

## BOOK REVIEW

THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES. By Bruce Allen Murphy. Oxford University Press, 1982. Pp. x, 473. Price \$18.95.

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This challenging and suprising book documents in great detail the extensive extrajudicial activities of two of the most noted Associate Justices in the history of the Supreme Court. Its publication stimulated an unusual flurry of public interest and news stories, with implications that the activities revealed were violative of judicial ethical standards.<sup>1</sup> Actually, the "revelations" were not all that new. Murphy and an associate had previously published much of the material on the Brandeis-Frankfurter connection in law reviews;<sup>2</sup> Philippa Strum had written about Brandeis' contacts with President Roosevelt,<sup>3</sup> and Felix Frankfurter's wide-ranging interests had been recounted by H. N. Hirsch.<sup>4</sup>

Moreover, the idea that Supreme Court justices begin a monkish separation from the world of affairs when they go on the bench has never been held by those who know the history of the Court.<sup>5</sup> As Murphy says, "the whole notion of a judiciary totally secluded from politics appears to be more myth than history. Fully two-thirds of the 102 people who have served on the Court have en-

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<sup>1</sup> In an editorial the *New York Times* found the disclosures "dismaying," and went on: "The Brandeis-Frankfurter arrangement was wrong. It serves neither history nor ethics to judge it more kindly." *N.Y. Times*, Feb. 18, 1982 at A22, col. 1. Extended news stories by David Margolick and a letter in defense of Justice Brandeis by Nanette Dembitz also appeared in the *New York Times*. *Id.* Feb. 14, 1982 at A1, col. 3, Feb. 16, 1982 at A16, col. 3, and Mar. 6, 1982 at A22, col. 1.

<sup>2</sup> Murphy, *Elements of Extrajudicial Strategy: A Look at the Political Roles of Justices Brandeis and Frankfurter*, 69 *GEO. L.J.* 101 (1980); Levy and Murphy, *Preserving the Progressive Spirit in a Conservative Time: The Joint Efforts of Justice Brandeis and Professor Frankfurter*, 78 *MICH. L. REV.* 1252 (1980).

<sup>3</sup> *Justice Brandeis and President Roosevelt* in W. MURPHY and C. PRITCHETT, *COURTS, JUDGES, AND POLITICS* 187-190 (1979).

<sup>4</sup> H. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* (1981).

<sup>5</sup> See Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 *SUPREME COURT REV.* 123.

gaged in some form of extrajudicial political behavior . . .”<sup>6</sup> These activities have included advising presidents, suggesting legislation to Congress, proposing appointments, participating in diplomatic missions, writing articles, delivering speeches, and sitting on official government tribunals. Why, then, did the Brandeis and Frankfurter activities attract such attention?

One reason is that both were unusually active in promoting their policy concerns off the bench. They undoubtedly breached the concept of judicial noninvolvement in politics as much as any Justice has ever done, at least in this century. But there were two additional factors that seemed to make their story unique. One was the fact that Brandeis largely carried on his policy activities in a sub rosa fashion through a younger operative, Felix Frankfurter, who himself later became a Supreme Court justice and continued the Brandeis practice of “meddling” in public affairs. Second was the fact, which few had previously known, that Brandeis had paid Frankfurter up to \$3,500 a year to reimburse him for time spent in pro bono activities.<sup>7</sup> It was this smell of money that was partly responsible for the attention paid the book on publication.<sup>8</sup>

As a Boston lawyer Brandeis’ dedication to many liberal causes had made him anathema in the utility, industrial, and financial worlds.<sup>9</sup> During President Wilson’s first term he was the President’s chief adviser on industrial and financial matters, and influenced a number of key appointments. After surviving the bitter Senate fight on his appointment to the Court in 1916, Justice Brandeis faced a dilemma. His first reaction was to drop all his outside activities, but he soon found such isolation unendurable. He resolved his dilemma by recruiting the dynamic young friend whom he had known since 1911, and who in 1914 had become a professor at Harvard Law School, to act as his eyes and ears, and to promote the policies to which both were committed.

Despite the availability of Frankfurter as an intermediary, however, Brandeis carried on many activities directly. He had contacts throughout the Wilson administration and at the top level

<sup>6</sup> B. MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION* 7 (1982).

<sup>7</sup> Hirsch had told of these payments in his 1981 book on Frankfurter. H. HIRSCH, *supra* note 4, at 47.

<sup>8</sup> A headline in the *Los Angeles Times* read: *Brandeis Paid Frankfurter Secretly to Publicize Views*. *L.A. Times*, Feb. 15, 1982, Part I, at 5, col. 1.

