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TITLE IV'S "NEVER NEVER LAND"
WHEN AND HOW VICTORIOUS
INSURGENTS ARE TO BE INSTALLED IN
UNION OFFICE

Arthur L. Fox, II*

I. INTRODUCTION

Our story begins when insurgents win an election for union office and the defeated incumbents refuse to turn over the reins of power. As the plot thickens, the Secretary of Labor (Secretary) either refuses to take any initiatives on behalf of the victorious insurgents, or worse, actively attempts to derail any litigation the insurgents initiate in an effort to be seated.

There are a number of variations on this simple theme. The insurgents might have won a regular, scheduled election. Or they might have won a rerun election supervised by the Department of Labor (DOL, Department). This rerun election might have been compelled by a court order or it might have been the product of an informal settlement between the Secretary and the union. Whatever the scenario, the problem is the same, getting the victorious insurgents installed when the vanquished incumbents refuse to yield the reins of power.

As democracy creeps slowly through the labor movement, incumbent officials are being challenged increasingly by insurgents who are becoming increasingly successful in winning election to union office. Of course, a democratic tidal wave is not sweeping through unions. But, as a general proposition, democratic progress is being made. Indeed some unions were more democratic in the 1950s, before the Labor Management Reporting and Disclosure Act (LMRDA)¹ was enacted, than they are today.

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Nonetheless, it seems that one law of physics is very much at work in the union democracy field: for every action there is an equal and opposite reaction. For every substantive LMRDA won victory by insurgents and reformers, a new procedural obstacle seems to arise. For insurgents who win elections, the problem is when and how they can get installed in union office. Unfortunately, the LMRDA does not specifically address this problem, and neither the Secretary of Labor nor the courts, have given it serious consideration. Now that insurgents are winning elections with some frequency, the time has come when we must deal with the problem of getting insurgents seated, and develop a clear set of rules and procedures to be followed by candidates, unions, the Secretary and the courts. Given the current state of the law and the Secretary’s posture, when victorious insurgents ask, “Do I use the law or a crowbar?” there is a temptation to recommend the mechanical, rather than procedural, solution. But, as lawyers, we have a responsibility to find legal solutions.

To give this discussion a practical focus, three illustrations of the problem are considered.

A. Case #1 — A Teamsters’ Election

Linda Gregg, a member of the National Steering Committee of Teamsters for a Democratic Union (TDU), a national, rank-and-file, reform caucus, won a regularly scheduled election as the president of a large Rocky Mountain Teamster local. The defeated incumbent, who had run the election, challenged it on the grounds that the return time he had allowed for the mail ballots did not afford an adequate opportunity for members who did not receive ballots to obtain and return them before the deadline. In this case, before the protest was finally resolved by the International Teamster President Jackie Presser, Gregg was installed. However, shortly thereafter, Presser upheld the ousted incumbent’s protest, and ordered a new election. This case illustrates the “keep voting ‘till you elect the right candidate” syndrome.

Although Gregg won the second election by a wider margin and

2. See infra notes 61-76 and accompanying text.
3. Linda Gregg won the Teamster Local No. 435 presidential election on December 17, 1984, by a margin of 744 to 697.
4. After his election bid was denied by Teamsters Joint Council 3 on January 3, 1985, the defeated incumbent filed an appeal with the International Teamsters Union.
Presser decided to honor the results, other victorious insurgents have not been so lucky.\(^6\) Many do not get installed. Rather, the union leadership permits the losers to rerun the challenged election. Having consumed their vacation allowance, insurgents are often unable to muster the resources needed to conduct another campaign on the heels of the one they just won. And even when they can do so, their opponents, having discovered their political vulnerability, take advantage of their second bite at the electoral apple by doing whatever is necessary, whether or not lawful, to avoid another defeat at the polls. And, while national union officials may be quick to overturn elections won by insurgents, they rarely overturn elections won by incumbents. Too often, the internal union election appeals process is a one-way street, with the traffic running against the insurgents.

**B. Case #2 — A Furniture Workers’ Election**

Rick Rader defeated a member of the national executive board of the United Furniture Workers of America (UFWA) when he recently won an election as the president of a Baltimore local.\(^7\) The defeated officer filed a protest with his friend and mentor, UFWA president Carl Scarbrough. Scarbrough promptly upheld the challenge, overturned the election and rather than order a new election, he installed his protege, the vanquished candidate, for a full term of office. This case illustrates the “What are friends for?” syndrome.\(^8\) But wait, there’s more, the plot thickens.

Rader’s local and his supporters sued the UFWA under Title I of the LMRDA\(^9\) seeking to enjoin the losing candidate’s installation

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\(^6\) Linda Gregg won the second presidential election by a margin of 1,190 to 882. Gregg’s installation can be contrasted with the odysseys of other victorious insurgents, where the end result rested in favor of the defeated incumbent. *See infra* notes 7-25 and accompanying text.


\(^8\) *Id.*

\(^9\) Carl Scarbrough, United Furniture Workers of America (UFWA) President ordered the installation of Kenneth Williams as president of Local 75A on December 27, 1985.


   Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization’s constitution and bylaws.


   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 con-
pending final resolution of the matter pursuant to Title IV. Despite the plaintiffs' narrow request for relief that would not have jeopardized the Secretary's exclusive enforcement authority under Title IV, the court dismissed their suit for lack of jurisdiction after receiving an ex parte letter from the Secretary claiming that the plaintiffs were plodding on his private, Title IV turf.

Thereafter, the loser was promptly installed and Rader was forced into the ironic position of having to protest the election he had won. Because Title IV requires the exhaustion of intra-union appeals for up to three months, Rader was first required to file an internal union protest with the UFWA executive board. That body took its time pondering the complex metaphysical ambiguity posed by Scarbrough's decision that a loser could be a winner before affirming that decision. Rader then filed a Title IV complaint with the Secretary who took the full 60 days allowed by law to complete his investigation. Eventually, the Secretary did sue to set aside Scarbrough's

duct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

10. The UFWA elections took place on December 8, 1985. However, Williams was not installed until after the temporary restraining order was lifted. 29 U.S.C. § 481(a) (1982) states:

Every national or international labor organization, except a federation of national or international labor organizations, shall elect its officers not less often than once every five years either by secret ballot among the members in good standing or at a convention of delegates chosen by secret ballot.


12. Local 75A, United Furniture Workers of Am. v. Scarbrough 122 L.R.R.M. (BNA) 2050 (D. Md. 1986). A motion to vacate was still pending at the time this article went to print despite the passage of 17 months.

13. 29 U.S.C. § 482(a)(2) states that a member of a labor organization:

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.


