NOTE

LEEDOM v. KYNE AND THE IMPLEMENTATION OF A NATIONAL LABOR POLICY

Twenty-three years ago, in *Leedom v. Kyne*,[1] the United States Supreme Court held that under certain circumstances a federal district court has jurisdiction to set aside a representation order issued by the National Labor Relations Board.[2] The Court affirmed the district court's exercise of jurisdiction in *Kyne* because the Board's representation order exceeded "its delegated powers and [was] contrary to a specific prohibition"[3] in the National Labor Relations Act.[4] Recently, Chief Judge Wright of the Court of Appeals for the District of Columbia Circuit, in his dissenting opinion in *Physicians National House Staff Association v. Fanning*,[5] reformulated the *Kyne* standard.[6] He proposed a four-part test to determine district court jurisdiction to review Board representation orders.[7]

Three notable deficiencies in the *Kyne* standard make its reformulation appropriate. First, the *Kyne* standard provides no guidelines to aid courts in determining when statutory mandates[8] command Board action. Because Congress and the courts have allowed the Board to

1. 358 U.S. 184 (1958). For a discussion of this case, see notes 66-80 *infra* and accompanying text.

2. *Id.* at 191.

3. *Id.* at 188. See text accompanying note 76 *infra*.

4. 29 U.S.C. §§ 151-169 (1976 & Supp. III 1979).

5. 642 F.2d 492 (D.C. Cir. 1980) (en banc), *cert. denied*, 101 S. Ct. 1360 (1981). See notes 106-17 *infra* and accompanying text.

6. Using the term "the *Kyne* standard" is slightly misleading because the *Kyne* opinion did not set forth a specific standard to guide lower courts. As a result lower courts have used various parts of the *Kyne* holding, see text accompanying note 76 *infra*, as the *Kyne* standard. *See, e.g.*, Rockford Redi-Mix Co. v. Zipp. 632 F.2d 30, 31 (7th Cir. 1980) (certification proceeding is reviewable only when a Board order exceeds its jurisdiction and is "contrary to a specific and unambiguous provision of the Act") (footnote omitted), *cert. denied*, 101 S. Ct. 1388 (1981); National Maritime Union v. NLRB, 375 F. Supp. 421, 430 (E.D. Pa.) (statutory terms must be "sufficiently 'clear and mandatory' to confer jurisdiction"), *aff'd* 506 F.2d 1052 (3d Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

7. See text accompanying note 114 *infra*.

8. An example of a statutory mandate is section 9(c)(1) of the Act, 29 U.S.C. § 159(c)(1) (1976): "If the Board finds . . . that . . . a question of representation exists, it *shall* direct an election . . . ." (emphasis added).

exercise considerable discretion under statutory mandates,[9] these provisions, unlike statutory prohibitions,[10] do not always command Board action. Without clear guidelines courts may incorrectly construe statutory mandates and improperly assume jurisdiction under the *Kyne* standard, thus infringing the Board's sphere of discretion.[11] This result impedes the Board's ability to effectively resolve labor disputes.[12] Second, the *Kyne* standard fails to address the following, significant concern: the denial of district court jurisdiction can result in the absence of judicial review of Board representation orders.[13] Third, the *Kyne* standard does not indicate whether district court jurisdiction should be denied to a party who could secure judicial review of a Board order in the courts of appeals after the representation election has occurred.

The significance, in addition to the shortcomings, of the *Kyne* standard makes its examination worthwhile. Historically, employers, unions, and employees have invoked district court jurisdiction to disrupt the representation process.[14] The *Kyne* standard determines the frequency of such interruptions, and therefore, in some cases, determines the results of a representation election. As a jurisdictional standard *Kyne* also determines the relative roles of the courts and the Board in regulating the representation process. Because the *Kyne* standard is used under numerous regulatory acts,[15] its significance as an allocating

9. *See, e.g.*, Gould, Inc. v. Fuchs, 486 F. Supp. 164, 168 (D. Conn. 1980); National Maritime Union v. NLRB, 375 F. Supp. 421, 432-34 (E.D. Pa.), *aff'd* 506 F.2d 1052 (3d Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

10. Statutory prohibitions forbid certain action. Section 9(b)(1), 29 U.S.C. § 159(b)(1) (1976), for example, provides: "[T]he Board *shall not* . . . decide that any unit [that includes both professional and nonprofessional employees] is appropriate [unless the] professional employees vote for inclusion in such [a] unit . . . ." (emphasis added).

11. See notes 96-101 *infra* and accompanying text.

12. Courts should interfere with Board action only if the Board acts clearly in excess of its delegated powers. *See* NLRB v. Local 103, Int'l Assoc. of Bridge Workers, 434 U.S. 335, 350 (1978) (quoting NLRB v. Truck Drivers, 353 U.S. 87, 96 (1957)). Justice White, in *Local 103*, explained the rationale underlying this proposition:

> The Board's resolution of the conflicting claims in this case represents a defensible construction of the statute and is entitled to considerable deference. Courts may prefer a different application of the relevant sections, but "[t]he function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review."

434 U.S. at 350 (citations omitted).

13. See text accompanying notes 102-05 *infra*.

14. See notes 24-28 *infra* and accompanying text.

15. *See, e.g.*, Borden, Inc. v. FTC, 495 F.2d 785, 786-87 (7th Cir. 1974) (citing *Kyne* in support of the "well-settled" proposition that district courts should not interfere with agency action unless the agency has clearly violated a right secured by a statute or regulation); United States v. Feaster, 410 F.2d 1354, 1371 (5th Cir.) (applying *Kyne* to the Railway Labor Act, 45 U.S.C. §§ 151-200 (1976 & Supp. III 1979)), *cert. denied*, 396 U.S. 962 (1969); Elmo Division of Drive-X Co. v. Dixon, 348 F.2d 342, 343-46 (D.C. Cir. 1965) (Federal Trade Commission Act, 15 U.S.C.

mechanism between courts and administrative agencies is not limited to the National Labor Relations Act.

This note first examines the *Kyne* standard and the reformulation suggested in the *Physicians* dissent. The note then argues that the *Kyne* test provides inadequate jurisdictional guidelines and that the reformulation proposed in *Physicians* does not effectively resolve these inadequacies. Finally, this note proposes a standard for determining when district court jurisdiction should be exercised to review Board representation orders.[16]

I. The Representation Process and Judicial Review of Representation Orders

A. *Background.*

Although courts have cited *Leedom v. Kyne* in various contexts,[17] it is invoked most frequently when a union seeks to become the authorized bargaining representative for a group of employees.[18] Section 9 of

§§ 41-47 (1976 & Supp. III 1979)); Marshall v. Nichols, 486 F. Supp. 615, 621 (E.D. Tex. 1980) (Occupational Health and Safety Act, 29 U.S.C. §§ 651-678 (1976)); M.G. Davis & Co. v. Cohen, 256 F. Supp. 128, 131 (S.D.N.Y.) (Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1976 & Supp. III 1979)), *aff'd*, 369 F.2d 360 (2d Cir. 1966); Long Island R.R. v. United States, 193 F. Supp. 795, 799-800 (E.D.N.Y. 1961) (Interstate Commerce Act, 49 U.S.C. §§ 1-40 (1976 & Supp. III 1979)); *cf.* Associated Builders and Contractors, Inc. v. Irving, 610 F.2d 1221, 1227 (4th Cir. 1979) (*Kyne* standard applied in reviewing acts of General Counsel), *cert. denied*, 446 U.S. 965 (1980).

16. This note does not discuss whether district court jurisdiction under *Kyne* should be eliminated entirely. This judgment belongs to Congress. Nor does this note discuss an interesting paradox: only two judicial forums, the courts of appeals and the Supreme Court, are available to review unfair labor practice orders, see notes 35-40 *infra* and accompanying text; three judicial forums, the district courts, the courts of appeals, and the Supreme Court, are available to review Board representation orders that fall within the limits of *Kyne*. This result is especially surprising in that Congress has expressly approved only judicial review of unfair labor practice orders. See notes 24-32 *infra* and accompanying text. This note also does not discuss the relative merits of the courts of appeals and the district courts as forums for the initial review of Board representation orders.

17. *See* Cannery Warehousemen, Local 748 v. Haig Berberian, Inc., 623 F.2d 77 (9th Cir. 1980) (refusal by Board to defer to arbitrator's decision in determining coverage of collective bargaining agreement); Terminal Freight Handling Co. v. Solien, 444 F.2d 699 (8th Cir. 1971) (action to compel a regional director to seek an injunction against an alleged secondary boycott), *cert. denied*, 405 U.S. 996 (1972); Machinery Employees, Local 714 v. Madden, 343 F.2d 497 (7th Cir.) (action to enjoin an election to remove a union-shop authorization), *cert. denied*, 382 U.S. 822 (1965). See note 15 *supra*.

