NOTES

WAIVERS OF THE LMRDA § 402(b) 60-DAY TIME LIMIT: WHEN MUST THE SECRETARY OF LABOR SUE TO SET ASIDE A UNION ELECTION?

In *Hodgson v. International Printing Pressmen and Assistants' Union*,[1] the Sixth Circuit Court of Appeals held that where a union has agreed not to plead the statutory sixty day time limit, the federal courts have jurisdiction to hear a complaint to set aside a union election under section 402(b) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA),[2] filed after sixty days by the Secretary of Labor. The case arose following a general election of officers held by the International Printing Pressmen and Assistants' Union (IPPA), on February 21, 1968. Members of three IPPA locals, after invoking procedures for internal union review, complained to the Secretary of Labor pursuant to section 402(a) of the LMRDA,[3] that

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1. 440 F.2d 1113 (6th Cir. 1971), *cert. denied*, 40 U.S.L.W. 3153 (U.S. Oct. 12, 1971).

THE FOLLOWING HEREINAFTER CITATIONS WILL BE USED IN THIS ARTICLE:

NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 (1959) [hereinafter cited as LEGISLATIVE HISTORY];

Letter from George T. Avery, Associate Solicitor, U.S. Dep't of Labor, to Charlotte Smith, Nov. 4, 1971, (responding to a Questionnaire), on file in the *Duke Law Journal* office [hereinafter cited as Labor Dep't Response] (quoted by permission);

Note, *Election Remedies Under the Labor-Management Reporting and Disclosure Act*, 78 HARV. L. REV. 1617 (1965) [hereinafter cited as *Election Remedies*];

Note, *The Election Labyrinth*, 43 N.Y.U.L. REV. 336 (1968) [hereinafter cited as *Labyrinth*].

2. 29 U.S.C. § 482(b) (1970):

> The Secretary shall investigate such complaint [filed by a member of a labor organization with the Secretary of Labor alleging violations of § 401] 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 . . . to set aside the invalid election. . . .

3. 29 U.S.C. § 482(a) (1970):

> A member of a labor organization—
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> (1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or
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> (2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,
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> may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of Section 481 . . . .

the election had violated section 401 of that Act.[4] The Secretary conducted investigations, and initiated discussions with the international union for settlement of the complaints. Twice, on June 19, 1968, and September 19, 1968, the General Counsel of IPPA wrote to the Secretary of Labor agreeing to extend the time limit for the Secretary to file suit, to September 28, 1968 and November 1, 1968, respectively,[5] and further agreeing not to plead an expiration of time as a defense to any such suit.[6] After discussions failed to resolve the dispute the Secretary filed an action against the IPPA on October 29, 1968: 135, 132, and 126 days after the individual members' complaints had been filed.[7] The Secretary pleaded the union waiver in his complaint,[8] and, as agreed, the international union did not raise the expiration of time as a defense.[9] However, the district court issued, sua sponte, a Memorandum Opinion and Order on December 3, 1969, directing the Secretary to establish that the jurisdiction of the court had not been improperly invoked.[10] After oral arguments, the district court ruled that it

4. What was the nature of the violations complained of?

Included in the protests filed with the union and the Secretary were allegations that the election . . . was not conducted by secret ballot, that there had been a lack of adequate safeguards to insure a fair election, that notice of the election had not been mailed to the last known home address of each member at least 15 days prior to the scheduled election, and that union funds had been expended to promote the candidacies of persons in the challenged election. Labor Dep't Response (question 2).

5. Brief for Appellant at 2-3, Hodgson v. IPPA, 440 F.2d 1113 (6th Cir. 1971); Complaint ¶ VIII, Wirtz v. IPPA, *decided sub nom.* Shultz v. IPPA, 65 CCH LAB. CAS. ¶ 11,759 (E.D. Tenn., May 7, 1970).

6. It is unclear who initiated these waiver agreements. Complaint ¶ VIII, Wirtz v. IPPA, *decided sub nom.* Shultz v. IPPA, 65 CCH LAB. CAS. ¶ 11,759 (E.D. Tenn., May 7, 1970), stated that the union's General Counsel had twice agreed to extensions of the LMRDA's sixty day time limit. This statement was referred to by the Labor Dep't in response to a question asking which party in *Hodgson* had initiated the waiver agreement. Labor Dep't Response 1 (question 3). Yet, in the IPPA's brief filed with the Sixth Circuit, Brief for Appellee at 2, Hodgson v. IPPA, 440 F.2d 1113 (6th Cir. 1971), the union asserted that "The Secretary [of Labor] had . . . obtained a waiver of the statutory time limit in which to bring suit from the defendant," suggesting some disagreement over who supplied the impetus for the waiver accord.

The significance of this factual discrepancy lies in the potential reduction of the union's blameworthiness in connection with the waiver agreement. It is much less compelling from an equitable standpoint for the IPPA to assert the invalidity of the waiver after having been the party initiating such an agreement, than it would be for the IPPA to attack the waiver having merely passively assented to Labor Dep't requests for a waiver of the sixty day time limit.

7. Brief for Appellee at 2, Hodgson v. IPPA, 440 F.2d 1113 (6th Cir. 1971).

8. Complaint ¶ VIII, Shultz v. IPPA, 65 CCH LAB. CAS. ¶ 11,759 (E.D. Tenn., May 7, 1970).

9. Brief for Appellant at 3, Hodgson v. IPPA, 440 F.2d 1113 (6th Cir. 1971).

10. Response of the Secretary of Labor to [District] Court's December 3, 1969 Memorandum Opinion and Order at 2, Shultz v. IPPA, 65 CCH LAB. CAS. ¶ 11,759 (E.D. Tenn., May 7, 1970).

was without jurisdiction because "the commencement of [the] action within [the sixty day] time of limitation is a condition precedent to bringing the action," and since the failure of jurisdiction could not be waived by consent or other action of the parties, a court must decline to proceed where it lacks such jurisdiction.[11] The district court found no congressional intention that the sixty day limitation was to be extended in the context of this action.[12] The Sixth Circuit reversed, finding that there was federal court jurisdiction, and it vacated and remanded for further proceedings.[13] The petition to the Supreme Court for a writ of certiorari, filed by IPPA on the question of whether the time limit of section 402(b) of the LMRDA is a jurisdictional provision,[14] was denied.[15]

To insure democratic control of union affairs, the LMRDA sets forth specific requirements for unions and remedies for aggrieved union members. Title IV of the LMRDA[16] provides that national or international union officers must be elected at least every five years, local officers every three, and officers of intermediate bodies every four years, by secret ballot. A union must have safeguards for fair elections such as pollwatching, access to membership lists for each candidate, and union distribution of each candidate's literature. Each union member in good standing must be given a reasonable opportunity to become, support, or vote for a candidate. Fifteen days notice of elections must be given and ballots must be kept for one year with the votes published and counted separately by locals. Further, unions are prohibited from spending funds to promote any one candidate. For enforcement of Title IV, the Act provides that a member of a local union, who has exhausted internal remedies or has not obtained a final union decision within three months after invoking union grievance procedures, may file, within one month thereafter, a complaint of violation of Title IV, with the Secretary of Labor.[17] The Secretary is required to investigate and file suit against the labor organization within sixty days if he finds probable cause to believe a violation of

11. Shultz v. IPPA, 65 CCH LAB. CAS. ¶ 11,759 (E.D. Tenn., May 7, 1970).

12. *Id.* at 21,377.

13. 440 F.2d at 1119.

14. Petition For Writ Of Certiorari at 1-2, Hodgson v. IPPA, 40 U.S.L.W. 3153 (U.S. Oct. 12, 1971).

15. 40 U.S.L.W. 3153 (U.S. Oct. 12, 1971).

16. LMRDA § 401, 29 U.S.C. § 481 (1970).

17. See note 3 *supra* for the text of the applicable LMRDA provision, 29 U.S.C. § 482(a) (1970). *See also* Wirtz v. Local 153, Glass Bottle Blowers Ass'n, 389 U.S. 463, 464 (1968).

Title IV has occurred and has not been remedied. If the court, after trial, does find violations of the election procedures, it shall declare the election void and direct a new one under the Secretary's supervision.[18] Section 403 of the LMRDA provides that any existing rights and remedies to enforce the constitution and by-laws of a labor organization *prior* to an election remain, but that Title IV is the *exclusive remedy* for challenges made *after* an election is held.[19] After a member has filed a complaint, he may not intervene should the Secretary file a civil suit.[20] If the Secretary of Labor does not bring suit, the complaining member may not sue the union himself,[21] nor may he compel the Secretary to file such an action.[22] Moreover, the courts will generally refuse to review the Secretary's decision because it is deemed discretionary.[23] However, should the Secretary find probable cause to

18. LMRDA § 402(c), 29 U.S.C. § 482(c) (1970).

19. LMRDA § 403, 29 U.S.C. § 483 (1970). *See also* Calhoon v. Harvey, 379 U.S. 134 (1964); Wirtz v. Local 611, IBEW, 61 L.R.R.M. 2423 (D.N.M. 1966). Title I of the Act appears to leave some rights to enforcement by the individual. The guarantees of equal rights to nominate and to vote provided by Title I seem to overlap with the election provisions of Title IV, and some violations might conceivably fall under both sections. In Calhoon v. Harvey, 379 U.S. 134 (1964), the Supreme Court considered such a violation. Union members sued to enjoin their union from holding an election on the grounds that the national union's constitution and by-laws infringed upon the right of members to nominate candidates, which is guaranteed by § 101(a)(1) of the LMRDA. 379 U.S. at 135. The provisions were such that members could only nominate themselves, and candidates had to have been union members for five years and at sea for 180 days each in two of the three preceding years, on vessels covered by union contracts. Title I of the LMRDA of 1959 does protect the equal rights to nominate candidates, and Title IV requires that a reasonable opportunity be given for the nomination of candidates and that every member in good standing be eligible to become a candidate, subject to reasonable qualifications for office. The Supreme Court ruled that its jurisdiction in Calhoon v. Harvey depended on section 101 of the Act and that the union members there could not rely in whole or in part on a violation of section 401. Title I was interpreted to require an element of discrimination deemed absent in that case. Since Title IV had its own standards of candidate eligibility, and its own enforcement administration by the Secretary of Labor, it could not be used to provide jurisdiction for an individual suit.

