

MAR 31 1976

In the

Supreme Court of the United States

THE SERBIAN EASTERN ORTHODOX
DIOCESE FOR THE UNITED STATES
OF AMERICA AND CANADA, ET AL.,

Petitioners,

v.

DIONISIJE MILIVOJEVICH, ET AL.,

Respondents.)

LIBRARY

SUPREME COURT, U. S.
WASHINGTON, D. C. 20543

No. 75-292

Washington, D.C.

Pages 1 thru 44

March 22, 1976

Duplication or copying of this transcript
by photographic, electrostatic or other
facsimile means is prohibited under the
order form agreement.

HOOVER REPORTING COMPANY, INC.

Official Reporters
Washington, D. C.

546-6666

IN THE SUPREME COURT OF THE UNITED STATES

-----:
:
THE SERBIAN EASTERN ORTHODOX :
DIOCESE FOR THE UNITED STATES OF :
AMERICA AND CANADA, ET AL., :

Petitioners, :

v. :

No. 75-292

DIONISIJE MILIVOJEVICH, ET AL., :

Respondents. :
-----:

Washington, D. C.,

Monday, March 22, 1976.

The above-entitled matter came on for argument at
2:06 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., 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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ALBERT E. JENNER, JR., Esq., One IBM Plaza, Suite 4400,
Chicago, Illinois 60611; on behalf of Petitioners.

LEO J. SULLIVAN, III, Esq., Nine North County Street,
Waukegan, Illinois 60085; on behalf of Respondents.

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
Albert E. Jenner, Jr., Esq., on behalf of Petitioners	3
Leo J. Sullivan, III, Esq., on behalf of Respondents	21
Albert E. Jenner, Jr., Esq. - Rebuttal	41

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-292, the Serbian Eastern Orthodox Diocese v. Milivojevich.

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

ORAL ARGUMENT OF ALBERT E. JENNER, JR., ESQ.,

ON BEHALF OF PETITIONERS

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

This is a First Amendment church case, their review of a decision of the Illinois Supreme Court, which our petition, we charge that that decision of that court violated the First Amendment, separation of church and state provisions and the right of free exercise of religion.

May I say that Mr. Justice Walter Schaefer did not participate in that decision, having excused himself because of the fact that his son-in-law is one of the partners in our firm.

Now, what the Supreme Court of Illinois did in this case -- and I will have to recite some basic facts, I know the Court has studied the briefs -- but to put the two perspectives in perspective, that is the issue of the suspension, the motion, removal, and then defrockment of Bishop Dionisije as to one; and, secondly, the reorganization of the diocese into three diocese, relating to organizational matters, the discipline of the Bishop Dionisije, the discipline area as distinguished from

organization area.

Now, the Illinois Supreme Court construed the constitutions of the church, the mother church, the Serbian Orthodox Church, and of the diocese of the United States and Canada, construed the penal code, various regulations of the Serbian Orthodox Church and mother church, by the way, all courts have said who have considered this matter, including the Illinois Supreme Court, is the true hierarchical church. And I will spend no time on that, unless that issue is raised in the reply argument.

In construing those internal regulations and the constitution, the Illinois Supreme Court --

QUESTION: Is the Court free to disregard church decisions about that initial question?

MR. JENNER: It is not, and that is included in the briefs that we have filed to which I will point, I hope, during the course of my argument.

The net result of the Illinois Supreme Court having looked into the regulations, looked into and construed them differently from the way the Holy Assembly of Bishops, which is the highest adjudicative authority in the Serbian Orthodox Church, and held that the defrockment of Bishop Dionisije, his suspension in May of 1963, his demotion or removal as Bishop of the Diocese in the summer of 1963, was arbitrary action within the decision of this Court in the Gonzalez case, of which you,

Mr. Justice Brennan, were the author on behalf of the full Court.

So that the net result of the decision of the Illinois Supreme Court was to restore as a Bishop of the Serbian Orthodox Church this suspended, removed and defrocked person. And as to the reorganization of the diocese, the court just says out of hand, without citing any authority whatsoever, not a single authority, that the Holy Assembly of Bishops, despite the fact that it is the highest body in the church, and despite the fact that only it and only it may create dioceses, and only it may end a diocese, only it may reorganize a diocese -- that is Article 16 of the Church constitution -- that that was improper action.

QUESTION: And only it may create bishops, isn't that correct?

MR. JENNER: And only it, as Your Honor has stated, that is absolutely right, the only body in the orthodox church, it is one of 14 great worldwide orthodox churches, and only the constitution provides, the constitution of the diocese, which is introduced here as a matter that must be discussed, provides expressly that only the Holy Assembly of Bishops, which is the same position of the College of Cardinals in my church, in the Catholic Church, those two highest adjudicative authorities may only appoint bishops, may remove bishops, and it may only appoint diocesan bishops for a particular diocese and the

congregation or parishes or people in that diocese have no say with respect to the appointment of those particular bishops.

QUESTION: And that is the way this respondent diocesan bishops became a diocesan bishop, wasn't it?

MR. JENNER: Precisely, if Your Honor please, that is exactly the way he became a diocesan bishop.

So the basic law in this case -- I have a little trouble arguing this case because they seem so simple to me and I don't want to oversimplify my argument. *Watson v. Jones*, a decision of this Court in 1871, was the first defended decision of this Court with respect to this subject matter. And that court, in a very deep analysis of the issues on the First Amendment, said in substance -- I have the --

QUESTION: Does the case of *Watson* touch the First Amendment at all?

MR. JENNER: You are correct, that *Watson* did not refer to the First Amendment.

QUESTION: I thought you just said it did.

MR. JENNER: If I said that, then I am sorry. I meant to say that *Watson v. Jones* set down the principles. Later on, this Court, in *Kreshik*, held that the 14th Amendment incorporated the First Amendment to make it applicable to the state courts and to the state legislatures. And forgive me for that misstatement. It was an oversight on my part.