15. 29 U.S.C. § 482(b) (1982) states:

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, and Rader was installed.\textsuperscript{16}

However, the seven month delay resulted in political disaster. During this period, Scarbrough's surrogate had filled vacancies and run new elections to fill the balance of the seats on the local executive board. Thus, when Rader finally took office, he was faced with a hostile majority on the local executive board which was effective in paralyzing the union. Although the Department of Labor eventually filed a new suit to overturn the elections that had stacked the board, by that time Rader had already submitted a letter of resignation in which he explained:

The members may not get what they want, but at least their union may begin to function again. Unfortunately, the only ones who get hurt in the kind of vicious political warfare we have witnessed are the members.\textsuperscript{17}

Remember, but for the Secretary's \textit{ex parte} intervention in the Title I lawsuit, this disaster might have been avoided.

\textbf{C. Case #3 — A Hospital Workers Election\textsuperscript{18}}

In a 1984 Hospital Workers' Local 1199 election, the Local president, Dorris Turner, engaged in massive ballot fraud — destroying ballots cast by members and substituting large plastic garbage bags filled with ballots she and her cronies had marked for themselves.\textsuperscript{19} The Labor Department was eventually successful in forcing Turner to agree to a DOL-supervised rerun election in the Spring of 1986 when the next regularly scheduled election was to have been run in any event. After monumental union obstruction of the Labor Department's efforts to establish fair electoral procedures,
an election was conducted, and the insurgents won.\textsuperscript{20}

Thereafter, the Department certified the ballot count but refused to let the insurgents take office until after it had conducted an investigation of Turner's protest alleging, of all things, that the Department had acted unlawfully when supervising the election.\textsuperscript{21} The insurgents went to court seeking installation pending the Department's resolution of the protest. But, as in the Furniture Workers' case,\textsuperscript{22} the Secretary argued that only he had the authority to install winning candidates, and not unless or until he was ready to do so. Because there was little, clear, decisional authority on the subject, the court concluded that it could not grant the requested relief in the context of a preliminary injunction proceeding.\textsuperscript{23}

In the meantime, months passed, and the Local's contract covering a majority of its members expired. Fortunately, the lame-duck administration did not renegotiate that contract although, according to the Labor Department's view of the law, it could have done so.\textsuperscript{24} Eventually, the Department did reject Turner's protest and the insurgents were installed. Although their delayed installation was not fatal to the union's interests,\textsuperscript{25} as in the UFWA case, it delayed the members' receipt of the benefits of wage increases, improved work rules, and increased health and pension insurance. Moreover, grievances were dropped, and arbitrations piled up. Everything ground to a halt while the Department's investigation ground on.

\section*{II. The Statute, Congressional Intent, and the Real World}

The starting point of any statutory analysis must be the language of the statute and the legislative history. Title IV of the LMRDA provides:

\begin{quote}
    The challenged election shall be presumed valid pending a final decision thereon . . . 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{26}
\end{quote}

And Congress explained its intent as follows:

\begin{itemize}
    \item \textsuperscript{20} Johnson v. Turner, 86-Civ. 3654 (S.D.N.Y.), aff'd, 86-6096 (2d Cir. 1986).
    \item \textsuperscript{21} \textit{Id.}
    \item \textsuperscript{22} \textit{See supra} notes 7-17 and accompanying text.
    \item \textsuperscript{23} Johnson v. Turner, 86-Civ. 3654 (S.D.N.Y.), aff'd, 86-6096 (2d Cir. 1986).
    \item \textsuperscript{24} \textit{Id.}
    \item \textsuperscript{25} \textit{But see supra} notes 7-17 and accompanying text where the union's interests were greatly affected.
    \item \textsuperscript{26} 29 U.S.C. § 482(a)(2) (1985).
\end{itemize}
Since union business must not be brought to a standstill whenever an election is challenged, it is necessary to make some provision for the conduct of business while the proceeding is in progress. It would be intolerable for the Government to appoint outsiders to act as receivers. The choice lay between keeping the old officers in office or allowing the new officers to enter upon their duties even though their right may be challenged. The latter course seems preferable. A union election should be presumed valid until the contrary can be reasonably established. There would be the least disruption of normal procedure within the union if they were continued in office. However, the ultimate decisions upon this point should be made by the labor unions themselves. Consequently, [the] section provides that pending a final court decision the affairs of the union should be administered by the new officers or in such other manner as the constitution and bylaws might provide. An employer who dealt with such officers would satisfy any duties under the National Labor Relations Act. The collective-bargaining agreements they negotiated would be legally binding upon the union.\(^{27}\)

At first glance, it would appear that Congress' intent was quite clear: the winning candidates in union elections, whether incumbents or insurgents, should be installed in office pending the outcome of any protests or challenges. Then why is there so much confusion, difficulty and delay in getting victorious insurgents installed? First, the law is not quite as clear as might be desired if all ambiguities were to have been eliminated. Moreover, for whatever reasons, the Department of Labor not only will not help seat insurgents, it will actively oppose their attempts to be seated promptly after winning elections.\(^{28}\) And finally, the Courts are reluctant to resolve the resulting confusion in the context of emergency injunction proceedings which, unfortunately, are the most common type of proceeding in which the issue is likely to arise.\(^{29}\)

In the Furniture Workers' litigation,\(^{30}\) the union argued that when Congress said "elections shall be presumed valid pending a final decision thereon,"\(^{31}\) it did not mean that the ballot tally should be respected, but rather that the end result of the union review proc-


\(^{28}\) See, e.g., supra notes 3-25 and accompanying text where victorious insurgents were not immediately installed into union office after the election.

\(^{29}\) Id.


ess should be honored. Of course, if victorious candidates cannot be installed until after the union has resolved election protests, then why did Congress specify that they were to be installed pending a final decision thereon? As we shall see, the only logical answer must be that the term “election” means final ballot tally.

But, while the Furniture Workers’ argument is clearly inconsistent with Congress’ directive, it does pose an important question: final resolution by whom — the union, the Secretary, or a court? In the Local 1199 case, the Secretary claimed that he was vested with the authority to make final decisions. Although Dorris Turner had manipulated the 1984 election, the Secretary insisted that she was entitled to remain in office until he had concluded his investigation and certified the results of the 1986 election which Turner had lost. The Secretary reached this result by arguing that since Turner won the 1984 election, Congress instructed that she was entitled to be installed and to remain in office until his final decision — not his decision to seek to overturn the fraudulent election, but rather his decision to certify the results of the rerun election months after Turner had been rejected at the polls.

