Mr. Justice Frankfurter

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It is often said of a contemporary figure destined for historical survival that it is too early to pass judgment on his work. The assumption is that the future will pass a definitive judgment. But there never is a definitive appraisal. Each generation places its own valuations; reputations grow and recede, only to grow again and recede. Even majestic figures—Shakespeare and Washington—have fluctuating recognition. No doubt the future attenuates merely personal bias, but it gives no assurance of freedom from partisanship. In any event, contemporary judgment may contribute the impact of vividness and immediacy, which only the most imaginative artist can later create. The limitations of contemporary judgment derive not so much from its closeness to the subject; they are due to the fragmentary materials on which judgment is based. Though history cannot be written solely out of documents, it cannot be written without relevant but as yet inaccessible documents.

This is peculiarly true of the appraisal of contributions made by members of the Supreme Court to the stream of thought which courses through its decisions. The Court's opinions often disclose merely the surface of the judicial process. The compromises that an opinion may embody, the collaborative effort that it may represent, the inarticulate considerations that may have influenced the grounds on which the case went off, the shifts in position that may precede final adjudication—these and like factors cannot, contemporaneously at all events, be brought to the surface.

It is true of opinions as of other compositions that those who are steeped in them, whose ears are sensitive to literary nuances, whose antennae record subtle silences, can gather from their contents meaning beyond the words. All this presupposes, of course, a grasp of the nature of the Supreme Court's functions—the scope and limits of its constitutional authority—and often, as well, familiarity with the record and briefs of a particular case whose opinion is under scrutiny. Even the most professionally equipped critic possessed of the faculties of a creative artist would be severely handicapped, however, in attempting a balanced estimate of the work of a ... justice ... if he were restricted to what is found in the United States Reports.¹

These words were written by Mr. Justice Frankfurter of Chief Justice Hughes eight years after Hughes retired from the Court and shortly after

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his death. It is hoped that they may be invoked a fortiori by one who is confronted with the burden of recording the recent retirement of Justice Frankfurter himself.

The withdrawal from active judicial life of one of the major figures of contemporary Anglo-American law is surely an event that the California Law Review could not fail to mark. One wonders whether any American in this century—even his beloved friends, counsellors, and admirers, Holmes and Brandeis—has been more important to the development of public law than has Felix Frankfurter. Law reform in all its manifestations has been his dominant concern for over half a century.

From the time he became an assistant United States attorney, a few months after graduation from law school, fairness in the administration of justice has been one of his principal preoccupations. His reports to President Wilson on the Bisbee deportations and the Mooney case, his courageous book on Sacco and Vanzetti, his participation, with Zechariah Chafee, Jr., in Colyer v. Skeffington, his influential role in the 1920 protest of a dozen distinguished lawyers against illegal practices of the Department of Justice, and the exhaustive survey of criminal justice in Cleveland, which he and Roscoe Pound directed, aroused the conscience of a now hysterical, now complacent nation. These experiences are reflected in a host of his judicial opinions, such as McNabb, Rochin, and Jay v. Boyd.

Of equally compelling interest to the Justice has been the relationship of law to social and economic policy. Again early public service enabled him to immerse himself in the realities of the day. As a federal prosecutor in an era of “trust-busting” he had become expert in the problems of regulating the railroads, the banks, and other dominant industries. When President Taft chose Henry L. Stimson as Secretary of War, Frankfurter went along as his aide and became absorbed in the Government’s struggle to protect the nation’s water resources from the depredations of private power interests. A few years later, called from Harvard after our entry into World War I, he served first as secretary and counsel to the President’s Mediation Commission and then as Chairman of the War Labor Policies Board. Professor Frankfurter put this rich background to good use. During the inter-war years he labored to document, in Holmes’ phrase, “the felt necessities of the time” and to help translate them into effective legislation. The best known example of this is his book with Nathan Greene, which has been called “the classic exposition of what were believed to be the

2 265 Fed. 17 (1920).
3 CRIMINAL JUSTICE IN CLEVELAND (Pound & Frankfurter ed. 1922).
7 FRANKFURTER & GREENE, THE LABOR INJUNCTION (1930).
evils of the labor injunction" and which did much to spur enactment of the Norris-La Guardia Act.

Effective legislation to meet the demands of a vast industrial society presupposes an effective legislative process, and it requires the creation of administrative processes capable of faithfully and yet imaginatively applying necessarily broad legislative prescriptions. As teacher, scholar, political commentator, and adviser to members of the legislative and executive branches of government, state and federal, Frankfurter also devoted himself to these aspects of statecraft. They continued among his abiding concerns as a member of the Court, but from what he deemed a very different vantage point.

