In the

Supreme Court of the United States

JONATHAN O. COLE, SUPERINTENDENT, BOSTON STATE HOSPITAL, ET AL.,

Appellants

v.

LUCRETIA PETEROS RICHARDSON,

Appellee.

No. 70-14

Washington, D. C.
November 16, 1971

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v.	:	No. 70-14
LUCRETIA PETEROS RICHARDSON, Appellee	:	

Washington, D. C.
Tuesday, November 16, 1971

The above-entitled matter came on for argument at 1:07 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, 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:

WALTER H. MAYO, III, ESQ., Assistant Attorney General, 373 State House, Boston, Massachusetts 02133 Attorney for Appellants

STEPHEN H. OLESKEY, ESQ., Hale and Dorr, 28 State Street, Boston, Massachusetts 02109 Attorney for Appellee

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Dunn against Blumstein.

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

ORAL ARGUMENT OF ROBERT H. ROBERTS, ESQ.,

ON BEHALF OF THE APPELLANTS, WINFIELD DUNN, ET AL

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

This is an appeal from a Three Judge District Court in the Middle District of Tennessee at Nashville, which struck down the durational residency requirements for voting, as provided by the State Constitution, and implemented by statutes of the legislature.

The time fixed in Tennessee for durational residency requirements was one year in the state, and three months in the county before the person offers himself to vote. Now, the question presented is whether or not such Constitutional and statutory provisions violate the Equal Protection Clause of the 14th Amendment of the United States Constitution, and whether or not, in determining this, the doctrine of "irrational or unreasonable" or the "Compelling State Interest" doctrine is to be made applicable in this kind of a case and for the determination of this case.

At the time this case was decided by the District

Court, and so far as this Counsel has any way of ascertaining now, thirty-three states and three territories have durational residency requirements of at least the one year, as is the case in Tennessee. Fifteen states had a six months residency requirement, which is double the county residence requirement provided for in the State of Tennessee. The remaining two states had, respectfully, one ninety days and the other, three months, durational residency requirement.

Q Mr. Roberts, have there been any studies made on widespread or even a national basis to determine how long it takes to crank up registrations and that sort of thing, and to check out to be sure that the voter isn't voting in two states?

MR. ROBERTS: No, sir, not to my knowledge. If Your Honor please, that's where we think that the District Court erred in trying to make such a determination based on the registration cut-off line of thirty days which applies in Tennessee and in most of the states that have registration laws. But it's our insistence that the Court was in error there because that cut-off period is designed specifically, and it is very clearly shown in the law, to be for the purpose of permitting the county election officials the necessary time to make the administration acts that they are required to.

For example, they have to take the master

registration list, and then break that down precinct by precinct, and make duplicates of it to go out to the precinct. They've got to run their advertisements in the paper, notices of the election, select all of the judges and officers to hold the elections at the precinct level, and it's a countless number of things. Nowhere during that period of time can the Election Commission in Tennessee, and I think it's generally true everywhere else, use that period of time to purge an ineligible voter.

Therefore, the durational residency requirement is necessary, we feel, in order to give some time for which the Election Commission can get rid of any ineligible voters, purge them, as the case might be, and then the thirty-day registration cut-off only for administrative period and things alone, because somewhere, there's got to be a period of time when the voter knows that he is going to be entitled to go to the polls and vote, and that is what we think the thirty days is for. Now, so far as --

Q What's been the experience with those administrative problems in connection with the new Federal statute on election of President and other Federal elections?

MR. ROBERTS: If the Court please, we haven't had a Presidential Election since then. We don't know yet quite how it's going to work out, and I don't think that --

Q That's thirty days, isn't it?

MR. ROBERTS: Sir?

Q Thirty days residence?

MR. ROBERTS: Yes, sir. Thirty days registration cut-off.

Q I gather Tennessee is going to have to accommodate itself to that for the forthcoming Presidential Election, isn't it?

MR. ROBERTS: Yes, sir. Well, Tennessee, if Your Honor please, already had done this before the 1970 Voting Rights Act was passed. That is one of the things that I wanted to point out to the Court.

There are other ways of doing it besides, in effect, reinterpreting the 14th Amendment in order to bring it about. In Tennessee, anybody that moves from, well, within a precinct or anywhere else in the state, has ninety days in which to qualify himself in the new area, or, until that period of time, he can go back and vote where he had always voted, either in person or by absentee ballot. He is never disenfranchised.

