up on pre-election complaints to see if the union was able to resolve the dispute and satisfy the complaining party. As with the pre-exhaustion complaints, if a valid formal complaint is not lodged against the election, the Department seems to assume that the dispute was satisfactorily settled by the union.

345. While there is no firm evidence, it is possible that the pre-clearance activity referred to in connection with the pre-election activities of the Department in fact involves union attorneys sounding out the Department on how it views particular election procedures already employed in elections which have become the subject of protest within the union appeals structure. There is no indication that the Department attempts to "weed out" these inquiries or to bring special pressure to bear to gain a favorable disposition from the union appeals structure.

346. Interview with Department of Labor Official A.


348. During the first full year of operation following passage of the Act, more than half of the cases were closed after investigations revealed that alleged Title IV
tions found were of Title I, and these are subject to neither investigation under § 601 nor enforcement under § 402.\(^{349}\) (2) The fruits of the investigation could not be used in litigation until a complaint satisfying the requirement of internal exhaustion specified in § 402 (a)\(^{350}\) was filed. It therefore seemed pointless to the DOL to pursue an investigation which would be "worthless" if a complaint satisfying § 402 (a) were not received.

In a few rare instances, the Department has deviated from this general policy and invoked its § 601 authority to intervene prior to the receipt of a formal complaint. In three cases this intervention involved seizing ballots to avoid tampering.\(^{352}\) In two others, the Department agreed to observe the final tally of national election returns submitted by individual locals.\(^{353}\) And in another case, the Department inter-

violations were unfounded. In the second and third years [after the shift to requiring a valid formal complaint], violations were confirmed in approximately 75 per cent of the cases, while in the fourth year over 80 per cent of the cases investigated disclosed some type of title IV violation had occurred.

SUMMARY OF OPERATIONS, 1964, supra note 299, at 6.

Section 601(a) specifically exempts Title I from its general authorization to investigate concerning a violation of "any provision" of the Act. 29 U.S.C. § 521(a) (1970).

Section 402(a) of the Act limits a complaint to the Secretary to violations of the provisions of § 401 or of the election and removal provision of the union constitution and bylaws.

Section 601 only empowers the Secretary to report "to interested persons or officials" the results of an investigation.

In the 1964 election of the President of the IUE, James B. Carey was declared the elected President by a narrow margin over Paul Jennings. The ballots from the election had been deposited with the Security Storage Company, and when word was received that the Executive Board of the IUE intended to remove the ballots, the Department instituted an investigation under the "authority of section 601 of the act . . . ." IUE Interim Report, supra note 256, at 563. In conjunction with this investigation, the Department took custody of the ballots and recounted them—finding Jennings to be the winner by a large margin. Id. at 564. One day after the announcement of these findings, Carey submitted his resignation, and Jennings was installed by the union's executive board. Id. at 562.

In the 1969 election for Director of District 15, Steelworkers, the Pittsburgh Area LMWP Office received word that one of the candidate's observers had been ejected from the tally of the ballots at his local and suspected that a ballot switch was in progress. The Area LMWP Director proceeded to the local and gained possession of the ballots. They were sent to Washington for analysis, which revealed that indeed a switch had occurred. The valid ballots were tallied, and the results submitted by LMWP to the international union tellers which considered the case in conjunction with other challenges to the election. Interview with union officer N.

In the most recent case, the election of officers in District 5 of the Mineworkers, allegations of improper tampering with absentee ballots resulted again in an Area LMWP office impounding the ballots and sending them to the FBI crime laboratory for analysis. Preliminary results have been announced which confirm the allegation of at least some degree of tampering. N.Y. Times, Feb. 19, 1970, at 26, col. 2.

In the 1969 election the Department sent observers to watch a similar tally, this time
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vended shortly after the election of delegates to a convention at which
the intermediate level officers were to be elected.354 The Department,
however, has no formal guidelines as to when it will intervene under
§ 601 after balloting but before receipt of a valid formal complaint.
In his testimony before the Senate subcommittee, Secretary Shultz
erroneously cited the three ballot-tampering cases as the "sole use"
of § 601 authority.355

Evaluation and Recommendations. The DOL role during the exhaus-
tion phase is characterized by self-limitation in deference to the
internal union appeals structure. Preventive intervention is avoided
by eschewing the powers granted in § 601, which provides the basis for
considerably broader regulatory activity. Yet in some situations, action
by the DOL during the exhaustion phase might help to protect elec-
tion rights with none of the feared side effects.

The Department should consider exercising its broader powers in
the following circumstances:

(1) In situations of joint request by the parties, as in the tally obser-
vation cases, the Department should be willing to observe the tally-
ing process. Actual balloting by the rank and file will have been com-
pleted, and a request for departmental assistance is an indication that
both sides foresee a high probability of violation, yet have been un-
able to devise a satisfactory procedure of joint observation of the
tally.356

of the nominations submitted by the individual locals. This action was taken based on
the unilateral request of the incumbent, I.W. Abel. Although § 601 was not explicitly
invoked as the basis for these actions, it provides the sole grounds on which such inter-
vention could be justified. Interview with union attorney W.

354. The delegates to the convention were elected without the use of a secret ballot,
contrary to LMRDA § 401(d), 29 U.S.C. § 481(d) (1970). The Department intervened
immediately after the delegate election and prior to receiving a valid formal complaint,
justifying its action on the grounds that by the time the exhaustion requirement had
been complied with the election of intermediate officers at the convention would have
been completed. The unlawful election of delegates would have tainted this election and
required a second convention. To avoid this expense to the union, the Department in-
vestigated and gathered evidence showing at least some of the delegates had not been
elected by secret ballot. On the basis of this evidence, the union voluntarily conducted
a new delegate election using secret ballots. Interview with Department of Labor Of-
ficial A.

355. From 1959 until today, the sole use of Section 601 investigatory authority in elec-
tion cases has been to collect or preserve evidence regarding elections which have al-
ready been held and, therefore, in circumstances in which the outcome of the election
could not be affected. This, as I describe later, we were willing to do in this case
if we had received any persuasive indication that evidence was likely to be destroyed.
We have used our authority only after the balloting was done—but before the pro-
cedural requirements for a Title IV investigation had been met.
Hearings on UMW Election, supra note 2, at 340 (May 4, 1970) (testimony of George P.
Shultz).

356. In the 1985 Steelworkers election, McDonald demanded the right to have an
observer watch the tally of local returns. Abel countered this proposal with a sug-
(2) The DOL should intervene where it has substantial reason to believe that violations of the LMRDA have occurred and that a formal complaint will not be filed because of coercion by the election victors. While a failure to renew pre-election or pre-exhaustion complaints may indicate corrective action by the union, a reluctance to file a formal complaint after exhaustion may also result from intimidation or a "buy-off" of the opposition.\textsuperscript{357} In such a situation, there may be considerable utility in conducting an investigation, particularly because the DOL can disclose its findings.\textsuperscript{358} Such publication might force corrective action within the union or provoke the filing of a valid formal complaint, permitting the Department to sue under § 402. If coercion is a factor, the very presence of the Department might be a counter-force that would restore the freedom of individual members to file a complaint. Once filed, legal remedies are available to the Department to protect the complainant from further reprisal.\textsuperscript{359}

(3) While some complainant members doubted the utility of internal union appeals,\textsuperscript{360} there seemed to be little desire to circumvent them completely.\textsuperscript{361} However, such procedures are often so complex that in many instances not even an initial determination is available before the expiration of the three month waiting period.\textsuperscript{362} To spur union appeals and encourage the adoption of prompt procedures specially designed that the tally be inspected by a neutral observer. McDonald still demanded the right to have his own observer present, and Abel resisted. Only when the Department agreed to provide two observers for the tally was the deadlock broken with Abel and McDonald agreeing to supplement the Department's observers with one additional observer each. 1965 USWA Study, \textit{supra} note 214. In the 1969 election the tally of nominations covered both national and district level positions, involving about 200 candidates, all requesting observers. To avoid the unmanageability of such a massive corps of overseers, the Department was requested to provide observers. Interview with union attorney W.

\textsuperscript{357} It was suggested that many contested elections, especially at intermediate or national levels, are in fact "palace revolts" by a former administration member who breaks with top leadership. If the insurgent fails, he is likely to be given a choice staff position to bring him back "into the fold" and to avoid continued disruption in the union. Interviews with union attorney S and Department of Labor Official A. The question arises as to whether the public policy of the statute is vindicated by such a practice. No complaint will be filed with the Department, for it will be in the interests of both candidates to insure that no one "rocks the boat." It would appear unlikely that a union member would go to the Department when he knows that one of the candidates has in fact withdrawn from the contest. The election may, however, have been completely corrupt and union members deprived of their rights under the statute.\textsuperscript{358} 29 U.S.C. § 521(a) (1970).

\textsuperscript{359} See note 508 \textit{infra}.

\textsuperscript{360} Interviews with complainant union members H, I, L, and S.

\textsuperscript{361} Two attorneys did feel that the exhaustion period could be shortened. Interviews with complainant attorney I and union attorney BB. The same result can be achieved by the Department's commencement of an investigation prior to exhaustion. It will then have sufficient evidence to file a Title IV action as soon as the three month statutory period has expired, rather than waiting until that time to begin its investigation.\textsuperscript{362} See note 580 \textit{infra}.
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cially adapted to election cases, the Department should initiate an investigation prior to the three month waiting period in cases involving unions which employ appeals structures that have previously failed to give serious and expeditious consideration to election appeals.

(4) The Department should continue its present policy of intervening where necessary to preserve evidence of violations, as in the ballot stuffing cases.

C. The Investigation Phase

When a complaint is made, it is assigned to the Area LMWP Office with jurisdiction over the local. The Area Office determines whether the complaint was timely filed and at the same time instructs the Area Office with jurisdiction over the parent organization to determine whether the complainant has exhausted his internal remedies. After a finding that the complaint is both timely and in compliance with the exhaustion requirements of § 402, the Area Office having jurisdiction over the local will investigate the merits of the complaint.

The statute specifies that on receipt of a complaint satisfying the requirements of exhaustion, timeliness, and allegation of a violation, the Secretary “shall investigate such complaint . . . .” The DOL position is that such an investigation is mandatory, not discretionary, and must at least encompass each allegation in the complaint. But the scope of the investigation is not limited to the violations alleged. Although the Department has determined that § 402 pre-empts its general § 601 power to investigate until after the filing of a valid formal complaint, it relies on § 601 to prove that its investigatory powers are not predicated solely upon a complaint by a union member and therefore that the scope of its investigatory authority “is

363. See pp. 540-44 infra.
364. This policy would seem to gain some support from the recent case of Hodgson v. Local 6799, Steelworkers, 403 U.S. 333 (1971). In a footnote to the majority opinion, Justice Marshall suggested that “members should not be held to procedural niceties while seeking redress within their union, and exhaustion is not required when internal union remedies are unnecessarily complex or otherwise operate to confuse or inhibit union protestors.” Id. at 341. A similar position has been taken with respect to court suits under Title I of LMRDA. See note 650 infra.
365. See pp. 486-87 supra.
366. See note 339 supra.
367. Interview with Department of Labor Official A. The Area Office responsible for this inquiry is called the Auxiliary Area Office.
369. 29 C.F.R. § 452.16(a) (1970).
370. See p. 485 supra.
371. INTERPRETATIVE MANUAL, supra note 298, at § 475.003.
not limited to those violations complained of by an individual union member under § 402." Instead, once a formal complaint is received, the Department considers the entire election process open to inquiry.

**Evaluation and Recommendations.** The use of § 601 to expand the scope of the Department's investigatory power has been criticized by union counsel as an improper extension of its statutory authority. This use of § 601 is, to the contrary, modest, since the provision actually authorizes a total investigation at any time. Moreover, even § 402 itself arguably permits the Department to investigate any possible violation of Title IV upon filing of a valid formal complaint.

While the stated policy of the Department is that all phases of the contested election are to be investigated, four of eight LMWP Area Offices indicated that the "most substantial" allegations of the complaint were stressed in the investigation. One office suggested that this meant concentration on those areas of violation that the "courts like," that is, clear quantitative frauds which will satisfy the "may have affected" test. This office suggested that for this reason it emphasizes election day violations, and tends to dismiss misuse of funds as an inevitable prerogative of the incumbent.

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372. Id. at § 475.007. This position has been uniformly affirmed in various judicial decisions. See Wirtz v. Local 169, Hod Carriers, 246 F. Supp. 741 (D.C. Nev. 1965); Wirtz v. Local 125, Laborers, 231 F. Supp. 590 (N.D. Ohio 1964), dismissed as moot, 375 F.2d 921 (6th Cir. 1966), reversed and remanded for trial on the merits, 389 U.S. 477 (1968); Wirtz v. Local 191, Teamsters, 218 F. Supp. 885 (D. Conn.), aff'd, 321 F.2d 445 (2d Cir. 1963).

373. "The valid formal complaint may make only one charge, such as not getting notice of the election. But that is all it takes for the Department to investigate everything from the nominations to the counting of the ballots. 'Any complaint gives a jurisdictional wedge to look at the entire election...'." Interview with Henry Queen, Chief of LMWP's Branch of Elections and Trusteeships, reported in Daily Labor Report, Washington Daily Reporter System, March 22, 1965, No. 54:A-1, at A-2. This practice was confirmed by the two Regional Offices interviewed, which indicated that every aspect of the election was investigated.

374. The Department itself has made this argument when seeking to bring suit relying on violations not raised internally within the union by the initiating complaint. The argument focuses upon the words of the statute which direct the Secretary to investigate a complaint filed pursuant to § 402(a) and to bring suit if he finds probable cause "to believe that a violation of this title has occurred." The Department interprets "a violation" to mean any violation and not merely those listed in the original complaint.

375. An attempt was made in the study to assess the quality of the Department's investigations. A few persons contacted accused the investigators of being pro-complainant. Interviews with union attorneys W, Y, AA, and CC, and union officers K and L. Complainants, on the other hand, suggested that the investigators were too sympathetic to the incumbents and not sufficiently attuned to labor election frauds. Interviews with complainant union members G, I, and S, and complainant attorneys E and O. In addition, some specific criticisms were heard. One complainant suggested that the investigator scheduled hearings at times when it was impossible for men to attend due to their work schedules. Interview with complainant union member L. Another alleged that a key witness to a statutory violation was not even contacted during the investigation. Questionnaire from complainant union member H. A third union member contended that the investigators failed to examine the election ballots despite
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The conclusion that DOL investigations tend to focus on election day abuses is supported by a study of the frequency with which the Department has found various statutory violations during its investigations. Of 669 statutory violations confirmed by the Department from January 1, 1965, through January 1, 1970, 45.7 per cent involved election day abuses while only 6.5 per cent concerned campaign period violations. Of course this may indicate that few campaign violations occurred. But the low frequency of campaign violations should be contrasted with the substantial extent to which the complainant union members surveyed alleged that such violations had occurred and had significantly influenced the outcome of their elections. The available data are too sparse to constitute proof, but they at least suggest that the DOL should more carefully scrutinize elections to detect other than election day abuses.

D. The Prosecution Phase

If the Area LMWP investigation concludes that no violation has occurred, it notifies the Regional LMWP Office which, if it concurs in the finding, is empowered to close the case and so inform the parties. If evidence of a violation is found, a copy of the investigative report is sent to the Regional Solicitor's Office for a decision. If the Regional Solicitor agrees that a violation has occurred, he may either refer the case to the Regional Solicitor for a Title IV decree, or he may take the matter to the District Court for a Title IV decree. In either event, the Regional Solicitor must provide the parties with a copy of the investigative report. If the Regional Solicitor does not concur in the finding of a violation, he must provide the other parties with a copy of the investigative report.

The only conclusions that can be drawn from this sampling of opinion are that the competence of the investigators is subject to individual variances. This allegation was made in interviews with complainant union member JJ and complainant attorney E. The violations within the category of campaign abuses are misuse of the union membership list, failure to distribute or discriminatory distribution of campaign literature, intimidation, and misuse of union funds. Of the thirty-one complainant union members contacted, seventeen indicated that intimidation was an abuse which most influenced the outcome of union elections. Eleven indicated that misuse of union funds had a similar impact. Several union attorneys suggested that the Department favors litigation of "picayune" issues involving formal election procedures and eligibility, rather than the more difficult matters of coercion or campaign fraud. Yet it was these latter abuses which most concerned Congress at the time of enacting the LMRDA. Interviews with union attorneys U, AA, DD, HH, and II.

In fact the practice is for the Regional Office to send a copy of the Area Office investigatory report to the Washington LMWP Office. Only if the Washington Office concurs that no violation occurred will the Regional LMWP Office be authorized to close the case. Interview with Department of Labor Official A.
report is sent to the appropriate Regional Office and the central LMWP office in Washington. The report is also sent to the corresponding Regional Solicitor’s Office and to the central Solicitor’s Office in Washington, the litigating arm of the Department.\textsuperscript{381}

The LMRDA specifies that if the Secretary, upon completion of his investigation,

finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint bring a civil action against the labor organization . . . in the district court . . . to set aside the invalid election . . . \textsuperscript{382}

The statute thus emphasizes the investigatory role of the Secretary in determining the validity of the complaint and appears to make the filing of suit automatic upon a finding of violations that have not been remedied internally. In the actual operation of the statute, however, the reverse has occurred. The finding of a violation has become likely, and the filing of suit discretionary.

1. \textit{The Mechanism of Settlement}

The finding of a violation is likely because of the “valid formal complaint” requirement, which has the effect of pre-screening complaints. Violations are now found in eighty per cent of the cases.\textsuperscript{383} Investigations are used less to determine whether a violation has occurred than as a means of determining which violations have occurred.

Even if a violation is found, DOL regulations state that the Secretary will not institute a Title IV suit unless he also finds that the violations “may have affected the outcome of an election.”\textsuperscript{384} This

\textsuperscript{381}. The Solicitor’s Office is headed by the Solicitor of Labor and embraces a central office in Washington and eleven Regional Field Offices. Each Regional Office is assigned a specific geographic area and has jurisdiction over the labor organizations falling within that area. Four of these regional offices have sub-regional offices operating in a second city within the same geographic area. Thus the total number of field offices is fifteen. \textit{See U.S. Dep’t of Labor, Office of the Solicitor, Regional Offices (1970).}

\textsuperscript{382}. 29 U.S.C. § 482(b) (1970).

\textsuperscript{383}. \textit{See note 381 supra.}

\textsuperscript{384}. 29 C.F.R. § 452.16(b) (1970). The rationale for imposing the “may have affected” requirement before bringing suit was given by Frank M. Kleiler, Director of LMWP, at the N.Y.U. Seventeenth Annual Conference on Labor:

\textit{We do not apply the law literally in this respect, because Section 402(c) provides that the court may set aside an election only if it finds upon a preponderance of evidence after a trial that the violation may have affected the outcome. We recognize that when the Government brings a case to a district court under Section 402(b), the Government has the burden of proof in showing that the violation may have affected the outcome. Therefore, where we cannot meet the test, we do not litigate.}

\textit{Kleiler, Recent Developments in Regulation of Intra-Union Affairs, PROCEEDINGS OF 17TH ANN. CONF. ON LAB. 345 (1964).}
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discretion in bringing a Title IV action enables the Department to use the threat of suit to induce voluntary union compliance and correction. The sixty day filing requirement in § 402 could limit this conciliatory role, and in several decisions courts have insisted on this period of limitation. However, the Department has largely circumvented this restraint by “taking a waiver” from the union. By this procedure, the union and the Department agree to disregard the limitation as to the filing of suit by the Secretary. The Department agrees to defer filing if the union agrees to waive the defense of timeliness in the event that settlement is not achieved and the Secretary brings suit to set aside the election.

By exercising its discretion in bringing an enforcement suit and securing waivers of the sixty day time limit, the Department has fashioned a promising settlement device. Settlements take the form of

385. In two cases involving motions on the part of the union to dismiss the Secretary’s suit as untimely filed, the courts rejected both claims only because they held the provisions of Fed. R. Civ. P. 6(a) to be applicable, thus extending the sixty day limit the day or two necessary to render the suits timely. In both cases there is dicta to the effect that the language of § 402(b) is not the usual language of a statute of limitations but is rather a directive to the Secretary of Labor which he is required to follow. However, the implication of the holding of the two cases is that if the Secretary’s suits were outside the sixty day limit as extended by civil rule 6(a), they could be dismissed as untimely filed. Wirtz v. Peninsula Shipbuilders Ass’n, 382 F.2d 237 (4th Cir. 1967); Wirtz v. Local 611, Hod Carriers (D. Conn. 1964), cited in Interpretative Manual, supra note 298, at § 476.200.

In two other cases, motions to dismiss for untimeliness were denied because the union itself had contributed to the delay by refusing to comply with the Secretary’s request for certain records and information until the Secretary began an enforcement action. The courts found that the delay caused by the unions’ intransigence was not chargeable to the Secretary under the sixty day restriction, and when the delay time was discounted the suits fell within the sixty day limit. Again, the cases implied that if the suits had fallen outside the sixty day limit, they would have been dismissed as untimely. Wirtz v. Local 705, Hotel Employees, 69 L.R.R.M. 2315 (E.D. Mich. 1969), vacated on re-hearing but reinstated on appeal, 389 F.2d 717 (6th Cir.), cert. denied, 393 U.S. 832 (1968); Wirtz v. Great Lakes District Local 47, Masters, Mates, and Pilots, 59 L.R.R.M. 2085 (N.D. Ohio 1965).

386. Kleiler, Recent Developments, supra note 384, at 345. Interview with Department of Labor Official A.

387. The Department’s right to accept a waiver of the sixty day requirement has recently been affirmed. In Hodgson v. International Printing Pressmen, 440 F.2d 1113 (6th Cir. 1971), cert. denied, 40 U.S.L.W. 3162 (U.S. Oct. 12, 1971), the court held that the “union’s voluntary waivers which were relied upon by appellant may be pled by appellant Secretary of Labor as an equitable defense to estop the otherwise mandatory bar of the statute.” Id. at 1115. In Hodgson v. Local 851, Machinists, Civ. No. 71-1107 (7th Cir., filed Dec. 9, 1971), the court reached a similar result. But the opinion also indicated that the Department’s discretion to accept a waiver was not absolute:

We do not hold that the discretion is unlimited, time-wise, but in the present case we cannot say that a 30 day extension was such an abuse that sanctions should be imposed. Furthermore, in general, the abuse of discretion will not be challenged by the unions, but by the dissenting members who have filed the complaint with the Secretary. We approve of the decisions noted above, Schonfeld v. Wirtz, supra, and DeVito v. Shultz, supra, which hold that the Secretary’s decisions can be challenged if they constitute an abuse of discretion, and in passing note that the Administrative Procedure Act is applicable to this section by virtue of Section 606 of LMRDA.

Id. at 12.
Formal Determinations and are both speedy\textsuperscript{388} and common among those cases in which a remedy is obtained.\textsuperscript{389}

**Evaluation and Recommendations.** The Supreme Court has emphasized that the structure of Title IV enforcement reflects a congressional desire for settlement of election disputes without resort to litigation.\textsuperscript{390} To achieve this objective, the DOL discretion to sue and its practice of accepting waivers of the sixty-day filing requirement would seem essential. If this conciliatory activity is successful, and a Formal Determination results, a remedy is obtained more promptly than could be achieved through full litigation.\textsuperscript{391}

2. **The Process of Settlement**

Settlement by Formal Determination is initiated by sending a DOL “summary of violations” letter to the local union upon completion of the election investigation.\textsuperscript{392} This letter lists all violations discovered but gives no indication of the importance the Department attaches to them or whether the Department feels they “may have affected” the election outcome. The Department thus seeks settlement in some cases it will not litigate if voluntary compliance fails. On the basis of this letter, an offer of settlement may be made by the local.

\textsuperscript{388} The average time for disposition through formal determination is four months. Interview with Department of Labor Official A.

\textsuperscript{389} Of all the Title IV election cases in which some remedy is obtained, either voluntarily prior to suit, pursuant to stipulation after the commencement of litigation, or by order of the court, forty-three per cent of these cases are settled by Formal Determination. See Appendix B infra.

\textsuperscript{390} Calhoon v. Harvey, 379 U.S. 134, 140 (1964); It is apparent that Congress decided to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the public interest. Cf. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 242. In so doing Congress, with one exception not here relevant, decided not to permit individuals to block or delay union elections by filing federal-court suits for violations of Title IV. Reliance on the discretion of the Secretary is in harmony with the general congressional policy to allow unions great latitude in resolving their own internal controversies, and, where that fails, to utilize the agencies of Government most familiar with union problems to aid in bringing about a settlement through discussion before resort to the courts. Cited with approval in Wirtz v. Local 153, Glass Bottle Blowers, 389 U.S. 463, 471 (1968).

\textsuperscript{391} See pp. 492-93 supra.

\textsuperscript{392} The Area LMWP Office making the investigation has thirty days from the receipt of a valid formal complaint to have completed its investigation and prepared its investigatory report. This report is then sent to the Branch of Elections and Trusteeships, a division of LMWP. On the basis of the investigative report, a letter is drafted and sent out by the branch to both the challenged local and its parent labor organization (if any). This “summary of violations” letter informs these organizations that the local has violated Title IV of the LMRDA and specifies the violations found. Washington Daily Reporter System, Daily Labor Report, March 22, 1965, No. 54:A-3. The Department then has thirty days in which to settle with the union, obtain a waiver of the sixty day filing requirement, or decide whether to initiate litigation.
In most cases this will entail a voluntary rerun of the election in question under the supervision of the LMWP.\textsuperscript{393} On completion of the rerun, a Formal Determination closing the case is issued by the LMWP.\textsuperscript{394}

Pursuant to the statute,\textsuperscript{395} the candidates elected in the contested election serve as the officers of the union during the settlement process. During settlement negotiations they are in effect asked to permit the Department to supervise a rerun of the very election that put them in office. If the officers are willing to permit such a remedy, settlement is possible. If not, the focus of the negotiations will shift.\textsuperscript{396} For the “summary of violations” letter is also sent by the central LMWP office to the parent labor organization. Where the local refuses to settle, the Department attempts to coax the national to force corrective action.\textsuperscript{397} The success of this strategy will depend both on the power of the national over its locals\textsuperscript{398} and its willingness to exercise such

\textsuperscript{393} Of seventy-four Determination cases involving elections held and contested, sixty-four of the Formal Determinations required a rerun of the election as the principal term of settlement. Of these sixty-four reruns, fifty-two were supervised by the DOL. Figures are for Formal Determinations filed between Jan. 1, 1965, and Jan. 1, 1970. See Appendix C infra.

\textsuperscript{394} The Determination letter follows a standard format. After indicating the date on which the complaint was received and giving notice that an investigation has been conducted, the violations discovered in the course of the investigation are listed. The letter then announces:

Upon completion of the investigation, officials of the ... Union were advised of these findings, and they agreed to conduct nominations and an election of officers. [The date of nominations and election are then given.] It is, therefore, DETERMINED, that there is probable cause to believe that the ... Union was in violation of Title IV of the LMRDA, but the violation has been remedied by the ... election. Therefore, civil action under section 402(b) of the LMRDA is not warranted.

\textsuperscript{395} The challenged election shall be presumed valid pending a final decision thereon [as hereinafter provided] and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.


\textsuperscript{397} The only threat that the Department has at its disposal is the threat of suit. Yet, in terms of probabilities, the odds are that if the union declines to settle by Formal Determination, the Department in fact will not bring suit. During the period between Jan. 1, 1965, and Jan. 1, 1970, the Department dealt with 453 election cases in which it found evidence of violation and satisfaction of the exhaustion requirement. Thus 453 summary of violations letters were sent out by the Department. Of these cases, 19.2 per cent were settled by Formal Determination; 25.2 per cent went to litigation; and 55.5 per cent were closed by the Department without obtaining either voluntary compliance or bringing suit. See Appendix B supra.

\textsuperscript{398} Interview with Department of Labor Official A.

\textsuperscript{399} Further, there is a general reluctance on the part of national organizations to interfere in the internal affairs of their locals. The one exception to this rule appears to be where the disclosure of violations in the “summary of violations” indicates misdoing on the part of the local which it has concealed from the national. In one case the national requested through its legal counsel that the Department bring suit against a wayward local “to bring it back in line,” after the Department’s investigation had revealed misdoing that the local had hidden from the national and lied about to its general counsel. Interview with Department of Labor Official A.
power. Unions vary substantially in both regards. There is some evidence that a national organization will agree to a settlement as much for internal political reasons as from a desire to avoid Title IV litigation.

