Department of Justice

REMARKS BY

ATTORNEY GENERAL NICHOLAS deB. KATZENBACH

at the

Memorial Proceedings in Honor of

the late Mr. Justice Felix Frankfurter

Supreme Court of the United States

Washington, D. C.

Monday, October 25, 1965

12:30 p.m.

Mr. Chief Justice; May It Please the Court:

The Bar of this Court met this morning in memory of Felix Frankfurter, who was an Associate Justice of the Court from January 30, 1939, until August 28, 1962, and who died on February 22, 1965. Few men have devoted as much of themselves to this Court -- it was, as the Justice said in expressing to the President his reluctance at leaving the Court, "the institution whose concerns have been the abiding interest of my life" -- and few men have had so much of themselves to give: His was a towering intellect; he had the keenest of minds and the most facile of pens; he brought to the Court his boundless love of life and his work; and his understanding of the Nation and respect for its institutions could not have been more profound. Unquestionably, his service here was the triumphant culmination of the life of one of the great public men of the Century, as well as one of the brightest chapters in this Court's distinguished history.

I need not remind those who are gathered here of the emptiness which his passing has left. In this room especially we recall the vivid and crackling excitement which was inevitably generated when he questioned counsel -- challenged would perhaps be more appropriate -- or delivered an opinion. Those marks of the Justice are lost to us except in memory. Nor shall I attempt to speak of his rich and varied life and accomplishments outside the Court. Let me speak rather of what I believe to be his principal legacy to this and later generations -- his forcefully articulated conception of the role of courts, and in particular of this Court, in the American political system.

We should first understand something of the background and experience of the man. As a poor immigrant boy who by sheer force of intellect and character achieved great eminence in the public life of his adopted country, he knew at first hand, and passionately believed in, the promise of American life. The years before he came to the Court, moreover, coincided with the great reform ear of the first decades of this century -- a period when Congress and the President, and even more, perhaps, State legislatures, were embarking upon programs of bold experimentation in social justice and reform. In that day, judicial decisions which took a restrictive view of the regulatory powers of the State and Nation were a major stumbling block. Himself an impassioned reformer, Justice Frankfurter saw that the American experiment with democracy is a workable one -- that government by the people through their elected representatives can be vital and progressive; and he saw that the courts of that day, in contrast, were remote from popular currents, and consequently ill adapted to function as an independent organ of social policy.

His career in government and as a professor of law at Harvard confirmed the lessons of his youth. He came into contact with Holmes, Brandeis and Learned Hand, whom he revered and whose fundamental views he shared, although he imbued those views both with his own passionate nature and with his own unique sense of the values of American institutions. His own researches added to his knowledge. His brilliant pioneering study of the labor injunction, for example, showed that there might be areas of social conflict to the resolution of which the processes of the courts were inherently ill suited. More important, at Harvard he became

the first systematic student of the Supreme Court as an institution. He acquired a scholar's understanding of its strengths and limitations, and came to believe in the Court's indispensable historic role as the arbiter of fundamental conflicts of power within the American political system, concluding that its success in this role depended in very significant measure upon scrupulous adherence to the procedures and limitations of a court of law.

Perhaps the most important result of his years as a law professor specializing in the study of this Court was that he became imbued with a tenacious faith in reason, and in this Court as its embodiment in the political structure. Almost a quarter century of brilliant and lively teaching, scholarship, and polemics did not fail to instill in him a profound belief in the efficacy of the rational processes of the law and a reverence for this Court as the institution of government pre-eminently fitted to bring these processes to bear upon the nation's fundamental problems -- which, as de Toqueville observed, are inevitably presented sooner or later in judicial questions.

These themes -- faith in the American democratic experiment and reverence for this Court as the embodiment of reason applied to the problems of government -- explain, I think, much of Justice Frankfurter's matured conception of the Court's role. Congress and the State legislatures, the basic organs of representative government, were, in his view, designed to make social policy; the Court was not. The Court must, therefore, in Justice Frankfurter's view, be most cautious in the exercise of its power to invalidate legislation on constitutional grounds.

