In the

ORIGINAL

Supreme Court of the United States

VALLEY FORGE CHRISTIAN COLLEGE, Petitioner	)	
v.	)	No. 80-327
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC., ET AL.	)	

Washington, D. C.

November 4, 1981

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Wednesday, November 4, 1981

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

APPEARANCES:

C. CLARK HODGSON, JR., ESQ., Philadelpia, Pennsylvania; on behalf of the Petitioner.

REX E. LEE, ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C.; on behalf of Federal Respondents supporting Petitioner.

LEE BOOTHBY, ESQ., Berrien Springs, Michigan; on behalf of the Non-Federal Respondents.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Valley Forge Christian College against the Americans United for Separation of Church and State.

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

ORAL ARGUMENT OF C. CLARK HODGSON, JR., ESQ.,
ON BEHALF OF THE PETITIONER

MR. HODGSON: Mr. Chief Justice, and may it please the Court, my client's petition to this Court raises for review the question of whether or not taxpayers who are unable to meet the criteria of Flast against Cohen and any other Article III decision of this Court will nonetheless be able to challenge the transfer of federal surplus property.

This, in short, is an Article III case. It is not an establishment clause case. The constitutional and statutory context is outlined by Article IV, Section 3, Clause 2 of the Constitution, which is called the property clause. Under that clause Congress has the power to dispose of territory or other property belonging to the United States. The Federal Property and Administrative Services Act of 1949 was enacted pursuant to that power, and creates a comprehensive program for federal property disposal, particularly property which is surplus, that is, property no longer needed by the United States.

The statute confers upon agencies of the executive branch a variety of options for property disposal, including the sale or lease to health or educational institutions. Sale may be for cash, but the Act requires that the Secretary consider any public benefit accruing to the United States as a result of the sale, and an educational institution may be entitled to a reduction in the purchase price computed on the basis of benefits which may accrue to the United States for the use of the property by that institution. The regulations refer to that reduction as a public benefit allowance.

Now, for the first time in the 32-year history of this Act, a program over which Congress has given exclusive if not plenary power under Article IV is subject to attack and the intervention of the judicial process.

This particular transfer, the Valley Forge General Hospital, originally about a 181 acre tract slightly outside the city of Philadelphia, was acquired by the government in 1942. It served the military as a hospital facility for nearly 30 years. In 1974, by order of the Secretary of Defense, the facility was closed. The Secretary states reasons of declining work force and economy as the reasons for the closure of the facility.

As is required by the Federal Property and Administrative Services Act, the following four steps took

place. First, the military departments determined that it was excess to their needs and the needs of the United States Coast Guard. Secondly, Congressional clearance was sought and obtained from the Armed Services Committee of both Houses. Thirdly, the General Services Administration, after notifying all other Federal agencies and all other branches of the government of the availability of this facility, reported that there was no need, and it was declared under the statute surplus to the needs of the federal government.

Finally, it was assigned to the Secretary of the Department of Health, Education, and Welfare for disposition to a health or educational institution. My client, Valley Forge Christian College, applied for a portion of the tract, and was ultimately selected to receive 77 acres and some personal property. The value of the surplus facility was $577,000.

The government, in connection with this sale, allowed a 100 percent public benefit allowance based in part upon my client's promises and representations to continue the broadening of its offerings in the arts and humanities and otherwise strengthen its academic position, conferring benefits upon members of the public.

In August of 1976, a deed was executed by the government transferring the real estate to my client. The deed included restrictive covenants which forbid the college

from utilizing the property for anything other than educational purposes and some other restrictions, and included in the government the right at any time within 30 years to revert the title back to the Department in the event of a breach of these conditions.

In the fall of 1976, as a result of a news release that was issued following this transfer, Americans United, the organization, and four paid employees on its executive staff filed a lawsuit in the district court seeking a recision of the transaction, thereby effectively ousting my client from its college campus.

After limited pretrial discovery, the district court dismissed the complaint, finding that none of the plaintiffs could comply with the standing criteria of Flast against Cohen, and further holding that their complaint alleged no more than a generalized grievance about the conduct of government.

The United States Court of Appeals unanimously agreed with the lower court's finding that these taxpayers could not meet the Flast criteria, but nevertheless reversed. The majority opinion of the Third Circuit launched an unsupportable test for establishment clause standing, wherein standing is now to be predicated upon the violation of the shared, individuated right that each citizen has to a government that obeys its Constitution.

QUESTION: Did the Third Circuit make any effort to distinguish Frothingham against Mellon?

MR. HODGSON: Not really, Your Honor. The Third Circuit spent most of its time on Flast against Cohen and tried to steer its reasoning around Flast. I think it finally concluded that under Flast, or this Court was bound by limitations on the pleadings when it decided Flast. Had the fact situation been presented to this Court that was before the Third Circuit, namely the presence of citizen separationists, the Flast Court would have decided that differently. That was the general approach.

QUESTION: Do you think that the Third Circuit opinion would extend so far that if B is the subject of a wrongful arrest under the Fourth Amendment, A could complain about it?

MR. HODGSON: Yes, I do, Your Honor. I agree that the words of the opinion appear limited to the establishment clause, but I think that the potential reach of this decision, the implication of a personal right in every citizen to enforce the Constitution at his or her demand is limitless.

QUESTION: That would include a challenge, do you think, to the recently approved sale of some aircraft to Saudi Arabia if they didn't like the foreign policy?

MR. HODGSON: I would say that I could envision a

plaintiff, if this is Your Honor's question, making that challenge. I am a little lost to think of what provision of the Constitution, but I could see that easily. I think it is limitless.

QUESTION: Mr. Hodgson, I expect you may already have covered it, but I didn't catch it.

MR. HODGSON: Yes, sir.

QUESTION: Was this an outright transfer to your client?

MR. HODGSON: I am sorry, I don't know what you mean by outright.

QUESTION: The property that you received.

MR. HODGSON: Yes.

QUESTION: I mean, this is a fee simple transfer, is it?

MR. HODGSON: Well, yes, it was fee simple transfer, but it had conditions, restrictive conditions, including a reverter clause. The college is --

QUESTION: Well, is there any rental arrangement or anything like that?

MR. HODGSON: No, Your Honor. The college is obliged to live up to the representations made in its application for the property for a period of 30 years, and any time during that 30-year period if the government determines that there is non-compliance with those

representations, it may enter and revert the title.

QUESTION: Thank you.