Here we touch upon another facet of Frankfurter's career as law reformer. No American with a "lively sense of law's relation to life and affairs" can fail to be cognizant of the power of judicial review and of the differing conceptions that have prevailed during this century with respect to the appropriate conditions for the exercise of that power. Felix Frankfurter entered the lists of law reform at a time when the courts persisted in frustrating the efforts of popularly elected government to cope with urgent social and economic needs. Although Holmes and Brandeis had early espoused the philosophy that would ultimately prevail, it is sobering to reflect that the outcome was barely decided at the time Justice Frankfurter went on the Bench. Accordingly, he had spent much of the first three decades of his professional life expounding the view that:

As governmental problems become more and not less complicated, as the dislocating impact of technological advances becomes more powerful and less imperceptible, as the forces of economic interdependence demand more and more determination and ingenuity for the maintenance of a simpler but perhaps socially more satisfying society, the deep wisdom of the Court's self-restraint against undue or premature intervention, in what are ultimately political controversies, becomes the deepest wisdom for our times.11

This concern with the role of the Supreme Court at the apex of our federal system led him as professor systematically to inquire into the institutional

9 The phrase is Justice Frankfurter's from a memorandum written by him July 5, 1913, in an attempt "to externalize, if not objectify, . . . what there was to be said for and against going to Harvard [to teach]." Felix Frankfurter Reminisces 80 (1960).
10 Less than a year before his appointment to the Court, he wrote:

The end crowns all. But surely it would require the author of Bleak House to do justice to a course of litigation whereby it took thirty years for the states to be allowed to deal through minimum wage legislation with some of the deep social problems created by the entry of women in large numbers into industry.

arrangements and policies through which the Court sought to fulfill its role. The result was the series of landmark studies of *The Business of the Supreme Court*, done with James M. Landis, Henry M. Hart, Jr., and Adrian S. Fisher, which did much to foster the tradition of informed and responsible criticism of the Court's work and profoundly influenced his judicial conduct.\(^\text{12}\)

This distinguished scholarship in collaboration with younger men suggests what may well be the Justice's greatest long-run contribution to law reform. In a 1913 memorandum to himself, written when deciding whether or not to teach, he noted that "at the root of any consideration of my job, is my gift of tapping people of all kinds, my coordinating faculties, the quality of productive sympathies."\(^\text{13}\) Certainly no job could have made happier use of these attributes than the one he chose. As professor, Frankfurter liberated the minds and directed the energies of a generation of students seeking self-fulfillment. He imbued them with the belief that "It is the legal profession beyond any other calling that is concerned with those establishments, those processes, those criteria, those appeals to reason and right, which have had a dominant share in begetting a civilized society."\(^\text{14}\) Many are the lawyers he inspired who have perpetuated this tradition. Many also are the scholars who have followed his example and thus radiated his influence.\(^\text{15}\) As Justice, his frequent visits to the law school world and his relations with his law clerks made it clear that service on the Court did not attenuate his ability to elicit the best from would-be lawyers.\(^\text{16}\) Surely it is no accident that over half of those who have assisted him at the Court are presently pursuing the public profession of the law in teaching and government.


\(^{13}\) *FELIX FRANKFURTER REMINISCES* 82 (1960). See note 9 *supra*.

\(^{14}\) Address by Mr. Justice Frankfurter, Proceedings in Honor of Mr. Justice Frankfurter and Distinguished Alumni, in *HARVARD LAW SCHOOL, OCCASIONAL PAMPHLET NO. THREE 3* (1960).

\(^{15}\) See, e.g., *HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM* at ix (1953), dedicated by the authors "To Felix Frankfurter, who first opened our minds to these problems."

\(^{16}\) In detailing the Justice's relationship with his clerks, Albert M. Sacks has touched the core of this ability:

> A most illuminating aspect of the man and a not unimportant part of the judge is the faith that Mr. Justice Frankfurter has maintained in his now more than thirty law clerks. I do not speak of faith here in the relatively minor sense of reliance on their work. The law clerk's job ranges from general research assistant through sounding board and foil to critic. The Justice takes pains to give his clerks a sense of full though appropriately subordinate participation. The work is of course intrinsically challenging and the Justice's own zest for his job fills the office with a special air of pleasant excitement.

> By faith, I mean that Justice Frankfurter regards his clerks as worthy of their high calling in the law and as having the capacity to meet those public responsibilities which—he takes it for granted—they will carry in their later lives. Whatever good qualities his clerks have possessed, the Justice's insistent faith in them has powerfully contributed to bringing those qualities to the fore.

> Warm and vibrant himself, Justice Frankfurter delights in stimulating personal
As thus antiseptically compressed in the pages of a law review the merit of Felix Frankfurter's activities as a public lawyer may seem almost beyond dispute. The fact is, nevertheless, that he has always been surrounded by controversy. The tensions generated by the issues on which he has been courageous enough to stand have repeatedly drawn him into clashes of national moment. His nomination to the Supreme Court thus caused acute discomfort in some quarters. Indeed, at the close of the hearings on his confirmation it was thought necessary to take the then almost unprecedented step of inviting the nominee to appear before the subcommittee. The purpose was to permit him to demonstrate the baselessness of the insinuations of witnesses who, as Senator Neely told him, "in a very hazy, indefinite way, attempted to create the impression that you are a Communist."\(^1\)

