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## Book Review: Fortas: The Rise and Ruin of a Supreme Court Justice. by Bruce Allen Murphy.

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loss as a consequence of having children against the worth of children to the woman and society. We would see to it that women get what most women want—time enough to nurture their children adequately without being punished later by an unforgiving job market. Children make losers of women only because our society devalues childraising.

Surely we can have no peace until we admit that children need us all, with our varied talents and skills, some probably gender based, some socially shaped, but all important. We can never reacknowledge this simple truth until we break free from radical feminism's repressive ideology that would deny us a free exchange of ideas. We must make up our own minds, live our lives in support of one another instead of at war, care for our children as we see fit, free from an ideological burden that impoverishes us all. We must learn to reconnect if our society is to survive.

**FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE.** By Bruce Allen Murphy.<sup>1</sup> New York: William Morrow. 1988. Pp. 717. \$25.00.

*John C. Chalberg*<sup>2</sup>

This is an overly long book about the public life of a Supreme Court Justice and his unplanned, undesired, and very brief judicial career. Justice Fortas served on the Court for a mere four years. Hounded by Lyndon Johnson to fill the vacancy created by the strange resignation of Arthur Goldberg, this "lawyer's lawyer's lawyer" reluctantly agreed to leave his lucrative Washington practice rather than disappoint his friend and client, the president. Harried by congressional conservatives, Fortas reluctantly resigned from the Court in 1969 rather than face certain impeachment at the hands of his enemies in Congress. In between there was the aborted nomination of Fortas to Chief Justice in the waning months of the Johnson presidency.

All this and more has been chronicled by Professor Bruce Allen Murphy, whose previous book was a study of the non-judicial, perhaps even injudicious, activities of Louis Brandeis and Felix Frankfurter.

Like the work on Brandeis and Frankfurter, this is biography

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as investigative reporting. If Murphy is right, he has found many "smoking guns," any one of which, had it been publicized at the time, would have been sufficient to assure that Fortas's tenure on the Court would have been even briefer than it was.

In brief, Professor Murphy doesn't much care for Abe Fortas. In fact, of the three subjects of his investigative eye Murphy has the least sympathy for Fortas. Like Frankfurter, Fortas enjoyed power and prominence during the New Deal. Unlike Frankfurter, Fortas was a Yale man, whose patron was fellow Yale professor William O. Douglas. Harvard, academically and socially, was simply not to his liking. It was Yale, not Harvard, which took a functional approach to the law; and right from the start an ambitious Abe Fortas wanted to understand how law actually operated in the real world. In addition, as a southerner (Memphis) and a Jew, Fortas thought he already had two strikes against him. The intolerance he detected in and about Cambridge threatened strike three. New Haven might not be ideal for the impoverished Fortas, but he thought it offered a more tolerant atmosphere in the classroom and out. Nothing he learned subsequently changed his mind.

Murphy spends little time tracing Fortas's early legal career. With Douglas's intercession he signed on with the AAA before following Douglas to the Securities and Exchange Commission. There were also stints of teaching at Yale and a wartime tour of duty with Harold Ickes and the Interior Department before Fortas settled in for what he expected would be a lifetime of work and pleasure as the ultimate Washington lawyer.

In Murphy's view there were two kinds of New Dealers after World War II: those who wanted an expansion of the New Deal for the sake of the nation and those who wanted a new deal for themselves. Fortas, the "legal gunslinger," falls easily into the latter category.

At this point problems—for Murphy—arise. Just who was Abe Fortas? Was he the preeminent wheeler-dealer, the last and best hired gun? Or was he the archetypal Cold War liberal? "Both," seems to be Murphy's answer. On the one hand, he contends that Fortas's failure to be elevated to Chief Justice sent the Court in a conservative direction, thereby changing American history "forever." In his concluding "political autopsy of Abe Fortas" Murphy compares the Fortas debacle to the Senate's 1987 rejection of the nomination of Robert Bork. In 1968 the liberals lost; nineteen years later they won. Therefore, Bork's was "not the first modern nomination rejected for ideological reasons." That dubious distinction, according to Murphy, belongs to Fortas.

This thesis strikes me as an oversimplification. In the first place, Murphy himself concedes that the "Fortas-Thornberry ticket" (Texas judge Homer Thornberry was the President's choice for the Fortas seat), would have probably shifted the court "more toward the middle." This is hardly a ringing endorsement for a Fortas-led Court as the embodiment of postwar liberalism. One doubts that there would have been all that much difference between a Fortas Court and a Burger Court.

