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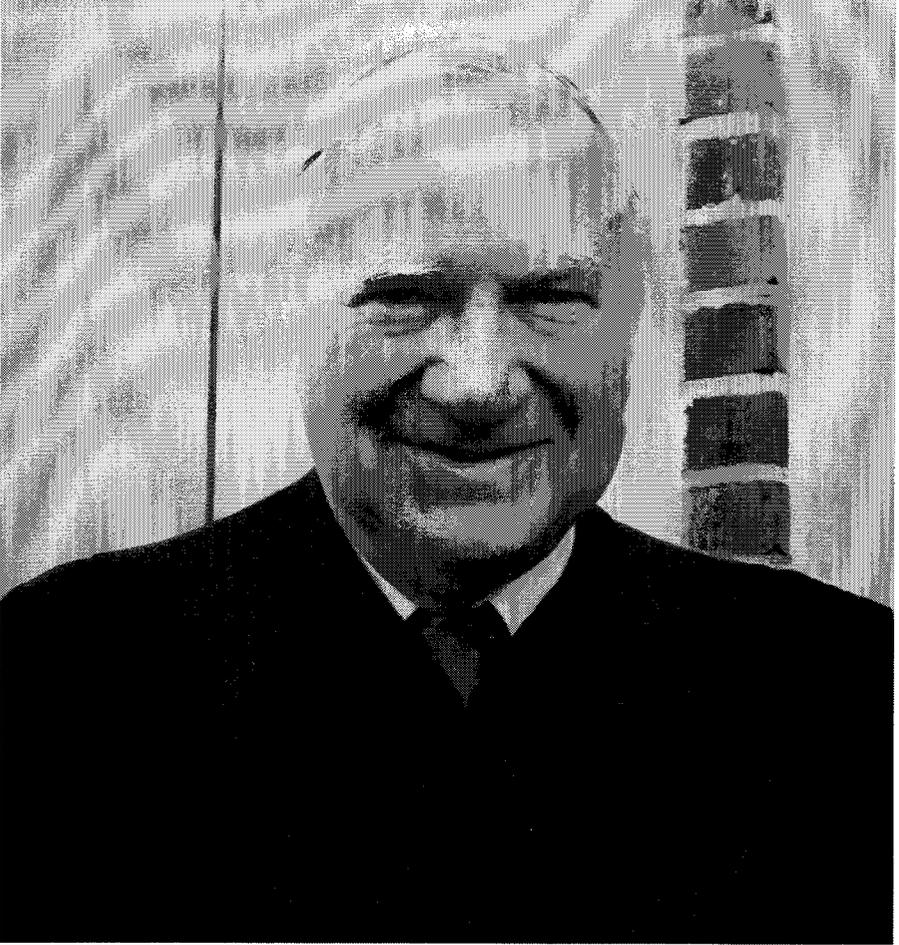
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FRANK A. KAUFMAN

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IN MEMORIAM: FRANK A. KAUFMAN

SHALE D. STILLER*

When Frank A. Kaufman was just twenty-four years old, he made a major contribution to Maryland law. For the next fifty-seven years he continued to make many contributions. He wrote, he negotiated, he argued, he advised, and he judged—all with a passion and energy rarely encountered in the history of the Maryland bar.

It was in December 1940, just six months after he graduated from the Harvard Law School, that the *Maryland Law Review* published his monumental article, *The Maryland Ground Rent—Mysterious but Beneficial*.¹ In those days, every member of the Maryland State Bar Association automatically received the *Review*, and in those days, when specialization had not truncated the perspectives of the bar, virtually every practicing lawyer had to understand the ground rent system. Young Mr. Kaufman's article quickly became the bible of ground rents, and has been cited in virtually every opinion or article on ground rents since 1940. It was, and still is, the finest treatment of that arcane topic. The thoroughness of the ground rent article—it was 72 pages with 186 footnotes—was a harbinger of Frank Kaufman's subsequent career, both at the bar and on the bench.

I first met Frank Kaufman in 1956 when I was a summer law clerk at the firm of Frank, Bernstein, Gutberlet & Conaway. My recollection of Frank and his office in 1956 is still as vivid as if I were there today. This giant of a man occupied a tiny office on the fifteenth floor of the old First National Bank Building. One usually had to stand up in the

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This tribute is an abridged version of my eulogy for Judge Frank A. Kaufman, delivered at his funeral on August 1, 1997 at Baltimore Hebrew Congregation.

