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Senate

MONDAY, SEPTEMBER 9, 1968

The Senate met at 12 noon, and was called to order by the President pro tempore.

The Chaplain, Rev. Frederick Brown Harris, D.D., offered the following prayer:

God and Father of mankind, who opens the gates of the morning, send us forth with powers of mind and body to front the duties of another day.

Thou art the reality behind all earth's shadows. Seeing that we spend our days as a tale that is told and that we pass this way but once, keep us from unkind words and from unkind silences, yet sure and strong in the faith that is in us.

Enrich us with those durable satisfactions of life so that the multiplying years may not find us bankrupt in those things that matter most. May the ruling passions and the deepest desires of those who here are called to serve the entire Nation be worthy for the facing of this hour.

Spirit of purity and grace,
Our weakness pitying see;
O make our hearts Thy dwelling place,
And worthier Thee.

We ask it in the dear Redeemer's name. Amen.

THE JOURNAL

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the reading of the Journal of the proceedings of Friday, September 6, 1968, be dispensed with.

The PRESIDENT pro tempore. Without objection, it is so ordered.

WAIVER OF CALL OF THE CALENDAR

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the call of the legislative calendar, under rule VIII, be dispensed with.

The PRESIDENT pro tempore. Without objection, it is so ordered.

LIMITATION ON STATEMENTS DURING TRANSACTION OF ROUTINE MORNING BUSINESS

Mr. MANSFIELD. Mr. President, I ask unanimous consent that statements in relation to the transaction of routine morning business be limited to 3 minutes.

The PRESIDENT pro tempore. Without objection, it is so ordered.

MESSAGES FROM THE PRESIDENT

Messages in writing from the President of the United States submitting nominations were communicated to the Senate by Mr. Leonard, one of his secretaries.

EXECUTIVE MESSAGES REFERRED

As in executive session,

The PRESIDENT pro tempore laid before the Senate messages from the President of the United States submitting sundry nominations, which were referred to the Committee on Post Office and Civil Service.

(For nominations this day received, see the end of Senate proceedings.)

MESSAGE FROM THE HOUSE—ENROLLED BILL SIGNED

A message from the House of Representatives by Mr. Bartlett, one of its reading clerks, announced that the Speaker had affixed his signature to the enrolled bill (S. 449) to provide for the popular election of the Governor of Guam, and for other purposes, and it was signed by the President pro tempore.

NORTH ATLANTIC ASSEMBLY—APPOINTMENT BY THE VICE PRESIDENT

The PRESIDENT pro tempore. The Chair, on behalf of the Vice President, pursuant to Public Law 84–689, appoints the Senator from Mississippi [Mr. STENNIS], the Senator from Tennessee [Mr. GORE], the Senator from Washington [Mr. JACKSON], the Senator from Ohio [Mr. LAUSCHE], the Senator from Indiana [Mr. BAYH], the Senator from Iowa [Mr. HICKENLOOPER], the Senator from South Dakota [Mr. MUNDT], the Senator from New York [Mr. JAVITS], and the Senator from Kentucky [Mr. COOPER] as members to attend the North Atlantic Assembly to be held in Brussels, Belgium, from November 11 to 16, 1968; and as alternates, the Senator from New Hampshire [Mr. MCINTYRE], the Senator from Maryland [TYDINGS], the Senator from Virginia [Mr. SPONG], the Senator from Nebraska [Mr. HRUSKA], and the Senator from California [Mr. KUCHEL].

PETITION

The PRESIDENT pro tempore laid before the Senate a petition, signed by H. Jenkins, and sundry other citizens of the State of Kansas, praying for the enactment of legislation to extend the National Labor Relations Act to cover farmworkers, which was referred to the Committee on Labor and Public Welfare.

REPORTS OF COMMITTEES

The following reports of committees were submitted:

By Mr. JACKSON, from the Committee on Interior and Insular Affairs, with an amendment:

S. 3420. A bill to authorize a per capita distribution of $550 from funds arising from a judgment in favor of the Confederated Tribes of the Colville Reservation (Rept. No. 1510).

