

## ***Book Briefs***

**FELIX FRANKFURTER REMINISCES** as recorded in talks with Harlan B. Phillips. 310 pp. Reynal & Company, New York. 1960. \$5.00.

The average law student in the Philippines (and for that matter also the average Filipino lawyer) knows Felix Frankfurter only as a justice of the Supreme Court of the United States and, possibly, as a former professor of law at Harvard Law School. Little known is the fact that Justice Frankfurter held varied positions in the public service of his adopted country (he was born in Vienna; at the age of 12 his family migrated to the United States; he is an American citizen by naturalization) before scaling the Olympian Heights of the legal profession; and that a good many times he had something to do with the Philippine Government.

The book is really an autobiography. The only intervention of Mr. Phillips, it seems, was to ask Justice Frankfurter some questions and the subject went on from there. Frankfurter's statements were tape-recorded.

In reviewing the book it might be worthwhile to depart from the usual critical and analytical approach. The book is full of anecdotes, character appraisals and recollections of precedent-setting cases. In the manner of the reviewer of a book embodying erotic realism, the task could well be limited to pointing out the "good parts."

When young Felix Frankfurter arrived in America in 1894, he had never heard English spoken nor had he spoken it. One day he came home and said, "This man Laundry must be a very rich man because he has so many stores."

He learned English quickly because his teacher in Public School 25 in New York City, a Miss Hogan, gave gentle uppercuts to anyone who spoke to him in German.

He had wanted to study law at Columbia. In fact he was on his way there one day, with ten dollars in his pocket, to matriculate. Then he met a friend who told him it was too lovely a day to go to Columbia. The friend suggested going to Coney Island instead. There he blew his ten dollars. Later he was persuaded to go to Harvard which he thought was in the country for anything that wasn't New York, or Vienna, or Chicago, or London was to his parochial mind the country.

On his attitude and appraisal of Harvard Law School, he says: "I have a quasi-religious feeling about the Harvard Law School. I regard it as the most democratic institution I know anything about. By 'democratic', I mean regard for the intrinsic and for nothing else. There weren't any courses on ethics, but the place was permeated by ethical presuppositions and assumptions and standards. On the whole, to this day I am rather leery of explicit ethical instruction. It is something that you ought to breathe in. It was the quality of the feeling that dominated the place largely because of the dean, James Barr Ames. We had no course in ethics, but his courses on the law of trusts and fiduciary relations was so much more compelling as a course in ethics than any formal course in ethics that I think ill of most courses in ethics. The delight he took in finding again and again and again the law had much higher standards than the businessman who prate about it."

When Dean Ames died and Frankfurter praised him, Morris Cohen was moved to say, "After all, what is the deposit Ames left behind him? He hardly wrote anything." To which Frankfurter replied, "What he left behind him is that which Pericles says in his funeral oration is the most important thing. His deposit is in the minds of men. He excited and touched more first-rate minds in the profession of law, I suppose, than any man who ever had pupils. Dean Ames would rather spend hours with a student than write a legal essay that would immortalize him."

The summer after his graduation from Harvard Law School, John Chipman Gray asked Frankfurter to help prepare volumes five and six of his famous casebook on Property. Sometime later, in New York, Frankfurter received from Gray a check for \$100. He returned the check with a note that his experience was compensation enough. Gray sent the check again with a curt note: "Oh, you musn't do that." Back went the check to Gray. But Gray sent it again with the note: "Dear Frankfurter: Don't be a damn fool." That closed the matter of the much travelled check.

Professor Copeland, who was known as Copey to his boys, had invited a famous anarchist Tschaikowsky to their regular Friday meetings. He informed the boys: "At the next meeting I shall have for you Tschaikowsky." When someone asked if that was the composer, Copey answered: "No, the decomposer."

