ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-432

TITLE LOCAL NO. 82, FURNITURE AND PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN AND PACKERS, ET AL., Petitioner v. JEROME CROWLEY, ET AL.

PLACE Washington, D. C.

DATE January 9, 1984

PAGES 1 thru 51

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IN THE SUPREME COURT OF THE UNITED STATES

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LOCAL NO. 82, FURNITURE AND PIANO :
MOVING, FURNITURE STORE DRIVERS, :
HELPERS, WAREHOUSEMEN AND :
PACKERS, ET AL., :
Petitioners :
v. : No. 82-432
JEROME CROWLEY, ET AL. :

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Washington, D.C.

Monday, January 9, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:04 p.m.

APPEARANCES:

GARY S. WITLEN, ESQ., Washington, D.C.; on behalf of the Petitioners.

JOHN H. GARVEY, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the federal respondent in support of petitioners.

MARK D. STERN, ESQ., Cambridge, Mass., on behalf of the Respondents.

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Witlen, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF GARY S. WITLEN, ESQ.,

ON BEHALF OF PETITIONERS

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

Today we ask the Court to determine whether union elections of officers are to be run under the supervision of the federal judiciary or the Secretary of Labor. The key question is whether a court can order a union to conduct a new election of officers under Title I of the Labor Management Reporting and Disclosure Act in response to a suit filed by someone other than the Secretary of Labor.

It is our position that Congress vested the Secretary and only the Secretary with authority to bring suit to rerun an election of union officers. Congress repeatedly rejected other enforcement schemes including suit by individual union members both before and after the addition of Title I to the legislation, and all of the bills considered over the course of two sessions of Congress relied upon the Secretary of Labor as the agent of government to supervise the rerun of union election of officers.

Thus, we seek reversal of the lower courts and reaffirmation of this Court's prior decisions that Title IV, not Title I, is to be utilized to resolve challenges to elections of union officers. We ask that the ballots cast by the members of Local 82 in the 1980 election be returned to the union for tabulation.

I would like to highlight several of the facts set forth more fully in our brief. First, suit here was filed based upon alleged violations of Titles I and IV of the Act which occurred at the union's nomination meeting.

The suit was not filed until after the union had mailed the mailed balloting packets to its members for voting in the election. A temporary restraining order was subsequently issued without an evidentiary hearing some 17 hours before the ballots were to be picked up and tabulated for the stated purpose of preserving the Court's jurisdiction and in order to prevent the Plaintiffs, the Respondents in this case, from having to go through the electoral processes of challenging an election under Title IV.

As a result the union was unable to elect officers for an additional year after the temporary restraining order was issued. In the interim the union was run by officers who had been elected four years

previously.

The new election ordered by the Court was conducted under its rules and under its court appointed arbitrators. Presently pending before the District Court these many years later is the application for attorneys' fees on behalf of Respondents, is a request for permanent relief, is the union's expected expense for reimbursement for the costs of the election that was conducted under the court's order, and for Petitioner Harris' claims for wages if it should be found that he was the successful candidate in the 1980 election.

QUESTION: Who ends up paying for the arbitrator or whoever it is the court appoints?

MR. WITLEN: The union paid for the entire cost of the election including the arbitrator with the understanding, which was discussed at the time, that the union could seek reimbursement from the Plaintiffs if the District Court's injunction was ultimately overturned.

QUESTION: Would there have been that sort of expense to either party if the Secretary had brought the injunction?

MR. WITLEN: Certainly some of the expenses of conducting an election would have been incurred, but the major expense, that in excess of $7,000 to pay the

arbitrator's expenses would not have been incurred because the Secretary of Labor does not charge the union for its expenses and personnel in conducting the election. That is the greatest bulk of the expense.

QUESTION: Were the procedures for the election under the court order like the procedures that the Secretary would follow under IV?

MR. WITLEN: There were major discrepancies between what the Secretary would do and what the union would do and what the court ordered.

QUESTION: Can you say briefly what the difference would be?

MR. WITLEN: Primarily the arbitrators that were appointed did not have the expertise of the Secretary to make evaluations as to the application of the Secretary's own administrative regulations or the union's constitutional regulations and requirements.

QUESTION: The question I wanted to ask in my mind is the violations here concern the nomination meeting as I remember.

MR. WITLEN: That is correct.

QUESTION: Would you make basically the same argument that you make today if the action had been brought promptly after the nomination meeting after the alleged violations occurred?

MR. WITLEN: We would not be making the same argument if the suit was brought prior to the time the ballots were mailed out.

QUESTION: Would not some of your policy arguments be equally strong about having the wrong people running the election and so forth?

MR. WITLEN: If we were to address that question prior to Calhoon and ignoring the prior cases of this Court we would say that the public policy issues and the legislative history arguments clearly discern a congressional intent that there be no pre-election Title I relief. The arguments that we made were in recognition of the language in Calhoon and in Bachowski that seems to recognize some appropriate role for a court under Title I.

Therefore, the line we are asking is a line that we would be happy to see the Court extend, i.e., to say there is no Title I relief, but we think that the line can be drawn in our favor in this case without going that far.

QUESTION: But the whole question really is at what point in time has an election been conducted.

MR. WITLEN: No, it is not the whole point because that --

QUESTION: It is just a little different

theory than Judge Campbell had as I understand it.

