

Book Review

Frankfurter as a Policymaker

From the Diaries of Felix Frankfurter: With a Biographical Essay and Notes. By Joseph P. Lash. New York: W.W. Norton & Co., 1975. Pp. xiii, 366. \$12.50.

Reviewed by Max Isenbergh†

I

Felix Frankfurter, a virtuoso in talking about anything at all and in writing about almost anything related to law, was not much of a diarist. His diaries, as they now repose in the Library of Congress, consist of fewer than 250 daily entries lopsidedly distributed over four decades. Originally, before parts were stolen from the Manuscripts Division, the diaries were probably only moderately more voluminous. There is no reason to suppose that FF was more assiduous in 1927-1931, 1937, and 1956, the years which the thefts ravaged. Anyway, in their 300-page totality, and with their many intervals of total dormancy, one lasting 16 years, they are a small and spotty mine to dig in.

The diaries do, nevertheless, yield some gold. To put it briefly, since this review means to concentrate on other matters, the diaries make it possible to believe, from the brilliant example of FF himself and many others in his sphere—Henry Stimson, Dean Acheson, the two Roosevelts, Jean Monnet, Neils Bohr, Chaim Weizmann, to mention a few—that high-minded, principled, and intelligent men who are also practical, realistic, and tough can function surpassingly in government or in universities without letting one set of qualities corrupt the other.

By and large, except for a few nuggets of a baser kind of pay dirt, the rest of the diaries' yield is hardly worth the digging. Of the exception—occasional intelligence not easily come by anywhere else on the intramural behavior of Justices of the Supreme Court—more will be said in due course. Of the by-and-large, it must be conceded that as a response to "the claims of history," which both diarist and editor

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assert to be the main justification for opening them to the public, the diaries fail. They do not illuminate, indeed they do not even mention, the more renowned pre-New Deal events and movements in which FF participated: the Sacco and Vanzetti case, the Paris Peace Conference after World War I, Zionism, the defense of unions from destruction by labor injunction, the commutation of Tom Mooney's death sentence, the saving of victims of the Palmer raids from deportation, and the establishment of the American Civil Liberties Union. And if they illuminate FF's later participation in the history of his time, it is only slightly. On his role in FDR's court-packing plan, for example, there is nothing. On the question of whether FF really was the *éminence grise* of the New Deal, the little there is merely makes it evident that he was not, at least during the periods in which the diaries were kept. Since those periods all together add up to eight months and FDR was President for 12 years, a satisfying answer has to be looked for elsewhere.

No put-down of the publisher intended. If the diaries are far less than a mother lode for historians, they were never advertised as one. They do in fact have some veins of special ore well worth working. Besides, the book is considerably more than the diaries. What Joseph P. Lash modestly announces as his "introductory essay and footnotes" is not merely a supplement of helpful information and an editor's tying-up of loose ends. The essay, 95 thoughtful pages by a biographer of certified¹ competence, supplies a clearer and more comprehensive summary of Frankfurter's career in government, teaching, and law than can be found anywhere else. And the notes identify, describe, and explain people, events, and settings which readers will have to keep in mind just to be able to grasp the significance of some entries. Lash's contribution has, in short, made the diaries publishable. Felix Frankfurter has had the luck to attract to a fragmentary remnant of his life not merely an editor but an indispensably needed posthumous collaborator.

When, in the last quarter of his essay, the editor-collaborator-biographer-historian becomes critic as well, his constancy in support of his subject wanes. Thus, after giving rout to an old canard that FF had been "duplicitous" in not disclosing to the public his views on President Roosevelt's court-packing plan,² Lash goes on as follows:

1. Lash received a Pulitzer Prize for biography in 1972.

2. Max Freedman's misguided "documentation" of this spurious charge in his book on the FDR-FF correspondence had lent it enough plausibility to make Mr. Justice Douglas's repetition of it in 1974 understandable. See M. FREEDMAN, *ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928-1945* (1967); W. DOUGLAS, *GO EAST YOUNG MAN* 322-23 (1974). See also my comments on Freedman's book in Isenbergh, *Claims of History? or What the Market Will Bear?*, 45 VA. Q. REV. 345 (1969).

But more needs to be said, even if in hindsight. Do Congress and the public not have a right to expect from the nation's foremost authority on Court and Constitution not silence but counsel?³

One may well ask why "more needs to be said." It has become clear that FF had nothing at all to do with the original design of the plan and that his connection with efforts to promote it was hardly more positive, consisting mainly of compliance with an oblique suggestion from the President to remain silent.⁴ The only reason Lash suggests to establish FF's responsibility to speak out—that in keeping his counsel to himself, the then professor at Harvard Law School was infringing a right of Congress and the public—disintegrates on a moment's thought. For readers of Lash who will not give a moment's thought—inevitably there will be many of them—the accusation of scanted civic duty may poison their attitude toward FF as much and as unfairly as the charge of duplicity which Lash refutes.