Second, the interpretive thrust of this biography is to portray Fortas as anything but an ideologue. His friendship with Lyndon Johnson, which dated from Fortas's years at Interior, was based on their common approach to politics. Both were "problem-solvers." Neither "really had a philosophy." True, Johnson was everything Fortas was not. He was large of stature and of political ambition. He loved the public dimension of public life as Fortas did not. Fortas, on the other hand, was an intellectual and, ironically, one of "at least the same caliber as LBJ's enemies among the Harvards." So the two men did complement one another, but they also shared an aversion to ideological thinking in general and to doctrinaire liberals in particular.

Fortas, of course, did have a past. His *pro bono* work in defense of Owen Lattimore had long made him an object of the wrath of conservative anti-communists. But Murphy is quick to absolve Fortas of any personal links to the Communist party. Unable to find a shred of evidence that Fortas "even flirted" with the communist movement, he is convinced that his subject was not even aware of the existence of a CP cell within the AAA.

Murphy does find Fortas's defense of Lattimore to be commendable, but he notes that Fortas took few such cases and snidely suggests that he did so in this instance to "soothe his conscience." As a Washington Lawyer, Fortas had taken on a number of major business clients, thereby committing a form of "corporate treason" against his old New Deal agencies. It is ironic, then, that Fortas would subsequently be attacked by the Right in its McCarthyite campaign against "twenty years of (New Deal-style) treason."

That Fortas was *persona non grata* to conservatives does not mean that he was a liberal's liberal. What he was above all was Lyndon Johnson's personal friend, prized adviser, favored hand-holder, and ultimate yes-man. In some respects this is less a biography of Abe Fortas than a study of the "monogamous relationship" between these two very powerful men and the ruin of a professional career that resulted from that relationship.

Out of his friendship with Fortas, Johnson was determined to

place (Murphy's verb is "force") Fortas on the Court. The problem was the absence of a vacancy, but in Lyndon Johnson's world every problem had a solution. And the solution to this particular dilemma was provided by none other than John Kenneth Galbraith. Rumor had it that Galbraith was slated to become the Ambassador to the United Nations (following the sudden death of Adlai Stevenson). Not at all anxious to assume that post, Galbraith suggested to Johnson that Justice Arthur Goldberg would be an admirable substitute. Thus was set in motion a chain of events which culminated in Abe Fortas becoming a Justice.

How did Johnson engineer all this? The first step was surprisingly easy. Goldberg, who was as anxious to remain on the Court as Fortas was to remain off it, was led to believe that he would be given a major role in foreign policy-making and then a return engagement on the Court. The second step proved to be more difficult. Fortas genuinely did not want what LBJ wanted for him. After repeated rejections of his entreaties Johnson's ultimate ploy was to make an unfavorable comparison between Fortas's recalcitrance and the willingness of American boys to serve and die in Vietnam. Nevertheless, to his dying day Abe Fortas was convinced that he had "never said yes" to his would-be benefactor.

Between his appointment and his death in 1982 Fortas would spend four years "dying on the Court." Those four years comprise the heart of this book. More specifically, the focus is on the single year between Johnson's attempt to perform one more favor for his friend and Fortas's resignation in disgrace.

Once on the bench, Fortas was quite willing to succeed Earl Warren as Chief Justice. After that possibility had been scotched, he was willing to fight to retain the seat he had never wanted in the first place.

Such is the stuff of tragedy. Fortas did not want to surrender his access to the White House. Nor did he relish the prospect of a drastic cut in pay. Simply put, money was "too important" (Murphy's phrase) to him. Lastly, he doubted that he had the "philosophical assurance" (his own phrase) necessary for the bench. Despite these strong misgivings, Fortas permitted himself to be manipulated onto the Court. And, once there, he discovered that he did not necessarily have to surrender either power or money.

Murphy spends precious little time dissecting Fortas's judicial opinions. In brief, his thinking epitomized what is sometimes called "corporate liberalism." In civil liberties cases he invariably sided with the individual against the state. In antitrust cases he generally ruled for the business firm and against the government. In this re-

spect, Murphy concludes, Fortas differed from Goldberg, who usually supported the liberal position on both individual rights and regulation of business.

While not a liberal's liberal, Abe Fortas did establish himself as a member in generally good standing of the Warren Court. Differing with Justice Black, Fortas took the due process clause of the fourteenth amendment to mean that it was the Court's obligation to expand constitutional rights in the name of protecting minorities. Staking out a leadership role for himself, he argued strenuously for the rights of juveniles in criminal proceedings.

In the now famous *Brandenburg* case Fortas voted with the majority in striking down an Ohio criminal syndicalism law which had been used to punish "mere advocacy" of ideas—even if advocacy in this instance meant one Clarence Brandenburg's role in the burning of a wooden cross at a KKK rally. But when it came to the burning of an American flag Fortas indicated that there were limits to his willingness to protect "mere advocacy." Voting with the minority, Fortas refused to overturn a conviction for flag mutilation (in response to the shooting of James Meredith). To Fortas, this was not free speech, but an "act of desecration" which had to be judged by the standard governing "conduct" rather than speech.

