In Memoriam: Charles Fahy

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Charles Fahy

Charles Fahy received a Bachelor of Laws degree from Georgetown in 1914. He attended school in the evenings while working in the day as legal secretary to Joseph J. Darlington, then a leader of the local bar. His secretarial skills must have helped him take law school notes, for a half-century later, as a sitting judge, he was still taking notes of oral arguments in shorthand. At the Law School—it had not yet assumed the more pretentious title of Law Center—he was active on the first staff of the Georgetown Law Journal, the Debating Society, the Morris Club, the members of which practiced brief writing and oral advocacy skills, and the Law School Sodality, an organization that actively combined the Catholic religion and the law. Upon graduation his peers noted in the class yearbook, *Ye Domesday Booke*, that he was “Young in limbs, in judgment old.” The description under his graduation picture was quite prescient:

He isn’t very large—neither was Napoleon—nor is he very noisy, but the brain does not talk. He is familiar with the legal atmosphere, likes it, and if hard work and good sense are due to win, Charlie will some day earn the deserved plaudits of a larger and more appreciative assemblage than ours.

The chronology of Charles Fahy’s achievements has been often told: practicing lawyer, naval aviator, first General Counsel of the National Labor Relations Board, Solicitor General, Legal Advisor of the Department of State, diplomat, and judge. His personal imprint lies upon many of the legal developments of the twentieth century. The expanded role of government in economic affairs since the New Deal era is the result, in part, of his guidance of the NLRB at its perilous inception in 1935 and his large role in constructing and presenting the critical *Jones & Laughlin* case.¹ That case not only preserved the NLRB and the Wagner Act, but also marked the turning point of the Supreme Court’s attitude toward government regulation of the economy.

Charles Fahy was also a central figure in the development of the principle that a person may be convicted of a crime only through the exercise of a process that shows respect for the dignity of the person and is limited by a

1. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). Actually, five cases were presented to the Supreme Court in the 1936 term to test the constitutional validity of the Wagner Act. They are usually referred to collectively as *Jones & Laughlin*. The other four cases are NLRB v. Fruehauf Trailer Co., 301 U.S. 49 (1937); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937); Associated Press v. NLRB, 301 U.S. 103 (1937); and Washington, Virginia & Maryland Coach Co. v. NLRB, 301 U.S. 142 (1937). Charles Fahy did not actually make the oral argument in *Jones v. Laughlin*, as he did in *Friedman-Harry Marks Clothing Co.* and *Associated Press*. J. Warren Madden, Chairman of the NLRB, and Stanley Reed, then the Solicitor General, successfully argued for the constitutionality of the Wagner Act in *Jones & Laughlin*. Nevertheless, as General Counsel of the NLRB, Charles Fahy certainly played a major role in mapping out the litigation strategy that culminated in the arguments before the Supreme Court on February 10 and 11, 1937. Mr. Chief Justice Earl Warren characterized the management of the *Jones & Laughlin* litigation—the selection of cases, the making of a record, the framing of arguments—as “one of the most important jobs of lawyering in this century.” Address of retired Chief Justice Earl Warren at dedication of Fahy Reading Area, Georgetown University Law Center (Sept. 10, 1971), reprinted in Fall 1971 RES IPSA LOQUITUR 7, at 8.
structure of procedural rights guaranteed by the Constitution. For example, he was prominent in the evolution of the protection against self-incrimination: As defense counsel he participated in the Wan case in 1924; he was Solicitor General when McNabb was argued; and his dissent in Goldsmith and majority opinion in Killough pointed the way for the Supreme Court's pronouncements in Escobedo and Miranda.

Charles Fahy certainly played a significant role in the eradication of racial segregation in our society. After the Second World War, he chaired the committee that was appointed by President Truman to eliminate racial segregation in the Armed Forces, and he accomplished that difficult task through persuasion and reason. As a circuit judge, he wrote the dissent that later became the unanimous Supreme Court opinion in the Thompson Restaurant case, thus ending segregation in public facilities in the District of Columbia before Brown v. Board of Education was decided.

