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# Abe Fortas: A Man of Courage

Milton V. Freeman†

As a lawyer, Abe Fortas had it all. He had a penetrating intelligence, an extraordinarily quick mind, and outstanding analytical ability. His oral arguments were a superb combination of the rational and the dramatic. A newspaperman who followed one of his more publicized corporate cases told me he would rather hear Abe Fortas argue a motion than see a Broadway musical. He had tremendous practical judgment and his advice to clients was both profound and wise. He was a principal factor in the foundation of one of our major Washington law firms, of which I have the honor to be a partner, and later became the leading Washington partner of a major Chicago law firm.

In addition, he had a great public career at the Securities and Exchange Commission and in the Interior Department, and he served with distinction for three and a half years on the Supreme Court. He was also influential in the development of the Kennedy Center for the Performing Arts, in Washington, and he helped greatly to make it the institution of culture that it is today. A mere catalog of his interests and achievements could go on for pages.

In a career so full of accomplishments in so many areas, it is difficult to justify focusing on only one. But I believe one of the greatest contributions he made was to the fight for civil liberties during the so-called McCarthy period, a fight that he led and a fight to which I find myself fortunate to be able to bear witness.

I first met Abe Fortas forty-five years ago when we were both SEC employees in the 1930's. He came down from the faculty of the Yale Law School as an associate director of the Protective Committee Study, of which William O. Douglas, also of the Yale faculty, was the director. They and their staff produced a report on reorganization practices that resulted in major legislation, the Chandler Act of 1938,<sup>1</sup> dealing with bankruptcy reorganization, and the Trust Indenture Act of 1939.<sup>2</sup> He was also later associate director of the Public Utility Division, coping with the new Public Utility Holding Company Act in its early stages, before he left for the Interior Department.

After President Roosevelt's death and the end of World War II, when

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1. Chandler Act of 1938, 52 Stat. 840.

2. Trust Indenture Act of 1939, 92 Stat. 2674, Pub. L. No. 253.

Fortas decided to go into law practice with Thurman Arnold, I was delighted when he asked me to join him and I accepted a substantial but fortunately temporary cut in income. The years that followed, particularly the early ones, were full of adventure and excitement. A large part of that excitement was the post-World War II loyalty probe of government servants. The search for communist sympathizers started during the war years when Russia was still our ally, under a Civil Service regulation promulgated under Roosevelt. This was followed by a Truman executive order setting up a government-wide system of loyalty boards and ultimately by the McCarthy hysteria and an expanded Eisenhower loyalty program. These "security" efforts spread to many other areas, and resulted in the blacklisting of actors, writers and others, the denial of passport applications, and the establishment of clearance requirements in private industry.

The atmosphere in Washington among government employees and others was one of almost tangible fear. By and large, they had little money and possessed only their jobs and their reputations. They also had a usually deserved view of themselves as honorable and useful public servants. It was most traumatic for them to face accusations of disloyalty to the government they were serving so faithfully. To find themselves no longer accepted as seeking to make valuable contributions to the public welfare but instead accused of quasi-criminal or treasonable beliefs was a deep psychological shock. It attacked the foundations of their being and self-esteem.

The loyalty programs were vague in content and unfair in procedure. The accusations were general. They masked only lightly the frequently underlying racial and religious prejudice.<sup>3</sup> They attacked the holding or expression of opinions other than the most conservative.<sup>4</sup> The reasons why

3. The dissenting opinion of Judge Edgerton in *Bailey v. Richardson*, 18 F.2d 46, 73 (D.C. Cir. 1950), *affirmed by an equally divided court*, 341 U.S. 918 (1951) states:

A record filed in this court shows that an accused employee was taken to task for membership in the Consumers Union and for favoring legislation against racial discrimination. The record in the present case contains the following colloquy between a member of the Regional Board and the present appellant: "Mr. Blair: Did you ever write a letter to the Red Cross about the segregation of blood? Miss Bailey: I do not recall. Mr. Blair: What was your personal position about that? Miss Bailey: Well, the medical—. Mr. Blair: I am asking yours."

