HOW MUCH FREEDOM OF ASSOCIATION?

When I selected as my topic "How Much Freedom of Association?", I had not anticipated its possible relevance to activities in the Harvard Yard. I had not known that Provost Buck had pending before him - and that your President, Mr. Lowell, would be asked to comment upon - an application by Harvard undergraduates to organize a local branch of American Youth for Democracy, a group which the newspapers call a Communist-front organization.[1] The immediate stimuli for my choice of subject were President Truman's socalled Loyalty Order of March 21, 1947, establishing as a standard for hiring and firing every government employee his sympathetic association or lack of it with any group designated by the Attorney-General as subversive,[2] and the provision in the pending Labor Management Relations Bill of 1947 that [redacted] may not enjoy the benefits of the National Labor Relations Act if [redacted] Communists as officers.[3]

But whether our horizon be limited to Cambridge or extends throughout the nation it becomes clear that among the fundamental issues of our times are those involving the relative claims of society as a whole and of those groups which represent partial, partisan or parochial interests. In my talk today I plan to say something of the history of this issue and somewhat more of its evolution in the twentieth century. But before I come to the main theme I should like at the outset to impose upon myself three limitations.

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1. Boston Herald, May 28, 1947, page 1.
2. Executive Order No. 9835.
3. New York Times, May 30, 1947.

First, I shall concern myself primarily with those aspects of the issue which are relevant to political science and philosophy rather than positive law. I am not unaware that the problem can be approached legalistically - as indeed I tried to show in a recent case before me - Galardi v. Hague.[4] But an approach exclusively in terms of American legal rules would be an arid avenue. To begin with, contrary to the popular view, and contrary to the constitutions which govern post-war France,[5] post-war Japan[6] and pre-war Russia,[7] the United States Constitution has no provision specifically guaranteeing freedom of association. The Founding Fathers did not regard that freedom as akin to freedom of speech or freedom of assembly. Therefore, they deliberately omitted it from our Eighteenth Century Bill of Rights. Moreover, so far as I have discovered, there are only a handful of cases[8] in the Supreme Court of the United States where the phrase "freedom of association" occurs even in concurring or dissenting opinions[9] and this despite statutes[10] and arguments of counsel which have invited the use of the broader concept. Moreover, in none of those cases was the phrase decisive of the controversy. Thus an American lawyer could plausibly argue that, so far as law books to date reveal, there is no constitutional limit to the claim of society to suppress such organizations as a majority deem noxious.

Second, I assume as beyond controversy that where society may justi-

4. 15 U. S. Law Week 2469.
5. New York Times, Oct. 1, 1946, p. 160.
6. New York Times, March 9, 1946
7. Constitution of 1937 of the U.S.S.R. Article 126. Note that according to the usual translation the right is stated to be that of "combining in public organisations."
8. Whitney v. California, 274 U. S. 328, 371, 372, 379; Bryant v. Zimmerman, 278 U. S. 63, 72; Bridges v. Wixon, 326 U. S. 135, 163
9. National Labor Relations Act, §1, 29 U.S.C. §151. Compare NLRB v. Jones & Laughlin, 301 U. S. 1, 33; American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184, 204.
10. See 75th Cong. 101 Sess. Doc. No. 52, p. 79. Argument of present author in Associated Press v. NLRB, 301 U. S. 103, 119.

fiably forbid one man to take certain action, it may likewise justifiably forbid one thousand men to do the same act in concert. Multiplication of offenders does not give immunity, at least unless their offense becomes a successful revolution. Then, of course, as Harrington's epigram reminds us "none dare call it treason."[11] Short of revolution, when a group commits what would be a criminal act or an act of treason if it had been done by any one of them then those who participate in the group action are all criminals and traitors. Hence in this talk I not need consider the freedom of such associations as are formed for what are literally criminal or treasonable purposes, including espionage[12] or acting as the unregistered agent of any foreign power.[13]

Third, I shall direct my remarks principally at organizations with a political or economic hue and pay relatively little heed to other groups. This does not mean that I have forgotten Maitland's lesson that there is a family resemblance among all types of voluntary associations - unions and universities, clubs and churches, communist cells and scientific societies.[14] But my focus of interest today is on those associations which exercise power in its grosser forms, not through the subtle pressures of what appear as mere sentiment or intellectual curiosity.

Indeed I rather suspect that if you criticise me for this third limitation it will be on the ground not that I have been too exclusive, but rather that I have been inclusive. You may contend that it promotes confusion

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11. John Harrington, Epigrams, Book IV, Ep. 5.
12. 50 U. S. C. §§ 31-50.
13. 22 U.S.C. §§ 611-621.
14. F. W. Maitland, Introduction to Gierke Political Theories of The Middle Age; F. W. Maitland, Selected Essays, The Unincorporate Body.

to put under one rubric cartels, Communists, associations of civil servants and trade unions. Each, you may regard as requiring separate diagnosis and prescription. And you may say that the secret of Anglo-American political success is its disregard of neat, logical patterns and its preference for sensible ad hoc adjustments.