> As a result of *Harvey*, the importance of the Secretary's title IV civil action in attaining union democracy—apparent on the face of the statute and in the legislative history—is magnified. Pre-election relief under title I is very limited; and resort to state courts for pre-election relief is available only in connection with rights conferred on members by the union constitution.

Beaird, *Union Officer Election Provisions of the Labor-Management Reporting and Disclosure Act of 1959*, 51 VA. L. REV. 1306, 1325-26 (1965). *See also Election Remedies* 1621-23.

20. Stein v. Wirtz, 366 F.2d 188 (10th Cir. 1966), *cert. denied*, 386 U.S. 996 (1967); Wirtz v. Local 1377, IBEW, 67 L.R.R.M. 2938 (N.D. Ohio 1968); Wirtz v. Local 12, IUOP, 66 L.R.R.M. 2080 (C.D. Cal. 1967).

21. McGuire v. Bhd. of Locomotive Engineers, 426 F.2d 504 (6th Cir. 1970).

22. Altman v. Wirtz, 56 L.R.R.M. 2651 (D.D.C. 1964).

23. McArthy v. Wirtz, 65 L.R.R.M. 2411, 2413 (D. Mo. 1967); Altman v. Wirtz, 56 L.R.R.M. 2651 (D.D.C. 1964).

believe a LMRDA violation was committed, a court may review his decision not to file suit, to the extent of determining whether or not he has abused his discretion.[24] In order to make such a determination, the court may order the Secretary to provide it with a more detailed explanation for his refusal to file suit.[25]

Between 1959 and 1966, the Department of Labor processed some 1300 union election complaints under the LMRDA with roughly 110 resulting in litigation, 840 considered not actionable, and about 240 settled through voluntary compliance.[26] During fiscal year 1971, 132 such complaints were filed.[27] A union member may make his complaint to one of the regional offices of the Department of Labor's Labor-Management Services Administration (LMSA), or to the Office of Labor-Management and Welfare Pension Reports (LMWP) in Washington, D.C.[28] The Department of Labor has apparently not published specific procedures for filing such a complaint in the Code of Federal Regulations; what is printed in the Code is largely a paraphrase of the statute.[29] No guidelines discussing how the Department determines the sufficiency of a complaint, ascertains probable cause, or accepts voluntary compliance, etc. are readily available, with a consequent burden thus placed upon the complainant in filing with, or the union in arguing against, the Department of Labor.[30] If the Labor Department's regional director feels the claim is frivolous, he may dismiss it; if not, it is investigated and forwarded with a recommendation to Washington, D.C., where it may be dismissed as frivolous, untimely, or for failing to exhaust internal union remedies. If a basis to the complaint is determined, there will be further investigation, with notice of this development to both international or national union and local.[31] Solutions short of litigation for the Department of Labor might entail requesting a re-run of the contested election, with or without Labor Department supervision; holding of the next scheduled election, with or without Labor Department supervision; or

24. DeVito v. Shultz, 72 L.R.R.M. 2682 (D.D.C. 1969); Schonfield v. Wirtz, 258 F. Supp. 705 (S.D.N.Y. 1966).

25. DeVito v. Shultz, 300 F. Supp. 381 (D.D.C. 1969).

26. *Labyrinth* 351, 369. In 1967 the Dep't of Labor's Annual Reports ceased including statistics on LMRDA actions.

27. Labor Dep't Response 4 (question 3).

28. *Id.* at 3 (questions 1 & 2).

29. 29 C.F.R. § 452 (1971).

30. For a discussion of this lack of specific Labor Dep't standards, see *Labyrinth* 382-83.

31. *Election Remedies* 1632.

amending the union's constitution and by-laws.[32] The Department obviously places much emphasis on bargaining with the allegedly offending union, with a view toward voluntary compliance.[33] Waivers of section 402(b)'s sixty day time limit are routinely sought as a precaution against a union's later reneging on an agreement stipulating its voluntary compliance with a Labor Department directive.[34] An affidavit by the (then) Acting Director of the Office of Labor-Management and Welfare Pension Reports filed with the district court in *Shultz v. IPPA* stated that in 175 of the 329 investigations conducted by the LMWP between 1962 and 1968, which disclosed actionable union elections violations, the Secretary of Labor withheld filing suit after receiving an agreement extending the time limit under section 402(b).[35] As of January 1, 1971, approximately 30 percent of the union election complaint cases handled by the Labor Department involved waiver agreements.[36] By judicial and administrative interpretation, a suit need not be instituted unless the Department feels there is probable cause to believe the outcome of the election has been affected.[37] The disposition of the complaint may or may not be communicated to the complainant; if so, it is often by a letter of determi-

32. *Id.*; *Labyrinth* 374 n.235.

33. *See* Response of Secretary of Labor to [District] Court's December 3, 1969 Memorandum Opinion and Order at 6-7, Shultz v. IPPA, 65 CCH LAB. CAS. ¶ 11,759 (E.D. Tenn., May 7, 1970); Holcombe, *Union Democracy and the Labor-Management Reporting and Disclosure Act*, 12 LAB. L.J. 597, 602 (1961); Petters & Humphrey, *Labor-Management Reporting and Disclosure Act of 1959*, J. OF WOMEN LAWYERS, Aug. 1961, at 13; *Election Remedies* 1632.

34. Response of the Secretary of Labor to [District] Court's December 3, 1969 Memorandum Opinion and Order at 7, Shultz v. IPPA, 65 CCH LAB. CAS. ¶ 11,759 (E.D. Tenn., May 7, 1970).

35. *Id.* at 2.

36. Labor Dep't Response 8 (question 19). According to the Department of Labor:

> In most cases it is the union representatives who offer an agreement to extend the time within which suit may be filed in order to permit them and their organizations to review the election once more particularly in light of the investigative findings of the Department. In some cases, however, the Department of Labor representatives may request that a waiver be given in those situations where the election investigation is quite complex and additional time is needed to complete the investigation. In either event the primary purpose of the waiver agreement is to permit the parties to discuss the findings with regard to the challenged election and to work out a voluntary settlement agreement whereby the violations are corrected. *Id.* at 4 (question 5).

While the average duration of these waiver agreements seems to be about 30 days (the waiver in *Hodgson* was for two successive 60-day periods), at least one such extension of the section 402(b) time limit has been for a period in excess of 18 months. *Id.* at 4-5 (question 7).

37. *See* Altman v. Wirtz, 56 L.R.R.M. 2651 (D.D.C. 1964); 29 C.F.R. § 452.16(b) (1971).

nation from the Director of LMWP, which is also placed on public file at the regional offices.[38]

In addition to regulating union elections, the LMRDA of 1959 protects the rights of union members, requires the filing of certain financial reports with the Secretary of Labor, and provides for other diverse regulation of labor organizations.[39] Pressure for such a labor reform bill came from public revelations of corruption and undemocratic practices in the labor movement, as reported by the United States Senate Select Committee on Improper Activities in the Labor-Management Field—the McClellan Committee.[40] An attempt was made to pass a reform bill in 1958, but, although one passed the Senate by a vote of 88 to 1,[41] it was defeated in the House.[42] The bill which passed the Senate was essentially the one introduced by Senator John Kennedy, and its section comparable to Section 402(b) of the LMRDA required that the Labor Secretary bring suit to set aside a suspect union election within thirty days of receiving a complaint.[43] During the course of the Senate debate, Senator Smith of New Jersey felt that thirty days was an insufficient time limitation, and submitted an amendment reading, "or as soon thereafter as possible."[44] Senators Smith and Kennedy agreed to a compromise reading "within 30 days or as soon thereafter as possible but in no event after 60 days."[45] It was in that form that the 1958 bill passed the Senate. In 1959, the principal bill introduced into the Senate forming the nucleus for the LMRDA was the Kennedy-Ives bill, but this time it contained the wording of the present statute, requiring of the Secretary that "he shall file suit within 60 days."[46] In considering the Senate bill, the

38. *See Labyrinth* 369-70, which states that of over 1000 determined cases, only 151 letters of determination were on file with the Dep't of Labor's New York regional office, although indications are that the unions actually receive a greater number of these letters. See note 24 *supra* for an indication of some problem with letters of determination.

39. 29 U.S.C. §§ 401-531 (1970).

40. Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 820 (1960).

41. 104 CONG. REC. 11487 (1958).

42. *Id.* at 18288.

43. See *id.* at 7953-55, for the introduction of the Kennedy bill, S. 3751, 85th Cong., 2d Sess. (1958). The final bill reaching the floor of the Senate after committee consideration, S. 3974, 85th Cong., 2d Sess. (1958), is discussed at 104 CONG. REC. 11003 (1958), where some of the Kennedy bill provisions are mentioned.

44. 104 CONG. REC. 11003 (1958) (amendment no. 4).

45. *Id.* at 11182.

46. 105 CONG. REC. 883-94 (1959) (S. 505, as referred to the Senate Comm. on Labor and Public Welfare). Note that the committee bill, cited in text accompanying note 52, *infra*, was numbered S. 1555.

House struck out the Senate bill's election enforcement section and provided instead for enforcement by civil actions to be filed by individual labor organization members aggrieved by election violations, who had either exhausted reasonable union remedies or had pursued the available remedies without receiving a final decision within six calendar months.[47] The Conference Committee adopted the Senate version.[48] Both the Senate[49] and the House[50] agreed to the version submitted by the Conference Committee.

