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BOOK REVIEWS

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BOOK REVIEW

Roosevelt and Frankfurter. Their Correspondence, 1928-1945. Annotated by Max Freedman (Boston: Atlantic-Little, Brown, 1967. Pp. 772. \$17.50).

Two days before his death in 1965, Felix Frankfurter charged Max Freedman, editor of this book-to-be, with the task of letting "the people see how much I loved Roosevelt [and] my country." In presenting the Roosevelt-Frankfurter correspondence within the context of related letters, documents and explanatory notes, Mr. Freedman has accomplished that mission.

Roosevelt's speeches, public acts and private anniversaries elicited from Frankfurter hundreds of telegrams and letters expressing his admiration, joy and gratitude. Their tenor is suggested by the following excerpts from a letter written after Frankfurter had "slipped out" of the White House in accordance with instructions of the President, who feared that public knowledge of the extent to which Frankfurter was advising him during the Court reorganization fight might later prejudice his friend's chances of being confirmed as a member of the Supreme Court:

'[S]lipped out' is a very inaccurate expression. If anything, I flew out. For, after my long happy exhilarating hours with you I was, as it were on wings and you put more spirit into me than possibly could any Bacardi . . . [April 21, 1937].

And from another letter written the night of Roosevelt's third inauguration:

Your words have passed into history, to join the utterances of Washington and Lincoln who alone, of all our Presidents, represent the destinies and fate of our country comparable to those which you symbolize. [January 20, 1940].

The other side of the coin was a sometimes surprisingly fierce though often fleeting attitude toward some of those who had crossed Roosevelt. The following passages are from letters written by Frankfurter to Roosevelt after the elections of 1936 and 1940:

Some things need to be killed not merely scotched. That was especially true of the mean and meretricious conception of "the American way of life" with which the Hearsts and the [John D.M.] Hamiltons and the minor fry of the Arthur Ballantines and the Agnes Meyers tried to fool and frighten the American people Shabby motives and bigoted ignorance were clothed in all sorts of high-sounding phrases [November 6, 1936].

A kind of Nemesis is pursuing Willkie in his persistence to challenge comparison with you. But it is good for the country. For he is a bad man—being a man with appetites and without convictions—who needs not only to be defeated but destroyed. And he will destroy himself . . . ; Armistice Day will help. I hope that you will speak . . . with Arlington . . . as the background And then let W.W.'s raucous appeal to faction shriek itself hoarse that night. [November 8, 1940].¹

But Frankfurter was more than a personal clique. The correspondence reveals how he demonstrated his devotion to Roosevelt by acting as unofficial advisor on appointments, public relations, governmental policy and legislation, and as occasional purveyor of cheese. Also, the book is of great interest for the light it sheds upon Frankfurter's attitude toward the role of the United States Supreme Court upon which he served from 1939 to 1962.

An example of the background material included by Mr. Freedman is an article from the January 1936 issue of *Fortune* magazine which was published in answer to the charge by National Industrial Recovery Administrator, General Hugh "Iron Pants" Johnson, that Frankfurter had "in-

1. Frankfurter's attitude toward Willkie softened again when the latter lent his support to the passage of the Lend-Lease bill. Later in November Frankfurter wrote to Roosevelt: "As you know, since the election a vacuum was created—and I partly suspect by your wise design—and some poisonous vapors (The Gen. Woods and the Joe Kennedys and the Roy Howards and their retainers) have tried to fill it with their poison." [November 29, 1940]. Even the long-standing friendship between Frankfurter and Brandeis was strained temporarily during the Court-packing fight when the latter joined Chief Justice Hughes in sending to the Senate Judiciary Committee a letter stating that the Supreme Court was abreast of its work. M. FREEDMAN, ROOSEVELT AND FRANKFURTER. THEIR CORRESPONDENCE 1928-1945, 391-96 (1967).

sinuated" his "boys" into obscure but key positions in every vital department of the Roosevelt administration. The *Fortune* article pointed out that since 1906 Frankfurter had been involved in "placing young men of brains in positions where they could use them"—whether in government or in leading law firms—and that by the thirties he had become "the most famous legal employment service in America." Barton Leach, Calvert Magruder, Henry Hart, James M. Landis, Alger Hiss, Harry Shulman, Thomas G. Corcoran, Ben Cohen, Lloyd Garrison and John G. Winant were among the Harvard law professor's better known recommendees who as a group were known to punsters as the "Happy Hotdogs." Also included is a description by Roosevelt of the kind of lawyer he sought to recruit for the New Deal. He asked for "youthful Abraham Lincolns" and further stipulated:

They must be liberal from belief and not by lip service. They must have an inherent contempt both for the John W. Davises and the Max Steuers. They must know what life in a tenement means. They must have no social ambitions. [February 6, 1936].²

Frankfurter's personnel suggestions were usually in response to requests for recommendations, but not always. In May of 1940 he suggested to Roosevelt that he secure the resignation of his entire cabinet: "Do give them this chance to show themselves worthy of their country and their President," he urged. The War and Navy Departments were reorganized a few weeks later, and the former department was headed by Henry L. Stimson as Secretary and Judge Robert Patterson as Assistant Secretary. Frankfurter had strongly urged both appointments. His counsel was not always heeded, however, as most notably in 1942 when Roosevelt failed to name Learned Hand as successor to James Byrnes.³ Chang-

2. Letter to C. C. Burlingham of the New York bar and a close friend of Frankfurter.

3. When Mr. Justice Byrnes left the Court in 1942 to become director of the Office of Economic Stabilization, Frankfurter paid him this tribute in a memorandum to Roosevelt which recommended that Hand be Byrnes' replacement:

While he had been out of the current of law practice for some years, the Lord endowed him with an excellent and quick brain whereby he easily mastered the technical aspects of the Court's work. He brought to the Court, however, not only vast experience in the actual operations of Government, an understanding of which lies so close to so much of the litigation that comes before the Court, but also an uncommon sagacity—a sense of what matters and what does not, a perspective which eliminates the irrelevant and the minor. More than that, he manifested

ing his mind at the last minute in favor of Wiley Rutledge, the President explained to Frankfurter that he was “estopped by his own words and . . . deeds” from nominating a 71 year old man to the Supreme Court after what he had said about the age of Justices in 1937. Upon Hand’s death in 1961, Frankfurter wrote that, “Events cast a sardonic smile on this misjudgment, for Judge Hand continued his distinguished judicial labors for more than a decade after the short tenure of the much younger man who was preferred to him.”⁴ Frankfurter’s last letter to Roosevelt just before the latter’s death was a recommendation that he appoint as Solicitor General Dean Acheson whom Frankfurter hoped would eventually become Chief Justice of the United States.⁵

From these newly published papers, Frankfurter emerges as a tireless, persuasive, confidential intermediary between Roosevelt and influential individuals at home and abroad. For example, in the early New Deal years, in seeking a sympathetic understanding for Roosevelt’s policies, Frankfurter interceded with the publishers and editor of the *London Times* (the Astors and Geoffrey Dawson), the publishers of the *New York Times* (the Sulzbergers), with his friends Walter Lippmann, John Maynard Keynes, and Harold Laski, and with some tame members of the business community. During the war he served as a conduit between the President and such writers and broadcasters as Dorothy Thompson, Edward R. Murrow, Geoffrey Crowther of the *Economist*, Antoine de Saint-Exupery (*Wind, Sand and Stars*), and Alice Duer Miller (*The White Cliffs of Dover*), and such foreign officials as Sir John Orr who helped with the planning of the United Nations Food and Agriculture Organization, Zionist leader David Ben-Gurion and Free French Leader Jean Monnet from whom Frankfurter obtained for Roosevelt’s use the term “arsenal of democracy.”

what surprised me greatly, namely, the real judicial temper, that is, detachment from political or personal considerations, a disregard of motives other than those wholly relevant to a judge’s job. [December 1942].

4. Frankfurter pleaded with Roosevelt to “give to the history of your Presidency the only man [Hand] worthy to rank with Holmes, Brandeis and Cardozo” who Mr. Justice Frankfurter believed were the “only truly great judges here since the Civil War.” [Letter of December 3, 1943].

5. The breadth of Frankfurter’s interests is suggested by the non-legal appointments in which he had a hand such as those of Archibald MacLeish as Librarian of Congress, Elmer Davis as head of the Office of War Information and Samuel Eliot Morrison as Naval Historian of World War II.

