



ADVANCE SHEET – March 18, 2022

President's Letter

We here present two excerpts from the oral recollections of one of the least currently fashionable of modern justices, Felix Frankfurter. Frankfurter, after resisting for more than a year the Supreme Court's opinion in *Baker v. Carr*, the initial reapportionment case, is said to have had a stroke shortly after its rendition. His dissent predicted the partisan gerrymandering and political polarization that followed.

His opinions were heavily footnoted and rather academic. One of his acolytes, Philip Kurland, gave a just and detached appraisal: "Felix Frankfurter was no scholar but he was knowledgeable about almost everything... He was not an originator, a discoverer or a synthesizer. He was a problem-solver and the problems that he solved were real and not theoretical... [he] trafficked in [the] newest form of power--the trained intelligence required to govern society", [favoring] "capitalism--but not state capitalism." Kurland noted the spartan observances at C.C.N.Y. and the Harvard Law School of the centennial of his birth. "Felix Frankfurter had no crowd during his lifetime and certainly none has formed since his death" but "to learn what he did is not to learn what he was."

The excerpts that follow, on the Sacco-Vanzetti Case and the New Deal, illustrate both his moral courage and his social sophistication.

George W. Liebmann

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You Gotta Have Hope

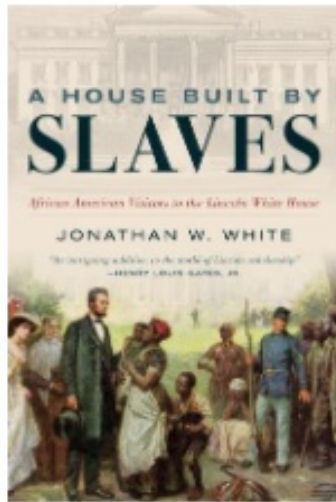
Since last we spent time together, we have sprung forward and are now on the cusp of Spring itself. Since Hawaii does not observe daylight savings time, my wife and I are now six hours away from our daughter who is stationed there, as opposed to five. Funny how significant that feels.

Within the last few days we have found out that there will be major league baseball in 2022, although we still do not know when Baltimore might return to the major leagues. In the first power rankings of the year, where each team is rated, the Orioles, if I can remember correctly, were sixty-fifth out of thirty teams. I have now come to the conclusion that if I am ever going to see my hometown team return to the World Series, as it was in six of my first twenty-four years of life, but not at all over the course of the past thirty-nine, I am going to have to move.

Still, Spring is a time for hope, even if it seems as though instead of seeing light at the end of the tunnel we appear to be standing on the edge of a new precipice. Has it always been this way or is it just that I have become an old man and everything is so much more magnified?

Well, back to the hope part. For 182 years the Baltimore Bar Library has provided it to those for whom it had previously not been available. In 1840, it was all the lawyers of Baltimore, who up until then, had no significant collection of legal materials available to them. In the years that followed, men and women, including Everett J. Waring and Etta Haynie Maddox, individuals who had very little reason for hope, found it at the Bar Library. Today, both members of the Bar and members of the public, in the guise of pro se litigants, continue to come to the Library in the hope of finding help with their legal issues.

In the tradition of those that have come before them, the staff of the Library does all that it can to provide not just services and collections, but hope. I ask for your help in the way of a membership and/or contribution to further these efforts. Whatever you can do is much appreciated.



In A House Built By Slaves: African American Encounters with Abraham Lincoln

On Thursday, March 24, 2022, at 5:00 p.m., Dr. Jonathan White will present a lecture on his book *A House Built By Slaves*. The lecture will be presented by way of Zoom. We invite those that will be watching to participate by contributing their questions. **Zoom** is an interactive platform.

Jonathan W. White is associate professor of American Studies at Christopher Newport University. He is author or editor of twelve books and more than one hundred articles, essays and reviews about the Civil War. His earlier book, *Emancipation, the Union Army, and the Reelection of Abraham Lincoln*, was named a best book of 2014 by *Civil War Monitor*, was a finalist for both the Gilder-Lehrman Lincoln Prize and the Jefferson Davis Prize, and won the Abraham Lincoln Institute's 2015 book prize. *Midnight in America: Darkness, Sleep, and Dreams during the Civil War* was named a best book of 2017 by *Civil War Monitor*. His recent book, *Our Little Monitor: The Greatest Invention of the Civil War*, co-authored with Anna Gibson Holloway, was a finalist for the Indie Book Awards and honorable mention for the John Lyman Book Award. He is a Distinguished Lecturer for the Organization of American Historians, and serves on the Boards of Directors of the Abraham Lincoln Institute, the Abraham Lincoln Association, and The Lincoln Forum. He also serves on the Board of Advisors of the John L. Nau III Center for Civil War History at the University of Virginia, the Ford's Theatre Advisory Council, and the editorial board of the *Pennsylvania Magazine of History and Biography*. In 2019 he won the Outstanding Faculty Award of the State Council of Higher Education for Virginia, the highest award given to faculty in the Commonwealth.

“In A House Built By Slaves: African American Encounters with Abraham

Lincoln”

Prior to the Civil War, African Americans were almost entirely excluded from the White House, other than as servants or slaves. However, during the war, the racial color line was broken down as African Americans claimed the First Amendment right to petition the government. For the first time in the history of the United States, they saw the president as their president and the White House as their people’s house. Between 1862 and 1865 Lincoln welcomed hundreds of African Americans into his White House office and at public receptions. This talk will explore the remarkable story of the relationship that developed between Abraham Lincoln and the black community during the crucible of the Civil War.

Previous Bar Library Presentations of Dr. White: “The Emancipation Proclamation” – A Zoom Presentation (July 30, 2020); "Our Little Monitor: The Greatest Invention of the Civil War" (February 6, 2019); "Lincoln on Law, Leadership, and Life" (June 2, 2015); “Lincoln's Dreams" (October 17, 2013) and "The Peculiarly Insignificant Role of the Supreme Court in the Civil War" (May 10, 2012).

Time: 5:00 p.m., Thursday, March 24, 2022.

If you would like to join us for this Zoom presentation please send an e-mail to jwbennett@barlib.org or telephone the Library at 410-727-0280. You will be forwarded the Zoom link the week of the program.



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Perhaps the "rapier" way to put what is essential to what you call the "drama of Sacco-Vanzetti" was expressed in a remark made to me by John F. Moors about "two wops." Moors was a Yankee of Yankees, a Bostonian of Bostonians, an intimate, close personal friend; indeed, a Harvard classmate of President Lowell and a member of the Harvard Corporation. His friendship with Lowell survived without strain despite Moors's nonconformist attitude, and indeed he fought hard for the cause of Sacco-Vanzetti. But he said to me after it was all over—this at once shows his breadth and his parochialism, his worthy parochialism—"It was characteristic of Harvard and in a way to the glory of Harvard that two Harvard men were the leaders of the opposing forces in the Sacco-Vanzetti affair. Here was A. Lawrence Lowell, the president of the school, and here was Professor Frankfurter of the Harvard Law School, who were the spearheads of those who expressed conflicting views."

That he should have derived satisfaction from the characteristic broadmindedness of Harvard's non-regimentation of thought illustrates his deep devotion to the law school, but in the course of that talk he said about his friend, Lawrence Lowell, this: "Lawrence Lowell was incapable of seeing that two wops could be right and the Yankee judiciary could be wrong."