1. Frank A. Kaufman, *The Maryland Ground Rent: Mysterious but Beneficial*, 5 MD. L. REV. 1 (1940).

office because Frank believed that the primary purpose of furniture, such as chairs, was to be a depository for files and other paraphernalia. I worked closely with Frank that summer and then for the many years after I graduated from law school—first as an associate in the firm and then as a partner. In those crucial early years, when lifelong habits are formed, I learned from Frank virtually everything about how to be a professional.

When Frank died, one of the newspaper reporters asked me: “What was Frank’s specialty as a lawyer?” The reporter probably didn’t believe my answer because it wasn’t published, but it *was* true. Frank specialized in virtually everything. His roving and penetrating intellect would focus on whatever came in the door, and when he was done with the matter, he was the specialist. His clients ranged from major New York Stock Exchange companies to the International League Orioles, from wealthy families to indigent criminal defendants. His clients adored him, not just for his intellect but for the exquisite care that he gave to every matter, large or small. Clients came to expect calls from him at any time from 7:00 a.m. to midnight. It is not hyperbole to recall that his work day really was sixteen to eighteen hours, and often there was no such thing as a weekend. I still remember trudging home from the office one night at midnight, only to receive a call from Frank at 12:30 a.m., challenging both vociferously and urgently an opinion I had written relating to the relationship of the rule against perpetuities to powers of appointment.

Frank continued these prodigious work habits almost up to the end. Part of the Kaufman legend—but it was true—was that he rarely traveled anywhere without those four or five beat-up briefcases. When I would visit him during various hospitalizations, the briefcases were always present. His cousins, George and Betsy Hess, told me when they invited Frank and Clem to go sailing with them, Frank brought all his briefcases on board. When he went to Oriole games, briefcases would usually be his accompaniment.

The firm, when I joined it, had only about ten people: Judge Eli Frank, Joe Bernstein, Howard Conaway, Eli Frank, Jr., George Gump, Charles Gutberlet, Jeff Miller, Larry Rodowsky, Lenny Cohen, and me. We later grew much larger, when such legal stalwarts as Robbie Goldman and Pete Moser joined the firm. When Frank joined the firm in 1945, it was *very* small, and was led by Reuben Oppenheimer, Frank’s mentor, a man of whom Frank often spoke so movingly. It was an era of no computers, no xerox machines, no CD-ROMS for research.

Frank Kaufman's career was extraordinary. His academic record was peerless. He graduated *summa cum laude* from Dartmouth College in 1937, seventh in his class, and then *magna cum laude* from Harvard Law School in 1940, fifth in his class, all in an era before grade inflation made honors more commonplace. During the War, he served as an attorney in the Treasury Department and in the Lend Lease Administration in Turkey when he was in a spectacular airplane crash, from which he was able to walk away without injury. Most important, however, was his service as Bureau Chief in the Department of Psychological Warfare at the Allied Forces Headquarters. I can never forget that wonderful moment in 1966 when Frank asked Reuben Oppenheimer to make one of the speeches when Frank was sworn in as a federal judge. Judge Oppenheimer pointed out how Frank's excellence at psychological warfare was the best type of training in dealing with trial lawyers.

While he was a lawyer, he also taught for many years at the University of Baltimore Law School and the University of Maryland School of Law. He was a member of the Governor's Management-Labor Relations Commission; the Governor's Commission to study whether the Uniform Commercial Code should be adopted in Maryland, and another gubernatorial commission on health problems. He was the chairman of a very important commission to study sentencing in criminal cases. His outside activities were voluminous. He was a board member of Goucher College, the Maryland Institute, the Park School, Sinai Hospital, the National Conference of Christians and Jews, Baltimore Hebrew Congregation, the Suburban Club, the Associated Jewish Charities, Good Samaritan Hospital, the Baltimore Chapter of the American Jewish Committee, the Baltimore Jewish Council, and the Jewish Family and Children's Service. In at least five of these organizations, he rose to be the president or the chairman. He was invited to membership in many of the wonderful social and legal clubs in Baltimore, such as the 14 West Hamilton Street Club, the Lawyers Round Table, the Wranglers, and the Rule Day Club. Indeed one remark that best summarizes all this activity was that of an FBI agent in 1966 who, checking on Frank's background after his nomination by President Johnson, commented that the FBI's most difficult problem with Frank was that it could not believe that all of this was really true. How could one man engage in so many activities at the same time!

