In the ORIGINAL

Supreme Court of the United States

DONALD FINNEGAN ET AL.,
Petitioners
v. NO. 80-2150
HAROLD D. LEU ET AL.

Washington, D. C.

February 24, 1982

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Wednesday, February 24, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 o'clock p.m.

APPEARANCES:

SAMUEL G. BOLOTIN, ESQ., Toledo, Ohio; on behalf of the Petitioners.

THEODORE M. IORIO, ESQ., Toledo, Ohio; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Well, we will hear arguments next in Finnegan against Leu.

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

ORAL ARGUMENT OF SAMUEL G. BOLOTIN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. BOLOTIN: Thank you.

Mr. Chief Justice Burger, and may it please the Court, this is a union democracy case. It involves the Bill of Rights of union members, and whether appointed officials who are appointed by a president, whether they can be discharged or terminated for exercising their rights of freedom of speech and expression in a union election and in particular for supporting the opposition candidate.

The facts in this case can be simply put. In December of 1977, in Toledo, Ohio, Teamsters Local 20 found itself with a third confrontation between two top protagonists, a slate headed by Omar L. Brown, the incumbents, and a slate headed by Harold D. Leu, the insurgents. Local 20 is a very large local in northwestern Ohio, that covers some 14 counties in northwestern Ohio, and has over 12,500 members.

The election was held in three different

cities. On December 9th, it was held in Fremont, Ohio, on the 10th and 11th in Toledo, Ohio, and the 12th in Bryan, Ohio. Due to a blizzard and inclement weather which hit the northwest Ohio area during those days, the turnout for the election was relatively poor, and approximately only 3,500 members were able to vote.

Leu prevailed in that election by 29 votes, although his entire slate of candidates was defeated and the Brown slate officers were elected, with the exception of Brown. Election protests were filed. The election eventually was voided in a separate proceeding not directly relevant herein, in a case captioned Marshall v. Leu.

Needless to say that the campaign involved was a very vigorous campaign and very heated campaign, since this was the third confrontation between the two top parties.

QUESTION: How much of your case rests on the First Amendment?

MR. BOLOTIN: I believe our case rests primarily on the statutory construction of the statutes involved herein. The First Amendment is applicable through analogy, but not, I don't believe, directly controlling in this case.

Now, Leu's first official act in office was to

conduct a meeting of all the Brown business agents, and at that meeting he discharged them, giving as his reasons that, Number One, they had campaigned for his opponent; Number Two, they were too loyal to his opponent; and Number Three, that he did not believe that they would support his policies and programs which he was about to implement.

QUESTION: Did he rest to any extent on the fact that their appointments were "at the pleasure of the president?"

MR. BOLOTIN: Under the Teamster bylaws, that indeed is what they say, that the appointments are within the president's discretion.

QUESTION: Is it not -- what is the precise language? Is it at his discretion or at the pleasure?

MR. BOLOTIN: The president has -- I believe it does say at his pleasure to hire, fire, and so forth.

QUESTION: The same way the President of the United States appoints several thousand people every --

MR. BOLOTIN: That is the same sort of appointmient power, yes, on a lesser degree.

Now, he did not make any inquiry. He did not approach any of the agents, nor did he even ask if they would support his policies and questions. The plaintiff Petitioners immediately went into district court and

sought injunctive relief, alleging three causes of action: one, that the discharge was an infringement of their equal rights and privileges pursuant to 29 USC Section 411(a)(1); that it was an infringement of their freedom of speech and assembly rights to participate in union affairs, in violation of 29 USC 411(a)(2); and that their discharges constituted discipline within the meaning of Section 529 of the same statutes.

The district court denied the injunctive relief, and later a motion for summary judgment by the Respondents was filed. It was granted, and the Sixth Circuit affirmed.

Now, the district court -- the reason the district court denied and dismissed the case is that the district court found that the plaintiff Petitioners had not alleged the cause of action under the LMRDA because the court made an inquiry and reached the point where it found that these business agents were appointed officials, and therefore concluded because they were appointed rather than elected that their rights as members were not affected, and the statutory provisions which I mentioned did not apply.

So, after that, the court really didn't make much of a factual inquiry. It -- The case is before this Court having been dismissed on summary judgment,

even though we would submit that there are factual differences in the record, and the record is -- we would also submit, is rather incomplete.

The issue, then, therefore, is whether under Section 411(a)(2) and under Section 529, whether these sections, which specifically refer to rights of members, excludes the rights of members who also happen to be appointed officials. We submit that members includes all members, including appointed members, and that these statutory provisions do apply.

In support of our argument, we have essentially four reasons. First of all, if you look at the plain meaning of the statute, if you look at the definitional section contained in 402(o), it defines "member" as being any person who has fulfilled the requirements of membership, who has not taken involuntary withdrawal card, nor has been disciplined or suspended through some sort of proper union procedure. So the "member" itself says any person.

If you look at the language contained in Section -- well, in all three sections and throughout, there are phrases such as "every member", "any member". These are very expansive phrases, which does not -- if you look at their ordinary and common meaning, it would seem to imply that there was no intent by Congress to

exclude members who happened to also be appointed officials, or for that matter who happen to be elected officials or officers.

To -- The district court, we believe, erred in construing these statutes to make that exclusion. Now, the second reason --

QUESTION: I didn't read the district court's opinion or the opinion of the court of appeals as having excluded members who were officers from protection as members. The district court says they were wearing two hats, and they are protected in their status as members, but they are not protected in their jobs as members of the president's advisory committee or cabinet or whatever it was.

