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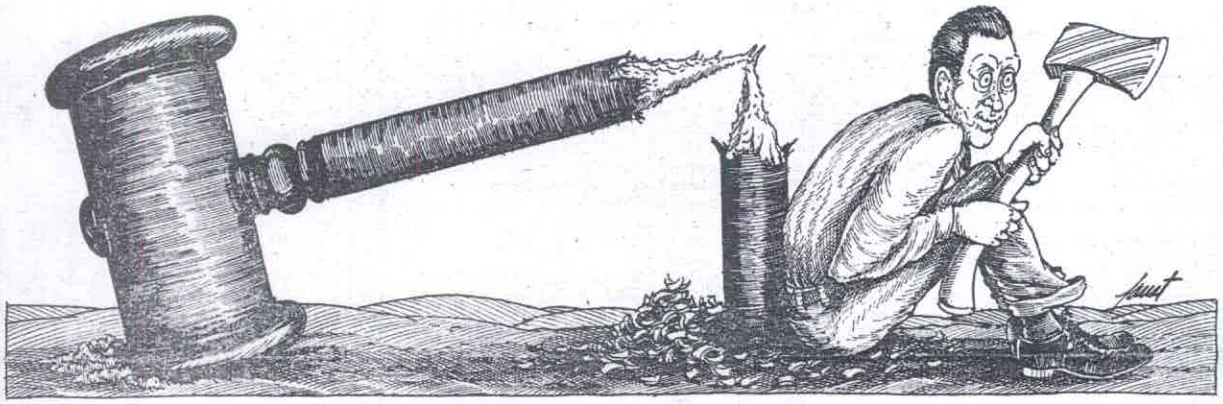
Disturbing questions about justice



A Question of Judgment

The Fortas Case and the Struggle for the Supreme Court.

By Robert Shogan.

Bobbs-Merrill. 314 pp. $10

Impeachment

Trials and Errors.

By Irving Brant.

Knopf. 202 pp. $5.95

Reviewed by EDWIN M. YODER JR.

The Abe Fortas affair of 1968-69, in both its phases, was a less than admirable performance all around—for a brilliant Supreme Court justice who as both advocate and judge had broken new ground in constitutional law, for his congressional inquisitors, and for his White House sponsor in one administration and White House pursuer in the next.

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What is undeniable is that his failure to win confirmation as chief justice, followed at a short interval by his resignation under fire, set in motion one of the swifter alterations in the Supreme Court in American history. It was an epochal affair; it merits sober reexamination.

Robert Shogan, who covered the story for *Newsweek*, has written a sober but compelling account of Fortas's fall —tracing the justice's career all the way back to his days as an Agricultural Adjustment Administration lawyer in the New Deal. Irving Brant, biographer of President Madison and constitutional scholar, writes about the sequel to the Fortas affair—the brazen attempt to purge Justice Douglas by means of a hollow impeachment threat; but his book sheds revealing light on the Fortas case as well. The two books complement each other, and read together they raise disturbing questions.

Shogan is more than mildly critical of Justice Fortas in what he calls "a case of non-criminal, non-judicial behavior"; but he is more critical of the tactics by which Attorney General John Mitchell gained Fortas's resignation in May, 1969, under fire from a *Life* exposé.

Whatever the Fortas matter suggested about the public morality of the old New Deal liberals—an imponderable much canvassed at the time—it is in the subtle byplay of politics that the actual constitutional significance resides.

The bare facts are familiar enough. By resigning as chief justice at the pleasure of President Johnson (and, it was widely believed, in consideration of the possibility that his old rival Richard Nixon could be the next president) Earl Warren gave LBJ a chance to elevate his old friend Fortas, and to practice a bit of Johnsonian legerdemain—a chance, as Alexander Bickel noted at the time, "to negotiate the succession." "In simplest terms," as Shogan writes, "the President's pleasure was to give the opponents of the Warren Court a choice between promoting Abe Fortas and keeping Earl Warren." Here LBJ miscued. The opposition did not have to choose. In fact, the president, by promoting an incumbent justice, gave the Court's critics a splendid opportunity to convene an inquest into the Court's policies. Fortas sought refuge in the high-minded position that under separation of powers detailed responses on his part would be improper. But he wavered. And the position was undermined by his Washington reputation as a constant informal counselor to the president—scarcely a case of the strict separation of powers. ("In a Puckish departure from his customary discretion," Shogan notes, "Fortas listed himself in the 1965-66 edition of *Who's Who in the South and Southwest* as 'presidential adviser' and gave his address as 'care of the White House.' ")

What finally torpedoed the nomination, given that LBJ already played a weak hand, was the abrupt revelation that Fortas had accepted a $15,000 fee for summer school law seminars—the sum raised by rich men and former clients. There was nothing really wrong with this, as far as it went, and the hat had been passed unbeknownst to Fortas by a former law partner. But the handsome fee had come undeniably from men who might someday have business before the courts. And it rather suggested a lack of the nicest sense of propriety in the junior associate justice. And although it was not known at the time, the disclosure foreshadowed *Life*'s later revelation of Fortas's lifetime $20,000-a-year arrangement with the Wolfson Foundation, which was to end his career on the Court.

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(Continued from page 3) comments to the press and, together with the President, in indiscreet confidences to the Congress which influenced the outcome.