The civil courts, said this Court in *Watson v. Jones*,

are limited to accepting the decisions of the highest judicative authorities in a hierarchical church and may not inquire into the decisions made by those authorities, and once made they must be accepted by the civil courts.

In Gonzalez, which came along at a later point, there was this statement in the opinion: In affirming and in adopting and in reaffirming Watson v. Jones, the Court said that this was true except possibly if there are elements of fraud, collusion or arbitrariness involved in the decisions of the highest body of the church.

This Court also said that that had very narrow reach, there was no occasion and the Court did not apply that particular doctrine for gloss upon Watson v. Jones in that particular case, nor has this Court done it in any other case.

QUESTION: So it is dictum?

MR. JENNER: It is dictum. It has been repeated but repeated as dictum from time to time in the cases this Court has determined, always going back in every decision of this Court to Watson v. Jones as the basic case.

QUESTION: Would you distinguish in any way between fraud and collusion on the one hand and arbitrariness on the other as to the reach of judicial review?

MR. JENNER: Yes, I would, if Your Honor pleases. If there -- I would be of this opinion, that if there is absolute fraud and absolute collusion, then I would reach the conclusion

that the Court had not exercised the -- that the church authority had not exercised in any respect the rights and privileges of decision on the merits that it had. It was engaged in a fraud and therefore was not functioning as a decision body.

QUESTION: But if there was an allegation of fraud, would the Court be entitled to sit and hear and decide whether or not there had been fraud?

MR. JENNER: The Court in my judgment, if Your Honor pleases, would be entitled to sit and hear whether there had been fraud to the extent that the church body was not sitting and exercising its rights and judgments as a church body, so it hadn't performed judicially.

QUESTION: But how do you apply that to a practical case? Supposing the argument is that the Council of Bishops was deceived because one of the people whom it heard had made a false statement? Now, is that enough allegation of fraud to entitle the Court to review the question of whether the decision ultimately made should be reviewed by the civil court?

MR. JENNER: If Your Honor please, my answer to that is quite an affirmative no. I thought your inquiry with respect to fraud or collusion was fraud or collusion in the decision body itself among its members, that is they were not actually exercising their judicial function within the rules of the church itself. If there is a fraud on the body itself, that in my judgment does not afford the civil courts to undertake to

inquire into the matter.

QUESTION: Really, under your understanding of that exception to the rule, fraud or collusion or arbitrariness, particularly fraud or collusion, it is difficult to imagine a case in the real world, isn't it?

MR. JENNER: It is very difficult, and I think that Your Honor has put his finger on it. It really never would occur, and that is why I have trouble with that fraud-collusion and arbitrariness exception. I certainly don't believe, in reading all the cases, all the judgments and comments in the Law Review articles, Zolman, Stokes and the others, I don't see any possible way in which it can function in the light of Watson v. Jones and the Court's repeated affirmance of the principles of Watson v. Jones.

QUESTION: Would you think that if you could absolutely prove that the decision-makers in the church had been bribed to reach the decision they did and reached it for that reason, that it would come within the exception?

MR. JENNER: I have to say in my own heart and mind that I would find it very difficult not to say that there be some measure possibly of relief. But one of the problems here is that we in America are thinking in terms of our own due process, our own procedures, and we are inclined to impose -- not necessarily impose them, but we think in that fashion when we are looking at allegations; whereas we are really not

permitted to do that under *Watson v. Jones*, and if these cases come up involving property -- this case involves property only in the sense that the original complaint filed in this case by Bishop Dionisiye and his followers sought to enjoin those loyal to the mother church from occupying the sea in Illinois and some of the other properties. This is not a property case in the sense of title to property, no one is seeking any title or trying to grab property, as is stated in the demagogical fashion in the answering brief in this case.

QUESTION: I thought your client, in its original complaint, it requested some sort of an injunction against a bank where there was some money tied up?

MR. JENNER: Well, Bishop Firmilian, as I recall the facts, if Your Honor pleases, Bishop Firmilian, now Bishop Firmilian -- he was then a cleric and not a bishop -- who had been appointed by the Holy Assembly as the -- or by the Holy Senate, which is the executive arm of the Holy Assembly, as the administrator, pending disposition of the proceedings with respect to Bishop Dionisiye, he being suspended at that particular time, and as alleged in that complaint, he had written a letter to the bank holding one of the bank accounts, requesting that bank not to honor checks drawn by Bishop Dionisiye and his assistants and followers. In that sense, money was involved.

QUESTION: It is a form of property, certainly?

MR. JENNER: It is a form of property, yes.

QUESTION: Mr. Jenner, you talked a bit about what might happen if there were fraud. Let's assume for the moment that it was crystal clear under church law, the constitution, that the governing body, before it could remove or defrock a bishop, had to afford him what we call a due process hearing, and assume further that it were equally clear, undisputed that no such hearing had been provided. Would you think that would come under the arbitrariness exception in Gonzalez?

MR. JENNER: I do not think it would come under the arbitrariness provision announced in the Gonzalez case. The Holy Assembly of Bishops has the authority, as does the College of Cardinals in the Catholic faith, to grant that hearing or not as it sees fit. The due process concepts of we in this great country tend to make us feel that that seems very arbitrary.

QUESTION: But my assumption was that it was perfectly clear that church law required a due process hearing, not the United States Constitution.

MR. JENNER: Well --

QUESTION: Your answer, I suppose, is that the College of Cardinals or the equivalent, the Council of Bishops, could say that is very clear in the language of church law and we decided in this case that there is no hearing at all, and that would be the end of it.

MR. JENNER: That is correct.

QUESTION: Because they would have the exclusive power

to decide what that meant, and by their action they would have decided it.

