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Abe Fortas: A Biography

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BOOK REVIEW

ABE FORTAS: A BIOGRAPHY. By Laura Kalman.
New Haven, Connecticut, and London, England:
Yale University Press, 1990. Pp. 499. \$ 29.95.

Reviewed by THOMAS K. LANDRY*

INTRODUCTION

Abe Fortas led a full life: consummate New Dealer, quintessential Washington lawyer, intimate presidential advisor and controversial Supreme Court Justice. Seldom is a man encountered whose talents were so broadly applied across the upper echelons of American power.

Fortas rose from humble beginnings in Memphis, Tennessee through hard-earned scholastic achievement, and landed as a Yale law professor and New Deal administrator by age twenty-three. After positions with the Agricultural Adjustment Administration and the Securities and Exchange Commission, he moved to the Department of Interior, where he attained the position of under secretary. He entered private practice in 1946 with Thurman Arnold, a colleague and professor from his Yale days, and their firm enjoyed immense success.

Over the years Fortas cultivated a close relationship with Lyndon Baines Johnson, who had been charting his own destiny as a Texas congressman. When Johnson became president, Fortas was thrust closer than ever to the heart of American political power. Johnson appointed his friend and advisor to the Supreme Court in 1965 without controversy. By 1968, however, the political climate had shifted, and the lame-duck president failed in an attempt to elevate Fortas to the position of Chief Justice. Moreover, the confirmation battle sparked investigations that would culminate in Fortas' resignation from the Court in 1969.¹

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1. Opposition to his confirmation as Chief Justice was a mix of animosity toward the Warren Court, concern over Fortas' role as an advisor to the president while he sat on the Court, and further concern over his acceptance of exorbitant sums of outside income. One of those sources was a teaching seminar funded by former clients (although Fortas may not have known who funded the seminar, and always recused himself from cases involving former clients). Another was a consulting position for the Wolfson Foundation, created by businessman Louis Wolfson, who was being investigated for securities violations. Although Fortas backed out of the foundation contract, he failed to appreciate the appearances created by its very existence. His opponents were also able to charge that he been less than forthcoming with the Senate Judiciary Committee. Indeed, he had lied about his

Laura Kalman's biography is the third attempt (and the second of recent vintage) to shed light on the life and the person of Abe Fortas.² Each of these works has its own place, forming a particular image of the man by emphasizing different aspects of his life. This review will therefore explain the significance of Kalman's book in the context of the other Fortas literature.

The first book substantially devoted to the life of Abe Fortas was *A Question of Judgment*.³ Written by journalist Robert Shogan in 1972, shortly after Fortas' resignation from the Supreme Court, it contains a relatively brief and readable account of Fortas' life, but primarily concentrates on the circumstances surrounding the failed confirmation hearings and ultimate resignation. Shogan's book remains important because of its detail regarding white collar criminal Louis Wolfson and his relationship with Fortas.

Kalman's principal competition, however, is Bruce Murphy's *Fortas: The Rise and Ruin of a Supreme Court Justice*.⁴ Murphy's work, published in 1988, was the first full-length biography on Fortas and is closely comparable to Kalman's book in many respects. The differences are nevertheless important. For example, Murphy provides a greatly detailed account of the confirmation battle. Murphy also presents a well-developed narration of Fortas' life, but here he treads on Kalman's turf, for she has provided the most intimate work yet, bringing us closest to the person of Abe Fortas.

I. THE PERSONAL TOUCH

One reason for Kalman's success at introducing the reader to Abe Fortas is her heightened attention to his formative experiences. She simply dedicates more attention to Fortas' early years and to his interests. For example, Kalman pays greater attention to the effect of the legal realist movement on Fortas, a subject on which she has written before.⁵ She tells

involvement with the president and the nature of the outside income arrangements. The resignation was forced by continued development of information on his connection to Wolfson, who had since been convicted of securities violations, and by the growing realization that he had lied to the Committee.

