

# Remembering 1965: Abe Fortas and the Supreme Court

By Larry M. Roth\*

With 1965 an era both ended and began. That year the American consciousness over the Vietnam War was truly awakened to the sound of far off howitzers. Also that year, Abe Fortas was nominated and confirmed by the Senate for the Supreme Court seat vacated by Arthur Goldberg. The reverberations of both phenomena still exist although the former permeates our social order much more than the latter. Quite recently, however, we witnessed a positive by-product of the Fortas appointment: the appointment of John Paul Stevens to the Supreme Court. With Stevens' nomination the appointive process witnessed a selection procedure that was open and carefully considered, quite unlike the Fortas affair. The result was an appointee publicly acknowledged as well qualified and acclaimed by the Bar as its choice with the highest recommendation. The nominee received wide support and recognition, for, in effect, a wide number of in-government and out-of-government sectors participated in the selection process. And the nominee was of a judicial tenor for he was himself a product of the Bench. But Abe Fortas and the year 1965 was a different time, a different day and a different way of doing things.

The Fortas nomination and eventual ascent to the Court was a throw back to the 19th-century patron system. In effect, a President of the United States chose an old friend and political confidant to fill a position that demanded of an individual the most stringent exercise of political self-restraint and the highest order of ethical conduct. But such items were not in the Fortas repertoire. Worse yet, Abe Fortas was appointed to a vacancy consciously maneuvered by Lyndon Johnson so that an old friend would be rewarded for years of faithful service.

This was not the first time in history that such an event occurred. Many presidents have looked immediately to old friends and political allies once a Court vacancy developed. One need only look to such notable examples as Jackson and Taney, Lincoln and Davis, Truman and Vinson. Last in the line of these appointments was Abe Fortas. The difference with Fortas was a more blatant exercise of cronyism and political maneuvering.

The competency of Abe Fortas is not now being questioned, nor is the facility of his legal mind in doubt. Many have said his intellect rated with

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the Supreme Court's finest. It was the process and its reasons that must be called into question. For in 1969, when Abe Fortas became the first Supreme Court Justice to resign before a public outcry of impeachment, the truths of 1965 became painfully evident. They have become even clearer today. Since then, the Senate, whose responsibility it is to confirm Court nominations, has looked with keener scrutiny at the names of the nominees submitted by the president. Richard Nixon's nominees were the first to feel this altered and more acute senatorial advice and consent. Now in the ashes of Watergate, the public demands no less. Gerald Ford was quick to discern this. It was, perhaps, the finest moment of his administration. This carefulness of consideration and the procedural mechanisms of the Stevens nomination will hopefully be the basic prototype for the future.

We should have learned by now the uniqueness of Supreme Court Justices. They should be judicially pristine, not politically tainted. But a little over a decade ago, 1965, a Supreme Court nomination succeeded in thrusting Abe Fortas into the role of "Mr. Justice." The Fortas success, however, was a throwback into an era that now should be discarded as the country moves into its Tri-Centennial. The Fortas nomination and Lyndon Johnson's success in promoting it is an example of how not to select a Supreme Court Justice. This article recounts the 1965 events leading to Abe Fortas' ascension to the Court.<sup>1</sup>

#### THE HOT SUMMER OF 1965: LBJ HOLDS THE TRUMP

No appointment a president can make approaches the enduring significance of a Supreme Court nomination. It is a lifetime appointment for the recipient of the nomination. It is an opportunity for a president to indelibly stamp an imprint upon the development of American jurisprudence and, indeed, on American social thought itself. Although there is no guarantee a Justice will live up to presidential expectations, it's a chance most presidents gladly accept. Few presidents are disappointed. Franklin Roosevelt was not—he had eight nominations. Thus far it can be said that Richard Nixon has been satisfied. Dwight Eisenhower was not so fortunate. He became shocked at Earl Warren's portfolio of liberal decisions. Ike reportedly said later that the Warren appointment was the worst mistake of his life.

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1. For one interested in the life of Abe Fortas prior to his Supreme Court tenure, many sources are available. Particularly these should be noted: Graham, *Abe Fortas*, 4 FRIEDMAN & ISRAEL, *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969* (1969); SHOGAN, *A QUESTION OF JUDGMENT* (1972); Navasky, *In Washington You Just Don't Return a Call from Abe Fortas*, N.Y. Times, August 1, 1971, §6 (Magazine). As far as legal prominence prior to his coming to the Court, Fortas had much. He argued the cases of *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); and *Durham v. North Carolina*, 214 F.2d 862 (D.C. Cir. 1954).

Each appointment is a presidential prize. Until the summer of 1965 there was no indication Lyndon Baines Johnson would be awarded such a gift. But fate was on Johnson's side. In 1965 the White House was his; the people had given him a landslide victory only one year earlier. In the Johnson style he played his opportunity for all its worth. In effect he created his own Supreme Court vacancy.

Adlai E. Stevenson, Ambassador to the United Nations, died on July 4, 1965, after having suffered a heart attack while in London.<sup>2</sup> It was a long way from London, England, to the United Nations, to the Supreme Court Building, but Lyndon Johnson was about to bring them all closer together. For in the few days after Stevenson's passing, Johnson already had Justice Arthur Goldberg's resignation and Abe Fortas on the burner to accept a Supreme Court appointment.