That posed a dilemma for Lowell which his mind couldn't over-

reach, clear and hurdle with ease. His crowd, the Yankees, were right, and the alien immigrants were what they were—pacifists and draft dodgers. He was incapable of doing what men have done, namely, say their crowd was wrong. You have to transcend the warm feeling of familiarity and reject that warm feeling in a spontaneous loyalty that transcends to greater loyalties, abstract virtues, truth and justice. That remark of Moors's for me goes to the root of the difficulty. Just as it was true of Lowell, it was true of many, many people, of lawyers who would suppress their beliefs that maybe something went awry, who would suppress their realization that no matter how disciplined or sterilized, as it were, their biases are through the habit of discipline, nevertheless, judges and courts may go wrong. I wrote in my book on the Sacco-Vanzetti case that, "Perfection may not be demanded of law, but the capacity to correct errors of inevitable frailty is the mark of a civilized legal mechanism."

Now there were any number of lawyers for whom the issue was not should justice be done, but should we weaken the whole structure, namely, respect for our courts. It was the realization that Lowell, a more civilized partisan than Judge Webster Thayer, couldn't transcend his belief in his crowd and entertain the belief that two Italian immigrants might be right, the realization that it was those forces and not merely individuals which saved me from ever seeing the affair in terms of devils.

A very important factor, and one that gnaws at my curiosity all the time, is the fact that men who know do not speak out. Any number of people privately were convinced all was not well, lawyers particularly. A dozen lawyers I can think of who had doubts would have added to the strength of those who did take action. There were a good many people who did take action. Moors was one of the fellows who went up to the governor and got the governor to appoint the Lowell Committee. Then, of course, the simple-minded, ingenuous people who don't understand thought that everything was going to be hunkey-dory because the president of Harvard University was appointed. When the Lowell Report came out—it was so vulnerable in so many respects—they didn't say it was a report by Lawrence Lowell. Although it was well known that it was written by him, they did say that it was a

report by the highly esteemed president of Harvard University. I remember saying to a dear friend of mine, "Don't talk to me about this report as the report of the president of Harvard University! You must go from the report to Mr. Lowell, not from Mr. Lowell to the report. You must deal with this report as though it was an anonymous report written on parchment, on papyrus, which was discovered way back in some catacomb, and some archeologist who was able to decipher it said, 'This is a report on the conviction of two men. I can't figure out their names—something like Sacco and Vanzetti. This is two thousand-odd years ago, and I'm happy to report that buried with it is the six thousand pages of minutes, so that we can check what was said in this report about these two men against the permanent and controlling facts—the stenographic minutes.'

"You are not thus led to the plausibility of this report by the author of the report, and, if the report is revealed as defective by the minutes of the proceeding, then you don't say that the report must be right because the president of Harvard University wrote it, but what kind of a man was the president of Harvard University to write such a report?"

It is very difficult for people to question authority and very difficult to get people to read documents. I remember being furious, really furious, with a friend of mine, a really intelligent woman, a strong supporter, deeply devoted to the cause of Sacco-Vanzetti. I was furious when I heard that at a private party—of course, the Sacco-Vanzetti case rent families, friendships and associations—people were discussing the case at dinner, and instead of debating with those who asked her questions she answered their questions by saying, "I don't know anything about it. It's enough for me that Felix Frankfurter has taken the position he has."

She hadn't taken the trouble to spend two hours with the little book I'd written in order to qualify herself to talk about the case and to answer the questions of doubters, the skeptics, who also hadn't read the book, who also hadn't familiarized themselves with the facts, but went on generalities about the reliability of Lowell's report. This was true enough in the overwhelming number of cases so that this was a combat in the dark by people who on either side eschewed the responsibility to find out what they were talking

about. John Morley says somewhere—I think it's in his important little book *On Compromise*—that the most important thing in a man's life is to say I believe this, or I believe that, on the assumption that when he says that, he has put behind that affirmation the necessary thought and inquiry. Here this woman—I was perfectly outraged—shot off her mouth all over the place, but she couldn't take one evening off to read my little book to find out what the facts were so that she could at least meet people who were honest and groping, if not the ignorant, the set, and the hopeless.

The Sacco-Vanzetti affair has almost every important, really sizable issue that cuts deeply into the feelings and judgments and conduct of the community, implicates factors that transcend the immediate individuals who, in the main, are instruments of forces that affect many, many beyond the immediate actors in the affair. It involves problems that still gnaw at my curiosity. Few questions bother me more from time to time than what is it that makes people cowardly, makes people timid and afraid to say publicly what they say privately. By "people" I mean not those who are economically dependent and who can't call their souls their own because they have to feed their wives and their children, but those who are economically independent, those who have position, those who by speaking out publicly would turn on the currents of reason and check the currents of unreason. What is it that makes so many men timid creatures?

I can give myself some answers. 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.

So the affair like Sacco-Vanzetti for me was a manifestation of what one might call the human situation. The upshot is that I didn't think that it should be minimized to the trivialities of a few individuals. Oh, sure. If another judge had presided, or if the governor of Massachusetts at that time had been a less crude, illiterate, self-confident, purse-proud creature than was Alvin Fuller, other things might have happened. There might have been Bury's "valuable collision" we referred to in one of our earlier talks. But these individual effects derived from the fact that there are causes at work on which they can operate.

As I understand your little book, your aim was a dispassionate examination of the record. In the Boston context in which the book was received, it was largely overlooked—that is, while it aimed at reason, irrationality won the day.

Without being Pollyannish about it, it isn't quite fair to say—and you haven't said it in those words—that this effort of mine was a dud in the sense that it didn't affect opinion. It jolted, particularly outside of Boston, minds and said, "Stop, Look, and Listen," and it gave discomfort and disquietude within Boston. You haven't asked me what I was trying to do. I think I can answer that question—what I was trying to do. Of course anybody who publishes as against a man who doesn't publish publishes not because he is an anchorite. An anchorite doesn't publish. A man doesn't publish because he doesn't want to touch men's minds, because he doesn't want an audience, because he doesn't want to influence conduct, because he doesn't want to persuade men to his way of thinking, or to his way of appreciation, or to his way

of seeing things. A man who publishes publishes for the opposite reasons, because he does want to reach a public, and so it's no use saying, "Oh, I published this thing not because I wanted to persuade people to this way of thinking."

Anybody who says that is either a fool or a hypocrite or just self-deceiving. But I was once asked, "How did you come to write this book?" The Swedish Socialist Party, like the socialist parties all over Europe and all the other people who hadn't read the evidence and didn't know, was infected by a feeling that some harm was done. In some places in Europe they were glad to get something on the United States, and a generous emotion is contagious which is to the credit of mankind's heart, though not always of its head, so that there were widespread protests all over Europe in this case. So it was with the Socialist Party of Sweden. They wanted to pass a resolution saying, "We condemn" etcetera. The son of either the then or previous prime minister of Sweden, Branting, a very notable Swedish statesman, was a lawyer and was the lawyer of the Swedish Socialist Party, and he urged on them that before they resolute against the injustness or unfairness of a conviction in the United States they'd better know what they were talking about. He suggested that they'd better send somebody to the United States to study the case and then resolute on the basis of knowledge, instead of on the basis of infected feeling. The upshot was that Branting himself was dispatched as a lawyer to the United States, and one day there turned up at the Harvard Law School a rather serious-minded, solemn-spoken blond fellow, and he introduced himself as Mr. Branting and told me that he was sent to the United States to make inquiry on the spot into the Sacco-Vanzetti case with a view to guiding the action of the Swedish Socialist Party.