MR. WITLEN: It is only marginally different from Judge Campbell. Our basic theory is that once you get to the point where the only remedy in order to grant the relief requested is to conduct a new election the Court does not have Title I jurisdiction.

QUESTION: Well, that could have happened if they had brought the suit right after the nomination meeting. The only effective remedy might be a court supervised election.

MR. WITLEN: I think at that point the court could have merely nullified the nomination meeting and gone back to the union and say do it again. There had been no ballots printed or distributed at that time. I agree, however, that the logic of the public policy arguments and the logic of the legislative history that is set forth in our brief is that even at that point the court should not have had Title I jurisdiction to challenge even the nomination meeting considering the nomination meeting to be part of the election.

QUESTION: Surely if ballots had been cast you think the election has in effect been had?

MR. WITLEN: Certainly, which is the case in this case.

QUESTION: There was not any legislative

history about Title I except in the floor.

MR. WITLEN: That is correct.

QUESTION: It did not go through a committee?

MR. WITLEN: No, it did not, Your Honor. It was --

QUESTION: No hearings on that aspect of it?

MR. WITLEN: No, there is no discussion in the legislative history.

QUESTION: It was written on the floor?

MR. WITLEN: Yes, sir.

QUESTION: You say you had quarrel with some language in Calhoon, or what was the other?

MR. WITLEN: Bachowski.

The legislative history that we have been referring to, I believe, makes at least three things clear about what the intent of Congress was in passing this statute. First, is that Title IV was intended to be the specific vehicle for resolving disputes concerning the conduct of union election of officers.

That procedure and Section 402 procedures were intended to provide the exclusive means of obtaining an order setting aside an election and providing for a rerun. Finally, the statutory goals of democratic elections could not be insured by any agent of the government other than the Secretary of Labor, and it

bears repeating that all of the bills considered in the House and the Senate provided that rerun elections were to be conducted by the Secretary of Labor regardless of how you happen to get to the point of having an order to rerun the election.

I submit that this case provides a textbook example of how the safeguards and objectives carefully established in Title IV will inevitably be nullified when a court acting under Title I is permitted to substitute its judgment as to how an election should be conducted for that of the Secretary, the Congress or the union involved. For example, the statute specifies that elections are to be conducted no less frequently than once every three years and that the winners are to be installed regardless of whether there is a challenge to the outcome of that election.

Well, here we did not have an election for four years, and in the interim we had lame duck officers responsible for running the union.

QUESTION: Was an election conducted this January?

MR. WITLEN: There was an election conducted in December of 1983.

QUESTION: December.

MR. WITLEN: Yes.

QUESTION: So why is it not moot?

MR. WITLEN: There are a number of arguments made on behalf of why it is not moot. First is that in order to resolve the matters presently pending before the District Court we must have the determination from this Court as to whether the District Court had jurisdiction to issue the type of relief it ordered.

Second, the Court itself has held in Glass Bottle Blowers the happenstance occurrance of an intervening election does not deprive either the Secretary or the courts of the authority to back to investigate a prior election in order to determine whether any of the alleged violations which occurred in that election could have tainted the second election.

We think that is certainly the case here. One of the issues that was never resolved by the District Court in this case was the legality of the continuous good standing requirement as a condition of eligibility to run for office. That is a question that has not been resolved.

Finally, we believe that this case would fall within the Court's general parameters of a case capable of repetition yet evading review because of the short time limitation and the time it takes to get a case up to this Court.

Another statutory goal that cannot be accomplished under Title I is that of specifying that the statute only specifies minimal government intervention in union affairs and leaves it to the unions to establish rules in its bylaws as to how the election will be conducted.

The union has been found to be free to conduct its elections in accordance with its own procedures so long as the procedures comply with the statute. Here in contrast the District Court issued an injunction which provided for detailed rules, took the entire administration of the election procedures out of the hands of the union and placed them into the hands of arbitrators that it happened to find willing to conduct this type of an election.

Most importantly, congressional history indicates an intent to reserve challenges to the conduct of the election until after the election has been completed and to prevent any faction in the union from delaying the election, and even once that election was completed if a member sought to challenge its outcome, court intervention was to be delayed until after the union was given an opportunity to review the problem and attempt to redress the grievance. Then if a member was dissatisifed with the union's action until the Secretary

of Labor, the agent of government most familiar with the union's affairs, conducted an investigation and made a determination not only that there was a violation but the violation affected the outcome of the election.

Elections were not to be set aside merely for technical violations, and they were only to be set aside after a hearing on the merits of a case. Here the relief that was granted was granted after a hearing on a preliminary injunction.

There never was a hearing on the merits. The Respondents were not required to exhaust the internal union procedures, and the union was not given full advantage of those procedures to remedy this matter itself.

There was no compliance with the time limitations which severely restrict the amount of time that the Secretary of Labor has to investigate a complaint and file a suit. Most importantly the procedures entirely ignored the Secretary of Labor, precluding him from investigating the complaint, precluding him from being able to attempt to settle a complaint before it was actually filed in court, precluding him from serving as a screening agent to prevent the court from spending time on frivolous issues, and preventing him from consolidating all of the

potential litigation concerning the outcome of the election in one proceeding before one court.