MR. JENNER: That is precisely my position, and I believe that is precisely the position this Court took in *Watson v. Jones*, which it has been at great care to affirm very affirmatively every time this issue has come before this Court.

QUESTION: But that position really boils down to saying that your client, the diocese comes into court and presents an injunction and the circuit judge of the county just has to sign it, no matter what sort of defense the other party might raise. If the bishops want an injunction, they get it.

MR. JENNER: Only with this gloss, Mr. Justice Rehnquist, the civil court inquires into whether or not the appropriate judicial authority in the tiers of hierarchy interpreted its church laws, those church laws, those church regulations and matters of that character. If it did --

QUESTION: What if it is unclear though to the court, what if there are conflicting decisions within the church canonical decision?

MR. JENNER: It is said in *Watson v. Jones* and other cases that Your Honors have decided that they generally are conflicting. It is amazing, the canons conflict, the penal codes conflict, various eccumenicals are held and they reach various decisions, say the bishops assembled and are calling in the spirit of the good Lord, reach the conclusion that Bishop

Dionisije should be discharged, that's it. They exercised in their own spiritual good faith, reached a decision in this particular hierarchy of the church and they had the authority to do that.

QUESTION: Well, what if there is a question under church law as to whether the Council of Bishops or say the triennial convention has the authority to do this, can the civil court decide that?

MR. JENNER: No. All the civil court can do is to look to see if the judicial body having the jurisdiction with respect to a particular matter of organization or a particular matter of jurisdiction has exercised that judgment, absent fraud.

QUESTION: But how does it decide what judicial body has that jurisdiction? Suppose there are two different judicial bodies in the church? One comes in and says we decided it --

MR. JENNER: My thinking here is there are different judicial bodies in this church but they are in tiers.

QUESTION: So you say there is never really any question if the highest judicial body has passed on it?

MR. JENNER: That is correct, and it is only the highest judicial body that was involved in this case, the Holy Assembly of Bishops, sometimes called the Bishops Council, comparable to the College of Cardinals. There wasn't any --

QUESTION: What if two groups exist and each one

claims it is the highest judicial body in that particular church and one defrocks a bishop and the other says no, you're not defrocked, instead of that we are going to give you a medal, you have been such a good bishop.

MR. JENNER: All right.

QUESTION: So what does the court then do?

MR. JENNER: The closest I can get to that is the Kedroff case, involving the occupation of the cathedral in New York City, in which there were two contesting groups, one was the members of the Russian Orthodox Church in America, organized under a New York statute, and the other was the Russian Patriarch, appointed by the Holy Assembly of Bishops of the Russian Orthodox Church, so there were two contestants as to who was the patriarch.

QUESTION: But it was pretty clear who the original and legitimate one was, wasn't it?

MR. JENNER: It was absolutely clear, and this Court so held that it was absolutely clear.

QUESTION: This is the way the Episcopalian Church began in this country, didn't it, a renegade bishop from the Church of England?

MR. JENNER: Well, I am not familiar with that, but I don't doubt, from my reading of law in this area that other religious disciplines started that way as well.

QUESTION: Mr. Jenner, I take it that it is your

position that the civil court may go into a determination of what is the highest juridical body in the church?

MR. JENNER: I do.

QUESTION: And this has been held and this is clear, and I think isn't this the answer to Mr. Justice Stewart's question?

MR. JENNER: I think so.

QUESTION: In any event, that is, you say, not an issue in this case?

MR. JENNER: Oh, no, clearly it is not an issue in this particular case.

QUESTION: Let me throw another hypothetical at you. Suppose the determination of dismissal, defrockment, was for a basis that would not be tolerated under the Constitution of the United States internally in our matters. Let us say, for example, that the particular priest or bishop had exercised his First Amendment rights within the framework of this country in a way that was unacceptable to the hierarchy and they dismissed him on that ground. Is that reviewable?

MR. JENNER: It is not. The civil courts must accept the decision of the highest body of that particular church and it is not reviewable.

QUESTION: The only judicial function is to see whether the particular church followed the rules of the club when they acted, is that it?

MR. JENNER: I think that is a fair way of putting it. They might not necessarily have followed literally the Holy Assembly of Bishops have the same privilege that this Court has. This Court has jurisdiction of deciding a case, it is not required to decide it right. There are allowances for error, and there are allowances for error in the case of the Holy Assembly of Bishops insofar as any inquiry of a civil court is concerned.

QUESTION: Well, would you concede at all in response to the Chief Justice's question that the civil court has the power to see whether the bishops followed the rules of the club, as he put it?

MR. JENNER: I would concede that the civil court has a right to look into the case sufficiently only to see whether the Holy Assembly of Bishops in this case in its recital and the judgment or otherwise, considered and construed its own rules, regulations and constitution. And if it construed them for X result, that was inimical and hurtful to the bishop or the person who is on trial, on the other hand, the civil courts in the United States can't say, well, your decision as to your construction of your statutes was wrong.

QUESTION: What if the bishops court had said we know this is what our canon law requires, but we are not going to followed the canon law, we are just going to do something we know if arbitrary, but it is up to us and that is what we are going to do?

MR. JENNER: They could do that, but when you use the word arbitrary, are you meaning arbitrary in the American sense or are you saying arbitrary in the sense here in the Serbian Church sense?

QUESTION: Arbitrary in the sense it is an abandonment of the written rules that should govern them.

MR. JENNER: I think under *Watson v. Jones* and even under *Gonzalez* that that would be binding upon a civil court.

QUESTION: What content, if any, do you give to Justice Brandeis in the absence of fraud, collusion or arbitrariness?

MR. JENNER: I give --

QUESTION: Because if you recall, Mr. Jenner, that preceded the principle which you have been insisting upon, the decisions of the proper church tribunals and matters purely ecclesiastical or affecting civil rights, are accepted in litigation before the secular courts as conclusive because the parties in interest made them so by contract or otherwise. That is the general principle.