The Secretary bolstered his argument with some linguistic gymnastics. Because Congress articulated its directive that winning candidates should be promptly installed in subsection (a) of section 402, the Secretary asserted that Congress must have intended that the presumption would apply only to regularly scheduled elections described in that subsection, not to rerun elections described in the following subsections. Of course, the legislative history does not concede such a fine distinction and fails to yield any support for the Secretary’s claim. On the contrary, Congress’ sole concern was that union business not be paralyzed. Yet, the Secretary’s litigative posture in both the Furniture Workers and Local 1199 suits actually created paralysis in these unions.

In fact, the paralysis in these two unions was of a relatively short duration. Typically, the Secretary’s investigations of alleged electoral misconduct span many months, and it is often years before

33. See Hodgson v. IUE Local 485, 503 F.2d 219 (2d Cir. 1984).
35. Id.
38. See supra note 27 and accompanying text.
39. See supra notes 3-25 and accompanying text.
rerun elections are conducted. As between the victorious insurgents, and the politically discredited incumbents, Congress most certainly intended that the former should run the union during the interim. Moreover, the hiatus can be extended significantly if either the Secretary should decide not to certify the results, or if the losing incumbents should attempt to challenge his decision to certify the results pursuant to *Dunlop v. Bachowski*. In addition, there is absolutely no legal or political justification for leaving the politically vanquished incumbent officers at the union’s helm during this period which can extend from several months, to years.

It is important not to lose sight of the fact that it was the incumbents’ unlawful conduct that led to the supervised rerun election where they were rejected by the voters. If they are allowed to remain in office while election protests are being investigated, and during the pendency of any ensuing litigation, they will have the opportunity, and an irresistible temptation, to spend their members’ dues to litigate near-frivolous *Bachowski* claims for the sole purpose of retaining office a little bit longer. This result would hardly comport with the objectives of the LMRDA Moreover, if they should succeed in persuading the Secretary that he should set aside his own rerun election, the relationship between the Secretary and the union will no longer be adversarial. Having lost the rerun election, it is difficult to imagine that the incumbent officers would not stipulate at once to a consent decree in order to win another bite at the electoral apple. And, after conducting two unlawful elections, they would secure the

40. See Note, *Union Elections and the LMRDA: Thirteen Years of Use and Abuse*, 81 YALE L.J. 407, 523 n.30 (1972) (average time between the contested election and the completion of the rerun is 2 years and 7 months).

41. 421 U.S. 560 (1975). *Bachowski* was defeated by an incumbent in a United Steelworkers of America (USWA) district office election. Thereafter, *Bachowski* filed a complaint with the Secretary of Labor alleging LMRDA § 401 violations. The Secretary’s investigation determined that action on the part of the Department of Labor was unwarranted. *Bachowski* brought suit in Federal District Court claiming that the election should be set aside and that the Secretary’s actions were “arbitrary and capricious.” The District court held that it had jurisdiction and found the Secretary’s action was “capricious.” Id. at 564. On appeal, the Third Circuit Court reversed. Finally, the case went to the United States Supreme Court, where the Court held that the District Court did have jurisdiction to hold that the Secretary acted in a capricious manner. Id. at 575.


43. In such circumstances, given the lack of adversity between the Secretary and a defendant union run by incumbent officers, one may question whether the action would qualify as a “case or controversy” under Article III of the United States Constitution. See infra note 113.
opportunity to conduct yet another election.

There can be little doubt that incumbents enjoy a distinct political advantage in any electoral race and this is particularly true in unions where it is the incumbents who control the electoral process. But, Congress most certainly did not intend for the political deck to be so stacked in favor of incumbent union officers, and against insurgents, at least after the insurgents actually managed to win election to office. Rather, the entire fabric of the LMRDA demonstrates a congressional objective to put insurgents on a more equal footing with incumbent union officials so that members would have more than a “naked right to vote.” 44 Although the Secretary would normally allow the incumbent officers to govern unions, defend lawsuits, and conduct rerun elections, Congress expressed a more politically neutral preference that the candidate who won the challenged election should perform these tasks, whether the incumbent or the insurgent. 45

Not only can serious abuses occur in the event that insurgents are not promptly installed after winning supervised rerun elections, but if Congress was willing to let incumbent candidates remain in office after stealing elections, then Congress surely was not unwilling to let insurgents take office after stealing supervised, rerun elections, if that is possible. In fact, there is a much stronger presumption that the candidates who win supervised, rerun elections are the legitimately elected officers since the potential for fraud is vastly reduced during elections supervised by the Secretary. 46 That presumption mounts when the victors are insurgents who played little or no role in conducting the election, and who ordinarily lack the means to engage in electoral fraud. In such cases, the likelihood of the election’s being overturned is very slim. Indeed, if Congress intended to allow victorious incumbent candidates to remain in office after having been charged with wrongdoing in order to permit the orderly conduct of union business, Congress surely could not have intended to deny victorious insurgents the right to govern the union after having won a DOL-supervised, rerun election.

44. See, e.g., Bunz v. Motion Picture Machine Operations, 567 F.2d 1117, 1121 (D.C. Cir. 1977).
45. 29 U.S.C. § 482(a)(2) (1985) states in part that:
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 . . .
Id. (emphasis added).
Thus, when searching for the precise meaning of the statutory presumption that a "challenged election shall be presumed valid pending a final decision thereon," it would be wise to heed Professor Archibald Cox's advice:

because many sections [of the LMRDA] contain calculated ambiguities or political compromises essential to secure a majority. Consequently, in resolving them the courts would be well advised to seek out the underlying rationale without placing great emphasis upon close construction of the words.

What is clear in the statute and legislative history is that Congress intended that the candidates who win at the polls should govern their unions during the pendency of election challenges regardless how long it takes to resolve those challenges. There is no reason why this directive should not apply with equal force and validity to DOL-supervised, rerun elections as well as to regular, scheduled elections conducted by unions. Indeed, there are many reasons why the directive should be applied in both settings.

