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Book Reviews: The Brandeis/Frankfurter Connection: The Secret Political Activities of Two Supreme Court Justices

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THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES. By Bruce Allen Murphy.† Oxford University Press, New York, New York, 1982. Pp. 473. Reviewed by Alan Betten.††

Between the time that Bruce Murphy originally wrote his manuscript innocuously entitled *Justices as Politicians: The Extrajudicial Activities of Justices Louis D. Brandeis and Felix Frankfurter*,¹ and the appearance of *The Brandeis/Frankfurter Connection: The Secret Political Activities of Two Supreme Court Justices*,² Murphy's editor at Oxford University Press encouraged him to revise the book in order to give it more market appeal.³ Evidently, Murphy's revisions proved quite successful, given the prominent reviews and articles that attended the book's publication.⁴ These articles, like Murphy's publisher, tended to focus on the parts of the book that gave it market appeal while only touching on Murphy's in-depth analysis of the intricate political activities of Justices Brandeis and Frankfurter.⁵ As a result, this emphasis of the publisher and the media has served to partly overshadow the fact that Murphy has authored a solidly researched and important book.

Murphy's book can be indirectly considered an expose of the activities of Justices Brandeis and Frankfurter. The *Brandeis/Frankfurter Connection* should not, however, be grouped with other post-Watergate volumes which concern the venality and indiscretion of government officials. Rather, this book raises much larger issues concerning our system of government.

At the outset of his book, Murphy explains that he wrote *The Brandeis/Frankfurter Connection* to examine the extrajudicial activities of Louis Brandeis and Felix Frankfurter.⁶ Murphy unravels his story, for the most part, in chronological order demonstrating how Brandeis, a "reflective moralist"⁷ appointed to the United States Supreme Court

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1. Levy & Murphy, *Preserving the Progressive Spirit in a Conservative Time: The Joint Reform Efforts of Justice Brandeis and Professor Frankfurter, 1916-1933*, 78 MICH. L. REV. 1252, 1291 n.201 (1980).

2. The book is hereinafter cited as THE BRANDEIS/FRANKFURTER CONNECTION.

3. Cover, *The Framing of Justice Brandeis*, THE NEW REPUBLIC, May 5, 1982, at 21.

4. See, e.g., Margolick, *2 Justices' Friends Back Secret Role*, N.Y. Times, Feb. 23, 1982, at 27, col. 1; Margolick, *Brandeis Paid Frankfurter to Push His Political Ideas*, N.Y. Times, Feb. 14, 1982, at A2, col. 2.

5. See sources cited *supra* note 4.

6. THE BRANDEIS/FRANKFURTER CONNECTION 8.

7. *Id.* at 17.

in 1916,⁸ continued his political activities while on the bench.

As a result of the bitterness that attended Brandeis' nomination to the Supreme Court, he realized that his appearance as an "interested spectator"⁹ had to be curtailed with regard to important issues. Thus, the need for some link or conduit outside the "Marble Palace" arose. In order to act freely in the political field, Brandeis needed a lieutenant who "[w]ould be his eyes and ears and . . . who [w]ould help him implement his programs."¹⁰ This method of political participation, however, had distinct disadvantages. For instance, Brandeis was forced to "rely on another to act in his behalf."¹¹ Moreover, this "technique also required the right lieutenant, one who commanded Brandeis' complete confidence as to ability and sense of discretion, who was well connected in important circles, and who was both a philosophical ally and a kindred spirit."¹²

Fortunately for Brandeis, there was a friend who was uniquely qualified for the position in every way. This friend was Felix Frankfurter, a thirty-three-year-old professor at the Harvard School of Law. "[Thus], the mantle of political reform was passed on [from Justice Louis Brandeis] to . . . Felix Frankfurter."¹³ The specific relationship that developed between the two men—to implement Brandeis' political programs—as Murphy accurately notes, is otherwise unprecedented in the Supreme Court's history.¹⁴

Brandeis felt such confidence in acting through Frankfurter, whom he called his "half-brother-half-son,"¹⁵ that he funded many of Frankfurter's activities from 1916 through 1938. During this period, Frankfurter's retainer increased from \$1,000 to \$3,500.¹⁶ This fee defrayed Frankfurter's expenses in carrying out Brandeis' assigned tasks, many of which were in accordance with Frankfurter's own political inclinations.¹⁷

With his "mechanism" ready for action, Brandeis soon became involved in several undertakings necessitated by World War I. First, he helped to streamline the governmental machinery which conducted the war effort. Brandeis accomplished this task by suggesting radical changes in the War Department, the War Industry Board and Commit-

8. Before Brandeis was appointed to the Supreme Court, he had a career as both private attorney and People's Attorney, participating in the battles between Progressivism, the financial worlds, and the industrial worlds. *Id.* at 19-28. Moreover, he also advised President Wilson on various issues of political importance.

