The Broad Role

Robert P. Griffin
United States Senate
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The President, who exercises a limited power, may err without causing great mischief in the State. Congress may decide amiss without destroying the Union, because the electoral body in which Congress originates may cause it to retract its decision by changing its members. But if the Supreme Court is ever composed of imprudent men or bad citizens, the Union may be plunged into anarchy or civil war.

Alexis de Tocqueville
Democracy in America

The debate in the United States Senate over the nomination of Mr. Justice Abe Fortas to the highest judicial post in our country culminated in a motion of cloture on October 1, 1968. This motion was intended to deny those opposed to Senate confirmation an opportunity to continue discussion. The controversy surrounding the cloture motion and in a broader sense surrounding the entire debate centers on one question: what is the duty of the Senate to "advise and consent" to nominations by the President for judges of the Supreme Court under the U.S. Constitution, article II, section 2? The Senate answered this question by refusing to shut off debate and simply rubber-stamp the President's nominee. Significantly, a majority of those voting, and those on record but not voting, supported further debate. Therefore, the Senate reaffirmed the broad and purposive obligation to scrutinize not only the

*United States Senator from Michigan. The source material for this article is drawn primarily from Hearings on the Nomination of Abe Fortas, of Tennessee, to be Chief Justice of the United States, and the Nomination of Homer Thornberry, of Texas, to be Associate Justice of the Supreme Court of the United States, Before the Senate Comm. on the Judiciary, 90th Cong., 2d Sess., pts. 1 & 2 (1968) and from several speeches given by Sen. Griffin and reprinted in the Congressional Record: 114 Cong. Rec. E5977 (daily ed. June 28, 1968); Id. at S8504, (daily ed. July 11, 1968); The Fortas—Thornberry Issue, an address to the National Press Club, Washington, D.C., July 30, 1968, reprinted in 114 Cong. Rec. S9848 (daily ed. July 31, 1968); Id. at S10717 (daily ed. Sept. 13, 1968); Id. at S11012 (daily ed. Sept. 18, 1968); Id. at S11337 (daily ed. Sept. 25, 1968); Id. at S11684 (daily ed. Oct. 1, 1968); Id. at S11856 (daily ed. Oct. 2, 1968).

1 The recorded vote was forty-five for cloture and forty-three against. Adding the recorded preferences of Senators not voting, the outcome would be forty-seven for cloture and forty-eight against, with five absent senators not indicating a preference. 114 Cong. Rec. S11856 (daily ed. Oct. 2, 1968).
If an appropriate balance is to be maintained among the branches of our government, there are times in the course of history when the United States Senate must draw a line and stand up.

I am convinced that this is such a time.

Positions on the Supreme Court of the United States cannot be regarded as ordinary political plums. Such deviations as may have been condoned in the past cannot serve as a guide for the present or the future.

The importance of the Supreme Court as an institution cannot be over-emphasized. Its decisions reach out and touch the lives of every American every day.

It was the intention of our founding fathers that an appointment to the Supreme Court should represent the pinnacle of achievement and recognition in the field of law.

At the very least, nominations to the Supreme Court should never be based on cronyism. If and when they are, the Senate's responsibility is clear.

I reject the view that the Senate should rubber-stamp its approval of every Presidential appointment simply because a nominee doesn't beat his wife. The responsibility of the Senate must be of a higher order, particularly with respect to the Supreme Court of the United States.

At the present time, the American people are in the process of choosing a new government. By their votes in November the people will designate new leadership and new direction for our nation.

Of course, a "lame duck" President has the Constitutional power to submit nominations for the Supreme Court. But the Senate need
not confirm them—and, in this case, should not do so.

The maneuvering to deny the people and the next President their choice in this instance is wrong in principle—and everybody knows it.

The appointments announced yesterday smack of "cronyism" at its worst—and everybody knows it.

Although other elements came into consideration as further evidence was brought out in the hearings of the Senate Judiciary Committee, that summary indicates the basic reason for opposing the nomination of Abe Fortas. This article will expand on two major points: first, the nature of the higher responsibility which the Senate owes to considerations of judicial nominations; and second, the factors generally influencing non-consent in the Fortas case. The purpose is not to reopen a discussion of the particularities of Justice Abe Fortas’ *quality* for appointment as Chief Justice of the United States. Rather we will be concerned only with the types of factors influencing a Senate determination.

