Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., ET AL.

Appellants,

v.

LOWELL WADMOND ET AL,

Appellees.

Docket No. 49

Place Washington, D. C.

Date October 15, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

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C O N T E N T S

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IN THE UNITED STATES SUPREME COURT

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Washington, D. C.
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The above-entitled matter came on for oral argument at 10:32 a.m.

BEFORE:

HON. WARREN E. BURGER, Chief Justice
HON. HUGO L. BLACK, Associate Justice
HON. WILLIAM O. DOUGLAS, Associate Justice
HON. JOHN M. HARLAN, Associate Justice
HON. WILLIAM J. BRENNAN, JR., Associate Justice
HON. POTTER STEWART, Associate Justice
HON. BYRON R. WHITE, Associate Justice
HON. THURGOOD MARSHALL, Associate Justice
HON. HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We shall hear arguments in No. 49, Law Students Civil Rights Research Council against Wadmond.

You may proceed whenever you are ready, Mr. Dorsen.

ARGUMENT OF NORMAN DORSEN, ESQ.

ON BEHALF OF APPELLANTS

MR. DORSEN: Thank you very much, Mr. Chief Justice and members of the Court:

This is the third in a succession of Bar admission cases that the Court has been hearing. This is an appeal from a decision of a three-judge court in the Southern District of New York.

The suit in this case was an affirmative suit bought by three applicants to the Bar of the State of New York and three organizations, including the Law Students Civil Rights Research Council, challenging the constitutionality of certain statutes and statewide judiciary rules governing admission to the New York Bar.

In addition, the complaint makes similar allegations on the implementation of the statutes and rules through questionnaires, affidavits, interviews and other facts which I shall describe shortly.

The majority of the three-judge court below, Judges Friendly and Bonso granted the appellant partial relief, but

upheld the challenged statutes and statewide judicial rulings. Judge Constance Motley in an extensive dissenting opinion took the view that the principal portions of the majority opinions were erroneous and she would have broadly declared unconstitutional on its face and the other as applies.

It is important for an understanding of this case to perceive the type of personal screening program that takes place in the State of New York. The statutes and judicial rules that are relevant are set out in the appendix to brief for appellants, starting on page 1a.

Section 90 of the New York judiciary law provides that admission to or removal from practice by appellate division takes place when the appellate division and the State Board of Law Examiners are satisfied that each person who passes the Bar exams possesses the character and general fitness requisite for an attorney and counsellor-at-law.

Rule VIII-1, immediately underneath Section 90 on page 3a of the appendix, provides -- this is the implementing rule that has the effect of the statute -- that each applicant to the Bar must produce before a Committee on Character and Fitness evidence that he possesses a good moral character and general fitness requisite for an attorney.

On the facing page, page 2a, is Rule 9406, which provides that no person shall receive a certificate from any Bar committee and no person shall be admitted to the practice as an

an attorney unless he shall furnish satisfactory proof to the effect, among other things, that he believes in the form of the government of the United States and is loyal to such government. And there are three other requirements, including citizenship and residence.

Now these standards for admission in the State of New York are implemented by a complex procedural mechanism that delves deeply into the political and personal lives of each applicant. I shall be more specific about this later. We will suffice to say now that each applicant must answer extended questionnaires that raise questions regarding every aspect of his life. Secondly, there are so-called "home life" affidavits which must be submitted to the Bar committee by persons who know the applicants personally and have visited his home. Third, there are independent investigations that take place, including inquiries of the applicant's school and draft board, his former employers and police and other agencies as well as the general public to publication in the New York Law Journal.

Finally, after all the information is reviewed by a committee member, a personal interview takes place. If there is nothing unorthodox about an applicant, the interview will be perfunctory and admission will follow almost automatically.

But if there is some unorthodox activity or association, there will be an intensified investigation, new interviews, new questions and sometimes a delay in admission at personal and

professional cost to the applicant.

All of this takes place at a low level of invisibility but the effect on the constitutional rights of the applicant are destructive. First, it involves an unwarranted intrusion broadly into their political and personal privacy; and secondly, it inhibits the exercise of First Amendment rights by law students and applicants because of a fear in delay in admission.

All this is destructive to them. It is also destructive to the national interest.

Q I have a question to that. Is this question used in all Departments or just in the Second Department?

A This question involves the Second Department and the First Department, but there are such questionnaires for all Departments.

Q Are they of the same character?

A Very similar.

The three-judge court below unanimously agreed in an opinion by Judge Friendly that certain practices of the Bar committee were invalid. They held question 27a, which asks applicants if they believe in the principles of the form of government of the United States to be impermissibly vague and over-broad.

It held question 26 also invalid. That sections dealt and currently deals with membership in organizations advocating the overthrow of the government by force and violence.