Having examined Congress' intent in a real-world setting, let us return to the language of the statute to determine whether it is susceptible of a construction that is consistent with that intent. A compelling argument can be made that when Congress stated that an "election" should be presumed to be valid pending resolution of disputes, it must have intended the term to mean the final ballot count. The candidate who wins the most votes is entitled to be installed pending a final resolution of election protests unless the union has provided in its constitution or bylaws for some other means of governance. Furthermore, when Congress stated that the victorious candidates should hold office pending "final decision (as hereinafter provided)," it must have intended the last uncontested decision in the chain which may stop at an internal union appeal, or proceed to the Department of Labor, and eventually to the courts. After all, Congress did elaborate in the legislative history that it expected the winning candidates to govern the union "pending a final court decision." The foregoing construction would incorporate this explicit preference, but make allowance for the fact that election protests are

49. Cox, supra note 48, at 845.
51. Id.
not infrequently settled short of litigation. Not only does this construction harmonize the language of the statute with congressional intent, but no other construction would uniformly achieve this result.52

Without one further refinement, however, this definition of the term “final decision” is not complete. Title IV courts retain jurisdiction to resolve disputes during the course of supervised elections, and must eventually consider the Secretary’s certification of the results and enter “a decree declaring [the victors] to be the officers of the labor organization.”53 One may still ask which court decision or order is the one that tolls this interim period during which the prior election is presumed to have been valid.54 The answer which promotes Congress’ overall objectives, and which does not produce absurd results, is to deem the “final decision” that court action which found the election to have been tainted by unlawful conduct and ordered a rerun election to be conducted under the Secretary’s supervision.55

This definition of “final decision” can be tested by examining the consequences of adopting different definitions. For example, as the Secretary contended in the Local 1199 case,56 the final decision Congress intended is not the court order compelling a rerun election, but rather the one accepting the Secretary’s certification of the results of the rerun election. Not only must one examine the implications of this interpretation, one must also ask how it would translate into a situation where there is a rerun election pursuant to an infor-

52. Any other reading of the term “final decision” could not be harmonized with the congressional intent. See supra note 26.
54. In the Turner case, the Secretary argued that the winning insurgents were not entitled to be seated until after he certified the validity of their election and concomitantly dismissed the election protest. But see Hodgson v. Int’l Union of Electrical, Radio and Machine Worker’s, Local 485, 503 F.2d 219, 224 (2d Cir. 1974), where the Secretary argued, and the court found that the final decision that entitled a victorious candidate to be seated was the order overturning the unlawful election. Although the court denied the Local 1199 insurgents’ motion for emergency injunctive relief under Fed. R. Civ. P. 65, solely on the grounds that they had failed to meet the criteria to qualify for such relief, the Secretary insisted in a subsequent, proceeding involving Teamsters Local 654, that the Turner court had upheld its position that insurgents are not entitled to be installed unless or until he decides to certify the validity of their elections. Kinsley v. Teamsters Local 654, (N.D. Ohio Civ. No. C-3-86-575).
55. If this definition were employed, one might ask if the victorious candidates could not be removed at the time this decision was issued. Indeed, while this remedy would be unusual, it would be consistent with a construction which causes the Title IV presumption to lapse when a court orders an election to be rerun, and it has been upheld. See Hodgson, 503 F.2d at 219, upholding a district court order removing from union office thirty days before a rerun election those officers whose misconduct necessitated the rerun election.
mal settlement rather than court order. Would the Secretary’s certification, by itself, constitute the final decision? And, to whom would it be addressed? What would happen if the Secretary decided he could not certify the results? Did Congress intend to confer on the Secretary the authority to unilaterally postpone “final decisions” until after another rerun election had been conducted and the results certified? Who should hold office during this perhaps interminable period?

There is yet another “decision” that some might argue to be the “final decision” in the Title IV chain. Whenever losing candidates or their supporters contest the Secretary’s decision to dismiss their post-election challenges pursuant to Bachowski57 — whether after an initial or a supervised, rerun election — one might argue that the court’s dismissal of that challenge is the “final decision.”58 Of course, the longer it takes to get a final decision, the more compelling the need to install the candidates who won the contested election so that the union’s affairs may be conducted by officers who have at least some semblance of political legitimacy.

The arguments raised by the Secretary in the Local 1199 case59 highlight the implications of an alternate view of the term “final decision.” The Secretary asserted that neither public policy, nor the union’s interests, would be served if the victorious insurgents were to be installed immediately after the final ballot count, only to be removed several weeks or months later in the event the Department were to uphold the incumbents’ election protest.60 If victorious candidates were rotated so quickly in and out of office, the Secretary’s argument would be quite compelling; union stability could be threatened. The fallacy in the Secretary’s argument is that it presumes that the illegality of the supervised election could be very quickly determined. This argument also presumes that if the rerun election was found to be legally defective after the victorious insurgents had been installed, they would immediately have to vacate of-

58. In fact, this is what happened in the Turner case where the Secretary had obtained an out-of-court agreement from the union to rerun the election. The Secretary’s “certification” followed the conclusion of his investigation of the election protests and came in the form of a letter to the candidates in which he affirmed the election results and denied the protests. Although the defeated incumbents immediately filed a Bachowski action, supra note 41, the Secretary took the position that his letter constituted the “final decision” and the incumbents would have to step down upon its issuance and permit the installation of the victorious insurgents.
60. Id.
fice. The notion that a court can find the supervised election unlawful within a matter of weeks does not strike this author as very plausible unless, of course, the Secretary possesses the authority to make that determination himself. If Congress reposed this authority with the Secretary, then it might be possible for him to initiate second rerun elections with relative speed. But, the Secretary would not be able to bring those elections to a conclusion any faster than any of the previous elections.

The scope of the Secretary's authority under Title IV must be examined in order to determine whether the Secretary's grandiose view of his statutory role is valid. Title IV does confer on the Secretary the authority to investigate election complaints and, where he concludes both that a violation has occurred and that it may have affected the outcome of the election, to initiate a lawsuit to set it aside. The law also provides that where a court upholds the Secretary's position and orders a supervised, rerun election, the Secretary is to "promptly certify to the court the names of the persons elected." More, Congress sayeth not. Unless a union chooses to forego its right to defend its election in a Title IV suit, and thus to enter into a settlement agreement with the Department, the Secretary is powerless to overturn and rerun elections. Only a federal court may overturn and rerun elections. Regardless of whether the election in question is a regularly scheduled, unsupervised election, or a supervised rerun, the Secretary must meet the burden of proving a violation which may have affected the outcome of the election.

61. As between the Secretary and insurgents, the Secretary has lost every major judicial contest in which the scope of his authority was at issue. See Trbovich v. United Mine Workers, 404 U.S. 528 (1972) (rejecting the Secretary's contention that insurgent candidates could not intervene in Title IV suits); Dunlop v. Bachowski, 421 U.S. 560 (1975) (rejecting the Secretary's claim that his decisions not to bring Title IV enforcement actions in response to insurgent complaints were unreviewable); Local 82, Furniture & Piano Moving v. Crowley, 467 U.S. 526 (1984) (rejecting the Secretary's argument that Title I courts are divested of jurisdiction whenever the alleged misconduct might also have violated Title IV).


