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In the

Supreme Court of the United States

MIKE TRBOVICH,

Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, et al.,

Respondent.

No. 71-119

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UNITED MINE WORKERS OF AMERICA, et al.,

Respondent.

Washington, D. C.,

Thursday, November 18, 1971.

The above-entitled matter came on for argument at 11:45 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

JOSEPH L. RAUH, JR., ESQ., 1001 Connecticut Avenue, N. W., Washington, D. C. 20036, for the Petitioner.

ERWIN N. GRISWOLD, ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C. 20530, for Respondent Secretary of Labor.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 119, Trbovich against United Mine Workers.

Mr. Rauh.

ORAL ARGUMENT OF JOSEPH L. RAUH, JR., ESQ.,

ON BEHALF OF THE PETITIONER

MR. RAUH: Mr. Chief Justice, and may it please the Court:

The courts below held that petitioner, the head of the reform group within the United Mine Workers, could not intervene in the Secretary of Labor's suit to upset the 1969 union election, in which petitioner and his reform group had an intense interest.

The question here on certiorari is whether the courts below erred in holding that the Labor-Management Reporting and Disclosure Act carves an exception out of Rule 24(a) and thus bars the intervention of petitioner's reform group.

On May 29, 1969, Mr. Joseph Yablonski announced that he would run for president of the United Mine Workers of America. Between May 29th and December 9th of 1969, the date of the election, Yablonski was forced to bring five lawsuits. In three of these we got our preliminary injunction, giving us the right to mail out literature, getting Yablonski his job back after he was fired in a reprisal firing, and stopping the

Journal, the United Mine Workers Journal, from being used as campaign literature.

In one of the five suits we didn't get an order, but before that the Mine Workers had done in court what we asked for, namely, to tell what the rules of the election would be; and the fifth suit, which is our suit to make Mr. Boyle and the others pay back what they have taken from the union, is still pending.

Now, in addition to these lawsuits, Mr. Yablonski also sat in an investigation by the Secretary of Labor, of the massive violations going on during the elections. But despite the cruel language of Section 601 of LMRDA, and despite this Court's statement in footnote 5 in the laborers case that Section 601 applied here and he could investigate, and despite the fact that we detailed the violations of law, the Secretary of Labor refused to make any investigation.

So, there came December 9th, and the incumbents declared themselves elected.

Two points might be mentioned on this election. First, where we had poll watchers, we either broke even or won. Where we didn't, we lost by margins up to 50 to 1.

Second, as was found by the Subcommittee on Labor, the decision was made by pensioners, because they voted, largely voted for them, 93 percent voted for Mr. Boyle.

On December 18th, nine days after the election,

Mr. Yablonski challenged the election, detailing to the Labor Department these massive violations.

On January 5th, Mr. Yablonski was found dead.

On January 20th, the petitioner adopted the challenge. He had been Mr. Yablonski's campaign manager, and he took over the challenge to the election.

On March 5th, the Secretary of Labor brought suit based on petitioner's challenge.

On April 1st, 1970, Miners for Democracy, the Yablonski reform group, was formed.

On October 2nd, when no progress had been made in the suit, an answer hadn't even been filed, we moved to intervene.

We sought three things then and now, as our intervention. That is, we seek to do three things by intervening.

First, to assure that the violations asserted by the Secretary of Labor are speedily and vigorously presented to the court.

Second, to raise two additional grounds for upsetting the election; namely, that Mr. Boyle, by his illegal pension increase, had engaged in improper interference with the election; and second, that voting through illegal locals had made it easy for them to steal the election. And I refer to the pension vote, because the illegal locals are

pension locals.

Third, to obtain a District Court decree insuring that the new election would not be a repeat of the last one. In other words, we seek to do three things: to assist and push the Secretary of Labor, to prove what he has set out to prove, to add two issues, and to see that there's a decree so there won't be a repeat.

The District Court said no to our intervention. He said, at page 112 of the Appendix, that the Landrum-Griffin Act deprived the court of jurisdiction to permit our intervention.

The Court of Appeals affirmed without opinion.

The case is here on an expedited schedule, because the case is in trial below. This is the status below:

On September 13th of this year, the trial started. After about five weeks of trial it went into recess. It reconvenes this coming Monday, November 22nd, for the completion of the government's case.

If we are permitted to intervene, we will not make any delays, we are not going to ask for discovery -- in fact, I hereby waive discovery, so that we can go right into the case as it is; and we will go on with our case promptly. So that, in other words, there is no question of delay through our intervention.

Q This isn't a jury trial, is it?

MR. RAUH: No, sir; it's in front of Judge Bryant.

Q Excuse me, Mr. Rauh, you did say you wanted to add two more --?

MR. RAUH: Two issues, sir.

Q -- issues. Well, doesn't Hodgson rather foreclose that?

MR. RAUH: It's different from Hodgson. You said that they couldn't add in Hodgson --

Q I didn't say it.

MR. RAUH: I know you didn't. The Court said --

Q Yes.

MR. RAUH: -- they couldn't add in Hodgson because it hadn't been in the petitioner's -- in the complaint.

