

LETTERS SHOW FRANKFURTER A SECRET VOICE OF BRANDEIS

By David M. Margolick

Feb. 14, 1982

Louis D. Brandeis, in his 23 years on the United States Supreme Court, paid Felix Frankfurter, who was then a Harvard law professor, more than \$50,000 to further the Justice's goals on public policy, according to previously unpublished letters.

A new study that relies in large part on the letters exchanged by two of 20th-century America's most prominent lawyers and jurists discloses that Brandeis, feeling ethically constrained from engaging directly in extrajudicial activities but possessing strong opinions about the political issues of the day, paid Frankfurter an annual retainer for his efforts.

The letters show that each year from 1916 through 1938 Brandeis deposited as much as \$3,500 in a special "joint endeavors for the public good" fund he set up for Frankfurter.

'In the Public Interest'

"I ought to feel free to make suggestions to you, although they involve some incidental expense," Brandeis wrote in 1916 to Frankfurter, "and you should feel free to incur expense in the public interest."

The financial relationship between the two men ended only when Brandeis retired from the Supreme Court in 1939. Frankfurter, 26 years younger, was named the same year to a different seat on the Court by President Roosevelt.

The retainer arrangement was discovered by Bruce A. Murphy, an assistant professor of political science at Pennsylvania State University, who obtained from the Library of Congress 300 letters between Brandeis and Frankfurter, most of them previously unpublished.

Findings Disclosed in Book

Professor Murphy described his findings in a book entitled "The Brandeis/ Frankfurter Connection: The Secret Political Activities of Two Supreme Court Justices," which is to be published this month by Oxford University Press.

Asserting that they were "court papers," Frankfurter had not permitted Brandeis's authorized biographer, Alpheus T. Mason, to see the letters, according to Mr. Mason.

After Frankfurter died in 1965, the letters were sent to the Library of Congress, but, for reasons not entirely clear, they have gone relatively unnoticed.

“The fund was designed to free Brandeis from the shackles of remaining nonpolitical on the bench and to permit him to engage freely in political affairs,” Professor Murphy wrote. “Frankfurter provided Brandeis the conduit through which he might both inquire freely in the political realm and influence the course of political decisions.”

Such a relationship, Professor Murphy wrote, was “unprecedented in Supreme Court history.” The newly detailed activities of the two men raise anew the problem of defining the proper scope of extrajudicial activity by Supreme Court justices, particularly for individuals with strong personalities and political views like Brandeis and Frankfurter.

They also help place in some perspective the recent allegation by John D. Ehrlichman that Chief Justice Warren E. Burger spoke of matters pending before the Court with President Nixon.

“Chief Justice Burger is being held to a standard that does not and has never existed,” Professor Murphy said in an interview. “The truth is that Justices throughout history have been involved in politics, and Justices Brandeis and Frankfurter were as politically active as any of them.”

Other Findings by Author

Professor Murphy’s findings, gleaned not only from the unpublished letters but also from newly available oral histories and personal papers, also include these points:

- Brandeis, steeped in a tradition of individualism and fearing concentration of power in Washington, warned officials in the Roosevelt Administration that he might seek to have two key New Deal measures, the Agricultural Adjustment Act and the National Recovery Act, declared unconstitutional should the laws come before the Court, unless the Roosevelt Administration abandoned its collectivist philosophy.
- With Frankfurter’s assistance, Brandeis’s views on contemporary legal and social issues were represented for many years in the Harvard Law Review and quoted, often verbatim but without attribution, in unsigned editorials in The New Republic magazine.
- Evidence from the Brandeis-Frankfurter correspondence, as well as from recently discovered transcripts of a wiretap placed by the Massachusetts state police on Frankfurter’s telephone in 1927, suggests additional reasons for Brandeis’s decision to disqualify himself from hearing the Sacco-Vanzetti case.
- After his own appointment to the bench, Frankfurter broke with Supreme Court tradition and gave an advisory opinion on the constitutionality of the 1940 “destroyers for bases” agreement with Britain. Moreover, he personally reviewed more than 30 drafts of the Lend-Lease bill, which provided military credits to Britain.
- Frankfurter campaigned for 56 months to have Henry J. Friendly named to the United States Court of Appeals for the Second Circuit, while seeking to deny Judges Irving R. Kaufman and Harold R. Medina similar appointments.

