II. New Deal and National Prominence

Published by

Thomas, Helen Shirley.
Felix Frankfurter: Scholar on the Bench.

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When Franklin Delano Roosevelt took the oath of office on cold and dread March 4, 1933, the nation waited expectantly for the announcement of his program. It did not have long to wait. The excitement of the first One Hundred Days has been thoroughly chronicled and is now a matter of history as, indeed, is the New Deal itself. What is of interest to this work is the behind-the-scenes role played by Felix Frankfurter in helping to guide the direction that the New Deal would take, his position on controversial issues during the New Deal period, and finally, his elevation to the Supreme Court as one of Roosevelt’s New Deal justices.

For his efforts on behalf of the Roosevelt program, Frankfurter was labeled the Iago of the Administration, whose sinister influence pervaded all of the government. Hugh Johnson called him “the most influential single individual in the United States.” More good-naturedly he was described as “Jiminy Cricket to President Roosevelt’s Pinocchio.” Supposedly carrying the latch-key to the
White House in his pocket, Frankfurter was concededly a welcome and frequent guest there. However, the extent and type of influence exerted upon Roosevelt during these visits remains to be seen.

I

Frankfurter and Roosevelt had first met in New York when both were young practicing attorneys. They came in contact again during World War I through joint work on the War Labor Policies Board. In 1928 Frankfurter conferred with Governor-Elect Roosevelt on reform of New York's judicial system. Although little was accomplished along this line, Frankfurter's career as adviser to the rising political figure had started. After F.D.R.'s nomination for the presidency in 1932, his contacts with the Harvard professor increased. Frankfurter was one of the persons invited to Albany to discuss campaign strategy from a program standpoint. Roosevelt once commented: "Felix has more ideas per minute than any man of my acquaintance. He has a brilliant mind but it clicks so fast it makes my head fairly spin. I find him tremendously interesting and stimulating." ¹ This admiration led to requests for opinions and advice on any number of topics.

Frankfurter did more than give Roosevelt advice. He worked actively for his election. The National Progressive League was formed in September, 1932, to give what aid it could. George Norris was Chairman, Fred C. Howe was Secretary, and Frankfurter, Harold Ickes, Donald Richberg, and Henry Wallace were on the national committee. These were many of the same men with whom Frankfurter had been associated in the 1912 campaign for T.R. His allegiance was to F.D.R., the man, rather than to F.D.R., candidate of the Democratic party. His history in politics was inconstant if judged by party labels. Support had gone to no one group. T.R., Wilson, the elder La Follette, Al Smith,

and F.D.R.,\textsuperscript{2} representatives of various political factions, gained his backing because of the Progressive type of programs for which they stood. His political history was constant, therefore, if judged by adherence to principle and policy. This is not to suggest that such factors as personal empathy were totally lacking. F.D.R.'s dynamism was an important quality. As Frankfurter himself has written, "In Roosevelt, optimism was not an anodyne, it was an energy . . . ."\textsuperscript{3} Above all, what the nation needed in those dark days of the early 1930's was optimism and energy.

The advice that Frankfurter did tender Roosevelt was heavily colored by the former's association with Louis D. Brandeis. Frankfurter consulted with Brandeis over recommendations he was going to make for certain administrative positions. More important, however, was the fact that, in his consultations with F.D.R., he reflected many of Brandeis' basic positions concerning the relation of government to business. One of the fundamental tenets of the Progressive creed was trust-busting, an insertion of the Jeffersonian theory of small economic holdings into T.R.'s New Nationalism and Wilson's New Freedom. Brandeis' dislike and fear of the Curse of Bigness represented a vital strand in Progressive thought and fit in quite naturally with Frankfurter's own predispositions. It followed, therefore, that the Harvard professor, in the course of his conversations with Roosevelt, should advocate a program aimed at dispersing economic concentration, whether in private business or in government.

