

# BOOK REVIEW

THE BRANDEIS/FRANKFURTER CONNECTION; by Bruce Allen Murphy.  
New York: Oxford University Press, 1982. 473 pp. \$18.95.

*Reviewed by Judith Resnik*†

*Should I be more serviceable to the State, if I took an employment, where function would be wholly bounded in my person, and take up all my time, than I am by instructing everyone, as I do, and in furnishing the Republic with a great number of citizens who are capable to serve her?*

XENOPHON'S MEMORABILIA bk. 1, ch. 6, para. 15 (ed. 1903), as quoted in a letter by Louis D. Brandeis to Felix Frankfurter (Jan. 28, 1928).<sup>1</sup>

## I

### THE RELATIONSHIP BETWEEN JUSTICE BRANDEIS AND PROFESSOR FRANKFURTER

From the same bits of information—letters, fragmentary notes, individuals' recollections, newspaper and historical accounts—several different stories can emerge, as the storyteller brings to the materials his or her own personal concerns and hypotheses. From reading some of the correspondence between Justices Brandeis and Frankfurter,<sup>2</sup> biographies of each,<sup>3</sup> and assorted articles about them and the times in which they lived,<sup>4</sup> I envision the following exchanges between Brandeis and Frankfurter:

The year was 1914. A young law professor, Felix Frankfurter, went to

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1. 5 LETTERS OF LOUIS D. BRANDEIS 319 (M. Urofsky & D. Levy eds. 1978) [hereinafter cited as LETTERS].

2. *E.g.*, 1-5 LETTERS, *supra* note 1. Other letters have been excerpted and summarized in B. MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION (1982) and in H. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER (1981).

3. *See, e.g.*, H. HIRSCH, *supra* note 2; J. LASH, FROM THE DIARIES OF FELIX FRANKFURTER: WITH A BIOGRAPHICAL ESSAY AND NOTES (1975); A. MASON, BRANDEIS: A FREE MAN'S LIFE (1956); M. UROFSKY, LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION (1981).

4. *See, e.g.*, Coleinan, *Mr. Justice Frankfurter: Civil Libertarian As Lawyer and As Justice: Extent to Which Judicial Responsibilities Affected His Precourt Convictions*, 1978 U. ILL. L.F. 279; Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683 (1965); Levy & Murphy, *Preserving the Progressive Spirit in a Conservative Time: The Joint Reform Efforts of Justice Brandeis and Professor Frankfurter, 1916-1933*, 78 MICH. L. REV. 1252 (1980); Mason, *Louis Dembitz Brandeis: Tempered Boldness in a Stand Pat Society*, 28 U. PITT. L. REV. 421 (1967); Rauh, *Felix Frankfurter: Civil Libertarian*, 11 HARV. C.R.-C.L.L. REV. 496 (1976).

one of his mentors, Louis Brandeis, for advice. Frankfurter had just been offered a teaching position at Harvard Law School but was unsure about whether to accept it. Some people from whom he had sought guidance, such as Henry Stimson and Oliver Wendell Holmes,<sup>5</sup> had urged him to decline it in favor of a career in government. Moreover, the salary was small—ranging from \$6,000 to \$10,000 per year<sup>6</sup>—and Frankfurter was not wealthy. Finally, he had doubts about his scholarly abilities.<sup>7</sup>

Unlike the others, Brandeis counseled that Frankfurter take the professorship. “[L]et those who have the responsibilities for selecting you decide your qualifications.”<sup>8</sup> Frankfurter heeded the advice and accepted the professorship.

In the following years, the friendship between Brandeis and Frankfurter deepened. Brandeis involved Frankfurter in a variety of activities, such as serving as the “Advisory Counsel” to an American Zionist organization.<sup>9</sup> In 1916, when Brandeis was nominated to the Supreme Court, Brandeis relied upon Frankfurter, as well as upon many others, to respond for him in the bitter nomination fight which ensued.<sup>10</sup> Brandeis’ defenders succeeded; on June 1, 1916, Brandeis’ appointment to the Court was confirmed.

Shortly thereafter, Brandeis wrote Frankfurter a letter. “You have had considerable expense . . . in public matters undertaken at my request or following up my suggestions and will have more in the future no doubt . . . . These expenses should, of course, be borne by me.”<sup>11</sup>

At first, Frankfurter demurred.<sup>12</sup> While he indeed had little money and spent a substantial amount of his time offering counsel and assistance to those who did not pay him, Frankfurter did not want to accept financial support from Brandeis. Moreover, he knew that, were he in need of additional funds, he could always earn money by consulting for corporate law firms.<sup>13</sup>

Despite Frankfurter’s polite refusal, Brandeis persisted, for several motives supported his offer of financial support. First, Brandeis, an avowed social activist, believed Frankfurter’s energies and talents should continue to be devoted to worthy, albeit unprofitable, causes. Second, Brandeis felt responsible for having urged Frankfurter, his

5. Levy & Murphy, *supra* note 4, at 1259.

6. B. MURPHY, *supra* note 2, at 42.

7. Levy & Murphy, *supra* note 4, at 1260.

8. *Id.* (citation omitted).

9. *Id.*; H. HIRSCH, *supra* note 2, at 44. Unlike many other joint activities in which Frankfurter may have become involved without Brandeis prompting, it appears that Frankfurter’s work in the Zionist movement was, in large measure, an artifact of Brandeis’ interest. See H. HIRSCH, *supra* note 2, at 17-19, 23-24, 44 (“Brandeis drew Frankfurter into Zionist affairs”).

10. M. UROFSKY, *supra* note 3, ch. VI.

11. B. MURPHY, *supra* note 2, at 40; 4 LETTERS, *supra* note 1, at 266.

12. B. MURPHY, *supra* note 2, at 40; 4 LETTERS, *supra* note 1, at 266-67.

13. See letter excerpted *infra* note 29.

"half brother-half son,"<sup>14</sup> to accept the professorship and, with it, a limited income. Finally, Brandeis was a millionaire and a philanthropist, well practiced in giving away money.<sup>15</sup> Sending the check a second time to Frankfurter, Brandeis urged its acceptance by arguing that the money should be viewed as reimbursement.<sup>16</sup> Frankfurter accepted.<sup>17</sup>

Over the years, Frankfurter grew more comfortable with the arrangement. When, in 1925, his wife became ill and in need of psychiatric care, he asked Brandeis for help. Brandeis responded with a check and the following words: "I am glad you wrote me about the personal needs . . . your public service must not be abridged."<sup>18</sup> Thereafter, Brandeis' secretary sent Frankfurter about \$1,750 twice a year until some time in the 1930's.<sup>19</sup>

This is one description of Brandeis' and Frankfurter's relationship. Most of this story's elements, including the fact of payment, have been disclosed by several authors<sup>20</sup> and were well known to Frankfurter's contemporaries.<sup>21</sup> Had the narrative been told as I outline it, it would have been an unlikely candidate for extensive media review. When the story is told differently, however, both the press and the scholarly world take note.<sup>22</sup> It is this other version of these same events—a description which alleges that Brandeis "secretly" paid Frankfurter to join Brandeis in an effort to shape public events while Brandeis' role remained unknown—that has prompted both this review and a spate of others.<sup>23</sup>

Bruce Allen Murphy, in his book, *The Brandeis/Frankfurter Con-*

14. B. MURPHY, *supra* note 2, at 39; 5 LETTERS, *supra* note 1, at 187. According to Danelski, Brandeis gave the same percentage of his estate to Frankfurter as Brandeis gave to his brother, nephew, and to his wife's sisters. Danelski, *Brandeis and Frankfurter*, 96 HARV. L. REV. 312, 321 (1982).

