In the

Supreme Court of the United States

JOHN T. DUNLOP, SECRETARY OF LABOR,

Petitioner

v.

WALTER BACHOWSKI

No. 74-466

Washington, D. C.
April 21, 1975

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Monday, April 21, 1975

The above-entitled matter came on for argument at 10:58 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MARK L. EVANS, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530
For Petitioner

MICHAEL H. GOTTESMAN, ESQ., 1000 Connecticut Avenue, N.W., Washington, D. C. 20036 For United Steelworkers of America

JOSEPH L. RAUH, JR., ESQ., 1001 Connecticut Avenue, N.W., Washington, D. C. 20036 For Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 74-466, Dunlop against Bachowski.

Mr. Evans, you may proceed whenever you are ready.

ORAL ARGUMENT OF MARK L. EVANS, ESQ.

ON BEHALF OF PETITIONER

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

Under Title IV of the Labor Management Reporting and Disclosure Act, the Secretary of Labor is given exclusive authority to file a civil action to set aside a union election conducted in violation of the provisions of the Act.

The Court of Appeals for the Third Circuit in this case held that an unsuccessful union office seeker, though barred by the Act from bringing an action in his own name to set aside the election, may bring an action against the union and the Secretary of Labor to compel the Secretary to file the suit, even though the Secretary had already determined, after an investigation, that the member's complaint was unmeritorious.

The case arose on a complaint filed with the Secretary by Respondent Bachowski alleging that there were violations in the conduct of an election in which he ran unsuccessfully for the position of district director of a

United Steelworkers District.

At about the same time, complaints were filed with respect to elections in five other steelworkers districts and after an investigation of each complaint, the Secretary filed suit to set aside two of those elections but he determined not to file a suit in the case of Bachowski's district because he concluded on the basis of his investigation that the violations in that district did not affect the outcome of the election.

Bachowski then brought the present action in the District Court alleging that the violations did affect the outcome and that the Secretary's refusal to bring an action was arbitrary and capricious.

The complaint sought an order compelling the Secretary to bring an action in his name to set aside the election and directing the Secretary and the union to extend the statutory 60-day period within which the Secretary may file such an action.

The District Court dismissed the complaint on jurisdictional grounds, but the Court of Appeals reversed. It held that the factual basis for the Secretary's determination that the violations did not affect the outcome of the election is subject to judicial review at the behest of the union member whose complaint was deemed by the Secretary to be unmeritorious.

That holding, in our view, is inconsistent with the enforcement scheme of Title IV of the Act because it would permit a complaining union member to circumvent the Secretary's screening funciton under the Act and subject the union to precisely the sort of intrusion upon its internal affairs that the Act was so carefully designed to prevent.

The mechanism that was established by Congress to enforce the election rights guaranteed under Title IV reflects a delicate balance between the need on the one hand to provide effective remedies for election abuses and the Congressional concern on the other hand to avoid unnecessary interference in internal union affairs.

Congress feared that needless intervention might endanger union self-government and then weaken unions in their role as bargaining representatives.

In the course of considering the act that ultimately was passed, Congress considered and rejected a number of proposals that would have authorized individual union members to bring suit to set aside an election.

It was thought that such individual suits, filed, perhaps, by union -- by unsuccessful candidates as a kind of preelection infighting would impose upon the unions the substantial burden of responding to unmeritorious and potentially harassing complaints and would place, in the process, a debilitating cloud over the cloud of the

elected officers.

In the end, Congress chose to rely upon the discretion and expertise of the Secretary of Labor to perform a dispassionate screening function, separating out the meritorious from the unmeritorious complaints and filing an action in his name with respect to those complaints that he found to be meritorious.

The individual's role in this enforcement scheme is an essential but a very limited one. He triggers the Secretary's investigative and enforcement authority. Without his complaint, the Secretary can take no action, but once the Secretary's authority has been invoked, he and he alone has the power to bring an action against the union to set aside the election within 60 days of the time the complaint was filed and then only if he finds probable cause to believe both the violations occurred in the conduct of the election and that those violations may have affected the outcome of the election.

And this Court accordingly held in the Calhoon case that the Act prohibits union members from instituting a private suit to set aside an election.

The intention of Congress was to interpose the Secretary between the complaining member and the courtroom in order to protect unions from potentially frivolous litigation and a consequent unnecessary interference with

their internal functions.

As this Court stated in Trbovich, the intention was to insulate the union from any complaint that does not appear meritorious, both to the complaining union member and to the Secretary of Labor.

The Court held in Trbovich that the Act's objectives would not be defeated by permitting the member to intervene in an action already initiated by the Secretary so long as that intervention were limited to issues presented in the Secretary's complaint.

The Court also held that the intervening member may not add issues which he originally complained of to the Secretary but which the Secretary found unmeritorious because that would be a circumvention of the very screening function that had been assigned under the Act to the Secretary.

In our view, the Third Circuit's holding in the present case would permit a much more burdensome intrusion than the one that the Court held impermissible in Trbovich and that would even more clearly allow a member to circumvent the Secretary's screening function.

Although a suit to review the Secretary's determination that litigation is unwarranted would inform, perhaps, the suit against the Secretary of Labor, the union might well be named the defendant as, indeed, the

union was named the defendant in this case.

But even if it were not named, it would be as a practical matter, essential for the union to participate, presumably as an intervenor, but no less than as an amicus in order to protect its rights in this -- what amounts to the critical stage of the litigation.

The consequences of a determination that the Secretary's refusal to file suit was so improperly-based as to be arbitrary and capricious would obviously be damaging in the immediate future because a suit would presumably be filed by the Secretary, but in the long run because the issues had been fully adjudicated, on a different burden, true, but fully adjudicated in the first action.

And in the course of this proceedings, while the issue presumably is the propriety of the Secretary's investigation and decision-making with respect to this particular complaint, it is inevitable that, among the issues that are going to be inquired into, is the validity of the election itself, which is really the ultimate way you test to see whether the Secretary's decision was arbitrary and capricious.

