ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309, Petitioner v. DEPARTMENT OF THE INTERIOR, ET AL.; and FEDERAL LABOR RELATIONS AUTHORITY, Petitioner v. DEPARTMENT OF THE INTERIOR, ET AL.

CASE NO: 97-1184 & 97-1243 c./

PLACE: Washington, D.C.

DATE: Monday, November 9, 1998

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IN THE SUPREME COURT OF THE UNITED STATES

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NATIONAL FEDERATION OF FEDERAL :
EMPLOYEES, LOCAL 1309, :
Petitioner :
v. : No. 97-1184
DEPARTMENT OF THE INTERIOR, :
ET AL.; :
and :
FEDERAL LABOR RELATIONS :
AUTHORITY, :
Petitioner :
v. : No. 97-1243
DEPARTMENT OF THE INTERIOR, :
ET AL. :

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Washington, D.C.

Monday, November 9, 1998

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

DAVID M. SMITH, ESQ., Washington, D.C.; on behalf of the Petitioner.

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APPEARANCES:

GREGORY O'DUDEN, ESQ., Washington, D.C.; on behalf of the Petitioner.

IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 97-1184, the National Federation of Federal Employees v. The Department of the Interior, and a companion case.

Mr. Smith.

ORAL ARGUMENT OF DAVID M. SMITH

ON BEHALF OF THE PETITIONER

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

This case involves the Federal Labor Relations Authority's interpretation of its own organic statute. The Authority has concluded that the Federal Service Labor-Management Relations statute obligates an agency to bargain over union-initiated proposals offered during the term of a collective bargaining agreement.

QUESTION: Didn't the agency at one time have a different position and then changed its position just as a result of the decision of the Court of Appeals of the District of Columbia Circuit?

MR. SMITH: Mr. Chief Justice, the Federal Labor Relations Authority indeed did originally come down on the opposite side of this question in its IRS I decision.

However, subsequent to the reversal by the Court

of Appeals for the District of Columbia the Authority reevaluated the issue and changed its mind, and decided that the statute did, in fact, obligate the agency to bargain.

QUESTION: How much choice did it have in the light of the court of appeals decision?

MR. SMITH: The Authority has in several cases, Your Honor, chosen to nonacquiesce in a court of appeals decision with which it disagreed.

We cite in brief cases where we've done this when we disagreed, so the Authority could have, given the multiple venue provisions of our statute, have chosen not to have followed the Court of Appeals for the District of Columbia's decision in this case, but did, in fact, reconsider its original position and decide that the D.C. Circuit was, in fact, correct.

QUESTION: Are the terms and the substance of the reconsideration set forth on remand from the agency in the IRS case?

Has the agency issued any other adjudicative dispositions or any rules to indicate that it continues to adhere to this position and to add to its reasoning in any respect?

MR. SMITH: Yes, Justice Kennedy, the Authority has, on numerous occasions, subsequent to its IRS II

decision in 1987, adhered to the position it took in IRS II and determined that mid-term collective bargaining is required under the statute.

The Authority said originally in the case on remand from the District of Columbia that it had reconsidered the issue and thought the District of Columbia Court of Appeals was correct and, despite several reversals by the Fourth Circuit Court of Appeals, the Authority has stuck to its position. This has, in fact, been our position since 1987.

QUESTION: Mr. Smith, you're here representing the Authority which is, as I recollect, three individuals, no more than two of whom can be from the same political party, appointed for 5 years and not removable except for cause.

MR. SMITH: That's correct.

QUESTION: And also appearing is -- in today's argument is the Solicitor General, who, I suppose, is appearing on behalf of the President of the United States.

MR. SMITH: Well, he will, of course, tell you on whose behalf he is appearing. I appear on behalf of --

QUESTION: Well, so we have a disagreement between these three individuals and the President of the United States regarding a statute that goes to the internal management of the personnel of the executive

branch. Is that a fair description of what's going on here?

MR. SMITH: I think we interpret the statute differently. The agencies of Government have a view --

QUESTION: And you want us to give deference to these three members of the Federal Labor Relations Authority in preference to the views of the President of the United States as to what the efficient management of the personnel of the executive branch requires?

MR. SMITH: Well, there are several points raised there, Justice Scalia.

We don't think deference is required in this case because we think the statute is clear that there is an obligation to bargain midterm.

If you think it unclear, yes, we would seek deference in this case.

The Congress, of course, passed the Federal Service Labor-Management Relations Statute. While it was signed by a President we are, in effect, carrying out the will of the Congress, not necessarily the will of the President, in what we do vis-a-vis Federal sector labor relations.

QUESTION: Mr. Smith, how could it be the will of the Executive, since the Executive is always an adversary in all the proceedings that are before the FLRA,

so Congress set you up to be an arbiter between the unions and the Federal Executive.

MR. SMITH: That is, of course, correct, Justice Ginsburg, and on the several occasions when we've had the privilege of being before the Court before, we are virtually always in opposition with agencies on --

QUESTION: I'm not questioning whether you're an arbiter. Of course you are.

But the question is, do you come here with some assumption of validity of what you have done in the narrow situation where what is at issue is the internal management of the personnel of the executive branch, and the President has chosen to disagree with you to such a degree that he's willing to go to court about it?

I mean, initially, very often two agencies of the Government disagree, and that is usually resolved internally, but here we have two agencies disagreeing, and they've come to the Court and asked us to settle it and the question -- it's a very narrow question I'm asking.

In settling this particular question, do you really think we -- it fits our scheme of Government to give deference to these three individuals, never elected by anyone, appointed without removal power by the President, over the views of the President, and I have serious doubts whether it's proper to give deference in

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that situation.

MR. SMITH: Justice Scalia, I would only point out that the members of the Authority are on a quasi-independent body.

As you noted in your question to me earlier, they are appointed by the President, confirmed by the Congress, and can only be removed by the Congress for good cause, so the President in the scheme of things --

QUESTION: But Congress is not free to create any scheme of things it wishes.

I mean, maybe Congress does want that scheme of things and does not want the President to be in control of the personnel of the executive branch, but I -- that's just not the way I read the Constitution.

MR. SMITH: Well, at the end of the day, Congress' statute has articulated several rights that Federal sector employees have when they bargain collectively under the statute, and if it is that we read the statute different from the agencies of Government, so be it.

QUESTION: Maybe the Pendleton Act, passed back in 1983, was unconstitutional, if Congress can't do anything to regulate the way the Executive deals with Federal employees.