<sup>9</sup> See the account of the Senate fight on the confirmation of Brandeis in A. MASON, *BRANDEIS: A FREE MAN’S LIFE* 465-508 (1946).

in the Justice, Treasury, War, and Navy Departments.<sup>10</sup> He received a steady flow of information from members of the independent regulatory commissions.<sup>11</sup> President Wilson asked him to work with Colonel House in accumulating information for the drawing up of a peace treaty.<sup>12</sup> He was responsible for the appointment of Herbert Hoover as Food Administrator, and he advised Hoover on how to secure enactment of the Lever Food Control bill.<sup>13</sup> Through Hoover he recommended a Russian policy similar to the later Marshall Plan.<sup>14</sup> He proposed reorganization and streamlining of the War Department, and when Secretary Newton D. Baker resisted, Brandeis sought through Colonel House to have Baker removed.<sup>15</sup> When Brandeis' suggestion to create a War Labor Policies Board was accepted in 1918, Frankfurter proposed that Brandeis be named its chairman without resigning from the Court, but Wilson named Frankfurter instead.<sup>16</sup> During this period Brandeis was also using all his administrative contacts to further the establishment of a Jewish homeland in Palestine; "few men had more impact on the creation of the state of Palestine."<sup>17</sup> Yet in spite of all his war-related activities, Brandeis wrote virtually the same number of opinions for the Court during each of the war years as he did later on.

In the postwar period, the Sacco-Vanzetti case created a cruel challenge for Brandeis.<sup>18</sup> Behind the scenes he encouraged Frankfurter to argue the case for them in print, but later when their attorneys petitioned him to stay their execution, he avoided any ethical question by disqualifying himself. When liberals criticized Brandeis for refusing to intervene, Frankfurter arranged for an explanation and defense of Brandeis' action to be published in *The New Republic*. Brandeis had a strong interest in this journal, with which Frankfurter was closely connected, and often gave Frankfurter suggestions for articles, which the latter would then present to the editors as his own ideas. Brandeis would also send

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<sup>10</sup> B. МУРФНХ, *supra* note 6, at 48. President Wilson once went to Brandeis' apartment to get his advice on the appointment of W. G. McAdoo as wartime operator of the railroads. *Id.* 47.

<sup>11</sup> *Id.* 50.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* 55. But he later voted to declare portions of the act unconstitutional. *Id.*

<sup>14</sup> *Id.* 51.

<sup>15</sup> *Id.* 53.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* 64.

<sup>18</sup> *Id.* 78-81.

comments on current affairs to Frankfurter, which then appeared as unsigned articles or editorials.<sup>19</sup> All through the 1920s he carried on a behind-the-scenes educational campaign for unemployment insurance.<sup>20</sup> In 1931 he launched through Frankfurter a campaign for tax reform that would increase taxes for the "super rich," a class that included himself.<sup>21</sup>

With the election of Roosevelt, Frankfurter's influence potential greatly increased. Frankfurter had known Roosevelt since World War I and was active in the 1932 campaign. Roosevelt promptly offered him the post of Solicitor General, but Frankfurter declined, at least in part on Brandeis' urging, thus choosing to remain behind the scenes and to retain his long-time role as "central lieutenant" for Brandeis.<sup>22</sup> Frankfurter was responsible for the first meeting between Roosevelt and Brandeis. Finding the President interested, Brandeis prepared an elaborate program for public works and tax and banking reform. But his dislike of monopolies and big government conflicted with the ideas of the planners and collectivists in the Brains Trust, and he was ineffective in the early days of the New Deal.<sup>23</sup>

In the meantime, Frankfurter was busy placing his Harvard students in key positions in Washington. The famous pair of Thomas Corcoran and Benjamin Cohen were drafting legislation for reform of the stock market and investment practices, and they got many of their ideas from Brandeis through a circular route of intermediaries.<sup>24</sup> Through dinners and weekly teas Brandeis kept in touch with everything that was going on.<sup>25</sup> Through Frankfurter he was an active force in development of unemployment insurance legislation, though he was unhappy with the compromise eventually written into the 1935 act.<sup>26</sup>

Brandeis was part of the unanimous Court which on May 27, 1935, handed Roosevelt a triple rebuff, declaring unconstitutional the NRA,<sup>27</sup> the Frazier-Lemke farm mortgage act,<sup>28</sup> and the re-

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<sup>19</sup> *Id.* 89-91.

