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## Felix Frankfurter: Liberal Lawyer, Conservative Justice

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## **FELIX FRANKFURTER: LIBERAL LAWYER, CONSERVATIVE JUSTICE**

*The Hon. Jed S. Rakoff\**

### **ABSTRACT**

The Hon. Jed S. Rakoff gave the first presentation at the conference, providing an introduction to Justice Felix Frankfurter by describing some of his accomplishments and situating his tenure on the Supreme Court in the context of the Court's historically conservative orientation. The article below is an edited transcript of Judge Rakoff's remarks.

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**LIBERAL JUSTICE, CONSERVATIVE LAWYER**

Thank you very much. It's a real privilege to be here and in particular to be asked to comment on Professor Snyder's absolutely brilliant book,<sup>1</sup> which opened my eyes to many things about Felix Frankfurter. I'm sure that's true for others as well.

I need to make a disclaimer at the outset. As a federal judge, I'm prohibited by law from commenting on any pending case, not just before me, but before any judge. And I'm also prohibited from commenting on any issue that may come before me in the immediate future.

**I. THE SUPREME COURT AS THE MOST CONSERVATIVE BRANCH**

Having made that disclaimer, I want to offer a perspective on Frankfurter that is my own. It may not hold water, but I'll offer it for what it's worth. And that is, that Frankfurter's approach and his life need to be partly considered against the background of the fact that the Supreme Court of the United States has historically been the most conservative of the three branches of our government.

Now, those of us who grew up in the era of the Warren Court<sup>2</sup> will say, "What? How could that be?" But the Warren Court, in my view, was a fluke.

If you look at what the Supreme Court was doing in the first half of the 19th century, they were busy enforcing slavery, in the most

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<sup>1</sup> See generally BRAD SNYDER, *DEMOCRATIC JUSTICE: FELIX FRANKFURTER, THE SUPREME COURT, AND THE MAKING OF THE LIBERAL ESTABLISHMENT* (W.W. Norton & Co. ed., 2022).

<sup>2</sup> See Morton J. Horowitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 5 (1993) ("From 1953, when Earl Warren became Chief Justice, to 1969, when Earl Warren stepped down as Chief Justice, a constitutional revolution occurred."). Professor Horowitz elaborated: "The constitutional revolution embarked upon by the Warren Court was based on two general conceptions that may have been in conflict. The first was the idea of a living constitution: a constitution that evolves according to changing values and circumstances. The second was marked by the reemergence of the discourse of rights as a dominant constitutional mode." *Id.*; see also JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE WORLD HE MADE DEMOCRATIC* (Riverhead Books 2007).

extreme way, as shown by the Dred Scott case.<sup>3</sup> They were busy undercutting the treaties with the Indians.<sup>4</sup>

What was the Supreme Court doing in the second half of the 19th century? They were busy destroying Reconstruction.<sup>5</sup> They were busy declaring that the nascent labor union movement was a criminal conspiracy.<sup>6</sup>

What was the Supreme Court doing in the first half of the 20th century, when Frankfurter came of age? They were busy knocking down, on alleged due process grounds, the progressive legislation of Teddy Roosevelt, Woodrow Wilson, and Franklin Delano Roosevelt (“FDR”).<sup>7</sup> And it’s true that FDR was popular enough to at least promote a court-packing plan—which did not succeed—and bring pressure on the Court and also was President for so long that he was able to appoint many justices. Nevertheless, even that group had no hesitancy in interning Japanese American citizens at the very time we were fighting the Nazis for doing the same thing. And that, of course, was the infamous *Korematsu* case.<sup>8</sup>

Now along came the Warren Court, which, as I say, was a fluke. No one expected Earl Warren to be the great liberal champion he became. Ditto Justice William Brennan. But that lasted only for a relatively short while. And then the Burger, Rehnquist, and Roberts Courts came along and undercut many of the most important decisions of the Warren Court.<sup>9</sup> And now, of course, we have, thanks to Donald Trump, a reactionary Supreme Court.

I mention all this because I think the conservatism of the Supreme Court had a major effect on Frankfurter and on how he viewed the role of the Court.

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<sup>3</sup> See generally *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

<sup>4</sup> See, e.g., *Johnson & Graham’s Lessee v. M’Intosh*, 21 U.S. 543 (1823).