Arthur Goldberg owed nothing to Lyndon Johnson. His Supreme Court appointment was for life. Unless impeached, he was beyond the faithless winds of changing political fortunes. Somehow LBJ was able to get at Arthur Goldberg, for on July 26, 1965, Goldberg resigned from the Court and accepted the post of U. S. Ambassador to the United Nations.

The problem of discerning why Arthur Goldberg left the Court is rooted in the varying versions of the story offered by the protagonists involved. According to Lyndon Johnson, in his memoirs *The Vantage Point*, Goldberg had made it known that he was restless with the sequestered existence of a Supreme Court Justice. This is what John Kenneth Galbraith told Johnson on July 16, 1965. Galbraith indicated to the President that Goldberg would step down if offered a more challenging position than the Supreme Court.<sup>3</sup> Anyone knowing anything about the law knows that few positions offer more challenges than the Supreme Court. Yet Johnson's story is founded on the converse.

Johnson related that Goldberg accompanied him to the Stevenson funeral. On that trip he asked Goldberg about the rumors of his "restlessness." Goldberg allegedly confirmed them as being true. Johnson then told Goldberg that the Secretary of Health, Education and Welfare post was available. Goldberg, however, indicated that his interest was in foreign affairs. The following day Goldberg called the President to relate his inclination to accept the U.N. position if offered to him. Johnson then appointed Goldberg to the U.N.<sup>4</sup> Thus, according to Johnson, Goldberg instigated his own resignation.

From the other perspective, Goldberg's story has been recently told by his wife Dorothy. In her memoirs recalling those years she emphatically

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2. SHOGAN, *supra* note 1, at 108.

3. JOHNSON, *THE VANTAGE POINT: PERSPECTIVES OF THE PRESIDENCY 1963-1969*, at 543 (1971).

4. *Id.*

states that it was Johnson who instigated the U.N. offer.<sup>5</sup> Johnson was persistent in seeking Goldberg's move from the Court to the United Nations, and assured him that as Ambassador, he would have a viable voice in shaping this country's foreign policy.

Why did Arthur Goldberg leave the Court? Some agree with Johnson that Goldberg was restless with Court work.<sup>6</sup> Based upon his lifetime of being embroiled in the spotlight of a lawyer's work, labor negotiations and politics, such a theory is not totally without foundation. Action and activity were in Goldberg's past. He had been John Kennedy's Secretary of Labor before appointment to the Court. But the activity of the Supreme Court was different. The Court was constant and demanding intellectual activity, although the physical body moved little from the cloistered chambers of the Supreme Court Building. And, of course, a justice's social outlets were much more circumscribed.

It seems more to the truth, however, that it was Johnson who approached Goldberg. As a lawyer Goldberg had to recognize the crowning achievement of being a Supreme Court justice. And that he was one of the few Jewish justices to have served on the Court. So, Johnson had to consciously maneuver Goldberg out of that office. He thrust upon Goldberg the request for a new venture; it was a presidential request. The nation witnessed the persuasive power of a presidential request during Watergate and its aftermath. When the President beckons his subjects comply, Johnson must have realized that applying direct pressure to Goldberg would achieve the desired result. He told Goldberg that the U. N. was to be the vehicle which would achieve a solution to the Vietnam problem, and that the U.N. Ambassador would be instrumental in that prospect. Even in 1965, however, the U.N. post was not a powerful position. The title over-

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5. GOLDBERG, *A PRIVATE VIEW OF A PUBLIC LIFE 192-196* (1976). In her book Mrs. Goldberg explicitly rejects Johnson's contentions that it was restlessness that led Arthur Goldberg from the Court. Her recitation of these events is interesting in helping to discern Lyndon Johnson's flip side. Quoting at length from her book, Mrs. Goldberg recounted: "In Johnson's book he wrote that the reason he asked Arthur to leave the Court and become UN ambassador was [not only] because of his undeniable ability but also because he had heard that he was bored with the work on the Court. This statement about 'boredom,' which was so contrary to the truth, outraged Arthur particularly because he had heard from a newspaper man a considerable time before Johnson's book came out that the President had made a similar off-the-record statement to that reporter. At that time Art had made a point to speak to the President at the White House to ask him whether he really had made such a statement. The President denied making the statement and said that he knew of Arthur's great contentment with his work on the Court and that he was keenly aware of the sacrifice Art made in leaving his Judicial post." *Id.* at 222. Later Mrs. Goldberg goes on to point out that, in her opinion, the real reason Goldberg left the Court was because of the Article 19 crisis. This crisis involved the Soviet Union, its satellites and France all refusing to pay their UN assessments because of that organization's intervention in the Congo. *Id.* at 255-256. It again appears doubtful, however, that Goldberg would have ever sat in the ambassador's chair had Adlai Stevenson never died. This in spite of whether the Article 19 dispute would have ever been resolved.

6. See D. HALBERSTAM, *THE BEST AND THE BRIGHTEST* 589 (1972).

shadowed the actual importance of the job. Johnson would have had to promise that the ambassadorship was to take on a theretofore unknown importance. For in Goldberg's own words, the President beckoned him "to join in the greatest adventure in man's history—the effort to bring the rule of law to govern the relations between sovereign states. It is that or doom. I have accepted as one simply must."