When Frank became a federal judge in 1966, he escalated the amount of activities in which he was involved. He dropped out of none and simply added many more. He became an active member of the Board of Governors of the American Bar Association (ABA) and

traveled and worked extensively for the ABA to help many countries throughout the world improve their legal systems. Frank fought in ABA debates for positions in which he deeply believed. In my last meeting with him, just five days before he died, he told Ellen and me about his desire to maintain a dialogue in the 1970s and 1980s with Soviet lawyers. Many in the ABA thought it was wrong to have any contact with lawyers who were part of a Communist government. Frank's belief was that the best strategy in dealing with one's enemy was to keep on talking. His position prevailed in a closely divided ABA. He also told us that one of his proudest possessions was a letter that Justice Brennan, who died a week before Frank, had sent to Frank complimenting him on his views and his ABA victory.

Another aspect of Frank was the fact that his extraordinary intellect and energy caused most of the federal appellate courts throughout the country to invite Frank to sit with them, hearing difficult cases.

Frank, among his other talents, was a great lover of the American popular song. Anyone who ever attended a party with Frank where there was a piano, and where someone could play Cole Porter or Irving Berlin, will know that Frank had practically memorized the whole corpus of Cole Porter's lyrics and a large number of Irving Berlin's as well. It has always been remarkable to me how he could just recite song after song after song. Several weeks before Irving Berlin was one hundred years old on May 11, 1988, I mentioned to Clem and Frank that Ellen and I were going to New York for Irving Berlin's hundredth birthday party at Carnegie Hall. I asked them if they would like to come along because I had some extra tickets. They were delighted to join us, not only because of Frank's knowledge of the Berlin oeuvre, but also because Clem's father, Rabbi Morris Lazon, had been a good friend of Irving Berlin. Clem left for New York early on the birthday, so I had arranged to meet Frank to travel together to New York. Of course, I had to say to Frank: "Now, look, you meet me at 2:05 in front of the courthouse. The train leaves at 2:30; this is 2:05 *real time*, not 2:05 Kaufman time." He laughed and said that he understood. He was on time, but as we were driving to the station, Frank mentioned to Ellen and me that he had left a jury that was still deliberating. So we both said: "What will happen if the jury comes back and asks a question? Who is going to be there to take the verdict if the jury comes in with one?" He told us about a rule that permitted a magistrate to be in the courtroom to answer questions and to take the verdict, but that if the magistrate couldn't deal with those questions, Frank had the perfect solution. We were traveling on the Metro-Liner. The Metro-Liner had telephones. Frank planned to call his

courtroom every twenty minutes from the train to see whether there were any questions. We proceeded to board the Metro-Liner, and Frank disappeared to go to the telephone. He returned a half hour later with a curious mixture of chagrin and disgust on his face. He informed us that he could not figure out how to work the phone using a credit card. He was panicked because he had told Betty Wiegand, his loyal secretary for many years, that he would be calling every twenty minutes. Finally, one of the other passengers on the train told Frank how to work the credit card. He had been inserting the credit card in the wrong way. So at last he reached his secretary, and just at that moment, the lawyers happened to be in her office with a question. So Frank gets the lawyers on the speaker phone in his office, he is on the Metro-Liner traveling 120 miles an hour to New York, and he is making legal rulings on the train. This for Frank Kaufman was ecstasy! He later mentioned that, at times, as the train was going through tunnels, he couldn't always hear the other lawyers and he was sure the lawyers couldn't always hear him. Somehow his notion of trying a federal case while on a train to New York just boggles my mind, but if there was a way of doing it, Frank Kaufman would find it.

The essence of Frank Kaufman the human being, Frank Kaufman the lawyer, and Frank Kaufman the judge was always the exquisite care with which he approached every problem. How often have we all heard these stories of Frank's finding an article in the *Arizona Law Review*, he would be fascinated by footnote nine in the article and the relevance of that footnote to the case he was trying, and he would ask the lawyers to give him a memorandum by the next day on the importance of the footnote to the case.