He studied the case like a good lawyer and when he got back to Sweden he wrote a book on the Sacco-Vanzetti case. He examined everybody, all the *dramatis personae*, and he turned up at Langdell Hall in Cambridge and said that he would like to ask me a series of questions that he had carefully considered and would I be good enough to answer them. I said that I would be glad to do so to the best of my ability. He had a long series of questions. The first one was, "How did you come to write your piece for the

Atlantic, which is now the little book? How did you come to write that book?"

I reflected a minute and then answered what I now would answer, if asked that question: "It wrote itself. I will explain what I mean. I didn't decide to write a book. I didn't say, 'Here's an interesting case; I'll write a book about Sacco-Vanzetti.' That isn't the way it happened at all."

The Braintree crime was committed in the summer of 1920 while I was abroad. Needless to say it wasn't reported in the English papers, or the French papers. Most of the time I was in England. When I arrived here in time for the opening of the law school, I didn't know that there was such a crime as the Braintree holdup-murder. So far as I know I'd never heard the names Sacco and Vanzetti. I knew nothing about it—just nothing. Soon, however, it got into the papers, and I didn't read anything about it because it was my habit, is my habit, engendered from my experience in the United States Attorney's Office, not to read accounts of trials as reported in the press unless the press purports to report the trial verbatim. My experience during those years about trials in which I took part as I saw them reported even in the best papers was distortion, mutilation and at best an opaque account of what took place in the court room. If I was sufficiently interested in a trial, if I really wanted to know, I would try to get stenographic minutes.

To illustrate this pedantic attitude of mine I can give you an episode in my life that is almost ludicrous, not only ludicrous, but incredible. You remember the Hall-Mills trial—the pig woman and all that marvelous wallowing in sensationalism for the American people for weeks? What is more exciting, what is more sensational than a secret liaison between a rector and a choir singer! You know—it's the classic case resulting in the classic crime of passion, getting the husband out of the way. One fine day in Cambridge, as here, I would read my *New York Times* at breakfast. One day I said to my wife, "Marion, what in hell is this Hall-Mills business that I see?"

She said, "What do you mean, this Hall-Mills?"

I said, "It's some kind of a trial evidently. I see Hall-Mills, and

it blocks my reading of the *Times*. For weeks now I've had to turn pages to get rid of Hall-Mills. What is it all about?"

"Don't you know what it is?"

"I haven't the remotest idea."

"You don't know anything about it? You don't know about the 'pig woman'?"

"I don't know what you're talking about."

The fact is that I didn't know until she then told me, and this after the trial had been under way for God knows how long and all the sensationalism preceding the trial had been under way for weeks. I had physically not read one line and so didn't know what it was all about, and to this day crimes can take place that have a front page in the *Washington Post*, and I couldn't tell you to save my life five minutes after I've seen something, just enough to turn the pages, what the criminal trial is about. So I haven't any idea what I saw, or what my eyes skipped, in Sacco-Vanzetti. All my life I've read newspapers avidly. I've told you about Cooper Union. One of the good things that I got out of those years of wastefulness is that I can read a paper very rapidly and with extremely profitable discrimination. I don't know what I saw or didn't see in the papers about Sacco-Vanzetti, but I don't recall having read anything. However, the case impinged on me because our dear friend, Mrs. Glendower Evans, became deeply involved, and I knew it involved some murder in which two Italians were charged. "Auntie Bee" as we called her was greatly exercised over it, and as the years went on my wife from time to time said, "Auntie Bee wants to know what you think about the Sacco-Vanzetti case."

We cared a lot about her. She was a woman of great benevolence. She lived in the household of Mr. Justice Brandeis. She was a Boston Gardiner. She was a very beautiful young thing when she married Glendower Evans, a most promising young lawyer, a great friend and classmate at the Harvard Law School of Louis Brandeis. Evans was a Quaker who came up from Philadelphia and remained in Boston. He had a very acute mind, extremely acute mind. Holmes told me that Glen Evans's criticisms of the *Common Law* published in 1881 were the only instructive criticisms that he had about the book. Evans married this charming

Boston lady, and he died a few years after their marriage. The Brandeises and the Evanses lived near each other, and it was a habit of Brandeis to pick up his friend Glen Sunday mornings for a walk. They took long walks and talked together. The Sunday following the death of Glen Evans, Brandeis turned up at the house of the Evanses and asked the young widow to take a walk, and he continued to do that, saw her through that awful period of devastation when everything went to smash for her and gradually directed her into ways in which she occupied her time, became, as it were, interested in social causes. She took some courses with William James. She had a very good brain, an awfully good brain. Brandeis didn't care much for abstract philosophy, but thought that it wouldn't do her any harm. She became the close friend of the Brandeis family and spent summers with the Brandeises. We occasionally saw the Brandeises during the summer, spent some time in Chatham down on Cape Cod. Incidentally because all this was going on while she lived in the Brandeis household, he disqualified himself when the case came before him and didn't sit in the case.

But Mrs. Evans—"Auntie Bee" she was called by the Brandeis children, and we picked this up—from time to time would ask my wife what I thought about the Sacco-Vanzetti case, and Marion would ask me. I would say to my wife, "Marion, you know very well that I have no opinion about a trial or a conviction unless I've read the record. I haven't read the record, and I don't know anything about it."

This went on over the years, into 1925, and I remember my wife once saying to me, "Why are you so sticky? Can't you give me some general opinion that I can tell Auntie Bee. She worries me so about it."

I said, "No, I can't," and I continued being what was called "sticky." There it was. I paid no attention to it, but one day I saw that William G. Thompson had become counsel for Sacco-Vanzetti, and that interested me. William G. Thompson was one of the most conspicuous lawyers in Boston and particularly conspicuous as a trial lawyer and an appellate lawyer. So far as we have any he was a barrister, not a corporate adviser, but a court man. I knew him, greatly respected him, admired him. I knew him

somewhat because he was a great friend of Mr. Stimson. They were contemporaries at the Harvard Law School, and he was a great friend of Ezra Thayer, who, as Dean, brought me to the law school. That's how I had a kind of feeling of association with him. When I saw this notice I said, "Hello!" Up to that time Sacco-Vanzetti had some class conscious lawyers and a blather-skite from the west called Fred Moore, but William Thompson was something else. He was as good a lawyer and as esteemed a lawyer as there was at the Boston bar.

By this time, of course, the men had been convicted, and there was a succession of endeavors for a new trial, new proceedings following the conviction and pending the appeal. One day I saw in the papers, THOMPSON MAKES MOTION CHARGES FRAME-UP—whatever the scare headline was and a short story, and I read that. I found that Thompson made a motion for a new trial based on an affidavit of one of the ballistic experts of the Commonwealth, Captain Proctor.

The specific thing Captain Proctor swore to in his affidavit was: [Reading from his book, *The Sacco-Vanzetti Case*] "During the preparation for the trial my attention was repeatedly called by the District Attorney and his assistants to the question whether I could find any evidence which would justify the opinion that the particular bullet taken from the body of Berardelli, which came from a Colt automatic pistol, came from the particular Colt automatic pistol taken from Sacco. I used every means available to me for forming an opinion on this subject. . . . At no time was I able to find any evidence whatever which tended to convince me that the particular model bullet found in Berardelli's body which came from a Colt automatic pistol, which I think was numbered 3 . . . came from Sacco's pistol, and I so informed the District Attorney and his assistant before the trial. . . . At the trial the District Attorney did not ask me whether I had found any evidence that the so-called mortal bullet which I have referred to as number 3 passed through Sacco's pistol, nor was I asked that question on cross-examination. The district attorney desired to ask me that question, but I had *repeatedly* told him that if he did I should be obliged to answer in the negative; consequently, he put to me this question: 'Have you an opinion as to whether bullet number 3

was fired from the Colt automatic which is in evidence?" To this I answered, 'I have.' He then proceeded. 'And what is your opinion?' A.: 'My opinion is that it is consistent with being fired from that pistol.' "

When I read that in the paper, something happened.