MR. HODGSON: The law of this country on standing until the radical reconstruction of this standing test by the Third Circuit related to the finding of a personal stake or injury in fact. That has been the construction of Article III by this Court. As to taxpayer standing, Flast has been the first and, until that opinion, the last word.

As Your Honors will recall, Flast allowed a taxpayer to challenge on establishment clause grounds a Congressional exercise of the taxing and spending power of the Constitution, the Article I, Section 8 powers. It was specifically limited by the text of the opinion to those circumstances and to that type of a statute.

This Court has strongly and consistently resisted any effort to expand Flast on taxpayer basis beyond Article I, Section 8, the taxing and spending power. Specifically, in Schlesinger, this Court rejected a taxpayer's challenge that was brought pursuant to the incompatibility clause under Article I. The same could be said of Richardson wherein executive action was challenged by a taxpayer pursuant to Article I, Section 9, Clause 7.

Here, of course, these taxpayers seek still a further run around Flast and say that the property clause, Article IV, and Congressional action taken pursuant to that

clause should become the basis for standing.

QUESTION: Mr. Hodgson, are there any citizens who in your view would have standing to file a suit to challenge this action --

MR. HODGSON: Yes --

QUESTION: -- in this case?

MR. HODGSON: Oh, excuse me. Although I would call them persons rather than citizens to get away from the concept of citizen standing, yes, I can imagine a number of Article III type injuries which would give a plaintiff standing to sue.

For example, an applicant for the property that was denied the application. In other words, if Valley Forge had been preferred over some other applicant, that individual could bring an action to challenge --

QUESTION: How about people living in the near vicinity?

MR. HODGSON: Adjoining landowners, I think, if they could establish an injury that was causally related to their estate, could equally bring a lawsuit.

QUESTION: Wouldn't you still have the tax spending problem? You would concede, thouugh --

MR. HODGSON: No, Your Honor, I --

QUESTION: That they could bring the suit?

MR. HODGSON: I would say that you don't have the

taxing and spending power because that is Article III injury. It is injury in fact. There is aggrievement independent of Flast, and you only need Flast and taxpayer standing where there is an Article I challenge. And of course any category of Article III plaintiff would have the right to raise the establishment clause question.

QUESTION: And didn't we say either in Schlesinger or in Reservists that the fact that there is no one that has standing doesn't necessarily mean that we must create standing for someone to sue?

MR. HODGSON: Yes. It said it is not a reason for granting standing. I think it addressed this very question, and Your Honor, it was both in Richardson and Schlesinger.

QUESTION: Mr. Hodgson, let me follow up on Justice O'Connor's question if I may. The adjoining landowner standing --

MR. HODGSON: Yes.

QUESTION: -- on review would depend on some kind of adverse -- not the mere fact they were an adjoining landowner.

MR. HODGSON: No, no, that adjoining landowner would have to show, for example, that the utilization of the property would impact in some manner on his rights as an adjoining owner. Maybe a sewage system would be changed in some fashion. I can't --

QUESTION: I see. And the other applicant for the property, I can see the theory there. Of course, if the other applicant were also a religious institution, I suppose they wouldn't have standing there.

MR. HODGSON: No, I think they would. I guess the question then would be whether under -- on the merits, whether the successful applicant was or was not a disqualified institution under Article I.

QUESTION: But if the theory of the claim is that all religious institutions are disqualified --

MR. HODGSON: Well, of course, that is not what -- at least not how this Court has interpreted Article -- or the establishment clause. Pervasively sectarian seems to have been disqualified, but not all religious institutions.

QUESTION: Let me put the question just a little differently. Instead of it being a property disposition, supposing the Secretary of HEW just decided to give your client a million dollars.

MR. HODGSON: Yes.

QUESTION: Would anybody have standing to challenge that?

MR. HODGSON: Well, I assume that a gift of funds --

QUESTION: Right.

MR. HODGSON: -- would be an action, a

Congressional action, I assume, executive action taken purusant to the taxing and spending power.

QUESTION: Right.

MR. HODGSON: And so a taxpayer most assuredly would have standing to challenge.

QUESTION: You would say that if it were a gift of funds, because it is the spending power, that there would be standing.

MR. HODGSON: Yes, and Flast so holds.

QUESTION: Economically, it is hard to see much difference between the two. I understand the theory, but --

MR. HODGSON: Well, I think that there is a world of difference for the reasons that this Court has set forth, notably in Warth against Seldin and Simon versus Kentucky Welfare Rights Organization, because you have the theory, you have attenuated injury when you have a plaintiff of this kind.

If you were to say $577,000 worth of real estate is the equivalent of $577,000 worth of cash, and you are saying the government should have taken the cash, for example, instead of the real estate, that assumes an awful lot. First of all, the government would have to maintain the property, and the government's brief says it was $250,000 a year. Secondly, the college clearly indicated on the record it was going to move. It may well have moved to

a different location, used tax -- federal assistance funds, such as those in Tilton versus Richardson, to support a building. It would have raised a building fund. Contributors would have taken tax deductions. That is all cash.

QUESTION: Well, I can see on the merits that is all relevant, but just in terms of the right of the individual who objects to the transaction, the standing of the person, it seems somewhat hard to differentiate between the two other than you say, well, one is a spending power and the other is a property disposition.

MR. HODGSON: Well, if you are saying that conceptually this is a difficult area of the law, I agree, Your Honor.

QUESTION: I suppose you would say that if they are indistinguishable, that Flast ought to be overruled.

MR. HODGSON: I have great reservations about Flast, Justice White. I know that other Members of the Court have expressed those reservations. I find it difficult --

QUESTION: Well, what if in the million dollar case the government specified that, please use the million dollars to buy a piece of property and use it precisely as it is described in this case?

MR. HODGSON: It is still the use of the taxing

and spending power.

QUESTION: But that makes it even closer, doesn't it?

MR. HODGSON: A little. The reason that I say that is that these are the sort of grants that this Court has considered in Tilton, Hunt versus McNair, Lemon, where you have the actual transfer of funds and then the utilitzation by the institution --

QUESTION: No, you interrupted.

MR. HODGSON: I am sorry.

QUESTION: On your adjoining landowner case --

MR. HODGSON: Yes.

QUESTION: -- why would the adjoining landowner, just because his drainage system is being damaged, have any standing to attack the transfer on the First Amendment ground?

MR. HODGSON: Well, assuming that there is an Article III injury, I just --

QUESTION: Well, there is an injury, all right.

