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### Book Review (reviewing Max Freedman, Roosevelt and Frankfurter: Their Correspondence 1928-54 (1968))

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invasion by officials."<sup>126</sup> The Procuracy, in particular, "has considerably reinforced 'socialist legality'."<sup>127</sup> However, the evidence which Gellhorn adduces to support this conclusion does not gainsay Professor Harold J. Berman's view—noted by Gellhorn that "it remains true that the Procuracy is helpless to enforce Soviet Law against the wishes of the Party leadership, and, moreover, that its efforts are usually directed against those abuses that the Party leadership desires to eradicate."<sup>128</sup>

Nevertheless, Gellhorn concludes that "legality as it bears on individual interests, quite apart from the supposed 'interests of the State' may have become an abiding concern and not merely a momentary tactic" of the Soviet leaders.<sup>129</sup> Again, this conclusion can be tested by subsequent events. And it appears to be fragile indeed in the light of the trail and imprisonment of Soviet writers Yuri Daniel and Andrei Sinyavsky on charges of having published anti-Soviet works abroad.<sup>130</sup> This act of repression has been followed by arrests, imprisonment, and secret trials of other writers and students who came to the defense of Sinyavsky and Daniel.<sup>131</sup>

Certainly the ice of totalitarianism is breaking and thawing in the Soviet Union and throughout Eastern Europe. But it is not incumbent upon intellectuals in the West to underestimate the continued suppression of freedom by the ruling Communist regimes. Our understanding and support should be extended to the courageous and lonely men and women who risk persecution in the fight for freedom against these regimes. We do them a great disservice by blurring the line between their democratic and liberatarian aspirations and the realities which they seek to displace.

CARL A. AUERBACH †

ROOSEVELT AND FRANKFUTER: THEIR CORRESPONDENCE, 1928-54. Annotated by Max Freedman. Boston: Little, Brown & Co. Pp. 772. 1968. \$17.50.

Anyone interested in the history of the New Deal will find this an exciting collection of materials. For it reveals the way in which Franklin

126. *Id.* 347.

127. *Id.*

128. *Id.* 349 n. 33.

129. *Id.* 366.

130. For parts of the transcript of the trial of Daniel and Sinyavsky, see the N.Y. Times, April 17, 1966, § 6 pt. 1 (magazine), at 20.

131. N.Y. Times, Dec. 10, 1967, § 1, at 28, col. 1.

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Delano Roosevelt's presidential actions were influenced by an intimate adviser, in this case, Felix Frankfurter. At the same time, it should destroy whatever lingers of the Rasputin myth, that Frankfurter exercised a strange dominance over the squire from Hyde Park.

There were many, especially those of Franklin Roosevelt's own class, who would like to explain his apostasy by the evil influences exerted on him by radicals of less than aristocratic heritage. What is demonstrated instead, in the many pages of this volume, is that Frankfurter was to F.D.R. what would, in today's lingo, be called a resource, a fount of ideas about solutions for the problems that plagued the country and about the men whose skills should be invoked to do something about them. (If only Lyndon Baines Johnson had the equivalent!) Certainly Frankfurter was close to the President. But there were a score of men who were closer, although only a very few had so longlasting a part to play.

For the lawyer, the aspect of this book that will claim special attention is Frankfurter's role in the court-packing plan. Freedman claims in his introduction that: "[p]erhaps the biggest single revelation in this book is the evidence of Frankfurter's active and continuous role in the Supreme Court-packing controversy of 1937. This compels a complete reversal of accepted versions, including the version of total neutrality which Frankfurter himself has spread."<sup>1</sup> Strangely enough, the comment on the jacket is more restrained: "[h]e [F.F.] took no part in the Court-packing (F.D.R. warned him not to), but we sense that he did not approve of it despite his impatience with Justices like McReynolds." The truth lies somewhere between.

Professor William E. Leuchtenburg, certainly the closest student of the courtpacking plan, expressed the opinion, contained in the jacket comment, prior to the publication of this book: "[t]he proposal has been attributed to Felix Frankfurter, who abhorred it," he wrote.<sup>2</sup> "Felix Frankfurter . . . opposed making an issue of the Court's rulings . . ."<sup>3</sup> "Half of those polled—including Felix Frankfurter—opposed agitation for an amendment. . ."<sup>4</sup>

What the newly revealed correspondence shows is that F.D.R. took Frankfurter unawares, as he did most of his close advisers. Frankfurter responded, with appropriate surprise, with condemnation of Roosevelt's political proteges, such as Herbert Lehman, who spoke out against the

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1. ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928-45 at 14 (M. FREEDMAN ed. 1968).

2. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347.

3. *Id.* at 379.

