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THE NATIONAL LAWYERS GUILD: THOMAS EMERSON AND THE STRUGGLE FOR SURVIVAL

*Victor Rabinowitz**

“THE NATIONAL LAWYERS GUILD was born in revolt—a revolt that embraced the entire intellectual life of the times.”¹ Indeed, almost all of the 50-year history of the Guild has been tumultuous. It has suffered from vigorous attacks, almost since its inception, from the Dies Committee, from the House Committee on Un-American Activities (HUAC), from the Federal Bureau of Investigation and from the Department of Justice. These attacks have been unremitting and backed by the full resources of a hostile government establishment. Along with such government action, and in part because of it, the Guild has endured a series of deep-seated differences within its own ranks, resulting in periodic waves of resignation from membership. Over the past 50 years the Guild has grown stronger than ever, but there were many times during that period when its survival seemed in doubt. The membership rolls of the Guild provide a rough quantitative index of the state of the organization; its membership was at about 4,000 when it was organized; 500 in 1955; about 10,000 in 1988.

This remarkable story of success over odds, that at times discouraged even the bravest, is the result of the loyalty of a small group of men and women who held firm against a hostile world in support of the principles on which the Guild was founded. Foremost among them was Professor Thomas I. Emerson, who accepted those principles: that personal rights were more important in our

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Author's Note: Much of the material of this essay has been supplied by the Meiklejohn Civil Liberties Institute of Berkeley, California. The Institute has an extensive collection of civil liberties material, including a great many of the Guild's records.

1. Emerson, *The Role of the Guild in the Coming Year*, 10 LAW. GUILD REV. 1, 1 (1950).

legal and social system than property rights; that certain rights of individuals were entitled to, and required protection against, their government; and that the law was an instrument which could be used to bring about social and economic change for the common good. Indeed, Emerson's life—as a scholar, as a writer, and as a teacher—has been devoted to these principles. But here we wish to treat him as one who found in the Guild an instrument to advance these ideas. And conversely, the Guild found in him and a handful of others an element of devotion without which the organization would have perished.

Tom Emerson was 29 years old when the Guild was organized. Like many other young lawyers, he had come to Washington to participate in the stirring times of Franklin Delano Roosevelt's New Deal. He was then Assistant General Counsel to the Social Security Board, one of the most enduring of Roosevelt's innovations. He joined the Guild almost before it was organized. A group of lawyers based in New York had sent out a call in mid-December 1936 for a founding convention to be held the next February. Those who sent out the call consisted in the main of two groups: long-time middle-aged liberals, whose principal purpose was to protect and advance the programs of President Roosevelt, and a militant segment of the bar, mostly young and sometimes radical, who were more interested in the broader issues of free speech, improved labor laws, social insurance and opposition to the Fascism which was on the rise in Germany, Italy and Spain. Within two or three weeks of the issuance of the call, strong chapters had been organized in Washington and New York.

Contention marked the organization of these chapters, as it would continue to mark the progress of the Guild for the generations to come. In both cities the Presidential position was contested; in each, a young, militant progressive prevailed over an older member of the liberal establishment. In Washington, it was Emerson who was elected. A month later at the Convention, he was elected to the first National Executive Board of the Guild. In New York, it was Paul Kern, a young associate of Mayor La Guardia.

The controversies marking the first few years of the Guild were reflections of controversies within the New Deal wing of the Democratic Party and within the progressive community in general. There were sharp differences among members of the Guild over Roosevelt's court-packing plan, a proposal to add several new places on the Supreme Court to eliminate the conservative majority which was blocking New Deal legislation. There were more differ-

ences over the perception of the younger lawyers, many of whom represented trade unions, that the Administration was not doing enough to protect organized labor. Protection of freedom of speech also had a higher priority for the younger lawyers than for the more established liberals.

But one big issue surfaced almost at once and created the first threat to the continued prosperity of the infant organization. Roosevelt's decision to enforce an arms embargo against aid to the Loyalist forces in the Spanish Civil War caused a deep division in both the liberal coalition which had reelected Roosevelt in 1936 and among the lawyers who had organized the Guild. Morris Ernst, Jerome Frank, and others whose interest was primarily to support the program of the President, whatever it might be, urged the Guild to stay out of foreign affairs, and especially to follow Roosevelt's policy in enforcing the arms embargo. Many in the Guild had a different agenda. Emerson and Kern, together with Mortimer Reimer, then Executive Secretary of the Guild, and Harry Sacher, a member of the New York bar, saw the Spanish Civil War as a precursor to a Fascist Europe, and they endorsed a proposal to "re-interpret" the Neutrality Act to permit the shipment of arms to the Loyalist Government. A mail ballot taken in the spring of 1938 showed an overwhelming majority of the Guild members supporting the Reimer-Emerson-Kern-Sacher position; relatively few supported Ernst and Frank.