He had been working for only a short time with a law office in New York when he was offered a position at a much lower salary by U.S. Attorney Henry L. Stimson who was later to become Governor-General of the Philippines. He wanted the position very much

because it would enable him to "practice law without having a client." But he didn't want to seem ungrateful to his present employer. He posed his problem to Ames who said simply: "Dear Frankfurter: I suggest you follow the dominant impulses of your nature. I am confident that if you were to go with Mr. Stimson he would like you and you would like him."

Stimson served under Theodore Roosevelt and when TR's term expired, Stimson left the government and returned to his private practiced. Frankfurter followed Stimson only to return to his government position for a short time in order to handle some appeals in cases which had originated during Stimson's time. When Stimson decided to run for governor of New York with TR's backing, Frankfurter re-joined Stimson. Stimson was defeated and he joined the Taft administration as Secretary of War. Before accepting the position, Stimson cleared the matter with TR saying, "Well, Colonel, if I enter Mr. Taft's cabinet and he runs again next year, I would be in duty bound to support him." TR replied, "Of course you would have to support him no matter what the eventuality." Taft did run and TR was his opponent. How did TR deal with Stimson? You guessed it. "He bludgeoned Stimson after he supported Taft."

Frankfurter followed Stimson to the War Department as the latter's special assistant. Much of Frankfurter's work had to do with legal questions which confronted the Bureau of Insular Affairs that had charge of Puerto Rico, the Philippines and other possessions.

One day General Enoch H. Crowder, the Judge Advocate General, asked Frankfurter to write a memorandum on whether the seizure (by America) of the customs house at Vera Cruz should be treated as an act of war. Frankfurter breezily answered, "General, I'm going to ask to be excused, I don't have to work on that. I know the answer to that."

"You do?"

"Yes, I do."

"What is the answer?"

"It would be an act of war against a great nation; it isn't against a small nation."

Of key men in the War Department, Frankfurter said: "The Bureau of Insular Affairs was headed by a man named Clarence R. Edwards who was a very charming phony, a great friend of Taft, and Mrs. Edwards was a great friend of Secretary Root. Edwards was a major general, and God only knows how he got to that rank. His deputy chief of the bureau was a man named Frank McIntyre,

a very scholarly soldier x x x. He became chief later as a Brigadier General. He was a superior person, a man of learning and understanding. He knew about finance and about problems of revenue. He devised the currency system for the Philippines. With McIntyre I had business and had to write legal opinions for the bureau. x x x My relations with Edwards were social. He spent a good deal of his time in the Metropolitan Club."

Of Leonard Wood who was then Chief of Staff and later to become Governor-General of the Philippines: "He was a powerful fellow. He was very unscrupulous, meaning by that that he would manufacture facts when he didn't have them. That's a hell of a thing to say about a distinguished person. Well, it's so. I remember once or twice Wood said something to Mr. Stimson, and Mr. Stimson said, 'General, are you sure?' " Frankfurter also recalls that in the fall of 1914, he met General Wood in the subway going out from Boston to Cambridge. He asked General Wood how long the war would last. General Wood predicted it would not last longer than six months "because financially the world couldn't stand it."

Frankfurter handled the case of *Tiaco v. Forbes* when it was appealed to the U.S. Supreme Court. Of Forbes he said: "The great pro-consul—the American Cromer without Cromer's brains. He was the grandson of Ralph Waldo Emerson, and he illustrates the principle that being disinterested and having a high sense of public duty doesn't mean that you promote the public good. That requires understanding and imagination. Forbes came on east, and we spent a day talking over Philippine problems, he, Secretary Stimson and I. x x x After a whole day with him, Forbes finally left, and Secretary Stimson and I were left alone. He asked me, 'What do you think of him?' " Frankfurter replied, "I think Emerson passed through him without stopping."

Of the *Tiaco* case, Frankfurter says: "It was not a very pleasant case. I had to argue the inherent power of the executive to deal with such a situation." Again, "that was a very tough case, and to my great surprise it was a unanimous opinion x x x. One of the subsidiary arguments was that Congress could have given the Governor-General such power originally; therefore, it can ratify it, and it did ratify it in that the Governor General reported this, and the War Department reported it to the Congress who did nothing about it. They appropriated money."