MR. JENNER: That is the general principle.

QUESTION: But he introduced it with in the absence of fraud, collusion or arbitrary -- what content did he mean by that, do you suppose?

MR. JENNER: Well, if may suppose, because that is all we can do, I suppose --

QUESTION: From what you have been saying, as Mr. Justice Stewart just suggested, none.

MR. JENNER: I don't think he gave -- as far as arbitrariness is concerned, in the sense that we normally consider arbitrariness, there is no moment, and I think the arbitrariness should certainly be stricken from it. As to fraud and collusion, where there is a -- where the deciding body, as I said earlier, becomes so bribed or engages in a conspiracy of some particular kind, that body is not interpreting its own laws. That body is not making a decision based upon the church authorities. Now, that is what I think he meant with respect to fraud and collusion.

QUESTION: Is that issue involved in this case?

MR. JENNER: It is not involved in this case. No course, the Illinois Appellate Court, the Illinois Supreme Court, the trial court, the trial court found expressly that there was no fraud, collusion or arbitrariness. The Illinois Supreme Court said that in its interpretation of the rules, regulations and constitution of laws of the church, that in its opinion, by way it interpreted those laws, that the Holy Assembly of Bishops didn't follow those laws and therefore didn't --

QUESTION: Are you suggesting, Mr. Jenner, that this is like McCull and Hull, we said we haven't any occasion to define fraud, collusion or arbitrariness?

MR. JENNER: That's right.

QUESTION: Are you suggesting that we don't have to address that here either?

MR. JENNER: I am exactly saying that, that the Court doesn't have to address either fraud or collusion --

QUESTION: Even to go so far as you just suggested, that at least arbitrariness is meaningless in Mr. Justice Brandis' dictum, but certainly there is no issue of either fraud or collusion?

MR. JENNER: There is no issue of fraud or collusion.

QUESTION: Well, what about arbitrariness, don't we have to address that?

MR. JENNER: In contrast, may I suggest, Your Honor, only to the extent that you say that it is not arbitrary in this case.

QUESTION: Well, to do that we have to give it a definition, don't we?

QUESTION: Because the Illinois Supreme Court said it was arbitrary.

MR. JENNER: That is correct, Mr. Justice Stewart. You have to stay out, as Mr. Justice Frankfurter said so many times, you have to stay out of this religious thicket. And may I just say one word, because my --

QUESTION: I think he might have said political, I didn't recall he said religious thicket.

MR. JENNER: Well, he may have said that in another case.

I ask Your Honors to direct your attention -- you will, I know, direct your attention to all issues in this case, but Article 16, turning to the reorganization of the diocese, Article 16 of the constitution provides expressly that the Holy Assembly of Bishops may create dioceses, it may reorganize dioceses, it may end dioceses.

QUESTION: May I suggest, Mr. Jenner, if you are right and that we can go no further than to identify which is the top decision-maker for the church, and having decided that, you say that is not an issue here in any event. Having decided that, there is nothing then left, I would think, of the case from your approach except this agreement with the Illinois Supreme Court's definition, if that is what it was, of arbitrariness.

MR. JENNER: That is my position, if Your Honor please, and I think well supported by the cases and especially by the decisions of this Court.

If there are no further questions, I will save what little time I have left.

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

Mr. Sullivan.

ORAL ARGUMENT OF LEO J. SULLIVAN, III, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

I would like to briefly divide my opening remarks into three general areas: One, I would like to address myself to the division question; secondly, the hierarchical question, which has been used in this case; and then, thirdly, the disciplinary proceedings against Bishop Dionisije.

First of all, we see the issues in this case as far as this diocese is concerned as a Serbian corporate diocese, really congregational in nature, which established a constitutional relationship with the Serbian Orthodox Church in Belgrade, Yugoslavia. And if I refer to the Serbian Orthodox Church of Yugoslavia from time to time as Belgrade, I intend no more disrespect in that regard than when I refer to my own church as Rome. So if I inadvertently use that term, please do not feel I intend any disrespect.

Under the terms of the relationship which existed between the American-Canadian diocese and the Belgrade church, the Belgrade church was to provide the spiritual leader. The American-Canadian diocese, however, was as to its administrative, legislative and property was -- and I am quoting from the constitution, which was approved by the Belgrade church -- have full administrative freedom, was to independently rule and

regulate.

Now I quote from the Belgrade church when it approved our constitution. We hope that you have "complete autonomous administrative freedom." It is the only diocese in the Serbian Orthodox Church which owns its property free and clear of any interest by the Serbian Orthodox Church. Its congregations each have a constitution and the diocese has absolutely no interest in the property of the congregations.

The American-Canadian diocese controlled itself by means of a church national assembly, composed of some of the clergymen and representatives from the various congregations which they from time to time call a Sebor, and it and it alone can amend the constitution.

It is found in the Serbian Church constitution, not in Article 14, which says these are the diocese of the Serbian Orthodox Church, and then lists all the diocese in Yugoslavia, but it is found in Article 15-A, or it was found -- it hasn't been found there since May 10, 1963, but prior to that date, Article 15 of the Serbian Church constitution said in addition to those diocese in a hierarchical respect is (a) the American-Canadian diocese of the United States of America and Canada.

In 1963, the Belgrade church called the Assembly of Bishops, acting within its authority, removed the American -- amended Article 15-A, and since then the American-Canadian diocese has never appeared in its constitution. In its place,

it put three new diocese, the West, Midwest and Eastern. It also at the same time in effect attempted to distribute the property of the three diocese and place three spiritual leaders. What was the diocese to do? Two alternatives. They could go along with it or they could insist upon maintaining their own existence, their own integrity and their own property. They chose the latter.