Well, the same is true so far as the year and the state is concerned, and by act of legislature, even before the 1970 Voting Rights ct, we provided that, in Tennessee, any person leaving that state would maintain his domicile -- which in Tennessee is the same as legal residence -- he would maintain the domicile until such time as he acquired a new

one, no matter what state he went to. And we think that that is a sensible way of doing it so that you are protecting the people that usually would have the most interest.

It takes some little time. I think the Court can take notice of the fact that a person who has lived a number of years in a county, and then he moves, it's a little while that he would prefer to be identified back where he had been for any period of time, as opposed to immediately entering into the political arena in a new -- aah -- new place.

Q Does Tennessee have criminal penalties for voting in Tennessee and voting somewhere else, if it could be accomplished?

MR. ROBERTS: Yes, sir, we do. The problem with this, though, if you are going to confine it to the registration deadlines, for example, is determining whether or not the person really is a bona fide resident of the state. Now, the District Court, in striking down the year in the state and three months in the county, did indicate that they felt that the thirty-day registration deadline was sufficient to accomplish this, and it has been argued in the Opposing Counsels' brief that anybody thatwould go into the Registrar's Office and be willing to make an oath that he's a bona fide resident would also be willing to make an oath as well about anything else that would be necessary to do this, but that doesn't follow, because it's a nebulous sort of

Stewart. Now, viewing the oath as a whole, we think that it is a promissory oath of constitutional support which requires action in the future. Now, the portion which requires one to "oppose or overthrow" is a correlative of the first portion which requires one to support and defend the federal and state Constitutions. For to support the Constitutions is, at the same time, to oppose the overthrow of the Constitutions. The second portion therefore clarifies the first portion and delineates the employee's obligations under it. And the second portion can also be said to test whether the first portion of the oath was taken without mental reservation or for purposes of evasion.

Q Let me ask you, Mr. Mayo, under this oath as it is phrased with reference to defending, a person could have a private belief, a philosophical and political belief in communism and still conscientiously take this oath to defend against those the overthrow of the government, could he not?

MR. MAYO: That's correct, Mr. Chief Justice.

Q So that this is, in that part of the oath, it is not a case involving belief. Is that right?

MR. MAYO: That is correct, and we would maintain that the second portion of the oath likewise. There is no question of belief which enters into the determination on this point. But there is certainly no question of belief in

the first portion of the oath.

Now, whatever may be the contentions on the vagueness question, and even assuming those questions to be colorable, as did Mr. Justice Harlan, when the case was here on prior appeal, we think that an examination of the effect of the oath on First Amendment freedoms dispels any doubt that any of the plaintiff's freedoms under the First Amendment are infringed by the oath.

First of all, the oath is far different from those oaths which have been struck down by this Court in Baggett and in Elfbrandt and in Cramp. Now, the oaths in those cases required specific disclaimers of affiliation with so-called "subversive organizations," and the instant oath is no such thing. In our view, it is a forward-looking promissory oath of Constitutional support. It does not require a statement of belief, which is the crucial distinction between this case and the Connell case decided by this Court last term. No statement as to one's beliefs at the time he is asked to take the oath is required, and the oath does not proscribe freedom of association so the employee is free to join whatever organizations or political parties he desires.

The oath does not prohibit membership in any organization or political party, nor does the oath infringe on anyone's religious beliefs or associations. For instance, if an employee is prohibited by reason of his religious

scruples from bearing arms, he might qualify the oath in that regard. And I might add that such a qualification was approved by the Attorney General of Massachusetts in 1967 in this respect.

In short, we think that none of the plaintiff's First Amendment rights are infringed by this oath.

Now, plaintiff's attack in this case seems in the main to be concentrated on very speculative and conjectural possibilities concerning speech and association in the event of a possible overthrow of the government.

Q Is it clear to you that the phrase, "By force, violence or by any illegal or unconstitutional method," modifies "overthrow" rather than "oppose?" As a matter of pure grammar, you could read this as saying that he will oppose the overthrow, and he'll oppose it by force, violence, or by any illegal or unconstitutional method.

MR. MAYO: No, I think, Mr. Justice Stewart, the language modifies the word "overthrow" and not the word "oppose." It's the overthrow by force, violence or any illegal or unconstitutional method.

Q As a matter of grammar, would you agree that it could be read the other way? That he has an obligation to oppose the overthrow by force, by violence or by any illegal or unconstitutional method, any way as to oppose

the overthrow of the government?

