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From the Diaries of Felix Frankfurter

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BOOK REVIEW

FROM THE DIARIES OF FELIX FRANKFURTER. By Joseph P. Lash. New York: W. W. Norton & Company, Inc. 1975. Pp. xiii, 366. \$12.50.

In attempting to understand the work of the United States Supreme Court, few persons would not argue that it is also necessary that we attempt to understand the tenor of the men who have sat upon that bench, that we delve into their characters for insight into the workings of that Court. This proposition being generally accepted, it is perhaps surprising to learn how little we do know about most of the men who have been Justices of the Supreme Court. Undoubtedly there is a variety of reasons for this paucity of information, but it certainly is a condition which should be remedied. Joseph P. Lash has found this dearth of knowledge about Supreme Court Justices to be fertile ground for his pen. In writing *From the Diaries of Felix Frankfurter*, Lash adds to our knowledge, not only of what we know about a great Justice, but also of what must surely have been the most exciting chapter in the Court's history—the era from the New Deal to the New Frontier.

Lash has divided his book into two parts—a biographical essay, and selections from the diaries themselves. The essay, appropriately entitled "A Brahmin of the Law," does not purport to give definitive treatment to all of Frankfurter's amazingly full life, but rather it tries to paint with broad strokes the outlines of this man's life and his remarkable contributions. Nor does Lash attempt in his essay to foreshadow events discussed in the diary entries. The essay was included, according to Lash, "because there is no adequate biography of the Justice."¹

The diaries, which were deeded to the American people, also present an incomplete picture because Frankfurter did not keep his diary diligently; long stretches sometimes exist between entries. The Justice apparently also destroyed portions of the diaries, for reasons

1. J. LASH, FROM THE DIARIES OF FELIX FRANKFURTER xii (1975).

known only to himself. Additionally, some portions of the diaries were stolen from the Library of Congress.

The author begins his biographical essay with Frankfurter's graduation from Harvard Law School, and his brief stint with a New York law firm. Shortly thereafter, armed with an impressive recommendation from James Barr Ames, Frankfurter joined Henry L. Stimson, whom Theodore Roosevelt had just appointed United States Attorney for the Southern District of New York.

Swiftly but surely the author covers Frankfurter's development as a lawyer in New York, and his subsequent move to Washington to continue service under Stimson, then Secretary of War. It was here, in October, 1911, that the future Justice began the diaries that would contain an invaluable record of important events and notable persons for the next half century.

Frankfurter stayed with the War Department until the summer of 1941, when he was asked to return to Harvard Law School as a professor. Frankfurter later said of this offer that "he could not have been more overwhelmed had he been asked to become 'a member of the House of Lords.'"²

According to Lash, it was at Harvard where Frankfurter acquired his reputation as a "liberal." He gained this reputation through several causes he supported. Foremost among them, and one which the author beautifully illuminates, would be Frankfurter's involvement with the Sacco-Vanzetti Defense Committee. In this connection Lash relates the newspaper debate between Frankfurter and Professor Wigmore over the relative merits of the Sacco-Vanzetti case. Another of Frankfurter's "liberal" causes was the Zionist movement, and his resulting friendship with Dr. Chaim Weizmann. These are but two of the many examples the author gives which would, Lash says, contribute to a misunderstanding of Frankfurter's judicial philosophy after his appointment to the Supreme Court.

Lash aptly re-creates the moment Frankfurter learned of his nomination to the Court. According to the author, Frankfurter, clad only in his underwear, heard Franklin Roosevelt tell him that he was the only suitable person to succeed Holmes and Cardozo. The voluble Frankfurter's only reply, notes Lash, was: "All I can say is that I wish my mother were alive."³

2. *Id.* at 15.

3. *Id.* at 63.