18. *See, e.g.*, Rockford Redi-Mix Co. v. Zipp, 632 F.2d 30 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 1388 (1981); Chicago Truck Drivers v. NLRB, 599 F.2d 816 (7th Cir. 1979); McCulloch v. Libbey-Owens-Ford Glass Co., 403 F.2d 916 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969); Greensboro Hosiery Mills, Inc. v. Johnston, 377 F.2d 28 (4th Cir. 1967); Local 1545, United Bhd. of Carpenters v. Vincent, 286 F.2d 127 (2d Cir. 1960); National Maritime Union v. NLRB, 375 F. Supp. 421 (E.D. Pa.), *aff'd*, 506 F.2d 1052 (3d Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

the National Labor Relations Act provides the statutory procedures for selecting a bargaining representative.[19] Under section 9(c)(1) either an employer, a union, or an employee can file a petition requesting that the Board hold a representation election.[20] The Board will investigate this petition and hold a hearing if it has "reasonable cause to believe that a question of representation affecting commerce exists."[21] If the evidence presented at the hearing demonstrates sufficient need, the Board will conduct an election. Absent challenges to the propriety of the election, the Board will certify the union receiving a majority of the votes cast.[22] Certification entitles a union to bargain with the employer as the exclusive agent of its electorate.[23]

Provisions authorizing immediate judicial review of representation orders are conspicuously absent from section 9 of the Act. This omission resulted from Congress's experience with the predecessor of section 9, Public Resolution 44.[24] That statute permitted immediate judicial review of representation orders in the courts of appeals.[25] By frequently appealing pre-election orders, some employers used this re-

19. 29 U.S.C. § 159 (1976).

20. *Id.* § 159(c)(1) (1976). Section 9(c)(1) provides in full:

> Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
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> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in [section 9(a)], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in [section 9(a)]; or
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> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in [section 9(a)];
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> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

An employer can also voluntarily recognize a union as the authorized bargaining representative for his employees. *See* R. GORMAN, LABOR LAW 40 (1976). Section 9 is inapplicable to voluntary proceedings. *See id.*

21. 29 U.S.C. § 159(c)(1) (1976).

22. Certification represents official Board approval of a union as the bargaining representative for a group of employees. *See generally* GORMAN, *supra* note 20, at 40, 52-54. For a discussion of the importance of certification, see Cox, *The Major Labor Decisions of the Supreme Court October Term 1958*, 1959 PROCEEDINGS A.B.A. SECTION OF LABOR REL. L. 36, *reprinted in* W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 447 (6th ed. 1974).

23. For a detailed discussion of the election process, see C. MORRIS, THE DEVELOPING LABOR LAW 153-266 (1971).

24. 48 Stat. 1183 (1934) (repealed 1935).

25. *Id.* § 2.

view procedure to postpone representation elections indefinitely.[26] Because this practice was inimical to industrial peace,[27] Congress purposefully omitted from section 9 of the Act a provision allowing immediate access to the courts of appeals.[28]

Section 10(f) of the Act[29] appears to authorize immediate judicial review of representation orders in that it provides for immediate appellate review of all "final orders" issued by the Board.[30] The Supreme Court has held, however, that representation orders are not final orders within the meaning of section 10(f).[31] The Court acknowledged that a contrary holding would allow direct judicial intervention into the representation process and opined that this practice would subvert the carefully circumscribed review provisions of section 9.[32]

Although section 10(f) does not provide for immediate judicial review of Board representation orders, judicial review of these orders can be obtained indirectly under this section.[33] To obtain judicial review a party must first provoke an unfair labor practice[34] charge after a representation election has occurred. The most common method of provoking such a charge is to refuse to bargain over the proposed collective agreement.[35] After investigation of the charge, the Board issues either an order to remedy the unfair labor practice or an order dismissing the charge.[36] These orders are "final orders" within the meaning of section

26. *See* Goldberg, *District Court Review of NLRB Representation Proceedings*, 42 IND. L.J. 455, 460 (1967).

27. The adverse effect on industrial peace resulting from the dilatory use of the courts was noted in the Senate Report on the Wagner Act:

> Under Public Resolution 44, any attempt by the government to conduct an election of representatives may be contested *ab initio* in the courts, although such election is in reality merely a preliminary determination of fact. This means that the government can be delayed indefinitely before it takes the first step toward industrial peace.

S. REP. No. 573, 74th Cong., 1st Sess. 5-6 (1935).

28. See note 128 *infra*.

29. 29 U.S.C. § 160(f) (1976). Section 10(f) provides:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside.

30. *Id.*

31. *See* AFL v. NLRB, 308 U.S. 401, 412 (1940); NLRB v. IBEW, 308 U.S. 413, 414-15 (1940).

32. AFL v. NLRB, 308 U.S. 401, 408-12 (1940).

33. For further explanation of the section 10(f) method of review, see Goldberg, *supra* note 26, at 491.

34. An unfair labor practice is any action that violates section 8 of the Act. 29 U.S.C. § 158 (1976).

35. *See* Goldberg, *supra* note 26, at 491.

36. 29 U.S.C. § 160(c) (1976).

10(f);[37] any party aggrieved by a final order is entitled to immediate access to the courts of appeals.[38] Because representation orders are reviewable incident to the review of an unfair labor practice order,[39] the appellate court can review the propriety of the Board's representation orders when determining whether to enforce the Board's unfair labor practice order.[40]

Generally, only employers will provoke an unfair labor practice charge to gain judicial review because they have little to lose by delaying contract negotiations. A certified union usually will not delay the bargaining process, for it has a vested interest in obtaining a collective bargaining agreement. Moreover, if a certified union refuses to bargain, the employer might not file an unfair labor practice charge. The union's refusal to bargain in this situation not only reduces the employees' confidence in the union's ability to negotiate a contract, but also fails to produce judicial review of the Board's representation order. Thus, section 10(f) does little to provide a certified union with a method by which it can obtain judicial review of Board representation orders.[41]

Section 8(b)(7)(B) of the Act theoretically provides an indirect method of appellate review for a union that has recently lost a representation election.[42] This section declares that recognitional picketing,

37. *See* AFL v. NLRB, 308 U.S. 401, 409 (1940).

38. See note 29 *supra*.

39. The specific language authorizing this practice is found in section 9(d) of the Act, 29 U.S.C. § 159(d) (1976):

> Whenever an [unfair labor practice] order of the Board . . . is based in whole or in part upon facts certified following an investigation pursuant to [section 9(c)] . . . and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

See Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 154 (1941); Goldberg, *supra* note 26, at 456-57.

40. The reason for the rather circuitous method of review provided by section 10(f) is explained by Gorman:

> The object of this [method of review] is to deter dilatory challenges in the midst of representation cases which will delay the conduct of an election and the prompt recording of employee preferences on collective bargaining; moreover, the outcome of the election will in many instances render moot the challenges to the Board representation findings.

GORMAN, *supra* note 20, at 11.

41. For an example of when a certified union would seek judicial review under section 10(f), see *Leedom v. Kyne*, 358 U.S. 184, 186 (1958). Section 10(f) also may not provide interested third parties with means to secure judicial review of Board representation orders. *See* Florida Bd. of Business Regulation v. NLRB, 497 F. Supp. 599, 602 (M.D. Fla. 1980) (State of Florida, seeking review of Board orders asserting jurisdiction over jai-alai industry, would not be able to secure review under section 10(f) if jai-alai employer did not institute an unfair labor practice proceeding).

42. 29 U.S.C. § 158(b)(7)(B) (1976).

or the threat of such picketing, is an unfair labor practice when a valid election has been conducted during the preceding twelve months.[43] To invoke this method of review, the union pickets the target employer for recognition after losing the representation election.[44] If the employer files a section 8(b)(7)(B) unfair labor practice charge against the union, the Board investigates the charge and, if it deems appropriate, uses its injunctive power under section 10(a) of the Act[45] to restrain the picketing. The issuance of an injunction results in "a reviewable 'final order by the Board . . .' " which can be appealed immediately.[46] The propriety of the certification proceeding is reviewed incident to this appeal.[47]

Courts have disagreed over whether section 8(b)(7)(B) presents a practical method of post-election review.[48] Judge Lumbard of the Court of Appeals for the Second Circuit found "no reason . . . why this approach would not provide an adequate vehicle for eventual review of the Board's determination."[49] The Court of Appeals for the Third Circuit, in *NLRB v. Interstate Dress Carriers, Inc.*,[50] identified three reasons that support a contrary conclusion. First, an employee can be discharged for cause if he pickets in violation of section 8(b)(7)(B).[51] The employee therefore has little incentive to initiate the section 8(b)(7)(B) review process. Further, a union that has recently lost a representation election probably does not have the influence nec-

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43. *Id.* Section 8(b)(7)(B) provides:

It shall be an unfair labor practice for a labor organization or its agents—

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

. . . .