Due to his weekly trips from Cambridge to Washington, Frankfurter was often thought of as a member of F.D.R.'s famous Brain Trust. It is certainly true that he knew such Brain Trusters as Raymond Moley and Rexford Tugwell. Because of this acquaintance his name was many times linked to theirs. All things considered, however, it appears that this identification is mistaken. Doubtless he concurred on many occasions in recommendations


emanating from the Brain Trust group. But on just as many occasions he dissented, proposing instead some facet of the Progressive program that he championed. One of his most important functions for the administration was as go-between or emissary drawing together the “old” Progressives with the “new” liberals. Primarily, therefore, he played a different role vis-à-vis F.D.R. than did other members of the High Command.

By the very nature of this counseling and mediational work, Frankfurter initially stayed off-stage. He had several opportunities to change this pattern and accept public office. Even before his relationship with Roosevelt became so pronounced, he preferred to remain in his capacity as teacher and private citizen. In June, 1932, Governor Ely’s offer of nomination to the Massachusetts Supreme Judicial Court was turned down with the following explanation:

The grave problems already upon us and those looming on the horizon require as never before a courageous and learned bar. And from such a bar alone can come an enlightened judiciary. The future direction of bar and bench will be determined by the quality of our law schools.

Moreover, the fabric of the law, particularly our public law, we have been told repeatedly by the most far-sighted in the profession, must be designed chiefly by the law schools.

This work must go forward, and I cannot bring myself to believe that I should prematurely abandon my share in it, however great and honorable the opportunity you offer me.4

While many of the nation’s liberal weeklies felt downcast by his refusal of Governor Ely’s offer, Frankfurter’s explanation seemed valid enough to most. They realized that while “Brandeis and Holmes impressed their philosophy upon a generation of lawyers through their opinions from the Supreme Bench Frankfurter, on the other hand, is exerting his influence upon the men just before they cross the threshold into the profession.” 5 In later

years the suggestion was made that Frankfurter did not want to get lost in an “old-fogey” court and ruin his chance for eventual nomination to the Supreme Court. Whichever explanation is correct, he did refuse the offer and was thus available when Roosevelt needed him.

Early in 1933 he demurred to the Chief Executive’s suggestion that he become an “official” adviser by taking over the duties of Solicitor General. Some find the reason for his refusal in the fact that he had already accepted the George Eastman Professorship at Oxford for the ensuing year. Pointing to Frankfurter’s well-known Anglophilism, they intimate that nothing, not even responsible government service, could stop him from seeking the self-satisfaction that would come from carrying on his personal campaign to unite the Anglo-American world. While probably there is a good deal of truth in such an explanation, other factors should not be discounted. By remaining free-lance he was able to take a continuing part in activities from which he would have been precluded if in government employ. He served on a committee trying to obtain Tom Mooney’s release from prison, a prison sentence that his report during World War I indicated he thought should never have been pronounced. Frankfurter, as had become usual, was called upon on many instances to lend his support to liberal causes. For example, David Levinson asked him to join in the defense of radicals accused by the Nazis of starting the Reichstag fire. While this particular invitation was declined, it is indicative of the breadth of his interests and reputation. Once again it should be pointed out that because of the nature of the causes that he joined Frankfurter’s radicalism tended to be overemphasized in some quarters. To use a term current today, it was “radicalism by association” rather than by proof.

II

If the Harvard professor’s long-range contribution to the legal profession came through his teaching, his long-range contribution to the New Deal came through his placement of young men

*New York Times, June 27, 1933.*
in various government posts. Known as America’s “most famous legal employment service,” ⁷ and as the keeper of “a sort of racing stable for liberal lawyers,” ⁸ he had been channeling young men into government service for years. The administrations of Coolidge, Harding, and Hoover had all utilized his advice in locating prospective employees. While the New Deal did not, therefore, initiate the inundation of Washington by Frankfurter’s “Happy Hot Dogs,” as his students and former students were known, it did provide unusual circumstances for the operation of his “employment service.”

