

REVIEWS

HARLAN FISKE STONE: PILLAR OF THE LAW. By Alpheus Thomas Mason. New York: Viking Press, 1956. Pp. xiii, 914. \$8.75.

EXCLUDING the present Justices, eighty-four men have served as members of the Supreme Court since its first term in 1790. Of this number, at least two-thirds put on their black faille robes, drafted their opinions and, after their deaths, fell into the minor figure file of American history, along with the generals, financiers and Congressmen who also had a moment of importance on the national scene and were quickly forgotten. Only three Justices have become popular culture heroes in a class with the Washingtons, Websters and Lees—John Marshall, Oliver Wendell Holmes and Louis D. Brandeis. Perhaps a dozen more have emerged as great judges in the considered opinion of lawyers, historians and political scientists, a judicial roster which would include men like Story, Miller, Bradley and Cardozo. Apart from this minority, most former Justices appear in our historical records and are known to the educated citizen only as part of a nine-some.

By and large, judicial biography has tended to follow these natural dividing lines. There are several Holmes biographies,¹ collections of his essays,² civil war letters³ and correspondence with contemporaries,⁴ and the first volume of a definitive life study is soon to appear.⁵ John Marshall is the subject of a four-volume portrait,⁶ several biographies and special studies,⁷ a three-volume collection of biographical-analytical essays,⁸ and a new set of essays

1. BENT, JUSTICE OLIVER WENDELL HOLMES (1932); BIDDLE, MR. JUSTICE HOLMES (1943); BOWEN, YANKEE FROM OLYMPUS (1944).

2. For example, HOLMES, COLLECTED LEGAL PAPERS (1921); HOLMES, SPEECHES BY OLIVER WENDELL HOLMES (1934); JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS (Shriver ed. 1936); THE JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES (Shriver ed. 1940); THE DISSIDENT OPINIONS OF MR. JUSTICE HOLMES (Lief ed. 1929); REPRESENTATIVE OPINIONS OF MR. JUSTICE HOLMES (Lief ed. 1931); THE MIND AND FAITH OF JUSTICE HOLMES (Lerner ed. 1943).

3. TOUCHED WITH FIRE (Howe ed. 1946).

4. THE HOLMES-POLLOCK LETTERS (Howe ed. 1941); THE HOLMES-LASKI LETTERS (Howe ed. 1953); ANON., JUSTICE HOLMES TO DOCTOR WU (1947).

5. HOWE, JUSTICE HOLMES: THE SHAPING YEARS 1841-1870 (1957).

6. BEVERIDGE, THE LIFE OF JOHN MARSHALL (1916-1919).

7. For example, BRYAN, THE IMPERIALISM OF JOHN MARSHALL (1924); CORWIN, JOHN MARSHALL AND THE CONSTITUTION (1919); LOTH, CHIEF JUSTICE; JOHN MARSHALL AND THE GROWTH OF THE REPUBLIC (1949); OSTER, THE POLITICAL AND ECONOMIC DOCTRINES OF JOHN MARSHALL (1914); PALMER, MARSHALL AND TANEY, STATESMEN OF THE LAW (1939); THAYER, JOHN MARSHALL (1901); WARREN, THE STORY-MARSHALL CORRESPONDENCE (1942).

8. JOHN MARSHALL (Dillon ed. 1903).

"re-appraising" Marshall's work from the perspective of the 1950's.⁹ Justice Brandeis is the subject of three books by one author alone,¹⁰ and the most comprehensive of these has recently been re-issued during the Brandeis Centennial, along with a flurry of magazine articles and newspaper tributes celebrating the anniversary. In addition, a book based on the Brandeis' judicial papers, heretofore closed to researchers, is now in press.¹¹