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted . . . .

44. For a more eomplete discussion of the procedures necessary to invoke section 8(b)(7)(B), see Goldberg, *supra* note 26, at 503-04.

45. 29 U.S.C. § 160(a) (1976). Section 10(a) empowers the Board "to prevent any person from eugaging in any unfair labor practice . . . affecting commerce."

46. United Fed'n of College Teachers, Local 1460 v. Miller, 479 F.2d 1074, 1079 (2d Cir. 1973) (quoting Herald Co. v. Vincent, 392 F.2d 354, 356 (2d Cir. 1968)).

47. Sce uote 39 *supra* and accompanying text.

48. *Compare* Cannery Warehousemen, Local 748 v. Haig Berberian, Inc., 623 F.2d 77, 80-81 n.4 (9th Cir. 1980) *and* United Fed'n of College Teachers, Local 1460 v. Miller, 479 F.2d 1074, 1079 (2d Cir. 1973) (holding section 8(b)(7)(B) to be a feasible method of post-election review) *with* NLRB v. Interstate Dress Carriers, Inc., 610 F.2d 99, 108-09 (3d Cir. 1979) (concluding that the remedy under section 8(b)(7)(B) is too speculative to be considered realistically available).

49. United Fed'n of College Teachers, Local 1460 v. Miller, 479 F.2d 1074, 1079 (2d Cir. 1973).

50. 610 F.2d 99 (3d Cir. 1979).

51. *Id.* at 109.

essary to convince employees to disregard the risk of discharge. Second, it is the employer who must file the unfair labor practice charge which enables the union to obtain access to the appellate courts.[52] Generally, an employer will file the unfair labor practice charge only if he finds the picketing disruptive.[53] A union's ability to secure judicial review of Board representation orders under section 8(b)(7)(B) is thus uncertain because it depends on the employer's assessment of the need to enjoin the picketing. Third, courts probably will not countenance disruptive picketing under section 8(b)(7)(B) because such picketing contravenes that section's purpose: to limit disturbances of industrial peace.[54]

The concerns enumerated in *Interstate Dress Carriers* indicate that section 8(b)(7)(B) is an impractical method of obtaining appellate review of representation orders. Under section 10(f) of the Act only employers are assured judicial review of Board representation orders. The Act therefore allows judicial review of Board representation orders only in limited circumstances: when an employer seeks such review in the courts of appeals after the representation election has occurred.

B. *The* Fay, Kyne, *and* Sociedad Nacional *Exceptions to Direct Judicial Intervention in the Representation Process.*

Although the Act prohibits immediate appellate review of representation orders and limits post-election appellate review of these orders, it does not state whether district courts have jurisdiction to immediately review representation orders. This issue was addressed in a trio of cases, beginning with *Fay v. Douds*.[55] In *Fay* Judge Learned Hand proposed, in dicta, that district courts have jurisdiction to intervene in the representation process if a party's claim, in attempting to establish that the Board deprived that party of a constitutional right, is

52. *Id.* at 108-09.

53. *Id.*

54. *Id.* at 109.

55. 172 F.2d 720 (2d Cir. 1949). *Fay* involved a representation dispute between two unions. Local 475, United Electrical Workers was the incumbent union. It was renegotiating its collective bargaining agreement when the United Automobile Workers filed a petition for certification as the exclusive bargaining representative of the employees that Local 475 represented. Because Local 475 had not complied with sections 9(f), 9(g), and 9(h) of the Act, 29 U.S.C. § 159(f)-(h) (1976), it lacked status to object to the holding of a consent election. The Board therefore duly ordered an election without holding any preliminary hearings. Local 475 lost the election and sought relief in the district court, alleging the unconstitutional deprivation of its procedural due process rights as a result of the Board's failure to conduct a formal hearing before the holding of the election. 172 F.2d at 723.

not "transparently frivolous."[56] Judge Hand intended the transparently frivolous limitation to allow district courts to deny jurisdiction when a party merely disagreed with the manner in which the Board conducted the representation proceeding. Notwithstanding this qualification, *Fay* possesses potentially enormous breadth. Because any arguable deprivation of due process rights meets its standard, *Fay* could authorize unlimited district court jurisdiction.[57] This problem has led several courts to question *Fay*.[58] Other courts have modified the *Fay* standard in an attempt to narrow its potential breadth.[59] No modification has been generally accepted by the courts, however, and it is highly doubtful that *Fay* is still authoritative law.[60]

A second ground for district court jurisdiction is found in *McCulloch v. Sociedad Nacional de Marineros de Honduras*.[61] In *McCulloch* several seagoing vessels were beneficially owned by an American corporation, but were legally owned by the corporation's foreign subsidiary.[62] The ships flew the flags of foreign nations and employed foreign crews; foreign unions represented the crews. The Board nevertheless

56. 172 F.2d at 723. Judge Hand also stated in dicta that "having once acquired jurisdiction, the [district] court might, and should, dispose of all other questions which arose, even though they would not have been independently justiciable." *Id.* This reasoning has not been adopted by any court. For an enlightening analysis of this dicta, see Goldberg, *supra* note 26, at 466-69.

57. *See* Blue Cross & Blue Shield v. NLRB, 609 F.2d 240, 244 (6th Cir. 1979).

58. *See, e.g.*, Amalgamated Meat Cutters, Local 576 v. Allen, 423 F.2d 267, 269 (8th Cir. 1970); Herald Co. v. Vincent, 392 F.2d 354, 359 (2d Cir. 1968); Greensboro Hosiery Mills, Inc. v. Johnston, 377 F.2d 28, 32 (4th Cir. 1967); Boire v. Miami Herald Publishing Co., 343 F.2d 17, 21 n.7 (5th Cir.), *cert. denied*, 382 U.S. 824 (1965). *But see* Florida Bd. of Business Regulation v. NLRB, 497 F. Supp. 599, 602 (M.D. Fla. 1980) (using *Fay* as an alternative ground for jurisdiction). The Supreme Court has never adopted the *Fay* standard.

59. A recurring, but not generally accepted, modification of *Fay* provides that the denial of a substantial constitutional right is sufficient for district court jurisdiction. *See* Squillacote v. International Bhd. of Teamsters, Local 344, 561 F.2d 31, 37-39 (7th Cir. 1977) (because the "transparently frivolous" standard can be so easily satisfied, jurisdiction should only be granted when a plain violation of a constitutional right is alleged); United Fed'n of College Teachers, Local 1460 v. Miller, 479 F.2d 1074, 1080 (2d Cir. 1973) (dissent) (violation of due process clause of fifth amendment allows district court to grant jurisdiction under the *Fay* doctrine); McCormick v. Hirsch, 460 F. Supp. 1337, 1347 (M.D. Pa. 1978) ("[W]hile mere allegations of constitutional deprivations may not be sufficient to vest jurisdiction in the District Court, a clearly colorable claim . . . is sufficient to require the District Court to intervene to protect constitutional rights") (footnote omitted). *But cf.* Firestone Tire & Rubber Co. v. Samoff, 365 F.2d 625, 628 (3d Cir. 1966) ("The question whether the Constitution [requires a pre-election hearing] is not of itself grounds for jurisdiction in the district court").

60. A reformulation of *Fay* is not attempted in this note. A proper analysis of *Fay* would require the determination of whether Congress can deny access to the federal court system even though a party's due process rights have been violated by a regulatory agency. This question arises if *Fay* is rejected as authoritative precedent, see note 58 *supra*, and the Board violates the due process rights of an unsuccessful union.

61. 372 U.S. 10 (1963).

