In the

Supreme Court of the United States

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CHARLES R. PERRY, et al.,

Petitioners,

vs.

ROBERT P. SINDERMANN, etc.,

Respondent.

No. 70-36

Washington, D. C.
January 18, 1972

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ROBERT P. SINDERMANN, etc.,

Respondent.

Washington, D. C.,

Tuesday, January 18, 1972.

The above-entitled matter came on for argument at 11:46 o'clock, a.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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

W. O. SHAFER, ESQ., P. O. Drawer 1552, Odessa, Texas 79760, for the Petitioners.

MICHAEL H. GOTTESMAN, ESQ., Bredhoff, Barr, Gottesman, Cohen & Peer, 1000 Connecticut Avenue, N. W., Washington, D. C. 20036, for the Respondent.

C O N T E N T S

[Afternoon session - page 11]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 70-36, Perry against Sindermann.

Mr. Shafer.

ORAL ARGUMENT OF W. O. SHAFER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SHAFER: Mr. Chief --

MR. CHIEF JUSTICE BURGER: You may lower the lectern, if you'd like. It's on the right side there, if you --

MR. JUSTICE MARSHALL: On the other side.

[Adjustment of lectern.]

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

I usually carry a coke box to take care of that differential [laughing.]

Petitioners in this case are the president and the Board of Regents of Odessa College. A small town in west Texas.

The respondent Sindermann was a teacher employed on a year-to-year contract, which, at its expiration, was not renewed. Termination did not occur during the contract term. Before the term did actually expire, and before official notice that it would not be renewed, he claimed he was fired for anti-administration activity.

The president of this college also, at about simultane-

ous with the notification of nonrenewal, issued a press release in which he detailed the activities and, as we read it, disclaime that it had anything to do with his discharge. But it set out in detail what we consider to be two precise, valid and legitimate grounds for nonrenewal, which included, one, persistent insubordination; and, two, a disruption of harmony among his colleagues by way of harassment.

Now, we don't know of any decision that says that either of those situations are invalid as grounds for dismissal.

Three days after notification --

Q Do you concede that there was a dismissal here, or simply a --

MR. SHAFER: It is a non-renewal, Mr. Justice, and I speak in terms of --

Q And you concede nonrenewal?

MR. SHAFER: -- termination, and I may slip and say "discharge". I do hope to make it clear that it was a year-to-year contract. It was not renewed at the expiration of the contract.

Q It was a failure to rehire, is that right?

MR. SHAFER: Yes, sir. It is a failure to renew or give him another contract. These are year-to-year contracts in what we present here as a nontenure college in a nontenure State, and with a nontenure professor. And we -- if I say "termination", I mean to say nonrenewal.

Q Well, you said dismissal. And I wondered if you were conceding that. And I gather you're not.

MR. SHAFER: No, sir. We do not.

Q This was a professor, you say? Full professor?

MR. SHAFER: Yes, sir.

Well, in -- I guess you would say a full professor, yes, sir. This is a junior college, and the --

Q A two-year college.

MR. SHAFER: Yes, sir, a two-year college.

Q That was one of the issues about which --

MR. SHAFER: So we don't have chairs and things of that nature, as you would find in a full university.

I do hope to make that clear, though, that I may use that term. I don't mean to. I will try not to.

A few days after he had notice of the nonrenewal, Sindermann filed a suit in the Federal Court in our area for $475,000 in damages, and seeking various other relief.

Simultaneously with the filing of the suit, he wrote a letter asking for a hearing, which was the first indication or request for any type hearing. No hearing was had.

The case proceeded under the court.

Q Does the college provide for hearing if requested?

MR. SHAFER: Odessa College does not have a tenure type of statement, although it has adopted, in part, the

declaration of policy of the American Association of University Professors. And had he requested a hearing, instead of placing the matter in court, I have no doubt that a hearing would have been provided him. But the college got -- the president of the college got the summons to go to court on the same day he got the letter requesting a hearing.

And of course, I am sure, was paralyzed as far as the college was concerned; and we simply answered in the forum in which he had chosen to proceed in, and we think that we should not be condemned for answering in court and proceeding there.

Now, upon motion, the trial court entered a summary judgment for petitioners, on grounds, basically, that Sindermann had neither tenure nor a contract, and that his constitutional rights had not been violated.

Now, we will agree that the trial court could have been somewhat more explicit in its findings, because he made the broad conclusion that his constitutional rights had not been violated. We think that it is inherent and necessary, not only permissible but inherent in that finding that he had to find either, one, that no hearing was necessary, or that Sindermann waived his right to one when he resorted to the courts; and that valid grounds for non-renewal were established as a matter of law by Sindermann's own pleading in the District Court for the Western District.

Now, it is on those bases that we seek affirmance of the trial court's judgment, and we think that if we can make our position clear on them, the Court will see why we say they dictate the affirmance.

First, about the hearing. As I have explained the hearing demand arrived with the summons. But Sindermann could have asked for a hearing, or he could have proceeded in court; both remedies were open to him. He chose to do both at the same time, and, we think, knowing that the court action would paralyze any action by the Board.

Now, the choice was his. He made this election, not the college. The college responded in the court, where it felt it had to answer. Now, we don't think they should be condemned for that.

And we think the court, the trial court, had a right under those circumstances which appeared in the pleadings, had a right to say that he had waived his right to a hearing.

Now, probably what is more compelling, from the record in this case, is that when you look at the basis on which the case was handled in the trial court, you can see that there is no necessity for a hearing in this case if the Board was correct in finding adequate and valid and supporting grounds, without dispute, already established.

The purpose of a hearing is to determine the existence of facts. If there is no dispute about the facts,

then there is -- it is certainly a useless thing to hold a hearing to determine facts that are already undisputed and without any controversy in the case.

In this case, Sindermann, himself, pleaded that he had been insubordinate and that he had violated the directions and instructions of his dean and his president on not one but on several occasions, and specifically and in detail on two.