MR. BOLOTIN: Well, the decisions did state -- did make the distinction between appointed and elected officials. We do not necessarily agree that that distinction is a meaningful distinction. It also pointed out, as you indicated, Justice Rehnquist, that the -- their rights as members, according to the district court, were not affected, but indeed, these business agents were disciplined for exercising their rights as members, and the reason given by the newly elected president in discharging them was that they had campaigned, and that they were too loyal for the

oppositional candidate. So there was an indication that yes, indeed, their rights as members were affected.

Now, if you look at the legislative history behind these particular sections, the first thing you realize is that it is a little sparse, and the second thing you realize is that there are different things in it that one could draw upon to justify various arguments. But we -- if you look at the comments of Senator Mundin and also of Senator Goldwater discussing the Schmidt letter to Senator Kennedy, we read from that that they assumed that officers were included, because both of those Senators were discussing the abuses and the reason for the -- the necessity for the law, and they were saying that members have to be protected and officers essentially have to be protected from retaliation by corrupt union officials.

QUESTION: Are you arguing for a construction that would require the president of a union to keep on on the executive committee someone who had campaigned against him in the election?

MR. BOLOTIN: We think that is an illegal reason. What we are arguing for is a construction which requires the president of the union to make a good faith reasonable inquiry on whether these individuals would oppose or obstruct his policies or not. What we have in

this case is -- the facts show that the president gave what we believe to be an illegal reason, that is, I am getting rid of you because you supported the oppositional candidate. And the facts in this case and the rule that we are asking for are no different than if you had an incumbent officer and you had an appointed agent working under that incumbent who -- who the incumbent president got word that he was going to run against him, or who happened to criticize him, and then he was terminated because of those viewpoints.

We do not believe that the election process itself is sufficiently controlling to justify the termination if the basis of the termination was an illegal reason, and the reason being because you exercised rights protected by the Bill of Rights and Section 411(a)(2), (a)(1), and protected also through 529.

QUESTION: Did your clients lose their membership in the union?

MR. BOLOTIN: The immediate effect of the discharge was not to lose their membership in the union, but put into motion a procedure whereby after a lapse of time under the Teamster constitution, Article XVIII, Section 5, if they were unable to return to employment within the industry, they would automatically be issued

involuntary withdrawal cards.

Now, as a practical matter, some of the plaintiffs and Petitioners were able to return to their prior employments, but a great many of them were not, and they found themselves out of -- out of work. They found that the -- the benefits the union had been providing for them were gone. You must keep in mind that they were paying dues to the local union. They had all the benefits of a member, but when they were terminated, their health and welfare payments were stopped, their Blue Cross, Blue Shield, life insurance premiums all were stopped, and they were out of work, and then it became a question of whether they could return back into the industry through some other employer.

QUESTION: Isn't that the issue on which the district court said that the complaint simply didn't take up, and if you wanted to go into that, you would have to file a new complaint?

MR. BOLOTIN: The district court did state that, and did state that the complaint should have been amended, but it did not give us an opportunity to amend the complaint, and stopped at the inquiry that no cause of action basically had been asserted. Now, I think the subsequent facts are relevant, because you must look at

the motivation at the time of the discharge, and I think if you look at what the effect of the discharge did to the plaintiffs, that is, it set into motion the probability that they would not be able to return to employment in the industry, that shows that this kind of termination did indeed affect their rights as members.

It also did another thing. When they were -- Prior to the discharge, they were appointed business agents. Prior to being appointed business agents, most of these men had been members of the local union for many years. They had worked their ways up as stewards, chief stewards, had been very active within the local union, had been very vocal in the local union, and this is why, I submit, they were eventually appointed as business agents.

While they were as business agents, they were allowed to participate on the stewards' council, which is the -- supposedly the legislative body of the local union. Now, the stewards' council is composed and comprised of some 800 or 900 stewards, so the business agents' role on that was more of a voice or a vote on the stewards' council. They certainly were not in a position to control, since there were only 15 of them, to control any policies or decisions that were made -- that were made, but they indeed, upon being terminated,

lost this position, lost this ability to participate as freely, to discuss union matters as openly as they had before, and they lost it because of the exercise of rights as members. There is no question that they were terminated because of the campaign and their campaign activity.

I think also if you go back and look at the legislative history you will find that there is no -- no where any language which indicates that an exception was being made in 411(a)(2) and in 529 to exclude officers from the coverage. As I indicated, I believe that the Congress assumed that they would be covered.

Now, there is one exclusion exception, and that is in Section 101(a)(5), or 411(a)(5). 411(a)(5) sets forth the procedural due process requirement for the unions, and contained in that section is a specific -- contained in that section is a specific exception that officers and employees were not -- did not have the due process rights of the regular membership, and if you go back and you look at the legislative history and the purpose behind that exception, you will find that Congress was concerned with allowing a potentially corrupt union official who was in power, who was misusing union funds or perhaps not holding meetings pursuant to the bylaws, they were concerned that if you

did not have that exception in the procedural part of the Bill of Rights, then that corrupt union official would be able to cause serious harm to the union as an institution before a trial could proceed or before he could be removed to determine whether indeed he was harming the union or indeed whether he was corrupt.

Now, we submit that because this exclusion was specifically put in 411(a)(5), and not put in Section 529, that it indicates an intent on the part of Congress not to exclude officers and employees from the protection of 529 and therefore also from the protection of 411(a)(1) and (a)(2).