‘Every Aspect of Public Life’

“I was astounded at the extent and breadth and quality of their extrajudicial work,” Professor Murphy said. “It reached every aspect of public life, every issue of importance during their time.”

According to the book, Felix Frankfurter’s first encounter with Louis D. Brandeis occurred in 1905, when, as a 22-year old student at Harvard Law School, he heard Brandeis speak. They began corresponding in 1911, and the young Frankfurter, like many before and after him, became enthralled with the charismatic “people’s attorney.”

Brandeis recommended Frankfurter for a faculty position at Harvard Law School and appointed him an adviser to the American Zionist movement, which Brandeis headed before his appointment to the Supreme Court in 1916. A few years later, Brandeis referred to Frankfurter in a letter as “half brother-half son.”

When Brandeis first mailed Frankfurter \$250 to compensate him for what he called “expenses in public matters undertaken at my request or following up my suggestions,” Frankfurter returned the check.

The Justice insisted, however, and the “joint endeavors” fund was established at the Engineers National Bank in Boston. For the next several years, Brandeis deposited \$1,000 annually in the account. Citing the costs of psychiatric care for his wife, Frankfurter in effect asked for, and received, a “raise” to \$1,500 in 1925, and from 1926 to 1938 he was given \$3,500 annually. His yearly salary at Harvard at this time was less than \$10,000.

Frankfurter’s retainer increased proportionately to his usefulness to Brandeis. Given his own ties to the progressive movement and to President Wilson, Brandeis had little immediate need for a political lieutenant in the Wilson Administration.

Roles in Action on Two Bills

The Justice’s activities were so considerable, in fact, that he was called upon to consider the constitutionality of two laws, the Lever Food Control Bill and the Army Appropriations Act, that he had helped either draft or administer. In neither case, Professor Murphy relates, did he disqualify - or, in judicial terms, “recuse” - himself, as the circumstances seemed to require. Instead, he simply refused to sign the court’s opinion and concurred only in its result.

“Perhaps,” Professor Murphy wrote, “where his private political involvement with aspects of the case was not known to the public Brandeis felt no need to disqualify himself, but nonetheless did feel the need to satisfy personal ethical qualms by taking only a very minimal role in the ultimate judicial decision.”

Through such activities, along with his ongoing but less conspicuous leadership of the American Zionist movement, “Brandeis changed the norms of extrajudicial conduct,” Professor Murphy wrote, adding, “His incredibly open and extensive political behavior made it possible

for members of the Court to establish intimate advisory relationships with later administrations.”

When the Republicans occupied the White House in the 1920’s and early 1930’s, Brandeis had to be content more with disseminating his ideas than directly affecting public policy. It was a task for which Frankfurter, with his numerous literary contacts and legions of bright, faithful students, was perfectly equipped.

Professor Murphy showed that Frankfurter undertook many chores for his political patron. In some instances, Brandeis asked him either to draft legislation designed to remedy what he considered incorrect rulings by his Supreme Court colleagues or to criticize them in the pages of the Harvard Law Review. On another occasion, he asked Frankfurter to research a constitutional question being considered by the Court.

Intricate Mechanisms

Frankfurter devised intricate mechanisms to disseminate Brandeis’s ideas in suitably camouflaged fashion, largely through the Harvard Law Review. Frankfurter’s army of student disciples wrote articles on topics originally proposed by Brandeis.

According to Professor Murphy, “Brandeis was able to perceive a needed reform, devise an analysis to support it constitutionally and jurisprudentially, command the introduction of this new analysis into the main currents of legal academic thought, orchestrate its publication in prestigious law reviews, have the abstract ideas then drafted into legislative proposals, and, if all else failed, cite all these independent efforts as mandate and intellectual authority to use the formal power of the Supreme Court to change the law.”

“It’s news to me,” Judge Friendly said when told last week that his 1927 article in The Harvard Law Review on Federal diversity jurisdiction was first proposed to Frankfurter by Brandeis.

Frankfurter, a trustee and contributing editor of The New Republic, also saw to it that excerpts from Brandeis’s letters - on such topics as the character of Charles A. Lindbergh, President Coolidge’s silence on the Teapot Dome scandal and the danger of “big money” in election campaigns - were printed, sometimes verbatim, a few weeks later as unsigned editorials in the magazine.

