

BOOK REVIEWS

ZECHARIAH CHAFEE, JR.: DEFENDER OF LIBERTY AND LAW. By Donald L. Smith.¹ Cambridge, Ma.: Harvard University Press. 1986. Pp. x, 355. \$25.00.

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Zechariah Chafee, Jr., the scion of a wealthy Rhode Island manufacturing family, was a distinguished member of the faculty at the Harvard Law School, where he taught Equity and Bills and Notes for forty years. He was the chief draftsman of the Interpleader Act of 1937, one of our more arcane federal statutes, which brought a measure of order to the complex legal universe involving multiple claims for the same debt against insurance companies, banks, storage warehouses, and similar businesses. Had he not also plunged into a few of this century's most controversial civil liberties debates, however, it is doubtful that Chafee's sudden death in 1957 would have generated more than a short obituary and his life, though exemplary, would not have merited a biography of this length. But when he was gone, the *Chicago Tribune* captioned its story, "PROF. CHAFEE, DEFENDER OF LEFTISTS, DIES," and J. Edgar Hoover himself closed the professor's FBI file with a short, disparaging note.

Chafee entered the history books forever between 1918 and 1920, when he published a series of articles in *The New Republic* and the *Harvard Law Review* that strongly criticized federal prosecution of war-time dissenters under the Espionage and Sedition Acts and the supine behavior of most of the federal judges who either presided at these trials or sustained the convictions on appeal. These articles became the basis for his celebrated book, *Freedom of Speech*, which appeared in 1920. With the exception of Learned Hand, then a young federal district judge, who had thrown out the government's case against the *Masses* in the summer of 1917, and Justice Holmes, who had forged a majority behind his celebrated "clear and present danger" standard in the *Schenck* case, Chafee found little to admire in how the federal judiciary faced the gravest

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threat to freedom of expression since the Alien and Sedition Acts of the late eighteenth century.

Neither the Hand nor the Holmes approach satisfied Chafee entirely. By punishing only speech that urged people to break the law, Hand's "direct incitement" standard superficially provided the greater protection, but it failed to deal adequately with the so-called "Mark Antony problem," when words that do not directly invite law-breaking nevertheless lead to incitement because of the context. Moreover, Hand's daring expedition into first amendment territory was soon ambushed by a federal appeals court that flatly rejected his formulations. Holmes's test, although failing to specify what "substantive evils" Congress might seek to prevent, nonetheless had the weight of a unanimous Supreme Court behind it. As it was later refined by Holmes and Brandeis in their *Abrams* dissent, this approach came closest to Chafee's ideal because it sought to balance two vital social interests: public safety and the search for truth. "Every reasonable attempt should be made to maintain both interests unimpaired," Chafee wrote, "and the great interest in free speech should be sacrificed only when the interest in public safety is really imperiled, and not, as most men believe, when it is barely conceivable that it may be slightly affected." Chafee's vindication came more than a decade after his own death, when the Warren Court held that government could not even proscribe the advocacy of the use of force or law-breaking, "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."³

Chafee's writings on the first amendment alone, all of which appeared after the Armistice in 1918, would not have gotten him into trouble with the Department of Justice and influential Harvard alumni, if he had not offended the forces of law and order in other ways as well. Working with that notorious law school "radical," Felix Frankfurter, he stopped efforts to deport eighteen communist aliens in the wake of the Palmer Raids; he signed the *Report upon the Illegal Practices of the United States Department of Justice*, written by the National Popular Government League and the American Civil Liberties Union, which accused the attorney general and his subalterns of violating the eighth amendment, the fourth amendment, and the fifth amendment; and he signed the petition urging amnesty for Jacob Abrams. But most serious of all, his 1920 article on the *Abrams* case contained scathing criticisms of Henry D. Clayton, the former United States Senator, who had presided at the trial.

