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# Book Reviews: A Question of Judgment: The Fortas Case and the Struggle for the Supreme Court

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In conclusion, Mr. Nimmer briefly, but adequately points out logical alternatives to a problem that is plaguing our criminal justice system. The study is effectively surprising, leading the reader to wonder why society continues to process unnecessary arrests.

**A QUESTION OF JUDGMENT. THE FORTAS CASE AND THE STRUGGLE FOR THE SUPREME COURT.** By: Robert Shogan. Indianapolis: The Bobbs-Merrill Company, Inc. 1972. Pp. 275 and Appendices, Index, and Bibliography. \$10.00. Mr. Shogan is a staff member of *Newsweek* in Washington, D.C. where his main assignment is the Supreme Court and the Department of Justice.

Who judges the judges?<sup>1</sup> This, a recurring question in recent times, is often posed, but seldom answered. Ethics, judicial conduct and moral obligations are the concepts foremost in the life of a Supreme Court Justice, or any man who serves his country from the bench. The separation and compartmentalization of private from public life are often the most difficult to achieve. The maintenance of a personal code of conduct and the striking of a delicate balance between personal friendship and juridical duty are the personal agonies and tribulations that the men who dedicate themselves to justice must face. The questioning and probing of an aware and educated public which demands the highest standard ever expected from those in public office, are the benchmarks of a modern society.

The year 1969 is a very significant one in the recent history of the judiciary. Abe Fortas resigned his position as an associate justice of the Supreme Court of the United States in that year. The impact that this event had upon the legal profession and the American scene in general was critical and far-reaching. Fortas' private financial dealings and alleged misconduct lead to his resignation. The repercussions of this occurrence has such a profound effect upon the legal profession that three years hence, at the 1972 Convention of the American Bar Association, the House of Delegates approved a new wide-ranging Code of Conduct for state and federal judges. This action represents the first major overhaul of the rules governing the conduct of the judiciary since 1924. It is reported that the 1969 resignation of Justice Fortas supplied the impetus for the revision in the code.<sup>2</sup>

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1. W. BRAITHWAITE, WHO JUDGES THE JUDGES? (1971).

2. The Evening Star and Daily News (Washington, D.C.) August 17, 1972, sec. A, at 12, Col. 1. Key provisions of this new Code are:

Every judge would have a duty to make a public report on his income from non-judicial sources once a year.

Judges would be required to report gifts worth \$100 or more.

Judges would have the duty to disqualify themselves if their relatives or if their wives' relatives were directly involved in the case or had an interest in it.

Judges would have to disqualify themselves if they had formed "fixed beliefs" about a case or had personal knowledge of the facts involved.

It is against this background that a *Question of Judgment* appears. The author gives an object analysis of the life of Abe Fortas and of the causes and results of his resignation from the Supreme Court. The analysis is based mainly upon information located in semi-public files in the Department of Justice, articles from major magazines and extensive use of materials obtained from interviews with individuals stated to be close to the situation. This interesting approach enables the author to place his work in the proper perspective, separating fact from fiction.

In reviewing this work, there is very little in the way of negative comment that might be leveled against this author's style. The detachment with which Mr. Shogan approaches his topic is apparent and refreshing. Structurally, he employs a flashback technique in his opening chapters. Although novelly applied, it can cause the reader some confusion. If this be a criticism, as it is, it is quickly compensated by the substance of the work once the reader gets the gist of the narrative.

The reader is first presented with a description of events occurring in May 1969, when the Fortas case had finally come to public attention. Then, the author plunges into the past, recounting Fortas' early days at Yale Law School where writing excellence and a quick mind won him acclaim from both faculty and students, his achievements through the Roosevelt Administration and finally assays his rise to prominence in the late fifties and early sixties. The author is most effective in his explanation of the Fortas case, citing the *Life* article written by William Lambert which eventually tolled the death knell for Mr. Fortas' career in public life.<sup>3</sup>

Scattered throughout the work are short anecdotes and highlights concerning Fortas' friendships with many prominent government leaders. One such peripheral narrative relates his close friendship with Lyndon Baines Johnson when a young congressman from Texas in the late forties. These side sketches are entertaining and amusing, providing the reader with familiar names to focus upon, thereby adding to his understanding of the complete picture development.

While adequately depicting the inner workings of the highest Court in the land, the author reveals his respect for Fortas as a member of that body. The Supreme Court portrayed as an institution of dignity and one whose members are bestowed with many solemn prerogatives.

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One provision would require judges to take disciplinary measures against other judges as well as lawyers for "unprofessional conduct of which the judges became aware."

