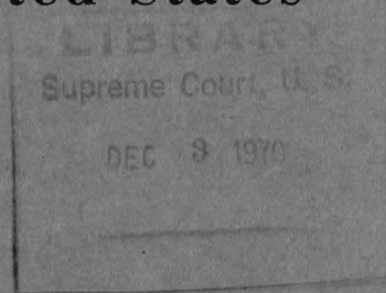


# Supreme Court of the United States

OCTOBER TERM, 1970



In the Matter of:

Docket No. 79

STELLA CONNELL,

Appellant,

vs.

JAMES M. HIGGINBOTHAM,  
ET AL.,

Appellee.

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE  
DEC 2 4 53 PM '70

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

Place Washington, D. C.

Date November 19, 1970

**ALDERSON REPORTING COMPANY, INC.**

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

TABLE OF CONTENTS

111-032  
24  
27

<u>1</u>	<u>ARGUMENT OF:</u>	<u>P A G E</u>
2	Sanford Jay Rosen, Esq., on behalf of the Appellant	2
3	Stephen Marc Slepian, Esq., on behalf of the Appellees.	23
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

o/o/o/o/o/o/o/o

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

-----

STELLA CONNELL, )  
 )  
 Appellant, )  
 )  
 vs ) No. 79  
 )  
 JAMES M. HIGGINBOTHAM, )  
 ET AL., )  
 )  
 Appellee. )  
 )  
 -----

The above-entitled matter came on for argument at 1:45 o'clock p.m. on Thursday, November 19, 1970.

BEFORE:

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

APPEARANCES:

SANFORD JAY ROSEN, ESQ.  
 School of Law  
 University of Texas at Austin  
 2500 Red River  
 Austin, Texas 78705  
 Attorney for Appellant

STEPHEN MARC SLEPIN, ESQ.  
 Counsel, State Board of Education  
 347 Miles Johnson Building  
 Tallahassee, Florida  
 Attorney for Appellee

P R O C E E D I N G S

1  
2 MR. CHIEF JUSTICE BURGER: We will hear arguments  
3 in Number 79, Connell against Higginbotham.

4 If Counsel in Number 88, either Mr. Rowntree or  
5 Mr. Williams are present, I hope you have been made aware that  
6 we will not reach your case today.

7 Mr. Rosen, you may proceed whenever you are ready.

8 ORAL ARGUMENT BY SANFORD JAY ROSEN, ESQ.

9 ON BEHALF OF THE APPELLANT

10 MR. ROSEN: Thank you, Mr. Chief Justice.

11 Mr. Chief Justice, and may it please the Court:  
12 I am representing a woman who was ousted from her job as a  
13 school teacher in Orange County, Florida because she refused  
14 to take a loyalty oath.

15 Incredibly, the oath that was first tendered to the  
16 Appellant was a duplicate, word-for-word, of the oath that was  
17 voided by this Court almost ten years ago in the Cramp case.  
18 Indeed, both this case and the Cramp case arose in Orange  
19 County. And individuals comprising that county's board of  
20 public instruction were defendants in both cases.

21 The Court will forgive counsel, he hopes, if he  
22 confesses to a sense of des je vous. The feeling of having  
23 been here before is enhanced by the fact that just three years  
24 ago counsel stood at the Bar of the Court to plead the  
25 Whitehill case on behalf of another teacher who chafed at a

1 loyalty oath.

2 From Cramp through Whitehill, and James versus  
3 Gilmore, on seven occasions in the last decade, I relatively  
4 now advance that this Court has invalidated all state negative  
5 loyalty oaths for public employees to come before it.

6 Three affirmative or positive oaths have been left  
7 standing. Now we have come full circle, for we are back again  
8 to consider the oath in law that was reviewed by the Court in  
9 Cramp, the first case in this line.

10 As enacted the Florida Loyalty Statute contains five  
11 operative phrases: test oaths, we submit, each separately or  
12 all taken together.

13 In Cramp this Court declared one of these phrases  
14 at least, invalid. In the present case the Court below struck  
15 down two more. Over Judge Simpson's dissent, however, it  
16 declared and then validated the remaining two phrases. On the  
17 surface one is negative and the other is affirmative.

18 Now, all teachers and all other employees or  
19 officials of the State of Florida must now swear an oath in the  
20 following form:

21 "That I will support the Constitution of the United  
22 States and of the State of Florida and that I do not believe in  
23 the overthrow of the Government of the United States or of the  
24 State of Florida by force or violence."

25 Appellant respectfully submits --

1 Q Would you have objected if it stopped after  
2 the first section?

3 A Your Honor, we would object if the Florida  
4 oath were to stop after the first section.

5 Q Well, we handed down a very recent decision  
6 of this Court in order to sustain your objection.

7 A Justice Stewart, Appellant requests that you  
8 consider the recent decisions of this Court which were not had  
9 after a full argument and briefing, but only on summary affir-  
10 mance of decisions below.

11 Q Well, it was an affirmance on the merits.

12 A Affirmance on the merits in three cases in the  
13 last three years: Knight, Olson and Hosack.

14 Q Do you think it's unconstitutional for this  
15 Court to require, as we did this morning, seven or eight men to  
16 take an oath that they will support and defend the constitution?

17 A Your Honor, I'm not here to press the question  
18 of whether an attorney may be compelled to take an oath to  
19 support the Constitution of the United States. I understand  
20 that that question may be before the Court right now in three  
21 other cases. However, I think the case of an attorney may be  
22 distinguishable, may be different, really different from the  
23 case of a school teacher, a garbage collector, a subway conduc-  
24 tor, well, any number of potential public employees of the State  
25 of Florida, or for that matter, any other state.

1           We are submitting that an indiscriminate test oath  
2 of all public employees is a test oath, an unconstitutional  
3 oath for various reasons. We could also suggest grounds upon  
4 which this particular test oath could be voided without the  
5 Court's reaching that question. However, we would respectfully  
6 submit that it would be appropriate in this case for that  
7 question to be reached.

8           But, taking the case of the attorneys, Mr. Chief  
9 Justice, one could suggest that an attorney coming to the Bar,  
10 to operate within a system of law under a constitution, might  
11 well, at very least, as a symbolic act of fidelity, take an  
12 oath to support the constitution. Whether or not such an  
13 attorney would ever be prosecuted for perjury, of course, is  
14 questionable in my mind. But, if cause came on subsequent  
15 occasions to think that the oath were taken falsely, we're  
16 not quite even certain what that would mean, of course, but we  
17 do believe that the case of the attorney would be somewhat  
18 different from that of just an ordinary public employee.