Evaluation and Recommendations. Seeking settlement by Formal Determination entails asking the incumbents to agree to rerun their own election. If the violations are due to ignorance of the provisions of the LMRDA or innocent neglect in following them, the Determination device is promising. But when the violations are intentional, an effort by a candidate to “steal” the election, this device is of limited utility. Although prompt, the Formal Determination works best where the violation is least serious, or, in the case of locals, where the DOL fortuitously encounters a national able and willing to impose a settlement.

3. The Decision to Litigate

When the union makes no offer of settlement, or when the settlement process breaks down, the Department must decide whether to

399. The willingness of the national to enforce the procedural requirements of Title IV will depend on the attitudes of the national officers and the national’s legal counsel. If they resent the LMRDA provisions as “middle class values imposed on a working class organization,” then there is little prospect of their cooperation in gaining voluntary compliance from an offending local. Interview with union attorney P. If the Act is regarded generally as “anti-union,” and an encroachment upon the autonomy of the union movement, then the Department can count on little aid in securing compliance regardless of how the national may feel about the specific practice involved. Finally, in many cases the national will have heard the election case in connection with the complainant's appeal within the union, and decided against the complainant. To involve the national in seeking voluntary compliance from the local is to ask it to re-open the case and in a sense reverse its position. This the national may be reluctant to do.

400. See pp. 538-40 infra.
401. See pp. 539-40 infra.
402. The national officers may, like local union officials, compute the probability of the Department's bringing suit should they refuse to settle. At the national level, however, the odds are much higher that the case will be closed without court action. Only three cases involving national unions have gone to litigation. The rest were closed either because the violations were held not to have affected the outcome, or because the case was deemed “not suitable” for litigation.

403. It should be noted that courts have no role in the process of settlement by Determination. There is no reported case of a court reviewing the Department's disposition of a complaint by Determination. The sole union attempt to effectively compel the Department to agree to such a disposition, by arguing that their corrective action preempted the Department from jurisdiction, was rejected in Goldberg v. Amalgamated Local 555, 202 F. Supp. 844 (E.D.N.Y. 1962). The court held that the filing of a complaint with the Secretary, provided the exhaustion requirements of § 401 are met, insures against any pre-emption by voluntary union correction.

The original complainant also is completely excluded from the settlement process. He receives no copy of the summary of violations letter and is not consulted during the ensuing negotiations. If agreement is reached between the Department and the union, he is sent a copy of the Formal Determination letter indicating that the case has been closed due to union agreement to take remedial action. For a sample of such a letter, see note 394 infra. Instances do exist where the complainant has taken an active role in this post-investigation settlement phase, but this is usually because he has retained the services of a competent attorney. Interview with complainant attorney N.
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sue to set aside the contested election. This is done at a litigation conference, with the final decision made jointly by the Solicitor of Labor and the Assistant Secretary of Labor-Management Relations. Their decision is based on recommendations submitted by the Area and Regional LMWP offices and the Regional Solicitor's Office.

If the decision is not to litigate, the case is closed and a letter to that effect is sent to the complainant, the local, and the national. If the litigation conference decides that a suit should be instituted, the matter is turned over to the Justice Department which assigns the case to the United States Attorney for the district where the defendant

404. Under the Democratic administration of the Act, the conference was attended by the Solicitor of Labor, his Deputy, and several representatives from the Solicitor's legal staff in Washington; the Assistant Secretary for Labor-Management Relations; and the Director of LMWP, his Deputy, the Chief of LMWP's Branch of Elections and Trusteeships (BET), and representatives from the BET staff who developed the case. If the case involved a national union election, representatives from the Area or Regional LMWP office in that geographical area might also attend the meeting. The decision on litigation was usually reached after an hour or two of conference, though if a national union were involved the decision might extend over several days. The final decision, though made jointly by the Solicitor and the Assistant Secretary, was influenced by the Area LMWP investigatory report, the disposition recommendations from the field LMWP and Regional Solicitor's offices, and the judgments expressed by the participants in the conference. Interview with Department of Labor Official E.

405. Having received a copy of the investigatory report completed by the Area LMWP Office with jurisdiction over the offending local union, see p. 492 supra, the Regional Solicitor's Office involved sends a recommendation to the office of the Solicitor of Labor in Washington as to whether litigation is warranted. Similarly, the Area and Regional LMWP Offices make a recommendation to the Central LMWP Office.

406. In cases closed because the violations found are deemed to have had no effect on outcome, the format of the letter sent to the local union and the parent organization is as follows:

[This is] to notify you of the disposition of a complaint to the Secretary of Labor alleging violations of Section 401 of LMRDA.

Pursuant to Section 601 of the LMRDA, an investigation was conducted by this office. The investigation disclosed evidence of the following violations of LMRDA:

[violations then listed].

However, it has been determined, after consultation with the Solicitor of Labor, that there is not probable cause to believe that the violations found may have affected the election outcome, and civil action under Section 402(b) of the LMRDA is not warranted. This case has been closed; but appropriate steps should be taken by your union to insure compliance with the LMRDA in future elections.

In cases closed because deemed by the Department to be not suitable for litigation, see p. 498 infra, the closing letter is even more abbreviated:

This is to notify you of the disposition of a complaint to the Secretary of Labor alleging violations of Section 401 of the LMRDA of 1939 . . . in the regular election of officers completed [date] by [union], [place].

Pursuant to Section 601 of the LMRDA, an investigation was conducted by this office. The results of this investigation have been reviewed, and it has been determined that this case is not suitable for litigation under Section 402 of the LMRDA: therefore, this case has been closed.

(Note that in this closing letter, the specific violations found are not indicated.)

About ten per cent of the time these letters include informal advice to the union as to how to bring its procedures into conformity with the statute. No attempt is made, however, to determine whether the union has complied with this advice. Interview with Department of Labor Official A.

The letter sent to the complainant in each of the above situations is virtually identical to that received by the union. See Letters on file at U.S. Dept of Labor, Office of LMWP, Silver Spring, Md.
union maintains its principal office. The Attorney then institutes and conducts the action on behalf of the Secretary of Labor, as prescribed in the Memorandum of Understanding between the two departments.\textsuperscript{407}

The DOL has formally denominated only the “may have affected” test as a criterion for the exercise of its discretion not to sue.\textsuperscript{408} But in practice, the Department has also refused to sue on the broader grounds that the case is “not suitable for litigation.” This standard is extremely difficult to define. Discussion with those involved in Title IV litigation suggests that the following situations are deemed “not suitable” by the Department: (a) cases where there is a problem of proof as to the occurrence of violations;\textsuperscript{409} (b) cases where violations can be proven but it is difficult to substantiate their impact on the outcome, or Department personnel themselves disagree as to the effect of the violations;\textsuperscript{410} (c) cases in which the alleged violations involve issues of “reasonableness,” and the Department feels that the court will not agree that the challenged union practice is “unreasonable”;\textsuperscript{411} and (d) cases involving a provision in a national constitution applicable to all its locals which is already being litigated.\textsuperscript{412}

The narrower “may have affected” test applied by the Department has a more explicit meaning. Where the violations involved are of such a nature that the number of ballots tainted can be determined, the Department will hold that the “may have affected” test is satisfied only if the number of ballots affected could have mathematically

\textsuperscript{407} The Memorandum of Understanding Between Departments of Justice and Labor, February 16, 1960, reads in part as follows:

5. Prosecution of Civil Enforcement Actions. Any violations of the Act which form the basis for civil enforcement actions will be investigated by the Department of Labor. Whenever the Department of Labor concludes that a civil enforcement action should be instituted, it will refer the case to the Department of Justice, with the request that suit be instituted on behalf of the Secretary of Labor, and will furnish the Department of Justice with all pertinent information in the possession of the Department of Labor. Upon receipt of such request, the Department of Justice will institute and will conduct the civil enforcement action on behalf of the Secretary of Labor. The Department of Justice will not institute any civil enforcement action under the Act except upon the request of the Department of Labor, nor will the Department of Justice voluntarily dismiss any action so instituted except with the concurrence of the Department of Labor. The Department of Justice will dismiss any action so instituted upon the request of the Department of Labor. Department of Justice attorneys will collaborate with the attorneys of the Office of the Solicitor of the Department of Labor in the preparation and, to the extent feasible, in the presentation of such actions in court.


\textsuperscript{408} See note 384 supra.

\textsuperscript{409} Interview with Department of Labor Official D.

\textsuperscript{410} Interview with Department of Labor Official A.

\textsuperscript{411} Interview with union attorney AA.

\textsuperscript{412} Interview with Department of Labor Official A.
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changed the outcome of the election. When the violation is less concrete and the specific number of ballots tainted is indeterminate, the Department has in some instances employed a per se approach in deeming the "may have affected" test satisfied. However, this approach is limited to violations of crucial safeguards in the electoral process, and there is considerable disagreement as to which violations fall within this category. When the violation is of insufficient importance to warrant a per se test, and the impact on an actual number of ballots is uncertain, there appears to be little guidance in determining when and if the "may have affected" test is satisfied.

Thus before the DOL will file a § 402 suit, it must have made a finding that a violation occurred, failed to reach informal settlement with the union, determined that the violations "may have affected" the outcome of the election, and decided that the case is "suitable" for litigation.

Evaluation and Recommendations. The final decision to sue appears to be a unilateral determination made by the Department in the isolation of the litigation conference. There is a common perception among both attorneys for Title IV complainants and union counsel that "political influence" is brought to bear on this decision. Complainants and their attorneys tended to view this influence as being exerted in specific instances to forestall litigation—by the national union to protect an incumbent local officer, or by the AFL-CIO to defend a national official. It is, however, virtually impossible to evaluate or document such asserted political bias.

413. The Department has generally rejected the notion that the "outcome" is affected whenever the margin of victory was altered by the violations. Thus if the violations affected only the relative showing of the candidates in the election, and the victor would still have won even if the violations had not occurred (though by a lesser margin), the Department will not regard the test as satisfied. Interview with Department of Labor Official A.

414. The only area of agreement seems to be that unreasonable eligibility requirements and instances of an eligible candidate being improperly barred from running for office satisfy the per se test. For other violations, such as misuse of union funds, there appears to be no clear consensus on whether a per se test should be applied.

415. See pp. 496-97 supra.

416. Interviews with complainant attorneys E, G, H, and I, and complainant union members O and JJ; questionnaire from complainant union member T.

417. Interviews with union attorneys Q, AA, DD, and GG.

418. While two of the Area LMWP Offices contacted indicated that such political pressure occurred "sometimes," five indicated that it occurred "rarely" or even "never." One area staff member did suggest that some cases were "turned off for political reasons," but the others indicated either lack of knowledge or a positive conviction that political influence had no effect on the Department's decisions.

The charge of political influence at the Washington level could be evaluated more systematically if the reports and recommendations of field personnel could be compared with the decisions coming out of the Department's litigation conference. This avenue of
Union attorneys suggested a systematic bias in favor of incumbents resulting from the fact that the Department, and specifically the Assistant Secretary for Labor-Management Relations, depends upon good relations with labor leaders in order to deal with them in labor-management disputes. While proof is difficult to obtain, it does not seem implausible to suspect that on occasion litigation to vindicate the statute may be sacrificed by the Department to preserve these relationships.410

This suspicion of a systematic pro-incumbent bias could be dispelled by participation in the decision to litigate of a party with interests clearly adverse to the incumbent's. The current participation of LMWP and personnel of the Solicitor's Office fails to inject this element of adversariness, because the general perception of these personnel is that their role is one of conciliation and mediation, rather than enforcement or regulation.

A more effective source of adversariness would be the member-complainant who initially brought the matter to the Department. Presently, the complainant has no part in determining the advisability of bringing suit. He is merely informed of the decision.420 If the litigation decision were to be shifted to the Area or Regional level, the complainant could participate in that decision directly. Absent this decentralization of Departmental decisions, it would seem eminently fair to provide the complainant with a copy of the investigative report and the litigation recommendation made by the Area or Regional LMWP Office. The complainant would then be entitled to add his own statement, to be attached to the Area Office recommendation and forwarded to the litigation conference in Washington, D.C.

Under current procedure, however, the complainant is excluded from the decision to bring suit. Perhaps in recognition of this exclusion, courts have occasionally reviewed the Department's exercise of inquiry could not be pursued, however, because the Department's files of internal correspondence are not open for inspection.

See Shultz v. Restaurant Employees Union, 76 L.R.R.M. 2123 (S.D.N.Y. 1970), where a union's demand for the Department's investigatory files was denied on the grounds that the union had failed to show "good cause" under Fed. R. Civ. P. 34, and that the files were exempt from the disclosure provisions of the Freedom of Information Act pursuant to 5 U.S.C. § 552(b)(7) (1970).

419. It must also be noted that other extraneous considerations may enter into the decision to bring suit. In some instances the Department might institute suit in a situation which would normally fall within the "not suitable" category as a punitive measure against a union which had not been cooperative in the pre-litigation phase. No allegation of such action was received, however.

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discretion not to sue, though departmental abstinence has never been overruled. But other courts have refused to review altogether, holding that the Department's decision is a matter committed to agency discretion and beyond the jurisdiction of the court.

Judicial reluctance to compel § 402 suits overlooks the fact that the individual complainant can vindicate his Title IV rights only through suit by the Secretary. A determination by the Department not to sue is effectively a final judgment on the merits. Moreover, in other areas, courts are beginning to exercise judicial review when the abstention of an agency has such an effect of finality.

421. Courts which have passed upon the issue have accorded the Secretary absolute discretion in determining probable cause of violation. Wirtz v. Guild of Variety Artists, 267 F. Supp. 527, 534 (S.D.N.Y. 1967); Wirtz v. Local 30, Operating Eng'rs, 34 F.R.D. 13, 14 (S.D.N.Y. 1963). In one case, the court dismissed an action by a union member to compel the Secretary to bring suit after the Secretary had closed the case upon a finding that no violation of the statute had occurred, on the grounds that the court lacked jurisdiction even to hear the claim. McCarthy v. Wirtz, 63 L.R.R.M. 2411 (E.D. Mo. 1967).

422. In Shonfeld v. Wirtz, 258 F. Supp. 705 (S.D.N.Y. 1966), the court held the Secretary's refusal to sue because the case was found "not suitable for litigation." There is dicta, however, in the DeVito opinion that would support the exercise of departmental discretion under this standard. Although the case dealt with a mandamus action seeking a court order directing the Secretary to initiate a Title IV suit, after the latter's refusal to do so on the grounds that the violations discovered did not affect the outcome, plaintiff contended at one point that the Secretary could win the suit if it were filed. In rejecting the relevance of this argument, the court said:

As a matter of law the Secretary is not required to sue to set aside the election whenever the proofs before him suggest the suit might be successful. There remains in him a degree of discretion to select cases and it is his subjective judgment as to the probable outcome of the litigation that must control.


424. In addition, it overrules the fact that the Senate Committee report intended to limit the right to refuse suit only in instances of minor violations. The goal was to avoid frivolous actions. The Department was to make a decision, much as a private lawyer would, about the usefulness of litigation. It was not to be empowered to pre-judge the entire case without review. S. REP. NO. 187 ON S. 1555, 86th Cong., 1st Sess. 21 (1959). See also Cox, supra note 201, at 845; Smith, The Labor-Management Reporting and Disclosure Act of 1959, 46 Va. L. Rev. 195, 225 (1960).

425. There are essentially two issues involved in the question of the propriety of review. One is jurisdictional, where the courts have grown restive permitting administrative decisions to go unreviewed unless clearly committed to agency discretion. See
Effective review will require greater disclosure of the grounds of the Department's decisions than is currently made.\textsuperscript{426} At least one court has demanded such increased disclosure,\textsuperscript{427} and others could demand that the Department further clarify its general position on instituting suit.\textsuperscript{428} The complainant should be provided with information as to the violations considered by the litigation conference.

Barlow v. Collins, 397 U.S. 159, 167 (1970); Abbott Laboratories Inc. v. Gardner, 387 U.S. 156, 140-41 (1967); Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1097-98 (D.C. Cir. 1970). Professor Jaffe contends that judicial review is the rule unless specifically excluded by Congress. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 340 (1965); 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.07 (1958). This restiveness is likely to be greater in the case of the Department's decisions because, although an element of expertise is involved, the original congressional directive simply asked the Secretary to apply the lawyer's calculus of his chances in litigation. See note 424 supra. This test does not involve a kind of expertise that the courts lack. For an analysis of the functional elements in committing a decision to agency discretion, see Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion," 82 HARV. L. REV. 307, 382 (1968).

As to the second element in the issue of review, the interest of the complaining party, the complainant who files his protest with the Department of Labor certainly has a sufficient interest to challenge the decision of the Department once the courts decide that they have jurisdiction to review. See Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1097 (D.C. Cir. 1970); Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97, 102 (2d Cir. 1970), cert. denied, 400 U.S. 949 (1970), for situations where the interest involved was much less direct than in a Title IV action and review was accorded.

426. There is also some question as to the standard to be applied in reviewing the Department's decisions and the form of relief. The DeVito court suggested that the action had to be patently arbitrary or capricious and would not be an abuse merely because the proof suggests that the agency would have won if it had gone to court. 72 L.R.R.M. 2682, 2683 (D.D.C. 1969). This standard seems to give the agency a great deal of leeway when one recognizes that it is suing in the interest of the private individual whose rights have been denied as well as in the public interest. But, unless the courts wish to regularly substitute their judgment for that of the Department, the DeVito standard may be the only viable one.

As to the remedy, the only relief available is a mandamus to begin legal action. Such relief faces two major hurdles. By the time the decision has been reached on the merits of the mandamus action, the sixty day filing period for litigation will have passed. Secondly, the court must then supervise the prosecution to insure that it is vigorously pursued. Intervention on the part of the complainant might insure that this latter condition is satisfied.

427. DeVito v. Shultz, 300 F. Supp. 381 (D.D.C. 1969). The court held that the letter sent to the complainant explaining the Department's decision not to bring suit was insufficient to give the complainant "an adequate written statement on the reasons for nonintervention." Some indication was required of why the Department deemed that the violations it had discovered did not warrant litigation. Id. at 383-84.

428. Professor Davis has taken the position that this pressure should be applied more often:

Any officer who has discretionary power necessarily also has the power to state publicly the manner in which he will exercise it, and any such public statement can be adopted through a rule-making procedure, whether or not the legislative body has separately conferred a rule-making power on the officer.

The preceding sentence is (a) especially important to successful control of discretionary power, and it is (b) exceedingly simple and clearly incontrovertible, even though (c) the legal effect of such a public statement by an officer depends upon extremely complex law that often baffles the best judges and the best lawyers.

(a) That an officer having discretionary power can make a public announcement of what his response will be to specified problems is especially important because such announcements are often the most practical and the most effective means of confining discretionary power . . .

and the reasons that each violation was deemed either to not have affected the outcome or to have been unsuitable for litigation. Such information will notify the complainant of the rationale behind the Department's disposition of his complaint and assist a reviewing court in determining whether the Department's discretion has been properly exercised. Such increased disclosure would restore confidence among union members that the Department's decisions are not controlled by political considerations.429

Suspicion of political influence within the Department could be further dispelled if the Department were to manifest greater concern with correcting violations in those cases where it decides not to bring suit. Having gone to the expense of investigating an election case later closed without settlement or litigation, the Department should specify in detail in its letter to the union how the discovered violations could be avoided in the future. The Area LMWP Office with jurisdiction over the offending union should subsequently contact the union to encourage adoption of formal procedural changes where necessary, and, where informal practices are involved, it should remind the union's election committee of the violations prior to the next election.

Further, the original complainant should be provided with a copy of the violations found and the suggestions made to the union. For if settlement negotiations have failed to obtain remedial action, the complainant may wish to raise the issue of election procedures within the union and obtain correction in future elections.

4. The Scope of the Complaint

Paralleling the debate over the scope of the Department's investigation is the question of whether the Secretary can bring suit based on discovered violations which were not included in the complaint filed by the union member. The primary consideration underlying the issue is the respect for union autonomy embodied in the exhaustion requirement of § 402(a). Such deference would appear to prohibit an action based on violations that had not been considered by the union in its appeals process.430

429. It is interesting to note the general lack of opposition to mandamus actions evidenced by the union attorneys contacted, perhaps because of their own suspicions about the role of political influence in the Department. See pp. 499-500 supra. Of the thirty-five union attorneys contacted, only twelve opposed this form of relief, and eight positively favored it.

430. The scope of complaint problem involves two possible comparisons. The comparison discussed in the text is between the violations contained in the formal complaint filed by the Secretary to set aside the contested election and the violations brought to
The Department has in the past contended that the filing of a formal complaint simply "triggers" an investigation and authorizes the Secretary to bring suit upon any and all violations discovered, whether or not they were brought to the attention of the union.\textsuperscript{431} This argument has been rejected in every reported case in which it has been raised,\textsuperscript{432} courts consistently sustaining union motions to strike from DOL complaints violations of which the union had no notice.\textsuperscript{433}

The Supreme Court ruled obliquely on the scope of complaint question in \textit{Wirtz v. Local 125, Laborers}.\textsuperscript{434} That case raised an unusual problem in that the violations had been considered by the internal appeals mechanism of the union, though only in connection with a run-off election. The question was whether the union was obliged to consider such violations as to the initial election as well. In holding that the union had such an obligation, the Court said that notice of the "overwhelming probability" that the violations had occurred in the initial election was a reasonable substitute for a formal

the union's attention during the process of internal appeal. But there is a second comparison, between the violations contained in the Secretary's formal complaint in court and the violations alleged to the Secretary by the individual complainant. Four cases have dealt with this comparison. In the first, the union sought to strike certain violations about which no union member complained \textit{either} to the union \textit{or} to the Secretary. The district court granted the motion, holding that the Secretary's suit must be limited to "those grounds about which some member . . . has previously complained to the union." \textit{Wirtz v. Local 6, Hotel Employees, 53 CCH Lab. Cas. ¶ 11,359 (S.D.N.Y. 1966)} (emphasis added). The appellate court, however, upheld the granting of the motion because "no member of the union filed with the Secretary any complaint as to these items." \textit{381 F.2d 500, 506 (2d Cir. 1967)} (emphasis added), \textit{rev'd on other grounds, 391 U.S. 492 (1968)}.

The second case, \textit{Wirtz v. Local 545, Operating Eng'rs}, reflected a similar disparity of treatment between the district court and the Second Circuit. \textit{64 L.R.R.M. 2449 (N.D.N.Y. 1966)}, \textit{aff'd, 381 F.2d 448 (2d Cir. 1967)}.

At least one court has rightly seen that the only policy interest at stake in the scope of complaint controversy is the integrity of internal union appeals. It therefore held that receipt by the union of any post-election appeal alleging a specific violation is sufficient to permit the Secretary to sue on that violation even if it was not included in any formal complaint to the Secretary, \textit{Wirtz v. Local 1622, Carpenters, 285 F. Supp. 455 (N.D. Cal. 1968)}.

The Sixth Circuit, however, has recently indicated that it considers the matter still unresolved. \textit{Hodgson v. Local 1299, Steelworkers, Civ. No. 71-1297, at 16 (6th Cir., filed Dec. 29, 1971)}.

\textsuperscript{431} Kleiler, \textit{Recent Developments, supra} note 384, at 343-44.

\textit{We therefore need not consider and intimate no view on the merits of the Secretary's argument that a member's protest triggers a § 402 enforcement action in which the Secretary would be permitted to file suit challenging any violation of § 401 discovered in his investigation of the member's complaint.}


\textsuperscript{434} \textit{389 U.S. 477 (1968)}.
complaint to the union.\textsuperscript{435} Although \textit{Local 125} is not a pure scope of complaint case,\textsuperscript{436} courts have since adopted its basic principle. If the court finds "fair notice," the Secretary may sue on the basis of a violation not alleged by the complainant during his union appeal.\textsuperscript{437}

The DOL has contended that the "fair notice" requirement is satisfied when the union has received a "summary of violations" letter listing the findings of the Department's investigation of the case. Early court decisions supported this position,\textsuperscript{438} but the Supreme Court has recently indicated that the concept of "fair notice" may require more. In \textit{Hodgson v. Local 6799, Steelworkers},\textsuperscript{439} the complainant invoked his union remedies charging misuse of union facilities during his

\textsuperscript{435} [I]n the face of Dial's evidence raising the almost overwhelming probability that the misconduct affecting the runoff election had also occurred at the June 8 election, the union insists that it was under no duty to expand its inquiry beyond the specific challenge to the runoff election made by Dial. Surely this is not the responsible union self-government contemplated by Congress in allowing the unions great latitude in resolving their own internal controversies. In default of respondent's action on a violation which it had a fair opportunity to consider and resolve in connection with Dial's protest, the Secretary was entitled to seek relief from the court with respect to the June 8 election.

\textit{Wirtz v. Local 125, Laborers, 389 U.S. 477, 484-85 (1968).}

\textsuperscript{436} In most scope of complaint cases the problem is not the failure of the complainant to challenge within the union a prior controlling election which the Secretary later seeks to set aside, but rather the failure to allege within the union a violation upon which the Secretary seeks to bring suit.

\textsuperscript{437} Complaints to the union of specific violations have been broadly construed to encompass related allegations in the Secretary's complaint. \textit{Wirtz v. Local 705, Hotel Employees, 389 F.2d 717 (6th Cir.), cert. denied, 393 U.S. 832 (1969)} (complaint that continuous good standing requirement had been discriminately applied to disqualify a candidate under the same requirement); \textit{Wirtz v. Petroleum Workers Union, 307 F. Supp, 462 (N.D. Ind. 1969)} (internal protest that a meeting attendance requirement was unfairly applied held also to challenge the fairness of the requirement itself). Violation of the statute's requirement of proper notice of the nomination and election to union members has even been held to be within the scope of the Secretary's complaint without any notice whatsoever to the union, on the theory that it is "too fundamental a requirement to be made dependent on a private complaint to put it in issue when the election is being contested." \textit{Wirtz v. Local 1622, Carpenters, 285 F. Supp, 455 (N.D. Cal. 1968), quoting Wirtz v. Local 169, Hod Carriers, 246 F. Supp, 741, 752 (D. Nev. 1965).}

\textsuperscript{438} \textit{Wirtz v. Petroleum Workers Union, 307 F. Supp. 462 (N.D. Ind. 1969); Wirtz v. Local 1622, Carpenters, 285 F. Supp. 455 (N.D. Cal. 1968). In the Petroleum Workers case, there had been conferences between LMWP personnel and union officials dealing with the violations in question. These were also considered by the court in finding adequate notice. 307 F. Supp, at 470.}

\textsuperscript{439} \textit{Hodgson v. Local 6799, Steelworkers, 403 U.S. 333 (1971). Certiorari was granted on the question:}

\textit{Does Landrum-Griffin Act authorize Secretary of Labor, in action to set aside union election, to allege only those violations of Act that were protested internally by complaining union member, or may Secretary also allege additional violations disclosed by his investigation and which he has given union opportunity to correct. 39 U.S.L.W. 3241 (U.S. Dec. 8, 1970).}

The only notice to the union of the violations contested was the Department's "summary of violations" letter and several conferences with the union. The question, then, was whether the Secretary was restricted to the violations protested within the union or whether he might also rely on those brought to the union's attention by the "summary of violations" letter.
unsuccessful bid for a local presidency. Failing to receive relief from the union, the aggrieved candidate filed a complaint with the DOL alleging misuse of the facilities and also, for the first time, objecting to a meeting attendance requirement imposed as a condition for candidacy. The Department confirmed both charges as violations of the Act, duly notified the union, and, failing to obtain voluntary compliance, brought suit on both.\textsuperscript{440} The Court held that the failure of the complainant to object to the meeting attendance requirement during his union appeal barred the Department from suing on that issue.\textsuperscript{441} The Court, noting the congressional intent to avoid “unnecessary governmental interference with internal union affairs” and to give unions an opportunity to remedy election violations through their own appeals structures,\textsuperscript{442} all but flatly held that the DOL cannot sue on any violation not raised by a complainant in his internal union appeal. Notice through the Department’s “summary of violations” letter was deemed inadequate.\textsuperscript{443}

The case need not be read, however, to foreclose the DOL’s letter from constituting fair notice in all cases. In \textit{Local 6799}, the complainant had \textit{knowledge} of the potential illegality of the meeting-attendance provision. It was not a violation newly discovered by the Department during its own investigation. For while the complainant failed to raise it during his internal appeal to the union, he included it in his complaint to the Secretary. The concern of the Court may thus have been to forestall attempts by union members to knowingly circumvent union appeals structures:

To accept petitioner’s contention that a union member, who is aware of the facts underlying an alleged violation, need not first protest this violation to his union before complaining to the Secretary would be to needlessly weaken union self-government.\textsuperscript{444}

\textsuperscript{440} Hodgson v. Local 6799, Steelworkers, 403 U.S. 333, 334-35 (1971).
\textsuperscript{441} \textit{Id.} at 336.
\textsuperscript{442} \textit{Id.} at 338-40.
\textsuperscript{443} Petitioner contends that the congressional concerns underpinning the exhaustion requirement were in fact adequately served in this case, . . . because the union was later given a chance to remedy specific violations before being taken to court by the Secretary.
\textsuperscript{444} Under petitioner’s limited view of congressional objectives, the exhaustion requirement of § 402(a) is left with virtually no purpose or part to play in the statutory scheme. . . . The obvious purpose of an exhaustion requirement is not met when the union, during “exhaustion,” is given no notice of the defects to be cured. \textit{Id.} at 339.
\textsuperscript{444} \textit{Id.} at 340.
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Under this interpretation of the case, it would still be possible for the Secretary to sue on a violation *unknown* to the complainant at the time of his internal appeal. Such a view is more consonant with the concept of "fair notice" in *Local 1254*445 and is also suggested by a passage which comes at the end of Justice Marshall's opinion:

We are not unmindful that union members may use broad or imprecise language in framing their internal union protests and that members will often lack the necessary information to be aware of the existence or scope of many election violations. Union democracy is far too important to permit these deficiencies to foreclose relief from election violations; and in determining whether the exhaustion requirement of § 402(a) has been satisfied, courts should impose a heavy burden on the union to show that it could not in any way discern that a member was complaining of the violation in question. *But when a union member is aware of the facts supporting an alleged election violation, the member must, in some discernible fashion, indicate to his Union his dissatisfaction with those facts if he is to meet the exhaustion requirement.*446

This interpretation also more accurately reflects the statutory purpose in giving investigative authority to the Department.

