

INTERVIEW LXIII

DATE: April 17, 1990

INTERVIEWEE: JOSEPH A. CALIFANO, JR., with comments by Marcel Bryar

INTERVIEWER: Michael L. Gillette

PLACE: Mr. Califano's office, Washington, D.C.

Tape 1 of 1, Side 1

G: With regard to the [Abe] Fortas nomination [as chief justice of the Supreme Court] the first element, I guess, is the wording of [Earl] Warren's resignation letter that had that conditional aspect to it.

C: That he'd resign as soon as the replacement was in place.

The only thing I really remember about that is the *Washington Post* wrote an editorial, saying that Warren ought to write another letter. "Let's go to another letter, please," or something. And the President called me to talk to Phil Geyelin, who by then had become the editorial page editor of the *Post* and through whatever the ways were, Lyndon Johnson realized I was a friend [of Geyelin's]. It's funny. He used Harry [McPherson] to talk to [J. Russell] Russ Wiggins and when Wiggins got moved out, he just knew who was hooked with who and [how to] explain to them that there was indeed a vacancy.

The issue was whether there was a vacancy on the Court. One of the arguments--when [Robert] Griffin announced he was going to oppose it, then every kind

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of argument was made. One issue was, "Is there a vacancy on the Court under these circumstances to be filled? Is there a vacancy in the chief justice's job and is there a vacancy on the Court? The way Warren wrote that letter and all the constitutional scholars said yes. It was just a political ploy and it was also on the part of the Republicans, their desire to get Warren off the Court.

G: Was there any consideration on the President's part to naming someone other than Fortas?

C: If there was, I was not part of it. I think he thought--and I doubt it. I think he probably wanted to reward his counselor, if you will. And I think he thought [Homer] Thornberry, coming from Texas and being a southerner, would pass muster in the South even though Thornberry--and at the same time satisfy his own standards for being right, if you will, on civil rights. He had written the opinion upholding the Voting Rights Act or what have you. And that turned out eventually to be a liability. But I think there was in retrospect I guess it was obviously a tremendous miscalculation on the depth of feeling about the Warren Court and the liberal court and the race issues and the rights of criminals thing, which really all got wrapped up in race, too. And in that context of not wanting to perpetuate the Warren Court, the vulnerability of Fortas as a candidate.

G: Was Fortas himself reluctant to be elevated--?

C: Not to my knowledge. Fortas wanted it. Once having been stuck on the Court he was prepared to be chief justice. He wanted it. I don't mean that he applied for it.

G: Apparently LBJ did talk to [Everett] Dirksen early on about the--

C: He talked to Dirksen, and Dirksen agreed to support it. He never would have done it if he didn't think he could get it through. I think he thought he could get it through. I think he had Dirksen's support in the beginning. I think the conversation in which [James]

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Eastland told Mike Manatos that Fortas wouldn't be confirmed, Johnson probably wrote off as the ravings of a real racist chairman who would oppose it anyway.

G: Did you yourself have much involvement on Capitol Hill in terms of the head counts and the--?

C: I was involved in editing the two papers we had, which are not here, incidentally, I don't think. We had a liberal paper and a conservative paper. It would be nice to have those.

B: We tried to find those before and we couldn't through the Library. [Inaudible]

C: Well, [Bruce Allen] Murphy had them obviously. Didn't he? He mentions them in his book [*Fortas: The Rise and Ruin of a Supreme Court Justice*]. We prepared two papers. We had a paper that tilted to Fortas the liberal, and we had a paper that tilted to Fortas the conservative. In that connection--I know I edited those papers. I remember editing those papers and working on those. And I was involved in an erratic way in the head count. I would periodically call some senator on the Hill, but my greater involvement was in lining up the businessmen to call on behalf of Fortas.

G: Who specifically?

C: We went after the National Alliance for Businessmen. I called Henry Ford [II]. I think I probably talked to everybody on the executive committee of the National Alliance for Businessmen to get them to call senators. Fortas was actually quite acceptable to the business community, at least that progressive part of it, Henry Ford and Paul Austin and people like that. Because on the business issues, you know, he'd been a corporate lawyer, he'd been a business lawyer, and I think they thought he'd be okay on the business issues, and they were less interested and had a much better perspective on *Miranda* [*Miranda v. Arizona*] and the criminal cases and civil rights cases. And remember, by and large this

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National Alliance for Businessmen was trying to put together [a plan], put to work the hard-core unemployed. So I think in that sense Fortas--they went to work and they started calling.