In fact, by deciding some of the issues here under Title I but deferring other issues for a Title IV proceeding, the District Court in essence insured that there will be two elections, two suits to challenge the outcome of this election. Indeed, by not resolving the 24 consecutive month continuous good standing eligibility requirement the court did not even guarantee that his own election was to be protected from a challenge after that election had been challenged.

Thus, we do not believe that the statutory goals can be accomplished in a proceeding under Title I. For that reason we do not believe that it can ever be appropriate within the meaning of Section 102 for a court acting under Title I to grant the relief of ordering a union to conduct a new election of officers.

QUESTION: Can it enjoin one? I suppose it can in the sense if you can set aside nominations.

MR. WITLEN: It would depend at what --

QUESTION: I thought you agreed they could set aside nominations under Title I.

MR. WITLEN: It would depend at what point the election was sought to be enjoined and what relief was being requested.

QUESTION: The only request is to hold a new nominating meeting.

MR. WITLEN: And that the election be enjoined until such time that that could take place.

QUESTION: There cannot be an election without some nominations.

MR. WITLEN: If that type of suit was brought prior to the mechanics of the balloting taking place and it relied upon a legitimate Title I basis for its complaint then we think that the prior decisions of this Court suggest that the District Court does have jurisdiction to entertain such a suit.

QUESTION: So appropriate injunctive relief is acceptable.

MR. WITLEN: It might be appropriate under the correct circumstances, yes.

QUESTION: Now if you go that far, supposing they do decide we'll have to have the election two weeks late because of the nomination and we've enjoined the old elections. They have a new nomination meeting, and I will order that there be some impartial observer at the election. He would have no power to enter that kind of an order?

MR. WITLEN: No, I do not believe that he does, Your Honor.

QUESTION: Any relief that pertains to the conduct of an election itself is beyond his statutory power?

MR. WITLEN: Anything which inserts the court in the actual conduct of the election, I believe, is beyond the statutory power.

QUESTION: You would not go so far as to say he could not delay the election two weeks and then say go ahead and conduct it pursuant to your normal rules.

MR. WITLEN: Not in the appropriate circumstances, and that is when the suit is in fact based upon a legitimate Title I issue and when it has been brought at a time before the balloting has taken place.

QUESTION: He could change the date of the election but could otherwise exercise no supervision whatsoever over it. That is your position?

MR. WITLEN: That is correct.

QUESTION: Is the Secretary's action under Title IV subject to review?

MR. WITLEN: Certainly. Under this Court's decision in Bachowski a member who has been denied a new election from the Secretary can seek review of the Secretary's decision.

QUESTION: So it is merely a question of

exhaustion rather than judicial power?

MR. WITLEN: Certainly. We are not saying that the courts have no role in the conduct of elections, but merely that that role was deliberately, intentionally and repeatedly delayed until after these other procedures had been exhausted, the union's exhaustion and the Secretary of Labor's exhaustion.

QUESTION: Mr. Witlen, who would invoke the Secretary's authority?

MR. WITLEN: Any complaining member has a right to go to --

QUESTION: Well, take your situation. Suppose there had been an injunction setting aside the initial nominating meeting and calling for another one, and at that point they had one and nominees. Now, how do you get the Secretary in?

MR. WITLEN: Any of the Respondents could have filed a complaint with the union and 30 days thereafter gone to the Secretary of Labor.

QUESTION: But there has to be that waiting period of 30 days then.

MR. WITLEN: There has to be a time for the union's procedures to work and then either 30 days after not getting a decision from the union or 30 days after the union decision then they go to the Secretary.

QUESTION: Well, assuming you have a nomination meeting and the election is two weeks later. Now under Title I you can go right into court I gather. You do not have to wait 30 days?

MR. WITLEN: That is correct. There is no exhaustion -- I should say there is an exhaustion requirement, but it is more easily waivable by the District Court than the statutory requirement under Title IV.

I would like to reserve the remaining time available.

CHIEF JUSTICE BURGER: Very well.

Mr. Garvey.

ORAL ARGUMENT OF JOHN H. GARVEY, ESQ.,

ON BEHALF OF THE FEDERAL RESPONDENT

IN SUPPORT OF PETITIONERS

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

Let me begin by saying a word about the question that Justice Brennan asked, how if the Secretary had conducted this election might it have been run differently. Let me give a few general examples and then a few specific examples.

Section 402 of Title IV says that when elections are to be rerun they are to be rerun in

accordance with regulations that the Secretary is to promulgate. Those regulations appear in part in 452 of 29 CFR.

I think it goes without saying that in running the election the Secretary would be more familiar with the operation of those regulations than would a court. The second difference is that this is the first time that the district judge had rerun a teamster election, and he was no doubt not as familiar with the teamster's constitution and bylaws as the Secretary would be because this would not be the first time the Secretary had rerun a teamster's election.

Some more particular examples might be one of the things that we do not find in the District Court's injunction that the Secretary does do in the course of elections is to read all of the publications that are sent out in the course of the election, not just campaign materials, but the Secretary rereads the proofs of the newspaper that the union circulates, for example, to make sure that it does not support one side rather than the other. You do not see any provision for that.

So in that sense the Secretary would often do more than the District Court, and in some cases the Secretary would do less than the District Court did. For example, the injunction here provides that the

arbitrators were actually to run the nominations meeting so that means somebody would be up at the podium running the meeting.

When the Secretary has a nominations meeting rerun they have a pre-election conference at which the rules for conducting the meeting will be set out, and there will be an observer there to take notes to make sure that things to all right. But it will not actually be run by the Secretary.