This is what I told Branting and what I tell you now and what is so. When I read that motion filed by Thompson based on this affidavit of Captain Proctor that the district attorney had "repeatedly" asked him, and he had repeatedly said that he could not do this, but finally the district attorney formulated this question, I said, "Hello! I don't have to read six thousand pages. Thompson is making a specific charge. I understand this, and I will now wait to see what the district attorney will reply."

When I read about that motion something happened to my insides. What reading it triggered was the experience I'd acquired under Mr. Stimson's guidance and rules, the standards he represented which had become habits of my mind as to how a district attorney should conduct himself. If what Proctor said was true, it was reprehensible beyond words, and it undermined any confidence in the conduct of the case, that a district attorney should try to get an expert to swear to something that he repeatedly said that he couldn't swear to. It took some time before the district attorney replied, and I don't see why I didn't give the date in my little book, but finally the district attorney stated that prior to his testifying Captain Proctor told him that he was prepared to testify that the mortal bullet was consistent with having been fired from the Sacco pistol, that "I did not *repeatedly* ask him whether he had found any evidence that the mortal bullet had passed through the Sacco pistol, nor did he *repeatedly* tell me that if I did ask him that question that he would be obliged to reply in the negative."

When I read that, that settled the matter because I didn't care whether it was "repeatedly" or only once that he asked Proctor whether the mortal bullet found in Berardelli's body was the bullet that came from Sacco's pistol. If he asked him once, and Proctor said, "I couldn't tell you," and then he got from Proctor his opinion that "it is consistent with having been fired by that pistol"—that is so misleading a matter to be allowed to put to a jury, because the jury didn't make that nice, subtle distinction. If they had, they

might have said, "Why the hell didn't he say, 'It did, or it didn't?'" To them it meant, "Yes, it went through," and that's all it meant. That's all you can expect from twelve jurors whose minds aren't sharpened to taking the kind of sophistical and subtle and fastidiously accurate meaning out of words, careful that you allow no implication to slip in that isn't intended, or is intended. When I read the district attorney's reply I said, "That settles me. I'm going to read the record."

That's what I meant to Branting when I said, "The book wrote itself." I got hold of the stenographic minutes and said, "I'm going to study this case and find out what it's all about." I was propelled and compelled by the something in me that revolted against this conduct of a district attorney resulting in the potential death of two people accused of murder. If I hadn't been the kind of fellow I am, if I hadn't had my experience with Mr. Stimson in the United States Attorney's Office, if I didn't care passionately about the clean administration of justice in the United States, if I didn't feel as strongly as I do about law, it wouldn't have had that effect on me, but taking the total of me for granted, what moved me into action was not a nice, quiet determination, but the triggering of my convictions, my impulses to action, the triggering of my total being by the kind of disclosure that was made by the Proctor affidavit and the reply made by the district attorney. If in his reply the district attorney had said, "The fellow is a liar. He is mistaken. He must have misconstrued"—there would have been an issue joined, a claim on one side and a contradiction on the other, but instead there was for me a far-reaching indictment of the disinterestedness that should guide the district attorney by one of the state's two expert witnesses on a decisive aspect of the case, and a district attorney not denying it, but practically in essence admitting it by a pettifogging evasion of the crux of the matter, that Proctor couldn't connect the bullet with Sacco, but a question could be framed so that he would give the jury the feeling that he did connect the bullet with Sacco. That outraged my sensibilities, outraged my whole conviction of what the administration of justice calls for, and my whole antecedents propelled me into action. I began to study the five or six thousand pages of the record. The result was the article which eventually appeared in the *Atlantic*

Monthly, and then the little book which had footnotes that Ellery Sedgwick didn't have room to print in the *Atlantic*.

The story of how the article came to be published in the *Atlantic Monthly* always amused me. I had known Ellery Sedgwick for a great many years partly because he was a great friend of a great friend of mine, Winfred Denison, another Harvard man, and Sedgwick from time to time would come to Washington and stay at the House of Truth. When I came up to teach I saw something of him. He was an extremely able editor, had a gift of pen, was a shrewd, calculating, money-making man. He was also one of these compounded creatures like the rest of us. He wanted to be on the side of the angels. He wanted to be for decency. He wanted to be for "liberalism"—provided it didn't cost too much, particularly if it didn't cost him too much with what he regarded as the "right people." His first wife was a Cabot, and he once told me, "It's very interesting to be married to a Cabot." He had all that side of him. He was very careful. One day he called me up. He said that he'd heard that I was writing something on Sacco-Vanzetti, would I let him see it with a view to having it published in the *Atlantic Monthly*? He would be brave up to a point. I said, "Yes, it is true, but I'm very sorry. I'm already committed to letting Croly have it for the *New Republic*."

Sedgwick was a very competitive creature. I thought I'd play with him. I was eager to have it published in the *Atlantic Monthly*, but I knew that I should appear to be indifferent. He was a great fellow to be wooed by, instead of sought after. He said, "What do you mean, you're committed to the *New Republic*?"

"What do you mean, 'What do I mean'? Haven't you got people who promise to write something for the *Atlantic*?"

"Yes, but you don't want to publish anything on this case in the *New Republic*."

"I don't know. Why not? What's the matter with the *New Republic*? Anyhow I'm committed to them."

Well, I appeared more and more indifferent. Finally I said, "Ellery"—I may have mentioned some author he particularly cared about—"if so-and-so had promised to let you publish in the *Atlantic* an article he had written and then said, 'I'm very sorry, but I prefer to put it elsewhere,' what would you think of him?"

How would you feel about it? I said that I'm committed to Croly. He's going to make a supplement of this."

Oh, Lord! He was hot on the trail. No jealous lover ever pursued a beloved object more than he did me. In the meantime I got hold of Croly and said, "Of course, if Sedgwick will really stand for what I've written, I'm sure you'll release me because it's much more important to have this in the *Atlantic* than in the *New Republic*."

Croly was a wonderful fellow, a devoted friend, generous, and had a real sense of the public good. He said, "I'm very sorry, but of course if you can get Ellery Sedgwick to publish this."

Well, I played cat and mouse with Sedgwick, made some conditions—publish it as it's written in full without editing. He was ready to give any old terms. The *Atlantic* paid nothing to speak of, certainly in those days. He was going to give me five dollars extra. I finally succumbed to what he then regarded as a great triumph, and that's how the article came to be published in the *Atlantic Monthly*.

As for the Wigmore business, somebody phoned me about three o'clock in the afternoon, "The *Transcript* is out with a front-page story, a full front page, an attack by Wigmore on you for the Sacco-Vanzetti article."

I told my secretary to pack up her things, "Let's go home. We'll buy a *Transcript* in the Square so I can answer it."

My wife loves to tell this story. We came home—took a typewriter because I didn't have one at home—and I was at work when I suddenly heard the house door and up rushed my wife. She said, "You're here!" She said that she was in a streetcar shopping in town when she saw this headline, WIGMORE ATTACKS FRANKFURTER, and she got off the streetcar and took a taxi to rush home to tell me about it, and "There," she says, "he was already in the middle of the answer."

