

Must A Supreme Court Justice Refuse To Answer Senators' Questions?

The squalid controversy surrounding the nomination of Mr. Justice Fortas as Chief Justice of the United States seems now to be over.¹ The Republican and southern Senators whose filibuster and vitriolic attacks on the Court finally forced the Justice to withdraw his name from consideration have won the victory, and for only the second time in three-quarters of a century a presidential nomination to the Supreme Court has failed to receive the advice and consent of the Senate.² But if it is now settled that Mr. Justice Fortas will remain a mere Associate Justice and that the unhappy Judge Thornberry will never ascend from the purgatory of the Court of Appeals to the paradise of a seat on the Supreme Court, the outcome of the struggle between Senators and President has left a loose end or two lying about.³ The protracted hearings before the Senate Committee on the Judiciary⁴ raised serious questions as to the duty of a judge nominated to a higher judicial post not to answer questions from Senators relating to his opinions and legal philosophy.

From very early on in the hearings, Senators Ervin and Thurmond—

1. President Johnson announced June 26, 1968 that he had accepted the retirement of Chief Justice Warren, "effective at such time as a successor is qualified" and nominated Mr. Justice Fortas to be the new Chief Justice. Judge Homer Thornberry, of the Fifth Circuit, was to take the seat vacated by Mr. Justice Fortas. N.Y. Times, June 27, 1968, at 1, col. 8; *id.* 30, col. 8. The Senate Judiciary Committee held protracted hearings on the nomination during July and September, before reporting it favorably on September 17th. SENATE COMM. ON THE JUDICIARY, NOMINATION OF ABE FORTAS, S. EXEC. REP. NO. 8, 90th Cong., 2d Sess. 1 (1968); N.Y. Times, Sept. 18, 1968, at 1, col. 6. A filibuster on the floor of the Senate prevented the nomination from coming to a vote, and when a motion to obtain cloture had failed, Mr. Justice Fortas asked that his name be withdrawn from consideration, to put an "end to destructive and extreme assaults upon the Court." 114 CONG. REC. S. 11688 (daily ed. Oct. 1, 1968); *id.* S. 12051 (daily ed. Oct. 4, 1968); N.Y. Times, Oct. 3, 1968, at 1, col. 8; *id.* 42, col. 3.

2. Since 1895, President Hoover's nomination of Judge John J. Parker in 1930 had been the only rejection of a Supreme Court nominee by the Senate. See pp. 702-03 & note 38 *infra*. The practice was much more common in the 19th century. During the period 1789-1894, more than a fifth of all presidential appointments to the Supreme Court were either rejected or not acted upon. See J. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 303 (1953); 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 757-62 (rev. ed. 1928).

3. Besides the matter discussed in this Note, the propriety of the Chief Justice's manner of retiring was also called into question. See NEW REPUBLIC, July 20, 1968, at 12.

4. See *Hearings on Nomination of Abe Fortas, of Tennessee, to be Chief Justice of the United States, and Nomination of Homer Thornberry, of Texas, to be Associate Justice of the Supreme Court of the United States, Before the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess., pts. 1-2 (1968) [hereinafter cited as *Fortas Hearings*].

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who were opposed to confirmation—tried to get Mr. Justice Fortas to discuss and defend various Supreme Court opinions of which they disapproved.⁵ They were interested, they said, in determining what the Justice's "constitutional philosophy" was—how he would be likely to decide cases and interpret the Constitution in the future.⁶ Some of the cases they asked him about were ones in which he had participated; others were earlier, decided before he joined the Court. But Mr. Justice Fortas respectfully declined to answer any questions about the meaning or basis of any Supreme Court opinion.

His position was an apparently simple one, and he stuck to it throughout the hearings, despite mounting senatorial indignation.⁷ He said that the Constitution forbade him, a sitting Justice of the Supreme Court, to answer the questions of Senators about Supreme Court opinions. Thus when Senator Thurmond asked for an explanation of the constitutional basis of the reapportionment cases, Mr. Justice Fortas replied:

Senator, with the greatest regret I must say that we are back where we were yesterday. I tell myself every morning before I come here, "You are not participating in these hearings as Abe Fortas, you are participating in this hearing as an Associate Justice of the Supreme Court of the United States, with responsibility solely to the Constitution of the United States."

5. *Fortas Hearings*, pt. 1, at 123-64, 180-209.

6. Senator Ervin stated his position as follows:

Mr. Chairman, I think I should make some preliminary statements to illustrate why I think it is so important for Senators to know something about the constitutional philosophy of a Supreme Court Justice, particularly a Chief Justice.

The good, wise men who fashioned the Constitution, had a most magnificent dream. They dreamed they could enshrine the fundamentals of the government they desired to establish and the liberties of the people they wished to secure in the Constitution, and safely entrust the interpretation of that instrument according to its true intent to a Supreme Court composed of mere men. They knew that some dreams come true and others vanish, and that whether their dream would share the one fate or the other would depend on whether the men chosen to serve as Supreme Court Justices would be able and willing to lay aside their own notions and interpret the Constitution according to its true intent.

....

It is no exaggeration to say that the existence of constitutional government in America hinges upon the capacity and the willingness of a majority of the Supreme Court Justices to interpret the Constitution according to its true intent. In consequence, no more awesome responsibility rests upon any Senator than that of determining to his own satisfaction whether or not a Presidential nominee to the Supreme Court possesses this capacity and this willingness.

I would like to say there are a great many people in the United States who do not feel that the Supreme Court during recent years, particularly during the past 3 years, has manifested a willingness, and an ability to interpret the Constitution according to its true intent.

Fortas Hearings, pt. 1, at 107-08.

7. By the end of the hearings, Senator Ervin was referring to "what I call the 'Judicial Fifth Amendment.'" *Fortas Hearings*, pt. 2, at 1304.

It is on that basis, and with the utmost respect, that I have said to you, that I cannot respond to questions of that sort, because I cannot and I will not be an instrument by which the separation of powers specified in our Constitution is called into question. And I will not and cannot discuss in this forum opinions of the Court of which I am a member. That is my constitutional duty, Senator, just as it would be the constitutional duty of a Senator if he were called before a court, no matter how much he might want to explain his vote or his opinion—it would be his constitutional duty, respectfully as I am trying to do here, to decline to answer questions that were put to him about his work in the Congress.