The proliferation of alphabetical agencies, with their ever-expanding need for skilled personnel, provided the forum through which many of Frankfurter’s theories could be put to the test. In 1930 he wrote a book entitled The Public and Its Government,⁹ in which one of the basic premises was that government should be thought of as a wise man’s study. In the same year his article in the Atlantic Monthly,¹⁰ took the ground that, while the expert should never be on top, he should always be on tap. Frankfurter sent his young men to Washington for the expertise they could display. And while there must have been a good deal of ego satisfaction in such a practice, the main point remains, nevertheless, that most of the Harvard products did make good and did add to the vitality of the New Deal program. Not overlooking the valid criticism that can be leveled at government and many bureaucratic characteristics, it seems fair to say that in theory and largely in practice the desire to have trained young people given a taste of government service before many of them filtered back into private employ was vindicated on the record. Certainly a good deal of the New Deal program could not have been accomplished without them.

While Frankfurter’s much-publicized art of filling offices gained

him the most space in newspapers, his function in helping to draft New Deal legislation remains relatively unknown. Approximately a month before F.D.R. took the oath of office, Frankfurter in an address before Survey Associates outlined some considerations that he thought important.

Ways must be found and they must be found through governmental lead to prevent the terrible psychology of idleness and hopelessness from setting upon the unemployed. The millions of our unemployed fellow citizens have shown an extraordinary patient temper. The only way to justify it, and, indeed, the only way to maintain it, is to make definite progress toward re-employment.11

When the time came to draft measures designed to lift the country by its economic boot-straps, Frankfurter was quite sure that the federal government would have to assume a major part of the lifting process. Since his views on this subject were often and vigorously pronounced, some feared that the depression would be used as an excuse for collectivism. It is apparent that they missed the real point for wanting government action. Action was desired, not to undermine the competitive system, but to save it. Reared in the tradition of small, viable economic units, Frankfurter did not forget his heritage so quickly. A good many of the early New Deal statutes, such as the National Recovery Act and the Agricultural Adjustment Act, left him unconvinced as to their workability or wisdom. He advised caution in drafting of legislation and statement of principle. If this advice had been heeded, perhaps the New Deal would have been able to avoid some of the friction that later developed between it and the Supreme Court.

The National Recovery Act serves as a good example. Not over-enthusiastic about the program or the program’s director, General Hugh S. Johnson, and more than slightly apprehensive over the constitutionality of the code arrangement, Frankfurter warned against trying to get a ruling on N.R.A. too quickly. When asked early in 1934 why a case on this issue should not be rushed to the Supreme Court, he replied, “Why are you so anxious for a

decision until you are sure of getting the right one?” 12 If judged on the basis of allowing an act thought unconstitutional to remain in operation as long as possible without adequate challenge, this position is not praiseworthy. If judged on the basis of making the best of a bad bargain and allowing the nation to reap as much benefit as possible from an act that, because of its inherent weaknesses, would soon enough fall, the position while still not completely unassailable is at least more understandable. Characteristically, this was a pragmatic approach, an approach that Frankfurter has subsequently used as a Supreme Court justice.

General Johnson placed much of the blame for the failure of N.R.A. on the Harvard professor. Arthur Krock, writing in the New York Times a few weeks after the Supreme Court had unanimously held the act unconstitutional, took much the same stance: “Unless high NRA officials, past and present, in a position to know the facts are completely misinformed, Professor Frankfurter was responsible for postponing the legal test of NRA for nearly two years, with the disastrous results familiar to everyone.” 13 While Krock attributed to Frankfurter a change in the President’s political situation “from favorable to distinctly perilous,” F.D.R. apparently did not find the Harvard professor’s counsel of caution disadvantageous, for it was Frankfurter who was called to the White House immediately after the decision to discuss the future of N.R.A. and the means whereby some type of code program could be made acceptable to the Supreme Court. Mr. Krock’s own paper editorialized several months later that if Frankfurter “has given F.D.R. any worse advice than the President received from General Johnson, he has so far covered it up rather cleverly. After all, a live Frankfurter is better than a dead Blue Eagle.” 14 Parenthetically, it may be noted that with the passage of time, many of the N.R.A. reforms themselves eventually were repudiated by elements within the liberal camp.