QUESTION: Isn't the question here how you construe the statute?

MR. BOLOTIN: That's right. That's right.

QUESTION: And do you say -- do you say that the statute should be construed as the Constitution would be construed, or is it just some --

MR. BOLOTIN: I say that --

QUESTION: Did Congress just -- was it just legislating in the dark?

MR. BOLOTIN: No, I say that the statute should be construed with the Constitution in mind, because the legislative history does indicate that they were attempting to adopt a bill of rights comparable to

the constitution for union members.

QUESTION: Well, do you think that then -- if you knew what the Constitution meant at that time, would you think that is the meaning that the statute should have?

MR. BOLOTIN: Not necessarily. I think that is a question of Congressional intent in interpreting the statute.

QUESTION: Well, of course it is, so -- of course it is. So what did Congress intend?

MR. BOLOTIN: Well, it is our position from reviewing the legislative history that they intended --

QUESTION: There wasn't any constitutional law at the time that would have forbidden firing for political reasons, was there?

MR. BOLOTIN: I know the AF of L-CIO has argued that point. I am not entirely clear where the status of the law was when these hearings were in effect. I am acquainted with the Adler and the Pickering cases that are cited.

QUESTION: Well, would you agree or wouldn't you that the statute should be construed in the light of the constitutional law that existed at that time, whatever it was?

MR. BOLOTIN: I don't necessarily agree with

that proposition, and for this reason. The reason is that it is difficult to know --

QUESTION: Well, would you still not agree with it if you could show that the constitutional law then was exactly what it is now? Suppose -- just suppose. I don't think that's true, but suppose that the constitutional law then is precisely what it is now. Would you still say that you should give some kind of independent construction to the statute?

MR. BOLOTIN: I think that would be very tempting, to take that position, since as I construe the constitutional law now it is more favorable for our position, but the point I wish to make is that it is difficult enough to construe the Congressional intent without going through the court cases and construing the judicial intent, which also may existed at the same time. I think when you are dealing with a statute, it is more important to focus on the -- the Congressional intent of Congress in passing it, because you --

QUESTION: May I ask, Mr. Bolotin, following up on my Brother White's question, I gather your argument focuses, statutory argument, in any event, primarily on the word "discpline" in 609, does it?

MR. BOLOTIN: Well, and infringement in 411 as well.

QUESTION: Yes, but do I -- perhaps I didn't correctly understand your argument, but I thought your argument emphasized that under 609, it is a violation to discipline for this protected conduct.

MR. BOLOTIN: That is true. There is two theories. One is the discipline.

QUESTION: And you suggest that these discharges were a discipline?

MR. BOLOTIN: Yes, I do believe they were a discipline. They were a discipline --

QUESTION: Well, there wasn't any misconduct involved, was there?

MR. BOLOTIN: Misconduct in the sense of -- well, according to the newly elected president, the misconduct was that they supported the wrong candidate, and they exercised their political opposition.

QUESTION: Well, he certainly dismissed them because they had supported his competitor.

MR. BOLOTIN: Right.

QUESTION: But did he -- was that action taken as discipline on --

QUESTION: That was -- 411.

MR. BOLOTIN: Well, I suppose that is the issue in the case, and that is, as every other discipline. This is what we are talking about. We

would submit that being discharged in retaliation for exercising rights of freedom of expression is a form of discipline because --

QUESTION: But you don't -- you don't give up your 411 argument?

MR. BOLOTIN: No, we do not give that up. Even if we were to -- if the Court were to reject the 529 or the 609 argument, the 411 argument is still a very good argument, and a -- and it is certainly an infringement.

QUESTION: What about retaliation?

MR. BOLOTIN: Well, the retaliation argument is sort of combining both of them, because it demonstrates a lack of --

QUESTION: But is that independently -- is that independently proscribed by the statute?

MR. BOLOTIN: I think it is inherent in 529 and in the infringement language, that if you --

QUESTION: What about 412? Is there a section --

MR. BOLOTIN: Yes, there is. That is the -- that is how it is carried out through the jurisdictional section. So if a right has been infringed, then you have the right to sue pursuant to 412.

QUESTION: I see.

MR. BOLOTIN: Now --

QUESTION: May we come back to the facts for a minute?

MR. BOLOTIN: Yes.

QUESTION: What is the size of the stewards' council? How many members?

MR. BOLOTIN: There's approximately, at any -- it depends upon the population of the local in terms of layoffs and so forth, but at that time there were approximately 800 to 1,000 stewards, including assistant stewards and chief stewards and so forth.

QUESTION: You had a local union of about 10,000 members?

MR. BOLOTIN: 12,500.

QUESTION: Right, and the stewards' council was about 1,000?

MR. BOLOTIN: Correct.

QUESTION: Right. And it included all of the business agents?

MR. BOLOTIN: And all the stewards and all the officers.

QUESTION: Yes. And how many business agents would there be all together, roughly?

MR. BOLOTIN: There were approximately 20 business agents all together, because all the officers

did not draw salaries as officers. They only drew salaries as long as they were employed as a business agent.

QUESTION: So 15 out of 20 were discharged?

MR. BOLOTIN: That's, I believe, correct.

QUESTION: Um-hm.

MR. BOLOTIN: The other reason that the --

QUESTION: Did the president in his action rely on the proposition that he as the duly elected president was entitled to have people who were in sympathy with his point of view and who would faithfully execute his policies?