The question of whether Frankfurter really was the strategist of the New Deal receives the same treatment: a defense against unfounded imputations mixed with a gratuitous acknowledgment of blame where the facts do not show any. And that treatment produces about the same result, an impression on balance not only unfavorable to FF but also at odds with the one Lash seems to have set out to convey. Thus, his response to portrayals in the anti-New Deal press of "Frankfurter as an Iago, a Svengali, an *éminence grise*," is the categorical assertion that "[t]here was nothing sinister about Frankfurter's role."⁵ And yet some pages further on he writes that Mr. Justice Frankfurter in the autumn of 1941 "was taking enormous risks . . . with the Court's authority and independence, because he was seeking . . . to lead a flaming cause from the cloister of the High Court's chamber";⁶ that his "political involvements" were distinguishable from Mr. Justice Douglas's only because "Douglas was ambitious for office for himself and Frankfurter was not";⁷ and that he engaged in "behind-the-scenes intervention in government affairs" while he was on the bench.⁸

Lash's casual dropping of such statements without a sign of awareness that they contradict his earlier general denial is remarkable. Equally so is his acceptance of their veracity either on faith or on the basis

3. J. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 62 (1975) [hereinafter cited by page number only].

4. See President Roosevelt's letter of April 5, 1937, set forth in M. FREEDMAN, *supra* note 2, at 396.

5. P. 53.

6. P. 75.

7. P. 77.

8. P. 88.

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of evidence too slight or silly or spurious to have any probative force. The following passage is an illuminating example of his approach. It is the only foundation, if it may be called that, which he lays for referring to the Justice as a taker of “enormous risks . . . with the Court’s authority and independence.”

[A. A.] Berle in the autumn of 1941 was worrying about an alleged Frankfurter move to get rid of Secretary of State Hull. “Frankfurter is apparently getting a little out of scale,” Berle wrote in his Diary, adding that “Stone is unhappy and wants to do something about it. If he wants the Supreme Court to be safe, he had better. . . .” A few weeks later Berle had “a quiet private dinner with Justice Stone. We talked of many things; I voiced my fear that Frankfurter’s operations on so many fronts were beginning to imperil the Supreme Court’s position; Stone indicated, with equal caution, that he felt the same way about it.”⁹

Here is a brew of feelings, fears, rumors, and opinions, too full of dubious ingredients to be swallowed on the brewer’s say-so. A. A. Berle, as noted by Lash earlier in the essay,¹⁰ was known to bear a long-standing grudge against FF.¹¹ The “alleged Frankfurter move to get rid of Secretary of State Hull” which worried him is such evident nonsense that refutation may be postponed until the general question of FF’s undisclosed participation in government is taken up below. The point to be made now is that Lash’s evidence is hearsay twice-removed—Berle’s statement about the allegations of undisclosed others about the activities of FF. Berle’s attribution of his own opinion to Chief Justice Stone is worth no more as proof that Frankfurter was in fact “getting a little out of scale” in his nonjudicial activities; or that if he was, the activities threatened the safety of the Court; or for that matter, that the Chief Justice either understood Berle’s Delphic utterance at the dinner table or intended his own response to convey the same fear and condemnation which his dinner partner was later to record in his diary. Lash nevertheless accepts the passage just quoted as gospel. When, in the sentence immediately following it, he refers to “the enormous risks” FF was taking by leading “a flaming cause from

9. P. 75.

10. P. 44.

11. Frankfurter’s reciprocal sentiments are revealed in this excerpt from his diary entry for January 24, 1943:

I well know that nothing can be so foolish or so incredible . . . as to be incapable of being expressed privately by Berle. There is not one iota of doubt that Berle is almost pathologically anti-British and anti-Russian, and his anti-Semitism is thrown in, as it were, for good measure, though probably derived through certain personal hostilities and jealousies.

P. 168.

... the High Court's chamber," he makes it plain that he means not merely to summarize the gossipy tissue Berle believed but to present a factual conclusion he has come to himself.

As noted, Lash sidles into acquiescence in two other uncomplimentary views of FF. One of them, which takes the Justice to task for "political involvements," may be passed over quickly. Lash gives no idea of what the political involvements were (or what Mr. Justice Douglas's were, with which he compares them). Even professional vilifiers of FF such as Westbrook Pegler never suggested that there were any.

The "behind-the-scenes intervention in government affairs" is quite a different matter. It *was* FF's fate, despite a flamboyant temperament incompatible with the role, to be thought of even by friends as *the* behind-the-scenes maker of national policy of his time. So much had this view of Frankfurter been in the air and so much has it persisted that Lash's slipping back into it after bringing forth particulars which seem to destroy its validity may pass unnoticed. But if response to claims of history is indeed the justification for this book, we the readers ought to notice. Especially if we are lawyers, we ought to come to grips with the evidence and decide for ourselves whether the picture of FF as a figure in the shadows exercising vast power in affairs of state is fact or myth.