There were some who criticized Frank for spending too much time on every issue. Even those critics always admitted that almost never did he come out at the wrong place. His results had an unerring accuracy. His meanderings into the byways and into the alleys and into the interstitial framework of the law resulted from the fact that he never disguised the difficulties of a case, as some do who win the game by sweeping all the chess men off the table. He never took shortcuts. For Frank, *every* case was a serious case, deserving full and careful consideration.

Frank needed to explore every aspect of every case because he believed it was only right for his clients when he was a lawyer and for the whole system of justice while he was a judge. The highest compliment one can pay to any professional is to say about him that in every case, he gave it his *all*. Everyone, winner or loser, always said that about Frank Kaufman. Some criticized him for badgering lawyers who

were unprepared. Those critics simply did not understand his philosophy; if the case was serious enough for him, the lawyers should have been serious and thorough, and not unprepared.

Frank was a legal product of the 1930s and 1940s, an era when there was a nobility to the legal profession that is not always present today. Law was the instrument in those days of reforming the ills of society, and everyone knew it and believed it. In today's America, when the emphasis—where the entire culture—steers toward amassing the largest possible accumulation of material wealth, what rare good fortune it was to find someone like Frank Kaufman who could give up the far more remunerative position as one of the leading lawyers in Maryland to be a public servant.

Frank's sense of caring was also part of his reverence for and continuity with the past. Frank's sense of obligation when he was a lawyer at our firm was to pass on the torch burning as brightly as it was when it was given to him. He came to a firm in 1945 that had men like Reuben Oppenheimer and Judge Eli Frank. Frank felt very keenly that everything he did as a judge was also aimed at passing the torch. He knew that his was one of the finest district courts in the country, and he felt very keenly about maintaining that tradition and making sure that the court was just as good when he left it as it was when he joined it in 1966.

Frank was a man of great warmth. Everyone enjoyed being with him. How often can many of us picture a scene, often at a party, where Frank would get you in a corner—that great big bear of a man—and put his arm around you and talk about a problem that you might have—either a legal problem or a personal problem. And what a loyal and warm friend he was to those who wanted to talk to him about their personal or other problems. For me, every time I needed advice and turned to him, that advice was absolutely perfect. His law clerks, two each year for thirty-two years, can attest better than I about the warm fatherly figure. Those law clerks have turned out to be deans, professors, federal judges, and some of the finest lawyers in the country.

One last comment. Frank had another special asset—his wife, Clem. Beyond her support of her husband's activities for fifty-two years, she added an extra dimension in her own right to his efforts. Clem Kaufman is an intelligent woman with broad interests. She has a light touch and a sense of humor that leavened Frank's occasional intensity. She and Frank built a close and loving family with their children, Frank, Jr. and Peggy, and with their son-in-law, Fred Wolf, whom they both treated as a son.

We have lost a friend who is irreplaceable. His life reminds me of that great line of Oliver Wendell Holmes. "A man can live his life as greatly in the law as he can elsewhere." Frank Kaufman lived his life as greatly as anyone could. We will miss him very much.

ANDRE M. DAVIS*

Frank Kaufman was my mentor, my colleague, and my friend. As is true for so many other men and women who were privileged to serve as one of his law clerks, he had an enormously positive and beneficial impact upon my personal and professional development.

I am often asked, by those who take an interest in my background, when was it that I first discovered in myself an interest in becoming a judge? Many presume, erroneously, that it was during, or as a result of, my year clerking for Frank. In fact, something close to the contrary is true; it was not until years later, after the many lessons learned during my time with Frank had been fully absorbed and appreciated, that I developed an interest and an aspiration to become a judge.

There is a simple reason for this, I think. One of the most profound lessons, among the many, that Frank taught his clerks, and this almost coincidentally, is that judging is extraordinarily hard work. The work of a judge is often unrewarding in any true sense. We learned, from our time with Frank, that the personal costs, in emotional and psychological currency, of striving in every case to reach the correct and just result, for the right reasons, was often very high. This is not to say, of course, that I feared hard work. (One did not accept a clerkship with Frank or, it should be noted, pursue or defend a case assigned to him, unless one was willing to work very hard indeed.) It is to say, however, that I, like all of us privileged to serve as his law clerks, eventually came to appreciate that, when done right, judging is and must be hard and burdensome, and sometimes not rewarding or fulfilling at all.