15. B. MURPHY, *supra* note 2, at 41.

16. "[T]his is nothing different than your taking travelling and incidental expenses from the Consumers League or the New Republic . . ." *Id.* at 40; 4 LETTERS, *supra* note 1, at 267.

17. B. MURPHY, *supra* note 2, at 41.

18. *Id.* at 42; 5 LETTERS, *supra* note 1, at 187.

19. B. MURPHY, *supra* note 2, at 42. It is unclear exactly when the payments stopped. Murphy cites letters dated only until 1934, *id.* at 374 n.86, but states that the payments continued until Frankfurter was appointed to the bench in 1939, *id.* at 42.

20. See, e.g., H. HIRSCH, *supra* note 2, at 44; M. UROFSKY, *supra* note 3, at 156.

21. Frank, *Review of Murphy*, 32 J. LEGAL EDUC. 432, 436 (1982).

22. See, e.g., the articles cited in Cover, *The Framing of Justice Brandeis*, THE NEW REPUBLIC, May 5, 1982, at 17; Margolick, *Letters Show Frankfurter a Secret Voice of Brandeis*, N.Y. Times, Feb. 14, 1981, at 1, col. 3; Schlesinger, *The Brandeis/Frankfurter Connection*, THE N.Y. Times Book Rev., Mar. 21, 1982, at 5; *Judging Judges, and History*, N.Y. Times, Feb. 18, 1982, at A22, col. 1.

23. See, e.g., Barbato, *The News Is There's No News in New Book on Justices*, 24 CHRON. OF HIGHER EDUC. 25 (1982); Cover, *supra* note 22; Danelski, *supra* note 14; Frank, *supra* note 21; French, *Book Review*, 67 MINN. L. REV. 287 (1982); Polsby, *A Tale of Two Justices*, 73 COMMENTARY 97 (1982); Reavley, *Free Speech for Judges*, LITIGATION, Fall 1982, at 5; Abrams, *Brandeis: After the "Secret Connection"*, N.Y. Daily L.J., July 9, 1982, at 2, col. 3; Kurland, *Review of Murphy*, Legal Times (Washington), Apr. 12, 1982, at 10, col. 1.

nection: *The Secret Political Activities of Two Supreme Court Justices*,<sup>24</sup> tells the Brandeis/Frankfurter story like this:<sup>25</sup>

Just one month after the opening of his first term on the Court, he [Louis Brandeis] put the relationship [with Felix Frankfurter] on a more business-like footing. Realizing that Frankfurter, as a professor at the Harvard Law School, would not be able to bear the considerable expenses associated with such a long-term lobbying effort [on behalf of minimum wage legislation, presumably, and other issues of concern to Justice Brandeis],<sup>26</sup> the justice was very willing to use for such a purpose some of his considerable financial holdings, which were estimated to be worth over 2 million dollars . . . . Brandeis wrote to [Frankfurter and enclosed a check for \$250, saying] . . . “[y]ou have had considerable expense . . . undertaken at my request or following up my suggestions *and will doubtless have more in the future no doubt*.”<sup>27</sup> These expenses should, of course, be borne by me. . . .” Frankfurter returned the check . . . . However, Brandeis was not to be denied . . . [H]e wrote [again]: “*I ought to feel free to make suggestions to you, although they involve some incidental expense. And you should feel free to incur expense in the public interest.*”

. . . .

Over the years, in fact, Brandeis donated nearly 1.5 million dollars to various causes . . . . What makes this particular contribution to Felix Frankfurter so unusual is that it was designed to free Brandeis from the shackles of remaining nonpolitical while on the bench and to permit him to engage freely in political affairs simply by sending to Frankfurter . . . “suggestions”<sup>28</sup> for various programs.

. . . Thus it was that Justice Brandeis and Professor Frankfurter forged in 1916 a potent partnership for the purpose of shaping public policy.

. . . [T]he financial aspects of his relationship with Brandeis led Frankfurter to view himself as an employee being compensated for services rendered.<sup>29</sup>

24. Professor Murphy's former title, “Justices as Politicians: The Extrajudicial Activities of Louis D. Brandeis and Felix Frankfurter,” was not so “newsworthy” as the title he adopted. See Murphy, *Elements of Extrajudicial Strategy: A Look at the Political Roles of Justices Brandeis and Frankfurter*, 69 GEO. L.J. 101, 130 n.192 (1980) [hereinafter cited as Murphy, *Extrajudicial Strategy*].

25. B. MURPHY, *supra* note 2, at 40-41.

26. Murphy's phrase, “such a long-term lobbying effort”, *id.* at 40, has an unclear referent.

27. Murphy's textual phrase misquotes the letter. Brandeis actually wrote, “will have more in the future no doubt.” 4 LETTERS, *supra* note 1, at 266.

28. Murphy does not note that Brandeis sent similar suggestions to many people. See, e.g., Letters to Jacob deHaas (June 30, 1918 & July 10, 1918), 4 LETTERS, *supra* note 1, at 346, 348-49; Letters to Julian William Mack (Sept. 1, 1920), 4 LETTERS, *supra* note 1, at 477-80; Letters to Julian William Mack, Stephen Samuel Wise, Bernard Flexner, Jacob deHaas, Felix Frankfurter, Robert Szold, and Alexander Sacks (Feb. 6, 1921 & Feb. 18, 1921), 4 LETTERS, *supra* note 1, at 530-32, 533-36.

29. Compare Murphy's earlier conclusion:

The excerpt I have chosen comes from Murphy's first chapter, entitled *Justice Brandeis, Professor Frankfurter: The Problem of Judicial Temperament*. In the chapters that follow, Professor Murphy relies heavily upon italics, erratically upon footnotes, and inordinately upon characterization to unfold his tale of Brandeis and Frankfurter. To Murphy, the story is about Brandeis' "employ" of his "lieutenant" Frankfurter to advance, in "secret," Brandeis' goals. Murphy amasses—and assigns great meaning to—an impressive collection of details about the sundry occasions when Brandeis or Frankfurter, or both, participated in the drafting of legislation, the staffing of executive branch departments, the writing of law review and magazine articles, and the conduct of foreign affairs.