By Mr. BURDICK, from the Committee on Interior and Insular Affairs, with amendments:

S. 2401. A bill to provide for loans to Indian tribes and tribal corporations, and for other purposes (Rept. No. 1508); and

S. 3072. A bill to amend the act entitled "An act to provide for the rehabilitation of Guam, and for other purposes," approved November 4, 1963 (Rept. No. 1509).

By Mr. GRUENING, from the Committee on Interior and Insular Affairs, without amendment:

H.R. 16880. An act to authorize the Secretary of the Interior to consider a petition for reinstatement of oil and gas leases (BLM–A–068348 and BLM–A–068348 (C)) (Rept. No. 1511).

By Mr. McGOVERN, from the Committee on Interior and Insular Affairs, without amendment:

H.R. 10911. An act to provide for preparation of a roll of persons of California Indian descent and the distribution of certain judgment funds (Rept. No. 1513);

H.R. 11552. An act for the relief of certain property owners in Tate County, Miss. (Rept. No. 1514);

H.R. 11782. An act to authorize and direct the Secretary of the Interior to accept allotment relinquishments, approve a lieu allotment selection, and issue appropriate patents therefor to the heirs of Dolly McCovey (Rept. No. 1515);

H.R. 14205. An act to provide for the disposition of funds appropriated to pay a judgment in favor of the Creek Nation of Indians in Indian Claims Commission docket numbered 21, and for other purposes (Rept. No. 1516);

H.R. 16211. An act to provide for the disposition of funds appropriated to pay a judgment in favor of the Creek Nation of Indians in Indian Claims Commission docket numbered 276, and for other purposes (Rept. No. 1517); and

H.R. 16402. An act to provide for the disposition of funds appropriated to pay a judgment in favor of the Delaware Nation of Indians in Indian Claims Commission docket numbered 337, and for other purposes (Rept. No. 1518).

By Mr. McGOVERN, from the Committee on Interior and Insular Affairs, with an amendment:

S. 3728. A bill to authorize the use of funds arising from a judgment in favor of the Kowa, Comanche, and Apache Tribes of Indians of Oklahoma, and for other purposes (Rept. No. 1512).

By Mr. TYDINGS, from the Committee on the District of Columbia, with an amendment:

S. 2589. A bill to provide for the regulation in the District of Columbia of retail installment sales of consumer goods (other than motor vehicles) and services, and for other purposes (Rept. No. 1519).

BILLS INTRODUCED

Bills were introduced, read the first time, and, by unanimous consent, the second time, and referred as follows:

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By Mr. SPARKMAN:

S. 4014. A bill to provide relief for Alley J. Register; to the Committee on the Judiciary.

By Mr. HART (for Mr. BAYH):

S. 4015. A bill for the relief of Christopher Ralph Sales; to the Committee on the Judiciary.

By Mr. WILLIAMS of New Jersey:

S. 4016. A bill for the relief of Virgilio Cibellis, Gelsimina Cibellis, and Mauro Cibellis; to the Committee on the Judiciary.

EXTENSION OF RENEGOTIATION ACT OF 1951—AMENDMENT

AMENDMENT NO. 942

Mr. CURTIS submitted an amendment, intended to be proposed by him, to the bill (H.R. 17324) to extend and amend the Renegotiation Act of 1951, which was ordered to lie on the table and to be printed.

ENROLLED BILL PRESENTED

The Secretary of the Senate reported that on today, September 9, 1968, he presented to the President of the United States the enrolled bill (S. 449) to provide for the popular election of the Governor of Guam, and for other purposes.

Czech

NO TIME FOR A SUMMIT CONFERENCE

Mr. DODD. Mr. President, there have been repeated reports that, despite the Czechoslovak crisis, President Johnson still hopes to be able to arrange a summit conference with Premier Kosygin at an early date. These reports lack official confirmation and it may well be that the information on which they were based was inaccurate.

No President has labored harder in the cause of peace than President Johnson. He has gone the extra mile, and 10 times that, in seeking to achieve agreements that would make the peace of the world more secure.