Judge Friendly held that the question as it is formally

provided was invalid, because it did not require knowledge by the applicant of the illegal purposes of the organization and there was no requirement that the illegal activity of the organization be coincident with the membership of the individual.

Finally, Judge Friendly held invalid question 31, which formally requires is there any incident in your life, the life of the applicant, that was called for by the foregoing questions in the questionnaire because of any unfavorable or detrimental bearing on your fitness. Judge Friendly held that this kind of a soul-searching question was too broad, and he struck it down.

At the same time the defendants themselves deleted certain questions from their questionnaires from what Judge Motley term the "tacit confession of error." These extremely broad questions, which are found in page 183 of the record, dealt broadly with membership in organizations and societies that the applicant may have joined before and during law school and extracurricular activities that he may have engaged in as a student.

But the majority below upheld the two relevant New York statutes and the implementing questions.

We have many objections both to the statutes and the questions and the implementing procedures, but they boil down to two principal points. The first point is that Rule 9406, which is on page 2a of the appendix, and the implementing question, question 27, are invalid because they compel a declaration of belief that is impermissibly vague.

Secondly, that Section 90 of the judiciary law, the good law of policy standard, which incidentally we do not dispute on its face because we accept Justice Frankfurter's formulation of the good moral character standards which Mr. Boudin stated yesterday from the Schware case. But we do maintain that Section 90 invalidly applies because it has been used to test the political ideas of the applicants that are protected by the First Amendment, both because of the invalidity of the revised question 26, which is found on page 6a, and because of the impermissibly broad pattern of investigation is a protected activity that the Bar committee undertakes.

Now before I close my first point, I would like to make four preliminary comments, which are essential for understanding our position: The first concerns the deterrent effect on the political activity of students. I have seen it for ten years at the New York University Law School. This is not an imagination. This is not a product of anyone's imagination. It is not an allegation.

There are students who are deterred from political activity. There are professors who tell students not to engage in political activity until they are members of the Bar. Some of the most responsible students, some of the best students are deterred from lawful political activity. Many of these students and the families of these students have gone to great expense to put them through law school, even a delay of a few months at

earning a living is relevant to the prospects of the families and to their own prospects.

The two cases I have cited in the brief, the cases of Messrs. Rosenberg and Kaimowitz, are examples of people who have been delayed by the Bar committee from engaging in undoubted political activities.

Secondly, nothing that is being urged in here in any sense is inconsistent with the ability of the Bar and the Court to discipline improper conduct of applicants or members of the Bar. Mr. Boudin has reviewed four different types of sanctions that are available, and I shall not repeat them, but I will deal with one other aspect.

Every one of us is concerned with violence. Every one of us is concerned with disruption in the courtroom. In my experience the Bar associations of this country are able to respond to this problem in a constitutional manner. The ABA has set up a special committee under Judge Murray, who is a member of the District Court in the First Circuit, to set standards of behaviors by judges, by lawyers and by spectators and by defendants. That committee has already delivered a preliminary report.

The Bar Association of the City of New York set up a special committee with men like Bruce Bromley, Seth Webster, George Lindsay and Bert Marshall on the committee, to look into the same matter. I had the privilege of being executive director of that study. The Bar association has not been delinquent; the

Bar associations of this country have been able to deal with conduct that is impermissible, conduct that deserves the sanction of either the Bar or the court.

But this is not conduct that we are dealing with here. It is the delving into protected political activity.

Third, none of the criticisms of statutes, none of the criticisms of the questions, none of the criticisms of the practices that we are making here are making in the slightest to impune the good faith, the integrity of the Bar committees, the members of the courts of New York or any other state. These men are operating under a system that was handed to them. They are doing their very best to implement that system, but it is a system that was set up without full consciousness of the First Amendment problems that are raised.

Now I want to repeat: We are not criticizing individuals, we are not suggesting that there is a certain arbitrariness on the part of certain people or committee. But the fact of the matter is a structure has been set up that is improper and it should be dealt with.

Q I have a question. Does the record show the history of these questions?

A The record shows the history ---

Q The structure that was set up?

A The history shows -- the record shows the previous questions that were asked and the present questions. The New York

system was set up in 1921. It traces back to 1921 -- questions of this sort.

Q And their character?

A To this kind of investigation.

Q But these aren't necessarily the particularized histories of these particular questions?

A It does not. It does not, Mr. Justice.

The final preliminary point that I would like to make is that there is no need for this Court to overrule the Konigsberg and Anastaplo cases to deal with the invalid statutes and practices here. The question in the Konigsberg was a different kind of a question from the questions that are being asked of the applicants in New York. The foundations of the questions Mr. Justice Harlan pointed out in opinions in both those cases had delayed and the committees were trying to fill in gaps. There are no gaps here; there is no foundation here.