Once off this special plane, there are single biographies (occasionally treatment by more than one author) of Justices like William Howard Taft,¹² Stephen J. Field,¹³ William Johnson,¹⁴ Roger Taney,¹⁵ Benjamin R. Curtis,¹⁶ Melville Fuller,¹⁷ Samuel Miller¹⁸ and Morrison Waite,¹⁹ and such "lesser" figures as George Shiras, Jr.,²⁰ John Campbell,²¹ Nathan Clifford,²² John McLean,²³ William Paterson²⁴ and James M. Wayne.²⁵ In all, some thirty-five Justices have been dealt with in about one hundred book-length studies, with biographies of David Davis, Joseph Bradley, John Marshall Harlan and others in various stages of progress. To the catalog of published works can now be added Alpheus T. Mason's life of Chief Justice Harlan Fiske Stone, certainly the most important judicial biography to appear since the publication of Merlo J. Pusey's Pulitzer Prize volumes on Charles Evans Hughes.

To review Professor Mason's volume adequately requires some background in the types of judicial biography which have been written. Apart from collections of essays and "lives of the Chief Justices,"²⁶ four main styles have developed. First is the "Life and Correspondence of . . .," a nostalgic recol-

9. CHIEF JUSTICE JOHN MARSHALL: A REAPPRAISAL (Jones ed. 1956).

10. MASON, BRANDEIS: LAWYER AND JUDGE IN THE MODERN STATE (1933); MASON, THE BRANDEIS WAY (1938); MASON, BRANDEIS, A FREE MAN'S LIFE (1946).

11. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK (1957).

12. COTTON, WILLIAM HOWARD TAFT, A CHARACTER STUDY (1932); DUFFY, WILLIAM HOWARD TAFT (1930); McHALE, PRESIDENT AND CHIEF JUSTICE; THE LIFE AND PUBLIC SERVICES OF WILLIAM HOWARD TAFT (1931); PRINGLE, LIFE AND TIMES OF WILLIAM HOWARD TAFT (1939).

13. SWISHER, STEPHEN J. FIELD, CRAFTSMAN OF THE LAW (1930).

14. MORGAN, JUSTICE WILLIAM JOHNSON, THE FIRST DISSENTER (1954).

15. SMITH, ROGER B. TANEY: JACKSONIAN JURIST (1936); STEINER, LIFE OF ROGER BROOKE TANEY (1922); SWISHER, ROGER B. TANEY (1935).

16. CURTIS, A MEMOIR OF BENJAMIN ROBBINS CURTIS, LL.D. (1879).

17. KING, MELVILLE WESTON FULLER, CHIEF JUSTICE OF THE UNITED STATES, 1888-1910 (1950).

18. FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT, 1862-1890 (1939).

19. TRIMBLE, CHIEF JUSTICE WAITE, DEFENDER OF THE PUBLIC INTEREST (1938).

20. SHIRAS, JUSTICE GEORGE SHIRAS, JR. OF PITTSBURGH (1953).

21. CONNOR, JOHN ARCHIBALD CAMPBELL (1920).

22. CLIFFORD, NATHAN CLIFFORD, DEMOCRAT (1922).

23. WEISENBURGER, THE LIFE OF JOHN McLEAN, A POLITICIAN ON THE UNITED STATES SUPREME COURT (1937).

24. WOOD, WILLIAM PATERSON OF NEW JERSEY (1933).

25. LAWRENCE, JAMES MOORE WAYNE, SOUTHERN UNIONIST (1943).

26. FLANDERS, THE LIVES AND TIMES OF THE CHIEF JUSTICES OF THE SUPREME COURT OF THE UNITED STATES (1875); UMBREIT, OUR ELEVEN CHIEF JUSTICES (1938).

lection usually written by a member of the Justice's family or a close personal associate, with interspersed selections from the letters and public papers of the judge.²⁷ As a rule, this type of volume appears shortly after the death of the Justice, contains little critical comment and is primarily of value for the personal papers it reproduces. Second is the published doctoral dissertation or lawyer-political scientist study which focuses on the legal philosophy of the Justice.²⁸ Usually entitled, "The Constitutional Doctrines of . . ." or "Mr. Justice . . . and the Supreme Court," it opens with an introductory biographical chapter sometimes only a few pages in length, followed by an analysis of the Justice's opinions by subject-matter or a reprinting of representative opinions with introductory comments. Increasingly, volumes of this sort are appearing while the biographee is still alive.²⁹

