PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES IN MEMORY OF MR. JUSTICE FRANKFURTER.*

MONDAY, OCTOBER 25, 1965.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE FORTAS.

Mr. Solicitor General Marshall addressed the Court as follows:

"Mr. Chief Justice, may it please the Court:

"A meeting of the Bar of the Supreme Court was held at 11:00 this morning in honor of the memory of Mr. Justice Felix Frankfurter. Former Solicitor General Cox, who initiated and completed the plans for that meeting, was selected as chairman, and the Honorable John F. Davis was selected as secretary of that meeting. Resolutions were adopted and will be read by Honorable Dean Acheson, chairman of the Resolutions Committee."

The Honorable Dean Acheson addressed the Court as follows:

"The resolutions unanimously adopted are as follows:

" 'RESOLUTIONS

" 'Mr. Justice Frankfurter because of grave impairment of his health retired on August 28, 1962, from active service on the bench. For three years he gallantly bore his afflictions and died on February 22, 1965, in his eighty-third year.

*Mr. Justice Frankfurter, who retired August 28, 1962 (371 U. S., IV, VII), died in Washington, D. C., on February 22, 1965. The services were private. (380 U. S., IV, VII.)

" 'Felix Frankfurter's birth on November 15, 1882, to Jewish parents in Vienna, Austria, little betokened a career in America as legal scholar, teacher, and jurist. The family, the Justice has said, was an intellectual one, though he admits to having been "more bookish" than the others, excepting his paternal uncle, an "oppressively learned man," the "librarian-in-chief of the great library of the University of Vienna." His Viennese origin was treasured by the Justice. Though time had dimmed memory of detail, he delighted in attributing to it his *joie de vivre*—what he called the Blue Danube side of his nature.

" 'When at the age of twelve Felix Frankfurter landed in New York, he had never heard a word of English spoken. Two years later, on graduation from Public School 25, he was reciting Chatham's speech on the conflict with America. At the school his beloved benefactress, Miss Hogan, had threatened with the rod any boy caught speaking German with him. He read omnivorously. At Cooper Union the periodical room brought on that addiction to newspapers from which he could never free himself. There, too, were lectures and, above all, debates—ecstatic fare. The reading rooms at the Ottendorfer, the Astor and the Lenox libraries all knew him.

" 'His vocabulary, over the years, became immense and exotic. Many of us have often turned from one of his pages to the dictionary to look up gallimaufry, for example, or hagiolater or palimpsest. He delighted in English words; but was not so happy with English style. His continued to be involved, often ornate, carrying a touch of the baroque. His best writing is his speech transcribed.

" 'Once he had firm grasp of the language, nothing could stop the flood of achievement. What enables one to be sympathetic with such continuous and unqualified success is an initial failure. He had set his heart on winning a Pulitzer scholarship to the Horace Mann School. But he failed. Looking back on this disap-

pointment, he found a curious ground for comfort in accepting kismet. "But if I had gone to Horace Mann, I would doubtless have gone to Columbia, and beyond that I don't know—Columbia Law I suppose . . . . These people who plan their careers—I have so little respect for them . . . ." His path was laid out for him. He followed it with submission and with joy. It led not to Columbia but to City College and to the Harvard Law School, the absorbing love of his life.

" 'At the turn of the century, student life at City College was more European than American collegiate. The students lived and studied in the midst of a great city, not segregated from it but a part of it. They learned the discipline of hard work in crowded and distracting conditions, completing half of high school and all of a college course in five years. They found relaxation in the East Side tea shops and coffee rooms, drinking tea and rum out of tall glasses and talking with all comers until dawn. The course was prescribed and rigid. Young Frankfurter completed it with high honors, gathering on the way yet another joy from language. He found great interest in the delicacy and precision of Greek until, unhappily, poor teaching stifled it. For the most part he taught himself in his usual way. "I read a lot," he has reported, "a terrible lot."

" 'After City College there was no money for law school, so a year was set aside to earn some as a clerk in the Tenement House Department of the City of New York. Again he toyed with fate. One fine spring day in 1903, with ten dollars in his pocket, he set out on foot for Morningside Heights to matriculate at Columbia Law School. But kismet would no longer be denied and events moved quickly to settle the matter.

" 'The prospective matriculant had not gone far when he met a friend who persuaded him to spend so fine a day—and the matriculation fee—more fittingly at Coney Island. Soon afterwards the family doctor, examining his lungs, advised strongly against continuing in New York and in favor of country air. Finally, a brother of

a friend in the Tenement House Department, a first-year man at Harvard Law School, home for the Easter holiday, persuaded him that Harvard was practicable financially, that Cambridge was about as far into the country as a New Yorker should venture, and that they should room together the next year. Thus was fate fulfilled and Frankfurter's distrust of those who plan their lives confirmed.

" 'Not only the Law School but Harvard University as a whole offered inexhaustible joys. A Lucullan banquet lay before him or, as he more earthily put it, "a free lunch counter." "I went to this and that, went to the library, read, roamed all around, and just satisfied a gluttonous appetite for lectures, exhibitions, concerts." His roommate protested; mid-year tests brought him up with a jerk. In all three years he led his class, still stubbornly, but more moderately, insisting that "I don't think law requires that I stifle all other interests." It never did.