[I]t is most improbable that Congress deliberately settled exclusive enforcement jurisdiction on the Secretary and granted him broad investigative powers to discharge his responsibilities, yet intended the shape of the enforcement action to be immutably fixed by the artfulness of a layman's complaint which often must be based on incomplete information. The expertise and resources of the Labor Department were surely meant to have a broader play.447

**Evaluation and Recommendations.** The reading of *Local 6799* advocated above would permit the Department to sue on violations discovered during its own investigation, where the union's only notice comes from the DOL and where the complainant was unaware of the violations during the exhaustion phase.448 This reading would probably affect the Department's activities only slightly, since few complainants will deliberately circumvent their union appeals proce-

445. See note 435 *supra*.
448. See pp. 506-07 *supra*. 

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dures. Needless resort to the Department is likely to bring adverse reaction within the union. This reading is also preferable for its recognition of the inadequacy of complainants' investigatory resources. Its limitation of the scope of complaint defense would strengthen the DOL's hand in bargaining for a settlement. Finally, this interpretation would create an incentive for unions to investigate thoroughly all aspects of an election when challenged within the union.

449. The broader interpretation of the opinion was adopted in Hodgson v. Local 1299, Steelworkers, Civ. No. 71-1297 (6th Cir., filed Dec. 29, 1971). This reading, barring suit on all violations not raised before the union during the exhaustion phase regardless of the knowledge of the complainant, would significantly limit the Department's settlement and litigation activities. This limitation could be avoided by increased pre-exhaustion contact between the complainant and LMWP personnel, with the latter coaching the complainant on what to bring to the attention of the union. See pp. 475-77 supra.

450. Both complainant union members and union officers indicated that departmental intervention caused significant reaction among the rank and file. Union officers tended to feel that the reaction hurt the complainant since the membership resented the presence of the Department as an outsider. Complainant union members felt that intervention tended to harm the winner of the first election, by casting some suspicion of wrongdoing upon him. While this latter assessment would seem to encourage complainants to resort to the Department, the general uncertainty as to the precise reaction of the rank and file may temper this enthusiasm. Several union members suggested that the impact of the Department's intervention would vary depending upon the violations discovered: if trivial, the complainant would be discredited, but if there were violations involving fraud or misuse of funds, the reputation of the incumbent would be harmed. Interviews with complainant union member L and union officers A and C. It was also suggested that in a close-knit union, such as a craft union, with a tradition of solving its problems internally, resort to the Department would harm the complainant. But if the union were large and diverse, the Department's intervention would have little impact. Interview with union attorney S. Finally, it was suggested that younger union members tended to be less opposed to government intervention, and only older members reacted strongly against it. Interview with union attorney I.

451. In Wirtz v. Local 125, Laborers, 389 U.S. 477 (1968), the complainant alleged that several ineligible members voted in the union's runoff election. When the Department investigated it found that ineligible voters had also participated in the first election. In Wirtz v. Local 705, Hotel Employees, 389 F.2d 717 (6th Cir.), cert. denied, 399 U.S. 892 (1968), the complainant claimed that he had been illegally disqualified because of alleged non-payment of dues. After a thorough investigation, the Department found that the incumbent victor in the election had also not paid her dues. There would have been no way for the complainant to have known of this problem without having done almost as complete a review as the government. Finally, in Wirtz v. Local 1622, Carpenters, 285 F. Supp. 455 (N.D. Cal. 1968), the Department discovered that the union newspaper, which was used to give notice of the election, had been distributed from an inaccurate mailing list. Although a member might have found an occasional individual who had not received his paper, it would have been unusual for him to have been aware that papers were mailed to only 2300 of the 2700 union members.

Discussion with complainants revealed that while they can find and present adequate evidence on the formal procedures surrounding an election, they have a difficult time ascertaining campaign violations, ballot stuffing, and discrimination in the use of membership lists.

452. The union may be reluctant to settle where it believes that it can defend on the grounds that a violation alleged by the Secretary was not raised during the exhaustion phase of the enforcement process.

453. Such a duty would seem to be an obvious part of an effective internal union appeals structure. In only one instance, however, has a court suggested imposing such a duty, and then only in an informal opinion on the scope of complaint issue. Wirtz v. Local 169, Hod Carriers, 59 L.R.R.M. 2286 (D. Nev. 1965).

Should subsequent Court interpretation narrow the Department's power to bring suit
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E. The Adjudication Phase

1. Disposition by Stipulation

During the pre-litigation phases the Department relies on informal negotiation with the offending union to gain compliance through Formal Determination. Should persuasion fail to obtain corrective action, the Department must resort to litigation. But even when suit is initiated, the pattern of negotiated compliance persists, for it is within the discretion of the Department to settle the action by stipulation if the union agrees to remedial measures.454

The minimum requisite for settlement prior to judgment is departmental supervision of an election.455 The Department will accept such a settlement when it believes a stipulated election will occur before one which could be obtained by court order.456 The stipulated

to only those issues raised before the union by the complainant, statutory amendment would be in order. Section 402(b) should then be amended to enable the Secretary to initiate a civil action based on Title IV violations not raised by complainants in their internal protests or appeals so long as the union is given prior notice and an opportunity to cure such violations by the Department via a summary of violations letter. Such authority is required if the Department is to make the most of the informal negotiation process.

454. The stipulation is based on an agreement reached between the union and the Department. It is then entered as judgment, and the court retains jurisdiction until the Department certifies to the court the names of persons duly elected to union office in an election supervised by the Department. Interview with Department of Labor Official A.

Unions have unsuccessfully attempted to compel such stipulations, in effect, by arguing that the Department's powers are pre-empted by the union's own voluntary corrective action. Shultz v. Local 1299, Steelworkers, 324 F. Supp. 750 (E.D. Mich. 1970), rev'd on other grounds, Civ. No. 71-1297 (6th Cir., filed Dec. 29, 1971). Unions have also argued pre-emption based on the occurrence of an intervening regularly scheduled election against which no complaints have been raised. This contention has also been rejected. Wirtz v. Local 153, Glass Bottle Blowers, 389 U.S. 163 (1969). The theory of the Court was that

only a supervised election could offer assurance that the officers who achieved office as beneficiaries of violations of the Act would not by some means perpetuate their unlawful control in the succeeding election.

Id. at 474. While the Court was concerned with the inability to assure that other violations might not occur in an unsupervised election, it might be argued that even an election without violation in which the winners of the contested election were re-elected would merely perpetuate an incumbency unlawfully obtained, and permit the officers full enjoyment of the fruits of illegality. Hence even a “clean” intervening election should not moot the Secretary's action.

455. Prior to 1962 the Department would accept an unsupervised voluntary rerun by the union as settlement. This policy was due primarily to the lack of staff and expertise in LMWP, which made widespread supervision of elections impossible. Since that time LMWP has acquired sufficient resources that it can insist on supervision as a condition of settlement. Interview with Department of Labor Official A.

456. The method by which settlement is arranged depends on the level within the union at which the Department is negotiating. If the national is involved in the case, either as defendant or representing the local whose election is challenged, the settlement will be arranged between the national and the central LMWP and Solicitor's Offices in Washington. Interviews with Department of Labor Officials A and B. If only a local is involved, then settlement is negotiated at the field level by the Regional Solicitor's Office handling the litigation. After consulting with the Area LMWP Office having juris-
election may be either a rerun of the contested election or the next regularly scheduled election for the contested offices.\footnote{457} The Department appears to make little distinction between these two alternatives.\footnote{458}

\textit{Evaluation and Recommendations.} In fact, however, the consequences of these two remedies are quite different. To the incumbent, supervision of the next regular election avoids the disruption of a rerun and allows him to serve the complete term to which he was elected. Further, he avoids the stigma and inference of wrongdoing that would result from a formal voiding and rerun of the challenged election. Because the Department makes no attempt to publicize the reasons for its supervision of an election,\footnote{459} supervision of a regularly scheduled election may be of such low visibility as to go unnoticed by most union members.

To the complainant, supervision of the next regular election may be an inadequate remedy. Having provoked hostility from the union membership by appealing outside the union organization,\footnote{460} mere supervision of the next regular election may be interpreted as a rejection of his allegations and may discredit the complainant in the eyes of the membership. If the complainant is a defeated candidate, failure to secure a rerun may impair his ability to secure support for another election campaign.

The apparent disregard of the difference between supervision of a rerun and of the next regularly scheduled election may be due to the fact that the original complainant, to whom this distinction is perhaps most significant, is normally not included in the negotiations that result in settlement by stipulation.\footnote{461} If the national is involved, settlement is conducted through the central DOL offices in Washington, the Washington LMWP Office, and his own superiors in the Solicitor's Office. In Washington, the Regional Solicitor will seek an accommodation between the objectives sought by the Department personnel in the settlement and the demands of the defendant union. If an agreement is reached, it is sent to Washington LMWP and the Solicitor's Office for approval, and then forwarded to the Justice Department for final action.

\footnote{457} Interview with Department of Labor Official A.
\footnote{458} Interviews with Department of Labor Officials A and B. The only contrary indication came from members of a field office who indicated that where the violations involved were merely negligent and not willful, and where the union had no prior history of election violations, settlement for supervision of the next regular election rather than for supervision of a rerun was more likely.
\footnote{459} Interview with Department of Labor Official A. By way of contrast, the district court in Wirtz v. National Maritime Union, 284 F. Supp. 47 (S.D.N.Y.), aff'd, 399 F.2d 544 (2d Cir. 1968), ordered that copies of its decision voiding a contested election be sent by the union to each member.
\footnote{460} See note 450 supra.
\footnote{461} Interview with Department of Labor Official B.
ton, and distance alone may preclude a complainant's participation.\(^{462}\) Even when the settlement is arranged by a Regional Solicitor's office, the complainant is not usually consulted. Though some regional offices do as a general rule confer with the complainant, it is not because of DOL policy. Personnel in the Solicitor's office view as their "client" not the original complainant but rather the Area LMWP Office that investigated the case.\(^{463}\) Even when consulted, the interests of the complainant are given little weight in the negotiation process.\(^{464}\)

This exclusion of the complainant reflects an overemphasis on post-election remedies as a vindication of the broad public interest in honest elections, ignoring the fact that the LMRDA was also intended to guarantee individual rights of participation within the union.\(^{465}\) The Supreme Court has recently recognized this critical interest in Title IV adjudications by granting a member's petition for intervention in \textit{Trbovich v. United Mine Workers}.\(^{466}\) Formerly, courts had denied such petitions on the grounds that since the complainant could not initiate a Title IV action, he could not intervene\(^{467}\) once the action was brought by the Secretary. The Court rejected this position and found no evidence whatever that Congress was opposed to participation by union members in the litigation...\(^{468}\)

\(^{462}\) Since many national union counsel are also located in Washington, settlement negotiations at this level may be conducted informally over the telephone or at occasional meetings. The complainant, however, not being located in Washington, will not be privy to these informal negotiations.\(^{463}\) Two of the five Regional Solicitor's Offices contacted expressed their refusal to include the complainant in settlement negotiations in this fashion.\(^{464}\) One qualification to this general proposition has been made. If the complainant had been a candidate in the contested election and would be eligible to run again in a rerun but would not be eligible to run in the next regular election, this may influence the Department to insist on his eligibility as a condition in any settlement for supervision of the upcoming election, see Stein v. Wirtz, 366 F.2d 188 (10th Cir. 1965), \textit{cert. denied}, 386 U.S. 996 (1967); or, to insist on supervision of the rerun rather than the next regular election, Interview with Department of Labor Official B; or, to refuse to settle altogether, Shultz v. Carpenters District Council, 74 L.R.R.M. 2863 (N.D. Ohio, 1970).\(^{465}\) The LMRDA is phrased in terms of rights of individual union members. The method of enforcement that has evolved under the DOL's administration, however, is a far cry from the model suggested by Senator John F. Kennedy, in which the Department was to act as the complainant's lawyer. See note 295 supra.\(^{466}\) 40 U.S.L.W. 4161 (U.S. Jan. 17, 1972). Intervention was sought in the Department's suit to set aside the December 9, 1969, election of officers of the United Mine Workers. In that election the incumbent union president, W.A. Boyle, was opposed by the late Joseph A. Yablonski.\(^{467}\) McGuire v. International Bhd. of Locomotive Eng'rs, 74 L.R.R.M. 2185 (6th Cir. 1970); Stein v. Wirtz, 366 F.2d 188 (10th Cir. 1966), \textit{cert. denied}, 386 U.S. 996 (1967); Shultz v. District 19, Steelworkers, 74 L.R.R.M. 2222 (W.D. Pa. 1970); Morrissey v. Shultz, 74 L.R.R.M. 2679 (S.D.N.Y. 1970); Wirtz v. Local 1377, IBEW, 288 F. Supp. 914 (N.D. Ohio 1968); Wirtz v. Local 11, Operating Eng'rs, 66 L.R.R.M. 2080 (C.D. Cal. 1957); Wirtz v. Local 825, Operating Eng'rs, 60 L.R.R.M. 2092 (D.N.J. 1965).\(^{468}\) 40 U.S.L.W. 4161, 4162 (U.S. Jan. 17, 1972).
The Court, through Justice Marshall, conceded that the Secretary was given exclusive control of the post-election remedy for two reasons:

(1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and (2) to centralize in a single proceeding such litigation as might be warranted with respect to a single election.469

The Court held, however, that participation by the complainant once the decision to sue had been made did not frustrate either of these objectives.

The Court also recognized that the interests of the Department and the complainant could diverge, thus justifying complainant intervention to protect his interest:

The statute plainly imposes on the Secretary the duty to serve two distinct interests which are related, but not identical. First, the statute gives the individual union members certain rights against their union and the 'Secretary of Labor in effect becomes the union member's lawyer' for purposes of enforcing those rights. 104 Cong. Rec. 10947 (1958) (remarks of Senator Kennedy). And second, the Secretary has an obligation to protect the 'vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member.' Wirtz v. Local 153, Glass Bottle Blowers Assn., 389 U.S. 463, 475 (1968). Both functions are important, and they may not always dictate precisely the same approach to the conduct of the litigation. Even if the Secretary is performing his duties, broadly conceived, as well as can be expected, the union member may have a valid complaint about the performance of 'his lawyer.' Such a complaint, filed by the member who initiated the entire enforcement proceeding, should be regarded as sufficient to warrant relief in the form of intervention under Rule 24 (a) (2).470

Intervention under Rule 24 requires a showing that the intervenor's interests are not adequately represented by the existing parties in the suit.471 The Court in Trbovich requires only a demonstration that

469. Id.
470. Id. at 4164.
471. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. FED. R. CIV. P. 24(a) (emphasis added).
the representation "may be" inadequate. Such a showing, which the Court itself describes as "minimal," 472 would appear to invite frequent intervention in future Title IV suits. 473 Intervention of this kind would be largely unnecessary if the DOL adopted a policy of participation by the complainant in the settlement process. This participation should often satisfy the complainant that his rights are being vindicated and that he need not incur the expense of formal intervention. 474 Involvement of the complainant will also have a salutary effect on Title IV dispositions. 475 His presence will sensitize

472. The requirement of the Rule is satisfied if the applicant shows that representation of his interest "may be" inadequate; and the burden of making that showing should be treated as minimal. See 3B J. Moore, Federal Practice § 24.09-1 [4]. 40 U.S.L.W. 4161, 4164 n.10 (U.S. Jan. 17, 1972).

473. It should be noted that the Court limited the intervention to the claims of illegality presented by the Secretary's complaint, preventing the intervenor from raising two additional grounds for setting aside the election. Id. at 4164. This limitation forecloses an effective device for reviewing the Department's decisions both as to whether specific violations occurred and as to whether they affected the outcome of the election. The congressional objective of centralization of litigation has been achieved even if the intervenor is permitted to allege new grounds for setting aside the election. The Department's screening function, freeing the union from frivolous litigation may be circumvented if the Department has already passed on these alleged violations. But as the Court majority itself recognizes, it is less burdensome for the union to respond to new claims in the context of a pending suit than when presented in a new complaint. If indeed the allegations are "frivolous," it would appear to be a simple matter to let the intervenor submit his proof. A minimal showing by the union should then be sufficient to convince the judge that the Department did not abuse its discretion by refusing to include the allegations in its complaint. Since the complainant is entitled to a review of the Department's exercise of discretion, see notes 420-29 supra, judicial scrutiny in the course of a motion to intervene would provide a context in which review could be promptly and adequately provided. An intervenor's request to introduce further allegations supplemental to those included in the Department's complaint could properly be seen as a request for such review.

It is also significant that the allegations sought to be raised by the intervenor in Trbovich were hardly "frivolous" in the normal sense of that word. The petition alleged as additional violations of the Act: (1) that the union required members to vote in certain locals, composed entirely of pensioners, which petitioner claimed were illegally constituted under the union constitution; and (2) that the incumbent president improperly influenced the pensioners' vote by bringing about a pension increase just before the election. 40 U.S.L.W. at 4161 n.2. Given the significant role which pensioners played in determining the outcome of the election, the allegations if true could hardly be considered "frivolous." See p. 431 and notes 84-87 supra. Moreover, the factual basis for the claims has been well established. See Letter from Harrison A. Williams, Jr., Chairman, to members of the Senate Subcommittee on Labor, June 24, 1970. By not including these allegations in its complaint, the Department apparently concluded that the challenged acts were not violations of the LMRDA. Even if the Department is entitled to make this determination initially, it is surely not beyond the reach of judicial review.

474. Formal intervention requires the presence of counsel to represent the complainant, and this may involve considerable expense. If the Department were truly fulfilling the role of "complainant's lawyer," this expense will be unnecessary.

475. This involvement would satisfy one of the principal objections which complainant union members had to the current administration of the Act. Of the thirty-one complainants contacted, fourteen indicated that the Department made little effort to get in touch with the complainant during the pendency of the Title IV action. One complainant only discovered that a case he had initiated had been settled by happening upon an article to that effect in the local newspaper. Interview with complainant union member L. Only three of the complainants contacted indicated that the Department kept them
the Department to the impact of various settlement arrangements on the union's internal political structure,\textsuperscript{476} and specifically to the distinction between a rerun and supervision of the next regularly scheduled election. Moreover, a degree of adversariness will be introduced to counterbalance the close relationship between Department personnel and union counsel that exists at other stages of the enforcement process.\textsuperscript{477} Finally, the presence of the complainant will prod the Department to handle cases more quickly, since the complainant is generally the party most injured by delay.\textsuperscript{478}

2. Disposition by Judicial Order

If a stipulated settlement is not obtained while the action is pending, the case is brought to trial.\textsuperscript{479} Although the action is nominally conducted by the local United States Attorney, the Regional Solicitor's Office for that area aids in the preparation of the suit.\textsuperscript{480} Thus continually informed as to the progress of the litigation. Such a situation tends to be more likely when the complainant has retained the services of an attorney. Interview with union attorney W. Fifteen of the complainants indicated that there should have been more contact with the Department during the period in which the litigation was pending and only one felt that such increased contact was unnecessary.

476. The Department instituted suit against several Operating Engineers locals contesting the union's requirement of membership in the parent branch of the local as a prerequisite to holding union office. The Department and the national union agreed that two locals would serve as test cases on the reasonableness of this requirement. The other suits were dismissed, and the two test cases were narrowed to deal solely with the issue of the eligibility provision. Yet those two cases also involved allegations of other violations which, while initially included in the Department's complaint, were dismissed pursuant to the agreement with the union. Complainants in one of the cases argued that their right to an election free from the violations dismissed in the case was sacrificed to an agreement based on mere expediency and made at the national level of both the union and the Department. Interview with complainant union member L.

477. It was precisely this type of consideration which motivated the Court to permit intervention in Cascade Natural Gas Corp. v. El Paso Natural Gas Corp., 386 U.S. 129 (1967). Major purchasers of natural gas were allowed to intervene in a divestiture proceeding brought by the Antitrust Division of the Justice Department under § 7 of the Clayton Act. The Court held that the government was not adequately protecting the interest of the purchasers and expressed a fear that the Antitrust Division would "knuckle under" to pressure and sign a consent decree too favorable to the defendants. Id. at 142. If intervention is to be allowed in such well-publicized litigation involving an agency not known for particularly close ties with those whom it is supposed to regulate, the need for intervention may be even more pressing in the case of a post-election Title IV suit.

478. See pp. 525-26 infra.

479. The Justice Department conducts Title IV civil enforcement actions pursuant to its Memorandum of Understanding with the Department of Labor. See note 407 supra.

480. Such collaboration is authorized in the Memorandum of Understanding between the Labor and Justice Departments. See note 407 supra. The extent of actual cooperation varies with the particular area in question. In some areas, lack of personal contact between the Solicitor's Office and the United States Attorney and geographical separation between the two offices tend to minimize the role of the Solicitor's personnel in the litigation process. In others, geographic proximity and personal rapport mean great reliance on the resources of the Solicitor's Office. Thus in one region the Solicitor's Office prepares the complaint, depositions, and the briefs, sends them to the Solicitor.

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when attempts at settlement fail, it is the court that must finally dispose of the case.

Section 402 specifies that

[i]f, upon a preponderance of the evidence . . . the court finds . . . that the violation of section 401 may have affected the outcome of an election, the court shall declare the election . . . to be void . . . .

When the court sustains the Secretary's finding of a violation, it must determine whether the violation "may have affected" the election outcome. This standard does not require a finding that the violations did affect the outcome—that the defeated candidate would have won had the election been fairly conducted. Rather, the court need only be satisfied of a "reasonable probability" that the violations influenced the outcome.

As noted above, adjudicative problems arise where the violations do not affect a clearly ascertainable number of ballots or voters. The Supreme Court attempted to provide guidance for such situations in

in Washington for approval, and then releases them to the United States Attorney. In another, the Solicitor's regional staff even conducts the in-court trial work.

The primary reason for placing responsibility for the conduct of litigation in the Justice Department was the fear that the Solicitor's Office might be too tied to the labor movement, so that the presence of the Justice Department was required to bring more adversariness into the process. Interview with Department of Labor Official B. Yet Justice does not participate in the initial decision to bring suit, and while the litigation is pending, Justice will neither settle a case without the approval of the Labor Department nor obstruct a settlement arranged by Labor Department personnel. Interview with Department of Labor Official B; Memorandum of Understanding, supra note 407. The adversariness gained in the settlement process would seem to be minimal, and at least some attorneys with experience in the Title IV area suggested that the arrangement handicaps the government because Justice personnel are less familiar with such litigation than the Solicitor's staff. Interviews with complainant attorney E and union attorneys GG and II. Three of the five Regional Solicitor's Offices contacted indicated that the conduct of the litigation suffered due to the lack of familiarity on the part of Justice Department personnel. It would therefore seem appropriate to undertake a re-examination of the Understanding to ascertain whether it contributes to the effective enforcement of the Act.

It should be noted that a second reason was given for vesting Title IV litigation in the Justice Department. This was a desire to centralize all government litigation in a single agency to provide uniformity in the handling of all litigation in which the government is involved. Interview with Department of Labor Official B. This second rationale cannot be evaluated here because it depends upon considerations external to the policies behind the LMRDA. An examination of the continued advisability of vesting the power to litigate in the Justice Department must weigh any potential gain in enforcement effectiveness resulting from a transfer of this authority to the Solicitor's Office against the impairment of governmental operations resulting from a dilution of the centralization principle.

Wirtz v. Local 6, Hotel Employees.\(^{483}\) There, an unreasonable eligibility requirement was applied both to exclude specific candidates and to curtail eligibility generally among the membership. The Court observed that in such cases,

"[t]here can be no tangible evidence available of the effect of this exclusion on the election; whether the outcome would have been different depends upon whether the suppressed candidates were potent vote-getters, whether more union members would have voted had candidates not been suppressed, and so forth. Since any proof relating to effect on outcome must necessarily be speculative, we do not think Congress meant to place as stringent a burden on the Secretary ....\(^{484}\)"

The Court therefore held that "a proved violation of § 401 [has] the effect of establishing a prima facie case that the violation 'may have affected' the outcome."\(^{485}\)

**Evaluation and Recommendations.** In reviewing the DOL's finding of probable cause of a statutory violation, courts must not only resolve factual questions concerning the case but must also pass judgment on the "reasonableness" of certain union practices.\(^{486}\) In making such determinations, courts have relied heavily on guidelines promulgated by the Department.\(^{487}\) In view of the apparent judicial desire for such direction, and the congressional intent that the Department take the lead in dealing with union election disputes,\(^{488}\) the Department should make greater use of informal rule-making to provide guidelines,

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\(^{483}\) Wirtz v. Local 6, Hotel Employees, 391 U.S. 492 (1968).

\(^{484}\) Wirtz v. Local 6, Hotel Employees, 391 U.S. 492, 507 (1968), citing Wirtz v. Local 410, Operating Eng'rs, 366 F.2d 438, 443 (2d Cir. 1966).


\(^{486}\) Members must, for example, be given a "reasonable" opportunity for the nomination of candidates. Every member is eligible for office subject to "reasonable" qualifications uniformly imposed. The right to vote and support candidates for office is guaranteed against "improper" interference. 29 U.S.C. § 401(e) (1970).

\(^{487}\) Courts have found these guidelines "highly persuasive," though "not controlling," Wirtz v. Independent Workers Union, 65 L.R.R.M. 2104, 2109 (M.D. Fla. 1967). Thus the INTERPRETATIVE MANUAL, supra note 298, and the regulations published in 29 C.F.R. § 452 (1970) have been used by courts as tools in finding eligibility restrictions on candidacy for office to be both reasonable and unreasonable. Shultz v. Local 1299, Steelworkers, 324 F. Supp. 750 (E.D. Mich.), rev'd on other grounds, Civ. No. 71-1297 (6th Cir., filed Dec. 29, 1971); Wirtz v. Independent Petroleum Workers, 75 L.R.R.M. 2940 (N.D. Ind. 1970); Wirtz v. Independent Workers Union, supra. In dealing with eligibility restrictions the courts have also relied on an LMWP study of the type and frequency of such restrictions in union constitutions. DOL QUALIFICATIONS STUDY, supra note 103. Where a particular restriction rarely appears in other unions or appears only in a much less stringent form, there appears to be some presumption of unreasonableness—though it is certainly not sufficient to establish the unreasonableness of the restriction per se. Wirtz v. National Maritime Union, 284 F. Supp. 47 (S.D.N.Y.), aff'd, 399 F.2d 544 (2d Cir. 1968); Wirtz v. Local 174, Musicians, 272 F. Supp. 294 (1967).