MR. SMITH: Well, clearly Congress can,

Mr. Chief Justice, do things to regulate the way the Executive deals with its employees. We've --

QUESTION: Well, it can tell them, as the Pendleton Act did, just what the President must do, but it can't tell the President to obey somebody else as to how he should treat Federal employees. Isn't that a different question?

MR. SMITH: Perhaps it is, but we are at this point reevaluating some 20 years of judicial review of Authority decisions, and disagreements between the Federal Labor Relations Authority and agencies of Government over what the Federal Service Labor-Management Relations Statute requires are not rare. They're commonplace.

QUESTION: Mr. Smith, tell me a little about the practicalities of this situation. Since the CADC decision saying that midterm bargaining is allowable, how often has that been sought in the jurisdiction of the District of Columbia by unions with Federal employees?

MR. SMITH: In point of fact, one of the points we make, Justice O'Connor, is it's very seldom come up. The basis upon which the Authority originally thought that there was no right to engage in midterm bargaining, and upon which the Fourth Circuit specifically concluded that there's no right to engage in midterm bargaining, was that this would cause enormous disruption to the Government, it

would lead to inefficiencies, and all the rest.

Well, we're here after 11 years of midterm bargaining being the law of the land in every court of appeals in this country except the Fourth, and there are no problems. There are no cases. We've had no controversies.

QUESTION: Well, have there been requests by the unions for midterm bargaining?

MR. SMITH: Yes, there have.

QUESTION: And -- frequently?

MR. SMITH: Well, yes, there have, but to a certain extent we're in the complaint business. We don't know when there's a request to engage in midterm bargaining and it goes down without a dispute, but what comes to the attention of the Federal Labor Relations Authority and the courts is when there is a disagreement over whether or not there's an obligation to engage in midterm bargaining, and there have been few disagreements that have come forth.

QUESTION: Well, because within the CADC you've taken the position that it's okay, so it just goes forward.

Do you know how often that these requests have resulted in arbitration so that it's resolved?

MR. SMITH: The -- noted in the copetitioner's

brief are only five instances in some 12 years that there have been disputes resolved by the Federal Service Impasses Panel involving midterm bargaining, so they've been rare indeed.

QUESTION: This is a very curious proposal for midterm bargaining, a provision that says, we have the right to have midterm bargaining, isn't it? I mean, it's a very curious provision that was sought after in this case.

MR. SMITH: I don't know that I understand the use of the word curious. It's more limited than that, though, because as we point out the obligation and the right to engage in midterm bargaining only pertains to matters that are not contained in or covered by the collective bargaining agreement, which of course is --

QUESTION: Where does that --

MR. SMITH: -- the rule in the private sector.

QUESTION: Where does that come from?

I mean, I can understand a position that says the FLRA has the power to decide when or whether midterm bargaining should exist and what sorts, but you're saying it doesn't have the power, that even if it thinks midterm bargaining is terrible, it has to allow it because of the statute, so if that's so, then why can't they reopen in the middle of the term every closed agreement?

MR. SMITH: Justice Breyer, the Authority reads the statute as creating an obligation to engage in midterm bargaining without limitation. However, we think that rule would not be appropriate, so we have developed and applied the private sector rule to the Federal sector.

QUESTION: Where -- if you're talking about the -- your position differing from the Government I would be repeating myself, but I don't see how you can read the statute as you do, which is that it forces midterm bargaining, it requires it. That's your position, isn't it?

MR. SMITH: If the union -- I want to be clear --

QUESTION: It requires it at the request of the union.

MR. SMITH: On matters that are not covered in the collective bargaining agreement.

QUESTION: Where does it say that in the statute? What I don't see is how you can say the statute requires midterm bargaining, but by the way, only on certain subjects, in a statute that says not a word about midterm bargaining. That's why I'm having trouble.

I'd like you to explain -- I can understand how a statute could delegate to the agency the power to decide whether and under what circumstances, et cetera, et

cetera, namely the SG's position, I think, basically.

MR. SMITH: Yes.

QUESTION: But I don't understand the position that it would require midterm bargaining even if the Authority were to say, midterm bargaining's the worst idea we've ever heard of.

MR. SMITH: It requires midterm bargaining because there's a broad obligation in the statute to bargain with no limitation on the time or circumstances when bargaining is to occur.

QUESTION: Okay, so in your view, if they come in, the union, and they say, we signed an agreement 3 weeks ago, and it promised to say nothing for 10 years, but by the way, we want to reopen everything right today, midterm, in your view, does the statute require that?

MR. SMITH: Absent the Authority's contained and covered by policy which the Authority has adopted to place reasonable constraints on midterm bargaining, it would.

QUESTION: Mr. Smith, I don't understand that, because I thought that the -- that even the D.C. Circuit had made it clear that you could have a zipper clause, so as Justice Breyer phrased the question, the union could say in the collective bargaining agreement we promise not to ask for midterm bargaining during the term of this contract.

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So the answer to his question is the zipper clause, but that would be something to bargain for, is that not so?

MR. SMITH: Certainly the agencies can bargain for zipper clauses to put an end to any midterm bargaining, and that could be a provision in a collective bargaining agreement.

QUESTION: Why couldn't the union come around in midterm and say, by the way, we want to renegotiate the zipper clause?

I mean, how can you lift yourself by your own petard that way? If the entire agreement is up for midterm bargaining, why isn't the zipper clause up for midterm bargaining?

MR. SMITH: We don't start with the premise that the entire agreement is up for midterm bargaining. The premise is, those portions of the agreement that are -- those matters that are not contained in the agreement can be negotiated midterm.

QUESTION: That was Justice Breyer's point. I don't know where you get that limitation from. It's contained in the National Labor Relations Act, but it's not contained in your legis -- I mean, there's a significant difference between the two, and I would think, if that difference meant anything, it would mean that

everything is negotiable midterm if anything is negotiable midterm.

MR. SMITH: There are many broad divisions in our statute that provide for basic rights without limitation and without explanation. It's the Authority's responsibility, as this Court has recognized in interpreting decisions of the National Labor Relations Board, to fill in the gaps.

QUESTION: Well, when you fill in the gaps on the general question of the permissibility or perhaps the obligatory nature of midterm bargaining, I assume that what you're doing is interpreting, if I remember the statute correctly you're interpreting the phrase, reasonable in -- the word reasonable in reasonable times as those times at which collective bargaining is obligatory.

Am I right that you're saying, well, midterm bargaining is a reasonable time? That's what you're interpreting, isn't it?