That there is a time for such particularism I agree. But I have more than one reason for inviting you now to take a generalized view. Professor Whitehead has told us that in almost all intellectual fields progress comes from the fruitful generalization.[15] And this aphorism has a special application to the social sciences because of the large risk which comes from the personal prejudice of every observer in those contentious fields. If he looks only at the organization which he already loves or hates the observer merely has his prejudice re-enforced. He may, on the contrary,have his emotion diluted and his vision deepened if he will try to see resemblances and comparisons. Indeed, is that not the way we moderns came to write constitutions and formulate the concept of liberty itself? What is a constitution but a generalization drawn from many codes? And is not the difference between the way we moderns understand liberty and the way Chaucer did,attributable in part to the fact that he used the word liberty in the particularized sense of the right of a bondsman to be released from captivity[16] while we generalize it as representing the sum total of that and many other emancipations and franchises.[17]

15. A. N. Whitehead Process and Reality, pp. 8, 15, 25.
16. VI Oxford English Dictionary 240, "Liberty", meaning 1.
17. VI Oxford English Dictionary 240, "Liberty", meaning 2.

If we take the generalized view that I have proposed, the first point which commands our attention is the obvious hostility of Americans of the eighteenth and nineteenth centuries to the broad principle of the freedom of men to form whatever political and economic associations they pleased.

The Fathers of the American Constitution plainly did not believe in such a wide freedom. In the tenth paper in the Federalist series[18] Madison denounced the "dangerous vice"[19] of "faction." "By a faction," he wrote, "I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate rights of the community."[20] And the same attitude was restated in memorable form nine years later on September 17, 1796, by George Washington in the Farewell Address which had as one of its main themes a declaration against the forming of combinations.[21] In this hostility Americans were representing not some quirk of provincialism, but the generally accepted democratic view of their time as is illustrated in France, for example, by the passage of the well-known Loi Le Chapelier of 1791 prohibiting the creation of occupational associations,[22] and in England by the judicial outlawing of combinations of working-men.[23]

In the United States three roots for this hostility deserve mention.

18. Federalist (Lodge ed.) No. 10, pp. 51-60
19. Ibid, p. 51.
20. Ibid, p. 52.
21. See Morison and Comager, The Growth of the American Republic, vol. I, p. 264.
22. H. Lauterpacht, An International Bill of the Rights of Man, p. 112; A. V. Dicey, Law and Opinion in England, p. 467. Compare Napoleonic legislation summarized in Dicey, supra, p. 150, n. 2, pp. 466,475.
23. A. V. Dicey, Law and Opinion in England, pp. 97-98.

First, the experience of the American colonists with royal cliques and royal monopolies had left an indelible imprint.[24] Powerful private associations had become symbols of interference with individual liberty. Second, the United States, like other nations of the world, had a relatively weak government one hundred and fifty years ago - weak in the force it could bring to bear not only externally but internally. We are apt to forget that even the practice of a standing paid well staffed domestic police force is only just one hundred years old. In 1800 the larger cities of the Atlantic seaboard had merely a night watch; the other cities often depended on posses. And when in 1844 the New York State Legislature made the first provision for a consolidated day and night police, the City of New York began with a regular police force of 16 men![25] In such circumstances the nation and the state looked at every private combination as a potential rival and a challenge to its authority. Third, the Founders of our Republic were heirs, and to a large extent conscious heirs, of a tradition more than two thousand years old which had sharply separated the rights of the individual from the rights of the group. Of this tradition I must give a brief parenthetical review because it forms no small part of the intellectual climate of our day as it did of theirs.

The tradition of individual liberty of which the Framers and we are legatees is woven from five principal strands,[26] - strands supplied by the Athenians of the Periclean Age, the Stoic lawyers of Ancient Rome, the

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24. The Declaration of Independence recites as grievances that the king "has excited domestic insurrections amongst us."
25. Encyclopaedia Britannica, vol. 18, p. 159.
26. A. N. Whitehead, Adventures of Ideas, passim; Carl Becker, Democracy, passim; New Liberties For Old, passim.

religious leaders of the Christian Church, the English lawyers of Tudor and Stuart days and the philosophers of the seventeenth and eighteenth centuries. While each of these sources has contributed to the creation of our faith in the dignity of the individual man and in his right to freedom of expression, almost all of them have opposed unlimited freedom of association and have looked with misgivings upon the claim of men to form groups not specifically licensed by the state.

