



THE LEGACY OF CHIEF JUSTICE FORTAS

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WAIT A MINUTE. Abe Fortas was never the Chief Justice of the United States. He was nominated for that post when Earl Warren announced his retirement from the Supreme Court in 1968, but President Lyndon B. Johnson withdrew the nomination in the face of determined Senate opposition.¹ Nonetheless, Fortas's defeat was a watershed that redefined the norms governing how the Justices interact with the White House and relate to presidential politics. Specifically, this episode led to the customs that the Justices should not give private advice to Presidents and should not retire during a presidential election year.

I.

BEFORE THE SUMMER OF '68

Until the 1970s, the principle that members of the Supreme Court should refrain from partisanship was unsettled at best.² Consider two recurring examples.³ First, Justices sometimes served

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¹ See, e.g., LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 328-55 (1990).

² For more on this topic, see Peter Alan Bell, Note, *Extrajudicial Activity of Supreme Court Justices*, 22 STAN. L. REV. 587 (1970); Leslie B. Dubeck, Note, *Understanding 'Judicial Lockjaw': The Debate over Extrajudicial Activity*, 82 N.Y.U. L. REV. 569 (2007).

³ There are others. For instance, Justices used to be considered part of the eligible

as confidential advisors for Presidents. Louis Brandeis played this role for Woodrow Wilson and Franklin D. Roosevelt.⁴ Chief Justice William Howard Taft consulted with Warren Harding, Calvin Coolidge, and Herbert Hoover on judicial appointments.⁵ Felix Frankfurter counseled FDR on political issues including the drafting of the Lend-Lease Act.⁶ Chief Justice Fred Vinson was a sounding board for Harry Truman, and evidently did not see a recusal issue in *The Steel Seizure Cases*⁷ even though he had reassured the President, before the seizure, that the action would be constitutional.⁸

Second, Justices did not see a problem with retiring in a presidential election year. There were seven such retirements before 1968, and some of the most outstanding Justices, including John Marshall and Benjamin Cardozo, were nominated and confirmed to fill those seats.⁹ As late as 1956, nobody thought anything was amiss when Justice Sherman Minton resigned in September and President

pool of candidates for national office. Charles Evans Hughes resigned in 1916 to be the Republican nominee for President, and William O. Douglas was the runner-up for the Democratic nomination for Vice-President in 1944. Since 1968 no Justice has taken another office or been seriously considered for one, though I cannot say that this is because of the precedent set by the Fortas nomination for Chief Justice.

⁴ See MEL UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 495-502, 693-94 (2009).

⁵ See GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 233-34 (2d. ed. 2011); ALPHEUS THOMAS MASON, *WILLIAM HOWARD TAFT: CHIEF JUSTICE* 138-56 (1965).

⁶ See NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES* 213, 219-20 (2010).

⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁸ See *id.* at 667 (Vinson, C.J., dissenting); DAVID MCCULLOUGH, *TRUMAN* 840 (1992) (explaining that Vinson also advised Truman on whether to fire General Douglas MacArthur).

⁹ See JEAN EDWARD SMITH, *JOHN MARSHALL: DEFINER OF A NATION* 14-15 (1996) (discussing the retirement of Chief Justice Oliver Ellsworth in 1800 and Marshall's nomination as his successor); UROFSKY, *supra* note 4, at 676 (noting the retirement Justice Oliver Wendell Holmes, Jr. in 1932 and his replacement by Cardozo). Other Justices who retired in presidential election years were Charles Evans Hughes (1916), William Strong (1880), Samuel Nelson (1872), and Alfred Moore (1804).

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Dwight Eisenhower gave a recess appointment to William J. Brennan just weeks before the election.¹⁰

Today neither of these practices would be deemed appropriate. Justice Scalia wrote in 2004 that a Justice's service as an advisor and confidant to a President was "incompatible with the separation of powers" and that the practice had been "properly abandoned."¹¹ Likewise, we take for granted that a Justice will not retire in a presidential election year absent some significant illness. When Potter Stewart quit in 1981, he told the press corps that he had chosen not to retire in 1980 because an election-year retirement would "inevitably" draw the Court "into the presidential campaign" and be "very harmful to the Court and the country."¹²

Why did these attitudes about the proper relationship between the Justices and the Presidency change?

II.