4. As Judge Edgerton noted:

In loyalty hearings the following questions have been asked of employees against whom the charges have been brought. . . ." Do you read a good many books?" "What books do you read?" "What magazines do you read?" "What newspapers do you buy or subscribe to?" "Do you think that Russian Communism is likely to succeed?" "How do you explain the fact that you have an album of Paul Robeson records in your home?" "Do you ever entertain Negroes in your home?" "Is it not true. . . that you lived next door to and associated with a member of the I.W.W.?" Too often the line of questioning has revolved around conformity with prevailing mores in personal habits and personal opinion.

*Id.* at 72-73.

accused employees were believed to be disloyal were frequently not articulated. No witnesses were produced to support the allegations. Employees were forced to seek to rebut unsubstantiated allegations by their own sworn testimony before supposedly judicial bodies. But these bodies reserved the right to decide whether to accept their testimony, or whether to accept instead unsworn allegations by persons whose names and identities the deciding courts did not know.<sup>5</sup>

In this state of confusion, government employees who were subject to the loyalty procedures had to seek legal assistance. By and large it was hard to come by. Major law firms would not touch such matters for fear of offending their clients. Thurman Arnold tried to form a group of prominent lawyers to take a stand against the loyalty program. He could get practically nobody. But Thurman Arnold, Abe Fortas, and Paul Porter were not intimidated. They had substantial standing. Arnold was a former judge of the United States Court of Appeals for the District of Columbia Circuit; Fortas a former Undersecretary of the Interior; and Porter a former Ambassador, as well as the holder of other major governmental positions. They were willing to face the inevitable criticism. They understood the danger and they stood up to it at great financial sacrifice. Plainly, government employees had no funds to compensate lawyers, and the firm contributed its services without fee to dozens and dozens of government employees who found themselves threatened by loyalty charges.<sup>6</sup>

Early on, in a case that was before the Supreme Court on a petition for rehearing from a denial of certiorari, the firm urged the Court to take action. The petition stated:

5. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 174, 180 (1951) (Douglas, J., concurring). Referring to the *Dorothy Bailey* case, Justice Douglas stated:

The Review Board stated that the case against her was based on reports, some of which came from "informants certified to us by the Federal Bureau of Investigation as experienced and entirely reliable."

Counsel for Dorothy Bailey asked that their names be disclosed. That was refused.

Counsel for Dorothy Bailey asked if these informants had been active in a certain union. The chairman replied, "I haven't the slightest knowledge as to who they were or how active they have been in anything."

Counsel for Dorothy Bailey asked if those statements of the informants were under oath. The chairman answered, "I don't think so."

The Loyalty Board convicts on evidence which it cannot even appraise. The critical evidence may be the word of an unknown witness who is "a paragon of veracity, a knave, or the village idiot." His name, his reputation, his prejudices, his animosities, his trustworthiness are unknown both to the judge and to the accused. The accused has no opportunity to show that the witness lied or was prejudiced or venal. Without knowing who her accusers are she has no way of defending. She has nothing to offer except her own word and the character testimony of her friends."

*Id.* at 179-80. The parallel to the famous French Dreyfus case where the central vice was also that of secret evidence was pointed out to the courts without avail.

6. Individual lawyers, some of great competence but without the public standing of an Abe Fortas or a Thurman Arnold or a Paul Porter, took on loyalty cases and did yeoman service, but without leadership it would have been even more difficult for them.

But this assault on freedom of opinion will not stop with Government employees. Assaults upon freedom have a habit of growing beyond a stated objective. They quickly attack not merely a manifestation, but freedom itself. So this crusade, once under way, will not stop with its victims in the federal service. It will spread and is now spreading over this country, blighting our democracy and bringing fear and distrust to American homes throughout the nation.<sup>7</sup>

The warning was not heeded and the petition was denied.

The virus spread. Many of the people who had been in the New Deal found themselves subject to loyalty charges. Some were personal friends or acquaintances, or friends of friends, or persons who had been referred to us. We were inundated with cases. We turned no one away because of our case load. Relatively early in the spring of 1947 we were approached to represent ten employees of the State Department who had been terminated for security reasons without a hearing. They did not want to go back to work for the State Department, but they wanted the opportunity to resign and have their records cleared of any charge relating to loyalty or security that made them unemployable elsewhere. At the time, the burden of loyalty cases on the firm was critical, constituting over fifty percent of the hours spent, and some question was raised whether we should take the matter on. It was Fortas who said, "We have to take it on, because if we don't nobody else will."<sup>8</sup>

Almost all of our cases were successfully defended, although at the cost of great psychological damage to the employees involved and injury to the efficiency of the government and to the fabric of our democratic society. Unfortunately, not all the accused were cleared.