MR. HODGSON: Okay. If there is an Article III injury, this Court has said in Sierra Club and elsewhere that once an individual has standing to sue, he may assert basically any claim, including the public interest, including a citizen's interest. You said that in Sierra and other cases. So that once the threshold is crossed by an

Article III plaintiff, he has a veritable panoply of issues that he can raise and argue, and which the Court can --

QUESTION: Well, there are some cases to the contrary, too. But that is your theory, anyway --

MR. HODGSON: Yes, Your Honor.

QUESTION: -- on the adjoining landowner.

MR. HODGSON: Yes, Your Honor.

QUESTION: Are there not some cases in which, in effect, cash grants made to religious colleges have been sustained?

MR. HODGSON: Yes. Tilton, Roemer, Hunt against McNair, are all college education grant cases, where money, pursuant to the taxing and spending power, is appropriated and delivered to the institution for the use -- for secular uses, not for sectarian uses.

QUESTION: That is a question on the merits, not standing.

MR. HODGSON: It goes to the merits, Your Honor. It does not go to the question of standing.

The line of attack generally taken by the Americans United in this case really relates to the merits, claims that we are pervasively sectarian, claims that we seek the perpetuation of formalism to this Court, claims that this entire transaction is a sham, that the statute is really an effort to bootleg federal surplus property around

the establishment clause and into the hands of a disqualified, religiously sponsored institution are all the kinds of claims which go to the merits, and as this Court has said repeatedly, the standing inquiry focuses on the litigant, not the issues which he seeks to have litigated, and in Warth, very directly, standing in no way depends on the merits.

Thank you, Your Honors.

CHIEF JUSTICE BURGER: Mr. Solicitor General.

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF FEDERAL RESPONDENTS SUPPORTING PETITIONER

MR. LEE: Mr. Chief Justice, and may it please the Court, I agree with Mr. Hodgson that there probably are other plaintiffs who could bring the suit in this case, but it is correct, as he also pointed out, that this Court in Schlesinger said that the lack of a better plaintiff does not mean that this plaintiff has standing, and indeed it is worthy of note that in the companion case, United States versus Richardson, this Court went one step further, and said that the fact that there is not a plaintiff who has standing in the traditional Article III sense is a good indication that it is the kind of case that ought to be left to the political branches of government rather than to the judiciary.

It is quite clear that since these plaintiffs

allege a harm that cannot be differentiated from the hundreds of millions of other American citizens, and since they do not fit the Flast versus Cohen standards for taxpayer standing, the only way that the judgment of the Court of Appeals can be sustained is to uphold the rationale of that court, which was that the establishment clause creates in each citizen a personal constitutional right to a government that does not establish religion.

There are two basic theories on the basis of which that could be accomplished. One is the one that Mr. Hodgson suggested, which is that any citizen has a right to enforce any provision of the Constitution, and frankly, it would be difficult if the right were limited to the establishment clause to distinguish it from many other provisions of the Constitution, but the approach of the Court of Appeals appears to have been to limit it to establishment clause to distinguish it from many other provisions of the Constitution.

But the approach of the Court of Appeals appears to have been to limit it to establishment clauses. As I say, it has been difficult to do that, but that appears to have been the approach of the Court of Appeals.

We would urge that even that approach represents neither good law nor good constitutional policy for several reasons. One is that it would violate this Court's

consistent teaching which gives more deference to the judicial article of the Constitution, Article III, that the fundamental aspect of standing is that it focuses on the party seeking to get its complaint before a federal court, and not on the issues that he wishes to have adjudicated.

More specifically, requiring the precise overruling of Doremus versus Board of Education, which was an establishment clause case brought by a citizen and dismissed because of the fact that there was no standing. Doremus has been cited with approval both in Flast and also Schlesinger.

Perhaps most important of all, the rulings of this Court requiring first that the plaintiff be affected more narrowly than members of the total populace, and second, that standing focused on the plaintiff rather than on the nature of the claim that the plaintiff is bringing lies right at the heart of basic constitutional principles.

The feature of our constitutional system that distinguishes courts from the other two branches of government is that courts perform their law interpretive function, including declarations of constitutionality, only in cases or controveries, and interest of the kind that these plaintiffs are pressing in this case, an interest in seeing that a particular philosophy of government prevailed, can be carried to the elected branches, and those branches

are free to entertain it.

QUESTION: Mr. Lee, wouldn't those same arguments have called for a different result in the Flast case? And aren't you really saying, then, that Flast was incorrectly decided?

MR. LEE: I agree with what Mr. Hodgson said in that respect. Flast can be distinguished. At least Flast presents only a -- if not a principle, at least a practical departure from the general proposition that there is no general authority in private citizens performing the function of Attorney General, because of its limitation to Congressional action and taxing and spending.

I would shed no tears if Flast were to be overruled.

QUESTION: And yet, Mr. Solicitor General --

MR. LEE: Yes.

QUESTION: -- Americans United, I take it, would have had standing had rather than a transfer of property there had been a transfer of $577,000 of cash, would it not?

MR. LEE: Yes. Under Flast, if done by Congress.

QUESTION: Well --

MR. LEE: Under the --

QUESTION: -- isn't this property transfer sort of a Congressional act?

MR. LEE: Well, this is an executive branch

transfer pursuant to --

QUESTION: The Congressional statute.

MR. LEE: -- so if you had a Congressional action pursuant to the taxing and spending clause, then your statement is correct. Yes, Your Honor.

QUESTION: Really, the only distinction here is that we have real property rather than cash.

MR. LEE: That is correct.

QUESTION: Under Doremus, both would have come out the same say, would they not?

MR. LEE: That is correct. Under Doremus, both would have come out the same way, and you really are at a Flast kind of crossroads. You either maintan that holding that is not entirely principled but at least practical and workable. A principle which this Court has cautioned on at least two occasions represented only a slight departure from Frothingham versus Mellon, or if you say that there is no practical distinction, economic distinction between a conveyance of money on the one hand and a conveyance of property on the other hand, then you can forget about Flast versus Cohen, you can forget about the taxpayer standing. You don't need it any more, because if citizens have standing, then any property owner also or any taxpayer will also have standing.

And that really brings me to the fundamental

reason that that would be a bad idea, to decide the case that way. In contrast to the political branches of government, which are perfectly free under the Constitution to entertain any advocacy for a particular form of government, philosophy of government that is put to them, the tradition ever since Marbury versus Madison has been that courts decide only those issues as they arise in actual lawsuits brought by persons who are injured in fact, and on at least seven separate occasions, reaching all the way back to the early parts of this century, this Court has said that that injury in fact means an injury more specific than the effect that is felt by the populace as a whole, and in our separation of powers, check and balance constitutional system, the most effective check on judicial power is the case or controversy limitation.