We are dealing with questions that are asked of every single applicant to the New York Bar. The entire generations of lawyers are going to have to deal with problems that all of us are going to deal with at the present time.

And, finally, Konigsberg and Anastaplo are distinguishable, of course, to the governing Constitution of Principles that was evolved by this Court, which have changed in the last decade. It is exactly a decade since the Konigsberg case was argued in this Court.

Now what I would like to do is deal with the first principal point that I alluded to earlier, namely, Rule 9406, which is found on page 2a of the appendix. And here we have a rule which has statewide applicability and the force of a statute that whatever the doubts may have been in the Arizona case, that Mr. Justice White raised, this is a belief question. It is clear that each person who wants to be a member of the Bar must furnish satisfactory proof to the effect that he believes in the form of government of the United States and the laws of that government.

There are many expressions by members of this Court -- Mr. Justice Roberts, the member of the Court who was referred to yesterday by Mr. Justice Black; Mr. Justice Jackson on another occasion expressed what seems to me to be the most cogent term, the reasons why belief is absolutely inviolable.

Q Do you think the oath that you heard the applicants who were admitted to our Bar today have been raising questions like this?

A No, I do not. The constitutional oath that was raised in the Knight case and put on per curiam by this Court, I would have no objection to at all.

But this is not that case. This deals with beliefs, and as Mr. Justice Jackson said, "I know of no situation in which a citizen may incur civil or criminal liability or disability because the court infers an evil mental state when no act at all has occurred. Attempts of the courts to fathom modern political

meditations would be as futile and mischievous as the efforts of the infamous heresy trials of old to fathom religious beliefs."

Q Do you think, Mr. Dorsen, in response to that question the applicant is strongly opposed to the divisions of the Constitution for the electoral system in electing the President, that the affirmative answer that he did believe in while entertaining that reservation about the Electoral College -- well, I ask you what consciousness did that produce, in your view?

A I think that is a very, very basic question and our second objection to this standard is it is infamously vague. It talks about the form of the government, the form of the Government of the United States. Now does this mean the electoral system, does this mean the capitalist system, does this mean the Federal system?

The Center for Democratic Studies under Mr. Hutchins has recently proposed a new Constitution, which would divide the country into regions, which would give different powers to the Supreme Court. That would certainly change our form of government.

Is an applicant in a position where he has to guess if he has unorthodox political views as to what the form of government of the United States really is or whether the judge or jury might consider it to be?

Judge Friendly dealt with this point. He said that it was improper to inquire of an applicant as to whether he was

loyal, the proof of this, underlying the form of government. He did not explain why the same objection would not apply to a slightly shorter formulation, that it seems to me is an indistinguishable formulation, of the form of government of the United States.

Judge Motley in her dissent raised this very question and as far as I know there is nothing in Judge Friendly's opinion which satisfactorily deals with this issue for the very reason suggested by the Chief Justice.

Now the state says that Section 9406 is really like the constitutional oath that Mr. Justice Harlan raised in connection with members of the Bar who were just admitted, that they would support the Constitution of the United States. But that is not what this says. In fact, it is not what it said.

No one wants to revise this formulation and life of what would be a constitutional formulation. Especially is this true in light of question 27, which implements this section, and says, among other things, 'Can you consciously, and do you, affirm that you are, without any mental reservation, loyal to and ready to support the Constitution of the United States?"

Now "without any mental reservation" clause is certainly a belief clause. Mental reservation. And then make it a question about the bicameral system, about one-man/one-vote, about whether or not in this modern age we need regional government rather than state government.

Now this section -- or this Rule 9406 -- and the implementing question are invalid for a wholly distinct reason. And that under Speiser v. Randall it impermissibly places the burden of proof on the applicant. Judge Motley said in her opinion that this was the very heart of the case. And the reason Judge Motley thought this was the very heart of the case is spelled out fully in Justice Brennan's opinion in the Speiser case, and that is that the hazard of the mistaken fact-finding is so great and the potential loss to the applicant and law student is so great that he will steer far wider of the unlawful zone if he has the burden of proof.

Now in his brief the state attempts to avoid this brush with Speiser without even mentioning the case by saying that there is a distinction between coming forward with evidence, the burden of initial coming forward, on the one hand, and the burden of open proof, on the other.

It seems to us that this is an inadequate answer. In the first place the language in 9406 says exclusively that the applicant must furnish satisfactory proof. The burden of proof is built into the section.