\(^{488}\) See note 390 supra.
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especially on questions of reasonableness. The Department has already promulgated a set of rules interpreting the Act in the Code of Federal Regulations as "a practical guide as to how the office representing the public interest in its enforcement will seek to apply it." But these rules do little more than restate the provisions of the statute, and are indicative of the Department's small effort to investigate union elections and violations of the LMRDA comprehensively. However, the Department's study on eligibility rules indicates the type of investigation of which the Department is capable. Were such research techniques, perhaps supplemented by public hearings, employed in other areas of the Act, more meaningful interpretive rules could be formulated. The rules could serve as an election code of minimum requirements in union elections. The Department could be expected to bring suit only for practices in violation of these rules. Thus they would give unions clear notice as to whether the union subjects itself to liability to suit by a particular procedure. In areas of uncertainty such as adequate motive or eligibility restrictions, this kind of clarification is desirable.

Departmental rules might also provide some indication as to the current status of the "may have affected" test in the wake of the Local 6 case. Because a rerun is expensive and time-consuming, both to the candidates and to the union, it may have seemed reasonable to

489. The LMRDA grants the DOL explicit rulemaking authority in the areas of public examination of union and employer reports [LMRDA § 205(b), (c), 29 U.S.C. § 435(b), (c) (1970)]; union provisions for removal of officers [LMRDA § 401(i), 29 U.S.C. § 481(i) (1970)]; and supervision of election reruns [LMRDA § 402(b), 29 U.S.C. § 482(b) (1970)]. No explicit grant, however, is made for dealing with the conduct of union elections generally. It is therefore arguable that the DOL cannot prescribe legislative rules governing the election provisions of Titles I, IV, V, and VI, even though an "implied or unclear grant of power" may be deemed sufficient to authorize legislative rulemaking. I. K. Davis, Administrative Law Treatise § 503, at 299 (1958). However, it seems clear that the DOL may issue interpretive rules governing union elections. See Davis, supra, at § 503 for a full discussion of the distinction between legislative and interpretive rules. Although interpretive rules may not have the force of law, they are given weight by courts. Interpretive rulemaking authority need not rest upon explicit statutory authority. Id.


491. See DOL Qualifications Study, supra note 103.

492. Should the Department become aggressive in rulemaking, it would seem necessary to follow the procedures of the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (1970), as LMRDA § 606, 29 U.S.C. § 526 (1970), requires that all rules authorized pursuant to the LMRDA be made in accordance with that Act's provisions.

493. Campaign costs are substantial and are paid for primarily from the candidate's own savings and salary. See p. 461 and notes 244-45 supra. Having expended these funds on the first campaign, the candidates may be without sufficient financial resources to conduct a second bid for office.

494. It may cost a small local union only $200 to $300 to conduct an election, but the expense increases with the size of the union. Thus for a local of several thousand men the cost may range from $3,000 to $10,000. In one of the largest locals examined, the expense reaches $60,000. Interviews with union officers C, D, G, and O, complainant...
limit relief to those situations where the violations potentially influenced the outcome of the election, rather than merely the distribution of votes. Almost from the day of the statute's enactment, however, the "may have affected" test has come under attack. Commentators have argued that the test: (1) by condoning violations for which no remedy is provided, engenders disrespect for the law on the part of union officials and cynicism among those whose rights are violated; (2) deprives minority movements of an opportunity to indicate their actual strength within the union; and (3) tends to afford relief only when parties in an election contest are of relatively equal strength, as wide margins of victory serve to shield even the most flagrant violations.

Perhaps because of such criticism, the case law is not replete with instances where violations were proven but relief denied due to failure to show an adequate impact on outcome. Lower courts have interpreted Local 6 to mean that proof of violation establishes a prima facie case of outcome effect and have ruled against defendant unions which presented "no evidentiary support," or no "convincing evi-

union members H and I, and union attorney R. At the district level, expenses approximate those of the largest locals and may even exceed them. In one large district, the conduct of an election costs the union $150,000, covering expenses for printing ballots, notifying the membership by mail of the election, printing election rules, reimbursing lost employment time for tellers, and renting a special election hall. Interview with union officer O.

495. See note 413 supra.
496. This effect is exacerbated by the Supreme Court's decision in Calhoon v. Harvey, 379 U.S. 134 (1964), which narrowed the availability of pre-election relief for election violations. Together, these two limitations deprive union members of "that to which they are entitled--a fair and honest election in the first instance." Summers, supra note 282, at 1248.
497. [A] member who realizes that he has no chance of winning an election may often wish to run so that he can manifest his opposition to the incumbents, or perhaps establish a political base for the future. Union democracy will not be advanced if, when such a member's rights have been infringed, he is denied judicial relief merely because the violation did not affect the outcome of the election in question.

Note, Election Remedies Under the Labor-Management Reporting and Disclosure Act, 78 Harv. L. Rev. 1617, 1624 (1965) [hereinafter cited as Harvard Note]. Limiting the "may have affected" test to instances when the actual winner would have been changed in effect deprives these minorities of a rerun election to provide a fair indication of their level of support among the rank and file.

498. Painters District 9 Study, supra note 156, at 68.
499. The most startling aspect of Title IV litigation is the success of the Department. Only thirteen of 177 suits have resulted in adverse judgments. Summary of Operations, 1969, supra note 299, at 4 (figures based on election case activity from fiscal 1963 through 1969).
500. Prior cases had regularly employed the Local 6 standard. Wirtz v. Locals 410 & 30, Operating Eng'r's, 366 F.2d 438 (2d Cir. 1966); Wirtz v. Local 406, Operating Eng'r's, 254 F. Supp. 962 (E.D. La. 1966); Wirtz v. Local 9, Operating Eng'r's, 254 F. Supp. 980 (D. Colo. 1966), aff'd, 366 F.2d 911 (10th Cir. 1966), vacated as moot, 387 U.S. 96 (1967); Wirtz v. Local 169, Hod Carriers, 246 F. Supp. 741 (D. Nev. 1965).
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dence,”502 or which had not “met by evidence”503 the prima facie case. One case effectively construed Local 6 to entirely relieve the Secretary of the burden of proving that the violation may have affected the outcome and placed on the union the “burden to establish that the violation did not in fact affect the outcome of the election.”504

If Local 6 is construed in this way, its impact will be to place upon the union a burden found “too stringent” to be borne by the Secretary.505 Where the alleged violation can be shown to have tainted a calculable number of ballots, the union may be able to rebut the presumption of outcome effect. But for other violations which do not affect specific ballots, such as unreasonable disqualification from candidacy or campaign violations, the presumption would effectively be conclusive.

Thus, certain practices emerge as virtually per se violations which, if proven, will result in a new election automatically.506 This result may cast doubt upon the present policy of denying most pre-election relief under the statute.507 If such violations are likely to cause automatic rerunning of the initial contest, dealing with them prior to the voting would avoid the expense and waste of a second election.

F. The Remedial Action Phase

Having voided the challenged election, the court is obligated by statute to “direct the conduct of a new election under supervision of

504. Wirtz v. Local 153, Glass Bottle Blowers, 405 F.2d 176, 177 (3d Cir. 1968).
505. See p. 516 supra.
506. In the Local 6 case the Court struck down the union’s requirement of prior service in minor union positions. Having agreed with the Department that the rule was unreasonable, the Court recognized a prima facie case of outcome effect which the union was obliged to rebut. 391 U.S. at 506-07. The union failed to overcome this presumption even though the incumbents had won the contested elections 9,314 to 1,247 and 9,216 to 1,299. 265 F. Supp. 510, 518 (S.D.N.Y. 1967). Given these margins of victory, it is difficult to envision any situation in which the union would be held to have dispelled the presumption of outcome effect. It would seem fair to conclude that any exclusion from the ballot due to an unreasonable eligibility provision is a per se violation of the statute, resulting in an automatic rerun of the contested election.

Per se tests are already employed by the Department of Labor, see pp. 498-99 supra, and seven of the seventeen complainant attorneys contacted recommended their use by the courts. Such tests found little support among union attorneys, who favored abandoning the presumption approach of the Local 6 case. Seventeen of the thirty-five union attorneys contacted suggested that an election should be overturned only if the Department can show that the violations affected enough votes to change the outcome.

507. See pp. 545-48 infra.
the Secretary . . . ."\textsuperscript{508} This can be either a rerun election\textsuperscript{509} or supervision of the next regularly scheduled election, but in only a few cases has a court ordered the latter remedy.\textsuperscript{510} If a rerun is ordered, the election is limited to those offices that "may have been affected" by the proven violations.\textsuperscript{511}

The burden of supervision rests primarily with the Area LMWP Office which originally investigated the complaint.\textsuperscript{512} The Department does not conduct the election, as does the NLRB in a representation election. Rather, it leaves the administration of the electoral process to the officials designated by the union constitution.\textsuperscript{513} The election supervisor of the DOL merely presides over the establishment of rules to govern the election and then observes to insure that they are followed.

Rules are established at a pre-election conference, chaired by the election supervisor. All interested parties may attend. Normally the rules and procedures specified in the union constitution and bylaws

\textsuperscript{508} 29 U.S.C. § 482(c) (1970). In addition to the order for an election, the Secretary may be able to secure other relief from the court. One source of this ancillary relief is the statute itself, which specifies in § 402(c) that the "court shall have power to take such action as it deems proper to preserve the assets of the labor organization." 29 U.S.C. § 482(c) (1970). Alternatively, the Department may appeal to the general equity power of the court, which has been the basis for orders protecting complainants to the Department from retaliation by the union. Shultz v. National Maritime Union, 73 L.R.R.M. 2388 (S.D.N.Y. 1969); Wirtz v. Local 1755, Longshoremen, 56 L.R.R.M. 2903 (S.D. Miss. 1963). In Wirtz v. Independent Workers Union, 65 L.R.R.M. 2104 (M.D. Fla. 1967), the court used its equity powers to enjoin expenditure of union funds by incumbents for their own campaigns and required repayment to the union of funds spent.

\textsuperscript{509} If the remedy is a rerun, the question may arise as to the term of office of the selected candidates. The Department has interpreted a rerun to be for the unexpired term of the contested election. Interpretative Manual, supra note 296, at § 478.005. But if the next regular union election is impending, courts have in effect preempted the upcoming election and specified that the term of the officers elected in the rerun shall be that of the officers that would have been elected if the regular election had been held. Wirtz v. Independent Workers Union, 65 L.R.R.M. 2104, 2112 (M.D. Fla. 1967); Local 545, Operating Engr's, 55 CCH Lab. Cas. ¶ 11811 (N.D.N.Y.), rev'd on other grounds, 366 F.2d 435 (2d Cir. 1966).


\textsuperscript{511} Courts initially approached this as a scope of complaint problem, limiting the rerun to the office for which the complainant was a candidate or to which his complaint was directed. Wirtz v. Local 9, Operating Engr's, 254 F. Supp. 980 (D. Colo. 1966), aff'd, 366 F.2d 911 (10th Cir. 1966), vacated as moot, 387 U.S. 96 (1967). But this position has in later cases been expressly repudiated, and the general rule has been to limit the rerun to those offices that "may have been affected" by the proven violations. Wirtz v. Local 705, Hotel Employees, 389 F.2d 717 (6th Cir.), cert. denied, 393 U.S. 832 (1968); Wirtz v. Local 295, Technical Engr's, 67 L.R.R.M. 2931 (W.D.N.Y. 1968); Wirtz v. Local 545, Operating Engr's, 64 L.R.R.M. 2449 (N.D.N.Y. 1966), aff'd, 381 F.2d 448 (2d Cir. 1967); Wirtz v. Local 191, Teamsters, 226 F. Supp. 179 (D. Conn. 1964).

\textsuperscript{512} An election involving an intermediate or national labor organization may be supervised by a Regional LMWP Office or perhaps even by the central office. Interview with Department of Labor Official A.

\textsuperscript{513} Kleiler, Recent Developments, supra note 384, at 346.
are followed. Deference is shown to union interpretations of these procedures unless they are clearly contrary to the statute or to formal rules prescribed by the Department.\(^5\) Rules necessary to the conduct of the election which are not specified in the constitution and bylaws are adopted at the pre-election conference.\(^6\)

Following the conference, the role of the supervisor is essentially to watch the union elections committee prepare and administer the election. The supervisor makes certain that dates for the steps in the election are established, notice is sent, ballots are printed, and eligibility lists are prepared. He observes the nomination proceedings, the balloting process, and the tally of votes. Finally, he will hear any further complaints against the conduct of the new election from union members.\(^7\) When the election is concluded, the supervisor certifies the names of the elected officers to the court, which declares them to be duly elected.\(^8\)

Some Department personnel claimed that they have no effective sanction if the union is uncooperative in the supervision process.\(^9\) A court may, however, grant an injunction restraining the union from interfering with DOL supervision,\(^10\) or enforcing a Department ruling when the union refuses to cooperate.\(^11\) Further, where supervision has resulted from a pre-litigation settlement, the Department may simply bring suit to set aside the election if the union refuses to coop-

514. The statute specifies that a Title IV suit may be brought to obtain "an election ... under the supervision of the Secretary and in accordance with the provisions of this title and such rules and regulations as the Secretary may prescribe." 29 U.S.C. § 482(b) (1970). In addition, the court may in ordering an election impose certain restrictions on its conduct, such as enjoining the application of provisions found to be contrary to the statute though they were not themselves the basis of the Secretary's suit. Wirtz v. Local 545, Operating Eng'rs, 366 F.2d 435 (2d Cir. 1966).

515. The description of the supervisory process contained in the text is drawn from what were characterized as common practices by the eight Area LMWP Offices contacted. Certain offices indicated that they employed other somewhat unique practices. Three indicated that they retained the right to step in and construe provisions of the union bylaws and LMWP guidelines despite the general rule of deference to unions' interpretations of their election procedures. Two indicated that they police campaign activities and literature to assure that no Title IV violations occur.

516. At least two of the eight Area LMWP Offices contacted indicated that this was standard practice.

517. An election may also be supervised by LMWP pursuant to a Formal Determination or pre-trial stipulation by the parties. In those instances the pattern of LMWP activity is apparently the same as that described above, with the exception that in the case for supervision pursuant to Determination there is no certification to any court.

518. Two of the LMWP Area Offices contacted held this view and stressed that their role was purely conciliatory.

519. Unreported case cited in INTERPRETATIVE MANUAL, supra note 298, at § 478.100. The union had refused to allow the complainant, who was determined by LMWP to be a member in good standing, to run for office, and had also sent out notice of nomination and election without the approval of the LMWP supervisor.

The only remedy specifically denied the Department is the power to refuse to certify the results of an election supervised pursuant to court order.522

Evaluation and Recommendations. Complainant union members expressed satisfaction with the fairness of Department supervision of rerun elections and a conviction that supervision effectively prevented the recurrence of the original violations.523 In only a few instances was there any evidence of a significant lapse in the quality of supervision.521 Yet mere prevention of the recurrence of statutory violations in the supervised election may not guarantee vindication of LMRDA rights.

It is difficult to ascertain the sense in which a supervised rerun is a "remedy." It is not punitive in character. The Act provides for no criminal sanction or penalty in connection with the ordering of a new election. The Department, in administering the Act, makes no attempt to inform the membership of its discovery of statutory violations and studiously avoids any accusation of wrongdoing.525 Its approach even at this state is conciliatory, not coercive.

Nor is the process truly remedial in the sense of providing a "repeat" of the contested election, free of violations. No attempt is made to restore the candidates to their pre-election positions. The winner of the contested election, serving in office during the Title IV enforce-

521. Interview with Department of Labor Official A.
523. Of the thirty-one complainant union members contacted, ten indicated that the Department's supervision insured that violations would not occur. Only seven suggested that violations still occurred in departmental reruns. Of the thirty-five union lawyers contacted, seventeen expressed satisfaction with the adequacy of the Department's supervision, and only five suggested that violations of the statute occurred despite this supervision.
524. In three instances, specific criticisms of the Department's supervision were heard. In one case, there was a problem in getting the incumbents to send out the insurgents' mail, and the election supervisor allegedly refused to resolve the matter. Interview with union officer C. On a second occasion, the Department's representative refused to extend his supervision to the area around the union hall in which voting was being conducted, allegedly permitting violations of the statute to occur. In this instance the Department itself attempted to correct its mistake by refusing to certify the results of the election, but was overruled by the court which had jurisdiction over the matter. Interview with union attorney T and complainant attorney Q. In a third election, the union's election committee declared ineligible a candidate who was later found by the national union to be duly qualified to stand for office. The Department's representative allegedly refused to pass on the question at the time of the local union's ruling, thus undercutting the legitimacy of the supervised election. Interview with union officer F.
525. Interview with Department of Labor Official A.
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ment process, remains in office throughout the rerun campaign. If he is a candidate in the supervised election, his position of incumbency will be an obvious advantage. Defeated candidates who have made substantial expenditures of funds during the first campaign may be unable to obtain sufficient financial support to campaign effectively in the rerun.

The supervised election, as it has evolved since the enactment of the LMRDA, is a prophylactic device designed merely to insure a procedurally fair election. Through this mechanism the union elections committee can be instructed in the proper procedures for insuring honest balloting. Once this is done, the statute's assumption is that the democratic processes within the union have been restored and the policies of the Act vindicated.

Not surprisingly, criticism of this remedy is widespread. Most significantly, it is argued that the remedy comes too late in the Title IV enforcement process. The average time between the contested election and the completion of the rerun, assuming no appeal beyond the district court, is two years and seven months. As would be expected,
complainant attorneys unanimously indicated that litigation under Title IV was ineffective due to this delay. But a substantial portion of union attorneys concurred, and even more significantly, DOL field staff members also considered the enforcement mechanism ineffective because of the substantial delays.

Delay undoubtedly works to the advantage of the incumbent. If a rerun were held promptly after the contested election, the abridgment of democratic procedures might itself become an issue in the subsequent election. But the passage of time and the low profile of DOL supervision make it unlikely that the rerun campaign will focus on this issue. Rather, the incumbent's performance during his time in office will be the more likely subject of debate. If the incumbent has performed well, the membership may re-elect him even though his incumbency is the fruit of unlawful conduct in the original election.

Delay robs the rerun device of both remedial and deterrent objectives. Yet the remedial function at least seems warranted by the “may have affected” test itself. Where a violation is of the kind affecting an identifiable number of ballots, the test permits a rerun only after a demonstration of doubt that the election winner would have triumphed in a fair election. As to other sorts of violations, the presumption that outcome may have been affected will probably be applied by courts only where the violations pose a serious threat to electoral responsiveness. Thus a rerun will be ordered only when established violations have thrown in doubt the question of who would have won an abuse-free election. Yet the victor in the tainted election remains in office and may have served his entire term by the time of the rerun. The defeated candidate, often with a substantial claim

531. Only one complainant attorney suggested that the supervised election was an effective remedy.
532. Thirteen of the thirty-five union attorneys contacted indicated that litigation under Title IV was an ineffective remedy because too much time passed before the new election was held. Only ten suggested that the supervised election was an effective remedy.
533. Five of the eight Area LMWP Offices contacted indicated that litigation under Title IV was not effective because of the delay in disposition through the courts. Two indicated that the remedy was effective despite the delay. Four of the five Regional Solicitor’s Offices contacted agreed that delay rendered Title IV litigation ineffective.
534. In a sample of fifty Department-supervised elections, see note 527 supra, the voter turnout in the second election actually decreased in 55.3 per cent of the contests. See Appendix E infra.
535. See note 541 infra.
536. See note 482 supra.
537. For example, three of the five Regional Solicitor’s Offices contacted and three of the eight Area LMWP Offices suggested that willful violations were taken more seriously by the Department.
538. See note 526 supra.
539. The statute specifies that local union officials must be elected at least once every three years. 29 U.S.C. § 481(b) (1970). Since the average time between the contested ele-
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to the office, is left without relief until after the second election. Though reruns are assuredly more effective than supervision of the next regularly scheduled election, delay substantially undercuts the utility of the rerun as a device for remedying the specific violations in the contested election.

The deterrence aspect of the rerun device is further impaired by the approach employed by the Department in supervising the election, which generally fails to take account of the widespread ignorance of the provisions of the Act among the rank and file and their willingness to tolerate less than fair procedures. Blatant election violations can probably be deterred only when the membership is aware of and able to insist upon compliance with the LMRDA. The present pattern of supervision is insufficiently focused on seeking the restoration of a democratic electoral process through education of the union electorate.

The inadequacy of the rerun device is shown most clearly in its utter failure as a means of disciplining conscious attempts to subvert democratic procedures to gain office. When such tactics succeed, the unscrupulous candidate will nevertheless spend an average of over two and one half years in office. While he may hold that office under an aura of illegitimacy, he will nevertheless have at his disposal the union's communication resources and the opportunity to justify his incumbency by performance. The losing candidate, particularly

tion and the rerun is two years and seven months, see p. 523 and note 530 supra, the average local official will have at most five months left of his term by the time the rerun has occurred.

Since the statute requires that district and national officers be elected only every four or five years, respectively, the unexpired term could be longer when these offices are involved. 29 U.S.C. §§ 481(c) and (d) (1970).

540. The general consensus of complainants, their attorneys, union attorneys, and union officials was that the rank and file generally know little about the provisions of the statute, but that candidates and incumbent officers know a great deal about the law.

541. It is an old argument that union members are most concerned with their officers' performance in getting a satisfactory contract, and that if performance is good on this issue, the membership will tolerate all kinds of misdoing in such matters as elections. See pp. 413-14 supra.

542. See p. 523 and note 530 supra.

543. The advantage of incumbency in winning a rerun election was well described in the context of the 1965 Steelworkers election and a discussion of the potential benefit to McDonald of a Title IV appeal under LMRDA:

But obviously, there would be appeals to the circuit court, and then to the Supreme Court. And all this time Abel would continue to serve as president, with the overwhelming majority of the Executive Board and staff representatives on his side. Under such circumstances it would take a miracle for McDonald to win in the second round.

1965 USWA Study, supra note 214. Perhaps for similar reasons, two union attorneys stated that they openly advise a delaying tactic to union officers whose elections are challenged. They then attempt to draw out the litigation until the Department is willing to settle for supervision of the next regularly scheduled election rather than a rerun of the challenged election itself. Interviews with union attorneys O and KK.
if he is part of a wider insurgent movement, faces the gradual fragmentation of his support and possible harassment and intimidation of himself and his supporters.\textsuperscript{544}

The inability of the rerun device to cope with a deliberate attempt to seize the election might be ameliorated if additional remedies were made available under the Act: (1) The Department should be empowered to sue for the installation of a candidate where it is clear on an honest count that he has won the election.\textsuperscript{545} This remedy would be most useful where ballot fraud has occurred and the Department, having intervened and correctly tabulated the ballots, obtains results indicating that the “loser” has won.\textsuperscript{546} It also could be employed where the duly elected candidate is barred from office because the current incumbents refuse to install him.\textsuperscript{547} In either case, there seems to be no reason for the expense and delay of a rerun when the preference of the membership is clear.\textsuperscript{548}

\textsuperscript{544} Of the seventeen complainant attorneys contacted, nine indicated that litigation under Title IV was not effective because of the delay involved. Six indicated that the result of this delay was to entrench the incumbents and fragment the insurgent's support within the union. Only one of these attorneys felt that a Title IV supervised rerun was an effective remedy.

During the period of the pendency of the action, insurgents and their supporters may be subject to various forms of coercion. See pp. 444-48 supra. As one complainant attorney suggested:

“To see the election held, the men accused of misdoing conducting union affairs, and then recriminating against the dissidents—to see this is to see the wheels of justice stop turning.”

Interview with complainant attorney O.

\textsuperscript{545} Officials in the Labor Department indicated a need for this form of remedy. Interview with Department of Labor Official A. The Department has sought this form of relief in several instances. Wirtz v. Local 73, Teamsters, 257 F. Supp. 784 (N.D. Ohio 1966); Wirtz v. Lodge 590, R.R. Trainmen (E.D. Ala. 1967), cited in \textit{Summary of Operations}, 1968, supra note 299, at 34; Wirtz v. Carpenters’ Council of Cuyahoga County (N.D. Ohio 1967), cited in \textit{Summary of Operations}, 1968, supra at 34. In none of these instances did the court pass directly on the propriety of such relief.

\textsuperscript{546} In at least three instances, the Department has intervened to prevent ballot tampering. See note 352 supra. The results were then supplied to the union and the internal appeals structure was allowed to handle the matter. In one case the winning candidate was installed by the union, but in another the Department was forced to bring suit to set aside the election. After a substantial delay, the rerun was held, and the candidate deprived of victory in the first election was elected and installed. Interview with complainant attorney N. The third case is still pending.

\textsuperscript{547} In one instance a duly elected candidate was coerced by his incumbent opponent into resigning after the latter had refused to formally install him. The Department brought suit for the insurgent’s installation, arguing that the court had the authority to issue such relief pursuant to its general equity power. The court refused to pass upon this contention. Wirtz v. Local 73, Teamsters, 257 F. Supp. 784 (N.D. Ohio 1966).

The suit was later terminated by stipulation and a rerun election held under the Department’s supervision. The aggrieved candidate had by this time left the union, allegedly due to continued harassment, and the incumbent was re-elected. Interview with complainant union member F.

\textsuperscript{548} In seeking this form of relief from the courts, see note 541 supra, the Department has argued that the power to order a total rerun includes the lesser power to rerun only one part of the election, the installation. Wirtz v. Local 73, Teamsters, 257 F. Supp. 784 (N.D. Ohio 1966). Alternatively, it might be urged that only so much of an election as is void need be set aside, and only that part need be rerun under the
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(2) Courts should be given the authority to disqualify a candidate from running in the rerun upon a showing that the candidate willfully violated the statute in a manner amounting to fraud in the electoral process. Such a showing would rarely be made, for even when clear fraud does occur it may be difficult to trace it to a particular candidate. But at the least, courts should be empowered to deal effectively with flagrant abuses should they occur.

(3) For analogous reasons, the Act should be amended to impose criminal penalties for violations amounting to fraud.

The Department could also modify its supervision policies to more effectively employ the rerun device as a way of informing the union electorate:

(1) The Department should send notice of its supervision to each union member, explaining that practices occurred which were con-

Department’s supervision. Beaird, supra note 78, at 1336. Both of the above arguments must deal with the phrase in § 402(c) which says that the court “shall declare the election, if any, to be void.” 29 U.S.C. § 482(c) (1970). That phrase on first reading seems to imply that the entire election would have to be overturned upon a finding that the “may have affected” test has been met. But it seems doubtful that Congress had all the possible permutations involving union elections in mind when it drafted the statute. It did, however, want to minimize the disruption and interference in internal union affairs. In light of this congressional concern, courts should not read the section as requiring that the entire election be voided and should be willing to simply install a duly elected candidate.

549. Because the sanction is essentially punitive, the showing required may be proof "beyond a reasonable doubt." The notion of disqualification is not foreign to the statute, as § 504 provides for such a sanction if a person is convicted of any of the crimes there enumerated. 29 U.S.C. § 504 (1970). The desired disqualification sanction could be created by amending § 504 to include willful violation of the statute amounting to fraud as a basis for invoking the provision’s five-year bar to office holding. The standard of willful violation amounting to fraud is employed to protect the incumbent officer who knowingly enforces a union election provision which is subsequently declared contrary to the statute. In this situation, the Department’s dispute is with the union, and the officer will feel obligated to follow the challenged provision since it reflects the desires of the membership which he represents. In such a case the officer lacks the intent to distort the election process for his own advantage, which is the circumstance with which the above reforms seek to deal.