19           In fact, Your Honor, we make five arguments as to  
20 the oaths in this case, none of which do turn on a particular  
21 phrase at issue or whether it is cast in negative or affirmative  
22 terms. We propose in this argument to take the high ground and  
23 hope to persuade the Court the time has come at least to ad-  
24 dress the underlying question of whether indiscriminate test  
25 oaths, regardless of how they may be cast, invariably offend

1 the constitution.

2 Now, we would make five points in this case. Two  
3 of them are just the indiscriminate test oaths or all indis-  
4 criminate test oaths.

5 The first is that such test oaths violate the First  
6 Amendments to the United States Constitution. The second is:  
7 by operating automatically in an area abutting essential First  
8 Amendment rights, all such test oaths violate the Due Process  
9 Clause of the 14th Amendment in this case, or if it's a Federal  
10 oath, the Fifth Amendment, for lack of a hearing.

11 The other three arguments we would make pertain more  
12 specifically to the oaths in this case --

13 Q I'm not sure I follow you on --

14 A On the hearing, Your Honor?

15 Q Or lack of the hearing. Hearing on what?  
16 And at what stage?

17 A All right. The hearing might be on two points.  
18 It's our submission that all test oaths have within them an  
19 element of vagueness and overbreadth. None of them is quite  
20 clear. A layman taking the oath, if he takes oaths seriously,  
21 might well wonder what the oath means. There is no provision  
22 in the Florida law nor in most laws, for any clarification of  
23 the oath.

24 The case before the Court is a particularly inter-  
25 esting one in this regard because, as the briefs demonstrate,



1 and the record demonstrates, this Court had, in fact, struck  
2 down one provision in the oath that was first submitted to our  
3 client, the Appellant. Now, it just so happened the Appellant  
4 went to an attorney and was informed that the oath that she was  
5 given was infirm. And then the public -- the school board  
6 attempted to cure that oath and we got into a litigation pos-  
7 ture.

8 In the absence of a hearing opportunity, that  
9 clarification in this case would never have occurred or might  
10 never have occurred. In addition, if the oath is at all vague,  
11 a clarification possibility would never occur if the person has  
12 conscientious reasons to believe that the oath is unclear.

13 Secondly, a large number of people have conscientious  
14 objections to the taking of oaths. I'm not merely talking  
15 about whether they can swear or affirm, but they conscientiously  
16 scruple against taking oaths. Members of the Society of  
17 Friends, for example, might well not wish to take any oath.  
18 Members of the Seventh Day Adventist sect might well not wish to  
19 take any oath as this Court recognized in *Torcaso*, I think.

20 So, the indiscriminate across-the-board, automati-  
21 cally operating test oath as in this case, provides no oppor-  
22 tunity for a person who may have a good constitutional excep-  
23 tion to the oath -- at least in her case or in his case -- to  
24 assert that exception. Or, it provides absolutely no oppor-  
25 tunity for that person to explain his or her reasons for not

1 taking the oath and to provide if that's necessary, the kind of  
2 a record to demonstrate whether, in fact, they are a risk to the  
3 government in an employment capacity.

4 Now, as I suggested, we will make three other  
5 arguments and have made them in our brief, addressed to the  
6 oaths at issue in this particular case. The first argument  
7 will be that is illuminated by the Florida Supreme Court on  
8 remand in the Cramp case, each of the phrases, each of the  
9 oaths in this case is unconstitutionally broad in derogation of  
10 the First Amendment. If not unconstitutionally broad, our  
11 second argument would be that each again as illuminated or  
12 perhaps obfuscated is the proper word by the Florida Supreme  
13 Court, is unduly vague, in violation of the 14th and First  
14 Amendments.

15 And finally, under Florida tests of severability,  
16 given the gloss that's put upon the oath by the Florida Supreme  
17 Court in Cramp on remand, any surviving provisions of the  
18 statute must now fall.

19 Now, if Your Honors will, I'll take up each of the  
20 points in order. My first point is that test oaths generally  
21 are unconstitutional.

22 Q May I ask if you filed a brief that the others  
23 filed on your position on the jurisdictional statement?

24 A Yes, Your Honor; we did. It was filed -- if  
25 Your Honor desires a copy I do have an extra one here.

1           As I was stating: test oaths a fortiori invade First  
2 Amendment provinces. Even a simple oath to support the con-  
3 stitution is encroaching upon a person's right to believe or not  
4 to believe in the constitution.

5           Q       Do you think that the First Amendment amended  
6 Article VI, which requires all state judicial officers, legis-  
7 lators and executive officers to support the constitution of  
8 the United States?

9           A       Mr. Justice Marshall, that's an intriguing  
10 question; one that had not occurred to me before and I suggest  
11 that the answer would be --

12           Q       I would suggest that your brush is too broad.

13           A       I agree with you and if --

14           Q       You are saying the statute is too broad; I  
15 think your argument's a little broad.

16           A       I was going to narrow the purview of my  
17 argument by suggesting what I meant by an indiscriminate test  
18 oath. I do not think the First Amendment has amended Article  
19 VI. And certainly this Court, in Bond versus Floyd recognized  
20 that the state might well require of a state legislator an oath  
21 that it could not require of a private citizen.

22           Now, it's important that Chief Justice Warren, in  
23 speaking to the oath in Bond versus Floyd, used almost precisely  
24 those words: "It may require an oath of a legislator that it  
25 could not require of a private citizen." Our submission is

1 that persons --

2 Q Can you make it in one and not the other?

3 A No; it might unconstitutionally invade the  
4 First Amendment rights of one rather than the other, even a  
5 simple oath to affirm --

6 Q Do you abandon your vagueness argument?

7 A We do not abandon our vagueness argument as to  
8 this oath. If the Court chooses to --

9 Q But you might say it would be vague to a  
10 legislator?

11 A Oh, I think this oath would be vague to anyone  
12 who took it; yes.

13 Q To support the constitution?

14 A Well, this oath is illuminated by a gloss  
15 provided by the Supreme Court of Florida which is controlling  
16 on the meaning of the oath now. In Cramp on remand the Supreme  
17 Court of Florida said: "The obvious legislative purpose in  
18 enacting the subject statute was to prevent the election or  
19 employment of public officials and employees who are knowingly  
20 disloyal to the Government of the United States, or to the  
21 State of Florida and subscribe to the doctrine of accomplishing  
22 a change in government by employment of force or violence."

23 We suggest that two words in that gloss are unclear;  
24 unconstitutionally unclear. We do not know what disloyal means,  
25 and we do not know what subscribe means as used by the highest

1 court of the State of Florida. I took the occasion to look up  
2 the word "subscribe" today and I noted that the first three  
3 meanings have to do with signing a written document to under-  
4 take it. I'm not sure that that's what the highest court of  
5 Florida meant when it used the word "subscribe." I'm not sure  
6 how far they meant to go when they used the word "subscribe,"  
7 and further, the word "disloyal" or "disloyalty," does confound  
8 me. That's as to this oath.