I got hold of a great friend of mine, Frank Buxton, editor of the Boston *Herald*, a man of honor and justice, and said, "I've just read this, am preparing an answer, will give you a scoop provided you hold the presses so that it can get in tomorrow morning's edition," and they said they would. Here was newspaper rivalry, all these motives that come into play. While I was at my

reply Ellery Sedgwick called up and said, "Have you seen what Wigmore has written?"

"Yes."

"I suppose you're going to reply."

"Yes."

"Now be temperate, be temperate, be cool," and he went on. Bill Thompson who was a good friend of Sedgwick's told me, "Sedgwick took to bed when he saw this attack by Wigmore."

Sedgwick was scared stiff, and he talked to me about how I should answer it, and I finally said, "Ellery, if you'll get off that phone, I'll be obliged to you, and maybe you'll be obliged to me when you see what I've written. Goodbye."

"Be calm, be temperate!" He was as jittery as he could be when telling me to be calm. I worked at it, corrected it, went over it, and took it into the *Herald*. They held the presses. There it was, a front-page story, and it really atomized Wigmore. I have no doubt that the attack was written by, or concocted by, or based on Judge Thayer, because it was the same kind of thing that Judge Thayer talked about. Wigmore just rehashed. He put things in there that just weren't in the record, and I asked him, "Would you please produce this. Where is this found?"

My senior colleague, my erstwhile teacher, Professor Williston said to me—this was after the two articles; two weeks later there came another Wigmore attack, and I replied, and it was in the *Morning Herald*—"Felix, I haven't read anything on the Sacco-Vanzetti case"—John Wigmore was a classmate of his—"but I must say you pulverised him."

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."

I said, "It's humanly impossible 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."

The proof of that pudding was that when Wigmore tried to attack me he was just pulverised. Mr. Lowell said to Norman Hapgood who promptly came over to tell it to me, "Wigmore is a fool! Wigmore is a fool! He should have known that Frankfurter would be shrewd enough to be accurate."

Not that you would be accurate.

Yes, 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.

That is the story of how I got into the Sacco-Vanzetti affair, how for years I was indifferent to it, what stirred my conscience, what led me to study the record, what led me then to write the book and then to deal with Mr. Wigmore's two articles. As I look back, I don't see why my wife and I were so calm about it all. At the time it was just a job I took on, the kind of thing that seems to me to be the most natural thing to do, and all the passion, the venom, the hatred of the community passed over our heads almost without awareness.

23. *FDR and the New Deal*

What was your relationship to FDR and the New Deal?

We were contemporaries at Cambridge. I did not know him there at all, and I'm sure I never met him. Shortly after I came to New York in 1906, I found myself frequently in the library of the Association of the Bar of the City of New York which is a very good library. I was then unmarried and would go across to the Harvard Club for lunch, or stay over and have dinner at the Harvard Club because while the office of United States Attorney was in the old Post Office Building on Park Row facing that beautiful city hall, I did a great deal of work in the library of the Bar Association. There I gradually came to meet this attractive young fellow, Franklin Roosevelt. Probably I came to know him through Grenny Clark—I'm not sure—because they were in the same law office, Carter, Ledyard and Milburn. We became acquaintances, not intimate friends at all, but we knew each other pleasantly.

I went to Washington in the Taft Administration and stayed over after Wilson became President. Soon my old acquaintance, Franklin Roosevelt, turned up on the same floor of the then State, Army and Navy Building, that old, ugly monument to the Grant era of architecture which is now occupied wholly by agencies and officials of the White House. I had an office next to the Judge Advocate General and soon—the most natural thing—Franklin

Roosevelt and I extended our New York-originating acquaintance-ship. I left in 1914 and went up to Harvard. I wrote one or two critical pieces, leaders on finance imperialism in the *New Republic* against action by him because it was the Navy that had a kind of receivership of San Domingo. I don't believe that we saw each other, after I left in 1914, until 1917. He was still Assistant Secretary of the Navy when I returned to Washington to the War Department, and naturally I saw something of, and saw increasingly, the Assistant Secretary of the Navy. He had a good deal to do with personnel problems with work in the Navy Yard, and I had to deal with those problems in the War Department, and we saw a good deal of each other in that connection. Finally through the competitive attitude of the different agencies of the government—the different agencies of the one, single, overriding authority and need, that of the United States of America, were dealing with each other as though they were rival grocery stores—there came into existence the War Labor Policies Board. It was a small permanent organization, and I was its permanent, full-time chairman. Each personnel-concerned branch of the government designated an important official to constitute the board, and FDR was the Navy member, and from the time that that agency came into being we saw a great deal of each other—not less than once a week for several hours with telephone conversations and talks in between.

Herbert Ehrmann, who figured as associate counsel to Mr. William G. Thompson in the Sacco-Vanzetti case, was then on the Shipping Board, and he very often sat in for, or with Bob Bass, the former governor of New Hampshire who was the permanent representative of the Shipping Board. In 1932, though he was rather a Republican and was against FDR for President, I remember his saying to me, "I'm bound to say that the chairman apart"—mine was a permanent full-time job; it was my job to have ideas—"of all those rather eminent people on that board, Franklin Roosevelt had the most resourceful mind and made the most important and fertile contributions at our meetings."

Franklin Roosevelt was very active and full of ideas, full of interest, and we became friends, close friends, the way men with genial common factors become friends when engaged in a common

enterprise, and those active years of comradeship in important work of an official kind rather transformed a casual, pleasant relationship into what might be called a warm friendship.

After the war was over I went back to Cambridge, and I lost sight of him. He stayed on through the Administration, and then in 1920 he ran for Vice President. I was not active in the campaign, and I'm sure that I had no communication with him then, but we did exchange letters when he was stricken. I wrote him, and some small correspondence passed between us, a trickle. I did not actually see him again until after he became governor. During his governorship I saw him, I think, twice in Albany and I saw him in Boston. On a visit of his to one of his sons at Groton he came to Boston where he sought me out on two matters regarding which presumably I had some knowledge and competence. One was crime, and the other was regulation of a public utility.

He became governor during the depression period and manifested great vigor, initiative, eagerness, a questing mind in dealing with problems in strong contrast to the torpid, lethargic, somehow-or-other-God-will-provide attitude, that prosperity is around the corner, the crisis is over with a constantly shifting date, from the occupant in the White House. Roosevelt then showed, as he showed later, that he got about him people with ideas, that he listened to all sorts of ideas, sifted them and absorbed what was congenial to him and rejected that to which he was allergic, but temperamentally he wasn't allergic to new ideas. A good deal of correspondence passed between us. He had to deal with utility problems, tax problems, water-power problems, who would pay the bill for governmental expenditures and how it was to be paid. How anybody who watched affairs at Albany during the three odd years that he had been governor could make the fatuous statement that Walter Lippmann did in that famous sentence of his, Franklin Roosevelt is "a pleasant man who, without any important qualifications for the office, would very much like to be President"—you remember that classic statement? How anybody could make that! Well, he could only make it if he paid no attention to the powers of initiative, resourcefulness, and aggressive statesmanship which Roosevelt subsequently showed in the White House and theretofore had shown at Albany. Now to be sure he was

careful as he was in the White House. To be sure he had the problem on his hands of how to get rid of Jimmy Walker and not alienate Tammany Hall, how to square the circle—that's the perennial problem of public men. How to do the right thing and not alienate the people who don't recognize the right reasons for wanting the right thing to be done, how to be ahead of the procession, "but not too much ahead" as TR said. If you're too far ahead, you've got no followers. If you're not ahead at all, then there's no leader for those who follow.