So sometimes they do more. Sometimes they do less. Sometimes they simply do things differently. For example, in the joint appendix I notice in the District Court's docket that one of the issues that arose in the course of this election was a question about whether James Miller was eligible. Under the District Court's injunction those questions about eligibility were to be determined in the first instance by the arbitrators and then taken to court.

If the Secretary had been rerunning the election and there were nothing faulty about the union's own procedures toward determining eligibility requirements the appeals on eligibility questions would have followed those normal procedures to the union's general president and then the general executive board and then to the Secretary.

QUESTION: Mr. Garvey, in this case was there objection to the order before it was entered by counsel?

MR. GARVEY: By the Secretary or by the parties?

QUESTION: By anybody.

MR. GARVEY: There was considerable negotiation in the District Court once it had been decided that the court was going to enjoin the election.

QUESTION: Was it ever pointed out to the court it would be inproper for the court to run the election?

MR. GARVEY: Yes, indeed. I believe that was the basis for the union's objection.

QUESTION: This was before the court entered the judgment or afterwards?

MR. GARVEY: That was before the District Court entered the injunction. The Secretary did not intervene in this action until the Court of Appeals.

QUESTION: Mr. Garvey, I assume you have no trouble with mootness either?

MR. GARVEY: No, we do not, Your Honor, both for the reasons mentioned by Petitioners and because we believe that the District Court by grabbing the ballots

in this case has prevented the Secretary from performing his role in the Title IV statutory scheme up until today up until those ballots are released.

QUESTION: You do not complain about this last election. You do not find any fault with this last election.

MR. GARVEY: There have not been any complaints. The Secretary is not entitled to act on his own until he receives a complaint, and to date there have been none.

QUESTION: Where does the Secretary draw the line between Title I and Title IV?

MR. GARVEY: That is the other thing I would like to address in the time I have remaining. Let me first say a word about where we get --

QUESTION: Unless he gives Title I no room at all.

MR. GARVEY: No, that is not so. The Secretary does give plenty of room for Title I. The line that we would draw is that -- Let me back up just one step and tell you where we get.

In the statute we think Congress could have been a little bit more explicit than it was about how Titles I and IV ought to fit together, but we think it gave at least three signals. The first of those is that

Section 402 sets out a very detailed system, which Mr. Witlen outlined, for rerunning elections.

The second signal is that Section 102 as you suggested cautions the district courts in Title I cases that they are to provide only such relief as is appropriate. The third signal that Congress gave is in Section 403 which says that the Title IV procedure for challenging an election which has been already conducted shall be exclusive.

Now, that language does not solve this case completely or we would not be here, but its purpose, I think, provides considerable assistance because the reason Congress put it in the statute was that Congress did not want the courts rerunning elections. In line with all of that the line that we would propose for accommodating these is that Title I relief should never be considered appropriate under Section 102 if Title IV relief is adequate to resolve the election violations that are being complained of.

Let me give an example or two about what kinds of Title I relief would be appropriate in the context of union officer elections. One is the Finnegan case that this Court decided two years ago. That involved complaints about equal rights and free speech in the context of a union officer election. You may recall

that there a union's business representative had been discharged after supporting the incumbents who lost the election.

In that sort of case there is not relief available under Title IV because what he wanted was reinstatement, and running a new election would not give him that necessarily. Let me give another example. In the Sadlowski case decided the same term as Finnegan there was again a complaint about free speech rights in connection with a union officer election.

There the complaint was that the union had improperly amended its constitution to forbid nonmember campaign contributions. In that case Title IV relief would not be adequate because there was not an election even on the horizon.

QUESTION: What about this case? Was Title IV the exclusive remedy for anything that happened at that nominating meeting?

MR. GARVEY: I do not know that Title IV is the exclusive remedy for anything that happened --

QUESTION: No, in this case.

MR. GARVEY: In this case, but the election could only be --

QUESTION: I understand that. That is not my question. My question is what under Title I could these

complainants have done?

MR. GARVEY: Might have sought damages.

QUESTION: After the election, that's all. Sought damages. What else?

MR. GARVEY: They might have sought damages.

QUESTION: Do you agree that they might have run into court and got an injunction setting aside the nomination meeting as your colleague here?

MR. GARVEY: No. We would draw the line short of that point, and the reason --

QUESTION: So the Secretary says that that kind of injunctive relief would be barred?

MR. GARVEY: That is right.

QUESTION: But the union does not agree with you.

MR. GARVEY: Mr. Witlen represented that they were not going to be that strict about it, but we would draw the line short of rerunning the nominations meeting because that kind of relief unlike -- Well, let me give you another example in the course of this election about what might have been done.

Suppose that these Respondents were complaining that they had not been given ballots. I think that injunctive relief under Title I might be appropriate to direct that they be given ballots.

Now that sort of relief unlike rerunning the nominations meeting, unlike what happened here in that sort of situation there is not the delay of the election which is involved here.

QUESTION: Could the court order that they be considered nominated and be put on the ballot?

MR. GARVEY: I am reluctant to say no because Professor Cox suggested in the course of the Senate hearings on this that that might be an appropriate remedy to order in this case that Mr. Lynch's name be put on the ballot for Secretary/Treasurer, but again that unlike rerunning the nominations meeting does not involve any delay, does not get the court involved in the details of how the meeting should be run.