The representation has been made that there are no assets concerned here. There are three large pices of real estate, one which -- there are incidentally three new dioceses -- one lying in the East, in Pennsylvania, called Shadeland -- and I can't recall how many acres, but it has become sort of a cultural center for Serbs in that area. It has an old folks home.

The real estate in Libertyville, Illinois, in Lake County, which has a cemetery, the body of King Peter lies there, it has been there -- it, under the reorganized plan, is to become the home of the Midwest diocese. And thirdly, there is a piece of substantial real estate in California, owned by the diocese, which they have accumulated over the years.

QUESTION: Of course, when you say that the diocese had the choice of keeping its own property, I suppose Mr. Jenner's argument is that whether or not that was the diocese's own property is something that has to be decided by the church court?

MR. SULLIVAN: No, sir. The constitution of the

American-Canadian diocese makes it quite explicit and quite clear that the diocese owns -- I might not be able to quote it accurately -- owns its own property and it is without rights of anyone else in it.

QUESTION: Well, are you contending then that the American-Canadian diocese is a separate juridical entity, that it is not just a branch of the Serbian Orthodox Church?

MR. SULLIVAN: The answer to your question is, yes, sir. Yes, sir, in the sense of having its own existence, in the sense of autonomously regulating itself, in the sense of having its own church national Sebor, in the sense of really it existed when it was found by the Illinois Supreme Court --

QUESTION: Well, I am looking at page 25 of the Illinois Supreme Court's opinion -- I mean Appendix 25.

MR. SULLIVAN: Yes, sir.

QUESTION: The plaintiffs argue and the defendant does not dispute that the Serbian Orthodox Church is a hierarchical and episcopal church, but although the parties agree that in cases involving hierarchical churches and decisions of the proper church tribunals and questions of discipline, faith or ecclesiastical rule, though affecting civil rights, are accepted as conclusive in disputes before the civil courts. Do you disagree with that?

MR. SULLIVAN: I do not disagree with all of it, sir, but --

QUESTION: Well, do you disagree with any? Don't we have to take it --

MR. SULLIVAN: Well, let me address myself to the hierarchical aspects.

QUESTION: It goes right on to say, all parties maintain that the sole limitation on this rule, when civil courts may entertain the kind of review because when a decision of the church is claimed to have resulted from fraud, collusion or arbitrariness --

MR. SULLIVAN: I am in agreement with that completely, sir. Let me address myself to the hierarchical distinction, Mr. Justice, and really it is in rebuttal to what Mr. Jenner has said. Now --

QUESTION: I thought you have been arguing so far that this is not a case involving a hierarchical church.

MR. SULLIVAN: Who was it, Mr. Justice Holmes who said a word is --

QUESTION: The skin of a living thought.

MR. SULLIVAN: All right.

QUESTION: But in this context though, counsel, it is a little bit like the difference between a corporation and a partnership, it isn't something that is a part of mythology, it is a word of art.

MR. SULLIVAN: Well, it is a word of theology and we -- it is from a different discipline than ours, and our discipline

is jurisprudence. Now, we had learned clergymen describe what hierarchical meant, and we cited part of it in our record and what they said was it is something to do with the ascendancy of a bishop, priest and deacon. It is --

QUESTION: Can the Midwest group appoint its own bishops?

MR. SULLIVAN: It could not before May 10, 1963, when then, prior to the date that they attempted to divide us, prior to the date that they took us out of their constitution, it had agree with Belgrade that Belgrade would appoint its spiritual leader, that is to say its bishop. But once they took us out of their constitution -- they had a perfect right to amend us out -- we could not amend ourselves out because they had to approve any amendments to our constitution, but they lacked the ability to amend our constitution.

QUESTION: Well, who appoints bishops currently? Does Belgrade appoint the bishops?

MR. SULLIVAN: To the American-Canadian diocese?

QUESTION: Yes.

MR. SULLIVAN: Belgrade does not because the American-Canadian diocese does not exist in the Belgrade constitution. It has been removed since May of '63. They have three different diocese there.

QUESTION: Well, suppose you are right and the Illinois Supreme Court is right, who will appoint the successor

of the respondent bishop here?

MR. SULLIVAN: That will be up to the members of the Church National Assembly or Sebors, those members of the Illinois religious corporation, which are the congregations that support it, when they meet in their every three year --

QUESTION: Without reference to the Assembly of Bishops in Belgrade?

MR. SULLIVAN: I think they could choose, if they wanted they could choose a Serbian bishop. I think it is up to them to decide who they will look to now for spiritual leadership, because their administrative leadership and their property and their legislative authority has always been intact, and they had it in a smaller form when they looked to the Russian Orthodox Bishop for guidance prior to 1921.

QUESTION: Well, have any bishops been appointed in these three categories now, these three geographical areas other than by Belgrade authority?

MR. SULLIVAN: In the three new diocese, Your Honor?

QUESTION: Yes.

MR. SULLIVAN: No, sir, those are three new diocese which Belgrade has a perfect legal right to have, but they certainly are not successors of the American-Canadian diocese.

QUESTION: My question is who has been appointing the bishops lately?

MR. SULLIVAN: To the three diocese represented by Mr.

Jenner, the Holy Assembly of Bishops, at Belgrade, Yugoslavia.

QUESTION: Well, that sounds something like hierarchical structure, doesn't it?

MR. SULLIVAN: Yes, sir. In the religious sense, there is no doubt that the religious sense, as defined by the religious men that they are hierarchical, because they all say hierarchical refers to the flow of sanctifying grace from bishop to priest to laymen.

What I think is causing some confusion in the case, now Mr. Jenner compared it to the Roman Catholic Church, and I am quite familiar with that. This diocese has never been like the Roman Catholic Church diocese, where the real estate is owned by the Catholic Bishop of Chicago, and he absolutely has an obligation to respond to Rome. This is the most unique diocese in the Serbian Orthodox Church, and to say that this is coldly and flatly hierarchical is to ignore the clear provisions of the constitution and the practices over the years. How do you explain that it is no longer -- we never found an Article 14 of their constitution. The relationship has always been one of independence over here in America as far as administration and control of the property is concerned, and we look to Belgrade, after the Russians finally found us too cumbersome to carry, for the appointment of the bishops.