Whether because of his familiarity with so many members of

the Court or because of his own extensive knowledge of constitutional law and history, the Harvard professor had a “feel” for many of the dominant issues underlying the New Deal and a comprehension of the limits beyond which it was unsafe to go in trying to remedy the economic imbalance of the country. On March 22, 1933, just a few weeks after Roosevelt’s inauguration, Frankfurter warned New York legislators against attempting to broaden the scope of certain bills. “Any attempt to broaden the scope of minimum wage legislation at present so as to include men can emanate only from sources hostile to the policy of minimum wage legislation for women or from sources unfamiliar with technical legal problems involved in translating such a policy into effective legislation.” Even though the legislators followed his advice, this attempt to establish minimum wages for women was unsuccessful, as the Supreme Court held the legislation unconstitutional. Unhappily in this instance Frankfurter misappraised the situation and thought that limited regulation would be accepted. The purpose behind the use of this situational example is to suggest that Frankfurter was usually attuned to the areas of possible advancement and was not apt to be trapped by all-encompassing panaceas. This trait has shown up in a slightly different form in his Supreme Court opinions when he has refused to acquiesce in absolute, immediate solutions for any problem.

While Frankfurter sat in on meetings devoted to settlement of controversy in the coal industry and gave some advice concerning the drafting of labor legislation, New Deal measures with which he is most readily identified and which clearly carry his imprint are the Securities Act of 1933 and the Public Utilities Holding Company Act of 1935. Joined by Benjamin Cohen and James M. Landis in drafting the New Deal measures, Frankfurter incorporated into his recommended legislation much of the philosophy that a few years earlier had been incorporated in his writings. Both acts had a typically Progressive flavor. The Securities Act was meant to promote free and fair competition on the stock exchange by requiring the registration of any security sold

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in interstate commerce. The Public Utilities Holding Company Act aimed at dispersal of control in the utilities field by requiring that any company having an interest in another show definitely and beyond doubt that the public was better served by such an arrangement. Ultimately, the Securities and Exchange Commission was given supervision over the companies. The utilities did not accept such regulation willingly. Frankfurter estimated that $10 million was used in the fight against passage of the Act.\(^\text{17}\) If this amount is nearly accurate, it indicates the fear of the holding companies of a tightly drawn measure that, unlike N.R.A., effectively set out to combat and control the evils at which it was directed. Judicial approval of various sections of these acts followed as a matter of course over the years.

Perhaps of all F.D.R.’s many publicized actions none gained more notoriety than his Court-Packing plan announced in February, 1937. Here, if anywhere, it was thought that Frankfurter’s sentiments would be made known. Contrary to expectation, he remained strangely silent. Comments on his thoughts on the plan must, therefore, be highly speculative, guided alone by statements that he had made previously about the size of the Court and its composition. Loyal to the Supreme Court as an institution and loyal to the President as the best man to guide the destiny of the country in the perilous days of the 1930’s, Frankfurter no doubt felt torn between the two adversaries. Caught on the horns of this dilemma, he suffered in silence. It is, however, known that he did not want the Constitution or the Court brought into the 1936 campaign.

In 1923 he had written that “multiplying judges by no means multiplies justice.”\(^\text{18}\) In 1935 he was even more explicit: “There is no magic in the number nine, but . . . experience is conclusive that to enlarge the size of the Supreme Court would be self-defeating.”\(^\text{19}\) From these sentiments one may gather that the student of the Court was not too happy over the proposals


\(^{19}\) Quoted in Current Biography, (1941), p. 307.
of F.D.R. Frankfurter thought that the solution to the problem did not lie in increasing judges but was to be found instead in the character of the men placed on the Supreme Court.