That is the mandate of our Constitution, and that is what I am trying to fulfill here.⁸

The exact scope of the constitutional duty thus said to rest on him, Mr. Justice Fortas did not make exceedingly clear. The prohibition apparently applied to decisions of the Supreme Court whether or not the Justice had participated in them. He declined to discuss the bases of *Escobedo v. Illinois*,⁹ *Mallory v. United States*,¹⁰ *Albertson v. S.A.C.B.*,¹¹ *Baker v. Carr*,¹² and *Pennsylvania v. Nelson*¹³—all decided before he went on the Court—as well as various later decisions in which he had taken part.¹⁴ But just how far into the past the prohibi-

8. *Fortas Hearings*, pt. 1, at 214-15.

9. 372 U.S. 478 (1964). The exchange was as follows:

Senator THURMOND. . . . Do you condone [*Escobedo*]?

Justice FORTAS. I must make the same response, respectfully.

Senator THURMOND. A man who is guilty of murder, wrote out in detail how he committed the crime, all about it, and yet he was turned loose, in a 5 to 4 decision of the Supreme Court.

Justice FORTAS. I was not on the Court at that time, Senator.

Senator THURMOND. That is true, you were not. And that is the reason I thought if you did not want to comment on the decisions you did participate in, you might give us the benefit of your opinion for the common good, for the public good of the people of this country, on a decision in which you did not participate.

Justice FORTAS. You flatter me, Senator, by suggesting that I could be of such service, and if I could be, it is with the greatest regret that I must say that the constitutional limitations upon me prohibit me from responding.

Senator THURMOND. So you refuse to answer?

Justice FORTAS. For the reasons stated.

Fortas Hearings, pt. 1, at 192.

10. 354 U.S. 449 (1957); *Fortas Hearings*, pt. 1, at 191.

11. 382 U.S. 70 (1965); *Fortas Hearings*, pt. 1, at 208-09.

12. 369 U.S. 186 (1962); *Fortas Hearings*, pt. 1, at 189-90.

13. 350 U.S. 497 (1956); *Fortas Hearings*, pt. 1, at 208-09.

14. *Katzenbach v. Morgan*, 384 U. S. 641 (1966); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Fortson v. Morris*, 385 U.S. 231 (1966); *Harper v. State Bd. of Elections*, 383 U.S. 663 (1966); *Berger v. New York*, 388 U.S. 41 (1967); *Witherspoon v. Illinois*, 391 U.S. 510 (1968). See *Fortas Hearings*, pt. 1, at 181, 184, 188-89, 194, 198-99, 200-01. Mr. Justice Fortas also sat mute, having said it would be improper for him to comment, while Senator Ervin expounded his own views on *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), *Stovall v. Denno*, 388 U.S. 293 (1967), *Duncan v. Louisiana*, 391 U. S. 145 (1968),

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tion extends remained uncertain. *Powell v. Alabama*¹⁵ was apparently forbidden territory, since the Justice discussed the case only to regret it—"I have done something I should not have done."¹⁶ Yet he was more than willing to discuss the scope of judicial review,¹⁷ implying that *Marbury v. Madison*,¹⁸ at least, is fair game.

The Justice was clearer about some other matters. In the first place, he made it explicit that he was not claiming a privilege, but fulfilling a duty. "As a person, as a lawyer, as a judge, I should enjoy this opportunity—I always do—of discussing a problem of this sort. But as a Justice of the Supreme Court, I am under the constitutional limitation that has been referred to."¹⁹ No questions arose as to Congress's power, whether by contempt or otherwise, to punish the Justice for refusing to answer the Senators' questions.²⁰ The only issue was whether the Constitution forbade his responding to questions when he knew the answer, when he was willing to answer, and when he would have preferred—as he said many times²¹—answering to keeping silent.

Second, the constitutional duty perceived by Mr. Justice Fortas was something other than the discretion normally expected from a judge.

Reitman v. Mulkey, 387 U.S. 369 (1967), and *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). *Fortas Hearings*, pt. 1, at 124, 126-53.

15. 287 U.S. 45 (1932).

16. *Fortas Hearings*, pt. 1, at 173. The context makes clear that Mr. Justice Fortas's regret was constitutional in nature. Compare the discussion of *Fortson v. Morris*, 385 U.S. 231 (1966):

Senator THURMOND. In my judgment, it is preferable for a Governor to be chosen by popular election. Yet I am unable to find a requirement to this effect in the Constitution. Would you consider your dissent in *Fortson v. Morris* to be an example of translating a personal preference into a constitutional requirement?

Justice FORTAS. I most certainly would not—but I should not say that. I must stand on the constitutional position. I cannot respond to that, Senator.

Senator THURMOND. I thought you did respond.

Justice FORTAS. I am sorry. It was an inadvertence.

Senator THURMOND. Well, maybe we need more inadvertent answers here this morning.

Fortas Hearings, pt. 1, at 189.

17. *Fortas Hearings*, pt. 1, at 105-06, 110, 116-21.

18. 5 U.S. (1 Cranch) 137 (1803).

19. *Fortas Hearings*, pt. 1, at 181.

20. There seems little doubt that use of the contempt power would have been inappropriate in any case. Just as a President may bar congressional access to administrative files under the doctrine of executive privilege, see Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 20 U. PITT. L. REV. 755 (1959), a sitting Justice of the Supreme Court may claim a privilege to refuse to answer Senators' questions. Mr. Justice Fortas himself appeared to rely on the privilege in refusing to appear for further questioning by the committee in September. *Fortas Hearings*, pt. 2, at 1285. The exact scope of this judicial privilege need not be considered here, though it would no doubt cover all the matters Mr. Justice Fortas declined comment on. The point is that at the earlier hearings Mr. Justice Fortas made no such claim of privilege; he spoke rather in terms of a duty he could not evade if he wished. On the distinction of privilege and duty, see Hohfeld, *Fundamental Legal Conceptions as Applied in Juridical Reasoning*, 23 YALE L.J. 16, 28-44 (1913).

21. *Fortas Hearings*, pt. 1, at 122, 124, 173, 181-82, 185-86, 189, 200.