The incident is important not only in terms of the history of the early days of the Guild; it was also an occasion for the emergence of an ideological struggle which has echoed throughout much of the Guild's—and Emerson's—life.

Charges were made by Ernst, Frank and others that the Communist Party was directing the affairs of the Guild—charges based primarily on the struggle over the Spanish War. Reimer and Sacher were alleged to be the representatives of the Party, and those who voted with them were tarred with the same brush—a phenomenon familiar in American history. The issue was carried into the February 1939 convention when Ernst proposed an amendment to the Guild's Constitution opposing "Communism, Fascism and Nazism";² Judge Ferdinand Pecora, retiring President of the Guild, supported this position. The matter was debated with fury for sev-

2. Emerson, in COLUMBIA ORAL HISTORY COLLECTION 772; P. Bailey, *Progressive Lawyers: A History of the National Lawyers Guild, 1936-1958*, at 251-52 (doctoral thesis, Rutgers University 1979).

eral days, and finally a compromise was reached which, it was hoped, would hold the Guild together for at least another year. The amendment to the Constitution was dropped, but a similar resolution was printed in the Guild Quarterly Review with an expression of general sympathy by the National Executive Committee.³ Tom missed that convention, but he, together with Osmond Fraenkel, Professor Alexander Frey, Professor Malcom Sharp, Felix Cohen and others then and later spoke out against any blanket denunciation of Communism, arguing that any such position taken by the Guild would play into the hands of the most reactionary elements of the country.⁴

Many resigned from the Guild as a consequence of that debate, including many who had signed the original call, but the issue was by no means settled. In 1940, Professor Paul Hays and a number of other New York and Washington members organized a slate of candidates for delegates to the annual convention who would pledge that they "have stated unequivocally their deep opposition to Nazism, Communism, Fascism."⁵ Many more resignations followed the defeat of the Hays ticket, including most who had run on that ticket. As before, Emerson, Fraenkel and others opposed the pledge as a test-oath designed to suppress free and open debate. As Emerson later said, the issue was whether or not persons would be willing to work in an organization in which Communists were permitted to participate.⁶

The controversies of the 1937-41 period were subdued during the war. Although the Washington chapter (of which Emerson was again President for two years) fell off in membership as most lawyers in government devoted their full time to meet the demands of a nation at war, other chapters of the Guild thrived; many more chapters were organized, and membership increased, as the Guild developed a significant legislative program in areas such as social welfare and taxation, and participated actively in the organization of the United Nations.

However, almost immediately after the shooting war ended, the Cold War started, and the next ten or twelve years confronted the Guild with the greatest challenge to its continued existence. Churchill made his Iron Curtain speech in 1946; Truman issued his

3. P. Bailey, *supra* note 2, at 256; Pecora, *Democracy and the Legal Profession*, 2 NAT'L LAW. GUILD Q. 5, 5, 7 (1934).

4. P. Bailey, *supra* note 2, at 254, 263, 273.

5. P. Bailey, *supra* note 2, at 277; Emerson, *supra* note 2, at 775.

6. Emerson, *supra* note 2, at 779.

Loyalty-Security Order in 1947; the Hollywood Ten went to jail in 1948; the Communist Party leaders were convicted in 1949; Alger Hiss was convicted in 1950, and Senator Joseph McCarthy made his first appearance in the same year.

Emerson took a prominent part, along with many other Guild members, in meeting this challenge to the freedoms protected by the Bill of Rights. He testified for the Guild in opposition to the Mundt-Nixon Bill in 1950; he participated actively in struggles for academic freedom, both at university levels and in the elementary schools. He spoke out continuously and with vigor at Guild and other meetings on the threat to academic freedom, as a result of which he in later years found himself under attack by Congressional Committees and the FBI.

The Guild convention met in 1950 in a threatening political atmosphere. Never in recent years had there been more need for the defense of civil liberties, never had there been more work for the Guild, and never had there been fewer to undertake it. The membership of the Guild was once more declining, and the number of those prepared to take on the fight for free speech was growing smaller as many progressive lawyers, like progressives in the general population, ran for cover. Clifford Durr, a former member of the Federal Communication Commission, had accepted the presidency of the Guild in 1948, but he had undertaken professional obligations which made it impossible for him to continue, and the convention turned to Tom Emerson as his successor.