One of the major involvements of the firm, which went to the Supreme Court, was the case of Dorothy Bailey. Dorothy Bailey was dismissed under the loyalty program from a position as a training officer in the United States Employment Service, a job that consisted of supervising the training of officers in state employment services. It involved no security element whatsoever. Accusations against her were vague and secret. No

7. The brief was signed by Arnold, Fortas and Freeman, but those words were pure Fortas.

8. Having taken on the cases, we started with statements to the Secretary of State outlining in great detail the obvious injustices to the ten employees of the action he had taken. Our communications might just as effectively have been inserted in a bottle and dumped into the Potomac, until Thurman Arnold enlisted the interest of Helen Reid, the publisher of the *New York Herald Tribune*, then a leading influential Republican newspaper. She designated one of her chief investigative reporters, Bert Andrews, and gave him carte blanche with the front page of her newspaper. For eight days he reported in great detail the nature of the allegations, the injustice of the proceedings, the failure to make any charges, the failure to make any findings, and the bewilderment of the employees. The net result was that the Secretary of State surrendered; all the employees were cleared and allowed to resign. Bert Andrews, who wrote the pieces for the *Herald Tribune*, was awarded a Pulitzer Prize. (The story is told in his book, *Washington Witch Hunt* (1948)).

one testified against her, but the questions asked by the Loyalty Board members revealed that unidentified informants had told the FBI that she had had unspecified connections with Communists, and perhaps had belonged to the Communist Party. She denied the allegations under oath and similarly produced witnesses under oath, including her minister, a director of a major oil company, a chairman of a Federal Reserve Bank, and similar prominent persons who had worked closely with her, who testified that the allegations could not be true.

The Loyalty Board and the Review Board ordered her dismissal. The Court of Appeals affirmed the dismissal by a two-to-one vote, Judge Edgerton dissenting.<sup>9</sup> The case was taken to the Supreme Court, which granted certiorari but affirmed by an equally divided court.

Miss Bailey had, after her dismissal, obtained employment with one of the universities in the District of Columbia. Upon the announcement of the Supreme Court decision, she was unceremoniously dismissed; the university being unwilling to face possible public controversy. Thurman Arnold, Abe Fortas, and Paul Porter immediately hired her for our law firm, where she shortly became our office manager. I have never been prouder of my association with these three men than when, returning from a trip, I learned of their decision to hire Dorothy Bailey.

In 1950, we were deeply involved in the *Bailey* case and a great many others under the Truman order. We did not know then that they were almost all to be revived a few years later by a new Eisenhower order reopening the old cases.<sup>10</sup>

Suddenly, Senator Joseph McCarthy of Wisconsin seized the issue and became prominent for his attacks on government employees in the State Department. He made a public pronouncement that "the top Soviet espionage agent in the United States" was Professor Owen Lattimore of Johns Hopkins University. Lattimore was not a government employee at all, but this did not inhibit Senator McCarthy's reckless charges. Mrs. Lattimore came to consult Abe Fortas, since her husband was then in Afghanistan on a United Nations mission. The case became the longest and most public involvement of Abe Fortas and the entire firm in the struggle for civil liberties.

The issue was highly publicized not only in the press but also in the relatively new medium of television. It was a political issue in the congress-

9. See *supra* notes 3-4.

10. This was done by an executive order changing the standard to "reasonable doubt as to loyalty" from "reasonable grounds for belief" of disloyalty. Exec. Order 10,241, 16 Fed. Reg. 3690 (1951) (revising Exec. Order 9835, 12 Fed. Reg. 1935 (1949)). In form, it was about a standard of proof and had no meaning in light of the fact that there were no adverse witnesses and no cross-examination. In substance, it meant that the old cases had to be reopened and tried in the same old unfair way with directives to weigh the scales against the employee more heavily.

sional campaign of 1950 and the presidential campaign of 1952. A major retainer client of the office told us that if we were to represent subversive characters like Professor Lattimore, our retainer could be considered at an end. Fortas called a meeting of the entire firm to consider the matter. It was unanimously decided that we would represent Lattimore and would not take direction from clients as to whom we should or should not represent.

