

FORTAS ABANDONS NOMINATION FIGHT; NAME WITHDRAWN

Justice, in Letter to Johnson, Says Senate Attacks Might Mar Court's New Term

DILEMMA FOR PRESIDENT

He May Try Another Man, Risking a Second Rebuff, or Yield to Successor

Texts of Fortas letter and Johnson statement, Page 46.

By FRED P. GRAHAM
Special to The New York Times

WASHINGTON, Oct. 2—Associate Justice Abe Fortas withdrew today as President Johnson's nominee for the office of Chief Justice, clearing the way for the President to submit a possible second nomination to the Senate.

In a letter that concluded with a prayer for "fairness and justice and moderation," Justice Fortas asked Mr. Johnson to withdraw his name to end the "destructive and extreme assaults upon the Court." The President promptly complied with Mr. Fortas's request.

The day's events also served to terminate Mr. Johnson's nomination of Judge Homer W. Thornberry of the United States Court of Appeals for the Fifth Circuit to succeed Mr. Fortas as associate justice. There is now no vacancy for Mr. Thornberry to fill.

New Nomination Weighed

Mr. Fortas made it clear that he would remain on the Supreme Court as an Associate Justice, at least during the term that begins next Monday.

Sources in the White House reported this afternoon that Mr. Johnson was consulting with legal advisers about his next move.

The President was said to be undecided whether to drop the matter and leave the appointment to the next President, or to send up the nomination of a

noncontroversial figure who might win confirmation in the fading days of the Congressional session.

Capitol Hill was swept with rumors of possible nominees. They included Senator Thomas H. Kuchel, Republican of California, who was recently defeated in a primary election;

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Senator Philip A. Hart, Democrat of Michigan; Arthur J. Goldberg Jr., a former Associate Justice; Secretary of Defense Clark M. Clifford; Secretary of the Treasury Henry H. Fowler, and Cyrus R. Vance, one of the United States negotiators at the Paris negotiations with the North Vietnamese.

Mr. Fortas's letter began by taking note of the vote in the Senate yesterday in which supporters of his nomination failed by a wide margin to cut off a filibuster by his critics. The vote was 45 to 43 in favor of the nomination's supporters. But that was 14 short of the two-thirds margin necessary to cut off debate.

Because Congressional leaders hope to adjourn for the year in a week or 10 days, most Senators considered the vote a death blow to Mr. Fortas's nomination.

Fortas Notes Criticism

Justice Fortas explained in his letter that "continued efforts to secure confirmation of that nomination, even if ultimately successful, would result in a continuation of the attacks upon the Court which have characterized the filibuster—attacks which have been sometimes extreme and entirely unrelated to responsible criticism."

"Attacks of this sort would be especially inappropriate and harmful to the Court and the nation if they should continue while the Court is in session, engaged in the adjudication of issues of great importance to the nation as well as the litigants," he said.

"I pray that we shall see," he said, "in all of our nation, renewed dedication to the principles of fairness and justice and moderation, without which our democracy cannot continue."

Justice Fortas indicated his future plans with the terse remark that when the Supreme Court convenes on Monday, "I will, of course, be participating in its work as Associate Justice."

According to Banning E. Whittington, the Supreme Court's press officer, Mr. Fortas wrote the letter yesterday after the Senate voted. It was typed this morning and delivered to the White House at about 11:15 A.M. by Mrs. Gloria Dalton, his secretary.

Mr. Whittington said that Justice Fortas did not come to the Supreme Court today because it is Yom Kippur, the Jewish holiday.

A White House spokesman said today that the contents of the letter were known before it was received, but there was no elaboration as to any conversations that might have taken place between Justice Fortas and Mr. Johnson before it was written.

Mr. Fortas's withdrawal, though expected, left the situation in considerable confusion.

There have been widespread reports in Washington that the President's mood has blackened as the four-day filibuster progressed against his old friend and adviser and that Mr. Johnson might decline to send up another name.

However, this possibility was undercut by the prospect that the opportunity to nominate a Chief Justice might thereby go by default to Richard M. Nixon,

the Republican Presidential nominee.

A further complication arises from the ambiguous position of Chief Justice Earl Warren.

Mr. Warren wrote President Johnson on June 13 of his desire to retire, "effective at your pleasure." President Johnson replied on June 26 that he would accept "your decision to retire effective at such time as a successor is qualified."

This gave rise to one of the major issues used against Mr. Fortas — the charge that no vacancy yet existed.

The Senate majority leader, Mike Mansfield, gave this issue additional credence when he warned Mr. Fortas's conservative opponents that Chief Justice Warren might tear up his letter of resignation and remain on the Supreme Court for years if they blocked the Fortas nomination.

According to opponents of the Fortas nomination, Mr. Warren could legally withdraw his tender of retirement even before President Johnson had a

chance to submit a second name. However, Mr. Warren's few comments on the matter since June 13 suggest that he intends to leave whenever any successor is confirmed.

Mr. Warren attended a White House ceremony today as President Johnson signed four conservation bills, including one creating the Redwoods National Park in California. Mr. Warren, a former Governor of California, has long advocated such a park.

When he left, the Chief Justice turned aside reporters' questions, saying jovially that he had not come for a news conference. George Christian, the White House press secretary, said later that the President and the Chief Justice had not discussed the Court vacancy.

Two of the leaders of the effort to block Mr. Fortas, Senator Robert P. Griffin, Michigan Republican, and Senator Sam J. Ervin Jr., North Carolina Democrat, served notice today that they might oppose a second nomination unless Mr. Warren either resigned or set a specific resignation date.

Although most of Mr. Fortas's opponents seemed to be treading water until the President clarified the situation, some of their statements indicated a disposition to fight any second nomination.

Senator Griffin and Senator Howard Baker, Tennessee Republican, both expressed a hope that Mr. Johnson would not send up another name.

Two other Republicans, Strom Thurmond of South Carolina and Clifford P. Hansen of Wyoming, remained so unmollified by Justice Fortas's withdrawal that they called for him to step down from the bench.

There has been some talk that the President might wait until Congress adjourns and then make a recess appointment. However, as Senate majority leader, Mr. Johnson supported a resolution that deplored President Eisenhower's use of recess appointments, and leading Democrats in the Senate have

said publicly that it would not be a good idea to resume the practice now.

O'Dwyer Is Critical

Paul O'Dwyer, the Democratic nominee for Senator, declared yesterday that the refusal of the Senate to stop the filibuster against Justice Fortas showed "the eagerness of Northern Republicans, including so-called moderates, to join racist and anti-Semitic forces from the South in assaulting the Supreme Court, destroying the liberties of individuals and repressing minority groups."

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