Now, we think he is bound under the rules of any court by his pleadings, upon which he relies to set forth his cause of action; and when he pleads them things himself, that that establishes that fact.

Q Well, assume that there were valid grounds for non-renewal revealed in the pleadings, that doesn't necessarily mean that those are the grounds the college used; it could be that they used an invalid ground.

MR. SHAFER: Your Honor, I --

Q That's precisely what he alleged in this complaint, isn't it?

MR. SHAFER: Yes, sir. I am going -- and I think if I may be allowed to lay this foundation, briefly --

Q All right.

MR. SHAFER: -- I am going to take issue with the proposition that where valid, legitimate, honest, full grounds for dismissal are established without any dispute in the evidence and without any controversy, that a concurrent claim

of impermissible grounds is not and should not be controlling.

Q Okay.

MR. SHAFER: Or require further -- if that is the point you reach upon, I'm getting to it as fast as I can go.

Q All right. Thank you. Sorry to interrupt you.

MR. SHAFER: Now, I do think it is appropriate here for me to say that, in Jones vs. Hopper, the Tenth Circuit, the Fourth Circuit in Parker vs. the Board of Education, these cases have held that a nontenured teacher in a nontenured school and in a nontenured State and college, upon expiration of his contract, has no right to a hearing. The First Circuit, I believe, in Drown vs. Portsmouth, may have joined them in that view, but said he ought to have a statement.

Now, we fit squarely under those cases, and if those cases have correctly declared the law, then our argument is over, because we are, we fit under that cloak and would be protected under it. But we do not think we are, and we are not here saying that that is enough, because we don't have to.

Our facts go beyond the holdings in those cases, and we say that whether it is contractual or not is not the point here. We go beyond, we think we have adequate grounds under the rule that we propose as being the only possible rule that the court can adopt, and that colleges and Boards of Regents in this country can live with. And this -- this

rule that we say we have to have for survival is that, when adequate, full and proper grounds that -- and I'm talking, I'm not talking about disputed grounds, I'm not talking about pretext, I'm not talking about matters incidental, the length of the hair, the length of the skirts, it might vary from school to school, or from place to place. I'm talking about insubordination. I am talking about disruption of harmony among the colleagues, incompetence, and inefficiency. Basic sound grounds.

We say that when those have been established, the inquiry is over. And that if there is a concurrent claim made, of impermissible reasons, that those pale in the contest.

Now, the reason for this --

MR. CHIEF JUSTICE BURGER: We'll resume there right after lunch, Mr. Shafer.

[Whereupon, at 12:00 o'clock, noon, the Court was recessed, to reconvene at 1:00 o'clock, p.m., the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Shafer, you may proceed.

MR. SHAFER: Mr. Chief Justice, may the Court please:

It may be best at this point to define the activity that we are talking about, to clarify the point.

Sindermann asked for and was refused permission to leave his duty post to go to the State Capital to lobby in support of certain legislation in which he was interested.

Now, as far as Odessa College is concerned, he was and he is and will forever be free to support any legislation that he chooses. What we say that he was not free to do was to leave his duty post contrary to the instructions and directions of the chairman of his department, his dean, and his president, and go some three or four hundred miles away, at his convenience and at his choice, to lobby in support of that legislation.

Now, whether the free support of legislation is protected, really, we don't think is the question. Here we think that the critical question is whether he can go three or four hundred miles away, at a time of his choice, contrary to instructions of his superiors, and lobby at his convenience in support of legislation in which he is interested.

Q Does it make any difference what he's doing when

he's gone that three or four hundred miles?

MR. SHAFER: We think on balance, may Your Honor please, that the compelling job which he has hired out to do, which is to teach his classes, must outweigh his own convenience in going wherever he chooses, at his convenience and at a time which he selects, to lobby in favor of legislation.

Q Let's assume for a moment that he was going there to listen to some lectures on the very subject he was teaching. Would that be an excuse for being absent from his duty post, as you put it?

MR. SHAFER: I think that would be a decision that his superiors would have to reach, again on balance, as to the benefit to the college and the students and as compared to him. Certainly he would have a constitutional and a protected right to go. That would be a matter of his choice.

But this Court has said, in Pickering, that this is a delicate balance, and that care must be used to preserve that autonomy of the Board to maintain discipline, competency, efficiency, and at least an orderly administration of the college.

The problem, Your Honor, is to look at your question as to one professor. But suppose, on that same day, 250 professors, or half the faculty, also wanted to go hear the lecture, and also wanted to go lobby, at the legislature.

Then how do you choose? Each one would have an equal

right to go. You couldn't say one man had a superior constitutional right to go to the Legislature and lobby, but what are you going to do? Shut down the college? No, you have students who came to get an education; you have professors who hired out to teach. And this is the point we make, Your Honor.

When we say that on balance this is not a matter of choice of the professor to go to a State Capital, not once, this perhaps arose some four times. And on both -- he went on two occasions, testified on the legislation in which he was interested on neither occasion.

The Fifth Circuit summarily held that this was just a protected right and really did not discuss the matter; but we think respondent recognizes the problem quite well, because in respondent's brief he classifies it as a gray area, upon which some balancing is needed.

And when you're in a gray area, if that's what it is, we think the actions of Sindermann himself may well be determinative of the importance of the problem.

Now, let's bear in mind that Sindermann himself, approached his superiors and requested permission to go. He didn't just leave and go. He came and asked, realizing that this was an area in which he might be refused permission. Otherwise, why ask? Why not just go?

They argue in their brief that the Faculty Guide

says that all he had a right to expect was, on an unexcused absence, a reduction of 1/180th of his pay.

Well, you see, we get out of unexcused absences. This is not just an unexcused absence, this is an absence which occurs in direct contradiction to his superior. If he just takes off and leaves, we have an unexcused absence. This man sought permission, was refused permission, and disregarded it, and went anyway.