MR. BOLOTIN: He did state that at some point in either his deposition or at the preliminary injunctive hearing, and perhaps even at the meeting, although I don't have the --

QUESTION: Is that not inherent in the union constitution and the provision that these men, his people hold office at the pleasure of the president?

MR. BOLOTIN: That is inherent in the bylaws of the Local 20. That is, the president has the sole and exclusive appointive power. But what we are complaining about here is that he --

QUESTION: Well, wait a minute. Is it the constitution or bylaws?

MR. BOLOTIN: It may be in both. I know it's in the bylaws, and it is probably in the constitution as well.

QUESTION: I think the constitutional provision is that they hold office at the pleasure of the president. They get their office by his appointment, they lose it by his decision. That's correct, under the constitution, is it not?

MR. BOLOTIN: That's correct. That's correct.

QUESTION: Well, Mr. Bolotin, if that is so, if that is expressed or implied in the constitution and the bylaws, then on your 411 argument, what of the qualification at the very end of (a)(1), subject to reasonable rules and regulations and such organizations' constitution and bylaws?

MR. BOLOTIN: Well, the question is, was it reasonable to discharge these particular business agents. Are they --

QUESTION: Well, no. This says, subject to reasonable rules. Are you suggesting such a rule, whether explicit or implied, would not be reasonable?

MR. BOLOTIN: No --

QUESTION: That on -- if you support the change of administration, why, the new president --

MR. BOLOTIN: What I am suggesting is that if

you, as the president did in this case, enunciate an unlawful reason along with perhaps lawful reasons for the discharge, then I think it becomes --

QUESTION: Well, suppose -- suppose the constitution and bylaws have explicitly set out that on the election of a new president, that president shall -- may dismiss all the business agents. Suppose it said so in so many words. Would you be here?

MR. BOLOTIN: Yes, we would still be here, because this is a retaliatory discharge --

QUESTION: Well, except that the 411(a)(1) says that all -- everything that -- in the way of rights and privileges thereby conferred are subject to reasonable rules and regulations in such organization's constitution and bylaws.

QUESTION: Well, you would say that wouldn't be a reasonable rule, I suppose.

MR. BOLOTIN: Well, what we would say is that that -- that qualifying language is not the same language that is worded in 411(a)(2), which says that it does have a reasonable rule, but it also talks about protecting the union as an institution, and if you look at the legislative history, you will see that there were two concerns of Congress. One, they wanted to, as practically as possible, ensure as much free speech and

democratic processes as possible, and two, they did not want the union as an institution to be harmed.

Now, to the extent that you have appointed officials who perhaps are at a very high level, who are involved as the -- in the Branti case, the analogy in the Branti case, who were involved in policy-making or who to the extent are confidential employees, then I would submit that it could be argued that the union as an institution would perhaps be in some sort of jeopardy if these people were allowed to stay on the payroll, but what we are saying --

QUESTION: Even two, 411(2) has a qualification, doesn't it, a proviso, that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization.

MR. BOLOTIN: Right, but they are talking there of the conduct of the member toward the union as an institution, not necessarily on the right of the president to hire and fire because someone happens to exercise the rights set forth in the preceding language in Subsection (2), and I think that is important.

QUESTION: What if they had a rule that said in so many words, anybody who votes against the

incumbent president will be fired the day after the president is re-elected? Would that be permissible under the statute?

MR. BOLOTIN: No, it would not be permissible, because I don't think union bylaws can be -- supersede the laws of the United States.

QUESTION: Well, but is there anything in the statute that would prohibit that? What would prohibit that?

MR. BOLOTIN: There is a section later on that requires that the constitution and bylaws be filed with the Secretary of Labor, and that they must provide certain reasonable procedures. I don't remember the exact cite, but I do believe there is something in the bill of -- the Landrum-Griffin Act concerning that point.

QUESTION: Do you rely at all on the particular jobs these people had? Would it be a different case if they were either more senior or less senior? I am not quite clear on what your position is.

MR. BOLOTIN: Well, I think the court -- unfortunately, we are here on summary judgment, and the court never -- decided this case as if there were no factual issues in dispute, but never really made the proper factual inquiries to determine what standards should be applied. I think it is conceivable that you

can get a very high position in the local union, like the chief administrative assistant to the president, or his confidential secretary. In those positions, it might require for the legitimate benefit of the union as an institution that they be removed, but in this case, we have a record that does not indicate -- that does not indicate what role these business agents played, and the Respondents, at the last page of their brief, in their argument, concede that these business agents were not involved in policy formulating at all. They are comparable to district attorneys, assistant district attorneys who are performing representation to clients. They performed representation in servicing the members.

I note that the balance of my time --

QUESTION: Could I ask you just a question?

MR. BOLOTIN: Yes.

QUESTION: Do you think the judgment below would permit the wholesale firing of all business agents if none of the business agents, A, had campaigned, or had said a word about whom they preferred? Would the holding below permit just cleaning out the business agents just because there has been a change in administration?

MR. BOLOTIN: I think that is a factual determination which has to be made. If they were

terminated because of lawful --

QUESTION: Well, I am just asking, do you think the holding below would permit that?

MR. BOLOTIN: At this point I think it implies that, yes, because --

QUESTION: Well, would there be anything wrong with that, if they fired them just in order to have new business agents? It wasn't because they opposed him, or because of what anybody said.

MR. BOLOTIN: I think if those were truly the facts, and if the Court had made those inquiries, then I agree with you, but what we have here --

QUESTION: Then there wouldn't be anything illegal about it?