Various congressional expressions were made concerning both the general legislative purpose and specifically who the LMRDA of 1959 was to protect.[51] One view was that the Act was aimed at protecting union members. Senator McClellan shared this view when he argued for the adoption of his Title I "Bill of Rights" amendment saying: "S. 1555 [the Committee bill] does not adequately meet the needs of union members for the protection of their rights."[52] Representatives Landrum and Griffin stated that prompt action should be taken if Americans, especially the working men and women, were to be protected.[53] Also persuasive, that there were those in Congress intending the bill to protect individual union members, was the fact that the original House bill provided for enforcement by private suits.[54]

Another view, and the one stressed by the *Hodgson* court, was that the LMRDA had a countervailing purpose to promote internal union democracy without undue government interference in union operations.[55] One of the principles the Senate committee said it had fol-

47. H.R. REP. NO. 741, 86th Cong., 1st Sess. 43 (1959), *reprinted in* 1 LEGISLATIVE HISTORY 801.

48. H.R. REP. NO. 1147, 86th Cong., 1st Sess. 35 (1959), *reprinted in* 1 LEGISLATIVE HISTORY 935.

49. 105 CONG. REC. 17919 (1959).

50. *Id.* at 18154.

51. *See generally* Hickey, *The Bill of Rights of Union Members*, 48 GEO. L.J. 226 (1959); O'Donoghue, *The Bill of Rights—Rights-Responsibilities of Its Beneficiaries*, 48 GEO. L.J. 257 (1959); Note, *Survey of the United States Supreme Court Decisions Affecting Labor-Management Relations During the 1967-68 Term*, 47 N.C.L. REV. 861 (1969).

52. 105 CONG. REC. 6472 (1959).

53. H.R. REP. NO. 741, 86th Cong., 1st Sess. 99 (1959), *reprinted in* 1 LEGISLATIVE HISTORY 857.

54. *See* note 47 *supra* and accompanying text.

55. *See* Holcombe, *Union Democracy and the Labor-Management Reporting and Disclosure Act*, 12 LAB. L.J. 597 (1961); Karro, *Administrative Interpretation of the Labor-Management Reporting and Disclosure Act of 1959*, WIS. BAR BULL. Oct. 1960, at 38; Kleiler, *The Impact of Titles I-IV of the Landrum-Griffin Act*, 3 GA. L. REV. 378 (1969); St. Antoine, *Landrum-Griffin, 1965-66: A Calculus of Democratic Values*, 19 N.Y. CONF. LABOR 35 (1966).

lowed was:

> the desirability of minimum interference by Government in the internal affairs of any private organization. . . . Moreover, . . . great care should be taken not to undermine union self-government or weaken unions in their role as collective bargaining agents.[56]

The Sixth Circuit placed much weight on the fact that, as it stated:

> In discussing the bill, *its principal sponsor, Senator Kennedy said*, 'The important thing is to get the democratic procedure and then to let the union run its own internal affairs in keeping with that democratic procedure, with the policing surveillance which the Kennedy bill, with respect to this matter and other matters, gave to the Secretary of Labor.'[57]

There is a strong possibility that the court incorrectly attributed this statement. These exact words appear under Senator Wayne Morse's name in the Congressional Record for September 3, 1959,[58] and also are reprinted under Senator Morse's name in the United States Department of Labor's *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Titles I-IV*.[59] Far from being the principal sponsor, Senator Morse was one of but two "nay" votes cast in the Senate in opposition to the LMRDA, which was passed by the margin of 95-2![60] And among the reasons Senator Morse opposed the LMRDA, was his belief that the Act *did not clearly* represent the objectives described in his statement above.[61] Since the Sixth Circuit Court of Appeals in *Hodgson* failed to provide a citation reference for their "Kennedy" quote, it is impossible to ascertain whether the court did have some source listing Senator John F. Kennedy as the author of the statement.[62] Since the Sixth Circuit considered the legislative history of the LMRDA most important in

56. S. REP. NO. 187, 86th Cong., 1st Sess. 7 (1959), *reprinted in* 1 LEGISLATIVE HISTORY 403.

57. 440 F.2d at 1117 (emphasis added). The court failed to indicate the source of this quotation.

58. 105 CONG. REC. 17872 (1959) (middle column). Senator Morse's name appears at *id.* at 17871.

59. U.S. DEP'T OF LABOR, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, TITLES I-IV 833 (1964).

60. 105 CONG. REC. 17919-20 (1959).

61. *See, e.g., id.* at 17859 (left column).

62. Even if the Sixth Circuit did possess some unknown source for their "Kennedy" quote, the Senator made several statements concerning the LMRDA which strongly supported government activism in combatting labor union corruption. Regarding the Kennedy-Ives bill of 1958, a joint press release by the co-sponsors declared:

> 2. The administration bill contains a weak and ineffective provision concerning election

deciding *Hodgson v. IPPA*,[63] a mistaken reliance on a quote incorrectly attributed to the "principal sponsor" of the Act would severely undermine the basis for the *Hodgson* decision.

The Supreme Court in its decision in *Calhoon v. Harvey* found that "the general congressional policy [underlying the LMRDA] was to allow unions great latitude in resolving their own internal controversies."[64] The Court has also identified a third object of the Act's protection: the American public. "[The provisions of section 401 are] necessary protections of the public interest as well of union members."[65] This view has been echoed by a commentator who stated that it was a congressional choice "that democratic principles must be the standard by which the unions govern themselves."[66]

The Sixth Circuit Court of Appeals considered *Hodgson* a close case of first impression.[67] It was argued by the Secretary of Labor that the established practice of the Department of routinely seeking waivers of the sixty day time limit should not be upset, that a statute of limitations was an affirmative defense not susceptible of sua sponte judicial treatment when not pleaded by the defendant, and, in any event, the LMRDA's statutory time limit should not be regarded as jurisdictional.[68] In opposing the Secretary's position, the IPPA

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procedures of unions. . . .

. . . .

The Kennedy-Ives bill authorizes the Secretary of Labor to bring court action to set aside elections not held in secret and not in compliance with the union's constitution. 104 CONG. REC. 10658 (1958).

Senator Kennedy later characterized his 1958 bill as:

based on the principle that even though commendable efforts to strengthen internal controls have been made by trade unionists, many situations cannot be reached by the machinery which has been established by the trade union movement. The bill recognizes, therefore, the necessity of applying the coercive power of Government to the correction of some of the most serious abuses which have come to the attention of the Congress. 104 CONG. REC. 10944 (1958) (left column).

Upon the introduction of his bill in 1959, Senator Kennedy noted that "[t]his bill is stronger and clearer than the 1958 version. . . . This is a strong, effective reform bill." 105 CONG. REC. 884 (1959).

63. 440 F.2d at 1119.

64. 379 U.S. 134, 140 (1964). *Accord*, Hodgson v. Local 6799, USWA, 403 U.S. 333, 338 (1971); Wirtz v. Local 153, Glass Bottle Blowers Ass'n, 389 U.S. 463, 471 (1968).

65. Wirtz v. Local 125, Laborers' Int'l Union, 389 U.S. 477, 483 (1968), *quoted in* Wirtz v. Local 6, Hotel, Motel & Club Employees Union, 391 U.S. 492, 497 (1968).

66. Beaird, 51 VA. L. REV., *supra* note 19, at 1307.

67. Hodgson v. IPPA, 440 F.2d at 1113, 1115.

68. Further, the Secretary pointed to courts which did not regard the time limit as jurisdictional where the union had obstructed the Secretary's investigation, thus delaying the filing of the suit. Brief for Appellant at 22-23 n.7, Hodgson v. IPPA, 440 F.2d 1113 (6th Cir. 1971).

argued that the language of section 402(b) of the LMRDA, in view of its legislative history, was mandatory, and should be strictly construed. The district court had certainly interpreted the Act's legislative history to render its language mandatory, and, in addition, had relied upon the principle that adherence to section 402(b)'s time limitation was a condition precedent to the Secretary's bringing suit.[69]

In reaching its decision, the Sixth Circuit noted that the district court's "condition precedent" interpretation came from a Supreme Court decision: *The Harrisburg*.[70] While *The Harrisburg*, standing alone, supported the district judge, the court of appeals thought it important to examine two more recent high court decisions: *Burnett v. New York Central Railroad*,[71] and *Glus v. Brooklyn Eastern District Terminal*.[72] Both cases arose under the Federal Employers Liability Act (FELA), which contains a three year statute of limitations.[73] *Burnett* held that a filing in a state court, which was dismissed for improper venue and not transferable to the proper court because of state law, was sufficient to toll the FELA time limit.[74] In *Glus*, the petitioner argued that the respondent was estopped to raise the defense of untimeliness because he had misled the petitioner into believing he (petitioner) had seven years to sue. The Court there rejected respondent's argument that, because the time limitation was integral to the FELA, estoppel was unavailable. Instead, the Court found nothing in the language or history of the FELA to indicate that the principle, that no man may take advantage of his own wrong, should not be applied.[75] The circuit court in *Hodgson* paid special attention to a footnote in *Glus* which quoted from *The Harrisburg* that "[n]o question arises in this case [*The Harrisburg*] as to the power of a court of admiralty to allow an equitable excuse for delay in suing, because no excuse of any kind has been shown."[76] This statement indicated *The Harrisburg* was not comparable to the *Hodgson* case since the former had not had occasion to consider equitable grounds for tolling a statutory time limitation. The *Hodgson* court relied heavily on that

69. Shultz v. IPPA, 65 CCH LAB. CAS. ¶ 11,759, at 21,375 (E.D. Tenn., May 7, 1970).

70. 119 U.S. 199 (1886).

71. 380 U.S. 424 (1965).

72. 359 U.S. 231 (1959).

73. 45 U.S.C. § 56 (1970).

74. 380 U.S. at 436.

75. 359 U.S. at 232-35, rejecting as dicta cases making "an exception to the doctrine of estoppel" in actions similar to petitioner's, in *Glus*.