Stimson and Frankfurter once had an appointment to meet Taft at the White House at nine o'clock. They arrived on time but at 9:15 Taft had not yet received them. Mr. Stimson, a busy man,

was boiling inwardly. Finally, at past ten, Taft waddled in and said: "Glad to see you, old man. Sorry to be late, but my tailor kept me." Not only was Taft an hour late but he had no idea why Stimson was there, "What have you got for me this morning, old man?"

Frankfurter tells how Lindley M. Garrison, Chancellor of New Jersey Equity, became Secretary of War under Wilson. Wilson told Garrison, "That is the most important, most far-reaching of the functions of the War Department, and one that makes the most exacting demands on the person to be Secretary of War because we are trustees for the Philippine people. Therefore, the Secretary of War having this responsibility should be a man with a very sensitive fiduciary equipment, a man with a very strong sense of responsibility as a trustee. He must have a sensitive conscience, a delicacy of feeling being the man who acts for nine million other people. What I need is a man whose conscience is very well informed, very alert."

Frankfurter's comment on the appointment of Garrison: "That is how Lindley M. Garrison became Secretary of War. He was a very nice man, very ill-equipped for this job. I can't think of a better illustration of how doctrinaire Wilson's thinking was. The notion that a fellow who sat in chancery and dealt with fiduciary responsibilities toward property, or had a keen sense in detecting shenanigans by a trustee, or was very alert in protecting the interests of infants and widows, and all the other multitudinous aspects in which the notion of trustee comes before a Court of Chancery, an equity court, the notion that there is any relation between that and the wisdom in when and how a subject people should be given increasing self-rule, perhaps eventually, as it turned out, given independence, is fantastic, is just riding a word to death. You know, trusteeship implies a sensitive conscience. Responsibility for other people calls for a sensitive conscience. Therefore, it is the same conscience for both. Fantastic!"

On Wilson: "Wilson didn't appeal to me man to man. I didn't warm in his presence. I recognized then as I do now his great qualities, but he was not sympatico to me as a man. He was cold, dogmatic. x x x He was dogmatic, intolerant; fundamentally didn't like his kind. He believed in democracy in the abstract, but didn't care for people. That's true. And he'd cut off their heads with equanimity."

When he was invited to join the Harvard Law School faculty, Frankfurter had misgivings about his qualifications. But Justice Brandeis told him: "I would let those who have the responsibilities for selecting you decide your qualifications and not have you decide

that." But then he also received advice from several friends. From TR: "Of course, if you go up and become a professor, you want to bear in mind that your denominator will remain substantially static. Only your numerator is within your control." And "Holmes wrote me a remarkable letter pithily putting the dangers of the cloistered life as against thinking under fire; the dangers of academic life, the easy judgments, the irresponsibility of running the universe on paper." But when Frankfurter declined an appointment to the Supreme Judicial Court of Massachusetts, deciding to remain a law professor, Justice Brandeis who commended his decision said, "People think it's wonderful to be a judge. I don't know why they think it's so wonderful to be a judge. They have this strange notion that a judge is something very special. x x x If ever the time comes when you should be asked to go on the Supreme Court, why then talk to me about it, and if you're then old enough, there might be some reason to leave the law school."

While in Harvard Law School, Frankfurter professed as well as practiced law. In a case which involved the constitutionality of a law limiting the number of hours of work, Frankfurter argued it before the Supreme Court. Justice McReynolds in the course of the argument snarled, "Ten hours! Ten hours! Why not four?" Frankfurter calmly answered, "Your honor, if by chance I may make such a hypothesis, if your physician should find that you're eating too much meat, it isn't necessary for him to urge you to become a vegetarian." And Justice Holmes commented loudly and embarrassingly from the bench, "Good for you."