9 Now, if that gloss were not present; if the Florida  
10 Law merely said that all persons accepting office under the  
11 laws of Florida or of any political subdivision, must take an  
12 oath to support and uphold or to -- well, "support and uphold"  
13 will do, the constitutions of the United States and of the  
14 State of Florida.

15 Then our position, Mr. Justice Marshall, is that  
16 oath would be unconstitutional as to mere public employees not  
17 in positions of sensitivity.

18 Q Why?

19 A If I may suggest first that it would be con-  
20 stitutional as to legislators. Why? Because --

21 Q Well, what about executive officers?

22 A It would be constitutional as to executive  
23 officers in a sensitive post, as well.

24 Q Because of Article VI.

25 A Because of Article VI and even in the absence

1 of Article VI it might still stand.

2 Q What about policemen?

3 A Policemen provide a tougher case. Policemen  
4 would be closer to lawyers and indeed, the oath if the oath  
5 would be supportable for lawyers, I imagine it might be for  
6 policemen.

7 Q How about civics teachers?

8 A I think not. I think not, and possibly not  
9 even for policemen, the point being that the main justification  
10 for the oath, aside from Article VI --

11 Q Suppose this petitioner in this case, which  
12 you say didn't necessarily understand the oath, right?

13 A Yes.

14 Q Became a legislator. You couldn't give an  
15 oath; could you?

16 A I --

17 Q Or could you?

18 A Do you mean the precise oath that was given to  
19 her, the particular oath?

20 Q Yes.

21 A Well, no; if she remained true to her cause  
22 she could not become a legislator, but if the oath were a simple  
23 one --

24 Q Well, could she get any relief in this Court?

25 A If she became a legislator?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Q No.

A Under this law?

Q No. If she said that "I don't have to take the oath."

A This particular oath?

Q The oath to support the Constitution of the United States.

A You mean if that were all there was?

Q Yes.

A No; she could not get relief from this Court.

Q Well, what's the difference between her as a legislator and her as teacher; the same her?

A What is the difference?

Q As to the understanding of the oath part.

A Well, on that point in vagueness we're not pressing that particular point to vagueness. The point of vagueness we press is the Supreme Court of Florida's gloss on this particular affirmative oath; when you're dealing with the affirmative oath.

But, as to her, we would still suggest that the affirmative oath, put to a school teacher or a sanitation employee or someone in that category, is an undue invasion of their First Amendment rights. There is no good reason why the government should require -- well, to start with: sanitation workers to take an oath to uphold the Constitution of the

1 United States. We can see some reason why the government  
2 might require a civics teacher, Mr. Chief Justice, to stand  
3 up and say that she will support the Constitution of the United  
4 States. However, we do not believe that

5           However, we do not believe the government can meet  
6 the burden of subordinating interest and substantial interest  
7 has been set recently by this Court in Shapiro versus Thompson,  
8 which must be met before you can invade First Amendment rights.

9           Q       I didn't quite understand how you distin-  
10 guished public school teachers from lawyers, permission to  
11 practice?

12           A       Well, there are two distinctions, I would  
13 think.

14           Q       Well, you do concede that maybe the lawyers  
15 may be required to take such an oath; do you not?

16           A       Well, I concede that I have more trouble with  
17 the case of lawyers an oath --

18           Q       We happen to have a rule of this Court that  
19 we abide by.

20           A       Certainly, and in the rules of most courts.

21           Q       Every morning they take a certain oath.

22           Q       Yes, and if anyone declined to take it he  
23 would not be admitted.

24           A       That's right. Now, it's interesting that the  
25 rule of this Court until recently, was a rule that had to be



1 executed in person. That is to say, the applicant for admis-  
2 sion to the bar has to present himself before the Bar of this  
3 Court and personally take the oath, swearing and affirming.

4 Q Does it make any difference between doing that  
5 and signing it in writing?

6 A Originally I believe there was a difference.  
7 I think the difference consisted of two parts -- well, one  
8 major part. It seems to me the oath to affirm the Constitution  
9 is basically a symbolic oath; it's a public gesture of fidelity  
10 to the constitution, to the basic system of government and of  
11 law. And it's a useful symbol and tradition to have the  
12 President of the United States, for example, on the occasion of  
13 his inauguration, or the Justices of the Supreme Court or other  
14 high government officers, take an oath of fidelity to the con-  
15 stitution to the basic document. I think it's very useful.

16 I don't know --

17 Q Do you think it's just a symbol?

18 A I beg your pardon?

19 Q Do you think it's just a symbol, ceremonial  
20 symbol?

21 A I assume that each man who takes the oath for  
22 high government office takes it conscientiously and believes he  
23 understands what the oath means and he intends to uphold and  
24 support the constitution of the United States, but in terms of  
25 the basic value to the society, I think it is basically

1 symbolic. I could hardly imagine that it would be enforced  
2 through a perjury prosecution, for example. And I do not see  
3 the symbolism of having a sanitationworker or even a teacher,  
4 sign a piece of paper saying that she will or he will, as the  
5 cost of the privilege of picking up our garbage or teaching  
6 our children, uphold --

7 Q Why do you put those two together all the  
8 time?

9 A Well, I don't mean to in any pejorative  
10 fashion. I -- of course, I choose the sanitation worker as  
11 what strikes me to be the most ludicrous example of the lack of  
12 relationship between a function for such an oath and the oath.

13 Q But the case here before us is a school  
14 teacher; we don't have to worry too much about the garbage  
15 collector; do we?

16 A In this case. In this case you can not even  
17 worry about the affirmative oath question, but of course, in  
18 Cole versus Richardson, which the Court remanded last year, the  
19 question has been refiled, or Cole versus Richardson has been  
20 refiled before the Court, and the question is being pressed  
21 upon the Court on innumerable occasions. In this case we're  
22 dealing with a school teacher. In Cole, as I recall, we were  
23 not dealing with a school teacher; the woman was a laboratory  
24 technician, which, if the area of education is one which seems  
25 to give rise to a reason for sensitivity as a symbolism of the

1 oath, well, certainly a lab technician in a bio-medical facility  
2 may move away from the school teacher area toward the sanita-  
3 tion worker area.

4 But if you move into the school teacher area, where  
5 surely the reasons for giving the oath or for requiring the  
6 oath may seem greater, you also find, Your Honors, that the  
7 reasons for not requiring the oath are greater. Innumerable  
8 decisions of this Court have recognized the centrality of  
9 academic freedom to the First Amendment, and indeed, to all  
10 essential democratic rights in our society.