Id.

9. *Id.* at 29.

10. *Id.* at 33.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 39.

16. *Id.* at 41-42.

17. *Id.* at 42-43.

tees, and by securing for Frankfurter the chairmanship of the War Labor Policies Board.¹⁸ Second, Brandeis sat in a number of cases that concerned war-related matters that interested him. For example, he heard numerous challenges to the Lever Food Control Bill, despite the fact that he had personally advised the Food Administrator, Herbert Hoover, regarding a strategy for securing the bill's passage in the Senate.¹⁹ Finally, Brandeis ensured that no agreement unfavorable to the Zionist cause²⁰ would result from an American mission sent to Turkey to negotiate that country's withdrawal from the war.²¹

Once the war ended, Brandeis turned much of his extrajudicial attention to domestic legislative matters. Since Frankfurter had a widespread reputation in the areas of public and administrative law, federal jurisdiction, and legislative drafting, Brandeis utilized these talents in numerous ways. For example, Brandeis used Frankfurter as a research assistant in the production of his judicial opinions.²² Moreover, he urged Frankfurter to encourage his bright Harvard Law School students to explore and analyze issues of interest to Brandeis.²³ The resulting articles either discussed various Court difficulties or criticized the opinions of other justices with whom Brandeis disagreed.²⁴ Brandeis then cited these articles in his opinions, as if they truly represented "the mandate of opinion in the Law Reviews."²⁵ In addition to promoting this intellectual activity, Brandeis used Frankfurter's close ties with various liberal publications, such as *The New Republic*, to infuse their editorials or unsigned articles with Brandeis' beliefs, sometimes transmitted almost verbatim by Frankfurter to the willing editors.²⁶

With the election of President Roosevelt in 1932, the "dynamic duo" believed that they could proceed with their legislative efforts. First, Roosevelt seemed to evoke some of the progressive liberal spirit that infused Brandeis' and Frankfurter's work. Second, Frankfurter considered himself to be a close friend of the President.²⁷ More important, however, was that Brandeis could count on Frankfurter's ability to mobilize the troops — Frankfurter's "Happy Hot Dog's" — the young lawyers whom the professor had quickly placed in several agencies, notably the Departments of Interior, Justice, and Agriculture.²⁸

Unfortunately for Brandeis, as Murphy notes with arresting detail,

18. *Id.* at 51-53.

19. *Id.* at 54-55.

20. This was a cause in which Brandeis was extremely active.

21. *Id.* at 57-58.

22. *Id.* at 83.

23. *Id.* at 84.

24. *Id.* at 87-88.

25. *Id.* at 86.

26. *Id.* at 89-91.

27. *Id.* at 98-101.

28. *Id.* at 112-13.

this period marked the beginning of the shift of Frankfurter's loyalty from Brandeis to Roosevelt.²⁹ Although Frankfurter, with the aid and ability of recruits such as Tom Corcoran and Ben Cohen,³⁰ attempted to forward Brandeis' goals,³¹ the pragmatic Frankfurter was more willing to work with the Brain Trusters — Roosevelt's other advisors such as Raymond Moley and Rexford Tugwell.³² For example, during the drafting and lobbying for the Securities and Exchange Act of 1933, Frankfurter kept Moley constantly informed of the latest developments, including Brandeis' views.³³

In Murphy's opinion, the ever-cautious Brandeis, perhaps because he was both so confident in Frankfurter's ability to cover his tracks and fearful of losing his final opportunity to implement his ideas, became indiscreet in the expression of his opposition to the National Recovery Administration (NRA).³⁴ Brandeis preferred to solve the country's business problems by use of the federal taxing power and not by the fair-trade type of regulation embodied in the NRA. He talked several times with General Hugh Johnson, the NRA head, and consistently told him that the NRA bill was bad because it was impossible to enforce, it endangered small industries, and it created an inefficiently large enterprise.³⁵ During a subsequent radio broadcast, Johnson stated that during his leadership of the NRA he had been in constant touch with Brandeis.³⁶ Although not fearful that Johnson's statement could be verified, Brandeis had to fear an in-depth investigation that might uncover his many extrajudicial activities.³⁷ Nevertheless, when the Supreme Court struck down the NRA,³⁸ Brandeis summoned Corcoran and Cohen to his chambers and proceeded to threaten the administration while breaking his own rule never to discuss Supreme Court cases with anyone other than Frankfurter.³⁹ As Murphy notes:

This was clearly not the same Louis D. Brandeis who was so discrete and restrained in his early years on the Court. Not only was he delivering threats to members of the administration, he . . . even dropped his one unwritten rule never to discuss cases decided by the Court with anyone but Felix Frankfurter. How highly unusual it is for a justice to discuss

29. *Id.* at 102.