II

Fragmentary as they are, and warily as one may choose to read them after the editor's warning that the diarist may have "withheld and destroyed some parts,"¹² the diaries themselves lead us far toward a confident answer. When Roosevelt died, Frankfurter had been a Justice of the Supreme Court for six years. During those years, 1939 to 1945, there are entries only for a period of six months, from January to June of 1943. But since there are 134 entries within that 176-day span, the period is far and away the most completely calendared within the diaries' extensive compass. It was a period of unrelenting crisis, one in which a President in the habit of relying heavily on a particular adviser would presumably have been in close touch with that adviser frequently. That the diaries show only three meetings between FDR and FF during those six months, all of them on ceremonial occasions with many others present, is at least enough to cast doubt upon the hypothesis of the Justice as the President's right-hand man.

Anyone clinging to that hypothesis nevertheless on some theory

12. P. xi.

that other meetings were deliberately covered up will get no help from such internal evidence as may be fine-combed from the text itself. Surely a man used to being in the President's company for intimate discussions of momentous issues would have no impulse to record, as FF did, two pages of details of the President's chitchat at a White House lunch.¹³ Nor would he be likely to regard it as worth noting that at a state dinner for President Barclay of Liberia, FDR "let me carry" the burden of conversation with the guest of honor.¹⁴ Nor, unless he were a monumental hypocrite, and insensitive enough about it to boot not to mind revealing it to one of FDR's closest associates, would he define his accessibility to the President for advice in the following terms, as he did for Judge Rosenman¹⁵ on February 26, 1943:

Sam (Judge) Rosenman phoned me and talked about the WPB [War Production Board] situation. I told him . . . that I was not competent to say who should be put in Nelson's place What I was sure of is that the man at the head of WPB must be one who is actually capable of running the organization ten hours a day . . . and that Baruch certainly is . . . not capable of doing that. The war production process cannot be run by intermittent flashes—occasional wise advice of a general nature—which is the function that Baruch has been exercising In a single word, my view was that . . . production . . . problems [are] not to be solved by glamour and a good press. Sam said "You are speaking words of wisdom and you ought to tell all that to the President. You should come up and see him." To which I replied "No, I should not. Of course whenever the President wants to talk to me about anything about which I am free to talk, I shall tell him frankly what I think. But it is not my business to volunteer views although of course you are free to tell him the substance of our conversation."¹⁶

If Lash has any more reliable grounds than scandal-sheet gossip for not accepting FF's own definition of his advisory role at face value, he does not disclose them. What he does bring forth is either beside the point, picayune, hazy, unsupported, or all of these at once. Thus,

13. Pp. 192-93 (Feb. 21, 1943).

14. P. 245 (May 26, 1943).

15. Mr. Lash provides this profile of Judge Rosenman: Samuel I. Rosenman's association with Roosevelt dated back to the 1928 campaign for governor. He was the mainstay of the Roosevelt speech-writing team and during the war years served in addition as White House legal counsel, drafting many of the President's executive orders. He was part of the Roosevelt household and usually stayed at the White House when he was in Washington.

P. 162 n.2.

16. Pp. 191-92.

one of the two specific incidents he relies upon is FDR's decision, at the urging of retiring Chief Justice Hughes, to ask FF in June, 1941, for advice on choosing a successor.¹⁷ Whoever sees impropriety there—I do not—will have to concede that it is not the kind to cause “uneasiness about Frankfurter's nonjudicial activities”¹⁸ which three months later A. A. Berle imputed to Chief Justice Stone. (Incidentally, FF had recommended Stone, and Stone knew it.)

Lash's other reliance is upon a telegram which FF, then vacationing in Connecticut, sent to FDR on September 3, 1939, immediately after a radio talk on the German invasion of Poland in which the President had said that “[e]ven a neutral cannot be asked to close his mind or his conscience.” FF's response in full was this: “MANY THANKS AND ESPECIALLY FOR NOT REQUIRING US TO BE NEUTRAL IN THOUGHT.”¹⁹ Perhaps a stickler for protocol would see something wrong in such a telegram from a Justice of the Supreme Court to the Chief Executive. But Lash makes plain that what he sees wrong in the telegram is far worse than a lapse from finicky standards of conventional good form. He offers it as the only documentation in support of otherwise unsupported assertions that at the outbreak of World War II, FF, who had been on the Court for only half of the 1938-1939 term, was “more of an activist than ever,” “had not diminished his assistance to Roosevelt,” and by a stream of “chits, . . . memoranda, . . . letters and telephone calls” to the President which “[i]ncreasingly . . . dealt with the approach of the war” had helped the President work out his policy on that subject.²⁰ Claims of history deserve better fulfillment. The telegram does not respond to them at all, unless it be negatively, in that by coming forward with no stronger support of the charges he makes, Lash may induce the belief that there was nothing to them in the first place.