550. This proposal received support primarily among union complainants. In addition, a few persons suggested that a defeated candidate in a successfully challenged election be provided with a civil damage remedy against those persons found to have committed willful violations of the statute, or fraud. Such actions would essentially reimburse the injured candidates for the cost of the first election, enabling them to wage an effective campaign in any subsequent rerun. See note 491 supra. The principal objections to this proposal were that most offenders would be unable to pay and that the threat of such actions would deter able men from participation in the election process either as candidates or campaigners. However, an analogous remedy is available under § 501(b) for breaches of fiduciary duty, and no complaints were heard of adverse effects from this provision. 29 U.S.C. § 501(b) (1970). Such a remedy could be created by statutory amendment or, alternatively, a court could construe Titles I, IV, and V as defining obligations of all union members toward the rest of the union, violation of which gives rise to a statutory tort. RESTATEMENT (SECOND) OF TORTS §§ 285-86 (1965). Compensatory damages are awarded under Title I for unfair disciplinary action and other consequential damage, as with complaints of unfair disciplinary action and other consequential damage, as such injury to reputation. Simmons v. Avisco, Local 713, Textile Workers Union, 320 F.2d 1012 (4th Cir. 1965); Vars v. International Bhd. of Boilermakers, 215 F. Supp. 943 (D. Conn.), aff’d, 320 F.2d 576 (2d Cir. 1963); Farowitz v. Local 802, Musicians, 241 F. Supp. 895 (S.D.N.Y. 1965), aff’d, 330 F.2d 999 (2d Cir. 1964).
trary to law and describing what changes will be instituted in the rerun. The DOL should also explain how the rerun procedures will better safeguard the electoral process.551

(2) If the incumbent officers are candidates in the rerun election, they will possess the advantage of access to union facilities, direct contact with those conducting the election, and a certain legitimacy from the fact that they are presiding over their own election.552 To minimize this advantage, the Department should take a more active role in the process and insure that procedures for conducting the election do not favor any particular candidate.553

(3) Accompanying the judicial order of a rerun election, the Department should obtain injunctive relief to insure that misdoing in the first election does not taint the rerun. Thus if misuse of the newspaper occurred in the contested election, such action should be enjoined in the rerun, and coverage for insurgent candidates required as a compensatory measure. Similarly, prior misuse of union funds should be enjoined and its deleterious effect mitigated by requiring that misappropriated funds be restored to the union treasury.

G. An Overview of Administrative Enforcement

In only a minority of the Title IV election complaints brought before the Department is the statutory remedy obtained. In 53.7 per cent of the cases,554 violations are found by the Department but there is no agreement for supervision of a subsequent election, and the Department decides not to bring suit. In 24.5 per cent of the cases, litigation is commenced by the Department. Most of these cases are settled by a stipulation in which the union accepts Departmental supervision of a subsequent election—increasingly, the next regularly scheduled election. The remainder proceed to judicial decision and a court-ordered rerun election. In either case, the significant delay between the contested election and subsequent supervision makes the device ineffective.


552. See note 526 supra.

553. In the Department's supervision of the 1969 rerun of a National Maritime Union election, allegations were made that rerun procedures, while fair on their face, operated discriminatorily against insurgents. The Department answered most of these charges in a lengthy statement by the election supervisor. Report from Benjamin B. Namnoff, LMWP Regional Director, New York, to Frank M. Kelker, Director, LMWP, June 2, 1969.

554. For complete disposition statistics, see Appendix B infra.
Settlement by Formal Determination, when obtained, provides an effective remedy for violations of Title IV. The resulting supervision, almost always involving a rerun election, occurs fairly promptly after the initial contest. An unscrupulous candidate who has violated the statute in an attempt to steal the election is not allowed to use his extended incumbency to enhance his position. The matter of democratic procedures and their initial violation has greater visibility.

This form of disposition is achieved, however, in only 18.5 per cent of the Title IV cases. As an enforcement device, it has inherent limitations. The Department can in no way compel settlement by Formal Determination. It must either obtain the voluntary agreement of the challenged union or rely on the power and willingness of the parent organization to compel its offending local to agree to corrective action. The Title IV process, then, seems to work best at giving unions an opportunity to remedy election abuses on their own. It adds little coercive force to that process.

IV. Internal Union Appeals

Congressional reliance on internal union mechanisms to remedy election abuses, a reliance heightened by DOL operating procedures, requires that the focus of inquiry shift to an analysis of union grievance procedures if a true picture of the enforcement of election guarantees is to be obtained. This section will examine the extent to which substantive election safeguards are included in union constitutions and bylaws, the internal structures available for the enforcement of these guarantees, and the actual operation of the internal appeals process.

A. Substantive Election Provisions in Union Constitutions

In 1965, the DOL surveyed seventy-three national union constitutions to determine the extent to which they mandated local elections requirements similar to those in the LMRDA. The study concluded:

[The constitutions] usually limit directions to prescribing the constitutional officers, their terms of office, and financial good standing qualification necessary for holding office and voting. On the whole, they contain significantly fewer provisions estab-

555. Before a member may file an election complaint with the Secretary of Labor under Title IV, he must have “exhausted the remedies available under the constitution and bylaws” of the union, or invoke “such available remedies without obtaining a final decision within three calendar months after their invocation.” LMRDA § 402(a), 29 U.S.C. § 482(a) (1970).
lishing other qualifications required to hold office or vote, or touching upon the procedural aspects of elections, and an even lesser number of provisions . . . providing safeguards ensuring fair elections.\textsuperscript{556}

A majority of the constitutions contained only one provision specifically meant as an election safeguard. This provision, requiring secret ballots, was included in forty-nine constitutions.\textsuperscript{557} Apart from the secret ballot, national union constitutional guidelines only occasionally guaranteed broader prerequisites of responsive elections.\textsuperscript{558}

Provisions for adequate notice to members of nomination proceedings were included in twenty-six constitutions, use of absentee ballots was provided in ten instances, the method of nomination was stipulated in thirty-four constitutions, and notice of the election itself was provided in only thirty-four of the seventy-three constitutions studied. Only seven constitutions granted rights to equal distribution of literature and to inspection of the union membership list. Ten prohibited use of union or employer funds in election campaigns, and measures designed to prevent election day fraud—provisions for poll observers, publication of election results, and preservation of election records—were included in only twenty-four, six, and twenty-five constitutions respectively.\textsuperscript{559} The DOL study properly concluded that

\begin{quote}
[p]rocedural matters and election safeguards are not generally subjected to extended constitutional regulation by the parental organizations.\textsuperscript{560}
\end{quote}

Despite the absence of these election guarantees in national constitutions, further guarantees might be included in local and intermediate organization constitutions and bylaws. The DOL report notes,

\textsuperscript{556} DOL CONSTITUTION STUDY, supra note 72, at 8 (emphasis added).
\textsuperscript{557} Id. at 12. On the other hand, of the seventy-three constitutions, fifty-two named the local officers, fifty-eight set out their terms of office, sixty-four required paid-up dues to vote, forty-seven set minimum membership periods to vote, forty made certain membership classes ineligible as voters, and forty specified the vote required for election. \textit{Id.} at 9, 12. None of these specifications is intended to guarantee a fair, democratic election. Rather, these provisions may at times prevent responsiveness. See pp. 428-44 supra.
\textsuperscript{558} Six of the seventy-three national constitutions have no provisions governing local elections. \textit{Id.} at 9, 12.
\textsuperscript{559} Id. at 12. The American Federation of Musicians has incorporated in its national bylaws a provision that all elections must conform with the LMRDA. Interview with complainant union member A. See also the Steelworkers' requirement that elections be in conformance with the Act, at note 614 infra.
\textsuperscript{560} DOL CONSTITUTION STUDY, supra note 72, at 11. The study did find a trend toward more inclusion of these guarantees in constitutions between passage of LMRDA in 1959, and 1965; but the progress has been slow, and achievement of full inclusion is far off.
however, that many locals do not have their own governing documents. A local is often guided only by unwritten traditions. It is therefore unlikely that the gaps in national constitutions are filled by local regulations.

Because of these substantive failings, members may be unable to secure the prerequisites of electoral responsiveness by pursuing only internal remedies, even if the union's appeals structures are procedurally fair and efficient. A member who feels aggrieved because of inadequate notice of nomination, discipline for free speech, use of union funds to support a candidate, or other unfair procedures typically has no internal standard on which to base an election protest. An internal appeal could, of course, provide a satisfactory remedy if the challenged conduct violates the LMRDA and if union leaders choose to enforce the statutory safeguards within the internal union process. The likelihood of this private enforcement, however, would seem to be directly related to the credibility of DOL intervention should the union fail to respond.

B. Internal Appeals Structures

Internal appeals structures have long been available to union members who have been disciplined by their locals. Special appeals procedures to contest infractions of election guarantees are not as common. The 1965 DOL study found special election appeals procedures in only fifteen of the seventy-three constitutions surveyed. The sample of unions surveyed for this Note contained a somewhat larger proportion; eighteen of the twenty-nine national unions examined had some special provision for appealing local union election decisions. The unions in this sample had established a variety of structures for handling election complaints.

1. Pre-Election Relief

   a. Formal Pre-Election Appeals Structures

Only five of the twenty-nine unions examined have formal pre-election appeals structures. Two limit their attention to complaints

561. Id. at 10.
562. Id. at 77-79. These fifteen constitutions, however, did cover forty per cent of union members in the seventy-three unions in the study.
563. See pp. 531-32, 534-35 infra.
about local rulings on matters of nomination and eligibility; the other three allow more general complaints. The specified procedure in four of the unions is for direct appeal to either the International President (IP) or the International Executive Board (IEB), by-passing the local and intermediate level organizations completely. The other union requires that the appeal first be made to the local or intermediate organization involved in the disputed election.

b. Formal Pre-Election Relief Through the General Appeals Structure

In the absence of a special provision for pre-election appeals, a formal appeal must follow the procedures prescribed in the union constitution for the review of general grievances or disciplinary actions. These general appeals procedures may be ill-suited for appealing an election irregularity; yet, in the absence of a special election appeals mechanism, they are the only formal means of protest open to a member. These procedures normally call for a protest to commence with the local and proceed through the union hierarchy. The regular appeals mechanism is typically incapable of disposing of a pre-election complaint before the election is held.

c. Informal Pre-Election Relief

Although a national union constitution may provide no formal means for appealing election irregularities before the election, an ag-

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564. Uniform Local Constitution, Laborers' International, art. 12, § 8 (Oct. 17-21, 1966); Constitution, United Plumbers, as detailed in DOL CONSTITUTION STUDY, supra note 72, at 78.
565. Constitutions, International Brotherhood of Teamsters, art. 22, § 5(a) (July 4-7, 1966); Upholsterers' International Union, art. 49, § 2 (Sept. 1, 1966); and Hotel and Restaurant Employes Union, art. 20, § 11 (July 26, 1966). In five other constitutions studied, there are special provisions for post-election appeals; however, the wording of each provision is ambiguous as to whether it also applies to pre-election appeals. All five constitutions refer to the necessity of filing appeals within a certain time after the election; clearly post-election appeals are contemplated. But, as the time limit on appeals is only a minimum, the sections do not necessarily rule out appeals before the election. Constitutions, United Brotherhood of Carpenters, § 57(g) (Jan. 1, 1968); United Rubber Workers, art. 8, § 5(e) (Nov. 1, 1968); Amalgamated Transit Union, § 47 (Sept. 8-11, 1969); and United Textile Workers, art. 14, § 8(a) (June 1970). For description of these routes of appeals, see pp. 533-34 and notes 573-77 infra.
567. Constitution, United Plumbers, supra note 564.
568. In some unions, local election committees may grant pre-election relief, but the intermediate or national officers do not take appeals before the election. Interview with union attorney GG.
569. See p. 534 infra.
grieved member may receive informal relief by directly asking a national staff representative, or a district or national officer, to pressure local officials to correct election irregularities. In four unions interviewed, national officers follow a policy of intervening in local elections when they believe a grievance is justified. When notified of an alleged irregularity, the national officer contacts the local officials and gathers facts relevant to the charge. If he believes that an infraction of union rules or federal law has occurred, he may order compliance with the applicable provision. Similar informal remedial activities probably take place in many other unions. While such informal intervention is likely to be effective, it is not guided by any articulated standards. Its effectiveness depends solely on the willingness and ability of national officers to insist on fair and democratic elections.

d. Trusteeship and Related Powers

Most union constitutions contain a provision empowering the national officers to suspend autonomy and take control of a local when such action is "necessary" or the "situation requires." Often such provisions explicitly authorize such action to "restore democratic procedures," and even when the constitution is not so specific, the language of most provisions is broad enough to encompass such a goal.

Although these measures to insure fair elections are considered an extreme step by most unions, they do exist as possible means of pre-election relief. Their drastic nature makes them a serious threat which national officers can use to gain local union compliance, especially when only informal pre-election remedies are otherwise available. On the other hand, several of the union members interviewed complained that the national unions often used the threat of trusteeship to intimidate dissident movements in local unions.

570. In some unions, appeals of an informal nature are made not to district or national officers but to the national staff representatives, who are often able to solve the problem. Interviews with union officers A and P.

571. Interviews with union attorneys R, S, and AA; letters from officials of the International Woodworkers and Amalgamated Transit Union, infra note 587.

572. Constitutions, Laborers' International, art. 9, § 7 (Oct. 17-21, 1966); United Steelworkers, art. 9, § 7 (Aug. 22, 1968); United Textile Workers, art. 7, § 4 (June 1970); and Service Employees Union, art. 8, § 7.

573. Constitutions, Hotel and Restaurant Employees Union, art. 6 (July 26, 1966); International Woodworkers, art. 2, § 7 (June 1970); Amalgamated Transit Union, § 28 (Sept. 8-11, 1969); United Brotherhood of Carpenters, § 10J (Jan. 1, 1968); and International Brotherhood of Electrical Workers, art. 9, § 7 (Sept. 1969).

574. See further discussion of trusteeships, note 614 infra.
2. Post-Election Relief

Because post-election remedies often necessitate a rerun of the contested election—a disruptive event in the life of any union—there is little chance that an aggrieved member can obtain post-election relief informally. Therefore, the primary means of achieving internal post-election relief is through one of two formal appeals processes.

a. Special Post-Election Appeals Structures

In eighteen of the twenty-nine national unions surveyed there is a special procedure for appealing the conduct of an election after its completion. Of these eighteen constitutions, seven do not require appeal first to the local involved, but instead permit direct appeal to the IP or the IEB.575 Three others require an initial appeal to the local and then permit a direct appeal of the local determination to the IP or IEB.576 The other six require a preliminary decision by the local and an appeal to either an intermediate body at the district level or to the IP, with final review by the IEB or a public review board.577

b. General Post-Election Appeals Structures

In the absence of special appeals procedures for complaints of election misconduct, the aggrieved member must pursue post-election complaints through the mechanism established by the union for appeals of general grievances or disciplinary actions. These general appeals processes normally involve an appeal first to the local and then to at least two review bodies.578

576. Constitutions, Hotel and Restaurant Employees Union, art. 20, § 11 (July 26, 1966); and United Rubber Workers, art. 8, § 50(e) (Nov. 1, 1968); and description of the constitutional provisions of the United Steelworkers (which do not require a hearing at local level) in DOL CONSTITUTION STUDY, supra note 72, at 78.
577. Constitutions, United Brotherhood of Carpenters, § 57G (Jan. 1, 1968); United Textile Workers, art. 14, § 8 (June 1970); Amalgamated Transit Union, § 84 (Sept. 8-11, 1969); International Woodworkers, art. 13, § 6 (June 1970); International Brotherhood of Teamsters, art. 22, § 5(b) (July 4-6, 1966); and description of the constitutional provisions of the United Automobile Workers, DOL ELECTION APPEALS STUDY, supra note 575, at 26.

The other two constitutions include special election appeals procedures, but our information does not indicate the exact appeals route to be followed. Constitutions, International Operating Engineers and International Brotherhood of Painters, id., at 12, 22. See also note 616 infra.
578. Eleven of the twenty-nine unions on which we have data have no special election appeals provisions. They do, however, have general appeals processes.
The 1965 DOL study of internal union appeals focused on the time required for exhaustion of internal remedies. The DOL tried to isolate the types of internal appeals structures which facilitate the exhaustion of internal union remedies before the filing of complaints under § 402(a)(1). It found five characteristics common to internal appeals structures which handled post-election complaints expeditiously: (1) the existence of special procedures applicable to election complaints; (2) two or less steps before final decision; (3) rigid limits both on the time allowed members in filing appeals and the time permitted for appellate bodies to reach a decision; (4) decision at the

One union, the Iron Workers, provides for direct appeals to the IP. DOL ELECTION APPEALS STUDY, supra note 575, at 30.


Three unions provide two-step appeals processes from local to IEB. Constitutions, Lithographers, § 18; International Typographical Union, art. 11 (Jan. 1, 1970), and description of the appeals process of the Musicians, DOL ELECTION APPEALS STUDY, supra note 575, at 31.

Four unions provide indeterminate appeals processes which may require from one to three steps. Constitutions, Amalgamated Clothing Workers, art. 12 (May 29, 1970); Service Employees Union, arts. 8 and 16; and descriptions of appeals processes of the International Longshoremen's Association and the Packinghouse, Food and Allied Workers, DOL ELECTION APPEALS STUDY, supra note 575, at 30.

One union provides a four-step appeals process. Constitution, United Mine Workers, arts. 6 and 18 (Sept. 9, 1968).

One union provides a three-step appeal from local to IP to IEB, description of appeals provisions of the Stage Employees Alliance, DOL ELECTION APPEALS STUDY, supra note 575, at 32.

579. The study lauded those appeals mechanisms expeditious enough to achieve a final determination within the three months required before a complainant can file a § 402 complaint with the DOL: "'Justice delayed is justice denied.' This is, in part, the theme of section 402(a) of Title IV of the Labor-Management Reporting and Disclosure Act of 1959." Preface to DOL ELECTION APPEALS STUDY, supra note 575. The study indicates that forty-nine per cent of all complaints are filed with the DOL more than three but less than four months after the election, ten per cent are filed between two and three months, nineteen per cent between four and five months and eight per cent between five and six months. Id. at 15.

580. 29 U.S.C. § 482(a)(1) (1970). Of the ninety-four complaints filed after internal exhaustion under § 402(a)(1), DOL ELECTION APPEALS STUDY, supra note 575, at 24, shows seven required one month or less to exhaust, twenty-three took between one and two months, twenty-six required between two and three months, sixteen took between three and four months, seven took between four and five months, four required between five and six months, and eleven took more than six months to reach exhaustion.

Some unions provide that all appeals may be taken to the national convention. However, because national conventions are often held only once every three or four years, LMWP does not regard appeal to the convention as an "available" remedy under § 402(a)(1). Id. at 10. Consequently, all references herein to two-, three- or four-step appeals processes do not include the convention step.

581. Most nationals place time limits on their members for filing appeals. These are often ineffective as a means of expediting appeals, as delay is more often caused by the appellate body than by the complaint. The Boilermakers constitution puts time limits on both members and appellate bodies, and most of its appeals are exhausted within three months. DOL ELECTION APPEALS STUDY, supra note 575, at 33-37.

Although time limits are often beneficial to the complainant in expediting relief or achieving exhaustion so he can appeal to the DOL, they can be a mixed blessing. Rigid time limits on complainant appeals put great pressure on a member trying to amass data and properly present his case. And, if union authorities are rushed by time restrictions, they may be hasty in investigative duties and fail to make a judicious decision based on all the facts.
national level by the IP rather than the IEB; and (5) elimination of the initial appeal to the local union trial body.

C. The Union Appeals Process in Operation

Rigorous evaluation of the internal union appeals process would require more data than are available and would require some way of determining whether the processes were fair. This Note cannot pretend to wholly answer the questions of effectiveness and fairness. Nonetheless, the bare skeleton of the appeals structure can be supplemented with a description of operational characteristics garnered from field interviews—characteristics which are relevant to the speed, thoroughness, and even-handedness of the internal union procedures.

More than 25,000 labor union elections are held each year, and only about 100 result in complaints to the DOL. Of the other elections, some unknown number produce no violations, and some produce violations about which no complaints are made. Available data indicate that some 1,000 to 2,000 complaints are raised each year beyond the local level of the union hierarchy, although it seems clear that more are raised at the local level but are not carried further. National union counsel estimate that between five and twenty-five per cent of the complaints advanced beyond the local level are eventually deemed justified by the internal mechanism of the union.

There

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582. The IP can act immediately, while IEB actions must await periodic meeting dates.
583. Id. at 35.
584. According to the 1969 Directory, supra note 29, at 78, there are more than 75,000 locals in U.S. unions. LMRDA § 401(b), 29 U.S.C. § 481(b), states that each local must hold an election at least once every three years.
585. See Appendix B infra.
586. This estimate is based on the figures in note 587 infra, extrapolating from the number of locals and number of internal appeals per year in ten unions to the total number of locals in the United States—75,000.

### Internal Appeal Statistics

<table>
<thead>
<tr>
<th>Union</th>
<th># of Locals*</th>
<th>Internal Appeals/Year</th>
<th>% Found Justified†</th>
<th>% Appealed to DOL†</th>
</tr>
</thead>
<tbody>
<tr>
<td>Textile Workers (TWUA)</td>
<td>702</td>
<td>2-4 pre 8-10 post</td>
<td>10%</td>
<td>0%</td>
</tr>
<tr>
<td>Woodworkers</td>
<td>235</td>
<td>2 post 30 pre 45 post</td>
<td>25% (1 in 11 yrs)</td>
<td>10%</td>
</tr>
<tr>
<td>Clothing Workers</td>
<td>797</td>
<td>1/2 30 pre 45 post</td>
<td>33%</td>
<td>66%</td>
</tr>
<tr>
<td>Hotel Workers</td>
<td>432</td>
<td>10 pre 45 post</td>
<td>5%</td>
<td>0%</td>
</tr>
<tr>
<td>Electricians (IBEW)</td>
<td>1,701</td>
<td>10 pre 45 post</td>
<td>20%</td>
<td>20%</td>
</tr>
<tr>
<td>Upholsterers</td>
<td>189</td>
<td>1/2 30 pre 45 post</td>
<td>0%</td>
<td>100%</td>
</tr>
<tr>
<td>Newspaper Guild</td>
<td>83</td>
<td>10 pre 45 post</td>
<td>10-20%</td>
<td>0%</td>
</tr>
<tr>
<td>Laborers</td>
<td>920</td>
<td>60-70 20-25</td>
<td>30%</td>
<td>?</td>
</tr>
<tr>
<td>Autoworkers</td>
<td>1,504</td>
<td>20-25 25-30</td>
<td>20%</td>
<td>?</td>
</tr>
<tr>
<td>Steelworkers</td>
<td>3,600</td>
<td>25-30 55%</td>
<td>10%</td>
<td></td>
</tr>
</tbody>
</table>

† Only internal appeals which got to the international level are included. Figures for the first seven unions are for recent years. Letters to Yale Law Journal from Patricia
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appears to exist, then, a large pool of complaints which the union views as unjustified yet which never reach the DOL. If these complaints are unmeritorious, there is little cause for alarm. While it is impossible to evaluate precisely the extent to which the internal union appeals process fairly weeds out unmeritorious complaints, certain characteristics of the process are not reassuring.

Most internal appeals begin at the local level, with an appearance before the local election board, the local officers, or a meeting of the membership. Union leaders argue that this is a valuable initial step because it notifies the incumbent officers against whom the complaint is often directed of the violations alleged and the evidence available to support them. If the charges are persuasive, the incumbents will theoretically be encouraged to settle and avoid intervention by the national or the DOL.\textsuperscript{588} Union members suggested, however, that this step is typically futile. They note that incumbents are unlikely to be sympathetic to complaints about the manner in which the election was conducted, especially if the reviewing officers were elected in the challenged election. Trial committees or election boards, often appointed by the incumbents, are equally unlikely to be sympathetic. Even if the complaint is made at a meeting of the entire membership, such meetings are typically not well attended. The incumbents will often be in control and can table any objection to the conduct of the election.\textsuperscript{589}

It is thus necessary for most complainants to appeal beyond the local level. While some appeals are to intermediate level union organiza-

\textsuperscript{588} Interviews with union attorneys P and GG. Appeals to a local trial body could prove valuable in compiling information on the claimed election irregularity; but, because local officials are generally unsympathetic to the complaints, they often do not bother to establish a record before dismissing appeals.

\textsuperscript{589} Interviews with complainant union member B and union officer H; questionnaire from complainant union member HH.
tions, relief is more usually obtained at the national level. For this reason, the efficacy of the internal union appeals process will depend largely on the thoroughness of the investigation conducted by the national, the power and willingness of the national to intervene in the affairs of the local, and the remedies available to correct election irregularities. The efficacy of internal appeals comes to be more a matter of the political structure of the union than of the architecture of the appeals system.

The scope of the national's investigation seems to vary substantially among unions. Some national general counsels suggested that they will go beyond the specific allegations made in an election complaint and investigate all phases of the contested election. But the general rule appears to be one of substantial faith in the local incumbents and little independent investigation. Instances have been discovered where no investigation at all was made and election records were not even examined. Unless the complainant is well prepared with proof of his charges, he may lose an election appeal because the national makes no effort to independently search for evidence of his claims. Complainants as a class are unlikely to have adequate investigative resources at their disposal, and their ability to prevail within the union is thereby diminished.

Even when a proper showing is made before the national, remedial action is not certain. While most nationals have the formal authority to intervene in local affairs, their ability to exercise this power varies. The CIO nationals tend to be strong, and power in these unions flows from the top down. Other nationals have far less control over their component locals, and in some unions the national is not even permitted to investigate local affairs. Constitutional powers aside, the political consequences of defying strong local leadership may deter national officers from reversing the outcome of a local election.

590. Of the election appeals carried beyond the local level, the typical pattern is for between thirty-three and fifty per cent to be resolved at the intermediate level and the other fifty to sixty-six per cent at the national level. Information from letters of general counsel of the Electricians-IBEW, Textile Workers, Woodworkers, and Hotel Workers, supra note 587.
593. Cf. Wirtz v. Guild of Variety Artists, 267 F. Supp. 527, 533 (S.D.N.Y. 1967), where the union claimed appeals had not been exhausted because complainants had not produced proof or witnesses for their claim. The court rejected the claim, saying neither Title IV nor the union constitution required proof or witnesses, and noting the complainants lack a subpoena power.
594. Interview with union attorney S.
595. Interview with union attorney X.
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Whether the intervention is through the formal appeals mechanism or by informal means, union leaders often shrink from supervising local politics.\(^{506}\) Unless national officers or their legal counsel are committed to procedural fairness and implementation of LMRDA guarantees, they are likely to allow local election decisions to stand.\(^{507}\) There is little pressure placed on the national by the LMRDA, as a Title IV suit, if one is brought at all, will probably name the local as defendant.\(^{508}\)

When a national is willing to get involved in local election practices, the evaluative question becomes one of the national’s fairness with respect to the parties involved. National officers contend they are free to be even-handed in local election disputes because the national has little stake in the outcome, and minimal preference as to who is actually elected.\(^{509}\) Because of the rapid turnover in local leadership, national officers claim they cannot afford to become tied to individual candidates,\(^{509}\) but this claim is open to doubt.\(^{501}\)

The fairness of national intervention is more suspect in connection with intermediate level elections, because intermediate level offices are highly political. If factions exist within the union, faction affiliations will appear at the intermediate level and may determine the disposition of an election complaint by the national.\(^{502}\)

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506. Taft, supra note 69, at 133.
507. Often such cases involve eligibility restrictions that bar certain groups within the union from seeking office, as apprentices or branch members. To remove such restrictions is to alter the distribution of control within the union and to change its political dynamics. The group that will have its power position diminished will oppose the change vigorously, and the national leadership jeopardizes itself politically if it voluntarily undertakes such a change. Even if the leadership agrees that the requirement is too restrictive, it will prefer to be forced by a court to alter the provision rather than assume the risk of voluntarily making the change. Interview with union attorney U.
508. The Act provides, 29 U.S.C. § 482(b) (1970), that the suit be brought against the offending union “as an entity.” However, courts have permitted parent organizations to intervene on the side of a defendant local. Shultz v. Local 6799, Steelworkers, 71 L.R.R.M. 280 (C.D. Cal. 1969), aff’d, 426 F.2d 969 (9th Cir. 1970), rev’d on other grounds, 403 U.S. 333 (1971).
509. The exception to this general rule is the disproportionately large local, which may be both a constituency and a financial base for permanent opposition to the incumbent national leadership. An example of such a local is local 600 of the UAW during the early years of the Reuther presidency.
600. Interviews with union attorneys D, R, and PP.
601. Questionnaire from complainant union member V. This complainant was challenged under the union’s eligibility rules after winning an election for business agent. The national president ruled that the incumbent should retain his position despite his defeat in the election, telling the complainant that he, the president, was “the Supreme Judicial Power and what he ruled was law.” Complainant protested to the DOL, which ruled the action illegal, but agreed to allow the incumbent business agent to remain in office if the national would oversee the next local election.
cials are more likely to call for a rerun when the administration-backed candidate has lost the original election, and thus dispose of the matter with little regard to the merits of the underlying complaint.