MR. MAYO: No, I could not agree, as a rule of grammar, that it would modify the word "oppose," because I don't think that an employee would use an illegal or an unconstitutional method to oppose the overthrow. I don't believe that would be permitted.

The Commonwealth of Massachsetts does not believe that remote conjecture can suffice to invalidate the oath on constitutional grounds. Now, what is required in this case to reach such a determination is a readily apparent constitutional infirmity. In other words, it must be clear beyond peradventure that the oath will restrict the plaintiff's First Amendment freedoms, and a precise identification of those freedoms must be made.

The Court must be able to say that the inhibiting effect on speech or association is real, not illusory, and we submit that such an inhibiting effect cannot be gleaned from the extremely remote possibilities as to what plaintiff may be required to say or do in the future.

Plaintiff goes on to argue that the due process clause invalidates the oath because it requires a summary dismissal without a hearing, citing the Connell case decided last term. Again, the crucial distinction between the two cases is that the Florida oath, which was considered by this Court in Connell, contained the word "believe," "I do not

believe in the overthrow of the government." And the opinion of this Court requires Florida to hold a hearing to ascertain, we suppose, whether the beliefs are firmly held prior to a final discharge of the employees.

In the case at bar there is no necessity for such a hearing because there is no factual inquiry to be made; since the oath involves only promises of future action, a hearing in this regard would be meaningless. Either a person takes the oath or he doesn't. Essential determination can easily be reached without a hearing.

In this case, I would note that the Court is confronted with a record that is absolutely barren of any threat of prosecution for perjury, or any hint that plaintiff would be discharged for a failure to live up to the terms of the oath and, in fact, since the oath was enacted in 1949, no prosecutions have resulted, and no public employee has been discharged for failure to perform his obligations under the oath. And therefore we think the plaintiff's fears as to the infringement of her First Amendment rights, under the circumstances, are simply without foundation.

We think that the case can be succinctly summarized in the words of Mr. Justice Harlan, who said, when the case was here on the earlier appeal,"....subscribing to the ..... oath subjected Mrs. Richardson to no more than an amenity."

The defendants would ask that the judgment of the

district court be vacated, and that this case be remanded to that court with directions to dismiss the complaint.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Mayo.

Mr. Oleskey.

ORAL ARGUMENT OF STEPHEN H. OLESKEY, ESQ.,

ON BEHALF OF APPELLEE, LUCRETIA PETEROS RICHARDSON

MR. OLESKEY: Mr. Chief Justice --

Q Do you agree, Mr. Oleskey, with the response that Mr. Mayo gave to my hypothetical question -- perhaps not hypothetical -- that a person could be a philosophical believer in communism and yet take the oath that he would -- conscientiously take the oath he would oppose the overthrow of the government by force, violence, and so forth?

MR. OLESKEY: Well, I'm not sure that I do agree, Mr. Chief Justice.

Q Do you think he might not be a very conscientious communist, perhaps?

MR. OLESKEY: I think that's one possibility. I thought originally that your question was addressed to clause one of the oath. If, in fact, we are referring to clause two, the oppose the overthrow, I think, clearly, it could be much more difficult, not only for a communist, but for an anarchist or anyone else who believed that under certain circumstances the violent overthrow of the government ought to be brought about to take that portion of the oath in

good conscience.

Q Well, does that second part of the oath deal with belief per se, or does it deal with a pledge with respect to future conduct?

MR. OLESKEY: There is no reference, as there was in the Connell case, concededly, to belief. It is a straightforward promissory oath of future intent. However, I would argue, and do argue that --

Q Future conduct, isn't it, rather than intent?

MR. OLESKEY: Well, the oath specifies "I will oppose." I would argue that that requires an affirmation at the time the oath is taken, the instant that the potential employee utters it, just as someone about to take the witness stand in a trial will be required to swear to the truth of what he's about to say, that he intends from that time forward to act in conformity with the words which he has repeated. Otherwise, the oath can't have any meaning.

Q Do you see much distinction between the oath -- the first part of the oath before the conjunctive "and" and the oath that you took, for example, when you were admitted to the Bar of this Court? That you -- I think the language almost tracks, except the oath here doesn't include the State of Massachusetts, of course.

MR. OLESKEY: I must confess with some slight embarassment, since I'm appearing pro hac vice, being three

days short of eligibility for admission to the Bar of the Court, so I have not yet taken that oath.

Q Well, then let's pose that in terms of the oath that you will take three days hence, or thereafter. You've heard the oath in this Courtroom, of course.

MR. OLESKEY: I have not, Mr. Chief Justice, in fact.