Murphy lets us know that he disapproves of a good deal of the behavior he describes, especially where Frankfurter was involved. Murphy tells us repeatedly that Frankfurter was Brandeis' "lieutenant."<sup>30</sup> In fact, Murphy uses the word "lieutenant" so frequently that one suspects that he went over his manuscript and inserted the word whenever he thought allegations of conspiracy or of underhanded behavior were necessary.

The ultimate message of the book, however, is not clear. Murphy frames his tale with two object lessons. In an introduction, he describes how Abe Fortas' candidacy for Chief Justice of the Supreme Court failed because of revelations that Justice Fortas had worked closely with President Lyndon B. Johnson and had accepted a substantial sum

Certainly Brandeis never regarded Frankfurter as a mere "employee," nor could he objectively do so. Brandeis never asked the professor to undertake projects or to act on suggestions that did not command Frankfurter's independent approval and allegiance. Frankfurter also embarked on reform activities on his own initiative . . . [which] were begun without prompting from the Justice. In no sense, therefore, could Brandeis think of Frankfurter as being "on a salary," taking money in exchange for the unquestioning performance of assigned duties.

Levy & Murphy, *supra* note 4, at 1302-03.

Moreover, the letter from Frankfurter to Brandeis quoted by Murphy simply does not support Murphy's thesis that Frankfurter saw himself as an employee. Rather, the letter, excerpted below, indicates that Frankfurter asked Brandeis for money to enable Frankfurter to engage in "efforts of a public concern," rather than having to do "odd jobs" for some of his "New York lawyer friends" to make the money he needed to pay for his wife's psychiatric treatment.

After considerable self-debate, I have concluded that it is unfair to withhold from you a personal problem. To carry out the therapy prescribed . . . for Marion [Frankfurter's wife] will mean . . . \$1500 . . . . There is little doubt that I could fill the gap through odd jobs for some of my New York lawyer friends. But I begrudge the time . . . that would take from intrinsically more important jobs . . . . Marion knows . . . of the extent to which you make possible my efforts of a public concern . . . .

From this letter, Murphy concludes Frankfurter had "no qualms about asking the Justice for a 'raise' in 1925," B. MURPHY, *supra* note 2, at 41-42.

30. See, e.g., B. MURPHY, *supra* note 2, at 39, 60, 82, 89, 99, 113, 157, 248, 258, 321, 339. As Floyd Abrams noted, Murphy describes many people, including Brandeis' daughter, *id.* at 95, as "lieutenants." Abrams also commented that "[n]o one is ever promoted in the Brandeis army envisioned by Murphy." Abrams, *supra* note 23, at 2, col 4.

for giving a law school seminar.<sup>31</sup> At the other end of the book, we find an appendix, *Toward the Monastery: A Survey of Justices in Politics from 1789 to 1916*,<sup>32</sup> in which Murphy chronicles the myriad of extrajudicial activities undertaken by numerous Supreme Court Justices.

Professor Murphy plainly wants to use his pervasive criticism of the Frankfurter/Brandeis relationship to instruct us, somehow, about what relationship Supreme Court Justices should have with members of the other branches of government. But because we also learn from Murphy that (1) Supreme Court Justices have engaged in extrajudicial activities ever since the inception of the Republic and that (2) some Justices have had extensive, ongoing relations with members of the legislative and executive branches, it becomes difficult to decipher precisely what Murphy's specific complaints against Brandeis and Frankfurter are. The difficulty in understanding arises because Murphy does not adhere to a consistent viewpoint. At times he attacks Justices Brandeis and Frankfurter for engaging in any activity other than judging; at other times, Murphy appears critical of the Justices for their failure to be effective in extrajudicial activities. One example of Murphy's waffling is his critical description of Justice Frankfurter's efforts to help Charles Wyzanski, Jr. and Henry Friendly obtain judgeships and to promote Learned Hand for a Supreme Court appointment.<sup>33</sup> According to Murphy, Frankfurter believed that judges should be selected on their merit—rather than upon considerations of party affiliation—and he attempted to convince others of the validity of his views.<sup>34</sup> Murphy does not allege that Frankfurter was disingenuous in espousing the merit standard; rather, Murphy demonstrates that Frankfurter consistently and vocally adhered to merit as the criterion when recommending individuals to be judges. Yet Murphy does not miss an opportunity to make a snide comment. Murphy says of Frankfurter's support of Wyzanski's appointment:<sup>35</sup> "pure merit selection just happened to favor *his* candidate, Charles Wyzanski." Murphy's critical note is gratuitous, in that most members of the legal establishment shared—and share—Frankfurter's esteem for Wyzanski.<sup>36</sup> But my

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31. B. MURPHY, *supra* note 2, at 3.

32. *Id.* at 345-63. In the appendix, Murphy details that Justices have long engaged in extrajudicial activity, and that our modern day expectations of disengagement were not shared by our forebearers. In the introduction to the book, however, Murphy ignores his own historical discussion and states: "By tradition, those who join the judiciary recognize an implicit *quid pro quo* in the judicial appointment. Given life tenure . . . they are asked . . . to renounce voluntarily those activities that compromise or appear to compromise the public's belief in the integrity and political independence of the judiciary," *Id.* at 6.

33. *Id.* at 315-30.

34. *Id.* at 317.

35. *Id.*

36. See, e.g., Easley, *Introduction to John A. Sibley Lecture—An Activist Judge: Mea Maxima*

criticism of Murphy is not simply that he is needlessly nasty. Rather, Murphy is inconsistent in his views about whether Supreme Court Justices should play any role in the selection of other judges and Justices. After describing with apparent disapproval Justice Frankfurter's efforts on behalf of Wyzanski and Friendly, Murphy abruptly shifts the grounds for his attack on Frankfurter. Turning to Frankfurter's unsuccessful attempts to obtain a Supreme Court appointment for Learned Hand,<sup>37</sup> Murphy criticizes Frankfurter not for trying, but for failing to succeed. In Murphy's words,<sup>38</sup> "the nation was made to pay a dear price for Frankfurter's many prior appointment campaigns, which had had the cumulative effect of diluting the credibility of his exuberance at the very moment he most wanted it taken at full value."<sup>39</sup>

Murphy's ambivalence is not limited to this example. Murphy describes, with disapproval, many of the activities of Justices Frankfurter and Brandeis. But then, the last chapter of the book concludes with a laudatory proclamation:<sup>40</sup> "[T]he torch of reform had been lit by the prophet Louis Brandeis and carried over the years by the scribe of boundless energy, Felix Frankfurter." And, along the way, we encounter occasional tributes to the Justices for their extrajudicial efforts. In sum, Murphy's ambivalence, and his questionable interpretation of facts (which all too often are in effect described as "never before appearing in print"),<sup>41</sup> give us little help in thinking about—let alone in understanding—what role Supreme Court Justices should play in the world around them.

