FRANKFURTER AND WELLINGTON

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The title of my talk is deceptive. It is meant only as a lead-in to explain my presence here. In thinking about a fitting subject for this occasion, I thought that I would honor Harry Wellington by talking about the man who brought us together. I met Harry forty-five years ago in the chambers of Justice Frankfurter. We were co-clerks in the 1955 Term of the Supreme Court and we have been lifelong friends ever since. The 1955 Term was a memorable year for both of us because Felix Frankfurter was a unique. Yes, I know unique is not a noun, but Frankfurter needs a special word because there was no one like him. Those who experienced the magnetism of his personality and intellect are fast disappearing. I will spend my fifteen minutes trying to capture some of the qualities that made him such a lightning rod for admiration and hatred in his day. I do this especially because today's generation of scholars seems much more influenced by the qualities that inspired hostility in his own day.

Frankfurter was a complex man who lived a complex life. Almost every conclusion about his personality, his values, his professional beliefs, and his contributions must be stated with a string of qualifiers. All except one. He was loyal to his friends. Once he admitted you to that circle – and the circle was very large – you were his friend for life. There was one group that was admitted en masse: his law clerks. Frankfurter treated us like colleagues; he was interested in our lives; he included our families in his interest; and he kept his clerks as his friends and as his colleagues forever. It is hard not to reciprocate the affection of someone who cares passionately for you. Harry and I shared that glorious experience for twelve months.[1]

Frankfurter was not alone in maintaining close relationships with his law clerks. But his magnetism, his links to his former clerks and to some former students and the stream of communications that passed between them have induced some scholars who have pored through his papers to suggest that there was something almost malign about

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1. *See generally* Andrew L. Kaufman, *The Justice and His Law Clerks*, in FELIX FRANKFURTER: THE JUDGE 223 (Wallace Mendelson ed. 1964).

some aspects of those relationships – that Frankfurter exercised control over his law clerks, that he used them, even manipulated them, for his own ends.[2]

That conclusion seems silly. As a group, without singling out particular individuals, Frankfurter's clerks were, and are, strong-minded individuals with quite diverse political views and professional philosophies, although the far right is not well represented. I remember quite well the annual dinners of the law clerks when Frankfurter was still alive. The small groups of clerks who mingled together were united in their feelings of great affection for the Justice, but there was always a current of tolerant criticism about his personal foibles and professional missteps. Frankfurter's law clerks, as a group, understood his weaknesses very well, but those weaknesses were vastly outweighed for them by the great virtues and personal kindnesses that they saw from close at hand. The law clerks also ran the spectrum of agreement to disagreement with his judicial philosophy. Just read the combined professional work of those clerks. It is filled with critical appraisal of Frankfurter's work. For example, a Frankfurter misstep, mangling the interpretation of a statute and deciding a constitutional question that need not and should not have been decided, was a subject of one of Harry's early law review articles, which was co-authored with Alex Bickel, another former Frankfurter clerk.[3]

Did Frankfurter's notion that his law clerks were his colleagues for life sometimes get him, and them, into trouble? Yes. His former clerk, Phil Elman, recounted the conversations that he had with Frankfurter about the Segregation Cases while they were pending before the Court, at a time when Elman was First Assistant in the Solicitor General's Office. "I just did what I thought was right," said Elman, "and I'm sure he [Frankfurter] didn't give it much thought."[4]

Frankfurter could be quite sensitive to questions of judicial ethics. I remember that he refused to hire a prospective law clerk who was practicing in a firm that had a major case that was going to be coming

2. *See e.g.*, HARRY N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 198-99, 208 (1981). *But see, e.g.*, Max Isenbergh, *Felix Frankfurter: The Enigma of H.N. Hirsch*, 91 YALE L.J. 1018-27 (1982) (book review); Jerome Cohen, Book Review, 10 HOFSTRA L. REV. 1327, 1329-30 (1982); Alan Stone, Book Review, 95 HARV. L. REV. 346 (1981); and Norman Dorsen, Book Review, 95 HARV. L. REV. 367 (1981).

3. *See generally*, Alexander Bickel & Harry Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957).

4. Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960*, 100 HARV. L. REV. 817, 843 (1987).

before the Supreme Court, even though the prospective law clerk had done no work on the case. The perception of influence on his vote was something Frankfurter wanted to avoid. But in Elman's case, Frankfurter appears to have engaged in ex parte conversations with a lawyer for the United States, which was involved as amicus in the most important case of the century – justified in Frankfurter's own mind, according to Elman, by the entirely specious notion that Elman's status as his "law clerk for life"[5] trumped Elman's actual role as a government lawyer in the case. Elman may have seen himself as an old-fashioned amicus, acting pro se as an expert, helping the Court in a very special case. The United States government, however, had first a potential and then an actual role in the litigation and Elman was an important player in that role. And even an old-fashioned amicus doesn't engage in the kind of ex parte conversations that Elman recounted, and Frankfurter should have known it. In my view, even under the standards of judicial ethics that applied in the 1950s, the discussions between Elman and Frankfurter were quite incompatible with Elman's professional obligations as a government lawyer and with Frankfurter's obligations as a Justice who was going to participate in the decision of the cases they discussed.[6]

While Frankfurter enjoyed warm relations with his law clerks, he did not inspire warm feelings in everyone. Frankfurter did not suffer gladly those whom he regarded as fools. An immigrant Jew who made his way through City College to Harvard Law School, he worked as a young lawyer for the patrician Henry Stimson, and came to know and become a protégé of both Holmes and Brandeis, even before he became a professor at Harvard Law School. All his life he had a flair for getting to know important people and people who were going to be important. Some have accused him of being a social climber who

5. *Id.*

6. In fairness to Elman, I should point out his subsequent claim that his article had been misread and that his conversations with Frankfurter took place before the government was involved in the litigation and at a time when it seemed unlikely that the government would become involved in the litigation. Elman, "Response" to Randall Kennedy, *A Reply to Philip Elman*, 100 HARV. L. REV. 1949 (1987). In my view, Elman's original printed article, especially the interview version that I have seen, strongly suggests that the conversations continued while Elman was actively involved in the litigation and right to its conclusion. Moreover, even if they were held when it seemed unlikely that the United States would participate, that does not change the fact that the United States Government had been involved in previous litigation raising the issues of *Brown* and had an enormous interest in the outcome of the pending litigation.

sought to shed his Jewishness as he sought to assimilate into the dominant W.A.S.P. community. While he may have ingratiated himself with such people consciously, I think he ingratiated himself only with those whom he thought were worth knowing on their merits. And while Frankfurter had shed religious Judaism, he never shed his identity as a Jewish person, and he spent a great deal of his energy in Zionist activities at various times in his life.

Frankfurter was a passionate fighter for ideas. He was a Social Democrat more than he was a social climber. The social climate at Harvard and in Boston was heavily Brahmin during Frankfurter's years there and he was constantly on the other side from that community—helping to found the ACLU and the New Republic, advising the NAACP, defending Sacco and Vanzetti. He was totally committed to the political philosophy of the New Deal and he did not follow the lead of Brandeis during the Court-packing fight, even though Brandeis had been quietly financing Frankfurter's professional research for years.[7] It is too easy to say that Frankfurter's failure to object to Roosevelt's plan is explained by his ambition for a seat on the Supreme Court. Frankfurter was outraged by the Court's decisions upsetting legislation that sought to cope with the economic dislocation of the Depression of the 1930s. If Benjamin Cardozo could mute his opposition to the Plan because of his admiration for Roosevelt, it is not surprising that Frankfurter would hold his fire.[8]

One of the keys to the present rather low state of Frankfurter's reputation is that his career left him with no natural cadre of supporters. The passion for social justice and government regulation to achieve that end that marked his pre-Supreme Court political performance left him as a hated symbol in the conservative community. But the pattern of his votes on the Supreme Court was so mixed and unpredictable – sometimes on the side of individual liberties, sometimes on the side of government regulation, that many of his former political allies were dismayed with his judicial performance. The strong constitutional law voices that one hears in the academy tend to be those who have strong views about appropriate theories, doctrine, and results. Except for scholars like Harry Wellington, they are not usually people

7. BRUCE MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION 40-45 (1982).
8. *See* ANDREW KAUFMAN, CARDOZO 524-25 (1998).

who favor a common law, case-by-case approach to constitutional law.[9] Frankfurter would not be their model, either for his case-by-case approach or for his application of that approach in particular cases.

Frankfurter came to the bench with strong views about the judicial role. Unlike many before and since, he did not see the bench as a forum for the achievement of his legislative goals. Harry Wellington has reminded us that the point, or at least a point of Frankfurter's judicial career, is that "judicial philosophy and not political ideology may govern constitutional interpretation."[10] That observation is correct and Frankfurter would doubtless have endorsed it as applicable to his own judicial career. He brought to the bench his experience with a Court in which five or six Justices had thwarted the will of the country for many years. Frankfurter was a small "d" democrat, with strong doubts about a Court in which a few judges could overturn the judgment of the elected representatives of the people.