III

If one feels the need for more light on the relationship between FDR and FF after FF became a Justice of the Supreme Court, another accessible source of it is their correspondence.²¹ It is a source, moreover, which commands acceptance at face value. Even the most extreme disparagers of the parties would find it hard to believe that for six years they both systematically doctored their communications to

17. P. 75.

18. *Id.*

19. M. FREEDMAN, *supra* note 2, at 499.

20. P. 74.

21. *See* M. FREEDMAN, *supra* note 2, at 485-774.

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each other in order to hide their true relationship as adviser and advised from an audience which was not to come into being until after their death. The correspondence is therefore a promising hunting ground for credible clues on whether the Justice doubled as a power behind the throne to the extent Lash suggests.

It lives up to its promise. In the autumn of 1941, for example, the very time at which Lash finds FF was "taking enormous risks . . . with the Court's authority and independence" by leading "a flaming cause from . . . the High Court's chamber," the Justice and the President exchanged the following notes:²²

Washington, D.C., November 12, 1941

Dear Frank:

I'm a tough sleeper, but I became restless early this morning, and here it is, a little after seven, and I'm writing this note to you. For it's your cares that roused me from my sleep. As I came home last night and Marion and I saw those dreadful headlines,²³ we could talk of nothing else except all the burdens that the selfishness and ignorance and shortsightedness of others cast upon you.

And so I woke—thinking of coal and rails, and wishing that I could lift ever so little from your shoulders. But all I can do is to send you my most heart-felt good wishes for your strength and health, and my devoted affection.

Ever yours,
F.F.

The White House, November 14, 1941

Dear Felix:—

Ever so many thanks for that sympathetic note. I wish I could put you in charge of this coal production problem but I am afraid that the legalities of what I fear I must do may come before you for final approval! Is there any way I can cut you in half, leaving your starboard side on the bench and putting your port side to work in the Executive Branch of the Government!

As ever yours,
F.D.R.

That FF's statement of regret at being disqualified to offer help on "coal and rails" and FDR's at being disqualified to receive it were sham is just not to be believed.

22. *Id.* at 622.

23. Freedman states that the "dreadful headlines" referred to threats of industrial strikes, quarrels over production, and charges that some friends of the President were guilty of conflict of interest. *Id.* at 623.

The correspondence around the time of Hitler's invasion of Poland does not so directly contradict Lash's description of FF as unofficial counselor to the President on national policy relating to the beginning of World War II. Indeed, the letters themselves, with Freedman's annotations,²⁴ are sufficient although not compelling proof that there was, as Lash asserts, a heavier-than-usual stream of "chits, . . . memoranda, . . . letters and telephone calls" from FF to FDR. And FF did touch upon such topics as the neutrality laws, the President's appeals for peace to Hitler and Mussolini in the spring of 1939, and wartime taxation.

But still, the worst to be deduced from an openminded reading of the entire correspondence from 1939 and 1940 is that once in a while FF was harmlessly injudicious or a bit of a busybody. For the graver charge of improper participation in the making of the Executive Branch's policy in the early stages of World War II, a charge which Lash treats as a fact, the communications themselves supply not support but refutation. Most of them, like the telegram of September 3, 1939, which Lash quotes, are messages of encouragement or amiability between friends evidently in the habit of keeping in touch with each other. Pertaining as they do to events, speeches, illnesses, or whatnots which have already occurred, these are plainly irrelevant to the question of FF's role as policymaker. With a few notable exceptions, the miscellaneous remainder is irrelevant also.

The few exceptional letters call for less casual analysis. The first,²⁵ written when FF had been on the Court only three months, was an answer to FDR's question, "What would you think of Archie MacLeish [as Librarian of Congress]? . . . You might consult with Sam Morison and any other . . . minds you think useful."²⁶ Here was an assignment of a nonjudicial task made without so much as an introductory could-you-do-it, as if it never occurred to the assignor to handle the problem any other way. The assignee's response was in the same tone—informal (except for a "Dear Mr. President" at the beginning instead of FF's usual "Dear Frank"), generous (opening reference to "your kind inquiry" followed by an answer reflecting long hours of industry and thought), and personal ("you touch a subject of very special interest to me [which] I [have] had to think about . . . during my twenty-five years at Harvard, [and during] my early boyhood [when] an uncle of mine was the Director of the great library

24. See *id.* at 485-507, for all of the correspondence from the end of January, 1939, when FF took his seat on the Court, until the end of that year.

25. *Id.* at 492-94 (letter of May 11, 1939).

26. *Id.* at 492.

of the University of Vienna"). It was a tone suggesting that both parties were used to dealing with matters of this kind as friends, and that neither saw FF's elevation to the bench as barring exercise of mutually advantageous and pleasurable prerogatives of friendship, which they kept to themselves and which they quite reasonably believed might help the country and could not possibly hurt the Court.