While he did not feel free to make these views known through newspapers, he did convey his feelings about the general situation through private correspondence and personal contacts. Frankfurter was early concerned about the growing disparity between Court decisions and the public temper. He did not think that this disparity could be lessened by tinkering with constitutional machinery. Writing to Justice Harlan Fiske Stone, he indicated that for him, “we ought not to make inroads upon our constitutional structure but ought to be zealously alert in the choice of those whom we entrust with the administration of our laws or our lawmaking.”

Stone apparently agreed with much of what his correspondent had to say, for in a note to him dated May 28, 1937, Stone confessed that he did not believe in appointing men simply because they would probably vote in a certain way. All that Stone would require of an appointee was that he “have integrity, intelligence, and sound legal knowledge, and that he have some appreciation of the world in which we live.” Penciled in as an afterthought was the message, “How I wish it would be you.”

III

Justice Stone was addressing his remarks to the particular vacancy caused by Justice Willis Van Devanter’s retirement in 1937. For this vacancy President Roosevelt nominated Senator Hugo L. Black. When Justice George Sutherland retired the following year, Solicitor General Stanley Reed was named as his successor. Stone’s suggestion that Frankfurter would be a proper person to fill a Supreme Court seat recommended itself to many persons, however. When the first two vacancies on the Court occurred the academician was often discussed as a possible choice. Indeed,

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on innumerable occasions since 1932, Frankfurter’s name had been mentioned in this connection. Justice Benjamin N. Cardozo’s death in July, 1938, presented Roosevelt with his third opportunity to name a new justice. Once again Frankfurter stood prominent on the list of those under consideration.

The opening statement of note in the concerted campaign on behalf of the Frankfurter candidacy was made by Senator George Norris, long-time friend and acknowledged leader of the old Progressive forces. Other supporters soon made themselves known. Newton Baker came out strongly for his former assistant in World War I, as did Senator Sherman Minton. By the middle of September the Gallup Poll had the following information to report. After canvassing members of the American Bar Association on their choice of a successor to Cardozo, Frankfurter’s name was mentioned five times oftener than any other. This was a surprising show of strength, for there were other strong candidates in the field, including Judge Learned Hand, John W. Davis, and Senator Walter George. The Gallup organization also reported that there was no correlation between the choice of Frankfurter and support of the New Deal. Only 38% of those polled indicated that they belonged to the pro-Roosevelt forces, while 62% indicated from mild to extreme anti-Roosevelt feelings. Thus it appears that Frankfurter gained support in spite of the fact that he was identified with F.D.R., not because of such an identification.

One of the factors weighing against the selection of the Harvard professor was a geographical consideration. The Court was already heavily overrepresented with members from east of the Mississippi and especially from the northeastern section of the country. To Roosevelt this was a vital consideration, both politically and for the good of the Court. Norris from Nebraska helped to dispel some of these doubts. Other voices, both Democrat and Republican, from the mid-West were soon heard in support. William Allen White wrote to F.D.R. that “President Hoover indicated that a seven dollar night letter that I sent him a day or two before Cardozo was named had weighed somewhat in the

*New York Times, August 9, 1938.

balance. If I could have one word to say to you now it would be to urge the appointment of Felix Frankfurter to succeed Cardozo.”24 Justice Stone appears to have put the quietus on F.D.R.’s geographical doubts. He told him that he could get “a very good man from every judicial circuit in the country, and thus constitute a Supreme Court of character and ability. But you could not get a distinguished Court that way because you cannot find a distinguished judge or lawyer in every circuit.”25 Since Stone wanted the Court on which he sat to be distinguished, he recommended Frankfurter for the Cardozo vacancy.