Of Justice McReynolds: "He is a good illustration of my deep conviction that on the whole as good a dividing line as any between men is those who love and those who hate, with varying degrees. McReynolds was a hater. He had a very good head. He was also primitive. He had barbaric streaks in him. He was rude beyond words to that gentle, saintlike Cardozo. He had primitive anti-Semitism."

When America entered World War I in 1917, Frankfurter received a telegram from War Secretary Newton D. Baker to go to Washington for the weekend. Frankfurter's weekend did not terminate until 1919. In the meantime he served as a civilian adviser to the War Department. He was offered a commission but refused it. "The reason I didn't want to go into uniform was because I knew enough about the doings in the War Department to know that every pipsqueak Colonel would feel that he was more important than a Major, and from the point of view of being effective as Baker's assistant it was very important for me to remain a civilian. As

a civilian I could get into the presence of a General without saluting, clicking my heels, and having the Colonel outside say, 'You wait. He's got a Colonel in there.' The matters which Baker wanted me to stay were problems x x x entirely filled with civilian implications and considerations and would not be helped if I got into a uniform, and besides, I'd feel silly to wear a uniform."

After world War I Frankfurter returned to Harvard Law School. The dean then was Roscoe Pound. There were complaints against Frankfurter and Pound, worried, consulted Justice Brandeis. Here is the conversation between Brandeis and Pound as narrated by Frankfurter:

Brandeis: "Well, what are you worried about? Hasn't Frankfurter got tenure?" Frankfurter: "Oh, yes, but they'll want to take away his courses in public law by which he might corrupt the young and their outlook on American public law." Brandeis: "Oh, don't worry about that. It doesn't matter what he teaches. If he were to teach Bills and Notes, he'd be teaching himself."

Frankfurter's comment: "I always thought that was about as good a definition of a teacher as you can have. That indicates, in essence, why I've always been left cold by curricular discussions. Oh yes, I know they are important, but not very."

Frankfurter retells the story of an old Jew who applied to the American consul in Lisbon to get on the quota list. When the Jew informed the consul that he was a citizen of Roumania, the consul told him that the quota had been filled for the next eight years and suggested that he come back after eight years.

"The old Jew said, 'Eight years?'"

"Yes, eight years."

"He bows deferentially, takes off his hat, and leaves. He gets to the door and then comes back and says, 'Mr. Consul.'"

"Yes, what is it?"

"You said that I should come back eight years from today?"

"Yes, yes."

"Shall I come in the morning or in the afternoon?"

On his involvement in the famous Sacco and Vanzetti case, Frankfurter lashes at timid creatures who would not speak out publicly in order "to turn on the currents of reason and check the currents of unreason." Said he: "People want to avoid unpleasantness. Life is hard enough even if you've got a bank account. Life is hard enough as it is. Why take on something extra? 'Why go

out on a limb?" as the phrase runs. "Why stick your neck out?" that other lovable invitation to do nothing. Even people who are economically independent are not socially independent. They may have money in the bank, but that isn't all they want. They want to be asked to dinners at certain houses. They want to run for office. They want to become Grand Masters of the Masonic Order. They want to get a degree from some college or university. They don't want to make trouble for their wives. They have silly wives with social interests or ambitions. Or if they get into public controversies their boy in prep school will be a marked character, 'Oh, it's your Dad who says this.' There are a thousand and one considerations beyond the immediate enslavement of economic dependence which I know make people hesitant, timid, cowardly, with the result however that those who have no scruples, who are ruthless, who don't give a damn, influence gradually wider and wider circles, and you get Hitler movements in Germany, Huey Long ascendancy in Louisiana, McCarthyism cowing most of the Senators of the United States at least to the extent that they didn't speak out, etcetera, etcetera."

Frankfurter wrote a little book which was a dispassionate examination of the record in the Sacco Vanzetti case. Of this book he said: "When I wrote my little book, I read, re-read, and re-examined the five or six thousand pages of testimony over and over again. I went over and over my little book again and again testing it against the record and so on. My wife and my secretary dropped out. They wouldn't read proof any more with me. My wife said, 'Why do you go over this? You've done it twenty times.'