**The Historical Context for Advice and Consent**

Much of the controversy revolves around the appropriate functions of the President and of the Senate in the circumstances of a nomination to the Supreme Court. There are some who suggest that the Senate’s role is limited merely to ascertaining whether a nominee is “qualified” in the sense that he possesses some minimum measure of academic background or experience. It should be emphasized at the outset that any such view of the Senate’s function with respect to nominations for the separate judicial branch of the government is wrong and simply does not square with the precedents or with the intention of those who conferred the “advice and consent” power upon the Senate.

I am firmly convinced that approval by the confirming authority of a nomination to the third highest post in our land, the highest judicial post, on the basis of the record before the Senate in the Fortas case, would have been a disservice to the nation and would have constituted an abdication of the “advice and consent” power of the Senate. To assure the independence of the judiciary as a separate and coordinate branch, then, it is important to recognize that this power of the Senate with respect to the judiciary is not only real, but it is at least as important as the power of the President to nominate.

No one denies the constitutional power of the President to make an appointment to the Supreme Court, technically even at a time when he is only a few months from leaving office. But, of course, that is *not* the point. Some have not understood, or will not recognize, that under our Constitution the power of any President to nominate constitutes only
one-half of the appointing process. The other half of the appointing process lies within the jurisdiction of the Senate, which has not only the constitutional power but the solemn obligation to determine whether to confirm such a nomination. Because the Senate has not used its power of "advice and consent," there is a widespread belief that it is almost a rubber-stamp.

However, against the backdrop of history we must recognize that the Senate has not only the right but the responsibility to consider more than the mere qualifications of a nominee to the Supreme Court of the United States, the highest tribunal in a separate, independent and coordinate branch of the government. The Senate has a duty to look beyond the question: "Is he qualified?" The Senate must not be satisfied with anything less than application of the highest standards, not only as to professional competence but also as to such necessary qualities of character as a sense of restraint and propriety. A distinguished former colleague, Senator Paul Douglas of Illinois, put it this way:

The "advice and consent" of the Senate required by the Constitution for such appointments (to the Judiciary) was intended to be real, and not nominal. A large proportion of the members of the (Constitutional) Convention were fearful that if judges owed their appointments solely to the President the Judiciary, even with life tenure, would then become dependent upon the executive and the powers of the latter would become overweening. By requiring joint action of the legislature and the executive, it is believed that the Judiciary would be made more independent.

Illuminating the appropriateness of these views is the clear history of the formulation of constitutional obligations built into the structure of our government to realize such objectives as an independent judiciary and checks and balances on respective centers of power. In the Federalist Papers, Alexander Hamilton wrote that the requirement of Senate approval in the appointing process would

... be an excellent check upon a spirit of favoritism of the President, and would tend greatly to prevent the appointment of unfit characters from state prejudice, from family connection, from personal attachments, or from a view to popularity.

In the Constitutional Convention of 1787, James Madison generally favored the creation of a strong executive; he advocated giving the President an absolute power of appointment within the executive branch
of the government. Madison stood with Alexander Hamilton against Benjamin Franklin and others who were concerned about granting the President such power on the ground that it might tend toward a monarchy. While he argued for the power of the President to appoint within the executive branch, it is very important to note that Madison drew a sharp distinction with respect to appointments to the Supreme Court, the judicial branch. Madison did not believe that judges should be appointed by the President; he was inclined to give this power to "a senatorial branch as numerous enough to be confided in—and not so numerous as to be governed by the motives of the other branch; as being sufficiently stable and independent to follow clear, deliberate judgments."

At one point during the convention, after considerable debate and delay, the Committee on Detail reported a draft which provided for the appointment of judges of the Supreme Court by the Senate. Gouverneur Morris and others would not agree, and the matter was put aside. It was not finally resolved until the next to last day of the Constitutional Convention. The compromise language agreed upon provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint judges of the Supreme Court and all other officers of the United States." Clearly, the compromise language neither confers upon the President an unlimited power to appoint within the executive branch nor confers upon the Senate a similar power of appointment with respect to the judiciary. Significantly, however, we have moved in actual practice over the years toward those original objectives of Madison. It is a fact, though sometimes deplored by political scientists, that judges of the lower federal courts are actually "nominated" by Senators while the President exercises nothing more than a veto authority. On the other hand, the Senate has generally accorded the widest latitude to the President in the selection of the members of his cabinet. It is recognized that unless he is given a free hand in the choice of these associates, he cannot be held accountable for the administration of the executive branch of government.