Now, if the Court ultimately held that the Secretary abused his discretion in failing to bring an action upon the member's complaint, the union would be at that point required either to try to persuade the same

judge, if it came before the same judge, that he was wrong in the first place, or if a different judge were assigned to the case, the union would have to put on its whole case again. That double burden is far greater than the burden Congress thought it was imposing on the union.

Even if the Court found, as it probably would, that the Secretary's actions were not arbitrary and capricious, the union would still have been put to substantially the same burden in participating in the suit to review the Secretary's determination that it would have been put to if the individual member could have filed on his own.

It is the same burden that Congress was legislating against, the burden of responding to potentially frivolous and harassing complaints.

In the end, no matter what result the District Court reaches on the member's suit to review the Secretary's determinations, the elected officers of the unions would, during the period of this litigation -- presumably subsequent appeals -- be functioning under a cloud upon their title to office.

That alone, we submit, would substantially defeat the Act's policy of requiring prompt resolution of election disputes, precisely to free the elected officials from the debilitating effects of the continuing doubt as to their legitimacy.

The result, in sum, is substantially the result that Congress sought to prohibit in giving the Secretary the exclusive authority to bring a post-election lawsuit.

Unions, under the Third Circuit's rule, could be haled into court without limitation. They would be subject to potentially frivolous complaints, and the Secretary's authority to insulate the union from those complaints and from an unnecessary interference with their internal affairs would be wholly emasculated.

His screening function, in effect, would be transferred to the courts.

The Court of Appeals' response to this argument which Respondent parrots in his brief, appears at pages 9A to 11A of the petition of the Government -- the Appendix to the petition of the Government.

The Court stated first that a suit to review the Secretary's decision not to sue would not subject unions to unnecessary interference because the Secretary's decision would be overturned only when there was a compelling showing that he ignored a meritorious complaint.

But to say that there would be a heavy burden upon the complaining member does not negate the intrusion. The interference is not simply the ultimate danger of having the election overturned but the very process of the judicial review which necessarily entails a response to

claims that the election was invalid.

Congress recognized that a union's internal affairs are intruded upon and its resources are taxed whenever it is haled into court to defend its election and that is why it sought to insulate the union from frivolous complaints. If the only worry were the ultimate overturning of the election, there would have been no need to insulate the union from frivolous complaints.

So the burden of proof makes no difference in the ultimate damage to the union.

Second, the court stated that unions would remain protected from frivolous claims because the Secretary would bear the primary responsibility for defending against a suit to compel the suit.

But it is unrealistic, I submit, to suppose that the union would not actively participate in support of its own elections and since any dissatisfied member could presumably, under the Third Circuit's ruling, bring a collateral action of the sort that was brought by Mr. Bachowski here, no matter how unmeritorious his complaint, there would be no protection at all.

The union's theoretical right to let the Secretary carry the weight of the litigation is not likely to be invoked simply because there is too much at stake for the union.

Third, the court stated that in a subsequent suit by the Secretary, if the members' collateral attack were successful, would be centralized in a single proceeding.

That, I conceive as an effort to satisfy the second of the purposes that this court stated in Trbovich was meant to be served by the enforcement scheme. That is, be centralized in a single proceedings -- such litigation as might be warranted.

But that, itself, is in substantial doubt. Presumably, a member who brings this suit to review the Secretary's decision not to sue could file it either in Washington, D. C. or in his home district. The Secretary is limited under the statute to suing the union if he ultimately brings a suit in the headquarters of the union, in the district in which the union headquarters is located.

So there is no guarantee that we are going to be -- you know, that this new proceeding is going to be even in the same court. But even if it were, it creates problems that I have alluded to earlier. If it comes before the same judge, the judge's mind is essentially made up. It is a next-to-impossible burden for the union in the second proceeding to adequately hope to defend itself and if it goes to the second judge then the union has to put on this second round of defense.

Finally, on page 11A, the Court minimized the

damaging effect on a union of having to function under a cloud on the title of the officers. In its view, that concern may be subordinated to the goal of providing effective remedies for election irregularities.

But Congress thought differently. It subordinated that concern only to the extent provided in the Act. Although the courts have properly permitted the Secretary to bring an action outside the 60-day period, when the union itself has waived the 60-day period or where the union itself has obstructed the investigation, that kind of estopple is not present here and those brief delays are not comparable to the obviously lengthy delays that would be involved here.

It may be months or years before the Secretary ultimately files the complaint if the court tells him he has to.

Of course, during all that time, the union members, the elected officers would be suffering under this doubt as to their legitimacy.

Respondent argues that Trbovich doesn't control this case because the issue of reviewability was not presented in that case and I think, strictly speaking, he is right. The court held only that the intervening member could not raise additional issues that were not deemed meritorious by the Secretary.

But on Respondent's theory, Trbovich, though barred from raising those additional issues as an intervenor in the Secretary's action, could have simply gone out and started a separate proceeding to review the Secretary's refusal to include those issues in his own proceedings. That would surely have been more burdensome to the unions, more cumbersome to the courts and I think much more damaging to the Act's policies than simply presenting the new issues in the ongoing proceeding.

While the court, in Trbovich, did not concededly expressly consider whether this collateral review proceeding would be proper, there can't be much doubt how that issue should be resolved in light of the principles of Trbovich.

A suit to review the Secretary's determination would effectively circumvent the Secretary's screening function and, just like the new issue intervention in Trbovich and just like the separate suit in Calhoon, a suit to review the Secretary's decision not to sue is barred by the act.

QUESTION: Yes, but the Secretary's decision not to sue must be preceded, I gather, by his determining that there is not probable cause to believe that there is a violation of the act.

MR. EVANS: Either that there is not a violation of the act or the violation did not affect -- there is not

probable cause to believe that they have affected the outcome of the election and that is not explicit in the statute, but --

QUESTION: It certainly isn't.

MR. EVANS: No, it is not. At this point, it isn't.

QUESTION: Where did you find that?

MR. EVANS: Well, it appears in legislative history. It appears in this Court's decisions and it has been a uniform decision in the courts of appeals.

QUESTION: Let's assume it weren't in there and the statute simply says on its face that if there is probable cause, the Secretary shall -- shall -- bring a civil action.