Well, --

Q How large an institution is Odessa Junior College? How many students and how many faculty?

MR. SHAFER: About 2,000 if you count, you must count the night students, too.

Q About 2,000?

MR. SHAFER: Yes, sir.

Q And about how large a faculty?

MR. SHAFER: Oh, about two, three hundred. Two or three hundred.

Q How large is this department? What was this, Social Political Science?

MR. SHAFER: Yes, sir. Oh, maybe six or eight.

Q Yes.

MR. SHAFER: Five or six, something like that; half a dozen, I'd say.

May I continue, sir?

Now, I guess what we are saying is the opposite of what respondent contends that the rule should be. They say that upon termination or upon non-renewal, if there is a claim -- and bear in mind, Your Honors, I'm talking about a claim. If there is a claim of impermissible reasons, then you must go into the matter with a hearing and with full procedural due process.

Q Inside the university?

MR. SHAFER: Yes, sir.

Now, this is what that contention is. Now, -- and he finds some support.

Fluker vs. Alabama, by the Fifth Circuit, says that. This case has -- very well it might be construed as saying that.

But let me try to explain why we say that can't work. You see, if that is true, then it is a matter of job security for any professor on any faculty, without tenure, to take antiadministration positions, to offend the administration in areas of gray or whatever, of black, or white, or green, because then if he is aware of his derelictions and he knows his contract may not be renewed, immediately upon notification, all he does is make a claim; it doesn't matter about the validity of the grounds, because he makes the claim, then we're in the hearing business, and then the courts are in business.

Q Are you objecting to -- I gather you are --

objecting to the suggestion that a person be given the right to prove a discharge for an invalid reason. Let's assume the complaint in this case did not in any way reveal what could be called a justifiable reason for discharge. All it did was say, "I made some speeches, and I was fired for making speeches."

MR. SHAFER: Well now, I think the trial court is going to have to hear some testimony.

Q So that either -- when he pleads right, it's either the court or somebody else who's going to have to entertain that claim?

MR. SHAFER: Yes, if he does not plead valid grounds, or, Mr. Justice, if he had disputed grounds --

Q All right.

MR. SHAFER: -- I'm talking only about the grounds established as a matter of law, valid and legitimate grounds.

Q All right. But you do see, then, that if he pleads only what would be called an invalid ground, or a disputed ground, he should have a hearing in court?

MR. SHAFER: Then we are going to have to have testimony, yes, sir.

Q Yes. All right.

MR. SHAFER: To determine what we say has already been pledged, you see.

Q Well, what do you think the Fifth Circuit meant

when it said "except in cases where the teacher or the institution refuse to follow these procedures, a court whose jurisdiction it invoked would ordinarily stay its hand"? Now, arguably, the court meant: Well, we think it would be better for the university to hold its own hearings, but if it refuses to do so we'll hold them here in court.

MR. SHAFER: Yes, sir.

Q And you concede that at least they'd have to hold them in court on the right kind of pleading?

MR. SHAFER: Yes, sir. I agree with that. Where I tried to distinguish ourselves, and I hope to do so clearly, because when I say the facts of the non-renewal on valid, sound --

Q I understand.

MR. SHAFER: -- not foolish grounds.

Q I understand that.

MR. SHAFER: I'm talking sound grounds.

Q I understand.

MR. SHAFER: Then, I say, the inquiry is over. And I say that is the only reason, because --

Q And you might win -- the District Court granted summary judgment in your favor, didn't it?

MR. SHAFER: Yes, sir. Two motions were filed, and we plead what we are now saying to the Court, that the complaint --

Q And the Court of Appeals disagreed, that this is not a summary judgment case. Right?

MR. SHAFER: The testimony -- yes, sir.

Q You may eventually win, so don't -- the only issue here is whether this is a case proper for summary judgment, isn't it?

MR. SHAFER: Yes, sir. And we say that it was appropriate remedy in this case, Mr. Justice, simply because --

Q We've been pretty strict, this Court has.

MR. SHAFER: Oh, yes, sir; I know that.

Q If there's a First Amendment, possibility of a First Amendment issue here, there should be a hearing, shouldn't there?

MR. SHAFER: Well, we do -- we say that that should not occur where valid, solid -- and, please, Mr. Justice, I'm not talking about foolish grounds; I'm talking about basic grounds, such as involved discipline and competency. When those are established as a matter of law, we say: What is the necessity of going to have a hearing to see if that ground has already been established, when it is pled and there's no dispute about it?

And this is the reason that we say, Mr. Justice, that a concurrent claim of First Amendment suppression, in the face of a valid right, is no longer need to be examined, because if you did so you'd get into the proposition of where it is a

situation of job security.

Q If we agree with your premise, --

MR. SHAFER: Yes.

Q -- we agree with your result, of course.

MR. SHAFER: Yes, sir.

Q That it's a valid ground. But that is something I don't imagine this Court will decide. I don't know. It would be very difficult, from this tangled record, to sort out the facts up here for the first time.

MR. SHAFER: Yes, sir. We think the pleadings are there, and the reason we feel a little more secure than if we had a record of some testimony or some affidavits, Mr. Justice, is that in this case we rely on Mr. Sindermann's own pleadings.

Q Well, Mr. --

MR. SHAFER: It isn't a question about that.

Q But, Mr. Shafer, --

MR. SHAFER: Yes, sir.

Q -- I notice that at that same place in the opinion to which Mr. Justice White referred you, the Court also says: Except -- following such procedures would be a needless waste of time.

And I gather your whole argument is that this is a case where following hearing procedures would be a needless waste of time; aren't you?

MR. SHAFER: Well, yes, sir. If I am correct in my

position, which I -- you see, I am at the opposite end of the spectrum.

Q Yes, well, I understand. Basically, as I understand, you are arguing that, in effect, Sindermann has pleaded himself out of the right to a hearing because he set up facts in a pleading which established the legal question, and you don't need a hearing on that.