The Court of Appeals suggested two possible bases for distinguishing this case or for distinguishing establishment clause cases from other cases. One was that the establishment clause does have or is a guarantor of individual liberties, and it is true beyond doubt that it can be, but far from being an argument in support of the Court of Appeals decision, it is squarely against it for this reason, that in those instances where you do have that kind of individualized harm, then that gives you a plaintiff with traditional Article III standing, and where you don't

have it, then what you have is, as this Court said in Richardson, the kind of case that by definition ought to be handled by the Article III -- ought to be handled by the Article I or the Article II branches.

The second proposition that was set forth by Judge Rosen, whose vote was essential to the majority in the Court of Appeals decision, was this matter that has already been discussed, is there a better plaintiff, and this Court made it very clear in both Richardson and Schlesinger that that was not a relevant concern. To the extent it is relevant, it cuts the other way.

Finally, setting aside establishment clause cases as being something of a special -- would give -- would unduly degrade the judicial article of the Constitution, which should have an independent life of its own, because to the already complex and difficult issues that surround standing, we would be visiting another layer of complexity, a layer of complexity that would incorporate into the Article III inquiry the question of what is an establishment of religion, presumably including the three-part test that this Court has struggled so mightily with over the past decade.

QUESTION: Is there anything in the Constitution, Mr. Solicitor General, that would prohibit Congress from enacting a statute that no property and no money would be

transferred or granted or given to a religiously controlled college or school, and thus cut off any power in the executive branch to make such a transfer as was made here?

MR. LEE: I would be reluctant, Mr. Chief Justice, to give a categorical answer to that until I have thought it through a little. My immediate temptation is to say no, and yet if there were a categorical disqualification of religion as religion from -- solely because they were religious groups --

QUESTION: From receiving it for nothing.

MR. LEE: Receiving it for nothing, then clearly where there was not adequate compensation, then Congress would --

QUESTION: That, of course, would mean, then, that that would be a modification in effect of the decision of this Court, I think, in the Tilton case

MR. LEE: Oh, yes. Oh, yes.

QUESTION: They couldn't make grants to Catholic colleges as were involved there.

MR. LEE: That is correct. That is correct. And that brings up --

QUESTION: Does that relate to -- I assume that relates to your argument --

MR. LEE: Indeed it does. Indeed it does.

QUESTION: -- as to the political question.

MR. LEE: Indeed it does. And it bears out also the point that this Court has stressed on a number of occasions, stated first by Justice Holmes a good part of a century ago, that there are also, in addition to protections that are built into the judicial system, but there are also protections in Congress. The fear has been, well, what if you simply gave away the War College, or gave away the Naval Academy.

In the first place, there probably would be someone who could challenge that, but even if there weren't, our system has survived for two centuries without that ever happening, and the most immediately responsive branches to that kind of thing ever happening would be the branches that are going to have to respond to the pressures of the people who cast the votes, as this Court pointed out in its opinion in Warth versus Seldin.

QUESTION: Mr. Solicitor General, I am not sure that argument is controlling, because the phenomenon of government support for private schools has become more important in recent years, and the fact that it wasn't done historically may not be a total answer, but suppose this case had arisen in a state court, supposing a state government did exactly what the federal government did here, and a person who was not even a taxpayer sought to challenge it, and the state court said, yes, we will entertain the

challenge, would we have the right to review such a decision?

MR. LEE: I think not. I think not.

QUESTION: That is Doremus, I guess, isn't it?

MR. LEE: I guess it is. Yes.

QUESTION: As I recall Doremus, the state court said there was standing.

MR. LEE: Yes, that is Doremus. The decision of, I believe it was a New York court --

QUESTION: New Jersey court.

MR. LEE: I certainly defer to your expertise on that matter, Your Honor.

Let me just say in conclusion that I can conceive of a constitutional system which gave to any citizen the right to accede to the courts for the resolution of any problem of public importance. Something like that, not that kind of -- it would not be, in my opinion, the best kind of system, because I believe that our separation of powers, checks and balances system is a better one.

Something like that was proposed with the Council of Revision, which was expressly rejected by the Constitutional Convention.

The underlying premise of Marbury versus Madison, the reason for judicial review is that judicial review is necessary to the performance by the Article III branch of its function of deciding real lawsuits between real parties,

and this Court clarified a half-century ago in Chicago Grand Trunk Railway versus Wellman that the corollary to that Marbury versus Madison principle is also true, that courts perform that function only in those circumstances where it is necessary in order to perform their Article III case or controversy decisional process.

Perhaps the most revealing statement on the record in this case is that of the plaintiff Setumbrini, who said, I represent all American citizens, and indeed he does. That is the kind of claim that under our constitutional system and under traditional practice under this Court's precedents must be taken to the political branches of government, and not to the courts of the United States.

QUESTION: Mr. Solicitor General, may I ask you one other question? If you recall in Justice Harlan's dissent in Flast against Cohen he draws the distinction between Hofeldian and non-Hofeldian cases

MR. LEE: Yes. Yes.

QUESTION: And he says that if Congress authorized a non-Hofeldian standing, it would be all right. Do you disagree with that view?

MR. LEE: I have serious problems with it, and particularly in light of the subsequent holdings, probably best spelled out in Warth versus Seldin, that there are constitutional minima, that one of those constitutional

minima is injury in fact, so that the real issue becomes, is the Richardson-Schlesinger type ruling, the citizen standing, rooted in injury in fact, and in my view it is. That is the only part of Justice Harlan's opinion that I disagree with. Thank you.

CHIEF JUSTICE BURGER: Mr. Boothby.

ORAL ARGUMENT OF LEE BOOTHBY, ESQ.,

ON BEHALF OF NON-FEDERAL RESPONDENTS

MR. BOOTHBY: Mr. Chief Justice, and may it please the Court, I believe that this is the first opportunity which this Court has had to address the question of standing as it impacts on the establishment clause since the landmark decision which had been discussed here of Flast versus Cohen some 13 years ago. This case also presents the first establishment challenge to the Federal Property and Administrative Services Act which the Court of Appeals has suggested in this particular case that there is the probability that no one -- that if these plaintiffs do not have standing, no one perhaps has standing to challenge, and I would suggest that if the Court should find that there is no standing, that that particular Act, that particular Act of Congress would be immune from the establishment clause challenge, no matter how gross the violation might be.

QUESTION: Wasn't it said either in Reservists or Schlesinger that the fact that there is no one who has

standing does not confer standing on someone?