MR. EVANS: Well, it is, on its face --

QUESTION: That is hardly unlimited discretion of the Secretary, isn't it?

MR. EVANS: Well, we are not saying he has unlimited discretion. We saying it is unreviewable discretion and there is a difference. There is a substantial difference.

QUESTION: Well, not the way you put it in your brief.

MR. EVANS: Well, I think if you read the brief in light of my argument, it will--

QUESTION: How about the legislative history?

MR. EVANS: Well, the legislative history I'm referring to, Mr. Justice White, is very explicit in the section-by-section analysis and in both Senate reports it states -- and, indeed, it was quoted in this Court's decision in the Hotel Employees decision, I believe.

QUESTION: You say that the Secretary should have the unreviewable discretion of a prosecutor dediding not to file a charge.

MR. EVANS: Well, I --

QUESTION: You are saying it is the same as the general counsel of the Labor Board has.

MR. EVANS: Precisely. Now, that is really -- that issue is an important issue, I think, but it really isn't even in this case because there is no question that the Secretary here found that there was violations that did not affect the outcome of the election.

Now, if he had relied on some collateral factors, we might be -- and I am sure we would be -- here arguing that he would be entitled to do so to a certain extent. Certainly to the extent, it seems to me, of taking into account all factors that bear upon the likely success of his suit because if he were to file a suit that he thought had no hope of prevailing, it would surely impose upon the rights of the noncomplaining members.

QUESTION: But you say the Secretary can be as arbitrary as he wants to in turning down a suit.

MR. EVANS: Well, we don't say he can be arbitrary. We just say that his exercise of the statute --

QUESTION: You say it is unreviewable. You say it is unreviewable.

MR. EVANS: That is not the same thing, Mr. Justice White.

QUESTION: It doesn't make any difference whether it is arbitrary or not.

MR. EVANS: Well, it doesn't make any difference --

QUESTION: He can be fired from his job, can't he? If he arbitrarily --

MR. EVANS: Precisely. Congress -- Congress made a very deliberate decision to trust --

QUESTION: Whether it is arbitrary or not, you say it is not judicially reviewable.

MR. EVANS: Precisely.

QUESTION: I don't think so.

QUESTION: One of the differences between your prosecutorial discretion-type of case and this case is that with the typical criminal case, your complaining witness at least has some sort of a private remedy and here, I take it, Congress has preempted all private remedies so that if the Secretary refuses to file, the complaining party

has no remedy.

MR. EVANS: Well, that is true in a sense, but it is also true of the general counsel of the Labor Board, if an employee files a charge that he was dismissed because of union activities and the general counsel, after investigating it, decides not to file a complaint for one reason or another, arbitrary or not -- there is, it is established that there is no further right. That is his only right

His only remedy is to have the protection of the general counsel and, thereafter, the board.

QUESTION: Is that clear, that he has no other right at all?

MR. EVANS: Well, my understanding is, is that if it were that kind of a charge, he would have no other right. There may be other kinds of charges that would be filed against an employer but he would have a right to go to court.

QUESTION: Does the analogous language in the National Labor Relations Act with respect to what the general counsel shall do upon the filing of a charge with him -- does it say he shall -- if he files a charge.

MR. EVANS: If the language really is differently structured, Mr. Justice Stewart, the -- what it says is in a more -- a little bit clearer on the face of the statute. It says that the general counsel's decision whether to file

a complaint will be final-- or has a final authority on behalf of the board to determine whether complaints should be filed.

QUESTION: So you can't very much rely on the similarity of language.

MR. EVANS: No, I am talking about --

QUESTION: You are talking about the similarity of function and structure.

MR. EVANS: Exactly and the whole structure of this act's enforcement scheme makes it plain how the -- what the result is. It should be the same as the general counsel of the Labor Board.

We have ceded five minutes of our time to Mr. Gottesman, who is here on behalf of the Steelworkers. I'd like to retain the balance of my time.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Evans.

Mr. Gottesman.

ORAL ARGUMENT OF MICHAEL H. GOTTESMAN, ESQ.

ON BEHALF OF UNITED STEELWORKERS OF AMERICA

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

The Congressmen that enacted the Landrum-Griffin Act spent more time on shaping the enforcement remedy of Title IV than on almost any other of its provisions and it spent so much time because it really had two essentially-

essentially conflicting objectives that it was trying to accomplish and it was trying to calibrate precisely the right balance between them so that it has an effective enforcement mechanism but one that was not going to injure its other concern and that other concern was that unions be able to function effectively and that they have stability of leadership and that their leadership not always be under a cloud.

Now, how did Congress shape that balance?

We know, of course, that their one concern, the major concern was to have democratic union elections and to that end, they enacted not only a very comprehensive substantive code but they put the full weight of the Federal Government into the enforcement of that code.

They said the Labor Department shall investigate at the behest of any member and if the Secretary of Labor found probable cause that a violation may have occurred, he would bring a lawsuit.

Now, I might say that there is no other election in this country, public or private, that is regulated as extensively, either substantively or in terms of the enforcement machinery as union elections are under Title IV and that is so whether or not you add to that arsenal the additional item of judicial review that is sought in this case.

Now, though Congress provided that arsenal of enforcement, substantive and enforcement machinery, it was also very concerned about the implications of that and the implication it was most concerned about was that if in every union election there could then be a subsequent legal challenge which could go on indefinitely, the title to the union office would then be under a continuing cloud and the capacity of unions to function would be adversely affected.

Congressmen, after all, are politicians. They know that in an election year there is some legislation that doesn't get passed or considered.

There are some steps that are not taken and they were concerned that if union elections could be under a constant challenge, union officers would like elected officials in the election year all the time. They would always be pulling their shots for fear, number one, that there is an election right around the corner and not only would they be pulling their shots, but the employees who look to them for direction and the employers who have to deal with them at the bargaining table would not be certain, number one, whether these people were ever properly elected in the first place and number two, whether they are still going to be there a week from now and it would affect, and vitally affect, the whole collective bargaining process and the whole internal process of unions.

