XIII. The Institutional Role of the Court

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Felix Frankfurter: Scholar on the Bench.

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The Supreme Court stands in a unique relation to administrative agencies and lower courts, be they federal or state. To some extent it must supervise their activities, but it must also be sure that in such supervision it does not encroach upon their prerogatives nor stifle their initiative. In the previous chapter we were concerned with certain elements of Justice Frankfurter’s judicial philosophy as these became articulate in demands for decentralization and division of responsibility in the federal government between Court and Congress. In the next chapter attention will be focused on geographical dispersal of control. With the Court’s institutional role, there is conjoining of functional and geographical reasons for dispersing competence throughout various governmental units. It should be made clear at the outset that in talking of an institutional role we are not basically concerned with the Supreme Court’s own primary jurisdictional position or with the Court’s symbolic role in instances of appeal. What we
are attempting here is a discussion of the juridical premises of decentralization and dispersal of control from which Justice Frankfurter reasons in dealing with units in some degree subordinate to the Supreme Court.

I

There are definite parallels between Justice Frankfurter's views concerning the relation of the legislature to the judiciary and his views concerning the relation of the Supreme Court to administrative agencies and the lower courts. Once again the major theme is that courts, and especially the Supreme Court, are not the only units of government that can protect the public interest. Others can fulfill part of this function better. As the Court was not to interfere with congressional policy, so the policy of administrative agencies should go largely unchallenged. When a challenge is unavoidable, the concept of expertise replaces the concept of reasonableness as the basis for judgment. The insistence that, before judicial action can be invoked, a real case or controversy must exist is translated into the demand that, before a challenge to administrative action is heard, it must be shown conclusively that the challenger has the correct standing. In reviewing the competence of the legislature, emphasis was placed on allowing it to correct its own errors. In reviewing administrative and state court action, emphasis is placed on finality of rulings and on exhaustion of remedies and procedures. Legislative purpose and intention should be clearly stated in the statutes; the records of administrative agencies and lower courts should be complete and concise. These are but a few of the intertwining themes in Justice Frankfurter's preoccupation with establishing the role of the Supreme Court vis-à-vis other agencies of government.

His position in specific cases and his treatment of technical administrative law concepts such as substantial evidence, primary jurisdiction, and the intricacies of notice and hearing have been ably covered elsewhere.\(^1\) A distillation of such materials presents,

however, a philosophy of administration and administrative law. Since he has written opinions in most of the important cases in this field—often the majority opinion, it might even be contended that an understanding of his philosophy would approach an understanding of the developing administrative philosophy of the last quarter century, thus throwing light upon a good deal of the American governmental scene.

"So far as administration decisions are concerned, it would seem that if this headless fourth branch has a head, it must be the Supreme Court." Justice Jackson's description of administration as a fourth branch of government was not new nor was his recognition of the fact that the Supreme Court had to be the directing force above that branch particularly startling. He was not trying to enunciate a new theory; he was merely stating a commonplace. The trouble with such commonplaces is that they often obscure the very real difficulties that do occur when the Supreme Court tries to exercise supervisory power. Justice Frankfurter, since the days when he taught administrative law at Harvard, has been stressing the point that the Supreme Court, because of its very nature, could not oversee all action. Attitudes that were conducive to individual and group rights had to be made part of the creed of administration itself. The first task was to make administration responsible for its own actions; the second was to make courts accept their limited but important role. Only after these feats were accomplished could the courts be effective in their anatomical function of being heads for the headless fourth branch.

One day when hearing a tax case argued, Justice Frankfurter leaned back in his chair and asked counsel, "And what is your philosophy of administrative law?" Perhaps fortunately, in view of the time limit set for argument, his question went unanswered. The question, however, was quite typical of the questioner. Unless administrative agencies can produce rational arguments for


their existence and exercise of power, they cannot expect other agencies of government, and particularly the courts, to respect or tolerate them. Justice Frankfurter had his own philosophy of administration, which he tried to impart to his young men who went to Washington. One of the cardinal tenets of this philosophy was that “although the administrative process has had a different development and pursues somewhat different ways from those of the courts, they are to be deemed collaborative instrumentalities of justice and appropriate independence of each should be respected by the other.”

Courts and agencies should compliment, not contradict, one another.

