A VOICE FOR LIBERTY

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I first saw Henry W. Sawyer, III in action in 1973 when I served as his junior associate in an unfair competition case that had been transmuted into a Sherman Act section 1 claim. The defendants retained Henry after suffering what was for them a catastrophic verdict at the hands of a jury in a Philadelphia federal court. When I came into Henry's office, he explained to me that the five individual defendants were facing personal ruin as a result of the verdict and, more immediately, from execution on the seven-figure treble damage award.

Our urgent task was to stay execution on the judgment, while the plaintiff corporation, through its able counsel, was insisting that the individuals post their houses as security for the stay under Rule 62(d) of the Federal Rules of Civil Procedure. Since all five of these men were married, this meant that their wives' interests were at stake and, as one would expect, they were horrified at the prospect of losing their homes. We therefore filed a motion on behalf of the wives (as well as their husbands) for relief from this Draconian condition, and shortly thereafter, I for the first time, saw Henry Sawyer as an advocate, pressing our motion before my now-colleague, Judge Raymond Broderick.

What immediately struck me as I heard Henry arguing our motion was what a terrific, impressive voice he had. If memory serves correctly, we were seated in Judge Broderick's chambers at the old Federal Courthouse at Ninth and Market Streets in Philadelphia. Seemingly without raising the volume, Henry Sawyer's rich bass voice nevertheless filled the room and kept everyone—most importantly, Judge Broderick—in rapt attention. I still can hear the sound of that voice saying to Judge Broderick, at a time when the women's movement was still largely a gleam in feminists' eyes, "Your Honor, women are people. They have an existence and interests separate and apart from their husbands. These women had *nothing* in any way, shape, or

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form to do with what the plaintiff claims in this case."

To my amazement, and before my very eyes, the voice worked its magic. At least to the extent that we were given the opportunity to provide substitute security—as it turned out, for less than the full amount of the verdict—the marital homes were never again in danger. Indeed, the case ultimately settled on appeal,[1] on terms that brought our clients back from the brink of bankruptcy and enabled them to put their energies and talents to rather rewarding business successes in later years. As one might imagine, they were convinced that Henry W. Sawyer, III had saved their business and personal lives. They were right.

I thereafter had the great good fortune of working closely with Henry Sawyer in other commercial litigation, most notably *Outboard Marine Corp. v. Pezetel*.[2] In that case, we represented the then-state-owned Polish entities who made golf carts that sold so successfully in this country that the domestic manufacturers of those vehicles became rather upset.[3] In *Pezetel* and in other cases, I heard that unforgettable voice, witnessed its crafty modulations, and beheld what it could do to many tribunals and gatherings of lawyers.

Indeed, over the course of the more than fifty years that Henry Sawyer practiced after his graduation from this law school in 1947, he used that highly sophisticated voice in many cases in courts around this country.[4] As successful as Henry Sawyer was in tuning that voice to advance the interests of his paying clients, he always in my years of practice with him saw those cases, however zealously he argued them, as a means to a larger end. Successful as he was in these private, and

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[1] The case discussed in the text is *C. Albert Sauter Co. v. Richard S. Sauter Co.*, 368 F. Supp. 501 (E.D. Pa. 1973).

[2] 461 F. Supp. 384 (D. Del. 1978).

[3] Interestingly, Henry was recommended to the Poles by Professor Louis B. Schwartz, who taught me criminal and antitrust law at Penn, and for whom I worked as a research assistant. Professor Schwartz remained as our co-counsel in the litigation before Judge Murray Schwartz (no relation) in the Delaware District Court and in the antidumping administrative proceeding in the United States Treasury Department.

[4] A Westlaw search reveals over one hundred citations of reported cases in which Henry Sawyer appeared as counsel from 1951 to the early 1990s. Of course, for much of Henry's career, judicial memoranda and opinions were not transmitted routinely to Lexis and Westlaw. Thus, for example, there are no reported decisions in two significant Robinson-Patman Act cases Henry and I worked on (together with Edward M. Posner), *Joseph Walsh Tire Co. v. B.F. Goodrich Co.*, C.A. No. 74-1310 (E.D. Pa.) and *Hub Tire Co. v. B.F. Goodrich Co.*, C.A. No. 75-85 (E.D. Pa.), *cited in Broyer v. B.F. Goodrich Co.*, 415 F. Supp. 193, 195 nn.1-2 (E.D. Pa. 1976).

largely commercial, cases,[5] the reason this *Law Review* has gathered these tributes is because of Henry Sawyer's contribution in public interest litigation. And it was in *that* litigation that one always found Henry Sawyer's heart and, above all, his voice in its most resonant and powerful pitch.