62. *Id.* at 13.

decided that the Act covered the foreign seamen and ordered a representation election[63] to determine their proper bargaining representative. The Board's assertion of jurisdiction aroused vigorous protests from foreign governments. The United States District Court for the District of Columbia exercised jurisdiction over the dispute and enjoined the Board from conducting the elections.[64] The Supreme Court affirmed the district court's decision and indicated that jurisdiction is properly exercised in "the presence of public questions particularly high in the scale of our national interest because of their international complexion."[65]

In *Leedom v. Kyne*[66] the Supreme Court developed a third ground for district court jurisdiction to review Board representation orders. In *Kyne* a labor organization petitioned the Board for certification as the exclusive collective bargaining agent for the nonsupervisory professional employees of a Westinghouse Corporation plant. The Board held a hearing on the petition. It concluded that the appropriate bargaining unit should include the 233 professional employees the union desired to represent as well as nine nonprofessional employees. The Board included the latter individuals in the bargaining unit because they shared a "close community of employment interests" with the professional employees.[67] The union requested that the Board conduct an election among the professional employees to determine if they favored inclusion in a mixed bargaining unit. The Board refused to do so despite section 9(b)(1) of the Act,[68] which provides that "the Board shall not . . . decide that any unit is appropriate" if it includes both professional and nonprofessional employees unless "a majority of . . . [the] professional employees vote [to be included] in such a unit."[69] The union was certified as the exclusive bargaining agent for the mixed unit, but it brought an action in the district court to set aside the certification order because of the inclusion of the nonprofessional employees.[70]

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63. *Id.* at 13-14.

64. Empresa Hondurena De Vapores, S.A. v. McLeod, 200 F. Supp. 484 (S.D.N.Y. 1961), *rev'd* 300 F.2d 222 (2d Cir. 1962), *aff'd sub nom.*, McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963).

65. 372 U.S. at 17. *Sociedad Nacional* also has significance in determining what activities are sufficiently "in commerce" to be within the Board's jurisdiction. *Id.* at 17-22. For other cases that delineate the scope of the words "in commerce," see Incres Steamship Co. v. International Maritime Workers Union, 372 U.S. 24 (1963); Benz v. Compania Naviera Hidalgo, 353 U.S. 138 (1957).

66. 358 U.S. 184 (1958).

67. *Id.* at 186.

68. 29 U.S.C. § 159(b)(1) (1976).

69. *Id.*

70. The Board later admitted that its refusal to conduct a vote among the professional em-

The United States District Court for the District of Columbia held that it had jurisdiction to grant the requested relief because the Board lacked authority to disregard the "mandatory limitation" of section 9(b)(1).[71] The district court also concluded that the Board's refusal to conduct the required election caused irreparable damage to the right afforded professional employees by section 9(b)(1).[72] The Court of Appeals for the District of Columbia Circuit affirmed.[73] The court of appeals held that the Board's action violated a statutory provision "intended to protect . . . professionals; that the professionals' right" to the benefit provided by the statute did "not depend on Board discretion or expertise; and that denial of [the right resulted] in injury."[74]

The Supreme Court affirmed the decision of the court of appeals.[75] The majority based its conclusion on the unauthorized nature of the Board's action:

> This suit . . . is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the act. Section 9(b)(1) is clear and mandatory. . . . [T]he Board . . . attempted [an] exercise of power that had been specifically withheld. It deprived the professional employees of a "right" assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given.[76]

The majority rejected the Board's argument that jurisdiction should be denied because Congress created no express remedy to redress violations of section 9(b)(1). The Court observed that section 9(b)(1) was stated in prohibitory terms and held that Congress intended that statutory prohibitions, which are definite in meaning, be judicially enforced. The court contrasted statutory language cast in prohibitory terms and statutory language expressed as a mandate:

> While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart

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ployees did violate a specific prohibition in the Act. 358 U.S. at 187. Limiting the *Kyne* holding to its facts, however, would permit the Board to evade judicial review simply by not admitting to its wrongdoing. *See* National Maritime Union v. NLRB, 375 F. Supp. 421, 430 (E.D. Pa.), *aff'd*, 506 F.2d 1052 (3d Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

71. Kyne v. Leedom, 148 F. Supp. 597, 601 (D.D.C. 1956), *aff'd*, 249 F.2d 490 (D.C. Cir. 1957), *aff'd*, 358 U.S. 184 (1958).

72. 148 F. Supp. at 601.

73. Leedom v. Kyne, 249 F.2d 490 (D.C. Cir. 1957), *aff'd*, 358 U.S. 184 (1958).

74. 249 F.2d at 491.

75. Leedom v. Kyne, 358 U.S. 184 (1958).

76. *Id.* at 188-89.

> the declared purpose of the legislation cannot be disregarded. . . . The definite prohibition which Congress inserted in the Act can not therefore be overriden in the view that Congress intended it to be ignored.[77]

Finally, the Court distinguished *Switchmen's Union v. National Mediation Board*.[78] In *Switchmen's Union* the Court held that a district court did not have jurisdiction to review a representation order issued by the National Mediation Board (NMB) because the NMB had acted within its statutory powers.[79] The *Kyne* Court stated that in *Switchmen's Union* no congressionally created right could have been violated by the denial of district court jurisdiction because the NMB had not violated any statutory constraint. In *Kyne*, however, the Court reasoned that foreclosing jurisdiction would have allowed the Board to deny professional employees their section 9(b)(1) rights. The Court reached this conclusion because the professional employees in *Kyne* had "no other means within their control . . . to protect and enforce" these rights.[80]

The *Kyne* opinion left three questions unanswered. First, the *Kyne* majority did not indicate whether district courts may exercise jurisdiction in cases involving alleged Board violations of provisions of the Act cast in mandatory language. Second, the significance of the following concern is unclear: the denial of district court jurisdiction can insulate Board representation orders from judicial review. Third, the *Kyne* Court never addressed the issue of whether district court ju-

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77. *Id.* at 189.

78. 320 U.S. 297 (1942).

79. *Id.* at 300.

80. 358 U.S. at 190. Justice Brennan, joined by Justice Frankfurter, dissented in *Kyne*. Justice Brennan concluded that nothing in the Act or its legislative history indicated that Congress intended the representation process to be interrupted by judicial review of Board orders, even when the order was based on an alleged misinterpretation of the Act. *Id.* at 191-95. He asserted that the majority's decision opened "a gaping hole in [the] congressional wall against direct resort to the courts" because any party alleging unlawful Board action could bring a case immediately in a district court. *Id.* at 914.

Justice Brennan also contended that the Court's reliance on *Switchmen's Union* was misplaced. He argued that *Switchmen's Union* held merely that access to the district courts should be allowed when Congress creates a right without creating a tribunal for its enforcement. Congress created the Board specifically to protect the rights embodied in the Act. Thus there was no reason to allow jurisdiction in *Kyne*. *Id.* at 197-201. Justice Brennan stated that any inequity in the procedure resulted from the congressional decision that the need to prevent the disruption of the representation process outweighed the hardship that might result from the absence of judicial review. *Id.* at 197.

For further analysis of the *Kyne* opinion, see Goldberg, *supra* note 26, at 470-90; Comment, *Judicial Review of Preliminary Orders of National Administrative Agencies After* Leedom v. Kyne, 8 BUFFALO L. REV. 372 (1959); 73 HARV. L. REV. 217 (1959); 57 MICH. L. REV. 910 (1959).

risdiction should be denied to a party who could secure judicial review of Board representation orders after the representation election.

II. EXTENSIONS OF *LEEDOM v. KYNE*

A. *Early Extensions.*

The first decision[81] to apply the *Kyne* standard to alleged Board violations of statutory mandates was *Miami Newspaper Printing Pressman's Local 46 v. McCulloch*.[82] In *Miami Newspaper* the Board conducted a representation election and then set it aside because of an infirmity in its own procedure. After conducting a subsequent hearing, the Board affirmed the validity of the original election. Rather than reinstating the initial results, however, the Board ordered the regional

81. Before the *Kyne* test was applied to statutory mandates, the Court modified the standard in Boire v. Greyhound Corp., 376 U.S. 473 (1964). In *Boire* the Board determined that Greyhound Corporation and Floors Corporation were joint employers of a group of bus-terminal maintenance employees and that the unit consisting of all employees under the joint-employer relationship was the appropriate unit for a representation election. *Id.* at 475. Greyhound disagreed and filed suit in district court to set aside the Board's decision and enjoin the election. The district court exercised jurisdiction on the basis of *Kyne* and granted the injunction, concluding that the Board's findings were legally insufficient to establish a joint-employer relationship. Greyhound Corp. v. Boire, 205 F. Supp. 686 (S.D. Fla.), *aff'd*, 309 F.2d 397 (5th Cir. 1962), *rev'd*, 376 U.S. 473 (1964). The court of appeals affirmed. Boire v. Greyhound Corp., 309 F.2d 397 (5th Cir. 1962), *rev'd*, 376 U.S. 473 (1964). The Supreme Court reversed the decisions of the lower courts, categorizing the joint-employer issue as "essentially . . . factual" and holding that *Kyne* is limited to questions that depend solely on the construction of the Act. 376 U.S. at 481-82.