MR. BOOTHBY: It says that it is an indication that it does not, that perhaps it should be handled by the political branch. However, I think in that particular case the suggestion of then Solicitor General Robert Bork as he argued that case before this Court is instructive, because he in that particular case argued that the plaintiff interest in CIA funding hardly rose to the dignity of a constitutional right involved in Flast because, as he said, First Amendment freedoms need breathing space to survive, and there is a broader concept of standing appropriate in that particular area.

That was the argument that was made in Richardson. In the brief in Richardson, the Solicitor General argued that the case did not involve core values involved in Flast; it involved the statement and account provision not central to the Constitution, and thus the circumstances rendered doubtful the occurrence of substantial adverse interest.

QUESTION: But it was nonetheless a constitutional provision.

MR. BOOTHBY: It was a constitutional provision, but it was dealing with Article I rather than with the establishment clause, and I think that brings us to really the very heart of this particular case. The question is, is the ultimate protection of values enshrined in the

establishment clause to reside with the judicial system, or the judicial branch of government, or are there certain establishment clause values that perhaps the political branch has the ultimate authority in?

QUESTION: Well, how do you distinguish the establishment clause in Article I, say, from the right to be free from unlawful searches and seizures in Article IV and the right to counsel in Article V or VI, or the right to fair trial, that sort of thing? Isn't it true that if the judgment of the Third Circuit would be affirmed, the Court would, as the Solicitor General suggests, have to be grading various provisions of the Constitution as to their fundamentality?

MR. BOOTHBY: I think that the establishment clause is different from even any other First Amendment right for this reason. It is an amorphous type right. All other First Amendment rights, right to free speech, free exercise, to publish, have two aspects. One is protection from certain government action, and the other one is protection for, to do certain specific things.

That is not true necessarily with the establishment clause, because basically that right is a right to be free from certain governmental actions, and may not directly impact specifically uniquely on any particular person, and I think that presents a separate, specific

problem that must be addressed in a practical way.

QUESTION: Well, isn't that true, then, of any taxpayer suit, that no -- we all pay taxes for many things that we object to and perhaps wouldn't vote for if we were legislators, but that we can't show any discrete impact on our own tax bill for it. Would you say everybody had standing to attack those sort of expenditures if they claimed they violated the Constitution?

MR. BOOTHBY: No, I think there is a distinction, which was in fact pointed out in Richardson and in Schlesinger, where a distinction was made between certain core value rights given by the Constitution and the type of political situation that was involved in both the decisions of Schlesinger and Richardson.

QUESTION: Well, are all constitutional provisions core value?

MR. BOOTHBY: I think perhaps there are certain core values which have to be protected in different ways, and I think a lot of what we are discussing today deals with the prudential concerns of the Court, the concerns of self-restraint, and I would suggest that there is standing from the constitutional standpoint in this particular case, and what we are dealing with now are prudential concerns, and the fact that if one accepts -- if one does accept the view, which I suggest is an appropriate view under West

Virginia versus Barnett, that certain rights must not be left in the political process, then prudentially we have to look to the court enforcement of those rights.

QUESTION: But in Barnett, there was actual standing in the sense that a particular school child was forced to do something that he objected to on constitutional grounds that he shouldn't have to do.

MR. BOOTHBY: That may be true, but it gets back to the basic question as to whether establishment rights should be subject to the political process, subject to the vote of the majority, and I suggest that that basic core value right under the theory of Madison and Jefferson when they suggested the religion clauses be included in the Bill of Rights was to commit that to the judiciary for protection.

QUESTION: Would you distinguish between the free exercise clause and the establishment clause of the First Amendment?

MR. BOOTHBY: Mr. Chief Justice, both of those are co-guarantors of religious liberty. The difference is that the free exercise right always impacts on a specific individual or group of people, so prudentially you have a person with standing without much difficulty. When we are discussing the problem with reference to the establishment clause, we have a much different situation.

QUESTION: Well, on your theory, then, on your

theory members of Jehovah's Witnesses and other religious people who sincerely are opposed to all forms of warfare and defense, military establishment, would have standing to challenge the levying of a tax on them to the extent that tax was used to buy tanks and airplanes and other things. Is that right?

MR. BOOTHBY: Well, perhaps they have standing. The question then would be raised as to what the compelling state interest might be, and how --

QUESTION: Well, all we are concerned here with now, we are talking about standing, aren't we?

MR. BOOTHBY: Yes, the question in that case --

QUESTION: We are not getting to the merits of this case.

MR. BOOTHBY: Under the free exercise clause, the question would be, does that particular governmental action impact or burden their religious freedom, and if they could demonstrate under the free exercise clause that it does, then they would have standing, I think, to bring the matter before the Court as to whether what the decision would be would be based upon the balancing test.

QUESTION: Do you agree with the Solicitor General, whose response was that Congress would have the power to forbid transfers of this kind and transfers, grants to colleges on religious grounds?

MR. BOOTHBY: I would think that they would have the power to do that. The question is as to whether they should be the final authority to determine whether their own actions are in violation of the establishment clause, which I suggest has been committed to the judiciary.

QUESTION: Well, I don't follow that. If Congress simply said, we are not going to give any money, we are not going to transfer any property to a religiously sponsored school or college, do you seriously question their authority to do that?

MR. BOOTHBY: Are we discussing it now in the context of the free exercise clause?

QUESTION: No, we are just discussing it in the abstract. They just say no money, no money can be given to any religious school, no property can be transferred except for full value to any religious school. Do you question the right of Congress to do that?

MR. BOOTHBY: I think Congress --

QUESTION: That avoids all your problems of the establishment clause, doesn't it?

MR. BOOTHBY: It would avoid it if the Congress in fact did that. The question is, we have here a 31-year history where that has not been the situation, where the benefit allowance has always been granted to the extent of 95 to 100 percent, and the question is whether anyone can

ever challenge what seems to us to be indistinguishable, the question of whether you are giving cash, giving an appropriation of dollars, or whether you are giving bricks and mortar, and whether you are giving personal property, it seems indistinguishable.

QUESTION: What was the government giving in the Tilton case?

MR. BOOTHBY: Well, in the Tilton case, it was -- it involved different items, but one of the items which was specifically addressed by the Court was with reference to buildings which 20 years -- there was a provision there that at the end of 20 years, the restrictions were at an end, and this Court invalidated a specific part of it dealing with a facility that might be turned into a chapel or something for a religious purpose.

