

Brandeis for Buffalo

*John Q. Barrett**

Copyright © 2010 by John Q. Barrett.
All rights reserved.

On March 27, 1939, Robert H. Jackson, the Solicitor General of the United States, visited Justice Louis D. Brandeis in his Washington, D.C. apartment. Justice Brandeis, age 82, recently had retired from active judicial service after almost 23 years on the Supreme Court. Brandeis was an admirer of Jackson's advocacy skills and, perhaps only by happenstance, Jackson was the lawyer who had had the honor to make, on February 13, 1939 (Jackson's 47th birthday), what turned out to be the final oral argument to Justice Brandeis on the Supreme Court bench.¹

Jackson's visit to Brandeis that Monday was the type of substantive social call that he and other New Dealers paid on the Justice with some regularity. Brandeis was interested in their work and they, Brandeis acolytes, valued his attention and advice. During the visit, Jackson mentioned that he was working to recruit his friend Francis M. Shea, who Jackson regarded as one of the ablest lawyers in the country, to a suitable position in the Department of Justice (DOJ).

Francis Shea had served an early stint in President Franklin Roosevelt's administration. In March 1939, Shea had been for a few years the young dean of The University of Buffalo School of Law, an institution that was, in its big and booming city and region, achieving national

* Professor of Law, St. John's University School of Law, New York City, and Elizabeth S. Lenna Fellow, Robert H. Jackson Center, Jamestown, New York (www.roberthjackson.org). An earlier version of this text was posted to my Jackson Email List on November 13, 2010.

For an archive of selected Jackson List posts, many of which have document images attached, visit www.stjohns.edu/academics/graduate/law/faculty/profiles/Barrett/JacksonList.sju.

To subscribe to the Jackson List, which does not display recipient identities or distribute their email addresses, send a note to barrettj@stjohns.edu.

¹ The case, No. 330, *Kessler v. Strecker*, concerned the government's broad reading of a statutory basis on which it could deport an alien who was a former Communist. Solicitor General Jackson, representing the government petitioner, made his initial oral argument in the case on Friday, February 10, 1939. On Monday, February 13th, the Court's only oral argument case was the continuation and conclusion of the *Strecker* argument. The justices heard from respondent's counsel and then rebuttal argument by Jackson. Justice Brandeis, knowing that he would not be on the Court to decide the case, asked no questions. See MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 749 (2009). On April 17, 1939, the Court, with two justices dissenting, decided against the government—Jackson lost. See *Kessler v. Strecker*, 307 U.S. 22 (1939).

acclaim. Brandeis, for one, thought well of both UB and of Shea, who was a protégé and friend of Brandeis's (and Jackson's) friend, the former Harvard Law School professor and now newly appointed Supreme Court Justice Felix Frankfurter.

During Jackson's visit, Brandeis commented that Shea's recent article criticizing current ideas to regulate alleged oversupply in law schools and the legal profession was very significant.² Brandeis also said that he was very impressed with Shea's work in Buffalo and thought that he should not be diverted from it—Brandeis expressed quite emphatically his disapproval of pulling talented young men away from the communities where they were needed and succeeding. (This had long been Brandeis's view, and Shea articulated somewhat similar thoughts in the article that Brandeis—perhaps for exactly this reason—so admired.³)

Jackson wrote Shea the next day to alert him about Brandeis's concerns.⁴ Jackson was somewhat defensive about being scolded by one of his heroes, and about the substance of Brandeis's criticism—as Shea knew well, Jackson had been deeply involved in Buffalo legal practice, commerce and civic affairs for more than twenty years.

Before the week ended, Shea wrote back to Jackson, stating his reflections and asserting his independence:

Dear Bob:

Thank you for your note of March 28, 1939. Mr. Justice Brandeis' feeling regarding this [University of Buffalo] venture here has been very encouraging and very helpful. Needless to say, I cannot help being flattered and pleased to have such comment as you relay come back to

² See Francis M. Shea, *Overcrowded?—The Price of Certain Remedies: A Study of the Problem of Admissions to the Law Schools and the Bar*, 39 COLUMBIA LAW REVIEW 191-217 (Feb. 1939).

³ See *id.* at 209 (“[I]s it not one of the most important functions of a democracy to send lawyers back into [small] communities? Decent administration of justice, political leadership of a high order, are as important in these small communities dotted all over the nation as in the great centers, if not more important.”); *id.* at 216 (“[T]he movement towards the great metropolitan centers [should] be checked and ... a larger proportion of the new practitioners be returned to the smaller and less well-represented communities.”).