Q Well, I think it is essentially the same as the first part of the oath that you take out in Massachusetts, so moving to just the second, the second is really a conduct, a pledge of future conduct, isn't it?

MR. OLESKEY: Well, I have tried to suggest that I feel it is more than conduct, insofar as it does require -- if the oath is to be taken as more than an amenity, and, clearly, there are those who, like my brother, Mr. Mayo, feel that it is only an amenity -- but if it is to be more than an amenity, it's got to comport with your belief at that time as to how you govern your future conduct, and, course, it reaches belief in that sense. How could you, consistent with a belief in violent overthrow under some circumstances, take the oath, part two, as required by Massachusetts? And I suggest that --

Q It works on the same theory, I suppose, that lawyers might disagree with an opinion of a court, and yet, as officers of the court, be bound to uphold it.

MR. OLESKEY: Yes, I agree to a bound to uphold a court in a judicial system, but we are not required, as this oath suggests, on one interpretation to necessarily undertake arms or take any other action to physically or even verbally oppose the overthrow of the state or federal government, which is what part two purports to say.

Of course, I recognize that one of the difficulties here in talking about what part two does purport to require or say, is that no one can really provide a satisfactory definition of that language. Mr. Justice Stewart, I think, has hit upon a very basic grammatical problem which I've never been able to resolve to my own satisfaction, which is whether or not the reference to force, violence, illegal, unconstitutional method modifies the words "oppose" or the word "overthrow." I think this is just one example of the vagueness found in the second portion of the oath, the more fundamental problem being exactly what do those elusive words "oppose the overthrow" mean? And the very fact that the Commonwealth of Massachusetts, in three years of arguments, brief, and again today before this Court, is basically unable to offer a satisfactory example of what that language means, I think, suggests how very vague and elusive it does -- it is -- and, therefore, does bring it within the purview of such cases as Baggett v. Bullitt and Cramp and Board of Public Instruction, which were struck down similarly for vagueness.

I would like to respond, if I may, to the Commonwealth position that the Appellee's arguments with regard to First Amendment freedoms are "speculative and conjectural." I think the Court, this Court, has clearly faced that problem many times before.

Mr. Justice White addressed himself to that rather forcefully in Baggett and Bullitt, particularly at page 373, when he talked about the dangers of conduct which might be deterred by vague oaths, the control which such oath gives a prosecutor who might wish to deter speech, association, and the like.

I suggest that Mrs. Richardson or any other employee of the Commonwealth of Massachusetts -- and the 1970 census indicates that approximately one hundred and sixty thousand such employees would have been exposed sometime during the period of their employment to the requirement to take this oath -- they have no real way to find out whether or not these fears about First Amendment freedoms and prosecution for violation of the injunction of the oath are "speculative" or "conjectural" except to go ahead and take the oath and take the risk, and that is exactly why this Court has quite properly struck down such oaths in the past.

The other alternative is, of course, the one that Mrs. Richardson, in this case, chose. It has caused her, to

date, a three-year wait since she was fired in November of 1968 for refusing to take the oath, but that is, to refuse to take the oath at all. Of course, in such cases as Wieman and Updegraff, and later cases, this Court has said that however you style government employment, whether you consider it a benefit, a privilege, or what, you cannot justify either exclusion or punishment because of such an oath, where it is unduly vague or overbroad.

Q What if it were perfectly clear here, the second part of the oath, that the oath reads that to obey the oath, you had to affirmatively to speak out against violent overthrow on the one hand and, secondly, physically to oppose violent overthrow? Suppose both of those things were specified?

MR. OLESKEY: I agree that that would clarify, but I feel it would be equally unconstitutional, clearly following the line of such cases as Barnette and West Virginia Board of Education, where it was said that, consistent with those schoolchildren's beliefs in another Diety, another system, they could not be compelled to take the flag salute. I don't think that Mrs. Richardson or any other employee, merely because she becomes an employee, is required to take physical action or to speak out.

Q Either one.

MR. OLESKEY: Either one.

Q Well, then, it's not your -- it's not the thrust of your argument, Mr. Mayo, that the vice of this oath lies in its vagueness, unconstitutional vagueness? I thought it was.

MR. OLESKEY: Yes, it is, Your Honor, Mr. Justice Stewart.

Q Well, then, I don't understand your -- quite understand your answer to my brother White's question.