Q In the charge, yes.

MR. RAUH: In the charge. Here, it's in the charge.

Q Oh, I see.

MR. RAUH: And the question is whether it can go to him now that he went ahead, so that that problem is up; but it is a different question than Hodgson, and we believe --

Q But -- it's different, but it does raise the question of whether the Secretary is wholly in control of the issue?

MR. RAUH: That's correct, Your Honor. And therefore --

Q Your other two grounds for intervention may be --

might be right; this one could be --

MR. RAUH: Precisely. We believe --

Q Could belong.

MR. RAUH: That's precisely correct, Your Honor. We believe that we are entitled to raise those two issues, and that there's -- because he's found probable cause, therefore, once we get in, we ought to raise it. We ought to be allowed to raise it.

Secondly, we feel that should be left to the District Court, who has control of how broad the intervention is going.

Third, we say that if you should knock us out on those two, that doesn't say why we shouldn't be in the case.

And therefore, I make it in that order.

Now, first, we meet the requirements of Rule 24(a). It fits us like a glove. Indeed, in the lower court, in the Court of Appeals the government conceded this. In the lower -- the Court of Appeals, Judge Wright asked Mr. Battocchi, who was arguing for the government, whether we didn't meet Rule 24(a) and whether his whole argument wasn't that the LMRDA excluded us, and he said yes.

Q Mr. Rauh, is that conceded by your opposition?

MR. RAUH: Well, at this moment, I cannot say. In their opposition to cert they said that the Secretary hadn't; then we pointed out that it had been done in open court. And in their brief they don't mention it, so I suppose it's

conceded that this happened. We heard it with our own ears!

However --

Q Was there a transcript of it?

MR. RAUH: Oh, they have a record, sir, but we don't have access to that, to the Court of Appeals record. I think it's like the record that you all make.

But I don't think they will challenge, sir, that Mr. Battocchi said, conceded; but they can withdraw the concession. I mean, I'm not arguing that they can't -- I'm not arguing that you can't withdraw a concession sometime during a case. I didn't look up the law on concessions, because I'm really not relying on it.

What I'm relying upon is the fact that it's so clear that we are in, that we meet Rule 24(a), that they even --

Q And that's intervention of right?

MR. RAUH: That's intervention of right.

Q Right.

MR. RAUH: And --

Q You mean under subdivision (2)?

Q That's right.

MR. RAUH: Yes, precisely, Your Honor.

And, for example, our interest is obvious. Our whole life depends on the outcome of this election.

The only question that the government raises, why we don't meet Rule 24(a), now that the concession has been

withdrawn, is that they adequately represent us, but they base that on the fact that they say there are no private rights.

But Your Honors have made clear, in both Laborers and the Glass Bottle Blowers case, that there are both; that there are private rights and public rights.

Indeed, strangely enough, the government, at page 33 of their brief cites this proposition that there are no private rights a case that refers to private rights.

At the bottom of page 33, the government says: "In the words of this Court, the Act was not designed 'merely to protect the right of a union member to run for a particular office in a particular election', they asserted a vital public interest" -- well, of course, I'd be the last person to say there isn't a great public interest here. But there is such an obvious private right, it's exactly like the parallel case of Scofield, where this Court unanimously referred to the interblending of public and private rights.

The same interblending of public and private rights that you have at the Labor Board, you have here.

Now, if there are an interblending of public and private rights, which, it seems to me, are obvious, then we're the only one to protect the private rights. The Secretary doesn't even claim to protect the private right; he says there aren't any.

So I'm not -- there is a tremendous hostility between

the Labor Department and our side. We do not, however, have to rely on that.

I'm not relying on that to show we're not adequately represented. I rely on the very simple proposition that the Landrum-Griffin Act, as this Court held, set out both public and private rights, and that no one can -- and that we are properly to protect the private rights.

Now, as Mr. Justice White said, you may not be able to get everything in there that you want to protect those private rights, that may -- we argue the other side. We're still the person to protect the private rights insofar as the District Court, in supervising, would permit.

Q Well, I take it, even if the two issues you want added couldn't be added, if the Secretary ran a new election, he would still have to run a legal election.

MR. RAUH: Well, I would hope so.

Q And if the situation you claim existed in the prior election, actually existed, it's not supposed to exist in the new one if it was illegal.

MR. RAUH: Yes, Your Honor, and that therefore the remedy and the issues do come together.

Q Yes.

MR. RAUH: That's quite correct, sir, that in the remedy point that we want to be in on, you do get, you will get the problem on the issues themselves --

Q Even if they can't be litigated?

MR. RAUH: Yes, sir. Precisely.

Now, assuming there are private rights as to which we have a right to protect them under 24(a) and that we need 24(a), then the question comes down: Does Landrum-Griffin carve out and exception to 24(a)? Does it say you can't get in?

Now, the government's brief demonstrates beyond peradventure of doubt what no one challenges: namely, we can't start the suit.

Of course we can't start the suit. Section 403 of Landrum-Griffin says that it's the exclusive right of the Secretary.