Murphy's book is disappointing because the difficult and interesting questions that are implicit in its subject are left unexplored. Was there something wrong about the payments of money by Brandeis to Frankfurter? If so, what? Is it a question of visibility: that while known to some,<sup>42</sup> the payments were not widely publicized? Or does the wrong flow not from the monetary exchange but from the associa-

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*Culpa Apologia Pro Vita Mea*, 7 GA. L. REV. 202 (1973) (Easley, in introducing Charles E. Wyzanski, Jr. to give the John A. Sibley Lecture, described Wyzanski's illustrious career.).

37. B. MURPHY, *supra* note 2, at 318-20.

38. *Id.* at 320.

39. Murphy might have argued—but did not argue—that a Justice's efforts on behalf of an individual for a seat on the Supreme Court are more appropriate than efforts to populate the lower courts. Murphy also neglects to remind us that Frankfurter was not alone in taking an active role in recommending individuals for judgeships. In an earlier, co-authored work, Murphy charts many Justices' similar attempts at influence. See Abraham & Murphy, *The Influence of Sitting and Retired Justices on Presidential Supreme Court Nominations*, 3 HASTINGS CONST. L.Q. 37 (1976).

40. B. MURPHY, *supra* note 2, at 340.

41. See, e.g., *id.* at 218, 270.

42. See, e.g., Frank, *supra* note 21, at 436. Murphy also acknowledges that a few people knew of the financial arrangement, B. MURPHY, *supra* note 2, at 43-44. Murphy attributes, at least in part, Justice Brandeis' assumed desire for secrecy to a well-founded fear of anti-Semitism. *Id.*

tion between sitting Justice and legal activist? Should we ban all extrajudicial activities by Supreme Court Justices?

## II

### THE FINANCIAL ARRANGEMENT BETWEEN BRANDEIS AND FRANKFURTER

Murphy, among others,<sup>43</sup> has told us that, while sitting as a Justice of the United States Supreme Court, Brandeis gave some money to Frankfurter, then a law professor at Harvard Law School. Although some of their contemporaries knew of the arrangement, neither Brandeis nor Frankfurter appears to have publicized it.<sup>44</sup> Moreover, each man, when on the Court, spoke often of the limits which his judicial role placed upon him.<sup>45</sup>

The financial arrangement between Brandeis and Frankfurter may, indeed, have been little known. But, the personal involvement and close friendship of Brandeis and Frankfurter were common knowledge. As Murphy himself has told us in an earlier work, "[b]y the end of the 1920's, Frankfurter had become a fixture in Brandeis private and public life."<sup>46</sup> Frankfurter openly selected Brandeis' law clerks,<sup>47</sup> was a

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Further, Murphy later states—by way of contrast to Frankfurter—that Brandeis did not "deny his own political interests or activities," *id.* at 258.

43. See *supra* note 20.

44. Since financial disclosure rules are relatively recent innovations, *e.g.*, Judicial Personnel Financial Disclosure Requirements, 28 U.S.C. app. §§ 301-309 (Supp. II 1978), and apply only to government officials, it is unclear what kind of disclosure Frankfurter could have made, and Murphy does not suggest what efforts to publicize the arrangement would have satisfied him. For discussion of the propriety of Justices accepting income from outside sources, see Note, *Extrajudicial Activities of Supreme Court Justices*, 22 STAN. L. REV. 587, 598-601 (1970); CODE OF JUDICIAL CONDUCT Canon 6 (1980) (requiring reporting of compensation received by judges for quasi-judicial and extrajudicial activities). For a discussion of attempts to limit judges' nonjudicial activities and to require financial disclosure, see McKay, *The Judiciary and Nonjudicial Activities*, 35 LAW & CONTEMP. PROBS. 9, 14-19 (1970).

45. See, *e.g.*, Brandeis' resignation from a variety of organizations and his refusal to serve on a commission to decide a border dispute with Mexico, described in Murphy, *Extrajudicial Strategy*, *supra* note 24, at 108; see also 4 LETTERS, *supra* note 1, at 233. For another example, see Frankfurter's assertion that the Court was a "monastery," B. MURPHY, *supra* note 2, at xiii, his refusals to engage in some activities, *id.* at 259-60, and his criticism of Justice Douglas' extrajudicial activities, *id.* at 261-68. See also Frankfurter, *Personal Ambitions of Judges: Should a Judge "Think Beyond the Judicial"?*, 34 A.B.A. J. 656, 658 (1948) (Supreme Court Justices must be "circumspect" in public speeches).

Despite Frankfurter's comments about the proper scope of a Justice's extrajudicial activities, his role as advisor to President Roosevelt has long been known. See, *e.g.*, ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE 1928-1945 (M. Freedman ed. 1967); a review of the correspondence by Isenbergh, *Claims of History? or What the Market will Bear?*, 45 VA. Q. REV. 345 (1969); J. LASH, *supra* note 3. But see a review of Lash's work by Isenbergh, *Frankfurter as Policymaker*, 85 YALE L.J. 280, 292 (1975) ("[N]ever . . . did FF think of himself nor did FDR treat him as his principal advisor on anything.").

46. Levy & Murphy, *supra* note 4, at 1296.

47. B. MURPHY, *supra* note 2, at 39; Levy & Murphy, *supra* note 4, at 1292; H. HIRSCH,

frequent guest at the Brandeis home, and edited a volume of essays about Brandeis as a tribute to him.<sup>48</sup> The two men did not hide their intimacy; for several years, they vacationed together.<sup>49</sup> Neither the fact of the relationship nor its closeness was covert.

Was there, then, anything wrong about the fact that Brandeis gave Frankfurter financial assistance? One concern might be that, had many of their contemporaries known of the support Brandeis gave Frankfurter, both men's judgments would have been suspect and neither man's opinions valued to the extent that they were. For example, if Brandeis had attempted to persuade one of his colleagues on the bench of the legitimacy of his view on some issue, and in doing so had relied upon a Frankfurter law review article, the colleague—had he known of the financial arrangements—might well have viewed Frankfurter's scholarship as unreliable because it had been financed by Brandeis. In contrast, if a colleague were unaware of the financial arrangement, he might have been persuaded by a Brandeis argument, as supported by a Frankfurter law review article.