I believe that history demonstrates that the Senate has generally viewed the appointment of a cabinet official in a different light than an appointment of a Supreme Court Justice. The general attitude of the Senate over the years with respect to cabinet nominations was expressed by Senator Guy Gillette of Iowa in these words:

One of the last men on earth I would want in my cabinet is Harry Hopkins. However, the President wants him. He is entitled to him.... I shall vote for the confirmation of Harry Hopkins....

Throughout our history, only eight out of 564 cabinet nominations have failed to win Senate confirmation.
The reasons for a limited Senate role with respect to executive branch appointments, however, do not apply when the nomination is for a **lifetime** position on the Supreme Court, the highest tribunal in the **independent**, third branch of government.\(^2\) No less a spokesman than former Justice Felix Frankfurter has emphasized one of the chief reasons for the higher responsibility of the Senate to look beyond mere qualifications in the case of a Supreme Court nominee:

The meaning of 'due process' and the content of terms like 'liberty' are not revealed by the Constitution. It is the Justices who make the meaning. They read into the neutral language of the Constitution their own economic and social views... Let us face the fact that five justices of the Supreme Court are the molders of policy rather than the impersonal vehicles of revealed truth.

In an oft-quoted statement Chief Justice Charles Evans Hughes noted wryly: "We are under a Constitution, but the Constitution is what the judges say it is."

Thus, when the Senate considers a nomination to one of the nine lifetime positions on the Supreme Court of the United States, particularly a nomination to the position of Chief Justice, the importance of its

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\(^2\) In this context, it is interesting to take note of the Senate's approach toward nominations for regulatory boards and commissions—agencies which are "neither fish nor fowl" in the scheme of government and perform quasi-executive functions and quasi-judicial functions. For example, in 1949, President Truman nominated Leland Olds for a third term as a member of the Federal Power Commission. Since Olds had served on the Commission for ten years, it was difficult to argue that he lacked qualifications. The Senate finally voted to reject the nomination. Afterward, there was general comment in the press that the real issue had nothing to do with the nominee's qualifications but everything to do with regulation of the price of natural gas.

In considering such nominations, it has not been unusual for the Senate to focus on the charge of "cronyism." That was the issue in 1946 when President Truman nominated a close personal friend, George Allen, not to a lifetime position on the Supreme Court, but to be a member of the Reconstruction Finance Corporation. Not only did such columnists as David Lawrence react sharply, but the New York Times opposed the nomination as well. Senator Taft led the opposition declaring that Allen was one of three who were nominated "only because they are personal friends of the President. Such appointments as these are a public affront."

In 1949, the Washington Post severely criticized the nomination by President Truman of Mon C. Wallgren, not to a lifetime position on the Supreme Court, but to be a member of the National Security Resources Board. A former Governor and Senator, the nominee had become a close friend of President Truman when the two served together on the Truman committee. The Washington Post characterized this nomination as a "revival of government by crony which we thought went out of fashion with Warren G. Harding." The Senate Committee which considered Wallgren's nomination voted seven to six against confirmation and the matter never reached the Senate floor.
determination cannot be compared in any sense to the consideration of a bill for enactment into law. If Congress makes a mistake in the enactment of legislation, it can always return at a later date to correct the error. But once the Senate gives its "advice and consent" to a lifetime appointment to the Supreme Court, there is no such convenient way to correct an error since the nominee is not answerable thereafter to either the Senate or to the American people.

Throughout our history as a nation, until the pending nominations were submitted, one hundred and twenty-five persons have been nominated as Justices of the Supreme Court. Of that number, twenty-one, or one-sixth, failed to receive confirmation by the Senate. The question of qualifications or fitness was an issue on only four of these twenty-one occasions. In debating nominations for the Supreme Court, the Senate has never hesitated to take into account a nominee's political views, philosophy, writings, and attitude on particular issues.

The Senate's responsibility to weigh these factors is not diminished by the fact that such professional organizations as the American Bar Association limit their own inquiries. The ABA committee on the federal judiciary has acknowledged limitations on its role. For example, letters from the chairman of the committee, Albert E. Jenner, to Senator James Eastland which transmitted the committee's recommendation with respect to the nominations of Abe Fortas and Homer Thornberry contained this statement:

...[O]ur responsibility [is] to express our opinion only on the question of professional qualification, which includes, of course, consideration of age and health, and of such matters as temperament, integrity, trial and other experience, education and demonstrated legal ability. It is our practice to express no opinion at any time with regard to any other consideration not related to such professional qualifications which may properly be considered by the appointing or confirming authority. [Emphasis added].