" 'One would not go wrong in thinking that Felix Frankfurter's years before coming to the bench were his happiest, as they were his freest, years. He never thought of them as years of preparation. They were years of gloriously self-justifying life in action. Nonetheless, they gave him rare insights into the changing social and economic facts of life in this country, whether he represented the federal government on the legal and social frontier, or, at the Law School, inspired young men to adventure by the tales he brought back from his forays into the surrounding battle.

" 'Hardly had Frankfurter left the Law School in 1906 for the law offices of Hornblower, Byrne, Miller and Potter in Manhattan, when he was lured away by an offer of a 25% reduction in salary and unlimited work. The offer came from Henry L. Stimson, President Theodore Roosevelt's newly appointed United States Attorney for the Southern District of New York. Frankfurter was inclined to worry about the ethics of this desertion until

Professor Ames wrote him to "follow the dominant impulses of your nature," which, of course, he was about to do anyway.

" 'Rarely can a decision or event in a man's life be called crucial. This was one. Colonel Stimson was a noble man, of towering integrity, an old Roman of the days of the Republic. Frankfurter's standards of work, of fairness, of integrity—as he himself often said—were forged in his years with Stimson.

" 'The times, too, were moving: The Progressive Era was in gestation. The United States Attorney's office, a storm center in itself, brought actions against the railroads for rebates, against sugar companies for customs frauds, against Mr. Charles W. Morse for banking manipulations disclosed by the panic of 1907. Mr. E. H. Harriman was haled before a United States court to answer questions of the Interstate Commerce Commission about his acquisition of control of railroads. The federal government had moved against business. This was revolution. People spoke of it, said Frankfurter, as they might have of the attack on the Bastille. But not all the work involved great matters. The young assistant tried run-of-the-mill criminal cases on his own and was assigned responsibility for the troubles of the 100,000 immigrants a month who passed through Ellis Island, since Stimson thought he was "likely to have more understanding of these problems than some of the other lads in the office."

" 'Soon the scene shifted. Stimson left office with Roosevelt and ran for Governor of New York. Frankfurter was soon in the fight, too, traveling with both the candidate and his supporter, the former President, and finding politics as absorbing as the law courts. Stimson lost the election of 1910. Almost at once he went to Washington as Secretary of War, taking Frankfurter with him.

" 'Again a new life opened vistas onto a new world. In 1910 the War Department was not only the War Office but the Colonial Office and Office of Public Works as

well. Its jurisdiction had followed the flag in its unplanned course from the Caribbean, across the Isthmus of Panama, to the Southwest Pacific. Manifest destiny brought in its train governmental, administrative, and constitutional problems beyond the farthest imagination of the framers at Philadelphia. In two administrations Felix Frankfurter was engaged in adapting eighteenth- and nineteenth-century constitutional conceptions to the world-encompassing needs of an imperial power.

" 'When this country entered the First World War, President Wilson called him back to Washington for a task as different as it was tough. Industrial disorder in the West and Southwest was paralyzing war production. A syndicalist movement, the Industrial Workers of the World, had taken over labor at the copper mines, lumber camps, and some other vital industries. It was being met by organized vigilantes using arms and deportation. The President's Mediation Commission, a group of realists under the chairmanship of Secretary of Labor William B. Wilson and with Felix Frankfurter as Counsel, plunged into this cauldron of hatred. One situation after another yielded to calmness and persistence. Counsel's contribution, it is not surprising to learn, was his resourcefulness in diminishing "hated words" and "the irrationalities of strife." When Counsel for the Commission went back to the Law School to resume teaching, he had had rare schooling in the realities of American industrial life.

" 'It is accepted belief that the invitation which came in 1914 to join the faculty of the Harvard Law School posed a difficult decision for him between the active and the contemplative life. The Justice himself gave currency to the idea and, indeed, made public a long memorandum of his own to himself on the pros and cons. But the difficulty was largely theoretical, since, in fact, Frankfurter never chose; he embraced both alternatives; he lived two lives without skimping either one—the life of the teacher and scholar and life on the firing line of all

the conflicts of his time. He rolled them into one. Scholarship for him was concerned not only with the history of the past but with the most current reports. Significantly one of his first efforts was with other lawyers to indict the witch-hunting excesses of Attorney General A. Mitchell Palmer.

" 'For twenty-five years Felix Frankfurter's prodigious energies were concentrated on the growing edge of the law. With Dean Roscoe Pound he directed the Cleveland Survey of the administration of criminal justice, a pioneering study. What brought home to Felix Frankfurter with searing intensity the responsibility of the state in criminal prosecution were the murder convictions of Sacco and Vanzetti, a shoe worker and a fish peddler. He believed that their trial had been unfair and their convictions due to their political and economic beliefs. He threw himself passionately into the attempt to set aside the convictions. The controversy rose to international proportions, but the men were executed.

" 'Gradually his interest centered on the law applicable to public agencies, resulting in a phenomenal outpouring of papers, some by his pupils, some in collaboration with several of them, and others his own work. These dealt with labor injunctions, judicial review of administrative decisions, evidence and procedure before administrative bodies, the history of diversity jurisdiction, and so on. His own work centered on the constitutional views of Justices Holmes and Brandeis and Chief Justice Taney, and, in collaboration with James M. Landis, on a book and annual articles on The Business of the Supreme Court.