The difficulty with the above scenario as an explanation of what was objectionable in the Brandeis/Frankfurter "counnection" is that all of Brandeis' colleagues must have been aware of the closeness of the two men. If Brandeis did in fact make arguments that relied upon Frankfurter's scholarship, the other Justices would already have been "on notice" of the many ties between the two men and might well have discounted the arguments in any event. Given the very public nature of the relationship, the unpublicized fact of financial support seems only of marginal relevance—at least insofar as it affected Justice Brandeis' relationships with his colleagues.<sup>50</sup>

Another kind of harm, however, must be considered. Supporting Frankfurter might not have affected Brandeis, as jurist, but may have undermined the integrity of Frankfurter, as scholar. The concern, of course, is that Frankfurter was financed not merely to think, but to think along lines approved by his mentor; as a result, his intellectual freedom might have been substantially curtailed. The fear that economic support may corrupt intellectual endeavors is not peculiar to Frankfurter's case; all scholars who receive funds from outside sources,

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*supra* note 2, at 86. According to J. LASH, *supra* note 3, at 36, Frankfurter also selected clerks for Justices Holmes and Cardozo.

48. See MR. JUSTICE BRANDEIS (Frankfurter ed. 1932). Frankfurter collected a similar set of essays for Justice Holmes in honor of the Justice's ninetieth birthday. See MR. JUSTICE HOLMES AND THE SUPREME COURT (Frankfurter ed. 1938). See also J. LASH, *supra* note 3, at 51.

49. B. MURPHY, *supra* note 2, at 77.

50. The Code of Judicial Conduct addresses the issue of judges' receipts of compensation but not the question of judges giving gifts and compensation to others. See CODE OF JUDICIAL CONDUCT Canon 6 (1980).

such as the Department of Defense or governments of foreign countries, face the problem. Many scholars nevertheless accept such support while attempting to maintain their integrity by resisting direct censorship and by hoping that no self-censorship occurs.

Whether the money provided by Brandeis in fact curtailed Frankfurter's intellectual independence is difficult to assess. In an earlier work, Murphy concluded that, prior to providing support, "Brandeis had . . . satisfied himself that Frankfurter's views on virtually all important political, social, economic and legal questions were likely to agree with his own."<sup>51</sup> Moreover, Murphy (and others) describe Frankfurter as having had several mentors, although most agree that Brandeis and Frankfurter had a special closeness.<sup>52</sup> Finally, Murphy notes that Frankfurter undertook several major efforts without Justice Brandeis' involvement and declined to act on some of Brandeis' proposals.<sup>53</sup>

Thus, while Brandeis undoubtedly had a profound influence upon Frankfurter, as well as upon many others, we cannot know which of Frankfurter's intellectual interests would have been pursued absent Brandeis' support. Further, Murphy himself is ambivalent on the question of Frankfurter's independence. In an earlier, co-authored work, Murphy concluded that Frankfurter was not a mere "employee" but maintained substantial independence.<sup>54</sup> In *The Brandeis/Frankfurter Connection*, however, Murphy appears to have revised his earlier assessment and stresses Frankfurter's supposed subservient status.<sup>55</sup> Given the evidence Murphy provides, his second conclusion seems unwarranted.

### III

#### EXTRAJUDICIAL ACTIVITIES AND SUPREME COURT JUSTICES

Turning from the question of financial support to the broader issues, Murphy's book leaves us without guidance to ponder what harms, if any, flowed from Justices Brandeis and Frankfurter's participation in the world beyond the Supreme Court. By helping their associates and clerks to get jobs, by advising their friends who were employed in diverse government offices, by expressing views on issues of the day, and by coordinating legislative efforts, did these Justices violate norms of

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51. Levy & Murphy, *supra* note 4, at 1260-61.

52. The ties between Brandeis and Frankfurter were forged in part by the fact that both were Jews, a minority in most of the areas in which the two worked, B. MURPHY, *supra* note 2, at 8-11.

53. Levy & Murphy, *supra* note 4, at 1274, 1302-03.

54. *Id.* at 1302-03.

55. B. MURPHY, *supra* note 2, at 41.

judicial behavior? And, more importantly, did the Justices dilute their ability to judge impartially the questions presented to them? Or did they intrude impermissibly on the work of coordinate branches of government?

### A. *The Custom*

From what Professor Murphy has told us,<sup>56</sup> and from what we know from others,<sup>57</sup> we must acknowledge that, for better or worse, and since the beginning of the Republic, many Supreme Court Justices have undertaken extrajudicial tasks. Several Justices have been close to and have advised Presidents.<sup>58</sup> Others have offered counsel and sought to intervene in both legislative and executive branch activities.<sup>59</sup> Supreme Court Justices, both Chief and Associate, from John Jay through Johnson, Story, Baldwin, Taney, Nelson, Chase, Field, Brandeis, Frankfurter, Vinson, Fortas, and Burger, have had extensive political connections which they have used to influence the course of events.<sup>60</sup> Thus, to the extent that custom informs prescription, we must conclude that our history demonstrates tolerance—if not encouragement—of Supreme Court Justices' extrajudicial activities.<sup>61</sup>

The frequency of extrajudicial behavior is not surprising.

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56. *Id.* at Appendix; Levy & Murphy, *supra* note 4; Murphy, *Extrajudicial Strategy*, *supra* note 24.

57. *See, e.g.*, R. DONAVAN, *TUMULTUOUS YEARS: THE PRESIDENCY OF HARRY S. TRUMAN, 1949-1953* (1982). According to Donovan, *id.* at 382-91, Vinson advised Truman that the seizure of steel mills was constitutional. Thereafter, Vinson dissented from a Supreme Court decision finding the seizures illegal. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). *See also* Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123; McKay, *supra* note 44, at 9, 27-36; Westin, *Out-of-Court Commentary by United States Supreme Court Justices, 1790-1962: Of Free Speech and Judicial Lockjaw*, 62 COLUM. L. REV. 633, 635-36 (1962) ("the basic tradition among the Justices has been one of wide-ranging and frank out-of-court commentary"); Note, *Extrajudicial Activities of Judges*, 47 IOWA L. REV. 1026 (1962); Note, *supra* note 44.

58. *See, e.g.*, Note, *supra* note 44, at 590-91 (Chief Justice Taft as regular advisor to three Presidents; Justice Fortas as advisor to President Johnson); R. DONAVAN, *supra* note 57, at 354 (President Truman consulted Chief Justice Vinson about whether to fire General MacArthur); R. DONAVAN, *CONFLICT AND CRISIS, THE PRESIDENCY OF HARRY S. TRUMAN, 1945-1948*, at 423-24 (1977) (Truman asked Vinson to go to Moscow to convey the United States' hopes for peace.).

59. Murphy states that Justice Story "virtually became a legislator on the bench." B. MURPHY, *supra* note 2, at 352. *See also* Note, *supra* note 44, at 590 n.14 (Justice D. Davis advised President Lincoln on several matters; Justice Stone commented on drafts of President Hoover's speeches).