30. *Id.* at 131-33.

31. *Id.* at 104-05. These goals included massive government expenditures on public-work projects and reforms in investment and banking practices.

32. *Id.* at 106-11.

33. *Id.* at 134.

34. *Id.* at 149.

35. *Id.* at 145.

36. *Id.*

37. *Id.* at 147.

38. *See* *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), decided the same day as *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *Louisville Joint Stock Land Bank v. Redford*, 295 U.S. 555 (1935).

39. THE BRANDEIS/FRANKFURTER CONNECTION 156.

the implications of a decision by the Court cannot be overstressed The judicial opinion is supposed to speak for itself — but it is even more unusual for a justice to frame that discussion in such a way as to provide general political advice on the new direction [that] the administration . . . [should follow as a result of the Court's decision]. The statement that 'I drafted' seems clearly to have been an advisory statement delivered to members of the administration regarding legislation not yet enacted.⁴⁰

Whether it was because Brandeis began to overreach his power or because his assistants, notably Frankfurter, Corcoran, and Cohen, began to assert their independent power within the administration, Brandeis' effectiveness lessened as the New Deal entered its second phase. For instance, although Brandeis' idea for a federal unemployment compensation program was taken up by the administration, Frankfurter did not strongly argue for the implementation of Brandeis' specific funding proposals. In fact, Frankfurter's "neutrality" when discussing the matter with Roosevelt, and his failure to keep Brandeis informed of some of the legislative activity, permitted the implementation of an alternative funding scheme that was opposed by Brandeis.⁴¹ In any case, Brandeis' influence with Roosevelt ended with his rather open opposition to Roosevelt's court-packing plan in 1937. Frankfurter, now practically confirmed in his loyalty to Roosevelt, objected to Brandeis' opposition and to his delivering an advisory opinion on a political issue.⁴² He found Brandeis' conduct to be "just as political as the President's."⁴³ Frankfurter's viewpoint, however, appears somewhat pretentious in light of his prior relationship with Brandeis.

Once appointed to the Supreme Court in 1939, Frankfurter verbally affirmed his allegiance to the tradition of judicial seclusion.⁴⁴ Nevertheless, he promptly began to husband his vast political resources for one purpose — to help win the coming war by aiding the United States' allies, especially Great Britain.⁴⁵ Unlike Brandeis, who preferred to use an intermediary to further his political ideas, Frankfurter was an "incessant meddler."⁴⁶ Thus, his campaign to involve the country in the pre-war and World War II effort consisted, in part, of daily contact with Roosevelt from 1939 to 1941,⁴⁷ and continuous advice to Secretary of War Stimson, Frankfurter's choice for the post, and other

40. *Id.*

41. *Id.* at 167-76.

42. *Id.* at 182.

43. *Id.*

44. *Id.* at 187-88.

45. *Id.* at 188.

46. *Id.* at 251.

47. *Id.* at 189-90.

Frankfurter-placed members of that Department.⁴⁸ In addition, Frankfurter was instrumental in bringing together American representatives with important foreigners, such as Jean Monnet, a Frenchman attached to the British Purchasing Commission,⁴⁹ and Richard Casey, an Australian on the British War Cabinet.⁵⁰ Frankfurter also gave Stimson an advisory opinion on the constitutionality of the 1940 "destroyers for bases" agreement with Britain,⁵¹ after which he personally reviewed numerous drafts of the Lend-Lease Bill providing military credits to Britain.⁵² Paralleling Brandeis' action in furthering the establishment of the War Production Board in World War I, Frankfurter helped to establish the Office of Production Management in 1941⁵³ and then proceeded to help staff it and other wartime agencies to ensure a smooth and efficient wartime effort.⁵⁴