MR. SHAFER: Insubordination.

Q That's what you say.

MR. SHAFER: Yes, sir.

Q And yet, apparently, the Court of Appeals did not think this was a case where, following such procedures would be a needless waste of time?

MR. SHAFER: No, sir. The court -- the Fifth Circuit said that we were guilty of sophistry, I believe is the term, Your Honor, and that when we -- they took the position that a forbidding of the exercise of First Amendment rights, and then, after a violation of the instructions, holding that to be insubordination, was simply a pretext -- oh, not a pretext, but was sophistry.

We don't agree. We think that they missed the mark when they didn't consider, to some length, the balance of the problem involved of going, at his convenience -- and we get back to the same problem, of 200 professors going also. How do you -- this must, we think, of necessity, be a matter

of control.

Q Is there anything in this record to show that when he went to his superiors, his superior said: You can't go because 199 others will go?

MR. SHAFER: No, sir.

Q Well, how does he get in this business?

MR. SHAFER: Well, I think/we are setting down on a principle which is being urged, as was in the Fifth Circuit, Mr. Justice, that you have to look at both sides of the possibility.

Q If you have followed the rule of the Fifth Circuit and gone back to the District Court, this would have all been over, one way or the other, by now, wouldn't it?

MR. SHAFER: Well, I suppose if we'd gone ahead and gone into the trial, that we would have been --

Q You would have had a whole, full record.

MR. SHAFER: -- either there or on the way up here, one of the two. We would have had to pull a --

Q So what you're really pushing for is for us to support the summary judgment?

MR. SHAFER: Yes, sir. I think it is appropriate --

Q That's all you're saying?

MR. SHAFER: Yes. And for the reasons which I hope to have made clear, because of the question of opposite end of the spectrum simply means you encourage anti-administration

activities, a fight with your superiors; those are the things, then, that place you in an excellent position if you -- if employment is terminated.

We don't think that the law is designed, Mr. Justice, to create dissension. We think it ought to be designed to --

Q Well, in order to -- I guess it would be the opposite of dissension if you had the absolute right to fire anybody for any reason without a hearing?

MR. SHAFER: We simply do not --

Q Is the only thing involved here, is a hearing?

MR. SHAFER: Well, we think it's something more than a hearing, Your Honor, --

Q Like what?

MR. SHAFER: Mr. Justice. Well, we think that the pleadings determine the case. The hearing thing, to us, goes out because, simply, we say the facts are --

Q Can't the pleadings --

MR. SHAFER: -- have been established.

Q Can't the pleadings be changed?

MR. SHAFER: No, sir.

Q Why not?

MR. SHAFER: Well, --

Q If it goes back to the District Court? As the Court of Appeals did.

MR. SHAFER: Did you say could they be, or are they?

Q If you had followed the decision of the Court of Appeals, gone back to the trial court for full evidentiary hearing, am I not correct the pleading could have been changed? Amended.

MR. SHAFER: I'm sure, with permission of the Court, no question about it, Mr. Justice.

Q Mr. Shafer, you've got me confused, or someone has. I thought the issue you were presenting in this case was the right of some kind of a hearing when a man's one-year contract is not renewed. Some kind of a hearing to establish evidence why it isn't renewed. Now, that's quite different from the terms of discharge and termination and so forth, that we've been loosely using.

I thought you had said at one point when you started that there's no discharge involved here, there's no termination involved here, it's merely a failure to renew, to extend, to make a new contract.

MR. SHAFER: That is correct, Your Honor. And if I have responded in other terms, I was afraid I was going to use the terms indiscriminately, and I notice that, apologetically, that some of the Justices have, too. So I only responded, as I've tried to -- we are talking about a non-renewal.

Q Perhaps you've led us into that to some extent.

MR. SHAFER: I'm sure that I have.

MR. CHIEF JUSTICE BURGER: I think your time is up,

Mr. Shafer.

Mr. Gottesman.

ORAL ARGUMENT OF MICHAEL H. GOTTESMAN, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I think there are more issues in this case than have actually revealed themselves so far.

But before trying to define what I think are three quite separate legal issues posed by this case, I think a couple of minutes more on the facts can be helpful.

Sindermann was a professor who had been teaching in the Texas schools for ten years, in Texas colleges. So that we don't have here what you have in the next case, the Roth case, a system where there is a tenure after so many years, and in cases before you on behalf of a probationary teacher who has been let go.

Sindermann had not only been teaching for ten years in a system which has no tenure, you never get tenure, but he had been the co-chairman of his department, so he was anything but a probationary employee.

Now, during his last year of teaching, that is the year which ended with his non-renewal, he had been active in two causes which were both very alive before the Texas Legislature.

Q Well, Mr. Gottesman, taking a phrase you used, "that he was anything but a probationary employee". In a non-tenured context, do you have such a thing as probationary employees here?

MR. GOTTESMAN: I suppose not. Everybody is one-year --

Q On a one-year appointment?

MR. GOTTESMAN: That's correct.

But what I meant by that was that where you have a tenure system, the arguments that are made in the Roth case for not providing hearing is that: Look, we need this time to look these fellows over, and we do give them the protections after we've weeded out those that we don't think are going to cut the mustard here.

And it's really only a short period of time until they're going to get their tenure; it's only seven years, in most States.

But all of those arguments have no application on, I'm saying, to its system. I haven't gotten to the legal argument yet.

The only point I wanted to make is there is no tenure system, but Sindermann is not somebody who is going through what we would customarily call a probationary period, where they were trying to decide whether or not he meets the criteria for some kind of continuing employment. He had been

teaching there already for ten years, and had been co-chairman of the department.

Q Mr. Gottesman, where is Mr. Sindermann now?

MR. GOTTESMAN: Mr. Sindermann has been, for three years, unable to obtain a teaching job. And, indeed, he has for most of that period been unable to obtain any employment even related to that. He has been working for a former Senator.