Sacco and Vanzetti

The financial ties between Frankfurter and Brandeis were to have more immediate ramifications after the 1921 trial of Nicola Sacco and Bartolomeo Vanzetti. In one of the most celebrated legal cases in American history, Sacco and Vanzetti were convicted and sentenced to death for the murder of a paymaster and his guard in Massachusetts. Justice Brandeis declined to participate in the appeals process and refused to hear a request by the convicted men for a stay of execution, citing his family’s close ties to a woman active in the pair’s defense.

The Brandeis-Frankfurter correspondence discloses, however, that Brandeis encouraged Frankfurter to defend Sacco and Vanzetti in print shortly before they were executed in 1927.

Moreover, concerned over expenses incurred by his colleague in this effort, the Justice inquired, in a letter dated June 2, 1927, whether “an additional sum might not be appropriate.” That August, he deposited an additional \$500 in the “public good” account.

The payments, Professor Murphy suggests, put Brandeis in a “compromising position” and may have helped “deprive convicted men of a right to a fair hearing by the Court’s most liberal member.”

Transcripts from a recently discovered wiretap placed by the Massachusetts state police on Frankfurter’s phone at the time of the case indicate that the arrangement might have had an inhibiting effect on Frankfurter as well.

Mindful of the ethical delicacy of his ties to the Justice, Frankfurter suggested to members of the Citizens’ National Committee for Sacco and Vanzetti, who were attempting to enlist his aid, that any approach he made to Brandeis on the subject could force the Justice’s recusal.

“Nothing more could clinch it than for me to go down to Chatham,” Frankfurter told them. “I can’t say anything more.” Brandeis saw his last chance. Brandeis, who was 76 years old when Franklin D. Roosevelt was inaugurated in March 1933, saw the incoming administration as his last chance to promote revisions in inheritance and income taxes, unemployment insurance and other elements of his political philosophy, according to Professor Murphy’s book. Brandeis’s opponents now were not so much conservative Republicans but Mr. Roosevelt’s “Brain Trust,” whose collectivist ideas were the antithesis of his individualistic creed, and the battle was fierce enough to prompt the jurist to shed his characteristic aloofness further still.

The recently opened papers of Raymond Moley, a top Roosevelt assistant, reveal that from January to September 1933, Moley received more than 150 letters from Frankfurter outlining Brandeis’s ideas on legislation and appointments to the Administration. Brandeis and Frankfurter did manage to install several sympathizers in key positions, including Secretary of Labor Frances Perkins and Under Secretary of the Treasury Dean Acheson.

Letters in the Brandeis-Frankfurter correspondence show, moreover, how the two collaborated with Benjamin V. Cohen and Thomas G. Corcoran to draft such key legislation as the Securities Act of 1933. Mr. Cohen and Mr. Corcoran were young Frankfurter protégés who had key positions in the Roosevelt Administration.

According to Professor Murphy, Mr. Cohen and Mr. Corcoran visited Brandeis - whom they called “Isaiah,” after the biblical prophet - as often as twice monthly. Afterward, Brandeis would forward specific legislative proposals on the matters they had discussed to Frankfurter, who would gather support materials and forward them to Roosevelt. The information would then be returned to Mr. Corcoran and Mr. Cohen, who would draft the legislation and shepherd it through Congress.

On other occasions, the author asserts, Brandeis was not so circumspect or circuitous.

‘War’ on the New Deal

The papers of an Agricultural Adjustment Administration official, Gardner Jackson, as well as those of Roosevelt and two of his aides, Rexford G. Tugwell and Adolf A. Berle Jr., indicate that in 1934 Brandeis said he was “declaring war” on the New Deal, a declaration the Administration regarded as sufficiently menacing that it postponed bringing a test case on the National Recovery Act’s oil code.

Berle related to Roosevelt that Brandeis had told him that he had “gone along with” legislation such as the Agricultural Adjustment Act and the National Recovery Act “up to now,” but that “he was disposed to hold the government control legislation unconstitutional” unless “he could see some reversal in the big business trend.”

The President told Berle that he expected “to have a good long talk” with “our friend of the highest court.” but added, “So many people expect me to travel at a rate of 100 miles an hour when the old bus cannot possibly make more than 50 miles an hour, even when it is hitting on all eight cylinders.”