The other piece was Johnson--when Griffin opposed Fortas, the President made a big thing about opposing the first Jewish chief justice and anti-Semitism. Although we didn't want to accuse him of anti-Semitism, the President wanted to make sure that got out. So Griffin--it was the only point in this thing in which Griffin got tangled up because he then said he would oppose any nominee from a lame-duck president. Then he later said--then when he started to feel the sting of the Jews calling him, Jewish business leaders and what have you.

I remember talking to Max Fisher--Body by Fisher, General Motors--who was in Capri, to get him to call Griffin. And at the same time we had Jewish leaders calling Dirksen to thank him for his support for Fortas. Griffin then, having said he'd oppose any nominee--we knew he was feeling the sting of the anti-Semitic charge because he then said that if Johnson had dominated Arthur Goldberg to go back on the Court, he would have supported Goldberg. But that's what I was involved in.

G: A lot of this seems to focus on Michigan and Griffin.

C: Well, that part of it. No, we had businessmen calling everybody in the Senate, all over the South.

G: How about Eastland? Was there any way to--?

C: Nobody ever thought we had a chance with Eastland. The only thing to do with Eastland was to get him to report it out.

G: How about [Richard] Russell early on?

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C: I think Russell--I really can't add a hell of a lot to what Murphy's got in his book on Russell. I think that part of it is very good. I think Russell would have supported Fortas if Johnson had nominated that judge. One of the puzzles of the Fortas thing, in retrospect, is why--what's the name of that judge?

G: Alex Lawrence.

C: Alex Lawrence. I can understand LBJ not sending Lawrence forward because the basic view would have been that he would not have supported us on civil rights, in the abstract. In the context of the President wanting to get Fortas nominated, why LBJ apparently didn't see or didn't relate the Lawrence nomination to the Fortas nomination, or wasn't willing to pay the price of a Lawrence nomination for the Fortas nomination, is a real puzzle to me. I don't know why. Either he didn't think Russell would oppose Fortas even if he didn't send Lawrence forward, that's one possibility, or he thought he could ultimately get Lawrence forward without having Ramsey [Clark] explode on him. I cannot--I really can't fathom what happened.

G: Was it more--?

C: I really don't know. I don't know what was going in his mind. Even if you take the worst case scenario, and I don't think it would have happened, which is that Ramsey resigned over the Ramsey [Lawrence] nomination, what would that have unleashed? It would have unleashed a bunch of people saying, "Well, this is a racist judge in Georgia." He incidentally turned out not to be a racist judge, which is one of the fascinating things about this. In which case I would have thought the President would have been able to say, "Look, that's one district. For that I get this and you've got a Court that's the Warren Court for the next generation." A price I thought he would have paid. Unless he thought

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that once they did that, that would unravel the Fortas thing. I don't know. But either he misread Russell--I don't know.

In retrospect my tentative sense--because I'm still thinking about this--is that he probably thought Russell didn't have any troops or didn't have the troops he once had and he [LBJ] didn't have to do this, one. And, two, is his basic friendship with Russell was such that Russell wouldn't turn on him on Fortas. A terrible miscalculation. It's almost like, you can think back to [Joseph] Stalin saying, "The Pope has no troops. So what?" And look at television this weekend and see millions of Russians and Eastern Europeans pouring into Catholic churches. Unbelievable numbers all weekend. And with all that Stalin did, he couldn't . . . I don't know. I really don't know. Have you thought--I mean I don't know if there are any other insights that other people had.

G: I guess one of the main questions is how much was LBJ's reluctance on Lawrence and how much was Ramsey Clark's? Did LBJ in fact feel that the nomination process was going forward?

C: Either he thought in connection with titles--well, the process did go forward. The guy got nominated and he became a federal district judge. Now maybe--the other alternative I guess is that Johnson thought, "Well, I can always just send it forward. If Dick blows on me, I can pick up the phone and say, 'it's coming.'"

G: But I even get a sense that Johnson was irritated with Ramsey Clark for holding it up.

C: Johnson was bullshit with Ramsey Clark for holding it up; he wasn't just irritated, he was angry with him, which just adds to the puzzle. All he had to say was, "Ramsey, send it over here or quit. Stop fucking around. Do it, period." Why didn't he say that? That's my puzzle. I can't think of anything else except that he miscalculated what Russell would

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do and he miscalculated his ability to put it back together again when Humpty Dumpty fell off the wall.

G: Do you remember the letter that Russell sent to LBJ that was returned to Russell?