60. B. MURPHY, *supra* note 2, at Appendix. Professor Kurland suggests that extrajudicial pronouncements and activities of Chief Justices derive from their unique role as the chief judicial officer of the United States Courts. *See* Kurland, *Mr. Chief Justice Burger on the State of the Judiciary—1981*, 15 SUFFOLK U.L. REV. 1105, 1107 (1981). The Code of Judicial Conduct expressly recognizes a role for judges in "Activities to Improve the Law, the Legal System, and the Administration of Justice." *SEE* CODE OF JUDICIAL CONDUCT CANON 4 (1980).

61. History may also show a move from a very visible form of extrajudicial involvement (such as Congressional authorization for Justices to engage in extrajudicial activities, *see* Wheeler,

Supreme Court Justices come from the world of politics. They have been people who, with rare exceptions, became Justices precisely because they were adept at maintaining political networks. Once these individuals were named to the Court, it is unremarkable that they did not immediately or completely disengage from their former patterns, and that their lifelong efforts to exert political influence did not abruptly cease.

### B. *The Normative Question*

To conclude that many Justices have engaged in extrajudicial activity is not to decide whether such behavior is appropriate. That question can only be addressed after analysis of what harms, if any, flow from extrajudicial activity.

#### 1. *A Threat to Impartiality*

Distrust of extrajudicial activity may stem from an intuition that the extra activities will, somehow, undermine Justices' abilities to judge impartially. That impartiality is desirable is uncontroversial.<sup>62</sup> However, because we understand little of how human beings arrive at decisions,<sup>63</sup> and because we do not believe that absolute impartiality is attainable, difficulties arise in deciding what rules to prescribe to promote impartiality. We can begin with an easy case. If Justice Able advises President Baker about the constitutionality of Legislation L, Justice Able should not participate in a subsequent decision on Legislation L's legality. This prohibition stems from several intuitions. First, we assume that Justice Able's earlier views on the constitutionality of Legislation L were based upon a genuinely held opinion, rationally derived. As a consequence, we believe that Justice Able will be less capable of considering the question afresh than would another Justice who had never thought about the specific issue. We assume that Justice Able's prior "involvement" will cloud his ability to decide the question based upon the arguments and information provided by the parties.

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*supra* note 57, at 133-34) to a form of extrajudicial activity (such as advising presidents by telephone) which is less visible.

Wheeler argues that Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792), marked a turning point because by it the Court declined to accept obligatory extrajudicial service. *Id.* at 158. As Murphy and others demonstrate, however, while the extrajudicial service may have become more informal, it did not abate. Cf. CODE OF JUDICIAL CONDUCT Canon 5 (1980) ("A Judge Should Regulate His Extra-Judicial Activities to Minimize the Risk of Conflict With His Judicial Duties").

62. The Supreme Court has consistently emphasized that the due process guarantees of the fifth and fourteenth amendments require that judges be "impartial." See, e.g., *In re Murchison*, 349 U.S. 133-34 (1955); *Ward v. Village of Monroeville*, 409 U.S. 57-60 (1970).

63. See generally, R. NISBETT & L. ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980) (examining how preexisting knowledge structures influence individuals' judgments).

Instead, he may simply reiterate his earlier views.<sup>64</sup>

Second, since Justice Able has already voiced an opinion on the legality of the legislation, and because others have relied on that opinion, Justice Able may have a "stake" in being right and may, for that reason, attempt to convince his fellow Justices of the correctness of his earlier view. Third, Justice Able may want to continue to be consulted by President Baker. Justice Able may thus have some "interest" in the outcome of the case, for the Court's decision may influence the President's assessment of Justice Able's effectiveness as an advisor. Given these suspicions about human behavior, we craft an absolute prohibition: a Justice who has provided advice during the drafting and enactment of legislation should not later sit to adjudicate its legality.<sup>65</sup>

There are, however, harder cases. Assume, again, that Justice Able advises President Baker about the legality of Legislation L. Thereafter, a lawsuit is brought challenging the constitutionality of Legislation M, which was also enacted at President Baker's request but about which Justice Able was not consulted. May Justice Able adjudicate the case?

In this example, Justice Able has, presumably,<sup>66</sup> not reached any prior judgment about the specifics of the challenged legislation. The Justice has, however, served as the President's advisor on other matters. Does Justice Able's general advisory role preclude impartial judgment in even those cases that are unrelated to any work the Justice has performed for the President? Does a general advisory role create such "interest," "involvement," or "stake" in the outcome of a case so as to disqualify a Justice from deciding all cases in which presidential programs are challenged?

One answer may be that there are no presidential programs that can be dissociated from any others; presidential prestige is determined by the success or failure of all proposals. If a Justice wants to be a member of the presidential team, then the Justice had better support all of an administration's policies. This response, however, ignores the substantial independence that Supreme Court Justices, as well as other federal judges, enjoy by virtue of the constitutional guarantees of life

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64. Despite such intuitions, legal rules routinely permit a judge who has adjudicated a case to preside at subsequent hearings upon reversal and remand of an initial decision. See generally Ratner, *Disqualification of Judges for Prior Judicial Actions*, 3 How. L.J. 228 (1957).

65. The English common law rule was that no man shall be a judge in his own cause. Its evolution is described in Note, *Disqualification of Judges For Prejudice or Bias—Common Law Evolution, Current Status, and The Oregon Experience*, 48 OR. L. REV. 311, 315-20 (1969), and in Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 610 (1947).

66. A Justice's mind is not, of course, a "tabula rasa." Justices may well have thought about and formed opinions on a variety of issues.

tenure and no diminution of salary.<sup>67</sup> By disagreeing with Presidents, Justices may provoke displeasure but they are protected. Unlike other presidential advisors, Supreme Court Justices cannot be fired.

But the fact that a Justice cannot be dismissed does not obviate the problem. Justices who have an ongoing role within an administration presumably enjoy the influence that they wield. As a consequence, they may—albeit unconsciously or inadvertently—mold decisions to please a President or to enhance their own influence within an administration. By virtue of a role in an administration, Justices gain “interests” beyond the judicial. Judicial allegiance to Presidents undermines independence, which, in turn, casts shadows on the impartiality of judgments rendered. Of course, a parallel analysis applies when Supreme Court Justices advise legislators.

Did Justice Brandeis decide cases in which his impartiality might have been questioned because of his extrajudicial activities? Under the standard for which I have argued above, the answer is yes—for Brandeis served as advisor both to Presidents and other members of the executive branch. Professor Murphy believes, however, that despite Brandeis’ extensive contacts with the Wilson and later administrations, Brandeis properly participated in many, but not all, of the cases in which executive branch programs were at issue.<sup>68</sup> Murphy does acknowledge that Brandeis ruled against the legality of a bill that he had helped to develop<sup>69</sup> and that Brandeis recused himself in cases challenging particular programs (such as minimum wage laws) of which he had long been a champion.<sup>70</sup>

Although Murphy provides us with his opinions about the propriety of Brandeis’ participation in several cases, Murphy does not develop a coherent standard of judicial behavior. Murphy neither argues that Brandeis’ extrajudicial work should always have mandated recusal nor attempts to draw distinct lines between the categories of extrajudicial actions which should have resulted in disqualification and those which should not have. Further, Murphy does not claim that Brandeis’ involvement with Presidents and with legislative proposals inevitably led Brandeis to uphold legislation against challenges.<sup>71</sup> However, after Murphy sets forth what appears to be a selective disqualification argument,<sup>72</sup> he suddenly shifts his position. Murphy concludes his discus-

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67. U.S. CONST. art. III, § 1.

