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# Book Review [The Brandeis/Frankfurter Connection]

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## BOOK REVIEW

THE BRANDEIS/FRANKFURTER CONNECTION. By Bruce Allen Murphy. New York, Oxford, England: Oxford University Press 1982. Pp. x + 473. Hardbound. \$18.95.

*Reviewed by Kathy Andreola\**

The publication of Bruce Allen Murphy's *The Brandeis/Frankfurter Connection: The Secret Political Activities of Two Supreme Court Justices*<sup>1</sup> created an immediate controversy among judges, attorneys, journalists and the public. On the front page of the New York Times, it was reported that Brandeis and Frankfurter had a relationship "unprecedented in Supreme Court history" in which Brandeis paid Frankfurter over \$50,000 during his 23 years on the court to further Brandeis' views on public policy.<sup>2</sup> Others claimed the book lacked "critical inquiry" and that the press coverage of the book raised more serious questions about ethics in journalism than ethics in the judiciary.<sup>3</sup> Whatever critics may say about this volume, few historical accounts of the Supreme Court are as revealing as this one.

Murphy, an assistant professor of political science at Pennsylvania State University, has amassed in this volume an amazing amount of detail chronicling the intricate political lives of two of this country's most lauded and intellectual Supreme Court Justices. While claiming to be merely an historical observer, it is evident that Murphy is attempting to expose both Brandeis and Frankfurter as persons whose primary role

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1. B. MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION* (1982).

2. N.Y. Times, Feb. 14, 1982, at 1, col. 3.

3. Cover, *The Framing of Justice Brandeis*, *THE NEW REPUBLIC*, May 5, 1982, at 17-21. Cover seriously questions the substantive integrity of many of Murphy's conclusions. He contends that Murphy misread letters, speculated as to the connection between occurrences, and misinterpreted events to exaggerate and sensationalize the Brandeis/Frankfurter connection.

as judges, presumably neutral, removed and fair, conflicted with their desire to manipulate the political process. However, it is the conflict between Murphy's role as a neutral historian and as an investigative journalist desiring to manipulate public opinion which most flaws this book. Murphy, the historian, hides behind the cloak of his academic role by never directly concluding that the relationship he has unearthed was wrong, dangerous or unethical. Yet his work is riddled with innuendo, broadly hinting at the impropriety of the Brandeis-Frankfurter relationship. The result is confusing and ineffectual because the reader is supplied with abundant facts but is unable to make firm conclusions regarding the propriety of this type of judicial-political conduct based on Murphy's myriad of speculations.

The financial connection between Brandeis and Frankfurter began shortly after Brandeis was appointed to the Court in 1916. Brandeis wrote a letter to Frankfurter, then a professor at Harvard Law School and longstanding progressive compatriot to Brandeis, urging Frankfurter to accept payment for expenses he incurred "in public matters." Frankfurter returned the check to his mentor, stating he appreciated the experience. But Brandeis, undaunted, sent the check again, explaining that "I ought to feel free to make suggestions to you, although they involve some incidental expense."<sup>4</sup> Throughout the years that followed, Brandeis periodically deposited sums in a special account at the Engineers National Bank in Boston to enable Frankfurter to "further the public good" by activating Brandeis' progressive ideals at Brandeis' request.<sup>5</sup>

The bulk of this book is spent giving the intricate details of the way that these two men exerted their influence in the political sphere. Brandeis, on his own, maintained a political relationship with whatever President was then in the White House. With President Wilson, Brandeis consulted on legislative strategies for the Army Appropriations Act. With Hoover, he discussed passage of the Lever Food Control Act. Both

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4. B. MURPHY, *supra* note 1, at 40. While Frankfurter was at first reluctant to accept these nominal payments, Murphy points out that Frankfurter soon considered himself an employee of Brandeis and came to depend on the support. He even asked for a raise in 1925 when his wife suffered a nervous breakdown and needed psychiatric care. *Id.* at 41-42.

