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Abe Fortas

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Abe Fortas was among those rare individuals possessed of the energy and ability to forge several distinguished careers in one lifetime. "A person of great legal ability and talent," "an exceptionally gifted lawyer who served his country with devotion in many capacities," "truly a brilliant man," "brilliant and effective lawyer," and "an engaging man with a fine sense of humor" were only a few of the encomiums of him expressed when his sudden death shocked the profession.

He began his public service at age 22 in highly responsible positions with the Securities and Exchange Commission, was general counsel of the Public Works Administration at age 29 and Undersecretary of the Interior at age 32. He continued that meteoric rise in practice after helping found Arnold, Fortas & Porter, one of Washington's most prestigious law firms. But he was perhaps particularly respected for his courage in representing targets of the McCarthy Era, notably Owen Latimore—he always had time to litigate, often without fee, important civil rights and individual rights cases of that perilous time. The appealing situation of a distressed individual enmeshed in a hard case never left him unmoved. When he came to the Court he shared the view of many great judges that judges spend too little time in the adopting of techniques for improving the human race as distinguished from punishing it.

The 1970 Justices' Poll¹ that rated the 100 Justices who had sat on the Court up to that time, and was conducted among leading professors of constitutional law, American history and politics, including several law school deans, ranked Justice Fortas among the 27 rated "great" or "near-great." The significance of this is that he earned that rating although in his four short Terms as a Member of the Court he delivered only forty opinions for the Court. Every one of the 26 other Justices given high

† Associate Justice, United States Supreme Court.

1. BLAUSTEIN & MERSKY, *THE FIRST ONE HUNDRED JUSTICES* 35, 142, 146 (1978).

ratings delivered many, many more opinions. But quality, not quantity, was Justice Fortas' hallmark. As every reader of his opinions will wholeheartedly agree, his opinions, lectures and numerous articles are not only models of clarity, construction and reasoning, and the result of industrious and comprehensive research—they also reflect a rich background of culture and learning. His passionate side interest was music—he began early to play the violin in various string quartets, a practice he continued throughout his life.

Justice Fortas possessed in the highest degree deep and perceptive insights into the larger function of law in our turbulent and rapidly changing society. Central to his thinking was his conviction that judges must perfect the adversary process as the essential tool for monitoring the performance of other disciplines to which a complex society must look in resolving myriad complex legal controversies. He held strongly to the view that what the law provides is a method for seeking wisdom, not wisdom itself.

Lively, even acrimonious, debate about the proper role of judges in a democratic society is ever with us. The judge who believes that the judicial power should be made creative and vigorously effective is labeled "activist." The judge inclined to question the propriety of judicial intervention to redress even the most egregious failures of democracy is labeled "neutralist" or "liberal"; where yesterday "activist" was pinned on "conservatives," today it's on "liberals." As often as not, however, such labels are used merely to express disapproval of particular decisions. If useful at all, the labels may be more serviceable to distinguish the judge who sees his role as guided by the principle that "justice or righteousness is the source, the substance and the ultimate end of the law," and the judge for whom the principle is that "courts do not sit to administer justice, but to administer the law." Such legendary names as Justice Holmes and Judge Learned Hand have been associated with the latter view. Holmes' imaginary Society of Jobbists is limited to judges who hold a tight rein on humanitarian impulse and compassionate action, stoically doing their best to discover and apply already existing rules. But judges acting on the former view believe that the judicial process demands a good deal more of them than that. Because Constitution, statute or precedent rarely speaks unambiguously, a just choice between competing alternatives has to be made to decide concrete cases. Notre Dame's former Dean O'Meara went to the heart of the problem in saying, ". . . the judge's role necessarily is a creative one—he must legislate, there is no help for it When the critical moment comes and he must say yea or nay, he is on his own; he

has nothing to rely on but his own intellect, experience and conscience.”²

Justice Fortas was not a Jobbist—if a member of that guild must be an automaton-like judge proceeding mechanically according to pre-determined rules. He was of that school that believes that law:

constitutes, rather a recognition of human beings, as the most distinctive and important feature of the universe which confronts our senses, and of the function of law as the historic means of guaranteeing that pre-eminence to . . . jurisprudence [which in a scientific age] . . . asks, in effect, what is the nature of man, and what is the nature of the universe with which he is confronted . . . Why is a human being important; what gives him dignity; what limits his freedom to do whatever he likes; what are his essential needs; whence comes his sense of injustice?³

Thus, for him, a legal concept is most worthwhile when it “becomes relevant to the homely experiences of individual human beings.”

In short, although he knew that the act of judgment inescapably belongs to him who bears the name of judge, he was strengthened in that arduous task by a quiet unobtrusive faith in his fellow human beings. The work, career and character of this scholarly, gentle, quiet-spoken and unfailingly courteous man exemplified the judicial role at its best. He richly earned the high respect in which he was held by all who were privileged to know him.

2. O'Meara, *Natural Law and Everyday Law*, 5 NAT'L L.F. 83, 96-97.

3. Report of Committee on New Trends in Legal Philosophy, ABA Section of International and Comparative Law, August 10, 1964, at 5-6.