

Stanford vs. Bruce Franklin: free speech still on trial

ANOTHER chapter in one of the most fascinating and consequential First Amendment battles in Bay Area history unfolds this week, when the American Civil Liberties Union squares off against Stanford University in the Sixth District Court of Appeal.

The issue before the court is this: Should Stanford have had the right in 1972 to dismiss H. Bruce Franklin, a tenured English professor and radical activist, after a quasi-judicial faculty committee ruled that Franklin had incited students "to lawless, coercive and violent action"?

In one of the most controversial cases the regional organization ever has handled, the ACLU has, for more than 13 years, been trying to establish that Stanford violated Franklin's constitutional rights by firing him for making speeches that should have been protected by the First Amendment.

Although it is a private institution, Stanford stipulated years ago that its tenure agreement with Franklin afforded him no less constitutional protection than he would have enjoyed at a public school.

Still, the university, represented by McCutchen, Doyle, Brown & Ebersen, has fought doggedly to show that Franklin overstepped the First Amendment and to preserve its right to determine the bounds of political speech and action it will permit of its faculty members.

To me, the case is of special interest:

I've known Franklin for about 15 years, finding him variously brilliant and confounding, eloquent and strident, but always sincere and challenging. I was active in the anti-war movement at Stanford and partici-

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And the faculty members voted 5-2 that later the same evening at an Old Union courtyard rally, Franklin urged and incited students to disrupt university activities and participate in actions that led to injury to individuals and property.

Five members of the board voted that Franklin should be dismissed from the university.

"While it is the consensus within the university that it should have room for the widest possible range of perceptions and expression," they wrote, "the university says in fact to its members: 'You may preach and also practice — but only up to a certain point.'"

"The real issue in these hearings is Professor Franklin's behavior on the offenses charged, not his political views... it is that behavior, not his political views and their expression, which we judge unacceptable."

But, the majority explained, the offending conduct stemmed from "a perception of reality which Professor Franklin and his followers profess to share which differs drastically from the consensus of the university."

"We are dubious whether rehabilitation is a useful concept in this case," the majority wrote. "Professor Franklin's announced convictions about the guilt of the university appear deeply held, and his opposition to the institution in its present form seems implacable... Barring a dramatic change in perception, he is unlikely to change his conduct; thus 'rehabilitation' is likely to fail, whatever the sanction."

Kennedy, chairman of the Advisory Board, and Robert McAfee Brown, dissented, arguing for suspension and against dismissal.

"The university thrives on diversity and challenge," they wrote. "When we lose a prominent symbol of

these qualities, we lose not only the substance of the challenge, but also the external perception that we can take it in stride..."

"Because we live in a society in which there are increasing public pressures to curb dissident speech and action, the university has a special responsibility to insulate its procedures from such influence..."

"We see substantial costs in Professor Franklin's loss to the institution; they are measured externally in the form of corrosive effects on academic freedom, and internally in terms of lost challenge and subtle inhibition of dissent."

Lyman, of course, accepted the majority opinion, and Franklin became the first and only tenured professor ever to be tossed out of Stanford.

Franklin turned to the ACLU for assistance, and that, according to Crosby, touched off a great debate, with Harvard Law Professor Alan Dershowitz flying in to argue that the organization should take the case, and Stanford Law Professor Gerald Gunther arguing against.

After reading the text of Franklin's offending speeches, however, the ACLU board voted to take the case.

Since then, in a tangled legal thicket, Superior Court Judge John Flaherty has ruled that Franklin's Old Union speech was constitutionally protected, but that the White Plaza speech and the computer center confrontation were not. The case was sent back to Stanford and a new advisory board, acting just before Kennedy became president, again voted to dismiss Franklin based only on the two surviving charges.

Now, Franklin and the ACLU are asking the Court of Appeal to reverse Flaherty's rulings on the White Plaza speech and the computer center incident. (If Franklin were found to have been unconstitutionally fired, Stanford could be ordered to rehire him or pay him lost wages.)

The White Plaza speech was a long discussion by Franklin of the relationship between the university, the Vietnam War and oppression of poor and working people in this country. In particular, Franklin talked about how striking at a university, shutting down some of its activities, was, in the scale of genuine struggles, only a minor event.

Then referring to a decision made at an open meeting the night before and a target to which numerous other speakers had addressed themselves, Franklin said:

"See, now what we're asking is for people to make that little tiny gesture to show that we're willing to inconvenience ourselves a little bit and to begin to shut down the most obvious machinery of war, such as, and I think it is a good target, that computation center."

The university already had locked the computer center's doors when demonstrators arrived there a few minutes later. But they broke in, caused the computer to be shut down and did about \$800 damage. Sheriff's deputies were called to clear the building a couple of hours later. The building was emptied peacefully, and deputies formed a ring around it.

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— Donald Kennedy and Robert McAfee Brown

Then, however, when authorities ordered the milling crowd in the nearby area to disperse, Franklin loudly protested. Other demonstrators circled around him, resisting the order to disperse. The police charged the crowd, causing a few minor injuries and a handful of arrests. No one was prosecuted. And no university charges ever were brought against anyone involved — except, of course, for Franklin.

The White Plaza speech, argues ACLU's Crosby, "was an example of political analysis and political advocacy which the Constitution is designed to protect." Franklin, she says, was explaining and endorsing an action that already had been decided on — not to a mob holding a rope, but to intelligent students and others who were deeply committed to ending Stanford's involvement in the Vietnam War.

And his confrontation with the deputies, she says, also was entirely legal. Citizens have a right — some would say a duty — to vigorously protest what they believe to be an improper police order.

David Heilbron, the university's attorney, argues that Franklin's speech and behavior at the computer center were incidents of inciting students to break the law. "A university cannot survive as a center of unregimented thought if it permits force rather than persuasion" as a means to accomplish goals, he says.

It is up to the Court of Appeal, now, to determine whether the First Amendment protects Franklin. But that decision does not exist in a vacuum.

In one portion of their findings, Stanford's Advisory Board revealed the essence of the university's position on this case:

"The board cannot accept the view that the interruption of university functions — let alone their disruption — is a part of the appropriate function of a faculty member at Stanford."

How antiquated and narrow that notion seems a dozen years later. Faculty members all across the country have joined in protests, strikes, sit-ins and shut-downs in recent years over the issue of apartheid in South Africa.

In hindsight, the dissent by Kennedy and Brown seems prescient.

And what about that intransigent professor who could not be rehabilitated? He's since become a tenured and honored professor of English at Rutgers University and has published six books, including his latest, "Vietnam and America: A Documentary History," which includes, as Franklin puts it, "an extended development of the argument presented in the White Plaza speech."

I doubt Franklin ever would seek to teach again at Stanford. But it's the university, not Franklin, that is poorer for his absence.

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