Boire substantially limits the ambit of *Kyne* and usefully allocates matters between the Board and the courts when the distinction between law and fact is clear. Often, however, the issue presented involves inseparable questions of statutory interpretation and fact. For example, in McCormick v. Hirsch, 460 F. Supp. 1337 (M.D. Pa. 1978), a union filed a representation petition with the Board. It sought certification as the exclusive bargaining representative of teachers employed at a parochial high school. The Board began an investigation to determine if a representation hearing was necessary. Upon the scheduling of a hearing by the Board, the superintendent of the school system filed suit in the district court. He requested a temporary restraining order and an injunction, contending that the Act, as applied, violated his religious liberties guaranteed by the first amendment. *Id.* at 1340.

In determining whether to exercise jurisdiction, the court in *McCormick* faced inseparable questions of fact and statutory interpretation: the court had to decide whether a parochial school was an employer within the meaning of section 2(2) of the Act, 29 U.S.C. § 152(2) (1976), and whether Congress intended the Act to extend to religious institutions. After examining the language of the Act and its legislative history, the court granted jurisdiction on the basis of *Kyne*. The court held that the Board "would be acting beyond the grant of power given by Congress in the Act" if it were allowed to conduct representation proceedings involving parochial schools. 460 F. Supp. at 1345.

The court in *McCormick* did not rely on *Boire* in reaching its decision. Because of the inextricable nature of the questions of law and fact presented, *Boire* could not have aided the court in its jurisdictional determinations. *But see* Grutka v. Barbour, 549 F.2d 5, 8 (7th Cir.), *cert. denied*, 431 U.S. 908 (1977) (court rejected arguments that the "matter of law/matter of fact distinction . . . is an overly facile solution to the problem of when district court jurisdiction is appropriate").

82. 322 F.2d 993 (D.C. Cir. 1963).

director to conduct a second election, whereupon a union filed suit in the district court to compel the Board to certify the results of the first election. The union contended that because the original election was found to have been properly conducted, the Board was required to affirm its validity pursuant to section 9(c)(1)[83] of the Act. The relevant portion of that section provides: "If the Board finds . . . that . . . a question of representation exists, it shall direct an election by secret ballot and *shall* certify the results thereof."[84] In holding that the *Kyne* standard applied to the statutory mandate found in section 9(c)(1), the court reasoned that a "party would be as aggrieved by [a failure of the Board to act pursuant to a statutory mandate] as by an act of the Board contrary to an express prohibition [of the Act]."[85]

The *Miami Newspaper* decision is important because many of the provisions of the Act that regulate the representation process are cast in mandatory language.[86] *Miami Newspaper* complicates the judicial inquiry required under *Kyne* because more extensive analysis is often necessary to determine whether a statutory mandate, as opposed to a statutory prohibition, confers district court jurisdiction. Statutory prohibitions are absolute; a court can determine if the Board has violated a prohibitory provision of the Act merely by examining the face of the Act.[87] In contrast, courts frequently must look beyond the face of the Act to ascertain whether a statutory mandate confers district court jurisdiction, for Congress and the courts have allowed the Board to exercise discretion under these provisions.[88]

An example of a statutory mandate that provides for Board discretion is section 9(c)(1) of the Act.[89] It states that if "the Board finds . . . that . . . a question of representation exists, it *shall* direct an election . . . and *shall* certify the results thereof."[90] The Board may exercise its

83. 29 U.S.C. § 159(c)(1) (1976). For the text of this section, see note 20 *supra*.

84. *Id.* (emphasis added).

85. 322 F.2d at 977. Since *Miami Newspaper*, courts frequently have applied *Kyne* to mandatory provisions of the Act. *See, e.g.*, Newport News Shipbuilding & Dry Dock Co. v. NLRB, 633 F.2d 1079 (4th Cir. 1980) (section 9(c)(1), 29 U.S.C. § 159(c)(1) (1976)); Surrat v. NLRB, 463 F.2d 378 (5th Cir. 1972) (section 9(c)(1)); Templeton v. Dixie Color Printing Co., 444 F.2d 1064, 1069 (5th Cir. 1971) (section 9(c)(1)); Bullard Co. v. NLRB, 253 F. Supp. 391 (D.D.C. 1966) (section 9(e), 29 U.S.C. § 159(e) (1976)).

86. *See* 29 U.S.C. § 159 (1976). *See generally* Cox, *The Major Labor Decisions of the Supreme Court October Term 1958*, 1959 PROCEEDINGS OF A.B.A. SECTION OF LABOR REL. L. 23, *reprinted in* W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 441 (6th ed. 1974). See note 20 *supra*.

87. *See* Leedom v. Kyne, 358 U.S. 184, 189 (1958) (quoting Texas & N.O.R. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548, 568-69 (1930)). See text accompanying note 77 *supra*.

88. See note 9 *supra*.

89. 29 U.S.C. § 159(c)(1) (1976). See note 20 *supra*.

90. 29 U.S.C. § 159(c)(1) (1976) (emphasis added).

discretion under section 9(c)(1) to prevent the holding of a representation election by applying the contract-bar doctrine.[91] The Board can also decline to exercise jurisdiction under section 9(c)(1) when statutory jurisdiction exists if it determines that the assertion of jurisdiction would not further the purposes of the Act.[92] To avoid infringement on the Board's discretion,[93] therefore, a jurisdictional standard must adequately focus the court's attention on whether a statutory mandate commands immediate Board action.

The *Kyne* standard, which prohibits Board action taken "in excess of its delegated powers and contrary to a statutory prohibition,"[94] provides little guidance for determining jurisdiction in cases involving alleged violations of statutory mandates.[95] This inadequacy of the *Kyne* test is illustrated by *Templeton v. Dixie Color Printing Co.*[96] In *Templeton* the Board used one of its discretionary tools, the blocking-charge doctrine,[97] to hold an employee decertification petition in abeyance for over three years.[98] Four employees filed suit to compel the Board to investigate the petition. The Court of Appeals for the Fifth Circuit, in affirming the district court's exercise of jurisdiction under *Kyne*, held that the Board's refusal to take notice of the petition was arbitrary and

91. The contract-bar doctrine is a discretionary tool that permits the Board to dismiss an election petition filed within either the first three years or the duration of a collective bargaining agreement, whichever is less. *See* GORMAN, *supra* note 20, at 54-59.

92. *See* NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 684 (1951); National Maritime Union v. NLRB, 375 F. Supp. 421, 433 (E.D. Pa.), *aff'd*, 506 F.2d 1052 (3d Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); Council 19, Am. Fed'n of State Employees v. NLRB, 296 F. Supp. 1100, 1104 (N.D. Ill. 1968).

93. See notes 11-12 *supra* and accompanying text.

94. Leedom v. Kyne, 358 U.S. 184, 188 (1958). See text accompanying note 76 *supra*.

95. The inability of the *Kyne* standard to provide useful jurisdictional guidelines has led several courts to reformulate the standard. *See* Squillacote v. International Bhd. of Teamsters, Local 344, 561 F.2d 31, 39 (7th Cir. 1977) (*Kyne* applies only to a plain violation of a statutory or constitutional right); Uyeda v. Brooks, 365 F.2d 326, 331 (6th Cir. 1966) (procedural provisions of the Act cannot be read as prohibitious limiting the Board's power under *Kyne*); Newport News Shipbuilding & Drydock Co. v. NLRB, 498 F. Supp. 267, 271 (E.D. Va. 1980) (*Kyne* authorizes an "arbitrary and capricious" standard of review); National Maritime Union v. NLRB, 375 F. Supp. 421, 429-30 (E.D. Pa.) (district courts should apply an ad hoc test to determine if the provision under scrutiny is sufficiently "clear and mandatory" to confer jurisdiction), *aff'd*, 506 F.2d 1052 (3d Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *accord*, United States v. Feaster, 410 F.2d 1354, 1368 (5th Cir.) (*Kyne* permits access to the district courts under the Railway Labor Act, 45 U.S.C. §§ 151-188 (1976), "only if the Mediation Board's determination is infused with error which is of a *summa* or *magna* quality as contraposed to decisions which are simply *cum* error"), *cert. denied*, 396 U.S. 962 (1969).

96. 444 F.2d 1064 (5th Cir. 1971).

97. The blocking-charge doctrine allows the Board to refuse to conduct a representation election if unfair labor practice charges are pending before it. *See id.* at 1065.

98. The Board delayed investigation of the decertification petition for over three years because both the employer and the incumbent union had filed numerous unfair labor practice charges. *Id.* at 1066.

contrary to the specific mandate of section 9(c)(1).[99] Emphasizing that no adequate administrative relief was available to the plaintiffs,[100] the court ordered the Board to investigate the decertification petition.

