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Book Review of A Question of Judgment: The Fortas Case and the Struggle for the Supreme Court

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BOOK REVIEW

A QUESTION OF JUDGMENT: THE FORTAS CASE AND THE STRUGGLE FOR THE SUPREME COURT. BY ROBERT SHOGAN. INDIANAPOLIS-NEW YORK: THE BOBBS-MERRILL COMPANY, 1972. pp. 314.

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"The error of Fortas's ways is hard to classify. He did not commit a crime; we have the Justice Department's word for that," writes Robert Shogan in his excellent book describing the circumstances leading to the resignation of Abe Fortas as an Associate Justice of the United States Supreme Court. The resignation of Fortas, as accurately described by Shogan, "jarred and bewildered the country," the true story coming out in "bits and pieces, amid a welter of rumor and innuendo." By bringing together background information concerning key personalities and the mood of the country as a whole, Shogan's descriptions of the events leading to the resignation are fully appreciated and understood. Adhering for the most part to its stated purpose, the book provides a balanced and accurate account of the events, leaving it to the readers to make their own moral judgments.

Fortas is characterized by others and described by Shogan as a very complex individual. One of his law clerks described him by saying, "[i]t wouldn't surprise me if he was robbing banks on the side or writing novels under another name." Senator Robert Griffin, who played an important role in successfully opposing Fortas's nomination as Chief Justice, is quoted as saying he had "something of a reputation as a fixer." According to Shogan, many mistrusted Fortas as a "relentless opportunist" who was "insufficiently holy." There is another side to the man which Shogan describes, however—a man admired by many (according to Lyndon Johnson) as a "profound thinker" and one of "humane and deeply compassionate feelings."

The first part of the book traces the activities of Fortas beginning with his graduation from Yale Law School during the depression. Fortas is remembered at Yale as being academically brilliant, as evidenced by his selection as editor-in-chief of the Yale Law Journal in his senior

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year, yet somewhat of a loner. After serving on the Yale law faculty for a short time following graduation, Fortas joined the New Deal, quickly advancing from one agency to another. He handled with subtle efficiency (a trait which also characterized his later life) varied and important tasks relating to the economic recovery of the country and, during the war years, matters relating to the national defense effort. As was the case with most veterans of the New Deal, F.D.R.'s death marked the beginning of a new career for Fortas. Refusing an offer to return to the Yale law faculty, Fortas and his former law professor, Thurman Arnold, also a veteran of the New Deal, opened their own law office in Washington. Within a year they were joined by yet another veteran New Dealer, Paul Porter.

The book thereafter reveals in some detail the rapid ascendance of the firm of Arnold, Fortas & Porter to a position of prominence among the Washington legal establishment. During this period, the firm's list of clients typified the anomaly of Fortas himself. The firm represented some of the largest and most powerful corporate bodies in the country, including many, such as tobacco companies, whose continued prosperity depended in large measure on the effectiveness of their Washington lobby in securing the continued friendly hand of various administrative bodies of the federal government. It was this type of representation at which Fortas was at his best. Yet Arnold, Fortas & Porter throughout its existence carried on another fight with equal vigor and success. Beginning with the post-war subversive cases and through the Warren-era emphasis on rights of the criminally accused, the firm took many cases, some gratuitously, involving the most controversial individuals and civil rights issues of the times. In fact, perhaps Fortas's most brilliant personal victory came in the representation of Clarence Earl Gideon, a 51-year old "ne'er-do-well," his fight culminating in ultimate victory in the cause of legal representation for indigent criminal defendants.

In one of the most interesting chapters of the book, Shogan describes the origin and nature of Fortas's friendship with Lyndon Johnson. The association between the two men began in the late 1930's when Johnson was a young congressman seeking administrative assistance for his constituents. According to Shogan, the lasting friendship between the two men was sealed during Johnson's 1948 campaign for the Senate. Johnson had won a hotly contested primary victory over Coke Stevenson. Stevenson sought and obtained in federal district court an injunction against state officials prohibiting the placement of Johnson's name on the November ballot until the validity of charges of fraud could be

determined. Fortas represented Johnson in the case, ultimately resulting in a victory for Johnson when the Supreme Court overturned the district court's decision on the ground that a federal judge was without authority to intervene in a state's election process.