But proving that we can't start the suit has nothing to do with proving that we haven't a right of intervention. And what the government's brief does not direct itself to is the difference between intervention and starting the suit. They don't mention the brilliant articles by Professor Shapiro outlining all the many differences between intervention and starting a suit. They don't mention that.

They don't mention this Court's decision in Phelps v. Oaks, which goes far beyond anything we suggest. In that case this Court said that in a diversity case an intervention by a non-diversity person didn't cause a loss of jurisdiction. The government doesn't mention that.

The government doesn't mention anything about the policy of strong enforcement, and having us in there will help strong enforcement, not weaken it.

Look at what we would do in our attack.

First, we will urge speed. We have every motivation for speed. The government suggests we might want to slow it down or something. We are under a despicable dictatorship here. The thing we want most is a speedy decision.

We know the union. We can be helpful in the court on that. We know the violations, because we were there when the violations were occurring that they wouldn't investigate. We think it would improve the situation to bring up the issues of pensions and bogus locals, and wrap the whole thing up as in Scofield.

We can help with the remedies. My goodness, we're going to be in the case.

In other words, we will be the ones who can help with this.

Now, Congress couldn't have thought that they wanted a one-sided thing here. You have to remember that Boyle is in that courtroom. The other side -- there are two factions: there's the Yablonski faction and the Boyle faction. Boyle is there. The general counsel of the union was the representative there.

But now they have new counsel, which has happened

because one man died, who was representing them. So they have new counsel.

The new counsel have already been disqualified in another case because they were too close to Boyle. And I would like to call Your Honors' attention -- we didn't have time for a reply brief because of the expedited schedule. But may I call Your Honors' attention to 77LRRM 2921, where the new counsel were discualified from the other case on conflict of interest because they're too close to Boyle. They're going to be there. And if we're not there, you get a wholly one-sided operation. Exactly what was referred to in Cascade about the danger of the court or the department knuckling under.

It will be a one-sided struggle in that courtroom with the Yablonski forces totally removed. Since 24(a) covers us, and since -- since 24(a) covers us like a blanket, which was conceded at one time, and since there is nothing in the statute that indicates that you should carve out this exception, we respectfully submit that it should not be.

Q Let me put a question to you, so you can be thinking about it while you're having lunch, Mr. Rauh.

I'd like to have you suggest to us this afternoon why it is that you can't do most of these things without intervention. I'm sure you will want to cover that.

That you won't be able to accomplish most, if not all,

of the objectives that you're seeking without actually having intervention allowed. If you'd address yourself to that after lunch.

MR. RAUH: Yes, Your Honor.

Q Thank you.

(Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.)

AFTERNOON SESSION

(1:00 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Rauh, you may continue.

MR. RAUH: Mr. Chief Justice, in answer to the question placed to me before luncheon, I would answer it this way:

I assume that the question does not go to the first reason for intervention, namely, to support the Labor Department in this suit by vigorous action; nor does it go to the last of the three points, namely, on the remedy. It goes to the second point of our adding issues, and why can't we litigate that somewhere else?

My answer to that is that while there may be jurisdiction to support the issue in other places, it cannot be in an election context because of Section 403.

For example, take the case of Boyle v. Blankenship, where the issue of Mr. Boyle's misconduct in the election raised has been adjudicated, he's been removed as trustee of the Welfare Fund because of his manipulations with the election -- with the pension fund during the election.

But it doesn't bring it into an election context.

So, my answer, sir, is that, first, it doesn't apply to our first and third reasons; secondly, on the additional issues, we cannot raise them in a context where they can be utilized in the election suit and, if I may add this point, Scofield was predicated on the assumption that you

would get all matters in one place that were appropriate to it. In fact, the basis of Scofield was that there not be piecemeal litigation; and I suggest the same thing would be useful here.

Now, --

Q If I may interrupt there, prior to this particular federal statute, if you had wanted to attack an alleged -- a union election, would you have had a State law action for it?

MR. RAUH: I believe so, yes, sir.

Q Under the Constitution, for a violation under it?

MR. RAUH: Yes, I believe, for many of these things; not all, but some.

Q And you still have that?

MR. RAUH: No, sir, I don't believe we have that any more, sir.

Q Q Why?

MR. RAUH: Because of the -- anything related to the post-election is covered by Section 403 --

Q Not just under the -- that just doesn't pre-empt other remedies under the federal law, you think it means --

MR. RAUH: Oh, I'm absolutely -- I'm quite confident of that, sir. If you look at this sentence, it says in 403, "The remedy provided by this Title for challenging an election already conducted shall be exclusive."

Q Where were you reading from?

MR. RAUH: I was reading from the last sentence of Section 403. In my brief it's on page 7, Your Honor.

"The remedy provided by this title for challenging an election already conducted shall be exclusive."

I do not --

Q What's the remedy?

MR. RAUH: Well, the remedy is the suit by the Secretary of Labor. That's the only remedy there is.

Q I know, but he's brought suit. I'm just wondering if there is any State law action which survives which could be pendent in this action.

MR. RAUH: I do not believe so, Your Honor.

