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**THE FORTAS CONTROVERSY:
THE SENATE'S ROLE OF ADVICE AND CONSENT
TO JUDICIAL NOMINATIONS**

THE BROAD ROLE

Robert P. Griffin

THE DISCRIMINATING ROLE

Philip A. Hart

... and [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the Supreme Court. . . .

United States Constitution, art. II, sec. 2.

In June 1968, President Lyndon Johnson nominated Mr. Justice Abe Fortas to be Chief Justice of the Supreme Court of the United States and Federal Circuit Judge Homer Thornberry of the Court of Appeals for the Fifth Circuit to fill Fortas' position as Associate Justice. On October 1, 1968, after four days of debate, the United States Senate voted not to invoke cloture, thereby effectively refusing to confirm the nominations. The controversy over the nominations, which developed during the summer months, involved disparate elements ranging from the circumstances surrounding the resignation of incumbent Chief Justice Earl Warren to the tenor of recent Court decisions on a wide variety of subjects.

Central to the final outcome was this question: what is the nature and extent of the constitutional role of the Senate to advise and consent to judicial nominations of the President? The Senators from the State of Michigan, Philip A. Hart and Robert P. Griffin, reached different conclusions on what should be required of the Senate and what the Senate should require of a nominee. Each became a respected representative of his position in this controversy.

Senator Griffin challenges the Senate role which characterized the immediate pre-Fortas years by propounding a relatively simple, broad rule that the Senate must always go beyond the qualifications to examine the quality of the nominee. Senator Hart suggests that many questions relating both to the standards that govern nominee qualifications

and to those that govern the evaluation process remain unanswered. Therefore, the Senator suggests that the Senate's role should be discriminating, which implies some selectivity in going beyond the qualifications of a nominee and expressly insists on responsibility in the use of tactics available to the Senate in its evaluation process. In soliciting an expression of their reflections here, we asked the Michigan Senators to focus the thinking of the legal profession on means of clarifying the Senate's role of advice and consent. Their articles are intended to generate thoughtful consideration rather than provide a completely researched and documented solution to the problem. We believe they serve this purpose well, and we express our deep appreciation to both men.