MR. SMITH: Yes, sir. I --

QUESTION: Okay. Do you have a similar word that you're interpreting when you come to the conclusion that they are obliged to bargain on matters which are not covered by the agreement but they in fact would be precluded from bargaining on matters that are covered?

Is there a textual basis for it the way there is on the time question?

MR. SMITH: I don't think so. I thought I'd answered that question.

Absent the Authority's contained and covered by doctrine, which of course is adopted from the private sector, I think there would be no specific limitation on the right to engage in midterm bargaining.

QUESTION: May I ask you just a technical question about the agency's position?

You say that midterm bargaining with respect to a matter covered by the agreement would be barred. I think it's the position that a matter that the union had raised and had failed to get an agreement on, in other words which it had dropped in the initial collective bargaining, would also be barred? Is that correct?

MR. SMITH: That's correct.

QUESTION: What about a matter raised by the governmental agency upon which nobody got any agreement in the collective bargaining agreement? Would that be barred as well?

MR. SMITH: It would, of course, depend on the nature of the bargaining history and what transpired at the bargaining table. If it was dropped in exchange for another concession, yes, it would be barred, but I'm

reluctant to --

QUESTION: Well, is the rule exactly the same whether the union wanted something or whether the agency wanted something --

MR. SMITH: I --

QUESTION: -- which did not find its way into an express provision of the collective bargaining agreement?

MR. SMITH: I think that's --

QUESTION: You treat each side identically?

MR. SMITH: Yes.

QUESTION: So that I suppose, then, the agency could protect itself, as it were, from being subject to midterm bargaining on a subject that it didn't want to be -- it didn't want to have to bargain on midterm, simply by raising it and trying to get an agreement favorable to itself, and if it failed, that would be it until the collective bargaining -- the original collective bargaining agreement itself came up for renewal, is that right?

MR. SMITH: That's our point. I'd like to --

QUESTION: So it's not just things that are covered by the agreement, then, that are -- you're precluded from midterm bargaining, but things that were raised and not made into an agreement at the bargaining session?

MR. SMITH: In the Authority's IRS II decision, Mr. Chief Justice, we broadened the matters that would be precluded to include matters that were contained in or covered by the collective bargaining agreement and matters that were waived, either waived by bargaining history, or waived by a zipper clause.

If I could reserve the remainder of my time.

QUESTION: Okay. Thank you. Thank you, Mr. Smith.

Mr. O'Duden.

ORAL ARGUMENT OF GREGORY O'DUDEN

ON BEHALF OF THE PETITIONER

MR. O'DUDEN: Mr. Chief Justice, and may it please the Court:

I'd like to spend just a moment taking the Court through a textual analysis here and explain how we get to our conclusion that midterm bargaining is required by the statute, and then I'd like to spend a moment, if I could, talking about the practicalities in connection with midterm bargaining.

The question was asked earlier, where is it in the statute that provides for the FLRA's conclusion that midterm bargaining is required. Obviously, if you look at the statute you see in section 14(a)(4) of the statute that it imposes on the agencies and the unions the

obligation to engage in bargaining for the purpose of arriving at a collective bargaining agreement.

Well, what does that mean? I think the answer to that is to be found in the statute's definition of a collective bargaining agreement.

When you turn to that definition in 7103(a)(12), what do you see? You see that it says that a collective bargaining agreement is an agreement entered into as the result of parties bargaining. That's a very broad definition. It includes --

QUESTION: Well, it's almost tautological, too, that a collective bargaining agreement is the result of collective bargaining.

MR. O'DUDEN: That is the way Congress chose to define it, though, in a very broad fashion without qualification, without temporal limitation, and it certainly did not choose to define that phrase as the respondent wants this Court to redefine it, namely, to mean only a basic, comprehensive agreement.

QUESTION: What about -- just -- I just want to be sure you focus on -- I see a broad word.

MR. O'DUDEN: Yes.

QUESTION: I see an Authority.

MR. O'DUDEN: Yes.

QUESTION: It looks a little like the NLRB,

looks a little like the labor statutes, a little like a lot of statutes that delegate to the Authority questions to decide what is or is not -- to fill in the blanks. So what I don't get is the position that says, they don't have the authority to fill in the blanks. They have to, no matter what they think --

MR. O'DUDEN: Well, of course --

QUESTION: -- permit midterm bargaining.

MR. O'DUDEN: Of course, to the extent the statute is ambiguous the Authority is performing a classic function.

QUESTION: That's exactly -- I understand that argument.

MR. O'DUDEN: Okay.

QUESTION: I'm saying the reason my question is on a different argument is on your position which is more extreme than that, which is the position that says, even if they think it's a terrible idea, they'd still have to allow it because the statute requires it. That's the argument I don't fully understand, and why I was asking.

MR. O'DUDEN: Even if the Authority thought it was a terrible argument?

QUESTION: Yes. Yes. You --

MR. O'DUDEN: Well, I think that the statute answers the question that is presented to the Court, and

that's of course what the NTEU v. the FLRA case was about.

QUESTION: In other words, are you satisfied with the -- you think the law is correctly satisfied with an opinion that says, these things are up to the Authority. Language is broad, up to the Authority. If they think it's a good idea --

MR. O'DUDEN: Absolutely.

QUESTION: -- sometimes, always -- yes, all right.

MR. O'DUDEN: And of course it was just a couple of years ago in the Fort Stewart case where this Court recognized that it was the Authority's job to give a rational interpretation to the statute, and it was entirely proper to give deference to the Authority, notwithstanding the fact that it was adjudicating disputes between employees and Federal agencies.

QUESTION: Well, that argument has to rest on your notion that the statute, then, is not clear, it's ambiguous on the question. If you leave it open to the Authority, then you have to say the statute's ambiguous, that's why it's open to the Authority.

MR. O'DUDEN: That's right. Our starting point --

QUESTION: And that's your position.

MR. O'DUDEN: Our starting point is that --

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QUESTION: Yes? That is your position?

MR. O'DUDEN: Our position is that if the statute is ambiguous, then this case is uniquely suited for deferral to the Authority's interpretation of those words.

QUESTION: Well, then you haven't answered my question, because I'm confused. Is it your position that the statute is ambiguous, or is it clear?

MR. O'DUDEN: No. It is our position that the statute answers the question presented to the Court.

QUESTION: Well, if the statute is clear, then the Authority would not have an option. It has to be one way or the other, I think.