Even if the internal appeals process worked speedily, with thorough investigation and even-handed adjudication by the national, its efficacy would depend upon the availability of remedies for election irregularities. The remedies available to the national are rarely specified in the constitution, even where there are special election appeals provisions. Where remedies are mentioned in union constitutions, they may be phrased vaguely. Some union general counsel stated that the national could order a rerun of the contested election or other “appropriate remedies,” including forbidding the tally of tainted ballots or placing an improperly disqualified candidate on the ballot. Because the available remedies are unspecified, however, their use depends almost entirely on the inclinations of the officials involved. As a rerun is an expensive and disrupting device, nationals may be reluctant to order them. Yet any lesser remedy may be ineffective in preserving the integrity of the electoral process. Because remedies are left to the discretion of the national, the complainant has little basis on which to contest the adequacy of the relief granted.

D. Recommendations

The LMRDA’s reliance on union self-correction of election abuses is defensible only when there is some reason to believe that internal union procedures are adequate. While the foregoing discussion hardly constitutes proof that all internal union appeals systems

603. Interviews with union officers N and O and union attorney DD.

604. When the election protest involves a national election, the same problem arises as in appeals to local bodies of local elections: the complainant is often asking the incumbents to rule against their own supporters, or against the election result which made them victorious. It is very unlikely that any national officer will order himself to rerun in an election.


606. Constitution, Upholsterers’ International Union, art. 49 (Sept. 1, 1966), provides that if union laws have been violated or “fair and equitable principles” not followed in an election, a member “may seek the remedy thereof.” Constitution, United Textile Workers, art. 14, § 8(a) (June 1970), provides specifically for reruns “if it is determined that the matter complained of might reasonably have affected the outcome.” Although it seems common for unions to apply a “may have affected” test before ordering a rerun, they need not. INTERPRETATIVE MANUAL, supra note 298, at § 475.420 specifically states that internally ordered reruns need not depend on “may have affected” violations as long as they are in accord with the union constitution.


608. Interview with union officer L.
are inadequate, or even that most of them are, it does suggest several ways in which those systems might be improved to increase the likelihood of speedy, thorough, and fair resolution of member complaints:

1. Union constitutions should be amended to include specific provisions guaranteeing the prerequisites of responsive elections.

2. An appeals procedure specifically designed to handle election cases should be included in union constitutions.

3. This appeals structure should provide for both pre- and post-election appeals.

   a. Pre-election appeals should by-pass the local and be directed to the International President (IP). His decision could be appealed upon completion of the election by providing that the International Executive Board (IEB) or some other appropriate body would have the power of review. This would serve to check the exercise of improper discretion by the president and to limit his intervention to cases with clear violations, while providing pre-election relief in such cases so that the local can avoid the expense and disruption of a rerun.

   b. The post-election structure should require a notice period to the local union (of perhaps a week) in which time the local would be able to attempt to remedy any violations that might have occurred, but no formal appeal should be required to the local. Appeal should be to either the chief executive officer of the intermediate organization, and then to the IP, or directly to the IP, if the union's intermediate level organization is an inappropriate one to decide election dis-

609. The DOL ELECTION APPEALS STUDY, supra note 575, at 39-41, concludes:
[T]here does not appear to be any indication that labor organizations, in general, are currently processing their members' election protests more expeditiously than during the period immediately following the passage of the LMRDA in September 1959 . . . . No trend is discernible which would indicate that there will be any significant change in either the average number of days taken by the members to file appeals to higher union authorities, or the average time taken by the organizations in processing their members' election protests and rendering decisions.

610. If an election guarantee is included in a union constitution, it is enforceable before election in a state court, as LMRDA § 403, 29 U.S.C. § 483 (1970), retains state remedies for a member who wishes to enforce the union's contractual obligation to him under the constitution. For further discussion, see pp. 554-56 infra.

611. Although it might seem appropriate to have an appeal to an apolitical trial board before appeal to the IP, especially when dealing with highly politicized intermediate elections, there are factors which militate against such a step. First, trial boards would take considerable time to arrange and would take longer to deliberate. Second, almost any trial board appointed by the national union will in any event tend to give decisions favorable to the national leaders; the net result may only be a wasted, time-consuming effort. Third, final appeal to a public review board or the IEB should provide an equally fair procedure; as not all complaints would go this far, the resulting system would be expected to operate more quickly. Yet the possibility of being overruled would act as a check on the IP's discretion.
putes. Subsequent appeal would then be to the IEB or public review board. Appeal to the convention should be viewed as extraordinary, considering the long delay entailed. Such an appeal should be optionally available to a complaining party but not required for exhaustion.

(4) A handbook or election manual should be prepared for the membership informing them of the substantive guarantees in the union's constitution and the procedures to be followed in election appeal cases.

(5) The national should be given the constitutional powers to fulfill its role in the appeals process, including:

(a) the power to investigate local elections,
(b) a specified assortment of remedies including the power to order a rerun election, and
(c) the authority to observe, supervise, or actually conduct an election.

(6) The remedial powers of the national should not include the power to impose a trusteeship on the local or to assume control of its finances and administration because of election abuses. The trusteeship device creates significant risks of compromising internal union democracy. The power to observe and conduct a specific election should be adequate to insure democratic conditions.

612. Some intermediate union organizations act as service staff for the locals, have an administrative structure, and would be capable of investigating and adjudicating. Other intermediate organizations serve only as lobbying arms or information clearinghouses and would not have the staff organizations appropriate for this task. supra note 66, at 63.

613. The Steelworkers have prepared such manuals. United Steelworkers of America, Local Union Election Manual (1967) and International Union Elections Manual (1968). The manuals include rules on eligibility, conventions, notices of election and nomination, balloting, appeals, mailing lists and nomination procedures. They also explain how the LMRDA applies to election procedures.

614. Although the imposition of a trusteeship may be a very potent tool for a national seeking to restore democratic practices, that same potency makes use of the trusteeship method unwise except in the most extreme instances. In writing Title III of the LMRDA, Congress realized both the benefits and evils of trusteeships. They provide a primary weapon for ridding local unions of graft, corruption or demagoguery. However, if needlessly imposed, continued for undue lengths of time, or wrongfully used as tools of internal politics, they can infringe on the independence of a local. Moss, Union Trusteeships: Title III of the Labor-Management Reporting and Disclosure Act of 1959, 4 S.U.R. U.L. REV. 1, 4-6 (1969); Beaird, Union Trusteeship Provisions of the Labor-Management Reporting and Disclosure Act of 1959, 2 G.A. L. REV. 469, 485-99 (1968).

While seeking to maintain the trusteeship device when necessary, Congress granted a federal right of local autonomy by limiting the purposes for which trusteeships could be imposed, LMRDA § 302, 29 U.S.C. § 462 (1970), and providing means by which a member could request the DOL to sue, or could himself bring suit to have the trusteeship enjoined. LMRDA § 304, 29 U.S.C. § 464 (1970). This alternate remedies provision, allowing individual suits even when an administrative remedy exists, contrasts with the Title IV mechanism which allows only the DOL to bring suit post-election. For further discussion of the remedies, see Moss, supra at 24-32; Beaird, supra at 516-20.

Congress granted a presumption of validity for the first eighteen months if a trusteeship
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(7) The appeals process should include time limits for decision by the appellate bodies themselves, with the objective of ensuring that an appeal would be processed through the stage of decision by the IP before appeal to DOL becomes available.

(8) Should the union require a further appeal to the IEB or to a public review board, this process could be continued even after a complaint has been filed with the DOL, since disposition by the union while the complaint is pending with the DOL could result in termination of the Title IV proceeding.615

(9) Unions should consider instituting public review boards, employing means of selection and procedures of appeal which assure maximum independence to the boards.616

was established in conformity with the union constitution and after a fair hearing. After eighteen months, however, the union must show "clear and convincing proof that the continuance of the trusteeship is necessary for a purpose allowable under Section 302." LMRDA § 304(c), 29 U.S.C. § 464(c) (1970).

As one of the allowable purposes for institution of a trusteeship under Section 302 is "restoring democratic procedure," the device has been used in election contexts. Fifty trusteeships, seven per cent of trusteeships reported to the DOL, were imposed for that purpose. U.S. DEP’T OF LABOR, UNION TRUSTEESHIPS: A REPORT TO CONGRESS BY THE SECRETARY OF LABOR 60-61 (1962). Local autonomy was suspended to prevent ballot stuffing and tampering, provide orderly union meetings, and supervise reruns. Such action was approved in Sawyer v. Grand Lodge, Machinists, 279 F. Supp. 747 (E.D. Mo. 1967), involving chaotic local meetings, but was not approved in Parker v. Teamsters Union, 229 F. Supp. 172 (W.D.N.C. 1963), where the Teamsters sought to perpetuate a defeated slate of candidates when ballots were stolen while the lights were out. Schonfeld v. Raferty, 271 F. Supp. 128 (S.D.N.Y.), aff’d, 381 F.2d 446 (2d Cir. 1967), highlights the dangers of trusteeships in election contexts. The court found the trusteeship had been imposed to keep an indicted chief district officer in power despite efforts by insurgents to install new leadership. For further details, see Painters’ District 9 Study, supra note 156, at 31-44. In the United Mine Workers, nineteen of twenty-three districts are under trusteeships; seven of the districts have been under trusteeships since 1941. Each of these districts has a president and a secretary-treasurer who are appointed by the national president, rather than elected within the district. The national union directly controls these intermediate organizations by the power of the purse. Hearing on UMW Election, supra note 2, at 21-23 (Feb. 5, 1970) (testimony of Joseph A. "Chip" Yablonski); Beaird, supra at 507; Moss, supra at 9. The national union can and has threatened to throw the autonomous districts into trusteeships if an insurgent slate is elected. Interview with complainant union member M. The DOL filed suit to upset seven of the UMW trusteeships on Dec. 15, 1964, but said it was ready to go to trial only recently. N.Y. Times, July 16, 1971, at 35, col. 2. In the meantime, private suits to challenge these trusteeships have been prevented by LMRDA § 306, 29 U.S.C. § 466 (1970), which cuts off alternative remedies once the Secretary has filed suit. This inability of the DOL to remedy the most shocking abuse of trusteeships in the nation demonstrates how dangerous they may be to local autonomy and democracy.

Because trusteeships are so susceptible to abuse, it seems unwise for them to be used in administering pre- or post-election remedies. It should be adequate for the national to send observers if election abuses are anticipated. If the observers’ presence in itself does not stop election abuses, the national can use its normal disciplinary procedures against recalcitrant members. (See Moss, supra at 10-13, and Beaird, supra at 502-12, on what constitutes a trusteeship under the law.)

615. Sometimes the national stops its appeals process once complaint is made to the DOL. Interview with complainant union member A.

616. Public review boards (PRBs) constitute an attempt by labor organizations to have voluntary impartial review of union decisions and practices not involving collective bargaining. The best known PRB is the United Autoworkers’, established in 1937. See J. STIEBER, W. OBERER, & M. HARRINGTON, DEMOCRACY AND PUBLIC REVIEW (1950). The
If such improvements were made, the congressional deference to internal appeals would be warranted, as an efficacious internal appeals process is the best method for handling election complaints. Internal appeals allow union leaders close to the problems to solve them, avoid time-consuming resort to government intervention, minimize legal expenses, and create within a union an environment conducive to responsiveness. But until such modifications are adopted, it must be concluded that congressional reliance on union self-correction and DOL deference to internal union remedies are largely misplaced, as these procedures provide inadequate protection for the guarantees of electoral responsiveness.

The UAW Board is composed of prominent citizens appointed by the national president. It handles appeals from decisions of the union’s IEB and reviews on its own initiative or at the IEB’s suggestion violations of the AFL-CIO ethical practices code. Id. at 9. Among appeals the PRB has handled are claims of election misconduct. Id. at 16.

A PRB can serve several functions. It can force union appeal bodies to be more conscientious because they realize that an outside board will review their decisions. It can discover and publicize failings in the union constitution and bylaws. And it can make members more aware of and willing to exert their rights under the union’s constitution. Id. at 30-32, 51-64. The Board can also relieve pressure on union officials by allowing them to avoid making unpopular decisions, knowing that the PRB will reverse them and take the blame for the unpopular result. In the election context, this might be significant, since even fair, conscientious leaders might be reluctant to find against their friends and supporters in a district or local election. Interview with union attorney X. See also Brooks, supra note 602, at 84-96.

Despite the UAW’s glowing praise for its PRB, UNITED AUTOWORKERS, A MORE PERFECT UNION ..., THE UAW AND PUBLIC REVIEW BOARD, WHY, WHAT, HOW (1960), few unions have such bodies. Many union leaders resent the idea that outsiders should review their decisions or interfere in union affairs. Interviews with union attorney AA and union officer B. However, support for PRB’s was voiced by union members interviewed. Interviews with complainant union members D, I, and K; union attorney II; complainant attorney K; and union officers F and P.

The efficacy of PRB’s in election appeals cases depends on a number of factors. First, its members must be honest and impartial. If they are appointed by the national president, who is likely not to welcome “outsiders,” Board members are likely to be friends of the incumbent administration. The potential for behind-the-scenes dealing with Board members always exists. Interviews with complainant union members D, I, and K and union attorney P. Second, the Board will be limited unless it is aggressive in pushing the union to adopt fair and comprehensive election rules. PRB’s are normally set up to enforce the union’s own rules; if those rules are inadequate, the Board is stymied unless it can pressure the union to amend them. STEIER, supra at 30. Third, the Board will be limited unless it has the resources to investigate claims and the procedures to receive meaningful evidence. The UAW allows lawyers to present evidence before the PRB, but it does not allow cross-examination of witnesses. Interview with union officer D.

Use of a PRB will inevitably involve time delays, especially if union leaders grow to rely on it to be the body which orders reruns or other equitable remedies. The extra step in the appeals process may involve six to eighteen months to resolve election disputes. Interview with union attorney AA. But if a PRB is well constituted, institution of such overseers can be a valuable adjunct to union appeals processes. It can be useful in establishing an environment within the union which encourages active participation in the electoral process. Self-improvement through institution of PRB’s seems called for in the union movement. However, as Lipset, The Law and Trade Union Democracy, 47 VA. L. Rev. 1, 16 (1961), points out:

Impartial review boards and/or enforced formal rights of opposition and due process exist in those unions that need them least, such as the UAW, Upholsterers International Union, the International Typographical Union or the American Newspaper Guild. The unions which most need elaborate and realistic safeguards protecting basic rights are least likely to establish them.
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V. Pre-Election Judicial Intervention

In addition to Title IV suits and internal union appeals procedures, there is a third potential source of relief for election abuses—private lawsuits brought before the election by union members.\(^617\) The more serious the flaws in the Title IV and internal union appeals procedures, the more it falls to this avenue of redress to insure fair elections. Pre-election judicial relief, however, has been severely and unnecessarily restricted by judicial interpretation of the LMRDA.

A statutory basis for challenging union election practices can be found most readily in either Title I or Title IV of the Act. Section 101 (a) (1) of Title I guarantees, among other things, that "[e]very member of a labor organization shall have equal rights . . . to nominate candidates [and] to vote in elections . . . subject to reasonable rules and regulations in such organization's constitution and bylaws."\(^618\) These provisions overlap with similar guarantees in Title IV that "a reasonable opportunity shall be given for the nomination of candidates and every member in good standing . . . shall have the right to vote for . . . candidates of his choice . . . ."\(^619\) But, whereas Title I may be enforced by a private, pre-election suit,\(^620\) Title IV relies primarily upon an action by the Department of Labor to set aside the contested election.\(^621\) For violations which are arguably covered by both titles, pre-election relief would seem to be available on the face of the statute, either by couching the complaint as a violation of Title I and bringing a private suit, or by bringing the complaint as a Title IV violation and arguing for the general availability of pre-election judicial relief under that title.\(^622\)

\(^617\) Private post-election suits are apparently precluded by LMRDA § 403, 29 U.S.C. § 483 (1970):

No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this subchapter. Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this subchapter. The remedy provided by this subchapter for challenging an election already conducted shall be exclusive.


\(^619\) 29 U.S.C. § 481(e) (1970). Virtually all violations of Title I will also be violations of Title IV. Harvard Note, supra note 497, at 1625.

\(^620\) Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.


\(^622\) Note, Union Elections under the LMRDA, 74 YALE L.J. 1282, 1284 (1964) [hereinafter cited as Yale Note].
The former avenue of relief was narrowed and the latter foreclosed by the Supreme Court in *Calhoon v. Harvey*. The pre-election suit was brought challenging a union's rigid self-nomination and candidate eligibility requirements under § 101(a)(1). The Court construed the Title I provision as prohibiting only *discrimination* in the right to nominate and held that discrimination was not shown because the same qualifications were required equally of all members of the union. The complaint, which challenged the *reasonableness* of the eligibility requirement, was held to state a claim under Title IV only. Pre-election enforcement of the Title IV provision was precluded by the Court's holding that the administrative remedy of § 402 was the "exclusive method for protecting Title IV rights." Since that remedy can be invoked only after the contested election, direct pre-election enforcement of Title IV rights was totally barred. The Court in *Calhoon* also seemed to eliminate virtually all possibility of indirect pre-election enforcement of election guarantees

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624. Plaintiffs were members of the National Marine Engineers' Beneficial Association, a maritime union. The union bylaws deprived a member of the right to nominate anyone for office but himself. The union constitution provided in addition that no member could be eligible for nomination or election to full-time elective office unless he had been a member of the union for five years and had served 180 days or more of sea time in each of two of the preceding three years on vessels covered by collective bargaining agreements with the union. *Id.* at 135-36.
625. *Id.* at 139. As Justice Stewart pointed out in his concurrence, the majority opinion would thus shield from Title I attack an eligibility requirement which said that only incumbents could be nominated, as long as it was applied equally to all candidates whom members wished to nominate. *Id.* at 143. This narrow reading was not mandated by the statute, as the Supreme Court has indicated in striking down subtle voting discriminations in the public sector under similar equal rights provisions. See *id.* at 143 (Stewart, J., concurring) and cases cited therein.
626. *Id.* at 139-40. It should be noted that the result reached in *Calhoon* can be supported on the narrow ground that the legislative history of the LMRDA specifically indicates that Congress intended the reasonableness of eligibility requirements to be determined only under Title IV. In the legislative debates on the LMRDA, Senator Kuchel stated that he did "not believe that in any fashion the equal rights section touches what the provisions of the constitution or bylaws might be with respect to the right to run for office." 105 Cong. Rec. 6710 (1959). Many candidates who were denied pre-election relief under § 101(a)(1) before *Calhoon* would have been satisfied with that interpretation, as they were not challenging the reasonableness of eligibility requirements, but rather their discriminatory application. Jackson v. International Longshoremen, 212 F. Supp. 79 (E.D. La. 1962); Colpo v. Highway Truck Drivers, 201 F. Supp. 307 (D. Del. 1961), aff'd on other grounds, 305 F.2d 362 (3d Cir. 1962), *cert. denied*, 371 U.S. 890 (1962); Johnson v. Waiters Union, 190 F. Supp. 444 (S.D. Cal. 1961); Byrd v. Archer, 45 L.R.R.M. 2289 (S.D. Cal. 1959).
628. *See id.* at 139-40. *See also Yale Note, supra note 622, at 1283 n.14.
629. *But see id.* at 1290-92 for an ingenious argument that private pre-election relief under Title IV may still be available despite *Calhoon* through use of 28 U.S.C. § 1337 (1970), concerning jurisdiction of federal courts under congressional acts dealing with interstate commerce.
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through the vehicle of Title I. While the case on its facts dealt only with contested eligibility and nomination requirements, Calhoon ignored the potential overlap between Titles I and IV on policy grounds that sweep more broadly. In its opinion, the Court asserted that Congress intended that judicial deference be paid to the administrative remedy specified in Title IV:

It is apparent that Congress decided to utilize the special knowledge and discretion of the Secretary of Labor in order to best serve the public interest . . . Reliance on the discretion of the Secretary is in harmony with the general congressional policy to allow unions great latitude in resolving their own internal controversies, and, where that fails, to utilize the agencies of Government most familiar with union problems to aid in bringing about a settlement through discussion before resort to the courts.

The effect of this policy of judicial deference has been to preclude most pre-election judicial relief and increase reliance on the administrative remedy as the prime vehicle for enforcing election rights. This section will describe the extent to which courts have been willing to grant pre-election relief despite Calhoon. It will then criticize the way in which the Calhoon Court interpreted the LMRDA and suggest areas in which greater pre-election relief should be available.

630. See H. Wellington, Labor and the Legal Process 212 (1968), commenting on the effect of the Calhoon opinion:

In accents strong and clear Title IV proclaims the primary rights of the members to a fair and democratic election, and then, as the Court has it, makes an utter mockery of those rights by denying their effective enforcement . . . Congress ought not to be read as making promises and then not fulfilling them, as acting in so slick and deceptive a fashion. Wellington had noted that, rather than looking to Title IV as a limitation on Title I, the Court could have and should have used it as a guideline for broadly defining "equal rights." Id. at 208.

631. In his concurrence, Justice Stewart agreed on other grounds with the holding of the majority, but cautioned that the majority's sweeping language could destroy many Title I rights. He noted that Title IV suits impose increased burdens on plaintiffs, notably a showing that the violation may have affected the election's outcome, and thus made it difficult to obtain relief. He said the majority's opinion contravened Congress' intention of strengthening and supplementing Title IV with Title I. Calhoon v. Harvey, 379 U.S. 134, 145 (1964). Cases subsequent to Calhoon have explicitly interpreted its decision as precluding Title I enforcement of rights which overlap with Title IV. See Verbisicus v. Local 49, Marine Workers, 238 F. Supp. 848, 849 (E.D. Mich. 1964); McCarthy v. District 9, Machinists, 252 F. Supp. 350, 352 (E.D. Mo. 1966); Spivey v. Grievance Comm., 69 L.R.R.M. 2709 (N.D. Ga. 1968); McGuire v. Brotherhood of Locomotive Eng'rs, 426 F.2d 504, 507-08 (6th Cir. 1970). Commentators on Calhoon have also given this interpretation to the opinion. See, e.g., Beaird, Some Aspects of the LMRDA "Bill of Rights," 5 Geo. L. Rev. 581, 679 (1971).

A. Current Availability of Pre-Election Relief

1. Title IV Pre-Election Remedies

Although Title IV generally relies for its enforcement on the post-election administrative remedy outlined in § 402 of the Act, specifically provides for enforcement of certain rights by private suit. Under this subsection, candidates have successfully brought pre-election suits to compel union officials to distribute campaign literature at the candidate's expense, to enjoin discrimination with respect to the use of membership mailing lists, and to obtain union distribution of campaign literature on the same terms as literature already distributed for other candidates. The availability of pre-election enforcement of the right to inspect membership lists is less clear, and pre-election relief under the subsection's broad guar-


634. As noted in Calhoon v. Harvey, 379 U.S. 134, 140 n.13 (1970), "Section 401(c) of the Act permits suits prior to election in the United States District Courts by any bona fide candidate for union office to enforce the rights, guaranteed by that section, to equal treatment in the distribution of campaign literature and access to membership lists."


637. The statute does not specifically state that the right to inspect the mailing list is enforceable in district court, as does the first sentence of § 401(c) in connection with distribution of campaign literature and non-discriminatory use of the membership list. 29 U.S.C. § 481(c) (1970). Although the Calhoon footnote states that "access to membership lists" is a right enforceable pre-election (see note 634 supra), the DOL favors a strict reading of the Act, precluding pre-election enforcement of the inspection right. See INTERPRETATIVE MANUAL, supra note 298, at § 431.700.

The question of pre-election enforcement of the membership list inspection right was specifically avoided in Conley v. Aiello, 276 F. Supp. 614, 616 n. (S.D.N.Y. 1967). However, in Yablonski v. United Mine Workers, Civ. No. 3061-69 (D.D.C., filed Nov. 6, 1969), plaintiff sought to inspect the membership list. Preliminary injunction was denied, but only upon consideration of "representations of action to be taken made by counsel for the union." These representations included the promise to allow six Yablonski supporters to inspect the membership list. See Supplementary Motion for Preliminary Injunction to Restrain Violations of Inspection Provisions of Section 401(c) of LMRDA of 1959, at 2, Civ. No. 3061-69 (D.D.C., filed Nov. 14, 1969). In Antal v. District 5, Mineworkers, 64 L.R.R.M. 2222, 2223 (W.D. Pa. 1966), the court stated the defendant was "bound" by the agreement of counsel to allow pre-election inspection of membership lists. While this decision does not indicate whether Judge Weber found pre-election jurisdiction to order inspection of the membership list, Judge Weber stated in Antal v. Budzanoski, 75 L.R.R.M. 2872, 2873 (W.D. Pa. 1970), that the only pre-election relief available under Title IV is "in Sec. 401(c) . . . which guarantees candidates for union office the right to inspect membership lists, and gives such bona fide candidate standing to sue prior to election for denial of this right. [See the Opinion of this writer in Antal v. UMV Dist. 5 . . . , where this right was enforced in this court.]

But, see an argument that pre-election enforcement of the list inspection right is doubtful in Daniels, supra note 247, at 325.
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antees of “adequate safeguards to insure a fair election” is even more doubtful. 639

2. Title I Pre-Election Remedies

The Title I provisions relevant to election contests include the guarantee of “equal rights and privileges” to nominate candidates and vote, and the general right to freedom of speech and assembly. 640 These guarantees are enforceable by any aggrieved member “as may be appropriate.” 641

Even before Calhoon, a Title I suit seeking a court order to enjoin voting fraud was dismissed, despite plaintiff’s argument that the equal right to vote was meaningless unless it was an “effective vote.” The court, foreshadowing Calhoon, held that Congress intended for such election disputes to be resolved through the Title IV mechanism. 642

The Seventh Circuit, however, had ruled differently prior to Calhoon, granting pre-election relief under Title I upon a clear showing of ballot tampering. The court held such tampering to be a denial of the equal right to vote “as surely as if the doors of the union hall had been barred.” 643 The Calhoon opinion, however, has cast doubt on the continued availability of Title I suits in such vote fraud cases. 644

639. The Calhoon footnote on § 401(c) did not mention the “adequate safeguards” provision. See note 634 supra. Courts have dismissed claims under § 401(c) for judicial determination of the eligibility of an allegedly qualified candidate, McCarthy v. District 9, Machinists, 252 F. Supp. 350 (E.D. Mo. 1965); for a court ruling that poll watchers need not be union members, Antal v. District 5, Mineworkers, 64 L.R.R.M. 2222, 2223 (W.D. Pa. 1966) (dismissed on the merits, holding that the union’s existing poll watcher requirements were reasonable); and for court orders requiring poll observers, secret ballots, adequate notice of election, and fair ballot counting, Yablonski v. United Mine Workers, Civ. No. 5061-69 (D.D.C., filed Nov. 6, 1969) (dismissed, however, only in light of “representations of action to be taken made by counsel for the union”). A claim for impounding of ballots was denied under § 401(c) in Jennings v. Carey, 57 L.R.R.M. 2635 (D.D.C. 1964), but without citing any statutory authority, the D.C. Circuit reversed and gave the requested order, 58 L.R.R.M. 2506 (1965).

The legislative history indicates that the “adequate safeguards” provision was not meant to be enforceable pre-election. That provision was originally in a different section of the bill where pre-election enforcement was not contemplated. See S. 1555, § 301(b), 86th Cong., 1st Sess. (1959), reprinted in NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959: TITLES I-VI 775 (1959). Senator Javits, whose amendment put the section in its present form, stated no intention to make adequate safeguards part of the § 401(c) pre-election provisions. 105 CONG. REC. 6727-29 (1959).

643. Beckman v. Local 46, Iron Workers, 315 F.2d 848, 850 (7th Cir. 1963).
644. In a case immediately subsequent to Calhoon, Jennings v. Carey, 57 L.R.R.M. 2635 (D.D.C. 1964), an attempt to obtain ballot counting safeguards under Title I was dismissed. The court said there was no discrimination alleged and thus under Calhoon
Prior to *Calhoon*, candidates declared ineligible for nomination to union office often sought pre-election relief under § 101(a)(1). These suits were generally dismissed on the grounds that Title I granted a right to nominate, not a right to be a candidate. In denying the eligibility challenge in *Calhoon*, the Court did not rely on this rationale, holding instead that a union member would not be deprived of an "equal right" to nominate if the same eligibility requirements were applied to all candidates. Title I was thus held to be no basis for a challenge to the reasonableness of an eligibility requirement, although it could presumably reach cases of discriminatory application of the requirement.