The Justice has been interested in all aspects of administrative functioning. With his background and training, the legal and philosophic side has held the most interest for him. In 1927 he wrote that “in administrative law we are dealing pre-eminently with law in the making; with fluid tendencies and tentative traditions. Here we must be especially wary against the danger of premature synthesis, of sterile generalizations unnourished by the realities of ‘law in action.’” Premature syntheses were to be avoided because they would stultify the growing capacity of administrative agencies to assume their peculiar and particular responsibilities. Administration was reprimanded for its tendency to copy inapplicable legal concepts and procedures. Because administrative law was “law in action,” it had to fashion its own tools. Its real strength was its adaptability. It would only dissipate this strength by trying to manipulate unsuited concepts and procedures. Administrative law was free and yet confined at the same time. Its confinement came from the fact that, while it did not have to use any predefined rules, it nevertheless had to provide the same protection for individual and group rights as did the normative legal order. These were Frankfurter’s views as a scholar. They have been translated into his votes on the Supreme Court. He has insisted that transplanting judicial procedures onto administrative agencies is not wise. The specific interests entrusted to an agency, its history, structures, or enveloping environ-

4 United States v. Morgan, 313 U.S. 409, 422 (1941).

ment are apt to preclude the transplant from taking root. There has, however, been a growing insistence on his part that whatever the administrative procedure chosen, it does provide substantially the same protection that would be given by judicial procedure.

The main function of administration is to provide flexibility denied courts in dealing with problems of a complex yet vital nature. Just as administration must be familiarized with its strengths and weaknesses, so courts must come to accept the fact that they are not all-powerful and that administrative agencies and tribunals are here to stay. Such acceptance does not mean that courts become "administrative adjuncts" or "automata carrying out the wishes of the administrative agency." 6 They continue their own independent existence but simply become more attuned to the fact that certain specialized factors have to be taken into account. The factor of expertise is perhaps the most obvious and important.

Because "problems of law became problems of administration," Professor Frankfurter wrote, "new instruments for expertness and precision were needed. Law had to meet the demands of the age of specialization." 7 The specialist, the expert, the professional administrator came to assume new prominence and their skills became the skills that would shape the future. During his first few years on the Court, Justice Frankfurter emphasized this point again and again. Indeed, many of his best-known opinions stand out for their discussions of the role of expertise in helping to bring about responsible administration. 8

In decentralizing responsibility within a democracy, courts were warned not to interfere with legislative policy. Any reasonable recommendations emanating from the experts must weigh heavily with courts, for the latter can only, as in their dealings with the legislature, deny action without being able to fashion an

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acceptable alternative. Expertise and specialization are thus a very necessary part of the division of labor that underlies the whole theory of decentralization and dispersal of control.

On more than one occasion critics of Justice Frankfurter, both on and off the bench, have charged that he has not paid the deference to expertise that he professes. Throughout the twenty years that Frankfurter has been on the Court, there is no doubt that his votes have not always followed his speeches. In one of his early opinions, however, he gave a clue as to when a claim of expertise would not be enough to validate administrative action. His dissent in Federal Power Commission v. Hope Natural Gas Company directs itself to this point. "Expertise is a rational process and a rational process implies expressed reasons for judgment. It will little advance the public interest to [encourage] conscious obscurity or confusion in reaching a result, on the assumption that so long as the result appears harmless its basis is irrelevant." In a different context, Frankfurter told his colleagues that "Courts can fulfill their responsibility in a democratic society only to the extent that they succeed in shaping their judgments by rational standards, and rational standards are both impersonal and communicative." Therefore, in asking the experts in administrative agencies to spell out in complete detail the bases for their findings, he is asking of them no more than he requires of courts proper. No question of their competence need be involved.

The judiciary in its opinions has to justify its exercise of supervisory power over legislative or administrative actions. What Frankfurter primarily requires is that administrative agencies in their findings and orders show that they too are working within the confines of the congressional statutory framework that created them in the first place. Once this is done, technical rulings go largely unchallenged. Beyond the immediate necessity of establishing title to subject matter, there is a second imperative behind demanding clarity in statement. If administration does

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9 320 U.S. 591 (1944).
10 Ibid., p. 627.
not fulfill its duty of laying out findings and the evidence
gathered to support such findings, courts in their opinions must
undertake such a task, for it is inherent in due process that the
parties moved against understand exactly the reasons for ad-
ministrative rulings. An integral segment of Justice Frankfurter's
theory of decentralization is that the legislature should not place
upon the courts duties that they cannot possibly fulfill. Likewise,
it is an imposition for the courts to have administration burden
them with chores from which they should be protected. As he
said in a controversy involving railroad rates,

When regard is had for the complicated technical nature of the
problems and voluminousness of the records in the important cases
that come before the Commission, a fair discharge of its function
precludes casting upon a reviewing court the task of quarrying
through a record to find for itself adequate evidence to permit
effectuation of orders of the Commission.12

Unlike the lower courts, which also deal in materials familiar to
the average lawyer or jurist, administrative agencies go far afield
from known legal terrain. Unless the agency gives aid to the Court
in explaining its highly technical materials, the Court will be left
with the formal power to give or withhold assent, but in reality
they will have their important supervisory function curtailed.
For someone as sensitive to the prestige of courts as is Frankfurter,
this indirect whittling away of power is unthinkable.