Lash's essay and Freedman's annotation of Frankfurter's correspondence confirm that on at least three other occasions while FF was a member of the Court, he gave advice to FDR on appointments, advice on which the President relied heavily. Two of these unofficial consultations, on Harlan Fiske Stone as possible Chief Justice and on Judge J. J. Parker as a possible Associate Justice,²⁷ are at most minor sins against good form. I should be willing to defend them against even that inconsequential charge, not perceiving why good form constrains the President to make appointments to the Court without the benefit of advice from those who know the requirements of the jobs to be filled from first-hand experience.

The third such consultation,²⁸ which there is reason to believe resulted in the appointment of Henry Stimson as Secretary of War after Hitler began his blitz of Western Europe in 1940, is not so easily dismissed. The problem to be solved did not pertain to the makeup of the Supreme Court itself. Nor was it, like MacLeish's appointment, so confined in scope that the Supreme Court's subsequent involvement could be treated as a negligible probability. Freedman, moreover, takes it for granted that "Frankfurter's suggestion that Stimson be named as Secretary of War,"²⁹ rather than a response to a request by the President, was the original propulsive force. FF's earliest letter on the subject is ambiguous on the point, referring to a prior conversation on it with the President. Even assuming Freedman to be correct, anyone bent on assessing blame ought to keep in mind that for the new Justice, the President did not by operation of law cease to be an old friend; that unguarded mutual confidence and frankness had always been distinguishing qualities of their friendship; and that the entire episode took place at a time when the fundamentals of civilization were in jeopardy.

With the ambiguity as to who was the moving force resolved against him, and with no allowance made for the perilous circumstances, FF's intervention with FDR on behalf of Henry Stimson would have to

27. FF's conclusion: "[Parker's] opinions cannot fail to give an impression of a high degree of competence." *Id.* at 581.

28. *Id.* at 523-30.

29. *Id.* at 524.

be counted as a lapse from standards of nonjudicial activity appropriate for a Justice of the Supreme Court. But as support for Lash's intimation of sustained and pervasive influence by the Justice on the policies and programs of the Administration, this most extreme instance of FF's participation in recruitment and the three lesser ones are quite insufficient.

On the question of the Justice's influencing the grand lines of national policy more directly than by landing high posts for his followers, the correspondence is equally negative. True, the flow of communications to FDR diminished only slightly after FF became a Justice, and FF continued as before to write about a wide range of subjects, not eschewing the pivotal issues of the hour. But letters or memoranda on such issues were too infrequent and too full of signs that both parties considered them exceptions from the usual course of the correspondence to support the hypothesis that the Justice was a general or even specialized adviser of the President. In all of 1939 and 1941, the two years which Lash draws upon to support his assertion of behind-the-scenes participation in policymaking, only seven of FF's communications on questions of policy go beyond applause of decisions already made. And of the seven recommendations on courses of action not yet decided upon, there is clear evidence that FDR heeded only two of them. One was a two-sentence suggestion on changing the neutrality laws, which FDR underlined and had copied out as a separate note to himself labeled "*From FF.*"³⁰ The other was a long memorandum submitted 10 days after Pearl Harbor, summarizing the problems facing the President and recommending a reorganization of the Executive Branch for more effective administration of the war. This almost certainly was the original stimulus to the course of events which resulted 10 months later in the resignation of Mr. Justice Byrnes from the Court and his appointment as head of the Office of Economic Stabilization, charged with vast powers over the national war economy.

The five other recommendations of policy from FF to the President during those two years are surely of less consequence. Most of them are interspersed with phrases like "You will forgive me, an affectionate and devoted friend, for saying this"³¹ or "I am venturing to send [these sentences for possible use in a speech] because you have a waste-basket handy."³² No acknowledgment of any of them appears in the correspondence. Two of them proposed what was in fact later done, namely an increase in aircraft production and establishment of bases in Iceland. But it is hardly credible that FDR, known to have

30. *Id.* at 499-500.

31. *Id.* at 600.

32. *Id.* at 615.

pondered these questions long and hard, would have given much weight to military, technological, and economic advice offered by a volunteering amateur, however wise in other respects and however unflinching in his loyalty.

What can be deduced from the diaries themselves, from Lash's commentaries, and from the FDR-FF correspondence during the entire two years, then, is the following. Probably no more than four times during the entire period, but rarely in any event, FDR requested and received from FF advice on appointments, including appointments to the Supreme Court. Once or twice, although whether the exchange began with FDR or FF is uncertain, the President may have put to FF specific questions on matters other than appointments and gotten FF's opinion. On several occasions, but no more than 10 all together, FF volunteered advice to the President on a variety of questions of policy, some of them indisputably of vast range and importance. In only two instances, the appointment of Henry Stimson as Secretary of War and of Mr. Justice Byrnes as head of the Office of Economic Stabilization, are there persuasive indications that FF's advice carried the day, or for that matter, even appreciably influenced the decision.