Thucydides, to whom we owe our report that Pericles advocated "discussion" and "the knowledge which comes from discussion"[27] and preached that "liberty is the secret of happiness, and courage is the secret of liberty,"[28] inveighed against political clubs and associations "for such associations are not entered into for the public good in conformity with the prescribed laws, but for selfish aggrandisement contrary to the established laws."[29] And in this warning Thucydides spoke as a typical Greek as we see the pages of Aristotle's Nichomachean Ethics advancing the proposition that faction is against the public interest since the secret of civic strength is a unity based on friendship and sympathy.[30] Indeed the advice of the famous teacher Isocrates to the Cyprian King Nicocles[31] is the locus classicus from which even today jurists[32] derive the principle that societies and unions constitute such a danger that they ought, at least in a monarchy, not to be formed without the sanction of the state.

27. Thucydides, II, 40, 3.
28. Ibid, II, 43, 4-5
29. Ibid, III, 82, 6.
30. Aristotle, Nich. Ethics VIII 1155a. lines 23-28.
31. Isocrates, III Nicocles or The Cyprians, 54, (Loeb ed. vol. I, p. 109).
32. Vinogradoff, Historical Jurisprudence, vol. II, p. 8; but see pp. 119-127.

Neither the Stoic lawyers nor their successors who codified the Corpus Juris Civilis of Justinian ever recognized the right of men to form associations without official authority.[33] And the medieval glossators interpreted Roman law principles to condemn all unlicensed corporations even those which had been formed by university students and teachers.[34] It is true that Sinibald Fieschi who is known to school-boys as Pope Innocent IV, made a breach in this general opposition by announcing a doctrine that organizations were permissible if they were formed "pro cause justitiae" - a doctrine which in practice merely accorded to true believers the privilege of uniting for religious and charitable purposes.[35] And it is also true that the Italian post-glossator Bartolus of Sassoferato carried the exception further to make licit mining organizations, farming partnerships, trade guilds and other purely domestic associations which were not offensive to the jus civile.[36] But Bartolus denied the right to form a combination with men outside the local area of government. From the jus gentium, or as we should say from principles of international law, he spelled out the rule that "civitates" who already owed allegiance to one king should not be permitted to form an independent federation. In Bartolus' day that conclusion was directed at the far-flung Papal and Imperial parties, the Guelfs and the Ghibellines.[37] Some of you may be reflecting on a contemporary parallel.

The very limited amount of freedom of association which mediaeval

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33. Buckland, The Main Institutions of Roman Private Law, p. 88.
34. W. Ullman, The Mediaeval Theory of Legal and Illegal Organisations, 60 L. Q. R. 285, 287.
35. Ibid, 287. Compare Maitland, Introduction to Gierke, supra, note 14.
36. Ullman, supra, p. 289.
37. Ibid, p. 290.

theorists recognized was not, surprisingly enough, much extended in the period of the Reformation when it might have been supposed that diversity of religious affiliations in the same territory would require substantial modification of earlier doctrines. In the respective areas where they were a minority the Jesuits[38] and the Dutch Protestants,[39] each, of course, from a different standpoint, successfully established the right of each man to belong to two separate communities, the one civil, the other religious. This right was founded on the doctrine that the state and church are each, as they said, perfect societies. Such a doctrine was formulated in terms of, was intended to be applied to and was in fact restricted to the right to belong to the two types of association known as state and church. The doctrine never grew to include the unfettered right of men to join other associations or the right of other associations to exist without specific governmental sanction.

The view of the Ancient, the Mediaeval, and the Reformation thinkers that, with few and peculiar exceptions, associations had no claim to exist unless officially authorized, was also held by the English lawyers and philosophers who were best known to those who moulded our governing charter. A few instances will serve to prove the point.

English lawyers from Tudor times were familiar with an interpretation which the Court of Star Chamber added to the common law of conspiracy. That court applied the broad rule that it was against the common law of England for

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38. Figgis, From Gerson To Grotius, pp. 164-165.
39. Ibid, pp. 178-180.

an unlicensed body of men to combine for any purpose which the judges regarded as against public policy even if those purposes were not criminal or even tortious. That is, the law of conspiracy implied the proposition that what is permitted to one man is not necessarily permitted to one thousand men.[40.]

The restrictive rule survived the Star Chamber and became part of the permanent law of England at least until the later part of the Victorian era. And in the meantime it had even the approval not only of the legal profession and legal historians but philosophers who were well known on this side of the Atlantic. Thus, Hobbes in The Leviathan had written that "all uniting of strength by private men, is if for evill intent unjust; if for intent unknown, dangerous to the Publique."[41.] And Edmund Burke agreed with him - "liberty," he said, "when men act in bodies is power."[42.]