Now, coming --

Q Let me pursue that just for a moment, Mr. Rauh. That would include, you mean, a suit to trace trust funds out of the union treasury or the pension fund, no State remedy survives the federal statute?

MR. RAUH: Oh, on tracing the funds, they're using the funds -- if they're using the funds illegally, under Section 501 we can bring suit. We have a suit on many of their illegalities.

Q But not a State action?

MR. RAUH: No. That's a LMRDA action. But it's not in a context of the election. In other words, what you

can't do is to bring a suit to try to affect the election after it's over. That has to be done in here. And we have to come in here.

Now, whether we can raise additional issues is the question that Mr. Justice White put to me, and I believe is also, in essence, the question that you put to me. I say we can. And I further say if there is any question about it, it should be left to the discretion of the District Court.

And I finally say that even if we can't, and you won't leave it to the District Court, it is only one of the three reasons why we say we should intervene.

Q Mr. Raum, I'm puzzled why you should suggest the last sentence in 403 necessarily bars a State action, on the grounds that it will not be heard in this suit.

Certainly if these were grounds which had not been included in the original complaint, that is, the entire union, under Hodgson; would you still say that as to those, which the Secretary now under Hodgson, may not touch in the lawsuit, that they would not be the basis of a State action?

MR. RAUH: Yes. I believe it would not be, Your Honor, --

Q By reason of this?

MR. RAUH: -- and I even -- yes, Your Honor, and I even -- and I point Your Honor's attention to an amendment that was rejected, that the government relies on, which is

irrelevant to the point that they rely on, but is relevant here.

On page 26 of their brief, they refer to an amendment that was offered, "The rights and remedies provided by this title shall be in addition to any and all other rights and remedies at law or in equity", and that was defeated. And the very purpose of that was to save those State lawsuits.

And that was defeated, sir.

Q Well, maybe in State courts.

MR. RAUH: But it -- I consider that exclusive in both, in both State and federal courts. I'm not saying the issue can't be raised, the issue is raised on the pension in a suit to remove Boyle as trustee, and it happened. But that is not in the election context.

Q No, I'm -- my question meant only in elections.

MR. RAUH: I don't believe it is possible. I know of no case where it has happened. And in -- I would like to just say that we haven't had to file a reply brief, we didn't have time. I'd like to just take one or two points in the government's brief and make a quick speaking reply.

On page 17 of the government's brief, they talk about how we'd slow it down and distort the planned procedure.

I call Your Honors' attention to the fact that in Scofield the Solicitor General's brief at pages 29 and 30 is almost the direct copy of all the terrible things that would

happen if people got in, and you let us in.

On page 26 -- the bottom of 25, they suggest we left a sentence out of a quote; but the sentence that we left out says, "A careful reading of the bill makes clear that, except where the bill provides specifically to the contrary" certain things.

Well, it is our contention, of course, that the bill here does not specifically provide that we may not come in.

On page 26 is the very statute I mentioned before, which the government says has something to do with intervention, but in fact what it had to do with was the right of saving your private right in State courts under State remedies.

And finally, on page 28, there's a reference to a Mr. Cox, who had a great deal to do with the adoption of the statute, and Mr. Cox, in the full quotation, makes perfectly clear what he's talking about is the undesirability of piecemeal litigation. He thinks it should all be in one place, and so do we.

In conclusion, I'd just like to say that the leaders and members of Miners for Democracy, the Yablonski faction, have risked much in this struggle. This suit is at the heart of that struggle. Nothing has been shown to evidence congressional intent, to keep us from the District Court courtroom, and we would urge Your Honors to get us there promptly.

Thank you.

Q Mr. Rauh, before you sit down: Did you say that this trial is scheduled to resume on Monday?

MR. RAUH: Yes, Your Honor.

Q Are you suggesting that we decide this thing immediately?

MR. RAUH: I'm not suggesting anything, Your Honor. I think that would be presumptious of me, and I am trying to be very --

Q Well, is it being held pending our decision?

MR. RAUH: No, sir. It is not being held pending your decision. What happened, sir, was that -- they were trying it, it started on September 13th. The government asked for a delay so they could do some work on their case.

While that delay was in effect, counsel for the Mine Workers died, so they postponed it for that reason. New counsel has been obtained. I explained to Your Honors this morning that the new counsel was that counsel that had been excluded from the 501 case by virtue of being too close to Boyle, but they will be there, and we want to be there, too.

But, as far as the date is concerned, well, of course, I think it'd be presumptious for me to tell you when to -- I'm trying to tell you how, but I wouldn't be --

(Laughter.)

-- so presumptious as to tell you when.

Thank you, sir.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Rauh.

Mr. Solicitor General.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF RESPONDENT SECRETARY OF LABOR

MR. GRISWOLD: Mr. Chief Justice, and may it please the Court:

Before I begin, I would like to call attention to the brief which we have filed in this case. For the first time, in literally thousands of these briefs that I have seen, the table of contents and table of cases is at the end instead of at the beginning. I haven't any idea why it happened. The Government Printing Office has printed these for 50, 75 years.