The client's attitude was not an isolated one. We suffered substantially in a number of cases with similar commercial clients. Fortas and the others took it all in stride. They accepted the battle with spirit. I remember one Sunday afternoon when we were working on the Bailey brief for the Supreme Court, Thurman Arnold saying, "Isn't it wonderful to work on something in which you really believe?" And, on one occasion, in the locker room of the Burning Tree Country Club, Paul Porter was accosted with the remark, "I understand your firm represents only communists and homosexuals." "That's right, Senator," Paul replied, "what can we do for you?"

The Lattimore story had two major chapters. The first was the hearing before a Senate Committee headed by Senator Tydings of Maryland. A number of witnesses were produced in an attempt to paint Lattimore as a communist on the basis of falsehood, innuendoes, and third-hand gossip. In fact, the charges were ludicrous. Lattimore was anti-communist, as his extensive writings over the years clearly established. But as Fortas had advised Lattimore at the outset, "we are operating in a situation characterized by insanity."

Abe Fortas was at Lattimore's side throughout the extensive hearings, which lasted from March to July of 1950. He was supported from time to time by the appearances of Thurman Arnold and Paul Porter, but was always present himself. In addition, the entire resources of the firm were committed to the defense, which required elaborate and extensive preparations and research.

The Republicans were attacking the China policy of the Roosevelt and Truman Administrations as based on communist influence; Senator McCarthy was their point man, with Lattimore the innocent object caught in their line of fire. In the end, the Senate committee, despite politically inspired innuendo by certain Republican senators, reached the obvious conclusion that "on the evidence before us . . . Mr. Lattimore is not an employee of our State Department, . . . he is not the architect of our Far Eastern policy, and . . . he is not a spy."

This complete vindication was memorialized by Owen Lattimore in his book, *Ordeal by Slander*, which he intended to serve as a warning of the danger of the type of proceeding to which he had been subjected. He said,

"the story would have been different and more tragic if it had not been for the law firm of Arnold, Fortas & Porter, and particularly for Abe Fortas. . . ."<sup>11</sup>

But this was merely prologue. For a new committee under the chairmanship of Senator McCarran of Nevada was created. Its purpose was to paint Owen Lattimore as precisely the kind of danger to American security that McCarthy had charged him to be. Again the objective was to attack the China policy of the administration as communistic, with Lattimore as the publicity object.

After extensive preliminary hearings, lasting for many months in 1951 and 1952, McCarran put Lattimore on the stand for thirteen days of consecutive testimony that consisted exclusively of badgering, harrassment, and denunciation. It is difficult today to believe that such an examination could have been conducted by a committee of the Senate of the United States. Fortas was constantly at Lattimore's side, attempting to bring reason to an unreasoning political assassination. But the committee was not to be moved from its predetermined course. In closing the hearings, Chairman McCarran denounced Lattimore as "flagrantly defiant of the United States Senate, outspoken in his discourtesy, and persistent in his efforts to confuse and obscure the facts,"<sup>12</sup> a very unlikely characterization of the polite and scholarly professor who was before him.

Inevitably, the attack on Lattimore resulted in an indictment for perjury. The major count was that Lattimore had lied in denying that he had ever been a "sympathizer or promoter of communism or communist interests." The court proceedings were taken over by Thurman Arnold, who was assisted by former Senator Joseph O'Mahoney of Wyoming. The principle charge was dismissed by District Judge Youngdahl because it was so nebulous, indefinite, and speculative in content that it did not meet the constitutional standard necessary to constitute an accusation of crime. It was also held to be an unconstitutional restriction of the freedom of belief and expression.<sup>13</sup>

On appeal before the entire bench of the Court of Appeals, the dismissal was sustained on the ground that the indictment was void for vagueness, with only one judge dissenting.<sup>14</sup> The government, unwilling to give up, reindicted Lattimore and attempted to shore up its weak case by including in the charge definitions of the terms of the indictment. It accused Lattimore of perjury in denying that he had been a "follower of the com-

11. LATTIMORE, *ORDEAL BY SLANDER* vii (1950).

12. *Hearings on the Inst. of Pacific Relations Before the Senate Comm. on the Judiciary*, 82nd Cong., 2d Sess. 3674 (1952).