As I have already said, currents flowing from these English teachings as well as from the Greeks, the Romans, the Mediaevalists and the religious controversialists, played an important, though often unperceived, part in forming the intellectual climate of the eighteenth and nineteenth centuries in America. They contributed to the widely held American tenet that grave danger to the public interest is presented by the existence of powerful private political or economic associations. To call this view a concept perhaps understates its role in American history, for this fear of those private associations might be called a major article of the professed American faith.

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40. Holdworth, History of English Law, vol. III, pp. 478-479, vol. VIII, pp. 382,383; Stephen, Criminal Law of England.
41. Hobbes, Leviathan, Pt. ii, c. 22, p. 122. Quoted Holdsworth, History of English Law, vol. VIII, p. 383, note 1.
42. Hobbes, supra, note 2.

Of course specific exceptions to this attitude developed in the nineteenth century. One example is the type of state statute, universally adopted, which allowed business groups to organize under general rather than special laws. Another is the legalizing of trade union activity after Chief Justice Shaw's decision in 1842 in Commonwealth v. Hunt,[43.]

Against the background of American history and American intellectual heritage it would be easy to conclude that with specified exceptions freedom of association not only never has been but never will be an American principle and that it is a spurious excrescence on the liberal creed. Yet I submit that such a conclusion would be too facile, for it would be a result of looking more at the world of yesterday than at the realities of today and the reasonable expectations of tomorrow.

Our forefathers based their attitude, consciously or not, upon the simple local society of the eighteenth and most of the nineteenth centuries. In their day they looked to the city, county, and state in which they lived as the principal market for and the chief source of their goods and services. That was the community that educated them. It set their intellectual, literary and artistic tastes. It exercised the political powers of which they were most aware.

A society so constructed gave the individual an opportunity to participate in vital decisions and thus to acquire both the sentimental values

43. 4 Metcalf 111.

which flow from companionship and the moral values which flow from responsibility. It gave the local governments power often directly, even more frequently indirectly, to set the prevailing customs of fair practice and honorable behavior. It guarded against the dangers of a despotic or belligerent central government by the checks and balances of a genuine territorial federalism. And its variety of local allegiances, cultures, interests and opportunities became the roots of a vigorous, adventurous and dynamic civilization.

For better or worse, the local territorial units of which that society was composed have been gravely impaired by modern technology, transportation and communication. The scale of economic, educational, intellectual and political action has become national and even international. With that change in scale, the focus of interest as well as of power has shifted far from the city, county and state. They have become expressions more of geographical convenience than of community life. And the values which the local territory once gave to individuals must now be sought elsewhere.

Under those changed conditions it is natural for the individual to seek effective expression of his views through organizations of men who in their vocational or other interests share his experiences. And it is not only natural; it is socially advantageous.

In these organizations the individual develops that sense of companionship and obligation which his father found in the city. For him it is

an opportunity to show his capacity for leadership. For society it is an opportunity to see which men will ultimately be best fitted for the new positions of political and economic responsibility which inhere in the complicated governmental structure of today.

And for these organizations society draws not only individual leaders but the fruits of group experience, that is, the habits, practices and specialized opinion which together form custom. And it is custom, as Aristotle taught in his Politics,[44] and as students of Anglo-American law well know, that is the surest ground from which to develop the type of law that will earn enduring respect.

A more subtle social contribution of these associations is their effect in guarding against the dangers of a powerful centralized government. The Founding Fathers, though they lived in an age when there was no immediate prospect of a strong central government, were aware of the risks inherent in such Leviathans. They supposed, as did Lord Acton a century later,[45] that the constitution which they drafted eliminated the dangers of central despotism and belligerence not merely by a formal arrangement of checks and balances but by the fundamental division of power between the nation and the states. The Fathers were sound in their objective, but they were overly optimistic in the means on which they counted to achieve their goal. The reliance they placed on territorial federalism has been of an ever diminishing

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44. Pol. II, 8, §24.
45. Acton, History of Freedom.

importance since the Civil War. It is now an almost obsolescent principle both legally and practically. If we were today faced with a militant threat of totalitarianism few would look first to the state governments to rescue us from tyranny or despotism or a fear of aggrandizement. The vigilance to see the danger and the power to arouse effective opposition must both be found at least in part in groups of greater vitality and cohesion.

But we may be told that groups strong enough to hold the state in check are themselves a menace because they cultivate a double loyalty in our people. Is it not appropriate to reply that the very meaning and purpose of a federal democracy is that the citizens shall be bound, and the state shall be held in check, by multiple loyalties? Liberty recognizes that its cause owes its principal advances to and will be best preserved by men who have always denied the omnicompetence of any one terrestial power.