Here, in this particular case, we don't have to wait 20 years down the road to find some speculation as to whether it is going to be used for a chapel. There was a specific building which was in the nature of a chapel that was given to the -- to the college and used directly and immediately for a chapel, so what we have here in part was the government giving a chapel to the college to be used for pervasively sectarian instruction, which I can see no difference between this and the decision in Tilton.

QUESTION: Which chapel was formerly used by the

government.

MR. BOOTHBY: That is correct.

QUESTION: With nobody's objection.

MR. BOOTHBY: That is correct, but of course we have distinguished under the free exercise clause prisons and chapels and chaplains in the armed services, because of the restrictions that are placed upon servicemen and upon prisoners, and as a means to accommodate because of the restrictions that government has imposed, we have permitted the furnishing of chapels in those instances, but --

QUESTION: I am not too worried about what you permit. I am worried about what the Constitution permits.

MR. BOOTHBY: I believe that that has been the theory under the chaplaincy and for chapels in the armed services.

QUESTION: How about chaplains in the Senate and House?

MR. BOOTHBY: That has, of course, been a long tradition there, and perhaps under the decisions dealing with the ceremonial decisions, those type of decisions, that would be a basis for sustaining that.

QUESTION: Mr. Boothby, if the Court were to affirm the Court of Appeals' decision, would you agree that really any person could come in then as a plaintiff and raise any establishment clause question, without any

practical limitation?

MR. BOOTHBY: I think the Court -- they always impose certain prudential considerations. As this Court has said as recently as last year, in the Geraghty case, that the Court should view these cases on a case by case basis.

QUESTION: But wouldn't that be the danger or concern we would have if we were to apporve that decision?

MR. BOOTHBY: To the type of cases that directly impact on specific individuals, I see no particular problem with those requirements. In addition, I would suggest that we are not dealing nor should we deal with a generalized grievance or one where we are asking merely for an advisory opinion. That is not the situation in this case. In this case, where it is a plaintiff not attacking generally an Act of Congress, but is attacking a specific transfer of property, and so we have a factual context in which this case is brought, and I would suggest that to the extent that the injury that we are concerned with is an amorphous type of situation where it is a step down the way towards the establishment of religion than citizens should be.

Let me suggest this, because I think we are going to the question of the locus of the injury. Does it make any difference, for instance, whether the citizen who feels aggrieved lives next door to Valley Forge Christian College? It really doesn't. Now, it does make a difference

if we are talking about a public school engaging in sectarian religious education within that school. Yes, the people within that community have a more direct impact. But that is not the situation here. We are talking about a transfer of property, government property, to be used for pervasively sectarian teaching, and I think the locus of it is unimportant.

QUESTION: Didn't the framers of our constitution really reject the idea of a roving commission to challenge actions of the government, and didn't the framers really contemplate the case in controversy requirement, which in essence embodies standing, and isn't this opinion a significant departure from that basic concept?

MR. BOOTHBY: I don't believe it to be a significant departure. As I understand the Article III requirements of standing, that is, that there must be injury in fact, we are talking about a case presented in a manner where it is an historical setting for judicial relief. We are talking about a situation where the issues are presented by adversaries in a factual context, and I believe that is met in this particular type of case.

QUESTION: What is the injury in fact?

MR. BOOTHBY: Injury in fact in this particular case is that type of injury which is experienced by many people in this country, but the fact that government is not

being neutral and establishing an environment which prevents a government operating with a separation of church and state.

QUESTION: Well, is that the sort of injury in fact that Barlows or Associated Processing was concerned with?

MR. BOOTHBY: Well, of course, those were concerned with economic problems.

QUESTION: Yes.

MR. BOOTHBY: But in Data Processing the Court specifically indicated that what it said in that case also applied to spiritual values, and we are dealing here with a spiritual value, not an economic value.

QUESTION: Mr. Boothby, along that same line, can you argue your case on standing without getting into the merits?

MR. BOOTHBY: Yes. I don't think one needs to get into --

QUESTION: I don't see how you can argue your standing without the merits, because you say that unless this is a church school, you have no case.

MR. BOOTHBY: I don't think one --

QUESTION: Well, if this is a school that is completely non-sectarian, do you have standing?

MR. BOOTHBY: I think that in order to reach the standing question, as the Court said in Flast, to find out

if there is a nexus between the plaintiff and the injury, that you have to look at the facts in that fashion, but you do not need to cross the threshold and decide the merits of the case. You do not need to determine whether in fact this is a pervasively sectarian institution, merely look to see whether there is an allegation --

QUESTION: Then you have to get to the merits. You would rather call it facts, but I prefer to call it merits.

MR. BOOTHBY: I think you have to look to see whether there is an allegation raised by the plaintiff that there is a pervasively sectarian institution involved, but you need not decide that fact.

QUESTION: But you have to get to it.

MR. BOOTHBY: To that extent.

QUESTION: If this was a non-sectarian institution, you would have no case.

MR. BOOTHBY: Well, there would not be the claim of establishment violation.

QUESTION: You would not have any standing, would you?

MR. BOOTHBY: You would not, and that would probably be a political question at that point.

QUESTION: You wouldn't have any standing.

MR. BOOTHBY: That's true.

QUESTION: So that any person in the country can file a complaint in any federal district court saying that the transfer was to a pervasively sectarian institution, and be entitled to a hearing on his allegation.

MR. BOOTHBY: Well, I think one of the ways of handling that particular problem is the summary judgment method of handling it, perhaps, but I think if there is a --

QUESTION: But it must nonetheless be considered.

MR. BOOTHBY: I think -- yes.

QUESTION: Under your theory, could an anti-war group object to the selling of these AWACS?

MR. BOOTHBY: No, I think that comes under --

QUESTION: They are against war. Would they have standing?

MR. BOOTHBY: I don't --

QUESTION: I didn't say when. I said, have standing.

MR. BOOTHBY: I don't believe so. I think that --

QUESTION: Why not?

MR. BOOTHBY: Unless they are making out a free exercise type of argument, it certainly --

QUESTION: I am saying that their religion says we are against war, and we object to you selling AWACS to anybody. Would they have standing? And when you get through with that, you can ask about declaring war. There

is no limit to where you could go.

MR. BOOTHBY: Well, of course, to some extent that was the issue that was argued here on Monday with reference to the social security tax, and they were raising the question, but they did have standing.

QUESTION: Was the standing point involved in that?

MR. BOOTHBY: No, but they --

QUESTION: We are talking about standing now. I would like to leave it with standing. I have great problems with where your line is drawn. I can allege that my religion is against taxing, so I want to stop paying my income tax. I don't have standing for that.