11 Q Do you think that school teachers are entitled  
12 to more freedom in that respect than Supreme Court Justices or  
13 lawyers who practice before the Court?

14 A Yes; in that respect. I am both a school  
15 teacher and a lawyer and I think that to have to take the oath  
16 as a school teacher would bother me a great deal more than to  
17 have to take the oath as a lawyer. I have taken the oath as a  
18 lawyer, of course, but yes; school teachers, according to the  
19 decisions of this Court, Mr. Chief Justice, are entitled to  
20 what appears, at least on my reading of the recent decisions, to  
21 be a higher protection of the First Amendment than most other  
22 folk in our society, because of the essentiality of academic  
23 freedom; because it's a very, very tenuous and subtle and, well,  
24 very fragile nature of the academic setting.

25 Our second point --

1 Q Mr. Rosen, can I ask you: did the record  
2 disclose the grade at which your client taught?

3 A She was either in the first or the third  
4 grade, Mr. Justice Blackmun.

5 Q Are you drawing a distinction between teaching  
6 at the elementary levels as compared with teaching in the law  
7 school, for instance? So far as the oath is concerned?

8 A No, we do not. I concede that such distinc-  
9 tions can be made, but we do not believe they make a difference.  
10 The abasic function of the oath is served in neither occasion  
11 to the extent that the state interest may be in avoiding in-  
12 doctrination of either third graders or law school students in  
13 subversive concepts or subversive ideas, whatever they may be.  
14 I would submit that the state has other means by which it can  
15 accomplish that end without requiring teachers to go to ignoble,  
16 in some cases, ends in having to subscribe to a test oath.

17 The second point that we make in terms of the broad  
18 base unconstitutionality of the indiscriminate test oaths, the  
19 oaths given to all people who somehow come within the state's  
20 power, either by way of employee or one who requests a benefit,  
21 is that because of the automatic nature of the disability, the  
22 First Amendment rights are even more greatly invaded or the  
23 danger to the First Amendment rights is even greater. There-  
24 fore, at the very least, if such oaths or such inquiry can be  
25 made, there must be provision for a hearing as there was,

1 indeed, in the New York cases, both in Adler and in Keyishian,  
2 some provision for a hearing at least whereby the oath or the  
3 inquiry can be clarified and the applicant, or the one who is  
4 being asked to subscribe to the oath, may, in fact, state her  
5 reservations.

6 Q Yes.

7 A The specific objection to the oath and the  
8 statute in this case, the oath of Florida and the statute of  
9 Florida, really illuminate, we feel, the defects of oral test  
10 oaths.

11 In the first instance under the gloss provided by  
12 the Florida Supreme Court, each of the oaths, in fact, unduly  
13 invades First Amendment interests.

14 Q Would you say your concept of academic freedom  
15 would go so far or maybe not so far as to say that the school  
16 or university could not hire a professor who was advising  
17 students to use violence to achieve their goals in the univer-  
18 sity?

19 A No, I would not say that, Mr. Justice White,  
20 but that is not the same thing as requiring all professors to  
21 take loyalty oaths.

22 Q Yes. We'll get closer.

23 What if -- could they ask him when he takes his job:  
24 "Do you intend to advise students to use violence to achieve  
25 their ends in the university?"

1 A Are they going to ask all teachers that?

2 Q Yes.

3 A That's the functional equivalent of the loyalty  
4 oath, at that point. I think it offends both the privilege  
5 against self-incrimination and the First Amendment, since it's  
6 quite vague at that point, asking him about future intent and  
7 things like that.

8 Q So you would say a fortiori you couldn't ask  
9 him: "Do you believe in the use of violence to achieve social  
10 ends?"

11 A A fortiori you could not ask him that, because  
12 that is just a belief and innumerable decisions of this Court  
13 have recognized that you may not invade the protected province  
14 or --

15 Q I mean that could keep him out of his job for  
16 that and I just wondered if you had asked him that.

17 A Well, you can always ask, Mr. Justice White.

18 Q Well, I know, but you are saying that if he  
19 refused to answer they couldn't fire him?

20 A That's right.

21 Q And you would say it's bad even if the state  
22 conceded that if he answered "yes," they couldn't fire him  
23 without answering some other questions?

24 A Well, you are trying to make the teacher's  
25 situation look much closer to the bar situation, I take it.

1 Q Well, I don't know whether it does or not.  
2 Which way do you limit it?

3 A Well, because of the fragility of academic  
4 freedom I would think that you would have to put a greater  
5 protection around the teacher than around the lawyer, although  
6 the lawyer is entitled to a great deal of protection.

7 Q Could you ask him if he has ever been con-  
8 victed of a crime, a felony?

9 A I believe you could.

10 Q Could you ask him as to whether he had ever  
11 been discharged from the teaching position?

12 A Yes.

13 Q Could you ask him why?

14 A Yes.

15 Q Well, how can you do that and not ask him the  
16 other questions?

17 A Because when you are asking him whether he has  
18 ever been convicted of a felony, in most instances you are  
19 dealing not with First Amendment activities. If he has, in  
20 fact, been convicted of a felony, he is a felon. That has  
21 no bearing on the First Amendment.

22 Q Well, "have you ever been convicted of  
23 burning your draft card?"

24 A I'd have more trouble with that, then.

25 Q I should hope so. I just have great

1 difficulty equating academic freedom with the First Amendment;  
2 they are a little different.

3 A If anything, academic freedom may be a bit  
4 bigger than the First Amendment for the rest of us.

5 Q Except it hasn't been adopted yet.

6 A Well, except that the gloss put upon the First  
7 Amendment by this Court in Whitehill and Keyishian and other  
8 decisions has recognized the terribly critical First Amendment  
9 part of academic freedom. My reading of those decisions was  
10 that academic freedom was entitled to the highest priority  
11 protection under the First Amendment.

12 Well, I see that my time is elapsing and perhaps I  
13 -- we will stand on our brief for the points in terms of the  
14 actual unconstitutionality of these provisions.

15 But, I suggest in closing, as I did desire to quote  
16 something from Professor Emerson's recent book on the system  
17 of the freedom of expression, which very succinctly demonstrates,  
18 at least as words can, the unduly vague, broad and due process  
19 violating character of all indiscriminate loyalty oaths. But,  
20 since I can't find that particular piece of paper --

21 MR. CHIEF JUSTICE BURGER: If you will give us the  
22 citation we will check out Professor Emerson's --

23 MR. ROSEN: Page 207 and 208.

24 In closing, Your Honors, Appellant respectfully  
25 requests this Court to declare the Florida loyalty oath and



1 statute, all of it, unconstitutional and to use the occasion  
2 to pass upon the indiscriminate test oath as such.

3 Thank you, Your Honors.

4 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Rosen.