2. L. KALMAN, *ABE FORTAS: A BIOGRAPHY* (1990); B. MURPHY, *FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE* (1988); R. SHOGAN, *A QUESTION OF JUDGMENT* (1972).

3. R. SHOGAN, *supra* note 2.

4. B. MURPHY, *supra* note 2.

5. L. KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986).

us more about the role of music and the arts in his life,⁶ and about his dedication to the Commonwealth of Puerto Rico.⁷

An even greater reason for her success in bringing us closer to Fortas is her good fortune to gain the cooperation of Fortas' closest friends and associates, thus becoming the "official" biographer. Although both Kalman and Murphy interviewed Fortas himself, only Kalman had the cooperation of Fortas' wife, Carol Agger. Similarly, the thoughts and memories of Mercedes Eicholz, the second wife of William O. Douglas and a close friend of the Fortases, will be found only in Kalman's work. Securing the participation of these two persons alone would have been highly significant, but the author also gained access to Fortas' private papers, and Agger "encourag[ed] other people to speak with [the author]."⁸

The result of this clear advantage in source material is a side of Abe Fortas that needed to be told, if only to balance the record formed by other writers. For example, Bruce Murphy describes Fortas being effectively hoodwinked by Lyndon Johnson into accepting his appointment to the Supreme Court.⁹ The impression is created that Fortas was forced into service. Kalman takes the rough edge off the events by relating the opinions of Fortas' close friends, one of whom recalled that Fortas was initially "delighted" at the prospect of becoming a Justice.¹⁰ Kalman's conclusion is that Fortas' surprise was exaggerated by Murphy, and that while Fortas had reservations about the appointment, he wanted and expected it.¹¹ The differences in telling the appointment story reflect a propensity on Murphy's part to pass harsh judgment on Fortas, whereas Kalman tends to rationalize his behavior by presenting countervailing considerations. In the end, this works to Kalman's favor because the reader is able to form an independent opinion.¹²

Although Kalman has made the best effort yet to portray the personal character of Fortas, some significant aspects of his life are left unmeasured. For example, the Fortases were childless, but we have no sense of how this shaped or reflected Abe Fortas' views and actions.

6. L. KALMAN, *supra* note 2, at 8-9.

7. *Id.* at 77-101.

8. *Id.* at xi. His private papers, however, "provide more insight into his activities than they do into his inner self." *Id.* at 2.

9. B. MURPHY, *supra* note 2, at 166-85. Murphy entitles this particular chapter "The Ambush."

10. L. KALMAN, *supra* note 2, at 241 (quoting an interview with Mercedes Eichholz (May 1986)).

11. *Id.* at 245.

12. Kalman may have gained some of these advantages, in all due fairness, by her opportunity to analyze Murphy's book and criticize it in her own.

Kalman does inform us that Fortas loved children.¹³ We also learn, however, on the basis of confidential interviews with the Fortases' "friends," that Agger "had made it clear to Fortas at the time of their marriage that she wanted no children."¹⁴ One wonders what sense of posterity Fortas had, and for whom or what he saw such a need to accumulate wealth that he would commit indiscretions serious enough to force his resignation from the Supreme Court.¹⁵

II. TECHNICIAN OR SKILLED NEW DEALER?

When he entered private practice, Fortas' attraction to money, or its attraction to him, prompted accusations by former New Deal associates that he had "sold out" to the interests the New Deal had been dedicated to reforming.¹⁶ But he had not simply become a flamboyant, highfalutin corporate mouthpiece. While the Fortases "lived elegantly . . . [n]either had great taste for the Washington social whirl"¹⁷ They "plainly enjoyed the good life in a way," recalled one of Kalman's sources, but "it always seemed . . . that Abe really preferred the simple things."¹⁸ And in a brush stroke typical of the more personal portrait Kalman provides, we learn that Fortas "bought cheap suits for himself."¹⁹ The fact is that the many signs to Fortas' character point in different directions, and it is only through familiarity with these numerous facets

13. L. KALMAN, *supra* note 2, at 194-95.

14. *Id.* at 195. Confidential interviews are used extensively by Kalman and, as here, are an important factor in the personal quality of her book.