76. *Id.* at 234 n.11, *quoting* The Harrisburg, 119 U.S. 199, 214 (1886).

portion of the *Glus* decision which reaffirmed that the maxim that no man may take advantage of his own wrong is deeply rooted, and has been frequently used "to bar inequitable reliance on statutes of limitations."[77] The Sixth Circuit Court of Appeals found support in *Burnett* for its approach of reliance upon congressional intentions underlying the LMRDA of 1959.[78] *Burnett* outlined a method for determining if the congressional intent permitted tolling of time limitations, by examining "the purposes and policies underlying the limitation provision, the [a]ct itself, and the remedial scheme developed for the enforcement of the rights given by the [a]ct."[79]

Since the Sixth Circuit in *Hodgson* determined from both *Glus* and *Burnett* that the proper approach was to examine congressional intent, it studied the legislative history of the LMRDA. The court first examined the statutory language, tracing changes in what eventually became section 402(b), from a time limitation of "30 days," to "30 days or as soon thereafter as possible" with the addition of "but in no event after 60 days," and finally to simply "within 60 days,"[80] the present wording of the section. The court felt that, while it was clear Congress was concerned that the Secretary of Labor act promptly, there was no record of Congress considering when section 402(b) would be subject to being tolled by equitable defenses. The Sixth Circuit did note, however, that more emphatic language was not adopted. Acknowledging the inclusiveness of the legislative history, the court turned to an examination of general purposes, and suggested that the statute "sprang from congressional concern for protecting the right of union members to democratic procedures within their

77. Hodgson v. IPPA, 440 F.2d at 1115, *quoting* Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 233 (1959). *See also* Shroeder v. Young, 161 U.S. 334 (1896), where a purchaser who told a debtor the limitation would not be pleaded was estopped to later resort to the statute.

78. "[T]he basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances," Hodgson v. IPPA, 440 F.2d at 1116, *quoting from* Burnett v. N.Y. Cent. R.R., 380 U.S. 424, 427 (1965).

79. *Id.* This method was applied in Midstate Horticultural Co. v. Pennsylvania Railway, 320 U.S. 356 (1943), wherein recovery of freight charges was sought under the Interstate Commerce Act § 16(3)(a), 49 U.S.C. § 16(3)(a) (1970), which provided a three year limit for the filing of such an action. Three days before the end of the statutory period, an agreement was made at the company's request that the company would refrain from pleading the statute of limitations if the railway would not sue for a specified period. In order to further the congressional purpose of uniform treatment of all shippers and carriers, the Court in *Midstate* concluded that such a waiver agreement did not toll the statute of limitations. 320 U.S. at 367.

80. 440 F.2d at 1116. For a full discussion of this legislative history see text accompanying notes 43-50 *supra*.

labor organizations."[81] However, the court noted a "countervailing desire to allow unions to put their own houses in order whenever they could and would do so"[82] and relied upon the Labor Department's administrative practice of resorting primarily to negotiation with the violating unions to effect voluntary compliance.[83]

Other court decisions seemed to provide illustrations of a retention of jurisdiction where the statutory time limit in the LMRDA had passed, although the court in *Hodgson* admitted none of these cases were controlling. Still, all but one case supported the Secretary's view,[84] and the Sixth Circuit thought it significant that, up until *Hodgson*, apparently no judge or litigant had seriously objected to the waiver process. The court also pointed to a case[85] where filing of a suit on the sixty-first day was held timely, because the sixtieth day was a Sunday, as supporting flexibility in application of the section 402(b) time bar, although the Sixth Circuit recognized the case as dealing strictly with an interpretation of Federal Rule of Civil Procedure 6(a).[86] Finally, the *Hodgson* panel cited a series of cases,[87] where the section 402(b) time limit was tolled as a result of union obstruction of Labor Department investigations, as supporting the view that the sixty day limitation was subject to equitable defenses. The court concluded that:

> [w]here a statute (as here) gives jurisdiction . . . and sets a time limit for filing, the tolling of that time limit automatically extends the jurisdiction of the court. The basic question is whether in view of the congressional purpose any equitable considerations should be allowed to toll the limitations . . . .
>
> . . . .
>
> [W]e believe that the congressional intent and purpose in enactment of Title IV is best served by holding that the waiver of the 60-day time limit and the

81. 440 F.2d at 1117.

82. *Id.*

83. *Id.* The court gave some, although not conclusive, weight to the administrative interpretation, following Udall v. Tallman, 380 U.S. 1 (1965), which had held that deference is to be given to an administrative interpretation of a statute, and that, so long as the interpretation is reasonable, it can be upheld despite the fact a court might have chosen a different result had it had the opportunity to decide the issue initially.

84. For a discussion of these cases, see notes 110-18 *infra*.

85. Wirtz v. Peninsula Shipbuilders Ass'n, 382 F.2d 237 (4th Cir. 1967).

86. "In computing any period of time prescribed . . . by any applicable statute . . . [t]he last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday." FED. R. CIV. P. 6(a). The court in *Wirtz*, in dicta, interpreted the section 402(a) time limit to be directory rather than mandatory. 382 F.2d at 240.

87. See notes 116-18 *infra* and accompanying text.

> reliance thereon tolled the time limitations and acted to estop its assertion by appellee [IPPA] . . . . [W]e believe this view accords with the intent of Congress, since the 60-day time limitation which was waived by appellee was principally intended by Congress as a protection for the very party which executed the waivers.[88]

As a general rule, statutory provisions limiting the time in which a suit may be filed have the dual purposes of fostering fairness to a defendant by allowing him to be secure from stale claims and of relieving the courts of insignificant and tenuous suits.[89] A distinction has traditionally been made between *general* statutes of limitations which apply to a variety of actions, and special, or *creative* statutes of limitations which apply to only one type of suit. These creative statutes are ones which create a right of action not existing at common law, and usually contain both the time limit and an authorization for the right of action in the same statute.[90] The expiration of the time limit was said to terminate the right as well as the remedy,[91] and such a bar was held to be absolute, not subject to tolling by equitable considerations or express waiver.[92] In contrast, general statutes of limitations, when expired, were held to extinguish only the remedy[93] and such statutes were subject to tolling by both equitable considerations and express waiver.[94] The difference between the two types of statutes was once described by terming general statutes "procedural" and creative statutes "substantive." However, the Supreme Court called this kind of substantive/procedural distinction worthless in determining when the limitation period may be extended.[95] Indeed, the judicial trend is to seek to soften the harsh results of even so-called creative statutes of limitations by tolling them on equitable grounds.[96]

88. Hodgson v. IPPA, 440 F.2d at 1119.

89. Burnett v. N.Y. Cent. R.R., 380 U.S. 424, 428 (1964); *Developments in the Law, Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185-86 (1950).

90. Midstate Horticultural Co. v. Pennsylvania Ry., 320 U.S. 356, 358-59 (1943).

91. Zellmer v. Acme Brewing Co., 184 F.2d 940, 942-43 (9th Cir. 1950).

92. *Midstate*, 320 U.S. at 359.

93. *Id.* at 359.

94. United States v. Price-McNemar Const. Co., 320 F.2d 663, 665 (9th Cir. 1963).

95. *Burnett*, 380 U.S. at 426-27.

96. Belton v. Traynor, 381 F.2d 82, 86 (4th Cir. 1967); Travelers Ins. Co. v. Cardillo, 225 F.2d 137 (2d Cir. 1955). This "modern interpretation," as the *Hodgson* court called it, 440 F.2d at 1119, is not all that conclusive. *Compare* United States ex rel. Moritz v. Merle A. Patnode Co., 323 F. Supp. 166, 167 (E.D. Wis. 1971) (one year time limit of Miller Act, 40 U.S.C. § 270b(b) "can be waived") *with* Martin v. Grace Line, Inc., 322 F. Supp. 395, 396 (E.D. Cal. 1970) ("statutes of limitations fixed by Congress may not be lengthened by estoppel or waiver by agents of the United States") *and* St. Paul Nat'l Bank v. United States, 320 F. Supp. 1066, 1069 (S.D. Iowa 1970) (26 U.S.C. § 6532(c) time limit for non-taxpayers to sue the Government "is a substantive jurisdictional requirement which must be met").

This tendency is apparent in the tone of *Midstate Horticultural Co. v. Pennsylvania Railway*,[97] if not in its holding, for, instead of automatically regarding the statute, there clearly a creative statute of limitations, as barring suit, the Supreme Court examined the intention of Congress, the judicial decisions regarding the time limitation, and the regulatory scheme developed by Congress.[98]

Several other federal statutes beside the LMRDA of 1959 have time limits within their own provisions capable of being classified as creative statutes of limitations. Under the approach of *Midstate*, some of them have been found to be tolled by equitable considerations and express waiver.[99] In other cases, courts have determined from a review of the pertinent congressional intents and purposes that the subject statute may not be tolled by a particular equitable defense.[100]

The limitation involved in the LMRDA is unusual because, rather than limiting the time within which a private individual must sue, it limits a federal government agency, in this case the Secretary of Labor. A few other statutes, including Title VII of the Civil Rights Act of 1964, have similar provisions. Title VII provides that:

> if within thirty days after a charge is filed with the [Equal Employment Opportunity] Commission (EEOC) . . . (. . . such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this subchapter, the Commis-

97. 320 U.S. 356 (1943).

98. *Id.* at 360-61.

99. Clayton Act §§ 4B, 5(b), 15 U.S.C. §§ 15b, 16b (1970): Westinghouse Elec. Corp. v. Pacific Gas & Elec. Co., 326 F.2d 575 (9th Cir. 1964); Kansas City, Mo. v. Federal Pac. Elec. Co., 310 F.2d 271 (8th Cir. 1962) (time limit within which individuals may file antitrust suits after government criminal suits, is tolled by "fraudulent concealment"); Longshoremen's and Harbor Worker's Compensation Act § 13, 33 U.S.C. § 913 (1970): Belton v. Traynor, 381 F.2d 82 (4th Cir. 1967) (representation by former deputy commissioner to injured longshoreman that he had received all compensation entitled longshoreman to an extended limitations period); Federal Employers Liability Act § 6, 45 U.S.C. § 56 (1970): Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231 (1959); Long v. Pittsburgh & Lake Erie R.R., 355 F.2d 443 (3d Cir. 1966) (reliance on misleading statements by claim agent may estop company from pleading expiration of time); Suits in Admiralty Act § 5, 46 U.S.C. § 745 (1970): Northern Metal Co. v. United States, 350 F.2d 833 (3d Cir. 1965) (time tolled while certain required administrative steps are taken); Trading with the Enemy Act § 34(f), 50 U.S.C. App. § 34(f): Honda v. Clark, 386 U.S. 484 (1967) (persons not filing suit within sixty days to contest distribution of seized Japanese bank assets, but bringing such an action immediately after disposition of another suit challenging the rate of exchange, not barred, and the time limit is extended).