" 'Professor Alexander Bickel has written:

" ' "There were great scholars of the Constitution before Mr. Frankfurter, but he was the first scholar of the Supreme Court. The study he pursued was not constitutional law, but institutional law. . . . He studied the sources, the volume, and the nature of the Court's business, over time and contemporaneously, and

perceived anew the Court's role in American government. . . ." Felix Frankfurter: A Tribute, p. 197 (Mendelson ed. 1964).

" 'The very nature of the Court's position in the scheme of American government called upon it to be wisely selective in the choice and restrained in the number of cases it heard and decided. He had no patience with charges that in denying review the Court was, as the press put it, "ducking the issue." The Court was not a knight-errant sworn to search out and right wrongs and slay dragons of precedent. It was far better to leave a decision unreviewed than for the Supreme Court to decide it wrongly or prematurely. He believed that the issues the Court chose to review should be ripe for decision and needed time for collective deliberation and decision, and for careful and persuasive exposition of the decision so necessary for its acceptance by the country. Congress had responded most generously to the Court's request for power to control and limit its own docket; to use the power effectively required, so he thought, stern selectivity.

" 'In 1939 Felix Frankfurter's life seemed firmly and happily settled in its course at Harvard. Without hesitation he had declined Governor Ely's offer of an appointment to the Supreme Judicial Court of Massachusetts and without regret heard from President Roosevelt that he could not appoint him to the vacancy on the Supreme Court left by Justice Cardozo's death. Then without warning or explanation Roosevelt reversed that decision and sent his nomination to the Senate. Curiously, for one so frequently in the storm center of controversy, only a few cranks opposed the nomination. The Senate unanimously confirmed it. The new Justice took his seat on January 30, 1939.

" 'The year was a turning point in history as well as in the history of the Supreme Court. Time had just ended the thirty-year war between judicial conceptions of the nineteenth century and social and economic con-

ditions of the twentieth, a war into which Professor Frankfurter had thrown on the side of modernity his professorial and polemical power. When Justice Roberts freed himself from the bonds of *stare decisis* in *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379 (1937), the last of the minimum wage cases, "freedom of contract" became an obsolete phrase and social legislation in the United States could move forward again. Another powerful obstacle, the Commerce Clause, was outflanked by doctrines, not new but long neglected, which Professor Frankfurter had advocated. See the chapter on Taney in The Commerce Clause Under Marshall, Taney and Waite.

" 'Just as an epoch had ended in the history of the Court, one was ending in the history of the world. The epoch of the nineteenth century, long undermined and tottering, the epoch of One World, of *Pax Europa,* was about to come crashing down about our ears. Whatever the new issues of the post-war world and the post-war Court would be, they would not be those in which the new Justice had served with such zest under his great heroes and captains, Stimson, Holmes, and Brandeis.

" 'The issues changed, but not the nature of the Court or the imperatives of its function and of its position in the American government, and not the ultimates of the democratic faith. More specifically, the separation of powers, federalism, the First Amendment, procedural due process, and the integrity and independence of the act of judging, and even a measure of substantive due process and equal protection—for Justice Frankfurter as for Professor Frankfurter, these were constants.

" 'There is a remarkable coherence and consistency in his outlook before and after his change of title—most remarkable for one who, before his accession, was so ardently engaged in the pursuit of immediate practical ends, who before and after spoke so often on almost all important aspects of the Court's work, and whose professional lifetime spanned two sharply divided periods in

the Court's history. No doubt, in his journalism especially, sparks were sometimes struck off which were extinguished and vanished as they rose. But his basic convictions, and of course his temperamental inclinations, endured and had decisive effect on issues old and new, because they were not drawn from the issues of the day.

" 'By nature an impatient man, and equally naturally a reformer, he managed somehow not to be both together. The struggle to change social, economic, and political conditions was for him the struggle to conserve the institutions and the values of the society in changed conditions. What is to be conserved must first be understood, and understood afresh, time and again, for its essence and its necessities are not conveyed by verbal formulas; they reveal themselves only in the full factual context of the past and present. History and a willingness to know that the conditions of life change in response to forces that the law does not create but must recognize—these are the tools of the true conservative. They were Justice Frankfurter's, as they had been Justice Brandeis's. In using them, the conservative is a creative reformer.

" 'During the twenty-three years of Justice Frankfurter's tenure, the Court not only abandoned old constitutional restraints on social and economic reform, but adopted fresh and hospitable habits of statutory construction. And it opened for itself new and important lines of influence under the First Amendment, in the administration of criminal justice, and in effectuating equal treatment of the races. In these enterprises Justice Frankfurter participated and often led. The reapportionment case of 1962, *Baker* v. *Carr,* 369 U. S. 186, was the only major new departure against which the Justice wholly and firmly set his face, and perhaps the final word has not yet been said.

" 'Justice Frankfurter participated and led, but after his fashion, subject to the cautions and restraints that were deeply imbedded in his view of the judicial func-

tion and in his philosophy of history and of government. Whether he led or participated or dissented, he left his mark on the evolution of the principles announced by the Court, and, therefore, on their content, on the timing and manner of their announcement, and on the methods chosen to enforce them.