The third type is the personal biography, in which the man's life and public career are presented, but his work on the Supreme Court receives little or no treatment.³⁰ In some cases this is because the Justice was on the Court only for a year or two and had his main career in another area; in other cases the Court period is significant, but the biographer is not equipped professionally to deal with the Court years and contents himself with stringing out quotations from key opinions for a chapter.

Fourth, there is the full-scale judicial biography.³¹ Here the man's formative years, his political career, his appointment to the Supreme Court, his judicial service and, if such, his post-Court activities all receive proportionate and adequate treatment. Within this category there has emerged a special sub-type, the "legal biography," which is primarily focused in emphasis and writing style

27. For example, CLIFFORD, NATHAN CLIFFORD, *DEMOCRAT* (1922); JAY, *THE LIFE OF JOHN JAY: WITH SELECTIONS FROM HIS CORRESPONDENCE AND MISCELLANEOUS PAPERS* (1833); KENT, *MEMOIR OF HENRY BILLINGS BROWN* (1915); MAYES, LUCIUS Q. C. LAMAR: *HIS LIFE, TIMES, AND SPEECHES* (1896); McREE, *LIFE AND CORRESPONDENCE OF JAMES IREDELL* (republished 1949); SCHUCKERS, *THE LIFE AND PUBLIC SERVICES OF SALMON PORTLAND CHASE* (1874); STORY, *LIFE AND LETTERS OF JOSEPH STORY* (1851).

28. For example, CLARK, *THE CONSTITUTIONAL DOCTRINES OF JUSTICE HARLAN* (1915); FRANKFURTER, *MR. JUSTICE HOLMES AND THE SUPREME COURT* (1938); HENDEL, *CHARLES EVANS HUGHES AND THE SUPREME COURT* (1951); KLINKHAMER, *EDWARD DOUGLAS WHITE, CHIEF JUSTICE OF THE UNITED STATES* (1943); KONEFSKY, *CHIEF JUSTICE STONE AND THE SUPREME COURT* (1945).

29. For example, FRANK, *MR. JUSTICE BLACK, THE MAN AND HIS OPINIONS* (1949); KONEFSKY, *THE CONSTITUTIONAL WORLD OF MR. JUSTICE FRANKFURTER* (1949); WILLIAMS, *HUGO L. BLACK; A STUDY IN THE JUDICIAL PROCESS* (1950).

30. CATE, LUCIUS Q. C. LAMAR; *SECESSION AND REUNION* (1935); HELLMAN, BENJAMIN N. CARDOZO, *AMERICAN JUDGE* (1940); MONAGHAN, JOHN JAY, *DEFENDER OF LIBERTY AGAINST KINGS & PEOPLES* (1935); SMITH, JAMES WILSON, *FOUNDING FATHER, 1742-1798* (1956); WEISENBURGER, *THE LIFE OF JOHN McLEAN, A POLITICIAN ON THE UNITED STATES SUPREME COURT* (1937).

31. MASON, BRANDEIS, *A FREE MAN'S LIFE* (1946); PASCHAL, *MR. JUSTICE SUTHERLAND, A MAN AGAINST THE STATE* (1951); PRINGLE, *LIFE AND TIMES OF WILLIAM HOWARD TAFT* (1939); PUSEY, *CHARLES EVANS HUGHES* (1951).

around the judicial materials, frequently because the subject's main contribution lay in his service on the Court.³²