If despite their long, continuing, and close friendship, that accounting establishes impropriety in the relationship between a Justice of the Supreme Court and his President, so be it. But on the issue of FF's role as a major adviser of the President and his "taking enormous risks . . . with the Court's authority and independence," it compels conclusions quite the opposite of Lash's.

IV

For the period before the Harvard Law School professor became a Justice of the Supreme Court, Lash shows more resistance to the vulgar view of FF's influence on FDR's administration. There is some tendency in the introductory essay to treat every recommendation from FF to FDR as if it were the only advice upon which the President acted. But Lash makes it clear that FF was not, as wisecracks of the day spread it abroad that he was, the prime architect of the New Deal. Lash recognizes, for example, that the creative center of the New Deal was the famous Brain Trust composed of Raymond Moley, Rexford Tugwell, and A. A. Berle, of which Frankfurter was never a member. Lash even concedes that most of the help FF offered at the President's request was not gratefully received.³³

33. P. 44.

This is not to say that the President did not often call upon FF directly for advice on all kinds of problems of state, nor that the advice he gave was not often followed. But there is a profound difference between a devoted friend upon whose wise counsel one draws heavily in times of crisis and an officially established consortium charged with drawing lines of policy for the Administration.

The short of it is that never—not when FDR was still Governor of New York, not while he was President-elect, not in the earlier years of the New Deal—did FF think of himself nor did FDR treat him as his principal adviser on anything. The correspondence was steady, even during the academic year 1933-1934, which FF spent at Oxford. (FF's communications made up at least 95 percent of it in volume.) It included everything from comments on the Boston Harvard Club's cheese³⁴ to suggestions for a State of the Union Message.³⁵ But still, it was correspondence. It was not the regular, direct consultation without which functioning as a major, not to say the principal, adviser to a President is impossible.

Man-to-man meetings were rare, adding up to only 14 during the entire period from FDR's election in 1932 to his naming FF to the Court in 1939, save for a few weeks in June, July, and August of 1935. During these exceptional weeks, which followed immediately after the *Schechter* decision,³⁶ FF appears to have made longer and more frequent stopovers in Washington than at any other time during this period. Possibly, but by no means certainly,³⁷ he consulted with the President as many times then as during the entire balance of those six years.

In any event, that single unusual concentration of consultations after *Schechter*, however frequent they may have been, is readily explained by a coincidence. At a time when judicial annulment of an Act of Congress seemed to have destroyed the Government's main program for bringing the United States out of the worst economic depression in its history, the President's best friend and closest confidant happened to be an outstanding legal authority whose specialty had been the study of the consequences to the nation of crucial decisions of the

34. See M. FREEDMAN, *supra* note 2, at 439, 440.

35. *Id.* at 404-06.

36. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), held unconstitutional the National Industrial Recovery Act of 1933, then thought to be the statutory cornerstone of the New Deal. The grounds of decision were insufficient definition of delegation of power to the President and excessive assertion of power under the commerce clause.

37. The correspondence and Freedman's annotations do not provide, as they do for the rest of the period 1932-1939, a basis for determining how many meetings between FDR and FF took place in the weeks after *Schechter*. See M. FREEDMAN, *supra* note 2, at 273-75, 281-85.

Supreme Court. Even if Professor Frankfurter had never been in President Roosevelt's personal circle, it would have been natural for the President to seek his advice and to prevail upon him to remain in Washington for consultations on how to get an alternative program under way. Such an ad hoc arrangement would not have lifted a Professor Frankfurter who had previously been a stranger to the President into the position of principal presidential adviser. It is hard to see why the conclusion should be different only because this Professor Frankfurter was the President's friend.

I believe that on balance Lash has done undeserved harm to FF's reputation; that despite the admirable job he has done in collecting and organizing the previously uncollected and unorganized facts of FF's nonjudicial life, he has been deeply affected without realizing it by the cheap broadside often loosed during FF's lifetime that he was "the most influential single individual in the United States";³⁸ and that as a consequence, in the course of trying to dispel the fiction of FF as *éminence grise*, he has unwittingly revived another one, less extreme but of like malignant tendency.

Neither before nor after FF became a Justice of the Supreme Court was he the giant among makers of national policy that Lash takes it for granted he was. Personally close as he remained to the creative center of national policymaking during Roosevelt's four terms, FF was almost always at least once-removed from the process itself. When he was called upon or even when he volunteered, it was typically to help with a speech or a message, to appraise what someone else had proposed, to express a preference among alternatives developed by others, or to serve as a broker for the recruitment of others to fill policymaking posts. Perhaps the latter, indirect as it also was, was his most important contribution to the making of national policy. FDR looked to him as Wise Man, not as Lieutenant, and in his loyal response before and after he came to the Court, Frankfurter's influence was moderating rather than directional. He was never FDR's Colbert. And yet, Lash, for all his care in working through the materials which show that FF was not a major power behind the throne, may have revived a dying myth that he was.³⁹

V

Near the beginning of this review it was announced that more would be said of the intelligence on intramural behavior of Justices of the Supreme Court which may be gleaned from the diaries. Postponement

38. *Id.* at 303.