Frankfurter replied: "It's humanly possible to avoid some errors, but if I have a comma instead of a semi-colon, or a semi-colon instead of a comma, that will be blown up to some heinous, venal offense in an effort to discredit the whole, and so far as it lies within my power I don't want to have a mistake in punctuation."

And when Wigmore (on Evidence) tried to attack Frankfurter, he was pulverized. Lowell of Harvard commented: "Wigmore is a fool! Wigmore is a fool! He should have known that Frankfurter would be shrewed enough to be accurate." But Frankfurter complains: "Not that I would be accurate, but that I 'would be shrewd enough to be accurate.' As though you choose whether you're accurate or not. Maybe that was true of him, but a habit of mine is to be accurate."

When Stimson left the Philippines to become Secretary of State, he had a difficult time looking for an undersecretary. Frankfurter was responsible for the appointment of Joseph P. Cotton, a

distinguished New York lawyer and a Harvard man through and through.

Frankfurter recalled: "After Lindbergh had flown the Atlantic he had imitators. Someone had concealed himself on one of those transatlantic flights and arrived at the airport near Paris as a stow-away. There he was, no passport, nothing, and that presented a great problem to our Embassy in Paris. The American Ambassador in Paris, whoever he was, cabled over that they had an American on their hands, that he came over as a stowaway, and that the French were raising some question. What should they do? This fellow with the striped trousers stood there respectfully. Joe took his corn-cob pipe out of his mouth and said, 'Send this cable to our Embassy in Paris: LAUGH IT OFF!'"

Hours later the man in the striped trousers came back to report that the cable could not be sent because they had no code word for "laugh." Cotton's curt reply was, "Make one up."

When Roosevelt became president in 1933, he offered the position of Solicitor General to Frankfurter but it was declined. The offer was made when Frankfurter visited Roosevelt in the latter's office. They had been friends for a long time and Frankfurter said, "Before I say another word, Frank—forgive me, but it will take some time to say 'Mr. President'—forgive me, Mr. President." And Roosevelt replied, "You can say that when there are others around, but not when we're alone. Don't you dare say that when we're alone! Arthur Ballantine whom you may have seen—we were together on the *Crimson* and every other word is Mr. President this, and Mr. President that, and I don't particularly care for it. When there are other people around, that's different."

Frankfurter went to Oxford as visiting professor. He and Mrs. Frankfurter were invited to a formal dinner at the vice-chancellor's and he came in white tie. To his dismay he found everyone wearing academic gowns. Frankfurter thought that he had disgraced himself, his country, and Harvard. Later he was to find out that he did the right thing for although gowns were called for at the vice-chancellor's dinners, they had to be Oxford gowns. Later Frankfurter had to be granted an honorary M.A. by Oxford so that he could lecture at Oxford and wear its gown.

Roosevelt had repeatedly told Frankfurter that he did not want to appoint Frankfurter to the Supreme Court. One day, while he was dressing for dinner and had only his B.V.D.'s, Frankfurter received a call from Roosevelt who said, "I told you that I can't name you. But wherever I turn, wherever I turn and to whomever I talk

that matters to me, I am made to realize that you're the only person fit to succeed Holmes and Cardozo. Unless you give me an unsurmountable objection I'm going to send your name in for the Court tomorrow at twelve o'clock."

That's how Frankfurter became justice of the Supreme Court of the United States.

Frankfurter reveals in his reminiscences a social consciousness and liberalism bordering on radicalism. But his opinions in the Supreme Court categorize him under the "conservative" group. Could it be a case of leaning backwards to disabuse the minds of those who hold him suspect? His statement to the Senate Judiciary Committee when his appointment was being considered is revealing: "If I understand the philosophy of Communism and the scheme of society it represents, everything in my nature, all my views and convictions, lifelong cares and concerns, are as opposed to it as anyone can possibly be. If I understand what Americanism is, I think I'm as good as an American as you are."

VICENTE ABAD SANTOS