" 'From the beginning to the end of his service, in an unrelenting line of decisions, he faithfully realized the promise of the Fifteenth Amendment. *Lane* v. *Wilson,* 307 U. S. 268 (1939); *Terry* v. *Adams,* 345 U. S. 461 (1953); *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960). His apt sentence, in the first of these cases, "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination" (307 U. S., at 275), can serve as a chapter heading for the Court's achievements under both the Fourteenth and Fifteenth Amendments.

" 'In the field of criminal law, Justice Frankfurter insisted upon civilized standards of justice in the federal courts, objecting to procedures which he believed impaired basic liberties. See *Harris* v. *United States,* 331 U. S. 145, 155 (1947). He was not troubled that constitutional safeguards were so often invoked by dubious characters (*id.,* at 156), insisting upon "conviction of the guilty by methods that commend themselves to a progressive and self-confident society." *McNabb* v. *United States,* 318 U. S. 332, 344 (1943). In the *McNabb* case and in *Mallory* v. *United States,* 354 U. S. 449 (1957), Justice Frankfurter, speaking for the Court, held inadmissible confessions obtained in protracted post-arrest interrogation before arraignment and without counsel for the defense.

" 'The role of the Supreme Court in reviewing state-court criminal proceedings he saw as limited to guaranteeing that "fundamental principles of liberty and justice" are upheld. *McNabb* v. *United States, supra,* p. 340. He acknowledged that there were many issues on which sincere exponents of constitutional rights could differ; resolution of these issues he believed to be the

province of the state courts in the exercise of their judgment. See *id.*, at 340; *Wolf* v. *Colorado,* 338 U. S. 25 (1949). Where, however, state courts refused to protect individuals from conduct offending the basic canons of decency and fairness, Justice Frankfurter did not hesitate to act. *Rochin* v. *California,* 342 U. S. 165 (1952).

" 'Courts in a democratic society, he thought, should defer to elected officials who had resolved conflicting legislative policies, retaining only the determination whether legislation is so unrelated to the experience and feelings of the community as to be destructive of popular rights. *American Federation of Labor* v. *American Sash & Door Co.,* 335 U. S. 538, 542 (1949) (concurring opinion). Popular rule he saw as a moral and practical imperative, a view which led him to support the constitutionality of the Smith Act, *Dennis* v. *United States,* 341 U. S. 494, 517 (1951) (concurring in affirmance), and of the compulsory flag salute in West Virginia's public schools, required without regard to religious scruples, *Flag Salute Cases,* 310 U. S. 586 (1940), 319 U. S. 624, 646 (1943) (dissenting opinion).

" 'He often said that "the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible." *United States* v. *Lovett,* 328 U. S. 303, 320 (1946) (concurring opinion). That this is not a negative principle in the hands of a resourceful judge, the Justice showed when he found a way to depart for the first time in over half a century from the judicial practice of "hands off" congressional investigations. *United States* v. *Rumely,* 345 U. S. 41 (1953).

" 'Yet when time and occasion were ripe, he did not shrink from the duty of judicial review. The historian of the Court will find Justice Frankfurter solidly aligned in the great collegial effort of school desegregation cases, *Brown* v. *Board of Education,* 347 U. S. 483 (1954), 349 U. S. 294 (1955); *Cooper* v. *Aaron,* 358 U. S. 1, 20 (1958) (concurring opinion). He insisted that a mature and

self-reliant people were not meant to be insulated from the printed word as if they were children, *Butler* v. *Michigan,* 352 U. S. 380 (1957); and in the same spirit that the college classroom may not be the object of official intrusion, *Sweezy* v. *New Hampshire,* 354 U. S. 234, 255 (1957).

" 'Idealist, optimist, and teacher, he found in Justice Holmes, his hero, his inspiration, a joy and spur to his spirit. Justice Brandeis was his mentor and guide. Like the latter he saw himself performing an educational role. He was a teacher because of his faith in democracy. With rare exceptions, he accepted the consequences of popular rule, and did not lightly brandish the Constitution to ward them off. If the people erred, the remedy for the most part was education.

" 'But he was a professor as well as a teacher, and could not shed the habits of the classroom, which are not perhaps the most useful or becoming for the teacher-at-large. He delighted in recounting how more than once Chief Justice Hughes at Conference would begin to address him as "Professor Frankfurter" before quickly correcting himself to "Justice Frankfurter." Characteristically this ended on one occasion with the Justice telling the Chief Justice that he need not apologize in correcting himself. "I know of no title that I deem more honorable than that of Professor of the Harvard Law School." (Of Law and Life and Other Things That Matter, p. 28.) It is a safe surmise that the teacher and practitioner of communicable reason, and the professor, manifested themselves not only in published opinions but in Conference and in the other intimate relations of the Justices. An independent and even a surprisingly private person, he had a religious respect for the independence of others. But the Court is in its way a continuous seminar, in and out of session, and we may be sure that Justice Frankfurter was a vigorous and continuous participant.

" 'As much as any of the men who have sat here, no less than Justices Brandeis or Van Devanter or Chief Justice Taft, he was painstakingly interested in the Court's methods and routines of conducting its business. In a small group of self-reliant men working with very little staff, he thought nothing too trivial for improvement, nor any effort too great to foster the most favorable atmosphere for maturing the Court's deliberative process. Only those who served with him can yet know the full value of his contribution to the inner organization and procedure of the Court. Outsiders may speak however of Justice Frankfurter's deep attachment to an institution, which was the focus of his professional life for over half a century.