Considerations of judicial propriety, of course, require a judge to refrain from comment on matters that are *sub judice*, or likely soon to be so.²² But this duty extends to all comments on such matters, no matter where they are made: if a judge is not at liberty to discuss a pending case before one group, he is not at liberty to discuss it before another. The constitutional duty resting on Mr. Justice Fortas, however, applied uniquely to comments made in the Congress of the United States;²³ it left him free to comment on past cases in lectures to universities or colleges or other "appropriate groups," or to address himself to the general public by means of books or other writings.²⁴

Finally, at no time did Mr. Justice Fortas contend that the information sought by the opposing Senators was irrelevant to their duty of passing judgment upon him. He agreed "absolutely" with the suggestion of Senator Thurmond that members of the Senate were entitled to know what his philosophy was if they were going to consider him for Chief Justice.²⁵ But he maintained that such information had to come from his published opinions and writings and from the course of his professional life; he was forbidden to assist the Senators by answering questions.²⁶

Indeed, Mr. Justice Fortas could hardly have denied that his views and legal philosophy were relevant to his confirmation. It is true that Alexander Hamilton believed that the senatorial power of confirmation would extend only to the rejection of nominees lacking even the

22. See *In re* Requests to Judges in Chancery for Advisory Opinions, 101 N.J. Eq. 9, 137 A. 151 (1927); *Crawford v. Ferguson*, 5 Okla. Crim. 377, 115 P. 278 (1911); *Wilson v. Hinckley*, 1 Kirby 199 (Conn. 1787); 48 C.J.S. *Judges* § 89 (1955). Cf. pp. 707-08 *infra*.

23. Senator THURMOND. Well, now, how is it that you can publish a book and express views, and then when that is done, you can elaborate here on such a matter, whereas if you have not published a book, you refuse to elaborate here?

Justice FORTAS. Senator, because of the problem of separation of powers, I repeat again—I do not like this situation as a man. I am not that kind. I like debate and discussion. The Constitution, so far as Members of the Congress are concerned, says that they shall not be held to answer in any other place for their votes or opinions while exercising their duties. In my opinion, that principle as applied to the Members of Congress is a fundamental one. It is the foundation of our system of government. The correlative, Senator, in my judgment, is true of judges. Judges may not be held to answer—which is very broad, has been construed by the Supreme Court in the case of Members of Congress very broadly—they shall not be held to answer before any other branch of the Government for their views. And it is that principle that is fundamental to our tripartite division of government, and it is that principle which I, being sworn to uphold the Constitution, am doing my level best in these trying circumstances to uphold.

Fortas Hearings, pt. 1, at 185.

24. "I have also expressed my views . . . to law schools and college audiences before whom I have been invited to lecture. And that is not a violation of a division of powers within the Government under our Constitution." *Fortas Hearings*, pt. 1, at 185.

25. *Fortas Hearings*, pt. 1, at 182.

26. *Id.*

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"appearances of merit,"²⁷ and that supporters of nominees to the Supreme Court contend that the Senate has done its job when it finds that the nominee is a competent lawyer, and a man of honor.²⁸ But for at least the last fifty years, it has been the practice for Senators to vote against the confirmation of candidates whose legal views they disapprove.²⁹ This is not the custom on appointments to the executive

27. See THE FEDERALIST No. 66, at 449-50 (J. Cooke ed. 1961) (Hamilton).

28. Mr. President, what are the tests that the Senate should apply to nominees for office? I have known of only two outstanding tests that it has been the custom of the Senate to require. First, has the man character and integrity and honesty? Second, has he ability?

81 CONG. REC. 9087 (1937) (remarks of Sen. Connally). Whatever the custom of the Senate, it had been the custom of Senator Connally (here supporting Mr. Justice Black) to require more: he voted against the confirmation of Chief Justice Hughes and of Judge Parker because of their economic views, as one of the Senator's colleagues pointed out. *Id.* 9087-88 (remarks of Sen. Burke). See also 72 CONG. REC. 8118-19 (1930) (remarks of Sen. Fess).

29. J. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 302-05 (1953); 2 G. HAYNES, THE SENATE OF THE UNITED STATES 755-60 (1938). Consider also the following:

[A]dmitting for the sake of argument that [Charles Evans Hughes] is the greatest lawyer in the United States, should we, for that reason alone, put him on the Supreme Bench? Are we going to consider nothing but ability? If that is all, then it is possible to go to Sing Sing and get candidates to fill the bill. It is possible to go to any State or Federal prison in the United States and find men who are able lawyers; and if they are not found there that is no reason why some of them should not be there. [Laughter.]

In my judgment, Mr. President, there are other qualifications necessary. Without speaking in disrespect of any man, I do not believe a man is fit to go on the Supreme Bench who has never had any opportunity to sympathize or to associate with those who toil and those who labor. Since Mr. Hughes retired from the Supreme Bench and after he got through running for Presidency, he has lived with those of wealth; he has been surrounded by the luxury of combined wealth.

. . . .

His vision has extended only to that limited area which is circumscribed by yellow gold. He is not to blame for that; I am not criticizing him for it; I am perfectly willing that he should live that kind of a life. I am perfectly willing that he should work for rich clients. I have not fault to find with that; but I am not willing that there should be transferred from that kind of surroundings one who shall sit at the head of the greatest judicial tribunal in the world; I am not willing to say that that kind of man, regardless of his ability, should go on the Supreme Bench.

While I have nothing in the world against him, yet, in my judgment, the man who has never felt the pinch of hunger and who has never known what it was to be cold, who has never associated with those who have earned their bread by the sweat of their faces, but who has lived in luxury, who has never wanted for anything that money could buy, is not fit to sit in judgment in a contest between organized wealth and those who toil.

72 CONG. REC. 3566 (1930) (remarks of Sen. Norris).

Mr. WATERMAN. I know very well the Senator has declared upon the floor here that Judge Parker is an utter and absolute impersonality, so far as he is concerned. That is likewise true so far as I am concerned. I do not know the gentlemen; I know nothing about him except what has been brought out in this debate. I am speaking, however, from a little different platform than is the Senator from Idaho. I look upon the Constitution as a document that is amendable only in a certain way provided in the instrument itself, and I think that is the way in which it should be amended.

Mr. BORAH. I agree with that.

Mr. WATERMAN. I do not think it should be amended by the method of importuning or threatening any candidate for office or by criticizing the courts or by criticizing a

branch, which the Senate normally opposes only in a case amounting to incompetence or lack of integrity.³⁰ The nominations of Justices Brandeis,³¹ Black,³² and Stewart³³ ran into serious opposition from those who thought the candidates were too liberal; while Justices Butler,³⁴ Stone,³⁵ and Hughes³⁶ were opposed as allied to conservative interests.³⁷ In 1930, President Hoover's nomination of Judge John J.

judge or by criticizing a decision or by bringing about a changed opinion in a political [*sic*] forum, as I think we are doing at the present time.