MR. OLESKEY: Well, my position, essentially, is this. First, it is so vague that neither Mrs. Richardson nor, in fact, the Commonwealth, knows what is required, but, were we to grant --

Q It wouldn't require any more than one of those two things -- than both of those two things, would it?

MR. OLESKY: Were we to grant your question, Mr. Justice White, and to say, all right, this is all the old fuzz meaning --

Q Well, I mean, what more could it mean than those two things?

MR. OLESKEY: Well, I suggest a sliding scale of possibilities. For example --

Q Yes, but one of those -- one of the matters I mentioned would be on one end of the scale, and one on the other, wouldn't it?

MR. OLESKEY: With a whole range and host of

possibilities in between.

Q What if all of them were unconstitutional?

MR. OLESKEY: Were constitutional? I suggest that under this Court's --

Q Your argument is straight vagueness, not overbreadth?

MR. OLESKEY: I suggest that under your -- this Court's construction of the cases, none of those things could be required. But I say, if the oath read, as you just suggested --

Q Well, you don't need vagueness then, do you?

MR. OLESKEY: Well, in my reading of the cases, I think this Court has frequently talked about both of them as different sides of the same coin, that coin being, basically, First Amendment freedoms, particularly speech and association and the deterrence which very frequently results when an employee like Mrs. Richardson or anyone else is faced with the necessity of taking such an oath.

Q Do you think "oppose" is any clearer than "support?" I mean, is it any more vague than "support?"

MR. OLESKEY: Well, the district court suggested -- my brother, Mr. Mayo, has said a range of meanings for "oppose" from "actively oppose," that is, to do something, to merely refraining from some conduct oneself, which, again are on different ends of the spectrum.

Q Well, what about "support," though, in the first part of the oath?

MR. OLESKY: Support is quite close. In fact, it's the same word that this Court approved in Connell and Higginbotham.

Q Well?

MR. OLESKY: I -- I fear that --

Q So I want to know why is "opposed" any more vague than "support" which isn't constitutionally vague.

MR. OLESKEY: Well, the line of cases which include Connell Higginbotham and, before that, Knight and Olsum?, which are both per curiam affirmances, don't really discuss the question you've raised, and I admit it is a troubling and puzzling one. I think that the only real and fair answer is that the Constitution itself, in Article -- I think it is Article VI, Section 3, has a general requirement of support of the Constitution. And I think if, in fact, as Mr. Mayo appears to argue at one point in his brief, if the oath merely said, "And I oppose the overthrow," it would be a tougher case. But it doesn't say, "I oppose the overthrow," it says, "I will oppose the overthrow," the key there, I think, being "will" meaning not only is Mrs. Richardson perhaps on one construction, but to refrain from action herself, or wonder in her --

Q If it said that it required you to take an

oath that "I oppose," would that be contrary to Connell?

MR. OLESKEY: I think that "I oppose" would have the same constitutional defect of vagueness, but I suggest that it might be an easier case than "I will oppose," which requires a public employee in Massachusetts to assess somebody else's conduct, not just his own, not just to govern his own conduct as, "I support the Constitution" does, but to go out and make a judgment, let's say, as he passes the Statehouse to Boston Common during the day, hears a speaker urging violent revolution. Is this overthrow of the government? Am I required to do something? If so, what is it? A whole host of possibilities are there. I don't think any fair choice can be made by that employee, consistent with the First Amendment.

Q You're speaking now of the second part?

MR. OLESKEY: Yes.

Q After the "and"?

MR. OLESKY: Yes. The problem with the whole oath is that the two parts, at least as the Attorney General argues -- and this is a plausible construction -- do appear to be linked. There's no indication that they are particularly severable. I think for that reason the district court properly struck down the entire oath.

Q Aren't things usually severable in this context when they are divided or separated by "and"?

MR. OLESKEY: Grammatically, it's separable. I think in its intent, particularly if the word "defend" in the first portion of the oath is linked with "oppose" in the second portion, they are not necessarily severable. We are not favored with any legislative history here by the Commonwealth of Massachusetts to help us, unfortunately. And the Supreme Judicial Court, in its closest pronouncement -- the Supreme Judicial Court of Massachusetts -- several years ago suggested that in construing a teacher's oath, which was not too dissimilar, it would prefer to leave such ultimate constitutional questions, interestingly enough, rather than pronounce upon it itself.

Q Mr. Oleskey, suppose the oath said, "I'm against the overthrow of the government"? I'm trying to use some plain english.

MR. OLESKEY: The entire oath, or the second portion?

Q After the "and." "And that I am against the overthrow of the government," et catera.