Almost as important as their role in guarding democracy against the threat of an omnipotent state is the contribution which these voluntary associations make to the advance of civilization. We so often and so justifiably state that the individual and not the group is the unit of spiritual significance and the seat of ultimate religious and philosophical value that we sometimes overlook the significance of the group as the decisive unit of intellectual advance. And yet the history of ideas, in short the history of man's progress, is largely the history of group action. The first great Greek thinkers were

members of an Academy. President Conant's Terry lectures at Yale remind us that the critical point in the rate of scientific advance was reached in the Sixteenth Century with the founding of scientific societies.[46] These groups were the precursors of the great university and industrial laboratories and even of the teams of scientists led by Mr. Conant himself and by Mr. Bush in World War II. Indeed the function of coteries and groups has counted for much even in literature and the arts as was magnificently illustrated in the Renaissance. The members of these groups do more than stimulate one another. Though we seldom realize it, members of the group act cooperatively, one building on the work of another. Listen to what the poet Valery has written about originality in his own metier: "It takes two to invent anything. The one makes up combinations; the other one chooses recognizes what he wishes and what is important to him in the mass of things which the former has imparted to him. What we call genius is much less the work of the first one than the readiness of the second one to grasp the value of what has been laid before him and to choose it."[47]

But though you may concede that groups give many of their members opportunities for self-development, for participation in setting patterns of behavior, for counterbalancing the power of the modern state and for intellectual adventure, you may contend that there remains the risk that such groups will oppress those who remain outside their inner circles.[48] In short, you may argue that the liberty of the few is purchased at the expense of the many.

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46. J. B. Conant, On Understanding Science, pp. 7, 60.
47. Quoted by J. Hadamard, The Psychology of Invention in the Mathematical Field, p. 30.
48. Compare A. V. Dicey, Law and Opinion in England, pp. 153-154.

If we had only the political and legal techniques which were known to the Court of the Areopagus or the Court of Star Chamber or the Court of John Marshall, the danger that groups presented to those not in their inner circles would be a real danger. But in modern times we have learned that in handling bodies corporate the state has other choices than either to suppress them or to allow them to thrive unchecked. We are now familiar with a hundred regulatory devices which require organized groups to do their business in public, to conform to specified standards of external and internal conduct and to make their terms of admission and exclusion consistent with the purposes for which the groups were formed. You will recall as recent vivid instances - the requirement of the New York Legislature that the Ku Klux Klan should make public its list of officers and members, its rules and its financial accounts;[49] the similar obligations of disclosure imposed by many states upon labor unions; the Supreme Court's decree that the Associated Press must open its membership to newspapers prepared to conform to objective standards;[50] and the same tribunal's determination that a statutory collective bargaining status should be accorded to a labor union only if it admitted workers regardless of the color of their skin.[51] From these examples can we not divine the future of the principle of freedom of association? Will not the symbols of its future evolution be the open window and the open door - the window through which the curious may see the character of the organization, the door through which the

49. Bryant v. Zimmerman, 278 U. S. 63.
50. Associated Press v. United States, 326 U. S. 1.
51. Steele v. Louisville & Nashville R. Co., 323 U. S. 192.

deserving may enter or leave?

I agree that what I see as symbols of the future are not characteristic of the prevailing thought in many quarters today. Some there are who would have associations treated as private preserves immune from scrutiny and supervision. To them I would repeat the maxim of one of the greatest historians of liberty, Lord Acton: "Everything secret degenerates; nothing is safe that does not show how it can bear discussion and publicity."[52]

Others there are - and some in high place - who are not content with scrutiny and supervision. They also want to exercise the power of suppression at least in those cases where the members of the group, though not indictable under the law of the land for crime or treason, do not believe in civil liberty according to the democratic creed and would overthrow that creed if they could.[53] There is a certain plausibility in that argument, for it is based on a kind of sporting notion that before you can play you must accept the rules of the game. And yet I venture to believe that the argument is unsound.

I first note that the argument proves too much and involves the destruction of groups that we have always tolerated, even if we thought them gravely in error. If suppression were justifiable in this supposed special class of cases, should we not suppress such religious groups as have indicated by their action in other countries that once they become an overwhelming majority they will not support the principle of freedom of the press according to our

52. J. H. Nichols, Lord Acton, University Observer, vol. 1, p. 14.
53. American Law Institute, Statement of Essential Human Rights, comment to Article 5.

notions? And should we not suppress patriotic groups that believe in discrimination on the basis of color or race or creed - for the free speech guarantees of the First Amendment are no more sacred part of our creed than the equal protection of the laws guaranteed by the Fourteenth Amendment.