Interest in having Frankfurter on the Court spread beyond the boundaries of this country. Chief Justice H. V. Evatt of the High Court of Australia sent Solicitor General Robert Jackson a memorandum on the matter and urged Jackson (who needed no urging) to support the Cambridge candidate. Evatt advised that:

What the Court and the Country need is that the new appointee vice Cardozo will have sufficient power of leadership, of persuasion, of imagination, and of learning to restore unity, if not cause union, among the loose group of progressives on the Court. The appointee must have a social outlook which is in accordance with the general aims and ideals of the Supreme Executive of the Nation. He should have a very close knowledge of the Court’s history and practice. He should have, if possible, the general confidence of the legal profession and the law schools, so that confirmation by the Senate will be certain.26

While Evatt was joined by many in thinking that Frankfurter possessed all the qualifications requisite to appointment, a few contrary opinions were expressed. General Hugh Johnson was most outspoken in his opposition during this preliminary period when the candidates were sparring for position.

Two themes run through the discussion of Frankfurter’s appointment. The first was that even if he did not succeed Cardozo, when Brandeis resigned, his Harvard friend was sure to take his

25 Quoted in Mason, Harlan Fiske Stone, p. 482.
place. There was peril in this approach, however, for no one was sure exactly when Brandeis planned to leave the bench. Harold Ickes, in arguing this point with F.D.R., told him that he was not convinced of Brandeis’ intention to retire and “that it would be a terrible thing if, relying upon such an event, Frankfurter should fail of appointment.” Ickes then went on to tell the President that if he appointed Frankfurter, “his ability and learning are such that he will dominate the Supreme Court for fifteen or twenty years to come. The result will be that, probably after you are dead, it will still be your Supreme Court.” 27 Harold Laski approached Brandeis directly in an effort to convince him that he ought to resign in time for Frankfurter to be appointed by F.D.R.28 Irrespective of his personal involvement, Brandeis seemed to entertain some doubts as to whether Frankfurter should go onto the Supreme Court. These doubts were based, not on Frankfurter’s capabilities, but on the question of whether he could not do more for the legal profession and the country elsewhere. In 1932 the older man had written, “The year has been for Felix . . . one of happy usefulness, with an ever widening appreciation of his rare qualities. His students are becoming teachers. Given another 20 years of such activity, and he will have profoundly affected American life.” 29 Frankfurter’s own letter to Governor Ely, quoted earlier, emphasized how important he thought the teaching profession was to the law. This letter now came back to be used as an argument against his appointment to the Court.

The second theme that colors discussion of Frankfurter’s elevation centers on the need for the individual best able to hold his own with Chief Justice Charles Evans Hughes. The President was impressed with the necessity of naming someone for the vacancy who could match wits with the formidable Chief Justice in the Conference Room and who could thus prevent the venerable and much-respected Hughes from carrying the Court by the mere force of his personality. Jackson wrote the President that

28 Ibid., ii, 424.
“what is urgently needed at this time is someone who can inter-
pret [the Constitution] with scholarship and with sufficient as-
surance to face Chief Justice Hughes in conference and hold his
own in discussion. . . . My urgent request, Mr. President, is that
you leave me at the bar of the Supreme Court and give me Felix
as the new Judge.” 30

Bombarded with this type of advice from July to December,
Roosevelt began to show signs of annoyance whenever the Frank-
furter nomination was mentioned. He finally decided, however,
that such recommendations were sound and sent to the Senate
on January 5, 1939, the name of Felix Frankfurter for Associate
Justice of the United States Supreme Court. Public reaction was
generally favorable and therefore it came somewhat as a surprise
when the Senate took the most unusual step at that time of an-
nouncing that it would hold hearings on the “fitness” of the nomi-
nee.31 These hearings were held in Washington on January 11
and 12, 1939. While at first declining to appear before the sub-
committee of the Committee on the Judiciary and sending Dean
Acheson to represent him, Frankfurter relented and put in a
personal appearance on the second day.