Secondly, the practical implementation of this section in New York, as in both the Rosenberg and Kaimowitz cases, which are cited incidentally on page 10 of the brief in opposition to the motion to affirm, show that the way the mechanism works -- and very naturally works -- is that when there is a question

about an applicant, as the gentleman from Ohio said a moment ago, no questions are asked until the Bar committee is satisfied.

And, of course, under Section 90 at the top of page 3a of the appendix it says that the state board of law examiners must be satisfied. That is burden of proof language. And I might cite what New York says here, in the Konigsberg opinion itself, at 366 U.S. page 41, in the footnote. Mr. Justice Harlan lists New York State where the burden of proof is on the applicant.

So it seems to us that apart from the defects that are apparent in the rule and the implementing question, the burden of proof problems are raised by Speiser and Randall, which are altogether supportive of our concern.

Q Have you got any figures as to how many applicants who have been denied admission since this question and answer that you are complaining about?

A The one case that deals with it is the Cassidy case cited in the brief, and it is unclear whether that person was denied admission because of a political matter or of a deception which he played upon the committee. The fact of the matter is that there are very few people who have been denied admission to the Bar on political grounds, but that in no way, it seems to me, Mr. Justice Harlan, ---

Q Are there any?

A Yes, the Cassidy case is the one that would come within it. But there are many cases that we know of of our own

personal knowledge and a couple of them are cited, where there is a delay. The people are prejudiced, the people's careers are hurt not only because of the delay in getting a job, not only because of the delay in earning money, but because of the notoriety, because of the unfortunate publicity.

Q Do pu go as far as Mr. Boudin does when he expresses the argument (portion unclear).

A I do not believe that there should be a character committee investigation that deals with advocacy for membership or beliefs. I believe that certain actions by an applicant may be relevant -- certain unlawful actions, certain improper actions. A man can be convicted of embezzlement from somebody or robbed a bank. Or engaged in unlawful activities, I believe that is a perfectly proper subject for the committee to delve into.

Q Well, how about the Fifth Amendment?

A This case, of course, does not present that issue.

Q Do you have any trouble with the Fifth Amendment, asking a man if he ever robbed a bank?

A I think you would be entitled to raise that.

Q Do you think the consequences of his deed stops at that point? Whether he takes the Fifth Amendment on whether or not he has ever embezzled money from a principal? Or is that specific?

A I think the Board would then be entitled to make its own private investigation. I might say in the case that

Mr. Justice Stewart and the Chief Justice are now putting, the particular objection that Mr. Boudin raised to the Fifth Amendment wouldn't be applicable, because it weakens the case where the Fifth Amendment would be closely related to the First Amendment concerns, and therefore the Fifth Amendment problems would not be as great in the first instance. And in the second instance, the committee would certainly be able to follow that up. And I see no problem about considering that relevant -- not the privilege against the Fifth Amendment, but the unlawful activity of the individual should be considered relevant to admission to the Bar.

But I do not see why why protected political activity, protected speech and certainly beliefs should be included within the ambit of relevant consideration, or permissible consideration by the Bar. And let me say that one of the chief reasons for this ---

Q Let me ask you this. Do you believe in the (unclear)

A Yes.

Q Well, do any of them ask that?

A I have never heard that particular question asked, but the questions that might be asked are questions concerning possible crimes.

Q Well, you draw a distinction, do you not, between asking if they have been convicted and asking if they have committed robbery?

A That's right. If the man has been convicted, that is a matter of public record and that is not incriminating. I do draw that distinction.

Q What would you say about a committee asking about whether an applicant to the Bar believed in courtroom disruption?

A I would say that is an impermissible question.

I am against courtroom disruption. I believe all of us are against courtroom disruption. When people engage in courtroom disruption, they should be punished, if it is appropriate to do so, by the proper body.

But this -- and I would like to quote here what Justice Trainer said -- "When an inquiry begins into advocacy," he said, "it is a greedy camel and it does not easily take its leave." This is a very, very slippery slope, to use the law school phrase. We begin asking belief about one thing about one thing and we begin asking belief about another thing, and there is no point I can see a logical line can be drawn once this line of questioning is opened up.

Q Really what you are saying and to make it concrete is that you can't keep a man out of the Bar unless, of course, he has committed a crime.

A I wouldn't go that far, I wouldn't go quite that far. I would stop short of if the applicant has "committed activities," which for example if a man had consistently broken up a courtroom, disrupting a courtroom, but has never been

convicted of it.

Q Well, we wouldn't get into a courtroom again.

A No, I mean as a spectator, for example, or as a law student. If he engaged in an activity that the committee was inconsistent or irrelevant to being a lawyer, I wouldn't go quite as far as you suggested, Mr. Justice Harlan.

Q But you might have that question in another way. That man seeking admission might have been committed in another state, and he used disruption as a tactic of advocacy ---

A Yes, quite right.