As you will recall, the case is here on an expedited schedule, and when I found this out on Monday I decided that we would simply leave it as it is and not try to incur overtime and whatnot and have it reprinted.

I've already found it something of an inconvenience myself, because naturally you turn to the front, and I say I'm sorry; but that's what happened. And there are some things even a Solicitor General can't control.

The case here turns on the construction of a statute, I believe, which is illuminated by the legislative history.

I do not think that I can demonstrate by logic, like that involved in the binomial theorem, that the result for which I contend is inevitable.

I do think, or hope, that I can make about as strong a case on legislative history as I can imagine, short of demonstration, which I think should lead the Court to the conclusion that the statutory provision should be construed to prevent intervention in this case.

Let me look first at the language of the statute to which not much attention has been paid in the argument so far, and I'm referring now to the brief of the United Mine Workers, the blue-covered brief, which has the statutes most comprehensively in the Appendix at the end.

Let me say also, by way of opening, that in this trial which is now going on, though it for the moment is in recess, in the District Court, the Secretary is vigorously opposing the United Mine Workers on this particular aspect of it relating to intervention. The Secretary and the United Mine Workers are on the same side. The United Mine Workers have yielded the time which they could have had in this oral argument to me, because they share our view that this is a suit in the District Court which is, and ought to be, in the control of the Secretary.

But Mr. Combs here is representing the United Mine Workers.

Now, Section 402 --

Q May I ask, Mr. Solicitor, I take it the trial judge is rather in a dilemma until we decide this, isn't he?

MR. GRISWOLD: No, Mr. Justice. I understand that he is going ahead on the basis of his decision, and the decision of the Court of Appeals. Should the case come to a conclusion before you decided it, I don't know what would happen. I assume that if you should decide that intervention is allowed, that he would then reopen the record and allow the presentation of the material which Mr. Rauh wants presented.

Q Except that I gather Mr. Rauh wants more than just to present that material, he wants to fight on the side of the Secretary.

MR. GRISWOLD: Yes, he wants -- he wants, I assume -- but he would, I suppose, be entitled to recall witnesses for cross-examination and other items of that kind. All of this, I should think, is within the control of the trial judge, and I have not heard any suggestion that it is not a matter which can be worked out.

Q There's no jury involved?

MR. GRISWOLD: No jury involved. And certainly if the Court's decision is adverse to our position, the Secretary will cooperate in trying to put the Court's decision into practical effect.

But Section 402 of the statute, which is the Labor-Management Reporting and Disclosure Act of 1959, quite a landmark in our labor relations law. Section 402 begins on page 5a of the Appendix to the brief. And it says that:

A member of a labor organization who has exhausted his remedies in the union, and who has invoked his available remedies without obtaining a final decision within three calendar months may file a complaint with the Secretary under Section 481; and Section 481 sets out, in considerable detail, standards for the conduct of elections.

402(b) provides that the Secretary shall investigate, and if he finds probable cause to believe that a violation has occurred, he shall bring a civil action against the labor organization in the district court of the United States; and then Section 402(c) provides that if upon a preponderance of the evidence after a trial on the merits, the court finds that an election has not been held within the time prescribed by section 481 or (2) that the violation of section 481 of this title may have affected the outcome of an election, the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the Constitution and Bylaws of the labor organization.

And then I will proceed next to Section 403, which is on the top of page 7a. There is a first sentence there

which is not relevant to this case, but the next two sentences I think are both highly relevant:

"Existing rights and remedies to enforce the Constitution and Bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this subchapter."

Whatever rights there are, State or federal, still remain.

And then the next sentence:

"The remedy provided by this subchapter for challenging an election already conducted shall be exclusive."

Q And do you also agree with Mr. Rauh that that pre-empts any State action?

MR. GRISWOLD: As to a suit after the election, yes, Mr. Justice. As to a suit prior to an election, not at all; because it does not relate to a suit prior to an election.

Now, I agree that it does not say "shall be exclusive and this shall apply to intervention". At no place does the legislative history or anything else contain the words "and this shall apply to intervention".

And that's why I say I can't mathematically demonstrate the result.

But I want to go ahead with the legislative history of the statute, to show that that language was deliberately intended by Congress, it was not incidental or accidental;

and that the scheme which Congress meant to carry out by this statute is one which would be frustrated by allowing intervention of other parties than the Secretary. What Congress intended was not merely that the Secretary should file the suit, but that he should control the suit. And he will not control the suit if intervention is allowed.

If Mr. Rauh's client can intervene, any other union member can intervene, including members of the opposition, and the scheme which Congress deliberately set up in this difficult and delicate area, would, I think, be clearly frustrated.

Now, the Labor-Management Disclosure Act perhaps can be said to find its legislative genesis in a bill which was introduced by Senator Kennedy in May 1958. And this contains essentially the language which is now found in Section 402, with only a very few changes.

Senator Kennedy said that there had been evidence that"some few unions have not conducted their affairs in a democratic manner, and since free secret elections are the cornerstone of the democratic union movenent, it appears appropriate that public safeguards be established."
And that is the first legislative statement with respect to the language.