5. *Id.* at 41.

bills faced constitutional challenges which reached the high court during Brandeis' tenure. In neither case did Brandeis disqualify himself.<sup>6</sup>

Through Frankfurter, however, Brandeis was capable of a much more subtle influence. Murphy uncovered the fact that Brandeis made recommendations to Frankfurter of timely topics for academic research with suggested conclusions. Frankfurter would then pass these ideas on to his law students at Harvard as material for law review articles. Murphy deduces that Brandeis could then cite the articles as authority for legislative reform and judicial opinions. In this way, the Harvard Law Review became a conduit for espousing Brandeis' views.<sup>7</sup>

Frankfurter, himself, also published articles in contemporary periodicals at Brandeis' suggestion.<sup>8</sup> Although not at Brandeis' direction, one of Frankfurter's most controversial articles during this period appeared in the *Atlantic Monthly* denouncing the trial procedure by which Sacco and Vanzetti were sentenced to death in Massachusetts. The highly publicized and irregular trial polarized the Boston Brahmins against these immigrant "anarchists" at the height of the "Red Scare." In a letter, Brandeis praised Frankfurter for his efforts and offered to defray Frankfurter's expenses for doing so by contributing an extra amount to their expense account.<sup>9</sup>

This is one of the few instances in which Murphy is able to show any direct connection between the Brandeis-Frankfurter financial arrangement and a case coming before the court. Shortly after the financial transaction took place, lawyers for Sacco and Vanzetti (having already been rebuffed by Justice Holmes) attempted to visit Justice Brandeis to obtain a stay of execution pending an appeal to the Supreme Court. Frankfurter refused to aid the attorneys other than to provide Brandeis' phone number. Brandeis, when called, refused to meet with them, stating he must disqualify himself because an old family friend who lived with him had been active in the defense effort. Sacco and Vanzetti were executed and when their subsequent appeal finally reached the Su-

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6. *Id.* at 54.

7. *Id.* at 76, 86, 89.

8. *Id.* at 89-90.

9. *Id.* at 79.

preme Court, it was summarily dismissed.<sup>10</sup>

Murphy attempts to demonstrate by this incident the limitations and dangerous potential of the Brandeis-Frankfurter connection. However, this conclusion is indicative of his persistent speculation in recreating the events contained in this book. Murphy doubts whether absent the tie of the family friend to the Sacco-Vanzetti controversy, Brandeis would have declined judicial involvement in the case even though he had financially encouraged Frankfurter's defense efforts. He condemns Brandeis for putting himself into such a compromising position, "thereby helping to deprive convicted men of a right to a fair hearing by the Court's most liberal member."<sup>11</sup> Such speculation as to the Justice's motivations is completely unfounded. Surely, Brandeis could have recognized from his initial action in supporting Frankfurter's defense efforts for Sacco and Vanzetti that he would have to abstain from any judicial review of the case because of his family ties, thereby enabling him to show some encouragement to Frankfurter.

When Roosevelt took office in 1930, Brandeis foresaw a very congenial environment in which to further his progressive beliefs. Frankfurter and Roosevelt had become friends in Washington in 1917-1919.<sup>12</sup> The three formed what Murphy calls a "triangular symbiotic relationship,"<sup>13</sup> which was relied upon throughout the New Deal years to share information and ideas on possible reforms. Brandeis and Frankfurter took an active part in recommending the appointment of persons with views similar to theirs in top administrative positions, especially in the Departments of Labor, the Interior, and Agriculture.<sup>14</sup> By counselling administration personnel, Brandeis pursued his longstanding goals of instituting unemployment insurance, a public works program, and more federal regulation of stock market and investment practices through the taxing power.<sup>15</sup>

In 1939, Felix Frankfurter was appointed to the bench by Roosevelt. Brandeis retired two weeks later at the age of 82,

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10. *Id.* at 80-81.

11. *Id.* at 82.

12. *Id.* at 100.

13. *Id.* at 101.

14. *Id.* at 113.