Their principal "evidence" had been his knowing membership—along with William Z. Foster, not to mention a variety of distinguished figures ranging from Alexander Meiklejohn to Edwin Borchard—in the national committee of the American Civil Liberties Union. That organization, it had been alleged, was Communist dominated and advocated overthrow of the government by force and violence. Thus, it was argued, one could hardly expect that as a member of the Court Frankfurter would vote to uphold measures designed to suppress such advocacy.\(^2\)

The Senate took the adverse witnesses for what they were—a sick, bemused, and insignificant lot, who were in sharp contrast to the accumulated pomp that had opposed the appointment of Brandeis. The unanimous vote to confirm the nomination did more than discredit the attempt to label the nominee a believer, as Senator McCarran suspected, in "the doctrine" of Harold Laski. It paid unusual tribute to the judiciousness of a remarkable personality, in whom fairness and self-discipline harmonize relationships, and his law clerks both individually and as a group are a source of special pleasure. As was true of Holmes, he has a particular fondness for young people as well as the rare ability to establish with them an easy relationship of trust and confidence. He has a sure sense of his clerks' ideals and aspirations and an uncanny shrewdness in measuring their strengths and weaknesses. This has made invaluable his advice and counsel, which is always available.

. . . .  
His intellectualism, without excluding contemplation, has a bounding energy. Characteristic is the joy with which the Justice engages in disputation, especially with his law clerks. Intensity of opposition leaves no deposit of personal rancor. Quite the contrary, the more passionate the argument, the closer the Justice seems drawn to his clerks.


\(^1\) *Hearings Before the Senate Subcommittee on the Judiciary on the Nomination of Felix Frankfurter to be an Associate Justice of the Supreme Court*, 76th Cong., 1st Sess. 128 (1939).

\(^2\) A number of witnesses also stressed the nominee's alien birth and Jewish origin as factors that disqualified him from interpreting the American tradition. As a telegram that was read into the record put it, "Why not an American from Revolution times instead of a Jew from Austria just naturalized?" Senator Norris responded: "An American from Revolution times would be too old." *Id.* at 6.
with incandescence and passion. The outside observer might have suspected that one with Frankfurter’s zeal for law reform might not be ideally suited for the Bench. Certainly one would not have said of him, as it has been said of Learned Hand, that he “was born to be a judge.” Felix Frankfurter was born to be l’homme engagé, the embodiment of western man embroiled in Ihering’s “struggle for rights.” It would be difficult to find one more admirably equipped by intellect and temperament for the arenas of legal conflict. Yet many had marked him for judicial office as a very young man. Subsequent events may have made William Howard Taft grateful that Frankfurter had declined the offer to put him on the United States district court before he was thirty. But his nomination to the Supreme Judicial Court of Massachusetts shortly after the furor over Sacco and Vanzetti and his appointment to the Supreme Court in 1939 suggest continuing, widespread recognition that the ardor of the dynamic professor was a disciplined one and that he amply possessed the prerequisites of the judge.

The fate of the judge is to suffer “the passionate resentments arising out of the interests he must frustrate.” In addressing himself to cases of the utmost national and even international significance Justice Frankfurter strived to meet the standard of the man he succeeded, Justice Cardozo, who could “weigh the conflicting factors of his problem without always finding himself in one scale or the other.” Those who had anticipated that he would cast the Constitution in his own image have thus been disappointed. Writing in 1939, Archibald MacLeish said of him: “Not only his friends but those who are not his friends may well believe that liberal democracy will be defended on the Supreme Court in the next generation as it has rarely been defended in the history of this country.” The accuracy of this prediction hinges, of course, on one’s conception of the proper role for the Court. The controversy over the precise magnitude of Justice Frankfurter’s judicial star will thus continue as long as men debate the theory and practice of American government. Yet it seems safe to say that his essential contribution as a judge cannot entirely become a

20 See, e.g., FRANKFURTER, Taft and the Supreme Court, in LAW & POLITICS 37 (MacLeish & Prichard ed. 1939); FRANKFURTER, The Same Mr. Taft, in id. at 41.
21 Hand, Mr. Justice Cardozo, 48 YALE L.J. 379 (1939).
22 Id. at 381.
23 Interestingly, the alien theme (see note 18 supra) recurs in criticism of the Justice by at least one disenchanted “liberal” student of the Court. See RODELL, NINE MEN 271, 273 (1955), which charges the Justice with “Continental teacher-knows-best authoritarianism,” and argues that “Frankfurter’s roots were thousands of miles to the East in a civilization long past its prime.”
24 MacLeish, Foreword to FRANKFURTER, LAW & POLITICS at xxiv (MacLeish & Prichard ed. 1939).
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This is the faith that Justice Frankfurter vindicated for over twenty-three years on the Court.

November 15, 1962, marked the Justice's eightieth birthday. Happily, unlike Charles Lamb's superannuated man, although delivered from "the irksome confinement of an office," he looks forward to the useful years that lie ahead. In this we join him, for, as the President wrote,27 Felix Frankfurter has much still to tell us.

25 Hand, supra note 21, at 380.