MR. O'DUDEN: No. As I said earlier, I don't think that the Authority does have an option to conclude anything other than what the D.C. Circuit said 10 years ago, but to the extent that the party, the respondent is now suggesting, as the Fourth Circuit did, by the way, that the language is ambiguous, if that is the premise, then --

QUESTION: Well, it's a pretty good argument in light of the fact that a court of appeal has differed from the D.C. Circuit and says yes, indeed, the statute requires something else.

I mean, it does appear to be somewhat ambiguous.

You can't find in the text anything referring to midterm bargaining, certainly.

MR. O'DUDEN: No, and we've never --

QUESTION: And you do find in the text references to a collective bargaining agreement.

MR. O'DUDEN: Yes, but --

QUESTION: Not a continuing process.

MR. O'DUDEN: But that begs the question, of course, of what a collective bargaining agreement is, and that's why you have to go to the statutory definition of that phrase.

QUESTION: Well, you really have two positions, don't you? One is the statute is clear and, second, if the court doesn't agree with that, it's at least ambiguous and the agency could do what it's done here.

MR. O'DUDEN: That sums up our entire argument, Your Honor.

QUESTION: Mr. O'Duden, before you finish, I do hope that you will get to what seems to me a very key issue here. It's, Chief Judge Wilkinson put great stress on the absence of a provision like 8(d). He said, if you're trying to be like the NLRB, the NLRA says, specifically says no bargaining on subjects that are already included in the contract.

The FLRA doesn't have similar language to deal

with.

MR. O'DUDEN: Right. I think that the absence of this 8(d) proviso ultimately is of no consequence here. I think it's almost counterintuitive. It's a kind of no-exception-proves-no-rule type of argument.

I think it's important to bear in mind that even before this 8(d) proviso was added to the NLRA there was no question under that statute that employers did have to engage in midterm bargaining.

I think that the principle --

QUESTION: But was there any question whether they had to engage in it even with regard to issues that had been decided in the collective bargaining agreement?

MR. O'DUDEN: I believe that there was some question along those lines, and that's why --

QUESTION: Which is why they adopted the proviso.

MR. O'DUDEN: That's why they adopted the proviso.

QUESTION: So by parity of reasoning, without the proviso, they would -- if you say, they must bargain midterm, it seems to me they must bargain midterm on everything. I don't know --

MR. O'DUDEN: Well, obviously the Authority has interpreted the statute in a different way, and thought it

was appropriate to fill that gap by adopting the covered-by doctrine.

QUESTION: You're telling us the statute is clear, as your argument number 1.

MR. O'DUDEN: With respect to the obligation to engage in midterm bargaining, yes.

QUESTION: How about with respect to the obligation to engage in midterm bargaining with respect to matters previously bargained upon?

MR. O'DUDEN: As my cocounsel says, the statute doesn't speak to that directly, and that is the reason why the authority filled in the gap to furnish the covered-by doctrine. The principle that the parties --

QUESTION: Well, if you think the statute is clear that there must be midterm bargaining, I don't know where you get this qualification. You're the one that wanted to walk through the statutory text.

MR. O'DUDEN: Yes, I do.

QUESTION: But you -- what is it you point to to show that there may not be midterm bargaining with respect to matters previously decided?

MR. O'DUDEN: I think that that is an appropriate function for the Authority to have performed here in interpreting the policies of the act and trying to balance the competing interests here in favor of

collective bargaining versus the interest in having repose during the term of the agreement.

QUESTION: It can add provisions that the act doesn't contain? It can say, even though the act says you must bargain midterm without qualification, we are going to import a qualification because it's, quote, appropriate? That goes beyond --

MR. O'DUDEN: If that is a reasonable construction of what the plan of the statute was, yes, I think it is appropriate.

QUESTION: That's what Justice Kennedy asked you, is it a construction of any provision in the statute, and you can't come up with any.

MR. O'DUDEN: Your Honor, the principle that the parties do not have to engage in bargaining regarding matters contained in the contract is such a well-settled principle of labor law, it's such -- a principle that's so well-integrated into the labor law jurisprudence --

QUESTION: So well-settled that Congress found it necessary to say it explicitly in the National Labor Relations Act. If it was so well --

MR. O'DUDEN: That was 30 years before they wrote the statute and, given that fact, I think that it's hardly surprising that Congress didn't choose to spell it out when it came time to write this statute.

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I think it's important, if I may finish by emphasizing the benefits, the good things about midterm bargaining. It allows the parties flexibility to deal with topics that are not covered by the parties' agreement such as health and safety issues that might arise during the term of the agreement.

The respondent will no doubt get up and say that it will be terribly disruptive to the Federal Government if it has to put up with midterm bargaining. We know that we have lived with this regime for 10 years now all over the country, except for the Fourth Circuit, and there's simply no indication of any kind of disruption along the lines that are described by the respondent.

Unless there are further questions, I thank the Court for its time.

QUESTION: Thank you, Mr. O'Duden.

Mr. Gornstein, we'll hear from you.

ORAL ARGUMENT OF IRVING L. GORNSTEIN

ON BEHALF OF THE RESPONDENTS

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

A Federal agency has a duty to negotiate with a union for the purpose of arriving at a collective bargaining agreement. Once such an agreement is reached, the agency does not have an ongoing duty to negotiate over

union-initiated proposals for the purpose of supplementing that basic agreement during its term.

QUESTION: On the threshold question raised by Justice Scalia as to whether or not we should give Chevron deference to the petitioner agency here rather than to the President and to the executive branch as a whole, you did not take the position that Chevron deference cannot be given to the petitioning agency, did you?

MR. GORNSTEIN: That's correct, we did not, and the reason is, this Court's decision seems to have -- seemed to have settled that question, including the Fort Stewart Schools decision and others that, as a general matter at least, the FLRA is entitled to Chevron deference.

Is the reason because the Federal Labor-Management Relations Agency has more expertise on this general subject than does the Government Executive's establishment in general?

MR. GORNSTEIN: That would not be the reason. I think the reason would be that Congress has delegated the authority to the FLRA to administer the act, to decide on fair labor practice charges, to adapt policies to further the purposes of the act --

QUESTION: Well --

MR. GORNSTEIN: -- and that is consistent with

the general way, the approach the Court takes in deciding whether an agency gets Chevron deference.

QUESTION: Well, but Chevron deference means that because of this delegation it develops an expertise, does it not?

MR. GORNSTEIN: Well, that does become part of it, but I would just say that it's first and foremost the delegation of authority that leads to Chevron deference, and expertise is a factor that goes along with that.

QUESTION: And what do you rely on primarily for saying we don't owe deference to this decision?