Because the jurisdictional standard used in *Templeton* did not adequately account for Board discretion, the court failed to consider fully the nature of the Board action. Had the standard focused the court's attention on this consideration, the unwarranted judicial interference that occurred in *Templeton* might have been avoided. This infringement on the Board's discretion frustrated an underlying policy of the Act: to rely on the Board's administrative expertise to resolve labor disputes.[101]

The *Templeton* decision also illustrates a second shortcoming of the *Kyne* standard: *Kyne's* failure to indicate the significance to be attached to a party's ability to secure judicial or administrative review of a Board order if district court jurisdiction is denied. In *Templeton* the court took notice of the unavailability of an effective administrative remedy.[102] Other courts have suggested that district court jurisdiction should be predicated on the absence of alternative forms of judicial or administrative relief.[103]

Resolution of this question is important. For some parties, such as unsuccessful unions, the district courts represent the only avenue of access to the judiciary.[104] The dissent in *Physicians National House Staff Association v. Fanning*[105] recognized the importance of considering the disparity between parties' abilities to secure judicial review of Board representation orders. The dissent therefore reformulated the *Kyne* standard in an attempt to render it more useful.

B. *The* Physicians *Standard.*

In *Physicians National House Staff Association v. Fanning*[106] an

99. *Id.* at 1068-70. For the text of section 9(c)(1), see note 20 *supra*.

100. 444 F.2d at 1069.

101. *See* Meltzer, *The Supreme Court, Congress, and State Jurisdiction over Labor Relations: II*, 59 COLUM. L. REV. 269, 299 (1959). Meltzer explains how repeated district court intervention would result in the subjugation of the Board's delegated powers to conduct representation elections:

> [I]ndirect judicial control over the Board's [representation] machinery . . . would either bring the Board and the courts into direct conflict in which courts, by virtue of their broad equity powers, would prevail, or it would subordinate Board action to judicial determinations in an area which demands all of the special insights and expertise imputed to the Board.

102. 444 F.2d at 1069.

103. See note 147 *infra*.

104. See notes 42-54 *supra* and accompanying text.

105. 642 F.2d 492 (D.C. Cir. 1980) (en banc), *cert. denied*, 101 S. Ct. 1360 (1981).

106. *Id.*

employee association sought to organize the house staff of several hospitals. House staff are physicians who serve as interns, residents, and clinical fellows. The Board had determined that house staff were not employees within the meaning of section 2(3) of the Act.[107] The Board therefore refused to conduct representation elections at the various hospitals. The employee association sought relief in the district court, contending that both section 2(3) of the Act and the legislative history accompanying the 1974 amendments to the Act[108] provide a clear mandate to the Board to classify house staff as employees.[109]

The Court of Appeals for the District of Columbia Circuit, sitting en banc, refused to grant jurisdiction under *Kyne*.[110] The majority found no statutory mandate on the face of section 2(3). Rather, the court considered the determination of whether house staff are employees to be essentially a factual question and therefore beyond the jurisdiction of the district court:

> The appellants attempt to find in section 2(3) of the Act . . . the clear statutory mandate required by Leedom v. Kyne. We think the attempt fails. That section does not define the term employee nor does any other section of the Act. Whether a particular individual is an employee depends upon the facts. The task of decision on the facts of each case is assigned to the National Labor Relations Board and in making that decision the Board exercises its informed discretion.[111]

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107. *See* Cedars-Sinai Medical Center, 223 N.L.R.B. 251 (1976). Section 2(3), 29 U.S.C. § 152(3) (1976), provides in part:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. . . .

108. The 1974 amendments to the Act removed the exemption for non-profit hospitals from the definition of employer. *See* Pub. L. No. 93-360, 88 Stat. 395 (1974).

109. 642 F.2d at 494.

110. *Id.* at 500. The district court had held that it lacked jurisdiction to review the Board's order because the question of whether the house staff were employees was "primarily a factual and definitional determination of the type traditionally left to the discretion of the Board." Physicians Nat'l House Staff Ass'n v. Murphy, 443 F. Supp. 806, 810 (D.D.C. 1978), *aff'd sub nom.*, Physicians Nat'l House Staff Ass'n v. Fanning, 642 F.2d 492 (D.C. Cir. 1980) (en banc), *cert. denied*, 101 S. Ct. 1360 (1981). On appeal, Chief Judge Wright proposed a reformulation of the *Kyne* standard and concluded that under the reformulation the district court should have exercised jurisdiction. Physicians Nat'l House Staff Ass'n v. Murphy, 100 L.R.R.M. 3055 (D.C. Cir. Apr. 2), *vacated pending rehearing en banc*, 104 L.R.R.M. 2592 (D.C. Cir. June 5, 1979). In reaching this conclusion he emphasized the affirmative congressional intent to classify house staff as employees within the meaning of section 2(3) of the Act, 29 U.S.C. § 152(3) (1976), and the absence of any feasible recourse to the judiciary other than through the exercise of district court jurisdiction. *See* 100 L.R.R.M. at 3060, 3062. In the en banc decision, Chief Judge Wright lost his majority and restated his proposed standard in his dissent. Physicians Nat'l House Staff Ass'n v. Fanning, 642 F.2d 492 (D.C. Cir. 1980) (en banc), *cert. denied*, 101 S. Ct. 1360 (1981). See notes 114-117 *infra* and accompanying text.

111. 642 F.2d at 496 (footnote omitted).

The court rejected the contention that the legislative history of the Act provides the statutory mandate necessary to grant jurisdiction under *Kyne*. It found no evidence that Congress intended house staff to be classified as employees.[112] Finally, the court was unpersuaded by the argument that if jurisdiction were denied, the Board's order excluding house staff from the coverage of the Act would never be subject to judicial review. The majority emphasized that Congress had considered this hardship but had determined that the need for timely representation elections overrode this concern.[113]

Chief Judge Wright, in his dissent, concluded that no meaningful jurisdictional determination could be made without a more precise standard. He identified four considerations relevant to the determination of jurisdiction under *Kyne*:

> (A) whether the alleged error by the Board involved a question of statutory interpretation or merely an issue of fact; (B) whether the statutory provision is "clear and mandatory" in creating rights for those subject to the NLRA; (C) whether the party challenging the Board's action has a realistic hope of eventual court review following an unfair labor practice order; and (D) the potential for thwarting the purposes of the NLRA which would flow from finding jurisdiction in [each] case.[114]

Chief Judge Wright concluded that jurisdiction existed in *Physicians* in light of these considerations. Contrary to the majority, he found a clear congressional intent in the legislative history of the Act to categorize house staff as employees.[115] He also noted the association's inability to secure subsequent judicial review if jurisdiction were denied.[116] He concluded by arguing that because the house staff were excluded from the coverage of the Act, a grant of district court jurisdiction could not possibly delay the collective bargaining process, for no representation election was being conducted.[117]

The dissent's test recognizes the need to formulate an effective jurisdictional standard. Such a standard must provide guidelines to aid courts in analyzing statutory mandates and must indicate clearly the

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112. *Id.* at 497-99.

113. *Id.* at 499.

114. *Id.* at 503. Chief Judge Wright admitted that his standard requires at least a partial examination of the merits to determine jurisdiction. *Id.* n.21. He felt this commingling was necessary, however, to "preserve the policy of holding the courthouse door not 'wholly closed,' yet also not 'widely ajar.'" *Id.* (quoting Local 130, Int'l Union of Electrical Workers v. McCulloch, 345 F.2d 90, 97 (D.C. Cir. 1965)).

115. 642 F.2d at 503-06.

116. *Id.* at 512.

117. *Id.* at 513.

jurisdictional significance of alternative forms of review. The dissent's test, however, does not successfully accomplish this task. Inquiring whether an alleged Board error involves a question of fact or statutory construction will properly allocate matters between the Board and the courts when the distinction between law and fact is clear.[118] In cases that involve inseparable questions of statutory interpretation and fact,[119] however, this distinction provides little useful guidance. Arguably, such a test tends to narrow unduly the focus of a court and to obfuscate the main issues of a case.[120] The usefulness of the fact-law distinction as part of a jurisdictional standard therefore is limited.