The fact of the matter is—I'd forgotten about this—I saw him twice at Albany and once in Boston apart from a rather active correspondence when he was governor. I forgot for the moment until I mentioned Jimmy Walker and Tammany Hall that I also saw him at Hyde Park. He asked me to come to Hyde Park and talk with him about the legal problems raised by the Jimmy Walker business. I worked out with him the legal theory on which Jimmy Walker had to go; the theory being that when a public official has acquired money during the time that he was in public office, the presumption of wrong doing lies there unless he can explain why he suddenly came into money that he couldn't have got merely through his salary. Anyone who reads, as I have read, the minutes of the hearings on Jimmy Walker in Albany and the skill with which FDR conducted that is not likely to say that he wasn't a man of great skill. I daresay he failed in some course at the Columbia Law School, and he didn't make much of a fist at the bar, but that performance showed an extremely skillful lawyer. Just as later on I was present in the White House merely as an onlooker when he dealt with the avoidance of a coal strike with Lewis and his cohorts on one side and the operators on the other. To be able to deal with tough babies like that is not child's play.

I remember that Walter Lippmann came to me as Farley was making more and more progress, as Franklin Roosevelt was emerging more and more as the challenging candidate for the presidential nomination. Walter Lippmann's favorite was Newton Baker. He wrote and said that he'd like to see me when he came up to the Harvard-Yale football game which must have been November. When he talked with me in order to make me realize that the man who really should be nominated was Newton Baker, whom

I knew well, probably at least as well as he did and about whose qualities I had as good a basis for knowledge as Walter Lippmann, I remember his saying, "Franklin is a dangerous man."

I was greatly disposed toward Newton Baker, but not for the Presidency, and I said, "Walter, a fellow who has your command of adjectives I should think could use a more felicitous one to describe Franklin than 'dangerous.' I can understand anything that might be said about him, but to say that he's a 'dangerous man' is straining the word 'dangerous.'"

Walter thought he was a rather meager, frivolous, not very responsible person—well, I leave it to you to decide how wise that judgment was. He had in him this so-called frivolity. There was a lot of that on the surface, a lot of shallowness on the surface, but Mr. Stimson came to a more perceptive realization of the depths of Roosevelt when he served under him. I remember Mr. Stimson once saying to me, "People who say that Roosevelt is impulsive don't know the man. There's a deep streak of the Dutch in him. When he digs in, you can't dig him out."

We formed rather easy, I might say intellectually intimate, ties in the course of his governorship. After his nomination I was for him, and I became enlisted. As you well know I was not of the so-called brain trust, a Columbia enterprise organized by Raymond Moley, but from time to time I would write suggestions.

There is a very funny episode connected with this. We used to spend weekends during the summer, and more particularly during the early fall, at Lyme, Connecticut with a great friend of ours, Katharine Ludington. She was a great suffrage leader. She was treasurer of the League of Women Voters, a New England lady, and somewhere in the middle of October her maid came in while we were at dinner and said, "There's a long distance call"—I forget from where. It was way out, Omaha, St. Louis—out West somewhere. This was a large weekend party Katharine Ludington had at her house. She was a very gracious hostess, charming surroundings and all that. I left the table. After I came back I said, "Guess with whom I talked?"

Somebody who thought that he'd say something irresponsible said, "Governor Roosevelt."

Well, sure enough, it was Governor Roosevelt. He was way out

in the sticks somewhere—way out. He traced me down, found out I was there somehow or other and what do you suppose he was asking me, calling me up for? He said, "I plan to be in Washington two days or three days before inauguration," and he'd be staying at the Mayflower. He was very anxious to see Mr. Justice Brandeis, and he wondered whether I could arrange it. I said, "I rejoice at the presupposition of your suggestion."

He said, "What do you mean presupposition?"

I said, "The implication of your remark is that you'll be elected."

He said, "Don't bother about that. That's all right."

It was just like that. I told him that I thought I could arrange a meeting with Justice Brandeis. That was the purpose of his call. He was already thinking ahead about talking with a man with ideas, probably a man who had as many ideas, as much wisdom on social and economic matters as any man in the United States, if not more. He was thinking ahead, two weeks before the campaign was over, making plans for such a meeting.

During the campaign he came up to Groton visiting one of his boys there, and he was to receive a delegation of independents for Roosevelt. I never was a party man. My record of voting is that of a mugwump, a typical mugwump. That's why these silly newspaper people whenever they have to give tags to the members of the Court, think I'm a hide-bound Democrat simply because Roosevelt named me. Well, I'm a hide-bound nothing, let alone a hide-bound Democrat. I led this delegation of independents for Roosevelt, an interesting motley crowd, interesting as independents usually are. They are not regulars, and therefore they're interesting. I made a speech of presentation and then introduced them, each of the people who turned up, and one of them was Mrs. Glendower Evans who was, to a large extent, the angel of the Sacco-Vanzetti defense, not "Moscow gold," but this Mayflower product, this Yankee of Yankees, and I introduced Mrs. Evans. She startled all of us by saying, "I'm not going to vote for you. I'm going to vote for Norman Thomas, but I'm contributing sizably to your campaign fund."

Well Roosevelt laughed, and I remember his saying—imagine this happening to almost any candidate you can think of; imagine how Taft would have received this, or Hoover, or Wilson—"Nor-

man Thomas is a fine man. I have only one thing against him."

She said, "What's that?"—quite challengingly.

He said, "I asked him to go on my unemployment commission shortly after I became governor to deal with the unemployment problem in New York when the depression really hit us, and he refused. I thought he should have gone on, but he is a fine man."

That was all done so simply, in such a civilized manner. He was elected and was President-elect. He asked my wife and me to come to Hyde Park two days before Christmas. He wanted to talk about things. I remember that Marion turned in around midnight, and we were up 'til nearly two o'clock. We talked about many things. He showed, having been out of Washington for a good long while, his limited knowledge of people in different branches of the government concerned with different problems that I'd had more alert interest in than he had had. Down with his disease, and then to come back, to be governor, his preoccupations were very different from mine. We talked about measures and men. I remember, for instance, that he didn't know about Joe Eastman. We talked about various problems that would come up. I said, "Well, if I had your problem, I'd talk to Joe Eastman. He knows more about that."

I remember Latin-American problems. We were still in the tail end of dollar diplomacy, Mexican relations—you know. I said, "The fellow who I think is more wisely informed on that subject, who has written a book on that subject and whom you ought to see is Ernest Gruening."

"Ernest who?"

He'd never heard of Gruening, and that's how they got together. Well, we talked of a number of things, and there were these suggestions of men. The next day I remember Marion saying to me, "You reminded me a little bit as though you were holding what I assume to be a seminar of yours. After all he is the President-elect."

I said, "I used to say to my students that in the realm of ideas there is no hierarchy, and I was friendly and respectful."

"Oh, yes," she said, "but he was taking down notes almost as though he were in a seminar of yours."

That very night I said, "Would you like to give great pleasure to a very old gentleman whom you admire?"

He said, "Certainly."

"Justice Holmes will have his ninety-second birthday shortly after your inauguration, on March 8, 1933. He will be ninety-two years old. I think it would be very exciting if you called on him by way of a surprise, and if you can work it out I will arrange with a wonderful maid who is in charge of him"—a marvelous Irish maid whom that very wise woman Mrs. Holmes installed to take care of him should she go and indeed she did before him—"Mary Donnellen, so that everything will go off according to Hoyle."

He said, "That's grand! Sure I'll do it. Will you be down there for this?"

"Yes, I'll be there for his birthday. Indeed, we're going to have a birthday lunch."

"That's fine. I'll turn up at four o'clock."