Mr. BORAH. But the Senator will agree with me that there is a limit. For instance, if a nominee should entertain communistic views—

Mr. WATERMAN. I would certainly be against him.

Mr. BORAH. Yes. So there is a limit. It is just a question as to what shall be the limit.

72 CONG. REC. 8354 (1930) (remarks of Sens. Borah & Waterman); *cf.* 89 CONG. REC. 681 (1943) (remarks of Sen. Langer).

30. J. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 258-301, 325-55 (1953); L. ROGERS, *THE AMERICAN SENATE* 28-30 (1925); 2 G. HAYNES, *THE SENATE OF THE UNITED STATES* 761-64 (1938). And compare:

Here in the Senate there has been a rather well-established practice to the effect that if a President nominates a person of character, honor, and ability for appointment, then there is no sound basis for withholding Senate confirmation. So far as appointments in the executive branch of the Government are concerned, this is certainly the general rule, and is one that I ordinarily follow. However, as to judicial appointments, especially at the very top, it has no application whatsoever; and, further, it is dangerous to the judiciary, as an independent branch of our Government.

101 CONG. REC. 2830 (1955) (remarks of Sen. Stennis).

There is some evidence, moreover, that the closer scrutiny given to Supreme Court appointments may reflect the original intention of the authors of the Constitution. The Convention agreed early in its deliberations that the Senate was to select judges of the Supreme Court. Other offices of the government, including lower federal judgeships, were to be filled by the President without any necessity for senatorial confirmation. Successive attempts to transfer the power to appoint Supreme Court Justices to the President were defeated, and only a last-minute compromise resulted in the present provision by which the President nominates, and with the advice and consent of the Senate appoints, *both* judges and other officials. The earlier understanding seems to have been preserved in the actual practice of the Senate. *See THE DEBATES OF THE FEDERAL CONVENTION OF 1787*, at 39-40, 56 (C. Hunt & J. Brown ed. 1920); *cf.* 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 136, 301 (M. Farrand ed. 1911).

31. *See Hearings on the Nomination of Louis D. Brandeis to be an Associate Justice of the Supreme Court of the United States, Before the Subcomm. of the Senate Comm. on the Judiciary*, 64th Cong., 1st Sess., pts. 1 & 2 (1916). The best account is A. MASON, *BRANDEIS: A FREE MAN'S LIFE* 465-508 (1956).

32. 81 CONG. REC. 8964-68, 9068-88, 9096-9103 (1937). Though a few Senators complained of Senator Black's erstwhile membership in the Ku Klux Klan, most opposition centered on his vigorous investigation of the telegraph companies, and his support of President Roosevelt's court-packing plan.

33. 105 CONG. REC. 7452-72 (1959).

34. *See* D. DANIELSKI, *A SUPREME COURT JUSTICE IS APPOINTED* 108-41 (1964). Neither committee hearings nor Senate proceedings in executive session were made public until 1929.

35. 66 CONG. REC. 3032-57 (1925). Senator Norris, the leader of the opposition to Stone, later recanted. 87 CONG. REC. 5618 (1941). *See generally* A. MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* 181-200 (1961).

36. 72 CONG. REC. 3553-91 (1930); *see* note 29 *supra*.

37. Scattered opposition has greeted various other nominations. Thus Senator Tydings waged a one-man crusade against Justice Jackson's confirmation: as Attorney General, Jackson had refused to use the criminal libel statute to punish some of Drew Pearson's comments about the Senator, *see Hearings on the Nomination of Robert H. Jackson to*

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Parker to the Supreme Court was rejected by the Senate after progressive Senators, led by Norris, Borah, and Wheeler, attacked Parker's decision granting an injunction against a union seeking to break a yellow-dog contract.³⁸ Thus, it is well established that the Senate will inquire into the legal views of a Supreme Court nominee.³⁹

Since he accepted as legitimate the Senators' interest in his legal philosophy, Mr. Justice Fortas was forced to look elsewhere in the Constitution for the source of his asserted duty not to answer their questions. In this connection, he placed great reliance on the speech and debate clause.⁴⁰ The Constitution "expressly" provides, he said, that members of Congress shall not be called to answer in any other place for their votes or statements on the floor. "And I think that probably it is true that the correlative of that applies to the Court."⁴¹

The shortest answer to this contention is the maxim, *expressio unius*,

be an Associate Justice of the Supreme Court of the United States, Before a Subcomm. of the Senate Comm. on the Judiciary, 77th Cong., 1st Sess. 47-69 (1941); 87 CONG. REC. 5830-41; 5843-45 (1941). Mr. Justice Douglas was opposed because he had no "substantial record on the subject of civil liberties," 84 CONG. REC. 3711 (1939) (remarks of Sen. Frazier); Justice Rutledge, because the Court needed more practicing lawyers, 89 CONG. REC. 681 (1943) (remarks of Sen. Langer); and Mr. Chief Justice Warren, because federal patronage to North Dakota was insufficient. 100 CONG. REC. 2044-47, 2353-64 (1953).

38. *UMW v. Red Jacket Consolidated Coal & Coke Co.*, 18 F.2d 839 (4th Cir. 1927). See W. BURRIS, *THE SENATE REJECTS A JUDGE* (1962); *Hearing on the Nomination of Hon. John J. Parker to be an Associate Justice of the Supreme Court of the United States, Before the Subcomm. of the Senate Comm. on the Judiciary*, 71st Cong., 1st Sess. (1930); 72 CONG. REC. 8475-87 (1930).

39. There have been a number of objections made to nominees for the Supreme Bench, but objections have never been made in our history, so far as I know, on the ground that the nominee was a man lacking in character or lacking in integrity. The objections have always been raised because of the views he entertained with reference to some public question.

72 CONG. REC. 8353 (1930) (remarks of Sen. Borah).

Once it is candidly recognized that [the Justices'] whole outlook on life, their freedom from fear, their experience and their capacity to transcend their experience, determine their decisions, it follows inevitably that these qualities will become pertinent matters of inquiry before a man is put on the Supreme Bench for life.

It is noteworthy that Presidents so unlike as Lincoln and Roosevelt should have deemed relevant the general direction of mind of prospective members of the Court toward public issues. Surely the men who wield the power of life and death over the political decisions of legislatures and executives should be subjected to the most vigorous scrutiny before being given that power. Public opinion, the President, and the Senate should all have a lively understanding of what the appointment of a Supreme Court Justice means.