MR. BOLOTIN: Right. What we have here -- I agree.

QUESTION: Well, what about somebody who -- what about somebody who hadn't actively campaigned, but they had just said who they were for?

MR. BOLOTIN: I think that --

QUESTION: Would the -- would the judgment below permit cleaning those people out?

MR. BOLOTIN: Well, I would think it would necessitate the court below to make an inquiry on whether that was a reason for the discharge. What we

have here is a prima facie case once you accept the notion --

QUESTION: Yes, I know.

MR. BOLOTIN: -- once you accept the notion that appointed officials are protected, and now it is incumbent upon the Respondents to justify their action.

QUESTION: But the reason in this case is that the man said, you are loyal to the other man and you are not to me, and that is the reason you go, that is this case.

MR. BOLOTIN: That's right.

QUESTION: That's right.

MR. BOLOTIN: I will reserve the balance of my time. Thank you.

CHIEF JUSTICE BURGER: Mr. Iorio?

ORAL ARGUMENT OF THEODORE M. IORIO, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. IORIO: Yes. Mr. Chief Justice, Members of the Court, may it please the Court, initially, I think it is important to reflect very quickly on some of the facts as it relates to this matter. Although counsel has hit on some of them, there are some other critical facts that I think the Court should be aware of.

Initially, the bylaws of Local 20 clearly and explicitly give the president the absolute right to hire

and fire whomever he wants. That is clearly spelled out and that is before this Court. The duties of the business agent are before this Court. The business --

QUESTION: Yes, but you don't contend that he could fire them for any reason he wanted to.

MR. IORIO: I --

QUESTION: He couldn't fire them because they were black.

MR. IORIO: That's correct. He could not fire them --

QUESTION: He couldn't fire them, for example, for having filed a charge.

MR. IORIO: That's correct.

QUESTION: Well, so there are reasons for which he couldn't fire them.

MR. IORIO: Where there is specific legislative enactment, Justice White, I would agree, that where Title 7 or the Labor Board has specific rules and regulations as they relate to labor unions as an institution, as with any institution --

QUESTION: Well, suppose he didn't fire them -- suppose he didn't fire them at the -- when he came into office, but a little later, when one of them said something in some union meeting contrary to what -- what he thought was contrary to his policies. Do you think

he could just fire them?

MR. IORIO: If he is an appointed business agent, that's correct.

QUESTION: Suppose he just said to them, I want your resignation, giving no reason at all.

MR. IORIO: If the president had asked for the resignation and given no reason at all, he certainly could do that under the bylaws and under the Landrum-Griffin Act as it exists today.

QUESTION: You would be relying on the provision --

MR. IORIO: Of the Act.

QUESTION: -- that they serve at the pleasure of the president.

MR. IORIO: Exactly.

QUESTION: You would still be subject to suit, that -- if somebody could prove that he really fired them for a specific -- for a specifically forbidden reason.

MR. IORIO: Well, again, I assume if the appointed business agent sued on the basis that it was because of race or something specifically prohibited, certainly --

QUESTION: Yes. You would have to prove it. You would have to prove it.

MR. IORIO: That's right. They would have to prove it. But if it was as a result of the facts that are before this Court, we think it is fairly clear what Congress intended when they passed the Landrum-Griffin bill. I think it is important also from a factual point of view that the business agents at Local 20, and it is before the record, the business agents negotiate contracts, they determine in the first instance what cases will be arbitrated, and they handle the day to day affairs of the labor union as it relates to representation with the employer. So they are the very heart and the very guts, as it were, of the labor organization.

QUESTION: I suppose you would have a harder case if it was the Ladies' Garment Workers Union, and the president said, I really think that the business agent of this big unit must be a woman, not a man. That would give you a rather hard case, wouldn't it?

MR. IORIO: That would make it more difficult, Your Honor, but again, on the basis of looking -- putting aside specific legislative enactments as they relate to labor or to employers or whatever particular organizations, given these specific facts, we think it is clear absent any kind of race or --

QUESTION: Why do you think -- why do you

think he is justified in firing them all, because of reasonable questions about their loyalty?

MR. IORIO: Yes, but I think it is important on the facts, Justice White, that the business agent here, and on the record, the administrative assistant to Brown, who was the incumbent, stated himself that a business agent must be loyal to the president and his policies.

QUESTION: Yes. Yes.

MR. IORIO: In the election, the insurgent Leu ran a campaign on the basis that the members were not being represented.

QUESTION: But you don't -- you don't suggest that the -- that your client made individual determinations about loyalty in this case.

MR. IORIO: I guess what I am suggesting --

QUESTION: You are just saying that anybody who campaigned against him, a per se rule is --

MR. IORIO: Exactly.

QUESTION: -- is subject to being disposed of.

MR. IORIO: Subject to dismissal.

QUESTION: Yes.

MR. IORIO: Exactly. What we are saying is, under the facts of this particular case, that the president of the local, consistent with the bylaws, has

the right to terminate business agents for whatever reason --

QUESTION: You wouldn't have to --

MR. IORIO: -- as long as, of course, they don't involve sex, race, or --

QUESTION: You wouldn't have to find that they campaigned against him. He could just decide that he wanted his own people aboard.

MR. IORIO: Exactly. It is not the basis of the -- he could have no reasons.

QUESTION: Exactly, but the thing of it is, he did have a reason. The reason was that they campaigned against him, and that -- and drew an inference of disloyalty.