Next, I observe that the argument proceeds on the assumption that the state can effectively suppress a group for holding opinions or engaging in conduct for which the individuals can not be tried under the criminal law of the land. I doubt whether the assumption ever has been or can be proved to be correct. Particular groups may, of course, be disbanded. But by hypothesis, the members remain free individually to entertain, to express and to effectuate the same ideas. And in such a situation the normal consequence is that the individuals will form new but secret combinations, about whose character the authorities are ignorant. That was the history of the attempts directly to suppress the IWW at the end of World War I. And it seems almost inevitable that suppression of groups which are subversive but not criminal will always work in that manner and will be less effective than governmental scrutiny and supervision of these same groups.

Finally, if an exception of the sort suggested were made to the general principle of freedom of association some of its chief advantages would be lost. For the heart of the principle of freedom of association is our confidence that by the stimulus of fellowship men will not only realize their full

potentialities but will bring to the surface the new adventurous ideas which the mass had not yet discerned but on which their future progress will be built. Freedom of association like the other basic freedoms looks at all conflicts of opinion and of doctrine sub specie aeternitatis. And it is ever mindful of the profound wisdom of Heraclitus' gnome, "That which opposes, fits. From different tones comes the finest tune."[54]

54 Frag. 8. Quoted by Jaeger, Paideia, vol. I, p. 181 and Aristotle, Nich. Eth. VIII, 2.

[redacted]Zanyzanski, Jr.
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~~Washington, D. C.~~

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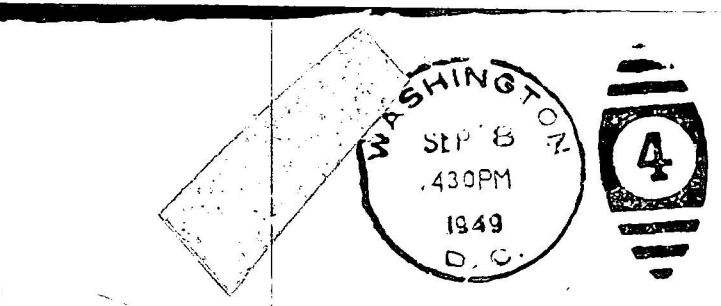

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CHAMBERS OF
CHARLES E. WYZANSKI, JR.
DISTRICT JUDGE

United States Court
Boston 9

September 6, 1949

Honorable Thomas P. Murphy
Special Assistant to the Attorney General
Department of Justice, Criminal Division
Washington, D. C.

Dear Mr. Murphy:

You may recall that when I testified in United States v. Alger Hiss in June 1949 you put to me a question as to a news item which you said appeared in a Boston paper about June 3, 1947. The substance of your question was whether I had stated with respect to a Harvard branch of American Youth for Democracy that unless an organization is criminal or treasonable it should be allowed "freedom of association". I answered affirmatively.

I was aware when you put the question that (no doubt unknown to you personally) the sentence which you quoted had been torn from its context. I could have made the point that the sentence came from a speech which was extremely critical of communistic associations and which recommended that all groups communistic or not should be open to public inspection and surveillance. However, I did not delay the trial to make that point for two reasons. The first one was that I did not want to give either the jury, the public or you the impression that I was trying to equivocate. I had spoken up in favor of freedom of association with qualifications. And I was not willing either to back track or to appear to back track by unduly emphasizing the qualifications which I had stated and often repeated. [See 35 California Law Review 336] My second reason for not being more detailed

[redacted]

in my answer to your question was that it seemed to me quite inappropriate for a mere witness in a criminal case to be elaborate in the statement of what was, after all, an issue irrelevant to the main charge being considered by the Court and jury.

However, inasmuch as the Hiss case is not currently being heard, I feel free to draw to your attention the full text of exactly what I said before the Harvard Phi Beta Kappa audience since I assume that you personally and the Department of Justice officially are interested in an accurate and fair estimate of what my views were and are in connection with freedom of association. I venture to ask you to read the full text of the enclosed address. I think that you will see that, no doubt quite unintentionally, your question to me at the Hiss trial gave a distorted impression of what have been and are my views in connection with left-wing and like political groups.

May I ask you, in addition to reading this manuscript yourself, to be good enough to call it to the attention of whatever branch of the Department of Justice and whatever individuals in the Department of Justice misled you by giving you a tortured excerpt from my speech.

Faithfully,

Charles Edward Wyzanski, Jr.

Enclosure

[redacted]

C H A R L E S E D W A R D W Y Z A N S K I, JR.,

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. STRYKER:

Q Judge Wyzanski, are you a member of the United States District Court for one of the districts in Massachusetts?

A I am, for the District of Massachusetts.

Q Pardon my unfamiliarity. I was not too sure. How long have you been a district judge?

A I was nominated on December 1, 1941. I was confirmed on December 19, 1941. I took office on January 26, 1942.

Q And you came from Boston here at our request?

A That is correct. I came voluntarily, not under subpoena.

Q I understand. Now do you know Mr. Alger Hiss?

A I do.

Q How long have you known him? A At least since 1929.