" 'The attachment was passionate and idealistic. He loved the Court not so much for what it was as for what it could be. If he felt on occasion that it fell short of his ideal, he scolded, pointing to what he believed to be faults and defects. For in the Court, the object of his passion, he could find no shortcomings tolerable. He had a vision, at once splendid and precise, restricted and magisterial, of the greatness of the Court's calling. Greatness for this Court, he held, was not a mere aspiration, but a duty and a necessity: Wherefore, it is

" '*Resolved,* That we, the Bar of the Supreme Court of the United States, deeply saddened by the death of Mr. Justice Frankfurter, record our loss of the guidance and inspiration of a mentor who led some of us into the study of the law and whose influence from the Bench has brought out the professional best in all of us, both by his clear delight in it and by his impatience with less; of a judge who joined learning in the law and its history with love and respect for it, and added to his profound knowledge of this Court, its history and its business, veneration for its unique and powerful place in our government; of a fellow citizen whose intense love of our country compelled complete devotion to its precious and

unique values and to the preservation of the institutions designed to safeguard them: It is further

" '*Resolved,* That the Chairman of our Committee on Resolutions be directed to present these Resolutions to the Court with the prayer that they be embodied in its permanent records.' "

Mr. Attorney General Katzenbach addressed the Court as follows:

"Mr. Chief Justice, may it please the Court:

"The Bar of this Court met this morning in memory of Felix Frankfurter, who was an Associate Justice of the Court from January 30, 1939, until August 28, 1962, and who died on February 22, 1965. Few men have devoted as much of themselves to this Court—it was, as the Justice said in expressing to the President his reluctance at leaving the Court, 'the institution whose concerns have been the abiding interest of my life'—and few men have had so much of themselves to give: His was a towering intellect; he had the keenest of minds and the most facile of pens; he brought to the Court his boundless love of life and his work; and his understanding of the Nation and respect for its institutions could not have been more profound. Unquestionably, his service here was the triumphant culmination of the life of one of the great public men of the Century, as well as one of the brightest chapters in this Court's distinguished history.

"I need not remind those who are gathered here of the emptiness which his passing has left. In this room especially we recall the vivid and crackling excitement which was inevitably generated when he questioned counsel—challenged would perhaps be more appropriate—or delivered an opinion. Those marks of the Justice are lost to us except in memory. Nor shall I attempt to speak of his rich and varied life and accomplishments outside the Court. Let me speak rather of what I believe to be his

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principal legacy to this and later generations—his forcefully articulated conception of the role of courts, and in particular of this Court, in the American political system.

"We should first understand something of the background and experience of the man. As a poor immigrant boy who by sheer force of intellect and character achieved great eminence in the public life of his adopted country, he knew at first hand, and passionately believed in, the promise of American life. The years before he came to the Court, moreover, coincided with the great reform era of the first decades of this century—a period when Congress and the President, and even more, perhaps, State legislatures, were embarking upon programs of bold experimentation in social justice and reform. In that day, judicial decisions which took a restrictive view of the regulatory powers of the State and Nation were a major stumbling block. Himself an impassioned reformer, Justice Frankfurter saw that the American experiment with democracy is a workable one—that government by the people through their elected representatives *can* be vital and progressive; and he saw that the courts of that day, in contrast, were remote from popular currents, and consequently ill adapted to function as an independent organ of social policy.

"His career in government and as a professor of law at Harvard confirmed the lessons of his youth. He came into contact with Holmes, Brandeis and Learned Hand, whom he revered and whose fundamental views he shared, although he imbued those views both with his own passionate nature and with his own unique sense of the values of American institutions. His own researches added to his knowledge. His brilliant pioneering study of the labor injunction, for example, showed that there might be areas of social conflict to the resolution of which the processes of the courts were inherently ill suited. More important, at Harvard he became the first systematic student of the Supreme Court as an institution. He acquired a scholar's understanding of its strengths

and limitations, and came to believe in the Court's indispensable historic role as the arbiter of fundamental conflicts of power within the American political system, concluding that its success in this role depended in very significant measure upon scrupulous adherence to the procedures and limitations of a court of law.

"Perhaps the most important result of his years as a law professor specializing in the study of this Court was that he became imbued with a tenacious faith in reason, and in this Court as its embodiment in the political structure. Almost a quarter century of brilliant and lively teaching, scholarship, and polemics did not fail to instill in him a profound belief in the efficacy of the rational processes of the law and a reverence for this Court as the institution of government pre-eminently fitted to bring these processes to bear upon the Nation's fundamental problems—which, as de Tocqueville observed, are inevitably presented sooner or later in judicial questions.

"These themes—faith in the American democratic experiment and reverence for this Court as the embodiment of reason applied to the problems of government—explain, I think, much of Justice Frankfurter's matured conception of the Court's role. Congress and the State legislatures, the basic organs of representative government, were, in his view, designed to make social policy; the Court was not. The Court must, therefore, in Justice Frankfurter's view, be most cautious in the exercise of its power to invalidate legislation on constitutional grounds.