This dissent notwithstanding, Fortas in a few years on the Court had clearly established a reputation as a liberal on personal freedom issues. But just as clearly, he was neither a doctrinaire liberal nor, dare it be said, an out of the mainstream liberal on such issues. After examining a series of obscenity cases (which provided senate conservatives with some of the rope used to hang Fortas in 1968) Murphy concludes that Fortas was somewhere in the middle of the Court.

In his only signed opinion on the subject of obscenity, Fortas revealed the "equivocal nature" of his thinking on this issue. The case was *Ginsberg v. New York*. One Samuel Ginsberg, owner of a combination stationery store and luncheonette, was convicted of selling two "girlie" magazines to a sixteen-year-old boy, who was acting on the instructions of his mother. Dissenting from the Court's affirmation of the conviction, Fortas argued that there was no criminal intent since Ginsberg had not "pandered" to the boy. Ironically, that same "pandering" formula would subsequently be used to convict people for aggressively selling otherwise legal materials. Therefore, in convincing his colleagues to focus on the conduct of the seller rather than the material itself, Fortas actually helped to make convictions in this area somewhat easier. In any event, even though he was always fearful of a new wave of book-burning, For-

tas was far from the protector of obscenity that his conservative opponents in the senate would soon make him out to be.

Unlike his mentor, William O. Douglas, Fortas was not a first amendment absolutist. This was made especially apparent in a 1967 case involving a conflict between press freedom and privacy rights. *Time v. Hill* concerned a *Life* magazine story on the connection between an actual hostage-taking incident and a fictionalized account of that same event. The hostage Hill family subsequently sued to recover damages for the invasion of their privacy. To Fortas that privacy was vastly more important than any free press claim. In his view, "Needless, heedless wanton injury" had been inflicted on the Hills in an attempt to sell magazines at the expense of their peace of mind. Fortas's opinion was the majority opinion until Justice Black decided to swing into action. In the end, that majority disappeared down a Black hole. "First amendment freedoms," Black argued, cannot be "weighed by judges against a judge-made right of privacy." Flushed with anger, Fortas issued his dissent "with more heat than usual"—a performance that Murphy attributes to Fortas's strong "hatred of the press."

Richard Nixon was the lawyer for the losing side in *Time v. Hill*. This footnote to the case would figure somewhat prominently in Fortas's confirmation proceedings. Those proceedings and the maneuverings that took place before and during, as well as in and out of hearing rooms and various Washington offices, comprise virtually half of the book. Again, Murphy has written not so much a biography of Fortas as a behind the scenes civic lesson on how Washington really works.

The result is a fascinating, if bumpy, read. Fearing that his ancient enemy, Richard Nixon, would be in a position to appoint his successor, Earl Warren resigned in June of 1968. But when he resigned he did so secretly and conditionally (in that it was to take effect upon the confirmation of his successor). Immediately White House wheels were set in motion—secretly. This was Lyndon Johnson's Court, and he was determined that his loyal friend would lead it even as he contemplated his own retirement. This meant cultivating senate "whales" like Richard Russell and Everett Dirksen. While all of this stroking and dealing was being done, news of Warren's pending retirement leaked. The result was a premature "Pickett's charge" led by Lyndon Johnson, master politician, but without all of his soldiers neatly in line. In this instance, however, defeat was not a foregone conclusion. As Murphy tells the story, this was a fight that not only swayed back and forth, but one that Johnson and Fortas might well have won.

It was also a fight that Murphy deeply believes that Johnson and Fortas did not deserve to win. In a desperate move to secure their victory Fortas himself rushed into the breach. Despite White House misgivings, he decided to testify in his own behalf. Never before had a sitting member of the Court submitted to senate questioning on the subject of his own nomination for Chief Justice. It proved to be a fatal, if almost unavoidable, blunder, not in the sense of dooming immediately his historic appointment, but in the sense of dooming irrevocably his historical reputation.

Here irony outweighs tragedy. Fortas was defeated for a number of reasons. His was a lame duck appointment (though there were precedents for such nominations). He was too liberal for many senators (though not the impassioned liberal many conservatives thought him to be). He was Jewish (though it was Fortas himself who was shameless in raising the largely phony charge of anti-Semitism). He was victimized by the anti-obscenity lobby (though unfairly so), thereby giving a number of fence-sitting senators a handy justification for refusing to vote cloture (thereby, no doubt, preventing confirmation by the barest of majorities). He was damaged by his connections (though his full association with the likes of the convicted Louis Wolfson would not be revealed until his final fight and ultimate defeat in 1969). And he was a Lyndon Johnson crony (though the full extent of his role in the Johnson administration would not be known until this book).

On more than one occasion Murphy broadly hints that, had the senate only known of Fortas's continuing role as an adviser to the President, he would easily have been defeated. In point of fact, they didn't and he wasn't. In short, the Senate acted properly, but for the wrong reasons.