C: We have a copy of that now, don't we? Do you have a copy of that?

G: Yes. Here it is.

C: (Long pause) It's quite a letter isn't it?

G: Yes.

C: Make a copy of that, will you?

We have Johnson's letter back to him? No, he just asked him to take it back, didn't he?

G: Yes. Do you remember the letter?

C: I don't have a present recollection of it. The answer is, yes, I remember it when I see it. But I think--[Larry] Temple is the guy to really talk to about this because he was immersed in the Fortas nomination, in my recollection, more than anybody on the staff.

But that was it. I guess you have to say that LBJ just miscalculated. It's a rare miscalculation for a guy that shrewd.

G: Was Russell's defection a major blow to the--?

C: Absolutely. What it meant was that a number--he [LBJ] didn't have a lock on the eleven southern states, whatever it was, the way he once did. A significant number of senators would vote against Fortas.

G: Was the question of Fortas' role--?

C: Let me put it another way. How many votes short of cloture were we? Fifteen?

G: Let's see, forty-five to forty-three.

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C: So we were fifteen votes short of cloture. With Russell we would have had at least ten more votes, so we would have been within striking distance. I can't say beyond question.

I can't say that beyond question we would have known with Russell. Let me put it this way, without Russell we didn't really have a prayer.

G: In terms of Dirksen's course on this, do you have a sense of why--?

C: Oh, I think Dirksen hung in and hung in and eventually it became apparent that it was a losing cause. He was losing his troops and Russell--you do things like that for a lot of reasons. Russell may have been losing his troops, too. Dirksen felt no longer could he--with all the Republicans opposed.

I think you have to look at this as two different levels. The real fight, in my mind, was over the Warren Court and the perpetuation of a liberal, activist, intrusive judiciary. On that level of abstraction you couldn't defeat the President's nominee. So you had to fight this battle on other levels. So there was the lame-duck president; should he determine what our court is going to be like for the next twenty years? Or should we wait and see if [Hubert] Humphrey wins; he can determine it. Two, the relationship between Fortas and Johnson; did Fortas exceed the bounds of propriety? Three, when they ultimately got their hands on him at the American University seminar. Those are the things that provided the hooks for people to go vote against Fortas without saying, "I don't believe in civil rights, and I don't believe in the rights of the accused, and I don't . . ." But I don't think there's a question in any of our minds that the real battle was over what kind of a Court we were going to have. And Fortas turned out to be a particularly vulnerable candidate in that regard.

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All you have to do is look at--if my recollection is right, when Thornberry got up to testify, while Fortas took most of the heat and got most of the publicity, I think Thornberry got his share of questions on one particular decision, which I think was upholding the Voting Rights Act in Texas, which he wrote, to get a sense of where we were.

But I do not know why, for such a master politician, how that miscalculation on Russell was made. And obviously Russell read it as his guy being held back. Maybe Johnson thought, "If I don't have something where I really have this guy by the balls, he won't be with me. So I've got to hold this." And maybe Russell would not have been with him as long as he was had he not held Lawrence back. But I just don't know. On the other hand, Johnson should know Russell as well as anybody in the Senate. I mean, he knew these guys inside out.

G: And would he have then been so irate at Ramsey Clark if--?

C: Well, he was outraged at Ramsey--this isn't the only time he was angry with Ramsey Clark, he was outraged at Ramsey Clark quarreling with whatever his view was on this judge, well, it turned out to be wrong on the merits. Ramsey tended to make everything a matter of principle, and he moved more and more and more to the left. In the jargon of the day, Ramsey Clark got "radicalized" in that job.

G: Were you concerned early on about Fortas' role as an unofficial adviser while he was on the Court?

C: I was surprised the first time I walked in and saw him at a meeting on the constitutionality of a rider that required advance notice of closing defense bases about a couple weeks after he went on the Court. I must say, when I walked in, to see him sitting there, having come

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out of Harvard Law School--I don't know whether I got jaded or what happened over time, but I--actually Vicky McCammon has the best line on this I think I've seen in which she says, "You can't change your lawyer in the middle of your biggest trial." It's a wonderful line, which I'll give her full credit for. I think he was his adviser. The depth of his involvement--sure, we were all a little queasy about it but we didn't really do much. He's all over the memos and everything else, although I notice--but even in the height of this battle--

He's nominated on June 6. I don't know what I was working on on June 18 and 19, but I noticed a memo last night clearing some statement, maybe on the Safe Streets Bill, and I clear it with [Clark] Clifford and people around the government, and then I have a sentence in there that says--maybe it wasn't Safe Streets--but I had a meeting on something, and there's a sentence in the memo that says, "The other person you wanted me to consult with thought we better do it privately," or what have you, "and I'll talk to him privately." So I notice that even while he's in the middle of his testimony we're talking to him.