"The same result followed by a slightly different route. If the Court were truly to exemplify the application of reason to government, it would have to respect the competencies of the other organs of government—Congress and the President; State courts and legislatures, federal trial judges and the federal regulatory agencies. If it went too far afield, in the long run it would only weaken itself. To the same end of preserving the Court's prestige and effectiveness, he felt that it should adhere

scrupulously to the procedures and traditions of a court of law, declining to pass upon any but cases in which the issues were focused and the facts digested in accordance with the strict requirements of the adjudicative process, and discharging its duties at all times with meticulous craftsmanship and impartiality.

"It is popular today to speak of Justice Frankfurter's philosophy of the role of courts as one of 'judicial self restraint.' Thus phrased, the Justice's ideology becomes a negative conception and, indeed, a most implausible one in light of the man. For Felix Frankfurter was not a man who was either restrained or detached; he was, quite to the contrary, both deeply passionate and consumingly involved. 'He was,' as Professor Mansfield (a former law clerk) said on the occasion of his death, 'the most unreserved of men.' His view of his proper role as a judge did, it is true, require him more than once to sustain policies and results irreconcilably at war with his personal predilections, and in this particular sense he may be said to have been restrained. A sharp example of such a dilemma early in his judicial career occurred in the second flag salute case, where the Justice found himself in dissent from a decision holding that a member of Jehovah's Witnesses could not constitutionally be compelled by a State legislature to participate in a patriotic ceremony contrary to his religious beliefs. Recognizing, with unusual candor and eloquence, the line between his personal views and those he believed to be imposed upon the State legislature by the Constitution, the Justice said:

" 'One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedom guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe

equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores.'

"That he nevertheless did not veer from his conception of the proper limitations of the Court bespeaks his fidelity to principle and his strong intellectual self-discipline. But it reflects much more as well—and I come now to a second important aspect of his contribution to our political and judicial philosophy. It was his belief that the Court's circumscribed role was a necessary corollary to the vigorous and progressive exercise of the policy-making function by the political organs of government, to which that function has been primarily entrusted by the Constitution, as it must be in a free society. To be sure, he did not hesitate to invalidate laws fundamentally incompatible with democracy; his consistent position in the civil rights area bears witness to that. He taught not a universal solvent for constitutional problems, but, rather, a fundamental attitude: To equate strong distaste for a statute with its unconstitutionality would unduly stifle, and might ultimately destroy, the creative forces of democracy—upon which, responsibly exercised, we ultimately depend for progress and for liberty. Courts cannot undertake comprehensively to exercise a policy-making role, and they must take care not to destroy the responsibility of those who do.

"These principles received a severe test near the close of Justice Frankfurter's judicial career, in the reapportionment case (*Baker* v. *Carr*). The ill which the Court was asked to confront was a malady of representative government itself, a malady, moreover, of the utmost gravity and nationwide in scope. Since a malapportioned legislature could hardly be expected voluntarily to reapportion itself equitably, Justice Frankfurter was faced with the hardest of choices: between judicial action that in his view would only harm the Court without

promising a satisfactory solution to the problem of unequal representation (a problem that he considered political rather than judicial in character); and judicial inaction which would leave the problem without foreseeable solution. He chose the first horn of this dilemma. He spoke in these words:

"'. . . [T]here is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers carefully and with deliberate forethought refused so to enthrone the judiciary. In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives.'

"I shall not presume to appraise the choice made. My point is that for him this was no empty rhetoric; the principles of separation of power and federalism were living guidelines, not mere cliches.

"In short, Justice Frankfurter's conception of judicial self-restraint was not solely, or even primarily, focused upon inhibiting judicial power as such. To be sure, he was concerned that expanding the Court's role beyond what he conceived to be its proper limits would deflect the Court from more basic duties, and impair its ability to discharge them adequately, and also that, outside the limited sphere of its competency, the Court would not be able to provide viable solutions to social and political problems. But he viewed the problem, at the same time, in the positive light of promoting a democratic and just society. The choice to abstain in many vital areas was for him a practical and acceptable, and, if painful, still not intolerable, choice, because he believed that in the final reckoning the representative organs of government must be relied upon to do, not shirk, their job. And he was convinced that the Court, if it took upon itself the task of righting all of the Nation's social wrongs, would

find itself ill-equipped, while at the same time encouraging the political organs to shed their rightful burdens. They could be expected to act most responsibly only if accorded the full and awesome responsibility for making policy and political judgments; the best thing the Court could do, therefore, was to place the responsibility squarely where it belonged.

"I have tried to suggest that Justice Frankfurter's view of the Court as an institution constrained to act within rigorous limits rested not so much on a negative view of the Court's power and competence, but more on an affirmative faith in reason, democracy, and the genius and fortune of the American political system to secure just solutions for essentially social or political problems outside the judicial arena. This faith did not exclude an important role for the Court. On the contrary, it suggested several important creative functions. Let me mention, in the first place, the Court's unique function as a teacher (as the Justice himself had been) and exemplar. We see this in the form and texture of his opinions. Written to instruct, explicit about their assumptions and implications, freighted with history and learning, they set a new style in judicial opinion-writing. We saw it too in his probing questions from the bench and his lively exchanges with counsel. The Court, he said, is 'a tribunal not designed as a dozing audience for the rendering of soliloquies' but 'a questioning body, utilizing oral arguments as a means for exposing the difficulties of a case with a view towards meeting them.'