The hearings did not bring to light any information of signifi-
cance. Witnesses testifying against the nomination ranged from
Elizabeth Dilling, authoress of sensational exposés, who accused
Frankfurter of master-minding the entire Communist conspiracy
in the United States, to a disgruntled Spanish-American War vet-
eran who thought that Frankfurter should have used his influence
to increase bonuses. One of the lighter moments of the proceed-
ings came when Collis Reed, National Director of Constitutional
Crusaders of America and that organization’s sole member, asked,
“Why not an American from Revolution times instead of a Jew
from Austria just naturalized?” Senator Norris’ caustic explanation
was that “an American from Revolution times would be too
old.” 32

The serious charges against Frankfurter were basically three.

30 Gerhardt, America’s Advocate, pp. 165–66.
31 U.S. Congress. Senate. Committee on the Judiciary. “Hearings on the Nomina-
32 Ibid., p. 6.
His association with the American Civil Liberties Union and his work on behalf of Mooney and Sacco and Vanzetti led to the first accusation, that he was an extreme radical, if not a Communist. In the second place, his Jewish background was brought up and discussed. Finally, the fact that he was not a natural-born citizen and that he had derivatively gained citizenship only through his father’s naturalization counted heavily with some people. The subcommittee really gave much attention only to the first point. When asked by Senator Pat McCarran whether he believed in the doctrines of Karl Marx or whether he subscribed whole-heartedly to the positions taken in some of Harold Laski’s books, Frankfurter replied: “Senator, I do not believe you have ever taken an oath to support the Constitution of the United States with fewer reservations than I have or would now, nor do I believe you are more attached to the theories and practices of Americanism than I am. I rest my answer on that statement.” At the end of this statement, the audience at the hearings broke into applause that lasted for more than two minutes.

Felix Frankfurter’s appointment was confirmed without a dissenting vote on January 17 and it was on January 30, 1939, that he took his oath to “administer justice without respect to person,” thus assuming the Scholar’s Seat on the Supreme Court. The crowd at the swearing-in ceremonies was so large that extra chairs had to be moved into the aisles of the Court chamber. Attorney General Frank Murphy and Solicitor General Jackson were among the notables present as were Secretaries Hopkins and Ickes. Such personal friends as Tom Corcoran and Ben Cohen, Dean Acheson and Marguerite LeHand were also there. Professor Joseph Beale, an instructor of the class in which Justice Frankfurter entered Harvard and an intimate friend over the years, summed up the feelings of most people present: “At Harvard we are very enthusiastic over the remarkable record our prize scholar has already made and are confident that he will be one of the outstanding members of the Supreme Court.”

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37 Baltimore Sun, January 31, 1939.
The Scholar's Seat was once again filled, but what kind of man was the new occupant? Felix Frankfurter was now fifty-six years old. Capping his five-foot-five-inch stocky frame was a finely rounded face, intense and quizzical of expression, reflecting, much as an actor's, any change in mood. Peering through his pince-nez glasses, which stood out sparkling and prominent from his graying head, Frankfurter gave an appearance of tenseness and unbounded energy. "A rapid, sensitive . . . personality, generous in temperament, irrepressible in speech, given to gusts of enthusiasm or outrage . . . ," thus has been described the new member of the Court. Taking his place on Chief Justice Hughes' extreme left, the former teacher appeared dwarfed by some of his brethren. Physically this was so, for one could barely see his head at times behind the large wooden bench. When visible, Frankfurter was usually busy scanning the courtroom, writing off notes, or talking to his immediate neighbor. Intellectually, no member of the Court dwarfed him.

At the time when he assumed his place, Frankfurter thought of himself as a symbol and thought his position on the Court would mean much to the Progressive cause. Certainly all the liberal papers were highly pleased with his new responsibilities, the New Republic feeling "surely no American of this generation has been more completely in the great tradition of American jurisprudence than this professor at Harvard Law School." Behind all the superficial agreement as to what "liberal" meant and how a "liberal" judge would vote, there lay vast areas for misunderstanding and recrimination. Even while the Frankfurter nomination was pending, one or two writers were perceptive enough to catch this danger and comment upon it. Louis Stark in the New York Times of January 8, 1939, warned that

87 Ickes, The Secret Diary Of . . . , ii, 563.
Frankfurter’s “method of approach to economic problems has always been empirical, and it is assumed that on the bench he will continue to ask for facts and proof rather than assumptions. In short, he may at times disappoint those liberal friends whose zeal for a ‘cause’ overruns their logic.”