15. It is tempting to think that Fortas acted out of undying devotion to his wife. Indeed, the Wolfson Foundation contract that was the final straw in forcing his Court resignation provided for payments of \$20,000 per year to Fortas for life, and then to his wife for her life if she should survive him. Examples of concern and devotion like this are difficult to square with other actions. For example, while Kalman tells us that Fortas and Carol Agger "were great friends and remained intensely loyal to each other," the two "had separate bedrooms, and Fortas had one serious affair in the late 1940s and a later, longer one. . . . [E]ven when he was involved in a serious relationship, he still pursued other women. He did not regard anyone, not even his wife's friends, as off limits." *Id.* at 195-96. Agger was apparently aware of the situation, however, and her tolerance was a prerequisite to his behavior. *Id.* at 196.

Explaining the drive to accumulate wealth as a function of concern for Agger's well-being is all the more inexplicable given her own notable success in private practice. At the time of Fortas' appointment to the Supreme Court in 1965, Agger was reportedly earning more than \$100,000 per year. R. SHOGAN, *supra* note 2, at 192.

16. See L. KALMAN, *supra* note 2, at 153-54; B. MURPHY, *supra* note 2, at 80.

17. R. SHOGAN, *supra* note 2, at 72.

18. L. KALMAN, *supra* note 2, at 192 (quoting an interview with Patrick Macrory (June 1987)).

19. *Id.*

that one can shape a reliable image of him.

Yet even those who have closely studied his life differ in their final assessments. Kalman maintains that Fortas was indeed committed to the values of New Deal liberalism, but was pragmatic and sensitive to a potential backlash to overextended liberal social programs. Fortas' style was therefore

to achieve his ends not by belaboring the Johnson administration's duty to the poor but by reassuring those who feared increased governmental involvement in social welfare. Remembering, as both he and Johnson did, the extent to which the New Deal had been condemned as "revolutionary," they tried even more explicitly than Roosevelt had done to remind the wealthy that reform carried its own reward.²⁰

Murphy's Fortas lacks the commitment to predetermined values that Kalman ascribes. Instead, Murphy asserts that over time Fortas and Johnson came to see themselves as "'technicians'—problem solvers who acted from the challenge of overcoming obstacles to a desired policy, rather than out of strict adherence to a single ideological viewpoint. This indifference to a single philosophy made Fortas much different from the devotedly liberal New Dealers surrounding him"²¹

Although the role of the technician is important to recognize in Fortas' career, it is another matter to say that the role was unaccompanied by an underlying ideological motivation. And if one lends credence to the

20. *Id.* at 217. A problem with enacting great measures of economic reform during Johnson's tenure was the lack of an impetus on the scale that Roosevelt had to support his reforms. The Depression provided the New Dealers with a great deal of leverage against business interests, which had to submit to reformation in order to survive at all. In this respect, Kalman quotes a 1972 speech by Fortas, who claimed that "the country would have supported practically any measure that seemed directed against the money merchants of Wall Street' and express[ing] pride in New Dealers who sought a partnership between Wall Street and Washington that would tame the stock exchanges without bringing them under government control." *Id.* at 53-54 (quoting speech by Abe Fortas, Investment Association of New York (Oct. 26, 1972)).

21. B. MURPHY, *supra* note 2, at 48. Similarly, Murphy found with regard to Fortas' efforts to bring public power within the control of the Department of Interior that "[t]hrough Fortas was not ideologically committed to public power, he was once more the 'technician,' designing the solutions regardless of the ends being sought." *Id.* at 37. In fairness to Fortas, it should be noted that his actions were at the behest of his boss at the Department of Interior, Harold Ickes, so Fortas' ideology could not necessarily have controlled the ends being sought. Moreover, Kalman believes Murphy to be mistaken on this point, referring to an article quoting Fortas as saying that "electricity must be produced and distributed to the people without private profit." L. KALMAN, *supra* note 2, at 71 (citing Koppes, *Environmental Policy and American Liberalism in The Department of Interior, 1933-53*, 7 ENVTL. REV. 244 (1983)).