If his efforts have failed, it is not because of any lack of commitment or perseverance on his part.

The failure stems, rather, from the fact that he has been seeking arrangements with a foe who honors no agreements, and peaceful coexistence with forces that are fanatically committed to the destruction of the free world.

If any further proof was needed, we have it now in Czechoslovakia.

The failure also stems from another source. It is obvious that the administration, in its recent policies, has been motivated by the belief that there had been a significant moderation in Soviet policy, which was resulting in a growing detente between our two countries. Who they are I do not know, but it is clear that there have been people around the President who were able to win him over to this belief. And this belief in a nonexistent detente, as I have pointed out on many occasions, has inevitably confused our judgment and paralyzed our will to act.

I consider it a safe assumption that the same advisers who sold the myth of the detente to the President are now among those who are urging him to seek a summit conference.

I am sure they are motivated by a genuine, and understandable, concern over the preservation of peace. But, in my opinion, a summit conference at this juncture would be a moral disaster that could only lead to further political disasters.

On this point, a recent comment of the Times of London stated the matter more cogently than any comment I have seen in the American press.

Let me quote what the Times said:

At the present time to continue to talk about *seeking detente* with the Soviet Union as though nothing had happened is as *imprudent* as the continued attempts to seek detente with the prewar dictators while they were actually in the midcourse of aggression. It may be impossible to deal effectively with an aggressor, but it is *not necessary to pine for friendship.*

There may be exceptional circumstances under which a summit conference can serve a positive purpose; I do not go as far as saying that summit conferences are wrong under all circumstances. But the record shows that the summit conferences that have taken place to date have invariably wound up serving the interests of the Communist world. And this is so despite the fact that the good faith of our leaders, in entering into these conferences, was apparent to all the world.

These conferences have always served to enhance the prestige of the Communist leaders and to foster belief in the myth of the detente or in the possibility of a detente.

They have also contributed to the weakening of the Western alliance by recurrently sowing the fear that the United States was about to enter into a bilateral arrangement with the Soviet Union.

And, because of the exaggerated expectations they inevitably arouse, they put our leaders under pressure to arrive at some kind of agreement with the Soviet leaders in the course of several days' discussion. Conducting negotiations affecting our national security and the security of the free world under this kind of pressure violates all the rules of diplomacy.

I have always had grave misgivings about summit conferences for these reasons.

Despite the good intentions of President Roosevelt and President Truman, the Yalta, Teheran, and Potsdam conferences turned out to be failures for the free world.

Despite President Eisenhower's good intentions, the Geneva Conference and the invitation for Khrushchev to visit this country, also turned out to be mistakes.

And despite President Johnson's overriding cammitment to the cause of peace, the Glassboro Conference turned out to be completely fruitless.

It is clear at this point that these conferences only served the interest of the Soviet Union.

A summit meeting at this juncture would be an even greater mistake.

If the Soviets pull their forces out of Czechoslovakia, a summit conference might be in order, because such a pullout would create the possibility of a wider understanding in the interest of world peace.

But now, instead of a summit conference, I believe that the appropriate response to Soviet aggression in Czechoslovakia would be to convene an emergency meeting of the North Atlantic Treaty Organization, to consider what measures must be taken to bolster the defenses of Western Europe.

For the implications of the Czechoslovak occupation go far beyond the frontiers of Czechoslovakia. Bismarck once said that whoever controls the Czech territory of Bohemia controls Europe. And this estimate of the strategic importance of Bohemia-Moravia has been shared by virtually every other strategist down through the centuries.

The entire balance of power in Europe has now been drastically altered by the fact that a Soviet army, 500,000 strong, stands on Czechoslovakia's frontiers with Western Europe. It is for this reason that the Governments of Austria and West Germany are openly apprehensive over the future.

The administration has indicated that it may seek to reassure our allies by publicly, and in unmistakable terms, reaffirming our commitment to the defense of Europe. But this reaffirmation will have to be backed up by concrete measures if it is to reassure our allies and deter the Soviets.