His recognition of the administrative process as a necessary
adjunct to democratic government holds a central place in his
judicial philosophy. His insistence that judicial review of ad-
ministrative action be severely limited is equally basic. This is so
because, "to the extent that a federal court is authorized to re-
view an administrative act, there is superimposed upon the en-
forcement of legislative policy through administrative control a
different process from that out of which administrative action
under review ensued."13 Technical rules that work well enough
under a unified command may, when taken out of their environ-

(1956).
134, 141 (1940).
ment, tend to stifle legislative power as exercised by a designated agency. Courts should only review administrative action under express congressional authorization. Statutory provisions granting review must be beyond question. There can be no implied grant; it must be explicitly stated.

While Frankfurter has rejected any implied congressional authorization and has advocated a like course for the Court, many of his brethren have not adopted a similar attitude. Reflecting activist tendencies, they have found as much authorization for review in the silence of Congress as they have found when Congress spoke. They argue that there are basic principles of our law that must be respected by administration and that it is up to the Court to exact such respect. One may wonder whether, in the light of the Frankfurter and activist positions on "basic principles" inherent in due process of law, either side is entirely consistent. In reviewing administration action, Frankfurter demands explicit provisions upon which to work; in dealing with the Fifth or Fourteenth Amendment he rejects absolute infusion of the specific provisions of the Bill of Rights. The activists merely reverse the process. These dual positions of both parties can be reconciled only by recognizing that each has a totally different conception of the role of the judiciary in democratic government.

Overemphasis on Frankfurter's insistence on authorization for review tends to distort the picture. Once the Court's competence has been established, he does not think the judging process automatic nor the end result foreclosed. There are too many impalpable factors involved to give any definite content to any theory of judicial review. There is a good deal of ad hocness in the relation of the Supreme Court to administrative agencies. Claiming that "since the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more helpful than the old," the Justice has gone on to say that "there are no talismanic words that can avoid the process of judgment. The difficulty is that we cannot escape, in relation to this problem, the use of undefined defining words." 14

Judicial review of administrative action is an evolving concept. Its finished contours have not and cannot be put down. Old doctrines are discarded while new ideas take on life.

One of Justice Frankfurter's very first opinions, Rochester Telephone Corporation v. United States, laid to rest the "negative order" doctrine. A negative order has been defined by the Court as one

which does not command the carrier to do, or to refrain from doing anything; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. If such an administrative order was involved, the Court refused review. Calling this doctrine "obfuscating," Justice Frankfurter in the Rochester case made it plain that the availability of review in any given case no longer depended upon the form of order. On the surface it appeared that the Justice, who was most anxious to limit the breadth of judicial review, was extending an open invitation for its extension. Such was not true, however, for Frankfurter was primarily concerned with the proper allocation of power between administration and the courts.

He has always insisted that, as courts must have their competence granted by Congress before administrative action could be reviewed, standing to challenge such action could only be gained by express statutory statement. In the case under discussion, he thought that persons who had duly been given such standing were being denied access to judicial review merely by an outmoded formulation of the Court. Thus the negative order doctrine had to fall. His opinion showed quite distinctly the interrelation of two of his main concerns. Maintaining the integrity of administration meant that it was not to be interfered with unless Congress so ordered. But maintaining the integrity of the Court's jurisdiction through exercising judicial review

15 307 U.S. 125 (1939).
when granted was equally important and in this instance took precedence. Legislation leads to a right of challenge; the concept of standing is but part of a larger case or controversy issue; establishment of a case or controversy determines whether judicial power can come into play; identifying the area of judicial power is merely identifying one of the areas created by the separation of powers doctrine; and separation of powers is the external manifestation of decentralization and dispersal of control, which are necessary in the United States. Stated in this fashion, the hierarchical nature of Justice Frankfurter's thought becomes evident.

When the Rochester decision was handed down, there was some speculation that the prime motivation for the abandonment of the negative order doctrine came from a desire to have greater leeway in correcting hardships that might stem from administrative action. Some members of the Court might have preferred to read the opinion that way, but Justice Frankfurter did not. Solely mitigating hardship was not the Court's concern. Some definite legal right had to be infringed before judicial power for correction was available. He quickly established this point with considerable force: "... to slide from recognition of a hardship to assertion of jurisdiction is once more to assume that only the courts are the guardians of the rights and liberties of the people." Availability of judicial review could not be made to depend on the justices' sensibilities. Even when review was available in theory, it could not be used until irreparable or immediate harm was threatened. A definite legal right had to be involved. This is a harsh position and in many respects Justice Frankfurter has not always been as harsh in action as he has been in theory. The theoretical statement on the availability of review, however, is completely in harmony with the rest of his judicial philosophy.