Johnson exercised his presidential muscle in persuading Goldberg. He wanted his man Abe Fortas in a high governmental office, and an appointment to the Court would satisfy that desire. Accepting an appointment from him, Goldberg, a previous Kennedy man, would become a Johnson man. Johnson, never totally secure with the omnipresent legacy of the martyred Kennedy stalking the White House hallways, thus was able to pull the coup and make Washington more Johnsonian and less like Camelot. Now, more than a decade after Kennedy appointed Arthur Goldberg to the Supreme Court, it can be said that Lyndon Johnson undid what the Constitution guaranteed President Kennedy—an opportunity to nominate a Supreme Court justice to serve for life. Moreover, the Goldberg resignation was of a different sort from that of James Francis Byrnes in the early 1940's. Then the nation was at war with the Axis. Byrnes was a Roosevelt appointee and it was Roosevelt himself who asked Byrnes to resign from the Court to head a vital war-precipitated domestic program. There could have been no other Rooseveltian motive. Byrnes was needed elsewhere.<sup>8</sup> It is still questionable whether Goldberg was needed more at the Court or the U. N. building.

#### THE FORTAS CONNECTION: TEN-GALLON POLITICS AND LBJ ARM TWISTING

Those of us who survived the 1960's vividly associate the Johnson years with the term "credibility gap." Simply stated, our elected leaders did not tell us all that was happening. Vietnam was a blatant example. The Fortas nomination was another. The Johnson Administration publicly disclosed that many prominent names were being considered for the Court vacancy. Among the notables: Congressman Wilbur Mills (remember this was 1965); Judge Homer Thornberry of the Fifth Circuit Court of Appeals, a long-time Johnson colleague; and Secretary of Labor Williard Wirtz.<sup>9</sup> But

7. SHOGAN, *supra* note 1, at 107.

8. Byrnes resigned from the Court to become Director of the Office of Economic Stabilization, which was established to cope with the effect the war would have on domestic economic policies. See *In Memoriam: Honorable James Francis Byrnes*, 93 S. Ct. 16, 20, 35-37 (1972); Murphy, *James F. Byrnes*, 4 FRIEDMAN AND ISRAEL, *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969*, at 2530-2531 (1969). At the time it was said that Byrnes was accepting "'a position of highest importance to the carrying out of the war.'" 93 S. Ct. at 16, quoting Franklin D. Roosevelt.

9. ASHBY, *SUPREME COURT APPOINTMENTS SINCE 1937*, at 309 (1972).

the politics of Court nominations played against these men. Goldberg had left vacant the "Jewish seat." This tradition dated back to 1916 when Woodrow Wilson appointed Louis Dembitz Brandeis.<sup>10</sup> Felix Frankfurter was the next Jewish justice. Goldberg followed. LBJ was not inclined to buck precedent. Admittedly, the precedent rested on dubious logic, but it had important political consequences. Thus, Senator Abraham Ribicoff and Professor Paul Freund of Harvard were added to the list.<sup>11</sup> This list, unlike what the Administration declared, in reality never existed. Johnson perpetuated this myth in *The Vantage Point*, his memoirs of the presidential years:

Finally, after studying the list these advisors had compiled, I concluded that there was only one man whose legal qualifications and character I well knew who could take Goldberg's place. I was confident that the man would be a brilliant and able Jurist. He had the experience and the liberalism to espouse the causes that both I and Arthur Goldberg believed in. He had the strength of character to stand up for his own convictions, and he was a humanitarian. That man was Abe Fortas . . . .<sup>12</sup>

A study of the chronology of events leading to the Fortas nomination dispels the myth. No list existed. No alternatives were considered.

According to Johnson, he carefully studied the list of nominees but found them unacceptable. This appears unlikely. By his own account, Johnson first learned of Goldberg's desire to leave the Court on July 16.<sup>13</sup> Yet other sources, including Mrs. Johnson, report that the President initially approached Abe Fortas on July 16.<sup>14</sup> By Johnson's calculations he had offered the job to Fortas before the substance of Goldberg's alleged restlessness with Court life was confirmed by Goldberg himself. It seems, therefore, that Johnson was offering Fortas an appointment to a seat on the Supreme Court not yet vacated. Johnson approached Fortas early enough so that on July 19, by Johnson's own account, and one day prior to Goldberg's agreeing to take the U.N. position if offered, Fortas would write the President:

But after painful searching I've decided to decline—with a heart full of gratitude. Carol thinks I should accept this greatest honor that a lawyer could receive—the highest appointive post in the nation.<sup>15</sup>

The language of the Fortas letter rejecting the appointment indicates a lengthy contemplation of the Johnson offer by the soon-to-be justice.

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10. See SHOGAN, *supra* note 1, at 109. See also TODD, *JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS* (1964).

11. See note 9, *supra*.

12. JOHNSON, *supra* note 3, at 544.

13. *Id.* at 543.