MR. IORIO: That's correct. The record reflects disloyalty, and the record reflects also that he ran a program on the basis that the incumbents were not adequately representing the membership, and that --

QUESTION: To what extent do you rely on the fact that these are business agents? What if they had been, say, bookkeepers, and had nothing to do with policy, but nevertheless could be discharged without any -- any hesitation for no reason at all? Would you take the same position?

MR. IORIO: Well, clearly, Your Honor, as it

relates to this Court's reasoning in Branti and in Elrod, this Court has taken a distinction in the constitutional area, the First Amendment --

QUESTION: Right.

MR. IORIO: -- but again, in this particular -- on the facts of this particular case, absent the application of a constitutional doctrine, we would say that although these are not the facts, that under the current status of the laws that exist today, that they would be permitted to terminate.

QUESTION: They would be permitted.

MR. IORIO: They would be permitted. Yes.

QUESTION: So it really doesn't matter whether they are business agents or bookkeepers, under your view of the law.

MR. IORIO: That's correct, although an adoption of a Branti-like standard or an Elrod-like standards based on what the duties of the business agents do, they would clearly fall within that rationale.

QUESTION: Well, how do -- there hasn't been a trial. That's what I was wondering about. All 800 of them would definitely be policy-making appointed officials. Is it perfectly clear on the record? That is what I am wondering.

MR. IORIO: Well, from the record, the

business agents, there was approximately that were involved, and the business agents that were involved, from the record it's clear they negotiate contracts, that they involve themselves in determining what cases are arbitrated at the first instance, and they handle the day to day affairs of the membership, and that really is the heart of what a local union does, and that is done, of course, through the business agents who are out in the field and out in the shop dealing with the membership, and we feel that the record --

QUESTION: So you really make two arguments, if I understand you. One is that they are in the nature of close to the -- close to the executive, like a policy-making person, that they should be able to fire. And secondly, you say in any event it is a statutory question and the Branti line of cases just doesn't apply at all. You make both arguments.

MR. IORIO: That's right. We would also make, although I haven't gotten there, Your Honor, we would also make a third argument that a Mount Healthy type of standard would also be applicable here, in the sense that if there were a finding by this Court that they were not policy-makers, and as Justice Rehnquist indicated in Mount Healthy, they should not be put in a better position than they would otherwise have been had

they not exercised their alleged Title I rights, and based on the record, where the record reflects that the insurgent, the outsider ran a campaign on the basis that there was poor representation, surely that provides sufficient justifiable motivation under a Mount Healthy type of application, so I guess we are saying three things as we get into that area.

QUESTION: Well, but the Mount Healthy analysis isn't whether it would be justifiable, but whether it was in fact the real motive.

MR. IORIO: That's right, if it was the sole motive.

QUESTION: Rather than the fact that they were of an opposite party

MR. IORIO: Right. There were equally contributing motives.

QUESTION: There is no question -- there is no question about what the reason was in this case.

MR. IORIO: Well, I -- from the record, Your Honor, there were two reasons. One was the question of loyalty, and the other question was that the insurgent ran on a platform that said that the incumbents were not giving adequate service to the membership.

QUESTION: As the question comes to us, though, the district court said it didn't make any

difference --

MR. IORIO: That's correct.

QUESTION: -- whether -- whether he fired them for -- whether they would be -- whether he had any individual findings of loyalty or not. They just said, just because they ran, that's enough.

MR. IORIO: Yes, that's true. The district judge adopted and the Sixth Circuit --

QUESTION: That's the way it comes -- and that was -- that's the way it comes to us.

MR. IORIO: And the Sixth Circuit adopted the per se rule.

QUESTION: Yes.

QUESTION: Is it possible there is a third factor, that the president can fire for any reason or for no reason?

MR. IORIO: That's correct, Your Honor. That's exactly what we say the bylaws --

QUESTION: Under the constitution and bylaws.

MR. IORIO: That's right, and that's what the -- which the members, of course, have adopted, and again from another point of view as it relates to some of the questions from Justice Stevens, as it relates -- and this was brought up initially on Petitioners's case, we think it is relevant that this Court in a time frame

sense look back to 1959, and when you look back to 1959, in order to glean the intent of what the Congress wanted to do as it related to Title I or 609, that it's clear that Congress could not have intended nor did they intend to protect in a patronage way as they did -- as this Court has done in Branti and Elrod subsequent, they could not have intended that. The law was nowhere along those lines at that time, in 1959, and it is clear that Congress had enough knowledge of the area in the sense that they distinguished between elected officials or appointed officials, as they did at 401(h) of the Act, so that they were aware that there were distinctions.

QUESTION: So you say Elrod and other developments like that since then are irrelevant.

MR. IORIO: We are saying as they relate to this, yes, because Elrod and Branti are irrelevant because this is a statutory case, this is not a constitutional case. The Act itself in Title I has a reasonable standard which is, of course, different than the First Amendment standard, which requires compelling governmental interest, so that on that basis alone, the language itself is written, not -- it does not adopt the First Amendment language by any stretch of the imagination, nor did Congress indicate in its legislative history anything to indicate that they

wanted to formulate a theory or a policy that would run parallel to the First Amendment of the Constitution.

And also, Your Honor, when you look at the legislative history, when you see the original draft of the Bill of Rights and the Bill of Rights's first draft, it had very strong language in 101(a)(2), the free speech provision, that -- that indicated that a member -- that no member could be subject to penalty discipline or interference of any kind. It was very broad when that was put together, and then as it went through the hearings and the conference committees and the like, the Keuchel amendment, of course, followed, and that amendment cut that language out, which we feel clearly indicates that Congress did not intend to give a broad and absolute approach to the rights as contained in Title I, but rather a limited one.