Some of the sternness has been tempered with the passage of the Administrative Procedure Act of 1946. Since Congress has seen fit to extend the scope of judicial review of administrative actions, Justice Frankfurter wrote, with what seemed to be a sense of relief, "the Administrative Procedure Act should be treated as a

far-reaching remedial measure affording ready access to courts for those who claim that the administrative process, once it has come to rest, has disregarded judicially enforceable rights.”¹⁸ It is perhaps well that Congress was thus able to reassure Justice Frankfurter and allow his conscience to remain clear while exercising wider reviewing powers. Although his hesitation to interfere with administrative competence is eminently praiseworthy, it does increase the danger that if the Court does not review, absolutely no review at all will be available.

While he has previously been much concerned over preventing personal conceptions of fairness from becoming the basis for review, he has also been aware that for administrative agencies themselves, “determination of what is ‘fair and equitable’ calls for the application of ethical standards to particular sets of facts.”¹⁹ Since these standards were not static, an agency was not bound by settled judicial precedents in evolving its concepts of fairness and equity. Here again was one of the strengths of administration coming to the fore—the ability flexibly to apply concepts of fairness and justice in fashioning its remedies or policies for current situations. But even for administrative agencies, fairness and equity alone were not enough. Factual justification must also be present.²⁰

Since judicial review is predicated upon Justice Frankfurter’s theory of decentralization and dispersal of competence and its corollary proposition that responsibility for actions must be attributed to the various units of government, his insistence on administrative finality, before judicial intervention, comes as no surprise. He feels that “for purposes of appellate procedure, finality . . . is not a technical conception of temporal or physical termination. It is the means for achieving a healthy legal system.”²¹ In order to have finality, administrative remedies must be exhausted. Unhesitatingly, he has fought against the abandonment of the exhaustion rule.²²

²¹ Cobbledick v. United States, 309 U.S. 324, 326 (1940).
Such a self-denying ordinance for the judiciary implies a very circumscribed—some would term it abject—attitude toward congressional grants of power to administration. Justice Frankfurter has written no opinions directly indicating the lenience he would accord legislative delegation of power. Probably a wide allowance would be approved. "Necessity . . . fixes a point beyond which it is unreasonable and impractical to compel Congress to prescribe rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated power." 23 Freedom and trust for administrative agencies also bring obligations. First and foremost, since the enabling legislation of Congress may be broad in scope, they must stay within the standards created thereby. Procedures may take due account of administrative needs, but they cannot be used as excuses for not complying with congressional and judicial standards. For instance, the elements that guarantee a fair hearing in administration must be those encompassed within the elements that guide courts in ruling on due process. In the last several terms Justice Frankfurter has become more and more insistent on this point.

The Justice also vehemently dislikes the constitutional-jurisdictional fact doctrine enunciated in Crowell v. Benson. 24 The classic distinction between law and fact forms an integral part of his philosophy. The Crowell doctrine to his mind completely distorts this distinction, allowing the Court to turn into legal issues what are normally factual determinations. By this twist of words the Court thus may assume jurisdiction over administrative actions and rule directly on the validity of administrative findings. For Justice Frankfurter, "'jurisdiction' competes with 'right' as one of the most deceptive of legal pitfalls. The opinions in Crowell v. Benson," he has written, "bear unedifying testimony of the morass into which one is led in working out problems of judicial review over administrative decisions by loose talk about jurisdiction." 25 When legal rights are truly involved, he is one of the first to de-

24 285 U.S. 22 (1932).
mand wide judicial review. Otherwise, he feels that it is best for the Court to exercise limited review under the dictates of the “substantial evidence” rule.