Emerson's courage in accepting the Presidency can hardly be overstated. The organization was rapidly diminishing in size, while the demands made upon its remaining members were greater than ever. The possibility of a successful administration was indeed faint. Tom started his administration with brave words of hope, and he proposed extensive activities in those areas of public affairs which were close to his interests and close to the interests of the Guild. The protection of civil liberties was at the top of his list; the field of labor relations, the preservation of peace through the development of international law, the institution of programs for assuring legal service to the indigent and laws providing health and other forms of social insurance followed in close order. As a pre-condition of success, he urged that these problems be approached "in a scientific spirit, with receptive and independent minds."⁷ He "look[ed] forward to real progress along that road which, a decade

7. Emerson, *supra* note 1, at 1.

and a half ago, we fashioned for our journey."⁸

As Emerson noted 25 years later, "there was [, in 1950,] no good reason why [he or the Guild] should have been [so] optimistic."⁹ The decade which followed his election saw a series of devastating blows to the Guild and its membership. On September 16, 1950, the House Committee on Un-American Activities issued its report entitled "The National Lawyers Guild: Legal Bulwark of the Communist Party," a report engineered by J. Edgar Hoover and the FBI, whose activities had long been criticized by the Guild. Emerson went to work immediately on a response (a draft of which was stolen from his office at Yale by FBI agents), which was published and widely distributed by the Guild shortly thereafter.¹⁰ But there was no way to stem a flood of resignations. About a third of the remaining membership quit. Recruitment of new members of the bar was almost impossible; students were, with just cause, concerned lest membership in the Guild might impede their admission to the bar. Many members who did not resign were nevertheless delinquent in their dues and ceased activity in local Guild chapters. As Emerson noted, most lawyers regarded membership in the Guild as an impediment to upward mobility in the profession, and many feared disbarment or other severe sanctions.¹¹

Emerson, as President of the Guild, provided an example of energy and courage for those who remained in the organization. Almost immediately after his election, he was called to Detroit, when the chapter in that city, historically one of the strongest in the organization, threatened to disaffiliate. Tom was successful in keeping the chapter alive, but similar situations elsewhere kept him busy writing and visiting other locations. It was not only in such emergency administrative matters that Emerson enacted his considerable influence. In the 18 months in which he held office, he spoke on matters of programmatic substance at many Guild chapter meetings and wrote extensively on the threats to freedom of speech posed by the Cold War.¹²

8. *Id.*

9. Emerson, *The National Lawyers Guild in 1950-1951*, 33 THE GUILD PRAC. 61, 61 (1976).

10. Emerson, *National Lawyers Guild: Legal Bulwark of Democracy*, 10 LAW. GUILD REV. 93 (1950).

11. Emerson, *supra* note 2, at 1529.

12. See, e.g., *The Trend of American Democracy*, 11 LAW. GUILD REV. 194 (1951); *An Essay on Freedom of Political Expression Today*, 11 LAW. GUILD REV. 1 (1951); *The National Lawyers Guild: Legal Bulwark of Democracy*, 10 LAW. GUILD REV. 93 (1950); *Segregation and the Equal Protection Clause: Brief for the Committee of Law Teachers Against*

In October 1951, he was succeeded as president of the Guild by Earl B. Dickerson. In his closing remarks to the Convention, he said:

The insistence, even by a relatively few, upon the full exercise of political freedom keeps alive and vigorous the entire tradition. It gives heart and strength to many others who may be less favorably situated to claim their rights

It is along these lines that the National Lawyers Guild must chart its course. We have in the Guild, even though smaller in numbers than we would like, the competence and the will to carry out these tasks. We have been somewhat battered in the past year. We have been too much on the defensive. But we remain alive and vigorous. We have maintained our independence and preserved the integrity of our position over the years. We will not be silenced.¹³

In the years following, the wave of political oppression under the guise of "Anti-Communism" increased. Senator McCarthy was riding high, and the House Committee on Un-American Activities was in full swing. Destruction of the Guild seemed to be one of the primary objects of Congressional action, and Emerson personally came under constant attack by the FBI and HUAC. His public activities on behalf of the Guild, however, never slackened. He spoke at frequent Guild conferences on civil liberties. He served on the Guild National Executive Committee for several years after he left office. He continued to write for Guild publications and undertook substantial administrative responsibilities for the organization. He spoke at the 1953 Convention of the Guild and accepted its annual Franklin Delano Roosevelt Award at its 1954 Convention. He chaired the Resolutions Committee at the 1956 Convention and led a panel in 1957. He wrote and signed an *amicus* brief for the Guild in *Communist Party v. Subversive Activities Control Board*,¹⁴ in the Supreme Court in 1960. He was a principal speaker at the Convention in 1967 and that year made the presentation giving the Franklin Delano Roosevelt Award to Judge George W. Crockett, Jr.

These public appearances were of inestimable value to the Guild. They strengthened the morale of its members and helped to keep the public face of the organization in view. They were, how-

Segregation in Legal Education, 34 MINN. L. REV. 289 (1950) (with J. Frank, A. Frey, E. Griswold, R. Hale, H. Havighurst & E. Levi); *Segregation and the Law*, 170 NATION 269 (1950); *The Conditions of Democratic Survival*, N.Y. TEACHER NEWS, Apr. 21, 1951 at 3.