15. *Id.* at 132.

having served 23 years on the Court. Frankfurter lacked the prophetic vision his teacher had. Instead, Murphy characterizes him as an "incessant meddler."<sup>16</sup> Still, Frankfurter continued the Brandeis-style of extra-judicial political activity. With friendly informers already strategically placed in the administration, and through his close relationship to the President, Frankfurter found it easy to exert his influence. For example, Frankfurter strenuously supported the war effort. Murphy provides endless details of Frankfurter's orchestration of foreign affairs, encouraging the acceleration of support for France and England, including his practically commandeering Roosevelt's lend-lease program,<sup>17</sup> masterminding meetings between diplomats in Algiers, and steering national policy regarding military support for Australia.<sup>18</sup>

Although Frankfurter reached his political zenith during the war years while his old friend, President Roosevelt, was still in office, he continued to obtain information about executive policies and disseminate his ideas after Roosevelt's death through some of his former law students, now appointees entrenched in government. In addition, the Justice persistently made recommendations to the President for judicial appointments. Until his retirement in 1962 following two strokes, Frankfurter worked tirelessly to effectuate his political goals and those of his mentor Louis Brandeis.

Murphy depicts the extra-judicial activities of Frankfurter and Brandeis as highly unusual. However, in the Appendix, where Murphy finally outlines the history of extra-judicial activity of Supreme Court Justices, Murphy discloses that the role of Supreme Court Justice has been highly political since its inception. In fact, it has not been uncommon for Justices to run for political office, even for the Presidency, from the bench.<sup>19</sup> Judges and lawyers today are expected to be outspoken in encouraging law reform and court reform. Court appointments are often made based on those views. It is therefore not surprising that a Justice would maintain an advisory role to the President who appointed him or her, making recommendations for judicial appointments and perhaps helping to guide national policy.

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16. *Id.* at 251.

17. *Id.* at 214-20.

18. *Id.* at 282-87, 289-96.

19. *Id.* at 356-57.

Murphy conceded in conclusion that he cannot accuse either Justice of deciding Supreme Court cases in such a way as to further his political goals, or of using his high position for personal gain.<sup>20</sup> The real issue he has tried to present is whether the Justices acted within ethical standards at the time they served and what standards should prevail. As discussed above, some extra-judicial activity was common among Justices then and it is now. As both Brandeis and Frankfurter avoided any charges of conflict of interest while on the bench, they seem not to have broken any ethical standard.

However, Murphy infers from the fact that no one has uncovered the Brandeis-Frankfurter connection before now, that both Justices perceived their actions as inappropriate and therefore they attempted to conceal them. He depicts the relationship as secretive, clandestine, almost subversive, detailing sunrise rendezvous, obscure messages, and hidden payments.

Again, Murphy's conclusion is flawed by his own interjection of the Justices' motivations. He is quick to speculate whenever the actions of the Justices were not completely public, that they were purposely kept secret to avoid public scrutiny and allegations of overreaching. An example of this is his interpretation of why the financial connection between Frankfurter and Brandeis was never made public:

As extraordinary as this financial relationship between Brandeis and Frankfurter was, there is no indication from either published or unpublished sources, that any of the justice's colleagues on the bench ever became aware of it. Or, if they did discover what was going on, they cared so little that it was never a cause for either public or private complaint. One indication of the success of this effort to hide the relationship from public view is the silence of Associate Justice William McReynolds. So incredibly anti-Semitic that he avoided speaking to Brandeis for a three-year period, refused to sit next to him in the annual Court picture for 1924 (hence no picture was taken that year), and on one occasion wrote to Chief Justice Taft, "As you know I am not always to be found when there is a Hebrew aboard," McReynolds hardly would have remained quiet had he discovered what was happening. Perhaps it was the fear of people like McReynolds that in

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20. *Id.* at 342.

part led Brandeis to consider embarking on such a covert relationship in the first place.<sup>21</sup>

The possible reasons for the private nature of the Brandeis-Frankfurter relationship are innumerable. Certainly fear of Justice McReynolds' anti-semitism is an unlikely incentive to keep their work secret. More likely, the other Justices cared little about the relationship unless it affected Supreme Court work. Further, if the Justices wished to leave no trace of their relationship, they could have destroyed their correspondence. Murphy's constant speculation into the motivations of the Justices turns a work of considerable historical research into near historical fiction.

The unanswered query presented by the book is whether such a relationship to the political activities of the day does compromise the ability of a Supreme Court Justice or other member of the judiciary to act as a fair and neutral arbiter of disputes. Murphy avoids answering this by stating his job as a historian is simply to record the facts and not set policy. However, based on the tenuous implications of Murphy's findings, the reader cannot fully evaluate the ethics of this conduct either, turning this work of potentially great significance to one of mere interest.

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21. *Id.* at 43-44.