Factors Affecting Quality in a Nomination and a Nominee

Only the broader and more purposive interpretation of the Senate's duty to "advise and consent" to judicial nominations to the highest court can insure that the quality of those nine influential public servants will remain worthy of the reputation established in the past. Even before the current controversy erupted, public confidence in the Supreme Court, regretfully, had fallen to an all-time low. The Gallup poll survey in June
1968 reported before this controversy arose that sixty per cent of the American people did not have a favorable opinion of the Supreme Court. Undoubtedly, much of this disfavor can be attributed to widespread dissatisfaction with some of the more controversial rulings of the Court in various fields, but the prestige of the Supreme Court does not hinge solely on the results it may reach in particular cases. There are other even more compelling influences; the same Gallup poll, for example, reported that sixty-one per cent of the people favored a change in the method of selecting Supreme Court Justices. This strongly suggests that the circumstances which surround the appointment of a Justice profoundly affect the capacity of the Court to merit public confidence. Therefore, a part of the Senate's responsibility must be to guarantee that under the present method of selection these circumstances are unimpeachably correct.

At the beginning of this crusade before Mr. Fortas and Mr. Thornberry were even named, I made it clear that I would vote against confirmation of any nominee by President Johnson to be Chief Justice—whether he named a Republican or Democrat, a liberal, conservative or a moderate. The circumstances surrounding the resignation of the incumbent indicated, first, that the outgoing President should not attempt to fill the vacancy and, second, that a "retractable retirement" was being used to pressure the Senate into accepting a particular nominee. I took the position that, in view of these circumstances, public confidence in the Court could be strengthened if the next Chief Justice were named to fill a real vacancy by the new President after the people had an opportunity to vote in November.

With regard to the retractable resignation, The New Republic magazine commented:

Executive officers serve under the direction and at the pleasure of the President. It is unobjectionable, and right, that they should make their resignations effective at his pleasure... But judicial officers are independent of the President...

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It is perhaps a small, symbolic point only, but the symbols of judicial independence are not trivial; they are an important source of judicial power and effectiveness.

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The point, moreover, goes beyond the symbolic, as Chief Justice Warren himself ingeniously emphasized at his press conference on July 5. He was still in office, said the Chief Justice, and would return to preside in the fall if the Senate fails to confirm Abe Fortas, of whom he thinks well.
That may not have been intended as a form of pressure, but it looked like it. The pressure was, in any event, implicit in the manner of Chief Justice Warren's retirement. Retirements which are effective on a date which is certain and irrevocable ensure that a replacement will be considered on his own merits, and not as a choice between himself and his predecessor.

The practice of retiring or resigning, as Chief Justice Warren did, effective upon the qualification of a successor, is unprecedented in the Supreme Court. It seems to have grown up among lower federal judges. It has nothing to commend it.

Apart from this unfortunate pressure tactic, the "vacancy" so created was to be filled by an outgoing President. The nation in 1968 was seething with unrest and calling for change. A new generation demanded to be heard and given a voice in charting the future of America. Particularly at such a point in our history the Senate would have been most unwise to put its stamp of approval on a cynical effort to thwart the orderly processes of change.

In addition to this responsibility to guarantee quality in the circumstances of nomination, the Senate must evaluate the quality of the nominee himself. Since the duty to "advise and consent" requires more than a cursory glance at the nominee's credentials, various factors may legitimately concern the Senate. I do not intend to evaluate once again the merits of the controversy surrounding the nomination of Mr. Justice Fortas. However, I will use the facts of that situation to illustrate some of the factors that indicate quality or lack of it in a presidential nomination to the Supreme Court.

To be quite candid, I suspect that I might have been a lonely figure standing in the Senate opposing any nominees solely on the ground that they were appointed under "lame-duck" circumstances. In submitting the particular nominations that he did, however, President Johnson provided in a most accommodating way several additional reasons to oppose his candidates.

Mr. Fortas and Mr. Thornberry were selected primarily because they were close and long standing personal friends of President Johnson, not because they were among the best qualified in the nation to fill the particular positions. The charge of "cronyism" is not new to Senate confirmation debates, but it is highly unusual for any President to subject himself to that charge with respect to a nomination for the Supreme Court of the United States. Never before in history has any President been so bold as to subject himself to the charge of "cronyism" with respect to two Supreme Court nominations at the same time.
Some have said that if a person, even though nominated because he is a "crony", is still "qualified", he should be approved. I reject this view because it diminishes public respect for the Supreme Court. In 1968 there was clearly manifested a desperate need to restore respect for law and order, as well as respect for the institutions which bear responsibility for maintaining law and order. This need was not met by nominations to the highest court which could be legitimately branded as "cronyism".