MR. GORNSTEIN: That you do not owe deference to this decision because Congress has clearly resolved this issue in the text of the act.

Unlike the National Labor Relations Act --

QUESTION: So you also take the position that the text is clear but just directly contrary.

MR. GORNSTEIN: That's correct, Justice O'Connor.

QUESTION: The text being the efficiency of Government text?

MR. GORNSTEIN: No, the text being 7114(a)(4).

Unlike the -- which appears on the white petition at 27a.

The -- unlike the National Labor Relations --

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QUESTION: What exactly is the language that you refer to?

MR. GORNSTEIN: The precise language is, shall meet, negotiate in good faith for the purpose of arriving at a collective bargaining agreement.

QUESTION: It's the singular, a collective bargaining agreement?

MR. GORNSTEIN: It is the combination of arrive and collective bargaining agreement. The ordinary and only, the established meaning of collective bargaining agreement is comprehensive term agreement. The product of negotiations that occur midterm are amendments, or supplements, or modifications to a collective bargaining agreement. They are not collective bargaining agreements themselves.

So if you have a single collective bargaining agreement, a term agreement, and it is amended four times during its term, the product of that is a single collective bargaining agreement consisting of the original provisions and the amendments. It is not, as they would suggest, five separate collective bargaining agreements.

QUESTION: Mr. Gornstein, I don't understand how it works differently on the union side than it does on the management side, because I think you agree that if management wants to -- chooses to negotiate midterm, it

can, and that will end up with something, some kind of agreement, whatever you call it.

MR. GORNSTEIN: It will. It will end up with either an amendment, a supplement, or a modification to the collective bargaining agreement.

QUESTION: Well then, why can't you call when the union initiates it the same thing, a modification?

MR. GORNSTEIN: You can call it that, but that's not what's provided for in 7114. What's -- management changes is provided for in 7106, which is in 25 -- 26a of the white petition, in (b), which describes the duties that managements have to negotiate not just at the point that it's arriving at a basic comprehensive collective bargaining agreement, but also throughout on a continuous basis, so if management exercises management rights at any point during the course of the agreement, it has a duty to negotiate by virtue of the duty spelled out in 7106(b)(2) and (3).

QUESTION: Well, do you read the effect of that provision as negating a similar authority for the union?

MR. GORNSTEIN: It --

QUESTION: You read the provision saying that if management makes certain changes it must initiate --

MR. GORNSTEIN: That's correct. What I would --

QUESTION: -- midterm bargaining.

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MR. GORNSTEIN: That's --

QUESTION: You read a negative in that.

MR. GORNSTEIN: I don't think you necessarily have to read the negative. You just note that there's no corresponding provision for union-initiated changes which forces the petitioners to fall back on 7114 itself to find any obligation.

QUESTION: May I interrupt? I'm just looking at (b) now. It would preclude any agency and any labor negotiation -- organization from negotiating. That doesn't say who must initiate the negotiation.

And then you go to (2). (2) doesn't tell you which one has to initiate the negotiation, does it? Procedures which management officials will observe in exercising any authority.

MR. GORNSTEIN: But the whole subject is about management rights, 7106, and what that is qualifying is the exercise of management rights, so what that is saying is that when management exercises rights, that it does not have to negotiate with respect to number 1, but it may, but it does have to negotiate with respect to the procedures which management officials will observe in appropriate arrangements, and I don't think anybody has disputed that 7106(b)(2) and (3) is exclusively about impact and implementation of bargaining over exercises of

management rights.

QUESTION: But Mr. Gornstein --

QUESTION: If management exercise some -- put into -- some new procedure into effect, and the union came to them and said, we'd like to negotiate about that because -- would they have to negotiate or not?

MR. GORNSTEIN: They --

QUESTION: This is a midterm request that we now negotiate about the change you've just made.

MR. GORNSTEIN: They -- we would have to negotiate about that, yes.

QUESTION: Even though it's a midterm request made --

MR. GORNSTEIN: That's correct, as a result of 7106(b)(2) and (3).

QUESTION: You're not as --

QUESTION: It's only the procedures. I mean, you can make the change. You just have to --

MR. GORNSTEIN: That's correct. I misspoke if I said more than that. We have -- we can make the change, but we have to bargain over the procedures and the impact of those changes.

QUESTION: Why doesn't that -- the Author -- look, that particular provision that Justice Stevens mentions says -- doesn't give anybody the authority to

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negotiate collective bargaining.

If the management says, we're going to contract out, and if the union says, it's midterm but we want to protect our people when you do, you have the right to do it, it says -- it says nothing precludes them from negotiating appropriate arrangements for employees. It says nothing precludes it.

Well, where do they get the authority to do it? The obvious place is right over here in 7114(a)(4), where it says, a collective bargaining agreement, which isn't defined and, since it isn't defined, the obvious thing is that by a collective bargaining agreement, they meant -- well, they meant whatever's reasonable given the whole statute, and they delegate authority to the FLRA to decide.

I mean, that would be the sort of basic, naive approach to this. Why isn't that naive approach --

MR. GORNSTEIN: Well, Justice Breyer, you state the case --

QUESTION: Right, yes.

MR. GORNSTEIN: -- as well as it can be stated for the other side, and --

QUESTION: All right --

MR. GORNSTEIN: -- but the answer to that is --

QUESTION: -- the other side.

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MR. GORNSTEIN: -- that in 7106, if Congress inserted the words, at the election of the agency into number 1, in (b)(1) --

QUESTION: 7106(b).

MR. GORNSTEIN: That's right, 7106(b)(1), it inserted the words, at the election of the agency there, and deliberately did not insert those same words into (2) and (3), and the entire purpose of that was to transform what looks like a nothing precludes into something that says, nothing precludes (1) but (2) and (3) are required, and that is the source of the obligation.

QUESTION: On a related --

MR. GORNSTEIN: It does not go back to 7114.

QUESTION: Related, why -- this is -- might be -- I -- you know, there's a general authority here, as there is with most agencies, like the NLRB and others. It says that the Authority has broad power under the statute to resolve issues relating to the duty to bargain in good faith, it has what I'd call a normal agency power "to take such other actions that are necessary and appropriate to effectively administer the provisions," so given those normal provisions, I don't know why we'd even refer to Chevron.

I mean, here you have a word, a collective bargaining agreement. It's very broad. It should be

stretched at least to cover (b)(1), (2), and (3), and you have a general delegation of authority to the agency.

Again, I'm putting the argument because I want to get your response.

