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The Brandeis/Frankfurter Connection: The Secret Political Activities of Two Supreme Court Justices. By Bruce Allen Murphy. New York: Oxford University Press. 1982. Pp. 473.  
\$18.95

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**Abstract**

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**KEYWORDS:** Secret Political, Supreme Court Justices, Oxford University

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*Reviewed by Arthur S. Miller\**

The Brandeis/Frankfurter Connection<sup>1</sup> is an interesting book, even an important one. It should forever bury the notion that Supreme Court Justices, as individuals as well as members of a collegial Court, are political eunuchs. We all should know that the Court as an institution is a significant part of the political process, making public policy for the nation. That is not Professor Murphy's focus. Rather, he shows in massive and convincing detail how two highly respected and revered men, who sat on the High Bench in this century, engaged in covert political activity after becoming Justices. Murphy, a political scientist at Pennsylvania State University, relates this in highly readable style. I see two faults in the book—one minuscule, the other major. The minor fault is a number of tiny factual errors (some are listed below), which do not damage Murphy's main message but which do bespeak some carelessness in proof reading and copy editing. The major fault is that Murphy really does not know quite what to make of his findings.

First, the message: Justice Brandeis kept Felix Frankfurter, as professor of law at Harvard, on his personal payroll from the time that Brandeis became a judge. The purpose of this was to permit Frankfurter to promote causes that Brandeis could not appropriately advocate from the bench. By this means, Brandeis kept his finger on many of the important public-policy issues of his tenure (1916-1938), including New Deal legislation. Frankfurter learned well; his pervasive personal intervention into the political arena exceeded that of Brandeis. There was little of any significance that escaped his attention. Murphy reveals much, but not all, of this.

Next, the nitpicks: Congressman Celler is not "Cellar," as Mur-

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1. B.A. MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES (1982) [hereinafter cited as MURPHY].

phy writes;<sup>2</sup> the destroyers-for-bases deal in 1940 could not have been rejected by the Senate, for it was never submitted to it;<sup>3</sup> Lewis Strauss is Louis in the text<sup>4</sup> and Lewis in the end-note;<sup>5</sup> he uses the word "appeal" in a generic sense, as a synonym for *certiorari*,<sup>6</sup> he seems to think that "fortuitous" means fortunate<sup>7</sup> and that "enormity" means enormousness.<sup>8</sup> There are a few others, but none of substantial importance. All of this is mentioned, not to denigrate the book but to indicate that Murphy was ill-served by the editors of a quality press and by those who read the manuscript. No doubt these minor lapses will be used in efforts to show that Murphy's main conclusions are invalid. That simply is not true.

Finally, what should be made of two Supreme Court Justices being important secret political actors while on the bench? Murphy treats this question gingerly, even disingenuously. Consider this statement: "My contention that Brandeis and Frankfurter wielded, in camera, enormous political influence does not accuse either man of deciding cases before the Supreme Court to suit his own perception of political rectitude."<sup>9</sup> Murphy asserts, without a scintilla of evidence, that "both Brandeis and Frankfurter should properly be classified among those justices who were best able to separate their political views from their judicial decisions."<sup>10</sup> Well, maybe . . . and maybe not. Can one think of any *important* case other than the *Steel Seizure Case*,<sup>11</sup> in which Frankfurter, an intense patriot and close presidential adviser, did not vote for the government? One is hard put to find any. This is not to say that he *always* voted for the government; but, rather, that he almost invariably did so in significant matters. One need not multiply examples: *Dennis v. United States*,<sup>12</sup> sustaining thought control, and *Kore-*

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2. *Id.* at 335.

3. *Id.* at 210.

4. *Id.* at 51.

5. *Id.* at 376.

6. *Id.* at 269.

7. *Id.* at 210.

8. *Id.* at 241.

9. *Id.* at 341-42.

10. *Id.* at 342.

11. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

12. 341 U.S. 494 (1951).

*matsu v. United States*,<sup>13</sup> upholding the penning up of native-born Americans of Japanese ancestry, in concentration camps, are evidence enough. His political views, that is to say, coincided almost exactly with his judicial decisions.

Sometimes Frankfurter wanted it both ways: he wanted to be a judicial self-restrainer and yet seek, secretly, to alter the vote of the Court politically. *Louisiana ex rel. Francis v. Resweber*,<sup>14</sup> a case Murphy does not mention, provides the classic example. There, Frankfurter—a lifetime opponent of capital punishment—voted to uphold Louisiana's second attempt to kill Willie Francis.<sup>15</sup> But immediately after the vote by the Court, Frankfurter secretly tried to get Francis's death penalty commuted by the Governor of Louisiana.<sup>16</sup> In his concurring opinion, Frankfurter asserted that the standard to determine whether due process of law had been violated was "that consensus of society's opinion"<sup>17</sup>—an extraordinary statement from one who surely knew that due process and other limitations on government were placed in the Constitution precisely because the majority—the "consensus of society"—could at times be tyrannical.

Frankfurter, furthermore, espoused judicial self-restraint, while assiduously practicing the most extreme type of activism as an individual. This extrajudicial activity is by no means aberrational, as Murphy notes in his valuable appendix listing such actions by other justices from 1789 to 1916, but few had the consummate *chutzpah* to do it while asserting that the Supreme Court should be likened to a monastery:

When a priest enters a monastery, he must leave—or ought to leave—all sorts of worldly desires behind him. And this Court has no excuse for being unless it's a monastery. And this isn't idle, high flown talk. We are all poor human creatures and it's difficult enough to be wholly intellectually and morally disinterested when

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13. 323 U.S. 214 (1944).

14. 329 U.S. 459 (1947).

15. *Id.* at 466.

16. L. BAKER, FELIX FRANKFURTER 281-86 (1969). Frankfurter's political actions were, as Murphy details, usually directed toward the federal government. The *Francis* episode is an unsuccessful effort to intervene in Louisiana politics.

17. 329 U.S. at 471 (Frankfurter, F., concurring).

one has no other motive except that of being a judge according to one's full conscience.<sup>18</sup>

I have maintained elsewhere that Frankfurter is "the most overrated judge in this century and perhaps in American history,"<sup>19</sup> and see no reason to alter that judgment. Certainly Murphy's book gives added evidence to buttress such a conclusion.

Professor Murphy does pose two questions: what standards about extrajudicial activity existed when Brandeis and Frankfurter were on the bench, and what standards should there be? The pity is that he contented himself with asking the questions, not attempting to answer them. Perhaps that is enough. Perhaps it is enough that he has spent years in discovering the facts, and then letting those facts speak for themselves.

Finally, this is, of course, a controversial book. Already one of Brandeis' idolators, Professor Robert Cover of the Yale Law School, has lamented that Brandeis was "framed."<sup>20</sup> His diatribe in *The New Republic* is at best a cheap shot at Murphy, at worst an attempt to blacken an important contribution to the literature. Professor Murphy has performed a genuine service, heightening our awareness of the Supreme Court and the judicial process. For this he should be commended. This book deserves to be required reading for every student of constitutional law as well as all concerned and thoughtful citizens. If its minor errors are corrected in a subsequent printing, it deserves serious consideration for a Pulitzer Prize or National Book Award.

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18. MURPHY, *supra* note 1, at 9.

19. A. MILLER, IN DEFENSE OF JUDICIAL ACTIVISM, SUPREME COURT ACTIVISM AND RESTRAINT 176 (1982).

20. Cover, *The Framing of Justice Brandeis*, THE NEW REPUBLIC, May 5, 1982, at 17.