QUESTION: Most courts do not get these things heard in two or three days. That might take two or three weeks to even get before the judge for a decent hearing. Can he enter a restraining order meanwhile?

MR. GARVEY: That gives me trouble. Even if the district court did --

QUESTION: Well, if you say no you are in effect saying there is no Title I relief for anything in this case.

MR. GARVEY: I am perfectly willing to say that there is no equitable Title I relief for the

problem in this case because the Title IV relief is perfectly adequate to resolve this problem. As we point out in our reply brief the kinds of violations that the District Court suggested might be meritorius, the exclusion of Lynch from the ballot, the exclusion of Crowley and others from the nominations meeting would, if proven, be Title IV violations that would justify rerunning the nominations meeting and rerunning the election, precisely the relief that the District Court afforded in this case.

On the other hand, neither the Court of Appeals nor the Respondents has advanced any advantage that Title I actually holds over Title IV procedures in the context of this very case. One of the suggestions that is made is that somehow --

I see my time has expired.

QUESTION: Mr. Garvey, I have one little question. On this mootness point you ask us to order that the ballots be returned to the petitioner. What good does that do?

MR. GARVEY: It is only after the ballots have been counted that a claimant is entitled to come to the secretary with a complaint.

QUESTION: That is what you ask us to do at this stage.

MR. GARVEY: That is right.

QUESTION: So we just ignore the new election?

MR. GARVEY: No, not necessarily. What would happen is --

QUESTION: What do we do with the new election?

MR. GARVEY: Perhaps nothing, but that is the decision that has to be made by the Secretary. If the ballots are counted and if the complaint --

QUESTION: Can we have something to do with deciding it, or do we have to just leave it all --

MR. GARVEY: Perhaps eventually after the Secretary brings a suit.

QUESTION: You did not bring this case to the Secretary. You brought it to us.

MR. GARVEY: We did indeed to complain that the District Court had prevented has prevented the Secretary from acting. If I may just answer your question about what you should do. If the ballots are returned to the Petitioners they will then be counted. Members are at that point entitled to complain to the Secretary about the violations which the District Court unsuccessfully, we suggest, attempted to remedy.

At that point under 402(b) the Secretary is to

determine if there are violations which have occurred and not been corrected. Now it is possible that the Secretary will conclude that as a result of the District Court's rerun and the subsequent supervening 1983 election that it may not be necessary to ignore the 1983 election and do it all over again.

On the other hand it may be so, and that is a decision which cannot be made until the case is brought before the Secretary.

CHIEF JUSTICE BURGER: Mr. Stern.

ORAL ARGUMENT OF MARK D. STERN, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

The issues raised on this appeal are less numerous and of less general application than the government and the union have suggested. The mootness issue here is primarily one of whether a party may seek to disturb on appeal portions of a District Court order to which it stipulated, namely, the running of a new election.

QUESTION: They did not stipulate to the fact that there should be a new election.

MR. STERN: Yes, they did, Your Honor. They did not stipulate to its being court supervised. They

specifically stipulated to a new election in an attempt to deprive the court of jurisdiction, and I mention only after, Your Honor, they heard the evidence in the preliminary injunction hearings did they make that offer.

It was not because of the temporary restraining order, Justice White, but after they heard the evidence that they made that offer when they realized this was going to be rerun at one point or another, and it would be less disruptive and less unsettling to the union to rerun it sooner rather than later.

QUESTION: They never agreed that a court should run it. They never stipulated -- I do not suppose they would even be here if they thought it was all right for the court to run the election.

MR. STERN: They did not feel it was all right for the court to run the election, and in fact that is why the factors mentioned by the government existed. The union refused to run the election. The union refused to run the election meeting. The union refused to name arbitrators. The union, in fact, blocked the triple A from being the arbitrators rather than honor ballot association by calling them up and telling them they did not approve of that. The union did not have

any publications to be sent out. It did not have any publications that were sent out.

So it was not because the Secretary did not run this election, that the union was not involved in the meeting or in determining who was going to run that meeting. It was because the union refused to, and strictly because the union refused to.

Now, the second issue in this litigation is as was mentioned by Justice O'Connor and Justice Marshall whether the election has become moot as a result of the December, 1983 election, and I suggest you have to really stretch the imagination as the Secretary of Labor did to come up with a reason why this case is not moot on that account.

Lastly the one question on the merits that is before the Court is whether a district court is so restricted in its remedial powers under Title I of the Landrum Griffin Act that it cannot order minimal supervision and the few terms it actually imposed on the union to remedy the flagrant violations of Title I that occurred in this case.

Now, I ask the Court to consider the fact that when a Title IV election is rerun it is the court, not the Secretary of Labor, that sets the terms for rerunning that election. It is the Secretary of Labor

who investigates the complaint and who goes and observes the election, but it is the court that sets the terms.

It is not as --

QUESTION: How often do district courts get into that posture?

MR. STERN: Every time there is a recalcitrant union that does not settle the matter. In conciliation proceedings the court must get into that posture.

The Secretary has no power to order a new election. A court must order it.

QUESTION: Once ordered, why can't the district judge let the Secretary take over?

MR. STERN: He can, but I believe the practice is that the Secretary submits a proposed order to the court and the court acts on the proposed order, and therefore it is the court's order that is in fact what determines the terms.