MR. OLESKY: I think that would clearly conflict with "believe," Mr. Justice Marshall.

Q Why?

MR. OLESKY: Because the person might or might not in fact be against the overthrow, consistent with decisions of this Court, including the Bar admission cases decided

last term.

Q It says that "as of this moment," which means that, immediately after I've taken my oath, I might change my mind, doesn't it?

MR. OLESKEY: But it does require and compel expression of belief as of that moment, which I don't think --

Q Consistent with one moment.

MR. OLESKEY: Yes, which I don't think consistent with the First Amendment can be compelled.

Q May I ask, Mr. Oleskey, if the purpose of this -- Mrs. Richardson now asks to take the oath stopping it -- the word Massachusetts. Would the state violate the injunction that the district court granted?

MR. OLESKEY: I believe that it would, Mr. Justice Brennan, because I believe that the injunction and the decision both go to the entire oath.

Q Well, if the -- the decision, the opinion, seems to treat the two parts separately, and indicates that the first part at least, on the authority of Knight, is constitutional, and that the vice is in the "I will oppose" part --

MR. OLESKEY: But, the --

Q -- as far as the course of the injunction is concerned the preparatory judgment was, you are quite right, there the whole oath is invalid, the section is invalid, and

the injunction is against prohibition based upon her refusal to take the oath required by the section, but if the Massachusetts were to say, "Well, we won't ask her to take the oath required by the section, but only an oath ending up with the word Massachusetts," do you still think that would violate the injunction?

MR. OLESKEY: I think it would, because of the specific language, first of all, in the judgment and injunction, that section 14 of 264 violates the First Amendment in ? odd section 14, clause 2 of the oath and --

Q Yes, but if Massachusetts was reinforced, it would no longer be the oath required by section 14, but a different one.

MR. OLESKEY: If the legislature reenacted such an oath, it is conceivable that -- it's obvious that Mrs. Richardson could be at least asked to do it.

Q I guess what we are saying is that the injunction is theirs.

Q Do you think there is any impediment to a court amending the oath?

MR. OLESKEY: I think, first of all, this oath, as I suggested, is not clearly severable. Secondly, there is no indication --

Q You mean that that's a matter of Massachusetts legislature --

MR. OLESKEY: Yes.

Q And therefore, it cannot be treated as severable?

MR. OLESKEY: Yes. I think the most proper course, if you're going to sustain the judgment of the three-judge court, as I hope you would, and the injunction would be again to affirm striking down the entire oath, and let the legislature in Massachusetts do with this oath, or any other oath, what it chooses, in light of the decision. I think it should be made clear that the second portion of this oath, which, I suggest, is tied firmly to the first portion, is constitutionally defective.

I would like to make one more point with regard to freedom of association which, again, my brother suggests is speculative and conjectural. I think, clearly, within the problems created by part two of the oath, someone like Mrs. Richardson, any state employee in Massachusetts, might well wish to join any group, even a so-called "fun" group, which had as its stated purposes something very innocent, like preserving forests in Massachusetts. One of the other aims of this group could obviously be violent overthrow of the government. Under decisions of this Court, as I understand them, Mrs. Richardson could not be convicted of attempting the violent overthrow of the government unless there was scienter present and unless she herself had the

actual intent to overthrow the government. But, I think, in terms of part two of the oath, the "I will oppose," she could clearly be deemed in conflict by a prosecutor at any time, notwithstanding what my brother says, the twenty-year history of non-prosecution in Massachusetts.

The test is not, I think, lack of prosecution, it is deterrence of First Amendment conduct, and I think that's the crucial issue here.

Q But it's put purely in personal terms. It is not put at all in associational or membership terms, just as the first part of the oath is put, purely in personal terms, and in the future tense.

MR. OLESKEY: I agree that it's personal and future, but I don't think there'd be any bar to a prosecutor going after Mrs. Richardson for a violation of, at least, the second portion, if she were found to be a member of a group like the one I suggested, which, in fact, had as one of its tenets, though she might be unaware of it, or although she might be a passive or inactive member and not even in favor of it, as the Court suggested in the United States and Robel, decided several years ago, she could still be prosecuted. There's additional --

Q You say there's some cases holding that? What's your authority for that? Because it seems to me quite far afield from the words of this particular oath.

MR. OLESKEY: My proposition is only that in terms of the words of the oath requiring a future promise of opposition.

Q What she will do in the future?

MR. OLESKEY: Yes.

Q What she personally will do.

