

JUDGMENT ON A JUSTICE

Each of us is a member of an organized society. Each of us benefits from its existence and its order. And each of us must be ready, like Socrates, to accept the verdict of its institutions if we violate their mandate and our challenge is not vindicated.

IN a sense, Abe Fortas prejudged himself last year in that characteristically pithy statement on civil disobedience. Last week, having violated society's mandate, Fortas reluctantly accepted its verdict by resigning from the U.S. Supreme Court. He thus became the only man in the history of the Republic to be forced from the high bench.

Fortas really had little choice: he had either to resign or to face almost certain impeachment by the House of Representatives. Though he attempted to dismiss his financial dealings with the Wolfson Family Foundation as routine and blameless, the pressure from both Congress and the Nixon Administration became severe and finally intolerable. Fortas decided to resign, he said, as soon as he realized that the furor surrounding him—and the court—could not otherwise subside. "Hell," he said piously, "I feel there wasn't any choice for a man of conscience."

Terse Exchange. "There has been no wrongdoing on my part," he insisted in a written explanation to Chief Justice Earl Warren. "There has been no default in the performance of my judicial duties in accordance with the high standards of the office I hold." He sent a copy to President Nixon, along with a two-sentence letter of resignation. The reply from the White House, which clearly welcomed just such an outcome, was equally terse: "I have received your letter of resignation," wrote Nixon, "and I accept it, effective as of its date."



CELLER
Baby delivered.

Neither message more than hinted at the tension that had hung over the Capital for eleven days. The relief in Washington was audible. New York's Representative Emanuel Celler, chairman of the Judiciary Committee, which would have initiated impeachment, said that he felt "like a woman who has just been delivered of a baby." While the possibility of continued investigation remained, Celler, like many others in Washington, wanted to see the case closed. He called the Fortas case "a Greek tragedy"—and again many in the Capital agreed.

Lifetime Income. In the end, practically no one could be found to speak up to excuse conduct that was, at very best, grossly improper. "He has not com-



FORTAS
Paradoxes abounded.

mitted the ultimate evil of taking a bribe," said Stanford Law Professor Gerald Gunther. "But that misses the point. There is a question about the appearance of virtue on the court." In fact, Fortas' action had been even more ill-judged than was at first realized. Not only had he received \$20,000 from Louis Wolfson's foundation in 1966—not giving it back until eleven months later, after Wolfson had been indicted for defrauding stockholders—but he had also agreed to accept \$20,000 a year for life. The payments were to go to his wife Carolyn, also a lawyer, if she survived him. The services he or his widow were to perform were spelled out only vaguely in his case. He had intended, he told Warren, to "help shape" the program and activities of the foundation, whose stated aim was to further racial and religious harmony. There was no explanation of Mrs. Fortas' role. While

DON SIDER



MITCHELL
Options circumscribed.

Fortas denied interceding for Wolfson with any Government agency, he did admit to receiving from Wolfson letters about the financier's business problems. At week's end, it was revealed that the Justice Department had subpoenaed the letters from Wolfson and his foundation.

The Justice compounded his own troubles—and the furor in Congress—by brushing off LIFE's original disclosure of the Wolfson link with a preliminary statement that omitted so much that it was almost a falsehood. It was not until the FBI had quizzed Wolfson in prison—using the power of a grand jury to force his testimony and to give him immunity from prosecution in connection with it—that Fortas wrote a fuller statement, along with his resignation.

Jail Interview. Almost no one, least of all those in the Nixon Administration, wanted to see the impeachment carried out. It would have poisoned the atmosphere in Washington and reflected unfavorably on the entire Government. More practically, it would also have monopolized the time of both houses of Congress for weeks and even months. Nixon cautioned Republicans in Congress against hasty action, and G.O.P. Congressional Leaders Gerald Ford and Everett Dirksen passed the word.

Not that the Nixon men lacked eagerness for the kill. They simply wanted to do the job bloodlessly, or at least to make sure that Fortas' was the only blood spilled. As the LIFE story was being prepared, Will Wilson, Assistant Attorney General for the criminal division, had personally begun an investigation of the Fortas-Wolfson relationship. His findings were presented to Chief Justice Warren by Attorney General John Mitchell. The next day the Justice Department dispatched agents to quiz Wolfson in his cell at the federal prison camp in Eglin, Fla.; the material they wanted was in hand. Among other things, Wolfson believed that Fortas was

going to intercede for him with the Securities and Exchange Commission.

While Fortas delayed, pressure built up in Congress, and even Fortas' staunchest friends deserted him. Chairman Celler quietly ordered his Judiciary Committee staff to begin preparing articles of impeachment. With the agreement of House leaders, he and William McCulloch, the ranking Republican on the committee, talked with Mitchell. Though no one would say what Mitchell disclosed, his evidence was apparently convincing. "We got a vast amount of information," Celler told TIME Correspondent Neil MacNeil. "The Attorney General unfolded the whole story. It clinched the matter. It necessitated that the Judiciary Committee take some action unless Fortas resigned."

Violin Consolation. Finally aware of the forces arrayed against him, the Justice obliged. More than his own rep-

Fortas to resign. Still, objections paled beside Fortas' admitted and gross indiscretion. In any case, regardless of the Administration's role, Congress would doubtless have met its constitutional responsibility to police the judiciary.

Even without impeachment, the case was certainly tragic. One of the most gifted lawyers of his generation, Fortas in 43 months on the bench had already proved himself an asset to a court that has often been faulted for its un-lawyerlike decisions. Though he had been prevented last year from becoming Chief Justice by congressional opposition—an obstruction that nearly everyone now views as providential—he nevertheless might have become an ever greater influence on the court and country.

