

[Nov. 1949]

Supreme Court of the United States

Memorandum

Five

-----, 194---

J.C.C.

Re assignments,
see pp. 3-4 here.
with.

✓

HARVARD LAW REVIEW

VOL. 63

NOVEMBER, 1949

No. 1

"THE ADMINISTRATIVE SIDE" OF CHIEF JUSTICE HUGHES

Felix Frankfurter *

IT is often said of a contemporary figure destined for historical survival, that it is too early to pass judgment on his work. The assumption is that the future will pass a definitive judgment. But there never is a definitive appraisal. Each generation places its own valuations; reputations grow and recede, only to grow again and recede. Even majestic figures — Shakespeare and Washington — have fluctuating recognition. No doubt the future attenuates merely personal bias, but it gives no assurance of freedom from partisanship. In any event, contemporary judgment may contribute the impact of vividness and immediacy, which only the most imaginative artist can later create. The limitations of contemporary judgment derive not so much from its closeness to the subject; they are due to the fragmentary materials on which judgment is based. Though history cannot be written solely out of documents, it cannot be written without relevant but as yet inaccessible documents.

This is peculiarly true of the appraisal of contributions made by members of the Supreme Court to the stream of thought which courses through its decisions. The Court's opinions often disclose merely the surface of the judicial process. The compromises that an opinion may embody, the collaborative effort that it may represent, the inarticulate considerations that may have influenced the grounds on which the case went off, the shifts in position that may precede final adjudication — these and like factors cannot, contemporaneously at all events, be brought to the surface.

* Associate Justice of the Supreme Court of the United States. A.B., College of the City of New York, 1902; LL.B., Harvard, 1906.

It is true of opinions as of other compositions that those who are steeped in them, whose ears are sensitive to literary nuances, whose antennae record subtle silences, can gather from their contents meaning beyond the words. All this presupposes, of course, a grasp of the nature of the Supreme Court's functions — the scope and limits of its constitutional authority — and often, as well, familiarity with the records and briefs of a particular case whose opinion is under scrutiny. Even the most professionally equipped critic possessed of the faculties of a creative artist would be severely handicapped, however, in attempting a balanced estimate of the work of a Chief Justice of the United States if he were restricted to what is found in the United States Reports. And no fellow member of the Court may contemporaneously add to what those Reports tell.

But he may speak of the Chief Justice as head of the Court. Even of that not all can be told contemporaneously. The relations of a Chief with his colleagues and with the officials of the Court, affect the conduct of the Court's business. The influence of a tough-minded Chief Justice in encouraging, if not prodding, a temperamentally indecisive judge to make up his mind, may have important consequences in the development of our law. But these are matters that call for exact knowledge that can only become available, if at all, when disclosure is justifiable. Such exact knowledge cannot be conveyed through the distorting and often falsifying medium of surmise and gossip.

Of the matters of which one can speak, Mr. Edwin McElwain, in the paper that follows, speaks with illuminating detail. For me the qualities of Charles Evans Hughes, as Chief Justice, are conveyed strikingly by Mr. Justice Holmes in speaking of Chief Justice Fuller:

Of course, the position of the Chief Justice differs from that of the other Justices only on the administrative side; but on that I think he was extraordinary. He had the business of the Court at his fingers' ends; he was perfectly courageous, prompt, decided. He turned off the matters that daily called for action easily, swiftly, with the least possible friction, with imperturbable good humor and with a humor that relieved any tension with a laugh . . .¹

¹ The quotation comes from a letter of Mr. Justice Holmes to United States Circuit Judge William L. Putnam, dated July 12, 1910. I am indebted to my learned friend Willard S. King, Esq., for quoting the form in which the letter is found in the Putnam papers. It was published in 22 GREENBAG at 529. Mr. King

Chief Justice Hughes brought to this "administrative side" uncommon powers of concentration, wide relevant experience, a high sense of responsibility, complete absorption in the work of the Court, fidelity to its best traditions not as worship of the past but as a stimulus toward promoting the most fruitful administration of justice.

He knew that the manner of conducting the business of the Court affects the matter. This realization guided him in the watchful exercise of the power the Congress has vested in the Court to control its business. He tried to avoid a swollen docket which precludes the brooding process indispensable for wise adjudication. In Court and in conference he struck the pitch, as it were, for the orchestra. He guided discussion by opening up the lines for it to travel, focusing on essentials, evoking candid exchange on subtle and complex issues, and avoiding redundant talk. He never checked free debate, but the atmosphere which he created, the moral authority which he exerted, inhibited irrelevance, repetition, and fruitless discussion. He was a master of timing: he knew when discussion should be deferred and when brought to an issue. He also showed uncommon resourcefulness in drawing elements of agreement out of differences and thereby narrowing, if not always escaping, conflicts. He knew when a case was over; he had no lingering afterthoughts born of a feeling of defeat, and thereby avoided the fostering of cleavages. Intellectual issues were dealt with by him as such. As a result, differences in opinion did not arouse personal sensitiveness. Partly a disciplined mind, partly long experience at the bar, made him treat a case that was over as over, whether victory or defeat fell to his views. This capacity for detachment also reflected his keen sense of humor, which it often pleased him to conceal; partly such detachment must be ascribed to great conservation of energy that saved him from crying over spilt milk.

Perhaps no aspect of the "administrative side" that is vested in the Chief Justice is more important than the duty to assign the writing of the Court's opinion. In its discharge, Chief Justice Hughes was like a general deploying his army. His governing consideration was what was best for the Court as to the particular case in the particular situation. That meant disregard of self but

is the author of a forthcoming *Life of Chief Justice Fuller*, and it is perhaps not irrelevant to say that he will amply vindicate Mr. Justice Holmes' estimate of that too little appreciated Chief Justice.

not of the importance of the Chief Justiceship as a symbol. For there are occasions when an opinion should carry the extra weight which pronouncement by the Chief Justice gives. Selection of the Court's voice also calls for resourcefulness, so that the Court should not be denied the persuasiveness of a particular Justice, though himself procedurally in dissent, in speaking for the Court on the merits.² The grounds for assignment may not always be obvious to the outsider. Indeed, they are not always so to the members of the Court; the reasons normally remain within the breast of the Chief Justice. But these involve, if the duty is wisely discharged, perhaps the most delicate judgment demanded of the Chief Justice.

Chief Justice Hughes was an administrator of distinction: he brought things to pass effectively and without friction. But while he gave creative guidance to the Conference of Senior Circuit Judges and the Administrative Office of the United States Courts in making the federal judiciary more responsive to the tasks of a civilized legal system, he avoided the temptations of a strong executive. He realized fully that elaboration of administrative machinery is deadening to the judicial process, that the individual excellence of the judges, not paper efficiency, matters most.

By the very nature of the functions of the Supreme Court, each member of it is subject only to his own sense of the trusteeship of what are perhaps the most revered traditions in our national system. In such a brotherhood, the ultimate indefinable test of leadership is intrinsic authority. No one who served with him is likely to gainsay that Chief Justice Hughes possessed that quality to a conspicuous degree. In open court he exerted authority by the artistic mastery with which he presided. He radiated authority in the conference room. He did not rely upon his position, he fulfilled it. The Supreme Court is a student's life and Chief Justice Hughes could tear the heart out of books because all his life he had been a student. He was also uncompromising with the Court's austere demands. He knew that these austerities promote dignity, that dignity makes for an atmosphere of respect, and that only in such an atmosphere can reason thrive. And without reason, law is merely a screen of words expressing will in the service of desire.

² See Mr. Justice Cardozo's opinion in *Helvering v. Davis*, 301 U.S. 619, 639-640 (1937).