impressions retained by Fortas' contemporaries, as related by Kalman, he certainly did possess ideology. Clark Clifford, who was paired with Fortas as a close advisor to Johnson, was asked what Fortas cared about most, and "immediately answered: 'The liberal cause. He was a deep-seated dyed-in-the-wool one-hundred-percent liberal. . . . He was a true-blue Roosevelt liberal.'"²² A White House staffer during the Johnson Administration even told an associate that Fortas was "'really a *radical*, you know.'"²³

It can be fairly concluded that both Kalman and Murphy make interesting and useful commentaries on Fortas' life, but that one may accept Murphy's view of Fortas as a technician without reaching his harsher conclusion that the man lacked ideology. Fortas and Johnson may have relished the task of leading the nation toward acceptance of civil rights legislation or military involvement in Vietnam, but Murphy does not convince the reader that they would have equally enjoyed a struggle to preserve Jim-Crowism or to prevent intervention in Vietnam. Acting "from the challenge of overcoming obstacles to a desired policy"²⁴ requires that a policy be desired, which implies the existence of values by which desirable and undesirable policies are distinguished.

III. THE IDEOLOGICAL TECHNOCRAT

Acceptance of Kalman's portrait of an ideological man along with Murphy's depiction of Fortas as a technician raises an issue that is bigger than the life of Abe Fortas: is it wise for a political system to provide for administration of government by ideologically motivated technicians? The word "technician" conjures up images of scientifically trained fix-it persons who, once told that something is awry, will repair it. But Abe Fortas was in the business of politics, not television repair. There is no single right way to design or repair something in politics, except according to ideological specifications.²⁵ The ideological debate over what "right" means is an old one. It may be taken in the Jacksonian sense as the "common sense of the ordinary citizen" or in the Hamiltonian sense as the

22. L. KALMAN, *supra* note 2, at 217 (quoting interview with Clark Clifford (July 1985)).

23. *Id.* (quoting Eric Goldman) (emphasis in original).

24. B. MURPHY, *supra* note 2, at 48.

25. *But see* M. SHAPIRO, WHO GUARDS THE GUARDIANS? 125 (1988). Shapiro notes that "[p]hilosophers are moving to the view that there are right and wrong government policies, above and beyond the mere summation of individual preferences."

Conversely, although there also may be more than one way to solve a truly technical problem, the constraints placed by the laws of nature are assumed to be greater than those of the political system.

"wise discretion of experienced men of affairs."²⁶ Modern tension between democracy and technocracy reflects that older debate.

The legitimacy of technocracy depends on the specialized abilities of the technocrats and the appropriateness of the problems committed to their discretion.²⁷ When technocracy is properly implemented, it will consequently have a narrow sphere of influence, because of the limited range of the technocrats' jurisdictional competence. Thus, experts having limited authority over certain environmental regulatory issues might properly determine the best way to solve the problem of pollution from coal-fired power plants.²⁸ On the other hand, widely ranging issues that do not require specialized knowledge cannot be the legitimate subject of a technocrat's authority.

A fellow government associate of Fortas is quoted by Murphy as saying that Fortas "felt he could take on any subject and master it given a reasonable period of time."²⁹ Whether or not Fortas was a competent technocrat during the New Deal, as a Supreme Court Justice he was not acting within the constraints of legitimate technocratic authority. Expansion of technocrats' authority tends toward forms of absolutism that are anathema to the American political system.³⁰ A Supreme Court justice involved in the creation of legislation and decisions on military strategy and national emergencies, is clearly a step in that general direction.³¹ The separation of powers concerns raised during Fortas' confirmation hearings were therefore justified.

Kalman notes in her prologue that "[f]ew symbolized liberalism's promise and paradoxes as well as Abe Fortas."³² The tension between

26. *Id.* at 150.