Here tragedy replaces irony. Abe Fortas was a brilliant and successful Washington lawyer, who loved the Washington life, relished Washington power and treasured his access to the Johnson White House. Murphy goes to considerable lengths to chronicle Justice Fortas's extra-judicial activities on behalf of his "only client." Who initiated the contact? An almost immediately bored Abe Fortas. Within days of his accession to the bench he was offering his services to the president. Within the year he was making almost no effort to hide his relationship with Johnson.

During the remainder of the Johnson administration Fortas was involved in everything from speech-writing to crisis management (in the face of urban riots) to counseling the president to stay the course in Vietnam. It was as though nothing had changed. The president was still his client. It was as though nothing was wrong.

Nobody seemed to worry about compromising what the president considered to be his Court or what the Justice regarded as his part-time judicial career. It was just business as usual. And it all went well beyond anything Brandeis or Frankfurter did.

It was as if Fortas could not help himself—once he had taken his first plunge. After all, his president, yes his nation, needed him. Ironically, while on the Court he played a much greater role in foreign policymaking than did Arthur Goldberg as UN Ambassador. Unfortunately, foreign policy was not Fortas's forte. His actual role was little more than that of yes-man and cheerleader at a time when President Johnson would have been better served by hard thinking and hard talking about a tragically mistaken war.

Of course, Johnson needed loyal friends. Of course, presidents must be protected. When all was said and done that really was Fortas's task: protect the president at all costs. Appearances were everything. Whether sending marines into the Dominican Republic, dispatching troops to Detroit, or dropping bombs on Indochina, protect your client.

Appearances continued to be everything when it came time for Chief Justice-designate Fortas to testify before the Senate Judiciary Committee regarding the White House activities of Mr. Justice Fortas. Yes, there had been meetings with the President. To Murphy, this in itself was a significant admission: "Never before had a Supreme Court Justice willingly admitted in such a forum that he had knowingly violated the sacred myth of separate governmental powers . . ." But what exactly had Fortas admitted? He had been "honored" to be invited to participate in a "few critical meetings." Beyond that Fortas would not go. Murphy concludes that the "true story" of the Justice's more than few meetings would have "shocked even Fortas's allies." But then truth to this Washington lawyer was "secondary when there was a battle to be won."

This battle, of course, was lost, but it was not lost for lack of effort. For someone who had been not at all anxious to join the Justices in the first place, Fortas fought very hard to become their chief. In fact, resorting to "outright lies" was not beyond him once he realized that the Judiciary Committee did not have the evidence to support the charges concerning services rendered to his most important "client."

This battle and the one which followed a year later are characterized by Murphy as a "holy war" between liberals and conservatives over the course of the nation's future. Murphy's comparison of the failed confirmations of Abe Fortas and Robert Bork is clinching evidence of his contention that some sort of titanic ideological

struggle unfolded in the summer of 1968. Yes, Abe Fortas was some sort of liberal. But he was defeated not simply because he was a liberal (does anyone doubt that a Philip Hart would have been confirmed at that time?), but because he truly did lack "judicial temperament." And no one knew this better than Fortas himself.

**MR. JUSTICE BLACK AND HIS CRITICS.** By Tinsley E. Yarbrough.<sup>1</sup> Durham, North Carolina: Duke University Press. 1989. Pp. xii, 323. Cloth, \$45.00.

*James Magee*<sup>2</sup>

Justice Hugo Black was Franklin Roosevelt's first appointee to the Supreme Court. His tenure coincided with the transformation of the judicial agenda from one preoccupied with property rights to the modern predominance of civil rights and liberties. Beyond doubt, he played a major role in fashioning the triumphs of the Warren Court, and by any measure he was one of the most influential jurists in our constitutional history.

The Nine Old Men were often assailed for protecting property interests in the guise of enforcing the Constitution. Senator Black, elected in 1926 and serving in the Senate until his appointment to the Court, was one of the most relentless of the Court's critics, and he knew very well that more than text, first principles, or original intent produced the judicial dogmas that were erected to invalidate progressive legislation.

As a Justice, Black in turn was criticized and even ridiculed when he insisted that the many novel judicial results that he reached in protecting civil rights and liberties were derived merely from fidelity to the law.

Black drew critics from across the spectrum: conservatives who challenged his liberalism as lawless; liberals disappointed that their erstwhile hero appeared to forsake the cause amidst the social turmoil of the 1960s; and legal scholars, some of whom found his jurisprudence simplistic. Alexander Bickel dismissed Black's jurisprudence as a fake, concluding that reliance on textualism was—as had been true of his disingenuous predecessors—a smokescreen to foster political convictions.<sup>3</sup> Black's "achievement," he observed,

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3. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 84-113 (1962).