Henry Sawyer usually is identified with his successes in two of the century's most important Establishment Clause cases, *School District of Abington Township v. Schempp*[6] and *Lemon v. Kurtzman*.[7] There is no question that both cases constitute major legal landmarks in First Amendment jurisprudence, as well as in the everyday life of any American who has ever set foot in a public or sectarian school. Given the lopsided votes in the Supreme Court, however—eight-to-one in *Schempp* and seven-to-one in *Lemon*[8]—a detractor might contend that Henry Sawyer was just lucky enough to be in the right place at the right time and won two cases that really did not depend on the power and sound of that great voice. Although I would argue to the contrary—particularly given the reality that Henry *lost* before the *Lemon* three-judge court[9]—it seems to me hard to dispose of such detraction, at least directly.

Another Supreme Court case, however, provides conclusive evi-

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[5] In private litigation, Henry Sawyer probably was best known for his work in the antitrust area, an expertise that began when he was (unsuccessful) trial counsel for the plaintiff in *Viking Theatre Corp. v. Paramount Film Distributing Corp.*, 320 F.2d 285 (3d Cir. 1963), though on the briefs and the certiorari petition, the Supreme Court did not hear Sawyer's voice, but that of Edward Bennett Williams. The decision of the Court of Appeals was affirmed by an equally divided Court. *See* 378 U.S. 123 (1964). Henry always believed that his work for Viking Theatre led to General Electric's retaining him in the civil electrical conspiracy price-fixing cases, a litigation so complex it became the impetus for the later enactment of 28 U.S.C. § 1407. *See, e.g.*, United States v. General Elec. Co., 209 F. Supp. 197 (E.D. Pa. 1962).

[6] 374 U.S. 203 (1963) (holding that state-mandated prayer and devotional Bible reading in public schools are unconstitutional under the First Amendment's Establishment Clause).

[7] 403 U.S. 602 (1971) (holding that state financial aid to nonpublic schools was an "excessive entanglement between government and religion" and therefore was unconstitutional under the First Amendment's Religion Clauses).

[8] In *Schempp*, only Justice Stewart dissented, *see* 374 U.S. at 308-20, though Justices Douglas and Brennan wrote concurrences to Justice Clark's opinion for the Court. *Lemon* involved one Pennsylvania and two Rhode Island cases. Justice White concurred in the Pennsylvania case and dissented in the Rhode Island cases, *see* 403 U.S. 661-71, and Justices Douglas and Brennan wrote concurrences to Chief Justice Burger's opinion for the Court in the Rhode Island cases. Justice Marshall did not participate.

[9] *See* Lemon v. Kurtzman, 310 F. Supp. 35 (E.D. Pa. 1969). District Judge Troutman wrote the majority opinion, in which District Judge Luongo joined. Third Circuit Chief Judge Hastie dissented.

dence that Henry Sawyer's voice indeed made a decisive difference, not only in those two Establishment Clause cases, but also for the cause of liberty in this country.

I refer to the case of *Deutch v. United States.*[10] At the time young Bernhard Deutch came to Henry Sawyer's office, the nation was consumed in what we now call the McCarthy Era. The facts of Bernhard Deutch's case demonstrate how far the *Zeitgeist* had taken our political and legal life from its constitutional moorings—as well as from the common "decency" to which Joseph Welch referred in his famous colloquy with Senator McCarthy.[11]

Two months before Welch's rhetorical questions about Senator McCarthy's "decency," Bernhard Deutch was working in the Physics Building of the University of Pennsylvania. He was served with a subpoena that commanded him to appear in Albany, New York two days later before a subcommittee of the House Committee on Un-American Activities. Though still only a graduate student, Deutch had the good sense to choose Henry Sawyer as his lawyer.

The subcommittee in its grace granted Henry's request for a continuance, and the appearance occurred three days later than scheduled, and in Washington, D.C. As Henry later described the Kafkaesque scene in his Brief for Petitioner, "Upon appearance at the committee's office in the House Office Building in Washington, [Deutch] and his counsel were directly shown into an office in which there were seated several unidentified men; he was forthwith sworn and without preamble the questioning commenced."[12]

The committee counsel informed Deutch that:

> [D]uring hearings at Albany last week, the committee heard testimony regarding the existence of a Communist Party group or cell operating among undergraduates at Cornell University, among certain graduates at Cornell and in the city of Ithaca.

