



# BATTLE FOR THE MARBLE PALACE

ABE FORTAS, EARL WARREN,  
LYNDON JOHNSON, RICHARD NIXON  
*and the FORGING of the*  
MODERN SUPREME COURT

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## PROLOGUE

**JULY, 1968**

**W**hen Justice Abe Fortas sat down for his third day of testimony during his nomination hearings on a steaming summer day in the nation's capital, he remained confident of his promotion to Chief Justice. What he did not foresee—what his sharp mind, years of experience, and tireless preparation could not have prepared him for—was that he was about to become an unwitting target in a confrontation that would change the course of history, and find himself in the role of a modern-day version of a hero in a Greek tragedy.

Despite some unexpected resistance to his ascension, he had every reason to feel optimistic. Foes and friends alike recognized Fortas as a brilliant lawyer. Rising from a humble upbringing by immigrant parents in Memphis, he graduated second in his class at Yale Law School. After teaching at his alma mater and stints in various New Deal agencies, he co-founded Arnold, Fortas & Porter, one of the nation's premier law firms. During two decades of guiding corporate clients through Washington's political and regulatory labyrinths, he established a reputation as a fixer. He was a "brain surgeon . . . the guy you call when all else fails," a colleague recalled. But he wasn't just a hired gun for well-heeled clients. Working pro bono, he stood up to Joseph McCarthy and prevailed in *Gideon v. Wainwright*, the groundbreaking case requiring government-funded lawyers for indigent defendants. Fortas and his wife, Carolyn Agger, a prominent tax lawyer, were one of the capital's original power couples. All of these accomplishments came before his arrival on the nation's highest court in 1965.

Aside from these gold-plated credentials, the biggest factor in Fortas's fa-

vor was the backing of his patron—President Lyndon Johnson. Other than the Vietnam War, the task of getting Fortas appointed was Johnson’s primary obsession in his final months in office. Johnson for years had benefited from Fortas’s first-rate legal skills and command of Washington’s gamesmanship. Both professionally and personally, their relationship flourished, and by the mid-1960s Fortas had emerged as the president’s personal lawyer and political confidant. It was a well-known secret in Washington that no matter the nature of a crisis, the president sought Fortas’s counsel: “He’s the wisest man I have ever known,” the president told his staff.

Eager to secure his dear friend a seat on the Court, Johnson maneuvered Justice Arthur Goldberg into resigning from the bench in 1965 to make room for Fortas. Three years later, the president’s desire to promote Fortas to replace the retiring Earl Warren represented far more than a reward to a beloved friend. Johnson sought to perpetuate the liberal dominance of the Court for another generation and safeguard his legacy in the process. At the age of fifty-eight, Fortas could build on Warren’s accomplishments for decades to come and shield Johnson’s vast legislative achievements from constitutional scrutiny.

Those accomplishments included crushing the South’s insurmountable filibusters that had long derailed civil rights legislation. On their own, passage of the 1964 Civil Rights Act and the 1965 Voting Rights Act would have constituted historic feats. The enactment of his brainchild, the nearly two hundred laws dubbed the Great Society, cemented Johnson’s status as a legislative genius. Only during the New Deal had Congress been so willing to follow a president’s lead. In the last major congressional showdown of his presidency, Johnson directed all of his acumen and political capital to getting Fortas confirmed.

History also pointed to an easy path for Fortas. Between 1894 and 1967, the Senate had confirmed all but one out of forty-six nominees, typically through voice votes in which senators bellowed out “Yeas” and “Nays” in a chorus instead of a formal roll call. The dearth of testimony accompanying these nominations often made confirmation hearings brief and uncontroversial: one lasted only five minutes. Unhindered by government investigators or inquisitive journalists, and unencumbered by advocacy groups, confirmations proceeded

swiftly, many coming to a conclusion within days of a nomination.

Not only did these historic precedents and political factors point to Fortas’s inevitable ascension, nothing about Fortas’s appointment as an associate justice three years earlier portended any hazards. During his nomination in 1965, Fortas slugged softballs thrown at him by the Judiciary Committee in just three hours of testimony. Despite Fortas’s extensive entanglements with the president, neither the Department of Justice nor the Senate conducted any background checks. Special interest groups stayed on the sidelines and the media didn’t bother to rummage for scandals. The Senate had hardly bothered to stage a debate before confirming Fortas as an Associate Justice through a voice vote. The entire process took a mere fortnight.