“Justice Brandeis was not the impartial, remote judicial statesman people thought him to be,” David Riesman, the Harvard sociologist who served in 1935 as Brandeis’s law clerk, said in an interview. “He was a fervent decentralist who hated the New Deal and would have been very happy to reduce Washington to what it was in the 18th century. That attitude would have led him readily to take actions beyond what a disinterested and properly aloof judge would do.”

Professor Murphy argues that despite similarities in their backgrounds and their long association, Brandeis and Frankfurter had vastly different approaches to extrajudicial activity.

Brandeis Stayed Above Fray

Brandeis, Professor Murphy says, was content both morally and tactically to stay above the fray and use intermediaries to achieve his political ends. Frankfurter professed to be aloof, writing in his diary in 1943, “I have an austere and even sacerdotal view of the position of a judge on this Court, and that means I have nothing to say on matters that come within a thousand miles of what may fairly be called politics.” In reality, Professor Murphy wrote, Frankfurter was an “incessant meddler,” more immersed in politics as a Supreme Court Justice than he ever was as a Harvard professor.

“One saw President Wilson having to travel to Brandeis’s apartment or send an emissary to obtain counsel,” the author explains, “whereas not even barring the doors and windows would have kept Frankfurter out of the Roosevelt White House.”

Like many of his predecessors on the Court, Frankfurter abandoned judicial restraint to aid his Government in wartime. In 1940, for example, he gave Secretary of War Henry L. Stimson an advisory opinion - a practice long frowned upon by the Court - on the constitutionality of Roosevelt’s “destroyers-for-bases” agreement with the British.

Further, the book discloses, Frankfurter personally reviewed more than 30 drafts of the Lend-Lease bill in 1941 -going so far as to suggest that it be labeled “House Resolution No. 1776” to counteract isolationist opposition - and helped draft the first War Powers Act.

Frankfurter also became involved in partisan politics, according to the book. He took an active role in Roosevelt's campaign for a third term and had some of his young associates write speeches and perform other tasks.

One such associate, Joseph L. Rauh Jr., defended Frankfurter's partisan activities. "If Felix were alive today he'd say that the re-election of F.D.R. was the only way to stop Hitler," said Mr. Rauh, now a Washington lawyer.

In another instance, Frankfurter asked one of his recent clerks, Edward F. Prichard Jr., then an assistant to Attorney General Robert H. Jackson, to draft a letter for his chief to send to the editor of The New York Times, chastising Wendell L. Willkie for criticizing Roosevelt's Supreme Court appointments.

Active in Naming Judges

While Frankfurter's political influence waned with Roosevelt's death in 1945, the Murphy study discloses one front on which he continued to remain active until the end of his career: appointments to the Federal judiciary.

Letters written by the Justice to Federal Appeals Court Judge Learned Hand and a prominent New York attorney, Charles C. Burlingham, detail Frankfurter's 56-month campaign, beginning in 1954, to place Henry Friendly on the Court of Appeals for the Second Circuit. At the same time, the letters show that Frankfurter was equally determined to keep off that court two other judges who had presided over politically sensitive cases in the Truman years, Irving Kaufman and Harold Medina.

Frankfurter characterized Judge Medina, who heard the prosecution of several Communist Party leaders in 1949, as a "Messianic character" and a "superegotist." Of Judge Kaufman, who sentenced Ethel and Julius Rosenberg to death for their role in passing atomic secrets to the Soviet Union, he told Learned Hand, "I despise a judge who feels God told him to impose a death sentence," and added, "I am mean enough to try to stay here long enough so that K. will be too old to succeed me."

Comments Dismissed

Judge Medina, now 93 years old, dismissed Frankfurter's comments. "He was no great friend of mine," he said. Judge Kaufman, through his law clerk, declined to respond directly to the Frankfurter characterization. Summing up his study, Professor Murphy said in an interview that Brandeis and Frankfurter were "patriotic men who were doing things they believed would advance the cause of the American people and improve our society."

"The real problem," he continued, "is whether you can have one set of rules for well-intentioned actors like Brandeis and Frankfurter, and another for those not so well-intentioned."

A version of this article (<https://www.nytimes.com/1982/02/14/us/letters-show-frankfurter-a-secret-voice-of-brandeis.html>) appears in print on Feb. 14, 1982, Section 1, Page 1 of the National edition with the headline: LETTERS SHOW FRANKFURTER A SECRET VOICE OF BRANDEIS.