14. See SHOGAN, *supra* note 1, at 110; JOHNSON *supra* note 3; JOHNSON, *A WHITE HOUSE DIARY* 299-300 (1970).

15. JOHNSON, *supra* note 3, at 544.

What must be surmised from these events is that Johnson had previously developed a plan to appoint Fortas prior to any Court vacancy. This offer preceded Johnson's efforts to lure Goldberg from the Court. It was a power play by Johnson to establish a Court vacancy, then appoint a Johnson man and remove a Kennedy appointee. (LBJ was accused of a similar tactic in 1967 with the appointment of Ramsey Clark as Attorney General, precipitating the resignation of his father, Tom Clark, from the Court and the eventual appointment of Thurgood Marshall to fill the slot.) Whatever Abe Fortas' explanation of this series of events is will never be known since his memoirs will not be written.<sup>16</sup> In the final analysis, however, it becomes inescapable that Lyndon Johnson was acutely conscious of pressuring Goldberg into resignation after having approached Fortas about being the successor for any appointment. Ironically, it was easier for Johnson to secure a Court vacancy than it was to convince Fortas to don a judicial robe.

Johnson first approached Fortas with the Court appointment when the two families were dining on the Truman balcony at the White House.<sup>17</sup> "Abe was moved, quiet, grateful. Before Lyndon leaves the office, I would like so much to see that happen. I think he would be a credit to the court."<sup>18</sup> So wrote Lady Bird Johnson that same day. Three days later Fortas declined the President's offer. Johnson was distressed. He had once before attempted to entice Fortas to government service. After Robert Kennedy resigned as Attorney General, the post had been offered to Fortas, but he had declined.<sup>19</sup>

July 21, 1965, found Fortas at the White House again. He was meeting with Mrs. Johnson over plans for the Johnson library at the University of Texas. He gave his reason for declining the job as his commitment to the law firm.<sup>20</sup> Also playing a role in this decision was his recent purchase of a \$250,000 Georgetown home, a \$100,000 mortgage and a \$200,000 a year salary as a senior partner with Arnold, Fortas & Porter.<sup>21</sup> The Supreme Court paid \$39,500. As he also explained to Mrs. Johnson, if he were on the bench he would be unable to come to the President's aid if any real trouble arose. Fortas was thinking in terms of his role as a presidential trouble-shooter. Already Fortas had rendered valuable services to the President: traveling on a sensitive mission to the Dominican Republic, serving as attorney for the Johnson family trust, and taking charge of the sordid and sad affair of Walter Jenkins who, as a top presidential advisor, had

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16. Rodell, *The Complexities of Mr. Justice Fortas*, N. Y. Times, July 28, 1968, §6 (Magazine), at 65.

17. SHOGAN, *supra* note 1, at 110.

18. JOHNSON, *A WHITE HOUSE DIARY* 299-300 (1972).

19. Seib and Otten, *Abe, Help! - L.B.J.*, *ESQUIRE*, June, 1965, at 87.

20. By law firm Fortas was referring to Arnold, Fortas and Porter, one of the biggest establishments in the D.C. legal community. See GOULDEN, *THE SUPERLAWYERS* 95-143 (1972).

21. SHOGAN, *supra* note 1, at 110.

been arrested on a morals charge. Moreover, on November 22, 1963, the first call from Lyndon Johnson in Dallas was to Abe Fortas. He also played a major role in the organization of the blue-ribbon Warren Commission to investigate the Kennedy assassination. As a Supreme Court justice it would be impossible for Fortas to continue in such roles.<sup>22</sup>

Fortas was called back to the White House on July 28 for a presidential news conference. The subject was Vietnam. Upon arriving, the President met with Fortas personally and quickly reviewed Fortas' objections to the Court appointment. He then announced: "I've just sent 50,000 men to Vietnam and I'm sending you to the Supreme Court."<sup>23</sup> The challenge of the Great Society was then thrust upon Fortas. The President was sending young men off to war and to death. Fortas was only going to the Supreme Court building. How could he refuse the call? His duty was clear. His obligation to the President, his longtime friend, was clearer. Johnson wrote of that occasion: "He [Fortas] looked at me in silence for a moment. I waited. Then he said 'I'll accompany you.' That was the only way I managed to get him on the Court."<sup>24</sup> Johnson seldom lost such confrontations. In 1965 after a landslide election victory and a public mandate, he was far from being a loser. In his public announcement of the nomination the President succinctly described the struggle: "In this instance, the job has sought the man."<sup>25</sup> And by that statement Johnson impliedly confirmed that the appointment was created for Fortas; it was a job molded for Fortas and only Fortas.<sup>26</sup>

#### THE SENATE CONFIRMATION: RUBBER STAMPING THE RUBBER STAMP

Hearings were convened by the Senate Judiciary Committee on August 5, 1965.<sup>27</sup> At the time, the Committee boasted some of the Senate's most determined conservatives. Many southern senators on the Committee were somewhat fearful of having Fortas, another liberal, on a liberal Court becoming more liberal every day. The ultimate effect of his liberalism, however, would be confined since Fortas shared many views with Arthur Goldberg. The senators' fear arose nevertheless from the likelihood Fortas would vote favorably on integration cases, a fact of life which especially

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22. See generally Seib & Otten, *supra* note 19; Rodell, *supra* note 16, at 12.

23. Graham, *supra* note 1, at 3015.

24. JOHNSON, *supra* note 3, at 545.

25. SHOGAN, *supra* note 1, at 112.

26. For a recapitulation of the confirmation proceedings on the Fortas nomination, see *Hearings on Nomination of Abe Fortas to be Associate Justice of the Supreme Court Before the Senate Judiciary Committee*, 89th Cong., 1st Sess. (1965); 111 CONG. REC. 2054-2079 (1965).