5 Mr. Slepín. Do I pronounce your name correctly?

6 MR. SLEPIN: Yes, sir. Thank you, sir.

7 ORAL ARGUMENT BY STEPHEN MARC SLEPIN, ESQ.

8 ON BEHALF OF THE APPELLEES

9 MR. SLEPIN: Mr. Chief Justice and may it please the  
10 Court: In employing a perspective slightly different from the  
11 perspective in which the Appellees' brief was cast, without  
12 abandoning any of the arguments in that brief, in the next few  
13 moments I'd like to take account of Appellant's argument within  
14 the somewhat prosaic context of a three-fold argument, if I may.

15 The position that the Appellees are going to ad-  
16 vance for the Court this afternoon are, briefly stated, these:  
17 first we think that the Court below was correct in assuming and  
18 we think that it was an operative assumption that oaths, per  
19 se, and we're not concerned for the moment with the contents of  
20 the oath, are constitutionally legitimate, running as they do,  
21 we think and as the court pointed out, through the very pith  
22 of and marrow of the American experience.

23 Secondly, we think the court was correct in advancing  
24 that assumption to a position that governmental employment as  
25 such, may be conditioned upon an oath under certain circumstances

1 and we will deal again with the content of the oath in just a  
2 moment.

3 Secondly, we are going to take the position that the  
4 Court was quite correct in upholding, after certain judicial  
5 excisions, the instant oath that is now before this Court and  
6 in the context of that I'd like to deal with the due process  
7 arguments advanced by the Appellant.

8 And finally, I would like to advance the argument  
9 that the court below is correct with respect to the doctrine of  
10 severability in holding, in effect, that the doctrine is alive  
11 and is well and in the case of Jackson and as well in the  
12 Cramp case, is alive, well and resident within these very  
13 chambers.

14 First of all, Your Honors, we're going to be  
15 somewhat less categorical than the Appellant; we want to speak  
16 to this case before the bar at this point and we will paint  
17 with the brush less broad than a comet's tail.

18 We want to take the position, Your Honors, as this  
19 Court knows, that Article II, Section 7 of the Constitution  
20 itself prescribes an oath. And later I want to point out that  
21 the oath which it does prescribe for the President of the United  
22 States, is far broader, far vaguer, if you will, far less  
23 specific than the oath with which we are confronted in the  
24 instant case.

25 Article VI, Clause II of the Constitution requires

1 that all executive, judicial and legislative officers of the  
2 United States and the several states must subscribe to an oath.

3 And as we noted in our brief, the first Congress in  
4 1789 precisely prescribed an oath.

5 This morning I stood before this Court and very  
6 proudly subscribed to an oath promulgated by this Court and  
7 imposed upon me by this Court pursuant to Rule 5, an oath  
8 which I want to point out to the Court, was a tri-partite oath,  
9 was far more expansive, if you will; far less specific than the  
10 oath attendant to the cause at bar at the present time.

11 In the of *Bond v. Floyd*, this Court held very  
12 categorically, it seems to me, if somewhat offhandedly, and I  
13 quote:

14 "A legislator, of course can be required to swear  
15 to support the Constitution of the United States as a condition  
16 of holding office. We do not quarrel with the State's conten-  
17 tion that the oath provisions of the United States and Georgia  
18 Constitutions do not violate the First Amendment."

19 And then finally, at page 247 of the Lawyer's e  
20 Edition, *Bond v. Floyd*:

21 "Of course a state may constitutionally require  
22 an oath to support the constitution from its legislators."

23 And then, as Mr. Rosen pointed out, in the *Hosack*  
24 case and the *Knight* case and the *Ohlson* case, affirmed by this  
25 Court, the so-called affirmative mode of the loyalty oath was

1       exacted; it was sustained and this Court affirmed it.

2               In *Gilmore versus James*, it was a case that had to  
3 do precisely with organizational membership and that particular  
4 oath or affidavit was struck down. Nevertheless, the Court  
5 pointed out that the affirmative mode of an oath as such, was  
6 hardly repugnant to the constitution because the constitution  
7 requires one in one place and prescribes it in another place.

8               And then lastly, in the case of *Stewart versus*  
9 *Washington*, which again is not on point because it dealt with  
10 subscription to Title V of the U. S. Code which was a far more  
11 involved case than the one at bar. Nevertheless, in dicta,  
12 *Stewart versus Washington*, the Court pointed out that the oath  
13 in the affirmative mode was part and parcel of our constitu-  
14 tion and our constitutional experience.

15               I suggest to the Court that the oath per se, is  
16 constitutionally legitimate on at least two grounds: number one,  
17 the Constitution of the United States in two articles admits  
18 of an oath and prescribes an oath.

19               And then secondly, this Court has held, and I would  
20 cite the Court to the *Mitchell* case, and I would cite the Court  
21 as well to *ex parte Curtis*, that governmental employment may be  
22 conditioned and may be conditioned in such a way that the  
23 employee may claim an infringement of his First Amendment  
24 rights but the Court itself will then determine, not whether  
25 there has been an infringement, because in the *Mitchell* case

1 upholding the Hatch Act, the Court admitted an infringement of  
2 several provisions of the constitution and rights derivative  
3 therefrom. But it will decide rather, the permissibility or  
4 impermissibility of the extent of this alleged infringement.

5 Q I am a little curious about the facts in this  
6 case --

7 A Yes, sir.

8 Q The petition was the one that had been very  
9 explicitly invalidated by this Court more than ten years ago  
10 more than almost ten years before she was asked to take this  
11 oath.

12 A That's correct.

13 Q Is it the practice for your clients, nonethe-  
14 less, to submit that oath and to have applicants sign it if  
15 they are willing to do so, even though this Court has held it's  
16 constitutionally invalid?

17 A It was unquestionably done in this case. The  
18 error is unblinkable, Your Honor. I have no knowledge that it  
19 has been done elsewhere. It seems to me that it's a case of  
20 error, omission, oversight or delinquency and the case of  
21 Adams, which, as you know, is to be before this Court and  
22 various portions of that record are included, was a case, in-  
23 cidentally, where some of the members of the University of  
24 Florida staff were employed for some substantial period of  
25 time before they were ever presented with an oath, which is

1 very much like Knight versus the Board of Regents. It pointed  
2 out that the oath was adopted in 1934 and I think the Knight  
3 case was brought in '67, several years after some members of  
4 that faculty at Adelphi had been employed and now presented  
5 with the oath. It was a delinquency in this case, Your Honor.  
6 And the Court moved very quickly to remedy that particular  
7 delinquency and to point out as did the Board of Public Educa-  
8 tion in Orange County, after it was notified by counsel for  
9 Miss Connell, that that portion of the oath which this Court had  
10 dealt with in the Cramp case, had no proper place being sub-  
11 mitted to Miss Connell, and she was under no legal obligation  
12 to subscribe to it.