Frankfurter, *The Supreme Court and the Public*, *THE FORUM* 329, 334 (1930). There are, of course, those who believe—precisely because of the Senate's power to inquire into matters other than the nominee's honesty and legal ability—that the whole confirmation power is unwise, at least as to judges. "After long experience and close observation I have reached the conclusion that senatorial meddling with judicial nominations is an unmixed evil. . . . An informed and vigilant public opinion and a President who is responsive to it are the surest guarantees of wise selection. When the Senate takes to weighing imponderables it is very apt to tamper with the scales." G. PEPPER, *FAMILY QUARRELS: THE PRESIDENT, THE SENATE, THE HOUSE* 89, 92 (1931).

40. "[A]nd for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. CONST. art. I, § 6.

41. *Fortas Hearings*, pt. 1, at 122.

exclusio alterius. A provision appearing in article I, and applicable by its terms only to members of Congress, probably does not also govern—even by implication—members of the Supreme Court, whose duties are set out in Article III. The history of the speech and debate clause, moreover, reveals that it was designed to correct a single, specific evil—the persecution of Members of Parliament by the King's judges.⁴² It is extraordinarily unlikely that a provision intended specifically to protect legislators against judges should also have the effect of protecting judges against legislators.

Even if the clause applied to judges, moreover, it would furnish no support to Mr. Justice Fortas's position. The aim of the speech and debate clause was to avoid the civil and criminal liability to which legislators might otherwise be subject as a result of votes or statements in Congress.⁴³ It creates at best a privilege: it frees the legislator from liability, but leaves him free, if he so desires, to explain his vote to his heart's content—either in a court of law or elsewhere. The suggestion that a Senator involved in a lawsuit would be forbidden from explaining his vote is plainly wrong: the clause would do no more than leave his choice unfettered by the threat of civil or criminal penalties.⁴⁴

More telling than Mr. Justice Fortas's argument based on the speech and debate clause was the appeal to the authority of Justice Frankfurter.⁴⁵ The latter, whose wonted deference to legislative judgment apparently did not extend to the matter of his own qualifications, had been asked to testify in response to a remarkable parade of grotesques and crackpots opposed to his confirmation.⁴⁶ Professor Frankfurter consented, but he was understandably unhappy:

42. See 6 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 231 (2d ed. 1936); C. WITKE, *THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE* (1921); Yankwich, *The Immunity of Congressional Speech—Its Origin, Meaning and Scope*, 99 U. PA. L. REV. 960, 961-64, 966 (1951); cf. *Stockdale v. Hansard*, 9 A. & E. 1, 112 Eng. Rep. 1112 (Q.B. 1839); *Coffin v. Coffin*, 4 Mass. 1 (1808).

43. See *United States v. Johnson*, 383 U.S. 169, 177-78 (1966).

44. A bold man might attempt to rationalize the Fortas position by arguing that the Senate was in some sense punishing the Justice by a denial of confirmation—that the refusal to consent to his nomination was the equivalent of the civil or criminal liability that the clause prohibits. The analogy would be to *United States v. Johnson*, 383 U.S. 169 (1966), a recent case construing the speech and debate clause. There the Supreme Court held that a speech on the floor of the House could not form an element of a cause of action against a Congressman for conspiracy to defraud the United States. It could be contended that the Senators' questions to Mr. Justice Fortas were similarly objectionable since the subject-matter to which they were addressed (the Justice's opinions and legal philosophy) could not form a proper basis for denial of confirmation. But this argument runs directly afoul of Mr. Justice Fortas's concession that his legal opinions and philosophy were a valid basis for denying him confirmation.

45. *Fortas Hearings*, pt. 1, at 123.

46. See *Hearings on the Nomination of Felix Frankfurter to be an Associate Justice of the Supreme Court, Before a Subcomm. of the Senate Comm. on the Judiciary, 76th Cong.*.

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While I believe that a nominee's record should be thoroughly scrutinized by this committee, I hope you will not think it presumptuous on my part to suggest that neither such examination nor the best interests of the Supreme Court will be helped by the personal participation of the nominee himself. My attitude and outlook on relevant matters have been fully expressed over a period of years and are easily accessible. I should think it not only bad taste, but inconsistent with the duties of the office for which I have been nominated for me to attempt to supplement my past record with present declarations.⁴⁷

As a basis for Mr. Justice Fortas's refusal to answer questions, of course, the quotation was not precisely in point. It did not refer specifically to the Constitution nor to separation of powers (as indeed Professor Frankfurter could not have, since not even the Harvard Law School is a fourth branch of government), but it *did* suggest that there is some special impropriety, rooted in the nature of judicial office, in answering senatorial inquiries during confirmation hearings. To that extent it was useful.

The difficulty with the Frankfurter quotation is that it addresses itself to a question that was open in 1939, but is now settled contrary to the position taken by Professor Frankfurter. That question is whether it is appropriate, under any circumstances, for a Supreme Court nominee to appear before a Senate committee. Until 1925, when Harlan F. Stone appeared to answer charges that he had misused his authority as Attorney General in the prosecution of Senator Burton K. Wheeler,⁴⁸ no Supreme Court nominee had come before a Senate committee. Frankfurter was only the second nominee to appear,⁴⁹ and Robert H. Jackson the third.⁵⁰ All three appearances were perceived as

1st Sess. (1939). Opposition witnesses included the National Director of the Constitutional Crusaders of America, who claimed to represent "consumers, taxpayers, the unemployed and old-age pensions; everybody but the C.I.O. and the A.F. of L.," *id.* 3; Wade E. Cooper, who thought Frankfurter had "fine qualifications," *id.* 28, but who felt his bank had been destroyed by the Supreme Court in violation of the ninth amendment, *id.* 24; a lady who believed that Justice Brandeis sponsored colleges "where they teach communism and have free love and nudist colonies," *id.* 47, though she admitted that she couldn't keep "all those radicals on my mind," *id.* 45; and a retired Spanish-American War veteran concerned by Frankfurter's connection with the International Red Cross, *id.* 92.

47. *Id.* 107-08.