Q --- has been found in contempt in Federal. Would you consider that as (unclear).

A Yes, I think I would.

Q In other words, it is all right to ask have you ever been found subject to contempt subject to any disciplinary proceeding or anything concerning him?

A Yes, absolutely, Your Honor.

There is one other point I would like to make. Even more generally than the turning out the Section 90 and the implementing question 26, which I won't review except specifically to say that this question which Judge Friendly found invalid, in his opinion, is still invalid because it does not qualify membership by requiring active membership and it does not require, as in the Scales case, and it does not require advocacy by the standards of the Yates case, namely, advocacy to do something

or in the Brandenburg case, to cite somebody (as Brandenburg put it).

Q Were those criminal cases?

A Those were all criminal cases, that is correct. But those are the standards that this Court set down as the standards for deterrent speech and association.

Now more generally even, Section 90 is invalid as applied because of the entire mechanism that operates that enables committees to roam at large over people's beliefs. In the Rosenberg case that I have mentioned earlier it was discovered that Rosenberg had taken part in an anti-Vietnam war march and the committee member asked him during an investigation, "Why are you against the war in Vietnam?" That is a matter of public record.

In the Kaimowitz there was an applicant who engaged in a strike. He was also asked, "Why did you strike?" "What was your reason for doing so?"

This is a bad business when questions of this kind are asked.

Q But in those cases there was delay?

A That's right, the admission was delayed. And the specific point I would like to come to in closing is that nobody should be delayed, that nobody should be prejudiced. While delay, though not as serious as exclusion, also has economic and personal prejudice, until there is a specific finding of probable cause by the committee based upon conduct, denoting immoral

purposes.

Q Can I go back to something and ask you a question?

A Yes.

Q I understood you to say that the effects of this complicated question was really trustworthy or belief. What proof have you got for that?

A The proof of that is ---

Q What proof does the record show?

A The record only shows these two cases, the cases of Rosenberg and Kaimowitz. In many First Amendment cases -- let me do that another way. These questions require protected political activity as well as belief. The natural effect of those questions is going to be deterring.

As I stated at the outset, I have seen it with my own eyes. I have seen people ---

Q Well, I know, but after all it is not in the record here. One can imagine those things. We don't question your sincerity for a moment. I am sure there would be a restriction, a broad restriction and you are asking us whether a long traditional system in New York and other places ---

A Well, that is correct. We are asking that question.

Q Well, I would suppose that there would be some proof beyond the chilling effect.

A Well, the kind of proof that we have is the kind of

proof, for example, the Court in Bagget v. Bullitt and several of the other oath cases. A natural effect of questions of this kind are in many cases, Kraft, Pishin, Baggett, Elfbrandt, all cases where the oath was struck based on ---

Q Would it be possible for you to refer to any compilation that we could get to see how many people that this question that you have introduced have been refused admission on the basis of their character?

A The most extensive notes on this subject are contained in whatever documentation is available in Columbia Survey on Human Rights and the New York University Intramural Law Review. But the record does not contain the kind of evidence -- and of course the answer is that -- the answer that I think I have given, namely, that in cases like Elfbrandt, Baggett and others the chilling effect or the inhibiting effect would proceed, and it is here and it is in my submission to this Court.

I think it should also be perceived here.

Q Are you suggesting the Judiciary note that as a fact, even though it is not demonstrated in the record?

A I won't say it is a fact. I will say on the basis of the precedents of this Court in the belief and speech areas that it has dealt with virtually the same situation. I am not asking the Court to deviate at all from precedents that have been developed over the past decade and more.

Q (Inaudible.)

A In New York State my understanding is that perhaps Mr. -- Judge Peth will correct me -- I think it goes back to the early 1920s, questions of this general character.

Q Well, not as elaborate?

A Not as elaborate, that is quite right.

Q (inaudible)

A Well, after the First World War, as you know, there was a similar concern about -- Attorney General Mitchell Palmer ---

Q At that time did they ask about Reds?

A I could not answer that, Mr. Justice Black.

MR. CHIEF JUSTICE BURGER: Mr. Peck, you may proceed when you are ready.

ARGUMENT OF DAVID W. PECK, ESQ.

ON BEHALF OF APPELLEES

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

I am not sure that it has been made clear what the requirements of law and the requirements are at the present time. Mr. Dorsen has sort of gone on what used to be questions, what was changed at one time or another and what the Court changed.

I think it should be said that the appellate divisions in the State of New York in the First and Second Departments have been extremely sensitive and conscientious, indeed, on their own about these requirements. As has been indicated, there is a long history about these questions and requirements, and

originally they go back a good many years and nobody raised any questions about them.