100. Interstate Commerce Act § 20(11), 49 U.S.C. § 20(11) (1970): Burns v. Chicago, M., St. P. & Pac. R.R., 192 F.2d 472 (8th Cir. 1951) (negotiations and correspondence do not toll time limit for filing suit for lost goods).

> sion shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge . . . .[101]

Two periods of limitation appear within this statute. The EEOC has thirty (or sixty) days to notify the person aggrieved if voluntary compliance has not been achieved. This is a limit upon the agency charged with seeking compliance for the benefit of a complainant, as is the LMRDA upon the Department of Labor. The Civil Rights Act time limit, however, is not considered mandatory, and a subsequent suit by an individual will not be dismissed if the Commission took more than sixty days to investigate and seek voluntary compliance.[102] However, the EEOC has provided in its administrative procedures that either the complainant or the respondent may demand in writing that the notification of the Commission's inability to gain voluntary compliance be given to the complainant after sixty days from the filing of his complaint.[103] Once the complaining party receives this notice from the EEOC, he may bring suit against the respondent within thirty days.[104] Although the LMRDA provides for suit by the Secretary of Labor instead of by an individual, it may be valuable to compare the interpretation of these two statutory time limits, for both permit suits to be instituted after periods of agency investigation and efforts towards voluntary compliance. Where no equitable considerations appear, the time limit for individuals filing suit under the Civil Rights Act of 1964 has been strictly applied.[105] Failure to sue within thirty days is held to be a jurisdictional defect despite a delay in receiving notice because of a complainant's illness;[106] and despite a request, as provided for by the Civil Rights Act of 1964,[107] for an appointed attorney when the EEOC had advised complainant it had found no probable cause for a finding of discrimination.[108] An individual's request for counsel where the Commission has found probable cause

101. Civil Rights Act of 1964 § 706(e), 42 U.S.C. § 2000e-5(e) (1970).

102. Cunningham v. Litton Ind., 413 F.2d 887 (9th Cir. 1969).

103. 29 C.F.R. § 1601.25a (1971). No similar procedure appears to be available in the Dep't of Labor.

104. Civil Rights Act of 1964 § 706(e), 42 U.S.C. § 2000e-5(e) (1970).

105. Goodman v. City Prods. Corp., 425 F.2d 702 (6th Cir. 1970). *Cf.* McCarty v. Boeing Co., 321 F. Supp. 260, 261 (W.D. Wash. 1970) (90-day time limit to file complaint with the EEOC under 42 U.S.C. § 2000e-5 (1970) to be "strictly followed").

106. Green v. Ford Motor Co., 59 CCH LAB. CAS. ¶ 9220 (W.D. Okla. 1969).

107. § 706(e), 42 U.S.C. § 2000e-5(e) (1970).

108. Davis v. Boeing Co., 60 CCH LAB. CAS. ¶ 9312 (W.D. Wash. 1969).

does, however, fulfill the requirement of filing within thirty days.[109]

In discussing the effect to be given to the sixty day limitation of the LMRDA, the Sixth Circuit supported its decision by citing nine cases where the Act's time limit had elapsed before the Secretary commenced action, yet which were not dismissed by the courts.[110] These cases involved situations where labor union obstruction of the Secretary's investigation was said to toll the time limit, and cases where a suit was held timely filed on the sixty-first day because the sixtieth day was a Sunday. But in three of the cases[111] there was no judicial mention of the waiver at all; rather, it was apparent only from the facts that commencement of action had been delayed beyond sixty days. In four of the other cases, the courts, while specifically mentioning that the unions involved had agreed to waivers of the time limit, failed to explore, or even to consider the effect the waiver had on federal court jurisdiction.[112] In one case,[113] a district court did specifically relate the fact of waiver to the timeliness of suit by saying: "This action was timely filed on May 7, 1964 by reason of the waiver of the time requirements of the Act by the defendant and International Union."[114] Certainly the cases upon which both the Secretary and the

109. Austin v. Reynolds Metals Co., 62 CCH LAB. CAS. ¶ 9408 (E.D. Va. 1970); McQueen v. E.M.C. Plastic Co., 302 F. Supp. 881 (E.D. Tex. 1969) (characterizing court and attorney delays encountered as equitable considerations). An interesting question apparently not reached by the courts is whether the time limitation is fulfilled by a complainant's petition for counsel (assuming an EEOC finding of probable cause) which is rejected, and, if not, for what period the thirty day time limit is tolled. *See* Cabot, *The Timeliness Question in Bringing Suit Under Title VII of the Civil Rights Act*, 22 LAB. L.J. 342 (1971).

110. Shultz v. Local 1299, USW, 324 F. Supp. 750 (E.D. Mich. 1970); Wirtz v. Local 1, Independent Petroleum Workers, 307 F. Supp. 462 (N.D. Ind. 1969); Shultz v. Local 6799, USW, 71 L.R.R.M. 2820 (C.D. Cal. 1969), *aff'd*, 426 F.2d 969 (9th Cir. 1970), *cert. granted sub nom.* Hodgson v. Local 6799, USW, 400 U.S. 940 (1971); Schultz [sic] v. Local 1470, IBEW, Civil No. 44-69 (D.N.J., April 28, 1969); Wirtz v. Local 57, IUOE, 298 F. Supp. 89 (D.R.I. 1968); Wirtz v. National Maritime Union, 284 F. Supp. 47 (S.D.N.Y.), *aff'd*, 399 F.2d 544 (2d Cir. 1968); Wirtz v. Lodge 872, Bhd. of R.R. Trainmen, 279 F. Supp. 873 (W.D. Pa. 1967); Wirtz v. Local 545, IUOE, 64 L.R.R.M. 2449 (N.D.N.Y. 1966), *aff'd*, 381 F.2d 448 (2d Cir. 1967); Wirtz v. Local 1377, IBEW, 63 L.R.R.M. 2029 (N.D. Ohio 1966).

111. Wirtz v. Local 57, IUOE, 293 F. Supp. 89 (D.R.I. 1968); Wirtz v. Lodge 872, Bhd. of R.R. Trainmen, 279 F. Supp. 873 (W.D. Pa. 1967); Wirtz v. Local 1377, IBEW, 63 L.R.R.M. 2029 (N.D. Ohio 1966).

112. Shultz v. Local 1299, USW, 324 F. Supp. 750 (E.D. Mich. 1970); Shultz v. Local 6799, USW, 71 L.R.R.M. 2820 (C.D. Cal. 1969), *aff'd*, 426 F.2d 969 (9th Cir. 1970); Wirtz v. Local 1, Independent Petroleum Workers, 307 F. Supp. 462 (N.D. Ind. 1969); Wirtz v. Nat'l Maritime Union, 284 F. Supp. 47 (S.D.N.Y.), *aff'd without mention of waiver*, 399 F.2d 544 (2d Cir. 1968).

113. Wirtz v. Local 545, IUOE, 64 L.R.R.M. 2449 (N.D.N.Y. 1966), *aff'd*, 381 F.2d 448 (2d Cir. 1967).

114. 64 L.R.R.M. at 2456.

Hodgson court relied do not offer compelling support for their position. However, except for the one unreported case,[115] there are apparently no cases contrary to their view.

The decisions that tolled the limitation period where unions had interfered with the Secretary's investigations[116] involved union refusal to furnish requested records, or to comply with a subpoena until the Secretary of Labor sought an order to enforce the subpoena,[117] or until the order to enforce was actually issued.[118] While these cases tend to support the Sixth Circuit's position in *Hodgson* that the time limit of the LMRDA is not automatically applied, overt and willful misconduct presents, of course, a different set of circumstances from where the question is a waiver agreement. Whether the statute is to be tolled because of the waiver is dependent upon an independent analysis.

Finally, the court of appeals in *Hodgson* relied upon *Wirtz v. Peninsula Shipbuilders Association*[119] to illustrate that the LMRDA's sixty day limit was not an absolute. A one day delay was there excused

115. Shultz v. Local 851, IAM, Civil No. 7C 1579 (unreported) (Oct. 29, 1970), *argued and taken under advisement*, Civil No. 71-1107 (7th Cir., Oct. 6, 1971).

116. Wirtz v. Local 1622, United Bhd. of Carpenters, 285 F. Supp. 455 (N.D. Cal. 1968); Wirtz v. Independent Workers Union, 65 L.R.R.M. 2104 (M.D. Fla. 1967); Wirtz v. Local 705, Hotel and Restaurant Employees Union, 63 L.R.R.M 2315 (E.D. Mich. 1966), *order to vacate on other grounds rev'd*, 389 F.2d 717 (6th Cir.), *cert. denied*, 393 U.S. 832 (1968); Wirtz v. Local 47, Int'l Masters, Mates and Pilots, 240 F. Supp. 859 (N.D. Ohio 1965).

In response to the question:

> What remedies are available to the Secretary of Labor when confronted with harrassment or hindrance during an investigation of intra-union election complaints?

the Labor Department stated:

> If, during an election investigation, a labor organization refuses to produce election records, thereby hindering our investigation, suit may be filed under section 601(b) of the LMRDA to compel production of these records. See *Local 57, Operating Engineers v. Wirtz*, 346 F.2d 552 (C.A. 1, 1965); *Wirtz v. Local 191, International Brotherhood of Teamsters*, 321 F.2d 445 (C.A. 2, 1963). . . .
>
> In addition, Section 111 of Title 18, United States Code, provides criminal sanctions in those situations where a Labor Department investigator is assaulted while performing investigative, inspection or law enforcement functions. See also 18 U.S.C. 1114 as amended by Section 17(h) of the Occupational Safety and Health Act of 1970. Labor Dep't Response 7 (question 15).