Shogan speculates that, as Johnson's power and influence in Washington grew, so did his need to surround himself with members of the so called "liberal establishment." For this purpose Fortas was well qualified. Fortas continued to advise and aid Johnson through his days as Vice President. When the Bobby Baker scandal broke shortly before President Kennedy's death, Fortas agreed to defend Baker. When L.B.J. assumed the Presidency, Fortas withdrew from the case, presumably to avoid a conflict of interest in his role as an informal Presidential advisor. According to Shogan, however, others speculated that Fortas's continued representation would serve as an embarrassing reminder of Baker's close association with Johnson.

Shogan also describes Fortas's role in the unfortunate Walter Jenkins case. Fortas was the first Johnson associate to learn of Jenkins' arrest; and in typical Fortas fashion, he convinced the Washington press to sit on the story until Johnson was notified and word of Jenkins' resignation was released. When the story was made public prematurely by a wire service, Fortas was upset. This incident contributed to Fortas's mistrust of the press—a philosophy which Shogan speculates reflected itself in some of Fortas's later judicial opinions involving freedom of the press.

After years of successfully avoiding Johnson's pressure to formalize his role in government, Fortas finally relented in 1965, accepting the nomination to the Supreme Court. Fortas's tenure on the Court and his stature among his fellow Justices will be documented better in works devoted solely to that purpose. Shogan's main focus during this period is on Fortas's continued associations with the President. It is clear that while a Justice, Fortas continued to advise Johnson on a wide variety of matters, much to the chagrin of his fellow Justices and members of Congress. It was, perhaps, the first of a series of actions by Fortas which contributed to his downfall.

As Shogan correctly documents, however, Fortas's actions were not the sole source of his difficulties. Perhaps the most noteworthy feature of the book is the extent to which the author attributes a portion of Fortas' troubles to events totally beyond his control. By 1968, Johnson had decided not to seek re-election, both the man and his policies being subjected to constant attack. It is not surprising that those closest

to Johnson would fall from favor also. In addition, the country was in the midst of a Presidential campaign in which the subject of "law and order" was being considered. The Supreme Court, of course, was accused of being largely responsible for the increase in crime.

When the lame-duck President attempted to nominate Fortas to replace Warren as Chief Justice in June, 1968, the substantial opposition came as no surprise. It was during the hearings on the nomination that the financial dealings of the nominee first began to surface. It was disclosed that Fortas, while on the Court, had accepted a \$15,000 fee to deliver a series of lectures at American University, the fee being raised by his former partner Paul Porter from leading business and financial leaders throughout the country. Although the mere exposure of this information could not be said to have blocked the nomination, it certainly contributed to the controversy. Ultimately, Fortas asked Johnson to withdraw the nomination. As the disappointed supporters of Fortas were later to discover, the worst had yet to be disclosed.

Perhaps the full story of Fortas's associations with Louis Wolfson will never be known. Despite very thorough research, Shogan is unable to disprove conclusively those who believe that Fortas attempted to intervene on Wolfson's behalf before the Securities and Exchange Commission. It is clear, however, that the association was more than a typical friendship between two men. In the end, Shogan cannot help but make certain personal observations which are equally obvious to the reader. Despite how one might feel about the culpable nature of his associations with Wolfson, Fortas can be criticized justifiably for his failure when confronted to admit the full nature and extent of his involvement with Wolfson.

If the book has a shortcoming, it may be nothing more than the shortcoming of Fortas himself. The reader is unable to see inside the man—the circumstances which were responsible for his success and which ultimately were responsible for his one and only failure. Fortas is obviously a very complex man who has avoided personal involvement with people. We are able to judge the man for the most part only by his actions. If, as the Canons of Judicial Ethics say, a judge must avoid any activity that might cause even the suspicion of impropriety, those who demanded Fortas's resignation were correct. Yet one cannot help feeling a degree of compassion for this brilliant man, who was himself a compassionate individual. As Shogan points out, those in the government who were principals in the investigation had previously learned—or were to learn shortly thereafter—their own lesson. The President

himself had been involved in a financial scandal that nearly ended his political career. Will Wilson, the Chief of the Justice Department's Criminal Division, was forced to resign in 1971 after his name was brought into a major scandal involving a Texas financier. Finally, Senator Joseph Tydings, who called for Fortas's resignation following public disclosure of Fortas's associations with Wolfson, was defeated a year later in his bid for re-election, generally attributed to allegations that he used his official position to foster his financial interests. Appropriately, the disclosure of Tydings' financial dealings was made in a *Life Magazine* article written by William Lambert, the same William Lambert who authored the *Life Magazine* article that first made public the Fortas-Wolfson dealings.