68. B. MURPHY, *supra* note 2, at 54 (Brandeis “cannot be faulted.”).

69. *Id.* at 55.

70. *Id.* at 54.

71. Brandeis voted to overturn portions of the Lever Food Control Act, about which, according to Murphy, he had counseled Food Administrator Herbert Hoover. *Id.* See *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921); *Weeds, Inc. v. United States*, 255 U.S. 109 (1921).

72. B. MURPHY, *supra* note 2, at 54-55.

sion of Brandeis' impartiality by contending that, had the public known about the extent of Brandeis' involvement with other branches of government, the appearance of judicial propriety would have been undermined along with, presumably, the legitimacy of Court decisions.<sup>73</sup> We are left to surmise that Murphy has implicitly revised his initial view—that selective disqualification would have been proper—and, in the end, would mandate blanket disqualification whenever a Justice provides advice to the executive.

Murphy's ambivalence about what rule to advocate may be attributed to at least two factors. First, Brandeis' accomplishments are as vast as was his network of associates; Murphy may be loath to announce a rule which, had it been in place and enforceable, would have prohibited Brandeis from contributing as extensively as he did to the many causes he espoused.<sup>74</sup> Second, Murphy may want to avoid a Pollyanna-like approach; in view of his opening discussion of the frequency of extrajudicial activity, Murphy may believe that proposing its ban would appear naive.

In my view, Murphy had a better argument than he made. In bits and pieces scattered through the book,<sup>75</sup> Murphy implies that extrajudicial activity may have been inevitable, if not appropriate, during much of the nation's history. Murphy does not, however, clearly address the fact of change—that the grounds which supported extrajudicial activity in the past no longer exist. For example, in his appendix, Murphy suggests several reasons why Justices early in the Republic partook of extrajudicial tasks. First, the English judges did it,<sup>76</sup> and many United States norms were imitative. Second, the Constitution does not bar extrajudicial activities;<sup>77</sup> no mandate for revising the English practice was provided. Third, the possibility of extrajudicial work may have been a necessary incentive for convincing competent men to accept the position of Supreme Court Justice. In the early days, the Justices did not have a lot to do.<sup>78</sup> Individuals of the requisite stature

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73. *Id.* at 55.

74. Brandeis' work in a vast array of New Deal legislation, his efforts on behalf of Zionism, and his advice to President Wilson during the First World War are chronicled in chapters 1-5 of Murphy's book. See also M. UROFSKY, *supra* note 3; THE SOCIAL AND ECONOMIC VIEWS OF MR. JUSTICE BRANDEIS (A. Lief ed. 1930).

75. B. MURPHY, *supra* note 2, at 3-15, 345-63.

76. *Id.* at 346-47. But see Note, *supra* note 57, at 1026-27 (describing early common law "incompatibility" rule, barring government officials from holding two offices which imposed inconsistent obligations).

77. B. MURPHY, *supra* note 2, at 346. The Constitution only prohibits Supreme Court Justices from simultaneously being Justices and being in Congress. U.S. CONST. art. I, § 6, cl. 2. See generally Wheeler, *supra* note 57 (examining the response of early Supreme Court Justices to requests that they undertake extrajudicial, governmental duties).

78. B. MURPHY, *supra* note 2, at 346-48. Justices were, of course, obliged to ride circuit, which was an arduous assignment. See F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE

might have been unwilling to accept the job had they been precluded from undertaking other assignments. In fact, it may well have been the other work—advising Presidents, drafting legislation, negotiating treaties—that was attractive; accepting a seat on the Court may have been viewed as a stepping stone to more important and interesting activities.<sup>79</sup> Murphy might have argued that changes in the federal judiciary's work make the rationale for extrajudicial activities obsolete. In contrast to the lighter burdens that judging may have imposed in the past, members of today's federal bench tell us that contemporary judges have too much judging to do.<sup>80</sup> Unquestionably, the workload of the federal courts has expanded enormously over the past 200 years.<sup>81</sup> As a consequence, Supreme Court Justices today can be fully and profitably occupied when they devote all of their time and talents to the task of adjudication. Moreover, today there is no dearth of qualified and interested applicants for Supreme Court appointments; incentives such as extrajudicial assignments are no longer needed. Finally, Supreme Court Justices are specially situated. As the nine least fungible members of our judicial apparatus, they should be available to sit on cases whenever called upon, rather than risk disqualification by participating in extrajudicial activities.<sup>82</sup>

Given the differences in the demands placed upon Supreme Court Justices then and now, and given the need for unquestioned impartiality, Murphy might have forthrightly claimed that, whatever the propriety of Brandeis' and Frankfurter's actions, Supreme Court Justices today should no longer engage in extrajudicial tasks.<sup>83</sup> Unfortunately,

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SUPREME COURT 4-55 (1927). For a discussion of the parallel quiet at the district court level during the first part of the nineteenth century, see M. TACHAU, *FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1798-1816* (1978).

79. From Murphy's chronicle, it appears that Justices were particularly active, extrajudicially, at time of war. It may be that Justices felt obliged to accept presidential requests for assistance in moments of crisis. B. MURPHY, *supra* note 2, at 302.

80. See, e.g., Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982); Becker, *Efficient Use of Judicial Resources*, 43 F.R.D. 421 (1967).

81. For a discussion of the reasons for such expansion, see Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 396-97 (1982).

82. The tension between recusal for cause and the "duty to sit" was demonstrated in a request to Justice Rehnquist, who was asked not to participate in a case which he had mentioned, in passing, when testifying before a Congressional subcommittee while the Justice was a member of the Justice Department. Justice Rehnquist refused to recuse himself and participated in the decision. *Laird v. Tatum*, 408 U.S. 1 (1972). Justice Rehnquist explained his decision to sit at 409 U.S. 824 (1972). His participation was criticized by several commentators. See, e.g., Note, *Justice Rehnquist's Decision to Participate in Laird v. Tatum*, 73 COLUM. L. REV. 106 (1973).