What opposing parties argue here is not the court lacked jurisdiction because the Secretary concedes that as do the union and the government and the AFL-CIO. What they do argue in essence is that the only power a court has is to grant damages in a situation such as this.

I point out to Your Honors that this election suit was filed three weeks after the nomination meeting,

just one week later than the union says would have been proper and all right. There is nothing in the record to indicate when the ballots went out, but I suggest that if they had gone out by the three week time they probably had gone out by the two week time.

In fact, to rule that when the ballots go out is the determining factor gives every union a way out of getting any relief under Title I. As soon as nominations are made you walk over to the printer, xerox your ballots and you mail them out. It takes a day. Nobody can get into court with that speed and get relief.

Now, an award of damages cannot correct a violation in a nomination meeting. It cannot correct a violation that takes place during an electoral process but before the conclusion of it.

All it can do is attach a stigma to the person who complains about the violation of having gotten damages against the union, taken money out of the treasury of the union for him or herself, a stigma that they cannot get rid of. Now if they had accomplished something else, gotten a new election run, in the process that stigma would not be serious, but having no other --

QUESTION: Well, the Secretary of Labor could

order that.

MR. STERN: Yes, but if you have a recalcitrant union the Secretary of Labor in practice cannot order that until the term has virtually run out for the people elected unlawfully. It takes an average of two and a half years with cases litigated. The maximum term under the act is three years. That is more than 75 percent of the term having been sat, and the union run by people unlawfully elected.

Anyone unlawfully elected can take the 90 days, not 30 days, under the Act that they must give the union to consider the matter internally, take the 60 days with the Secretary and delay on top of that another two years in the courts before an order is issued. It does not take much, if any, skill to do that.

QUESTION: Why can't the Secretary act without the court action?

MR. STERN: Only if the union agrees and if you have a person who has engaged in flagrant violations of Title I, Justice O'Connor, I suggest that is not the person who will agree, who will make the concilation or correct it internally. That is a determination of fact that Judge Keeton made in this case.

The proposition that damages are the only relief that can be effectively granted in an electoral

process under Title I flies in the face of the legislative history, the language and this Court's interpretation of the Act, and it is incompatible with the primary purpose of the Act.

In Hall v. Coal this Court determined that district courts have great flexibility and discretion in fashioning appropriate remedies for violations of Title I. In the Steelworkers decision this Court determined that in the electoral process Title I rights are particularly critical and deserve vigorous protection.

To separate those two propositions from each other, to except the one from the other and vica versa largely nullifies Title I in what this Court has determined to be the most important area for its functioning, and I would also suggest virtually the only area in which members of unions interested in promoting democracy in their union in fact do come forward and act.

Title I confers on union members comparable rights to those we possess as citizens of the United States. It is the foundation of the Landrum Griffin Act, the right to free speech, assembly, equal treatment under the law, due process.

Title IV governs the particulars of an election process. As a remedial statute the Landrum

Griffin Act is to be broadly construed to express its goals.

To adopt the position urged by the government and the union in this case will largely nullify Title I in the area that has been determined by this Court to be its most important area, to function and frustrate the congressional goals expressed in the preamble to the Act. Adoption of our position --

QUESTION: May I ask, Mr. Stern, did I understand you to say that the Secretary's procedures including judicial review mean that there is a two year delay in conducting a local --

MR. STERN: An average of two and a half years, Justice Brennan, which is more than 75 percent of the term. I believe it would be five-sixths of the term.

QUESTION: Are there any statistics to support that?

MR. STERN: Yes. They were cited in our brief and referred to in the law review articles that have compiled those statistics. That is not the average for every complaint brought to the Secretary. It is the average cases that go to litigation.

You have to assume that an officer willing to violate Title I in the flagrant fashion that these

officers did is going to use every opportunity for delay under the Act and will fall into the two and a half year average.

Now, as I indicated before damages is a liability, not a remedy, under Title I, and the granting of damages will chill, not foster, the further exercise of democratic rights by union members. There is no indication in the history of this Act that recalcitrant union leaders who unlawfully influenced an election's results are not to be removed in an expeditious and democratic fashion.

In fact, the history of the Act indicates that they should be removed once it has been determined that they are unlawfully elected. The District Court in this case issued its orders after factual hearings held within the first month that this complaint was brought and determined that the officers were unlawfully elected.

In fact, the union concurred in that by coming forward as soon as it heard the evidence and saying a new election should be run. The union alone in this cases suggests that the language already conducted in the statute should be interpreted to mean commenced, as soon as matters are commenced.

The Secretary of Labor backed off that

position in its brief and reply brief. In fact, it says at the present time that this election still is not completed and that it is not proper for members to raise Title IV complaints about this until the ballots are taken out and counted.

On the other hand, it seems to be saying that no injunctive relief can be granted right after the nominations meeting.

QUESTION: What if the elections had been completed and the ballots been taken out and counted, then would there be a Title I remedy based on the allegedly illegal nominations?

MR. STERN: No. We think the point in time of counting the ballots and letting the people know where they came out is in fact the time that Title IV talks about as removing any matter into the area of the exclusive jurisdiction of the Secretary.

QUESTION: After the election is actually conducted.

MR. STERN: That would be the conducting of an election.

QUESTION: The ballots cast and counted, is that it?