Q Working for what?

MR. GOTTESMAN: A former Senator from the State of Texas.

Q State Senator?

MR. GOTTESMAN: No, a U. S., a former U. S. Senator.

He has, as an affidavit in our brief reflects, applied to something like 105 or 110 colleges and universities, and been unable to secure another teaching appointment. And we suggest there is a relationship between his non-renewal and that fact, which I'll come to later.

In any event, Sindermann was very active in two causes: one was an effort to get tenure for the junior colleges of Texas. He was the president of the association of all of the junior college teachers in Texas, some 42 colleges. And he had been invited, he had been active throughout this period, writing letters and preparing speeches and making speeches. He had also been invited, in his capacity as president of the Texas Junion College Teachers Association, to testify when that

legislation was up for hearing before the Texas State Committee.

The other cause he was involved in was a community effort to turn Odessa College into a four-year college, from a junior college. And most of the people in the community were supporting that, as was Sindermann. But the Board of Regents of the college, who would have lost their positions if the nature of the college had changed, were opposing it.

As a result, on both of these issues, the tenure issue and the elevation of the college issue, Sindermann was aligned with groups who were supporting legislation which the college administrators were violently opposed to.

Both of those bills came up for hearings in the Texas Legislature, within two or three days of each other; Sindermann was invited by the members of the Texas Senate to testify on both.

He went to his superiors and he said, "May I have permission to go? The only way I can testify, since the Legislature only sits during class hours, is if I can go and get permission to be absent for one day on each occasion."

He offered to pay for the substitutes who would fill in for his classes, and the substitutes who were available were people who taught precisely the same courses at other hours in the day, so there's no question that they were fully capable of teaching the course.

They had agreed to substitute for him, and he was

prepared to pay them for doing so.

And the college said, "No, you can't go." And gave him a long, elaborate letter from the president of the college explaining why he couldn't go. The first reason, in one sentence, was: We pay you to teach, not to go lobbying.

But then they went on with: This isn't your job; you ought to have a legislative man in Austin who can do the testifying for your groups; and we're thinking about giving tenure, anyway, so there's no reason why you need to go and testify on it.

Quite plain, I think, that the college didn't want Mr. Sindermann to be testifying.

He did go, notwithstanding their refusal to grant permission. He did provide for substitutes to teach the classes; and he did offer to pay for the substitutes himself.

Notwithstanding that, a couple of weeks later he got advice from the college that he was not to be renewed for the following year. And when rendering that advice, they issued a press release, which they furnished a copy of to him.

The press release did not say he was guilty of insubordination, it did not say he was guilty of creating disharmony among his fellow colleagues. The press release recited the entire gamit of what we would call his First Amendment activities that year. He got involved in the committee to get tenure, and that was unfortunate, and it was

in opposition to the views of the Board of Regents.

He got involved in the effort to elevate the college, and that created a lot of dissension in the community, and that was unfortunate, and that was in opposition to the position of the Board of Regents.

In support of the latter cause, his name appeared on a "disgusting" ad, which appears at the end of our brief, and which is quite innocent. But his name was attached to a "disgusting" ad which supported the effort to elevate the college.

And though Sindermann had told the Board of Regents that his name had been put there without his permission, he was, nevertheless, responsible on the theory of guilty by association, because he had associated with the group who did publish the ad.

And then, at the end of the group, this list of what I would call reasons that were being given, they mentioned the two absences; and then they said: The Board of Trustees has been -- the Board of Regents has been furnished the above explanation of Mr. Sindermann's activities, and has expressed its diapproval.

And, indeed, on that same day, though the press release didn't say it, they voted not to renew him.

Sindermann then came to court. I should say, before he came to court, immediately upon being notified of his non-

renewal, he requested a hearing. He wrote a letter. He had, when he first had inklings that he was in trouble, he had previously requested that he be furnished the procedures which some internal AAUP documents provide for faculty members. Those had been refused him.

He was notified of his non-renewal, and without being afforded a hearing of any kind he wrote a letter saying, "Can I have a hearing?" He got no answer to that letter, and three days later he filed his lawsuit.

Now, the lawsuit which, it has been suggested, in effect, confesses a lack of claim on his behalf, does nothing of the sort. The lawsuit recites Sindermann's active participation in these two causes. It recites the fact that he was non-renewed. It alleges that the reason he was non-renewed was that he was taking positions contrary to that of the Board of Regents, on both pieces of legislation, and it attaches the press release as reflecting precisely what the complaint alleged, namely, on its face, the press release and the way it's written and the way it's structured, suggests that all of his activities played a part in the decision not to renew him.

The university then moved for summary judgment, and it did so on a ground which it is not arguing here today, it was the ground on which it sought certiorari. I should say the college. The college said: Since his contract has

expired, and since he has no tenure, we have no obligation to keep him or to hire him again for another year, and we can refuse to hire him for any reason whatsoever, including the exercise of his First Amendment rights.

And for that proposition they cited a decision of the Tenth Circuit, which held precisely that. It's the only case we've ever found that held that, but it did, and they cited that proposition in support of their motion for summary judgment.

The District Court apparently granted summary judgment for precisely that reason. Its opinion recites one, two, three, four, he has no tenure, he has no contract, he therefore has no right to reemployment, therefore the complaint should be dismissed.

And the Court of Appeals of course reversed that, quoting from a long line of decisions by this Court, which establish the proposition that a teacher or a public employee or anyone else, for that matter, cannot be denied even a privilege which the State affords, if the reason for its denial is that he's exercised his First Amendment rights.

Q Now, does this theory also apply to one employed as a teacher by a private college?

MR. GOTTESMAN: I would think not, since the -- well, that depends on whether the finance -- the public financing that the private college gets would make it State action. The

theory derives from the Fourteenth Amendment, which of course requires State action. And therefore you would have to find that the college's action constitutes State action before you can find that it's applicable to a private college.