To sum up, Justice Frankfurter’s view of the relation between courts and administration is conditioned by his more complete theory that competence should be decentralized and dispersed in a democracy. He has not become disillusioned by the obvious faults of administration. No branch of government ever completely fulfills its theoretical role. As long as an attempt is made to approach the theoretically perfect, the Justice is satisfied. Moreover, Frankfurter, in trying to ascertain the proper relationship between judicial and administrative power, is as interested in the former as he is in the latter. He wants to define the role of courts within a democratic society and in order to do this he must define the roles of other agencies. To avoid absolute positions, which might later prove untenable, he has gone out of his way to forego broad constitutional rulings on the power of administration. He prefers to deal with particular situations through specific holdings. He does not start with a bias in favor of judicial review, but, when Congress makes plain its desire to have the judiciary supervise, he does not side-step the responsibility. Indeed, in recent years, he has been more willing than some other members of the Court to find directives for judicial review in congressional enactments. Utilizing the concept of due process to absorb the strictly legal doctrines of *res judicata* and *stare decisis*, he had made administration mindful of its responsibilities to the present and to the future. Upholding administrative discretion to the limit, he has faltered in his admiration for the “fourth branch” of government only when it has collided with the lower courts, another of his intense interests.

II

Maintaining the integrity of the lower courts, and especially those in the federal system, has been one of Justice Frankfurter’s deepest concerns. Even before going on the Supreme Court he
The Institutional Role of the Court evidenced, in his books and articles, an awareness that, however excellent the job that the Court itself was doing, it of necessity relied heavily upon the wisdom of the lower courts. Two factors conditioned all of the federal judiciary acts—that the United States was a federation and that it covered a continent. In whatever manner Congress dealt with these issues, the Supreme Court remained the vital center of all judicial activity. Therefore, while relying on the lower courts, it also largely determined the mode in which they worked. It set the standards of judicial conduct, especially for the federal hierarchy. “In so doing it acts less as an organ of technical law than as exemplar of the highest ethical sense realizable through political institutions. What is decisive is the Court’s feeling for the integrity of the judicial process.” 26 These were the views of Harvard’s Frankfurter in 1933; his opinions for the Court reiterate the same philosophy. One thing is clear. The Justice considers his supervisory power with respect to the lower federal courts different from that exercised over state courts. His position is most clearly articulated in cases involving review of criminal trials held under federal auspices.

He begins with a disposition favorable toward lower federal judges. As he said in one of his very first opinions for the Court in 1939, “Such a system as ours must . . . rely on the learning, good sense, fairness and courage of federal trial judges.” 27 As with administrative agencies, the lower courts, having been granted a great deal of freedom in their actions, should feel responsible for the way in which their power is exercised. While the Supreme Court can only require of state courts that they enforce “fundamental principles of liberty and justice” through the Fourteenth Amendment, its role in relation to the federal courts is not thus constitutionally circumscribed.

Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safe-

guards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force.28

Federal justice cannot rely on minimal historic safeguards; it had to pass beyond this point to a full protection of individual and corporate rights. But, and here is the important element, the Supreme Court cannot provide such protection by itself. The lower federal judges have to co-operate.

In recent proposals to have the Judicial Conference change the rules of criminal procedure, Justice Frankfurter was much against the Supreme Court justices participating in any such venture. "The Justices have become necessarily removed from direct, day-to-day contact with trials in the district courts. To that extent they are largely denied the first hand opportunities for realizing vividly what rules of procedure are best calculated to promote the largest measure of justice." 29 Even in the federal courts, the High Tribunal can but interpose a veto on flagrant violations. Otherwise, it must allow the lower tribunals to work out their own destinies on the basis of rules instigated and promulgated by members thereof.

While lower federal judges are responsible for their conduct and cannot shirk the praise or blame that stems from such conduct, other general circumstances also have to be taken into account. Courts of law are not the only instruments of adjustment for the contending forces within society. The range of their authority and, indeed, even their structure, is determined to a large extent by contemporary considerations. Since the Supreme Court has become the focus of national attention, the vital functions that the lower courts perform are often overlooked by the public. To compensate for this oversight, Justice Frankfurter's opinions often allude to and uphold the prerogatives of the lesser tribunals of the federal hierarchy. These tribunals must gain recognition in their own right. Final appeal to the Supreme Court, while necessary in certain instances, will not encourage a healthy judiciary and may even prove deleterious to the Supreme Court itself.

Equally undesirable is the effect, however insidious, upon Courts of Appeal. If, barring only exceptional cases, they are to be deemed final courts of appeals, consciousness of such responsibility will elicit in them, assuming they are manned by judges fit for their tasks, the qualities appropriate for such responsibility.  

"Courts of Appeal are human institutions," but, unless some abusive excess of discretion is evident in the record, institutional foibles must be tolerated. For the Supreme Court needlessly to rebuke lower federal judges weakens the entire judiciary.  