Among other things, I believe we should put our forces in Europe on an "alert" basis, and that we should return to West Germany, for participation in prolonged maneuvers, the 34,000 men who were recently withdrawn.

I believe we should also make an all-out effort to achieve a rapprochement with De Gaulle. Certainly, it is conceivable that, on the heels of the June insurrection in France which led De Gaulle to speak about "the menace of totalitarian communism," and now on the heels of last month's events in Czechoslovakia, the French President will be willing to join in an effort to revive and reinforce the Western alliance.

We should also mobilize all of our diplomatic, political and economic resources in an effort to induce the Soviets, in their own interests as well as in the interests of the peace of Europe, to withdraw their forces from Czechoslovakia.

One of the first things we should do—and this is a matter to which I have referred many times—is to impose an embargo on the shipment of all industrial and technological equipment to the countries that participated in the invasion of Czechoslovakia, and try to persuade the other countries of the free world to join in parallel action.

I welcome the initiative the administration has already taken in suspending our cultural exchange programs with the Communist countries involved in the invasion of Czechoslovakia, and in calling off a pending ceremonial flight by Aeroflot officials, intended to mark the inauguration of direct Moscow-New York flights. But the imposition of economic sanctions would carry a hundred times as much weight with the Commu-

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nists governments because of their desperate need for sophisticated technological equipment which they can only obtain from the West.

These are the things we should be doing, instead of talking about a summit conference or about the revival of a detente which never really existed.

This is the surest way of preserving the peace in Europe.

czach

NUCLEAR NONPROLIFERATION TREATY

Mr. BYRD of Virginia. Mr. President, I note that the distinguished majority leader has indicated that the invasion of Czechoslovakia by the Soviet Union may preclude Senate consideration of the treaty on nonproliferation of nuclear weapons.

Certainly, the brutal action by the Soviet Union shocked the world; hopefully, it will cause many in our Government to reappraise their thinking in regard to appeasing the Soviets.

But, I would hope it would not prevent Senate consideration of the nonproliferation treaty, the purpose of which is to prevent the spread of nuclear weapons.

As strongly as I condemn the action of the Soviet Union and its satellites against Czechoslovakia, that action serves to remind us that the Soviet Union has not forsaken its aggressive policies and that the risk of nuclear war is still very much with us.

The threat posed by the possibility of more nations, some under irresponsible leadership, obtaining nuclear warmaking devices is so grave that every reasonable precaution should be taken.

I speak as one who voted against the Consular Treaty with the Soviet Union, and I would do so today and for so long as the Soviet Union continues to supply North Vietnam.

I speak as one who played a part in defeating our President's determination to use American tax dollars to build a Fiat automobile plant in the Soviet Union—and would do so again.

I speak as one who strongly opposes the efforts of many high administration officials to appease the Soviet Union, believing as I do that appeasements of Communist dictators is as unfruitful and as futile as were efforts to appease Nazi and Fascist dictators 30 years ago.

But, the nuclear nonproliferation treaty does not appear to contain any of these elements.

I have read the testimony taken by the Committee on Foreign Relations, and while I might change my mind as the result of floor debate, the treaty appears to be a sensible one.

It may not be too much to the liking of some of our Western allies—and because of this we may wish to proceed slowly—but the treaty does not appear harmful to our own national interests and it could prove helpful in preventing the spread of nuclear weapons.

I note that the distinguished senior Senator from Tennessee [Mr. GORE] will seek tomorrow to have the Committee on Foreign Relations report the treaty to the Senate for its consideration.

I wish him well in this endeavor.

Mr. MANSFIELD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

REGULATION OF MAILING OF MASTER KEYS FOR MOTOR VEHICLE IGNITION SWITCHES

Mr. BYRD of West Virginia. Mr. President, I ask the Chair to lay before the Senate a message from the House of Representatives on H.R. 14935.

The PRESIDING OFFICER laid before the Senate a message from the House of Representatives announcing its disagreement to the amendment of the Senate to the bill (H.R. 14935) to amend title 39, United States Code, to regulate the mailing of master keys for motor vehicle ignition switches, and for other purposes, and requesting a conference with the Senate on the disagreeing votes of the two Houses thereon.