This was all arranged with Mary Donnellen. I was there. We had a wonderful lunch. In due course the wife of his nephew, Ed Holmes, produced out of a baize bag a bottle of champagne. Prohibition was still on, and he shrank back. She said, "Don't worry, Uncle Wendell, this is all right. This comes from the French Embassy"—I'm sure it didn't; she just made this up—"It's legal."

He said, "I never ask the source of champagne. I have no truck with bootleggers, but I do not reject their product. I assume it's legal. I assume people obey the law, but I have no truck with bootleggers."

While I was at lunch there were several phone calls, people who knew I was in town, and I was outraged. I told his secretary, "No matter who calls don't interrupt the lunch. Tell me after lunch is over if anybody calls."

When the lunch was over the secretary said, "The White House has been ringing."

I rang back Steve Early, the President's press secretary. He said, "Where have you been? Don't you know that the President has been waiting for you for lunch?"

"How should I know the President is waiting for me for lunch if nobody ever invited me."

He said, "What?" Then he said, "This will show that we've got to be more efficient around here. You come over here as soon as you can. The President wants to see you."

I went back in and told Holmes that the President was expecting me for lunch, that I didn't know about it, but that I wouldn't have gone anyhow for lunch. He turned, "You wouldn't. What do you mean? It's a command from the White House."

I said, "I told them I had a prior engagement, probably a better lunch anyhow."

He said, "It's rather fun to have the President's nose tweaked."

Eventually I went over to the White House, and as I waited to be ushered in, out came an old law school friend of mine, Arthur A. Ballantine. He had been Undersecretary of the Treasury under Ogden Mills and had stayed over. As he came out, all aglow, he said, "The President will doubtless offer you some post or other, and you must come into the administration."

I said, "I hope you're staying in it. Thank you very much for the advice."

I went in and there I saw him for the first time as President. I'd known him well, called him Franklin for what—fifteen, twenty years—and there I saw him, the American flag in that lovely oval room in the White House, and I paused. I was awed, not by him, but by the Presidency. That was the first time I had been in that room—this was 1933—since 1907, I think, when Mr. Stimson took me down to the White House and I then saw the President, Theodore Roosevelt. No, that's wrong. It was in that room that President Wilson met the Mediation Commission and instructed me on the *Mooney* case. Well, I saw Cleveland at the dedication of Grant's Tomb on the sidewalk as a little shaver with the crowd hissing him. Nevertheless, there was the President of the United States. I saw Taft, Wilson, and the Presidency is the Presidency. I feel about it the way I'm sure Winston Churchill did when he called Roosevelt, "My *august* friend." The "august" was a characteristically felicitous adjective to describe the majesty of the office. I saw FDR sitting there with the presidential flag in back of him, and I said, "Before I say another word, Frank—forgive me, but it will take me some time to say 'Mr. President'—forgive me, Mr. President."

He said, "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."

I said, "Before I sit down, Franklin, all I can say to you is that my hopes are as much engaged, perhaps more engaged, in the success of your administration than that of any President in my life time."

He said, "I know that and I want you to be part of it. I want you to be Solicitor General"—quickly like that. I have a memorandum about this meeting, and rather than give a rehash of it now, I'd prefer to rest on that contemporaneous account, dictated March 15, 1933, which reads, in part, as follows:

This took me completely off my feet. It was the first reference directly or obliquely that Roosevelt had ever made to me about my holding any office, although at Albany and over the phone he had discussed with me and very intimately questions of personnel for the Cabinet and other places in the Government. I started to speak, but he stopped me with "I want to talk before you say anything." He then said, "I have wanted you to be Solicitor General ever since November." He said he had talked with "poor Tom Walsh" about it, and that Walsh was very eager to have me, and that it "just awaited the formalities." "When Walsh died I had to act quickly, and I put Homer Cummings in. Homer was scheduled to go to the Philippines, and he wants to go there still. I think he's a shrewd, level-headed fellow, and he's all right. I have talked to him about you; he said he thinks he met you only once, but knows all about you and admires you greatly and is most enthusiastic about having you as Solicitor General. Now, I want you down here, because I need you for all sorts of things, and in all sorts of ways. As you know, we are going in heavily for utility regulation, reorganization of the various Commissions, amendment to the Sherman Law and a lot of other things. I need your help on all those matters, and I want you to come very much." This accurately conveys the substance of the President's remarks in stating his desire in wanting me to be Solicitor General.

I said to him, in substance, that he would understand if I didn't put in words how I felt about what was implied in his desire to have me as Solicitor General. I said, "To a lawyer it is professionally the most interesting job. But confronted as I am with the situation, I have to decide whether I ought to come down and give myself up completely to being a technical lawyer, exciting as it would be to have charge of the Government's cases before the Supreme Court." The President interrupted to say that I could free myself for other work, there would be adequate help in the Department, etc., etc., to which I replied, "If you don't mind my saying so, I think I know the demands of that office perhaps more completely than there is any reason for your knowing them. I have known about the work of that office almost from the time that I left the Law School. It is exciting and profoundly important professional work. But if a man is to be Solicitor General, he must make up his mind that it will absorb sixteen hours of the day." I briefly tried to indicate the nature of the duties of the Solicitor General's office and why it would preclude participation in working out his Presidential policies. I then proceeded, "It is my genuine conviction—I am sure it is so—that I can do much more to be of use to you by staying in Cambridge than by becoming Solicitor General. The fact of the matter is that I could not have anything to do on any of the matters on which you would want my help and do my job as Solicitor General—it just can't be done. I am due to go to Oxford next fall. I won't urge that as an excuse, for while of course I am obligated, and it would disarrange matters if I didn't go, considering the exigencies of the time, I have no doubt I could be released if there were a compelling public duty. But I do want to say that no matter who will be your ambassadors abroad, I think I can be of use to you even while I am abroad, and of more use to you than as Solicitor General."

Having listened eagerly and with sympathy, the President made the following reply: "I think there is a great deal in what you say. I'm not at all sure it isn't true that you can be of more use to my Administration outside the office than you

could as Solicitor General. But there is another consideration, and I am going to talk Dutch to you. I am going to talk to you frankly, as a friend. You ought to be on the Supreme Court, and I want you to be there. One can't tell when it will come—it may come in my time or not—but that's the place where you ought to be. Now you have, a course, a national reputation, a national recognition. But you know—and I said I was going to talk Dutch to you—that there are also objections to you. For a good many years now you have been a professor (smiling); you haven't actively practiced law, you've never held judicial office (again smiling); you've been the man who has refused to be a judge; then there is the Sacco-Vanzetti case (again smiling) and (this time with a grave countenance) your race. I can't put you on the Supreme Court from the Harvard Law School. But once you are Solicitor General, these various objections will be forgotten or disappear. I talk to you this way because I think for once you have a right to think selfishly, to think about yourself and not exclusively of the public interest."

My reply was: "Of course I very deeply appreciate not only what you say but the friendship that makes you say it. You know what any American lawyer thinks about the Supreme Court and a place on it, but so far as that goes, that matter will have to take care of itself, if ever the time may come. It's clear to me that from the point of view of such usefulness as I may have, I ought not to abandon what I am doing and can do to become Solicitor General, and I do not think it is a wise way of life to take a job I don't want because it may lead to another, which also I'm not at all sure I'd want. All that must be left to the future. I really don't think I ought to take a post at which I know I cannot be of the use I can be in remaining where I am, simply because it may promote my going elsewhere."

After a pause, the President said, "Well, there's no hurry about this. I tell you what I want you to do. I sometimes find it useful, and you might find it useful—I wish you would talk to your Mrs. about it. And I repeat that for once you have a right to think a little bit selfishly."