<sup>20</sup> *Id.* 93-96.

<sup>21</sup> *Id.* 92.

<sup>22</sup> *Id.* 102.

<sup>23</sup> *Id.* 106-08.

<sup>24</sup> *Id.* 131-33.

<sup>25</sup> *Id.* 120-22.

<sup>26</sup> *Id.* 165-78.

<sup>27</sup> *Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935).

<sup>28</sup> *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

moval of a Federal Trade Commissioner.<sup>29</sup> But it was Roosevelt's "Court-packing plan" that brought about the destruction of Brandeis' standing with the President and also substantially terminated the Brandeis-Frankfurter connection.<sup>30</sup> At the age of 80, the oldest member of the Court, Brandeis particularly resented Roosevelt's charge that the Court was behind in its work and needed "new and younger blood." As usual, he worked through an intermediary, suggesting to Senator Burton K. Wheeler that he ask Chief Justice Hughes to answer the charge of judicial inefficiency. In the resulting letter, which Wheeler used most effectively against the plan, Hughes specifically noted that in writing it he had consulted his colleagues Brandeis and VanDevanter. While Frankfurter had taken no public position on the Court-packing plan and was personally ambivalent about it, he resented Brandeis' action and subsequent relations between them were strained.<sup>31</sup> Brandeis retired on February 13, 1939, two weeks after Frankfurter had joined the Court as successor to the late Justice Benjamin Cardozo.

The "Brandeis-Frankfurter connection" ends here, but Murphy proceeds through another 150 pages to detail the extrajudicial activities of Justice Frankfurter, which were easily as spectacular as those of his mentor. But the author concludes that Frankfurter was somewhat more troubled about the ethics of his off-the-bench role than Brandeis had been.<sup>32</sup> He made repeated public protestations of his judicial purity, while accommodating his political activities by developing a kind of split personality, a "double Felix."

While the private Felix became in his own time on the bench one of the all-time leaders in political involvement by a Supreme Court justice, the public Felix went to incredible lengths to present just the opposite image. He continually denied his own involvement in activities in which he was deeply involved, set stiff standards for the behavior of others, and, even while violating these standards himself, severely criticized those who failed to observe them.<sup>33</sup>

William O. Douglas was his particular target. Murphy devotes considerable attention to Frankfurter's attacks on Douglas,

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<sup>29</sup> *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

<sup>30</sup> B. MURPHY, *supra* note 6, at 178-80.

<sup>31</sup> *Id.* 181.

<sup>32</sup> *Id.* 258.

<sup>33</sup> *Id.* 259.

which he thinks were "far more intense than the latter's actions warranted."<sup>34</sup> He even speculates that Frankfurter, who as a naturalized citizen was not eligible for the presidency, resented talk about Douglas for president.

Murphy was puzzled, in interviewing some former Frankfurter clerks, to find that they were almost completely unaware of his political contacts, which were especially intense during the wartime period. He believes that the Justice maintained a separation between his political and judicial worlds in part by an ingenious arrangement of his three-office suite.<sup>35</sup> Instead of installing himself in the luxurious inner office, designed for the judicial occupant with a fireplace and shower facilities, he gave that office to his law clerk (there was only one at that time) and took the smaller middle office for himself. Consequently visitors could come in through the outer reception area unnoticed by the law clerk. Murphy believes that from his book some of Frankfurter's law clerks will learn for the first time how fully the Justice compartmentalized the two sides of his personality "in a careful use of two distinct sets of lieutenants."<sup>36</sup>

Only a sampling of Frankfurter's operations can be given. For example, he found out about the super-secret Manhattan Project, and enlisted Niels Bohr to join him in a direct but unsuccessful effort to get Roosevelt and Churchill interested in the international control of nuclear weapons.<sup>37</sup> He gave Secretary Stimson an advisory opinion that the proposed "destroyer-for-bases deal" with Britain was constitutional.<sup>38</sup> He provided FDR with one of his most famous phrases—that the United States must be "the great arsenal of democracy."<sup>39</sup> He played a dominant role in writing the Lend-Lease Act, and suggested the remarkable public relations stroke of giving it the number of House Resolution 1776.<sup>40</sup> He facilitated the success of a 1941 meeting between Churchill and Harry Hopkins.<sup>41</sup> He prevented Donald Nelson from being replaced by Bernard Baruch as head of the War Production Board.<sup>42</sup>

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<sup>34</sup> *Id.* 262.

<sup>35</sup> *Id.* 271.

<sup>36</sup> *Id.* 270.