27. See generally *Hearings on Nomination of Abe Fortas to be Associate Justice of the Supreme Court Before the Senate Judiciary Committee*, 89th Cong. 1st Sess. (1965).

disturbed the southerners. At the time racial tensions permeated the air in the wake of the riots in Watts.

But the year was 1965. President Johnson was still able to manipulate the Senate as he did so well as its majority leader. Thus, the Committee "seemed little disposed to challenge the President's judgment."<sup>28</sup>

The hearings began. After permitting the professional anti-communists to take a crack at Fortas,<sup>29</sup> the Committee concentrated, although only briefly, on the only issue in contention: Would the Abe Fortas friendship with Lyndon Johnson interfere with his judicial province?<sup>30</sup> To this Fortas replied in short order:

There are two things that have been vastly exaggerated with respect to me. One is to the extent to which I'm a Presidential advisor, and the other is the extent I am a proficient violinist. I am a very poor violinist but very enthusiastic, and my relationship with the President has been exaggerated out of all connection with reality.<sup>31</sup>

It was undisputed at the time, however, that Fortas was one of Johnson's closest confidants. After Johnson became Vice President, Fortas was always close at hand. When White House lawyers prepared the Fair Housing

28. SHOGAN, *supra* note 1, at 114.

29. *Hearings, supra* note 27, at 8-21.

30. *Id.* at 46-50. The history of the Johnson-Fortas friendship was both interesting and long lasting. It was a minor Department of Interior Official, Arthur Goldschmidt, who first brought together over a proposed public-power project a young New Dealing congressman from Texas and Goldschmidt's boss in the Department of Interior's power division. These men were Lyndon Johnson and Abe Fortas, respectively. Rodell, *supra* note 16, at 12.

Fortas played a major role in seeing to it that Lyndon Johnson's name was on the 1948 Texas senatorial ballot. Johnson had won the democratic primary by a mere 87 votes. His opponent claimed illegal voting for Johnson. Suit was filed in federal district court which granted an injunction against the placement of Johnson's name on the November ballot. In effect this would deprive Johnson the Senate seat since the democratic candidate, whoever he was, was otherwise assured of victory. Johnson, with the able assistance of Fortas, urged successfully to have reversed the injunction granted by the district court. Lewis, *A Tough Lawyer Goes To Court*, N.Y. Times, Aug. 8, 1965, §6 (Magazine), at 65-66. See *Johnson v. Stevenson*, 1970 F.2d 108 (5th Cir.); *cert. denied*, 336 U.S. 904 (1948). See also *Johnson v. Stevenson*, 335 U.S. 801 (1948).

This friendship and working relationship continued to mature. Fortas played an important behind the scenes role in 1949 while Johnson was in charge of a special Senate Commerce Subcommittee that was set up to study the renomination of Leland Olds as Chairman of the Federal Power Commission. It was Fortas' responsibility to supply materials and arguments against the Olds' nomination. And in the mid-1950's Fortas served as part of a three-man advisory board set up to advise Johnson while he was the Senate majority leader. EVANS & NOVAK, *LYNDON B. JOHNSON: THE EXERCISE OF POWER* 36, 110 (1966).

31. *Hearings, supra* note 27, at 50.

Later in responding to a direct question from Senator Roman Hruska on whether the Johnson friendship would affect his ability to function in the true judicial fashion and tradition, Fortas responded: "The short answer to that is absolutely not . . . . But I am very distressed at any suggestion or idea that any relation that I might have with the President would in any way bear upon the discharge of my functions in the Court." *Id.*

order to be enforced by the Vice President's Committee on Equal Employment Opportunity, Johnson requested that Fortas be able to examine the document although he had no official government position.<sup>32</sup> Fortas' friendship spilled into the posture of an unofficial presidential advisor. He aided President Johnson in replacing the old Kennedy men with personnel more atuned to Johnson's needs.<sup>33</sup> According to one source who saw the Johnson Administration from the inside,

Abe Fortas was the President's confidant, legal sharpshooter, personal ambassador and Jack-of-all advisors. The White House knew him as the man Lyndon Johnson would turn to when the problems were especially important or knotty, and the only advisor treated with a respect not untouched by awe.<sup>34</sup>

Aside from this concern over the Johnson-Fortas friendship, the Committee made no substantive attempt to delve into Fortas' judicial philosophy.<sup>35</sup> This seemed odd since the Senate was becoming painfully aware of the recent Warren Court decisions vastly expanding the rights of the criminally accused. It was suspected by most that Fortas would fit nicely into the liberal seat of Goldberg and continue the Warren Court's criminal decisions. This seemed consistent, remembering that Fortas had argued *Gideon v. Wainwright*<sup>36</sup> two years before. Three hours of testimony later, the Committee voted unanimously on the Fortas nomination.<sup>37</sup>

The full Senate debate was a replay of the Committee hearing. The minor grumblings echoed concern only with the potential circumvention of the Separation of Powers Clause due to the Johnson-Fortas friendship. As noted, Fortas' role in White House affairs was more than that of the average taxpayer. There was no indication this role would not continue after Fortas' accession to the Court.<sup>38</sup> The precariousness of this Separation-of-Powers balance would, unfortunately, depend on the men involved. But at least one senator recognized the dangers involved. It was agreed that the friendship-advisor to the President in office could not be separated from Abe Fortas the Justice. Senator John Williams thus voiced what has been proved to be historical prescience: "Contrary to the President's claim that he had looked all over America to find the best qualified men for the job, it is quite obvious that he did not look far beyond his inner circle of friends."<sup>39</sup>

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32. EVANS & NOVAK, LYNDON B. JOHNSON: THE EXERCISE OF POWER 345 (1966).