The same result followed by a slightly different route. If the Court were truly to exemplify the application of reason to government, it would have to respect the competencies of the other organs of government -- Congress and the President; State courts and legislatures, federal trial judges and the federal regulatory agencies. If it went too far afield, in the long run it would only weaken itself. To the same end of preserving the Court's prestige and effectiveness, he felt that it should adhere scrupulously to the procedures and traditions of a court of law, declining to pass upon any but cases in which the issues were focused and the facts digested in accordance with the strict requirements of the adjudicative process, and discharging its duties at all times with meticulous craftsmanship and impartiality.

It is popular today to speak of Justice Frankfurter's philosophy of the role of courts as one of "judicial self restraint." Thus phrased, the Justice's ideology becomes a negative conception and, indeed a most implausible one in light of the man. For Felix Frankfurter was not a man who was either restrained or detached; he was, quite to the contrary, both deeply passionate and consumingly involved. "He was," as Professor Mansfield (a former law clerk) said on the occasion of his death, "the most unreserved of men." His view of his proper role as a judge did, it is true, require him more than once to sustain policies and results irreconcilably at war with his personal predilections, and in this particular

sense he may be said to have been restrained. A sharp example of such a dilemma early in his judicial career occurred in the second flag salute case, where the Justice found himself in dissent from a decision holding that a member of Jehovah's Witnesses could not constitutionally be compelled by a State legislature to participate in a patriotic ceremony contrary to his religious beliefs. Recognizing, with unusual candor and eloquence, the line between his personal views and those he believed to be imposed upon the State legislature by the Constitution, the Justice said:

> "One who belongs to the most villified and persecuted minority in history is not likely to be insensible to the freedom guaranteed by our Constitution. Were my purely personal attitude relevent I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores."

That he nevertheless did not veer from his conception of the proper limitations of the Court bespeaks his fidelity to principle and his strong intellectual self-discipline. But it relects much more as well -- and I come now to a second important aspect of his contribution to our political and judicial philosophy. It was his belief that the Court's circumscribed role was a necessary corollary to the vigorous and progressive exercise of the policy-making function by the political organs of government, to which that function has been primarily entrusted by the Constitution, as it must be in a free society. To be sure, he did not hesitate to invalidate laws fundamentally incompatible with democracy; his consistent position in the civil rights area bears witness to that. He taught not a universal solvent for constitutional problems, but, rather, a fundamental attitude: To equate strong distaste for a statute with its unconstitutionality would unduly stifle, and might ultimately destroy, the creative forces of democracy -- upon which, responsibly exercised, we ultimately depend for progress and for liberty. Courts cannot undertake comprehensively to exercise a policy-making role, and they must take care not to destroy the responsibility of those who do.

These principles received a severe test near the close of Justice Frankfurter's judicial career, in the reapportionment case (Baker v. Carr). The ill which the Court was asked to confront was a malady of representative government itself, a malady, moreover, of the utmost gravity and nationwide in scope. Since a malapportioned legislature could hardly be expected voluntarily to reapportion itself equitably, Justice Frankfurter was faced with the hardest of choices: between judicial action that in his view would only harm the Court without promising a satisfactory solution to the problem of unequal representation (a problem that he considered political rather than judicial in character); and judicial inaction which would leave the problem without foreseeable solution. He chose the first horn of this dilemma. He spoke in these words:

> ***(T)here is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The framers carefully and with deliberate forethought refused so to enthrone the judiciary. In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives."

I shall not presume to appraise the choice made. My point is that for him this was no empty rhetoric; the principles of separation of power and federalism were living guidelines, no more cliches.