<sup>37</sup> *Id.* 297-301.

<sup>38</sup> *Id.* 211.

<sup>39</sup> *Id.* 214.

<sup>40</sup> *Id.* 217-19.

<sup>41</sup> *Id.* 216.

<sup>42</sup> *Id.* 244.

What conclusions can be reached on the basis of this revealing study? First, the financial arrangements between Brandeis and Frankfurter seem of minor importance. On an academic salary and with his wife's medical expenses, Frankfurter needed assistance if he was to be Brandeis' pro bono aide and give up other opportunities for professional remuneration. The serious question is whether the two justices violated any judicial norms or expectations.

As already noted, there has been a long record of extrajudicial operations and contacts of various sorts by the justices. Murphy supplies a very convenient "Survey of Justices in Politics from 1789 to 1916" in an appendix.<sup>43</sup> Moreover, the early service of both Justices was during wartime, when they would have felt patriotic pressures to promote the war effort. Murphy suggests that their activities were "not much different in kind from the endeavors of other justices, such as Joseph Story in the War of 1812 [and] John A. Campbell and Samuel Nelson in the Civil War . . . ." <sup>44</sup>

But there were differences in degree of political involvement that do distinguish the pair from the great majority of their brethren. And though neither could properly be credited with a "judicial temperament," they were otherwise dissimilar. Murphy sees Brandeis as "a visionary prophet," a "reserved ascetic," issuing his prophecies from a distance and waiting for others to secure their adoption.<sup>45</sup> Frankfurter was the opposite—a teacher, a political man, "an incessant meddler: aggressive, bold, and relentless in pursuit of each small tactical victory."<sup>46</sup>

It is significant that both Brandeis and Frankfurter felt under an obligation to conceal the extent and nature of their extrajudicial activities. They ran the risk of having to sit as judges on policies or legislation on which they had earlier consulted. For example, Brandeis participated in the court test of the Agricultural Adjustment Administration, *United States v. Butler*,<sup>47</sup> but he maintained a low profile by writing no opinion and simply signing Justice Stone's dissent.<sup>48</sup>

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<sup>43</sup> *Id.* 345-63.

<sup>44</sup> *Id.* 302.

<sup>45</sup> *Id.* 251.

<sup>46</sup> *Id.*

<sup>47</sup> 297 U.S. 1 (1936).

<sup>48</sup> But in *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), Brandeis provided the necessary fifth vote to uphold the Social Security Act, including the unemployment insurance provisions with which he had been so closely involved. For other cases of this sort in which he participated, see B. МУРФУ, *supra* note 6, at 54.

The United States Supreme Court would be a poorer institution had not Justices Brandeis and Frankfurter served on it. They must rank among the great justices, and their extralegal activities undoubtedly contributed to the general welfare. Concealment of those activities was a necessary condition for their reputations and perhaps for their continued service on the Court (consider the crucifixion of Justice Fortas for his contacts with President Johnson). And for practical purposes the question whether Brandeis and Frankfurter acted improperly has become, in a way, irrelevant. Murphy concludes:

While it may have been possible once to see the harm not in the activity but in its possible disclosure, and the problem in how best to prevent public scandal, such distinctions are no longer realistic. It is a fact of post-Watergate political life that activities in which past justices participated with impunity can no longer be undertaken without very high risk of disclosure, and this fact alone must change our attitude toward the enforcement of whatever standards of justice are established.<sup>49</sup>

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<sup>49</sup> *Id.* 344. On the issue of concealment, it is instructive to review the principal biography of Brandeis, A. MASON, *supra* note 9, in the light of Murphy's revelations. It is clear that Alpheus Mason, writing in 1946, had no idea of the "Brandeis-Frankfurter connection," although there are occasional references to Frankfurter as one of Brandeis' close friends. Mason does have a chapter entitled *Wilson's Adviser*, which gives some indication of his World War I status. In a later chapter entitled *Extrajudicial Activities*, Mason writes: "There is not a little evidence that work on the Court failed fully to satisfy his zeal for constructive endeavor." *Id.* 584. But Mason then continues: "Though still at heart a reformer, his activities now were much circumscribed . . . . Furthermore, he gratuitously enlarged even the normal strictures imposed by the judicial function, refusing to make public addresses or write for publication on matters unrelated to his Court work." Mason then quotes Stone's comment about Brandeis: "He was strongly of the belief that a Justice of the Court should devote himself, single-mindedly to his duties as a Justice, without undertaking to engage in any outside activities." *Id.*