It is in this last group that Professor Mason's book on Stone belongs, a choice of format probably chosen, in part, from the nature of the papers which Professor Mason was given by the Stone family. Stone kept carbon copies of many of his letters, in which he wrote frank and revealing comments about the conduct of his judicial associates. Joining the Court in the era of the law clerk and secretary, Stone left bulging files on the cases that came before him—files that included drafts of opinions, detailed memoranda by Stone about points involved in the cases, notes on Court conferences and slip sheets with comments written by fellow Justices on the development of that opinion. Twenty-two law clerks, men whose one year with a Supreme Court Justice was etched sharply into their memories, provided a wealth of detail and anecdote which Professor Mason sought out and reproduced. Finally, the author combed through the best of law review comment on the workings of the Court during these years, contemporary editorial comments and a wealth of secondary literature, all of which is used selectively and to great advantage.

The result of this source material is a big book—809 pages of tightly-packed text—a book which earns its place on the shelf of every constitutional law teacher, specialist in Supreme Court history and student of the judicial process. For a view of how the Supreme Court Justice decides a case, how he is acted upon and moulded by the conference and in his relationships with fellow Justices, how legal doctrines are developed and undeveloped within the Court, how ambition, conviction and self-restraint interplay in the mind of a judge—for all these processes, there is a wealth of choice data in *Harlan Fiske Stone*. For a graphic view of the New Deal's collision with the Supreme Court, the "show-down" fight and the eventual triumph of "old wine in new bottles" (to use the author's phrases), this is an unsurpassed source book. And for the picture of a triumphant majority of New Deal appointees painfully searching, with much intramural conflict, for a positive judicial ideology to replace the "old guard" jurisprudence they had defeated, Professor Mason's book is the fullest account yet to appear.

Beyond this, controversy over *Harlan Fiske Stone* begins. This reviewer's reaction was that Professor Mason was, to some extent, buried under the mountain of rich materials he was given. If two hundred pages had been taken out of the Stone biography and the detailed materials used for articles in law reviews and scholarly journals, Professor Mason's book would not have bogged down in the center as it does now. Perhaps if he had not had so much data on the Court years, so many drafts and memoranda and letters—and had not used so much of this—Professor Mason would have produced a companion book to his own *Brandeis, A Free Man's Life*, a warm and balanced portrait of a man

32. FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT (1939); KING, MELVILLE WESTON FULLER, CHIEF JUSTICE OF THE UNITED STATES (1950); SWISHER, ROGER B. TANEY (1935).

and a judge. Instead, it is hard to resist the feeling that in the present study neither man nor judge has been portrayed with complete success.

As a man, Harlan Fiske Stone never comes through with the clarity and fullness that we find in Henry Pringle's life of Chief Justice Taft, in Willard King's portrayal of Melville Fuller or in Mason's Brandeis. Despite some two hundred pages of pre-Court biography and forty-two pages devoted to Stone's interests as gourmet, sight-seer and art connoisseur, the essence of Stone's personality flits elusively through the book, peeking out momentarily from a footnote and hiding in a shadowy incident never quite illuminated. Stone's education and early life are chronicled, outlining Harlan Stone as New England schoolboy, young law teacher, Law School Dean, World War I administrator involved with conscientious objectors, and United States Attorney General. For the Supreme Court period, several revealing "themes" about Stone are developed. There is Stone as a conservative, shaking his head ruefully at many New Deal measures, yet defending New Dealers, nonconformist "pests" and radicals in their "reasonable" legal rights, as well as criticizing the blind conservatives within his own party. There is Stone as the judicial craftsman, heaving to the careful, even "heavy," opinion in the face of the flashing scalpel-work of Holmes and the imaginative reconstructions of Brandeis, insisting to his liberal colleagues that traditional doctrines and interpretations be used to meet the new emergencies. There is also the picture of Stone in the 1940's as a mellowing, nostalgic "left-over" of the Hoover period, his hard-won principles branded as demeaning compromises by associates who were once his law students or young New Dealers. Likewise, Stone is seen as a less than brilliant administrator in the Chief Justiceship, encountering great difficulties and widening cleavages in his attempt to "mass" the Court. But these images only pose more questions and serve as intellectual appetizers. The core of Stone's personality, the well-springs of his actions remain clouded.

