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The Fortas Nomination

The Fortas and Thornberry nominations for Chief Justice and Associate Justice of the Supreme Court are expected to reach the floor of the United States Senate next week after a journey of two and a half months through the shoals of Chairman Eastland's Judiciary Committee. Although the committee has promised to allow the nominations out next Tuesday, the price paid is the continuation of hearings until then and the threat of a filibuster thereafter.

Despite the personal attacks and the tangential routes taken by the Judiciary Committee, it must be clearly recognized that it is the Constitutional right and duty of the Senate to give its consent to Supreme Court nominations by the President. Accordingly, we regret that Mr. Fortas has now rejected the Judiciary Committee's latest request to return for further questioning. Although he was grilled for four days last July, some new matters have been introduced about his involvement in extra-judicial concerns. He can, of course, decline to answer questions that he feels are an intrusion on adjudicated cases. Yet, by appearing once again, he can also underscore his superb judicial qualifications in the face of what may be inquisitorial and irrelevant needling.

Unfortunately, the Judiciary Committee has not kept the hearings on a high plane. The subject-matter has been dominated by Senator Thurmond of South Carolina, whose gutter-level assault on Justice Fortas is based on movies the Senator has been showing Congressmen behind the scenes. One is called "Flaming Creatures" and the others are penny arcade peep-show spectaculars. Senator McClellan of Arkansas has joined in the fun by circulating magazines with suggestive photographs. Their hope is to get across the idea that the Supreme Court has been soft on hardcore pornography; that Justice Fortas is part of the Court; ergo, he should not be Chief Justice.

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In point of fact, there were two guideline cases involving pornography decided by the Supreme Court in the past few years. In the Schackman case in 1967, which concerned alleged pornographic films, Justice Fortas was on the majority side in a 5-to-4 ruling that they were not obscene within the meaning of the law. No opinion was written in that case. In a previous 5-to-4 ruling in the Ginzburg case, in which a publisher was convicted for "pandering," Fortas voted to uphold the conviction.

To reargue these decisions instead of Justice Fortas' judicial qualifications is in itself pandering to the lowest Senatorial instincts; to pass out magazines and show movies and blame Mr. Fortas for their obscenity, real or otherwise, is to attack one man when the real target is the Supreme Court itself. That, of course, has been the aim of the demagogues all along.