The Supreme Court of the 1940's was exceptional for the number of highly political men who had been appointed to it and who, while sitting, were generally active in politics. Justices Murphy, Reed, and Byrnes continuously offered advice to Roosevelt during World War II. In fact, Byrnes left the Court to head the Office of Economic Stabilization.⁵⁵ Discerning a strong sense of guilt from his extrajudicial activities, Murphy notes that "Double Felix" privately politicked while the public Frankfurter repeatedly and vociferously denied his involvement in these activities and castigated others who seemingly violated his professed standard of judicial monasticism.⁵⁶ As an example of this dichotomy, Murphy delightfully describes how Frankfurter used one set of proteges — his clerks — for his public duties and another set of proteges for his private activities, all permitted by Frankfurter's ingenious arrangement of his judicial chambers.⁵⁷

With Roosevelt's death and the end of World War II, Frankfurter's extrajudicial political activities sharply declined, and most of his political efforts involved securing the appointment of his candidates to the various federal courts. For instance, Frankfurter actively promoted the appointment of Charles E. Wyzanski to the District Court for Massachusetts,⁵⁸ Henry J. Friendly to the Court of Appeals for the Second Circuit,⁵⁹ Learned Hand to the Supreme Court,⁶⁰ and Justice

48. *Id.* at 196-204.

49. *Id.* at 212.

50. *Id.* at 208.

51. *Id.* at 210-11.

52. *Id.* at 216-20.

53. *Id.* at 221.

54. *Id.* at 222-25.

55. *Id.* at 254-56.

56. *Id.* at 258-59.

57. *Id.* at 271-72.

58. *Id.* at 315-21.

59. *Id.* at 327-38.

60. *Id.* at 318-20.

Stone to the position of Chief Justice of the Supreme Court.⁶¹ Frankfurter, however, was not always successful in such promotions, as evidenced by his failure to succeed in having Learned Hand ascend to the High Bench. In addition, he was also unsuccessful in preventing the appointment of some individuals he thought unworthy. For example, Frankfurter was unable to thwart the elevation of District Court Judges Harold R. Medina and Irving Kaufman to the Court of Appeals for the Second Circuit.⁶²

In setting out this historical narrative, Murphy amply demonstrates both his thorough research abilities and his talent for weaving material together to produce a work that flows like a well-written mystery. Murphy's sensitivity to historical nuance is evident in his discussion of the early New Deal, when Brandeis' hopes for implementation of his legislative program were less than wholeheartedly supported by the diverging Frankfurter.⁶³ In this respect, the book is an interesting examination of the extent to which the progressivism of the early twentieth century was advocated and implemented in the liberal reforms of the New Deal. Similarly, Murphy's sense of irony is evident in his description of the front page of *The New York Times* of October 6, 1941, in which one column reported the death of Brandeis and the next announced Roosevelt's intention to decide whether to modify the United States' neutral position as to the European fighting, a goal sought by Justice Frankfurter.⁶⁴

The flow of the narrative is marred, however, in two respects. First, although Murphy included an appendix delineating the extrajudicial activities of the justices from 1789 to 1916,⁶⁵ it would have been more useful to have such information as a prologue to the nomination of Brandeis in 1916. This would have given the reader a better perspective with which to understand the norms adhered to by the justices of the Supreme Court in 1916.⁶⁶

Second, the narrative is too often punctuated by the author's self-congratulatory remarks concerning the nature of the facts revealed in the book. Statements such as "private, formerly unpublished memorandum,"⁶⁷ "until now no volume has revealed,"⁶⁸ "documents discov-

61. *Id.* at 313-14.

62. *Id.* at 330-36.

63. *See supra* notes 29-33 and accompanying text; *see also* O. GRAHAM JR., AN ENCORE FOR REFORM 124-25 (1967).

64. THE BRANDEIS/FRANKFURTER CONNECTION 248.

65. *Id.* at 345-63.

66. The sitting justices who engaged in some extrajudicial activities during that time included: Chief Justice Taney, who continuously advised his friend President Jackson, *id.* at 357-58; Justices McLean, Moore, and Woodbury who ran for the presidency while sitting on the Supreme Court, *id.* at 356-57; Justice Story, who drafted legislation and openly lobbied for its passage, *id.* at 355; and Justice Moody, who was a member of the informal "Tennis Cabinet" of President Theodore Roosevelt. *Id.* at 363.

67. *Id.* at 69.

68. *Id.* at 89.

ered in Frankfurter's private papers,"⁶⁹ and "[u]npublished documents discovered in three different sets of personal papers,"⁷⁰ are unnecessary emendations probably urged upon Murphy by the same editor who wanted the book to have more market appeal. Although one unfamiliar with the sources would find all the information new, one who has researched some of the sources utilized by Murphy would know that not everything contained in the book is original. In either instance, such self-contradictory remarks are unnecessary.