Q What, Mr. Gottesman, if Mr. Sindermann had been an original applicant for employment by Odessa Junior College, if he had come with impeccable academic, intellectual credentials, with all sorts of fine letters of recommendation from the dean and the professors at Harvard, where he had received his graduate degree.

MR. GOTTESMAN: Right.

Q But if the hiring authorities at Odessa Junior College had said, Yes, we recognize you're superbly qualified to be a member of our faculty, academically, professionally, intellectually, your character also we grant is impeccable; but you've been making too many speeches on subjects we don't agree with you on, so we're not going to hire you.

Would he have had a cause of action?

MR. GOTTESMAN: Well, this Court has held that he would; I'm not sure I'd want to get involved.

A case called Whitehill vs. Elkins, 389 U.S. 54, in which this Court held that an applicant for employment by the college could not be refused employment because of his prior exercise of his First Amendment rights. To be more precise, because he wouldn't sign an oath assuring that he had not belonged

to certain organizations.

Q Yes. That's quite a --

MR. GOTTESMAN: Well, I don't want to get into it too far, because --

Q Well, I do want to get into that, because I think it tests your position in this case.

MR. GOTTESMAN: Yes, I --

Q My question, I'm not talking about a non-communist oath or any other kind of oath.

MR. GOTTESMAN: Yes, I understand. But this Court has said that the State cannot condition employment, either in the first instance or continued employment, upon someone refraining from exercising his First Amendment rights.

Now, I've got a case where the man's been teaching for ten years, and they said -- we say they said --

Q That his contract has expired, as it does each year.

MR. GOTTESMAN: That's correct. That's correct.

Q So each year he has to be rehired. And I'm asking simply about original employment.

MR. GOTTESMAN: Yes. I think if a university said to a teacher: You are someone we would hire, but for the fact that we don't like your political views. Or but for the fact that you support tenure; or but for the fact that you organized --

Q That you would like it to be a four-year college rather than a two-year college.

MR. GOTTESMAN: Right. Or -- well, yes, that's right. So --

Q Therefore we're not going to hire you.

MR. GOTTESMAN: Yes. Let me emphasize that. Under Pickering, this Court has suggested that there are limits within which a teacher must confine himself --

Q That was a dismissal case. That was a dismissal case.

MR. GOTTESMAN: Yes, that's right.

Q What I'm asking about is, since this is a case where his employment contract had expired; I'm asking you about the case of original employment.

MR. GOTTESMAN: Right. Well, all I can say is that this Court has decided three cases.

Q All right, let me have them.

MR. GOTTESMAN: Two of them on non-renewals, and a third on an application for employment. The two non-renewal cases are Keyishian and Shelton v. Tucker, both of which are cited in our brief. And the job application case is Whitehill v. Elkins. And though the facts are different and though we could argue whether a particular statement of a teacher is protected by the First Amendment, the principle of those three cases clearly stated was that the State cannot condition

employment, even though it be a privilege, upon a teacher's refraining from the exercise of his First Amendment rights.

Now, the reason I mention Pickering is that Pickering somewhat limits the scope of the right, the First Amendment rights available to a teacher. There are certain instances, Pickering at least suggests, where a teacher might not be allowed to speak and hold his job, whereas other members of the society might. For example, where his criticism would go to his immediate superior.

Q But Pickering, as I said, was a dismissal case.

MR. GOTTESMAN: Pickering itself was a dismissal case, that's right.

Q That was a dismissal case, and you properly identified the question on which we granted certiorari in this case, a question to which Mr. Shafer didn't really address himself, and I think that's the question on which we did grant certiorari in this case. And that's the reason I asked my question about original employment.

MR. GOTTESMAN: Right.

Now, I can only say these things about it: No. 1, every single brief filed in the Roth case, which you're going to hear next, which includes the State of Wisconsin, the State of California, the State of Massachusetts, the City of New York, and a brief filed on behalf of, quote, "Almost all the colleges and universities in the United States", end

quote, concedes this legal issue. Every single one of them says: We absolutely concede that a college cannot refuse to renew a non-tenured teacher for another year. Because he has exercised his First Amendment rights.

Q What impact does that concession suggest for us?

MR. GOTTESMAN: Well, that concession, I think, did not bind this Court, obviously, this Court can say they're all wrong. What I'm suggesting is a long and continuing, unbroken line of decisions by this Court had said something which these briefs all reflect; namely, that even -- and,you know, the person who's an applicant in the first instance, I think, is a somewhat different case than this. This is a man that's been teaching here for ten years.

But the cases clearly establish that the man who has been teaching here for a period of years, on a one-year renewable contract each time, may not be told: This time you shall not be renewed because we don't like what you're saying.

That, for the purposes of determining his protected rights under the First Amendment, his status is no different than that of the teacher in Pickering.

Now, to be sure, that doesn't mean that he can say anything he wants. It means -- but are we talking about that area of substantive statements which Pickering says the teacher is allowed to make? And our argument is that it has already been decided by this Court several times, that a teacher

can't be denied renewal for that reason.

Q Mr. Gottesman, --

Q May I ask you -- go ahead.

Q -- conceding that there is a difference, obviously in fact, between one who has been teaching for ten years but who teaches on a year-to-year contract, and an original application; what is the difference, from your point analytically?

MR. GOTTESMAN: Well, I start with the proposition that even the applicant can't, I mean, you know, so analytically it shouldn't make a difference. But there is a -- it seems to me there's an obvious difference. If you start at one end by saying the man who has in fact got tenure -- whatever that means -- can't be dismissed; can't be dismissed, as distinguished from non-renewed. But the man who is an applicant in the first instance isn't -- you know, does not have this same right. Let's assume that hypothetically.

This man obviously falls somewhere in the middle. Now, what is it that has led this Court to say you can't be dismissed for exercising your First Amendment right?