117. Wirtz v. Local 47, Int'l Masters, Mates and Pilots, 240 F. Supp. 859 (N.D. Ohio 1965).

118. Wirtz v. Local 1622, United Bhd. of Carpenters, 285 F. Supp. 455 (N.D. Cal. 1968); Wirtz v. Independent Workers Union, 65 L.R.R.M. 2104 (M.D. Fla. 1967); Wirtz v. Local 705, Hotel and Restaurant Employees Union, 63 L.R.R.M. 2315 (E.D. Mich. 1966), *order to vacate on other grounds rev'd*, 389 F.2d 717 (6th Cir.), *cert. denied*, 393 U.S. 832 (1968).

119. 382 F.2d 237 (4th Cir. 1967).

by the method of computation provided in Federal Rule of Civil Procedure 6(a), because the sixtieth day fell on Sunday. Applying the federal procedural rule was deemed consistent with the purposes of the Act, which had been enacted after the Rules of Civil Procedure, because the limit was felt not to have been written in the terms of a mandatory statute of limitations;[120] because the Act itself incorporated an imprecise reference to time in section 402[121] and because allowing suit would vindicate the LMRDA's purpose to protect a union member's rights.

The essence of the conflict in *Hodgson* is whether the sixty day time limit of section 402(b) of the LMRDA, within which the Labor Secretary must file suit, may be tolled by the equitable consideration of a union's having agreed to a specific extension of the limitation period.[122] The Court of Appeals for the Sixth Circuit properly chose the accepted analytical approach of examining legislative intent, policies, and purposes.[123] The court also showed that the LMRDA's time limitations are not always strictly applied, but may be tolled, as where there has been union obstruction of Labor Department investigations.[124] However, if the approach to be used is to examine whether the legislative intent would best be served by tolling the statute, then tolling the statute for union obstructionism is not necessarily a sufficient or compelling answer to the problem of whether the legislative purpose is equally met by tolling the statute where there has been a waiver agreement by the union. The important question, therefore, is whether the Sixth Circuit properly analyzed the history and purposes of the LMRDA. The court was correct in stating that there were two principal sympathies present in Congress during the enactment of the bill—one that the Act was to protect the democratic rights of working people, and the other that there should be minimum interference with

120. "In fact, § 402(b) is not even couched in the usual language of a statute of repose; rather, it is a directive to the Secretary of Labor which, under certain circumstances, he must follow." *Id.* at 240, *quoted by the court in* Hodgson v. IPPA, 440 F.2d at 1118.

121. The term "calendar month" could mean anywhere from 28 to 31 days. See note 135 *infra*. See note 3 *supra* for the pertinent text of this section.

122. Equitable estoppel and waiver are frequently confused, for they are similar and analyzed alike. The process which occurred in *Hodgson* is usually termed a waiver, since an express agreement was made. *See* 63 HARV. L. REV., *supra* note 89, at 1223. Equitable considerations have been used to justify tolling of time limitations in many cases, *e.g.*, Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231 (1959); Westinghouse Elec. Corp. v. Pacific Gas & Elec. Co., 326 F.2d 575 (9th Cir. 1964).

123. See notes 78-79 *supra* and accompanying text.

124. See notes 116-18 *supra* and accompanying text.

union operations.[125] The *Hodgson* court concluded, consistently with the Supreme Court's language in *Calhoon v. Harvey*,[126] that the congressional desire for minimum government interference was predominant.[127] Yet the Sixth Circuit failed to give sufficient consideration to the other principal congressional intent, that of protecting the interests of individual union members. These interests, which may well be in sharp conflict with those of the international union, or even those of the Government, were never forcefully asserted in any of the briefs filed by the parties in the case.[128] Certainly, there were many congressional indications of concern for the interests of individual union members as evidenced by Title I of the LMRDA.[129] Moreover, the House version of the LMRDA originally provided for enforcement of the election provisions by permitting the aggrieved individual to file suit[130] indicating that the House was interested in protecting the union

125. 440 F.2d at 1117. *See also Election Remedies* 1623-26; notes 81-82 *supra* and accompanying text.

126. 379 U.S. 134 (1964).

127. Hodgson v. IPPA, 440 F.2d at 1119. The Sixth Circuit inexplicably failed to cite to the Calhoon v. Harvey decision. *See* S. REP. No. 187, 86th Cong., 1st Sess. 21 (1959), *reprinted in* 1 LEGISLATIVE HISTORY 417. The court also failed to meet the interesting argument raised by IPPA that congressional concern for minimal interference in union internal affairs—letting unions resolve their own disputes whenever possible—was satisfied by the LMRDA section 402(a)(1) exhaustion of internal union remedies requirement. Brief for Appellee at 14, Hodgson v. IPPA, 440 F.2d 1113 (6th Cir. 1971). *See* Wirtz v. Local 153, Glass Bottle Blowers Ass'n, 389 U.S. 463, 472 (1968).

128. The *Hodgson* court felt that the sixty day time limit was meant to protect the international union. This was the position urged by the Secretary of Labor: "[t]he purpose of the short time limit of section 402(b) is to resolve union electoral disputes in the shortest possible time, in order to free the union and the successful candidates from the suspicion of electoral malfeasance as quickly as possible and to enable them to act effectively in behalf of the union membership," Brief for Appellant at 23-24, Hodgson v. IPPA, 440 F.2d 1113 (6th Cir. 1971), the Secretary, of course, arguing that IPPA could permissibly waive a statutory provision enacted for its benefit. This position was also urged by the international union in *Hodgson*: "officers of a labor organization whose positions were in doubt as a result of a Department of Labor investigation could not function as effectively or efficiently in dealings with third parties such as employers who could easily convert the doubtful status of union officers into collective bargaining delays, contrary to the interests of the members of the labor organization as well as the overall national labor policy to avoid and minimize situations leading to labor disputes," Reply Memorandum for Defendant at 9, Shultz v. IPPA, 65 CCH LAB. CAS. ¶ 11,759 (E.D. Tenn., May 7, 1970), but the international union drew the conclusion that the sixty day time limit should not be allowed to be waived.

129. See note 19 *supra*. Since the availability of an individual intra-union election violation suit under title I has been narrowed by judicial decision, perhaps a stronger argument exists for preserving some alternate form of protection.

130. H.R. REP. No. 741, 86th Cong., 1st Sess. 43 (1959), *reprinted in* 1 LEGISLATIVE HISTORY 801.

member, as well as the international organization. Interestingly, the last line of section 402(b) of the LMRDA provides that upon the Secretary's filing suit "[t]he court shall have power to take such action as it deems proper to preserve the assets of the labor organization,"[131] an obvious safeguard for the dues paid by individual members.

The importance of protecting the individual union member in the context of a Title IV complaint is emphasized by the fact that the provisions of section 402(b) constitute his sole post-election remedy outside of internal union procedures.[132] The sixty day time limit of that section can be seen as guaranteeing to complainants prompt Labor Department consideration, and a speedy resolution of their grievances. The Secretary's failure to file suit within sixty days, after having made the required finding of "probable cause," means that the complainants are subject to an extended period during which the allegedly improperly elected union officials remain in office,[133] perhaps to consolidate their power, making it more difficult to unseat them should a re-run of the contested election later be held;[134] or, perhaps to utilize the union's treasury or financial holdings for personal gain.

The Sixth Circuit viewed the section 402(b) sixty day time limit in terms of a conventional statute of limitations whose purpose was, as the Secretary contended, "to protect potential defendants . . . [and such] protection . . . is sufficiently insured when the delay in filing a suit is bottomed upon the defendant's own express consent . . . ."[135] However, when the congressional concern for the protec-

131. 29 U.S.C. § 482(b) (1970).

132. See note 19 *supra*.

133. Such officials, however, are to be assumed to have been validly elected until final disposition of the complaint(s) by the Dep't of Labor. LMRDA § 402(a), 29 U.S.C. § 482(a) (1970).

134. Chief Judge James T. Foley of the Northern District of New York, during a hearing on motions in Shultz v. Local 420, Aluminum Workers Int'l, Civil No. 68-CV-357 (N.D.N.Y.), remarked that "[u]sually, they have the new election, and the same fellow gets elected, and it is all over with," *quoted in* Brief for Appellant at 17a, Hodgson v. IPPA, 440 F.2d 1113 (6th Cir. 1971).

135. Response of the Secretary of Labor to [District] Court's December 3, 1969 Memorandum Opinion and Order at 8, Shultz v. IPPA, 65 CCH LAB. CAS. ¶ 11,759 (E.D. Tenn., May 7, 1970). For a discussion of statutes of limitations see notes 89-96 *supra* and accompanying text.