64. See Donovan v. Local 299, Int'l Bhd. of Teamsters, 515 F.Supp. 1274, 1284 (E.D. Mich. 1981). But see Holmes v. Donovan, 796 F.2d 173 (6th Cir. 1986), where the court upheld an out-of-court settlement by a losing incumbent to rerun an election. Given the lack of adversity, and the opportunity for sweet-heart deals between the Secretary and losing candidates who still control unions, one may question the wisdom of this decision. Cf. Marshall v. Local 1010, United Steelworkers of Am., 664 F.2d 144 (7th Cir. 1981) (incumbents may not secure a new election based on their own unlawful actions).

65. Some might argue that whether the Secretary's decision is to seek a third election, or to deny the election protest and certify the second, supervised election, is immaterial and that both decisions need only be reviewed under Bachowski's "arbitrary and capricious" standard. See supra note 41. In fact, however, the two decisions are of a very different character.
While this should end our inquiry, let us proceed nonetheless to determine how long the incumbent officials may retain office pending a rerun election. It is quite true that because the Secretary supervised the election he now wants to have set aside, it may be possible for him to obtain a court order compelling a second rerun election more quickly than an order overturning a regularly scheduled election. After all, members who protest regular elections must first exhaust internal union appeals for up to 90 days before filing their complaints with the Secretary, while in rerun elections they file their protests directly with the Secretary. Having supervised the rerun election, the Secretary may already be in possession of information relevant to the protest and thus he may be able to conclude his investigation in fewer than the sixty days allowed by the Act.

Even so, the actual course of the litigation is not likely to be shortened. Moreover, assuming the Secretary prevails in obtaining and must be reviewed under different standards. While the standard of review of a decision to certify may be narrow, this does not entitle the Secretary's decision not to certify to be reviewed under an equally narrow standard.

As we have seen, Congress did not give the Secretary the authority to overturn elections unilaterally. Only a court may do so and only when it finds "upon a preponderance of the evidence after trial upon the merits" that the election results were tainted by unlawful conduct. 29 U.S.C. § 482(c) (1982). Whether the election at issue is a regular, scheduled election or a supervised, rerun election should make no difference. Just because the Secretary may have supervised the rerun election does not qualify him effectively to decide its validity. In either case, the burden should be on the Secretary to proffer evidence and meet an affirmative burden of proof to persuade a court that it should enter an order overturning the election. Millwrights Local Union No. 1914 v. Carroll, 654 F.2d 548 (9th Cir. 1981); Donovan v. Local 299 Int'l Bhd. of Teamsters, 515 F. Supp. 1274 (E.D.Mich. 1981).

By contrast, a decision by the Secretary to certify the results of a supervised, rerun election is inextricably intertwined with, and part of, a decision to deny an election protest. Obviously, the Secretary could not both certify the results of an election on the one hand, and sustain a protest and seek another rerun election on the other hand. The Secretary's rationale for his decision to certify the election is set forth in a single unified "statement of reasons." Bachowski makes clear that this action by the Secretary is to be reviewed only to determine whether it is "arbitrary and capricious." And, such review is normally limited to an examination of the Secretary's "statement of reasons" where the party opposing the Secretary's action must carry the burden of persuasion. See Donovan v. Local 6, Washington Teachers' Union, 747 F.2d 711 (D.C. Cir. 1984); Donovan v. Local 299, Int'l Bhd. of Teamsters, 515 F. Supp. 1274 (E.D. Mich. 1981); Usery v. Local Union 639, Int'l Bhd. of Teamsters, 543 F.2d 369 (D.C. Cir. 1976); Usery v. Local 1369, Textile Workers of Am., 92 L.R.R.M. (BNA) 2921 (E.D.Pa. 1976). But see Doyle v. Brock, 632 F. Supp. 256 (D.D.C. 1986), appeal docketed, No. 86-5608 (D.C. Cir. 1986). Indeed, the courts are reluctant to overturn supervised, rerun elections unless the violations were substantial. See, e.g., Donovan v. Local 29, Blasters, Drillrunners & Miners Union, 108 L.R.R.M. (BNA) 2894 (S.D.N.Y. 1981).

66. LMSE Enforcement Manual, Chapter 21, ¶¶ 87-89.
an order compelling the union to conduct yet another election, it is unlikely that a third election could be conducted any faster than any of the preceding elections. Election notices would still have to be mailed, and “a reasonable opportunity [must] be given for the nomination of candidates . . .” who would then have a right to send mailings and otherwise to campaign before the election could be conducted.\textsuperscript{68} The election process can consume many months depending on the union's constitutional procedures which may require the accumulation of signatures on nominating petitions, and may also require the conduct of the election over a period of weeks, or even months.\textsuperscript{69} Consequently, it is unlikely that member protests challenging supervised rerun elections can be finally resolved, or new elections conducted, much faster than protests of regularly scheduled elections. Therefore, there is no empirical basis for making an exception to the congressional directive that the candidates who win the most votes should be the ones who govern unions pending final court decisions on the legality of supervised, rerun elections on the grounds that such elections can be conducted on a quick turn-around basis.

Finally, the Secretary's argument assumed that if victorious insurgents were to be installed after winning a rerun election, they would have to step down once he concluded that their election was invalid.\textsuperscript{70} Although it is undoubtedly true that the presumption of

\textsuperscript{68} 29 U.S.C. § 481(e) (1985) provides that:

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 reserve 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.

\textsuperscript{69} When the election is conducted by mail, the ballots are generally not returnable for several weeks. Some unions, whose members are away from home and balloting locations for lengthy periods, specify that the polls shall remain open for much longer periods. The Masters, Mates & Pilots Union, for example, conducts its elections over a period of three months.

\textsuperscript{70} See supra note 15.
validity, and the right to hold office, runs only until a final decision, there is no reason why insurgents who win elections should be treated by the Secretary, or in the eyes of the law, any differently than incumbents. Almost without exception, the officers whose elections are overturned are allowed to conduct the supervised, rerun elections. There is no basis for applying this rule on a discriminatory basis and denying insurgents the right to conduct rerun elections while allowing incumbents to do so.

Should the Secretary be concerned about preserving the union's assets, or obtaining a fair and lawful rerun election, the law gives him the right to seek special relief from the courts. A court has the authority to "take such action as it deems proper to preserve the assets of the labor organization." A court may also enter appropriate orders during the course of a supervised election to compel the union to adopt, or refrain from adopting, rules or procedures that are inconsistent with the law. Moreover, where the circumstances warrant, the Secretary may also seek removal of officers, if necessary, to insure that the election will be conducted in a lawful manner. However, the Secretary's assumption that victorious insurgents would have to step down from office in the event a second rerun election is ordered is without legal foundation. The Secretary's position reflects a bias against insurgents and favors incumbent union officials.