And so, though Congress created this machinery for enforcing union democracy, it also provided very carefully for when the curtain would be rung down on that machinery and when it could be said, okay, members of this union, your officers have now been finally determined. The status is no longer under a cloud. Employers know who to deal with and employees know who to look to and you shall now go on for the duration of the term.

And to that end, Congress, number one, put very rigid time limits into the complaint mechanism of the statute. Members have to go to the Secretary within a specified time. If the Secretary is going to sue, he has to bring that lawsuit within a specified time.

Congress was anxious in that way. It said that time was of the essence to end the cloud on title to union office.

Beyond that, Congress expressly took away the right of individual union members to institute these lawsuits because that would have left to any union member the capacity to put the union title under cloud.

And, finally, what Congress did was to say that this action which the Secretary of Labor could bring if he found that there were violations that may have affected the outcome was exclusive, so that it made clear that if the Secretary reached the contrary determination, there would

not, indeed, be the continuing cloud over union office.

The curtain would ring down. The officer's title would be clearly established.

Now, to allow the suits of the type that is involved here totally undoes that statutory structure. It totally undoes it because it puts back in the hands of every union candidate in every union election the capacity to indefinitely leave title to the union office under a cloud.

QUESTION: Do you think the Secretary ought to leave behind him some evidence that he has done the job?

MR. GOTTESMAN: Absolutely. I think this Court could well inquire as to what procedures should lead up to the Secretary's decision.

QUESTION: Do you think there might be judicial review to the extent of requiring the Secretary to A) process a complaint and B) to do it in accordance with the statute?

MR. GOTTESMAN: I think as to A) the failure to investigate, clearly, he could be mandamused to investigate as this statute required.

QUESTION: And also required to make a decision on the complaint --

MR. GOTTESMAN: Absolutely.

QUESTION: -- as to whether to file or not.

MR. GOTTESMAN: Absolutely.

QUESTION: And must he also, as I say, leave some facts that indicate that he has decided that there is not probable cause?

MR. GOTTESMAN: Well, the court below said that he had to and it said that it would have reached that result independent of the reviewability of his decision. They said, we want people to state the reasons for administrative action.

QUESTION: How about that? Do you disagree with that?

MR. GOTTESMAN: Not at all. Nor does the Secretary.

QUESTION: And so that he can be required to state reasons as to why he doesn't think there is probable cause or does he just have to say that there isn't probable cause?

MR. GOTTESMAN: Well, the court below said he has got to tell the complaining member the reasons and the Secretary expressly has said that he is not seeking review.

QUESTION: You don't seek review.

MR. GOTTESMAN: No, not at all.

Now, if all we were concerned about was the fact that theoretically one member in that rare case in a million where the Secretary is arbitrary could institute a lawsuit

the concern about clouding union title wouldn't be very grave. But I think we have to realistically recognize that there are incentives to bring these lawsuits other than the prospects, which are always going to be small, that they can be successful.

The losing candidate in the union election, if he hopes to run again, needs a forum to keep his name and attention, to keep his charges against his opponent alive, and these lawsuits are magnificent vehicles for that purpose. There is nothing the media love more than internal union conflict.

The filing of this lawsuit has attracted enormous media attention. The charges that are made in the complaint in this lawsuit are repeatedly recited in the press in the Pittsburgh area and of course, there is also the opportunity for discovery, which is useful to a candidate who would like to find that with which to campaign next time around.

So that these lawsuits will be seen as attractive vehicles by candidates irrespective of whether they think there is any realistic chance of setting the Secretary's decision aside as arbitrary and capricious and thus you can anticipate that in order to accommodate that one case in a million where the Secretary is arbitrary, you are going to totally topple the Congressional concern that

union officers titles not be under an indefinite cloud at the behest of any union member.

Now, in closing, I'd like to note that we think the statutory interpretation question is clear. There would be a very serious constitutional question if this Court were to read the statute differently than we do.

Never, at least as far as any of these parties have been able to find, have the federal courts ever directed the executive branch to bring a lawsuit before them.

There is a serious separation of powers question of whether the Court assumes a prosecutorial mantle when it not only directs the Secretary to file a lawsuit but of necessity tells him what allegations to include in the complaint in that lawsuit and the Court would have to do that because after all, not every one of the dozens of charges that the complainants may bring to the court was necessarily so powerful that the Secretary was arbitrary and capricious in not suing about it.

The Court is going to have to sift through those and say, Mr. Secretary, I think you ought to sue on items one, five, nine and twelve. You were arbitrary and capricious on those.

So the Court is in the process of telling the Executive Branch, file a complaint before me. Here are the allegations I want you to make and it is ironic that

under a statute in which Congress evidenced no intent for such review that we would have to get to such a constitutional question.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Rauh.

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

ON BEHALF OF RESPONDENT

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

This case is rendered simple by two points. First, the provision of the verified complaint admitted before this Court that the Secretary's own investigation substantiated our allegations of violations and affected the outcome of the election.

We pleaded more than we had to, Mr. Justice White.

You have made the point that it says only that the violations.

We pleaded, the violations, the Secretary found them and that they may have -- and, more, that the most the statute could require is that they may have affected the outcome. We pleaded that they did affect the outcome. That is admitted before this Court.

Second, that is the paragraph 18 of our complaint.

Second, the statute provides that, under the admitted circumstances of this case on the complaint,

namely, that the Secretary's own investigation found violations which affected the outcome of the election, the Secretary shall sue to upset the election.

Not may sue, but shall sue.

If you look at the Government's brief on page 3 where they set forth the statute, the statute reads, "The Secretary shall investigate such complaint and if he finds probable cause -- " and the most that "probable cause" could mean is that there are violations and that they may have affected the outcome.

We pleaded more, if he finds probable cause to believe that there has been a violation, he shall bring a civil action. Now, that --

QUESTION: Where do you say it is printed, Mr. Rauh?

MR. RAUH: Paragraph 18 of our complaint, sir. It is on page 5A of the --

QUESTION: Yes, but why do you say the Government admitted it?