MR. BOOTHBY: I think then you reach the question of whether it is a burden on the free exercise rights of those people. I think you have to look to that issue, and then the question of sincerity. Now, perhaps they would have standing to raise the question.

QUESTION: And they could plead forma pauperis and it wouldn't cost them a nickel to do it. Right?

MR. BOOTHBY: Basically, Sherbert versus Verner dealt with somebody objecting to the impact of a particular statute, state statute. The question was not standing. The question that was disposed of was the question of the use of the balancing test to determine whether there was a compelling state interest to override the free exercise

rights.

QUESTION: I am trying to draw a line in my mind between standing and the merits, and I can do it on your argument, because your argument needs merits to get to standing.

MR. BOOTHBY: Well, I think you have to look to the facts briefly, as Flast said, in order to determine whether there is a nexus between the individual's injury and the constitutional provision.

QUESTION: Mr. Boothby, you have referred two or three times to the free exercise clause. I had thought the Third Circuit's opinion was limited to establishment clause claim.

MR. BOOTHBY: That is correct.

QUESTION: Which is your view, that it should be limited to establishment clause?

MR. BOOTHBY: Yes. It is only an establishment question here, and as I indicated, I think the establishment clause presents unique problems that are not experienced in the free exercise clause, because of the nature. Establishment problems are created, as the Chief Justice in Lemon indicated, when the first step is taken respecting the establishment of religion, and so, in order to protect against that very first step, it is necessary to be able to raise the question in a judicial forum when there is a case

presented in a historical way with specific facts asking for specific relief directed against the -- what is perceived to be the wrong.

QUESTION: And the specific allegations about establishment.

MR. BOOTHBY: I think that you need to say that --

QUESTION: You have to have allegations.

MR. BOOTHBY: -- you are basing it upon an establishment claim, yes.

I think there might be an illustration that would demonstrate perhaps why the establishment question raises separate questions, and let me suggest, what if Congress would enact a law that would say, we are officially recognized in a certain church as the official church, Baptist church, Unitarian church, Presbyterian, or whatever it might be, but we provide no sanctions and we grant no money, we make no appropriation.

The question is, would anyone have a right to come before a court and ask that that particular Congressional act be voided, or is that something specifically that you would have to go to the Congress and go through the political proces in order to accomplish, and I submit that those are the type of problems as it is particularly highlighted in this case, where you must have, you need to have access to the courts to prevent violations of the

establishment clause from occurring.

QUESTION: Would you be here, Mr. Boothby, if they had sold it for $500,000?

MR. BOOTHBY: First of all, this really involves $1,300,000 when you involve the personal property, but I think the principle involved is important whether we are talking about $500,000 or whether we are talking about $100, the principle is. Now, obviously --

QUESTION: What principle would be involved if they sold it for $500,000?

MR. BOOTHBY: Oh, if they sold it and received $500,000?

QUESTION: Yes. Less than value.

MR. BOOTHBY: Less than the value?

QUESTION: Less than value.

MR. BOOTHBY: Then you would be perhaps -- I think perhaps there would be standing, but the question would be on the merits as to whether there was an actual gift made by the government without consideration, whether it was in fact a contribution or a donation to some extent.

QUESTION: Then what if they put it up for auction, limiting the bidders to colleges and universities, and this institution was the low bidder, and the bid was $100,000, way below value. Would you have standing first? Let's stay with standing.

MR. BOOTHBY: To the extent that you could make out a claim of violation, I would say perhaps you would have standing.

QUESTION: Doesn't that illustrate the practical side of this situation, that you must leave the running of the government to the people who were elected to run it?

MR. BOOTHBY: I think that is normally true, except when you have this type of situation where we are talking about a violation of such a basic core value, and I don't believe that one should have to go to the political processes in order to have that redressed.

One other -- perhaps one other matter which goes to this particular problem is the fact that one of the things that indicates that this is a case in controversy, and this is a case for judicial relief, is, I would seriously question whether the executive or the legislative would have power to provide the relief which is requested. We are requesting that a transfer which has been made be voided. I would suggest that it would be difficult, if not impossible, for the legislative branch or the executive branch to perform that. That is the type of relief which is uniquely within the power of a court to provide.

So, I don't think that the executive or legislative branch can provide that type of relief.

QUESTION: Mr. Boothby, I have been looking at

your complaint. What provision of the complaint -- I am looking at Page 10 of the Joint Appendix -- contains your allegation of injury in fact? The Joint Appendix --

MR. BOOTHBY: Yes.

QUESTION: -- Page 10. Is that the complaint that is before us?

MR. BOOTHBY: That is the complaint. However, as was pointed out in the --

QUESTION: Well, before we --

MR. BOOTHBY: Pardon?

QUESTION: Before we leave that, could you identify in the complaint the injury in fact language upon which you rely?

MR. BOOTHBY: Paragraph 12 is the one that deals with the claimed violation of the establishment clause. I would like to, however, add to that --

QUESTION: Before you leave the complaint, what about Paragraph 2, which is the one that speaks of the injury to the plaintiffs?

MR. BOOTHBY: Yes. That describes -- that describes the organizational plaintiff in this particular case, and indicates the fact that these particular people that are members of the organization are taxpayer members affected by the use of the property.

QUESTION: Each individual member would be

deprived of the fair and constitutional use of his or her tax dollar.

MR. BOOTHBY: That's correct.

QUESTION: Is there any allegation in here other than that, which seems to relate to status as taxpayers, that indicates an injury in fact to these particular plaintiffs?

MR. BOOTHBY: Not in the complaint, Your Honor. I might make reference to Page 13 of the brief that was filed on behalf of the college, where they specifically stated, which is correct, that Respondents were given the opportunity through discovery to particularize the allegations of the amended complaint in connection with the district court's ruling of the college's motion for summary judgment. The depositions and answers to interrogatories were considered.

And I would suggest that the injuries that we are talking about were particularized in those depositions, and specifically Pages 28 through -- 27 through 30 of the plaintiff Gunn's deposition, where he described in a very particularized way those type of injuries with which he was concerned, where, on Page 28, he stated, "When the government establishes religion, that is, contributes to the establishment of religion, my religious liberty is being violated. It affects me in that my freedom of conscience is

being violated and my religious liberty is being trampled upon because the government is taking -- is fostering and promoting religion. It is not the business of government to do this. The government is to remain neutral."

Then, "When the government gives over public lands that belong to the public, and public buildings and personal property, then it is promoting one religion over against all other religions."