The remainder of the author's excellent essay devotes itself to a consideration of the Justice's actions on the Supreme Court. Lash points out that Frankfurter was quite naturally expected to lead the liberal side of the Court, especially in the area of civil liberties and human rights. This the Justice did not do. Instead, says Lash, "[i]nvoking the hallowed name of Holmes he pushed the doctrine of judicial restraint to an extreme that violated the spirit of Holmes and separated him from the most innovative members of the Court."⁴

The author points out, however, that this apparent contradiction was not based on an inconsistent philosophy, but rather upon Frankfurter's concern for the integrity of the judicial process. Lash says this concern of the Justice cannot be overemphasized, for

[i]n retrospect, his interventions in such civil liberty *cause célèbres* as the Mooney case, the deportation cases after World War I, in the Sacco-Venzetti case, his approval of the Court's overturning of the verdict against the Scottsboro boys, although they earned him a reputation for liberalism, even radicalism, can be seen to have had little to do with sympathy for the defendants, and nothing to do with approval of the doctrines they espoused. His outrage, Professor Freund has observed, had been over a miscarriage of justice, the perpetration of a gross abuse at some level of the judicial process.⁵

The author also discusses what he terms "the paradox of Frankfurter's activism off the Bench and his restraint on it"⁶ While on the bench, Frankfurter was very involved in the Roosevelt administration, and was, in effect, a counselor to the President.

Although chiefly remembered as the foremost exponent of judicial restraint, Frankfurter did sometimes find himself in the position of legislating from the bench. Lash, in the closing pages of his essay, illustrates the difficulties Frankfurter faced in "drawing the line between judicial restraint and judicial arrogation."⁷ The author, in illustrating this conflict, attempts to square the hands-off position of the Justice in *Minersville School District v. Gobitis*⁸ and *West Virginia State Board of Education v. Barnette*⁹ (the flag salute cases) with his judicial activism in the historic *Brown v. Board of Education* decision¹⁰ (the school

4. *Id.* at 73.

5. *Id.* at 80.

6. *Id.* at 77.

7. *Id.* at 83.

8. 310 U.S. 586 (1940).

9. 319 U.S. 624 (1943).

10. 347 U.S. 483 (1954).

desegregation case). Lash resolves these divergent positions by saying that "[i]n the end the ultimate values of the individual Justice must enter."¹¹

In the diaries though, lies the real heart of this book. For in these entries, the reader finds that for which he was searching—an insider's view of the interplay of both human and philosophical forces on the Supreme Court.

Lash has selected diary entries which are extremely readable and absorbing. One does not have to be knowledgeable in history to read these diaries, as Frankfurter wrote them with an intent to make them public, thus providing any necessary background information in the entries themselves.

The entries range in tone from those written while the Justice was in a quietly philosophical mood to ones which he must have written while choking with rage. Regardless of the emotional intensity of particular entries, all are characterized by Frankfurter's pellucid prose.

The plenitude of fascinating entries makes it difficult to select those which should be mentioned in this review, but perhaps two items do invite particular attention. One is Frankfurter's tremendous clash with Justices Black and Douglas "over the nature of the judicial function."¹² The force of this conflict must have truly rocked the Court. Many times in the diaries one sees a wrathful Frankfurter vehemently disagreeing with, in his words, "Black & Co."¹³

The second item, an utterly fascinating episode, occurred on December 20, 1947. The law clerks were planning their annual Christmas party, and wished to invite the Negro messengers of various Justices and of the Marshal's office. Other members of the Court staff refused to attend unless this innovation were sanctioned by the Court. The Chief Justice raised the matter at conference, where it was discussed for nearly an hour. The reactions of the various Justices, as recorded by Frankfurter, are deeply intriguing. Particularly revealing is the fact that as soon as the issue was raised, Justice Douglas hurriedly left the conference. This was due to his personal political ambitions, Frankfurter hints.¹⁴

11. J. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 84 (1975).

12. *Id.* at xi.

13. *Id.* at 198.

14. *Id.* at 334.

Thus in summary, Joseph P. Lash, in writing *From the Diaries of Felix Frankfurter*, has given us an engaging and enlightening view of a great Justice and of the Supreme Court he sat upon. The book is recommended to all who believe the work of our highest Court is best illuminated by the character and values of the men who have constituted that Court.

Richard A. Woolery