13 Q They hadn't, although they were parties in the  
14 Cramp case, they hadn't received the word of our decision?

15 A Your Honor, the ways of government, executive,  
16 legislative --

17 Q These were the very parties in the case;  
18 weren't they?

19 A They were the parties to the case, Your Honor,  
20 although this was not the same school board and not the same  
21 superintendent, as far as I know.

22 Q Overlapping parties.

23 A But, there is no question that that was an  
24 error and a delinquency on their part, Your Honor.

25 Q Well, you don't know whether or not, if the

1 -- it was, at least the practice, their practice to submit this  
2 form generally, or whether this was just an individual  
3 idiocyncrasy?

4 A No, sir. If that was the point of the  
5 question I suspect, without any knowledge, and I have no know-  
6 ledge that this was adduced in the testimony below, that the  
7 impermissible form, with the excised phrase was generally dis-  
8 tributed; yes, sir.

9 And in fact, in the Adams case, the Court will re-  
10 call from those portions of the record which are included in  
11 Appellant's brief, there was remedial action taken by the  
12 administration, admittedly, ten years after the fact, to with-  
13 draw the impermissibly enlarged oath and to submit a revised  
14 oath with the excised provision deleted. Yes, sir.

15 The position that the Appellees wished to take  
16 before this Court is complicated, somewhat, Your Honors, by  
17 virtue of inability to follow this Ariadne thread of the  
18 Appellant. The Appellant seems to take the position that  
19 vagueness is applicable when a person is a school teacher but  
20 vagueness as a constitutional challenge somehow is not appli-  
21 cable when one is a legislator, to take the position that some  
22 of the arguments apply to sanitarians but others don't seem to  
23 teachers, and I confess, though this is an admission which per-  
24 haps I'm not compelled to make, but I'm not quite following that  
25 particular argument. I am following the argument of this Court's

1 statement in Bond, in the three cases which it affirmed and  
2 with respect to the oath I took and with respect to the two  
3 prescribed oaths that government employment may be conditioned  
4 upon the exaction of an oath.

5           And I might point out to the Court right now that  
6 I am persuaded that the State of Florida and any other state  
7 could exact from a doctor who becomes an employee of the state  
8 and who takes the position of an employee in one of the state  
9 hospitals, an oath making him disclaim, if you will, that he is  
10 opposed to antiseptics; make him disclaim that he is an advocate  
11 of euthanasia and it's not beyond the realm of either reason or  
12 experience that a man who favors euthanasia or a man who is  
13 opposed to Dr. Lister's discovery, who does not believe in  
14 antiseptic procedures, founds it upon either religious commit-  
15 ments or if you will, a political commitment.

16           Morris Cohn once said, "Not all who rave are  
17 divinely inspired," and it may be that a man is misdirected, but  
18 nevertheless feels he has a First Amendment right to believe in  
19 euthanasia. Yet I think that an oath per se, addressed to this  
20 individual is most evidently reasonable and ought not to  
21 offend constitutional rights.

22           Q       What about belief -- I take it there is a  
23 belief clause that survived below --

24           A       There are, Your Honor, and --

25           Q       What is your position about that?



1           A       Our position is that there are two belief  
2 clauses and I think that's precisely what the Appellant said.  
3 The Appellant said that the affirmative mode of the oath which  
4 reads as follows:

5                   "I do hereby solemnly swear that I will support the  
6 constitution," is in point of fact,"he says,"a belief oath and  
7 it's really a negative oath masquerading as an affirmative  
8 oath."

9           Q       What about the other requirement?

10           A       The other requirement is: I do not believe in  
11 the overthrow of the Government of the United States or the  
12 State of Florida by force and violence and we support that and  
13 I should like to cite to the Court at this point the opinion  
14 of the lower court in Ohlson versus Phillips, affirmed by this  
15 Court at 397 U.S. 317.

16                   The Ohlson oath was an oath, Your Honor, to uphold  
17 the Constitution of the United States and the Constitution of the  
18 State of Colorado. In explanation of that oath the Ohlson case  
19 went on to say, and I quote:

20                   "The present oath is an affirmation of belief in  
21 organic law and disbelief in the use of force to overthrow the  
22 government"and I think that's quite --

23           Q       Don't we affirm judgments, not opinions?

24           A       You do, indeed, Your Honor and I am urging  
25 upon the Court the reason of the Ohlson Court, not the strict

1 words which I certainly would not claim that this Court adopted  
2 per se.

3 The point I am making is that if the affirmative  
4 oath means anything, to uphold the constitution, it seems to me  
5 could quite reasonably -- and I think it is preeminently  
6 reasonable -- mean that one avows a belief in organic law and  
7 the infinite mutability of the constitution through organic  
8 process and devise simultaneously a disbelief in the utiliza-  
9 tion of force and violence to overthrow the government.

10 Now, the point that we wish to make in this regard  
11 is simply this: no hearing procedure is prescribed or allowed by  
12 the constitution with respect to the President of the United  
13 States, nor with respect to myself and my four colleagues who  
14 stood before the bar this morning; nor is it allowed so far as  
15 I know, to members of the executive, legislative and judicial  
16 departments of the Federal Government of the several states.

17 Q Well, in those cases they had the protection  
18 of the Sixth Amendment and you don't have that protection.

19 A Excuse me, sir; you mean it's authorized by the  
20 Sixth Amendment?

21 Q It doesn't authorize you to require this oath  
22 of a teacher. And I think that's the difference between what  
23 you're talking about now.

24 A Your Honor, -- respectfully I disagree on this  
25 ground: I disagree on the simple ground and I trust it's not

1 too simplistic, that oaths per se are not anathematized by the  
2 constitution. The constitution is very specific --

3 Q Well, I don't know who -- at least I have  
4 never thought that. I have never thought that because Article  
5 VI says so.

6 A Precisely. And because oaths --

7 Q But that doesn't mean that I have to agree that  
8 all oaths are good.

9 A Certainly not and we wouldn't urge that --

10 Q Well, why don't we get to this case. Is this  
11 oath good that, what business is that of the State of Florida  
12 as to what the belief of a teacher is?

13 A We think it's the first order of business, as  
14 this Court pointed out in Shelton and as it pointed out before  
15 that in Adler: the schoolroom is a very sensitive place; the  
16 minds of our students are very sensitive instruments, malleable  
17 as they should be and the state -- I beg your pardon?