And further, "When the government takes sides on matters of religion, it is taking a side against my religion, and therefore is inhibiting me and violating my freedom of conscience by forcing me as a taxpayer and as a citizen to give support to someone else's religion."

QUESTION: Is that document before us, Mr. Boothby?

MR. BOOTHBY: The document is not in the Appendix. It is part of the record, and as I have indicated, was considered by the district court at the time of the dismissal of the case.

QUESTION: The record here?

MR. BOOTHBY: Pardon?

QUESTION: Is the record here?

MR. BOOTHBY: I would assume that the record --

QUESTION: I mean, in this building. Was it filed with the clerk? That's all.

QUESTION: I am sure it had to be.

MR. BOOTHBY: That is my understanding. And as I say, that -- there are other -- there are several other similar statements in other depositions, and I won't go in great detail, but I might make reference to Plaintiff Doerr, on Pages 15, 22, and 23, Plaintiff Binns, Pages 14, 15, 18, and 19, 24, 25, 31, 32, and 36, and Plaintiff Gunn on Page 10, 11, 12, 27, 28, 29, and 30, all indicate what we would suggest would be the particularized injuries complained of in this particular case.

In United States versus Carolina Products Company, Justice Stone, in Footnote 4 of his --

QUESTION: United States versus Carlolene Products?

MR. BOOTHBY: Carolina Products?

QUESTION: That is C-a-r-o-l-e-n-e?

MR. BOOTHBY: L-i-n-a. Carolina. Suggested that exacting judicial scrutiny of state action is appropriate when state action violates the Bill of Rights or frustrates the political process.

I would suggest that we can't have exacting judicial scrutiny when there is an absolute denial of all judicial scrutiny, and one of the things that has been highlighted in this particular case is that no one perhaps might have standing if these particular plaintiffs do not have standing.

It has been suggested that perhaps someone close

by in the area might have some standing about a drain or something, but those people are not going to be specifically concerned about raising establishment issues except to some extent that it might assist their case. Also, it was suggested that there might be another applicant for the property, and again I would suggest that that concern is more economic than one dealing with the values enshrined in the establishment clause, and it would seem that if we are trying to find the plaintiff to raise the establishment issue in the most specific way to bring to the attention of the court the issue, we should be looking at the plaintiff that can best present the establishment clause challenge from the standpoint of their own specific injury, the injury being a violation of their rights under the establishment clause.

In Warth versus Seldin, it was stated that the standing question requires a determination as to whether the constitutional or statutory provisions on which a claim rests properly can be understood as granting persons in the plaintiff's position judicial relief, and I would suggest that the establishment clause does do just that. It grants to a specific individual the right to judicial relief.

I question whether it is ever tolerable to expect the establishment clause by the doctrine of standing to be divided into enforceable and non-enforceable establishment

clause rights, and I suggest also that the precious aspects of religious freedom should never be placed upon the barter block of legislative debate, political tradeoffs, or compromise.

QUESTION: Well, in Doremus they were.

MR. BOOTHBY: I think that is correct. I think in Doremus it was. I think that Flast went a long way in resolving the problem there.

QUESTION: But Flast cited Doremus with approval.

MR. BOOTHBY: That is correct, but it certainly was a departure from what was said by the Court in Doremus. I think that there has been also a substantial change in the way the question of standing has been viewed since Doremus, as far as this Court is concerned, in its most recent expressions --

QUESTION: Well, there certainly was a substantial change in view of standing in the Third Circuit's opinion as compared to this Court's cases in Warth and Simon versus East Kentucky.

MR. BOOTHBY: I think that this Court has never really had to face this issue in this context before, and it did face it to some degree in Flast, but it did not need to go further than to find some taxpayer standing. This is a situation which is somewhat different, but I would suggest that as the establishment clause was deemed to be a

limitation of Article I, Section 8, it is equally a limitation on Article IV provision granting to the Congress the power to dispose of property. I don't see any distinction.

QUESTION: Well, do you just read out Article III, then?

MR. BOOTHBY: No, I think that there must be a case in controversy. I don't think you can merely ask for an advisory opinion, but when you have real parties litigating real factual issues and asking for specific relief, not merely an adjudication of a Congressional Act, but asking for specific judicial relief, I think that the case in controversy requirements of Article III have been met, particularly where there is an allegation of injury in fact of the character involved in the establishment clause itself.

Your Honor, I believe I have a minute or two. If the Court has any questions, I will do my best to attempt to answer them. Otherwise, I am prepared to submit the case.

ORAL ARGUMENT OF C. CLARK HODGSON, JR., ESQ.

ON BEHALF OF THE PETITIONER - REBUTTAL

QUESTION: I have a question that occurred to me during the argument. Someone referred to the case we had earlier this week that also came from Pennsylvania, involving a religious group, some people who felt very

deeply that paying a certain tax would be a sin against their religion.

Supposing someone living next door to this institution felt that it would be a sin to live in a community in which the government established a religion in which they had no belief, or they just thought it would be a sin even to live where the government established religion. Would that person have standing?

MR. HODGSON: You seem to be positing the existence of a free exercise injury in fact, Article III, and I would say yes.

QUESTION: Well, supposing somebody said it is a sin to live in a country in which the federal government does this sort of thing. Would that still -- would you think that would be standing?

MR. HODGSON: I think it alleges --

QUESTION: A deeply held belief.

MR. HODGSON: -- it alleges an injury in fact, an alleged violation of the free exercise clause.

QUESTION: Well, the injury to him is continuing to live there.

MR. HODGSON: Yes. I can't help but think of it on the merits, thinking particularly of Reynolds versus United States, the polygamy case, that believing as a matter of religious conscience that the practice of bigamy was

appropriate, but of course that goes to the merits, but I think that the allegations that you fashion, while they appear at least to be frivolous, might fall within the free exercise.

QUESTION: Well, supposing these people, instead of stressing their taxpayer status, had just said they believe very deeply that it will offend their conscience to have their government do this. Is that really different?

MR. HODGSON: That it offends their conscience?

QUESTION: It offends their conscience.

MR. HODGSON: Yes.

QUESTION: Just as a matter of conscience.

MR. HODGSON: I think it is very different. Their conscience as citizens of the United States. Because matters of citizen conscience, I think, are not protected under the Constitution. Matters of deeply felt religious conviction are protected under the free exercise.

QUESTION: I see.

MR. HODGSON: Thank you, Your Honors.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:19 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

VALLEY FORGE CHRISTIAN COLLEGE vs. AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC., ET AL. NO. 80-327

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Sharon Hyatt Connelly