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Mr. Justice Felix Frankfurter 1882-1965

J. Edward Lumbard

MR. JUSTICE FELIX FRANKFURTER
1882–1965

Recipient of the
National District Attorneys Association's
1964 Furtherance of Justice Award

Acceptance Speech on Behalf of
Justice Frankfurter
by
J. EDWARD LUMBARD

At the 1964 Annual Conference of the National District Attorneys Association, held in New York City in August, 1964, it was hoped that Justice Frankfurter would be able to appear in person to receive the Association's 1964 Furtherance of Justice Award. Illness, however, prevented his personal appearance, and Chief Judge J. Edward Lumbard of the United States Court of Appeals of the Second Circuit Court accepted the award on behalf of Justice Frankfurter. The speech of acceptance that follows is not only a tribute to a great jurist but it also reflects some thoughts of another distinguished jurist with respect to the administration of criminal justice—Judge Lumbard himself.—EDITOR.

On behalf of Mr. Justice Frankfurter I accept for him the Furtherance of Justice Award.

In preparation to be his *alter ego* I visited him in Washington on August 11, and he told me what he would say if he could come here and stand on his own feet. He was bubbling over with vitality and ideas; I shall do my best to give his views as he would wish.

Justice Frankfurter is especially pleased to receive your award because his life has largely been concerned with criminal justice. Let me add that it must be especially pleasing to him that this award should be given one who served actively on the Supreme Court for over twenty-three years. During that time he has been the leading spokesman for the balanced view—that the primary function of law is the protection of society; that our continuing and principal dilemma is to achieve that and at the same time give proper recognition to individual rights.

In 1906 after graduation from Harvard Law School, Felix Frankfurter returned to New York to clerk in a law office. Henry L. Stimson had recently been appointed United States Attorney by Theodore Roosevelt and Felix Frankfurter answered his call to public service at a reduced salary—reduced salaries were one of the rules of the game then, as now. Stimson had accepted on two conditions: first, a free hand in running the office—no interlopers from elsewhere to come into the district to try cases—and, second, a free hand in the selection of his staff. For his young assistants their years of federal service were golden years which set their course for the future.

Justice Frankfurter wanted me to tell you about the Morse case. In the panic of 1907 the failure of the Knickerbocker Trust Company and the National Bank of North America led federal investigation to the manipulations of Charles W. Morse—"a Maine man of powerful mentality whose real difficulty was that he was born I don't know how many centuries out of his time. He was meant to be a viking. He was an absolutely ruthless manipulator." He went into banking to finance his attempts to corner coastwise shipping and other operations, and in 1907 many small depositors faced great losses.

Felix Frankfurter assisted Stimson in the lengthy grand jury investigation necessitated by Morse's labyrinthine activities through 70 odd brokerage houses. After some weeks Stimson received a telegram from Roosevelt saying that he was sending up Loeb, his private secretary. Loeb told Stimson the President was greatly concerned because there had been no action and he was getting many complaints. In short, the President wanted action. Stimson explained the complications of the investigation and that he had to find out whether a crime was committed and what action he would be warranted in recommending to the grand jury, and as the Justice recites it in his reminiscences, Stimson said: "I don't know how long [the investigation]

will take.... It'll take a good long while. When the evidence is all in, if it warrants my so advising the grand jury, I shall advise them to find an indictment.... You tell the President that is the way I shall proceed, and if that seems too dilatory to him and he wants other action, then, of course, it's in his power to remove me and get some other United States Attorney."

And the Justice comments: "I'll never forget the excitement in me to hear Mr. Stimson tell the President what he was going to do."

When Felix Frankfurter told this to Emory Buckner, who had been with Stimson but had gone over to the county district attorney's office where Charles S. Whitman was district attorney, Buckner told Felix Frankfurter how Whitman had handled the Triangle Fire case. There had been a loft building fire in which several hundred young women had lost their lives when fire broke out and doors wouldn't open. The question was whether fire regulations had been disregarded. As Buckner told it, "Whitman came in this morning mad as fury, and he called in the head of the homicide division and said, 'What's happening in the Triangle case? '"

This was only a few days after the fire. "Well, boss, we're not finished with the investigation, but very soon we'll have the case before the grand jury."

"Well", said Whitman, "Get an indictment! We can always nol pros it. Here, look at it!" and he held up an editorial in the Hearst New York American. "You go and get an indictment. We can nol pros it if we can't maintain it. You can always nol pros." and the Justice comments: "Whitman was getting indictments because Hearst's American was shouting blue murder!"

Morse was indicted and tried and Felix Frankfurter's job was to sit in the courtroom and advise Stimson on the reception and rejection of evidence. He was instructed to advise when the government should not put in evidence, when it should not object to evidence and what was necessary to keep the record free of error.

Morse was convicted, Felix Frankfurter handled the case on appeal, and Morse served his sentence.