Nothing in Fortas’s profile had changed since his swift confirmation in 1965. No one had discovered any black marks on his record and his judicial outlook turned out to be exactly as predicted: a liberal ideologue in the mold of the outgoing chief justice.

Little had changed as well to the Senate’s composition during those three years. Democrats still outnumbered Republicans by a two-to-one margin and the same men held leadership posts. Within the Judiciary Committee, fifteen of its seventeen members remained unchanged, including its chairman, James Eastland of Mississippi, whose generous treatment of Fortas in 1965 earned him an invitation to Fortas’s celebration party.

Swelling with confidence, Fortas arranged for his clerks to take over some of the administrative tasks typically handled by the Chief Justice’s office soon after Johnson announced his nomination on June 26, 1968. He wasn’t the only one in Washington to make this presumption: In an editorial endorsing Fortas, *The New York Times* proclaimed that when the “Supreme Court reopens in the fall . . . Fortas will move up . . . to stage center as Chief Justice.”

But something was different this time around. Radically different! Unbeknownst to anyone at the time, the Fortas nomination would turn out to be the turning point of a historic transformation that revolutionized the confirmation process and the launching point for the conservative takeover of the Court.

A maverick his entire career, no one was more willing to sabotage Fortas

than Strom Thurmond and to buck the capital's pundits and breach the deep-seated customs governing judicial confirmations standing in his way. Enraged by the Democratic Party's turn towards civil rights, Thurmond bolted from the party to become the Republican kingmaker in the South. Unlike some of his peers, however, Thurmond had no qualms over his unapologetic defense of Jim Crow. "We talk about somebody being more Catholic than the Pope," observed a senate aide. "Strom had become more Confederate than Robert E. Lee." The South Carolina Senator reinforced his status as one of the region's leading opponents of integration after the Court issued *Brown v. Board*, the 1954 ruling declaring segregation unconstitutional. Since then, few politicians had spent more time bashing the Warren Court: "Warren has done more harm to the American way of life than any other man holding public office in the history of our country," Thurmond declared weeks earlier, reiterating a theme he had uttered repeatedly since *Brown*.

While *Brown* embodied the Court's original sin in Thurmond's eyes, its other groundbreaking rulings morphed the judicial body into his ultimate bogeyman. "What is wrong" with American society, he asked in his jeremiad, *The Faith We Have Not Kept*, published months before Fortas's nomination. "The trouble began with the attack on the Constitution" and that "assault . . . is being led by the Supreme Court." Under Warren's watch, the Court had indeed upended large segments of American life through a series of far-reaching decisions. It handicapped the government's anti-communist crusade at the height of the Cold War, ended a practice dating back to colonial times in banning prayer in schools, expanded the right to privacy by abolishing restrictions on birth control, invalidated nearly every legislative district in the nation, shielded criminal defendants, and liberated erotica from Victorian-minded censors.

Historically, the Court had taken a back seat in America's culture wars. Under Warren's watch, however, it had evolved into a prominent—and often the preeminent—voice on the most contentious debates of the era. Up until the onset of the Great Society in the mid-1960s, this positioned the Court at the vanguard of American liberalism. In contrast to the liberals extolling this judicial revolution, Thurmond pinned the nation's ills on the justices: "The

chief fountain of lawlessness in this country," he declared in *The Faith We Have Not Kept*, is the "United States Supreme Court."

Despite the radical nature of his accusations, when it came to the Court, Thurmond was no outlier. Though he was an unusually vocal segregationist, his antipathy reflected sentiments popular throughout the South. Likewise, his hostility towards the Court's other rulings was consistent with large segments of the populace. Nearly four in five Americans abhorred the Court's school prayer ban and its criminal procedure cases helped turn law and order into the electorate's top concern and a centerpiece of Richard Nixon's 1968 presidential run. As pornography proliferated, three-quarters of the American public found the loosening of its censorship abominable.