Even in a sensitive area affecting foreign relations, Justice Frankfurter has not hesitated to uphold the powers of the lower courts. When foreign nations seek standing to sue in American courts, ticklish issues of international prestige often become involved, and the Supreme Court is pressed to assume immediate jurisdiction. While the Court relies heavily on State Department advice in such matters, when indefinite advice is forthcoming, Justice Frankfurter prefers that regular channels be followed before the Court takes a case. As he said in *Ex parte Republic of Peru*, "To require a foreign state to seek relief in an orderly fashion through the circuit court of appeals can imply an indifference to the dignity of a sister nation only on the assumption that circuit courts of appeals are not courts of great authority." He was quick to add that our system presupposes the contrary.  

The Justice has amply demonstrated his faith in the competence of the lower federal courts. As with administration, such a faith does not justify any or all actions that these tribunals may wish to take. On matters of criminal procedure, the lower courts must take the initiative in promoting high standards. The Supreme Court, however, remains the ultimate arbitor on questions of responsibility. When the lower courts seek to exceed their power through the use of such writs as injunction or habeas corpus, the High Tribunal must call a halt. When a circuit court judge does not follow the distinction between "law" and "fact" and attempts to exercise independent judgment on facts as though he were sitting in a district court, he is called to account. There are cer-

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31 318 U.S. 578, 602 (1943).
tain institutional requirements for lower courts, both federal and state. These requirements parallel demands made upon administrative agencies and stem far back into Frankfurter's writings as a teacher. Explaining the Judiciary Act of 1925, he thought it extremely important that "carefully framed findings by the lower courts should serve as the foundation for review, leaving for the Supreme Court the ascertainment of principles governing authenticated facts, the accommodation between conflicting principles, and the adaptation of old principles to new situations." \(^{32}\) In his book on the business of the Court, considerable space was given to explaining why the justices should not have to disentangle confused testimony or to pass on questions of evidence. These things were for the lower courts. Like emphases have reappeared in the Justice's opinions.

In addition to institutional requirements for the federal judiciary there are personal requirements of equal importance. Often tucked away in the midst of his opinions are little essays on the need for federal judges to remain above reproach personally and in the conduct of their official business. In Sacher v. United States \(^{33}\) Justice Frankfurter was one of the dissenters from the majority, holding that Judge Harold Medina could summarily punish for contempt lawyers representing the thirteen Communist leaders in the Dennis case.\(^{34}\) He felt that Judge Medina had not shown himself completely objective and therefore should have disqualified himself from deciding guilt and punishment. The Sacher dissents have been called "the most severe scolding for judicial misbehavior ever given a lower federal judge by a bloc of Supreme Court Justices." John P. Frank thought "the rebuke was all the more striking because its most comprehensive statement was by Justice Frankfurter, noted for his almost extreme courtesy to the lower federal bench." \(^{35}\) In recent years one federal judge, smarting under a verbal spanking administered by


\(^{33}\) 343 U.S. 1 (1952).

\(^{34}\) Dennis v. United States, 341 U.S. 494 (1951).

Justice Frankfurter, spoke out against the latter's action on the bench.

District Judge Alexander Holtzoff of the District of Columbia was apparently quite annoyed that the Supreme Court did not approve of his use of the summary contempt power, and he was quite indignant over the reprimand that Frankfurter had administered for the majority of the Court. In one of his opinions rendered soon thereafter, he, in turn, upbraided Frankfurter for the many times and the many ways in which he thought the Justice was overruling previous decisions without explicitly mentioning them. He also complained bitterly about disregard of the principle of stare decisis and abandonment of precedents. Some questions can be raised about Holtzoff's interpretation of Frankfurter's devotion to stare decisis. In any event, Justice Frankfurter has probably found that teaching etiquette to lower court judges can at times be painful. However, given his deep insistence on personal integrity for the federal judiciary, there is little probability that in the future he will forego his instruction.

The Supreme Court and other courts in the federal hierarchy are joined by certain other tribunals established under general legislative power and not covered by Article 3 of the Constitution. At one time or another these tribunals have included those devoted to patent problems, tax litigation, and cases growing out of interstate commerce. While the personnel requirements for these courts are the same as those applicable to regular federal courts, Justice Frankfurter combines in his treatment of them attitudes previously noted as being directed to the administrative agencies and lower courts. He is impressed with the expertise they display. "To hold that . . . this Court, must make an independent examination of the meaning of every word of tax legislation, no matter whether the words express accounting, business or other conceptions peculiarly within the special competence of the Tax Court, is to sacrifice the effectiveness of the judicial scheme designed by Congress . . . ." Likewise he feels that appellate court intervention will deprive these special courts of confidence.

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in their own abilities and thus psychologically will destroy their reason for being. In his treatment of legislative courts, with the very important exception of courts martial, Justice Frankfurter shows a considerable tendency to accept them as reliable partners in his campaign to carry out decentralization of function.