The *Baltimore Sun* informed its readers that Frankfurter was not just another New Dealer nor was he merely a satellite of F.D.R. “Philosophically, his path parallels that of the New Deal in numerous respects. . . . Dr. Frankfurter’s philosophy is his own philosophy and could well differ, and does differ, from the amorphous doctrines of the President in several respects.” Felix Frankfurter, in other words, was completely a New Deal justice only by appointment and not by approach. It was written of him in 1934: “Liberal that he is, he will not change old lamps for new merely because they are new. On the other hand, he does not object to trimming the old.” This perhaps in essence is the difference between Frankfurter and some of the other Roosevelt appointees. His philosophy precludes adoption of wholesale changes in the law. Depending upon empirically proven need for change, he has at times appeared to hold back when some of his brethren wished to rush in “where angels fear to tread.”

When the Harvard professor went on the bench, everyone expected that he would follow, wherever possible, the leads that his idols Holmes and Brandeis had provided during their tenure. In fact it was charged that intellectually he was their captive and would be unable to act independently. In recent years exactly the opposite charge has been made, namely, that he does not follow the spirit of Holmes and Brandeis often enough. What cannot be denied is the fact that Frankfurter did, and does, often rely on one of the two men for authority. Surely the heroes that anyone picks tell a good deal about the person himself. If Frankfurter thinks of himself as the heir of Holmes and Brandeis, the mere identification has meaning regardless of its validity.

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40 *Baltimore Sun*, January 6, 1939.
As Frankfurter wrote in 1931, “for all of us, truth is born when we discover it. But intellectual genealogy is important. The history of ideas is essential to culture; thereby we are saved from being intellectually *nouveaux riches.*” While disagreement there may be over the question of how much Frankfurter has absorbed from Holmes and Brandeis, it can be agreed that he has absorbed some things. If his intellectual genealogy is to be complete, however, other names such as James Bradley Thayer, Roscoe Pound, Benjamin N. Cardozo, Thorstein Veblen, Charles A. Beard, Herbert Croly, William James, and James Dewey must be included.

Frankfurter’s activities as adviser to the President were, of course, curtailed after he took his place on the Supreme Court. On rare occasions, however, Roosevelt still called upon him for aid. A continuing function was as reviewer of F.D.R.’s speeches. Samuel Rosenman, one of the President’s chief writers, found Frankfurter helpful. “Frequently, while a speech was in the discussion stage, [I] would drive out to his house in Georgetown to exchange ideas about what it should contain. Our sessions often lasted until the early hours of the morning, and they were always fruitful.” It is no wonder that Rosenman and others would turn to Frankfurter for such assistance. The Justice had a penchant for striking phrases, and he was quick to pick up such phrases when used by others. When Jean Monnet visited this country in 1940 on a diplomatic mission, Frankfurter met and engaged him in conversation. Hearing a particularly apt expression, he asked that F.D.R. be allowed to introduce it to the public. The expression was “arsenal of democracy,” and it became the archstone for one of Roosevelt’s most important speeches concerning the role that the United States was to play in World War II.

The decade of the 1930’s was a full one. In its final year Frankfurter gained the position that he probably desired more than any other, that of Associate Justice of the United States Supreme Court.


Court. His whole background had really been a preparation for this office. It is fitting to close this biographical section with a quotation from the Justice himself. While he was writing of Benjamin N. Cardozo, the sentiments expressed apply equally to Justice Felix Frankfurter: “If surprise there was in anything that he wrote as a Justice, it was not want of disclosure by him as to the way he looked at questions that would come before him.” 45