MR. RAUH: Because it was dismissed on jurisdictional grounds. You see, this -- there was never an answer filed. The court dismissed the complaint on -- the District Court dismissed the complaint on jurisdictional grounds and therefore, obviously, everything we have pleaded not only must be accepted but must be -- not only

accepted, but has to be given a favorable construction.

The court said -- in essence, what the court said was, nothing you can plead will change my mind. I have got nothing to do with it and so --

QUESTION: Which paragraph are you referring to?

MR. RAUH: Eighteen, sir.

QUESTION: Eighteen. On page 5A of the Appendix.

MR. RAUH: Yes, sir. Now, this is --

QUESTION: Was your suit in the District Court something in the nature of a mandamus action?

MR. RAUH: In the nature of, yes, sir. But you -- we didn't call it that but I think you could say it was in the nature of mandamus, actually, sir.

QUESTION: Is a mandamus action not limited into an inquiry into whether the procedure followed was proper?

MR. RAUH: No, it is a mandamus action only in the sense that it would require the Secretary to do something. It is not a mandamus action -- it is a review action of the Secretary's conduct.

QUESTION: Well, mandamus does not lie to compel a discretionary act, does it?

MR. RAUH: Well, I -- I may have misspoken but it was mandamus in the sense that we require him to do something, but it was the normal review, the normal judicial review of an administrative agency is to require them to

do something, to do something different than they wanted.

In that sense, it is a perfectly normal review.

QUESTION: YOu say that this case is no different than if the Secretary had said, I know you filed a complaint but I am just not going to prosecute.

MR. RAUH: That is exactly what he did. His own investigation showed this.

Now, you may ask me, how do I know this? We have a verified complaint of this. We have it from the Pittsburgh office of the Secretary of Labor. That is where we got it. We don't verify -- Mr. Kenneth Yablonski is a member of this Court.

QUESTION: I suppose you would say that the Secretary should have answered and said, I investigated and I performed my duty and I move to dismiss.

MR. RAUH: He could have done that but he didn't.

QUESTION: Well, I know but if he had said that, wouldn't the court have been through then? He wouldn't have had to have a trial.

MR. RAUH: Well, we -- I think we would have had a right to review. Now, I'd like to -- this is exactly the point, sir. This is not a case of arbitrary use of discretion. This is far worse than abuse of discretion.

The Secretary had no discretion to abuse. This is a simple case where the Secretary refused to act on his own

investigation as required by the statute.

Well, the statute in this case just fits it but I don't -- that point hasn't ever been referred to by the Government. The Government never said anything. You didn't hear a word said about paragraph 18 and the allegation there. But let me say this, I like to look at it in a broader context. I think the case is over when we allege probable cause is dismissed on jurisdictional grounds and then we come here. I think we have won the case. But I am going to argue --

QUESTION: Well, that is what the case is about.

MR. RAUH: No, I want to argue a broader point. I think there is a reviewability of abuse of discretion. Even if you didn't accept -- I want to go farther -- I want to look at this at the broader point. I disagree completely with the Government on the question of abuse of discretion.

The Government says there is no right of review of abuse of discretion. I'd like to argue that as the major point, even though the minor premises, I don't know that you get to that.

Now, on the major premise, what is APA all about if this isn't an APA case? There is a presumption of reviewability under APA. It takes clear and convincing evidence to rebut that presumption and actually, we don't

even need that presumption because there are more Congressional indicators of attempt to review than are the other way. There is the mandatory terms of the statute -- I won't repeat that. There is the desire of Congress to preserve preexisting rights to which Justice Rehnquist addressed himself.

This interpretation of the Government does away with all our preexisting rights. It means, we, the minority in the union, who had a right to sue under the Constitution under our old state law, to sue under the union constitution, now lose that right and they say the Secretary can arbitrarily take that away.

That could not have been the Congressional intent. Indeed --

QUESTION: Congress took the right away to sue under state law!

MR. RAUH: Yes, sir.

QUESTION: YOu don't challenge?

MR. RAUH: No, no. Precisely because they took it away --

QUESTION: You rely on that.

MR. RAUH: I rely on it. Thank you, sir.

I rely on it because they couldn't have both taken it away and then said the Secretary, who now is your union lawyer for you to vindicate those rights can do it

arbitrarily.

QUESTION: Well, when you say they couldn't have done that, you begin to lose me --

MR. RAUH: I said --

QUESTION: -- because I would think Congress could say, you have no rights under state law and the interest in having union title unclouded is sufficient that we are going to give the Secretary unreviewable discretion.

Would you say there is a constitutional question?

MR. RAUH: I would, but I don't have to.

QUESTION: I would think you don't have to.

MR. RAUH: Well, I say I don't have to say there is a constitutional problem. There might be a contracts clause. A member has a contract in his union, sir, and it may deprive him of those rights but I can't -- under due process -- but I don't need that. There is no intent. There is no showing that they intended to do that.

In fact, the showing is that they wanted it the other way. In 403 they squarely say, we protect the pre-existing rights prior to the statute -- prior to the election. We don't protect them after the election. The Secretary is to protect them.

I can't believe they intended to give the Secretary that right to protect them and then say he could be as arbitrary as he wanted in protecting them. Indeed, they

call him the union members' lawyer.

Well, don't tell me I got a lawyer who is able to be arbitrary in handling my case. That is what they are, in effect, saying. The Secretary is -- then, you go on to the basic purpose of the statute.

The statute was for union democracy. Is it to be interpreted that they wanted to give the Secretary the arbitrary right? I didn't hear anybody challenge the statement that we made on the bottom of page 6 in our brief -- "Counsel for the Secretary in the court below when"-- this is footnote 4 -- "Counsel for the Secretary in the court below, when asked whether the Governmentsclaim of immunity from review included a case where a union made a substantial political contribution in return for the Secretary's decision not to sue, answered in the affirmative."

I don't know what --

QUESTION: Isn't the Secretary something a little different or a little more than attorney for the union? Doesn't he occupy a role something like the one of the Attorney General of the United States when it is described as a quasi-judicial function?

MR. RAUH: In that --

QUESTION: It is a ministerial function, is it not?