But Frankfurter was not wholly consistent in his judicial philosophy. On the one hand, he gave a great deal of deference to legislative judgments about the needs of government, fueled by his belief in democracy and his emotional patriotism. On the other hand, he believed strongly in enforcing certain constitutional protections for individual rights. One constitutional protection was the requirement of procedural regularity. Another was the constitutional rights of racial and religious minorities. Thus, he strongly supported *Brown v. Board of Education* and the succeeding segregation cases,[11] and he was usually on the side of strong enforcement of the Religion Clauses of the First Amendment.[12] Except for his commitment to academic freedom,[13] however, he did not often carry those views forward into the Free Speech Clause of the First Amendment[14] or at all into the issues

9. *See, e.g.*, Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973). *See also* HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION 77-95 (1990).

10. WELLINGTON, INTERPRETING THE CONSTITUTION, *supra* note 9, at 151.

11. *See* 347 U.S. 483 (1954). *See also* Cooper v. Aaron, 358 U.S. 1, 20 (1958).

12. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 18, 28 (1947) (Frankfurter, J., dissenting) (joining dissents of Justices Jackson and Rutledge); Zorach v. Clauson, 343 U.S. 306, 320 (1952) (Frankfurter, J., dissenting).

13. *See* Sweezy v. New Hampshire, 354 U.S. 234, 255, 262-63 (1957) (Frankfurter, J., concurring).

14. *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 646-47 (1943) (Frankfurter, J., dissenting). *But see, e.g.*, AFL v. Swing, 312 U.S. 321, 325-26 (1941).

of legislative apportionment.[15] All along, he never managed to reconcile his many strong views about the proper accommodation of government power and individual liberty in a coherent statement of his judicial philosophy.

I have used the word passion many times – deliberately. This is not the occasion to speculate about the relationship between a passionate personality and an appropriate judicial temperament. But without generalizing, I do believe that in Frankfurter's case his emotional and professional passions were strongly related to his inability to state and to apply a consistent judicial philosophy. His passion was a main feature of his life. He was passionate about virtually everything – his likes and dislikes, his interests, his political beliefs, and his professional creeds. What he believed in, he believed in strongly. When his beliefs collided with one another, one did not just prevail over another by a little bit. One just gave way; it was not applicable; and the other was forcefully applied.

That phenomenon existed in his judicial career as well, and helps account for the different pattern of results that he reached in First Amendment cases involving freedom of speech, and in cases involving freedom of religion and the Establishment Clause. There were legitimate grounds for favoring government exercise of power that impinged on individual speech that did not exist when issues implicating the religion clauses were involved—not always, but often, or perhaps, usually. The only problem is that Frankfurter never satisfactorily explained why. He was simply more passionate about the individual rights protected in the religion clauses than about those protected in the speech clause.

I finish as I began. The title of this talk is set forth in partnership terms—Frankfurter and Wellington. But there was also Wollett and Wellington,[16] and Bickel and Wellington[17], and Shepherd and Wellington, and Summers and Wellington,[18] and Winter and Wellington.[19] And there was a lot of just plain Wellington.[20] But on this

15. *See* Baker v. Carr, 369 U.S. 186, 207, 270 (1962).

16. Donald Wollett & Harry H. Wellington, *Federalism and Breach of the Labor Agreement*, 7 STAN. L. REV. 445 (1955).

17. *See* Bickel & Wellington, *supra* note 2.

18. CLYDE SUMMERS & HARRY WELLINGTON, CASES AND MATERIALS ON LABOR LAW (1968).

19. HARRY WELLINGTON and RALPH WINTER, THE UNIONS AND THE CITIES (1972).

20. Aside from the items already cited, see generally, LABOR AND THE LEGAL PROCESS (1968), *Union Democracy and Fair Representation*, 67 YALE L.J. 1327 (1958), *On Free-*

wonderful occasion, I want to end by mentioning that there was always Wellington and Wellington, Harry Wellington and Sheila Wellington, a very special partnership that is in its fifth decade and has brought extraordinary warmth, friendship, and good cheer to those lucky ones of us who have been part of their lives.

dom of Expression, 88 YALE L.J. 1105 (1979), and *The Nature of Judicial Review*, 91 YALE L.J. 486 (1982).