Stimson told his assistant, Frankfurter, that he would not be a lawyer until he could convince a jury, and so, as Felix Frankfurter puts it, Stimson threw him to the wolves. He prosecuted a man who had been impersonating a federal officer and cashing a lot of worthless checks, and as Frankfurter was summing up to the jury he happened to turn around and there was Stimson in the back of the courtroom.

After his tour of federal duty Felix Frankfurter was assigned to defend cases in General Sessions where serious criminal cases were handled and he learned about the defense side.

The Justice stressed to me two other features of service with Stimson: first, there was no reversal of any conviction secured while Stimson was district attorney—how many district attorneys could say this after four years of service in such an office?; second, when search warrants were executed some assistant went along with the executing officers to see that the law was carefully observed.

Then followed work in the War Department as legal advisor to Stimson, who had become Secretary of War under Taft. Felix Frankfurter worked on hundreds of legal records and after 1913 worked with John W. Davis, who had become Solicitor General after Wilson became President.

The Justice reminded me of what Taft had said at a Yale Law School commencement in 1905: "The administration of the criminal law in all the states in the Union (there may be one or two exceptions) is a disgrace to our civilization."

In 1914 Felix Frankfurter returned to Harvard Law School to teach. For twenty-five years he badgered and stimulated hundreds of law students and made them think for themselves. For some years he taught criminal law but by 1922, when I entered, he was teaching in other fields. It was my good fortune to sit under him in administrative law, and later his generous word to Emory Buckner helped me to become part of the Stimson-Buckner-Frankfurter tradition in the United States Attorney's Office after graduation from law school. Edward Silver, the able District Attorney for Kings County, New York [now Surrogate of Kings County] enjoyed a like fate. There are many men throughout this country who have moved into public service directly or indirectly as a result of Justice Frankfurter's ideas and suggestions.

You will remember the *Sacco-Vanzetti* case in the 1920s and Professor Frankfurter's passionate involvement in the public controversy which followed. His concern was not so much as to whether Sacco and Vanzetti were guilty of murder; what disturbed him was the unfairness of their trial and the questionable procedures followed by the state.

The Justice remarked that some years ago in reading many volumes of English decisions he was struck by the fact that he found no reversals of convictions because of evidence improperly ad-

mitted; the very few reversals in criminal cases were because the judge had misdirected the jury. Greatly concerned at the complaisance with which the bar and public in the United States suffered illegal practices and improper tactics on the part of the prosecutors, he provoked a law review note in 1929 which exposed the reckless tactics of Illinois prosecutors who did anything to win convictions and, on appeal, seemed to earn more reversals than affirmances. But few state prosecutors took any heed of the fact that the Supreme Court of the United States had nullified an Arkansas murder conviction in 1923 because of mob domination and, in 1936, had nullified a Mississippi murder conviction because a coerced confession had been used.

The Justice asked me to say to you: if state prosecutors had had Stimson's ideals and practices, there never would have been any need to seek federal court interference under the due process clause of the Fourteenth Amendment; resort to the federal courts would have been forestalled.

It was in 1941, and about Emory Buckner, that the Justice wrote, "He who wields the instruments of criminal justice wields the most terrible instruments of government. In order to assure their just and compassionate use, a prosecutor must have an almost priestlike attitude toward his duties."

How fortunate for the balanced view of criminal justice that after his becoming a justice of the Supreme Court in 1939 his sane views and articulate pen were there to cut through to the essentials and help the Court to steer its often tortuous course between the Scylla of leaving society without reasonable protection and the Charybdis of sacrificing individual rights. For example, there is no better statement of the need to question suspects and the difficulties of protecting their rights while being interrogated in the custody of police than what he wrote for a majority of the Court in *Culombe v. Connecticut*[1] in June 1961.

He was well aware that appellate judges are far from the battle and do not always take the full view. In one of his early opinions, 1942, where he dissented from the reversal of a fraud conviction, *Glasser v. United States*, he took occasion to warn his colleagues:

> "It is a commonplace in the administration of criminal justice that the actualities of a long trial are too often given a meretricious appearance on appeal; the perspective of a living trial is lost in the search for error in a dead record."[2]

And the next year in *Johnson v. United States*,[3] in concurring in an affirmance of conviction, he said:

> "In reviewing criminal cases, it is particularly important for appellate courts to re-live the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal appeal into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution."

How well this puts it!

This view he repeated vainly in 1961 in his dissent in *Stewart v. United States*,[4], when the Supreme Court reversed a murder conviction for the third time.