Similarly the public must be expected to respond with the utmost skepticism to the acceptance by a Supreme Court Justice of a fee for seminar teaching which exceeded by a ratio of nearly seven to one the usual compensation for such a course and which, more importantly, was privately raised by a former law partner from businessmen previously unconnected with the university through which the fee was paid. Such an action is clearly wrong in principle and violates the canons of judicial ethics. While it may not violate any law, the Senate has the responsibility nevertheless to weigh such conduct in measuring the sense of discrimination, propriety and judgment of a nominee.

Notwithstanding the grave concern raised by the propriety of the "Seminar fund", I believe the factor that gave rise to the most disagreement in the Fortas case concerned the Justice's extrajudicial involvement. I am confident that the public did not approve of the admitted telephone call made by Mr. Justice Fortas to a business friend, criticizing a public statement that Vietnam war costs would run $5 billion higher than Administration estimates. I am also confident that the public did not condone the fact that Mr. Justice Fortas admittedly participated in the decision-making process of the executive branch of government on such matters as the Vietnam war and the Detroit riots.

However, perhaps most disturbing was the fact that the nominee stated to the Senate Judiciary Committee that he was proud of his extrajudicial activities and that he "did not see anything wrong" with them. When it became apparent that the Senate was far more deeply concerned with these extrajudicial activities than he himself was, the nominee declined to appear on a second occasion before the Judiciary Committee. I have never questioned the right of Mr. Justice Fortas to refuse to answer questions concerning decisions in which he has participated. My concern goes to his refusal to answer questions concerning decisions in which he had participated:

For example—may I mention one, I wonder, without breaching my constitutional responsibility as I see it—just one. For example, I think that one of the most important decisions that we made in my three years on
his participation in extrajudicial matters as to which he could not possibly assert immunity under the doctrine of the separation of powers. As he came to the committee at one time to discuss these subjects voluntarily, he was simply without justification in refusing to answer further questions in this regard.4

**Scrutinizing One Factor: Involvement with the Executive**

Each of these aspects in the record before the Senate generated serious questions as to the quality of the nominee, if not as to his qualifications. Perhaps the most crucial aspect deserves an extended examination: the involvement of a justice in the executive branch of the government.

The doctrine of separation of powers is the most fundamental concept embodied in our Constitution, and yet separation of powers was not

the Court in the field of criminal law is a case that has received no attention, a case called *Warden v. Hayden* [387 U.S. 294 (1967)]. In that case we did overrule a precedent. We overruled the case of *Gouled v. United States* [255 U.S. 298] decided in 1921 by a unanimous Court. Holmes and Brandeis were on that court. . . . See *Hearings, supra* note *, pt 1 at 170.

It might be argued that at that point the nominee waived his immunity from discussing other decisions of the Court as well.

4 In addition two officials of the Johnson administration refused to appear and give testimony before the Committee on Judiciary concerning reports that Justice Abe Fortas had helped the White House in drafting legislation in 1968. In letters to the committee, Treasury Undersecretary Joseph W. Barr and W. DeVier Pierson, associate special counsel to the President, based their refusal on the claim of “executive privilege.”

Yet in a letter dated March 7, 1962, to Chairman John Moss of the Special Government Information Subcommittee of the House Committee on Government Operations, President John F. Kennedy wrote:

> As you know, this Administration has gone to great lengths to achieve full cooperation with the Congress in making available to it all appropriate documents, correspondence and information. This is the basic policy of this Administration, and it will continue to be so. Executive privilege can be invoked only by the President and will not be used without specific Presidential approval. [Emphasis added].

Further, in a letter of April 2, 1965, to Representative Moss, President Johnson wrote:

> Since assuming the Presidency, I have followed the policy laid down by President Kennedy in his letter to you of March 7, 1962, dealing with the subject. Thus, the claim of "executive privilege" will continue to be made only by the President.[Emphasis added].

To my knowledge, the refusal by Messrs. Barr and Pierson was the first outright violation of that sound policy.
even a unique invention of the delegates assembled at Philadelphia in 1787. Even before the Constitutional Convention, every state constitution drafted or revised during the Revolutionary period embodied the doctrine of separation of powers as the very starting point, creating in each instance separate and distinct executive, judicial, and legislative branches. As James Madison told the convention, separation of powers is "a fundamental principle of free government." Only when power is divided under a system of checks and balances can we expect to find government limited, responsible, and free. But if the doctrine of separate powers is important, what constitutional justification is there for a member of the judicial branch while serving on the bench to participate actively in decisions of the executive branch on a regular, undisclosed basis?