Mr. BYRD of West Virginia. I move that the Senate insist upon its amendment and agree to the request of the House for a conference, and that the Chair be authorized to appoint the conferees on the part of the Senate.

The motion was agreed to; and the Presiding Officer appointed Mr. MONRONEY, Mr. YARBOROUGH, Mr. RANDOLPH, Mr. CARLSON, and Mr. FONG conferees on the part of the Senate.

THE NOMINATION OF JUSTICE ABE FORTAS FOR THE OFFICE OF CHIEF JUSTICE OF THE UNITED STATES

Mr. ERVIN. Mr. President, on August 9, 1968, the Washington Post printed a letter which I had written to its editor concerning the nomination of Justice Abe Fortas for the post of Chief Justice of the United States. On August 15, 1968, the Washington Post printed a letter written by Mr. Thurman Arnold to its editor which undertook to reply to my letter. On August 23, 1968, I wrote a letter to the editor of the Washington Post asking for space to comment on Mr. Thurman Arnold's reply to my statement on the Fortas nomination.

I ask that these letters be printed at this point in the body of the RECORD.

There being no objection, the letters were ordered to be printed in the RECORD, as follows:

[From the Washington Post, Aug. 9, 1968]

SENATOR ERVIN ON THE FORTAS HEARING

The Washington Post of August 2, contained an editorial entitled "The Least Effective Branch," which described the members of the Senate Judiciary Committee who believe that Associate Justice Fortas ought not to be made Chief Justice of the United States "as its nastiest and least respectable members."

Since I am unable to fathom why a newspaper of standing indulges in a verbal tantrum on its editorial page, I ignore the vituperation except to observe that it shed no light whatever on the only important issue, i.e., whether Justice Fortas' nomination for the post of Chief Justice should be confirmed by the Senate.

I am one of the members of the Senate Judiciary Committee who is convinced that the right of the American people to be governed by the principles of their written Constitution rather than by the arbitrary, inconstant and uncertain notions of Supreme Court Justices will be best served by denying to Mr. Fortas the office of Chief Justice of the United States.

As a member of the Senate Judiciary Committee, I merely undertook to perform forthrightly my obligation as a member of the Committee and the Senate to make known the qualifications of Mr. Fortas for the post of Chief Justice. This obligation arises out of Article II of the Constitution which provides that the President appoints Supreme Court Justices "by and with the advice and consent of the Senate."

The gravity of the obligation which this constitutional provision imposes on a Senator is clearly revealed by the nature of the office a Supreme Court Justice occupies and the awesome power he exercises in it. Supreme Court Justices hold office for life, and are not responsible in any way to the people. After they ascend the bench, no authority external to themselves can control their official conduct or make them keep their oaths to support the Constitution.

As Chief Justice Stone declared in the Butler Case: "While unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our exercise of power is our own sense of self-restraint."

Since Mr. Fortas has been a Supreme Court Justice for about three years, the important question confronting the Senate is whether he ought to be elevated for life to the more prestigious office of Chief Justice—an office more powerful than that of the Presidency in its impact upon constitutional government.

The reason why it is essential for Supreme Court Justices to abide by their oaths to support the Constitution is clearly disclosed by Justice Benjamin N. Cardozo in his book, "The Nature of the Judicial Process." In disapproving the theory that judges are privileged to substitute their individual sense of justice for established rules of law when they decide cases, Justice Cardozo said: "That might result in a benevolent despotism if the judges were benevolent men. It would put an end to the reign of law."

Let me recount my actions at the hearing on the Fortas nomination.

I questioned Justice Fortas for a comparatively short time concerning general matters relating to the Constitution and his extrajudicial activities, and he freely responded to my questions.

I then informed Justice Fortas that I did not think it proper to put to him any questions relating to his future judicial actions and would not do so.