13. Emerson, *The Trend of American Democracy*, 11 LAW. GUILD REV. 194, 197-98 (1951).

14. Brief of the National Lawyers Guild as Amicus Curiae, *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1 (1961).

ever, but a part of his services in the years after 1951, when he was called on to participate in administrative work for the Guild in a non-public, almost anonymous role. In August 1953, Attorney General Herbert Brownell announced, at a meeting of the American Bar Association, that he would start proceedings to place the Guild on his list of "subversive organizations."¹⁵ In his speech he said, "It has been clear that at least since 1946 the leadership of the National Lawyer's Guild has been in the hands of card-carrying Communists and prominent fellow travelers."¹⁶

The intended effect of the Attorney General's announcement was to destroy the Guild, and it came close to succeeding. Within a matter of days, over half of the membership resigned, and by 1955, the membership dropped to its low point of about 500. As Emerson said at the time, it was clear that the organization could not survive if Brownell's efforts were successful.

The Guild responded to Brownell's attack by starting legal action to enjoin the Attorney General from listing the Guild as a subversive organization. The litigation was successful in securing a preliminary injunction against the Justice Department,¹⁷ and was ultimately successful when, in 1958, the Justice Department withdrew its proposal to list the Guild. Emerson, of course, played a vital role in formulating policy and legal tactics in this litigation.

But the period between 1955 and 1960 continued to be a desperate one. While some of the Guild chapters were able to mount constructive activity during this period, other chapters disappeared altogether. The National Office was compelled to devote its energies in large part to administration of the office, to raising money to carry on with the legal fight, to attempting to hold up the weakened chapters, and occasionally, and often with questionable success, to proposing programmatic activity. Indeed, in 1960, at a Convention in San Francisco, a serious but unsuccessful effort was made to dissolve the Guild.

To cope with the continuing crisis, in 1955 a Program and Administration Committee was created, whose primary task was to hold the organization together. Nominally, it was a nationwide committee, but it met quite often, and rarely did it meet anywhere but at the National Office in New York, being attended only by the New York members—and Tom Emerson, who travelled from New

15. 78 REP. OF THE A.B.A. 334, 340 (1953).

16. *Id.*

17. *National Lawyers Guild v. Brownell*, 215 F.2d 485 (1954).

Haven periodically to attend. Those sessions were devoted to a desperate and depressing effort to keep alive an organization which seemed to be dying. The fact that these efforts turned out to be successful does not alter the fact that they were quite dreary at the time and seemed almost hopeless.

The recovery and subsequent prosperity of the National Lawyers Guild is the story of a miracle, but it is a story not within the scope of this essay. It would not be fair to say the organization would have perished in the fifties without Tom's help. Such responsibility cannot be assigned to any one person, but it can be said that Tom's contribution was invaluable and that his devotion to the cause of civil liberties, manifested throughout his personal and professional life, strengthened the Guild at a time when such strength was badly needed.

Throughout this period, Tom frequently made clear his position on the issue of Communism in the Guild and, for that matter, in other organizations as well. He refused to be diverted from principles he believed in because Communists also believed in them. His position differed from that of the Communist Party on many occasions but remained devoted to the greater cause of freedom of speech and press. In 1955, he said:

It wasn't that the positions [the Guild] did take were inconsistent with the thinking of many liberals in the period. It was simply that . . . most of them involved Communist Party problems or issues in which the Communist Party was interested. Now, this was not because, in my view, the Guild was dominated by Communist influence It was rather that the work done in the Guild, and those who were most active in doing work, in many respects were the people who held more left-wing views It wasn't that the rest of the organization was opposed to what was being done. It is simply . . . not a full balance across the whole liberal spectrum of what might have been done if all the elements of the Guild had worked as hard as the left-wing group did.¹⁸

Professor Emerson's devotion to civil liberties was, of course, manifested not only by his Guild activity. Throughout his long career as Professor of Law at Yale University, his writings and teachings have been devoted to a steadfast defense of the civil liberties written into the first ten amendments of the United States Constitution. It may well be said that his entire professional life has been dedicated to the defense of those rights. His two-volume *Political*

18. Emerson, *supra* note 2, at 1528-29.

and Civil Rights in the United States,¹⁹ written with Professors David Haber and Norman Dorsen, now in its Fourth Edition, is a standard and invaluable text for all lawyers practicing in the field and all students who aspire to such practice. The consistency of his position through the years and his steadfast and undeviating devotion to the protection of our most fundamental rights have provided strength for those who have needed it in the past, and wisdom and inspiration for all of us.

19. N. DORSEN, P. BENDER & B. NEUBORNE, *EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* (4th ed. 1979).