48. See A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 195-93 (1961).

49. As he pointed out. *Hearings on the Nomination of Felix Frankfurter*, *supra* note 46 at 107.

50. *Hearings on the Nomination of Robert H. Jackson to be an Associate Justice of the Supreme Court of the United States, Before a Subcomm. of the Senate Comm. on the Judiciary, 77th Cong., 1st Sess. (1941)*. Jackson's failure as Attorney General to prosecute Drew Pearson for allegedly libelous statements about Senator Tydings was in issue. *Cf.* note 37 *supra*.

rather special cases,⁵¹ and as late as 1949, when Sherman Minton declined to appear before the Judiciary Committee, the Senate concluded that there was no reason for him to do so.⁵² Commentators agreed that personal appearances were inappropriate and unwise.⁵³ But in recent years the rule has changed. Mr. Chief Justice Warren did not appear before a Senate committee, but every subsequent nominee has done so,⁵⁴ and none asserted the old doctrine as to the impropriety of such an appearance.⁵⁵

51. Stone's and Jackson's because they involved charges of malfeasance in office as Attorney General; Frankfurter's because of the scurrility and virulence of the right-wing attack on him.

52. The Judiciary Committee had requested Judge Minton to appear before it on September 26, 1949. Rather than testifying, he sent a letter to the committee quoting Justice Frankfurter's statement, p. 705 *supra*, and calling their attention to the "serious questions of propriety and policy" involved. The Judiciary Committee then voted to recommend the nomination favorably without further hearings. See 95 CONG. REC. 13795 (1949).

When the nomination came to the floor a week later, Senator Morse, with the support of Senator Ferguson, moved to recommit, so that the nominee could appear before the committee and new evidence be taken. 95 CONG. REC. 13797 (1949). Senator Morse indicated he would vote for confirmation of Judge Minton, but added:

We shall do a disservice to the judicial system of this country tonight if we let the precedent of the Minton letter stand. I say that the Senate of the United States tonight must make very clear the fact that it puts its stamp of approval and sanction on the principle that when the President of the United States nominates a man to the United States Supreme Court there is nothing improper about calling the nominee before the Judiciary Committee for an inquiry into his qualifications. If we do not make that clear tonight, great disservice will be done this country.

If we are able to come to grips with the principle of the obligation of the Senate under the advice-and-consent clause of the Constitution, I do not see how we can justify in effect supporting Judge Minton in his letter, which, when we boil it all down, leaves only the principle for which he contends, that a nominee for the United States Supreme Court should not be called before the committee on the Judiciary for inquiry because it might violate the proprieties. I say that is a dangerous precedent, and I say we have to consider these matters from the standpoint of the principles, and not of the individuals concerned.

95 CONG. REC. 13798 (1949) (remarks of Sen. Morse). But the motion was defeated 45-21, after opponents had argued that it would "serve no purpose to call him before the committee." 95 CONG. REC. 13799 (1949) (remarks of Sen. Magnuson). Several Senators pointed out that, before his appointment to the Seventh Circuit, Judge Minton had been a Senator, and was known to the membership. Compare Senator Connally's speech after Senator Bridges had requested hearings on the nomination of Senator Black to the Supreme Court:

Does the Senator mean that we shall be obliged to have long and protracted hearings, and let everyone who wants to come before the committee make a stump speech on the subject; or should the committee, when it has satisfied itself with respect to the nomination, report to the Senate?

Hearings are for the information of the committees, not for the purpose of public amusement; not to have a legislative rodeo so that everybody may come in and have a good time. Hearings are had to obtain information.

81 CONG. REC. 8964 (1937) (remarks of Sen. Connally).

53. J. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 246 (1953).

54. *Hearings on Nomination of John M. Harlan, of New York, to be Associate Justice of the Supreme Court of the United States, Before a Subcomm. of the Senate Comm. on the Judiciary*, 84th Cong., 1st Sess. 129 (1955); *Hearings on Nomination of William Joseph Brennan, Jr., of New Jersey, to be Associate Justice of the Supreme Court of the United States, Before the Senate Comm. on the Judiciary*, 85th Cong., 1st Sess. 17 (1957); *Hearing on Nomination of Charles E. Whittaker, of Missouri, to be Associate*

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In place of the old doctrine that any personal appearance was improper has grown up a new doctrine, similar to the one governing judicial utterances generally. A Supreme Court nominee is free to discuss legal philosophy or opinions, but must shy away from specific comment on situations presented in cases pending, or soon to be pending, before the Court. The distinction is generally one between discussion of past cases, which is permitted, and discussion of future cases, which is not, with the caveat that where the law is unsettled, discussion of past cases is restricted by the fact that hypotheticals based on them will almost certainly appear as cases on the Court's docket in the immediate future. This new doctrine, with its distinction of past and prospective cases, has been applied and endorsed by all those who have come before the Judiciary Committee.⁵⁶ Mr. Justice Fortas himself, when he was nominated to be an Associate Justice, recognized that Supreme Court nominees should speak only with "great diffidence" about matters likely to come before the Court,⁵⁷ but did not feel it improper to outline in general terms his views on the problems involved in *Escobedo v. Illinois*,⁵⁸ then a matter of controversy.⁵⁹ During the more recent

Justice of the Supreme Court of the United States, Before the Senate Comm. on the Judiciary, 85th Cong., 1st Sess. 32 (1957); Hearing on Nomination of Byron R. White, of Colorado, to be Associate Justice of the Supreme Court of the United States, Before the Senate Comm. on the Judiciary, 87th Cong., 2d Sess. 22 (1962); Hearings on Nomination of Arthur J. Goldberg, of Illinois, to be Associate Justice of the Supreme Court of the United States, Before the Senate Comm. on the Judiciary, 87th Cong., 2d Sess. 5, 23 (1962); Hearing on Nomination of Abe Fortas, of Tennessee, to be an Associate Justice of the Supreme Court of the United States, Before the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. 38 (1965); Hearings on Nomination of Thurgood Marshall, of New York, to be an Associate Justice of the Supreme Court of the United States, Before the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 3, 25, 65, 159, 187 (1967). The Stewart confirmation hearings have not been printed. See N. Y. Times, April 10, 1959, at 1, col. 5; id. 14, col. 4.

55. Compare Senator Hruska's comments at the hearings on Justice Goldberg: . . . I first of all want to say that I am personally gratified at your appearance here, and pleased that you are here on this kind of an occasion. I would like to reflect, just a little bit, that it was not always this way with nominees for Supreme Court justiceships. If my memory serves me right, it was the man whose place you are taking [Justice Frankfurter] who, on the occasion when he was invited to appear personally, took exception to the procedure, and thought that it was just a little bit out of order.