Professor Mason is more successful in his five hundred and fifty pages dealing with Stone as part of the Supreme Court. Through letters, quotations of opinions, pen-sketches of Stone's contemporaries and historical resumes, the setting of the Court and its operations come through nicely. Holmes, Brandeis and Cardozo, Stone's partners in dissent, are fully treated, and their relations with Stone make good reading. Similarly, the evaluation of the New Deal appointees, particularly Black, Douglas and Frankfurter, is well made. The point at which one becomes uncomfortable with Professor Mason's account is just beyond this, in the many pages dealing with the "conservatives" of the Court. Mason depicts Hughes as a crafty and deliberate Machiavellian, assigning himself the liberal opinions in order to win personal glory, or when he wished to fulfill his "real" self by voting with the reactionaries, making another Justice face the storm of protest in writing the opinion. That this estimate was made by Irving Brant³³ and was, to some extent, shared by Stone himself at

33. P. 316.

the time,³⁴ should not relieve a biographer writing from the perspective of twenty years of the duty to assess the merits of the charge, particularly in light of the evidence in the Hughes biography,³⁵ pointing to a far different evaluation.

In the same way, Roberts is described as devious and deceptive, a man who like Hughes, sought to hide behind the "veil of liberalism"³⁶ but really went about consciously trying to suppress liberalism on the Court. The two men are accused of engaging in "shifty judicial behavior" and having "no consistent principles,"³⁷ attributes which Professor Mason describes repeatedly, and always in savory rather than scholarly language.

Of course, Professor Mason is entitled to his assessment of Hughes and Roberts, but the terms in which he frames his assessment are arguable. If he had described Hughes and Roberts as stand-patters, or as moderate progressives, or as semi-enlightened conservatives, few readers would challenge the propriety of the estimate. Rather, Professor Mason chooses to make *honesty* and *motivation* the central issues. His guidepost seems to be the statement that those who opposed Stone and the liberals did so "to satisfy the purblind demands of practical politics."³⁸ In the sense that this suggests Republican-Democratic allegiances, it weakens the structure of Professor Mason's discussion of the Court in action. That Chief Justice Hughes might have had convictions, that he might have followed a conscious policy of assigning opinions to keep the lines of division at their narrowest, that he might have been honorable in his attempts to move the Court forward slowly in a catapulting decade—these possibilities receive no consideration whatever. The same is true of Justice Roberts, whose motives are never given with the same clarity and insight reserved for the later "anti-Stone" actions of Justices Black and Douglas. The latter emerge as men with deep predilections—but always honest ones. Only Hughes and Roberts are denied the explanation of being men caught in the bonds of legal and moral prepossessions; only with those "right of center" is all politics, economics and vanity.

When it comes to assessing the delicate question of the Supreme Court's effect on American politics, Professor Mason at one point completely misses the mark. In the 1924 election, he writes, "Robert M. La Follette, a life-long Republican and Progressive presidential candidate, could, by making an issue of the judicial veto over congressional legislation, attract four and a half million votes."³⁹ This is a surprising statement to find in a book written by someone as well versed in the realities of American politics as Professor Mason. Of course, the Court's decisions did figure in the 1924 Progressive Party platform and La Follette's speeches, but so were they raised in 1896 (when Bryan at-