The bill introduced in May 1958 contained the language that the remedies enunciated therein were to be exclusive, so that only the Secretary could bring such a

civil action.

This, incidentally, applied both before and after elections.

Nothing much came of that bill, but in June 1958 there was introduced another bill, S. 3974 of that Congress, known as the Kennedy-Ives bill. Senator Kennedy had built up support within the Senate, and this was passed by the Senate on June 17, 1958, seven days after it was introduced. Obviously showing that it had been worked on and agreed to by a substantial number of Senators.

And the Committee Report with respect to Section 301 in that bill that's now Section 401 states that these provisions "are to be enforced by the Secretary of Labor, upon complaint of any union member". And the report further stated explicitly that "private court litigation would be precluded".

In the course of the Senate debate on June 12th, 1958, Senator Kennedy presented some of his reasons for giving the Secretary the sole authority; Senator Wiley expressed his concern that this would involve the "destruction of the present rights of union members to seek State and Federal court relief", and Senator Kennedy responded that such relief was costly and time-consuming and, as a practical matter, unsatisfactory. He said that the bill chose rather to "provide the right to appeal to the Secretary of Labor, whenever a member believes that his rights, as provided in the bill in the

case of an election, have been denied to him."

Now, the petitioners in this case do refer in their brief, on page 28, to a statement of Senator Kennedy's in the debate which they say points in their direction. But, as Mr. Rauh has already indicated, in giving the quotation on page 28 of their brief, they omit entirely the immediately preceding sentence, which contains the language which he read, except where the bill provides specifically to the contrary.

And we contend that this bill does provide that with respect to post-election relief, that the enforcement rights are solely in the Secretary.

Q And I gather, Mr. Solicitor, does that position take you to the point, however inadequate -- let's assume -- may be the representation of the Secretary?

MR. GRISWOLD: Mr. Justice, there's always, of course, the situation of no good faith, of complete walking away and not meeting your responsibilities.

Q No, I wasn't thinking so much of that as, in this case Mr. Rauh urges on us that there are two questions, two issues that that side thinks ought to be submitted, and litigated, and that, I gather, are not to be.

MR. GRISWOLD: Yes, Mr. Justice.

Q Now, you have agreed with him that the last sentence of 403 precludes their seeking a remedy anywhere

else with respect to this election.

MR. GRISWOLD: Anywhere -- no, Mr. Justice, we do not. And I think that's important.

With respect to the question whether the past election shall be set aside, we say it does preclude them from seeking any remedy anywhere. But we see no reason why they are not free to maintain a suit with respect to the forthcoming election. Section 403 completely preserves all rights with respect to any future election, and we know of no reason why they cannot maintain a suit in the appropriate court, I don't know whether it would be State or federal, to raise the question with respect to the pension payments.

They already have the suit pending with respect to the validity of the pension increase. It's true it's not focused on the election, but it can be. And they have pointed out in their brief that before this election, Mr. Yablonski was forced to initiate five suits in the District Court for the District of Columbia, to secure rights guaranteed him and other UMWA members under the Act.

Q Well, do these two issues that they want litigated in this action, don't they -- aren't they addressed to setting aside the past election?

MR. GRISWOLD: They are addressed to setting aside the past election, but the Secretary having made investigation has decided that these are not grounds upon which he thinks it

appropriate to proceed, and we -- our position is that Congress has made him the exclusive judge of that.

Q Well, that's what I was trying to get to. I gather, then, that as to this past election, those two grounds may not be asserted anywhere --

MR. GRISWOLD: As to the past election --

Q -- under 403.

MR. GRISWOLD: As to the past election, I would agree that those --

Q Well, doesn't that suggest that there is at least a question, under the last sentence of 24, "unless the applicant's interest is adequately represented by existing parties"?

MR. GRISWOLD: Well, that -- you mean under Rule 24, with respect to --

Q What did I say? I meant Rule 24.

MR. GRISWOLD: And that -- my answer to that would be, in part, that Congress has allocated the determination of this question to the Secretary, and that, under Rule 82 and the enabling act, and decisions of this Court, the rule cannot extend the jurisdiction of the District Court, which is limited exclusively to actions by the Secretary. And that that would be inconsistent with the scheme which the Secretary has, which the statute has provided.

I would call attention to language of Rule 82. "These

rules shall not be construed to extend or limit the jurisdiction of the United States District Courts."

And I would suggest that to say that the petitioners here can intervene under Section 42, although it is established that the suit by the Secretary is the exclusive right, would be extending the jurisdiction. And I would call attention to cases such as Sibbach v. Wilson and United States v. Sherwood, both at 312 U.S. And in Sibbach v. Wilson, the Court referred to the inability of the court, by rule, to extend or restrict the jurisdiction conferred by statute.

And if this statute means what it says, that the suit by the Secretary shall be the exclusive remedy, then I think that the construction of Rule 24, for which Mr. Rauh contends, would amount to an extension of the jurisdiction, and, in effect, an amendment of Section 403 as Congress has passed it.