83. Such a rule would prohibit Justices from actively engaging in all kinds of legislative and presidential initiatives, including proposed court reform legislation, because such legislation may well be reviewed by the Supreme Court, see, e.g., *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S. Ct. 2858 (1982) (grant of jurisdiction to bankruptcy judges unconstitutional), or be part of legislative packages of presidents. Under this test, the extrajudicial activities of both Justices Brandeis and Frankfurter, insofar as they campaigned for the enactment of or advised

Murphy fails to make such an argument in cogent, explicit form. Instead, he litters his pages with pejorative comments without articulating the causes for his dismay, and he leaves us, unassisted by analysis, to find our own way out of the confusion his story creates.<sup>84</sup>

## 2. *Concerns Beyond the Judiciary*

Another way to think about the problem posed by the extrajudicial activity of Supreme Court Justices is to consider what impact such activity has on the spheres, other than the courtroom, in which the Justices operate. Justices who engage in extrajudicial activity may be criticized if they use the power which accrues to them as Justices to overwhelm opponents they encounter in other arenas. Supreme Court Justices need not expressly threaten the use of judicial power to obtain a coercive effect. Rather, members of the executive or legislative branches may simply yield to a powerful Justice's request—or order—out of fear that the Justice will later sit in judgment on proposed legislation or on an executive pronouncement. As a result, members of the nonjudicial branches may be too easily persuaded of the "wisdom" of a Justice's view—too readily convinced out of hopes that the favor will be returned and out of fears that disagreement carries too great a sanction. Given the possibility of such a threat—which may be inevitable and even unintended—Justices who seek to influence the world have too much power, and their power is illegitimate because it is based upon the potential misuse of the judicial office.

Murphy's book does not provide much illumination of this problem.<sup>85</sup> Brandeis was indeed influential, but the sources of his authority appear to have been the power of his intellect and the force of his vision, rather than his position as a Supreme Court Justice.<sup>86</sup> Brandeis achieved acclaim and was a major public figure long before he was

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presidents about legislation, were inappropriate, as were those of several Chief Justices. See Swindler, *The Chief Justice and Law Reform, 1921-1971*, 1971 SUP. CT. REV. 241; McKay, *supra* note 44, at 12-14, 19-26 (arguing for "line drawing" rather than a ban on extrajudicial activity); Landever, *Chief Justice Burger and Extra-Case Activism*, 20 J. PUB. L. 523 (1971) (advocating an "extra-case" role for the Chief Justice in the area of judicial reform).

84. Had Murphy only provided us with information, and refrained from engaging in normative criticism, he could not easily be faulted for his failure to analyze the problem of extrajudicial activity in general and to offer some insight into it. However, Murphy frequently moves from description to normative analyses. Because Murphy unhesitatingly characterizes events, expressing his approval and (mostly) disapproval, he has an obligation, in my view, to explain the sources of his views. Moreover, in Murphy's earlier work, Murphy, *Extrajudicial Strategy*, *supra* note 24, at 130 & n.192 he promised to discuss these normative issues in his book, so presumably he believes his characterizations to constitute such a discussion.

85. Murphy does describe what he deems Brandeis' "playing political hardball" with President Roosevelt because of disagreements with the New Deal. B. MURPHY, *supra* note 2, at 140.

86. See generally M. UROFSKY, *supra* note 3, *passim*. See especially *id.* ch. 1 ("Beginnings"); ch. 10 ("Isaiah").

named to the Court; some of Brandeis' cohorts in the "progressive" movement expressed their distress at losing him as a colleague when Brandeis gained confirmation to the Court.<sup>87</sup>

While Frankfurter's extrajudicial efforts appear to have been less effective, the explanation comes, once again, from the person and not the office. Though Frankfurter sought continually to exert influence, he did not possess as sustained a vision of what his extrajudicial efforts were to accomplish as did Brandeis. Those whom Frankfurter sought to influence often found him "meddlesome" rather than persuasive.<sup>88</sup>

Whether it can be documented or not, the threat of judicial overreaching provides additional support for a ban on extrajudicial activity. Preserving the independence of both the judiciary and the other branches of government is essential to their separate operation. Permitting Supreme Court Justices to attempt to influence events in coordinate spheres of government undermines the legitimacy of decisions made in all three branches.

#### CONCLUSION

Although our procedures for judicial selection<sup>89</sup> most often provide us with Supreme Court Justices who are political animals, our hopes lead us to wish for Justices who are god-like oracles. Murphy holds himself out as the voice of reality, a debunker of myths who brings us into the "marble palace"<sup>90</sup> of the Supreme Court and reveals to us how extensive the influence of two Supreme Court Justices was in the world beyond that palace.

Ironically, many of his revelations contribute to the myths of the Justices. As Murphy chronicles the breadth of Brandeis' concerns and the diverse events in which he played an important role, Brandeis looms heroic. While Frankfurter remains somewhat more to scale, the explanation comes, in large measure, because the proportions of Murphy's stage are set by the scope of Brandeis' achievements. Had Frankfurter been contrasted with many others, his work would also have approached the monumental. In my view, Murphy fails to diminish the substantiality of the contributions made by either Justice. And, although Murphy disparages their "connection," he provides no gui-

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87. *See id.* at 118.

88. Murphy describes Frankfurter's relative lack of power during World War II in chapter 8, and his unsuccessful campaign to gain Judge Hand's appointment to the Court is related at pages 318-20. *See also* H. HIRSCH, *supra* note 2, at 162, 166.

89. *See generally* L. BERKSON, S. BELLER & M. GRIMALDI, *JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS* (1981).

90. B. MURPHY, *supra* note 2, at 10.

dance in fashioning norms of what associations are appropriate for today's Justices.

As for Murphy's claim that he has uncovered new information, he does not, in fact, tell us much that is new. As others have described,<sup>91</sup> a substantial amount of what Murphy "reveals" has been reported elsewhere. Further, Professor Cover has shown that some of Murphy's "history" is erroneous.<sup>92</sup>

Nevertheless, Murphy has returned our attention to Justices Brandeis and Frankfurter, and for that, he deserves credit. His book has led me to read many of Brandeis' letters,<sup>93</sup> which are carefully annotated and which, in themselves, provide a wealth of detail about the "Brandeis/Frankfurter connection"—including the fact of payments<sup>94</sup>—and about Brandeis' inordinately productive and varied life. Further, excerpts from Frankfurter's diaries provide insight into the breadth of his interests.

Murphy's contribution may lie in his reorganization of events that are recounted elsewhere. By careless history and provocative prose, Murphy has sparked others to think about the roles Supreme Court Justices should play in the legislative and executive spheres. In his earlier work and in this volume, Murphy has drawn attention to a good deal of information about Justices' activities outside the courtroom. With this mass of data, and with energy stimulated by Murphy's overstatements, we find ourselves considering afresh what prescriptions should rule the extrajudicial activities of Supreme Court Justices.

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91. Frank, *supra* note 21, at 436.

92. Cover, *supra* note 22, at 17.

93. 1-5 LETTERS, *supra* note 1.

94. See, e.g., 4 LETTERS, *supra* note 1, at 266-67; 5 LETTERS, *supra* note 1, at 187.