III

In one of his opinions Justice Frankfurter said somewhat hopefully that "an Act for the elimination of diversity jurisdiction could fairly be called an Act for the relief of the federal courts." 39 His preoccupation with ridding the federal judiciary of cases arising solely from diversity jurisdiction is one of long standing. Back in 1927 he had thought that reducing the range of business of federal courts was extremely necessary and one of the prime ways in which to relieve the overburdening then visible was to refuse to hear arguments based on diversity of citizenship. 40 Litigation of essentially a federal nature was growing by leaps and bounds. State judicial reforms were making those courts more reliable. The historic reasons for diversity jurisdiction were no longer valid. Therefore it seemed best, for both state and federal courts, to do away with this category of cases. Each judicial hierarchy would consequently fulfill the functions for which it was truly suited and thus responsible administration of justice would ensue. Justice Frankfurter's desire to have diversity jurisdiction abandoned has not been fulfilled, but this desire is a very natural accessory to his judicial philosophy with its veneration of the federal hierarchy and its growing appreciation of the worth of state judicial power. 41

40 See Frankfurter and Landis, The Business of the Supreme Court.
Professor Frankfurter in 1929 wrote an article for the *New Republic* entitled “Federal Courts” in which he expressed the view that the distribution of judicial power between nation and states was perhaps the most delicate of all recurring problems that had to be faced. Geographical dispersion of function assumes a place second to none in his philosophy. In his treatment of state courts there is a coalescence of his views on geographical dispersion with his general veneration of the judicial process. The role of the Supreme Court is narrowly limited in reviewing state court action. Only in guaranteeing substantive and procedural due process, and then mostly in criminal cases, does the Justice feel that interference with state competence is warranted. Even here care must be taken before attributing to him overzealousness for Supreme Court action. Once again, more than one reason is apparent. State courts should be respected; the Supreme Court should not allow itself to be drawn away from its primary responsibilities by undertaking tasks for which it is not suited.

Back in 1932 Frankfurter noted that “the Court, though it will continue to act with hesitation, will not suffer, in its own scathing phrase, ‘judicial murder.’” This comment was on the Court’s handling of the Scottsboro case, Powell v. Alabama. But he also felt that “in no sense is the Supreme Court a general tribunal for the correction of criminal errors. . . . On a continent peopled by 120,000,000 that would be an impossible task; in a federal system it could be a function debilitating to the responsibility of state and local agencies.” Such debilitation was to be avoided at all costs. As he wrote in a case late in 1959, “something that thus goes to the very structure of our federal system in its distribution of power between the United States and the States is not a mere bit of red tape to be cut, on the assumption that this Court has general discretion to see justice done.”

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43 287 U.S. 45 (1932).
port of the states. Even though state court methods and procedures may appear outmoded, awkward, or finicky, “this Court is powerless to deny a State the right to have the kind of judicial system it chooses and to administer that system in its own way.” 46 This, of course, was stated with the provisions that no federal claims were stifled.

Justice Frankfurter, on one of the first days in which he was a member of the Court, was questioning a lawyer as to the procedures for getting a case to the Court. “How did you get here?” he quizzed. Apparently quite flustered, counsel replied, “I came in on the B. & O.” 47 This certainly was not the explanation expected. The initial question of the Justice did, however, highlight one of his main interests. He is always at some pains to discover whether the Supreme Court’s jurisdiction has been properly invoked, and this is especially true when a question of federal-state judicial relations is involved. He will not be lulled into having federal courts adjudicate cases that are basically local in nature through the mere claim of a litigant that a federal right has been violated. Violation has to be conclusively demonstrated. Federal courts cannot intervene on the basis of a federal right when state courts have not made any ruling on the issue. Even in the event that a valid federal question is present, state court remedies must be exhausted before the federal courts intervene. Justice Frankfurter does not, however, flinch from upsetting state court procedures and remedies when it is evident that they are being used to circumvent rather than to aid the course of law. All things considered, one cannot help but agree with Wallace Mendelson that within the broad range of discretion that Congress has left to the courts, “Mr. Justice Frankfurter has drawn lines for a modus vivendi that would leave to state judges the broadest range of competence consistent with full respect for national interests.” 48

IV

One further topic needs to be mentioned and that is the role of the bar in our system of government. Strictly legal competence relations are not involved, but members of the bar do have functional responsibilities toward administration, the court, and the public. Responsibility rather than prerogative should be the keynote of the lawyer's creed. From the public defender to the Solicitor General, lawyers must be made aware of the fiduciary nature of their profession.