<sup>5</sup> See, e.g., *Civil Rights Cases*, 109 U.S. 3, 11 (1883) (declaring the Civil Rights Act of 1875 unconstitutional because the Fourteenth Amendment only protects against state action, and not against private “invasion of individual rights”).

<sup>6</sup> See, e.g., *In re Debs et al.*, 158 U.S. 564 (1895).

<sup>7</sup> See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>8</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>9</sup> *Precedent and the Roberts Court in 4 Charts*, LAW360 (Oct. 7, 2019, 9:32 PM EDT), <https://www.law360.com/articles/1207062/precedent-and-the-roberts-court-in-4-charts>.

## II. FELIX FRANKFURTER'S MODEST BEGINNINGS AND EXTRAORDINARY ACCOMPLISHMENTS

I should start out by saying, when talking about Felix Frankfurter, that one cannot be anything other than lost in admiration for how much he was able to do from such modest beginnings. He came to the United States at the age of twelve with his parents not even speaking a single word of English. Twelve, thirteen years later, Frankfurter graduated from Harvard Law School, first in his class. Of course, he couldn't get a job in most of the law firms in New York because he was a Jew. But thanks to the Dean of Harvard, who was not Jewish, Frankfurter did finally get a job.<sup>10</sup>

And more importantly, a few months later, Henry Stimson (another hero, in my view), who had just been made U.S. Attorney for the Southern District of New York, brought in Frankfurter as part of an attempt to hire his prosecutors on the merits—something very radical for the time. In fact, the tradition up to then was that being an AUSA was a patronage job. This tradition, by the way, continued in many districts, including the one we're in now, the Eastern District of New York, to the 1970s.

But Stimson changed all that, so far as the Southern District of New York was concerned, and he brought in this young guy. I have a photo of that class of assistant U.S. attorneys on my chambers desk and Frankfurter really looks like he's about 16 years old. But he was an excellent prosecutor.

Frankfurter's most important case was against one of the high-level executives in what was called the Sugar Trust, one of these cartels that Teddy Roosevelt pursued as a "trust buster."<sup>11</sup> It was not an easy case at all, but Frankfurter won it hands down.

## III. AN IMMENSELY GREGARIOUS FELLOW IN WASHINGTON, D.C.

Stimson became Frankfurter's mentor, and when Stimson went down to Washington as Secretary of War—a post that Stimson held twice, by the way, once right before World War I and once during

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<sup>10</sup> SNYDER, *supra* note 1, at 24 (describing Frankfurter's experience interviewing at law firms with letter of recommendation from Harvard Law School Dean James Barr Ames).

<sup>11</sup> *Id.* at 28-31.

World War II—he brought Frankfurter down there. And Frankfurter, an immensely gregarious fellow, quickly became popular with many people.

If I recall correctly, it was then that he first met a young Assistant Secretary of the Navy named Franklin Roosevelt and they became good friends. In any event, Frankfurter was a liberal Republican at that point. Woodrow Wilson won the election in 1912, so Frankfurter knew his days in Washington were limited. But Harvard came to his rescue once again and offered him a professorship.<sup>12</sup> Frankfurter became, I think it's fair to say, the most powerful professor at Harvard Law School during the next few decades.

But he still was very interested in government, very interested in power, and he went down to Washington again as Assistant Secretary of Labor. And it was during those years that the Supreme Court was busy—already before FDR, even before the New Deal—knocking down progressive legislation, and that had, I think, a major effect on how Frankfurter viewed the Court and its role.

Back in Harvard, he became something of a liberal hero by being the appellate lawyer in the infamous Sacco and Vanzetti case.<sup>13</sup> Although he did not win, he did a great deal to expose what a ridiculous prosecution that was and achieved considerable notoriety.

While Frankfurter was a professor, there was always the fact that he was a Jew and therefore attempts were made periodically at Harvard to get him thrown out as a Communist and so forth. But eventually he abandoned his liberal Republican approach and became a close confidant of FDR. And one thing I learned from Brad's book, among many other things, was that during the period of the New Deal, the Saturday Evening Post—which was an extremely popular magazine at the time—described Frankfurter as the single most powerful individual in the United States.<sup>14</sup>

And that was because FDR leaned on him very, very substantially for the names of people to appoint to positions in the New Deal and for advice generally. And Frankfurter, if I recall correctly, even slept at the White House regularly. So, eventually, and perhaps almost inevitably, FDR appointed Frankfurter to the Supreme Court.