But before these cases were started, the courts on the whole became concerned about this historical record and whether it was up to date and modern, and they went through the requirements and the questions and they made substantial changes in them. Then these proceedings were started and with the matters of complaint here they looked at them again and made some other changes before the matter ever got into court.

And finally, at the third stage the courts have had the benefit of the statutory court's review of procedures and its holding as towhat was proper and what was improper, so that what you have now is what I am going to confine myself to. I would just like to say, preliminarily to that, that my friend has said many things here which has no support in this record. There is nothing in this record to suggest that these committees "roam at large over people's beliefs," not one iota of a suggestion of anything of the kind.

They talk about what is in their brief, about what happened in Rosenberg and Kaimowitz. There is nothing in the record about it. Suffice it to say, both Rosenberg and Kaimowitz were admitted to the Bar and Mr. Cohen from the Attorney General's office tells me he has personally gone over the records of the admissions in the First and Second Departments and that no one ever has been refused admission to the Bar of the State of New

York on so-called "political trials."

Q That is a pretty powerful statement to make, no one ever had been refused? It is ridiculous.

A I can only tell you that Mr. Cohen told me that he has personally examined the records and states that to be a fact. I wouldn't think it would be ---

Q No pressure of politics in any of it, no request for relief?

A This is about exclusion, not having been admitted upon those grounds. I don't purport to say that he has gone through the records of every question that was asked by a character committee member, but he says that no one has been excluded on political grounds.

Q Expelled from the Bar?

A No, denied admission.

Q How many do you have?

A How many do we have?

MR. COHEN: About 5800 a year.

Q That were admitted without question?

A How many were denied admission? On any grounds? Can you answer that?

MR. COHEN: Probably less than five, some because of perjury.

Q Nobody has ever been excluded on the basis of asking these questions. Then what's the point of asking these

questions?

A Well, that is a good question, I suppose, but I would say that the answer that these are things that you should certainly know -- the questions that exist today are things that you should certainly know, in my opinion, about an applicant for membership in the Bar.

In my thinking I think it is fundamental as to whether a man believes in the Constitution of the United States and is prepared to take an oath to uphold it. I think without being facetious in any way, Your Honors, it is the same matter as to whether it is a formality or a reality for the members of the class here this morning to take the oath. We know that it is done everywhere, so far as I know, for a public officer, for a judge and a member of the Bar who is an officer of the court, I assume, starts in this country as distinguished from some other places in being willing to support the Constitution of the United States. And I think it is all basic inquiry at the outset of a man as to whether he can conscientiously take that oath and whether he does take it in good faith.

Q Is there anything in the questions that we ask the members of the Bar that would begin to compare with the questions now under consideration? I don't think we have any.

A Well, let me divide into two respects, Mr. Justice. There are really two requirements here. There is one that a man has of a moral qualification to be a member of the Bar and the

other is whether he can support the Constitution of the United States.

As far as the general moral character is concerned, I think that what the requirements are in the State of New York are no different, in substance, than the more simple form in this Court where you call upon two members of this Bar to state that they believe that the candidate has the qualifications which according to the rules of this Court means that he appears to have good character.

Q Well, we don't make inquiries here. We rely on states' admissions, do we not?

A That is right. You do not make any inquiries, but you lay down that as a requisite and a member of this Bar stands before this Court and makes the motion he is representing as far as he knows, he believes this is a candidate who has that character.

Q You want "that character" changed?

A I think as the Chief Justice has said, Mr. Justice, this Court, of course, has to rely upon the admissions machinery in the states. But still I think it is important that this Court has laid down a requisite that a man appear to have good character. You are interested in him. You are concerned by him. You do recognize that it is an essential -- being a lawyer, it should be an essential for admission to this Bar, which I submit recognizes the permissibility of that realm of inquiry at the

state level.

Now what does that inquiry consist of as far as good moral character is concerned? It consists simply of one thing. In Rule VIII of the Rules of the New York Court of Appeals for admission of attorneys, it says: "Proof of moral character." It says, "Every applicant must produce evidence" -- not about a burden of proof, but be that as it may, "must produce evidence that he possesses a good moral character and general fitness requisite for an attorney and counsellor-at-law."

This must be shown by the affidavits of two reputable persons.

Q Where is that under attack?

A I am not sure. It's under attack ---

Q --- of this Court would disagree with you there, the test for "good moral character." Of course people disagree on what good moral character is.

A The objection is made specifically -- I heard my friend make the objection -- to a so-called "home life" affidavit, which he has somewhat overstated, that the two affiants are expected to report upon the home life of the applicant. Nothing of the kind.

All they are asked is, in what way do they know the applicant? Merely professional, or personally. And the question is asked, have they visited his home? Nothing about what they found when, as and if they did visit.