MR. GORNSTEIN: Well, the answer is that the term, collective bargaining agreement, is not subject to the kind of interpretation that you're suggesting. Collective bargaining agreement, the established meaning of that in the private labor field, is comprehensive term agreement.

When this Court in its decisions refers to collective bargaining agreements, it is always referring to comprehensive term agreements. When it refers to the products of midterm discussions, it is talking about supplements to the agreement, modifications to the agreement, amendments to the agreement, and that is -- the FLRA does not have authority to read that term in a different -- other than in its ordinary usage.

QUESTION: May I just get your help, because I really am having trouble with following part of your argument. I'm looking at (b)(3), about appropriate arrangements for employees, and supposing an agency decides to contract out a portion of the work, and it does not make any appropriate arrangements for employees whose duties will be changed by that transfer.

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You're saying that it's perfectly clear that only management could initiate negotiations to -- about those appropriate arrangements?

MR. GORNSTEIN: No, Justice Stevens. We're saying that the only bargaining that takes place arises by virtue of management making the change, and then once management makes the change midterm, the union could request negotiations, and in fact management is required when it makes the change or even before it makes the change to offer the union an opportunity to negotiate over impact of implementation.

QUESTION: Does that mean that whenever management makes a significant change that triggers a union desire to negotiate with somebody, in that case, midterm negotiation initiated by the union would be appropriate?

MR. GORNSTEIN: Well, I would say that it's not initiated by the union per se, because when management makes the change it must offer the union an opportunity to negotiate over --

QUESTION: Where do -- where does the statute say that?

MR. GORNSTEIN: Well, that is how (b)(2) and (3) have been interpreted in light of the very same executive order experience that preexisted the act.

QUESTION: You don't get that out of the text of the statute.

MR. GORNSTEIN: Well, it is an interpretation of the text of the statute.

QUESTION: Well then, the -- then it isn't all clear from the text itself.

MR. GORNSTEIN: Well, not from (b)(2) and (3), but it is clear from -- that the duties in 7114 are limited to negotiation for the purpose of arriving at a comprehensive term agreement, and then 7106(b)(2) and (3) picks up only midterm bargaining as a result of management changes.

QUESTION: Well, why just midterm bargaining? I mean, as I read (b) it would have been procedures or the exercise of authority to reassign work, which occurred in the past.

MR. GORNSTEIN: Correct.

QUESTION: When a new collective bargaining agreement, as you use the term, is being negotiated.

MR. GORNSTEIN: That's correct. 7106 applies to both. It's unrestricted. It's not limited to either midterm or bargaining at the point of reaching a comprehensive term agreement.

QUESTION: Well then, doesn't it make sense that, just as those rights would otherwise exist for the

collective bargaining agreement, as you use the term, those rights as far as this section is concerned could also exist midterm? I mean, it doesn't narrow in on some nonexistence of midterm authority. It just says --

MR. GORNSTEIN: Well, whatever rights exist under 7106(b)(2) and (3) that there are, whatever those rights are, and we would say they are limited to bargaining about impact and implementation of management changes, not the substance of --

QUESTION: Yes.

MR. GORNSTEIN: -- but those rights, yes, they apply midterm as well as at the point of the comprehensive term agreement.

The point is, there's no corresponding provision for union initiated changes through proposals that have nothing to do with management changes, or that have nothing to do with the impact and implementation of management changes, and so unions must fall back and the petitioners must fall back on 7114, which only creates a duty to negotiate for a comprehensive term agreement.

QUESTION: Does that mean that what we're fighting about -- I really have trouble knowing how important this case is, that if you concede that every time management makes a change it has a duty to negotiate about it.

Is it very often going to happen that the union is going to request midterm bargaining when the management has done nothing?

MR. GORNSTEIN: Yes, and that's the problem in the case.

QUESTION: I see.

QUESTION: That's what you're worried about.

MR. GORNSTEIN: Yes, that's the concern.

QUESTION: They just come up with a brand-new idea.

Give me an example, would you.

MR. GORNSTEIN: Justice Stevens, anything could come up in the term that could come up --

QUESTION: Give me a specific example of a specific kind of request by the union that we're fighting about in this case.

MR. GORNSTEIN: Well, in this particular case we're fighting about inserting a provision.

QUESTION: Oh, I understand.

MR. GORNSTEIN: But in other cases there's a proposal about relocation expenses, about working at home, about parking, about --

QUESTION: In other words, the union -- I see.

MR. GORNSTEIN: -- any matter that could come up, any matter that --

QUESTION: The union initiates a request for more parking space or something.

MR. GORNSTEIN: That's correct.

QUESTION: Okay.

QUESTION: I have trouble with 7106(b)(1), exactly what it does. It says, at the election of the agency you can negotiate, and then it has some things that would appear to be pretty important. Does that mean that the union cannot initiate bargaining about the subjects in (1)?

MR. GORNSTEIN: That's correct.

QUESTION: If you're right, which is that the collective bargaining agreement is a term of art, always meant to refer to the end of term agreements, and anything in the middle is called a supplement to a collective bargaining agreement --

MR. GORNSTEIN: Or an amendment, or a modification --

QUESTION: Or an amendment or something like that, then what would forbid a union and the agency from negotiating in what you consider the correct end of term agreement a promise that on certain matters they could open it up in the middle?

I mean, you see -- does that require any stretch of the statute? I mean, that's what's really before us,

too, isn't it?

MR. GORNSTEIN: What is before you is not what you just said. It's something that completely duplicates the statutory duty. Your hypothetical was to open up a particular matter.

QUESTION: Well, they would make a list. They make a list.

MR. GORNSTEIN: That's correct, and that would present a different question than the question we have in this case, which concerns solely whether they can propose something that replicates entirely the rejected scheme of open-ended midterm bargaining.

QUESTION: Well, to be specific, then, let me rephrase it, taking your definitions.

What in the statute would forbid them from at the end of term putting in a clause that says, we will have midterm bargaining on matters not covered by this agreement?

MR. GORNSTEIN: What -- that would be precluded by 7103(14)(C), which appears at 25a of the white brief and that -- what that says is that a proposal is not negotiable if it is specifically provided for by a Federal statute, and here Congress has specifically provided for the basic bargaining structure, and it has rejected open-ended midterm bargaining, so a proposal that merely

duplicates that is not a permissible subject of bargaining.

I did want to --

QUESTION: While you're on that section of -- subsection (12) defines collective bargaining so that the units have to negotiate -- meet at reasonable times. Can't you say that in the event of a change in the workplace it's a reasonable time to negotiate about that right after it occurs?