One of the peculiar aspects of the Hodgson case is the somewhat contradictory position taken by the Dep't of Labor concerning the precision with which the LMRDA's section 402(b) and 402(a) time limits were to be applied. On one hand the Secretary quoted with approval the

tion of individual union members is taken into account, the *multiple* purposes of section 402(b)'s sixty day time limit become evident. While, of course, the time limit serves to benefit "the union and its officers in removing doubts about their authority and reputation,"[136] it also serves to require the Department of Labor "to give prompt and expeditious consideration to the merit of the union member's complaint,"[137] providing the individual member with a speedy remedy after exhaustion of internal union procedures. Thus, the *Hodgson* court's assertion that "the 60-day time limitation which was waived by appellee [union] was principally intended by Congress as a protection for the very party which executed the waivers,"[138] fails to fully examine whether *this* statutory time limitation was intended solely to protect *this* defendant (international union) and should be waivable by this defendant acting *alone*.[139]

Fourth Circuit's statement declaring "[t]hat the Act did not contemplate precision limiting filing to the exact day is reflected by the 'one calendar month' provision in section 402(b), [sic] which can mean anything from 28 to 31 days." Brief for Appellant at 9, Hodgson v. IPPA, 440 F.2d 1113 (6th Cir. 1971), *quoting* Wirtz v. Peninsula Shipbuilders Ass'n, 382 F.2d 237, 240 n.4 [apparently the Fourth Circuit erred in citing to section 402(b), since 402(a), mentioned at *id.* at 239 n.1, contains the "one calendar month" provision]. On the other hand, in response to the following question:

> May an intra-union election violation complaint filed with the Secretary of Labor be refiled in order to reinstate a 60-day time limit?

the Department of Labor stated:

> No. Section 402(a) of the LMRDA provides that a union member must file his complaint with the Secretary 'within one calendar month' after he has exhausted his internal union remedies. The legislative history indicates that Congress intended this provision to be mandatory. See *Senate Report No.* 187, 86th Cong., 1st Sess. (1959), p. 21, wherein it is written that 'no complaint may be entertained which is filed more than 1 month after the union has denied a remedy or the 3-month period has expired.' Thus, in the situation you describe, the one calendar month would have expired several weeks prior to the refiling of the complaint and the Secretary would have no authority under section 402(b) to act on such complaint.

Certainly it would be unusual for Congress to have enacted section 402(a) and 402(b) at the same time, yet been of two different frames of mind concerning the precision with which the statutory time limits were to be followed, section 402(a) strictly adhered to, section 402(b) susceptible to waiver. Furthermore, if one of the two time limits was intended to he *less* strictly adhered to, wouldn't it be more logical to expect it to be the one referred to in the *inexact* term "one calendar month," (section 402(a)) instead of the one specified *exactly* as "sixty days" (section 402(b))?

136. Brief for Appellant at 24, Hodgson v. IPPA, 440 F.2d 1113 (6th Cir. 1971).

137. Petition for Writ of Certiorari at 10, Hodgson v. IPPA, 40 U.S.L.W. 3153 (U.S. Oct. 12, 1971).

138. 440 F.2d at 1119.

139. An area of inquiry beyond the scope of this note concerns the *authority*, in an agency law sense, to agree to a waiver of the sixty day time limit. This issue has apparently arisen in

Even though the Sixth Circuit did not give an adequate expression of the need to provide protection for individual union members in its decision sanctioning the section 402(b) waiver process, it is beyond question that such an administrative procedure for the Department of Labor is required in some form. In the immediate context of the *Hodgson* litigation, without the judicial acceptance of the waiver agreement, all of the complainants would have been deprived of an effective remedy through no fault of their own, contrary to the above-mentioned congressional policy of protecting the interests of individual union members. Equally compelling is the fact that the Department of Labor's practice of routinely accepting section 402(b) waivers "has been followed since shortly after the effective date of the Act";[140] a longstanding administrative procedure accorded "considerable weight" by the *Hodgson* panel.[141] One of the reasons for this must be that the Department is understaffed for the numerous responsibilities assigned to it under the LMRDA, as well as under the other statutes

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the past where a president of an international union acted to waive the time limit on behalf of a local union. *See, e.g.*, Shultz v. Local 420, Aluminum Workers Int'l, Civil No. 68-CV-357 (N.D.N.Y.), *reprinted in* Brief for Appellant at 5a, Hodgson v. IPPA, 440 F.2d 1113 (6th Cir. 1971); Shultz v. Local 1470, IBEW, Civil No. 44-69 (D.N.J.), *reprinted in* Brief for Appellant, *supra*, at 2a, 34a-36a.

140. Response of the Secretary of Labor to [District] Court's December 3, 1969 Memorandum Opinion and Order at 6, Shultz v. IPPA, 65 CCH LAB. CAS. ¶ 11,759 (E.D. Tenn., May 7, 1970).

141. 440 F.2d at 1117. It has been observed that the section 402(b) time limit is unworkable without the flexibility of the waiver procedure. Chief Judge James T. Foley remarked during a hearing in Shultz v. Local 420, Aluminum Workers Int'l, 74 L.R.R.M. 2281 (N.D.N.Y. 1970), that Congress' purpose was "not to make a limitation on a period of time, because [sixty days] would be a very short period," *reprinted in* Brief for Appellant at 12a, Hodgson v. IPPA, 440 F.2d 1113 (6th Cir. 1971). While the Labor Department has apparently not sought congressional amendment of section 402(b), it recognizes the impossibility of conforming strictly to its literal language:

> The 60-day period provided in section 402(b) is for the most part sufficiently long enough to allow the Department to conduct a complete and adequate investigation of a protested election. In some cases, such as those involving large local unions or large international unions, *the 60-day period has proved to be an obstacle which we have had to overcome.* In the large election cases additional time may be helpful to permit the parties to fully discuss the investigative findings and for each side to conduct more complete investigations. Hence the Department makes use of waivers when additional time is necessary. Labor Dep't Response 7 (question 16) (emphasis added).

The international union in Hodgson countered with the argument that any claims of difficulty under section 402(b) should be directed to Congress, which had enacted the sixty day time period. Reply Memorandum for Defendant at 10-11, Shultz v. IPPA, 65 CCH LAB. CAS. ¶ 11,759 (E.D. Tenn., May 7, 1970).

it administers.[142] According to the Labor Department, there are about 350 professionals available at the 24 area Labor-Management Services Administration (LMSA) offices to investigate intra-union, and any other labor, complaints.[143] During the fiscal year 1971 alone, there were 132 such election complaints filed. On the basis of prior Department experience, about one-third of these will probably prove to be actionable,[144] meaning about 44 will require more than minimal investigation. As the Secretary pointed out:

> In the case of international union elections . . . the required investigation may involve many locals. In such cases, a scrupulous and fair investigation may be lengthy. It simply may not be possible to complete such an inquiry within 60 days.[145]

Other reasons underlying the Department of Labor's practice of accepting waivers of the section 402(b) time limit are its belief that this more closely conforms to the LMRDA's preference for minimal judicial interference in labor union matters, as well as the Depart-

142. For a contrary opinion, see Brief for Appellant at 8a-9a, Hodgson v. IPPA, 440 F.2d 1113 (6th Cir. 1971), where Mr. Anthony F. Cafferky, counsel for Local 420, Aluminum Workers Int'l, declared that the FBI is available to participate with the Labor Department in union election investigations, and that the Department was able to complete its investigation of the United Mine Workers Union, with 1,219 locals and about 186,000 members, in only 58 days.

143. Labor Dep't Response 3 (question 2). In responding to the questionnaire, the Department stressed that:

> It should be noted that the responsibilities of the area offices are not limited solely to actions taken in connection with the administration of the LMRDA but include all departmental activities involving the Welfare and Pension Plans Disclosure Act, Section 10(c) of the Urban Mass Transportation Act of 1964 (P.L. 88-365); Section 6(a) of the Act of 1965 Authorizing Research and Development in High Speed Ground Transportation (P.L. 89-220); and statutes relating to employment rights including Section 9 of Universal Military Training and Service Act of 1951, as amended; Section 7 of the Service Extension Act of 1941, as amended; Section 3 of the Army Reserve and Retired Personnel Service Law of 1940, as amended; and Section 5(a) of the Act of March 31, 1947 (P.L. 80-26). In addition to these statutes the areas offices of LMSA are responsible for carrying on investigative responsibilities which arise in connection with the administration of Executive Order 11491, as amended by Executive Order 11616. *Id.*

144. *See* notes 26-27 *supra* and accompanying text.

145. Brief for Appellant at 25-26 in Hodgson v. IPPA, 440 F.2d 1113 (6th Cir. 1971). It is interesting to note that, in answer to the question:

> In what percentage of the intra-union complaint cases are waiver agreements reached?

the Labor Department responded:

> Agreements have been entered into in approximately 30 percent of the election complaint cases *filed* with the Secretary of Labor as of January 1, 1971. Labor Dep't Response 8 (question 19) (emphasis added).

Since roughly only about 33 percent of the complaints *filed* prove to be actionable, this means that *in almost 80 percent of these* a waiver agreement is reached!

ment's belief that litigation should be avoided whenever possible.[146] The availability of a waiver allows the Labor Department to conduct its investigation, or that part of it possible to complete within sixty days, and to present its findings to the respondent union for consideration. Absent this flexibility, the Secretary has claimed he would be forced to automatically file an action whenever he reasonably believed violations had occurred affecting a union election.[147] With the waiver of the sixty day time limit, the Secretary has the opportunity to allow "the union to review the Department of Labor's investigative findings and to allow the parties to have conferences looking toward the voluntary settlement of the issues involved."[148] This preference for avoiding litigation, while grounded for the most part in the congressional policy against undue government interference in internal labor union affairs,[149] also has a practical foundation: voluntary compliance almost always provides a faster resolution of complaints than does litigation.[150]

146. Joseph A. Yablonski, testifying before the Senate Labor Subcommittee on July 13, 1971, remarked that he didn't "know what phobia fear of litigation is, but the Department [of Labor] apparently has it."

147. Brief for Appellant at 28 in Hodgson v. IPPA, 440 F.2d 1113 (6th Cir. 1971).

148. Labor Dep't Response 4-5 (question 7).

149. The Secretary interpreted the congressional policy to mean that "Congress has expressed a decided preference for the resolution of the intra-union conflicts by all processes short of litigation." Brief for Appellant at 24, Hodgson v. IPPA, 440 F.2d 1113 (6th Cir. 1971). However, Congress' policy actually "reveals a clear congressional concern for the need to remedy abuses in union elections without departing needlessly from the longstanding congressional policy against unnecessary *governmental* inference with internal union affairs," Hodgson v. Local 6799, USW, 403 U.S. 333, 338 (1971) (emphasis added), *citing*, Wirtz v. Glass Bottle Blowers Ass'n, 389 U.S. 463, 470-71 (1968). Obviously, once the Secretary of Labor has entered into the union election controversy, there *is already* governmental interference, and one can only speculate whether congressional aversion to *any* governmental involvement meant also that Congress equally strongly preferred for controversies to be handled almost completely within the Labor Department's own administrative procedures. In any event, there is no question that the Department of Labor is waiver oriented:

> The Department of Labor considers it more appropriate to accept waivers . . . than to initiate litigation and hold a case pending on the court dockets. By entering into these agreements we avoid unnecessary litigation and overcrowding of the court dockets while at the same time we accomplish the statutory purpose of obtaining a new election under the supervision of the Secretary of Labor which will afford the members of the labor organizations the free and democratic opportunity to elect the officers of their organization. Labor Dep't Response 5 (question 7).