Of course, that has long been worn out as an objection or as any reflection on any nominee for the justiceship. And so I want to say I am gratified at your being here.

Hearings on Nomination of Arthur J. Goldberg, supra note 54, at 10.

56. See, e.g., *Hearings on Nomination of Thurgood Marshall, supra note 54, at 9; Hearings on Nomination of William Joseph Brennan, supra note 54, at 18-20; Hearings on Nomination of John M. Harlan, supra note 54, at 138-40.*

57. *Hearing on Nomination of Abe Fortas, supra note 54, at 42.*

58. 378 U.S. 478 (1964).

59. Mr. Justice Fortas commented on a highly publicized exchange of letters between Attorney General Katzenbach and Chief Judge Bazelon of the District of Columbia Circuit concerning the proper balancing of the defendant's interest in his rights and society's interest in restraining criminals. *Hearing on Nomination of Abe Fortas, supra note 54, at 41-43.*

Fortas hearings, the questioning Senators referred to the established practice and insisted that their questions involved past cases, rather than matters likely to come before the Court.⁶⁰

Past practice, then, gives no support to the idea that a Supreme Court nominee may not respond to questions, providing he does not discuss pending cases. It gives equally little support to the idea propounded by Mr. Justice Fortas, that additional restrictions are imposed on the nominee by virtue of his being a sitting Justice.⁶¹ True, there is no exact parallel to the situation of Mr. Justice Fortas: neither of the two previous Chief Justices promoted from Associate Justiceships appeared before the Judiciary Committee.⁶² But none of the three recent recess appointees⁶³ to the Supreme Court relied on any doctrine such as the one advanced by Mr. Justice Fortas, though they too were sitting as Justices of the Supreme Court when they were questioned by the Senate Judiciary Committee.⁶⁴ Mr. Justice Stewart, indeed, did not hesitate to discuss a recent, and controversial, Supreme Court case: in response to a question from Senator McClellan, he allowed that the legal and sociological basis of *Brown v. Board of Education*⁶⁵ was "substantially" in accordance with his own views.⁶⁶

Moreover, since separation of powers is one basis of the restriction which Mr. Justice Fortas said is imposed on a sitting Justice,⁶⁷ the restriction should apply equally to any federal judge promoted to the Supreme Court.⁶⁸ Such at least was the position taken by Judge Thornberry,⁶⁹ who may fairly be presumed to have discussed with his would-

60. *Fortas Hearings*, pt. 1, at 122, 181.

61. *See Fortas Hearings*, pt. 1, at 100-01, 122, 181, 214-15.

62. Edward D. White in 1910; Harlan F. Stone in 1941. Nor did Charles Evans Hughes, who had been an Associate Justice from 1910-16, and was appointed Chief Justice in 1930. But his decision in the Shreveport Rate Case, 234 U.S. 342 (1914), which Senator Glass claimed "extirpated every remaining right that any State had over intrastate commerce," played a part in the debate over his later confirmation as Chief Justice. 72 CONG. REC. 3373 (1930).

63. Justices Brennan, Whittaker, and Stewart. The last previous nominee to take his seat on the Court without being confirmed was Justice Benjamin Curtis in 1851.

64. *See* note 54 *supra*.

65. 347 U.S. 483 (1954).

66. N.Y. Times, April 10, 1959, at 14, col. 4.

67. *See* p. 698 *supra* & pp. 710-11 *infra*.

68. The judicial power is vested not only in the Supreme Court, but also in "such inferior courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

69. The following colloquy occurred:

Senator ERVIN. Well, you do agree with me in my view that Members of the U.S. Senate who are required to pass upon appointments to Supreme Court Justiceships have a perfect right, indeed an absolute duty, to ascertain the constitutional philosophy of any person for that position?

Judge THORNBERRY. I certainly do, sir.

Senator ERVIN. But as I take it from your statement, that you are unwilling because of your belief of either the limitations or the privileges of a judicial office,

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be colleague the scope of their duty not to respond to questions, and who declined to explain or expand upon his decision in *United States v. Texas*.⁷⁰ Yet federal judges previously nominated to the Supreme Court have shown no reluctance to discuss with Senators past cases in which they participated, provided always that they could avoid ones likely to be pending before them.

Mr. Justice Marshall expressly stated his willingness to answer questions about opinions he had written as a judge in the Second Circuit, providing they were not "cases that will come before me later."⁷¹ Justice Whittaker, asked about an Eighth Circuit case denying relief to a professor fired for refusing to appear before the Senate Internal Security Subcommittee, did not think it improper to justify his reasoning. He said that he had "declared no new law. I followed the adjudicated cases."⁷² Similarly, Judge John J. Parker, under attack for his decision in the *Red Jacket Coal Company* case,⁷³ explained in a letter to Senator Overman that he had only followed controlling precedents.⁷⁴

Hence the practices of earlier confirmation hearings furnish little support to Mr. Justice Fortas's position. Yet precedent and the speech and debate clause were not the only broken strings to the judicial violinist's bow.⁷⁵ He relied also on more general notions of the separation of powers,⁷⁶ a concept with the useful characteristic of being insufficiently defined to permit effective rebuttal. Nor did the Justice feel obliged to flesh out the exact contours of the doctrine.

He might have meant simply that when the Constitution entrusts a question to one branch of the government, which resolves the question in a particular way, it is improper for a member of that branch to inform the other branches of the reasons underlying the decision. Some

to explain your own constitutional philosophy as expounded by you in a decision you wrote.

Judge THORBERRY. I would not say judicial privilege, Senator. If I may say—I must say, Senator, that I believe that under the separation of powers, under the provisions of the Constitution, under my judicial oath, after once having expressed my views for a court, I ought not to try to amend it, take back, add to, or any thing else.

Fortas Hearings, pt. 1, at 256.

70. 252 F. Supp. 234 (W.D. Tex. 1966). The decision, by a three-judge panel, struck down Texas's poll tax as unconstitutional.

71. *Hearings on Nomination of Thurgood Marshall*, *supra* note 54, at 56.

72. *Hearing on Nomination of Charles E. Whittaker*, *supra* note 54, at 33.

73. 18 F.2d 839 (4th Cir. 1927); *see* pp. 702-03 *supra*.

74. 72 CONG. REC. 7793 (1930) (remarks of Sen. Overman). During the Fortas hearings, Senator Ervin recalled that Mr. Justice Stewart had "made no objection to answering questions" about "decisions he had written as a circuit judge." *Fortas Hearings*, pt. 2, at 1304. The Stewart confirmation hearings have not been printed. *See* note 54 *supra*.