Q When did you first become acquainted with him?

A When I was at the Harvard Law School.

Q Well, you were at the Harvard Law School, too?

A I was.

Q It seems to me everybody in the room except myself was there. Well, all right --

[redacted]

THE COURT: Except excluding Mr. Murphy and myself.

Q Now you went through the Harvard Law School with him? A I was a class behind him.

Q And did there come a time when you were on, I almost hesitate to mention it again, the Law Review?

A No, sir.

Q You followed him? A Yes, sir.

Q How many young men were there in the Harvard Law School at that time? The jury gets tired of this, but I have to ask it. A There were between 1500 and 1800.

Q Did you know a great many people that knew Alger Hiss? A Yes, I did, sir.

Q After you had finished at the Harvard Law School did you too come to Washington? A Yes, I came to Washington once to visit Alger Hiss at the home of Mr. Justice Holmes.

Q You were there when he was with Mr. Justice Holmes?

A Yes, sir.

Q Did you see him in Washington at all? A I saw him on that day of March or April, 1931, and I thereafter saw him between 1933 and 1937 with some regularity, and I saw him thereafter between April of 1941 and December of 1941 with less regularity, and I saw him on occasions when I was in Washington thereafter.

Q Were you working in some department or other at one time in Washington? A Yes. I was first in the Department of Labor and thereafter in the Department of Justice, and thereafter was a member of the National Defense Mediation Board.

Q And you had probably seen him in his office sometimes in the State Department?

A I have seen him in his office in the State Department.

Q In addition to the hundreds that you knew that knew him in theHarvard Law School, did you know a great many other people around Washington, or even more in Washington than the Harvard Law School, I suppose you did, who knew him? A I did, sir.

Q Would you be good enough to tell his Honor and these ladies and gentlemen whether you know the reputation of Mr. Alger Hiss for integrity, loyalty to his Government and veracity? A I do, sir.

Q Is it good or bad? A It is good. It is a -- the answer is Yes. I am willing to amplify it, but I don't want to go beyond --

Q You know we are under the rules of evidence here. I suppose you have them in your court too. All right, Judge.

MR. STRYKER: You may cross-examine.

CROSS-EXAMINATION BY MR. MURPHY:

Q Judge, did you want us to believe that you knew

that there were 1500 people in Washington who knew Mr. Hiss? A I did not so testify, sir.

Q Let me see what you said. Did you say there were about 1500 students up in Harvard? A I said there were in the Harvard Law School at the time Mr. Hiss and I were students, between 1500 and 1800 students.

Q Didn't Mr. Stryker say that there were hundreds up there that knew him in addition?

A He certainly asked if there were many. If you recall "hundreds," I would say that is right.

Q Then did he ask you whether there were as many people at Harvard that knew him as in Washington?

A He did not ask that.

THE COURT: I think Mr. Stryker said there were more people in Washington than in the Harvard Law School, without indication whether they knew him or not. That is the testimony.

Q Judge, you hold the same rank as Judge Kaufman here, is that right? A We are both United States District Court judges. That is correct.

Q I think you said you had come voluntarily without subpoena? A That is correct.

Q I take it that you came pursuant to a request?

A Pursuant to my own request.

Q That is a request, isn't it? A That is correct.

[redacted]

Q What time did you arrive here this morning?

A I arrived here somewhat after 10 o'clock. I would say about seven minutes after. By "here" do you mean the City or the courthouse?

Q In the courthouse. Did you tell Mr. Stryker and Mr. McLean you were here? A I told Mr. McLean -- I think Mr. Stryker saw me but not either of them as promptly as seven minutes after ten.

Q Can we say at least at 10.30? A That is correct.

Q Did you see them at the recess -- I forget what time it was, but about half past eleven?

A I saw both of them -- not together.

Q Judge, did you ever hear, prior to 1948, any reports or rumors that the defendant Hiss was a Communist?

A I did not, sir.

Q And did you ever hear, prior to 1948, any reports or rumors that the defendant Hiss had taken papers out of the State Department and given them to people who were unauthorized to receive them? A I did not, sir.

Q Did you visit him at his home in Washington when you were in Washington on these various occasions?

A I did not get the latter part of the question.

Q On these various occasions? I think you saw him in 1931 and from 1933 to 1937, and 1941. A I did not probably visit his home after the month of February or March,

1937. That is the last time I remember being in his home. I saw him elsewhere.

Q But in Washington and prior to the time you fixed, you were at his home in Washington?

A I was.

Q How frequently would you say you were there?

A Infrequently.

Q Can you remember now whom you met at his home other than himself and his wife? A I do.

Q Will you tell us who they were? A On the only occasion I have clearly in mind I went with Mr. Charles A. Horsky one evening to the home of Mr. and Mrs. Hiss and that is a visit in March and about 1937.