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[10] 367 U.S. 456 (1961). I have elsewhere, in a very different context, discussed Henry Sawyer's effect on the Supreme Court in *Deutch*. *See* Stewart Dalzell, *Faces in the Courtroom*, 146 U. PA. L. REV. 961, 967-68 (1998).

[11] The great Boston lawyer's words to Senator McCarthy, after McCarthy's gratuitous slander of Welch's young associate, bear repeating to give the flavor of the era in which Sawyer represented political outcasts like Deutch: "Until this moment, Senator, I think I never really gaged [sic] your cruelty or your recklessness. . . . Let us not assassinate this lad further, Senator. You have done enough. Have you no sense of decency, sir, at long last? Have you left no sense of decency?" *Special Senate Investigation on Charges and Countercharges Involving Secretary of the Army Robert T. Stevens et al.: Hearing Before the Special Subcomm. Investigations of the Comm. on Gov't Operations*, 83d Cong., at 2429 (1954) (statement of Joseph N. Welch to Senator Joseph McCarthy).

[12] Brief for Petitioner at 5, Deutch v. United States, 367 U.S. 456 (1961) (No. 233).

> In connection with that testimony, the committee was informed that you were a member of one or more of those groups.[13]

Whereupon, Deutch explained that he had met a charismatic black law student at Cornell named Ross Richardson, who eventually persuaded Deutch to join a small Communist Party cell. Richardson would drive Deutch to the meetings and collect dues from him.

Although Deutch answered most of the subcommittee's questions, he declined to answer five, all relating to people other than himself. For example, the first question he declined to answer was:

> 1. The committee was advised that a witness by the name of Ross Richardson has stated that you acted as liaison between a Communist Party group on the campus and a member of the faculty at Cornell, and that you knew the name of the member of that faculty, who was a member of the Communist Party. Will you tell us who that member of the faculty was?[14]

As Henry Sawyer later told the Supreme Court, Deutch "respectfully told the committee that he was willing to tell all about his own activities but that he could not, because of moral scruples, bring himself to inform on other people."[15] In any event, Deutch made it clear that the subcommittee easily could get all of the requested information from Ross Richardson.

When the House of Representatives voted a contempt citation against Deutch, he was indicted for refusing to testify, a violation of 2 U.S.C. § 192.[16] The bench trial took place in the District Court for the District of Columbia in 1956, before District Judge Alexander Holtzoff. In his brief opinion in support of the conviction as to four of the five counts, Judge Holtzoff not only gave a ringing endorsement to the power of Congress to investigate domestic Communism in all its details, but also summarily rejected Henry Sawyer's argument that the particular questions were not pertinent to the subcommittee's inquiry.

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[13] *Id.* at 5-6.

[14] *Id.* at 8. The other questions and orders were:

> 2. Will you tell the committee, please, the source of that $100 contribution, if it was made?
> 3. Where were these meetings held?
> 4. Were you acquainted with Homer Owen?
> 5. The witness is directed to give the name of the person by whom he was approached.

Deutch v. United States, 280 F.2d 691, 692 n.1 (D.C. Cir. 1960).

[15] Brief for Petitioner, *supra* note 12, at 7.

[16] *See* 2 U.S.C § 192 (1997) (setting forth liability for refusing to testify or produce papers during a congressional investigation).

To this contention Judge Holtzoff wrote that a congressional committee "has a right to obtain cumulative testimony" and that it may question "several witnesses to the same matter in order to check the accuracy of the information that it is obtaining."[17] Judge Holtzoff acquitted Deutch on Count Three, holding that someone "may not be punished for contempt of Congress merely for stating that he does not remember."[18]

During its long pendency in the Court of Appeals for the District of Columbia Circuit, the case had become rather more difficult owing to the Supreme Court's intervening decision in *Barenblatt v. United States*.[19] In that case the majority upheld, over First Amendment objections, the power of a subcommittee of the House Committee on Un-American Activities to inquire into a witness's past or present membership in the Communist Party. As the Court of Appeals interpreted *Barenblatt* in Deutch's case, "[T]he Government has proved beyond a reasonable doubt that the subject under inquiry and the pertinency of the questions were made to appear at the committee hearing with 'indisputable clarity.'"[20] The Court of Appeals's affirmance thus could not have come as a surprise.