4. *Id.* at 384.

plan and he supplied Roosevelt with a wealth of material that could be used in the battle to show that the Court had exceeded the bounds of its proper jurisdiction in striking down New Deal legislation in such profusion. There is nothing to show that Frankfurter approved the proposal, unless it is his original letter of response that spoke of

the deftness of the general scheme for dealing with the mandate for national action which you received three times, in '32 and '34 and '36, and each time with increasing emphasis. . . . But beyond that—well, the momentum of a long series of decisions not defensible in the realm of reason nor justified by settled principles of Constitutional interpretation had convinced me, as they had convinced you, that means had to be found to save the Constitution from the Court, and the Court from itself. . . . There was no perfect easy way out. . . . But I have, as you know, deep faith in your instinct to make the wise choice—the choice that will carry intact the motley aggregation that constitutes the progressive army toward the goal of present-day needs, and that will, at the same time, maintain all that is good in the traditional democratic process.<sup>5</sup>

It is clear, however, that what Frankfurter thought to be necessary was an educational process, one that is still needed: “. . . the problem is essentially an educational one—to make the country understand what the real function of the Supreme Court is and how, for a long stretch of years, it has been exercising it.”<sup>6</sup> His correspondence on the subject was directed to supplying the information so that Roosevelt could carry forward that process. He did, however, complain about Brandeis' lending his name to Hughes's opposition to the Roosevelt plan. And he sent F.D.R. an article by Henry Hart, in support of court-packing, with approval of the capabilities of the author.

Frankfurter's complaint to C. C. Burlingham, also included in this volume, touches a sympathetic chord in a law professor expected to teach constitutional law today:<sup>7</sup> “[f]or I speak as one who has a teacher's sacred duty of trying to answer as honestly as he can the honest questions of youth. I tell you it has gone hard with me in recent months to be both truthful with students and build up in them respect for the Supreme Court as an institution.”

That Frankfurter thought the Court in error in its constitutional

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5. ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928-45, *supra* note 1 at 38-61.

6. *Id.* at 383.

7. *Id.* at 480.

decisions is not to be gainsaid. That he enjoyed the discomfort imposed on the Court and its defenders by the court-packing plan is also patent. That he approved the plan is still somewhat doubtful. But whatever the ultimate story about who supported what, there are two interesting problems about the court-packing plan that may never be resolved. The first is not dependent on what view one takes of the resolution of the battle, *i.e.*, whether it was a victory or defeat for the President. The question is stated in Robert Southey's *Battle of Blenheim*:

'But what good came of it at last?'

Quoth little Peterkin.

'Why that I cannot tell,' said he,

'But 'twas a famous victory.'

The other is the mystery of the absent precedent. Most authoritative sources trace the court-packing plan back to a statement by McReynolds when he was Attorney General of the United States. And there is, of course, a delightful irony in such attribution. But Professor Leuchtenburg suggests that the McReynolds' scheme was discovered and put forward by Professor Corwin. If he is right about Corwin's sponsorship of the scheme, it may well be that so distinguished a constitutional historian was better aware of the fact that the exact court-packing program, in terms of superannuated judges, had been put forth—unsuccessfully—in the 41st Congress, by Congressman Bingham, a Radical Republican. One can see why an advocate of the Roosevelt plan would rather find its source in McReynolds than in Bingham. But, somehow, I think that the thread will one day be traced back to the Bingham proposal. When it is, either Corwin's or Frankfurter's role may prove to have been greater than the evidence now available would suggest. That Frankfurter was aware of the Bingham proposal is suggested by his reference to it in his book, *The Business of the Supreme Court*.<sup>8</sup>

It would be interesting to speculate about why, at this time, studies of the court-packing plan are coming back into vogue. It is enough here to take note of the revived interest. An excellent newspaper reporter's story of the event has recently been published<sup>9</sup> and Leuchtenburg's more scholarly effort should be completed this year. Does such interest augur a revived desire for considering means to chasten a Supreme Court that has gotten out of step? Probably not; in any event, not until both a Congress and a President were prepared to join together in stemming the

8. F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 75 n.86 (1927).

9. L. BAKER, *BACK TO BACK: THE DUEL BETWEEN F.D.R. AND THE SUPREME COURT* (1967).

flood tide of judicial power could any such proposal as the court-packing bill become a reality. And when the state of public opinion is such as to warrant that joint action, the Court will probably, as it did in 1937, cure itself, at least temporarily.

Enough of court-packing. The correspondence between F.D.R. and F.F. raises so many issues, at least as important and certainly as interesting, that to dwell on one is to give a distorted picture of this book's contents. It would have been a better book without the inclusion of so much extraneous matter and without the intrusion of the editor's personal predilections. But a reviewer should not carp. It is seldom that a book so interesting and enlightening as this one comes along. Were it not for the price, I should exhort everyone with an interest in Roosevelt, Frankfurter, or the New Deal to buy a copy. As it is, I can enthusiastically suggest that they should all read it. What else are libraries for?

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