What's led this Court to say that is that society has a very important interest in hearing what teachers have to say about their colleges and universities, and if we were going to allow colleges and universities to dismiss people because of what they say, then we're going to silence the people who can most benefit society by advising us of what's

wrong with our colleges, how they can be improved.

Q Mr. Gottesman --

MR. GOTTESMAN: Now, that consideration is equally applicable to Mr. Sindermann.

Q Mr. Gottesman, if we follow you to the bitter end, Mr. Sindermann wins his point, doesn't he? i.e. that you now have tenure in Florida.

MR.GOTTESMAN: I'm sorry. i.e. that --?

Q You now have tenure in Florida.

MR. GOTTESMAN: Oh, absolutely not. You have the right not to --

Q I mean in Texas. I mean in Texas. Excuse me.

MR. GOTTESMAN: You now have the right not to be fired for exercising your First Amendment rights.

Q That's tenure.

MR. GOTTESMAN: That's not -- I've always understood tenure to be something more than simply giving you what the First Amendment gives you. Tenure says you can't be fired for any reason whatsoever, unless the college undertakes to establish that you have been guilty of some reach of their regulations, or rules, or obligations.

Q Well, is your relief you want a hearing?

MR. GOTTESMAN: Does he want a hearing? Absolutely. But it's nott he kind of hearing that would be a tenure hearing, and that's what I'd like to turn to in the remainder of my time.

Q Before you do that, Mr. Gottesman, let me ask you this: We'd both agree, I'm sure, that writing articles or making speeches are First Amendment rights.

MR. GOTTESMAN: Absolutely.

Q Suppose when he applies, they send back a letter to him, so that there's no dispute, to say: We are impressed considerably with your academic credentials, but on the information we have you make too many speeches and write too many articles, and for that reason we do not want to employ you.

Do you think he has got a right to a hearing on that issue?

MR. GOTTESMAN: If he's never worked there before?

Q Yes.

MR. GOTTESMAN: Oh, I think that I'd have to get into the analysis of the hearing right to explain why I think he may not have a right to a hearing on that.

Q All right.

MR. GOTTESMAN: There are, as we see it, two completely different sources for the right to a hearing of a non-tenured teacher. One emanates from the First Amendment, the other from the procedural due process clause.

This case and Roth, both pose, at least arguably, First Amendnemtn considerations. They seem to have been implicated in the decision not to renew.

This Court has repeatedly recognized that -- assume with me for a moment that this teacher does have this First Amendment right. This Court has repeatedly recognized that academic freedom or the exercise of First Amendment rights can be chilled if the State can come along and wallop somebody to the point where he knows that can happen, and he says, "Well, I don't want that to happen to me; I am going to refrain from the exercise of my rights."

And because of that, this Court has recognized, as it sometimes put it, that the freedoms of expression must be surrounded by necessary bulwarks or buffers, procedural protections which will eliminate the chilling effect which would otherwise exist in the exercise of such right.

Now, in the case of a university teacher who does not have tenure, if the college has the right to deny him renewal, with neither a statement of reasons nor a hearing, then every teacher says to himself: Well, if I say something they don't like, all they've got to do is say, Okay, fellow, next year no contract.

Now, the impact of that on teachers, unless they're extraordinarily brave and not concerned about whether they continue their employment or not, the impact of the knowledge that the college need provide neither a statement of the reasons nor a hearing is that teachers are going to say: I better not say anything that they're not going to like, because if I do

I'm not going to be working here next year.

Now, all of the amicus briefs in Roth are very sensitive to this point, and they acknowledge that you do need procedural protection, because otherwise the First Amendment rights will dry up and vanish. But they say, Look, there is a procedural protection. If the college fires the man, and if he believes that the reason he was fired was because of things protected by the First Amendment, he can bring a lawsuit under Section 1983, and if he wins he'll get back.

Well, we say, and we've briefed this extensively, that availability of that lawsuit does not remove the chilling effect. There are a number of reasons for that.

No. 1, if they don't tell the teacher why he's been fired, he doesn't know that he's been fired because of his freedom of expression. He's got to bring a lawsuit just to find out. In discovery he'll find out whether or not he's got the right to proceed with his lawsuit.

Q Well, now are you talking about a case where he is fired, to use your word, or non-renewal?

MR. GOTTESMAN: I'm talking about a non-renewal case. And I'm assuming, for the moment, because that's our first point, I'm assuming that a non-renewed teacher, if the reason for his non-renewal is the exercise of his First Amendment right, has in fact suffered a constitutional violation, and is entitled to reinstatement.

So that the question comes: How do you enforce and protect that First Amendment right? Is it sufficient to say that after he's fired he can bring a lawsuit? Or is it necessary in order to make those rights meaningful and not to chill academic freedom, to say that he's got to have a buffer between his speech and the moment of firing; a procedure in which the First Amendment considerations will be aired and debated, and the facts will be gathered, and he will know that within the academic community, before the knife falls on his neck for what he says, there will have been a hearing in which his position will have been heard, and the First Amendment considerations will have been explored.

Now, we suggest, and we've detailed it in the brief, and I'm not going to have time to go through the full analysis. We suggest that simply having the right to bring a lawsuit after you've been fired, when you may not even have been told why you've been fired, and I used "fired" to mean non-renewed, I have to make the same concession that Mr. Shafer did; when I used "fired" I mean non-renewed in this case.

Simply having the right to bring the lawsuit afterward is not an adequate protection for First Amendment rights. Teachers will not regard it as sufficient protection to embolden them to speak, when they know that --

Q Well, it would be adequate if they told the non-renewed teacher that he was fired for exercising his

First Amendment right, though?

MR. GOTTESMAN: Well, it would be adequate in the sense that if the teacher could afford to sue and could afford to be unemployed until he wins, because those are some of the prospects he faces, it would then be adequate. But, you see, the problem --

Q But if the university said: Yes, we fired you for that reason; we're sticking to it.

His only alternative is to go to court, then.

MR. GOTTESMAN: That's right. But the hearing provides a buffer whereby he may talk them out of it.