On July 13, 1960, when Henry Sawyer filed his petition for a writ of certiorari to the District of Columbia Circuit, he was facing what then had to have seemed like a hopeless enterprise. The Supreme Court only a year before had decided *Barenblatt*, with its approval of wide-ranging and intrusive power on the part of Communist-hunting congressional committees. Though *Barenblatt* was decided by a vote of five to four, the fifth vote was supplied by the Court's newest member, Justice Potter Stewart, who joined Justices Frankfurter, Harlan, Whittaker and Clark.[21] Where Lloyd Barenblatt had cited the First Amendment as the basis for his refusal to answer, Bernhard Deutch only mentioned "moral scruples." True, Henry by this time had achieved some success for another "unfriendly" witness on the

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[17] United States v. Deutch, 147 F. Supp. 89, 92 (D.D.C. 1956).

[18] *Id.*

[19] 360 U.S. 109 (1959).

[20] *Deutch*, 280 F.2d at 695. In addition to *Barenblatt*, the panel also cited *Watkins v. United States*, 354 U.S. 178 (1957), and *Flaxer v. United States*, 358 U.S. 147 (1958), for the quoted proposition—all cases decided after the bench trial before Judge Holtzoff.

[21] Justice Black's dissent was unusually powerful, even for him, particularly in its quiet anger in referring to the majority's "conclusion that on balance the interest of the Government in stifling these freedoms [of speech, press, assembly and petition] is greater than the interest of the people in having them exercised." 360 U.S. at 143 (Black, J., dissenting) (internal quotations omitted).

grounds that a Senate subcommittee had failed to establish the subject matter of the inquiry.[22] But this argument was not available to him in *Deutch* because, as seen above, the subcommittee counsel made the purpose of Deutch's appearance quite explicit at the beginning of the proceedings on April 12, 1954.[23]

When, probably very much to his surprise, the Supreme Court granted his petition for a writ of certiorari, Henry Sawyer faced a daunting task. The judicial branch seemed oblivious to Senator McCarthy's death on May 2, 1957. Three years after that death, the Court of Appeals unanimously affirmed Judge Holtzoff, who was by then one of the most accomplished district judges in the federal system[24] (the Court of Appeals panel included later-to-be Chief Justice Burger). The *Barenblatt* majority in 1959 included the intellectual weight of Justices Frankfurter and Harlan.

When it came time for the oral argument, however, Henry brought with him his ultimate weapon: his voice. He used that voice to tell quite a story. Henry stressed Ross Richardson's involvement in keeping Deutch in the Party. He pointed out that when Deutch wanted to resign his Party membership, Richardson retorted that Deutch was a "white chauvinist" who could not stand having a black in control. Deutch relented and remained in the Party until he left Cornell to attend the University of Pennsylvania for his graduate work.

After recounting these facts, I suspect from many years' experience with him that Henry Sawyer then allowed a long, pregnant pause to fill the courtroom with silence. He always would do this before his punch line, and what a powerful one he had that day for his audience of nine. Doubtless reaching down to the lowest registers of that grave

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[22] In *Knowles v. United States*, 280 F.2d 696 (D.C. Cir. 1960), Henry won a reversal on behalf of a woman discharged from her position as a librarian in Norwood, Massachusetts, who had been called three times to Washington to appear before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, of the Committee on the Judiciary of the United States Senate. When she appeared on July 29, 1955, "no statement was made as to the Subcommittee's purpose in calling her, or as to the subject matter of the inquiry." *Id.* at 698. Her conviction therefore was reversed with instructions to dismiss the indictment. *See id.* at 700.

[23] *See supra* text accompanying note 13.

[24] Among his accomplishments, Holtzoff had, with William W. Barron, written a treatise, FEDERAL PRACTICE AND PROCEDURE, that Professor Charles Alan Wright acknowledges was the "lineal" ancestor of our Wright and Miller. 1 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, at vii (2d ed. 1982). The Supreme Court regarded Judge Holtzoff as "the person who almost certainly drafted" what became the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (1994). Kosak v. United States, 465 U.S. 848, 855-56 (1984).

voice of his that suitably could announce the Apocalypse, he then disclosed to the Court that, at all times, Ross Richardson worked as an agent for the Federal Bureau of Investigation.

On its face, Henry's shot at Ross Richardson was gratuitous and irrelevant to all but Bernhard Deutch and his advocate. Deutch was the one who refused to answer the subcommittee's questions, not Richardson. And Richardson's true role was utterly beside the point regarding the pertinence of those five questions to the subcommittee's inquiry.