18 Q How does that affect the law school students?

19 A I'm not quite prepared to say anything about  
20 the minds of law school students --

21 Q That doesn't apply to law school professors?

22 A It applies to them, indeed, Your Honor. I  
23 should hope that the minds of law school students are subject  
24 to imprint by other professors. At least it's been suggested  
25 to me --

1           At any rate the state does, as this court pointed  
2 out, have a vital concern in maintaining the security of the  
3 state and the question is: what can they do in that regard?

4           Now, if I have to swear an oath and an oath which  
5 I would point out to the Court requires me, not merely to up-  
6 hold the constitution, Your Honor, but an oath to conduct my-  
7 self uprightly, whatever that means, to draw upon the vagueness  
8 argument of the Appellant, an oath to conduct myself according  
9 to law, whatever that means, to draw upon the scalpel used by  
10 the Appellant. Then it seems to me clear that it's far more  
11 specific to require in the affirmative and the negative mode  
12 these two avowals of belief and disbelief.

13           And that's all the State of Florida is doing. The  
14 question is: are oaths per se, anathematized by the constitu-  
15 tion and the answer is: no.

16           May the government condition employment or office  
17 upon the exaction of an oath and the answer is: sometimes,  
18 depending upon the nature of the oath.

19           Is a hearing necessary if one requires an officer  
20 or employee to swear that he will uphold the constitution?  
21 None if provided the President; none is provided me; none is  
22 provided you. We think it's not necessary with respect to an  
23 affirmative oath.

24           Is it vague to say that one swears to preserve, to  
25 protect and to defend the constitution as the President must,

1 according to Article II. Certainly it's far vaguer than saying  
2 "I don't believe in the violent overthrow of the government."

3 Is it a prediction as opposed to a promise, because  
4 Appellant asks this Court to invalidate this oath on the grounds  
5 that it may well be a mere prediction. One may be predicting  
6 when one says, "I do not believe in the violent overthrow,"  
7 but violent overthrow may come, as opposed to promising. I  
8 should think that this was set to rest in the Dodds case,  
9 when the Court says that belief means a promise, not a predic-  
10 tion and if we're not content with the Dodds case, in light  
11 of subsequent cases, then I merely refer this Court to the oath  
12 prescribed by Article II which says, "I will execute," and  
13 surely the President is saying that he promises to execute;  
14 not that history will demonstrate that he did execute; the  
15 meaning of these oaths are --

16 Q Well, the whole problem about hearing as to  
17 the Presidential oath, I don't know of any elected President  
18 that's refused to take it.

19 A Your Honor, I don't think that's the test of  
20 the constitutionality of it.

21 Q But do you think there should be a hearing  
22 there?

23 A I most surely do not, sir; I see no need for  
24 a hearing and the very interesting argument, and I think the  
25 correct argument made in the Smiley and Ohlson cases, is that a

1 hearing has to do with the weighing and sifting and finding of  
2 evidence; it has to do with the confrontation of accusers and  
3 it has to do with cross-examination; none of which applies to  
4 the instant situation.

5 Q Well, do you want to pursue your position that  
6 in the case of a school teacher it is quite all right for a  
7 state to bar a school teacher for refusing to answer the  
8 question: "Do you believe in the overthrow of the government  
9 by force and violence?"

10 A Yes, sir. As I pointed out, and indeed, as  
11 this Court has pointed out, the state has a very compelling  
12 concern, it seems to me, in the beliefs as a spring to action.  
13 Surely we're not so abstractionist that we want to be exceed-  
14 ingly careful so as to believe that human belief is irrelevant  
15 to human conduct.

16 And this Court has pointed out time and again that  
17 the state has a vital concern in education; indeed, in the  
18 Brown case versus the Board of Education, it was noted that  
19 education is the principal business today of government. This  
20 Court, as noted in Shelton and Tucker and earlier in Adler, is  
21 concerned with the very sensitive minds of its students.

22 Q So, I take it you are saying that if they say,  
23 "Yes, I believe in the overthrow by force and violence," or if  
24 they refuse to take the oath, saying, "I do not believe in it,"  
25 that right then and there that Florida may bar the person from

1 teaching? It just isn't a preliminary question?

2 A No, sir; unlike one or two of the other cases  
3 with which this Court was concerned: principally the case of the  
4 California tax exemptions, there is no weighing and sifting or  
5 judgmental element which enters into this and that case, as  
6 the Court recalls, the assessor was mandated to make a factual  
7 determination. The swearing of this oath or a refusal to  
8 swear the oath is dispositive of the matter under Florida Law.

9 Q Mr. Slepín, let me somewhere along the line,  
10 would you comment on the argument that the true subversive  
11 isn't going to be bothered by any loyalty oath in the first  
12 place? I want you to touch on that before you get done.

13 A I'll comment directly on it at this point, if  
14 I may, sir. I think it's probably true that one who has  
15 engaged in espionage or one who has an insidious purpose, is  
16 not going to scruple at either lying or taking some other action  
17 which will avoid placing him in the clutches of the law or  
18 place him outside the area in which he would like to find him-  
19 self to carry out his mission.

20 And while it seems to me quite clear, and I can  
21 certainly be fooling and deluding myself if I were to take  
22 any other position, that the Florida loyalty oath, like any  
23 oath, is not a panacea in terms of security. And that the  
24 Florida loyalty oath does not assure the school authorities  
25 that they are having present in their classrooms, competent,

1 dedicated loyal people; it is a measure, number one: which we  
2 don't think is constitutionally impermissible, and therefore it  
3 is a measure, as are so many measures, within the broad dis-  
4 cretion of the legislature of the State of Florida.

5 And if the legislature of the state feels that this  
6 is one important symbol and a symbol which may have more or  
7 less utilitarian effect, then it seems to me, so long as it is  
8 constitutional and permissible, the legislature of the state of  
9 Florida and her sister states must be granted that leave to  
10 impose such a symbolic oath.

11 And indeed, we would seize upon the question put  
12 to counsel for Appellant: it is, in point of fact, a symbolic  
13 oath and we feel that it's as symbolic and as important an  
14 oath as was subscribed before this Court this morning and as  
15 the constitution itself requires.

16 Q May I ask you when this law was passed?

17 A 1949, I believe was the initial act, Your Honor.

18 Q Was there any oath of any kind before that?

19 A I'm not aware of any, Your Honor, but I  
20 certainly wouldn't be surprised if there were some kind of oath  
21 required. I'm not precisely aware of that and perhaps counsel  
22 for the Appellant can answer that as he rises.

23 Q Was the first one passed, the same one that is  
24 now in effect?

25 A Yes, sir --



1 Q Or was it amended?

2 A The same one but far more abundant because it  
3 contained the provision which was excised by this Court in  
4 Cramp and then contains the other provisions which were excised  
5 by the court below and we're not arguing about those judicial  
6 excisions. So it was generally the same oath but it contained  
7 three more provisions than it now contains as it sits before  
8 this Court in this case.