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<sup>12</sup> *Id.* at 60-61.

<sup>13</sup> *Id.* at 160-86.

<sup>14</sup> *Id.* at 254.

#### IV. APPOINTED TO THE SUPREME COURT BY FDR

There's a nice vignette in Brad's book where Frankfurter was opposed to the court-packing plan. And when Roosevelt found this out, he said to Frankfurter, "You know, keep that to yourself. Because I'm planning to appoint you to the Supreme Court." Roosevelt was no fool and Frankfurter duly shut up.<sup>15</sup>

But when what was then called the "Jewish seat" opened up, Frankfurter was appointed to the Supreme Court. And he very quickly showed his distrust for the Supreme Court's exercise of power.

What Frankfurter missed, I think, and this would be one of my two major criticisms I have of him, is that Frankfurter didn't recognize that when it came to individual liberties and minority rights, the Supreme Court was the one branch of government that had the power to protect people who were not in the majority.

In an early case, known as *Gobitis*,<sup>16</sup> which Frankfurter wrote but was later reversed by the Supreme Court, where the Jehovah's Witnesses refused, on religious grounds, to take the oath of allegiance to the United States, they were punished, and the Supreme Court upheld the punishment. And Frankfurter said, you know the remedy is for the Jehovah's Witnesses to convince the people of Pennsylvania that they should be able to exercise their right not to take the Oath of Allegiance.

That's frankly ridiculous! But it showed how far Frankfurter's ideology went in his, on the one hand, trust of democracy, but on the other hand, his distrust of the Supreme Court being an activist court.

Another example of this was his dissent in *Baker v. Carr*.<sup>17</sup> I mean, there's a case where the Supreme Court was actually trying to make democracy work the way it was supposed to work. And yet, Frankfurter still thought that was beyond the Court's natural role. And so he dissented from that otherwise terrific case.

#### V. FDR'S CONFIDANTE WHILE STILL SERVING ON THE COURT

My other criticism of Frankfurter is that he still kept in close touch with FDR during many of his years in the Supreme Court. The notion of separation of powers did not include his personal exercise of

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<sup>15</sup> See *id.* at 266-67.

<sup>16</sup> See *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), *overruled by* *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

<sup>17</sup> See *Baker v. Carr*, 369 U.S. 186, 266-267 (1962) (Frankfurter, J., dissenting).

power through his relations with FDR. And we have all the recent controversies regarding Clarence Thomas coming to light.<sup>18</sup> Frankfurter was much more direct. He just believed, the President wants advice on something that's coming up before the Court or something on social policy, who better to give him that advice than me? So he did not have a good feel, I think, for the need for preserving both the actuality and the appearance of independence on the part of Supreme Court justices.

Having said all that, it is hard not to admire Frankfurter not only for what he accomplished, but for what was just mentioned in the introduction by Dean Langan. He hired the first black law clerk ever, Bill Coleman.<sup>19</sup>

I knew Bill Coleman. He lived a few blocks away from me when growing up in Philadelphia and was a wonderful, wonderful man. Like Frankfurter, he was first in his class at Harvard Law School. He then clerked for Frankfurter. He then went back to Philadelphia and could not get a job in any law firm in Philadelphia because he was black.

So here was history repeating itself in the most negative fashion, but in the end, like Frankfurter, Bill Coleman made a great career, became Secretary of Transportation, and had a great career as a litigator. And, having known what a great guy Bill Coleman was, I will always have a soft spot for Felix Frankfurter for hiring him when no one else was touching blacks, even on the Supreme Court.

So those are my views on Felix Frankfurter. I look forward to hearing what other people have to say. Thank you so much.

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<sup>18</sup> Alison Durkee, *Clarence Thomas: Here Are All The Ethics Scandals Involving The Supreme Court Justice Amid Unpaid RV Loan Revelations*, FORBES (Oct. 26, 2023), <https://www.forbes.com/sites/alisondurkee/2023/09/22/clarence-thomas-here-are-all-the-ethics-scandals-involving-the-supreme-court-justice-amid-koch-network-revelations/?sh=e9b06f15df75>.

<sup>19</sup> William T. Coleman Jr., *Who Broke Racial Barriers in Court and Cabinet, Dies at 96*, N.Y. TIMES (Mar. 31, 2017), <https://www.nytimes.com/2017/03/31/us/politics/william-coleman-jr-dies.html>.