The answer has been clear since 1793, when Secretary of State Thomas Jefferson, acting on behalf of President George Washington, sought the advice of the Justices of the Supreme Court on twenty-nine controversial matters. Jefferson asked the Justices "whether the public may, with propriety, be availed of their advice on these questions." The Supreme Court firmly declined to give its opinion to the executive branch, saying in part:

We have considered the previous question stated . . . regarding the lines of separation, drawn by the Constitution between the three departments of government. These being in certain respects checks upon each other, and our being Judges of a Court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been purposely as well as expressly united in the Executive departments. [Emphasis added].

This same principle has been reinforced through time. In 1942, President Franklin D. Roosevelt called upon Chief Justice Stone for assistance in arriving at executive decisions in connection with wartime rubber problems. In response to the President's request Chief Justice Stone replied as follows:

I have your letter of the 17th . . . . Personal and patriotic considerations alike afford powerful incentives for my wish to comply with your request that I assist you in arriving at some solution of the pending rubber problem. But most anxious, not to say painful,
reflection has led me to the conclusion that I cannot rightly yield to my desire to render for you a service which as a private citizen I should not only feel bound to do but one which I should undertake with zeal and enthusiasm...

A judge, and especially the Chief Justice, cannot engage in political debate or make public defense of his acts. When his action is judicial he may always rely upon the support of the defined record upon which his action is based and of the opinion in which he and his associates unite as stating the ground of decision. But when he participates in the action of the executive or legislative departments of government he is without those supports. He exposes himself to attack and indeed invites it, which because of his peculiar situation inevitably impairs his value as a judge and the appropriate influence of his office.

I do not suggest that a Justice of the Supreme Court should have no contact whatever with the President or with members of the legislative branch while he sits on the bench. However, the people have a right to expect that such contacts will not breach the constitutional line which necessarily separates the branches of our government and that such contacts will be characterized by the restraints customarily observed by members of the judiciary.

In his testimony, Mr. Justice Fortas acknowledged that he had participated in White House deliberations concerning the policy of the executive branch with respect to Vietnam and the Detroit riots while sitting on the Supreme Court. In seeking to explain this to the committee, Mr. Fortas said:

...I have, on occasion, been asked to come to the White House to participate in conferences on critical matters having nothing whatever to do with any legal situation or with anything before the Court or that might come before the Court.

At another point the nominee assured the Judiciary Committee:

There was nothing involved in the conferences, the consultations, or the issues that were discussed in which the Court might possibly become involved.

Acceptance of such assurances would certainly have been misplaced, for it is evident that cases have already reached the Court pertaining to
executive matters in which Mr. Fortas participated while sitting as a Justice of the Supreme Court. In *United States v. O'Brien*, a case arising out of the burning of a draft card in protest to the Vietnam war, Justice Douglas stated in dissent:

The Court states that the constitutional power of Congress to raise and support armies is "broad and sweeping" and that Congress' power "to classify and conscript manpower for military service is 'beyond question.'" This is undoubtedly true in times when, by declaration of Congress, the Nation is in a state of war. The underlying and basic problem in this case, however, is whether conscription is permissible in the absence of a declaration of war. That question has not been briefed nor was it presented in oral argument; but it is, I submit, a question upon which the litigants and the country are entitled to a ruling. . . . This case should be put down for reargument and heard with *Holmes v. United States* and with *Hart v. United States*, *post*, p. 956, in which the Court today denies certiorari.

The rule that this Court will not consider issues not raised by the parties is not inflexible and yields in "exceptional cases" (*Duignan v. United States*, 274 U.S. 195, 200) to the need correctly to decide the case before the court. E.g., *Erie R. Co. v. Tompkins*, 304 U.S. 64; *Terminiello v. Chicago*, 337 U.S. 1.

In such a case it is not unusual to ask for reargument (*Sherman v. United States*, 356 U.S. 369, 379, n. 2, Frankfurter, J. concurring) even on a constitutional question not raised by the parties. . . .[case citations and discussion omitted] . . .

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These precedents demonstrate the appropriateness of restoring the instant case to the calendar for reargument on the question of the constitutionality of a peacetime draft and having it heard with *Holmes v. United States* and *Hart v. United States*.6

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6 391 U.S. at 389-91.
Thus, although the issue was not directly presented, Justice Douglas dissented from the Court's opinion and raised the question whether the Supreme Court should hear argument on the constitutionality of the draft absent a declaration of war by Congress in the Vietnam war. The issue was, therefore, before the Court because the Justices had to decide whether to hear argument which they ultimately decided not to invite.