150. For example, the *Hodgson* action involved an election on February 21, 1968, for which suit was filed on October 29, 1968; but it was not until December 3, 1969 that the district court dismissed without any consideration on the merits. The district court cited the delay in its order of dismissal: "The Court experienced difficulty in bringing this action into status for disposi-

Even accepting the need for some form of waiver of the sixty day time limit of section 402(b) of the LMRDA, there still remains the problem left unexamined by the *Hodgson* court of whether the entire Labor Department waiver procedure should remain as unsupervised as it is currently. The Department of Labor contends that the Secretary's decision to accept a waiver is *not* a judicially reviewable administrative determination.[151] The opinion of the district court in *DeVito v. Shultz*,[152] however, suggests that this is still an unsettled area of administrative/labor law. In *DeVito*, a petition for mandamus was sought to require the Secretary of Labor to institute a section 402(b) suit. While he had made the determination that the LMRDA violations complained of did, in fact, occur, he also had made the further determination that the violations were not sufficient to have influenced the union election. Judge Gesell recognizing that it was not for the court to substitute its discretion for that of an administrative official, nevertheless rejected the Secretary's contention that judicial review was entirely inappropriate:

> Indeed, the very exclusivity of the remedy serves to emphasize the necessity of some degree of Court supervision. To rule otherwise would enable the Secretary to frustrate the will of Congress; it would leave the Secretary's conduct immune from scrutiny in matters where he is charged with significant responsibilities that must be carried out if the sweeping congressional directive to infuse basic principles of democratic free election into union organizations is to be implemented.[153]

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tion." Shultz v. IPPA, 65 CCH LAB. CAS. ¶ 11,759, at 21,375 (E.D. Tenn., May 7, 1970). Almost four years following the contested IPPA election, after denial of certiorari by the Supreme Court, this case is ready to be heard on the merits.

The Labor Dep't indicated that while the petition for certiorari was pending "the parties entered into a stipulation whereby the Union agreed to conduct its next regular election of officers under the supervision of the Secretary of Labor. In this election nominations will be held in December, 1971, and the balloting in February, 1972. The stipulation has been submitted to the United States District Court for its approval." Labor Dep't Response 2 (question 7). For a discussion of the problem of delay see *Labyrinth* 372-80.

151. Labor Dep't Response 6-7 (question 13). The general rules precluding an individual from intervening in a suit filed by the Department, filing a § 402 suit, or obtaining review of the Secretary's decision not to file a § 402 suit, support the Labor Dep't's position. *See* notes 20-25 *supra*.

152. 300 F. Supp. 381 (D.D.C.), *complaint dismissed after remand for further administrative proceedings*, 72 L.R.R.M. 2682 (D.D.C. 1969).

153. 300 F. Supp. 381, 382 (D.D.C. 1969). Judge Gesell found that the letters sent by the Secretary to the complainants were insufficient to explain why further Labor Department action was not being taken, and he ordered the Secretary to reopen the matter for further consideration, and to furnish the court with a more detailed statement of the Department's reasons for its decision. *Id.* at 384. When the case was heard again by the district court, Judge Gesell declared

Another aspect of the judicial reviewability issue is the timing of when the recourse to the courts would be available. And this, in turn, would seem to depend upon what the acceptable duration for a waiver agreement, including extensions, is to be. In the *Hodgson* case, two separate extensions of the time limit were agreed upon, for a total of 120 additional days beyond the apparent statutory deadline. In the "obstruction-of-investigation" cases, the approach has been to subtract the period of union-caused delay from the time between the submission of a complaint to the Secretary and his filing of a civil action; if the result is sixty days or less, the suit is held to be timely.[154] Generally, in statute of limitations cases where the time limit is held to be tolled by equitable defenses, the prevailing standard allows extensions for a "reasonable time."[155] The Department of Labor has expressed the opinion that any waiver "should in all cases be limited to that period of time deemed necessary to correct violations which were uncovered in the challenged election."[156] An alternative restric-

that the Secretary "has . . . satisfied the Court that there is a rational basis for his not proceeding." 72 L.R.R.M. 2682, 2683 (D.D.C. 1969). What further materials were in fact submitted to the court by the Department of Labor is not clear; and, indeed, there is a suggestion from the statement by Judge Gesell that it would have been "impossible for Secretary Shultz to explain the actions of Secretary Wirtz." *Id.* at 2683.

154. Wirtz v. Local 47, Int'l Masters, Mates and Pilots, 240 F. Supp. 859 (N.D. Ohio 1965).

155. Munter v. Lankford, 232 F.2d 373 (D.C. Cir. 1956).

156. Labor Dep't Response 5 (question 8). The current administrative practice, however, is usually to accept waivers for a standard period of thirty days, with an additional extension of thirty days if necessary, and at least one waiver agreement was accepted for a period of at least 18 months. *Id.* at 4-5 (question 7). Moreover, the Department will accept a waiver of the section 402(b) time limit despite its having discovered sufficient evidence to justify a finding of probable cause.

In response to the question: "Does the Secretary of Labor agree to a waiver after he has determined that probable cause exists that an intra-union election violation has occurred?" the Department stated:

> A waiver would be accepted if the labor organization agrees (a) to conduct a new election of officers under the supervision of the Department of Labor or (b) to take such other action as the Department deems appropriate to remedy the violations which occurred during the challenged election. Labor Dep't Response 4 (question 6).

With respect to the Hodgson case, the Department said:

> In this case it was determined shortly after the investigation was completed that violations had occurred which may have affected the outcome of the challenged election. After the investigative results were analyzed and the Union was advised of our findings several conferences were held looking toward voluntary corrective action by the Union. Shortly before the expiration of the 120 day period it became evident that the violations would not be remedied. At this point the Secretary's duly designated representative—the Solicitor of Labor—made the finding of probable cause required by the statute and authorized the filing of a civil action to set aside the challenged election of officers. Labor Dep't Response 2 (question 5).

tion upon the duration of waiver agreements is suggested by the Secretary's assertion that "[w]ithout the device of the time waiver, the Secretary would have no recourse if the union reneged on the settlement agreement."[157] This raises the possibility that waivers could be judicially restricted to situations where a bona fide agreement with the respondent union has been obtained by the Secretary; the section 402(b) sixty day time limit then being tolled should the union renege on its promise to effect a suitable remedy. This would have the benefit of requiring the Secretary of Labor to proceed expeditiously toward a settlement *prior* to the expiration of the sixty day time limit, while providing him, should he refrain from filing suit, with protection against a union's breaking its promises to remedy any LMRDA violations.

The question of when, if at all, a complainant may seek judicial review of a waiver agreement—after the section 402(b) sixty day period has passed; after the sixty days had passed and the Secretary had failed to obtain a compliance agreement from the union; after the expiration of the first extension period; or after the expiration of a "reasonable waiver period"—still remains; but any solution to this problem must necessarily include an inquiry into the complainant's role in Department of Labor section 402(b) waiver procedures. At present, complainants are generally not participants in discussions preliminary to a waiver agreement, since they are not considered parties to such a waiver.[158] Nor are complainants generally even informed of waiver agreements, the Department of Labor only notifying them upon a final determination of the complaint, and sometimes not even then:[159]

157. Response of the Secretary of Labor to [District] Court's December 3, 1969 Memorandum Opinion and Order at 7, Wirtz v. IPPA, 65 CCH LAB. CAS. ¶ 11,759 (E.D. Tenn., May 7, 1970).

158. Labor Dep't Response 6 (question 11).

159. In his statement of July 13, 1971, before the Senate Labor Subcommittee, Mr. Joseph A. Yablonski, discussing complaints filed with the Secretary of Labor concerning the 1969 UMWA Int'l election, asserted that:

> For ninety days we remained completely in the dark as to whether the Department had found merit in our challenge or not.
>
> . . . .
>
> Thus, had we never made inquiry, we would never have known what was happening. It is standard operating procedure within the Department not even to inform the complaining party that the Department is going to court. This was true concerning the 1969 election. We never even received a letter from the Secretary of Labor advising us that suit would be filed.

> As a general rule complainants are not advised of the fact that the Department has accepted a waiver of the statutory time period within which suit must be filed. Such persons will be made aware of the waiver agreements if they contact the LMSA Area Office or the National Office of LMWP regarding the status of their complaint to the Department.[160]

Obviously, an individual union member who desired to contest the Secretary's decision to agree to a waiver of the section 402(b) time limit would be handicapped by his lack of knowledge of the circumstances of the waiver agreement. A better approach for the Department of Labor would be to adopt procedures similar to those of the EEOC, permitting, at any time after ninety days from the filing of the complaint, either a complainant or a respondent to request that a determination letter from the Commission be sent.[161]

Hodgson v. IPPA seriously undermines the viability of the sixty day time limit imposed by section 402(b) of the LMRDA. The court, in acquiescing to a longstanding administrative practice of the Department of Labor, prevented the immediate need for an amendment to the Act, which might have been difficult for Congress to wrestle with. But in attempting to construe the language of section 402(b) of the LMRDA in conformity with both the congressional purpose behind its enactment, and the manner in which the section has been administered by the Secretary of Labor, the Sixth Circuit uncovered many knotty issues, including the duration and scope of the waivers to be allowed, and the role of the individual complainants in the Labor Department's waiver process.

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160. Labor Dep't Response 6 (question 9).

161. See note 103 *supra* and accompanying text.