III. THE LOGISTICS OF LITIGATION

A complete discussion of the substantive law of the LMRDA can not be conducted in a procedural vacuum. The realities of the

71. See supra notes 53-58 and accompanying text.
74. See, e.g., Usery v. Local 639, Int'l Bhd. of Teamsters, 543 F.2d 369, 375 n. 7 (D.C. Cir. 1976) (district court enjoined the union from "subjecting any of its members to penalty, discipline or improper interference in violation of section 401 . . . "); Brennan v. Connecticut UAW, Community Action Program Council, 373 F. Supp. 286, 288 (D. Conn. 1974); Brennan v. Local 551, United Automobile Workers of Am., 486 F.2d 6, 7, (9th Cir. 1973); Wirtz v. Independent Workers Union of Florida, 272 F. Supp. 31, 34 (N.D. Fla. 1967) (court held that the union could not discriminate against the complainant); Wirtz v. Local 1752, Int'l Longshoremans Ass'n, 56 L.R.R.M. (B.N.A.) 2303, 2304 (S.D. Miss. 1963) (plaintiff suffered from discrimination, financial loss and standing in the union).
75. Hodgson, 503 F.2d at 219.
76. See supra notes 3-28 and accompanying text.
legal process must also be recognized. And, to some extent, these realities may shape, or reshape, our view of the substantive law. Successful candidates will usually seek to be installed either after an initial, unsupervised election,\textsuperscript{77} or after a second, rerun election which was supervised by the Department of Labor.\textsuperscript{78} However, the Title IV legal process is not readily available to an insurgent who wins an unsupervised election where the incumbents refuse to step down, or when a higher union body issues a decision overturning the election and orders a new election. Let us examine what legal recourse the insurgents may have in such circumstances.

The first, and most serious obstacle the insurgents will encounter is the Secretary of Labor. Congress did not give union members standing to initiate lawsuits to enforce Title IV rights.\textsuperscript{79} Rather, Congress conferred that right on the Secretary, and it further provided in section 403 that "[t]he remedy provided by this title for challenging an election already conducted shall be exclusive."\textsuperscript{80} That remedy is a court order overturning an unlawful election and directing a new election to be conducted under the Secretary's supervision.\textsuperscript{81} And it is available only in lawsuits initiated by the Secretary. Thus, it has been held that courts are without jurisdiction to award relief under Title IV to anyone other than the Secretary.\textsuperscript{82} Accordingly, the Secretary believes that he possesses the exclusive right to obtain an insurgent's installation. However, in practice he has refused to do so promptly after the insurgent's election. Rather, he has invariably investigated the insurgent’s election first to satisfy himself that it was lawful, and only then has he taken action to seat the insurgent. In the meantime, the union may be thrown into a state of chaos, as in the Furniture Workers\textsuperscript{83} and Local 1199\textsuperscript{84} cases. And, where the Secretary concludes that the insurgent’s election may not have been lawful, although no court has so found, the Secretary refuses to take any initiative to seat the winning candidate.\textsuperscript{85} One cannot help but wonder if the Department is not attempting to undermine congressional intent on behalf of its political constituency, the

\textsuperscript{77} See supra notes 3-17 and accompanying text.
\textsuperscript{78} See supra notes 18-25 and accompanying text.
\textsuperscript{79} Calhoon v. Harvey, 379 U.S. 134, 140 (1964).
\textsuperscript{80} 29 U.S.C. § 483 (1982).
\textsuperscript{81} 29 U.S.C. § 482(c) (1982).
\textsuperscript{82} Driscoll v. Int'l Union of Operating Engineers, Local 139, 484 F.2d 682 (7th Cir. 1973), cert. denied, 415 U.S. 960 (1974).
\textsuperscript{83} See supra notes 7-17 and accompanying text.
\textsuperscript{84} See supra notes 18-25 and accompanying text.
\textsuperscript{85} See, e.g., Knisley v. Teamster Local 654, N.D. Oh., Civ. No. C-3-86-575.
incumbent leadership of the nation's labor unions, that naturally want to promote the status quo.

Giving the Department the benefit of the doubt, one can imagine how it might be concerned about the possibility of being caught in a seemingly compromised position. Thus, the Department may worry that if it were first to install an insurgent, then investigate the election and conclude that it was unlawful, and finally sue to overturn the insurgent's election, its actions would be seen as being arbitrary and inconsistent. To protect its image and to avoid taking this seemingly inconsistent action, the Department may feel justified in postponing the installation of insurgents. Undoubtedly, courts would share the same concern about their own image. However, there is no inconsistency between actions to overturn elections, and actions to seat victorious candidates. Congress has provided both when and how elections may be overturned and when victorious candidates are to be installed. Neither the Secretary nor the courts should be second-guessing the judgment of Congress.

Inasmuch as Congress provided that unions should be governed by victorious candidates pending resolution of election protests, the Secretary's action to seat victorious insurgents should seek only temporary relief. The Secretary would still be bound to investigate any election protests that might be filed, and to seek to overturn the election in the event that the Secretary concluded the election was tainted by unlawful conduct. The courts could avoid issue preclusion claims that might be raised in subsequent actions by specifying that the judicial inquiry during the installation proceeding was limited exclusively to determining whether the insurgent candidate won a majority of the votes; the lawfulness of the election would be beyond the scope of the court's inquiry in any installation proceeding.86

The Secretary might also argue that his policy of refusing to assist the installation of victorious insurgents is justified because the law only authorizes him to initiate suits to overturn elections. The suits to install election winners. However, the Secretary has taken action to bring suits to affirm, as well as overturn, union elections, and to install the candidates who win lawful elections.87 Thus, while it is unlikely that the Secretary would argue in favor of any such limitation on his authority one may expect this argument to be made by the incumbent union officials in an effort to retain office. But, if

neither the Secretary, nor the union members, can bring a lawsuit to install union election winners, who can? If no one can bring suit, how is the congressional presumption and mandate to be enforced?88

While Title IV speaks only of suits by the Secretary to overturn and rerun elections, the Secretary has successfully prosecuted actions to affirm valid elections and install the victorious candidates,89 albeit only after concluding normal post-election investigations.90 One could logically extrapolate from these decisions the authority for the Secretary to sue to install elected insurgents prior to the conclusion of investigations of any election protests, pursuant to Congress' section 402(a)(2) directives.91