⁴ See Robert H. Jackson to Francis M. Shea, Mar. 28, 1939, in Robert H. Jackson Papers, Library of Congress, Manuscript Division, Washington, D.C., Box 88, Folder 3 (unsigned carbon copy). An image of this letter is attached at the end of this file.

me. At the same time, it is not without its dangers. In the final analysis I should like to decide myself how I want to use my life. If he urges too emphatically that I should not be diverted from Buffalo, a good many of my friends who would be likely to think of me as a possibility in connection with other things may be persuaded that I am not available. I am not likely to toss up lightly this present place. At the same time, as you know, there are a few jobs to which I probably would go if offered. However, I don't mean to give you the impression that I am much concerned on this score. I am convinced that one is much more effective and has more fun out of life if he is not constantly haunted by the thought, "If only this other plum would drop into my lap." I can do important things here and get great satisfaction out of the work. If one of the other few things which I might be willing to take in preference turns up, well and good, but I am not going to worry too much over the prospects. That is a bit of education I owe in large measure to you.

...

Cordially yours,

/s/ Francis⁵

Jackson got Shea's message—Jackson soon extended, and Shea in turn accepted, job offers that took him from Buffalo to Washington. That spring, Shea, working out of DOJ, directed a top-level interagency committee that investigated the fee system in receiverships and bankruptcies and recommended major reforms that in time became law. That summer, President Roosevelt, acting on Jackson's recommendation, nominated Shea to serve as Assistant Attorney General heading DOJ's Claims (today, Civil) Division. Shea's appointment was confirmed and he held that position until 1945.

In summer 1945, Francis Shea served as a senior assistant to Jackson in the negotiations that produced the August 8th London Agreement creating the International Military Tribunal (IMT). Shea moved that fall with Jackson from London to Nuremberg in Allied-occupied former Germany. In October, Shea was the United States representative who presented to the IMT the indictment of the principal

⁵ See Francis M. Shea to Robert H. Jackson, Mar. 31, 1939, *in id.* An image of this letter is attached at the end of this file.

BRANDEIS FOR BUFFALO

Nazi war criminals. Although Shea departed from Nuremberg before the trial commenced that November, he was one of the friends who Jackson brought with him back to Nuremberg in September 1946 to witness the IMT's announcement of its judgment.

In 1947, Francis Shea co-founded, and then he spent the remaining four decades of his life practicing law in, one of Washington's premier law firms, Shea & Gardner. He indeed, as Brandeis had feared and foreseen in March 1939, never resumed his life in Buffalo.

* * *

November 13, 2010, marked the 154th anniversary of the birth of Louis Dembitz Brandeis. He is still, as Felix Frankfurter, Robert Jackson, Francis Shea and so many others were lucky to know in their lifetimes, a model of substantive, thoughtful citizenship.⁶

Brandeis was born on November 13, 1856, in Louisville, Kentucky. At later points, he was a rooted, contributing, significant resident in St. Louis (briefly) and in Boston. He later came to Washington and, of course, he stayed.

⁶ See generally MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* (2009). To order the book through Amazon.Com, [click here](#).

March 28, 1939

Mr. Francis M. Shea
The University of Buffalo
School of Law
Buffalo, New York

Dear Francis:

I think you will be interested to know that yesterday, in talking with Justice Brandeis, he called my attention to your article in the Columbia Law Review, which he regarded as a very significant one. He was very much impressed with your work in Buffalo and thought you should not be diverted from it. Perhaps he has already communicated with you, for he seemed quite emphatic in his viewpoint.

Best regards and good wishes.

Sincerely yours,

THE UNIVERSITY OF BUFFALO

SCHOOL OF LAW

March 31, 1939.

77 WEST EAGLE STREET

Dear Bob:

Thank you for your note of March 28, 1939. Mr. Justice Brandeis' feeling regarding this venture here has been very encouraging and very helpful. Needless to say, I cannot help being flattered and pleased to have such comment as you relay come back to me. At the same time, it is not without its dangers. In the final analysis I should like to decide myself how I want to use my life. If he urges too emphatically that I should not be diverted from Buffalo, a good many of my friends who would be likely to think of me as a possibility in connection with other things may be persuaded that I am not available. I am not likely to toss up lightly this present place. At the same time, as you know, there are a few jobs which I would probably go to if offered. However, I don't mean to give you the impression that I am much concerned on this score. I am convinced that one is much more effective and has more fun out of life if he is not constantly haunted by the thought, "If only this other plum would drop into my lap". I can do important things here and get great satisfaction out of the work. If one of the other few things which I might be willing to take in preference turns up, well and good, but I am not going to worry too much over the prospects. That is a bit of education I owe in large measure to you.

I see that Norris has come out for you for President. Somehow I hope that can be brought off. I would feel a lot better about the prospects for the country if there could be any reasonable assurance of it.

I am enclosing a copy of a speech which I delivered last Sunday. It may be of some interest to you.

With warmest regards.

Cordially yours,

Francis
Francis M. Shea

Honorable Robert H. Jackson,
Wardman Park Hotel,
Washington, D.C.