27. *Cf.* J. LANDIS, *THE ADMINISTRATIVE PROCESS* 23, 25-26 (1938) (concluding that the creation of administrative agencies consisting of compact and select personnel for the discharge of responsibilities was natural and inevitable).

28. *See* B. ACKERMAN & W. HASSLER, *CLEAN COAL/DIRTY AIR* (1981) (examining the Environmental Protection Agency's role in the development of the Clean Air Act amendments of 1977).

29. B. MURPHY, *supra* note 2, at 37 n.11 (quoting Arthur "Tex" Goldschmidt).

30. Thus, the New Deal depended on increased executive power. According to Shapiro, "opponents of the New Deal . . . denounced the 'statism' of continental administrative law as a way of attacking the expansion of the executive branch and presidential power." M. SHAPIRO, *supra* note 25, at 78.

31. Congressman Gordon Allott of Colorado charged during the confirmation battle that Fortas had "cleared" the wording of an appropriations bill amendment providing for Secret Service protection of presidential candidates. B. MURPHY, *supra* note 2, at 483. Fortas participated in numerous meetings with the president on the Vietnam conflict, and was relied upon rather heavily by the president in handling the Detroit riots of 1967. These and other examples of Fortas' extrajudicial activity are recounted in both the Kalman and Murphy books.

32. L. KALMAN, *supra* note 2, at 3.

technocracy and democracy is one of those paradoxes: as the New Deal strove to empower the masses, it concentrated power in presidentially directed bureaucracies, out of the reach of Congress.³³ As Martin Shapiro eloquently stated, "the shared values and esprit de corps of New Deal politicians and New Deal bureaucrats masked the latent contradictions for a democratic political system posed by the shift of political power to a technocratic bureaucracy."³⁴ And young men like Abe Fortas came to believe they could cure any ill if given "a reasonable period of time."³⁵ When the New Deal faded, it just may be that some New Dealers, including Abe Fortas, retained their arguably arrogant faith in themselves as problem-solvers. This might help explain his callous disregard for judicial propriety, and also his persistent hostility toward the democratic branch (i.e., Congress). The latter is a recurrent theme in Kalman's book.³⁶

These issues are not fully developed in any of the Fortas literature, and are considered only superficially here to illustrate the significance of Fortas' life and the value of reflection upon his actions.

CONCLUSION

Kalman's book is a worthy addition to the Fortas literature, and may be the best choice if one intends to read just one of the available works. This is especially true if the historian's style, uncluttered by attempts to judge or explain Fortas' enigmatic life, appeals to the reader. The personal touch lent to this "official" biography by the cooperation of Carolyn Agger Fortas and Mercedes Eicholz is another feature that guarantees the book a meaningful place among its competition.

On the other hand, the goals of the reader could justify a different selection. Fortas' losing battle for confirmation as Chief Justice has become a vital precedent for the modern appointment process, and Bruce Murphy's work contains the most detailed and useful account of that battle. Robert Shogan's book also maintains its significance by virtue of its information on the relationship between Fortas and Louis Wolfson, as well as its concise account of Fortas' life.

Each of the three books amplifies different aspects of Fortas and his life, and the efficient reader will carefully consider the reasons for studying Fortas in deciding which book to read. Kalman's effort is thought-provoking, and valuable to anyone who identifies with the

33. See M. SHAPIRO, *supra* note 23, at 62, 78-79. Judicial scrutiny of bureaucratic power was restricted during this period as well. Shapiro, *Judicial Activism*, in *THE THIRD CENTURY* 121-23 (S. Lipset ed. 1979).

34. Shapiro, *supra* note 33, at 124.

35. See *supra* text accompanying note 29.

36. See, e.g., L. KALMAN, *supra* note 2, at 55, 166.

complex of personal ambitions and liberal beliefs that infused the elusive character of Mr. Fortas. Bruce Murphy's work is the better source if you want to know what happened to Fortas, but if you want to get to know Fortas, choose Kalman.

