MR. JUSTICE FRANKFURTER

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FELIX FRANKFURTER has served the law, both as disciple and apostle, for slightly over a half century. His time has been largely divided—now almost evenly—between the academic rostrum and the bench. As my colleague, Paul Freund, has pointed out, "We do not enjoy a superabundance of institutions engaged in the rational pursuit of truth and right. As a law teacher I think of the universities and the courts."[1] It is understandable that Mr. Justice Frankfurter continues to be pleased when intimate friends occasionally confer on him the title, though not the perquisites, of Professor Frankfurter.

Underlying both the professor and the judge are basic articles of faith that have been with him always and that may help us to understand the fruits of his labors. Since they are not sharply separable, their arrangement will be somewhat arbitrary. The first strikes a more personal note; the others bear directly on the judicial role.

A most illuminating aspect of the man and a not unimportant part of the judge is the faith that Mr. Justice Frankfurter has maintained in his now more than thirty law clerks. I do not speak of faith here in the relatively minor sense of reliance on their work. The law clerk's job ranges from general research assistant through sounding board and foil to critic. The Justice takes pains to give his clerks a sense of full though appropriately subordinate participation. The work is of course intrinsically challenging and the Justice's own zest for his job fills the office with a special air of pleasant excitement.

By faith, I mean that Justice Frankfurter regards his clerks as worthy of their high calling in the law and as having the capacity to meet those public responsibilities which—he takes it for granted—they will carry in their later lives. Whatever good qualities his clerks have possessed, the Justice's insistent faith in them has powerfully contributed to bringing those qualities to the fore.

Warm and vibrant himself, Justice Frankfurter delights in stimulating personal relationships, and his law clerks both individually and as a group are a source of special pleasure. As was true of Holmes, he has a particular fondness for young people as well as the rare ability to establish with them an easy relationship of trust and confidence. He has a sure sense of his clerks' ideals and aspirations and an uncanny shrewdness in measuring their strengths and weaknesses. This has made invaluable his advice and counsel, which is always available.

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[1] "The Supreme Court Crisis," address delivered at Brandeis University, Nov. 12, 1958.

A way of thought deeply embedded in Justice Frankfurter's approach to legal problems is best summarized in words which he has often quoted from an opinion of Holmes: "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."[2]

If principles and policies are, like atomic particles, in constant collision, then the judge must appraise the "energies" of each—but by means other than the physicist's. For this task the judge requires more than a stout heart and an agile mind, helpful as these may be. If he is to escape the role merely of a competent artisan, he needs to have not only thorough training in the processes and institutions of the law, but also the teachings of history and philosophy, the insights supplied by modern social disciplines, and beyond these a sense of the yearnings of the human spirit. He needs more than he can ever hope to have.

Mr. Justice Frankfurter has been and continues to be as well qualified for the task as human limitations permit. At the time of his appointment to the bench, many commentators pointed to his record as a liberal in the political and social controversies of the day. The humanitarian cast of his mind was of course relevant, but at least equally perceptive were those who noted the breadth of his learning in the institutions and the traditions of Anglo-American life and law. Nor has his work on the bench narrowed his intellectual activities. His reading habits, his letters and notes, his circle of friends, all attest to the catholicity of his interests.

Contrasting with Justice Frankfurter's view that a balance must be struck between competing considerations is the tendency of some members of the Court to speak in terms of dogmatic absolutes. This absolutism has been invoked in various cases, but perhaps it has been most noteworthy in the area of liberties protected by the First Amendment. It is interesting to trace the development of thought from "clear and present danger" to "preferred position" to the present assertion that "Congress shall pass no law" and no law means *no law*. Justice Frankfurter has resisted this development at all stages. His refusal to accept the Holmes "clear and present danger" test may well have been precipitated by the thought that it was being used to justify the development of absolutes.

Justice Frankfurter has insisted that even with respect to freedom of speech the judicial question is whether the state or the Congress has struck a reasonable balance. That this view has meaning and bite for him is shown in the instances in which he has voted to invalidate government action.

It has been urged that the "reasonable balance" approach places restraints on civil liberties on precisely the same plane as economic regulations. And because Justice Frankfurter has been concerned to expose the defects of a view

[2] Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908).

that puts civil and economic liberties in two rigidly separated categories, his opinions can easily be misunderstood. But to one who views competing interests and principles as having relative values, rather than embodying absolute commands, it is just as mistaken blindly to equate as dogmatically to categorize. A careful reading of the Justice's concurring opinion in *Kovacs v. Cooper*[3] will show that he has fallen into neither error.

Another not unrelated tenet lies at the core of Justice Frankfurter's legal philosophy and pervades his thinking: an abiding faith in the institutions of law and government. The Justice feels deeply that a system of ordered liberty depends upon the proper allocation of competencies among the institutions of our legal order.

In our legal system, with its mosaic of governmental units proliferated at local, state, and federal levels and organized into different departments of government, the "umpiring" role of the Supreme Court, as it has been fittingly called, is essential to the scheme. Inevitably in deciding cases the Court must delimit the relationship of federal to state organs, and of executive to legislative in the federal sphere, as well as of government to individual. Just as inevitably, it must define its own relationship to each of these other organs. Whether exercised consciously or not, the function cannot be avoided.