"As another example of the Court's creative role, consider his consistent attitude toward the other organs of government whose actions or enactments he was called upon to enforce and review. While vigorously upholding their autonomy (as in his famous *Pottsville* opinion), and reluctant to second-guess their substantive determinations, he was aggressive in interpreting statutes so as to effectuate Congress' basic purpose (however imperfectly expressed in the statutory language), and in en-

forcing procedural regularity to compel the policy-making organs to act responsibly.

"As a reader of statutes—really the bulk of the Court's business—Justice Frankfurter drew upon his great understanding of the Nation and its processes. He was impatient with mechanical literalism divorced from the underlying purpose. In speaking of the Fourth Amendment, he once wrote: 'These words are not just a literary composition. They are not to be read as they might be read by a man who knows English but has no knowledge of the history that gave rise to the words.' He was realistic in his assessment of the practical limitations of the legislative process—the inability to provide for every contingency of statutory application; the difficulty of verbal precision in instruments whose phrasing is inevitably a product of compromise. He also refused to abandon hope of finding behind a statute a coherent legislative design that would give meaning and direction to the search for the 'intent' of Congress. This quest for purpose involved much more, of course, than resort to the committee reports and the record of debate. To him the legislative history of an Act comprised the history of prior enactments in the field, the mood and temper of the legislators, the events that gave rise to the legislative proposals, the changes the bill underwent before it assumed its final enacted form. Above all, he tried to understand the nature of the problem that had called forth the legislative response. If the Court could divine the legislators' problem and trace in the rough the indicated lines of their solution, it was obligated to give the statute a construction that would help to achieve their end.

"This creative and masterful sensitivity in the interpretation of statutes was surely one of the most fruitful products of his conception of the Court's role. I emphasize that it was, indeed, rooted in that conception. His faith in representative government implied to him a commitment to use the special resources of the judici-

ary—power and skill in analysis and clarification—to help make the legislative process viable and productive, and his faith in Reason committed him to bring to the task of meaningful statutory construction all the tools of cogent analysis: history and scholarship, imagination and understanding, practical experience and common sense. The bold results of his approach are particularly evident in his famous opinions in the labor field, from *Phelps Dodge* to the second *Garmon* case.

"Justice Frankfurter's view of the Court's role also underlay his pioneering approach to cases involving a challenge to the validity of official action. He showed that the Court had a salutary role to play in encouraging responsible action. We see this most clearly in his opinions reviewing administrative decisions. In the early years of his career on the Court, such review had already gone through two phases. In the first, agency action that seemed to exceed lawful bounds had been unhesitatingly struck down, without more. In the second phase—a reaction to the first—the tendency had been to uphold agency action almost as a matter of course, and to exercise little judicial control over the administrative process. Justice Frankfurter found a middle ground between the extremes of judicial supervision and abdication—requiring that the agencies conform to procedures calculated to maximize the prospects for wise and rational decisions, while refusing in general to review the substantive wisdom of a decision responsibly made.

"His view of the Court's function in such cases is exemplified by his landmark opinion in the first *Chenery* case. The agency, in its opinion, had placed decision on one ground; in defending the decision in the Supreme Court, the agency's appellate staff relied heavily on a different ground. Speaking for the Court, Mr. Justice Frankfurter held such a procedure impermissible. Congress had lodged the responsibility for decision in the members of the agency, and not in their appellate lawyers. If agency action was to be upheld, it should be

on a ground considered and adopted by the agency itself. Only then would there be assurance that agency policy was being formulated deliberately and that responsibility was being assumed, not evaded, by those whom Congress made responsible.

"This notion is epitomized in a memorable sentence from Justice Frankfurter's *McNabb* opinion: 'The history of liberty has largely been the history of observance of procedural safeguards.' What he meant, I believe, was that if the courts did no more than compel officials to follow fair and proper procedures in enforcing the law—procedures that would require them to reason before deciding and to explain the basis of their actions—substantive rights would inevitably flourish.

"Consider also Justice Frankfurter's devout insistence that the Court must never permit itself to become a party to injustice; never allow its image as an institution of reason and conscience to become tarnished. This lies at the root of the Justice's steadfast stand against the admission of confessions obtained by the third degree or other illegal means. A conviction based on such methods could not be upheld without condoning wilful disregard of our society's basic norms of fair procedure, and hence should not, he reasoned, be tolerated by the Court. The same idea explains his frank refusal to uphold convictions based on methods shocking to the conscience. His standard in the famous stomach-pump case (*Rochin* v. *California*) rested on a bold and forthright, not a negative or passive, view of the Court's role in the American governmental system—as the keeper of the public conscience.

"His emphasis on procedure and on the Court's duty to avoid injustice led him to play an active and forward role in the area of federal criminal justice. For example, it was Justice Frankfurter who, in the *McNabb* case, significantly advanced the fertile concept that this Court has a broad 'supervisory authority' over the procedures of the lower federal courts in criminal cases. And in other

areas where the elaboration of policy was peculiarly appropriate for courts—such as the enforcement of the Fourth Amendment—he was also in the forefront.