Chafee criticized the government for assigning to the *Abrams*

3. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

trial "a judge who had tried no important Espionage Act case, who was called in from a remote district where people were of one mind about the war, where the working class is more conspicuous for a submissive respect for law and order than for criticism of high officials, where Russians are scarce and Bolsheviks unknown." Judge Clayton, according to Chafee's reading of the transcript, displayed open prejudice against the defendants and improperly instructed the jurors, leading them to believe that pro-Russian sympathies were sufficient to convict. When Chafee failed to retract what critics called his "errors" (Clayton, for example, had tried an espionage case before *Abrams*), they demanded an inquiry into his fitness to teach at Harvard Law School.

This extraordinary assault upon academic freedom was led by two Wall Street lawyers, Austen G. Fox, a member of the Harvard Board of Overseers, and Robert P. Stephenson, with supporting roles played by two Department of Justice officials, Francis G. Caffey, the United States attorney whose office handled the *Abrams* case, and John M. Ryan, the assistant attorney in charge of the trial. Chafee's so-called trial at the Harvard Club in the spring of 1921 is surely one of the most lamentable and heroic episodes in the entire history of that university: lamentable, because the ridiculous accusations of Fox and his henchmen forced an inquiry in the first place, and because five of the eleven members of the law school visiting committee who listened to the "evidence" believed that Chafee should have retracted his "errors" in the *Harvard Law Review*; and heroic, because Harvard President A. Lawrence Lowell, later the villain in the Sacco-Vanzetti case, defended Chafee during the "trial," tore Fox's accusations to ribbons, and made a strong defense of academic freedom.

Chafee went on to render yeoman's service in the cause of civil liberties for the remainder of his professional life. A patrician and a life-long Republican, who voted twice against F.D.R., he nonetheless believed, as he said during the trial at the Harvard Club: "My sympathies and all my associations are with the men who save, who manage and produce. But I want my side to fight fair." When "his side" did not fight fair, which was often, Chafee entered the lists against them. Along with Grenville Clark, he became a leading figure in the American Bar Association's new Bill of Rights Committee, founded in the late 1930's, which filed important amicus briefs on behalf of plaintiffs who were threatened with a deprivation of first amendment rights. Among their triumphs were *Hague v. Committee for Industrial Organization*, which limited the power of local officials to ban public assemblies arbitrarily; and *West Virginia State*

Board of Education v. Barnette, which struck down the mandatory flag salute. Chafee also defended Clyde W. Summers, a conscientious objector who was denied admission to the Illinois bar as a result of his pacifism. He spoke out against segregation in the American Bar Association, and waged relentless war against most of the legal outrages of the Cold War-McCarthy era, including the prosecution of leading communists under the Smith Act and the passage of the Internal Security Act of 1950.

Professor Smith covers these important episodes with thoughtfulness and meticulous care. Once they have been exhausted, however, his book labors under the difficulty of maintaining interest in the career of a professor whose work consisted mainly of less dramatic events like teaching classes, grading bluebooks, and organizing and revising casebooks. The preparation of *Cases on Equity* is not material from which even a master craftsman can fashion a great biography. Zechariah Chafee was a productive, humane, and altogether sterling professor of law, a good husband and a caring father, who suffered many of the ills that afflict other academics, including financial problems, the suicide of a son, and a nervous breakdown, but apart from his confrontations with the federal government over first amendment issues, his life remained rather ordinary. That he was not Louis Brandeis, Felix Frankfurter, William O. Douglas, or even James Landis, is not Professor's Smith's fault. What Chafee's life may have lacked in panache it more than made up for in integrity, fair play, and old-fashioned decency.

NO IVORY TOWER: McCARTHYISM AND THE UNIVERSITIES. Ellen W. Schrecker.¹ New York, N.Y.: Oxford University Press. Pp. 437. \$20.95.

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Heroic behavior was a rare commodity during the brief heyday of Senator Joe McCarthy. Without "naming names," let's look at the record. A general disobeyed a President and then wrapped himself in the flag of a country upon whose soil he had not trod in fourteen years. The next year (1952) a presidential candidate failed to defend a general (and a friend) who had been unfairly smeared by the junior senator from Wisconsin. Once safely in the White House, the erstwhile candidate proceeded to wrap himself in the

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