Q In other words, you went with this man? A I went with him.

Q So he was not a guest when you arrived? A He was not.

Q You cannot now recall the names of other people you might have met there? A At his home, no. I would say probably his brother Donald, but that is the only one I can fairly testify to.

Q Judge, we have a quotation from a newspaper, from the Boston Herald, of June 3, 1947.

A 1947?

Q Which I am going to read and ask you whether you

[redacted]

said it:

"Unless a group is found criminal or treasonable, it should be allowed freedom of association, Judge E. Wyzanski, Jr., of the Federal Court, contended yesterday in defending the decision of Harvard University to permit within the college a branch of the American Youth for Democracy.

"Speaking at the annual exercises of the Harvard Chapter of the Phi Beta Kappa Society, the jurist maintained, with respect to the organization which has been termed a member of the Communist Front, 'You cannot be certain whether groups termed subversive are termed so in error or in truth.'"

Is that a fair quote from your speech?

A I believe it is, but in any event I believe it.

MR. MURPHY: No further questions.

REDIRECT EXAMINATION BY MR. STRYKER:

Q Judge, a question I forgot to ask: Do you remember one occasion when you entered Mr. Hiss's office in Mr. Sayre's suite in the State Department when Mr. Hiss was not there? A I clearly remember such occasion.

Q Will you define that occasion? A Yes. On September 21, 1938, I started out for Washington. It was

[redacted]

the day of the hurricane in New England and my train was held up at Westerly at the very center of the hurricane storm, and I had to return to Boston, and I proceeded thereafter to Washington and arrived there on September 23, 1938. On that day I had business, as a lawyer, I then being a partner in the Boston law firm, Ropes, Gray, Brydon & Perkins.

mft MR. MURPHY: May I interject at this time, your Honor, and ask you to instruct the witness to confine himself to the question? I think the question was whether he ever visited Mr. Hiss in his office.

THE COURT: He testified that he recalled the incident very clearly.

MR. MURPHY: Yes.

THE COURT: He was asked for the details of it.

MR. MURPHY: Well, I object to the details. I don't think we are concerned with the details at all.

THE COURT: The objection is too late to be sustained anyway.

You may continue your answer, Judge Wyzanski.

A After I had completed my other business in the State Department I went to the office of Alger Hiss. I went into his room. I cannot state and do not say whether there was a secretary at the time stationed in the office outside his office. I do know that I went into

[redacted]

his office, and which before I entered, I was in the Secretary's office, and I waited there for him, he not being there. He subsequently returned to that office, he having been, as he told me, consulting someone else.

Q You were not challenged or -- A I was not.

Q -- thrown out by Miss Lincoln, or anyone?

A I don't know Miss Lincoln.

Q No.

MR. MURPHY: You have no recollection, Judge, of who was present --

MR. STRYKER: Just a moment, please, Mr. Murphy. I had not finished.

MR. MURPHY: I am sorry.

Q I forgot to ask this, too, Judge: Were you and Mr. Hiss colleagues in the Solicitor General's Office?

A We had adjoining offices.

Q And are the various lawyers in the Solicitor General's Office among those that you had in mind when you said that you knew others and from them knew his reputation?

A That is correct, sir.

MR. STRYKER: Thank you very much, Judge.

RECROSS-EXAMINATION BY MR. MURPHY:

Q Just one question about that secretary. You don't think you have, as you said, any recollection of whether there was on the day you visited there a secretary present? Isn't

that your recollection? A That is correct. I don't recall.

Q So you don't know whether you were stopped or not when you went in? A I do not.

MR. MURPHY: Thank you, Judge.

MR. STRYKER: Thank you very much, Judge.

(Witness excused.)

MR. STRYKER: Now, if yourHonor please, in view of Mr. Murphy's questions of the Judge, at the time this gentleman was here, if the suggestion was that I was endeavoring to delay this testimony I now offer and will be very glad to continue on with an afternoon session.

THE COURT: We have promised the jury that we would adjourn at one o'clock. They have made their plans accordingly, and, so, we will recess at this time until 10.30 Monday morning.

I again admonish the jurors not to discuss the case with anybody and not to permit anyone to discuss it with you.

I realize the difficulty that everybody has in this case in connection with newspaper reports, radio commentators, television, and other forms of communication. Nevertheless it is your duty and mine, too, to try this case on the evidence as it is adduced in this courtroom without the implications or slanting, if you will -- and

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we have heard something in this case of slanting of news -- without implications from anybody as to the testimony in this case. And I urge you, so far as humanly possible, to avoid any extraneous mattersaffecting your judgment in this case.

We will adjourn now until 10.30 on Monday morning.

(Adjourned to Monday, June 27, 1949, at 10.30 a.m.)