In part, this is due to the fact that this business of judging requires of one who would undertake the task an unflagging commitment to intellectual rigor, courage to achieve and maintain independence of mind in the all-too-public act of reconciling conflicting principles and rules, often against a tide of popular agitation for a contrary result. It requires, as well, an understanding of, and a com-

* United States District Judge, District of Maryland, and law clerk to Judge Kaufman during 1978-79.

passion for, human frailty and imperfection. Frank embodied all of these essential traits in abundance. I am strengthened and reinvigorated by my recollection of his view that one should not easily assume that one can measure up to so high a standard. Frank never let it be said out loud, without feelings of personal embarrassment to himself, that he had measured up; he simply continued to strive, as he would say, "so to do."

Frank is accurately remembered as a judge who worked the lawyers appearing before him to the exhaustion of their capacity for work. He is also justly remembered as a great and esteemed jurist, not least because of his relentless quest for fairness, impartiality, justice, and, importantly for Frank, thoroughness, in all the cases and matters he decided. No one who spent more than a few moments in his chambers or in his courtroom ever doubted that the fiery inner need to achieve excellence, which drove him to exact extreme effort from others, drove him to exact the same from himself, many times over.

There is a belief shared by some that judging is a science and not an art; that good judges must be all but fungible, computer-chip-like decisionmakers, oblivious to all but a statute's words, or a precedent's holding. In this view, a legislator's work is hard, but not a judge's.

Frank did not adhere to this view, and those of us who were fortunate to work for or with him, or whose cases were assigned to him, and his community as a whole, are the better for it. Frank understood the warning contained in Justice Cardozo's lament that:

There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions In this mental background every problem finds its setting. We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own.¹

Frank was a great judge because he understood, and met, the challenge that Cardozo identified as that facing every judge: to see the world through our own eyes, as we must, but with an insightfulness, an empathy, and an appreciation for the burdens imposed upon all men and women by what has been called the human condition.

1. BENJAMIN N. CARDOZO, *THE NATURE OF JUDICIAL PROCESS* 12-13 (1921) (footnote omitted).

He knew that while written words are the bricks and mortar of the law, the structures formed by judicial decisions are intended to house real people in the real world.

The Constitution of Massachusetts, where Frank went to law school, provides in part: "It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit."² This is a mandate worth remembering.

Frank Kaufman was blessed with many enviable gifts: a keen intellect, a delightful sense of humor, and a passion for justice. He was possessed of a deep and abiding understanding of what the law could and could not achieve. He cared deeply about his work and the people who sought from the courts a fair and impartial hearing of their grievances. He was, in short, a judge "as free, impartial, and independent as the lot of humanity will admit." His court and his community are diminished by his death, and we shall remember him with great fondness and with gratitude for his tireless efforts to make justice a reality for all litigants appearing in his court.

WILLIAM L. REYNOLDS*

Law clerks know the measure of their judge. The intimate daily (indeed, minute-by-minute) contact between clerk and judge reveals all. A judge cannot hide his true self from his clerks. As a result, a fine judge has devoted clerks, and the devotion of Judge Kaufman's clerks was legendary.¹

To his clerks, the Judge was primarily a great teacher and father figure. (None of his former clerks, including me, ever called him anything but "the Judge"; it wasn't that he scared us; rather, no matter how successful we became we always remained in awe of him. The

2. MASS. CONST. pt. 1, art. 29.

* Jacob A. France Professor of Judicial Process, University of Maryland School of Law, and law clerk to Judge Kaufman during 1970-71.

A version of this tribute appeared as William L. Reynolds, Editorial, *Kaufman's Departure Leaves Colleagues Paying Tribute*, DAILY REC. (Baltimore), Aug. 21, 1997, at 9A.