MR. RAUH: It is a function that involves some

discretion -- not in this case, as I pointed out earlier, but in the ordinary case there would be some discretion.

QUESTION: Well, in the first instance, when the problem is presented to him, he is to act as something in the nature of an umpire. He is neither on the side of the union or on the side of the dissidents.

MR. RAUH: Yes.

QUESTION: Isn't that true?

MR. RAUH: He had a double function, your Honor. There was something in the nature of an umpire but, as Senator Kennedy said on the floor -- and as this Court referred to in Trbovich, he also was to act as the union members' lawyer because the union couldn't sue -- the union member couldn't sue himself.

QUESTION: That is once he has decided that an action should be brought.

MR. RAUH: No, I think he was the union members' lawyer. I don't think it was in that connection, sir. It seems to me, if you are the lawyer, you are the lwyer. I don't think it was limited to time.

QUESTION: Well, you can say the same about the Attorney General of the United States. But we also have often said -- many courts have said he has a magisterial function.

MR. RAUH: Perhaps a material function.

QUESTION: Oh, magisterial, too. But they must first make the decision whether he is going to bring the suit and then once he has made that decision, then he is an advocate and an adversary.

But until the Secretary of Labor has made the decision here, do you suggest he is an adversary?

MR. RAUH: He has the double function, according to the Senator Kennedy saying, we are taking away the right of the union member to sue. We are treating the Secretary as the union members' lawyer.

He has a double function there, sir. There is no way of getting away from the double function.

QUESTION: But doesn't he, under the statute, have the right to take into consideration the public interest?

MR. RAUH: Whatever that might mean, sir. But in a case where you have the violations affecting the outcome, I can see no other judgmental factor that would come into it. But furthermore, he didn't --

QUESTION: Well, he doesn't have to find his public interest in what you say it is, does he?

MR. RAUH: No, sir. But he has to find it in something I think that the Court could reasonably feel was the public interest. It would be that point on which I would --

QUESTION: That is, if the statute didn't give it

to him.

MR. RAUH: If it didn't give him final power. If it did, it is sure an exception because after APA, the number of cases this Court has said are totally unreviewable are mighty limited.

QUESTION: Mr. Rauh, you seem to have made two points, one, that the Secretary didn't even do his job here or even purport to do it --

MR. RAUH: Yes.

QUESTION: And, secondly, that even if he did it, he was arbitrary.

MR. RAUH: Yes, precisely, your Honor.

QUESTION: Now, the first issue seems to have washed out in this case because the Government doesn't contest and neither does the opposing union contest that the Secretary has to make the decision and has to give reasons for it.

MR. RAUH: Well, I --

QUESTION: In which event, he is going to demonstrate that he has at least covered the track the Act indicates he should cover.

MR. RAUH: Sir, for 16 years the Labor Department has not given reasons.

QUESTION: Well, I know, but --

MR. RAUH: Wait a minute, when we were here in this

Supreme Court, you always get improvement in the Government when you are in the Supreme Court.

When we were in the Supreme Court for the first time in 60 years of this statute, they finally admitted they had to give reasons. Now, why in heaven's name should they have to give reasons and not have to justify the reasons?

Suppose they said I din't want to.

QUESTION: That is not my point, now. I just want to know, now, is the first issue washed out on that?

MR. RAUH: No, sir.

QUESTION: Well, why hasn't it? Because now they are going to have to give reasons. They are going to have to prove that they didn't disregard the complaint. That they made the investigation. There isn't probable cause and here is why.

MR. RAUH: Well, they are not going to be able to show that. They have made --

QUESTION: Well --

MR. RAUH: It is as if I said, oral phone call. We are not going to sue. That is what we learned about this. Now, a year later --

QUESTION: Well, I know, but that was before --

MR. RAUH: That's right.

QUESTION: -- before this decision.

MR. RAUH: Before it got to the Supreme Court.

Then, all of a sudden, the Labor Department, when they are in the Supreme Court, suddenly says, oh, we are happy to give you a reason. Then they start giving them.

QUESTION: Well, in which event, if you -- if that is what occurs, then you are going to know that they have at least purported to do their job, which you complain -- your paragraph of complaint alleges and it is admitted that they didn't.

MR. RAUH: Well, I think that is final until we go back and, look, we can go back to the District Court, if this is revkewable and they can then say what they want to say about it, which they didn't say before. They can say it in the District Court when we go back under the Third Circuit.

Now, look at their indicators, the Government's indicators and weak they are. They say, we are trying to circumvent the mechanism of the Act. We are not trying to circumvent anything. We have to prove arbitrary and capriciousness. That isn't the same as trying to sue.

The exclusive remedy, far from helping them, hurts them. Congress, when they gave an exclusive remedy, must have felt they weren't going to be arbitrarily applied. You don't give exclusive remedies for arbitrary application and I think Trbovich settled this.

Everything said this morning by the representatives of the Government and the union was said by Solicitor General Griswold to this Court in '71 when I argued the Trbovich case against him.

He said the exclusive remedy shows you can't intervene. Well, exclusive remedy no more shows you couldn't intervene, as this Court held, than it shows that you can't do anything about it.

This Court rejected the proposition that the private, poor minority union was helpless. This Court rejected that and it must reject it again.

Indeed, it is funny, if you look at the Government's brief. You might have your law clerks look back because it is funny, what the Government's brief and its legislative history did was just to pluck it right out of Trbovich and yet this Court had said, in Trbovich -- this is what the Court said in Trbovich about the Government, the Secretary; in his view, the legislative history shows that Congress deliberately chose to exclude union members entirely from any direct participation in judicial enforcement proceedings under Title IV and then you rejected this unanimously. And the exact same legislative history --

QUESTION: I don't quite understand your point of what was plucked out of what brief or what page?

MR. RAUH: Out of the Trbovich Government brief,

they plucked the legislative history section of this brief which your Honors had already rejected in Trbovich as not showing you wanted to exclude the minority member from any union participation -- any participation in the process.

QUESTION: This brief plucked from Trbovich.