In *Holmes v. United States* and *Hart v. United States,* Justice Stewart as well as Justice Douglas indicated that the Court should consider questions concerning the war in Vietnam. In *Holmes* Justice Stewart stated in a memorandum:

> This case, like *Hart v. United States,* No. 1044, Misc., *post,* p. 956, involves the power of Congress, when no war has been declared, to enact a law providing for a limited period of compulsory military training and service, with an alternative of compulsory domestic civilian service under certain circumstances. It does not involve the power, in the absence of a declaration of war, to compel military service in armed international conflict overseas. If the latter question were presented, I would join Mr. Justice Douglas in voting to grant the writ of certiorari.9

Although his opinion was somewhat more limited than that of Justice Douglas, Justice Stewart in these cases also believed that the questions pertaining to the validity of the war in Vietnam should have been heard by the Court. Justice Fortas did not disqualify himself, but rather, as far as the record shows, he participated on the Court in these three decisions. Moreover, it would not sufficiently protect the public interest for a Justice who had engaged in executive consultations merely to disqualify himself from judicial consideration of any resulting litigation. If one or two Justices were allowed to participate in executive decisions on such a basis, then surely all nine Justices could do so and then there would be no Court to decide the controversy. Even if this ultimate breakdown were not likely to occur frequently, the number of Justices available in each case would probably be reduced, thus decreasing the interaction of human minds which was envisioned by those who set the number by law.

In response to questions concerning his participation in the actual drafting of legislation within the executive branch, the nominee responded at one point very flatly: "It is not true that I have ever helped to

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9 391 U.S. at 936.
frame a measure since I have been a Justice of the Court." Yet less than
two months earlier Justice Fortas was involved in the preparation of an
amendment to the Treasury Department’s appropriation bill, pertaining
to the security and protection of presidential candidates. The testimony
of Senator Gordon Allott of Colorado on May 27, 1968, revealed that
Under Secretary of the Treasury Joseph Barr had informed him in
substantially the following terms:

...[T]his is the amendment [referring to the
Secret Service protection amendment] they
want at the White House. It has been gone
over by De Vier Pierson and Abe Fortas,
and they have cleared it and they can live
with it.

Obviously, Senator Allott’s testimony raised serious question con-
cerning the weight which could have been accorded by the Senate to Mr.
Fortas’ earlier testimony. As has already been pointed out, even more
disturbing than this apparent contradiction was the refusal by Mr. Fortas
after this discrepancy came to light to return to the committee in order
to clear it up.

After acknowledging participation in White House conferences con-
cerning the Vietnam war and the Detroit riots, Mr. Fortas testified, “I
guess I have made full disclosure now.” Senator Allot’s testimony is a
direct challenge to that statement: a challenge which stands uncon-
tradicted, saying to the Senate and to the nation that the nominee did not
make a full disclosure of his activities in the executive branch while
serving as a Justice of the Supreme Court.

Mr. Fortas admitted under questioning that he had called a friend,
Ralph Lazarus, to criticize a statement made on behalf of the business
council of Hot Springs, Virginia, concerning the cost of the Vietnam
war. It had been reported in the June 4, 1967, issue of the New York
Times that Justice Fortas had made this call to transmit President
Johnson’s ire to the business council over the statement. However,
when he was questioned further concerning a report in the New York
Times of July 18, 1968, that business executives at the meeting said that
Lazarus reported that Fortas told him that the President was upset,
Justice Fortas replied: “Senator, I could not say in one say or the other
about that. I just do not remember.”

Thus, whether we look to the testimony of Senator Allott, or to the
testimony of the nominee himself, or to the other uncontradicted reports,
one cannot avoid the conclusion that serious doubts existed as to wheth-
er Mr. Fortas did in fact make a full disclosure of his activities in the
executive branch. Both the questions which were left unanswered and
the responses that were in fact made suggested less than the minimum
level of propriety and discretion necessary in relation to the problem of
involvement with the executive branch.
It is well to remember that the problem does involve propriety and discretion because existing law does not provide adequate rules of conduct for involvement of a judge in executive affairs. On the contrary, the propriety of taking men from the bench to fill executive posts is governed almost wholly by judicial ethics and public policy.\(^{10}\) The practice of a federal judge acting in some other governmental capacity without resigning his office is restricted statutorily only by the Dual Compensation Act of 1964\(^{11}\) which repealed and updated the prior Act of July 31, 1894.\(^{12}\) The Act of 1894, when in effect, had been narrowly circumscribed by rulings such as those which construed "office" to apply only to "constitutional" offices, creating a broad field of non-judicial posts where a judge could serve unhampered by legal restrictions. Neither the Act of 1894 nor the present law applies to the situation where the non-judicial post carries no compensation.