From its origins in the South, this enmity spread throughout the nation in the 1950s and '60s, helping to coalesce the voters—evangelicals, blue-collar workers, and southerners—who now constitute the foundation of the modern-day Republican Party. By 1964, these assaults on the Court became fixtures in national elections. While previous presidential candidates had eschewed exploiting the Court's unpopularity—Franklin Roosevelt, for instance, refused to turn the Court into an electoral issue in 1936—attacks upon the Court became central components of the presidential campaigns mounted by Barry Goldwater and Richard Nixon.

What made Thurmond unique among the Warren Court's critics was not his denunciation of its rulings, which were widespread, but his assaults on the institution's standing in the nation's constitutional framework. The 1956 Southern Manifesto he co-authored called upon his fellow southerners to defy the Court. Not one of the Court's detractors through the ages, whether abolitionists fuming over *Dred Scott* or frustrated New Dealers, ever questioned the Court's authority. Masterminding or serving as a wingman for dozens of legislative actions throughout Warren's tenure, Thurmond tried to put the Manifesto's words into law. These efforts included attempts to impose term limits for the justices, grant the Senate the power to overrule the Court, direct federal judges to ignore any rulings breaking with precedent, and require justices with judicial experience. This fervor to profoundly transform the Court's role in a constitutional order nearly two centuries old knew no bounds. Thur-



mond backed the formation of a new judicial body to supersede the Court. If that wasn't extreme enough, so frustrated by the Court's handiwork, its detractors fell one state short of calling for a Constitutional Convention for the first time since 1787 to undo its rulings! As unpopular as the Court may have been—from 1949 to 1973, the percentage of Americans expressing “great confidence” in the Court plummeted from 83 to 32 percent, the largest drop for any branch of government—and despite carrying significant support within Congress, the unwillingness of many Americans to so dramatically alter the Constitution foiled these attacks.

This litany of failures convinced Thurmond that the best means to control the Court was through its make-up. “In its contest with the Supreme Court,” he came to conclude in 1968, “Congress is fighting a losing battle at present. The only power Congress has chosen to exert over the Court is the power of confirmation.” Taking this bitter lesson to heart, Thurmond and his allies devised a simple yet blunt strategy now so widely accepted it seems self-evident: keep liberals off the Court and supplant them with conservatives. No matter how outlandish or unprecedented, their willingness to topple the long-established norms Fortas effortlessly navigated just three years earlier transformed the confirmation process from a routine, almost casual, practice that had seen little friction in the past to a no-holds-barred brawl. Thurmond was mindful of the ramifications of his undertaking: “If the Senate refuses to confirm . . . Fortas . . .,” he wrote to his constituents, “it will be a turning point in modern American history.”

The harshness that Fortas had endured from Eastland and North Carolina Senator Sam Ervin during the first two days of questioning made it clear to Court observers that this confirmation would not play out uneventfully like those of yesteryear. The prospect of a heavyweight bout between Thurmond and Fortas enticed members of the Washington press corps to show up en masse for the third day of the justice's testimony. To accommodate the overflow of spectators, the Judiciary Committee moved the session from its cramped chamber to the Caucus Room. Capable of holding more than 300 people, it was an ideal—and at a time when these hearings weren't televised, an exclusive—venue for a spectacle. Those in attendance didn't come away

disappointed. The highpoint of Thurmond's performance, the moment he delivered the coup de grace marking Fortas's descent from a heroic figure to a scandalized pariah, came during the justice's testimony. Reaching a crescendo after hours of interrogating the witness, Thurmond accused Fortas of encouraging criminals “to commit rapes.”

The tirade was just one of the many breaks with well-established customs. Republicans crossed party lines to team up with Southern Democrats to orchestrate the first filibuster for a Court appointment. Just by itself, the willingness to wield the Senate's ultimate parliamentary weapon set the Fortas confirmation apart from its predecessors. But it was only the opening salvo. Warren's enemies accused the Chief Justice of timing his retirement to prevent a Republican president from naming his successor. Claiming Johnson was a lame duck despite ample precedent for successful Court appointments in a president's final year in office, the Court's detractors—much like Mitch McConnell would do in 2016—called for the next president to fill the vacancy. Critics labelled Fortas a crony for his close relationship with the president, exploited questionable earnings from teaching a course to tarnish his reputation, and invited social conservatives to brand Fortas a guardian of criminals and pornographers. Even that last smear failed to satisfy the Court's enemies. Aiming for the jugular, Thurmond aired a series of adult movies to highlight Fortas's lax moral standards. On top of labeling Fortas a greedy crony with a soft-spot for thugs and a penchant for pornography, his adversaries pummeled him with tendentious questions and ad hominem diatribes through eleven days of hearings that stretched over two months. This outlasted the total number of days spent on all of Franklin Roosevelt's nine nominees to the Court. Some of these antics now seem par for the course. But at the time, they were revolutionary and it was during this era that they became fixtures in a process we've lived with to this day.