Now ---

Q I take it as to the questions that Judge Friendly held improper, you are not inquiring into those rulings?

A We have done exactly what the Court said.

Q May I ask, in this application here, in this record ---

A Could you tell me what page?

Q Page 52. Is that the one?

A That's the old question, Mr. Justice.

Q Is that the questionnaire now?

A No.

Q Is that the one we have up before ---

A No.

Q Well, why was it put in?

A Well, there was put in the record the whole history of this thing.

Q The history of it?

A Yes.

Q Well, this is an old one. Where is the present one?

A Pages -- I am informed that pages 121 and 139 are ---

Q That is the one that they are attached on?

A No, that is present questionnaire.

Q There is something here that seems so far -- I

would think.

A 125, Mr. Justice.

Q 125.

A Now, on the matter of the so-called political activity, which is very narrow indeed, if you want to call it "political activity." There is the provision of Rule 9406, which if it is standing alone and without any interpretation or implementation, would bother me. Rule 9406 says that a person shall not be admitted unless he furnishes satisfactory proof that he believes in the form of government of the United States and is loyal to such government.

Now I suppose you can indulge your imagination and say that the "form of government" means a bicameral legislature and an Electoral College, although of course we all know that when an applicant said that he believes in abolishing the Electoral College, he believes in the unicameral legislature, nobody would ever ask him the second question, let alone be disturbed in the slightest by his answer.

Q But now in the oath that we give we ask him to support the Constitution of the United States without any mental reservation and for purposes might have the same affinity.

A I think that it might. As Judge Friendly says, "You have to have some generality of language." You can't pick words always with an exact precision that covers precisely what you want. You can't conceivably cover something else. But as

Judge Friendly pointed out, "You have to look at this in the way it has been interpreted and applied by the courts." And there is no question at all that suggests to an applicant about his belief in anything.

If the Court will look at pages 5 and 6 of our brief, Your Honors will find the questions which are asked, and there are four of them, all of which are aimed at testing whether a man can conscientiously take the common oath of supporting the Constitution.

Question 26(a) says: "Have the ever organized or helped to organize or become a member of any organization . . . which you knew was advocating or teaching" the overthrow of the government by force or unlawful means? And then if your answer is in the affirmative -- this is question 26(b).

Did you during that period have the specific intent to further the aims of such organization to overthrow or overturn the government by unlawful means?

I can't see that any exceptions can be taken to those questions and if any exception can be taken, I submit that Konigsberg has settled it. And while Mr. Dorsen says that he is asking for any overruling of Konigsberg, the brief submitted by his clients makes it perfectly clear that that is exactly what they are asking for -- an overruling of Konigsberg.

Q Mr. Peck, may I ask a question?

A Yes, sir.

Q I would like to get to a question which has a little more significance than some of the others. But suppose a man has sworn that he didn't belong to any organizations that advocate any overthrow. You indict him for perjury. Then in that case would in hinge on whether or not that organization was advocating the overthrow of the government? And who would have the burden of proof?

A Well, certainly the prosecution would have the burden that the organization advocated that, but he knew it.

Q Is it true ---

A He knew it.

Q It might have a million members. How can you prove the advocating -- how can you put that to the jury that the man is tried for perjury? He would be doing it on the basis of conscience, wouldn't he? Can a man be charged against perjury?

A I can imagine how you might. It might be difficult, but I suppose that you might produce members of the organization who testified as to its nature and testified to conversations that they had with this man when they asked him to belong to this organization, and that they advised him that they believed in the overthrow of the government by force, and he said, "That's right. That's exactly what I believe in and that's why I'm here."

Q He could be tried on a perjury case?

A Could be, could be.

Q And then you would get right back in the old _____ case.

A Most respectfully, Mr. Justice, I don't think so.

Q But it certainly is a step in that direction.

A I wouldn't say that.

Q The same question that he was raising. And of course it wouldn't be difficult to prove, some of these things you might have to prove them. Perjury -- if they chose about six witnesses and some of them said that was the purpose they understood for their organization being organized, then he would have to overcome that, wouldn't he, by everything?

A I don't think so. I have said that the prosecution would certainly have to go on and say by evidence beyond a reasonable doubt that he knew perfectly well when he joined this organization what its precepts were, that he prescribed to them willingly and he answered the questions on the questionnaire that he wasn't forgetful, but he was being deliberately deceitful.

Q Well, then, suppose that they had proved by six or seven witnesses what they had told him what to say there. How difficult might it be for him to show the jury that he hadn't? That they were wrong?

But why does the Bar association have to get mixed up and involved in applications simply to determine that he is of good character, a human being and he wants to be a lawyer? What ought to be done?