I informed him, however, that I did wish to make inquiry of him concerning past decisions in which he had joined in his capacity as an Associate Justice. The objective of my proposed inquiry was to ascertain whether he could reconcile those decisions with the words of the Constitution and the numerous prior decisions of the Court placing contrary interpretations upon them.

Upon being advised by Mr. Fortas that he did not feel free to answer questions relating to past decisions in which he had participated, I informed him I would not insist on his doing so, and that I would state my interpretation of those cases myself for the hearing record and then insert all the

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opinions filed in them in the hearing record so any interested person could thereby determine whether I had interpreted the cases correctly. Incidentally, a committee hearing record is made for the information of the Senate when it passes on committee recommendations.

Before stating my interpretation of the cases and inserting the opinions in them in the record, I advised Justice Fortas that as far as I was concerned he was at liberty to depart from the hearing. I added, however, that in the event he elected to remain he would be at liberty to make any comments he desired respecting the accuracy of any interpretation I placed upon any of the cases. Justice Fortas voluntarily elected to remain while I was stating my interpretation of the cases for the record and inserting the opinions in them in the record. My performance of this task necessarily consumed much time because the cases were numerous and the opinions in them rather lengthy.

Let me assure you that I was courteous to Justice Fortas throughout the hearing and treated him just exactly like I would have liked to have been treated had our positions been reversed.

In my deliberate judgment, the cases make it plain that in the performance of his work as an Associate Justice, Mr. Fortas has undertaken to carry into effect the words he spoke at American University on March 20, 1968. At that place and time he declared:

"But the words of the Constitution were not written with a meaning that persists for all time. Words are not static symbols. Words may be carved in impervious granite, but the words themselves are as impermanent as the hand that carved them. They reflect light and shadow, they are modified by rain and sun, they are subject to the changes that a restless life brings upon them. So the specific meaning of the words of the Constitution has not been fixed and unchanging. They never will be fixed and unchanging. The Constitution is not static. But the changes in those words—changes in the meaning of those words—have not, as one might think, been arbitrary or haphazard."

After reading these words of Justice Fortas, I wondered why George Washington, Benjamin Franklin, James Madison, Alexander Hamilton, and the other good and wise men who framed the Constitution put provisions in that document requiring Supreme Court Judges to take oaths to support a Constitution whose words Justice Fortas says have no fixed meaning, and specifying that the Constitution can be amended, i.e., changed only by the joint action of Congress and the States.

When all is said, America's greatest jurist of all time, Chief Justice John Marshall, said all that can be soundly said on the subject in *Marbury* v. *Madison*. After declaring that the principles of the Constitution "are designed to be permanent," he added:

"From these, and many other selections which might be made, it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments and the knowing instruments, for violating what they swear to support! . . . Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government? . . . If such be the real state of things, this is worse than solemn mockery."

I close with this observation: If its words have no fixed meaning, the Constitution is indeed a "solemn mockery," and furnishes "no rule for (the) government" of Supreme Court Justices.

This letter may convince some of your readers that those who advocate the confirmation of Mr. Fortas do not have complete possession of all the truth.

SAM J. ERVIN, Jr.,
U.S. Senator.

WASHINGTON.

[From the Washington Post, Aug. 15, 1968]

A REPLY TO SENATOR ERVIN ON THE FORTAS HEARING

In a letter published in *The Washington Post* of Aug. 9, Sen. Sam J. Ervin Jr. of North Carolina, sets forth his position with respect to the qualifications which should be considered in confirming the appointment of the Chief Justice of the United States Supreme Court, and the character of the hearings held to determine those qualifications. These views are important not only with respect to Mr. Justice Fortas, but also as a precedent in the kind of hearings which might be held in connection with future appointments.

The Senator relegates to a minor place the considerations which in the past have determined the qualifications of the Justice, such as outstanding integrity and legal ability. The sole qualification for appointment to the Court which Senator Ervin discusses is this: Will a new Justice reverse decisions which the Senator does not like? In support of the test of eligibility, the Senator first observes that once a Justice is confirmed, his future decisions will be independent of any control by the Senate or the people. It is therefore the duty of a Senator to put pressure on the Supreme Court by blocking confirmation of any Justice whose views do not coincide with the Senator's interpretation of the Constitution.