THE COLLAPSE OF THE WARREN COURT

The answer is that the fiasco that followed the first retirement of Chief Justice Warren and the nomination of Justice Fortas as his successor set a powerful precedent for what the Justices should *not* do.¹³ In June 1968, the Chief Justice informed President Johnson

¹⁰ See SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 72-73, 82 (2010). Minton was a Democrat and President Eisenhower was a Republican, yet Eisenhower named Brennan, another Democrat, to the seat. In today's polarized political environment, neither the retirement, nor the party affiliation of the replacement, nor the use of a recess appointment would be possible.

¹¹ See *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 541 U.S. 913, 926 (2004) (Scalia, J.) (memorandum denying motion to recuse). Justice Scalia also argued that this sort of relationship was "rare" and "not widely known when it was occurring." See *id.* I would dispute the first claim, though the second one depends on how widely something must be known to be widely known.

¹² See Linda Greenhouse, "Justice Stewart on His Retirement: 'Better to Go Too Soon,'" *N.Y. TIMES*, Jun. 20, 1981; cf. Joan Biskupic, "Chief Justice Shows No Sign of Leaving Soon," *USA TODAY*, Jun. 13, 2003, at A4 ("Justices traditionally do not retire in an election year because any nomination would be more politically charged than usual and could lead to a prolonged vacancy on the bench.").

¹³ The analogy here is with anti-canonical cases, which are cited as examples of how

that he would retire “effective at your pleasure.”¹⁴ The President picked Fortas to replace Warren and Judge Homer Thornberry, an ex-Congressman who had been part of LBJ’s inner circle since the 1940s, to succeed Fortas.¹⁵ But, because Fortas’s nomination never came up for a vote in the Senate, Warren remained on the Court for another year and was instead replaced by President Nixon’s choice, Warren Burger.¹⁶

To unpack the deeper meaning of these events, let us begin with the partisan nature of Chief Justice Warren’s scuttled retirement. His announcement came just a few months before the presidential election, and Warren made his decision only after Robert F. Kennedy’s death in early June.¹⁷ At that point, there was a good chance that the Republicans would win the election, and, worse, that the President would be Warren’s old political rival from California.¹⁸ So the Chief Justice did not commit to leave the Court if Nixon won, making his retirement effective at the pleasure of President Johnson, rather than the next president.¹⁹ Although Justices can choose to retire when their preferred party is in power, many Senate Republi-

the Constitution should not be interpreted. *See, e.g.*, Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

¹⁴ *See* JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* 491 (2006).

¹⁵ *See* KALMAN, *supra* note 1, at 327-28; *see also* ROBERT CARO, *THE YEARS OF LYNDON JOHNSON: THE PASSAGE OF POWER* 316-23 (2012) (observing that Thornberry was with LBJ in Dallas following President Kennedy’s death); *see also* STERN & WERMIEL, *supra* note 10, at 305 (stating that Thornberry succeeded Johnson in the House of Representatives).

¹⁶ *See* JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* 346-47 (1998).

¹⁷ *See* NEWTON, *supra* note 14, at 491-92.

¹⁸ Nixon and Warren’s feud began at the 1952 Republican National Convention, when Governor Warren felt that Nixon undermined his effort to become the presidential nominee. *See id.* at 246-50; *see also id.* at 397 (stating that the Chief Justice and President Kennedy laughed together on Air Force One reading accounts of Nixon’s defeat in the 1962 election for Governor of California).

¹⁹ *See* KALMAN, *supra* note 1, at 328; *see also* “Another Letter, Please,” *WASH. POST*, Jun. 28, 1968 (criticizing the ambiguity of Warren’s letter to the President).

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cans thought Warren went too far by doing so during a presidential election year and failing to make a firm commitment; they argued that only LBJ's successor should select Warren's successor.²⁰ Senator Robert Griffin of Michigan went further, stating that a President should not fill a Supreme Court vacancy in his final year because the voters should have "an opportunity to speak in November."²¹

Perhaps the controversy surrounding the timing of Warren's retirement would have blown over if Fortas's own confirmation had gone smoothly, but the Fortas selection ran into a buzz saw.²² While Justice Fortas is now remembered mainly for his subsequent resignation from the Court due to a financial scandal, at the time of his nomination for Chief Justice, many of the attacks on him focused on his cozy relationship with the President.²³ Prior to his confirmation as an Associate Justice in 1965, Fortas was one of Washington's most influential lawyers, and he maintained a close relationship with Lyndon Johnson.²⁴ After reaching the Court, Fortas remained one of the President's key aides and had a direct phone line to the White House installed in his chambers.²⁵ He participated in White House

²⁰ See KALMAN, *supra* note 1, at 331 (quoting a petition by seventeen senators stating that "the next Chief Justice of the Supreme Court should be designated by the next President of the United States"). Warren did not help matters by holding a press conference a week after writing to LBJ in which he stated that he would stay on the Court if Fortas were not confirmed as Chief Justice. See NEWTON, *supra* note 14, at 493.