MR. STERN: Other than injunctive relief -- Injunctive relief would be barred.

QUESTION: No, but triggering the Secretary's authority. Is the conduct of the election the counting of the ballots?

MR. STERN: The conduct of the election -- The election would be conducted at the point that the ballots are counted. To make it any point earlier could make it possible for a union to accomplish that act the day after the nomination.

QUESTION: Suppose you decided that the courts are just too slow. Before the election could you go to the Secretary?

MR. STERN: No. There is no way you can go to the Secretary before the election. He has no jurisdiction. The Secretary only has remedy. A hydrogen bomb, wipe out the old election and start fresh and new. The Secretary has no flexibility to remedy a minor violation and let the election proceed.

QUESTION: So you do not think the Secretary would have any jurisdiction or authority whatsoever if somebody complained to go into court and enjoin the election that has not been held yet?

MR. STERN: He does not.

QUESTION: Do you have law to that effect?

MR. STERN: The Cucho amendment took that power away from the Secretary and gave it to members.

That is what the Cucho amendment was.

QUESTION: I know it gave it to members, but did it also take it away from the Secretary completely?

MR. STERN: Yes. The Secretary says in his own regulations that he has no power to remedy Title I violations, that they are to be remedied by a different means by a member in court. That is stated in his regulations.

QUESTION: After the election -- Let's assume before the election the only complaint is that nominations, the very nominations here. You say that you can go right into court before the election to remedy that. After the election you have to complain to the Secretary about the very same Title I violation.

MR. STERN: Yes, and if it was intentionally done you can expect that it will be two and a half years later that it is remedied if you wait till after.

Now, I would like to address a few points made by opposing counsel in response to questions presented by the Court. First, the 24 hour rule -- The court below did not determine that there would have to be two court cases because the 24 hour rule was enforced in the election that took place in 1981, and no objection was made to its going there so there would not be a second case about it.

Secondly, the union in this case could have suggested a third party with the expertise satisfactory to it. Instead it chose to frustrate the selection of the third party and agreed to accept the third party that was nominated without agreeing to the supervision of the court in general.

QUESTION: Mr. Stern, don't all these arguments go to whether this particular judge handled this particular matter in a proper way rather than the power of the court to handle it at all?

MR. STERN: I do not think there is any question that the court has the power to handle Title I violations, and I do not think there is any question in this case --

QUESTION: As I understand your opponents even though they may not phrase it in terms of power they say there is virtually no power in a district court until after the election has been conducted in trying to figure out when the election has been conducted. There is an awful lot of argument between the parties about whether the judge did everything right or whether he was too slow or the union was recalcitrant in this case.

It seems to me that is all entirely immaterial in this case. We are dealing with a rather narrow question of law.

MR. STERN: Yes. I believe union's recalcitrance is germane to the court's consideration on one point, and that is what the alternative remedy to these members would be when you have a person who is recalcitrant and willing to delay the processes that exist under Title IV and only relevant to that point.

QUESTION: Mr. Stern, may we come back a minute to the discussion you had previously? In this case the District Court entered the picture one day before the ballots were being counted, did it not?

MR. STERN: No. It entered the picture before that. That is --

QUESTION: It entered the injunction that the ballots not be counted the day before they were to be counted.

MR. STERN: A temporary restraining order, yes, Your Honor.

QUESTION: Right. If that procedure is appropriate the Secretary's authority always could be usurped by a federal court, could it not?

MR. STERN: Your Honor, I think the number of cases that this could occur in are minimal, and that is --

QUESTION: Why is that? That is what I do not understand.

MR. STERN: Because it could only occur in an overlap case in the first place where there is a clear violation of Title I. This Court determined that a court cannot do that where there are violations of Title IV and only violations.

QUESTION: I do understand that, but if a violation of Title I is claimed could the court always enjoin the counting of the ballots?

MR. STERN: Yes, it could if it deemed it appropriate. It might deem lesser remedies appropriate. Unfortunately the Secretary only has one choice and that is all or nothing.

I would like to suggest that the stepping in the day before and giving a temporary restraining order and holding off for several months before entering its final preliminary injunction in this case in a sense promoted the purpose of this Act that the opposing counsel hearsay were frustrated. It allowed the union to engage in concilation and get a prompt resolution. It just concilated in front of the court and in fact the conciliation was successful.

The union proposed all but several very minor terms of the order with the exception of the court's supervision, and those minor terms of the order to which the union objected had nothing to do with the running of

the election. It had to do with enjoining future violations and the like and not posting bonds for the appeal.

Secondly, it afford the union as much of an opportunity to voluntarily redress the wrongs that had been engaged in as a Title IV process would have. It just supported it at an earlier time, and it did not encroach on Title IV's principle of not removing persons elected from office until it is reasonably clear their election was unlawful. It was reasonably clear as soon as the evidence was heard in this case, and Judge Keeton so determined.

The processes engaged in by the District Court here and approved by the Court of Appeals balance the rights and remedies provided in Titles I and IV in such a way as to allow them to compliment each other rather than conflict with each other.

Unless there are any further questions we respectfully request the Court to affirm --

QUESTION: Let me ask, say the election had taken place in this case and you went to the Secretary and complained and he investigated and thought that the nominating process was defective and a new election should be running. Then he has to sue does he not?

MR. STERN: He has to sue unless they agree to

it.