In short, Justice Frankfurter's conception of judicial self-restraint was not solely, or even primarily, focused upon inhibiting judicial power as such. To be sure, he was concerned that expanding the Court's role beyond what he conceived to be its proper limits would deflect the Court from more basic duties, and impair its ability to discharge them adequately, and also that, outside the limited sphere of its competency, the Court would not be able to provide viable solutions to social and political problems. But he viewed the problem, at the same time, in the positive light of promoting a democratic and just society. The choice to abstain in many vital areas was for him a practical and acceptable, and, if painful, still not intolerable, choice, because he believed that in the final reckoning the representative organs of government must be relied upon to do, not shirk, their job. And he was convinced that the Court, if it took upon itself the task of righting all of the nation's social wrongs, would find itself ill-equipped, while at the same time encouraging the political organs to shed their rightful burdens. They could be expected to act most responsibly only if accorded the full and awesome responsibility for making policy and political judgments; the best thing the Court could do, therefore, was to place the responsibility squarely where it belonged.

I have tried to suggest that Justice Frankfurter's view of the Court as an institution constrained to act within rigorous limits rested not so much on a negative view of the Court's power and competence, but more on an affirmative faith in reason, democracy, and the genius and fortune of the American political system to secure just solutions for essentially social or political problems outside the judicial arena. This faith did not exclude an important role for the Court. On the contrary, it suggested several important creative functions. Let me mention, in the first place the Court's unique function as a teacher (as the Justice himself had been) and exemplar. We see this in the form and texture of his opinions. Written to instruct, explicit about their assumptions and implications, freighted with history and learning, they set a new style in judicial opinion-writing. We saw it too in his probing questions from the bench and his lively exchanges with counsel. The Court, he said, is "a tribunal not designed as a dozing audience for the rendering of soliloquies" but "a questioning body, utilizing oral arguments as a means for exposing the difficulties of a case with a view for meeting them."

"As another example of the Court's creative role, consider his consistent attitude toward the other organs of government whose actions or enactments he was called upon to enforce and review. While vigorously upholding their autonomy (as in his famous *Pottsville* opinion), and reluctant to second-guess their substantive determinations, he was aggressive in interpreting statutes so as to effectuate Congress' basic purpose (however imperfectly expressed in the statutory language), and in enforcing procedural regularity to compel the policy-making organs to act responsibly.

"As a reader of statutes-really the bulk of the Court's business-Justice Frankfurter drew upon his great understanding of the Nation and its processes. He was impatient with mechanical literalism divorced from the underlying purpose. In speaking of the Fourth Amendment, he once wrote: 'These words are not just a literary composition. They are not to be read as they might be read by a man who knows English but has no knowledge of the history that gave rise to the words.' He was realistic in his assessment of the practical limitations of the legislative process-the inability to provide for every contingency of statutory application; the difficulty of verbal precision in instruments whose phrasing is inevitably a product of compromise. He also refused to abandon hope of finding behind a statute a coherent legislative design that would give meaning and direction to the search for the 'intent' of Congress. This quest for purpose involved much more, of course, than resort to the committee reports and the record of debate. To him the legislative history of an Act comprised the history of prior enactments in the field, the mood and temper of the legislators, the events that gave rise to the legislative proposals, the changes the bill underwent before it assumed its final enacted form. Above all, he tried to understand the nature of the problem that had called forth the legislative response. If the Court could divine the legislators' problem and trace in the rough the indicated lines of their solution, it was obligated to give the statute a construction that would help to achieve their end.

"This creative and masterful sensitivity in the interpretation of statutes was surely one of the most fruitful products of his conception of the Court's role. I emphasize that it was, indeed, rooted in that conception. His faith in representative government implied to him a commitment to use the special resources of the judiciary-power and skill in analysis and clarification-to help make the legislative process viable and productive, and his faith in Reason committed him to bring to the task of meaningful statutory construction all the tools of cogent analysis: history and scholarship, imagination and understanding, practical experience and common sense. The bold results of his approach are particularly evident in his famous opinions in the labor field, from *Phelps Dodge* to the second *Garmon* case.