Frankfurter emerges also as a major New Deal policy maker. His letters, memoranda and counsel strengthened Roosevelt's inclination toward more public power and securities regulation in 1933-34, an "only just begun to fight" campaign for re-election in 1936,⁶ Neutrality Act repeal in 1939,⁷ a third term bid in 1940⁸ and Lend-Lease in 1941.⁹

Frankfurter also worked tirelessly to help the President in the Court-packing fight although this plan was not his, but had originated with Attorney General Cummings. Frankfurter had suggested to Roosevelt in 1935 that the best response to Supreme Court decisions invalidating New Deal legislation would be the proposal of a Constitutional amendment "giving the national Government adequate power to cope with national economic and industrial problems."¹⁰ This advice is consistent with the judicial restraint to be practiced by Frankfurter on the bench. Frankfurter's first response to Roosevelt's appeal for help when the storm broke over the Court fight was a note in which he quoted from the judicial opinions of Taft,¹¹ Brandeis,¹² Holmes,¹³ Hughes,¹⁴ and Stone.¹⁵ That note's introductory sentences may be seen as a lodestar which was to guide Frankfurter the Justice:

With accumulating disregard of its own settled canons of constitutional construction, the Supreme Court for about a quarter of a century has distorted

6. See Frankfurter's draft of the 1936 Democratic platform. M. FREEDMAN, *supra* note 1, at 345-54.

7. See M. FREEDMAN, *supra* note 1, at 496, 499-500. More than 300 notes sent to Roosevelt by Frankfurter on this general subject were destroyed.

8. See Frankfurter's memorandum on a third term. M. FREEDMAN, *supra* note 1, at 531-33.

9. See Frankfurter's memorandum of February 27, 1941. M. FREEDMAN, *supra* note 1, at 583-86. "Roosevelt and Frankfurter worked as closely together [on the Lend-Lease bill] as they ever did on any large matter." M. FREEDMAN, *supra* note 1, at 582.

10. Letter of May 29, 1935. The 1936 Democratic Platform Committee was told "that President Roosevelt would tolerate no 'short cuts of any kind' in dealing with the constitutional problems" and that "if the social and economic program of the party could not be solved by legislation within the Constitution, we would seek such clarifying amendments as would assure to the legislatures of the several states and to the Congress, each within its proper jurisdiction, the power to enact such laws." M. FREEDMAN, *supra* note 1, at 373-79.

11. *Adkins v. Children's Hosp.*, 261 U.S. 525, 562 (1923) (dissenting opinion).

12. *Burns Baking Co. v. Bryan*, 264 U.S. 504, 534 (1924) (dissenting opinion).

13. *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (dissenting opinion).

14. *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330, 375 (1935) (dissenting opinion).

15. *United States v. Butler*, 297 U.S. 1, 87 (1936) (dissenting opinion).

the power of judicial review into a revision of legislative policy, thereby usurping powers belonging to the Congress and to the legislatures of the several states, always by a divided court and always over the protest of its most distinguished members. With increasing frequency a majority of the Court have not hesitated to exercise a negative power on any legislation, state or federal, which does not conform to their own economic notions. [February 18, 1937].

Mr. Freedman's adroit presentation of the written exchanges between Frankfurter and Roosevelt is a notable contribution to the history of the New Deal. This disclosure of the scope of Frankfurter's extra-curricular¹⁶ and extra-judicial¹⁷ activities may well cause him to be remembered

16. In 1936 Walter Lippmann wrote the following concerning faculty members at privately endowed universities:

This does not mean that professors must not be consulted in matters where they are professionally competent. But it does mean that professors must not be office holders and political advisers to office holders. For once they engage themselves that way, they cease to be disinterested men, being committed by their ambitions and their sympathies. They cease to be scholars because they are no longer disinterested and having lost their own independence, they impair the independence of the university to which they belong.

M. FREEDMAN, *supra* note 1, at 330-31. Freedman states that Frankfurter "never forgot and never forgave what Lippmann had written."

17. We catch the pot calling the kettle black in letters to Roosevelt in which Frankfurter writes about Mr. Justice Murphy: "Yesterday . . . my baby Brother turned to me on the Bench, and said: 'I wonder if the President knows how bad things are in the Philippines . . . No one in the United States knows that problem as well as I do, and I know how to handle it.'" [February 12, 1941]. "My Brother continues to show uninterrupted preoccupation with affairs outside the narrow confines of the law . . . I've never known such restlessness—and I have ample opportunity for hearing and seeing and reading his notes to me." [March 18, 1941].

In 1942 Frankfurter asked Roosevelt, "Isn't [Chief Justice] Stone the man to give you an authoritative report on the rubber situation? . . . There is no decent reason why he should not do it—if you wanted him to." [July 8, 1942]. The Chief Justice declined the assignment in a letter to the President which contained the following:

A judge and especially the Chief Justice cannot engage in political debate or make public defense of his acts. When his action is judicial he may always rely upon the support of the defined record upon which his action is based and of the opinion in which he and his associates united as stating the grounds of decision. But when he participates in the action of the executive or legislative departments of government he is without those supports. He exposes himself to attack and indeed invites it, which because of his peculiar situation, inevitably impairs his value as a judge and the appropriate influence of his office. [July 20, 1942].