Indeed, much of the information used by Murphy is not new at all, but has been known for some time. For example, the role of Brandeis and Frankfurter in the Palestine talks after World War I,⁷¹ the Frankfurter-Corcoran split in 1941,⁷² and Frankfurter's attempts to staff the federal judiciary,⁷³ are by no means new information.⁷⁴ Murphy does deserve much credit, however, for assembling hitherto known and unknown facts and placing them in a useful perspective.

One may also quibble with the author's occasional inconsistencies, such as his various assertions that Brandeis and Frankfurter never discussed cases pending before the Court,⁷⁵ or that they discussed cases but only with each other,⁷⁶ or that they actually discussed cases with someone "outside" their normal arrangements.⁷⁷

In his conclusion, Murphy notes that both Brandeis and Frankfurter should be classified among those justices who were best able to separate their political views from their judicial decisions.⁷⁸ It would have been interesting if Murphy had discussed how Brandeis and Frankfurter got along with their fellow justices and were able to persuade them to support their judicial positions. A recently published work by Harry N. Hirsch, for example, suggests that Frankfurter's mode of operation in the extrajudicial sphere was the same meddling, sometime unctuously self-righteous, approach that he often used when dealing with other justices.⁷⁹ Hirsch's conclusion demonstrates that, while this pattern of behavior might have been successful in the extrajudicial sphere, it led to the abysmal failure and rejection of his

69. *Id.* at 280.

70. *Id.* at 143.

71. *Id.* at 55-64.

72. *Id.* at 191-93.

73. *Id.* at 304-41.

74. See, e.g., F. FRANKFURTER, FELIX FRANKFURTER REMINISCES chs. 15-16 (1962); ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE 1928-1945 577-78 (Freedman ed. 1967); Murphy, *A Supreme Court Justice as Politician: Felix Frankfurter and Federal Court Appointments*, 21 AM. J. LEGAL HIST. 316 (1977).

75. THE BRANDEIS/FRANKFURTER CONNECTION 78.

76. *Id.* at 83, 156.

77. *Id.* at 141, 322-23.

78. *Id.* at 342.

79. H. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 127-200 *passim* (1981).

leadership within the court.⁸⁰

Turning to the larger issues raised by his research, Murphy correctly states that both Brandeis and Frankfurter "should and will survive as giants of twentieth century America."⁸¹ Moreover, Murphy did not find that either Brandeis or Frankfurter used his position for personal gain.⁸² They did not bring the Supreme Court into disrepute by any venal act. Rather, their actions were directed at " 'whole institutions shaped to fit the needs of the times.' "⁸³ Both Brandeis and Frankfurter thought, planned, and acted on a grand scale. Yet should one applaud or even condone their extrajudicial activities? They certainly did not ascend to a High Bench that had a strict tradition of noninvolvement in extrajudicial activities. As Murphy notes nearly two-thirds of all Supreme Court justices have engaged in some extrajudicial activity.⁸⁴ Nevertheless, the dissembling attempts by both men almost forces one to believe that Brandeis and Frankfurter realized that their extrajudicial behavior was improper, or at least would appear improper.

In the end, Murphy refuses to take a position on whether society should permit such extrajudicial activity, albeit preferring to note that whatever standards are utilized must be applied uniformly.⁸⁵ Murphy has successfully demonstrated, however, that even the most patriotic and well intentioned acts by Brandeis and Frankfurter almost inevitably led to conflicts that were badly managed. Thus, even if one could clearly distinguish between political and nonpolitical acts, it would be hard to distinguish the well-intentioned from those not well-intentioned. In fact, it may be impossible to limit all of the extrajudicial activities of judges. Conversely, given that the selection process of judges encourages judicial candidates to be politically active lawyers,⁸⁶ the issue arises whether society should be realistic and, rather than adopting an all-or-nothing approach, attempt to delineate those areas — such as the United States Judicial Conference Committees — in which judicial politicking is encouraged. These are some of the questions that rise above the enormously interesting personalities of Brandeis and Frankfurter and that ultimately make Murphy's book an important work.

80. *Id.* at 177-200 *passim*.

81. THE BRANDEIS/FRANKFURTER CONNECTION 341.

82. *Id.* at 342.

83. *Id.* at 247 (quoting Sen. R.F. Wagner in The Washington Post, Oct. 7, 1941, at 4, col. 4).

84. THE BRANDEIS/FRANKFURTER CONNECTION 343.

85. *Id.* at 344.

86. *See, e.g.*, J.W. HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM ch. 4 (1981).