G: And Fortas seems to have really minimized his role in this connection during his testimony.

C: Murphy said Fortas lied, and if he didn't lie, he came as close to lying as you can come. He portrayed himself as a guy that just summed up at the end of a meeting. I don't know what's come out in your other interviews; I think everybody that was involved in this--Temple, myself, [Larry] Levinson--we were all really queasy about Fortas' testimony.

G: Was there any discussion in advance of what he should say or how he should handle it?

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C: I was not involved. If there was, I was not involved. And it may be that it's a classic example of a guy being his own lawyer. He and LBJ may have been the only guys who really talked about it but, again, I think the guy to talk to about this more than anybody is Larry Temple. I don't know whether you've talked to him about the Fortas thing yet, but he was involved in it in much more detail.

But I notice in here I caught a pamphlet. We put a pamphlet together off the March 31 speech to go out all over the country, and just as I was clearing the last version of it, I saw a picture of Fortas. I suggested we hold it back, and we held it back.

G: The question of the American University seminar.

C: Let me mention one other thing. We could have survived that testimony, and we could have survived--I forget, obscenity became an issue, too. I don't know what the hell it was, *Flaming* something or other. There was some movie--we used to joke about the fact that we never got to see damn thing. We should at least see it.

G: *Flaming Creatures*.

C: Fortas had said [it] shouldn't be blocked or should be shown or something. That became an issue.

Go ahead on American University.

G: You were saying that you could have survived this.

C: Well, it was an accumulation of things. The testimony alone we could have survived, I think, but one of the things that hurt with the testimony was that there were leaders, there were senators in the Congress, that knew that Fortas was involved in a depth, and with a frequency, that was more than you'd imply from the testimony he gave. While technically Fortas might not have lied, although I think Murphy makes a fair assessment, certainly a

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reasonable conclusion is that he lied. There were senators on our side that had a sense of how deeply Fortas was into LBJ and while they continued to support Fortas because they cared about the liberal court issue, they were willing to wink at that stuff. They knew he was walking a damn fine line.

American University?

G: Yes. The seminar.

C: At some point--well, we had lots of rumors in September that Griffin had something. There were rumbles on the Hill; Manatos, other people were bringing them back. And then Paul Porter called me one day and came over and gave me a copy of the letter and told me about American University. [He] gave me a copy of the letter, I asked him--I remember my first question was, "Did it go to clients?" "Yes." "Had they paid?" "Yes." "How much did Abe get?" "He got fifteen or thirty grand or something."

If you took those men, whose names I don't remember now, not only the companies they ran but the boards they sat on, in a sense their interest had to have touched all kinds of court cases and issues. I think--Porter had tears in his eyes. I don't know whether he cried, but they were certainly welled up when he gave me this. Then my recollection--but I can't piece this together from the written record, so it may be wrong--I then went to talk to Temple about it. I was the first guy to find out about it. I thought at the time we did not take it to Johnson at that moment because he had some tough issue on Vietnam or something else that he was dealing with and we knew what kind of a blow it was, and [we] took it to him later. But I don't see a time where Temple and I saw him after I sat down with Porter. So it may be that Temple took it to him. Although I have, for some reason, for whatever recollection is worth, I have a recollection

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of sitting there in the Mansion around that dinner table with Temple talking about this with the President, but I'm not recorded over there. So I don't know. Maybe it was somewhere else.

G: Anything on the President's reaction?

C: We knew we were in an incredibly uphill battle before that happened. I think he knew that this was it, because it was right after this that he said he still wanted to vote because he wanted at least to give Abe a majority. He knew we couldn't break the filibuster, but he wanted Abe to know that a majority of the senators were for him being chief justice, and we knew we could get a majority. But interestingly, the majority we would have loved to have had would have been fifty-one, and we weren't able to do that. We had to get guys to take a walk. We had a majority of what forty-five to--

G: Forty-three, I think.

C: --forty-two or three. Was is forty-five--?

G: Forty-five to forty-three.

C: So that's eighty-eight. We had to get twelve guys to either pair off or take a walk. Believe me, that's the biggest margin we were able to assemble, but at least it was a majority. And he wanted to do that, and that came right in the wake of this letter.

