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In The Nation: U.S. Senate vs. Fortas.

By TOM WICKER

WASHINGTON, Sept. 11 — President Johnson's nomination of Abe Fortas to be Chief Justice of the United States has produced one of the most complex and fascinating controversies since Majority Leader Lyndon Johnson led the fight in the late fifties against President Eisenhower's nomination of Lewis Strauss to be Secretary of Commerce. This reflects the fact that nothing is so shattering in American politics as one constitutional branch in collision with another.

In the Fortas matter, the Senate is threatening open opposition to the executive branch, and a more subtle conflict with the judicial branch —a sort of two-front war within the system of checks and balances that could have far more fateful consequences than Fortas' service or Johnson's vindication.

The Political Snarl

There are at least five separate strands, of varying worth, in this snarl of politics, ideology and constitutionality. The first of these, most loudly asserted by Senator Robert Griffin of Michigan, the Republican leader of Fortas' opposition, is also the least.

But the likelihood is that the charges against Warren's procedure, as well as the criticism of Fortas' political activities, are less important in themselves than in giving a color of merit to a fourth and stronger thread in the tangle—the desire of Senate Republicans and of Nixon to reserve such a vastly important appointment for themselves. (It is fascinating to speculate on Nixon's choice. Would it be Thomas E. Dewey, perhaps? Herbert Brownell? Charles Rhyne?)

A Galling Precedent

The Republicans have a galling precedent. For six long years, from 1954 through 1960, Democratic Congressional majorities—again led by Senate Majority Leader Lyndon Johnson—repeatedly refused Eisenhower's annual pleas to create more Federal judgeships to relieve critically overcrowded dockets. In 1959 Eisenhower even offered, to no avail, to divide his nominations to these judgeships equally between Democrats and Republicans.

Once the Democrats were in office and in control of Federal appointments, naturally, they lost no time in creating 73 new judgeships.

Griffin, with some support from Richard Nixon, maintains that it is too late in Johnson's term for him to make such an important appointment. This is patent nonsense: Johnson does not cease to be President and his powers — of veto, appointment and the like — run undiminished until next Jan. 20. Thousands of major appointments have been made by "lame ducks" and a goodly number might just be made by Richard Nixon four or eight years from now.

A Contingent Retirement

A somewhat better argument against Fortas' confirmation is that Chief Justice Warren had no right to make his retirement contingent upon qualification of a successor, in effect giving the Senate a choice between Johnson's nominee or Warren himself. There is some suspicion in the Senate that this was the President's idea, not Warren's.

There may also be some validity to the argument that Johnson chose cronies in Fortas and Judge Thornberry — who was named to take Fortas' present seat on the Court—and picked, in Fortas, a man who had breached judicial custom in continuing as something of a political adviser to the President.

It is the final strand of the snarl, however, that bears meaning far beyond the identity of the next Chief Justice. or of the man who chooses him. It is the question whether Abe Fortas' fitness to be Chief Justice is to be judged by his character and ability or by decisions he already has written or concurred in

Numerous Senators—mostly Southerners — strongly disagree with Fortas's civil libertarian views and those of the Court on which he serves. If his nomination is to be defeated for ideological reasons, it might well bring undue Senate influence to bear on future Court decisions, and even on Presidential appointments, and it could cause other sitting justices to guard their flanks at the expense of bold decisions, lest they too be excluded by the Senate from the Chief Justiceship. The net effect could only be an impairment of judicial independence.

Judicial Independence

The Supreme Court, on the other hand, is a "policy court" whose decisions profoundly affect every aspect of American life. Since Senators are human and political, they can hardly be expected to be altruistic and theoretical about such an unusual chance to influence the course of vital events as is provided by the nomination of a Chief Justice.

That is why, at the least, the Fortas matter ought not to be smothered in a committee dominated by Southerners, or filibustered to death by a minority. If the policies of the Warren Court are what is to be tried, then the whole Senate ought to stand up and be counted.