Assessing whether a statutory provision is "clear and mandatory" in creating rights for those subject to the Act also poses several difficulties as a jurisdictional inquiry. First, requiring a statutory provision to be clear is meaningless: the term clear does not distinguish statutory provisions of the Act.[121] Second, the clear and mandatory standard provides imprecise guidance, for it does not aid a court in determining when to grant jurisdiction under statutory mandates. Third, this part of the dissent's test apparently allows a court's jurisdictional analysis to extend beyond the face of the Act to legislative history,[122] but it does not state whether courts should consider in their jurisdictional inquiry accepted Board practices that are not specifically approved in the Act or its legislative history.[123] Fourth, if a statutory provision is ambiguous and examination of legislative history is permissible, the standard reaches a paradoxical result: an ambiguous statute is classified as clear and mandatory.[124] The imprecision of the clear and mandatory standard thus may lead to arbitrary jurisdictional determinations.

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118. See note 81 *supra*.

119. *See* McCormick v. Hirsch, 460 F. Supp. 1337 (M.D. Pa. 1978) (inseparable question of fact—is a parochial school an employer within meaning of section 2(2) of the Act, 29 U.S.C. § 152(2) (1976)—and statutory interpretation—did Congress intend the Act to extend to religious institutions). See note 81 *supra*.

120. *See* Grutka v. Barbour, 549 F.2d 5, 9 (7th Cir.), *cert. denied*, 431 U.S. 908 (1977) (distinction between matters of law and fact required administrative adjudication of constitutional issues).

121. *See* Note, *Labor Law: Direct Judicial Review of NLRB Election Orders*, 66 COLUM. L. REV. 1546, 1551 (1966) (the difference between a *clear* violation of a statutory provision and any other type of a violation is illusory); *cf.* Local 1545, United Bhd. of Carpenters v. Vincent, 286 F.2d 127, 133 (2d Cir. 1960) ("To be sure, the distinction between violation of a clear and of a not so clear statutory command is neither completely satisfying nor . . . readily applied").

This argument assumes the term "clear" has independent meaning in this part of the jurisdictional standard.

122. One commentator suggested that legislative history must contain "an express statement . . . addressing the issue involved" to satisfy the second part of the standard proposed by the *Physicians* dissent. *See* 56 NOTRE DAME LAW. 315, 323-24 (1980).

123. Such practices include the contract-bar doctrine, see note 91 *supra*, and the blocking-charge policy, see note 97 *supra*.

124. *See* 56 NOTRE DAME LAW. 315, 323-24 (1980).

The third element of the dissent's test regulates the timing of judicial review based on a party's ability to secure post-election access to the courts. If a party is unable to obtain judicial review by committing an unfair labor practice, this element allows for immediate review of representation orders.[125] All parties except employers can meet this requirement because the district courts represent the only effective means of access to the judiciary for these parties.[126]

Initially, it would appear inappropriate to consider in a jurisdictional standard the disparity in ability to secure later judicial review of Board orders. Congress rejected arguments premised on this consideration[127] in disapproving an amendment to the Taft-Hartley Act.[128] Congress rejected these arguments, however, because the proposed amendment would have allowed immediate review of all Board representation orders, thus enabling parties to delay indefinitely a representation election by appealing these orders.[129] Congress chose to prevent this practice because of the need to ensure an uninterrupted representation process.[130] It is therefore consistent with Congress's intent to inquire about alternative means of judicial access in a jurisdictional standard if the standard does not allow parties to delay indefinitely a representation election.

Chief Judge Wright's test does not allow such dilatory tactics. The third part of the standard authorizes immediate judicial review of Board orders only for parties with no other means of access to the courts. Further, these parties must meet the other requirements of the dissent's four-part test before jurisdiction will be granted. The possible dilatory use of district court jurisdiction could be reduced further, however, by denying pre-election judicial relief to parties able to secure

125. *See* Physicians Nat'l House Staff Ass'n v. Fanning, 642 F.2d 492, 512 (D.C. Cir. 1980) (en banc), *cert. denied*, 101 S. Ct. 1360 (1981).

126. See notes 33-54 *supra* and accompanying text.

127. An argument made in favor of the amendment was that unless it was passed, some parties would be unable to secure judicial review of Board orders. *See* 93 CONG. REC. 6444 (1947) (remarks of Sen. Taft).

128. *See* H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 56-57 (1947). Judge Robb, writing for the majority in Physicians Nat'l House Staff Ass'n v. Fanning, 642 F.2d 492 (D.C. Cir. 1980) (en banc), *cert. denied*, 101 S. Ct. 1360 (1981) summarized the congressional hearings:

> When it passed the Taft-Hartley Act, Congress considered an amendment which would have allowed immediate review of Board certification decisions. This proposal was included in the House version of the bill. . . . The provision was eliminated in conference. . . . Senator Taft explained this action by commenting that the proposal "would permit dilatory tactics in representation proceedings."

Id. at 499 (citations omitted).

129. See notes 24-28 *supra* and accompanying text.

130. *See* 93 CONG. REC. 6444 (1947) (remarks of Sen. Taft).

effective post-election review by committing an unfair labor practice.[131] Precluding these parties from pre-election relief imposes additional costs on them,[132] but the concomitant benefit of significantly reducing interruptions in the representation process outweighs this hardship.[133] Notwithstanding its apparent benefits, this additional jurisdictional requirement is not included in the third part of the dissent's standard.

Another aspect of the timing of judicial review not considered by the dissent's test is whether parties must exhaust their administrative remedies before seeking district court relief. Requiring exhaustion of administrative remedies would allow the Board to conserve judicial time because of the structure of the Act's administrative review process. Under section 3(b) of the Act[134] a regional director is delegated all powers of initial decisionmaking. Parties to a representation proceeding can appeal his decisions to the Board. The Board then reviews the director's decisions if "compelling reasons" exist.[135] Because these same reasons can provide grounds for district court jurisdiction, requiring the exhaustion of administrative remedies allows the Board the opportunity to correct errors made by the regional director before the courts become involved.

The final element of Chief Judge Wright's test, which requires courts to determine whether the purposes of the Act will be thwarted by a court's exercise of jurisdiction,[136] is unnecessary. If a court concludes

131. See notes 33-54 *supra* and accompanying text.

132. These costs arise from the necessity of a second representation campaign and from the decreased efficiency of operations resulting from workers focusing their attention on another election rather than on their work. *See* Goldberg, *supra* note 26, at 497-98. These costs, however, are arguably negligible. Because suits to enjoin representation elections usually are brought when the election campaign is almost over, employers incur nearly identical representation campaign costs and decreases in productivity whether or not they can secure pre-election relief. *See, e.g.*, Firestone Tire & Rubber Co. v. Samoff, 365 F.2d 625, 626 (3d Cir. 1966). Further, pre-election suits brought by the employer can intensify employee interest in the representation election; this interest can cause a greater decrease in work productivity than would employee interest in a judicially ordered second representation election. *See* Goldberg, *supra* note 26, at 497.

133. Pre-election interruptions would be significantly reduced because the suggested jurisdictional requirement bars employers from pre-election relief, and employers have historically brought most pre-election suits. *See* Goldberg, *supra* note 26, at 493 n.114 (of the first 67 cases reported involving *Kyne*, 43 were filed by employers).

134. 29 U.S.C. § 153(b) (1976).

135. The "compelling reasons" are: (1) that a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent; (2) that the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudices the rights of a party; (3) that the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error; and (4) that there are compelling reasons for reconsideration of an important Board rule or policy. 29 C.F.R. § 102.67(c) (1980).

136. If this part of the standard is intended to instruct courts when to deny pre-election jurisdiction, it is too vague to provide useful guidance.

that the second part of the test is satisfied—that the Board acted in excess of its delegated powers—it is unlikely a court would conclude that the fourth part of the standard is met. If a court did find the last part of the test satisfied in this situation,[137] it is probable the court would nevertheless grant jurisdiction. The violation of a clear and mandatory statutory provision seems to be a more substantial ground for jurisdiction than the contravention of a general purpose of the Act. The fourth part of Chief Judge Wright's test also allows courts substantial discretion in interpreting the purposes of the Act, for the purposes are broadly defined.[138] The final part of the dissent's test is therefore subject to multifarious interpretations and does not provide precise jurisdictional guidance.

Although the *Physicians* dissent attempted to improve the *Kyne* standard, its proposed test does not adequately aid a district court in determining whether to exercise original jurisdiction over an alleged violation of a statutory mandate. The dissent's emphasis on whether the Board has violated a clear and mandatory statutory provision detracts from the crucial inquiry of whether the Board has acted pursuant to its discretionary authority. Chief Judge Wright's test does focus a court's inquiry on the important question of a party's ability to secure judicial review of Board representation orders by committing an unfair labor practice. Yet the dissent's standard leaves unresolved two issues related to the timing of judicial review: whether a party able to secure post-election review should be denied district court jurisdiction before the election and whether a party must exhaust his administrative remedies before seeking district court relief. Although the dissent's test illustrates the need for a reformulation of the *Kyne* standard, it fails to resolve important questions that the *Kyne* exception raises.