But we know that this ornament to Henry's *recitativ* not only was relevant, but decisive for at least one other listener in that audience. As Henry many years later reported to me, "Justice Potter Stewart (hitherto on the government's side of this issue) leaned forward and said, 'Is that in the record, Mr. Sawyer?' I said indeed it was inasmuch as Richardson was the sole witness against Deutch at the trial."[25] To this Justice Stewart leaned back and said to a colleague (probably Justice Brennan), "'Outrageous . . . outrageous!'" in a volume "more *voce* than *sotto.*"[26]

In writing his opinion for the five-Justice majority reversing Deutch's conviction, Justice Stewart, after recounting the basic facts, mentioned, at the very end of one of those pregnant and powerful footnotes the Supreme Court sometimes drops, that Ross Richardson had joined the Party "at the behest of the Federal Bureau of Investigation."[27] He then went on to hold for the Court that the questions indeed were *not* "pertinent to the committee's inquiry."

Technically speaking, Justice Harlan's dissent in *Deutch* had much power, given the recent vintage of *Barenblatt.* But once the Court got the whole story of Deutch's case, in truth and justice there is no doubt that the conviction *had* to be reversed if the nation was to recover a modicum of the decency that Joseph Welch and many others had found so lacking in that poisonous time.

When Henry Sawyer's bass voice filled the silence of the Supreme Court's chamber with the words, "Ross Richardson was at all times an agent of the Federal Bureau of Investigation,"[28] can there be much

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[25] Letter from Henry W. Sawyer to Stewart Dalzell 2-3 (Mar. 2, 1998) (on file with author) [hereinafter Sawyer].

[26] *Id.* at 3.

[27] *Deutch,* 367 U.S. at 460 n.4.

[28] These were the words Henry recited to me that he actually said. The Supreme Court Clerk's Office was unable to find a transcript of the oral argument in its retrievable records when I sought it in 1998 in writing the essay cited above in note 10.

doubt that these words, more than Joseph Welch's oft-quoted comment to Senator McCarthy, truly began the end of this dark chapter in our jurisprudence and national life? To be sure, that voice remained jurisprudentially incorrect to some of the brightest and best judges for some years after McCarthy's death—indeed, that voice so offended the judicial sensitivities of Justice Frankfurter in March of 1961 during Sawyer's argument, that the learned Justice "turned his chair around, facing backward" as Henry continued speaking.[29]

Henry Sawyer's voice really did have that much power to it. True, on a day-to-day basis it was often in the service of private interests, since Henry had to make a living and someone had to pay for all of that pro bono work. Indeed, Henry explicitly acknowledged to me that his work on behalf of significant economic interests served these larger ends.[30] The truth of the matter is that I do not believe Henry Sawyer ever made a dime representing Communists and other political outcasts. It was simply of no interest to him.

But Henry Sawyer always would say that he got much more out of representing these clients who could not pay him. He unquestionably was not speaking of gaining notoriety. He was talking about sometimes actually achieving justice. And with that great voice of his, he

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[29] Sawyer, *supra* note 25, at 2 & n.4. To get another sample of the flavor of the judicial atmosphere long after the echo had died to Joseph Welch's comment, the Supreme Court of Pennsylvania's decision in *Kaplan v. School District of Philadelphia*, 388 Pa. 213 (1957) will do rather well. When that Court ruled against Henry Sawyer's client, it began the opinion with the following two sentences:

> On July 12, 1948, Samuel M. Kaplan, the plaintiff in this case, entered into a contract with the School District of [Philadelphia], the defendant, to teach English in the public schools of Philadelphia on a salary basis. So far as the record shows, he demonstrated himself to be a competent teacher in his field, but it was reported to the Superintendent of Philadelphia Schools that while Kaplan was instructing the children in his classes how to express themselves in English he was devoting time to an organization which, if successful in its plans, would eventually have those children or their children's children speaking Russian in a Russian state.

Id. at 214 (Musmanno, J.).

[30] To its credit, besides providing a significant financial subsidy, Drinker Biddle & Reath itself withstood a good deal of criticism when Henry was at the height of representing accused Communists in the McCarthy Era. He once told me a rather touching story in this respect. After Henry Drinker died, his secretary of many years reported for the first time to Henry Sawyer that a representative of one of the firm's largest clients called to complain to Mr. Drinker about the young Sawyer representing some Communists in a protracted Smith Act prosecution. After Mr. Drinker assured himself that the client took no exception to Henry's legal abilities or ethical performance—indeed, the essence of the client's complaint was that too much talent was being put in service of such disreputable people—Mr. Drinker advised the client that if he was so upset he should take his business elsewhere.

did more than that. He was one of the pillars of his time in securing the liberties that benefit all Americans. Henry Sawyer's voice therefore spoke for every one of us.