When the practice of using federal judges beyond the judiciary arose in the early period of our country's history, men like Jefferson, Madison and Pinckney were opposed because it tended to make the bench an "annex" of a political party and an "auxiliary" to the executive branch. In the words of the Senate Judiciary Committee in 1947:

Where the practice is infrequent, it may well be reasoned that the situation will take care of itself; but where there is an increasing tendency to draft members of the judiciary for executive and nonjudicial duties, as is the case in modern times, the propriety of the practice should be examined anew if the integrity of the judiciary in American life is to be preserved.

* * *

What may happen to judges in the exercise of their judicial functions if the tendency increases to appoint them to Executive offices? Will it not be difficult for them to maintain the integrity and independence of the judicial office if the practice becomes common of selecting them for executive positions carrying exceptional privileges and prestige? Would not the suspicion be ever present that the President might gain desired ends by favoring judges in Executive appointments? Ill motives need not be charged at all; they will be


present as a matter of course where the situation, by its very nature, carries the seeds of suspicion.

With respect to the acknowledged fact that a judge may not be compelled to perform non-judicial duties, the Senate Judiciary Committee has warned of other pressures which may become equally coercive:

Elements other than statutory are present. Public opinion is a compelling factor. It is difficult for a judge to refuse the Executive when the request is placed on the plane of patriotism in time of war. Even without the compelling argument of war a judge is embarrassed in refusing an appointment when urged to serve on the grounds of indispensability, even though the doctrine of the indispensable man has no real place in American public life.

Personal motives may easily join with the urgent call to duty in exerting strong pressure on the judge to accept nonjudicial appointments. Ambition is a wholesome human trait and judges are human. If it becomes common to expect Executive appointments, judges may slip into that frame of mind which seeks promotional opportunity at the hand of the Executive and the quality of the judicial character may be impaired. This could take on an ugly political tinge if judges came to see in the Executive appointment a chance to advance themselves politically or a chance to aid the Chief Executive politically.

The American Bar Association’s Committee on Professional Ethics and Grievances has ruled on whether a judge might also properly hold an office in another branch of the government. The committee concluded that this was clearly improper, since it “might easily involve conflicting obligations.” The Canons of Judicial Ethics of the American Bar Association themselves admonish against this practice. Canon 24 precludes acceptance of “inconsistent duties”. Canon 34 insists that the judge’s “conduct should be above reproach”. Canon 31 precludes the judge’s practice of law, though it allows acting as an arbitrator, author, lecturer or instructor of law and accepting compensation provided “such course does not interfere with the due performance of his judicial duties.” The same conclusions were summed up in the 1947 Senate Judiciary Committee report:
A judge who embarks upon official nonjudicial activities in another branch of the Government lays himself open to the charge that he is undertaking "conflicting obligations" or "inconsistent duties", that in spirit he is violating the doctrine of the separation of powers, and that in discharging his nonjudicial duties he is neglecting the proper performance of the judicial ones. [Footnotes omitted].

Since statutory law is inadequate to govern such a practice and control the dangers inherent in it, a heavy burden of discretion must rest with the President who would suggest non-judicial missions. The obligation of the Senate is equally important, for it can contribute a means of control through close scrutiny of the propriety of judicial nominees who have during their term participated in executive affairs. The conclusion of the Senate Judiciary Committee in 1947 was clear:

The Committee on the Judiciary of the United States Senate declares that the practice of using Federal judges for nonjudicial activities is undesirable. The practice holds great danger of working a diminution of the prestige of the judiciary. It is a deterrent to the proper functioning of the judicial branch of the Government.

This same conclusion governed the determination of the Senate with respect not only to the non-judicial activities of Justice Fortas in the executive branch, but also with respect to the other factors which detracted from the level of quality in that nomination. I am convinced that due to the Senate vote on October 1, 1968, rejecting cloture of debate on the presidential nomination of Abe Fortas, future Presidents will take more care in submitting nominations, particularly those for the Supreme Court. I believe there will be hope again that judges approaching the stature of Learned Hand or Benjamin Cardozo will be appointed to the Supreme Court: not for personal or political reward, but simply because they are among the best qualified in the land. If this hope is realized, there will be a sounder foundation upon which to build confidence and to restore public respect for the Supreme Court as an institution.