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Reflections by an academic-freedom pioneer

By David L. Hudson Jr.
First Amendment scholar
09.26.07

One in a series of interviews with principals involved in First Amendment-related U.S. Supreme Court cases (see below).

Forty years ago U.S. Supreme Court Justice William J. Brennan wrote for a bare majority of the Warren Court in *Keyishian v. Board of Regents* (1967) that academic freedom represents a "transcendent value" and constitutes a "special concern of the First Amendment." Free-speech expert Robert O'Neil, the founder of the Thomas Jefferson Center for the Protection of Free Expression and a former Brennan law clerk, calls the decision "the high water mark of academic freedom jurisprudence." Reflecting on the decision recently, lead plaintiff Harry Keyishian said that "those words of Justice Brennan were the crowning achievement of the decision."

The Court's decision invalidated a series of state regulations — sometimes known collectively as the Feinberg Law — that sought to eliminate "subversive" persons from employment in state institutions. It reflected a concern for much of the 20th century about the threat of communism and subversive influences. The Court's decision in *Keyishian* was not expected in many quarters, given that the Court had upheld the bulk of the law in its earlier decision *Adler v. Board of Education* (1952).

However, Harry Keyishian and four other University of Buffalo faculty members thought they could successfully challenge the anti-communist law. They believed that their employment should not be conditioned on their signing a loyalty oath affirming they were not communists. Those individuals were English instructor Keyishian, associate English professor George Hochfield, philosophy lecturer Newton Garver, assistant English professor Ralph N. Maud and former English lecturer and librarian George E. Starbuck.

"I had been teaching at the University of Buffalo, a private institution, for two years when the state of New York expanded the State University of New York system," Keyishian recalled in an e-mail message. "When the University of Buffalo became SUNY-Buffalo, it followed the law of the time and distributed 'loyalty oaths' to faculty and staff, as required of all city and state employees. The Feinberg Law, passed in 1949, barred 'subversive' persons from teaching jobs."

Keyishian and the others refused to sign the oath. As a result, Keyishian's one-year teaching contract was not renewed. "Of course I did without a year of salary, but I was able to get by and used the time to finish my doctoral dissertation at NYU," Keyishian said, recalling that perhaps the most difficult part of his firing was convincing his parents and other relatives of the merits of his decision.

For Keyishian, the loyalty oath infringed on core principles and endangered academia. Several of his professors at Queens College had lost their jobs in the early 1950s because of the Feinberg Law. "I decided to go ahead with this because of (my) conviction that the Feinberg Law represented a violation of academic freedom and had done a great deal of harm to our educational system by creating an atmosphere of conformity, timidity and fear," he said. "This was a widely held view: I never heard from anyone a defense of the Feinberg Law and the loyalty oaths. The best people could do was to say that the court was unlikely to overturn this law."

Many believed the lawsuit would not prove successful given Court precedent. The

Court had rejected many constitutional challenges to loyalty oaths, including a challenge to the Feinberg Law in its 1952 *Adler* decision, which involved a challenge to the statutes from the secondary-school level. Justice Sherman Minton defended the purpose of a law to prevent subversive elements from corrupting young minds: "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted." The Court had also upheld the dismissals or contempt citations of teachers in *Beilan v. Board of Public Education* (1958) and *Barenblatt v. United States* (1959).

Keyishian remembered that some at the University of Buffalo law school believed that his and his fellow plaintiffs' legal challenge would fail. He recalled that the law school "reported that [the Feinberg law] was very unlikely to be overturned." Keyishian said the report concerned him, but "frankly we decided we knew better than the Law School and their experts."

Keyishian and the other plaintiffs were ably represented by famed attorney Richard Lipsitz. "Lipsitz and his associates were active advocates for civil liberties and [F]irst [A]mendment rights, so they were the natural choice," he said.

In the lower courts

Initially, it seemed the law school's concerns over stare decisis ("let the decision stand") would prove prescient. In January 1966, a three-judge federal district court ruled against Keyishian, upholding the constitutionality of the state statutes. The district court rejected the plaintiffs' arguments that *Adler* should not apply because they were university faculty, not secondary-school employees. "The interest in national self-preservation … applies to the university campus as well as to the rest of our society," the district court wrote.

Keyishian never lost faith in the cause, believing that the U.S. Supreme Court headed by Chief Justice Earl Warren was ready for change. "Mr. Lipsitz had prepared us for that (the loss in the district court)," Keyishian said. "He was always aiming for the Supreme Court."

Supreme Court victory

Lipsitz argued the case for Keyishian and his fellow plaintiffs in November 1966, and the Court rendered its decision in January 1967. The result was a narrow 5-4 victory for the plaintiffs with a five-member majority of Brennan, Warren and Associate Justices Abe Fortas, Hugo Black and William Douglas.

Confronting the *Adler* decision, Brennan wrote that "pertinent constitutional doctrines have since rejected the premises upon which that conclusion rested" and "*Adler* is therefore not dispositive." He contended that the "complicated plan" of regulations under the Feinberg Law was too vague. He reasoned that many university teachers would chill their speech: "It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery." He then waxed eloquent on the high purpose of academic freedom on the university campus and classroom:

> "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas."

The *Los Angeles Times* reported at the time of the decision that the Court was "bitterly divided." Justice Tom Clark authored a vigorous dissent — joined by Justices John Marshall Harlan, Potter Stewart and Byron White. "No court has ever reached out so far to destroy so much with so little," Clark wrote. "The majority says that the Feinberg Law is bad because it has an overbroad sweep. I regret to say … that the majority has by its broadside swept away one of our most precious rights, the right of self-preservation."

Significance and reflections

Keyishian — who retired earlier this year from his teaching job at Fairleigh Dickinson University in Madison, N.J., but remains as director of Fairleigh Dickinson University Press — still relishes the majority's embrace and language on the importance of academic freedom. "This was the first time that the term 'academic freedom' had received specific protection," he said.

He was not dismayed that the victory was 5-4. "I wish it had been higher in our favor, but that was the split in the [C]ourt at the time, so it was good enough," he says. "More important was that the decision was beautifully crafted so that it has had staying power."

Keyishian remains a "profoundly important" precedent for First Amendment jurisprudence, O'Neil said.

"This was really the first time — and the clearest and the most forceful ever — that the Court grounded a protective ruling on academic freedom principles as such, rather than (on) due process or on general First Amendment precepts," he said. "The *Keyishian* Court wanted to, and did, go substantially further and with sharper focus on intellectual freedom and free inquiry in the academic world that did any of the previous rulings."

O'Neil added that "few current threats to academic freedom reflect either the motive (anti-[c]ommunism) or the means (compelling disavowal of political activity or affiliation) that were prevalent in the 1950s and 1960s."

Asked whether he feels positive about becoming a part of enduring First Amendment history, Keyishian affirmatively responded: "Hell yes." He said the experience taught him that "when you get the opportunity to make a difference, do it!"

Because Harry Keyishian and a few other University of Buffalo faculty members in the 1960s chose to "make a difference," university campuses today enjoy much greater First Amendment freedoms.

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