In the international sphere, his influence was also felt. He served as legal advisor to the American Military Government in post-war Germany and gave counsel informally at Nuremberg. He was also present, as an advisor to the American delegation, at the birth of the United Nations in San Francisco in 1945. More recently, he was a member of the panel that held in a per curiam opinion that the transfer of the Canal Zone to Panamanian control and possession was within the treaty-making power of the President and the Senate.10

Charles Fahy's contacts with Georgetown did not end with his receipt of an LL.B. in 1914. Throughout his public career he remained available to the Law School as moot court judge and sodality breakfast speaker, in addition to participating in many informal capacities. He served as a member of the Board of the University's Institute of Law, Human Rights, and Social Values, and at his death he was on the Advisory Board for Continuing Legal

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2. Wan v. United States, 266 U.S. 1, 16 (1924) (confession obtained after five days of relentless interrogation and denial of medical attention to suspect suffering from colitis held involuntary as matter of law).
3. McNabb v. United States, 318 U.S. 332, 341-42 (1943) (admissions held inadmissible because obtained through process that undermines integrity of criminal justice system; suspects not taken to judicial officer for commitment hearing, as required by statute, before interrogation).
4. Goldsmith v. United States, 277 F.2d 335, 340-41 (D.C. Cir. 1960) (reaffirmation, following judicial warning and advice from counsel, of concededly inadmissible confession held not inadmissible as fruit of original confession).
5. Killough v. United States, 315 F.2d 241, 244 (D.C. Cir. 1962) (en banc) (reaffirmation of inadmissible confession made without advice of counsel held inadmissible fruit of original confession).
6. Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964) (once criminal investigation focuses upon particular suspect in police custody, sixth amendment requires that suspect be given opportunity to consult with his lawyer and be warned of absolute right to remain silent in face of questioning).
7. Miranda v. Arizona, 384 U.S. 436, 444 (1966) (once criminal suspect has been significantly deprived of freedom of action, no statement elicited from him may be offered in evidence by prosecution unless use of procedural safeguards to secure fifth amendment privilege against self-incrimination can be demonstrated). See Warren, supra note 1, at 9 (noting Judge Fahy's identification in Goldsmith and Killough of the relevant constitutional principles addressed in Escobedo and Miranda).
Education at the Law Center. His last public appearance was at Georgetown’s Gaston Hall on May 29th of this year, and the last written piece by this remarkable man was published in the *Georgetown Law Journal* shortly after his death.11

That last written work, though short, summarizes much. It is a commentary on a burning issue of the day, the abortion issue. Of course it was not a polemic, but a reasoned response about the role of the Supreme Court in the handling of that issue. As always, he was able to deal with an important, emotional issue within the constraints of a constitutional legal system.

Georgetown has often honored Charles Fahy. He received from the University an honorary doctorate of laws, the John Carroll Medal, and on May 29th last, on the occasion of the 65th anniversary of his graduation from law school, the President’s Medal. Perhaps the most fitting honor, however, was bestowed after Judge Fahy’s law clerks and friends established the Charles Fahy Book Collection at the Law Center, to which the Judge contributed much of his own legal library. When the current Law Center building was opened in 1971, the University dedicated the law library’s central reading area to this distinguished graduate. The man and the occasion were perhaps best summarized in the opening lines of Judge Fahy’s remarks on that day:

> A reading area in a library reflects what has been. What is to be depends largely upon what has been. An adult was a child; a tree was a seed. Yet an adult is not a child, nor a tree a seed, for though there is continuity there is great change. So it will be with those who use this library, with its treasures to be mined and fashioned or discarded as those who study here may think best.