Mysteries and paradoxes in the case abounded, but one of the most puzzling aspects was Fortas' concern for what, by his standards, was a relatively

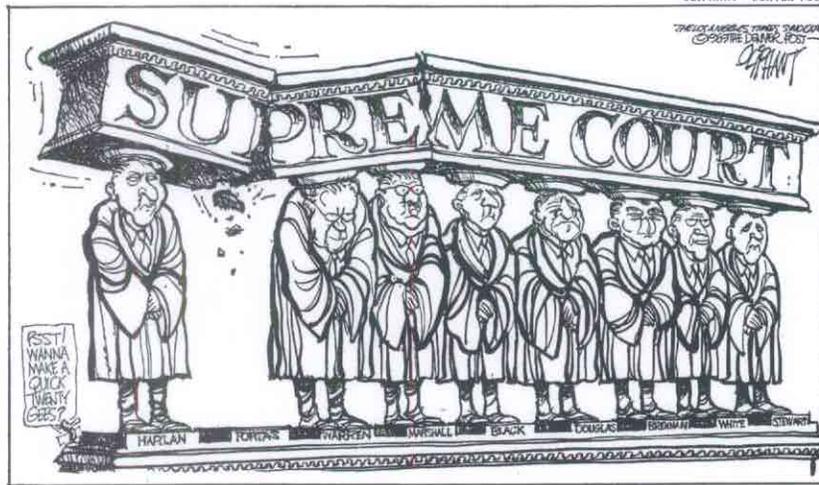
one Johnson intimate remembered, "who was most responsible for Johnson's never answering criticism. 'Leave it alone,' he'd say. 'Don't dignify it.'"

With Fortas' resignation and the retirement next month of Chief Justice Warren, Nixon will have an unprecedented opportunity to change the court in the first six months of his presidency. At the same time, the near-impeachment has circumscribed his own options, probably ruling out anyone, like Attorney General Mitchell, who could be tagged, as Fortas was, the President's "crony." It is more likely now that Nixon will look to the lower courts or to the law schools, where he could find distinguished, nonpartisan professors. For Chief Justice, he might elevate someone already on the Supreme Court. Associate Justice Potter Stewart, an Eisenhower appointee, is considered a sound, noncontroversial choice for the spot. Somewhat to the right of center, Stewart has a solid, if not brilliant reputation. The two new openings might be filled by Henry Friendly, a judge on the 2nd U.S. Court of Appeals, Harvard's Paul Freund, noted civil libertarian and authority on the Supreme Court, or Warren Burger, formerly an Eisenhower Assistant Attorney General and now a judge on the District of Columbia's Court of Appeals.

The New Men. Whoever they are, the new men will probably be more conservative than either Fortas or Warren, who were in close agreement on most issues. Still, conservative critics who expect a turnabout in decisions are almost certain to be disappointed. For one thing, the major decisions of the Warren Court are largely irreversible, already part of the social fabric. For another, the court almost always changes at a pace that can only be called glacial. Innovations usually proceed decision by decision, year by year.

What change there is can usually be measured only by degree. If the new appointees are in fact conservative, their effect will probably be only to slow legal innovation. It is far from certain that Nixon, even if he tried, could swing the court in the direction he wanted. Justices often disappoint Presidents. "You shoot an arrow into a far-distant future when you appoint a Justice," says Yale Law Professor Alexander Bickel. "And not the man himself can tell you what he will think about some of the problems that he will face."

One change may be a more watchful executive and Congress. As a result of the Fortas affair, congressional demands have arisen for curbs on outside activities by Justices and full disclosure of incomes. The Senate will almost certainly give greater scrutiny, for a while at least, to presidential appointments to the high court. That is probably all to the good, but the Justices may also find themselves under personal attack for unpopular decisions. The long-range result of the Fortas case could be a more vulnerable judiciary.



utation worried him, he said. The court's prestige and independence were also endangered. He might have added that even if he had survived impeachment, his own position as a Justice would have been untenable. As it is, the Justice Department is continuing its investigation of his affairs. (Mrs. Fortas believed that the phone in their Georgetown home was being tapped.) For the moment, at least, Fortas, like everyone else, seemed vastly relieved. The day after he resigned, he consoled himself with his violin and the soothing elegance of Mozart and Haydn.

As self-serving as his comments may have been, Fortas accurately believed that a battle would have damaged the balance of the three branches of Government. Some in Washington already believed that the Administration had pushed too hard to dislodge Fortas. Philip Kurland, a Supreme Court scholar at the University of Chicago, suspected a "planned operation to dump him." Tennessee's Democratic Senator Albert Gore called for a congressional investigation to determine if the Republicans had used unreleased information to force

small sum of money. Until he went on the bench, he grossed well over \$100,000 a year; some estimates go as high as \$250,000. His wife, a noted tax lawyer in his old firm of Arnold and Porter, still makes more than \$100,000. They lived exceedingly well, but Fortas has also in the past freely donated his expensive time and talent to causes and people he believed in. As it happens, the recent pay raise for Supreme Court Justices was exactly \$20,500—\$500 more than Wolfson offered.

Beyond Fortas' personal agony, some saw in him the pathetic symbol of the Johnson years—that perhaps he was even representative of the old liberal era that began with the New Deal. Motivated by unquestioned humanitarian ideals, many such men nevertheless grew so accustomed over 30 years to power and influence—and the material goods both brought—that they believed they could do no wrong. Lyndon Johnson's self-righteous dismissal of his critics was not so very different from Abe Fortas' arrogant assumption that he had done nothing wrong in dealing with a man like Wolfson. "Fortas was the guy,"