3. Lambert, *Fortas: A Question of Ethics*, *LIFE*, May 9, 1969, at 32-37. This article exposed Justice Abe Fortas' financial dealings with convicted financier Louis Wolfson. It was a searing indictment of Fortas' conduct seriously impugning his honor and integrity. A year later another prominent public figure came under the journalistic guns of Mr. Lambert. Senator Joseph Tydings of Maryland was charged in an article, *What the Senator Didn't Disclose*, *LIFE*, Aug. 28, 1970, at 26-29, with unethical behavior and fostering his own financial interests. This article contributed heavily to his defeat in 1970.

Intertwined with the Court's functioning processes, the author stresses the conflicts facing a member of that Court.

For Fortas, the choice was between personal gain and monetary advantage as opposed to the responsibilities of a position of public trust. The manner of presentation of the judgment question allows the reader to gain valuable insight into the inner conflicts which confront all judges, but more, it encourages the reader to examine his own feelings concerning the concepts of ethical conduct involved in the legal profession. Skillfully, the meaning and implications behind the title are revealed as the author develops the narrative. Pointing up that the transition from political advisor to the President of the United States and counsel for top corporations to the sequestered life of a Supreme Court Justice is not easily made, some important questions are raised for the reader's consideration. Can a man so prominent in public life and accustomed to the limelight, ever really forfeit those advantages? Shogan suggests that Abe Fortas could not.

Fortas is portrayed as a subtle, somewhat mysteriously introverted and tragic personality. Concededly the author is no great tragedian, but the way in which Fortas is presented brings to mind the ancient Greek "hubris", or tragic flaw. He is shown as a man who carries within him the seed of his own destruction; victimized by his own shortcomings which eventually resulted in his downfall. This idea is brought home to the reader when it is developed and considered in light of the American Bar Association Canon which provides that, "[a] judge's official conduct should be free from impropriety and the appearance of impropriety"<sup>4</sup> which Fortas is alleged to have violated.

Justice Fortas reluctantly resigned from his post on the Supreme Court. His decision to terminate his association with the Court which ended the public debate was the most trying decision of his career and was Fortas' answer to his personal question of judgment. In his last letter to Chief Justice Warren, he very succinctly states his commitment:

There has been no wrongdoing on my part. There has been no default in the performance of my judicial duties in accordance with the high standards of the office I hold. So far as I am concerned, the welfare and maximum effectiveness of the Court to perform its critical role in our system of government are factors that are paramount to all others. It is this consideration that prompts my resignation which, I hope, by terminating the public controversy, will permit the Court to proceed with its work without the harassment of debate concerning one of its members.

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I leave the Court with the greatest respect and affection for you and my colleagues, and my thanks to all of you and to the

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4. ABA CANONS OF JUDICIAL ETHICS NO. 4.

staff of the Court for your unfailing helpfulness and friendship. I hope that as I return to private life, I shall find opportunities to continue to serve the Nation and the cause of justice which this Court so ably represents.<sup>5</sup>

As the work ardently points out, the fall of Justice Fortas not only signaled the end of a public career for one man but also brought the years of liberal judicial activism to an end that had been so prevalent in the years of the Warren Court.

In sum, one is left with the thought that Fortas, although resigning from the Court, was innocent of the allegations of impropriety. He emerges as a victim of the circumstances of the times and yet as a man of principle, a man of law, and responsibility. The work possesses a certain philosophical as well as pragmatic quality which tells a basic story of a prominent man while at the same time paralleling the true meaning of ethic, judgment, and professional responsibility.

A challenging, as well as thought-provoking work, it is one to be appreciated. It is designed to inspire and caution, accomplishing both with unusual clarity. It is one that is bound to attract attention and respect.

**A REPUBLIC, IF YOU CAN KEEP IT.** By: Earl Warren. New York: Quadrangle Books, Inc. 1972. Pp. 203 and Appendices. \$5.95. Mr. Warren served as Chief Justice of the United States Supreme Court for sixteen terms from 1953-1968. This is Mr. Warren's first book.

"We can have justice whenever those who have not been injured by injustice are as outraged by it as those who have been." This statement could well have been from one of Mr. Warren's opinions. Instead, these are the words of Solon of Athens, spoken in 594 B.C. and quoted by the Chief Justice in *A Republic, If You Can Keep It*. The words are appropriate for this work attempts to enlist those citizens who have not suffered in the battle against injustice. Warren tries to encourage others to recognize and advocate the need for a concerned citizenry. He feels that unless citizens know the results of injustice, realize the need for civic education and understand the significance of the historical development of our democracy, we could lose our republic. However, the non-legalistic, general approach of this work would tend to alienate the legal community and whether it will enlist other citizens to the cause is debatable.

Mr. Warren's work is divided into three sections: 1) a very elementary review of our republic's historical background, 2) a superficial discussion of society's current needs and problems, and 3) a sufficient dissertation on the Bill of Rights. The author concentrates on

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5. R. SHOGAN, *A QUESTION OF JUDGMENT*, 282 (1972).