> I hope they will think of the law, both as it has been and will be, as a civilization of its own, enhancing the whole of our civilization.12

Yet, this does not say it all. To complete the picture of Charles Fahy’s relations with the Law Center one would need to include his many visits to the law library and his personal chats with the students there. Of particular note was that remarkable day when Judge Fahy, with little ceremony, gathered about him the students in the library and rededicated the Fahy Reading Area to the students then studying the law, and the generations yet to come. Then too there was the day in late spring of his eighty-seventh year, when Charles Fahy had the time to spend an afternoon with a Law Center seminar, discussing the Supreme Court. Those Georgetown students who were there knew that they were in the presence of a man who had done much, yet, as one of them reported:

> [H]e did not speak down to us as a towering figure possessed of all the wisdom and power in the universe. Instead, he spoke in such modest, even quiet tones that one truly felt that he was receiving

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more pleasure from meeting with several law students than we as a class received from having the privilege of meeting him.\textsuperscript{13}

It is the footnote to that story that is truly the measure of the greatness of Charles Fahy:

[T]hat luncheon was not the end of this experience. Several days later I received a letter from Judge Fahy, in which he stated that he had not been satisfied with the answer to a question I had asked of him at the luncheon. He then proceeded to explain how he had directed the Labor Act cases of 1936-37, thus saving the New Deal from judicial butchering.

Besides providing me with a glimpse of historical "background", the letter struck me as an incredible gesture of thoughtfulness on the part of a man who could legitimately claim to have had several careers of historical impact.\textsuperscript{14}

To those who have had the good fortune of knowing Judge Fahy well, this story is typical of the man.

Perhaps the greatest tie between Georgetown and Charles Fahy has been the recognition that he exemplified the essence of the legal education that Georgetown seeks to convey. Yes, he was an accomplished craftsman and technician of the law. But he was more. As Judge Bazelon writes in these pages, Judge Fahy did not believe that religion was to be relegated to sabbath mornings. Although he believed in the separation of church and state, he saw no contradiction in a man of government bringing to his responsibilities the moral values of his religion. Even more, he saw the law as a force for the moral good of humanity. In an age in which realism became rampant, before faltering on the shoals of what appeared to be its ineluctable results in the 1930's and 1940's, Charles Fahy believed deeply that there is a greater moral value against which the law must be judged, a moral value that imbues our constitutional system and yet transcends it. Mr Chief Justice Earl Warren perhaps stated it best:

Judge Fahy's vision of the role of law is not that of a technician adjusting and balancing competing political, economic and social interests. He does not, to put it differently, regard the law as ethically neutral, or the search for truth as foredoomed. His vision, rather, is essentially that of a moralist. He believes that there is such a thing as moral good and moral evil; that [in the political order they are manifested as social justice] and social injustice; and that in a perfect political order . . . the law would be an instrument of rooting out the one and securing the other. He recognizes, of course, that we do not live in a perfect order, and, moreover, that the power of a judge is rightly cabined by institutional restrictions. Still, within those restrictions he is moved by his conception [of] justice as a controlling reality, and not simply as the label that one

\textsuperscript{13} Letter to Editor from Stuart H. Newberger '79, Georgetown Law Weekly, Oct. 8, 1979 at 9, col. 3.
\textsuperscript{14} Id.
places on the outcome of a decision in order to conform to society's expectations.\(^\text{15}\)

The last word justly belongs to Judge Fahy. At the dedication of the Fahy Reading Area he stated his credo, which says so much of what he has meant to his Alma Mater:

A judge, a lawyer, anyone of a particular occupation, is more than his occupation signifies. In his larger self he must live, and in living must think, beyond his speciality. In suggesting now a particular approach I realize [there] are many other directions in which movement should be advocated. A choice may be made, however, of what one deems most important, without disparaging the thoughtful choice of others. I would therefore identify our single most important need to be consciously to orient [sic] "within the limits of [our] power," to paraphrase Cardozo, the use of freedom and the fulfillment of our responsibilities toward the norms of our Judeo-Christian heritage.

There are two concepts of freedom. One is the freedom the law allows—the blessings of liberty our Founders envisaged as the fruit of their plan of government. The other is the freedom of the spirit, rooted in the moral law—freedom from an abuse of the freedom the law allows. To the extent that these two freedoms merge into one, and only to that extent, is there true freedom. So it seems to me. This is my liberalism.\(^\text{16}\)

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