QUESTION: Suppose he goes to court, what does he have to prove?

MR. STERN: He has to prove not only the violations occurred but that they may have --

QUESTION: What it is a violation of? Title I?

MR. STERN: Title IV. It has to be a violation of Title IV.

QUESTION: So the two sections overlap in the sense that he would prove there was a violation in the nominating process.

MR. STERN: A violation of Title IV. A violation of Title I would not allow the Secretary to seek relief afterwards.

QUESTION: I know, but it just happens to be a violation -- It was a violation of Title I also.

MR. STERN: Fine.

QUESTION: He goes to court. What kind of a decree does he get?

MR. STERN: First he has to prove, Justice White, that the outcome may have been affected.

QUESTION: Assume he does.

MR. STERN: Then he gets a decree that provides for the election to be run under certain terms

and conditions --

QUESTION: By the Secretary.

MR. STERN: For the Secretary to observe the election.

QUESTION: But is it not pursuant to regulations that the Secretary has?

MR. STERN: Yes.

QUESTION: It is not terms that the court dreams up.

MR. STERN: You are allowed to intervene --

QUESTION: I will put it to you this way. If this election had already gone on and you went to the Secretary and he goes and makes his case before the court and there is going to be a new election, if the judge had then ordered the election pursuant to -- exactly the way he did in this case, he would be violating Title IV, would he not?

MR. STERN: Exactly the way he did in this case? I do not think so, Your Honor.

QUESTION: I thought the Secretary had a set of rules as to how new elections were to be run.

MR. STERN: Yes, but there is no -- I do not believe under the --

QUESTION: You mean the court can displace them?

MR. STERN: I do not believe the rules set down in this case are any different from the rules --

QUESTION: Is the court constrained by the regulations the Secretary has issued as to how new elections are to be run?

MR. STERN: Under Title IV?

QUESTION: Yes.

MR. STERN: I do not believe the court is, Justice White. I believe the courts respect them, but I do not believe they are.

QUESTION: The exclusivity means hardly anything there.

MR. STERN: It hardly means anything because it is the same court that sets the same terms, and if the union refused to run its own meeting under Title IV the court would have done the same thing that it did here under Title IV. It would have had somebody else run the meeting. There would not have been any other choice.

Thank you, Your Honors.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Wilken?

ORAL ARGUMENT OF GARY WITLEN, ESQ.,

ON BEHALF OF PETITIONERS -- REBUTTAL

QUESTION: What about my last question?

MR. WITLEN: I would be happy to start with it, Justice White. The problem with Mr. Stern's analysis at that point is that he misconstrues the statute.

The terms of the election that the Secretary conducts are the terms set by the Secretary.

QUESTION: In published regulations?

MR. STERN: In published regulations and after analyzing the union's rules and regulations. If you look at 402(a)(2)(b) -- excuse me, 402(b) of the statute -- try once more, 402(a)(2) of the statute provides that the order received by the Secretary is to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this Title and such rules and regulations as the Secretary may proscribe, the first statutory misconstruction that was presented to you.

The second statutory misconstruction is Mr. Stern's statement that the Congress decided that where there was a violation with the statute in connection with an election those officers should be displaced and new officers should be implaced. Clearly the statute provides in 402(a)(2) that in the interim when an election has been challenged the affairs of the

organization shall be conducted by the officers elected and in such other manner as the constitution and bylaws may provide.

Even where the election has been challenged, and remember there is a presumption to the validity of that election, but even where it has been challenged the officers elected most recently take office and run the union. That did not happen here. For an entire year we had lame duck officers running the operation.

A moment about the way the union proposed the stipulations so-called. The union offered to conduct a new election.

Now if as Mr. Stern says there were in fact massive violations here and the union was recalcitrant then this Court cannot accept his further conclusion that unions will also take the two and a half years to litigate to death any suit of the Secretary of Labor because here in fact once those violations became obvious and once the litigation problems became obvious the union here offered to conduct a new election and to grant the plaintiffs exactly the type of remedy they were looking for so long as the District Court modified its temporary restraining order to allow the union to conduct it under its own rules.

The District Court refused to do that.

Thereafter we engaged in seven months worth of negotiation over a preliminary injunction during which in answer to your question, Justice Brennan, the union repeatedly raised the argument as to the District Court's jurisdiction. There are citations in the briefs. I would also refer you to Joint Appendix 111 and 112, which is the clearest statement with counsel for the union saying, Your Honor, we don't agree to any of this. Regardless of who you appoint, we object to your fundamental authority to appoint or to set aside the results and the court saying yes, I understand that, but we appreciate your participation in these discussions.

So it is great misstatement of the record, and in fact the Court of Appeals found that the union did not agree to the terms of the election that the court ordered. If we accept Mr. Stern's contention that the 1983 election moots this case, then we are left in the anomolous position on the basis of Glass Bottle Blowers that only the Secretary can fully litigate a Title IV complaint and only where he loses at the district court because if the union loses at the district court and then is subsequently caught up in its next regularly scheduled election then that suit may be mooted out by the conduct of that election. I suggest that is not

before the union the due process rights that is inferred.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:59 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:

#82-432-LOCAL NO. 82, FURNITURE AND PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS WAREHOUSEMEN AND PACKERS, ET AL., Petitioners v. JEROME CROWLEY, ET AL.

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BY _____

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