A Well, it depends upon the embrace of the words "good character" and whether or not it includes an ability and a willingness to take an oath to support the Constitution. Generally, in these cases ---

Q I have an objection. I haven't asked you about that.

A Yes. Well ---

Q I took one. I am glad of it. I wanted to do it both times.

A I think, Mr. Justice, if you start with the premise that the oath may be required, I think it follows that a committee investigating into the qualifications of a candidate for admission to the Bar are entitled to make appropriate inquiries to ascertain whether or not this man can conscientiously take that oath, and when he takes it will mean it.

Q Well, why should they, in order to show that, have to subject him to the possibility of a trial for perjury on issues involving the advocacy of a big organization? How can he escape having to defend himself on that if someone happened to be after him?

A He might say, "I don't know" about an organization. He might ---

Q He might say, "I have none."

A Well, but the question is, first, have you been a member ---

Q Which advocates ---

A No, which you knew ---

Q --- which you knew advocates. So they subject him to a trial for perjury on that issue about an organization as to whether it believes in overthrowing the government.

A And he knew it?

Q Yes. And he knew it. But take them both. Get him under the right environment, with the right jury in the right room, with the right prosecutor and with the right judge.

A Then maybe he should be convicted of perjury. I don't ---

Q I suppose that any time that a man has six witnesses against him testifying to a fact in a criminal case, he would have serious problems, wouldn't he?

A Yes, serious problems.

Q He would have more serious ones when he fell on an issue that is subject to sharp political division as to whether the organizations that they are talking about are some that the vast majority of the people are vigorously against, does he not?

A We are trying all the time, Mr. Justice, cases that are in a sensitive area and where defendants sometimes think they are apt to get a fair trial, yet ---

Q It provides the change of venue.

A It provides the change of venue, but some sometimes ---

Q But maybe you couldn't provide the change of venue.

A Oh, I think you might get a change of venue if you made a showing that the atmosphere -- some other jurisdiction where ---

Q What are you going to get when there is a lot of talk about the Reds and the Communists? You would expect to have a community that was looking too sharply at that. Somebody would say that that man has done something to help them.

A I can only say very respectfully, Mr. Justice, that I don't feel that the dangers here are any different from the dangers in a good many cases where defendants feel, justly or unjustly, that they have difficulties in coping with the nature of the case that is before the courts. But we have to try them we have to do the best we can and notwithstanding ---

Q But you don't have to make certain things a crime with reference to what a man believes or what organization he belongs to and what they believe in.

A May I repeat that there is no question here which asks a man's belief about anything. The questions are, have you been a member of this organization knowing ---

Q And ---

A --- and that you have the specific intent?

Q Have you been a member of this organization and -- an organization which advocated the overthrow of the government?

A And did you know it?

Q You know it. As you know, there are very many people who refuse any political party, of being on one side or the other in anything. I presume they would have to deny that they belong to a party.

A I don't really think they have that problem, plus specific intent. And then I will just close by my reference on page 6 of our brief to questions 27 and 28 -- I mean, 28a and 28b.

"Is there any reason why you cannot take and subscribe to an oath or affirmation that you will support the Constitution of the United States? If there is, please explain.

"(b) Can you conscientiously, and do you, affirm that you are, without any mental reservation," -- just as in the oath taken by this Court -- "loyal to and ready to support the Constitution of the United States?"

It is my respectful submission that the appellate divisions of the Supreme Court of the State of New York have very conscientiously, and the district court here, limited these provisions, these requirements and these questions to what is entirely proper.

Thank you.

Q May I ask you just one other question?

A Yes, sir.

Q It ran to belief.

Do you believe the Bar ought to have the right to deny a man admission because he has been a member of the Communist

Party?

A No, I don't think that is the issue and I would answer that question, Mr. Justice, that I don't think that a man should be denied admission merely because he has at one time or another been a member of the Communist Party.

Q He was a member at the time he applied.

A No, I wouldn't think that alone probably would be sufficient. I think it is perfectly clearly indicated here, Mr. Justice, what the line is, and that belonging to the organization, knowing that it believes in the overthrow of the government by violence and that the applicant has the specific intent ---

Q The applicant?

A Yes, the applicant.

Q The applicant?

A The applicant for admission to the Bar has the specific intent to have the government overthrown by force.

Q Now that is quite different from the question that I asked you. It had an opposite aim.

A Well, that is how I understood the question, Mr Justice.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Peck. Mr. Dorsen, I believe your time is up.

Does Mr. Dorsen have any more time?

THE CLERK: No, he doesn't.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Peck and

Mr. Dorsen. The case is submitted.

(Whereupon, at 11:34 a.m. the argument in the above-entitled matter was concluded.)