Subsequent cases have dealt with nomination there was no Title I remedy. The court further noted that the *Calhoon* decision confirmed the decision in *Rarbach*, supra note 642. Jennings, however, was reversed in a decision which cited no statutory authority. 58 L.R.R.M. 2606 (D.C. Cir. 1965). For a description of this case, see *NYU Note*, supra note 119, at 355-57.

The argument that ballot stuffing is not a discrimination among union members depriving them of equal rights as interpreted by *Calhoon* is made in *Beaird*, supra note 631, at 675, and in *Bercham*, supra note 82, at 10.

But see McDonough v. Local 825, Operating Eng'rs, Civ. No. 1313-71 (D.N.J., filed Sept. 17, 1971). Judge Coolahan ordered a supervised recount under § 101(a)(1), holding that until the recount was completed, no post-election appeal to DOL could be started, and thus Title I jurisdiction still existed. Finding that *Calhoon* said "only that Title IV violations do not provide independent or derivative source of jurisdiction under" §§ 101(a)(1) and 102, the court held that pre-election relief was available when it could be shown that, through ballot tampering, equal rights to vote were infringed: the majority [in *Calhoon*] attributed to the equal voting rights guarantee of § 411(a)(1) no greater meaning than a prohibition against discrimination. Yet § 481 is replete with references to equal treatment among all candidates and "each member." Therefore, if plaintiff brings a colorable claim under § 411(a)(1), logic dictates that federal jurisdiction is not ousted simply because a similar claim may later be advanced under Title IV.

See also Stettner v. International Printing Pressmen, 278 F. Supp. 675 (E.D. Tenn. 1967), holding that counting of illegal ballots in a referendum violated § 101(a)(1) equal rights to vote.


646. See Davis v. Turner, 395 F.2d 671 (9th Cir. 1968); Wirtz v. Local 406, Operating Eng'rs, 254 F. Supp. 962, 966 (E.D. La. 1966).

647. Calhoon v. Harvey, 379 U.S. 124, 139 (1964). In *DePew* v. Edmiston, 261 F. Supp. 966 (M.D. Pa. 1967), plaintiff, whose unique seniority status allowed him to belong to either of two locals, was denied relief on a Title I claim that he had been declared ineligible because of membership in the "wrong" local, although he had been allowed to run in the past. The dismissal was reversed, 386 F.2d 710 (3d Cir. 1967), when the court realized this was a claim not of unreasonableness of an eligibility requirement, but of discriminatory application of the requirement.

However, in *McArthy* v. District 9, Machinists, 252 F. Supp. 350 (E.D. Mo. 1966), where the plaintiff claimed that in violation of the union's bylaws he was disqualified...
restrictions other than candidate eligibility requirements, and have held Title I applicable only when a formal limitation on the right to nominate is discriminatory on its face.\(^\text{648}\)

Other attempts to use § 101(a)(1) to protect member voting and nomination rights have been frustrated by judicial deference to union autonomy and expertise in writing election regulations.\(^\text{649}\) Relying on the Calhoon refusal to judge reasonableness, courts have tended to defer to union nomination and voting restrictions without examining them for discriminatory impact.\(^\text{650}\)

from candidacy, an apparent discrimination, denial of jurisdiction under Title I was based on Calhoon. Despite the possibility that discriminatory application of eligibility requirements could still be challenged under Title I, plaintiffs challenging what appear to be discriminatory applications of eligibility requirements may not even bring their actions under Title I, possibly because of the broad sweep of the Calhoon opinion. See Conley v. Aiello, 276 F. Supp. 614 (S.D.N.Y. 1967).

648. Before Calhoon some courts restrained unfair nomination proceedings, Connor v. Local 565, Teamsters, 45 L.R.R.M. 2165 (D.N.J. 1959), but Title I challenges to nomination procedures have since been dismissed based on Calhoon's statement that any requirement applied equally to all members is not a Title I violation. Paravante v. Local 13, Insurance Workers, 59 L.R.R.M. 2169, 2170 (W.D. Pa. 1965) (refusing to consider a question of the "propriety of union procedures with respect to the nomination meeting"); Lenhart v. Local 9, Operating Eng'rs, 68 L.R.R.M. 3034 (D. Colo. 1963) (disallowing a claim that under the union constitution members should have been allowed to nominate a person for more than one office); and Avery v. Stage Employees Union, 54 CCH Lab. Cas. ¶ 11, 453 (N.D. Cal. 1965) (dismissing claims of violation of one-man-one vote principles, lack of adequate notice, and failure to provide a reasonable opportunity to nominate).

However, in O'Brien v. Paddock, 246 F. Supp. 809 (S.D.N.Y. 1965), an allegation that denial to "associate members" of the rights to nominate and vote was a § 101(a)(1) violation was found to be a triable issue.

As Justice Stewart had predicted, the language of Calhoon led courts to intervene under Title I only when nomination requirements were discriminatory on their face. See note 625 supra. Thus, despite the fact that the lack of notice in Avery, the questionable nomination procedures in Paravante, and the violation of the union constitution in Lenhart might have just as effectively deprived certain members of equal rights to nominate as did the "associate member" classification in O'Brien, relief was found appropriate only in the latter case. See also note 137 supra for a pre-Calhoon example of a limited interpretation of equal rights.

649. In LMRDA § 101(a)(1), 29 U.S.C. § 411(a)(1) (1970), the required equality of rights is limited by the phrase "subject to reasonable rules and regulations in such organization's constitution and bylaws." Thus, relief has been denied to a member who was deprived of the right to vote after being reclassified as a member "not working at the trade" when the union discovered he had a full-time outside job. Williams v. International Typographical Union, 423 F.2d 1293 (10th Cir. 1970), cert. denied, 400 U.S. 824 (1970). Relief has also been denied to "provisional members" who sought to participate in the national convention. Ragland v. United Mine Workers, 188 F. Supp. 131 (N.D. Ala. 1960). However, a claim that "associate" members were deprived of their legitimate right to vote has been held a triable issue under § 101(a)(1). O'Brien v. Paddock, 246 F. Supp. 809 (S.D.N.Y. 1965). Cf., United Mine Workers v. District 50, Mineworkers, 74 L.R.R.M. 3001 (D.C. Cir. 1970).

650. Another possible hurdle to Title I relief is the requirement of exhaustion: No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants to respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization,
In contrast to the judicial wariness in § 101 (a) (1) suits, courts have been quite aggressive in protecting § 101 (a) (2) freedom of speech and assembly rights. Recognizing the importance of free speech during election campaigns, courts have reversed or enjoined union suspensions of members resulting from campaign statements. When there has been a "substantial likelihood" that plaintiffs would be able to show that discharges, transfers, and demotions were reprisals intended to limit free speech during a campaign, preliminary injunctions have been issued. This judicial activism has occurred despite before instituting legal or administrative proceedings against such organizations or any officer thereof: And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.


However, this requirement has been interpreted loosely ever since the Second Circuit's decision in Detroy v. Guild of Variety Artists, 286 F.2d 75 (1961), cert. denied, 366 U.S. 929 (1961). Noting that the statute reads "may be required," the court held that the requirement was discretionary and was meant to require only that courts never demand exhaustion for more than four months. Cf., NLRB v. Marine Workers, 391 U.S. 418, 425-26 (1968). Detroy held that any time plaintiff can show a clear violation, irreparable harm, the futility of internal appeals, and that the internal decision would not aid the court, exhaustion would not be demanded. Subsequent decisions have accepted less than all four showings to grant relief without exhaustion. Simmons v. Avisco, Local 713, Textile Workers, 350 F.2d 1012 (4th Cir. 1965) (clear violation shown); Local 455, Boilermakers v. Terry, 398 F.2d 491 (5th Cir. 1968) (futility shown); Steib v. Local 1497, New Orleans Clerks & Checkers, 436 F.2d 1101 (6th Cir. 1971) (futility and irreparable harm shown); Fulton Lodge 2 v. Nix, 415 F.2d 212 (5th Cir. 1969) (futility shown); Local 760, Fruit & Vegetable Packers v. Morely, 378 F.2d 738 (9th Cir. 1967) (non-futility not shown by union); Libutti v. Di Brizzi, 337 F.2d 216 (2d Cir. 1964) (clear violation shown); Farowitz v. Local 802, Musicians, 330 F.2d 999 (2d Cir. 1964) (futility shown). In most election cases, either the violation is clear, the internal remedy futile, or the harm irreparable. Thus § 101(a)(4) should rarely be a deterrent to relief. See Bercham, supra note 82, at 22-27.

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


The plaintiff represents a small dissenting group within the Local who may provide the checks and balances on the operations of this Local which are needed in any well run democratic organization.


Most of these suits are also brought under LMRDA § 609, 29 U.S.C. § 529 (1970), prohibiting labor organizations from interfering with member rights under the Act and providing for enforcement through § 102 suits.

the fact that the right to free speech during a campaign is a right guaranteed by both Title I and Title IV. The approach taken by the Court in Calhoon would appear to argue for limiting the free speech provision in Title I to non-election contexts, leaving the latter within the scope of Title IV and subject to enforcement through the post-election administrative mechanism. This approach has not been followed in the free speech area.

3. Title V Pre-Election Remedies

Section 501 of the LMRDA provides that union officials have a “fiduciary responsibility,” and that any member can sue for violation of that obligation. Because officers conduct elections as part of their duties, an expansive reading of § 501 might impose upon the officers a duty to conduct “fair elections” as part of their fiduciary obligation. Pre-election suits would then be available to remedy any abuses in election procedures for which the officers were responsible. With a few exceptions, however, most courts have not so interpreted § 501. Relief under this section has been denied in cases where plain-
tiffs have sought to require pre-election registration of voters, restrain ballot counting, protect voting rights, and eliminate "ghost locals." Some courts, reasoning much as Justice Black did in regard to Title I in Calhoon, have pointed to the existence of a comprehensive scheme for protecting election rights in Title IV as justification for reading Title V narrowly.

The question of whether there is a § 501 violation when union funds are spent illegally to promote a particular candidate has not been resolved. Bringing such an abuse under § 501 would not entail recognition of a general fiduciary duty to conduct fair elections; it would only challenge officer misuse of union funds.

4. State Pre-Election Remedies

Section 403 preserves "existing rights and remedies to enforce the [union] constitution and bylaws," and under this section state courts remain an avenue for pre-election relief. Commentators in 1959 hoped that passage of the LMRDA would give new life to state remedies for election irregularities, but this appears not to have occurred.


661. Jennings v. Carey, 57 L.R.R.M. 2635, 2638 (D.D.C. 1964). Jennings was reversed and the ballots impounded. 58 L.R.R.M. 2606 (D.C. Cir. 1965). But, as the lower court claims were made on the basis of both §§ 101(a)(1) and 501, and the D.C. Circuit's decision cites no statutory authority, it is impossible to know the jurisdictional basis for the ruling. If the decision was based on § 501, it would comport with the D.C. Circuit's minority position of granting broad § 501 relief. See note 659 supra.


667. For an argument that Calhoon implicitly precludes pre-election state court relief, see Yale Note, supra note 622, at 1290 n.53.


669. There seem to be only twenty-two reported state cases dealing with union elections since the Act was passed; relief was denied in all but six. For the six cases granting relief, see notes 675-80 infra; the sixteen denials are listed in notes 672-73 infra.

Searching for state election relief cases has proved fruitless for others. The California Superior Court in Burroughs v. Operating Eng'r's Union, 63 L.R.R.M. 2161, 2162 (1959) commented: "[O]f the more than 500 appellate cases which have construed, applied or acted upon Title I or Title IV rights . . . only one case is a state case."

However, as noted in Summers, Judicial Protection of Union Democratic Processes in New York, Oct. 20, 1959, at 2 (unpublished report to the New York Industrial Commissioner), many state cases go unreported. In the course of interviewing, instances were discovered where pre-election relief was available from state court judges through informal settlements. These cases do not get reported. Interview with union attorney Y.
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Three factors may largely explain the paucity of pre-election state relief. First, most union constitutions and bylaws do not include specified guarantees for a fair election. Since state enforcement is based on union constitutions and bylaws, members typically have little upon which to base a claim. Second, state courts appear reluctant to become involved in union election suits. This reluctance is suggested by frequent findings that internal remedies have not been exhausted or that the irreparable harm necessary for a preliminary injunction has not been shown. Third, where the judiciary is elected, insurgents seem to believe that judges would favor incumbents and may be discouraged by this belief from bringing suit in state court.

670. See pp. 529-31 supra.
671. S. REP. NO. 187 ON S. 1555, 86th Cong., 1st Sess. 21 (1959). Summers, Pre-Emption and the Labor Reform Act—Dual Rights and Remedies, 22 Otto Sr. L.J. 119 (1970), argues that § 403 establishes a federal substantive law which allows state courts to enforce Title IV rights as well as union constitutions and bylaws. Although Calhoon would seem to rebut that theory in holding that the exclusive way to enforce Title IV rights was through the post-election DOL mechanism, no state court cases were found denying pre-election relief specifically on those grounds. See also Bercham, supra note 87, at 43-45; Harvard Note, supra note 497, at 1629-31.


In line with the argument to be made at pp. 556-61 infra, two suggestions of means by which states should expand the availability of pre-election relief are warranted. (1) State courts should adopt the Detroy doctrine (see note 650 supra) for determining whether exhaustion of internal relief should be demanded. This is the exhaustion standard which is proposed for all pre-election suits as being consistent with the legislative history of LMRDA. See p. 560 infra. Use of the Detroy doctrine will guarantee uniformity of exhaustion requirements among the states in enforcement of union constitutions and uniformity with federal courts in determining availability of pre-election relief. (2) State courts should use the guidelines developed in Titles I, IV, and V litigation to determine what is "reasonable" whenever a union constitution calls for "reasonable" election procedures, and should use the same guidelines to knock down unreasonable local bylaws whenever they are promulgated under a national union's authorization to locals to use "reasonable" procedures. See Harvard Note, supra note 497, at 1629. By using the federal precedents as guidelines, the state courts would maintain the uniformity of national labor policy and benefit greatly from the experience federal courts have had in adjudicating Landrum-Griffin claims.

674. Interviews with complainant attorneys I and N, and union attorney GG.
When they have acted, state courts in pre-election suits have enjoined unconstitutional nomination rejections, required a vote on a proposed use of voting machines, enforced election guarantees where irregularities were shown, ordered officer elections, reversed politically retaliatory suspensions and suspended constitutionally invalid eligibility restrictions.

B. Calhoon Reconsidered

The language and reasoning of Calhoon go far toward eliminating pre-election judicial relief for election violations. It is therefore necessary to critically examine the considerations underlying the position adopted in that case.

Three plausible rationales are suggested by Justice Black's decision. Each relies on some aspect of the legislative history of the LMRDA to show that Congress favored routing all election disputes through the Title IV mechanism. The strength of these rationales, especially in light of the foregoing analysis of the Title IV administrative mechanism, is doubtful.

The United States' amicus brief in Calhoon argued that the Court should discount the apparent utility of supplementing the Title IV mechanism through Title I relief and instead should emphasize the need for a single national labor policy. Implicit in this argument, and in the majority opinion, is the assumption that courts should rely on the expertise of the DOL to develop national standards. The Court was apparently persuaded that the public interest in labor policy could be vindicated only if the DOL, as a representative of the public, was involved as the complaining party in union election litigation.

Secondly, the Court's decision reflects a recognition of the congressional deference to internal union resolution of election disputes. As already noted, the Title IV mechanism demands exhaustion of internal

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680. Libutti v. Di Brizzi, 343 F.2d 460 (2d Cir. 1965). A federal court, under pendent jurisdiction, enforced the union's constitution under state law.

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union appeals before complaint can be made to the DOL, while Title I exhaustion requirements are discretionary. Since eligibility requirements can easily be brought before the union and can be altered through internal amendment, the Court may have felt that pre-election intervention in Calhoon would have constituted an invitation to dissidents to ignore internal union structures and appeal directly to the courts.

A third plausible rationale for the Court's broad language is that by requiring review of a complaint by the DOL before a suit can be brought, unions are screened from frivolous court actions. As the union's primary tasks are collective bargaining and contract administration, it is important that union lawyers not be forced to divert their time to defending frivolous suits.

The first of these rationales is weak in its assumption that reliance on the DOL can bring about a uniform national policy with respect to union elections. Total uniformity is impossible, even under the Calhoon opinion, because the statute specifically preserves access to state court relief. While complaints to state courts have been rare, the statute permits pre-election state court relief for violations of union constitutions and bylaws. To the extent that Title IV rights are included in union constitutions, state courts will in effect be interpreting federal law without the direct aid of the Department. The provision of some pre-election relief even within Title IV also suggests that Congress cannot have meant to rely completely on DOL suits to generate public policy regarding elections.

If the Court was concerned that a lack of uniformity would result because judicial decisions would be made on an ad hoc basis, it failed to comprehend the operation of the Title IV mechanism. The Department has created LMRDA precedents through case by case adjudication and has not attempted to articulate broad national policy

683. See note 650 supra.
684. Practicing union attorneys point out that the Title IV mechanism filters complaints in an additional way not mentioned by the Court. If the complainant wins the election, or is resoundingly defeated and gives up any hope of pursuing a claim, no appeal will be made either internally or to the DOL. As a means of reducing the number of suits brought against unions, union attorneys find the Title IV mechanism to their liking. Interviews with union attorneys P, S, U, W, and HH.
685. See pp. 554-56 supra.
687. Summers, supra note 671, at 137; Yale Note, supra note 622, at 1293-94.
688. See pp. 548-49 supra.
689. See pp. 516-19 supra.
through use of its rulemaking authority. The assumption that courts need the assistance of DOL expertise also seems unfounded. Many cases are purely factual disputes. Even when policy issues are involved, judges can rely on DOL rules and guidelines. Or, as was suggested in the legislative history, the courts can draw on their experience in other fields of American life. Finally, any suggestion that the public interest requires DOL participation in a suit appears unsupported by the legislative history of the Act. Congress made Title I provisions enforceable by private suit in order that individual rights could be litigated directly. The interest of the general public in honest unions is important, but that interest is represented by the statute itself and by DOL interpretive rulings. There is no need to have a DOL lawyer arguing every election case.

The Court's second rationale, deference to internal union appeals, is significant, but it does not justify routing all election cases through the Title IV mechanism. In Title I suits, for example, the court has discretion to demand full internal exhaustion. When it would be helpful for the court to have the guidance of an internal decision, or when internal relief is available without significant delay, courts can demand exhaustion before hearing a complaint.

Finally, the desire to avoid disruption of union activities does not

690. See id.
691. See pp. 561-67 infra discussing the nature of cases which might arise prior to election and distinguishing between factual questions and more complex policy issues.
693. Only a few union lawyers doubted that courts would be able to adjudicate pre-election suits properly. Some fear was expressed that even an impartial judge could not cope with a simple fact situation because of ignorance of union politics, but much of the fear seems to stem from the resemblance of pre-election relief to the despised labor injunction. Unions and their lawyers suspect an anti-labor judge could intervene to undermine their organization. Interviews with union attorneys DD and HH. Union attorney S, however, based his disapproval of pre-election relief on a belief that judges would be over-zealous in granting injunctions because their attitudes would be: “If you aren’t doing anything wrong, why are you bothered if I impose an injunction just to make sure?”
694. By adding the Bill of Rights of Title I to Landrum-Griffin, Senator McClellan said he sought to give members a right to individual liberties within the union. 105 Cong. Rec. 6471-72, 6475-76 (1959). Originally, even suits to vindicate these rights were to be brought only through the DOL post-election mechanism. See Kennedy-Ives bill, S. 3974 § 303, 85th Cong., 2d Sess. (1958), referred to in S. Rep. No. 1684, 85th Cong., 2d Sess. 13 (1958); and Kennedy-Ervin bill, S. 505, § 303, 86th Cong., 2d Sess. (1959), reprinted in I NLRB LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT 64-65 (1959). But the bill was amended to take Title I suits away from the DOL and allow private actions. See 105 Cong. Rec. 6690, 6720 (1959) (remarks of Senators Kuchel and Johnston). Thus, in Title I Congress enumerated some election-connected rights which courts would be asked to enforce without the aid of DOL expertise. See Calhoon v. Harvey, 379 U.S. 134, 143 (1964) (Stewart, J., concurring). Although the overlap of Title I and IV rights should have been apparent, Congress gave no guidelines to harmonize the conflicting enforcement schemes.
695. See note 690 supra.
warrant the judicial restriction of pre-election relief. Although pre-election suits may be unsettling, reruns resulting from post-election suits are even more disruptive. They appear to cause far more emotional strain and loss of time for all candidates. In cases where an election violation is likely to result in a rerun, it is to the union’s benefit to have the defect remedied before the election. Secondly, it seems highly unlikely that the availability of pre-election relief will greatly increase the number of suits brought against unions. Although some insurgents admitted that bringing suit is sometimes used as a strategy to show that incumbents are unworthy of office, others indicated that a candidate going outside the union for assistance would alienate the membership. Moreover, few insurgent candidates have sufficient funds to be extremely litigious.

The rationales supporting Calhoon are an inadequate basis for the sweeping restrictions on pre-election relief which the case has spawned. The problem Calhoon does raise, however, is delineation of the judicial and administrative spheres regarding enforcement of LMRDA election rights. There is a better solution to this problem, different from the Calhoon approach, in the form of criteria which courts could apply to pre-election suits to determine whether pre-election judicial action is feasible and consistent with the policy goals of the Act. These criteria would be: (1) the availability of internal relief; (2) the existence of standards for decision; and (3) the possibility of granting relief without undue delay in conducting the election.

Courts should be solicitous of union autonomy and require internal exhaustion when reasonable appeals procedures exist. Such a policy would comport with the congressional desire that unions be allowed

696. One of the most disheartened incumbents interviewed was the secretary-treasurer of a large, industrial local whose election had just been overturned for the illegal disqualification of a candidate. He had just been through a hard-fought campaign, had spent several hundred dollars of his own money, and experienced much strain. The rerun was forcing him to go through it all again. Interview with union officer E.

697. Interviews with complainant union member D and union attorney U.

Union attorney W suggested another reason why pre-election suits would be numerous is that during an election campaign enthusiastic candidates would get carried away and see election violations behind every bush. After the election, with more time for reflection, the same candidate would not be so prone to sue.

A third reason suggested for pre-election suits was given by complainant attorney I, who said suits were brought in order to compile evidence of election infractions which could be used in a post-election suit. By bringing suit, the candidate was able to take depositions of union officials.

On the other hand, it was suggested that some candidates do not bring pre-election suits because they want to save the issues for appeals to the DOL to obtain a rerun should they lose the election. Interviews with union officers D and F.

698. See notes 335, 450 supra.

699. Interview with complainant union member I.
to “clean their own houses,” but would at the same time create an incentive for unions to provide efficacious pre-election internal appeals mechanisms if they wish to keep election disputes out of court. Courts can look to the body of law which has already developed under the § 101 (a) (4) discretionary exhaustion requirement for guidance as to when to defer to the internal appeals process.700

Courts should also avoid pre-election review where questions are so complex that a violation of the LMRDA cannot be clearly established under existing doctrine. If there is a genuine need for the expertise or the public interest viewpoint of the DOL, the court should decline pre-election jurisdiction. Uniformity in national labor policy will be facilitated by this criterion, as courts will avoid areas where the proper framework for decision has not yet been established.

The third criterion, avoidance of undue delay of an election, recognizes that the enjoining of an election to permit a long court trial would be extremely disruptive of internal union affairs. This criterion would pose no bar to relief in situations where the election need not be delayed. Where postponement of the election is required to grant adequate pre-election relief, the court must be certain of the existence of violations and convinced of their grievous impact on the electoral process. Otherwise the court should defer to the post-election process of relief.

These three criteria establish the general principle that when pre-election relief is available under the LMRDA, limitations on its use should not be grounded in an arbitrary deference to the DOL post-election mechanism, but rather in the ability of the court to understand and formulate a prompt remedy while still respecting the integrity of the union’s own appeal procedures.701 When an LMRDA provision which arguably provides for pre-election relief is the basis of a private lawsuit,702 pre-election relief should be available if the

700. See note 650 supra.
701. Two complainant attorneys (F and Q) have suggested that, in order to aid courts, the DOL should compile a list of instances when pre-election judicial review would be warranted. Such a list should be drawn up in line with the criteria here suggested.
702. The limits of the “pre-election” period are defined by § 403 of the Act which makes the Title IV administrative remedy exclusive for an election “already conducted.” 29 U.S.C. § 483 (1970). The proper interpretation of that phrase is that an election is conducted “only after the counting of the ballots and the announcing of the results.” Harvard Note, supra note 497, at 1628. This interpretation is consistent with the DOL’s position that the post-election period for purposes of Title IV relief commences only after the ballots have been counted and the results announced. See note 338 supra.
three criteria enunciated above have been met.\textsuperscript{703} In this way, the policies behind \textit{Calhoon} can be effectuated without adhering to the needlessly broad dicta of the opinion itself.

C. \textit{Electoral Responsiveness and Pre-Election Relief}

1. \textit{Freedom from Internal Group Discrimination}

The reasonableness of a union rule depriving a class of members of the right to vote would be subject to judicial scrutiny under the § 101 (a) (1) provision guaranteeing equal rights to vote.\textsuperscript{704} Despite the applicability of that section, and the present availability of pre-election relief even under \textit{Calhoon}, the foregoing criteria for granting such relief would indicate review is unwise if the suit is brought immediately prior to the election. First, internal exhaustion, if reasonably available, might give the court some indication of the various interest groups within the union and some understanding of the union's reason for imposing the restriction. Second, while such restrictions are to be viewed with great suspicion, guidelines as to what limitations might be "reasonable" are not available.\textsuperscript{705} The third cri-

\textsuperscript{703} Union election oversight as suggested here is similar to the system now established in Australia. Under the Conciliation and Arbitration Act 1904-1969 §§ 80, 141, 159-71, the Australian Commonwealth Industrial Court has wide powers to intervene in union elections. A union member can, either before or after an election, appeal directly to the court for enforcement of the union's own rules (§ 141), or request the Industrial Registrar, the Australian equivalent of the DOL, to refer to the court allegations of violations of the national rules for elections (§§ 159-71). The court has broad intervention powers and need not limit its investigation to any specific allegations (§ 163(1)). It is authorized to make whatever orders it thinks "necessary for the purpose of the inquiry" (§ 165(2)), including postponement of the election until the inquiry is completed (§ 163(a)(1)). Moreover, it is not bound by rules of evidence (§ 164(4)(b)). If violations are found, which did or may affect the election outcome (§ 165(4)), the court may declare the election or any step in the election void (§ 165(3)(a)), or a person elected or not elected (§ 165(3)(b)), or arrange for a new supervised election (§ 165(3)(c)). The court may also punish for contempt of its orders. Even if an irregularity is not found, the court may order the complainant's costs paid provided he acted reasonably in lodging the complaint (§ 168(2)).

Members may also seek a supervised election. Either 1,000 members or ten per cent of the members in a national election, or 500 members or twenty per cent of the members in a local election, may petition for supervision (§ 170). A registry officer will then conduct the election.

The rapidity with which the system works can be seen in Walkerden v. Giles, 15 F.L.R. 207 (Cth. Indust. Ct. 1969), where only two months elapsed between the time complaint was filed with the Registrar and when the court ordered the wrongfully declared ineligible candidate to be nominated. For further description of the Australian system, see O. \textsc{Foerander}, \textit{Trade Unionism in Australia} 125-51 (1962); \textsc{Nolan} & \textsc{Cohen}, \textit{Federal Industrial Law} 356-94 (3d ed. 1963); \textsc{Merrifield}, \textit{Regulation of Union Elections in Australia}, 10 Ind. & Lab. Rel. Rev. 252 (1957).


\textsuperscript{705} \textit{See} pp. 428-30 \textit{supra}.
terion for pre-election relief is also not satisfied, as resolution of this complex issue would probably entail postponement of the election.

However, if suit were brought after internal exhaustion and well before the next election, two of the criteria for granting pre-election review would be satisfied. Sound guidelines for resolving this issue might then be developed. Although DOL expertise would not necessarily be available in a private suit, the Department could participate as an amicus. Moreover, the advent of a number of voting rights suits might prompt the DOL to develop its own guidelines on this issue.