The Douglas impeachment brouhaha was a natural sequel to this productive administration exercise in extra-constitutional and politically opportune defenestration. With Fortas gone, there were those in the Justice Department and Congress who dared hope that Douglas could be pushed through the same window. Accordingly, House Minority Leader Gerald Ford within months launched noisy impeachment proceedings against Douglas—proceedings that are the basis of Brant's incisive little study, which among other things manages to depict Ford as a perfect blockhead.

At one point, Ford was heard to exclaim at "how easy it is to start impeachment proceedings and how broad the grounds are." Small wonder! Not only was he scandalously misinformed of the details of Douglas's relationship with the Albert Parvin Foundation (which had paid him $12,000 a year), his counsel had given Ford a view of the impeachment power that was dubious at best and utterly nonconstitutional at worst. On Ford's sweeping view of impeachment—that grounds for it are whatever the House thinks they are at any given time—an ambitious Congress could shortly make itself master of the other branches of government. Certainly the independence of judges would be undercut.

In a survey of every major impeachment, back to those of Judges Pickering and Chase and of Senator Blount, Brant persuasively shows that the founding fathers, anticipating just such slipshod partisans as Gerald Ford, intended impeachment to be a criminal proceeding, limited to indictable "high crimes and misdemeanors" and violations of the oath of office—not a vague inquest into the "behavior" of judges. But this view, securely grounded in the words of the Constitution as well as the debate records of the Federal Convention, has not prevented the political perversion of impeachment. Indeed, Brant shows that there has been recently a steady erosion of congressional understanding of impeachment. Construed as Ford would have it, impeachment becomes a process of attainder—the rendering of a judicial verdict by legislative vote, with the violation tailored to fit the violator; and that is flatly forbidden by the Constitution. It was Brant's interest in the best-known impeachment in American history—that of President Andrew Johnson in 1868—that led him to study the matter. The charges against Johnson fell one vote short, and thus was a baneful precedent of "disguised attainder" prevented.

As for the charges of substance against Douglas, they were demolished by the House Judiciary Committee. (Essentially, the bothersome point about the Wolfson Foundation's projected fee to Justice Fortas was Wolfson's own entanglement in the toils of the securities laws. The fee paid to Justice Douglas by the Parvin Foundation was not clouded by legal embarrassments. And in fact the Judiciary subcommittee found that Douglas had refused a larger salary, taking the $12,000, after taxes, as an expense account to defray the cost of a great deal of transcontinental and international travel in the foundation's behalf.) The most charitable judgment of Ford's speech of April, 1970, on the House floor is that he had failed—not for the first time—to do his homework well. But a darker miasma hangs over the misrepresentation of a hotel voucher to suggest that Douglas had been a "crony" of Bobby Baker, the deposed secretary to the Senate majority.

Read together, these two books are disturbing, for they suggest that most of the discussion of the Fortas case at the time fell short of getting to its constitutional implications. Whatever Justice Fortas's errors of arrogance or avarice, they are by no means the most disturbing legacy. The fact is that an administration ambitious to reshape the highest court in the land found ways, short of impeachment, to depose a justice and sought, by bogus impeachment threats, to depose another. Thus was a questionable precedent in extraconstitutional procedure set. It was, Abe Fortas told friends afterwards, as if a car had hit him as he stepped off the curb. That wasn't a car, Judge, it was John Mitchell. □

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(Continued from page 1) here, as Irving Brant shows, is that the distinction between official and unofficial behavior in a judge tends to become muddled when political passions slip the leash. With excellent reason, the federal judiciary is separate and self-policing; judges are no more answerable for their unofficial demeanor to Congress or the president than the latter are to judges for theirs. As for official behavior, the case of course is different: Congress has the ultimate weapon of impeachment. But it is a weapon the founding fathers wisely restrained by limiting the grounds to criminality. The common misconception that the words "during good behavior," as describing tenure, arm Congress with a kind of moral surveillance is, as Brant demonstrates, both false and pernicious. The Federal Convention considered and rejected such British models of removal in 1787.

When *Life* broke its story of Fortas's former relationship with the Wolfson Foundation in the spring of 1969, some months after the debacle over the chief justiceship, there was talk of impeachment—loose talk, most of it, and constitutionally illiterate as well. (Just how constitutionally illiterate is the burden of Brant's discussion of the ensuing impeachment move against Douglas.)

Fortas's entanglement with Wolfson, who had committed his criminal stock manipulations some years before he met

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Fortas, was "non-criminal and non-judicial," as Shogan says, and thus entirely beyond the impeachment power as properly understood. But that fact did not stop the Nixon administration from exploiting a fuzzy and partial public understanding to press for Fortas's removal by extraconstitutional means:

> Throughout the controversy [writes Shogan] the attorney general and the President were guided by two objectives. One . . . was to force Fortas off the Court. The other was to avoid . . . the appearance that the Republican Party, and particularly the Republican President, was exerting a partisan influence on events.

The matter was pressed. Leaks to the press—for instance, about Attorney General Mitchell's "secret" visit to Chief Justice Warren—and to influential congressmen gave rise to damaging innuendos. These, coupled with Fortas's failure at the outset to tell the full story of the free arrangement, helped make the thing seem more sinister than it was. Shogan again:

> . . . The sensitive ramifications of the case should have obliged the Justice Department to conduct any investigation in the strictest confidence. Instead . . . Mitchell indulged himself in gratuitous (Continued on page 15)