Q Mr. Solicitor General, suppose that we disagreed with you that Rule 24(a) was irrelevant in this case, but agreed with you that the Secretary is the only one that could bring the action, and he's the only one who can specify the issue, but that, nevertheless, in trying out those issues that he controls, 24(a) should have its normal operation; would intervention then, under 24(a), be justified on normal grounds?

MR. GRISWOLD: I'm not sure, Mr. Justice. I think it's hard to say. Mr. Rauh says that my predecessor, who

represented the Secretary in the Court of Appeals, conceded that in the Court of Appeals. I am told that he does not so understand what he said.

But I think it is a question which is very difficult for us. It is really a question of whether the petitioners here are adequately represented by the Secretary.

Now, it's perfectly plain that the Secretary is not presenting every issue and every ground --

Q Well, I'll put aside the issues.

MR. GRISWOLD: All right. Is not presenting every argument that they would like to have presented. And I think that turns somewhat upon the question of what you mean by representation, particularly in the light of a statute which prescribes that a remedy shall be the exclusive remedy.

Mr. Rauh refers to an article by David Shapiro, in which he holds open this question, but it isn't clear to me that Mr. Shapiro gave adequate weight to the -- not merely to the language of the statute that it shall be the exclusive remedy, but also to the very clear legislative history.

I think the question of intervention is a question of balance between many factors.

Q Well, isn't it -- as I read the opinion below, they did not consider 24(a) on its own footing, except with respect to the financial records and reports issued. As with respect to the other part of the case, they just said 24(a) was

irrelevant, in the sense that the statute itself, the labor statute itself, precluded application of 24(a).

MR. GRISWOLD: I think that's very close to accurate, Mr. Justice, and if one reads "exclusive" to mean exclusive, then Section 24(a) becomes irrelevant.

Q Well, if the court decided that that was error, I suppose 24(a) should be considered, and I suppose the Court of Appeals should consider it first.

MR. GRISWOLD: That would depend entirely upon the nature of the remand which this Court made, if this Court remanded it to the Court of Appeals to consider, I assume they would consider it.

Q But what would you think would be the scope of their consideration on the subject?

MR. GRISWOLD: I can't quite see, Mr. Chief Justice. If the Court says that "exclusive" doesn't mean exclusive, I find it somewhat difficult to see how a court could say that any union member cannot intervene if he thinks he has a point of view which isn't going to be fairly represented. This gets a little bit like the argument in the case which I presented yesterday. Here is a case where I think Congress --

Q I was just thinking, Mr. Solicitor General, that whether you're right or wrong, you certainly are consistent.

(Laughter.)

MR. GRISWOLD: Not always, Mr. Justice. But --

Q I mean between yesterday and today.

MR. GRISWOLD: -- between yesterdy and today, I am.

(Laughter.)

This is a --

Q That the agencies of government can take care of themselves, and the outsiders must be kept out.

MR. GRISWOLD: Not quite, Mr. Justice.

Q Well, almost, then.

MR. GRISWOLD: When Congress says the outsiders must be kept out.

Q I understand, yes.

MR. GRISWOLD: And when Congress deliberately allocates a function to be handled by the Secretary and says that that shall be exclusive in post-election suits. It does seem to me that it is entirely appropriate for the Court to say that this is a matter which can properly be allocated by Congress to the exclusive handling by the Secretary.

I repeat, this does not foreclose Mr. Rauh and his clients from raising, in whatever appropriate court there is, any issue, including these two issues, in advance of any election, including the election which will be conducted by the Secretary.

Indeed, I am not sure that it precludes the Secretary from filing a suit in connection with the holding of the

election under this suit in which he, in effect, asks for instructions, asks for a declaratory judgment.

This is somewhat complicated by this Court's decision last spring in Hodgson v. Steel Workers case, which says that the Secretary can't raise issues in the 402 proceeding, which were not presented to him by the employee. But I'm not sure after the 402 proceeding is completed, and it has been decided that there shall be a new election, that the Secretary cannot then raise in court questions with respect to the conduct of that election. And I know of no reason why Mr. Rauh and his clients cannot raise those questions in court with respect to the conduct of an election.

Now, let me say that the position advanced here by Mr. Rauh is a reasonable one, it was the view of a large part of Congress, and the bill passed the House once and, depending how you interpret it, I think twice, the way he says; but the other view is the one which was finally enacted by Congress, and both houses adopted it.

We have set in our brief more legislative history, including important statements by Professor Cox, who was well known to he Senator Kennedy's immediate advisor in the drafting of the Act, and, among other things, he said that the purpose of the bill was to centralize control of the proceedings in the Secretary of Labor.

It was also Professor Cox who recognized and, I assume,

prevailed on Senator Kennedy to accept the change, so that the exclusive suit by the Secretary was made applicable only to post-election proceedings.

The House adopted the bill in such a way that the employee could bring the suit at any time. There were hearings before the House Committee, in which Mr. Reilly made essentially the same point that Mr. Justice White has been making with me. He said, "There is all the difference in the world between having an administrative remedy and being able to control the litigation yourself.

"Would you not rather prepare a case yourself and present it than to go to an administrative agency?"