"Justice Frankfurter's view of the Court's role also underlay his pioneering approach to cases involving a challenge to the validity of official action. He showed that the Court had a salutary role to play in encouraging responsible action. We see this most clearly in his opinions reviewing administrative decisions. In the early years of his career on the Court, such

review had already gone through two phases. In the first, agency action that seemed to exceed lawful bounds had been unhesitatingly struck down, without more. In the second phase--a reaction to the first--the tendency had been to uphold agency action almost as a matter of course, and to exercise little judicial control over the administrative process. Justice Frankfurter found a middle ground between the extremes of judicial supervision and abdication--requiring that the agencies conform to procedures calculated to maximize the prospects for wise and rational decisions, while refusing in general to review the substantive wisdom of a decision responsibly made.

His view of the Court's function in such cases is exemplified by his landmark opinion in the first Chenery case. The agency, in its opinion, had placed decision on one ground; in defending the decision in the Supreme Court, the agency's appellate staff relied heavily on a different ground. Speaking for the Court, Mr. Justice Frankfurter held such a procedure impermissible. Congress had lodged the responsibility for decision in the members of the agency, and not in their appellate lawyers. If agency action was to be upheld, it should be on a ground considered and adopted by the agency itself. Only then would there be assurance that agency policy was being formulated deliberately and that responsibility was being assumed, not evaded, by those whom Congress made responsible.

This notion is epitomized in a memorable sentence from Justice Frankfurter's McNabb opinion: "The history of liberty has largely been the history of observance of procedural safeguards." What he meant, I believe, was that if the courts did no more than compel officials to follow fair and proper procedures in enforcing the law--procedures that would require them to reason before deciding and to explain the basis of their actions--substantive rights would inevitably flourish.

Consider also Justice Frankfurter's devout insistence that the Court must never permit itself to become a party to injustice; never allow its image as an institution of reason and conscience to become tarnished. This lies at the root of the Justice's steadfast stand against the admission of confessions obtained by the third degree or other illegal means. A conviction based on such methods could not be upheld without condoning wilful disregard of our society's basic norms of fair procedure, and hence should not, he reasoned, be tolerated by the Court. The same idea explains his frank refusal to uphold convictions based on methods shocking to the conscience. His standard in the famous stomach-pump case (Rochin v. California) rested on a bold and forthright, not a negative or passive, view of the Court's role in the American governmental system--as the keeper of the public conscience.

His emphasis on procedure and on the Court's duty to avoid injustice led him to play an active and forward role in the area of federal criminal justice. For example, it was Justice Frankfurter who, in the McNabb case, significantly advanced the fertile concept that this Court has a broad

"supervisory authority" over the procedures of the lower federal courts in criminal cases. And in other areas where the elaboration of policy was peculiarly appropriate for courts--such as the enforcement of the Fourth Amendment--he was also in the forefront.

In these remarks, I have made no effort to encompass or evaluate all of Justice Frankfurter's rich contributions to the law, this Court, and the Nation. I have concentrated on his view of the Court's role in society because it seems to me that there may be a particular value in reminding ourselves of the fullness, the maturity, and the affirmativeness of his view. To be sure, his philosophy is open to challenge both generally and in its application to specific cases. Men of originality and greatness are inevitably men of controversy, and the Justice relished such battles. The heart of the matter lies beyond agreement or disagreement. Justice Frankfurter contributed to the jurisprudence of this Court a coherent, articulate, and rounded conception of its place and function in the firmament of the American system. And to the law as a whole he brought a devotion to the process of achieving justice through reason. Few have left so rich a legacy.

May it please this Honorable Court: In the name of the lawyers of this Nation, and particularly of the Bar of this Court, I respectfully request that the resolution presented to you in memory of the late Justice Felix Frankfurter be accepted by you, and that it, together with the chronicle of these proceedings, be ordered kept for all time in the records of this Court.