MR. GORNSTEIN: Well, on -- 7103(12) is a definition. Ultimately the duty that you find, Justice Kennedy, is in 7114(a)(4), which also talks about meeting at reasonable times, but it ties the meeting at reasonable times to the overriding duty, which is to negotiate for the purpose of arriving at a collective bargaining agreement.

QUESTION: Yes, but (12) --

MR. GORNSTEIN: So reasonable times would be for the comprehensive agreement.

QUESTION: But (12) defines collective bargaining as meeting at reasonable times to reach agreement, not a collective bargaining agreement, but to reach agreement with respect to the conditions of employment.

MR. GORNSTEIN: But collective bargaining means

the performance of the mutual obligation, and the mutual obligation that is referred to there, it begs the question of what is the mutual obligation. The mutual obligation is the obligation, and the only obligation, which appears in 7114(a)(4).

QUESTION: Mr. Gornstein, I'd like you to comment on the opinion in the D.C. Circuit following up the original decision, Judge Edwards and Judge Silberman joining and saying, this is all a tempest in a teapot, after all, the agency can negotiate for a zipper clause, and that's the end of it.

MR. GORNSTEIN: I think the problem with a zipper clause -- and what a zipper clause is is a provision that would say, the union agrees not to negotiate about anything midterm.

The problem with a zipper clause are several. First of all, no one has ever said that a union must negotiate a zipper clause other than two judges in that opinion. The FLRA has never said that that is something that is mandatory and, if they have --

QUESTION: How about a reopener clause?

MR. GORNSTEIN: Well, I --

QUESTION: Has the FLRA said that that's okay?

MR. GORNSTEIN: Well, a reopener clause, like the one that's in this --

QUESTION: That's sought here.

MR. GORNSTEIN: A complete reopener clause?

QUESTION: A clause like the one that's sought here.

MR. GORNSTEIN: That is not a negotiable matter, because it is -- that is a matter that Congress has specifically provided for by a Federal statute, and that is that Congress has decided on the basic structure of bargaining, and it has ruled out open-ended midterm bargaining. It has specifically provided for the basic structure, and so that is not a permissible subject of bargaining.

QUESTION: Why isn't the teapot proportion sort of dictated by the position that Mr. Smith described to us, that the -- that the -- that -- I keep wanting to say the board. What do I want to say? The --

QUESTION: Authority.

QUESTION: The Authority takes, that if a matter has been raised by management at the time of negotiating the basic agreement and has been rejected without reaching agreement, that subject is precluded as a subject of bargaining midterm. Why doesn't that protect management and reduce the argument here really to something pretty small?

MR. GORNSTEIN: Well, if the FLRA interpreted it

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in exactly that way, which it hasn't up until this point, it would improve the matter some, but you would still have all the unforeseen issues that can be raised, and a union really, in this context, when it can take an issue to impasse and then take the issue to the binding arbitration, has an incentive to raise any issue of any concern --

QUESTION: Then why hasn't --

MR. GORNSTEIN: -- to any Federal employee --

QUESTION: Why hasn't it been doing it to a disturbing degree for the last 11 years outside the Fourth Circuit?

I mean, if we were -- if this were the first day of creation, I think you might have a stronger argument there, but we've had 11 years' experience, and it doesn't seem to have become a source of great difficulty.

MR. GORNSTEIN: We have not had experience in a regime in which this Court has said, there is a duty to bargain midterm.

What we have had experience with is a regime in which the D.C. Circuit has said there is such a duty and the Fourth Circuit has said that there is not.

QUESTION: But not for a while. How many years was it before the SSA decision in the Fourth Circuit?

MR. GORNSTEIN: I believe it was --

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QUESTION: About 5 years?

MR. GORNSTEIN: It was about 5 years, and I frankly do not know the dimensions of the problem, but the fact of the matter is, a D.C. Circuit decision is very different than a decision from this Court. I would not want to gauge or predict what the experience will be after a decision by this Court based on a single court of appeals decision.

QUESTION: Except that that court of appeals is in a rather special position, because it's always an alternative venue in these cases.

MR. GORNSTEIN: It is an alternative venue, but there are many other venues for -- as the Fourth Circuit case's experience indicates for Federal agencies to go, and for Federal agencies that did not want to engage in midterm bargaining, like the Department of Energy and the Department of Interior here, there was an option to take the issue to the Fourth Circuit, and that would be true in many other circuits.

So I -- in point of fact, I just don't think it's a fair test that the Court --

QUESTION: Have there been circuits that have followed the D.C. Circuit?

MR. GORNSTEIN: There have been no other circuit decisions on this particular issue, on midterm bargaining,

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other than the D.C. Circuit decision in the Fourth Circuit.

QUESTION: May I ask you one narrow question? Supposing, on a brand-new subject, the union asked the agency to bargain, and the agency said yes, we will bargain, would they have been acting lawfully?

MR. GORNSTEIN: I would say what -- you could call it bargaining, but really what would be going on is the agency -- the Government seeking input from whatever source it wants to to solve a problem, including an agency.

There's nothing wrong with the Federal Government consulting with an agency when a problem comes up midterm, after the fact.

QUESTION: No, no, the Federal Government can -- I was talking about the agency consulting with the union.

MR. GORNSTEIN: Yes.

QUESTION: The union comes in and says, we want to bargain about some more parking spaces and they say, okay, we'll sit down and bargain with you. That would not be unlawful.

MR. GORNSTEIN: That would not be unlawful, that's correct.

QUESTION: But the key is that it would not go to arbitration if it came to an impasse.

MR. GORNSTEIN: That's correct. Not only that, but if the bargaining did not seem productive from the agency's point of view it could cut it off, and it would not be an unfair labor practice of not bargaining in good faith.

QUESTION: Could they, do you think, say well, if we can't agree among ourselves we'll let it be arbitrated by the agency?

MR. GORNSTEIN: That's possible, Justice Stevens. I wouldn't want to rule out single after-the-fact solutions to problems on particular issues, but what is objectionable here is a clause that commits the agency to open-ended midterm bargaining without limit.

QUESTION: Is -- if you were going back hypothetically, putting yourself in the position of a Congressman who thought this -- realized this was all going to come up years later, would you have thought, or why not -- I'm putting it against you.

Wouldn't it have -- leave it up to the agency. You know, if these things -- we don't know if it will work out well or badly. If it works out well, then they'll follow it. If it works out badly, the FLRA itself will change the rule, as it might have the authority to do.