Charges of manipulation of interest groups through election procedures favoring an incumbent-controlled group, isolation of the group from the normal political processes of the union, or financial incentives to generate support, all involve allegations of specific conduct treated separately in the following sections dealing with pre-election relief for the other aspects of responsive union officer elections.

2. Membership Participation in the Electoral Process

A showing that equal rights to vote or nominate are being denied in violation of § 101(a)(1) seems likely if eligibility requirements are applied discriminatorily, if nomination meetings are manipulated, or if adequate notice of nomination meetings or elections is not given. Calhoon is no bar to this construction since it recognized that discrimination in the right to vote or nominate was a fit subject for Title I relief. A showing that free speech is being denied in violation of § 101(a)(2) seems likely whenever union members or staffers are subjected to job intimidation, members are fined or disciplined for expressing opinions, or violence or other coercive means are used against candidates or their supporters. Between these two Title I provisions, virtually all of the abuses of participation rights are covered by a statutory provision that would permit pre-election relief. Only the reasonableness of eligibility provisions appears beyond the reach of Title I—reflecting the continuing impact of the Calhoon decision.

706. See pp. 430-34 supra.
709. See pp. 440-44 supra.
710. See pp. 440-42 supra.
712. See pp. 444-52 supra.
713. See note 150 supra.
714. See pp. 444-52 supra.
Most allegations of infringement of rights to participate in the electoral process will fulfill the proposed criteria for granting pre-election relief. Internal exhaustion will often be futile, for the charge of abridging participatory rights will be directed at the very officers who would be hearing any internal appeal. Pre-election appeal beyond the local is often unavailable. Courts should in these instances find internal exhaustion unnecessary. The issues involved in suits to enforce participatory rights will often be purely factual and the relevant principles clear. For example, it should not be difficult for a court to determine that a prospective candidate meets union eligibility requirements but has nonetheless been denied nomination, or that notice to the electorate has been inadequate, or that members are being threatened with loss of jobs for election activities. In a few cases, courts have granted such relief, and their example should be followed. Lastly, delay of the election need not be undue in such cases. Injunctions against infringements of free speech or orders to have voting at a more convenient time or place will not delay the election at all. Even a finding of inadequate notice would typically necessitate only short delays.

It is possible that determining reasonable endorsement requirements in the nomination of intermediate or national officers will present more complex issues involving necessary delay, and refusal to grant pre-election review would there seem warranted. However, if suit is brought well before the election, it should be possible for a court to resolve the issue as suggested previously for suits challenging the composition of the union electorate.

3. Mechanisms of Communication

The primary problems in the communication area—discriminatory use of the membership list or newspaper and failure to distribute candidate campaign material—are covered by § 401 (c) which itself provides for pre-election enforcement. The provision contains no exhaustion requirement, and none need be imposed. In instances of failure to distribute literature, a request for action will already have been made to the union, since it is the refusal to act on the request which

715. See pp. 531-33 supra.
716. Depew v. Edmiston, 586 F.2d 710 (3d Cir. 1977). See also free speech cases cited at notes 653-54 supra.
717. See pp. 432-34 supra.
718. See p. 562 supra.
719. See pp. 452-60 supra.
constitutes a violation of § 401 (c). Exhaustion for discriminatory use of the membership list, including its use to mail the newspaper, will often be futile since appeal would have to be made to the same persons who are charged with the misconduct. The primary issues in § 401 (c) suits will be factual in nature, and courts have already laid down principles of interpretation. Finally, unless the suit is brought immediately before the balloting, courts would have time to fashion effective remedies without delaying the election.

4. Discriminatory Use of Union Resources

Use of union resources to support a particular candidate should be subject to attack under § 501. Suits challenging staff campaigning on union time, provision of campaign services at union expense, or direct use of union funds should thus be susceptible to pre-election review.

Although there is no formal exhaustion requirement in § 501, the section does require that a plaintiff first apply to union officers for relief. Even when rejected, the plaintiff may proceed in court only "upon leave . . . obtained upon verified application and for good cause shown." In determining whether to grant leave to sue, the court has an opportunity to employ the three criteria suggested above for governing pre-election relief. In addition, the plaintiff will have to comply with the "good cause" requirement. The full scope of this requirement has not been articulated by the courts, but the interpretation of a similar "just cause" requirement in § 201 (c) suits to compel unions to open their financial records seems applicable. In both §§ 201 and 501, the issue involved is the illegal expenditure of union funds, and the same difficulties confront members trying to gather information to support court suits. The Ninth Circuit has construed the good cause requirement of § 201 (c):

The standard for determination whether there was just cause is necessarily minimal. Just cause need not be shown by a prepon-

722. See pp. 460-63 supra.
derance of the evidence. It need not be enough to convince a reasonable man that some wrong has been done; it is enough if a reasonable member would be put to further inquiry.\textsuperscript{726}

The availability of pre-election relief under § 501 should depend largely on the availability of evidence. In some cases it may be difficult and time consuming to separate legitimate union expenses from campaign expenditures, or staff campaigning from legitimate performance of duties. When such complicated factual questions make long trials necessary and undue delay of the election inevitable, it would be necessary to deny pre-election review.

5. \textit{Fraudulent Tally of Votes}

Ballot stuffing or vote tampering dilute the value of one’s vote and would appear to violate the § 101 (a) (1) guarantee of an equal right to vote.\textsuperscript{727} Similarly, when election procedures are such that members fear their votes will not be secret, they may be coerced from voting their free choice and thus deprived of equal voting rights.\textsuperscript{728}

Exhaustion of internal appeals, if none are available beyond the local, would prove futile in cases where local officers are responsible for the offensive practices. Internal appeals might also be futile if the tampering were occurring on election day. Such abuses should not be difficult for courts to understand or remedy. In a few cases, courts have granted pre-election relief for ballot stuffing.\textsuperscript{729} Moreover, there are available analogies from federal and state law on prevention of election day fraud,\textsuperscript{730} and the National Labor Relations Board rules governing representation elections should provide further standards.\textsuperscript{731}

Undue delay should not be a problem. The court can resort to third party oversight of the voting process to prevent invasion of secrecy and ballot tampering. Arrangements for such neutral observers should

\textsuperscript{726} Local 760, Fruit & Vegetable Packers v. Morley, 378 F.2d 738, 744 (9th Cir. 1967).
\textsuperscript{728} See pp. 468-72 supra.
\textsuperscript{729} See pp. 549-50 and notes 643-44 supra.
\textsuperscript{730} Various Supreme Court cases have dealt with the issue of whether the right to vote in public elections includes a right to have the vote counted—and counted accurately. United States v. Saylor, 322 U.S. 385 (1944) (involving an indictment for ballot stuffing); United States v. Classic, 313 U.S. 299 (1941). In United States v. Mosley, 238 U.S. 383, 386 (1915), upholding a criminal statute which made it a federal crime to falsify a count in a congressional election, the Court said, "We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in the box." These decisions are reaffirmed by the apportionment cases which conclude that any procedure which "dilutes" the effect of a vote is a denial of a citizen's equal rights to vote. Wesberry v. Sanders, 376 U.S. 1, 17 (1964).
\textsuperscript{731} These procedures are outlined at 29 C.F.R. § 102.69 (1970).
not require either complicated planning or postponement of the election.

D. The Costs of Litigation

Even if courts are willing to entertain more pre-election suits to correct irregularities in the electoral process, the costs of litigation may stand as an obstacle to the effectiveness of this mode of LMRDA enforcement. One insurgent reported that his legal fees over a ten year period totaled more than $40,000. Many candidates cannot meet such a burden, and it may therefore be impossible for them to hire good lawyers.

One solution to the problem of litigation expenses would be to award attorney's fees to plaintiffs successful in pre-election suits. The LMRDA provides for court costs and attorney's fees to be awarded in Title II and Title V suits, and courts have made these awards. Title I, however, contains no similar provision, and recovery of costs was generally denied to successful plaintiffs until the Third Circuit decision in *Gartner v. Soloner*. Since that decision, several courts have deemed it to be within their discretion to allow recovery for litigation expenses, but others have continued to find such awards to be unjustified.

Litigation expenses have also been denied to plaintiffs in successful § 401 (c) pre-election suits. Union attorneys tend to oppose granting court costs or attorney's fees in Title I suits. This decision includes an exhaustive review of the Title I legislative history on this question.

---

732. Interviews with union attorneys AA and BB, and complainant union members F, H, and S.
733. Interview with complainant union member I. Another complainant was able to find a lawyer, but he left the lawyer with $100,000 in unpaid legal fees. Interview with complainant attorney I.
734. Interviews with union attorney AA and complainant attorneys I, L, and Q.
737. 384 F.2d 348 (3d Cir. 1967). See cases cited therein for previous denials of attorneys' fees in Title I suits. This decision includes an exhaustive review of the Title I legislative history on this question.
Union Elections and the LMRDA

fees, whether paid from union funds or by the specific individuals being sued.\textsuperscript{741} They fear that such awards would encourage frivolous suits.\textsuperscript{742} The reluctance of union members to appeal outside the union except in extreme cases, however, suggests that complainants will still prefer to avoid litigation even if expenses are recoverable.\textsuperscript{743}

VI. Conclusion

There is no simple formula for producing internal responsiveness. The LMRDA, through specific guarantees and sufficiently general language, has provided union members, courts, and the DOL with a mandate and a broad range of potential regulatory powers for the achievement of fair elections. The statutory balances, however—between union self-correction and government intervention on the one hand, and workers' rights and the public interest in democratic unionism on the other—have shifted as the statute has been implemented. The point has been reached where union self-correction figures all too prominently in the conciliatory government enforcement process, and the DOL's conception of the public interest is dominant as a result of an unduly narrow doctrinal treatment of individual workers' access to the courts. Unions may well be the best institutions to reform election procedures and implement responsiveness. But the current state of internal union mechanisms bodes ill for extreme reliance on union self-correction. Similarly, a single administrative enforcement mechanism under the Department of Labor may be the best way to achieve

\textsuperscript{741} Of twenty-two union attorneys interviewed, ten opposed awarding court costs in pre-election suits to victorious plaintiffs; three favored imposing costs on the individuals sued; and five favored imposing costs on the union. Of seventeen complainant attorneys interviewed or answering questionnaires, none opposed granting court costs; seven favored imposing costs on the individuals sued; and seven favored imposing costs on the union.

A suggestion was made that costs be granted only if the violation were willful. One complainant attorney suggested that the willfulness of the violation should only be determinative of whether the individuals responsible or the union itself should bear the costs. Interview with complainant attorney D.

\textsuperscript{742} Interviews with union attorneys U and X.

Harassment injunctions will be deterred by the provision of Fed. R. Civ. P. 65(c), which allows a judge to require security be paid by the applicant for payment of damages to the enjoined party should he be found to have been wrongfully enjoined.

\textsuperscript{743} For discussion of the internal political disadvantages involved in appealing outside the union for assistance, see notes 697-99 supra.

a uniform national policy toward union elections. But workers' interests as individuals are also at stake, and the operation of the DOL mechanism suggests neither a comprehensive articulation of policy nor a firm insistence on compliance.

Unions are representing more and more white collar workers and younger, better-educated blue collar workers. Both groups manifest a greater desire for representative institutions than their predecessors. These new demands will force union leaders into more responsive roles in order to satisfy the participatory demands of their members. Thus the necessity for internal union democracy appears more pressing than ever before.

744. The recommendations made in Part III for altering the Department of Labor's administration of the Act, coupled with expansion of pre-election relief along the lines suggested in Part IV, would greatly improve enforcement of LMRDA. It might still be suggested that adjudication of all union election disputes, both pre- and post-election, should be vested in a single administrative agency. Such an agency, by combining investigative and adjudicatory functions, would hopefully develop expertise in matters of internal union politics and provide prompt relief. However, it seems by no means clear that district court judges are lacking in the expertise necessary to handle LMRDA suits, nor that any administrative agency can be shielded from gradual cooptation by established labor interests. The possibility of appeal to the courts of any administrative decision casts grave doubt on the prospect of greater speed of disposition than currently exists under Title IV. Overall, it seems unlikely that exclusively administrative enforcement would be preferable to the current system of mixed judicial and administrative intervention, if improved as suggested here.
APPENDIX A
Types of Violations Confirmed by Department of Labor and Their Disposition²

<table>
<thead>
<tr>
<th>Category of Violation</th>
<th>Violations Confirmed</th>
<th>% of Total Violations in Category</th>
<th>% of Total Violations Found³</th>
<th>% of Total Violations Disposed by No Outcome Effect Finding</th>
<th>Remedy by Determination</th>
<th>Remedy by Stipulation</th>
<th>Remedy by Court Decision</th>
<th>% in Category Disposed by Remedial Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>Illegal Voter Eligibility Requirements</td>
<td>82</td>
<td>12.3</td>
<td>45</td>
<td>54.8</td>
<td>31</td>
<td>3</td>
<td>3</td>
<td>45.2</td>
</tr>
<tr>
<td>All Type I Violations</td>
<td>82</td>
<td>12.3</td>
<td>45</td>
<td>54.8</td>
<td>31</td>
<td>3</td>
<td>3</td>
<td>45.2</td>
</tr>
<tr>
<td>Reasonable Opportunity to Nominate Denied</td>
<td>62</td>
<td>9.3</td>
<td>31</td>
<td>50</td>
<td>25</td>
<td>2</td>
<td>4</td>
<td>50</td>
</tr>
<tr>
<td>Candidate Eligibility Violations</td>
<td>55</td>
<td>8.2</td>
<td>6</td>
<td>10.9</td>
<td>29</td>
<td>6</td>
<td>14</td>
<td>89.1</td>
</tr>
<tr>
<td>Inadequate Notice of Election</td>
<td>68</td>
<td>10.2</td>
<td>30</td>
<td>41.2</td>
<td>31</td>
<td>3</td>
<td>4</td>
<td>55.8</td>
</tr>
<tr>
<td>Intimidation of Members</td>
<td>7</td>
<td>1.0</td>
<td>3</td>
<td>42.8</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>57.2</td>
</tr>
<tr>
<td>All Type II Violations</td>
<td>192</td>
<td>28.7</td>
<td>70</td>
<td>36.5</td>
<td>86</td>
<td>13</td>
<td>23</td>
<td>63.5</td>
</tr>
<tr>
<td>Membership List Violations</td>
<td>6</td>
<td>.9</td>
<td>1</td>
<td>16.7</td>
<td>2</td>
<td>1</td>
<td>2</td>
<td>83.3</td>
</tr>
<tr>
<td>Campaign Literature Distribution Violations</td>
<td>11</td>
<td>1.6</td>
<td>5</td>
<td>45.5</td>
<td>3</td>
<td>3</td>
<td>0</td>
<td>54.5</td>
</tr>
<tr>
<td>All Type III Violations</td>
<td>17</td>
<td>2.5</td>
<td>6</td>
<td>35.3</td>
<td>5</td>
<td>4</td>
<td>2</td>
<td>61.7</td>
</tr>
<tr>
<td>Misuse of Union Funds</td>
<td>20</td>
<td>3.0</td>
<td>12</td>
<td>60</td>
<td>7</td>
<td>0</td>
<td>1</td>
<td>40</td>
</tr>
<tr>
<td>All Type II Violations</td>
<td>20</td>
<td>3.0</td>
<td>12</td>
<td>60</td>
<td>7</td>
<td>0</td>
<td>1</td>
<td>40</td>
</tr>
</tbody>
</table>

[Continued on following page]
### APPENDIX A—Types of Violations Confirmed by Department of Labor and Their Disposition—Continued

<table>
<thead>
<tr>
<th>Category of Violation</th>
<th>Violations Confirmed</th>
<th>% of Total Violations in Category</th>
<th>% of Violations in Category by No Outcome Effect Found</th>
<th>% of Violations in Category by No Outcome Effect Finding</th>
<th>Remedy by Determination</th>
<th>Remedy by Stipulation</th>
<th>Remedy by Court Decision</th>
<th>% of Violations in Category by Remedial Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lack of Ballot Secrecy or Infrequency of Election</td>
<td>29</td>
<td>4.3</td>
<td>3</td>
<td>10.7</td>
<td>22</td>
<td>1</td>
<td>3</td>
<td>89.3</td>
</tr>
<tr>
<td>Improper Ballots or Inadequate Guarding of Ballots</td>
<td>127</td>
<td>19.0</td>
<td>68</td>
<td>53.2</td>
<td>53</td>
<td>5</td>
<td>1</td>
<td>46.8</td>
</tr>
<tr>
<td>Electioneering at Polls or Interference with Observers</td>
<td>28</td>
<td>4.2</td>
<td>20</td>
<td>71.5</td>
<td>3</td>
<td>4</td>
<td>1</td>
<td>28.5</td>
</tr>
<tr>
<td>Improper or Fraudulent Ballot Counting</td>
<td>28</td>
<td>4.2</td>
<td>14</td>
<td>50</td>
<td>12</td>
<td>1</td>
<td>1</td>
<td>50</td>
</tr>
<tr>
<td>Improper Preservation of Election Records</td>
<td>94</td>
<td>14.0</td>
<td>56</td>
<td>59.6</td>
<td>35</td>
<td>1</td>
<td>2</td>
<td>40.4</td>
</tr>
<tr>
<td><em>All Type V Violations</em></td>
<td>306</td>
<td>45.7</td>
<td>161</td>
<td>52.6</td>
<td>125</td>
<td>12</td>
<td>8</td>
<td>47.4</td>
</tr>
<tr>
<td>Union Constitution or Bylaws Violated</td>
<td>52</td>
<td>7.8</td>
<td>30</td>
<td>57.7</td>
<td>20</td>
<td>1</td>
<td>1</td>
<td>42.3</td>
</tr>
<tr>
<td><strong>TOTALS</strong></td>
<td>669</td>
<td>100.0</td>
<td>324</td>
<td>48.4</td>
<td>274</td>
<td>33</td>
<td>38</td>
<td>51.6</td>
</tr>
</tbody>
</table>

1. Includes confirmed violations in cases disposed of by a finding of "No Outcome Effect," by Formal Determination, by litigation terminated pursuant to stipulation, and by litigation terminated pursuant to court decision. Does not include confirmed violations in cases deemed by the Department to be "Not Suitable for Litigation," as in these cases the Department's correspondence with the union does not reveal specifically what violations were found.

2. Information drawn from DOL records and reported court opinions for Title IV election cases closed during the period of Jan. 1, 1965 through Dec. 31, 1969.

3. "No Outcome Effect Found" means that despite finding a violation, the DOL neither reached a settlement to remedy the violation with the union (i.e., a Determination) nor decided to bring suit (which would result in a supervised election or other remedy either by court ordered stipulation or court ordered decision).

4. Types I, II, III, IV and V violation categories sum up the more specific violations listed immediately above them and correlate with the categorization of abuses in Part II of the Note, pp. 427-72 supra.
Union Elections and the LMRDA

APPENDIX B

Department of Labor Disposition of Election Cases

(a) Election Complaints Received¹

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
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</thead>
<tbody>
<tr>
<td>Number of Complaints</td>
<td>99</td>
<td>149</td>
<td>92</td>
<td>118</td>
<td>110</td>
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</tbody>
</table>

(b) Disposition of Election Cases

<table>
<thead>
<tr>
<th>Year²</th>
<th>1965</th>
<th>1966</th>
<th>1967</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>% Disposed in this Manner</td>
<td>% Disposed in this Manner</td>
<td>% Disposed in this Manner</td>
</tr>
<tr>
<td>Case in Which No Violations Found</td>
<td>3</td>
<td>3.6</td>
<td>2</td>
</tr>
<tr>
<td>Case in Which Complainant Failed to Exhaust Internal Remedies</td>
<td>3</td>
<td>3.6</td>
<td>1</td>
</tr>
<tr>
<td>Case Resulting in a Determination</td>
<td>15</td>
<td>17.9</td>
<td>32</td>
</tr>
<tr>
<td>Case in Which Violations Found Which Did Not Affect Outcome</td>
<td>33</td>
<td>39.3</td>
<td>23</td>
</tr>
<tr>
<td>Case Found Not Suitable for Litigation</td>
<td>18</td>
<td>21.4</td>
<td>25</td>
</tr>
<tr>
<td>Case in Which Suit Was Brought</td>
<td>12</td>
<td>14.3</td>
<td>35</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year²</th>
<th>1968</th>
<th>1969</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>% Disposed in this Manner</td>
<td>% Disposed in this Manner</td>
<td>% Disposed in this Manner</td>
</tr>
<tr>
<td>Case in Which No Violations Found</td>
<td>2</td>
<td>2.2</td>
<td>2</td>
</tr>
<tr>
<td>Case in Which Complainant Failed to Exhaust Internal Remedies</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Case Resulting in a Determination</td>
<td>14</td>
<td>14.3</td>
<td>10</td>
</tr>
<tr>
<td>Case in Which Violations Found Which Did Not Affect Outcome</td>
<td>22</td>
<td>22.4</td>
<td>22</td>
</tr>
<tr>
<td>Case Found Not Suitable for Litigation</td>
<td>37</td>
<td>37.8</td>
<td>25</td>
</tr>
<tr>
<td>Case in Which Suit Was Brought</td>
<td>23</td>
<td>23.5</td>
<td>29</td>
</tr>
</tbody>
</table>


2. Data for first five categories collected from DOL files for dates in each calendar year; data for sixth category from DOL Summary of Operations, supra note 60, is for fiscal year.

[Continued on following page]
APPENDIX B—Department of Labor Disposition of Election Cases—Continued

(c) Disposition of All Title IV Suits Brought by the DOL through the End of Fiscal Year 1969³

<table>
<thead>
<tr>
<th>Category</th>
<th>Number of Suits Brought</th>
<th>Number of Suits in Which Settlement Had Been Reached by June 30, 1969</th>
<th>Number of New Supervised Elections per Court Ordered Stipulation</th>
<th>Number of Union Stipulations of Future LMRDA Compliance</th>
<th>Number of Suits Dismissed on Secretary's Motion or by Stipulation</th>
<th>Number of Suits in Which Judgment Was Granted or Relief Denied</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of Suits Brought</td>
<td>177</td>
<td>123</td>
<td>79</td>
<td>21</td>
<td>10</td>
<td>13</td>
</tr>
<tr>
<td>% of Settled Suits in Category</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of Suits in Which Settlement Had Been Reached by June 30, 1969</td>
<td></td>
<td>100</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of New Supervised Elections per Court Ordered Stipulation</td>
<td></td>
<td>64.2</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of Union Stipulations of Future LMRDA Compliance</td>
<td></td>
<td></td>
<td>17.1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of Suits Dismissed on Secretary's Motion or by Stipulation</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of Suits in Which Judgment Was Granted or Relief Denied</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>


APPENDIX C

Relief Frequency¹

<table>
<thead>
<tr>
<th>Relief</th>
<th>Determination</th>
<th>Stipulation</th>
<th>Decision</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overdue Election Held Without DOL Supervision</td>
<td>4</td>
<td>...</td>
<td>...</td>
<td>4</td>
</tr>
<tr>
<td>Overdue Election Held Under DOL Supervision</td>
<td>8</td>
<td>...</td>
<td>...</td>
<td>8</td>
</tr>
<tr>
<td>Union Pledged Compliance in Next Regular Election (No Supervision)</td>
<td>2</td>
<td>2</td>
<td>...</td>
<td>4</td>
</tr>
<tr>
<td>Union Constitution or Bylaws Amended to Comply with the Act (No Supervised Election Held)</td>
<td>11</td>
<td>1</td>
<td>1</td>
<td>13</td>
</tr>
<tr>
<td>Improperly Disqualified Winner Installed Without Rerun Election</td>
<td>1</td>
<td>1</td>
<td>...</td>
<td>2</td>
</tr>
<tr>
<td>Rerun Election Held Without DOL Supervision</td>
<td>12</td>
<td>1</td>
<td>...</td>
<td>13</td>
</tr>
<tr>
<td>Rerun Election Held Under DOL Supervision</td>
<td>52</td>
<td>14</td>
<td>7</td>
<td>73</td>
</tr>
<tr>
<td>Next Regularly Scheduled Election Held Under DOL Supervision</td>
<td>4</td>
<td>13</td>
<td>1</td>
<td>18</td>
</tr>
</tbody>
</table>

¹. The relief obtained in three kinds of cases is indicated. The Formal Determinations included are those concluded by the Department from Jan. 1, 1965 through Dec. 31, 1969. The other two categories refer to Title IV suits brought by the Department from Jan. 1, 1965 through Dec. 31, 1967 in which some remedy was obtained either pursuant to stipulation or court decision.
Union Elections and the LMRDA

APPENDIX D

Time Lapse Data

<table>
<thead>
<tr>
<th>Time Lapse Between Challenged Election and Filing of Suit</th>
<th>Cases Closed by Court-Approved Stipulation</th>
<th>Cases Closed by Court Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>7.3 months</td>
<td>6.7 months</td>
</tr>
</tbody>
</table>

| Time Lapse Between Challenged Election and Supervised Election | 2 yrs., 1.6 mos. | 2 yrs., 6.7 mos. |

1. Based on suits filed by the Department from Jan. 1, 1965 through Dec. 31, 1967 in which remedy through departmental supervision of a rerun or next regularly scheduled election was obtained, either pursuant to stipulation or court decision.

APPENDIX E

Statistics on Elections Supervised by DOL

(a) Gross Statistics on Supervised Elections

<table>
<thead>
<tr>
<th></th>
<th>Supervised Election Pursuant to Stipulation or Court Decision</th>
<th>Supervised Election Pursuant to Formal Determination</th>
<th>All Supervised Elections</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Number of Offices Involved in Supervision</td>
<td>212</td>
<td>284</td>
<td>496</td>
</tr>
<tr>
<td>Number of Offices Contested</td>
<td>160</td>
<td>224</td>
<td>384</td>
</tr>
<tr>
<td>Number of Contests with Different Outcome²</td>
<td>103</td>
<td>114</td>
<td>217</td>
</tr>
<tr>
<td>Per Cent of Total Contests</td>
<td>64.4</td>
<td>50.8</td>
<td>56.6</td>
</tr>
<tr>
<td>Number of Contests with Incumbent Victory³</td>
<td>39</td>
<td>70</td>
<td>109</td>
</tr>
<tr>
<td>Per Cent of Total Contests</td>
<td>24.3</td>
<td>31.3</td>
<td>28.4</td>
</tr>
<tr>
<td>Number of Contests with Incumbent Defeated⁴</td>
<td>18</td>
<td>40</td>
<td>58</td>
</tr>
<tr>
<td>Per Cent of Total Contests</td>
<td>11.3</td>
<td>17.9</td>
<td>15.0</td>
</tr>
</tbody>
</table>

1. Information drawn from 50 elections supervised by the Department during fiscal years 1968-70.

2. Indicates offices in which the winner in the original, challenged election does not stand for office in the subsequent, supervised election.

3. Indicates offices in which the winner in the original, challenged election stands for office in the subsequent, supervised election and is victorious.

4. Indicates offices in which the winner in the original, challenged election stands for office in the subsequent, supervised election and is defeated.

[Continued on following page]
### APPENDIX E—Statistics on Elections Supervised by DOL

#### (b) Statistics on Contested Offices Where the Winner of the Challenged Election Stands for Office in the Supervised Election

<table>
<thead>
<tr>
<th>Incumbent Victory</th>
<th>Incumbent Defeated</th>
<th>Total Contested Offices Where Original Winner Stands for Office</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supervised Election Pursuant to Stipulation or Court Decision</td>
<td>39 68.2</td>
<td>18 31.8</td>
</tr>
<tr>
<td>Supervised Election Pursuant to Formal Determination</td>
<td>70 63.6</td>
<td>40 36.4</td>
</tr>
<tr>
<td>All Supervised Elections</td>
<td>109 65.3</td>
<td>58 34.7</td>
</tr>
</tbody>
</table>

#### (c) Turnout in Supervised Election Relative to Challenged Election

<table>
<thead>
<tr>
<th>Turnout Greater in Supervised Election than in Challenged Election</th>
<th>Turnout Less in Supervised Election than in Challenged Election</th>
<th>Total Supervised Elections</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supervised Election Pursuant to Stipulation or Court Decision</td>
<td>9 47.4</td>
<td>10 52.6</td>
</tr>
<tr>
<td>Supervised Election Pursuant to Formal Determination</td>
<td>12 42.8</td>
<td>16 57.2</td>
</tr>
<tr>
<td>All Supervised Elections</td>
<td>21 44.7</td>
<td>26 55.3</td>
</tr>
</tbody>
</table>