9 Q I wonder if you know how many people have been  
10 discharged from office for failure to sign it?

11 A I have no knowledge, Your Honor, of any person  
12 being discharged, other than those who are the parties to the  
13 cases now before the Court.

14 Q How many are they?

15 A There are several thousand teachers in the  
16 state; there are many, many thousands of state employees.

17 I'm sorry, sir. Three in the Adams case and Mrs.  
18 Connell in the instant case.

19 Q Three people?

20 A Four in all, I think, Your Honor.

21 Q Do you think maybe it was the law before '49?

22 A I'm sorry, Your Honor.

23 Q Do you think that maybe there was a loyalty  
24 oath before '49?

25 A I should suspect that there was, but I know of

1 no statute prior to '49 and my research didn't reveal one.

2 Q Are teachers on a year-by-year contract?  
3 Public school teachers?

4 A They are until the first few years of teaching,  
5 Your Honor, whereupon they gain continuing contracts.

6 Q That was after the first two years?

7 A Two or three years, I believe, Your Honor.

8 Q So that they would have to take this oath  
9 three times?

10 A I strongly suspect that they would, Your Honor,  
11 yes, but I'm not at all --

12 Q Suppose a teacher said, "As of this moment  
13 I am not for advocating the violent overthrow of the government,  
14 but I can't guarantee what my research and study might lead me  
15 to believe." Would that be okay?

16 A No; I think not, Your Honor.

17 Q They have just got to take it that way or  
18 else?

19 A I think so, Your Honor.

20 Q Just the way you do in this courtroom in the  
21 morning.

22 A Precisely, and I think it stands on the same  
23 feet as the oath that is sworn before this Court or the oath  
24 sworn --

25 Q I don't know about you, but I didn't take an

1 oath that I wouldn't overthrow the government, did I?

2 A Your Honor, I -- it is not given to me to  
3 exercise judicial interpretations, but I suspect that the oath  
4 which you did take has some very real meaning to it and I think  
5 it involves a very real commitment and belief as this Court  
6 stated in the Dallas case: the belief means a promise.

7 Q I agree with you and I don't agree with the  
8 other side that it's just symbolic. I most certainly don't  
9 agree with that, but my worry is that how a teacher, for example,  
10 of mathematics has to take an oath would not agree with about  
11 the overthrow of the government.

12 A Well, Your Honor --

13 Q My whole point is what I mentioned before:  
14 there is no leeway in these joints here.

15 A There is no leeway in this respect because it  
16 applies to all state employees of every source and variety an  
17 including the sanitation worker who I hold to have an extremely impor-  
18 tant place in society and anyone who has roamed through New York  
19 during the garbage strike is acutely and sensitively aware of  
20 that and I should think that the state even had a compelling  
21 interest in maintaining whatever symbolic protections it can  
22 with respect to the sanitation workers who are, in my scale of values,  
23 is not the lowly creature who is below an oath; he's not below  
24 an oath and more than a teacher is above an oath, because  
25 again, the oath itself is not an anathema, and secondly,

1 because this particular oath is well within what we think the  
2 Court has decided is permissible.

3 MR. CHIEF JUSTICE BURGER: Justice Blackmun had a  
4 question, I believe.

5 A Yes, sir.

6 Q Well, perhaps it's been answered. I was  
7 merely interested in knowing whether Florida has tenure for  
8 teachers; for instance: Arkansas does not?

9 A For university personnel, Your Honor. For  
10 public school personnel, it's what's called a continuing con-  
11 tract, meaning that after they have taught for approximately  
12 three years, they then go on a continuing contract and they  
13 only may be dismissed for cause and there are procedures out-  
14 lined for that. So, it's called a continuing contract in the  
15 elementary and secondary schools and tenure in the higher  
16 education area.

17 Let me just fleetingly refer to separability. This  
18 Court stated that the rule in Jackson. It was stated by the  
19 Supreme Court of Florida in Cramp and it's quite clear that we  
20 have an affirmative and negative mode requiring an avowal of  
21 belief and an avowal of disbelief; fundamentally and probably  
22 the same avowals, if you will, and I don't think the constitu-  
23 tion and I think the cases don't think that the constitution  
24 anathematizes a grammatically negative oath, irrespective of  
25 what the meaning of it is.

1           And I should think that this Court would not commit  
2 itself to the proposition that because an oath happens to be  
3 framed in the negative, then there is some superhuman command-  
4 ment which says that negative oaths per se are objectionable to  
5 the constitution.

6           Q       May I ask you if that oath, as you interpret  
7 it, means that the person who takes it has to swear that he will  
8 never, under any circumstances nor conditions, no matter how  
9 bad the government may be, attempt to overthrow it?

10          A       No, sir; I think that it does not. I think  
11 that it does not. As I stated to this Court, Your Honor and  
12 I trust that I'm on reasonable ground though it makes me far  
13 less categorical in my statements than Appellant who challenges  
14 all oaths under any circumstances. It seems to me that we are  
15 concerned with this case at this time involving these parties.  
16 We are not, and I'm as grateful as Your Honor is, living in the  
17 Third Reich at this point, and we are not faced, it seems to me,  
18 Your Honor, with the circumstances which faced a Simone Weil,  
19 or some of the revolutionaries whose concern with the Gestapo  
20 or who is concerned with the totalitarian state.

21           And if Your Honor asks me whether I would project  
22 this oath into the abstract, I can only tell Your Honor that I  
23 trust that the parties defendant and Appellees in this case are  
24 perhaps in their own way, every bit as committed to the notion  
25 of individual liberty and freedom as are the Appellants in this

1 particular cause.

2 But I can't project into some totalitarian teacher  
3 which I trust will not descend upon us and which I trust will  
4 not give rise to a case before this bar --

5 Q May I say if a man had to face that situation  
6 he should continue to abide by that oath?

7 A Your Honor, I think --

8 Q Suppose the government, and I don't think it  
9 ever will, and I hope it won't -- suppose it should have a  
10 government like Hitler -- would you say that he would then  
11 have to swear that he would not fight it?

12 A Your Honor, I think that Judge Learned Hand  
13 put it well and it may be very paradoxical. As I recall he said:  
14 "The government, any government, and I assume he meant the  
15 totalitarian one, juridically, as well as our government, has  
16 the right to protect itself against revolution and any person  
17 oppressed by that government who does not have available to him  
18 constitutional means of altering that government, has a moral  
19 right to do what he can to alter it.

20 And I think that's the everlasting, moving paradox  
21 with which any man in any state is called.

22 Thank you.

23 MR. CHIEF JUSTICE BURGER: I think you have consumed  
24 all your time, Counsel.

25 The case is submitted.