QUESTION: Well, it sounds like you are saying one of two things, one, the Serbian Church may be a hierarchical church,

but we are not part of it. That may be one of your arguments. The other one is that -- the other one apparently is that it just isn't hierarchical.

MR. SULLIVAN: No, sir, I hope I am not misleading you. Without any doubt, those diocese in the Serbian Orthodox Church found in Article 14 of the Serbian Orthodox Church are hierarchical and are strictly hierarchical and are as hierarchical as the amicus here, the --

QUESTION: But you are not one of them?

MR. SULLIVAN: No, sir, we are not, we are --

QUESTION: You are saying you are not part of a hierarchical church.

MR. SULLIVAN: Well, today --

QUESTION: You have your own hierarchical church, I suppose?

QUESTION: At least you are not --

MR. SULLIVAN: That we have our church now.

QUESTION: To the extent that the Serbian Church is hierarchical, you are not part of that hierarchy is what you are saying?

MR. SULLIVAN: Since they threw us out, since they amended us out, yes, sir.

QUESTION: Since 1963, your relationship to the church in Yugoslavia is more or less the same as the Episcopalian Church of the United States is to the Church of England, is that

it?

MR. SULLIVAN: I am not too sure of that relationship, but it is one of --

QUESTION: It is an off-shoot but --

MR. SULLIVAN: It is an off-shoot. They threw us out.

QUESTION: -- and each is hierarchical, but one is not part of the other, although historically they have the same book.

MR. SULLIVAN: Yes, sir.

QUESTION: Well, now, what if you present -- you assert that that is your claim, but we are not just not part of that hierarchy. Now, let's assume, however, that the highest church court in that hierarchical church, which you agree is hierarchical --

MR. SULLIVAN: Yes, sir.

QUESTION: -- the highest church court addresses this very question and decides that you are part of it, that you are part of the hierarchy.

MR. SULLIVAN: I don't believe they have ever done quite that in quite that manner.

QUESTION: They certainly decided that in this case.

MR. SULLIVAN: All right, let us assume that they have, sir. I think --

QUESTION: And you think that the courts must as a threshold issue address itself and can completely get into the

question of whether or not it is a hierarchical church, hierarchical structure, and to what extent it is, that the decision of the church court on whether it is hierarchical or not is not final?

MR. SULLIVAN: Oh, I do not believe that the decision of the church court as far as it affects property right need be enforced by a civil court of this country as long as the civil court of this country can pick up the constitutions that regulate the relationship between the two parties and make the decision without finding themselves in a doctrinal snare. If you can find --

QUESTION: Well, does that answer my question?

MR. SULLIVAN: Mr. Justice --

QUESTION: I doubt it. It doesn't sound like it. I just wonder to what extent a civil court is free to review the judgments of the highest court of a hierarchical church that this particular part of the church is part of the hierarchy.

MR. SULLIVAN: Well, I think you must be able to ask the person who comes looking to a civil court for enforcement of --

QUESTION: Well, Mr. Jenner at the outset seemed to indicate that that issue was open to some extent anyway and --

MR. SULLIVAN: Well --

QUESTION: What if the Serbian Eastern Orthodox Church and Council of Bishops decides that the Lutheran Church in

America is a part of the hierarchy of the Serbian Eastern Orthodox Church and the Serbian Eastern Orthodox Church goes to court and says we want to take over the following Lutheran churches? Would a court be entitled to inquire into that point?

MR. SULLIVAN: Yes, sir. I think anyone making application to a court for civil court enforcement of a decision must, one, demonstrate that we had jurisdiction, and they must be able to demonstrate it -- they are going to get civil court enforcement by neutral principles of law, and you said that and how the states set it up that way, and the churches better get it together that way. I think then they would have to demonstrate that it is a matter over which we had jurisdiction, and then they would have to demonstrate that there was a good basis for their opinion, whereupon I think the defense -- let us say they make the prima facie -- and there may be some other elements that they would have to prove, and I think the defense is available for someone to come in and say that decision is absolutely fraudulent, that decision was obtained by the collusion of three ex-Lutheran members.

QUESTION: I am thinking of the jurisdiction question first, Mr. Justice Rehnquist. Is that the issue in this case, whether or not you are part of the hierarchy or not, or are you relying mostly on what you were talking there at the end of your answer, that it is arbitrary or fraudulent?

MR. SULLIVAN: The hierarchical aspects -- I call it the hierarchical blanket drawn over the issues by the petitioners. I believe we, our diocese is not the strictly Roman Catholic hierarchical diocese, so that the class three Watson v. Jones, paragraph three, Watson v. Jones hierarchical rule does not apply to our diocese because there are in existence clear easily read constitutions which involve no doctrinal disputes by which this question can be resolved.

QUESTION: Well, let's assume that you were one of the -- let's assume that this diocese was one of those diocese within Article 14 in Yugoslavia. Would you be here?

MR. SULLIVAN: No, sir.

QUESTION: And no matter how arbitrary the decision might have been?

MR. SULLIVAN: If they sought civil court enforcement of it and we thought we could put up a defense of fraud, collusion or arbitrariness, yes, sir, then we would be here. But there would be on question about the right of the Holy Assembly in that case, because there isn't another diocese in the Serbian Orthodox Church that has a constitution.

QUESTION: Mr. Sullivan, since 1963, has any bishop been appointed in this diocese?

MR. SULLIVAN: The American-Canadian diocese?

QUESTION: Yes.

MR. SULLIVAN: Yes, sir.