MR. OLESKEY: Yes. A future association, or even an association of the time she took the oath, which was inconsistent because of some aim of that group, which was, in fact, in favor of the violent overthrow of the government, or, by illegal, unconstitutional methods, a Massachusetts prosecutor could prosecute Mrs. Richardson under the oath, and I think that she would not, even though she might be sustained by this Court or some other court, eventually, she would not be in a very effective position to argue, as my brother has suggested, that, well, after all, the oath is only an amenity. It didn't mean very much. The state considers it only an amenity, so I don't really have an obligation to live up to the terms of that future promise. If the oath -- this oath, or any other oath, is going to mean anything in this country, then I think they have to be clear, not vague, not broad, and streightforward, and this one isn't.

Q What would you suggest? What language would you suggest to meet, that might meet your standards of clarity, and lack of vagueness, and lack of breadth?

MR. OLESKEY: The only standards which it would appear would be consistent with what this Court has said, would be the language of the Connell oath, part one, or the language required by the Constitution, "support and uphold."

Q This says, "uphold and defend." Do you think those words have any more precise meaning than the word "oppose"?

MR. OLESKEY: Well --

Q "Uphold and defend."

MR. OLESKEY: I think that "support" --

Q Well, that's not in this --

MR. OLESKEY: Or "uphold" have come to be traditional words associated with a kind of minimal residuum of loyalty which we have decided under the Constitution, in fact, in Article VI, Section 3, from the very beginning, we've allowed, under the Constitution, to be exacted from public employees and public officers and the like.

Something beyond that creates, clearly, on the decisions of this Court in the past, questions of unconstitutionality.

Q Well, just as a matter of words, do you think the words "uphold and defend" or "uphold or defend" are -- have more definitive and precise content than the word "oppose?" I grant you they're antonyms, but is one more precise then the other?

MR. OLESKEY: I think that "uphold or support," which have been read by the court below and by this Court, I think, as roughly synonymous, have this historical content. What you are saying is that you believe in the system for which you are working, under which you live.

Q Well, now, that, I thought you told us, would be very constitutionally invalidative, if you are inquiring about somebody's beliefs.

MR. OLESKEY: Well --

Q This is not doing that.

MR. OLESKEY: If the question were open to me for the first time today, I think I would make a strong argument that "support and uphold" certainly requires some affirmation of belief. However, I think this Court's recent pronouncements, including Connell and Higginbotham, leave that question closed.

Q That doesn't bother you at all in arguing about "oppose." You think "oppose" is just in a different world.

MR. OLESKEY: I think, in terms of future conduct, and in terms of the number of variants of required conduct, which the state itself has suggested in three years of this case, that "oppose" appears to be much more elusive for all of us than "support" or "uphold."

Q Let me try another one on you, then, Mr. Oleskey.

What would you think of the oath, "That I do solemnly swear that, as an Attorney and Counselor of this Court, I will conduct myself uprightly and according to law and that I will support the Constitution of the United States"? Do you think that's any less vague than --

MR. OLESKEY: At least the last part of that, "That I will support the Constitution of the United States clearly doesn't go any farther than the Connell language or the Constitutional language which we've been discussing.

Q How about the language, "I will conduct myself uprightly"?

MR. OLESKEY: It seems to me that's a simple promise of conduct consistent with being an officer of a bar that doesn't necessarily go into ultimate philosophical or political beliefs about the utility of this Court or any other court.

Q If this doctor, your client, were required to take that oath, would you have any trouble with it?

MR. OLESKEY: Would I, or would she?

Q You're arguing the case.

MR. OLESKEY: I would -- I personally would take the oath. I don't feel it's inconsistent with, as I say, with ultimate beliefs.

Q Would you advise her that there was any difficulty about taking that oath, to conduct herself

uprightly as a physician and surgeon, or whatever she may be?

MR. OLESKEY: I don't think that's really troublesome. I think that goes to your conduct in a particular profession, the rules of the game. If Massachusetts was suggesting here that they're trying to regulate all employees because of some security sensitivity involved, as the Federal government and other state governments have argued in other cases, it would be a different situation, but there's no suggestion by the Commonwealth today -- I don't find any in his brief -- that such a broad oath, across the board, affecting all employees, is necessary for security sensitivity, or for the effective, orderly working of state government or any other compelling state interest. The record that the Commonwealth has made seems to be peculiarly bare of any suggestion of the compelling state interest for this oath. In fact, they suggested it is an amenity, as I say. Strange that they'd require it in that case.