C. *A Proposed Standard.*

A jurisdictional standard designed to replace the *Kyne* test should clearly identify circumstances in which district courts may exercise

137. A court could find both the second and fourth parts of the test satisfied if a specific statutory provision conflicted with a purpose of the Act. *See* Newport News Shipbuilding & Dry Dock Co. v. NLRB, 633 F.2d 1079, 1082-83 (4th Cir. 1980) (section 7 purposes of employee free choice and majority rule, 29 U.S.C. § 157 (1976), conflicted with section 9(c)(1) duty to investigate a decertification petition, 29 U.S.C. § 159(c)(1) (1976)).

138. The Act states in section (1):

> It is hereby declared . . . [to encourage] the practice and procedure of collective bargaining and [to protect] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection.

29 U.S.C. § 151 (1976). *See* NLRB v. Hearst Publications, Inc., 322 U.S. 111, 126 (1944).

original jurisdiction over alleged violations of statutory mandates. Such a standard should also define the impact of alternative avenues of review on a determination of jurisdiction. Clear guidelines will reduce the likelihood of judicial infringement of Board discretion and will reduce the number of unwarranted interruptions in the representation process. To achieve these goals, a standard should permit district court jurisdiction only if: the Board has violated a nondiscretionary provision of the Act; challenging parties have exhausted their administrative remedies; and challenging parties possess no other effective means of recourse to the judiciary.

Requiring courts to determine whether the Board has violated a nondiscretionary provision of the Act recognizes the need to avoid judicial interference in areas of Board discretion and directly focuses a court's attention on that important consideration. The discretionary-nondiscretionary distinction[139] also provides a guideline to aid courts in analyzing statutory mandates.

Determining whether a nondiscretionary provision of the Act has been violated should involve an assessment of relevant statutory provisions and, if necessary,[140] their legislative history. Additionally, courts should consider Board practices not specifically authorized by statute that have developed and become accepted over time.[141] Such thorough analysis is necessary to determine when the Board is allowed to exercise its discretion and to ensure proper interpretation of statutory provisions.[142]

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139. Essentially factual determinations would be considered discretionary under this standard. *See generally* 56 NOTRE DAME LAW. 315, 325 (1980). See note 81 *supra* and text accompanying note 111 *supra*.

140. Consideration of legislative history is usually impermissible when the statute is unambiguous. *See, e.g.*, Wilbur v. United States, 284 U.S. 231, 237 (1931).

141. The court advocated a similar approach in National Maritime Union v. NLRB, 375 F. Supp. 421 (E.D. Pa.), *aff'd*, 506 F.2d 1052 (3d Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). Judge Fogel, after an excellent review of the evolution of the *Kyne* standard, stated:

> From our review . . . we are persuaded that the exception enunciated in the majority holding in *Kyne* should neither be mechanically restricted to violations of "shall not" clauses of the Act, nor automatically extended to any clause which contains the word "shall" or similar language of apparently mandatory intent. Rather, it is the task of the District Court to carefully examine the provision in question, and to determine from the context, from the structure and purposes of the Act as a whole, from prior practice in the Board and decisions in the Courts, whether the terms are indeed sufficiently "clear and mandatory" to confer jurisdiction under the rule of *Kyne*.

375 F. Supp. at 429-30.

142. In Intertype Co. v. Penello, 269 F. Supp. 573 (W.D. Va. 1967), for example, an employer filed suit in district court to compel production of an investigation file compiled by the Board. The employer argued that the Board, by refusing to divulge the file, violated the specific mandate found in section 9(d) of the Act, 29 U.S.C. § 159(d) (1976). Section 9(d) provides that whenever an order of the Board is based in whole or in part on facts certified following an investigation, the "certification and the record of such investigation shall be included in the transcript of the entire

The second part of the proposed standard requires parties to exhaust their administrative remedies before seeking relief in the district courts. This requirement ensures that the Board is given the opportunity to develop fully the factual record necessary for judicial review.[143] The Board also can correct errors committed by the regional directors[144] and thus reverse decisions that otherwise would provide grounds for district court jurisdiction.[145]

The third part of the proposed standard requires a district court to decline jurisdiction if effective[146] subsequent recourse to the judiciary is available.[147] Parties who could secure access to the courts through a post-election method of review, such as section 10(f),[148] should be denied district court jurisdiction. Although this part of the standard imposes additional costs on these parties,[149] the resulting reduction in the dilatory use of district court jurisdiction outweighs this burden. This

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record" subject to review. *Id.* The court stated that "[a] literal reading of Section 9(d) would appear to support the Company's position," 269 F. Supp. at 579; it found, however, that the Board would be able to conduct effective investigations only if it preserved the confidentiality of its findings. *Id.* at 580. Thus, the court held that "the production of the investigation file must rest within the sound discretion of the Board, and consequently Section 9(d) does not establish a 'specific statutory right,' the abrogation of which would be ground for this court's taking jurisdiction." *Id.*

143. It is generally desirable for an administrative agency to develop the factual record in order to have the benefit of the agency's expertise. *See* Erzatty v. Puerto Rico, 648 F.2d 770, 774 (1st Cir. 1981).

144. See notes 134-35 *supra* and accompanying text.

145. The exhaustion requirement can, of course, be waived when pursuit of an administrative remedy would be futile or when other judicially recognized exceptions to the requirement exist. *See* K. DAVIS, ADMINISTRATIVE LAW §§ 20.01, .07 (3d ed. 1972).

146. An example of an ineffective means of securing judicial review is that provided by section 8(b)(7)(B), 29 U.S.C. § 158(b)(7)(B) (1976). The section 8(b)(7)(B) means of review is inadequate because of its speculative nature. See notes 42-54 *supra* and accompanying text.

147. Thus, the third part of the suggested standard, combined with the exhaustion of administrative remedies requirement, essentially means that parties must have no other effective means available to secure district court jurisdiction. *Cf.* Long Island RR Co. v. United States, 193 F. Supp. 795, 800 (E.D.N.Y. 1961) (Friendly, J.) (a district court may entertain a suit to enjoin an Interstate Commerce Commission suspension order only if the complaint shows the suspension is "plainly without statutory authority" and the aggrieved party has no other available remedy).

148. 29 U.S.C. § 160(f) (1976). See notes 33-41 *supra* and accompanying text.

149. See note 132 *supra* and accompanying text. Intangible costs, such as the possible stigma of initially losing a representation election, cannot be avoided by an employer under the proposed standard because an employer cannot obtain pre-election relief under this standard. A union, however, may be able to avoid these costs by enjoining an election it feels it may lose, for it can attempt to secure pre-election injunctive relief under the suggested test. This disparity in ability to prevent a representation election one might lose can be equalized. A court faced with a union suit to enjoin an election may permit the election to occur but order the Board to impound the ballots until the court passes upon the union's claim. *See* Goldberg, *supra* note 26, at 506. Several courts have adopted this solution. *See, e.g.*, Miami Newspaper Printing Pressmen's Union v. McCulloch, 322 F.2d 993, 996 (D.C. Cir. 1963); Livingston v. McLeod, 209 F. Supp. 606, 611 (S.D.N.Y. 1962); Int'l Prod. Union, Local 710 v. McLeod, 183 F. Supp. 790, 792 (E.D.N.Y. 1960).

portion of the suggested test therefore allows the representation process to proceed smoothly and, in combination with the other elements of the proposed standard, provides a possible solution to the problems presented by *Leedom v. Kyne*.

III. CONCLUSION

The application of *Leedom v. Kyne* to those provisions of the Act cast in nonprohibitory terms has led to inconsistent jurisdictional determinations. The dissent in *Physicians National House Staff Association v. Fanning* reformulated the *Kyne* standard in an attempt to eliminate this confusion. Because the dissent's standard does not accomplish this purpose, this note proposes a new standard to determine district court jurisdiction. The suggested standard allows for thorough judicial analysis of statutory provisions. It also restricts employer access to the courts prior to a representation election.

Although the proposed standard provides a possible solution to the jurisdictional problems associated with *Kyne*, it is only a partial response to the difficulties posed by judicial intervention in the representation process. Problems remain in determining what types of constitutional violations are sufficient to invoke district court jurisdiction.[150] The suggested standard, however, discourages judicial encroachment into areas of decisionmaking delegated specifically to the Board and therefore may provide for more efficient resolution of labor disputes.

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150. See notes 55-60 *supra* and accompanying text.