39. See Isenbergh, *supra* note 2, at 347-48.

until now reflects the reviewer's disappointment with the yield. To be sure, there are 32 entries for 1943, 17 for 1945-1946, 12 for 1947, and three for 1948, which bear in some way upon the Court, and many of them rivet attention. But of the important juridical questions the Court had before it or the functioning of the Court as a juridical institution, the diaries say next to nothing.

Morris Raphael Cohen, FF's friend for 60 years, once berated him for "thinking in terms of personalities and neglecting ultimate issues."⁴⁰ However misplaced that criticism may have been elsewhere, it quite fits Frankfurter's treatment of the Court in the diaries, which consists almost entirely of observations on the personal qualities of his brethren as revealed in their participation in the Court's business, with hardly a word on what the nature of that business was.

One cannot fail to be arrested by statements like the following: "Black [at a Saturday conference of the Court] indulged in a harangue worthy of the cheapest soapbox orator . . . [A] perfect illustration . . . of Brandeis' remark to me, 'Black hasn't the faintest notion of what tolerance means, and while he talks a lot about democracy, he is totally devoid of its underlying demand which is tolerance in his own behavior'";⁴¹ "Roberts . . . said [that] Black [at another conference] just rode roughshod over everything and everybody . . . [And] I replied . . . I just could not be silent when . . . Black [went on] with fanatical disregard of the truth of the cases and statutes";⁴² "not long after Douglas came on the Court it was . . . plain . . . to me that he was not consecrated to the work of this Court but his thoughts and ambitions were outside it. . . . [S]uch ambition in a man corrupts his whole nature—especially if he is a judge";⁴³ "[Burton] hasn't the remotest idea how malignant men like Black and Douglas not only can be, but are."⁴⁴

But after the shock, when one ponders these statements and others like them, what more is there to say than that if they are true, they diminish the accused, and if not, the accuser? Whichever conclusion he reaches, the reader is not appreciably advanced toward better understanding of the Court as a judicial body or of FF or Black or Douglas as jurists. It is to the credit of Lash that, having the task of building a marketable book with no more than a fragmentary journal of infrequently relieved dullness as a foundation, he did not indulge

40. P. 55 (quoting a letter from Cohen to Frankfurter, July 23, 1935).

41. P. 174 (Jan. 30, 1943).

42. P. 228 (Apr. 20, 1943).

43. P. 230 (Apr. 27, 1943).

44. P. 343 (Mar. 9, 1948).

himself the slightest exploitation of those few sensational pages of which a sample has just been given.

VI

On the less sensational but more significant subject of evaluating FF as a judge, there was no reason for Lash to speak at all. Unlike the short biography and notes, which provided a setting for the diaries, appraisal of FF's judicial career was not a prerequisite to creating a workable book. Moreover, such an appraisal, to be worth anything, would require more effort than all the rest of Lash's essay and all of his notes put together. It would have to start with a study of the 263 opinions for the Court, the 171 concurrences, and the 291 dissents which FF produced in his 22 years as Associate Justice; it would have to go far and deep in many other directions; and it would have to make use of the acumen and skill of a first-rate legal analyst. One has to agree with Lash's statement that a "systematic analysis of [FF's] contribution to the Court is beyond the scope of this essay."⁴⁵ After the most respectful reading of the 10 pages or so of comment on FF as a judge with which Lash, not a lawyer himself, nevertheless follows this salutary abnegation, one regrets that he did not abide by it.

The conclusion which Lash's juridical analysis brings him to, that FF "was not one of the giants of the Court,"⁴⁶ coincides with the prevailing opinion among more qualified evaluators of FF's judicial performance. Even among votaries⁴⁷ of the Justice it is not likely to be contested, and in my opinion ought not to be. Lash's conclusion about FF's nonjudicial career is that in the influence he exerted upon the Executive Branch, Frankfurter *was* a giant. Paradoxically, it is this conclusion—though one which Lash's mastery of the materials and experience as a biographer well qualify him to assay—which is likely to be contested. For the reasons suggested above, it ought to be. In his third career, as a teacher at Harvard Law School and writer on the law, FF was generally regarded as often brilliant, prevailingly snobbish, on occasion windbaggy, and never dull, but yet not a giant of the academic world. With this appraisal, Lash agrees.⁴⁸

Why this preoccupation with whether or not FF was a giant in his multifarious professional activities? Behind the overworked metaphor there lies a fundamental question on the significance of the book:

45. P. 78.

46. P. 87.

47. The reviewer readily admits to being one. See Isenbergh, *Reminiscences of FF as a Friend*, 51 VA. L. REV. 564 *passim* (1965).