²¹ See *id.* at 331; *id.* at 334-35 (stating that Justice Fortas drafted the speech that Senator Ribicoff gave rejecting Griffin's argument).

²² Likewise, Fortas's nomination was tainted by the manner in which Warren attempted to retire.

²³ See *id.* at 359-76 (discussing the Lewis Wolfson affair that led to Fortas's resignation). Justice Fortas was also taken to task for various Warren Court decisions that were unpopular and for personal financial irregularities that were unrelated to the scandal that drove him from office a year later.

²⁴ See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding, in a case that Fortas argued *pro bono*, that all indigent criminal defendants were entitled to a lawyer); ROBERT CARO, *THE YEARS OF LYNDON JOHNSON: MEANS OF ASCENT* 368-72 (1990) (discussing the role that Fortas played in crafting the legal strategy behind Johnson's contested Texas Senate primary win in 1948).

²⁵ See ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 567 (1994).

strategy meetings on Vietnam, edited the President's State of the Union Address in 1966, vetted candidates for executive appointments, and gave advice on topics such as the decision to send federal troops to quell riots in Detroit.²⁶ As *Newsweek* told its readers in 1968, "few important Presidential problems are settled without an opinion from Mr. Justice Fortas."²⁷ While it seems incredible now, Fortas even sat in on the meeting that LBJ convened after he received Warren's retirement letter to decide if Fortas should replace the Chief Justice.²⁸

When Justice Fortas was confronted with these facts at his confirmation hearing, he responded with a mishmash of lies and justifications. Laura Kalman, Fortas's definitive biographer, makes a persuasive argument that the Justice deceived the Senate when he testified that he never initiated policy suggestions to the President, recommended job candidates, offered his opinions on Vietnam, or reviewed drafts of presidential speeches.²⁹ But the Justice could not deny all of his White House contacts, so he also cited the precedents for sitting Justices assisting Presidents and emphasized that his special executive service would end when Johnson left office in January.³⁰ *The Washington Post* editorialized that the examples Fortas relied on did not make his relationship with LBJ "wise or proper," and even a friendly senator on the Senate Judiciary Committee stated that "I think all of us, as citizens, had the notion that the contact between Presidents and Justices of the Court would be social only."³¹ In October, the President withdrew Fortas's nomination, and the Justice can be heard on a White House tape discussing other candidates for the Chief Justiceship with LBJ.³²

²⁶ See KALMAN, *supra* note 1, at 294-98, 303-07, 354; NEWTON, *supra* note 14, at 494.

²⁷ NEWSWEEK, July 8, 1968, at 18.

²⁸ See KALMAN, *supra* note 1, at 328.

²⁹ See *id.* at 337-38.

³⁰ See *id.* at 339.

³¹ *Id.* (quoting Senator Philip Hart); see "Mr. Fortas and the President," WASH. POST, July 18, 1968.

³² See STERN & WERMIEL, *supra* note 10, at 307. Johnson taped some of his White House

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Justice Fortas's extrajudicial conduct rubbed people the wrong way for many reasons. First, President Johnson was unpopular and the political issues that the Justice worked on (especially the Vietnam War) were among the most divisive in our history. Second, Fortas was not candid about his executive portfolio, which left the impression that there was something unseemly about what he was doing. Third, by the late 1960s, more voices were being raised against the growth of presidential power, so there was a heightened sensitivity about the need for an independent Supreme Court, which was not in sync with Fortas's divided loyalties.

Of course, when we pull back for a wider perspective, Lyndon Johnson must also get some of the credit for transforming our expectations about the Justices' political behavior (and thus inadvertently strengthening the separation of powers). Throughout his presidency, LBJ treated the Supreme Court like the Senate cloakroom. Chief Justice Warren was adamant that members of the Court should not serve in any significant extrajudicial positions, but LBJ convinced him to chair the Warren Commission that investigated President Kennedy's assassination.³³ Today, it would seem highly inappropriate for a President to lobby a Justice to resign and take a position in the Administration, but that is exactly what the President did to Arthur Goldberg in order to place Fortas on the Court in the first place.³⁴ (There was no greater demonstration of Johnson's legendary persuasive powers than his success in convincing a Justice to become our Ambassador to the United Nations.) Two years later, the President nominated Ramsey Clark, the son of Justice Tom Clark, as the Attorney General, which compelled the Justice to resign and created a vacancy for Thurgood Marshall, satisfying LBJ's desire to appoint the first African-American to the Court.³⁵ Finally, the President's selection of Judge Thornberry – who was seen as an

phone conversations, and the discussion with Fortas occurred on October 1, 1968. The tape can be found at the Lyndon B. Johnson Presidential Library in Austin, Texas.