Wouldn't that be a practical -- if we're talking practicalities, isn't that practical?

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MR. GORNSTEIN: I think that Congress had a very big concern that it expressed in 7101(b), that this statute should not be interpreted in a way that threatens the effective and efficient administration of justice, and that is -- administration of the Government, and that is in 24(a).

QUESTION: But Congress also thought that collective bargaining would advance the interest of the Government --

MR. GORNSTEIN: That's --

QUESTION: -- in efficient management.

MR. GORNSTEIN: That's correct as a general matter, but it did not believe that unending bargaining would, and Congress recognized that there were special needs, and that's what 7101(b) reflects, that there are special needs in the Federal Government and in Government in general that there have to be reasonable limitations that are not present in the private sector.

QUESTION: Is there anything that suggested that Congress thought that the agency was differently situated than private -- in the private sector, where by this time, by the time this statute is enacted midterm bargaining is long-established?

MR. GORNSTEIN: Well, I think there are two things. One is the text of the act, which is very

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different. There was an open-ended duty to bargain collectively in the National Labor Relations Act, subject to a specific exception for matters contained in the agreement.

QUESTION: Yes, but there was no -- nothing originally.

Taft-Hartley brought in the 8(d) exception, but originally there wasn't anything that said, there shall be midterm bargaining, was there?

MR. GORNSTEIN: Well, there was an open-ended duty to bargain collectively, which the National Labor Relations Act -- Authority, the NLRB interpreted to lead to wide-open bargaining, and then Congress cut that back to the contained in.

But even the open-ended term, bargain collectively, is bigger than the term here, which is bargaining for the purpose of arriving at a collective bargaining agreement, a narrower obligation than the original NLR -- National Labor Relations Act duty that was subsequently reduced.

QUESTION: The big difference, as I understand your position, is that there is no disincentive here to raise it midterm, as there is in the private sector.

In the private sector, if you come to an impasse midterm and you want to make something of it, you have to

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call a strike. After you've gone through a big collective bargaining agreement you're usually not going to get your union members to be willing to do that.

Whereas here, if you raise it midterm and you go to an impasse, it's cost-free. You go to an arbitrator. Maybe he'll rule for you. I mean, it's, you know, heads I win, tails you lose.

MR. GORNSTEIN: Justice Scalia, I was going to make that point first but I thought the text would go first better.

QUESTION: For me of all people. Yes.

QUESTION: He's basically a policy --

(Laughter.)

QUESTION: Basically a policy wonk, you're right.

MR. GORNSTEIN: But that is -- yes, Justice Scalia, that's absolutely correct.

That was the second enormous difference that Congress faced when it was looking at this act as it compared to the private sector experience.

The kind of incentives that would be in play for midterm bargaining are just completely different, and when you can take every issue to impasse, you have the incentive to raise any issue of any concern to any Federal employee --

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QUESTION: Of course, I'm not really convinced that every mid-term bargaining in the private sector that doesn't reach an agreement results in a strike.

MR. GORNSTEIN: I -- Justice Stevens, what happens is that unions do not raise things midterm in the private sector unless they are of crucial importance, and therefore there isn't a lot of union-initiated midterm bargaining in the private sector because their only recourse is to strike at impasse, and it was something which is very difficult to accomplish midterm except over some very crucial issue.

QUESTION: On that point, is there some source, some body of authority that we could consult to determine how midterm bargaining works in the private sector?

MR. GORNSTEIN: Justice Kennedy, I think we cited in our brief a text that talked about that this was something that was not done very frequently, and I think that the law review article that we refer to also in the brief discussed the fact that this is not something that is done in the private sector very often.

QUESTION: Thank you.

MR. GORNSTEIN: If the Court has nothing further --

QUESTION: Thank you, Mr. Gornstein.

Mr. Smith, you have 3 minutes remaining.

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REBUTTAL ARGUMENT OF DAVID M. SMITH

ON BEHALF OF THE PETITIONER

MR. SMITH: The very first sentence of the Federal Service Labor-Management Relations Statute notes that Congress has examined both the public and private sectors and has determined that collective bargaining is in the public interest. That collective bargaining as set out in the statute has no limitation as to the circumstances when it must occur.

We've heard the respondent offer their spin of what collective bargaining agreements mean. They don't look to the term of art in the statute set out in section 7103(a)(8). Instead they say, this is what it's come to mean in the private sector.

In point of fact, we have specific terms of art defined in the statute before you that tell you what a collective bargaining agreement is --

QUESTION: Well, but he says the collective bargaining agreement in labor relations means an agreement that's negotiated from term to term, and anything else is called a supplementary agreement or an additional agreement. Now, is there some example that you could point to where that isn't so?

MR. SMITH: That isn't so in the wording of our statute, Justice Breyer.

QUESTION: No, no, but I mean, let's find -- that's what's at issue, so let's find an agreement somewhere that was made midterm, in any context whatsoever, where it was labeled by some person in a case or in a statute or something to say that's a collective bargaining agreement.

They don't use the word supplementary agreement. They don't use the word additional agreement.

MR. SMITH: We have the word local agreement used in our statute to describe agreements entered into at the local level between those that are not at the national level, so there's one example for you where the word is used. That is specifically set out in section 7114(c)(4) of the statute.

QUESTION: 7114(c)(4)?

MR. SMITH: Yes.

QUESTION: That could be a local collective bargaining agreement in the sense that the Solicitor General uses it.

MR. SMITH: Which would disprove their --

QUESTION: I mean, it could be a local agreement that lasts 3 years, couldn't it?

MR. SMITH: Which would disprove the point that there's only one collective bargaining agreement and everything else is simply a modification or a supplement

to it.

Our view is there can be numerous collective bargaining agreements, and their view that any side agreement entered into as a result of a management-initiated change is a supplement to or an addition to finds no warrant in the statute.

There's no suggestion in -- any place in the statute that says these subsequent agreements are supplement to a comprehensive term agreement. In fact, the words, comprehensive term agreements, are not found in the statute.

If I could address one other matter briefly, we have not talked about the negotiability of this provision. We stand on the statutory right analysis and we believe, in fact, there is a right to engage in midterm bargaining.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Smith.

The case is submitted.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)

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NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309, Petitioner v. DEPARTMENT OF THE INTERIOR, ET AL.; and FEDERAL LABOR RELATIONS AUTHORITY, Petitioner v. DEPARTMENT OF THE INTERIOR, ET AL.
CASE NO: 97-1184 & 97-1243

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY _____

(REPORTER)