December 8, 1933.

Professor Felix Frankfurter,
18, Norham Gardens,
Oxford, England.

My dear Felix:

I have your gracious note of the 21st and the enclosure. You are quite right about the Forum article.

During the last two months I have missed you more than I can say. I have sorely needed your advice and consultation, for I have spent much time on the Securities Act – a thing which I know must still be close to your heart.

As you know, a battle has been waging on these shores. It has been a bitter one. Good old Jim has been maintaining a noble front against all attacks. You know where my sympathy lies. I saw just enough of the horrors of Wall Street to know that an adequate control of those practices must be uncompromising. The attacks being made on the Act were ill conceived, to say the least. And I knew that much which was emanating was merely a disguised attack on the fundamental principles of the Act. This I resented very much.

At first I decided to bring my small and insignificant battery into place and employ it to attack the citadels of high finance. But then I concluded that my small contribution (if any) might be more effective in the long run if I divorced myself so far as possible from my strong emotional slant and observed the Act from the sidelines and endeavored to appraise it dispassionately in light of its ability to do the things desired. And so I degenerated into a technician, trying not to lose sight of the forest for the trees. The result is two articles, both in collaboration with Bates – one in the Chicago Law Review for November and the other in Yale for December. Of the former I am not proud. It is too technical and not placed in focus with the actualities of life. The latter is better as it places in perspective more of the things which are fundamental.

But the doing of these two articles has caused me great suffering. The first is that what I said might be taken as an advocacy of the cause of the goddam bankers, who have handled their own affairs so badly as to deserve no support. In fact they suffered more actual damage by the Pecora investigation than they ever would under the Securities Act. That is what I mean when I say their risks have been subject to no mathematical basis of calculation. The second is that some of the things that I said might be taken as an effrontery to you and the noble cause you serve. I have not been able to free myself from either of these fears. But I write you to assure you that I have no cause except the public good and no client except the investor.

My thoughts run along the following lines. (1) The Act is of secondary importance in a comprehensive program of social control over finance. Publicity of affairs, control over capital structures, control over directors, regulation of speculation, regulation of

holding companies, protection of minorities are primary. Merely to tell the truth about securities is to give some protection (against fraud and excesses) but much of what has gone on can still go on with a Securities Act. Witness, that but few of the scandals disclosed by Pecora would have been affected by a Securities Act. This is not to say that the Act should not be on the books. It should be. Its principles are sound. But the point is important from the viewpoint of emphasis. Too much should not be expected of it.

(2) The Act as a day to day code needs clarification. That can be done easily without changing in one iota the fundamental principles or creating any dodge or subterfuge. I realize that many oppose it because it is too comprehensive – because there is no loophole. I have no sympathy for such attack as you know. I don't want loopholes anymore than you do. Yet I feel that it should be clarified immediately. It is easy to criticize – difficult to do what one says should be done. So I tried my own hand (here in my cloister) at writing amendments. The several dozen which I worked out merely stated what I believe was implicit in the Act. But they would save it in part from technical quibbling, from emasculation at the hands of unsympathetic judges (of whom there are some) and would force the opposition to meet squarely the issue – are the principles of the Act sound? On the latter (to repeat) I have no doubt. These principles are wholly and truly essential and fundamental.

This question of clarification is essential because the power of the Commission is so restricted – too restricted in my judgment. But more of that later.

(3) The in terrorem aspects of the Act are wholly necessary to make it provident for those required to tell the truth to tell it. Beyond a certain point however they cease to become effective. In a few particulars – and only a few – I think the Act passes that point. One example is among the underwriters. I think the little dealers throughout the land should be controlled – must be. In that respect the Act does not go far enough. In treating them the same as the originators or principal underwriters, however, the Act takes a step which I do not believe is the best one. I would eliminate them as underwriters. I would not eliminate the liability of the principal underwriters. Morgan, Kuhn, Loeb & Co., et al. should long have had the responsibility which the Act places on them. They are wholly and adequately in a position to assume that risk. I would devise a provision which would place it on them unequivocally and which at the same time would make it impossible for them to dodge it.

I would not consider such steps an emasculation or weakening of the Act in any way whatsoever. Every one need not be liable to make it effective. If strategic and substantial persons are made liable, the Act will gain rather than lose in effectiveness.

(4) My thought runs in the direction that in terrorem methods are not and cannot be effective agencies of continuous administration. Something more is needed. That something is control over access to the market. That is illustrated by what I have seen going on. (I have by the way done very little since July except nose around in all places getting as much first hand information as I could on the Act). I observe rascals stepping into the breach and doing what respectable and substantial men should do. It is that sort of thing which drives me to conclude that something more than in terrorem is needed.

I feel strongly that in addition to the threat of civil liability there should be an increased Commission control. If we ever are to make real and permanent progress, that control must range from "unsound" securities to high pressure salesmanship. This cannot be done overnight. Yet the statute could be devised so that there is a greater power in the hands of the Commission to prevent. You will agree, I know, that prevention rather than compensation is the foundation of any adequate control.

These in general are my ideas. I have not talked them over with Jim. I hesitated to intrude on him since Washington is so full of men who carry in their pockets the keys to all our problems.

Any emotional slant I have is against the recent movements to emasculate the Act. Yet I was so interested in seeing that this new significant step be successful that I persuaded myself to go to work on a basis as wholly objective as possible. The result has been perhaps a too technical treatment - an analysis that does not expressly show an awareness of the horrors which I have seen. Yet I, as much as anyone, know how real these horrors were. The time had come however when I thought that a rather technical discourse was needed. I felt that that as much as anything would resolve many (but not all) of the issues being debated.

As I said above I write you because I want it clear that I stand with you not against you and that no effrontery was intended. I cannot hope to convince you of my position. That is an intellectual matter on which disagreement among individuals must be expected. I would have been happier if I could have been in constant touch with you during the last few months. I would have then been sure that there were no blind spots in my reasoning and no naivete in my assumptions. And however the battle lines are drawn in the future you may be assured that I am ever at your call to serve the cause of the public interest and the investor in such technical or political way that is necessary or desirable for the occasion.

Meanwhile, Jerome Frank has called telling of plans for federal incorporation and asking my assistance. I am greatly enthused over the prospects. I think that substantial and permanent progress can be made to prevent the occurrence of much, if not most, of what happened during the last decade. At present I am merely thinking out loud in the problem of federal incorporation. It is immediately necessary and must be done at once. I am thinking, however, that once that is done it may be possible to return the problem to the states on certain conditions viz. that they (severally or in compact with one another) adopt the form and kind of regulation which the federal government prescribes. This has obvious practical difficulties. My thoughts turn to that, however, because fundamentally I am in sympathy with local regulation so far as that is consistent with the public interest and to the extent to which it is practicable. We have gone too far however to expect much immediately from the states. And the alternative of vigorous and uncompromising control by the federal government is the only sane and logical move.

It will be swell to have you back again. We all suffer when you leave.

Yours faithfully,

WOD:D.