33. 1966 CURRENT BIOGRAPHY 102.

34. GOLDMAN, THE TRAGEDY 39-40 (1969).

35. See *Hearings*, *supra* note 38, at 41-45.

36. 372 U.S. 335 (1963). See generally LEWIS, GIDEON'S TRUMPET (1967).

37. ASHBY, *supra* note 9, at 317.

38. *Id.*

39. SHOGAN, *supra* note 1, at 113. The entire text of the floor debate can be found at 111 CONG. REC. 2054-2079 (1965).

On August 11, 1965, the nomination was confirmed by oral vote. It was unanimous. No dissents were recorded.<sup>40</sup> Abe Fortas, on October 4, 1965, was sworn in as the 95th Justice of the United States Supreme Court.<sup>41</sup>

#### THE VIEW FROM THE BRIDGE: WHY FORTAS?

No one but Lyndon Baines Johnson would have nominated Abe Fortas for the Supreme Court. This is not, however, to denigrate Fortas' legal abilities.<sup>42</sup> But of course, no one but Fortas had a friend like Lyndon Johnson. In 1965, Johnson did not forget Abe Fortas for all his years of faithful service and friendship. He bestowed upon the Tennessean the highest prize a lawyer can obtain: the Supreme Court. It was a forced prize, a prize not necessarily sought by Fortas.<sup>43</sup> The steamrolling politics of the Great Society was put in gear and before the conclusion of its journey, Abe Fortas had traded his Georgetown-navy suit for a black robe. Almost four years later, when Abe Fortas was the first Supreme Court justice to resign under public pressure and threatening impeachment, he most likely questioned the efficacy of the Johnson blitz<sup>44</sup> and his own seduction to the office. For Abe Fortas soon discovered, as did the American public, perhaps to the eternal detriment of the Supreme Court, that old adage: A judicial robe does not a judge make.

Put in perspective, however, what can be discerned as the real reason for the Fortas appointment? The Johnson-Fortas friendship was the sole motivating factor.<sup>45</sup> Aside from the manipulation of Goldberg as discussed earlier, this reason becomes even more apparent as one looks to see that Johnson selected Fortas directly from private practice. It had been 35 years since Herbert Hoover plucked Owen Roberts directly from private practice.<sup>46</sup> To arrive at his selection Johnson had to be myopic to a long list, running back twenty preceeding justices selected by five previous Presidents, of lower federal court judges, government officials and law profes-

40. ASHBY, *supra* note 9, at 318. See also 11 CONG. REC. 2079 (1965).

41. SHOGAN, *supra* note 1, at 117.

42. "In intellect and breadth of experience and sheer ability as a lawyer, Fortas would stand high on any list of possible Justices." Lewis, *A Tough Lawyer Goes to the Court*, N. Y. Times, Aug. 8, 1965, §6 (Magazine), at 67. See Wukasch, *The Abe Fortas Controversy: A Research Note on the Senate's Role in Judicial Selection*, 24 WEST. POL. Q. 24-27 (1971).

43. See SHOGAN, *supra* note 1, at 112.

44. See, e.g., 25 CONG. Q. ALMANAC 136-139, 1021 (1969); NEWSWEEK, May 26, 1969, at 31-33; LIFE, May 23, 1969, at 38-39; NEWSWEEK, May 19, 1969, at 29-33; Bickel, *Mr. Justice Fortas*, NEW REPUBLIC, May 17, 1969, at 9-10; Lambert, *The Justice and the Stock Manipulator*, LIFE, May 9, 1969, at 32-37. See also 115 CONG. REC. 11259-11267 (1969) (remarks of Senators Miller and Williams); 115 CONG. REC. 11419 (1969) (remarks of Senator Thurmond).

45. For an account of this friendship see Seib and Otten, *supra* note 19, at 86-88, 147-149. See also ABRAHAM, JUSTICES AND PRESIDENTS 261 (1974).

46. Rodell, *supra* note 16, at 12.

sors. Moreover, only Lyndon Johnson's friendship could have persuaded Abe Fortas to give up the wealthy life of a Washington "superlawyer."<sup>47</sup> All in all, therefore, the appointment revolved around one factor: the Lyndon Johnson-Abe Fortas camaraderie.

That is it. All else should be discredited. The sequence of events leading to the Fortas nomination point only to that conclusion.

What is perhaps most interesting about the Fortas-replace-Goldberg sequence and supportive of the theory that the Fortas nomination was a friendship appointment, is the fact that no policy change was involved. Goldberg was considered a liberal. Fortas was a liberal, particularly so in Johnsonian terminology.<sup>48</sup> Goldberg was a Kennedy man, a New Frontier appointment. But Goldberg was also as closely associated with the New Frontier qua Great Society as anyone. He, like Fortas, would have ruled favorably upon any domestic program coming from the Johnson White House and tested before the Court. In the area of civil rights and the rights of the criminally accused, both men would have come down on the same side.<sup>49</sup> Likewise, as with Fortas' recognized talents there was no questioning of Goldberg's intellectual credentials.