"In these remarks, I have made no effort to encompass or evaluate all of Justice Frankfurter's rich contributions to the law, this Court, and the Nation. I have concentrated on his view of the Court's role in society because it seems to me that there may be a particular value in reminding ourselves of the fullness, the maturity, and the affirmativeness of his view. To be sure, his philosophy is open to challenge both generally and in its application to specific cases. Men of originality and greatness are inevitably men of controversy, and the Justice relished such battles. The heart of the matter lies beyond agreement or disagreement. Justice Frankfurter contributed to the jurisprudence of this Court a coherent, articulate, and rounded conception of its place and function in the firmament of the American system. And to the law as a whole he brought a devotion to the process of achieving justice through reason. Few have left so rich a legacy.

"May it please this Honorable Court: In the name of the lawyers of this Nation, and particularly of the Bar of this Court, I respectfully request that the resolution presented to you in memory of the late Justice Felix Frankfurter be accepted by you, and that it, together with the chronicle of these proceedings, be ordered kept for all time in the records of this Court."

The Chief Justice said:

"Mr. Attorney General:

"You and Mr. Acheson honor the Court in presenting to us these Resolutions of the Bar concerning the life and passing of our late-lamented Brother, Felix Frankfurter, and your felicitous words honor the profession of which we are all a part and in which he so greatly distinguished

himself for more than a half century as scholar, teacher, advocate, administrator and jurist.

"Felix Frankfurter was the 77th Justice appointed to this Court. Only 18 Justices served longer than did he, and none with greater devotion or distinction. In the 23 years he graced this Bench, he wrote 263 opinions for the Court, 171 concurring opinions, and 291 dissenting opinions, making a total of 725, thus bringing into sharp focus, as he was admirably equipped to do, the argumentative issues in the problems which confront us. These opinions cover a myriad of facets of American jurisprudence and are to be found in Volumes 306 to 369 of the United States Reports. Some of these have already been noted in the Resolutions which you present and still others in your personal remarks. You have pointed up sharply both his legal philosophy and his application of it to the problems of his day.

"It would serve no good purpose to elaborate on them further at these proceedings because they are already recorded with us in a manner that will make them available to the Bench, the Bar, and legal scholars so long as constitutional principles are a matter of concern in this and other lands. And so long as they are scrutinized, they will command respect and strike sparks of interest that otherwise might be overlooked. It should, therefore, be sufficient to say that in composite they portray his profound belief in and knowledge of constitutional principles, his deep sense of patriotism, and his lifelong devotion to the Court as an institution.

"His patriotism was of a passionate kind. Like many others who have come here from other lands to live their lives in freedom, he had the deep-seated and abiding appreciation of the institutions of his adopted country. While so many others who are born here accept freedom as their birthright and fail to appreciate the necessity of guarding it zealously, he acted always as a sentinel on watch. Felix Frankfurter was ever grateful for his citizenship.

"He was accustomed to telling young people that they, too, should be grateful for it and that, like the Romans, they should consider citizenship as an office. He always asserted that the basis of good citizenship is discipline—self-discipline—and that government, like individuals, should be self-disciplined. He believed fervently in the separation of powers and in the division of powers, and that every branch of the government as well as every level of government should respect the others, and that by self-discipline each should confine its own activities strictly to its assigned functions. He believed that troublesome as some of the problems inherent in it are, Federalism is the genius of our institutions, and that it must be preserved in pristine form.

"Justice Frankfurter started early in life to discipline himself for citizenship. Two years after his arrival in this country at the age of twelve, he mastered the English language, and in due time graduated from college and Harvard School of Law. He was an assiduous student and an indefatigable reader. In neither capacity did he confine himself to the law; in neither did he have any bounds for his research. The economic, social and political problems of the day, the history behind them, as well as the current news were of equal interest to him. All of this later was reflected in his work on the Court.

"He believed citizens should serve their Government, and he did so avidly whenever called upon to do so, either full time or part time, both before and during the quarter of a century he was a Professor at Harvard. His governmental assignments were many and varied. The subjects he taught at the Law School and his writings were equally varied, but he always focused on the Supreme Court, its jurisprudence, its procedures, and its place in our Government. It is doubtful if anyone who has sat on this Court came to it better prepared for his task. In his twenty-three years here, his interest in our problems and all of life never flagged.

"How he loved knotty problems! He liked to research them; he delighted in enlightening the Court with his memoranda on difficult questions; he reveled in discussing them at Conference. His last active hour on the Court was spent lecturing on the history of the Interstate Commerce Commission on the occasion of the 75th anniversary of that agency. He never ceased to be a teacher. He believed implicitly in Mr. Justice Holmes' statement that a page of history is worth a volume of logic.

"Yes, we miss him greatly. We miss his spontaneity; we miss his wit, his charm, and his fellowship. We also miss his occasional impatience when he thought the Court was departing from the standards he conceived for it. It was always therapeutic. He was a genial colleague as well as a great Justice.

"I believe Justice Frankfurter would have approved of this kind of Memorial Session of the Court where his friends are gathered in such numbers and where they not only deplore his loss to the Nation as one of its great public servants, but also where they give vent to their joy and satisfaction of having had the privilege of knowing him and basking in the warm glow of his friendship.

"Mr. Attorney General; Mr. Acheson: On behalf of the Court, I thank you for your fine presentations today, and I ask you to convey, if you will, please, to all the friends of Mr. Justice Frankfurter and his family our concurrence with them in their devotion to his memory.

"Let the Resolutions be spread upon the Minutes of this Court."