QUESTION: Isn't it pretty clear, though, that a member, a member as a member, has much broader rights to do almost anything he wants to do free of any interference as distinguished from a member who is an officer?

MR. IORIO: Well, in the case -- that's correct, Your Honor. In this case, though, it's an appointed officer, and of course there is a major distinction between an appointed and an elected officer.

QUESTION: Yes, and an elected officer.

MR. IORIO: That's correct. The whole concept of Landrum-Griffin was a bill that was put together in order to look to the member and balance the rights of a member vis-a-vis the union institution.

QUESTION: Counsel --

MR. IORIO: Yes.

QUESTION: -- on that point, some of the briefs that have been filed indicate that it was the desire of Congress to rely on kind of unfettered union democracy to reach better results in terms of union practices, and urged this Court to reverse on the basis that to affirm the Court below would give the union the tools to create a one-party patronage machine. Would you comment on the position taken in some of those briefs?

MR. IORIO: Your Honor, the -- of course, the facts before this case indicate that -- particularly at Local 20, which is the local that is before this Court, that there has been a history here of a two-party system. If anything, the facts of this case are a tribute to Landrum-Griffin in the sense that there have been three or four elections in which Mr. Brown and Mr. Leu have fought each other on a number of occasions, where they have, and the record discloses, have been

engaged in very heated campaigns, election campaigns.

And we would submit that where the local union members determine the bylaws, and they say in their bylaws they want their president to pick the agents, that that in effect is a referendum on the business agents, and if the business agents are doing a job, and they are out in the shop and they are doing a job, then the president who is elected is not going to have any problems.

We think that the way Local 20 is set up their -- the bylaws and the way that they operate indicates exactly what Congress wanted. They said to the members, what kind of bylaws do you want? The members said, these are the bylaws, the kind of bylaws we want. This is the kind of president we want to have. And if the president's business agents don't do the job, then he is going to be gone, and we don't see that patronage as it relates to your particular inquiry would in any way cut down on the effectiveness of union members' rights, because the stewards' council, again, the bylaws are before this Court, indicates that they can change the bylaws if they want.

In fact, the irony of this case is, and it is on the record, Mr. Brown ran a campaign on the basis he wanted elected business agents. That was a finding by

Judge Young in the lower court. And of course that was never put into effect, and Judge Young commented, well, maybe if it had we would have a different result here, but be that as it may, again, we feel that the way that this whole situation has been handled is a tribute to the Landrum-Griffin process.

There has been some reference to 609, and very quickly, I would like to point out that as it relates to 609, that 609 was preceded by 506 and the legislative history, and when it was -- when 506 was put together -- it's the identical language of 609 -- that when it was put together the bill of rights had not even been -- had not been formulated. Therefore it is difficult to glean from 609 an intent to broaden the rights under Title I of the Act.

Also, again, when Congress wanted to distinguish and indicate its -- that it understood the difference between discipline and removal as it did in 201(a) of the Act, it spelled out under the Title II provisions, the reporting provisions, that unions have to report discipline or removal of an officer or an agent. And surely, if discipline meant removal, why would you have to put discipline or removal?

As importantly, in 101(a)(5), the procedural due process aspect of Landrum-Griffin, the court in

parallel language to 609, almost identical language, the legislative history is clear from Senator Kennedy's comments that officers were not to be included with the "every member" language of 101(a)(5) of Landrum-Griffin, and that is clearly spelled out, and unless there is a reason to the contrary, it seems pretty clear that if Congress meant 101(a)(5) to exclude union officers within the definition of "member" with the same kind of language as 609, it seems only consistent that in 609 the same type of reasoning should be adopted.

QUESTION: Is there anything in the language of the statute or in the legislative history that suggests that Congress was contemplating an Act that would give tenure to appointed officers?

MR. IORIO: Your Honor, I would suggest to the -- well, first of all, the legislative history is sparse on it. But I would suggest that the Congressmen -- it is hard to believe that the Congressmen at that time who were attempting to balance the interests of the union and the interests of the members, and who themselves have engaged in patronage, would have assumed or would have put into an Act a patronage type of -- or outlawed patronage, particularly at that time, in 1959, without specifically laying it out within the Act. I mean, it is almost inconceivable that those who enjoyed the

patronage system would take it away from the union institutions without specifically referring to it in the legislative history, and there is absolutely none of that.

I would like to just briefly comment on Branti and Elrod for a moment, because it has been raised by the various briefs here that the Branti and the Elrod have some application here, and as I have already indicated, it is our position that the court -- that the Congress did not intend for Landrum-Griffin or the Title I aspects to follow the evolution of the First Amendment of the Constitution, and that it requires an entirely different interpretation of this Court.

That issue, the Branti-Elrod issue, was never raised in the court below, and was raised for the first time as we got to this Court, but nonetheless, we feel it is ripe for adjudication, although I would point out to the Court that under the Branti and, assuming the Court feels in some way that it's applicable, that under the Branti and Elrod standard, that in those cases the Court was very clear in setting forth the factual situation that the individuals protected there, the bailiff or the summonser or the public defender, were passive in the political process.