How has this transformative event been lost to history? The year 1968 burst with enough drama to generate a film festival worth of documentaries. Weeks into the new year, the Tet Offensive demolished the prevailing notion of impending victory in Vietnam. Before the shock had worn off, Johnson did the unthinkable in declining to run for reelection. Less than a week later, on

April 4, Dr. Martin Luther King Jr.'s assassination ignited riots that subsumed a dozen cities in fire and mayhem, which even for a decade of unparalleled turmoil surpassed all previous conflagrations. Another gunman murdered Robert Kennedy two months later and the summer of carnage continued at the Democratic convention in Chicago as thousands of protestors clashed with Mayor Richard Daley's battalion of baton-wielding police. The bombshells continued into the election. As Nixon made one of the unlikeliest comebacks in political history, George Wallace captured the most electoral votes for a third-party candidate in fifty-six years by running on a platform of segregation and economic populism. If that wasn't enough to make 1968 one of the most consequential years in the nation's history, added to these events were Huey Newton's trial, the My Lai massacre, the near downfall of the French republic, the Prague Spring, and the memorable image of Olympic medalists Tommie Smith and John Carlos raising their fists in protest during the award ceremony at the Mexico City Games.

Coming in quick succession, the surfeit of news crowded out this transformative episode taking place in the senate. Yet, just as the Biblical flood marked a clear demarcation of events occurring before and after the deluge, Fortas's nomination fundamentally altered the Court, turning the selection of justices into high-stakes contests over the future of the nation. The noxious confirmation clashes surrounding Clement Haynsworth, G. Harrold Carswell, Robert Bork, Clarence Thomas, Merrick Garland, Neil Gorsuch, and Brett Kavanaugh are a testament to this reality. It's therefore no coincidence that some of the revolutionary tactics deployed in 1968 reemerged in recent confirmation fights over the replacements for Antonin Scalia and Anthony Kennedy. And contrary to conventional wisdom, Bork's nomination in 1986 did not usher in the modern confirmation process. After a peaceful lull, it represented an atavistic return to the cultural, partisan, and ideological wars of this earlier era.

The Fortas nomination also marked the first major step of the conservative crusade to seize control of the Court. Buoyed by originalism and textualism—a pair of judicial philosophies harnessed to promote a conservative agenda—and buttressed by a network of well-financed institutions, like the Federalist Society and the Heritage Foundation, committed to refashioning

the federal judiciary, this takeover spanned half a century. Although this movement suffered some setbacks—Harry Blackmun, John Paul Stevens, and David Souter, in particular—it ultimately ushered in the right's domination of the Court and rallied Republican voters, perhaps none more so than Donald Trump's supporters.

But before conservative leaders could put this plan into effect, before they developed the institutions and roster of jurists necessary to restock the Court with proven and reliable ideologues, before they had even devised a workable blueprint for an undertaking that would take decades to come to fruition, they first sought to end the Warren Court's perpetuation under Fortas. Embittered by years of defeat and frustration, they were willing to shatter just about every tradition that had governed the confirmation process since the nation's founding to do just that.

Fast forward fifty years, it is clear that both the tactics deployed against modern nominees as well as the political and ideological considerations that dominate present-day judicial politics hark back to Fortas's confirmation fight. Focused on the immediacy of the battle at hand, none of the adversaries in Fortas's confirmation realized that the episode would, in establishing the template for modern judicial politics, come to serve as a pivotal moment in the nation's history. Instead, as Fortas and Thurmond faced each other down like a pair of rivals out of ancient mythology, they plotted their next moves.