Q Let me try another one on you. What is your reaction to an oath to this effect, "That I will, to the best of my ability, preserve, protect, and defend the Constitution of the United States"? "Preserve, protect, and defend."

MR. OLESKEY: Well, I think that, clearly, in light of our discussion in the last half-hour, that becomes a narrower case, particularly with the use of the word "defend."

I see vagueness difficulties there, as I do with the word "defend" in clause one of the Massachusetts oath, but --

Q You do see vagueness difficulties?

MR. OLESKEY: In the word "defend."

Q Would it disturb you if I told you that I was reading from Article 2 of the Constitution?

MR. OLESKEY: I think I would allude now to my previous conversation with Mr. Justice White and say that there are certain oaths or general terms of support which have been with us since the beginning --

Q And that's certainly not the only vague provision in the Constitution, is it?

MR. OLESKEY: No, it's not.

Q Justice Blackmun was reading the oath that the Constitution requires the President of the United States to take, as you perhaps recognized.

MR. OLESKEY: I can only suggest again that, in all honesty, the range of meanings for "oppose," when set aside, as it is here, in clause two, and not linked by implication with "support and uphold," as in the Presidential Oath that you read, does create much greater difficulties, both in terms of vagueness and in terms of broadness of deterring both speech and association.

Q So you -- if it's just an oath that says, "I will defend the Constitution," you have no great problems

on that?

MR. OLESKEY: I think --

Q At this point?

MR. OLESKEY: I think an oath that says "I will defend the Constitution" is quite close to an oath that simply says, "I will support the Constitution." They really are similar.

Q And you would find trouble if you said, "I will defend the Constitution of the United States against all enemies and against its overthrow by force and violence"?

MR. OLESKEY: Yes.

Q Then you'd have trouble with "defend"?

MR. OLESKEY: Yes, because I think that we imported more language; we've imported, as in this case, the government of Massachusetts, the United States government, force, violence, illegal, unconstitutional methods, all of which in a connection like the present one, mean that someone like Mrs. Richardson, as I say, not only has to assess her own conduct, but has got to make an assessment of somebody else's conduct, and action, and speech.

Q So really, it's the context in which the word "defend" is used.

MR. OLESKEY: Yes. It can be, and I think it is in this oath, although it isparticularly the words "oppose the overthrow" with which we find fault in this oath, not

the word "defend."

Q You're not suggesting that the Article 2 oath became unconstitutional by the adoption of the First Amendment?

MR. OLESKEY: No, Your Honor, I'm not.

Q All right.

MR. OLESKEY: Very briefly, we make in our brief and I would make today, two other arguments. One I have, I think, touched on, essentially, the vagueness argument, and the difficulty, for example, where Mrs. Richardson or any other employee is faced with a sit-in by militants at the Statehouse in Massachusetts, or at the Federal Courthouse, or the Federal Building in Boston, which has happened frequently in the years past. Is this an attempt at overthrow? How does she know? Is she required to act? Is she required to go and get a policeman? Just what is she supposed to do? I think the vagueness problems are clear enough to need, I hope, no further exposition.

The final point is that the statute violates due process as the Connell case construed it last term, in that it provides for no hearing for Mrs. Richardson or any other employee to show why she refuses to take the oath, no opportunity to make a record to show that she is merely, let us say, a scrupulous, conscientious woman who feels, because of the vagueness and overbreadth problems in this oath, that

she can't in good conscience, take it.

Q Was that raised and litigated in the three-judge court?

MR. OLESKEY: The particular problem of --

Q No hearing?

MR. OLESKY: No hearing, I don't think it was, Your Honor.

Q Yes.

Q Is there provision, either explicit or implicit, under this statute, for somebody to -- somebody who objects to taking oaths generally, to affirm, rather than to take an oath?

MR. OLESKY: The only provisions in the oath are those found in the oath, and it does say, in the first sentence, "I do solemnly swear or affirm."

Q "Or affirm" so there's not -- that's not an issue in the case.

MR. OLESKEY: No. It could be an affirmance rather than a swearing. Nonetheless, as I see it, the double penalty under the Massachusetts statute, both for prosecution for perjury, which Section 14 explicitly refers to, and, under Section 15 of the same Chapter 264 for violation of the terms of the oath, whatever that may be, still remain.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Mayo, do you have anything further?

MR. MAYO: No, Mr. Chief Justice, I have no rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, gentlemen, and thank you.

The case is submitted.

(Whereupon, at 1:57 p.m., the case was submitted.)