13. *United States v. Lattimore*, 112 F. Supp. 507 (D.D.C. 1953).

14. *United States v. Lattimore*, 215 F.2d 847 (App. D.C. 1954).

munist line” and a “promoter of communist interests.” The indictment was again stricken<sup>15</sup> and the ruling was affirmed by an equally divided court.<sup>16</sup>

In the end, the attempted prosecution of Lattimore on remaining minor counts was dropped. Lattimore finally was vindicated after years of struggle in which Abe Fortas had stood valiantly by his side. As Anthony Lewis recently said in the *New York Times*, Lattimore was “soiled by McCarthy’s mud but clear in the eyes of history.”<sup>17</sup>

Fortas had carried the entire burden of the legislative hearings, but courtroom appearances were taken over by Thurman Arnold. There was no clear line of distinction since Arnold and Porter had also appeared occasionally at the Senate hearings and, plainly, Fortas’ outstanding courtroom talents would have been most valuable. But all were sensitive to the value of having Thurman Arnold’s different but equally effective courtroom abilities, coupled with his special standing before the courts as a former judge of the Court of Appeals. Even though Abe did not appear in court, he was an active participant not only in the Lattimore court case, but also in the *Bailey* case, and the later *Peters*<sup>18</sup> case, which presented the same issue. His wise counsel and his draftsman’s pen were available in all of these cases, and the briefs bear clear marks of his deep involvement. The briefs in the *Bailey*, *Lattimore*, and *Peters* cases are, so far as I know, the only briefs in the history of the firm that were signed by all three—Thurman Arnold, Abe Fortas, and Paul Porter.

The last major loyalty case was brought to the firm by two Yale professors, Fowler Harper and Vern Countryman. It involved Dr. John Peters, a professor at the Yale Medical School, who was a consultant on an advisory basis to the Secretary of Health, Education and Welfare. He advised the Surgeon General when called upon concerning federal grants to medical research institutions. The case was another secret evidence case of the same kind as the *Bailey* case, and was quickly brought to the Supreme Court as a test case of the issues left unresolved by the four-to-four decision in *Bailey*.

In this case the Solicitor General of the United States, Simon Sobeloff, in an act of great civil courage, urged the Attorney General to confess error and refused to sign the government’s brief. The case was argued in his stead by an Assistant Attorney General Burger, now Chief Justice of the United States. In the course of the argument, Chief Justice Warren raised the question as to whether Dr. Peters was not entitled to win be-

15. *United States v. Lattimore*, 127 F. Supp. 405 (D.D.C. 1955).

16. *United States v. Lattimore*, 232 F.2d 334 (App. D.C. 1955).

17. Lewis, *Courage in Hard Times*, *N.Y. Times*, Apr. 22, 1982, at A31.

18. *Peters v. Hobby*, 349 U.S. 331 (1955).

cause the Loyalty Board had cleared him before the Loyalty Review Board had taken the case up and reversed the clearance. Thurman Arnold objected that Dr. Peters did not want to be cleared on the basis of any such technicality, but wanted the entire procedure thrown out. The court asked for briefs on this point. To his credit, Assistant Attorney General Burger agreed with Thurman Arnold that the case should not be decided on a technicality and that the government's rights under the loyalty program should be defined by the court so that it would know whether secret evidence could be used. Disregarding the briefs on both sides, the Court decided in Dr. Peter's favor on the narrow ground that once he had been cleared by the Loyalty Board, the Review Board had no right to reverse that judgment.

The ruling was a most disappointing victory. But although it was not possible to get the Supreme Court to rule on the vital issue of secret evidence, it was not long before President Eisenhower announced that he believed in the right of a person to face his accuser.

The services of Abe Fortas and his colleagues, Thurman Arnold and Paul Porter, in the cause of civil liberty and in restoring a sense of decency to our political discourse, will and should be long remembered. It is a rare thing to find "Courage in Hard Times" as Anthony Lewis titled his tribute to Fortas in the *New York Times*. It should be honored.

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