I eventually wrote him from Cambridge, saying no, that my answer was definitive and gave him the reasons. That same afternoon, on March 8, after our talk, I went back to Holmes and eventually FDR turned up. Tom Powell happened to be at the Brookings School which was on that block, or near there, and he saw the President's arrival. It took the President about half an hour to negotiate the stairs of that old brownstone house. There was no ramp. The crowd gathered. It was a wonderful thing. It was quite an experience. Suddenly the door opened and as he stumped in on the arm of Jimmy and Justice Holmes became aware that somebody was coming in, he looked sharp, leaned forward in his chair and said, "Isn't that young fellow the President of the United States?"

He stood up, and he could hardly—well, you know, he was a very old gentleman. He used to say, "The jack-knife won't open." It was a wonderful scene. Then it got into the papers. He was with him for about an hour, and I said to myself, "I'll bet they're all speculating what did the President of the United States and this most revered figure in the land, this wise, old, wisest of judges, what did they talk about? What great things passed between them?" Well, somehow or other the talk got on prize fights—John L. Sullivan and Jim Corbett. Holmes was telling of the first prize fight he saw, and they got talking about prize fights. As soon as President Roosevelt put him at his ease he quickly said, "What do you suppose I was doing just before I came here, Mr. Justice?"

"I haven't the slightest idea."

"I was signing an executive order calling in all the gold."

Holmes looked a little disturbed and said, "Does that mean I must turn over my gold medal from Congress?"

"Oh, I've made a special exception for that. That's taken care of," quickly improvised the President.

After an hour FDR stumped out on those stairs. It was hard for him to manage. I tell all this because you can't understand my relations to FDR and the New Deal without it. All this silly business! The "happy hot dogs"—you know, with whom I filled the Departments. It was the most natural thing for him to ask suggestions from me as he did from other people, and it was the most natural thing for me to have a wider acquaintance of people who

were qualified for government service than probably anybody else. Why? Because I'd been at the Harvard Law School from 1914, and this was 1933, and because of the kind of people the Harvard Law School was turning out, because of their peculiar competence for dealing with governmental problems in a society and government that rests on law, I was doing for the administration what I had been doing for big offices from the time I was at the Harvard Law School, year after year after year. I used to say, "I've probably recommended more lawyers for Cravath and Henderson than I have for any department of the government."

This transcended economic views, social views. I was a professor at the Harvard Law School. I'm bred in the law. I'm a common-law lawyer. I've cared passionately about law and the institutions of law. I happen to have a penchant for relations, good relations, warm relations with young men who were students there and am probably endowed with a gift of spotting talent. I will admit to that faculty probably beyond the average. I was the recruiting officer. Most of the men who went into the United States Attorney's Office I brought in and not for any ideological reasons. They were Republicans and prohibitionists, people with humor and people without, but they had certain faculties and certain training, and so it was natural for the President to say to the Secretary of Labor, Frances Perkins, "If you need a very good lawyer, why don't you talk to Felix about it?"

That didn't mean anything ideologically. It meant no more than that Emory Buckner would ask me every few years to recommend him six men for Root, Clark, Buckner and Howland, or Winthrop and Stimson, or any number of New York law firms. Until I came down here each year God knows how many letters I had from lawyers "What do you think of this fellow?" and, "Can you recommend me that fellow?" and not only has it no significant other than professional meaning, but it has no sinister meaning other than the significance that turns you to a fellow who has some knowledge, some experience, some skill in regard to the needs you have. That is all there is to this newspaper hullabaloo—what Chief Justice Hughes was fond of saying, "The calumnists. I beg your pardon. I mean the columnists."

All this silly stuff that newspapers indulge in! Of course they have to dramatize. They have to personify. "This is a great plot!"

There's a very funny story, an amusing episode, bearing on this at the Hiss trial. One of the reputation witnesses for the defense was Mr. Justice Reed. Alger Hiss had been his immediate assistant, certainly one of his assistants, a very important assistant, when Mr. Justice Reed was Solicitor General. The prosecutor, Thomas Murphy, asked Justice Reed, "How did you come to hire Alger Hiss?"

The sedate, quiet-voiced Mr. Justice Reed said, "He was recommended to me by Judge Frank."

Murphy said, "You mean Judge Frankfurter?"

"No," he said, "I mean Judge Frank."

He referred to Jerome Frank, but what a lot that assumption of Murphy tells—you know.

The depression brought a change in the thinking of young men; the holy grail was no longer deemed to be exclusively in New York. When their thinking changed, their opportunities seemed different. Certainly in the case of the best of them, a good many of the best, the appeal of working for the country, the government, the people of the United States, in a time of dire need and distress became a sought opportunity. There was a great expansion of governmental activity and need for lawyers, and there was nothing more natural than that they should turn to the institution that turned out the best lawyers in largest number and to the man who probably was in closest contact with most of them or more voluminously in contact with the best men in the graduating class. It was the most natural thing in the world. If you want to get good groceries in Washington, you go to Magruder's, or in New York to Park and Tilford, or in Boston to S. S. Pierce. If you wanted to get a lot of first-class lawyers, you went to the Harvard Law School. There were contemporaries of mine, men I'd known who had been my friends, or men who were out and had been formerly students, and now themselves were heads of agencies and what not. It was the most natural thing in the world, and it so happened that there came to be a considerable percentage of Harvard Law School men on the legal staffs, among government lawyers.

This is so commonplace that I forget that I had been sending year after year—from the time I went to the Harvard Law School—law clerks to Mr. Justice Holmes and after Mr. Justice Brandeis went on the Court to him. I supplied Learned Hand with law clerks, Judge Julian Mack with law clerks, and so on. What's the

great conspiracy? What's the subtle, below-the-surface reason?

This reminds me of a remark I heard William A. White, the editor of the *Emporia Gazette*, that wise fellow, make. A newspaperman was sent to Washington to be the Washington correspondent for his paper. He was very young, a hopeful one. He'd made good in his home town, but Washington—my heavens! He saw Mr. White and asked his counsel, suggestions, and advice. Mr. White said to him, "Every newspaperman wants to make scoops. You do too. It's a perfectly natural thing. Would you like to know how to have scoops as a Washington reporter, particularly of what goes on in Congress?"

He said, "Oh, certainly."

"I advise you to do this. You sit in the Senate gallery and listen hard to the debate. Most of the time very few other newspapermen will be there. They'll be looking for stuff underneath the asphalt. If you very often will report what is going on to which nobody else will pay any attention and assume that what you hear and see is the truth, you have no idea how often you'll make a scoop."

There is something in human nature that will not take the surface, if you please, the ingenuous, on-the-face view. They must look for some cunning, conspiratorial, sinister, extremely sophisticated, out of the way, exotic explanation, and so it is with all this business of how Felix Frankfurter filled the government with his cohorts, his disciples, whatnot. In the first place, they have no understanding of my relations with these young men. They have no understanding of the kind of independence—that we're just all in the same boat in being, as it were, part of the ministry of justice, part of the great company of lawyers who serve law, and that the bond was just the bond of fellowship of ideas and purposes and nothing more complicated than that. So often of course these efforts to seek for some ulterior motives and purposes are what the psychologists call "projections"—there must be some ulterior reason, either money, or wanting to join the club, or get a job, or marry off your daughter, or something. Well, I don't mean to say that there aren't ulterior motives in this world in people. It is true that very often there's more than meets the eye, but whoever said it for the first time said a profound thing when he said about Washington, "In Washington there's often less than meets the eye."

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