MR. RAUH: Yes, sir. It is an almost identical. I got a good laugh because somebody just copied it out. And it was exactly what you had rejected on the very point that is before this Court.

QUESTION: Well, that is the only legislative history there is.

MR. RAUH: Touche, sir.

Well, they made a lot of the time that the cloud over title -- honestly, the only word that can describe that, coming from the Secretary of Labor, is hutzvah.

The Secretary has stalled and stalled these cases. As the Yale Law Journal says, in a careful, 180-page study of their performance over 15 years, they violate the 60-day provisions time and again, take much more than 60 days to sue, and they take two and a half years on the average from complaint to judgment.

For them now to come and say that we shouldn't be able to sue because of the time schedule is shocking. On prosecutorial discussion, Mr. Justice Rehnquist said it, I think just right, that there is a civil remedy still

available in the criminal field, and that is the difference and, of course, there is none here.

QUESTION: Of course, the argument of opposing counsel is that under the NLRB, there isn't any civil remedy.

MR. RAUH: I was going to just get to the NLRB, sir. It is different for many reasons. I guess the simplest one would be from the statute.

Mr. Justice Stewart, you referred to the statute.

The language is in the footnote 6 on page 15 of the brief amicus curiae for the Association for Union Democracy. It is the blue brief on page 15. They have the language. It says that "He shall have power to issue a complaint." It nowhere says that he shall do so.

But, more important, that is just that the language is different. But, much more important than that is, it was different in that it set up new rights. It didn't take away any rights and that is the fundamental difference between the two, to say nothing of all the procedures that they have at the Labor Board and they have none here whatever.

But the real point is that they -- that the Labor Board is predicated on new rights given under the original Wagner Act which didn't exist before.

Here, a great part of what is given was predicated

on old rights which will be gone forever if they could be arbitrarily destroyed by the Secretary's action.

QUESTION: But isn't the effect of Garmon and other cases like that to hold that when the Wagner Act, in creating rights, actually preempted rights that might have existed under state law for the same purpose?

MR. RAUH: Well, they may have preempted some, but by and large, sir, there was nothing in the labor law compared to what the Government admits is was here. The Government admits on page 12 of their brief exactly all of the preexisting rights that we did have.

There was nothing compared to that.

The situation is totally different with the lawyer. Of course, there is a lot of dissatisfaction with the rule that leaves the general counsel of the Labor Board unreviewable, but I don't need to go into that because it is totally different than this section.

When you weigh the two sets of indicators; the language, the preexisting rights and the purpose of the statute, I most respectfully suggest to this Court, that there is clear and convincing evidence of non -- that the clear and convincing evidence is of reviewability and not of nonreviewability.

I don't need to go that far. They have got the burden -- they have got the clear and convincing evidence.

How anybody -- I cannot believe that anybody could suggest that there was clear and convincing evidence that Congress intended nonreviewability.

QUESTION: By reviewability, you mean that the District Court had the power at your behest to order the Secretary to file the suit.

MR. RAUH: Yes, sir.

QUESTION: To set aside the election.

MR. RAUH: Yes, sir.

QUESTION: So to that extent --

MR. RAUH: Now, Mr. --

QUESTION: -- in answer to the other question of the Chief Justice, you -- this is in the nature of a mandamus.

MR. RAUH: It is mandamus in remedy. It is a review of administrative action under the APA. I don't think anybody has ever challenged that it is reviewable under the APA -- if it isn't -- the Government doesn't challenge this. If --

QUESTION: What?

MR. RAUH: The Government does not challenge that if the exception to APA does not apply, namely that this is left entirely to the agency, that the APA doesn't apply.

They are not suggesting the APA doesn't apply. They say the APA does apply. But --

QUESTION: This falls under one of the --

MR. RAUH: The exceptions, so they don't even make --

QUESTION: -- one of its exceptions.

MR. RAUH: One of the APA's exceptions, yes, your Honor.

QUESTION: Mr. Rauh, are you suggesting that if you prevailed in the proceeding in the District Court, the Government can do what?

MR. RAUH: They can file an answer. They haven't filed one yet, though.

QUESTION: Well, for example --

MR. RAUH: And say that there was no probable cause.

QUESTION: Suppose they did? Suppose they suggested that you were quite wrong in your allegations and that, indeed, there was an investigation and there was conclusion by the Secretary that there was no probable cause to bring suit. Then what can you do?

MR. RAUH: Well, we can show, as we will show, that that defense is totally false. I'll use that word. That that is not the facts of this case.

QUESTION: Well, I am positing that they do show it, no matter what you say.

MR. RAUH: Well, if they show that there was no

probable cause, we lose on the ground it wasn't under the statute or wasn't arbitrary.

We can lose on the facts. The question is whether we have the right to show that they violated the statutory provision or that they abused their discretion.

QUESTION: Well, no matter what their showing may be, you say you can challenge it in that proceeding.

MR. RAUH: Yes, sir. But they can show that they weren't arbitrary or that it didn't apply and that isn't a very hard thing. We have the burden of showing that they are wrong which is going to be pretty difficult.

I think we can do it because of what we were informed, that the Pittsburgh office says exactly what paragraph 18 says and that this was sworn to by our Plaintiff and notarized by Mr. Yablonski.

QUESTION: So you do wind up, in any case, where the Secretary spreads on the record -- as they concede he must -- that he had made an investigation and that there was no probable cause for the following reasons, you are still entitled to have judicial review of that determination.

MR. RAUH: Only to the extent that it was arbitrary and capricious or, in our terms, that they are not saying what the facts are.

QUESTION: And you have a right to presumably

depose and conduct discovery.

MR. RAUH: Yes, your Honor, and that is what the Third Circuit said we had and what they --

QUESTION: So that means that every determination of the Secretary under this statute, bottomed as the Government now concedes it must be bottomed, you nevertheless may challenge.

MR. RAUH: Well, for once, your Honor, the Government doesn't even claim there is a real burden here. There are so few cases -- there are so few times a poor minority member of a union can go this far. They can't get lawyers. They can't get aid. The number of cases you can put in my eye.

QUESTION: Not if he is fortunate enough to be represented by Joe Rauh.