Finally, one further justification for the Fortas appointment must be rejected when confronting this "friendship theory." It has been argued that, in fact, Johnson sent Goldberg to the U.N. to help soothe the ruffled feathers of discontented liberal doves who were slowly, if not blindly, beginning to snap at his heels over Vietnam.<sup>50</sup> But Goldberg could be no more effective than had Adlai Stevenson been. Not that the men lacked the ability, only that the United Nations ambassadorship was impotent in the formulation of American foreign policy. It has always been and has remained so. This oftentimes lack of persuasive impact would trouble and frustrate Goldberg throughout his years at the U.N.<sup>51</sup> And the fact that Fortas, a liberal, was being moved to the Supreme Court surely had no dampening effect on Southeast Asian critics nor did it divert their concern from the bombing of Vietnamese villages. Fortas himself was, in fact, heavily responsible for the shaping of Vietnam policies in his capacity as unofficial advisor to the President.<sup>52</sup> This advice continued to flow from Fortas throughout his years on the Court.<sup>53</sup> For instance, after his appoint-

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47. SHOGAN, *supra* note 1; 1966 CURRENT BIOGRAPHY 102-103.

48. "Fortas subscribed completely to Johnson's Great Society approach and sees it as an extension of the pattern set by Roosevelt." Seib and Otten, *supra* note 19, at 88.

49. See STEPHENS, THE SUPREME COURT AND CONFESSIONS OF GUILT 140 n. 57 (1973).

50. SHOGAN, *supra* note 1, at 106-107.

51. Friedman, *Arthur J. Goldberg*, 4 FRIEDMAN AND ISRAEL, THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, at 2990 (1969).

52. See HALBERSTAM, THE BEST AND THE BRIGHTEST 589 (1972); HEREN, NO HAIL, NO FAREWELL 203 (1970); SCHMIDHAUSER & BERG, THE SUPREME COURT AND CONGRESS: CONFLICT AND INTERACTION 1945-1968, at 118 (1972).

53. See Mason, *Pyrrhic Victory: The Defeat of Abe Fortas*, 45 VA. Q. REV. 19, 23 (1969).

ment and confirmation, Fortas still advised the President on critical strategy in Vietnam; and as a strong hawkish voice in Johnson's inner circle of advisors, Fortas went so far to suggest a military escalation in Vietnam after the 1968 Tet offensive.<sup>54</sup> Finding displeasure with Johnson's Southeast Asia policy therefore was tantamount to disapproval of the advice offered by Fortas.<sup>55</sup> Thus, the switch on the Court from Goldberg to Fortas did nothing but install a Johnsonian presence on the Court where none had existed.

#### A CONCLUSION

Ninety-four Supreme Court justices preceded Abe Fortas through the marble columns of the nation's highest court. The contrast of black robes against the white marble belies the truth of Holmes' adage: "We [the Supreme Court] are very quiet there but it is the quiet of a storm center."<sup>56</sup> When Abe Fortas took his Court seat, turbulence followed. It was a different storm from what Holmes envisioned, and a storm with reverberations bounding off the already weakened walls of an American society in the mid-to-late 1960's. Today, when Abe Fortas is mentioned, the stock answer is the same: "Wasn't he the guy who got his fingers caught in the till and . . . ?" The Supreme Court deserves better. So does Abe Fortas.

Where did the fault lie? Abe Fortas' nomination was a 20th century carryover from Andrew Jackson's kitchen cabinet and the spoils system. The Supreme Court is too fragile an institution, in fact and in fiction, to be used for the oldest pawn game known to the political system. Fortas was not the first "buddy" of a President to be elevated to the Court. There was even talk, before the leak in the Watergate dam became too large to contain, that Richard Nixon would appoint John Mitchell, an old friend and protege, to the Court. And Gerald Ford was said to be seriously considering the appointment of his old friend, Senator Robert Griffin, to the vacated Douglas seat. The difference lies in the different actors playing the part and the different times in which they played their roles. But the precarious factors involved in such chance appointments cannot be the guide by which to follow in Supreme Court appointments.

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54. HALBERSTAM, *THE BEST AND THE BRIGHTEST* 589 (1972); HEREN, *NO HAIL, NO FAREWELL* 203 (1970). Halberstam wrote: "[D]uring the crucial months before he went to the Supreme Court and even after, Fortas was in constant contact with the President, Johnson phoning him almost every night and replaying the day's events, listening to Fortas' wisdom. Fortas was a tower of strength, a pillar of hawkishness, a man of few doubts about the wisdom of going forward, and Fortas would remind Johnson that no President had ever lost a war, that the political consequences of withdrawal [in Vietnam] were terrible." (Emphasis supplied.)

55. "Mr. Justice Fortas brought down the wrath of many, apparently because he gave unpopular advice to an unpopular president, which is thought to be different from giving popular advice to a popular president." KURLAND, *POLITICS, THE CONSTITUTION AND THE WARREN COURT* 47 (1970).