48. See pp. 15, 35, 36.

is publication justifiable of a piecemeal personal record kept briefly and irregularly by a man who never quite touched the superlative in any of three careers, a record which illuminates him and his time only with the indispensable help of an accompanying essay and notes supplied by another? I believe that publication is abundantly justified. True it may be that already, only 11 years after FF's death, there are signs that he will not be remembered long as judge, adviser on high government policy, or legal scholar and teacher. But with the diaries and Lash's biography and notes put before the public, another attribute of FF, which might otherwise have been soon forgotten, may find a place in American historical lore destined to endure for a long time.

That attribute, indeed a secular phenomenon, was FF's unique capacity for friendship.⁴⁹ That his wife's comment, "'Felix has two hundred best friends,'"⁵⁰ was no exaggeration is borne out by the diaries themselves at too many places to cite and by Lash's emendations.⁵¹ Never since Voltaire held court at Ferney has there been anything to compare with the constant parade of friends to FF in Washington and Cambridge. Most came just for the pleasure of his company, and FF being as good a talker and listener as there was in his day, they usually felt amply rewarded. Many, regarding FF as the wisest man they knew, came for advice, sometimes on pivotal problems of their lives and careers. More often than not they got it roundly. Besides wisdom, they counted on him for loyalty, discretion, and sympathy, and he was generous with these, too.

Who were his friends? Young law clerks, old scientists, middle-aged actors; musicians and ministers; Dean Acheson, Henry Stimson, Hermann Blumgart; the British Ambassador, the Indian General Agent, the Archduke of the Hapsburgs, and the President of Czechoslovakia; T. V. Soong, Harold Laski, Fiorello La Guardia, and Charlie Chaplin; and so on to a length impossible to believe unless one recognizes that in the domain of friendship FF was a prodigy, in a class by himself during his lifetime, and possibly without a peer ever before. As soon as it is perceived how completely Frankfurter as friend eclipsed himself as jurist, teacher, or public servant, the sterility of putting a value on his performance in the lesser roles becomes apparent. It also becomes apparent that his relationship with FDR, the supreme expression of his incomparable talent, was important to the nation not because of

49. This is a theme which I have developed more fully elsewhere. See Isenbergh, *supra* note 47.

50. P. 30.

51. Pp. 50, 51, 54, 88.

the influence it may have had upon particular programs and policies but because of the influence it surely had upon the President's heart and soul.

That Lash does not make FF's genius for friendship a central topic is no fault of his. The diaries themselves do touch upon it obliquely. A few entries show FF as confidant and adviser of friends who were or thought themselves to be in crisis. Perhaps the most moving of these is the report of a conversation with Henry Stimson on May 2, 1943, when Stimson, 76 years old and Secretary of War, was having doubts that the President wanted him to stay on in his post.⁵² (FF's advice was that Stimson "ought not to be thinking about the subject at all.") But such entries are too few to suggest that publication of the diaries was the appropriate occasion for undertaking the inward-looking study of FF which any worthy explanation of his miraculous gift would require.

Although Lash properly regards it as his task to recount FF's achievements in law, government, and teaching, rather than to dilate on what manner of man he was, he does not conceal his fascination with FF's "complex, enigmatic character,"⁵³ and manages, without going beyond the bounds of an essay which has presentation of the externals of FF's triple career as its aim, to stir his readers into sharing that fascination.

Two short passages illustrate how certain Lash makes it that readers will look beyond his catalogue of FF's exploits to the nature of the man who performed them. At the beginning of his biographical sketch, he says of the "young Jewish immigrant" that his first day at Harvard Law School in 1903 gave him "one of the most intense frights" of his life and that he continued to be so "awed" as not to dare speak up once during the whole first year.⁵⁴ Near the end,⁵⁵ he refers to the elderly Justice of the Supreme Court presiding with regal assurance over "the great and the gifted" who "thronged" his chambers. Who would not marvel at such a change from scared alien to poised denizen of Mount Olympus and grand guru of the Olympians as well? And who would not wonder about what caused it? Or fail to realize that however mysterious the causes were, FF's deliberate molding of his own personality must have been of crucial importance among them?

Pursuing such a line of questions, one comes to the belief that what FF wrought within himself was by far the most creative enter-

52. Pp. 231-32 (May 2, 1943).

53. P. xi.

54. Pp. 3, 4.

55. P. 88.

prise of his life; that this, rather than his achievements out there in the world, is the measure of his worth as a man; and that, through the incomparable suffusion of friendship it made possible, it accounts for his most significant and durable influence on his times. Although the diaries do not provide Lash the occasion for coming to grips with such ultimates, and although he keeps within the proper scope of the smaller task he was called upon to perform, it is all to the good that he alludes to them nevertheless. For it would not be an unworthy consequence of Lash's effort, worthy as it is without further consequences, that it serve as a stimulus to someone to take on the enormous work of a full scale biography. Perhaps it will to Lash.