Only if each institution respects the powers of the others can responsibility flourish in its proper habitat. The Court restrains primarily by laying down negative commands. Responsibility generates restraint through the educating force of experience rather than through coercion. Though the result may be less certain, it is more enduring. And responsibility can do more—it can nourish creativeness. Recognizing all this, the Justice has deplored the persistent tendency to confuse the constitutionality with the wisdom of a statute.

Although distinct in character, institutional policies intersect with other principles of law in diverse and subtle ways. Discernment of their significance is often difficult and they are at times overlooked. Perhaps there are occasions when a particular social or economic cause is considered so important that it overshadows institutional aspects. This appraisal seems to flow more easily for some judges than for others. To Justice Frankfurter it rarely comes easily, for he views institutional considerations as an intrinsic part of "the merits" of a particular case or controversy.

Many examples might be cited. The Justice is far more reluctant to invalidate state action as violative of the due process clause than when it is challenged under the commerce clause. A due process limitation cannot be changed except by constitutional amendment or a change of view in the Court, whereas a commerce clause restriction can be lifted by ordinary congressional process. Also illuminating is a comparison of his views on criminal processes in the federal and in the state courts. With respect to the federal courts the Supreme Court exercises primary responsibility; regarding state procedures, the states have of

[3] 336 U.S. 77, 89–97 (1949). See especially id., at 95–96.

course the principal responsibility, and the Court has an important but more limited function of review. This difference in its function has caused Justice Frankfurter to refuse to strike down law enforcement practices of which he passionately disapproves.

The Justice's willingness to play a limited role even as to issues about which he feels strongly reflects still another major article of faith he holds: that the judicial function be exercised in as rational a manner as human capacity can attain.

In part this is evidence of a deeper strain—the intellectual quality of the man. His intellectualism, without excluding contemplation, has a bounding energy. Characteristic is the joy with which the Justice engages in disputation, especially with his law clerks. Intensity of opposition leaves no deposit of personal rancor. Quite the contrary, the more passionate the argument, the closer the Justice seems drawn to his clerks.

This is not to say that he sees the law as an inexorably logical process, involving mechanical application of simple axioms. Reasoning proceeds from premises which themselves may not be derivable through reason. Some premises confer a power of choice that is so at large that it cannot fairly be resolved by reasoned process. Even when men seek a reasoned solution of relatively narrow issues, it is not startling that they come to different conclusions.

What is the significance of these difficulties? For some it suggests that the judge cannot escape personal judgments and that ideas can serve only to rationalize his unavowed views. Justice Frankfurter rejects this reading. The claim of a judge to a legitimate function rests on the assumption that reasoned ideas have the power to organize and mold social life—and to control the action of the courts. For the courts lack the endorsement of the electoral process and the check that goes with it.

Justice Frankfurter is prepared to accept the consequence that judges cannot contribute to the solution of some social problems, and can offer only partial solutions, perhaps inadequate and belated, for others. Other institutions must play their part. The Court insists that police officials may not use certain methods even though the goal of law enforcement be made more difficult. The Court must live up to the same broad principle as applied to its decisional processes. The Justice insists that the judge seek impersonal premises, rooted in the long-term traditions of the society, though he notes that they are far more elusive than most sideline observers think. And the judge must proceed by reason from these starting points.

These articles of faith of Justice Frankfurter inevitably call for the exercise of self-restraint in the use of judicial power. Like many basic ideas, this concept can be over-used and even abused, and in recent times it has been. Many current critics of the Court have talked of "self-restraint" when it is clear that their disagreement is solely with the results reached by the Court. Yet it has a

significant and valid meaning, and Justice Frankfurter has by precept and practice given us a clear outline of its essentials.

Courts characteristically tend to take a longer-run view of a given problem than do other organs of government. At times, they reflect "sober second thoughts" and at other times they force the community to do so. This has been one of their most important contributions to the legal order. Mr. Justice Frankfurter has characteristically tended to add to this a longer-run view of the judicial function itself.

To delimit judicial power is not to take a negative view. The Court, while exercising restraint, has the opportunity and duty to function creatively in the development of law. Indeed, recognition of its proper role increases the likelihood that it will accurately reflect the more enduring aspirations of our society.

The Justice is a man of intense and passionate convictions. Close friends have noted that Marion Frankfurter—his gracious and discerning wife who has contributed incalculably to his life and work—is the calm member of the family. But the seeming paradox of the volatile man and the carefully controlled judge is fully explained by Justice Frankfurter's view of his judicial role. Perhaps the very realization of the depth of his own feelings has encouraged development of a balancing restraint.

Felix Frankfurter's judgments reflect an interweaving of faiths, and the strands may conflict with rather than reinforce one another. He cannot embrace the easy simplicity of a monolithic approach. The uncertainty of outcome implicit in his approach is inseparable from the Court's role; the Justice find that uncertainty acceptable in a free and mature society. The observer who embraces the same faiths will find individual instances in which he would have struck a different balance. The effort the Justice makes to live and work by them is nevertheless a powerful inducement to respect for the work of the Supreme Court and the integrity of the law. Mr. Justice Frankfurter would ask no higher tribute.