The House adopted the bill that way. It went to Conference and it came out of Conference in the form of the Senate bill, with the language in the statute to which I have referred, which seems to me to be, to use a word which has come into our law recently, to be facially conclusive. The exclusive suit by the Secretary, and which I believe is thoroughly supported by the legislative history.

It is perfectly true the legislative history does not say "and there shall be no intervention". But it seems to me to be very clear, or indeed the sort of question which the courts are well qualified to decide, that it was the contemplation and expectation of Congress that there should not be any sort of interference with the suit brought by the Secretary;

that this was allocated to the Secretary for a very real public purpose. After all, when there is a dispute about an election, after the election has been held, there is a great deal of feeling in many quarters, and if you then have the big, complete, comprehensive lawsuit in which all the issues are raised and all the emotions are let out, the thing becomes not only difficult but perhaps unsatisfactory.

And the purpose was to filter this through the Secretary of Labor. And I may say that in this case he made an enormous investigation with respect to what went on here. And then have the Secretary decide which issues he thinks are the ones which should be presented in court.

And if we go through all that process, but, nevertheless, the union disputants can intervene on both sides, and convert the lawsuit for setting aside an election and providing for the conduct of a new election, convert that into a general intra-union dispute settlement procedure, we have, it seems to me, destroyed the very remedy which Congress deliberately chose and established in these particular cases.

Now, I agree that Rule 24(a) is there. It's not unimportant. I don't say it is irrelevant. Rule 82, it seems to me, restricts its scope. And I think that, although Rule 24(a) might in other settings be adequate to allow for intervention here, generally, of course, intervention is encouraged, it is welcomed; that was the function of enlarging

the scope in Rule 24(a), but here there is a very special reason for keeping the control of the suit in the Secretary. That reason was explicitly intended by Congress, by a close division, the House one way, the Senate the other way. We do not know what went on in the conference to lead to the choice of the Senate bill.

We do know that both houses of Congress approved the Senate bill, and provided in the law, as it has been since 1959, that the suit by the Secretary should be exclusive, and we think that "exclusive" means that there should not be intervention.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Rauh, you have six minutes left.

REBUTTAL ARGUMENT OF JOSEPH L. RAUH, JR., ESQ.,
ON BEHALF OF THE PETITIONER

MR. RAUH: Thank you, sir.

The learned Solicitor General has demonstrated that we can't start suit. And when he says that the bill passed the House the way we say, it didn't pass the House the way we say, it passed the House saying the individual could start the suit. Nobody ever considered the position we take, namely, that the Secretary can start the suit, but intervention under 24(a) is something else.

Now, I would not have raised the question that the

Secretary is vigorously opposing the UMWA. But since the learned Solicitor General raised that issue, I have to state to the Court that in our opinion the case is not being prosecuted with the vigor it should.

I simply make -- I had refrained from saying that, but I cannot let the record stand with only the Solicitor General's statement that the Secretary is so prosecuting it, when we feel so strongly that it is not.

Most important --

Q This is apart, you mean, from the two issues that you wish presented?

MR. RAUH: Precisely, sir. However, we don't need that point. We have private rights, and the Solicitor General, on oral argument, did not suggest that we don't have private rights. He suggested it under 24(a). He was arguing that the word "exclusive" prevents intervention, although it doesn't say it.

But we have private rights, and we're entitled to represent those rights, because the Secretary doesn't even claim he's representing those rights. All apart from the fact that we do not agree that the case is being vigorously presented.

I only answered it because I didn't want the record to stand on one leg on that matter. I don't think it is important.

Now, Mr. Solicitor General states that the union disputants could intervene on both sides. But the union disputant is there on one side, that's what the point is: Mr. Boyle is in the courtroom and we're not. It's as simple as that.

It would be one thing if counsel were -- for Mr. Boyle, counsel for the union were independent of Mr. Boyle. But it's Mr. Boyle's counsel. He's in there fighting for Mr. Boyle, and we're not there.

It would be absolutely hopeless that the case could be a straight-down-the-middle. Judge Bryant has the advantage of Boyle in the courtroom; he doesn't have the advantage of the Yablonski faction.

Now, finally, and most importantly, on rebuttal: This idea that we could start a suit for the forthcoming election. Now, if Your Honors please, would you look at Item (c) of Section 402. It's in our brief, for example, at the bottom of page 6. It says:

"If, upon a preponderance of the evidence ... the court finds" that there should be a new election, the court shall declare the election, if any, to be void and direct the conduct of a new election.

Now, how in Heaven's name, can we start a suit after that? He'll have a decree giving the conditions of the new election. When will the time period be? A couple of months?

There's no -- the desire of Congress for speed is evidenced by a provision in (d), 402(d), that there can't even be a stay pending appeal.

The minute the District Judge enters the order saying that there's to be a new election, and enters a decree giving the conditions of that new election, it will be held. The suggestion that we then start a suit about a forthcoming election, in an election that can't be stayed, is just impractical and unrealistic.

The fact of the matter is, if we can't get there, we can't go anywhere.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Rauh.

Thank you, Mr. Solicitor General.

The case is submitted.

(Whereupon, at 1:44 p.m., the case was submitted.)