The facts in this case are, is that we have a

very active participant and personal confrontations, and we would suggest to the Court that in that situation Branti and Elrod should not be applicable, and the reason for that is, and it's fairly simple, there is no way a local union, or for that matter any organization, could operate on the basis of having people that were in confrontation, as they were in this very hotly contested election, sit down and try to work together. The internal bickering would make the very function of the union impossible, not to mention the fragmentation of the power of the union in dealing with employers, particularly in the troubled times that we face today.

Also, as it relates to Branti, we would point out to the Court that, using Justice Stevens's language, that in this particular case, if it is applicable, that we feel that party affiliation, if that is what we want to call those who supported Harold Leu, is an appropriate requirement for the effective performance of office for the reasons we have just given, that it would cause fragmentation of the union and internal bickering, not to mention the fact under the Branti or Eldrod standard that these are -- business agents are defined as key administrative personnel under the Act itself, that, as I said, they negotiate contracts, do the grievances, handle the day to day affairs of the union.

And we would suggest, and I think it was a concern of this Court in Elrod, that to permit business agents who have campaigned head to head in the situation that we have here today, to say to the insurgent in this case, you can't hire who you want, would be to put people in the position where they could thwart, within the language of Elrod, thwart the policies of the in party.

In conclusion, we would suggest to the Court that we cannot imagine a factual situation or cannot imagine that Congress would have ever in its day intended, in 1959, that an insurgent who ran in a union election and ran on a platform -- on a platform which said to the members, we don't feel you are getting good service, we are going to clean house when we get in, that Title I in any way precludes that insurgent after winning the union election from cleaning house, as it were, particularly where the people that were -- in which -- were terminated, that those business agents that were terminated fully participated to the fullest as it relates to their Title I rights, and therefore we suggest that based on the record before this Court, that the lower -- the courts of the -- the lower courts were correct in their determination, and look for an affirmation. Thank you.

CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Bolotin? You have about four minutes remaining.

ORAL ARGUMENT OF SAMUEL G. BOLOTIN, ESQ.,
ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. BOLOTIN: Thank you.

The problem is the record before this Court, and the other problem is that this matter is before the Court on summary judgment. There is no doubt that there are facts in the record which counsel for the Respondents can refer to to support their arguments, but there are equally facts in the record that show that the facts are in dispute, and the facts are not not in dispute, and in particular, counsel is referring to the fact that Harold Leu ran a campaign against these business agents because they were providing poor representation, but if you look at Page 64 of Harold Leu's deposition, which is not in the joint appendix but is contained in the records of the Court, when asked under cross examination why he terminated the agents or whether he campaigned against them, this is what he said. "Where it was on there, on the literature possibly that Harold Leu represents you, that was my theme. If you think that I campaigned against the business agents, you are wrong. My campaign was against

the administration because that's where the responsibilities lies." So that --

QUESTION: Well, aren't they -- aren't they part of the administration, the business agents, by their -- the other hats they wear?

MR. BOLOTIN: Yes, but the point I am making, Chief Justice Burger, is that the facts are in dispute as to whether he campaigned against them or campaigned against Brown as the chief officer of the local union. The other thing that is in dispute is the factual issue of whether he indeed received a mandate from the membership to replace these business agents. In fact, all of Brown's officers were elected. We would submit that if it weren't for the blizzard, Brown would be in office and this case wouldn't be before this -- wouldn't be before this Court today, and in fact the election ultimately was declared null and void because of employer money which Leu received in the campaign.

So, clearly, there was never any mandate. I am not suggesting that the fact that the election was voided is determinative of the issues in this case. I am merely stating that the facts in the record are not clear.

QUESTION: Has there been a re-election?

MR. BOLOTIN: Yes, there has. There was a

rerun election.

QUESTION: And did Leu --

MR. BOLOTIN: Leu prevailed at that point. That's correct, with another very close election.

Now, let me conclude by saying that you have to keep in mind the basic overall policy behind Landrum-Griffin and the Bill of Rights, and that was a policy that came about because of corruption, dictatorial practices, racketeering, employer and unions being in bed together, if I may use that phrase, and a policy where union members and officers were being denied rights.

If you keep that policy in mind, you must find that appointed officials in this case must be protected for the exercise of those rights, and you must take an expansive and ordinary common meaning of the language contained in these sections rather than the restrictive meaning that -- which would exclude coverage for appointed officials.

QUESTION: Would not the position you take mean that if a "reform candidate," putting that in quotation marks, who campaigned against the president in authority on the grounds of corruption within the union tolerated by the business agents and the other people of the governing body, then came into office with an

overwhelming vote, are you saying that the statute contemplated that the new president, the reform candidate, should be saddled with the people against whom he had charged corruption?

MR. BOLOTIN: Well, if they were corrupt individuals, and that determination was made, then it would be --

QUESTION: No, not a determination, but he campaigned against them on the grounds that the whole crowd were corrupt, that they were looting the retirement fund, the pension fund, and so forth. Now, apart from whether he can sustain the proof of that, the membership of the union has then voted him into office and voted the other fellows out. No hearing, no determination of the facts. Just the hypothetical I have given you.

MR. BOLOTIN: Well, based upon those facts, then the reason for the discharge would not be unlawful, because he is not discharging them for the exercise of their -- of supporting the wrong candidate or for terminating them because of their political expression in an election. He is discharging them because he believes they are corrupt and they are harmful to the union as an institution. I think that would be a different situation. Thank you.

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

(Whereupon, at 1:53 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Donald finnegan et al. v. HAROLD D. LEU ET AL No. 80-2150

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BY Sharon Ryan Connelly