MR. RAUH: Well, thank you, sir.

In conclusion -- did I cut you off? I didn't mean to.

[Laughter.]

After that beautiful statement, I didn't mean to be rude, sir.

QUESTION: Just before you reach the conclusion, it is not clear to me what the chronology was here. Reading from the Government's brief on the merits on page 5, it says, "Two days after the complaint was filed and before the

Secretary had an opportunity to file a formal answer, the District Court, after a short oral argument, dismissed the complaint for lack of jurisdiction."

Now, what -- there must have been a motion to dismiss.

MR. RAUH: Yes, sir, if you'll look on page one of the record, sir --

QUESTION: Right.

MR. RAUH: -- under November 12th, "order entered"-- It is on Proposal file 11973 granting defendant's oral motion made at hearing in chambers to dismiss.

You see, it was -- it's right. That is the only reference to it but it was --

QUESTION: Oral motion to dismiss.

MR. RAUH: It is right there on the relevant documents.

QUESTION: Because the indication is -- in the Government's brief -- that the Secretary was contemplating that he would file an answer.

MR. RAUH: No, he made an immediate oral motion to dismiss.

QUESTION: Because it says, "Before the Secretary had an opportunity to file a formal answer."

MR. RAUH: Well, it's just -- sir?

QUESTION: I was wondering if he was prejudiced by

this.

MR. RAUH: I cannot believe that that docket entry is wrong.

QUESTION: Umn hmn. Well, there must have been something that triggered the District Court.

MR. RAUH: Well, it is right there, sir.

QUESTION: I realize that.

QUESTION: Well, you have the expert TRO.

MR. RAUH: Yes, and a motion to dismiss against the TRO. They could have just opposed the TRO. They moved to dismiss as an opposition to it.

In conclusion, I want to make the confession that I think the two amicus briefs are better than mine and it is, I don't say they are better lawyers. Maybe they are. But they are better briefs.

They are better briefs because they deal with the real world. I couldn't do that. I can't get up here and tell all the facts about this fight. I have been in it.

But these two amicus briefs, I respectfully suggest, are the heart of what this is all about.

In the Association for Union Democracy brief, they make clear that the whole purpose of this statute comports with reviewability. It is a beautiful brief that was written by the distinguished Yale professor of law, Clyde Summers and by my former associate, Mrs. Feldman.

The other brief, by the UMWA, is an eloquent effort to explain what the fight for union democracy has been all about and on page 3 it says, "The struggle by UMWA members to overturn tyranny in their union was a lonely and difficult one in part because of apathy and indifference, if not outright prejudice against them by the officials within the United States Department of Labor, purportedly the guardians of union members' rights under LMRDA. Too often union reformers have found the Department of Labor allied with union incumbents against their interests.

"The Court's decision in Trbovich made possible the clean-up of the United Mineworkers' Union." And I say this from the bottom of my heart. It is footnote 8 of the Trbovich decision that determined the Mineworkers' fight because what it said was, we could go into the remedies and as we fought for remedies for the new election, the Labor Department opposed us on every turn.

These two briefs show what a reformer is up against in the union movement. Congress intended to further democracy in unions and only by review of the Secretary's actions can we do this.

Something beautiful happened under LMRDA in the Mineworkers and it is spreading to other unions.

It is spreading just as Congress intended it, that

there be more democracy and I plead with this Court not to deal this movement for union democracy the body blow of permitting arbitrary action by the Secretary.

Don't ever forget the pressures on the Secretary of Labor from the incumbents. In a case drawing out of the same set of elections in the Steelworkers, the president of the Steelworkers in a deposition said, "Our official family backs the incumbent at every turn with everything we have. The pressure is tremendous. If we don't have a right to sue, if the loser, with all he loses when he does sue, comes forward and he can't bring a suit, then the fight may be hopeless."

And as I pleaded four years ago for intervention in Trbovich, which made the difference there, I plead for this right, too, on behalf of a great number of people who believe in union democracy.

MR. CHIEF JUSTICE BURGER: YOu have two minutes left, Mr. Solicitor General, if you have anything further.

REBUTTAL ARGUMENT OF MARK L. EVANS, ESQ.

MR. EVANS: Very briefly, Mr. Chief Justice. I just want to point out that paragraph 18 of the complaint does not allege that the Secretary found probable cause to believe that the violations affected the outcome.

This Court stated in Glass Bottle Blowers that the Secretary may not file suit unless he finds probable

cause to believe that the violation that did occur infected the election.

Second, I want to point out, because it didn't arise at all during Mr. Rauh's argument, that the Secretary, in compliance with the mandate of the Court of Appeals and the subsequent order by the District Court submitted what prints out to 15 pages of a statement of reasons in this case.

Now, while we don't raise the issue of whether the Secretary must submit a statement of reasons in this case, we don't necessarily concede that he is required by law to do so.

We didn't bring that issue here because as a practical matter, the Secretary --

QUESTION: Didn't the Fourth Circuit hold you did have to?

MR. EVANS: They said we do have to in this case. They -- they didn't make a general -- they implied that we would have to do it continually. But I mean, you know, we didn't bring the issue in because the fact of the matter is, the Secretary always does, at least the last five years, I am told, provide a brief statement of reasons with respect to every case that he closes and if a complaining member is unhappy with that letter that he receives, he is always entitled to ask the Secretary for a fuller statement and

they always accommodate to the extent they can, whatever request they get.

QUESTION: My understanding is, in this case it was a telephone call.

MR. EVANS: Well, the reason it was a telephone call -- as I understand it --

QUESTION: That is what I thought it was.

MR. EVANS: Well, there was a letter that was sent the same -- two days later. The day the complaint was filed, the Secretary in the meantime sent a letter, a very brief and summary letter because the time was short. The 60th day was coming very soon and the case was enormously complex and it was important from the Secretary's relationship with the complaining member to let them know as soon as possible what the determination was.

He made a telephone call. He wrote a brief letter. If the member had asked for further information, it would have been provided.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, the case was submitted at 12:00 o'clock noon and a recess was taken for luncheon.]