QUESTION: And again, I thought I got this before, what is the source of his appointment, Belgrade or Chicago?

MR. SULLIVAN: No, Libertyville. They have a viccar bishop in addition to Bishop Dionisiye who was elected, I should say nominated by the Holy Assembly of Bishops, he was consecrated in the usual orthodox manner by the laying of hands of --

QUESTION: Since 1963?

MR. SULLIVAN: Yes, sir. Now, you are talking about the American-Canadian diocese?

QUESTION: Yes.

MR. SULLIVAN: Yes, sir.

QUESTION: So the bishop now holding office got his authority out of Belgrade?

MR. SULLIVAN: No, no.

QUESTION: Why don't you clear it up?

MR. SULLIVAN: Okay. Maybe I have confused it. The American-Canadian diocese of Libertyville, which we represent, and the congregations which have remained faithful to Libertyville, and recognize Dionisiye as a bishop. These are the ones that I am talking about. They elected a viccar or viccar bishop who serves under Bishop Dionisiye in 1963 or '64, I am not sure of the year -- they nominated him, really -- and then he was ordained by other orthodox bishops, which as far as they are concerned takes the laying on of hands of two orthodox bishops to make him an orthodox bishop. Now, he serves as

vicar bishop under Bishop Dionisije in the American-Canadian diocese.

Now, as to the three new diocese, those bishops have been appointed by the Holy Assembly of Bishops -- actually four, because one passed away and they had to fill a spot. So they have made four appointments of bishops to their three diocese in America --

QUESTION: Well, you don't question the validity of that?

MR. SULLIVAN: No, sir. No, they have a right to --

QUESTION: That is a separate church?

MR. SULLIVAN: Yes, sir. We can't -- you see, when we talk about the American-Canadian bishop of the Serbian Orthodox Church, if we pick up their constitution, we can't find it in the constitution because they wrote us out and they have an absolute right to write us out. And one of our complaints about Justice -- the only Supreme Court's opinion was they got down to the end of the opinion and they said, yes, these people used the word repudiation because all of a sudden we are talking of contract law, but these parties have split apart. But I find that there is an underlying religious unanimity that exists, and therefore I am not going to give the natural effect to their acts that I would if they were a voluntary association, a club or a union, and we feel --

QUESTION: Are you addressing now the trial court?

MR. SULLIVAN: The Illinois Supreme Court.

QUESTION: Well, you had a court trial, didn't you?

MR. SULLIVAN: We felt all issues necessary to do justice are before the court --

QUESTION: But you didn't cross-petition, did you?

MR. SULLIVAN: We filed what is known as a conditional cross-petition.

QUESTION: Oh, did you? I beg your pardon.

MR. SULLIVAN: And an issue arose because we came --

QUESTION: My apologies. I didn't know you did that.

MR. SULLIVAN: I don't think it was allowed. It was not specifically allowed, Mr. Justice.

QUESTION: Was it denied?

MR. SULLIVAN: No, sir, it was not denied either. All it said was certiorari granted, and we felt all issues necessary were -- we wondered whether or not to make a footnote on federal practice or not.

QUESTION: I had forgotten it.

MR. SULLIVAN: We did raise that issue. We felt that the court went as far as it did.

Now, I would like to move to Bishop Dionisiye for briefly. Bishop Dionisiye, a member of the Serbian Orthodox Church, elevated to bishop, in 1961 they adopted the penal code, penal procedures. As an incident in our view to their efforts to -- no matter what their motives were, to proceed against

Bishop Dionisiye, they sought first of all to suspend him, take the first step in the penal proceedings, then the second step, they appointed an administrator who was just to keep the place from burning down while they proceeded with the penal proceedings. Practically, there was a great stir in the country among the people because of the division of the diocese, and the Sabor, I think it was at the Arson Council, fired off telegrams to Belgrade and said, look, give Bishop Dionisiye a trial, if he is guilty, he's guilty, if he's innocent, he's innocent, take care of that issue, but as far as this division question is concerned, we are going to move the Sabor forward and we are going to find out -- we are going to present this to the congregations who are still with us. And, by the way, as far as we are concerned, congregations can come and congregations can go, we have no interest in their property and there isn't much we can do about it.

We feel Belgrade acted with a great deal of haste. A great many charges and accusations were thrown back and forth, heresy, heretics, and they were thrown by both sides, a great deal of mud back and forth.

An investigating commission, whose obligation it was to come over and follow the rules of the penal procedure completely and totally, ignored the rules. They wouldn't show him the charges, they issued findings of his guilt as soon as they talked with him. They knew very well what the outcome, the

result would be. The sum and substance of it was --

QUESTION: Would you comment on the point they make at the end of their reply brief that their action really rested on his conduct after May 10 of '63 in refusing to participate and so forth? Is that a sufficient basis for their action? Do you understand the point I make on that?

MR. SULLIVAN: Yes, I understand the point. I have two answers to that. And perhaps the most important answer is earlier in the brief they say, ahah, the court gave this case a trial de novo. They couldn't do that. Why, Bishop Dionisiye's faction retried his guilt or innocence before the court and then immediately in their brief they come back and say but notwithstanding that, there was still plenty to convict him on.

But let me answer the second part of that question. His conduct after May 10th, when he failed to recognize the division, since every court has held that the division was illegal, I would find it rather unconscionable to support a judgment against him because he was right. I know it makes for a tough situation. Had they followed the rules and strictly adhered to the rules, I think their judgment would be entitled to enforcement by this Court, but as it stands now, since they didn't follow the rules, I think this Court has to say I'm sorry, we are not going to enforce it. Now, you are not reinstating him as a bishop, because there is no desk in the Holy

Assembly of Bishops meeting hall for the bishop of the American-Canadian diocese. It is gone.