Then, you know, as Murphy lays out in that book, the guy from American University walked a very fine line, and Porter did. It was a web of--"deceit" may be too strong a word but it came damn close. And part of it--I don't know. It's one of the stranger--

G: Did LBJ try to speed the nomination through before the summer--?

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C: We tried to get a vote before they went home on the summer recess, but we weren't able to. We knew that time was not on our side, and we didn't want them to have more time. But the problem was, we didn't have the votes to break cloture. You have to understand something. We did not have the votes--if you look at the head counts just in my file, and I'm sure Temple had a lot more--we did not have the votes to impose cloture before the American University thing broke. We were still short. So with it, there was no way, absolutely no way.

G: You were at the Ranch when--

C: I suppose in retrospect you could argue that what he did with Russell really didn't make any difference because the American University thing would have blown it anyway. Even with Russell's votes, even if we had ten votes including Russell, which was the most we would have gotten out of that, we were still up to fifty-five and were still five short and we never would have gotten those five after the AU thing.

G: You were at the LBJ Ranch when Senator Eastland came down to visit in early August. Do you remember that and any discussion--?

C: No, just that he really schmoozed him to try and--what he was trying to do with Eastland was--there was no hope of Eastland voting for Fortas--was to get Eastland to back off the filibuster, to not resort to the filibuster as a way of defeating Fortas. But I don't. . . . We knew that we were in difficult problems on the race issue, but I don't think anybody fully appreciated how deep it ran and how deeply people felt about the Warren Court.

G: Were there any significant horse trades that were either affected or attempted in order to get the nomination through?

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C: The answer is, I'm sure there were. There may be some even reflected in my memos but I'm sure there were; I just don't remember them. But there's--I mean, we would have traded damn near everything except the Grand Coulee Dam to do this. But that's a very delicate problem with respect to the Supreme Court. One of the things I learned in the course of that battle, and one of the things [Richard] Nixon learned when he went with [Clement] Haynsworth and whatever the other guy was, and of the things [Ronald] Reagan learned with [Robert] Bork--[G. Harrold] Carswell--that Supreme Court seat is something that the Senate takes very, very seriously and it's unlike any other vote. The more people vote on the issue of what they believe than on anything else. So I'm sure there was horse trading; I'm sure it was done delicately.

G: Anything on the impact of the defeat? Was Johnson embittered by it?

C: I don't think he was embittered by it. My recollection is that he thought that Nixon was involved in it.

Well, that's another thing: I did talk to [Nelson?] Rockefeller and we had [J.] Irwin Miller talk to Rockefeller, and others to get him to support the nominations, at least not oppose them, and to try and get him to make sure Charlie Goodell--I don't know how he voted on it. Did he vote to impose cloture? I don't know--to get him to vote to impose cloture.

One of the interesting things, little footnotes to history here: when Robert Kennedy died, we lost the liberal vote on the Judiciary Committee. We tried to get Goodell put on in his place, but Dirksen put his son-in-law on--

G: [Howard] Baker.

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C: --who was more conservative, and was clearly going to vote against the nomination. We had a majority coming out of the committee anyway, so it didn't make that much difference.

No, the only thing I do remember, I remember he thought Nixon was--we tried to get people to call Nixon, because Nixon made some public statement about not nominating--I can't remember. But Nixon wouldn't back off and he thought Nixon was working hard behind the scenes.

G: Did you ever have any evidence that he was, that Nixon was?

C: No, but he didn't really have to do much. In the real world, if you're a Republican senator sitting over there, the Court is going to be an issue in the campaign, all he had to do was indicate he was going to change the Court if he became president.

G: Anything else on the--?

C: I don't think so.

G: I think that covers it.

End of Tape 1 of 1 and Interview LXIII

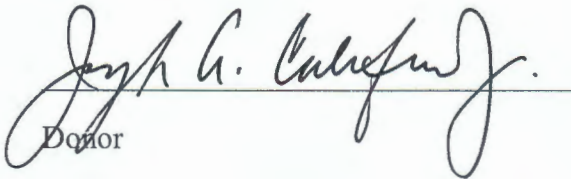
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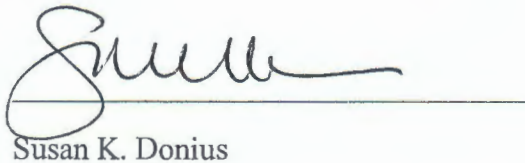
Joseph A. Califano

Interviewed by: Paige Mulhollan, Joe B. Frantz and Michael L. Gillette

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