On the need for speedy justice, he wrote in *Nardone v. United States:*

> "Dispatch in the trial of criminal cases is essential in bringing crime to book. . . ."[5]

And in *Cobbledick v. United States:*

> "To be effective, judicial administration must not be leaden-footed."[6]

In the application of new rights a most important consideration is whether those rights shall be applied to all cases where they might have been asserted in the past or whether the courts need apply them only to situations arising after the decision which announces the new right. Justice Frankfurter saw the great havoc which such rulings might cause to state criminal justice and it was he who pointed out that wisdom might well counsel a cautious and limited application of new principles. His concurrence in *Griffin v. Illinois* in 1955 was the occasion for his expressing these views.[7] In that case the Supreme Court held that Illinois had violated Griffin's rights in not making available to him a transcript of the record of his trial and the Illinois courts were directed to afford Griffin effective appellate review. Justice Frankfurter pointed out that there undoubtedly were many indigent Illinois prisoners who had not been able to appeal and that, because the Court's ruling created new law, these prisoners could not be said consciously to have waived their constitutional rights. He

[1] 367 U.S. 568 (1961).
[2] 315 U.S. 60, 88 (1942).
[3] 318 U.S. 189, 202 (1943).
[4] 366 U.S. 1, 11 (1961).
[5] 308 U.S. 338, 341 (1939).
[6] 309 U.S. 323, 325 (1940).
[7] 351 U.S. 12, 20–26 (1956).

counseled that the Court should openly limit application of its new rule to cases arising after its decision:

"The Court ought neither to rely on casuistic arguments in denying constitutional claims, nor deem itself imprisoned within a formal, abstract dilemma. The judicial choice is not limited to a new ruling necessarily retrospective, or to rejection of what the requirements of equal protection of the laws, as now perceived, require.... In arriving at a new principle, the judicial process is not impotent to define its scope and limits."[8]

From the great wealth of his opinions I bring just one more quotation; his concurrence in the 1960 case of *Irvin v. Dowd*,[9] where an Indiana murder conviction was set aside because the prosecutor's statements and broadcasts had made it impossible to select an impartial jury in the community:

"More than one student of society has expressed the view that not the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community. One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. These rudimentary conditions for determining guilt are inevitably wanting in the jury which is to sit in judgment on a fellow human being comes to its task with its mind ineradicably poisoned against him. How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused."[10]

The Justice said that several years ago in England he was discussing crime news with a friend who was the editor of the London Times. He asked him whether he would be correct if he said that there were not two hundred people in London who knew the name of the Director of Public Prosecutions. The editor replied he was sure this was so, and that he himself did not know his name.

On the fairness of trials, the Justice gave me a quotation from Macdonell's *Historical Trials* about the trial of Michael Servetus, eminent 16th century physician, lawyer and scholar, who because of his theological heresies was burned alive at the stake in Geneva in 1553. Wrote Macdonell:

"There is no accepted test of civilization. It is not wealth, or the degree of comfort, or the average duration of life, or the increase of knowledge. All such tests would be disputed. In default of any other measure, may it not be suggested that as good a measure as any is the degree to which justice is carried out, the degree to which men are sensitive as to wrongdoing and desirous to right it? If that be the test, a trial such as that of Servetus is a trial of the people among whom it takes place, and his condemnation is theirs also."

And I believe Justice Frankfurter would say that every criminal trial is a trial of the community.

Justice Frankfurter brought to criminal cases not only his sense of the function of criminal law in society but also the same views of the judicial process and federalism that permeated all his work on the Court. He has felt strongly that it is the duty of a judge to subordinate personal views about legislation and administrative policies to the dictates of precedent and the law as written by the law makers. Thus his own strong views against capital punishment never played any part in his consideration of cases where the penalty was death.

In the matter of reviewing state court convictions, Justice Frankfurter felt that the Supreme Court was exercising a function quite different from its duty to supervise the administration of criminal justice in the federal courts. He felt that the Supreme Court should interfere with state court action only when it clearly passes beyond what is generally thought to be the limits of decency and fair play. Therefore, while federal requirements for the prompt arraignment of prisoners in federal cases should be strictly construed by the Court (as in *McNabb v. United States*),[11] the states ought to be given some leeway in their administration of criminal justice and interpreting their own requirements of law.

[8] *Ibid.* 25.
[9] 366 U.S. 717 (1960).
[10] *Ibid.* 729.
[11] 318 U.S. 332 (1942).

Justice Frankfurter's final admonition to prosecutors is this: Despite all the increased difficulties in securing evidence and prosecuting cases, the only course for the district attorney is to maintain high standards and to observe the law as laid down by the courts. This is not an impossible task—it can be done and it should be done.

You must know from what I have reported and from my brief account of Justice Frankfurter's fifty-eight years of concern about criminal justice how heartening to him is the accolade of the Furtherance of Justice Award. I have accepted the award in his name and at his request, but I entrust this beautiful representation of the award to Edward Silver, who will have the pleasure as well as the duty to deliver it to him in person.

In honoring Mr. Justice Frankfurter, whose flame has burned so steadily and with so bright and piercing a light for so long, you honor the highest ideals of the prosecutor and the public servant, and—indeed—all of those who believe that only balanced, wise, compassionate and restrained enforcement of criminal justice is in keeping with our democratic and egalitarian traditions, and that in the long run only criminal justice so administered can be an effective vindication of the right of society to be secure and the right of the individual to be fairly treated.