56. Holmes, *Law and the Court*, in *COLLECTED LEGAL PAPERS* 292 (1920).

A number of factors contributed to Fortas' ultimate failure and resignation from the Court. The chemistry of the Johnson-Fortas formula itself, a growing concern over American blood flowing far off in a looking-glass war and the sudden awareness of college students—an awareness long before discovered and practiced by their European counterparts<sup>57</sup> — that perhaps something was wrong in the heart of American society. Added to this recipe was the fact that Fortas was the alter ego of Lyndon Johnson. Thus, when Lyndon Johnson nominated Abe Fortas in 1968 to replace retiring Chief Justice Earl Warren, the Senate and the public were not willing to so easily accede to Johnson's commands. The attacks on Fortas then were as much attacks on Johnson. Much had indeed occurred in the three years since the Fortas appointment. And in May of 1969 when the Abe Fortas-Louis Wolfson dealings became public, Fortas plummeted with a steady barrage of criticism and condemnation, and ultimately resigned.

There was never any question concerning intellectual ability. What Abe Fortas could do so well in life outside the Court was not so well suited, however, for the judiciary. He was a wheeler-dealer in Washington legal circles. He was the managing force behind one of Washington's most powerful law firms. His footsteps were quite familiar to many high governmental corridors. But the Supreme Court was the jealous mistress. It demanded the full and detached attention of its suitors. In the end, neither Johnson nor Fortas understood this. A willing Senate, which had confirmed Fortas, concurred in the mistake. In the final analysis the downfall of Justice Abe Fortas began that day in 1965 when Lyndon Johnson decided to appoint his friend to the Supreme Court. It was how Abe Fortas became an Associate Justice that spun the web of his own judicial demise. One commentator has remarked: "But as a symbol of the system itself, there is no one like him. His life, his career and his mentality perfectly express what America is about: idealistic, rich, imaginative, ambitious — and finally self-defeating."<sup>58</sup> What the Fortas story has taught us is both a history and a lesson to be learned. The lesson is that these types of friendship appointments must be eliminated and that cronyism of this sort has outlived its usefulness. The country and the Court were lucky until 1965. Friendship appointments had produced many justices, but the taint of scandal remarkably avoided the Court. A new Watergate consciousness forced us to put aside the Fortas fate, but the fact remains. The Fortas debacle is the primary example that a new, systematic selection of Su-

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57. While on the Court Fortas responded to student protest over the war, particularly aimed at Lyndon Johnson. In his book *ON CIVIL DISOBEDIENCE AND DISSENT*, published in 1968, Fortas recognized the need for protest and dissent although he deplored the violence and staunchly held to the position that such dissent could not in the final analysis aim itself at the destruction of the foundations of American society. In a sense, however, Fortas came to the defense of Johnson by maintaining that there must be a reason for dissent which, in Fortas' view, was not present in the late 1960's.

58. Kopkind, *The Significance of Abe Fortas*, *NEW STATESMAN*, Sept. 20, 1968, at 340.

preme Court justices is in order. The approach taken by Gerald Ford was an enlightened exercise in presidential and constitutional power, a step in the right direction and a marked contrast to the 1965 Fortas appointment. Ford initiated a public and systematic effort to solicit wide recommendations before making his selection.

Using this approach as a fountainhead, the responsibility of submitting the names of qualified jurists for the Supreme Court should rest with organizations such as the Appellate Judges' Conference, the National College of the State Judiciary, the American Judicature Society and the Justice Department. Various committees within each of these organizations could be assembled for the purpose of selecting a list of qualified candidates. All potential nominees should, however, come from the ranks of either the federal or state judiciaries. These names would then be presented to the American Bar Association and the National Bar Association for their evaluation and recommendation. These groups would place the candidates into some kind of order or ranking. Then the President would get this list with the recommendation. These general recommendations should be made public so that a President could not totally disregard the advice of these legal organizations. At that point the President could consider experience, age, party background, if any, and religious and geographical factors that always play some role in the selection process.<sup>59</sup>

This type of procedure would be deliberate and more effective. There would also be less chance that the ultimate nominee would not surmount the Senate's advice and consent. For the nominees, selected from the rolls of judges, would be much less under the aegis of political obligations. And in limiting nominees to those already judges, more of the influence in the streams of political compromise could be eliminated. However, the real selling point in such a program arises because the individuals and groups closely associated with the law would be the ones primarily responsible for determining the individuals and their qualifications for the office. These are the people in the best position to know. A planned systematic and procedurally public method of selecting a Supreme Court justice should absolutely be followed in our next 200 or 2,000 years of existence.

The Supreme Court demands and breeds a different brand of person. Progeny from the judicial ranks are the best suited for that voice of nine which so often affect our lives. The Court should be in-bred with judi-

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59. For a broad analytical discussion as to what considerations may be entered into when selecting a Supreme Court Justice, see generally Note, *The Politics of the Appointment Process: An Analysis of Why Learned Hand Was Never Appointed to the Supreme Court*, 25 STAN. L. REV. 251 (1973). Cf. Carman, *The President, Politics and the Power of Appointment: Hoover's Nomination of Mr. Justice Cardozo*, 55 VA. L. REV. 616 (1969). One source defined cronyism as a "partiality to cronies, esp. as evidenced in the appointing of political hangers-on to office without due regard being taken of their qualifications." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 539 (1961).

cial personalities. It is a clique, almost its own royal family. It is a closed society of brethren which should, and must, remain inviolate as much as possible.