QUESTION: Could I ask you to go back to the passage in the Supreme Court of Illinois, the opinion that Mr. Justice Brennan referred to, where it says on Appendix 25, "The plaintiffs argue that the defendant's bishop does not dispute that the Serbian Orthodox Church is a hierarchical and episcopal church. Moreover, the parties agree that in cases involving a hierarchical church and decisions of proper church tribunals on questions of discipline" and so on "are accepted as conclusive. All parties maintain that the sole limitation is the narrowest kind, fraud, collusion and arbitrariness."

MR. SULLIVAN: Yes.

QUESTION: And then it goes on and decides in your favor within that narrow exception.

MR. SULLIVAN: Yes, sir.

QUESTION: Now, in your petition for certiorari, do you challenge that recitation that I just read to you?

MR. SULLIVAN: No, sir. No, sir.

QUESTION: So we are accepting -- we judge this case on the basis that this diocese is part of a hierarchical church?

MR. SULLIVAN: Yes, sir, in the context by which I have attempted to explain it, that they look to Belgrade for the spiritual leadership and always have.

QUESTION: Well, I just want to make -- you have not

challenged in your petition for certiorari this statement that I read?

MR. SULLIVAN: No, sir, we have not.

QUESTION: Mr. Sullivan, along that same line of inquiry, as I understand your position, you do not question the basic jurisdiction of the mother church in Belgrade to remove the American bishop? You do question -- and I understand this to be the issue here -- the way in which it exercised that jurisdiction. You have said that if it had acted properly, it has the authority under church law to remove the American bishop.

MR. SULLIVAN: Absolutely, without -- subject to the problem, really we have the Bishop Dionisiye issue here and, no matter what the Court sees fit to do on the Bishop Dionisiye issue, the integrity and the fact that we have been thrown out of the Serbian Orthodox Church still remains, and whether the civil court sees fit to enforce that decision at Belgrade regarding disciplinary proceedings against Bishop Dionisiye, it has nothing to do with the fact that the Illinois religious corporation still exists and it may now have to look to somebody else for spiritual direction. Now, it has already been recognized by the patriarch of Alexandria, who is known as the judge of the patriarch -- of the Orthodox Church. It is also recognized by other orthodox clergymen. And this may be an evolutionary sort of thing. And that, by the way, I warn you,

is not in the record. That is something that has just occurred within the last six weeks or so, the recognition by the Patriarch of Alexandria.

With that, Members of the Court, I thank you.

MR. CHIEF JUSTICE BURGER: Mr. Jenner, you have a few minutes left.

ORAL ARGUMENT OF ALBERT E. JENNER, JR. -- REBUTTAL

MR. JENNER: Thank you, if Your Honors please.

One, the American Canadian diocese is still a part of the Serbian Orthodox Church. It is not a separate diocese. When the Holy Assembly of Bishops reorganized the American-Canadian diocese, because it was becoming so large and so difficult to administer as Bishop Dionisije himself pleaded to the Holy Assembly of Bishops, instead of sending more bishops over, they divided the diocese into three parts, the very three parts that Bishop Dionisije had organized as episcopal divisions. And in doing so in the order, the final boundaries of the newly established diocese's revision of the existing church constitution for this territory, in conformity with a newly created situation, and all other questions relative to the ecclesiastical organization of these diocese shall be studied by the Church National Convention here with the bishops in charge and their motions submitted for final decision to the Holy Assembly of Bishops.

So what these holy men did, exercising sound judgment,

said we will create three dioceses here to afford better administration, you decide, as stated in this order, exactly what the boundaries of those three dioceses will be, you review the constitution of the Canadian-American diocese, and recommend revisions of that constitution to apply to all three of the dioceses. That is what these people in Yugoslavia, these holy men, said you over in America, we have trouble understanding quite what your laws are, but you do it, and that is what was done.

Now, secondly, the Illinois Supreme Court, the Illinois Appellate Court, every trial court that has considered this matter has said that the effort of Mr. Sullivan's clients, Mr. Sullivan is a distinguished Illinois lawyer, to withdraw the diocese from the archical structure was invalid and that this diocese is still there pending the ultimate disposition, now litigation pending for thirteen years, the ultimate decision of affirming the creation of the three diocese as a reorganization administratively.

Now, lastly, this diocese never had complete autonomy. The constitution itself says for administrative purposes, since the American-Canadian diocese and half a dozen others outside of Yugoslavia are mentioned in the article to which Mr. Sullivan refers, they have to have special provisions because we don't have -- it isn't the dioceses that are in Yugoslavia, and we are close to them, we may administer to them, we give

you a large measure of administrative independence, but that constitution provides expressly, and the constitution of the diocese provides expressly that all decisions of the church councils here must go to the bishop and be approved by the bishop, and he in turn submit them to the Holy Assembly of Bishops for ultimate approval. And all decisions with respect to this diocese and its administration, if the bishop disagrees, then those decisions made by the Sabors and the councils do not go into effect until he agrees or until submitted to the Holy Assembly of Bishops and the Holy Assembly of Bishops approves.

So you have this enormous situation of the moment -- and this will only be a few more words -- the Holy Assembly of Bishops being placed in this position, with schismatics seeking to withdraw from the church, and those holy men in Belgrade are holding the American-Canadian diocese as a unit pending disposition of this litigation, commenced by the schismatics in the summer of 1963, and they having appointed Bishop Firmilian as the administrator pending the disposition of this, this litigation, the Holy Assembly in hopeful deference to this Court and all other courts until it is finally decided, it is sort of amorphous, that the diocese as a whole exists pending this litigation, the division of the diocese. exists to bring eventually the council of the diocese -- it says council, it doesn't say there in that order that you shall call Sabors in each of the three diocese, you shall call a

council for the whole diocese, report back to us how you need this constitution revised so that this may be all settled and you may go on administering with three bishops instead of one bishop.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 3:08 p.m., the above-entitled matter was submitted.]

- - -