For example, in this case there's no evidence whatsoever that the college was aware that the First Amendment had any implications here. They seem to have proceeded,as the press release is awfully candid -- they seem to have proceeded without regard to the fact that they might have some constitutional obligations here.

Q What do you think the remedy -- what do you think was going to go on in the District Court after this remand?

MR. GOTTESMAN: It depends what it says.

Q Well --

MR. GOTTESMAN: You mean if it was remanded in the terms that the Fifth Circuit suggested?

Q Well, you figure you won your case in the Court of Appeals?

MR. GOTTESMAN: Well, there will be a remand to trial.

Q For a trial?

MR. GOTTESMAN: Right. A trial under the Fifth Circuit's decree that there's got to be a trial on the right to a hearing. We don't think that's particularly wise.

Q Well, I know, but I would think you would be arguing that the District Court would have to say that your client may not be terminated until there's been a university hearing.

MR. GOTTESMAN: Well, the problem is, a hearing at this point, the hearing doesn't do Sindermann very much good. The people who are going to make the decision have already decided it before they gave him the hearing.

Q That's right.

MR. GOTTESMAN: Our point is, you've got to have a hearing before they make the decision.

Q Well, then --

MR. GOTTESMAN: And our point is that since they denied Sindermann the hearing to which we say he was entitled, he's entitled to reinstatement and back pay, and we say in a large number of cases of this Court.

Q Without regard of what the facts would show, even though the university could show that he was not fired for his First Amendment --

MR. GOTTESMAN: That's right. That's right.

This Court has decided a number of cases, of which I think the most recent is Greene vs. United States, where there is a statutory procedure which has been violated. And then the government says, Well, look, we don't have to put him back. At least let's go through the procedure now and find out if we had substantive grounds to justify what we did.

And this Court has said: No, you didn't give him the hearing when he was entitled to it, and when it would have been meaningful; therefore, your action is null and void, and it must be set aside. You have to put the man back, and then if you want to get rid of him, you have to give him the hearing that he's entitled to.

Now, I'd like in my remaining five minutes to get to what is the wholly separate sources that we say are the right to a hearing.

Our first point stems from the First Amendment. This one stems from the procedural due process concepts, which have been enunciated by this Court in a number of recent decisions.

This Court has said that where the State proposes to injure important interests of one of its citizens, it must first afford them a hearing, or some form of procedural due process, unless the individual's need for -- or the help that he will derive from the hearing is outweighed by the State's

interest in summary adjudication.

Now, the teacher's interest, when he's a teacher like Sindermann, I think are clear. When he's denied renewal, No. 1, he loses his sole source of income. This Court has many times said what the significance of that is.

No. 2, he loses the entire professional relationship that he's developed with his colleagues at this campus.

No. 3, he confronts a problem which is unique, I think, to teachers. Almost invariably, if he wants to stay in his career, he's got to move to another city. Because only one college in Odessa, Texas, if he's going to teach somewhere else, he's got to move. That means he's got to sell his house, he's got to move, he's got to buy a new house, make new friends. His entire life is changed as a result of a non-renewal.

And No. 4, the evidence -- and we've got it all set out in our brief -- is very substantial that non-renewal just doesn't mean that you don't teach at this college; it means that you don't teach again anywhere.

We're now in a period, for the first time in the last two or three years, and it's going to continue, of a growing teacher surplus in this country, because of the decline in the number of people who are -- the total population of college age.

Nobody hires a teacher with a black mark, when there's

another teacher who doesn't have one. Sindermann has been trying for three years to get a teaching job. Roth went for a year without a teaching job. In another case pending on cert, the Orr case, he went for a year and a half and didn't get a teaching job.

The fact is when you're non-renewed, your career very likely may come to an end.

Q Are you saying, Mr. Sindermann, that there must be a hearing whenever there is a non-renewal, regardless of whether reasons are assigned or not?

MR. GOTTSMAN: Yes. What we're saying is that you must do, our concept of the procedure is, if someone is recommending that you be not renewed, that you be advised of the recommendation, and that you be advised that if you wish you will be told the reasons and afforded an opportunity to be heard.

Now, one thing I want to emphasize, the main argument made by all parties in Roth as to what's wrong with this proceys, is that it's going to take away the college's discretion which they now have in making decisions, and that's -- because they seem to think that the purpose of this hearing will be to force the college to prove the validity of the reasons that it has assigned for the decision.

And we want to emphasize that the hearing, as we conceive it, is not a hearing in which the college must prove

the validity of its reasons. The purpose of the hearing is literally what the due process clause says, to give the teacher an opportunity to be heard. That is to say, the college must tell him in sufficient detail so that he knows what he's responding to why they propose to non-renew him.

Having told him that, he then is afforded an opportunity to present whatever evidence he has for his cause, to persuade them otherwise.

Now, there's no evidence of proof here, and no finding to be made, the college will ultimately make the decision, just as they would have before. And wherever they had discretion, they still have it.

But at least he would have had the benefit of putting before them those facts and those arguments which he thinks could persuade them to go the other way.

Q You wouldn't think that after a hearing such as that there would be any room for judicial review in those cases?

MR. GOTTESMAN: Only as it now exists. The Constitution does prescribe certain limited areas where --

Q And your client, in fact, he wasn't hired -- fired or discharged or not renewed for Reason A, but actually for Reason B, which exists now?

MR. GOTTESMAN: That exists now, and it would exist then.

I might say we filed the yellow brief in the Roth case, in which we explored all the counter arguments, because that case was accelerated, it was only filed, I think, last Friday, and the Court may not have had a chance to read it, but it's the only document, I think, that systematically tries to respond to the argument thrown up against hearings as being burdensome and so on.

And we urge the Court to see that.

Thank you.

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

Thank you, Mr. Shafer.

The case is submitted.

[Whereupon, at 1:47 o'clock, p.m., the case was submitted.]