³³ See CARO, *supra* note 15, at 445-46.

³⁴ See NEWMAN, *supra* note 25, at 566-67.

³⁵ See WILLIAMS, *supra* note 16, at 329.

undistinguished crony from Texas – as Justice Fortas’s successor further reinforced the view that the Court was being turned into just another source of executive patronage.³⁶ These heavy-handed acts, along with LBJ’s reliance on Justice Fortas in his Kitchen Cabinet, surely contributed to the backlash against direct political links between the Court and the White House.

Finally, within a few months after his nomination as Chief Justice was withdrawn, Fortas resigned in disgrace from his position as an Associate Justice, which made his links to the Administration look even sleazier. In May 1969, *Life* disclosed that Justice Fortas had received a \$20,000 retainer from a foundation run by Louis Wolfson, who was under federal investigation at the time and was later convicted of securities fraud and perjury.³⁷ While this relationship was unrelated to the Justice’s work for the White House, there was a natural concern that Wolfson put Fortas on retainer in the hope that he would use his influence with LBJ to discourage a prosecution or to obtain a pardon.³⁸ Fortas quit a week after the *Life* article was published, and Chief Justice Warren’s second retirement took effect one month later. The Warren Court was over.

III.

THE AFTERMATH

Chief Justice Fortas’s legacy is a constitutional etiquette of self-denial.³⁹ Since 1968, no Justice has retired in a presidential

³⁶ See KALMAN, *supra* note 1, at 329; cf. Robert McG. Thomas, Jr., “Homer Thornberry, Appeals Judge, Dies at 86,” N.Y. TIMES, Dec. 13, 1995 (stating that Thornberry “was even more of a Johnson crony than Justice Fortas was”).

³⁷ See William Lambert, “Fortas of the Supreme Court: A Question of Ethics,” LIFE, May 5, 1969.

³⁸ See KALMAN, *supra* note 1, at 364-65.

³⁹ The most visible symbol of that abstention is the Justices’ refusal to applaud during most of the State of the Union Address. See Ronald J. Krotzowski, Jr., *On the Danger of Wearing Two Hats: Mistretta and Morrison Revisited*, 38 WM. & MARY L. REV. 417, 420 n.16 (1997). One recent study found that the Justices first started attending the annual address with regularity when Lyndon Johnson moved it into prime time, and that judicial applause was not uncommon – until 1970. See

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election year or served as a presidential advisor. Likewise, the Justices no longer accept special assignments from the White House, such as chairing the Warren Commission.⁴⁰ Social contacts between the Justices and Presidents also sharply declined after the 1960s, and are a far cry from the days when the Justices used to gather annually at the White House for dinner.⁴¹ The ideals of separation of powers and judicial neutrality, at least as between the Executive Branch and the Court, are now better reflected in constitutional practice.

In truth, the development of these customs was probably inevitable given the growth in the Supreme Court's power under the Warren Court. Judicial independence is not free, and the price of that enhanced authority was a restriction on what the Justices could do beyond deciding cases. When the reach of federal constitutional law was more limited, people were less concerned about the Justices taking on extrajudicial tasks or leaving the Court in the presidential election season. Once the Court became the key player on sensitive issues such as desegregation, criminal procedure, and the apportionment of state legislative districts, citizens and lawyers would no longer tolerate the Justices acting as political partisans.



Todd C. Peppers and Micheal W. Giles, *Of Potted Plants and Political Images: The Supreme Court and the State of the Union Address*, 22 KAN. J.L. & PUB. POL'Y 49, 56-59, 62-63 (2012).

⁴⁰ There was a long tradition prior to the 1970s of Justices serving other roles while on the Court, from Robert H. Jackson's participation in the Nuremberg Trials to the five Justices who served on the Commission the ruled on the disputed electoral votes in the 1876 presidential election. See *Bush v. Gore*, 531 U.S. 98, 157 (2000) (Breyer, J., dissenting) (discussing the 1876 election dispute).

⁴¹ See JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* 4-5 (2010) (describing the dinner held before FDR announced his Court-packing plan); *id.* at 4 ("The Judiciary Dinner had been, for more than half a century, one of the final events of the winter social season at the White House.").