Since membership in the bar is largely governed by state regulations, Justice Frankfurter has been tolerant of obligations imposed by the states in their attempts to ascertain the responsibility of candidates for admission. During the 1957 Term two cases of interest on this topic were heard and both were decided on the same day, Schware v. Board of Bar Examiners and Konigsberg v. State Bar of California. They involved state requirements that candidates show "good moral character." Frankfurter did not join the Court's opinion in either case, for he thought that even an implied rejection of the conception of moral character for indefiniteness was unwarranted. The basic outline of moral character—a high sense of honor, granite discretion, and observance of fiduciary responsibilities—was readily understood and states should be able to exact it. Justice Black, who wrote the majority opinion in both cases, inserted in his Konigsberg opinion an answer to Justice Frankfurter. He thought little of the term "good moral character," even though states had used it for many years. "Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law." 51

As is true with so many of these issues, there was no disagree-

49 353 U.S. 232.
50 353 U.S. 252.
51 Ibid., p. 263.
ment between Black and Frankfurter on the question whether a state could establish some criterion for admission. Disagreement came over giving substance to the criterion. Justice Black rightly thought that the prejudices of the definer of necessity entered the picture. What Frankfurter was trying to do was to make sure that these were not the prejudices of the Supreme Court. Since the bar must serve the state, the latter must be able to judge the qualifications of its servants. Only when excessively harsh and unreasonable conditions are imposed is it up to the Supreme Court to interfere.

While the states are primarily responsible for the character of the bar, all units of government have a right to make certain demands upon the legal profession. The state and federal courts are, of course, most directly concerned. As a scholar, Frankfurter complained that the empiricism characteristic of Anglo-American lawyers prevented them from systematically presenting information to the Courts. To remedy this situation the "Brandeis Brief" was evolved. This technique, partly originated by Frankfurter, has continued to find favor in his eyes. Lawyers, by presenting courts with adequate information on all facets of a case and by knowledgeable and relevant arguments on the issues involved, can do much to aid the judiciary in fulfilling its responsibilities. At the same time they, as lawyers, carry on the vital function of indicating possible lines of development for the legal system. Courtroom performance is probably of some value when basic constitutional issues are at stake, but one may speculate that extensive briefs and records are of even more value. Certainly for the Supreme Court, counsel's arguments in ordinary cases weigh heavier than when great national questions are under consideration. For the bar, then, as for administration and the lower courts, there is a functional relationship with the Supreme Court.

There could be scant disagreement with Justice Frankfurter's opinion that "if lawyers are good, if lawyers have range, if lawyers are true to their functions, then they are what I venture to call

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experts in relevance." And his reliance on and encouragement of the "Brandeis Brief" as a means of informing the Court would draw few criticisms. But the question can be raised whether, in some instances, lawyers can be experts in relevance when the Brandeis technique is used. When Frankfurter argued before the Court, he presented briefs of over a thousand pages. While the briefs were no doubt very scholarly pieces of work, may it not be that such extreme length defeats its own purposes by making everything and anything relevant information? Justices may be impressed by the massiveness of material gathered; but they are not thereby induced to go through and absorb its content. In the period since the inauguration of the Brandeis brief, judges, and especially Supreme Court justices, may be trapping themselves by demanding too much information.

In other words, they are finding it impossible to deal with all the facts and conflicting precedents and citations given them. They are being forced in many instances almost to the position of having to act on personal predilections, since they cannot disentangle the vast network of authorities with which they are presented. Justice Frankfurter's desire to cut down on the number of cases that the Supreme Court hears is at least in part conditioned by the fact that lawyers have learned their lessons too well. Sensitive to the reality that only if materials are read and contemplated can they be of any use at all, Justice Frankfurter now finds himself faced with a plethora of information provided by each lawyer for every case and apparently finds it an impossible task to inform himself intelligently from such an abundance. It may well be, consequently, that the Court in the future will have to emphasize extensive briefs only in rare instances, as in establishing the historic meaning of the Fourteenth Amendment for desegregation, while on other occasions warning lawyers that relevance means relevance and not mere accumulation of statistics or citations.

However the Supreme Court works out its difficulties with the bar, one thing is certain. Justice Frankfurter will continue to

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strive for some reasoned workable relation, as he has striven for accommodation between the judiciary and other arms of government. His treatment of administration and the lower courts is predicated upon the pattern of competence that he discerns. This pattern of competence is diffused geographically and decentralized functionally. For competence to remain dispersed, however, requires that the recipients thereof exercise it with understanding and responsibility. Otherwise, by the natural need to fill a vacuum, the Supreme Court will be drawn in, to its own detriment and to the detriment of democratic government. It is to infusing understanding and responsibility, therefore, that Justice Frankfurter has devoted himself in his dealings with administration, lower courts, and the bar.