Unfortunately, waiting for the Secretary to reform his Title IV mindset may be like "Waiting for Godot." Therefore, the legal actions victorious candidates might pursue on their own should be explored. In Kupau v. Yamamoto,92 an insurgent who won an election which the union overturned, won a preliminary injunction compelling the union to install him in office. He and his supporters in the union brought their suit under Title I.93 Both the union and the Secretary argued that despite the plaintiffs having brought their action under Title I, in reality it was an action arising under Title IV which only the Secretary could initiate.94 The court reasoned that while "[s]ection 483 does state that section 482 is the exclusive remedy for challenging an election already conducted[,] [p]laintiffs . . . are defending the validity of the election."95 As to the plaintiff's Title I claim, the court held that the union members:

right to nominate candidates and to vote in elections would be meaningless if, after having nominated and voted for a successful candidate, they are nevertheless deprived of his services as an elected official due to defendants' concerted actions to subvert the

88. In Crowley, 467 U.S. at 542 n.20, the Supreme Court seemed to suggest that it was the Secretary's responsibility to enforce the presumption that elections were valid pending final decisions.
90. See supra note 87.
91. Moreover, Congress has assigned to the Secretary a role in seating the winners of rerun elections by requiring him to "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 . . . ." 29 U.S.C. § 482(c)(2) (1982).
93. Id. at 1086.
94. Id. at 1086-87.
95. Id. at 1087.
results of a valid election.\textsuperscript{96}

The court relied on the Title IV presumption that challenged elections shall be presumed to be valid only for the purpose of devising appropriate relief in the Title I action.\textsuperscript{97}

To some degree, \textit{Kupau} was a daring decision because courts had previously held that when a union member’s Title I claim was asserted during or after an election, and overlapped a possible claim the Secretary might make in a Title IV action, the exclusivity language in Title IV had the effect of depriving the court of jurisdiction over the Title I claim.\textsuperscript{98} However, in \textit{Local 82, Furniture & Piano Moving v. Crowley},\textsuperscript{99} the Supreme Court resolved this jurisdictional uncertainty and effectively upheld \textit{Kupau}. The Court held that lower courts are not divested of jurisdiction over Title I actions simply because the action may also implicate rights conferred by Title IV.\textsuperscript{100} The Court found that the exclusivity language in Title IV related only to the \textit{relief} made available by Title IV.\textsuperscript{101} Thus, the Court held that as long as the plaintiffs in a Title I suit do not seek to challenge the validity of an election already conducted, and as long as the court can remedy the Title I violations without substantially delaying an ongoing election, jurisdiction would lie in Title I to do so.\textsuperscript{102}

\textit{Kupau} should serve as a litigation model for insurgents who are denied the right to be seated in accordance with their unions’ constitutional procedures after winning regular, scheduled elections.\textsuperscript{103} \textit{Kupau} should also serve as a model for securing installation following a supervised rerun election. However, in this setting, there may be additional problems stemming from the Secretary’s active involvement in the election and the court’s reluctance to grant relief op-

\textsuperscript{96} \textit{Id.} at 1090. This language may have been borrowed from Schonfeld v. Penza, 477 F.2d 899, 903 (2d Cir. 1973). Since both the \textit{Kupau} and \textit{Schonfeld} decisions predated \textit{Crowley}, the courts felt it necessary to distinguish Calhoon v. Harvey, 379 U.S. 134 (1964), in order to uphold their jurisdiction under Title I. In light of \textit{Crowley}, however, there would no longer appear to be any need to find that the Title I violation was part of a deliberate campaign to suppress opposition.

\textsuperscript{97} \textit{Kupau}, 455 F. Supp. at 1091.

\textsuperscript{98} Driscoll v. Int’l Union of Operating Eng’rs, Local 139, 484 F.2d 682 (7th Cir. 1973), \textit{cert. denied}, 415 U.S. 960 (1974).


\textsuperscript{100} \textit{Id.} at 538-50.

\textsuperscript{101} \textit{Id.} at 541-43.

\textsuperscript{102} \textit{Id.} at 549-50.

\textsuperscript{103} If the union could demonstrate that it had scheduled a very prompt rerun election and that its stability could be subverted if the insurgents were seated and then defeated, the balance of the equities and potential hardships would make it more difficult to secure injunctive relief under Fed. R. Civ. P. 65.
posed by the Secretary.\textsuperscript{104}

For the purpose of discussion, assume a scenario where insurgent candidates lost the first election, and won the second, rerun election.\textsuperscript{105} If the rerun election was held pursuant to a court order, then the court will have ongoing jurisdiction to review the results and certify the winners to be the lawful officers. The insurgents may, or may not, have intervened during the initial stages of that proceeding. If the insurgents were intervenors, their role would have been limited by the decision in \textit{Trbovich v. United Mine Workers}\textsuperscript{106} to participating in the Secretary's shadow in a case whose prosecution he controlled.\textsuperscript{107} Nonetheless, in \textit{Trbovich} the Supreme Court found "no reason to prevent the intervenors from assisting the court in fashioning a suitable remedial order."\textsuperscript{108} Thus, once the Secretary has tallied the ballots, though not yet certified the validity of the rerun election, the insurgents should be installed. Furthermore, the insurgents should be allowed to apply to the court for a temporary restraining order compelling their immediate installation under the theory that this relief is a fitting and equitable remedy.\textsuperscript{109} If the insurgents had not participated as intervenors in the Title IV suit, once the Secretary fails or refuses to seek their installation upon certifying the election results, the insurgents should be entitled to intervene at that, albeit late, phase in the Title IV proceeding and request the court to order their installation.\textsuperscript{110} Of course, in light of the heavy burden placed on parties seeking preliminary injunctions, and the courts' general respect for governmental institutions, if the Secretary opposes the insurgent's motion for injunctive relief, the insurgents will face an uphill battle.\textsuperscript{111}


\textsuperscript{105} Hopefully, if the insurgents had won the first election, they would have gotten installed before running, and winning, the second election.

\textsuperscript{106} 404 U.S. 528 (1972).

\textsuperscript{107} \textit{Id.}

\textsuperscript{108} \textit{Id.} at 537 n.8.

\textsuperscript{109} While there is a lame duck period following most regularly scheduled union elections, union constitutions do not usually make any provision for installation, much less delayed installation, of candidates who might happen to win rerun elections. And even if they did, it is unlikely that the provision would be upheld as being consistent with Title IV.

\textsuperscript{110} Insurgents may argue that intervention is timely because their interests had been protected by the Secretary until such time as he refused to seat them. At that point, their interests became adversary and it became necessary for the insurgents, for the first time, to intervene in order to preserve their rights. United Airlines v. MacDonald, 432 U.S. 385 (1977); Flight Attendants v. Gibbs, 123 L.R.R.M. (BNA) 3167 (5th Cir. 1986). \textit{See also} Shapiro, \textit{Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators}, 81 HARV. L. REV. 721, 729-34, 746 (1968).