Senator Ervin does not put his argument in such blunt terms. The Senator says a Supreme Court Justice must take an oath to support the Constitution. If after confirmation the Justice delivers opinions contrary to the Senator's convictions, he violates that oath. It is clear that the Senator thinks the majority on the Warren Court have been violating their oaths to support the Constitution for the past several years. He intends to put a stop to this sort of thing, if he can. In such an effort, endorsement of the American Bar Association and the faculties of our greatest law schools becomes irrelevant.

The Senator quotes from a recent speech in which Mr. Justice Fortas says:

"So the specific meaning of the words of the Constitution has not been fixed and unchanging. They never will be fixed and unchanging. The Constitution is not static. But the changes in those words—changes in the meaning of those words—have not, as one might think, been arbitrary or haphazard."

These words prove to the Senator that Justice Fortas will violate his oath of office and ignore the written language of the Constitution. He sums it up with great simplicity as follows:

"I close with this observation: If its words have no fixed meaning, the Constitution is indeed a 'solemn mockery,' and furnishes 'no rule for (the) Government' of Supreme Court Justices."

It must be obvious, even to a layman, that words like "general welfare," "due process of law," "equal protection of the law," represent constitutional ideals, not definite rules. What the Senator is saying is that the constitutional fathers made a mockery of the Constitution by using such general terms.

Senator Ervin cites Chief Justice Marshall in support of his position that the words in the Constitution are designed to be permanent and have a fixed meaning. He overlooks a whole body of legal literature including Marshall himself who observed in *McCullough* v. *Maryland* that "Almost all compositions contain words which taken in their rigorous sense would convey a meaning different from that which is obviously intended." Such examples could be endlessly multiplied. I conclude with Learned Hand's observation which expresses a concept that Senator Ervin ignores:

"For a judge called upon to pass on a question of Constitutional law everything turns upon the spirit with which he approaches the question before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs or thistles, nor supple institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which make it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidity confined.' Having come to the conclusion that the qualifications of a Supreme Court Justice depend on how he is likely to decide future cases, the Senator is faced with a procedural problem, i.e., how to find out in advance whether the new Justice is likely to violate his oath of office by handing down future decisions which contradict the Senator's views. The simple way of course would be to call the new Justice on the stand and ask him his views on each of the controversial issues which might come before the Court. There is no doubt that this is what the Senator would like to do, but it would be indiscreet to use such injudicious language. Therefore the Senator adopts the more cumbersome procedure of reading the past decisions of the Court to Mr. Justice Fortas, giving him the opportunity to repent and repudiate them or to explain them away. This of course is an open attempt to put pressure on and influence a judiciary which the Constitution declares should be independent.

Of course the Senate has the actual power by majority vote to destroy the independence of the Supreme Court. There is little danger that this will ever occur. Even President Roosevelt at the height of his power could not get the votes to approve his Court packing plan. The danger represented by Senator Ervin and his collaborators is a different one. It is that a small minority, by the use of filibuster tactics, may impair the independence of the judiciary and influence the course of judicial decisions in the United States. This is the threat which is so ominous in the procedures which now threaten to block the appointment of Justice Fortas as Chief Justice of the United States.

THURMAN ARNOLD.

WASHINGTON.

AUGUST 23, 1968.

The EDITOR,
The Washington Post,
Washington, D.C.

DEAR SIR: I ask space to comment on Mr. Thurman Arnold's reply to my statement on the Fortas nomination.

I offer no defense to Mr. Arnold's attempt to belittle my position by attributing to me remarks I did not make, thoughts I do not think, and motives I do not entertain. These things are not relevant to the issue whether the Senate ought to advise and consent to the President's nomination of Mr. Fortas for the office of Chief Justice of the United States.

If it is to determine this issue aright, the Senate must consider and answer these questions Why was the Constitution written? Do the words of the Constitution have fixed and unchanging meanings? What obligation does the Constitution impose upon a Supreme Court Justice? Will Mr. Fortas per-

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