1. Because this is a scholarly journal, I must confess that none of us ever would drive anywhere with Judge Kaufman willingly. He was the worst driver this side of Rome. When I was clerking, he several times suggested, when we disagreed, that we drive around and talk about it. After the first excursion, I always gave in immediately; winning the argument was not worth the terror of his driving. I do not believe that the Judge realized that a "let's drive and talk" would always win the argument, but maybe his subconscious did.

closest we ever came to familiarity was to call him—*never* to his face—by his ubiquitously scrawled initials, “FAK.”) I cannot possibly convey my debt, both intellectually and personally, to the Judge. He taught me so much about the truth of the law that his words guide me even a quarter century later. We had very strong professional disagreements, especially over my views concerning the proper role of appellate courts, but they were never personally sharp; even as he lay dying we discussed somewhat heatedly the current decisions of the Supreme Court and whether they were right.² I like to think that we each helped the other see some light.

We clerks also learned that FAK was an outstanding jurist who reveled in his job. Judging was his true vocation, and he truly believed in equal justice for all. He wanted, desperately so, to get to the truth of every case. If that meant that the lawyers had to respond to his view of the case, so be it. He was not interested in who won or lost. His only concern was that true justice—not just “litigation justice” be done.

This was most evident in cases involving the poor. Judge Kaufman was never content to let the cases brought by unrepresented litigants, or even those who had attorneys who were in over their heads, be decided without the most searching review of the whole matter by his clerks and then by himself; this latter chore was not done lightly; he really dug into the record of every case. This, of course, sometimes caused unrest among the lawyers involved. No matter. Dispensing justice was his duty, and FAK was damned well going to see that it was done. I have often described Judge Kaufman in this way: If you were on trial for your life, and you were innocent, you would want him as your judge. There can be no higher praise for a judge.

Frank Kaufman received great respect from his peers. The respect accorded him in this state, of course, was enormous. But his fame was national: Wherever I went, from ABA and ALI meetings to law school conventions, I heard his praises sung by the leaders of the national bench and bar. He was a leader in the ABA; a correspondent of academics like Charles Alan Wright, Bernard Segal, and Maurice Rosenberg; and invited to sit as a visiting judge on trial and appellate courts from California to the District of Columbia. He knew *everyone*, and they all respected and loved him.

The Judge was very proud (and protective) of his courtroom family: his secretaries, his courtroom clerks and reporters, and his law

2. Neither of us thought that they were right. The Judge felt more strongly about it than I did. He always did.

clerks. He was enormously pleased that Ben Legg and Andre Davis had succeeded him on his own Bench, and that at least eight of his former clerks had become law professors. For any of us, his helping hand was always there if needed, as it often was.

An enormous perk that came from clerking with the Judge was becoming part of his family. For more than a quarter of a century, Clem, the Judge's wonderful and talented wife, Peggy and Frank, Jr., his delightful children, and their families have been an intimate part of my life. That, of course, is the way it was with Judge Kaufman: Once he had accepted you, your life was changed forever.

Judge Kaufman was famously idiosyncratic—he would have made a wonderful absent-minded professor. The stories told about him at the bar are legion. I will only tell one here because it reveals a lot of his nature. During the 1970 World Series (the “Brooks Robinson Series”), the Judge was engaged in a complicated and sensitive criminal trial. Doing his duty meant that he could not see his beloved Orioles.³ Ever resourceful, the Judge arranged for a parking spot near the entrance to Memorial Stadium. As lunch recess approached, I retrieved his car and waited for the Judge on Calvert Street. Recess was called, and the Judge flew down the hall still wearing his robe. As he loved to tell the tale, one of the jurors stopped him and said: “Judge we don't mind you going to the game. We just wish you had given us enough warning so we could have gotten tickets.” But, of course, the recess was only an extended one, and by 3 p.m. the trial had reconvened. I was still at the game, however, for the Judge, kind as always, let me stay in his seat until the glorious end.

FAK belonged to the school of judges that believes in justice with a human face. All of us who knew him well, mourn his death deeply. But as the poet said, we also know that the good that men do lives on after them. And for Frank Kaufman that good lives on in so many.

3. And he truly loved them. When I last saw him, shortly before he died, the Judge, Frank, Jr., and I had a long and very learned conversation on the current Os, their predecessors, the state of baseball, and other related topics. I only pretend that I was really a part of this conversation, for their expertise far outstripped mine.