\textsuperscript{111} \textit{See supra} notes 7-25 and accompanying text. In the event the Secretary were to
Nonetheless, the insurgents should be able to gain some advantage by pointing out that if they are not installed, the incumbent administration will capitulate to the Secretary in what would amount to a sweet-heart lawsuit. Naturally, the Secretary and incumbent officers might argue, in unison, that the insurgents could still raise their defenses in their role as intervenors. However, it would stretch and warp the judicial process beyond recognition to have both the plaintiff and defendant aligned against the intervenor, not on some peripheral issue, but on the merits of the basic underlying case or controversy — the lawfulness of the election. This func-

112. A number of courts have held that intervenors’ counsel are entitled to fees where they make a substantial contribution to the successful outcome of Title IV litigation. E.g., Donovan v. CSEA Local Union 1000, 784 F.2d 98 (2nd Cir.), cert. denied, CSEA Local Union 1000 v. Brock, 107 S.Ct. 74 (1986). However, it is still difficult for insurgents to find competent counsel willing to work on this sort of contingency. Thus, as long as the insurgents remain out of office, they are not likely to be able to afford to mount a very aggressive legal defense.

113. On the other hand, the courts are divided whether defeated incumbents can intervene to challenge the Secretary’s decision to certify rerun elections they lost. The Ninth and Tenth Circuits have upheld the denial of motions to intervene. Usery v. District 22, United Mine Workers of Am., 567 F.2d 972, 975 (10th Cir. 1978); Brennan v. Silvergate District Lodge No. 50, Int’l Ass’n of Machinists, 503 F.2d 800, 806 (9th Cir. 1974). Other courts have permitted intervention. Donovan v. Westside Local 174, United Automobile Workers of Am., 783 F.2d 616, 623 (6th Cir. 1986); Usery v. Local Union No. 639, Int'l Bd. of Teamsters, 543 F.2d 369, 376-79 (D.C. Cir. 1976); Hodgdon v. Carpenters Resilient Flooring Local Union No. 2212, 457 F.2d 1364, 1369 (3rd Cir. 1972). If those wishing to challenge the Secretary’s certification are denied the right to intervene, they are effectively denied their rights under Backowski, 421 U.S. at 560. Once a court accepts the Secretary’s certification of an election, there is little likelihood that it would overturn itself if the incumbents subsequently filed a Backowski suit. The better time to resolve any uncertainties concerning the validity of the election is during the certification proceeding.

This conflict highlights the procedural awkwardness of certification proceedings. During the initial phase of a Title IV suit, the Secretary (plaintiff) and the defeated insurgents (intervenors) are generally aligned against the union and the victorious incumbents. But, if the insurgents win the court-ordered election, there will be a realignment of interests among the parties. At this point, the defeated incumbent officers would like to see the rerun election overturned and the insurgents are anxious to defend the status quo. If the incumbent officers are allowed to remain in office pending the resolution of any election protests, they may be able to use the union’s resources to overturn the election. Furthermore, if the Secretary should decide to certify the results, the defeated incumbents could use the defendant-union as a vehicle for voicing their Backowski objections to the Secretary’s decision. Of course, for the defeated officers to hold the union as a hostage and use it in this manner would be highly improper. To the extent the union should play any role other than that of a stakeholder, it should be defending the election conducted in its name. This result, however, can only be assured if the victorious insurgents are promptly installed after the Secretary has tallied the votes.

On the other hand, if the Secretary decides not to certify the rerun election, and if the defeated incumbents are still in control of the union, there is no adversity between the plain-
damental point must ultimately be recognized, if not by the Secretary, then at least by the courts, as the most compelling reason why victorious insurgents must be installed after winning an election, whether or not the Secretary should eventually decide to certify the validity of the election. Where this argument is presented to a court that has presided over a Title IV action and ordered a rerun election, the court will have acquired a sufficient familiarity with the law and the parties to appreciate the new alignment among the parties and the potential for judicial abuse. One would hope that these courts will be willing to act independently to override the Secretary’s asserted discretion to decide whether and when to seat victorious candidates and to enforce Congress’ presumption that elections should be presumed to be lawful until a court affirmatively finds that they were not.

Finally, assume the scenario where the insurgents have won a supervised, rerun election conducted pursuant to a private, out-of-court agreement between the Secretary and the union. In this case, there is no court with continuing jurisdiction over a Title IV proceeding to which the insurgents might appeal for assistance obtaining their installations. As a result, the insurgents would probably have no choice but to initiate a Title I suit modelled after Kupau. But, as difficult as it may be for insurgents to win such cases against just their union, the difficulty becomes almost insuperable when they must show that both their union and the Secretary have acted improperly in refusing to install them after a rerun election.

IV. CONCLUSION

The Department of Labor is the major obstacle for insurgents who seek to be installed following their election to union office but before the Department has concluded its post-election investigation
of alleged election irregularities. If the Department's historic posture in such proceedings has been the product of inattention, rather than political bias, one might hope that it would be willing to re-examine and modify its position. Too often, however, the Department has been willing to alter its historic enforcement policies that have benefitted incumbent union administrations only after receiving some form of "firm judicial guidance."

When insurgents go to court, however, they encounter another obstacle. Courts are reluctant to resolve this debate in the context of emergency injunction proceedings which, unfortunately, are the most common type of proceeding in which the debate is likely to be aired. Additionally, most courts insist that the party seeking either a temporary restraining order or a preliminary injunction make a strong showing of their legal right to such relief. Since most courts will be deferential to the Secretary, given his enforcement role under Title IV, the courts will be reluctant to find that the insurgents have met their heavy burden once the Secretary disputes the insurgents' right to be installed following their election. Even though the Secretary's position vis-à-vis seating victorious insurgents is without legal foundation, few courts are going to be willing to subject the Secretary's position to close scrutiny in an expedited injunction hearing. And, months later when the courts have the time to analyze the legal arguments in a deliberative manner, most cases will have become moot. As a result, the Secretary is positioned so that if he chooses, he may be able effectively to undermine congressional intent for some time to come.

However, once the Secretary alters his policy voluntarily, or the courts take the time to analyze the law carefully and to issue decisions affirming congressional intent that victorious candidates should be seated pending final decisions as to their validity of their elections, the tide should quickly turn. At that point, a body of decisional law will begin to develop which will furnish reluctant courts with a clear legal foundation to support injunctions ordering unions to promptly install insurgent candidates who have been elected to office.