75. *See Fortas Hearings*, pt. 1, at 168, 176.

76. *Id.* 185, 214-15.

such theory would appear to be the basis of Mr. Justice Fortas's contention that "no matter how much he might want to" it would be improper for him to explain the reapportionment cases, since he would thereby become an "instrument by which the separation of powers would be called into question."⁷⁷ But such a doctrine seems extraordinarily broad. The power to recognize foreign governments is as clearly committed to the President⁷⁸ as the power to overturn statutes is to the Supreme Court, yet no one would suggest that this fact alone makes it improper for the Secretary of State to explain a particular recognition decision to the Senate.⁷⁹

It is thus likely that Mr. Justice Fortas's reliance on separation of powers is to be taken, not with reference to doctrines generally applicable to the relationship of the three co-ordinate branches of the government, but in terms of constraints implicit in the idea of judicial, as opposed to executive or legislative, power.

Support for this conclusion can be drawn from the Justice's comments at the only point in the hearings where he discussed the policy considerations that might underlie the constitutional duty he perceived:

I cannot address myself to the question that you have asked be-

77. *Id.* 215.

78. *United States v. Pink*, 313 U.S. 203, 229 (1942); *United States v. Belmont*, 301 U.S. 324, 328 (1937).

79. A claim of privilege would of course be a different matter. *Cf.* note 20 *supra*. Cases like *United States v. Morgan*, 313 U.S. 409 (1941), are not to the contrary. In *Morgan* the Supreme Court held that a district court judge had erred in overruling the Secretary of Agriculture's objections to the taking of his deposition in a suit challenging his determination of a reasonable rate under the Packers and Stockyards Act, 7 U.S.C. § 181 *et seq.* (1964). Courts and administrative agencies, the opinion said, "are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other." 313 U.S. at 422.

But *Morgan* was addressed to a problem different from the one involved in the Fortas hearings. The Secretary had, by objecting to the questions, made a claim of privilege: unlike Mr. Justice Fortas, he indicated that he did not wish to answer. The Government made no claim that any duty not to testify rested on the Secretary; instead it suggested that the case would have been different had the Secretary "voluntarily submitted to examination as a witness in his own behalf." Brief for Appellant at 32.

To the extent, moreover, that the decision in *Morgan* was based on the finding that the Secretary was exercising quasi-judicial power, and that "an examination of a judge would be destructive of judicial responsibility," 313 U.S. at 422, it rested on established principles of appellate review. It is settled that when the decision of an inferior tribunal is embodied in a record regular on its face, the reviewing court will not probe into motives that may underlie the record but are not patent. This principle applies variously to jurymen, *Mattox v. United States*, 146 U.S. 140 (1892); arbitrators, *Duke of Buccleuch v. Metropolitan Bd. of Works*, L.R. 5 H.L. 418, 457, 462 (1872); judges, *Fayerweather v. Ritch*, 195 U.S. 276 (1904); and tax assessors, *Chicago, B. & Q. Ry. v. Babcock*, 204 U.S. 583 (1907). The effect of *Morgan* was merely to apply this longstanding doctrine to review of the quasi-judicial decisions of administrative agencies. Grounded as it is in the necessities of appellate review of lower-tribunal determinations, the rule has no particular application to the situation presented by the Fortas hearings.

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cause I could not possibly address myself to it without discussing theory and principle. And the theory and principle would most certainly be involved in situations that we have to face.

Also, I could not discuss a case decided by us without discussing theory and practice, and thereby laying open the possibility of petitions for rehearing, thereby laying open the possibility of references to prejudgments on my part, thereby laying open the possibility that litigants and their counsel would use some remarks that I might have made here in the course of the presentation of their case.⁸⁰

But if the duty resting on the Justice is, as he suggested, rooted in the difficulties of trying cases and sitting in judgment, it is hard to see why these difficulties are not fully resolved by the established rule entitling any nominee to refrain from discussing situations that are likely to come before him for decision.⁸¹ It is simply not true that *every* discussion of theory, principle, or practice involves a real danger of prejudging future cases. When there is a danger of prejudgment, the traditional rule—as previous nominees recognized—fully protects the Court, the Justices, and potential litigants.⁸²

The Fortas doctrine, on the other hand, prevents a Justice from speaking out even when there is no danger of prejudging a future case. Such a result seems unfortunate in view of the relationship between the Supreme Court and the people. As an oligarchic institution in a generally democratic society, the Court's prestige, power, and authority all depend ultimately on its ability to communicate clearly and convincingly to the American people the worth of the constitutional principles which it applies and the manner in which those principles inform its decisions.⁸³ Hearings on the confirmation of a Supreme

80. *Fortas Hearings*, pt. 1, at 181-82.

81. Fear of petitions for rehearing, in particular, seems exaggerated. A case in which such a petition may still be filed should simply be treated as a pending case for purposes of the rule against comment.

82. It is conceivable that in a limited class of situations a sitting Justice of the Supreme Court might have a duty to assert, not his own privilege, but that of his colleagues—just as an attorney is under a duty to assert his client's privilege. This would certainly be the case in regard to inquiries as to the philosophy of other Justices, or as to the course of discussions in conference, for example. But the Senators asked no questions along these lines, Mr. Justice Fortas never based his duty on such a principle, and it is hard to see why it should be applicable at all to the type of question put to him—interrogation concerning not some other Justice's philosophy, but his own.

83. On this point the commentators have achieved an unaccustomed unanimity. *See, e.g.,* A. BICKEL, *THE LEAST DANGEROUS BRANCH* 95 (1962); E. ROSTOW, *THE SOVEREIGN PREROGATIVE* 88 (1962); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1, 19 (1959); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 *U. PA. L. REV.* 1, 4 (1959). Mr. Justice Fortas himself thought that communications between Court and people ought to be improved. *Fortas Hearings*, pt. 1, at 112.

Court nominee attract wide public attention and provide a convenient forum from which the teaching function of a Justice of the Supreme Court may be exercised. The Supreme Court decisions for which Mr. Justice Fortas was attacked are considered by most legal observers to be fair and right, yet they are the subject of considerable public misunderstanding and abuse. Mr. Justice Fortas is an excellent judge, a practiced speaker, a skilled advocate, and a former law professor. By declining to defend the Court, he missed an opportunity to educate the people, and perhaps even the Senate.