34. P. 460.

35. PUSEY, CHARLES EVANS HUGHES 677-79, 724 (1951).

36. P. 318.

37. P. 348.

38. P. 402.

39. P. 211.

tacked the Court's income tax and injunction decisions) and in 1912 (when Theodore Roosevelt championed recall of judicial decisions). But students of American politics know Bryan's votes to have stemmed out of a farmer-debtor protest and Roosevelt's third-party support to have come from the city-reformers, imperialists and muckrakers attracted to his cry for the "New Nationalism." Likewise, La Follette's votes came from the farm revolt of the 1920's and isolationist aspects of this vote, from widespread labor unrest which led the AFL leaders to break with their long-standing policy of not endorsing political parties, from socialist voters who joined the Progressive camp, and from city reform elements who saw no hope in the "two old parties." To talk of "the line of the Supreme Court" in solitary fashion as the cause of La Follette's showing seems very much like calling one part, one relatively minor part, the whole.⁴⁰

Another criticism of the Mason section on the Court years is that the author's critical comments, apart from personal assessments and scene-setting, are restricted largely to adjectives telling us that an opinion was "self-righteous," a quip "irreverent," a question "plaintive" or a biographer's conclusion "lame." Aside from this type of interjection, Professor Mason must have decided that the materials spoke for themselves and that a skillful arrangement of newspaper commentary and law review quotation developed the argument well enough. If this is so, it seems a pity, since the chapters on the Court years fairly cry out for concluding paragraphs which do not merely remind the reader of what was in the chapter.

There is also a question of propriety which deserves to be raised in a review of *Harlan Fiske Stone*. The Stone Papers are now deposited in the Library of Congress, with the stipulation that their use be restricted until 1975.⁴¹ Presumably, this is to protect the Justices with whom Stone sat and the judicial process itself from the untimely publication of confidential letters and statements. Indeed, many Justices went further than Stone and destroyed all or part of their papers—for example: Wayne, Miller, Lurton, Peckham, White, McKenna, Cardozo and Robert Jackson.⁴² Justice Brandeis divided his papers into two groups: his personal papers, which he gave to the University of Louisville Law School, and his judicial papers which he put into the hands of Justice Felix Frankfurter and which have remained closed until 1954. One may argue that total destruction of the papers of Justices is a grave loss to American history and unnecessary for the protection of the judicial process. This is particularly true when one realizes that, unlike the case of the State Department or

40. This reviewer would be the last one to minimize, when properly defined, the influence of the constitutional decisions of the Supreme Court on third party movements and protest groups. See Westin, *The Supreme Court, the Populist Movement, and the Campaign of 1896*, 15 J. OF POLITICS 3 (1952).

41. Manuscript Division, Library of Congress, *Location of the Personal Papers of Justices of the U.S. Supreme Court*, Case File Memorandum, 1956.

42. *Ibid.*

administrative agencies, there are few files of the Court itself, and the papers of individual Justices are the only full records of the Court's internal business.

A time restriction on judicial papers, however, is both wise and proper. But in seeming conflict with the time restriction on Stone's papers, Professor Mason has chosen to publish comments of Justices still on the court in regard to specific cases and about continuing constitutional issues. Such publication, it seems clear, places on the public record thoughts and statements by a Justice which he did not intend for public view during his lifetime—statements which could prove distinctly embarrassing to him should cases come before him involving the same issues. Professor Mason's use of the intra-Court observations of Justices Black, Frankfurter, and Reed in *Ex parte Quirin*⁴³ pointedly illustrates that situation.⁴⁴ Likewise, Mason's use of the intra-Court correspondence on the Roberts retirement in 1945,⁴⁵ while helpful in exploring Stone's abilities as Chief Justice, is a use which Stone himself would probably have deplored. When former law clerks gave out "tittle-tattle" which appeared in print, reporting Stone's views as to other Justices, Stone branded such publication as "embarrassing and troublesome," tending "to degrade the Court and its members in the minds of many thoughtful people."⁴⁶ Since Justices involved in the Roberts incident are still on the Court, Stone could well be speaking to his own biographer.

Clearly, the primary responsibility in closing judicial papers rests on the Justice himself. Where the papers are given to a selected biographer, either by the Justice or his family, there would also seem to be an independent responsibility on the part of the biographer to exercise discretion in what he reproduces. Professor Mason, if he wanted to publish in 1956, could easily have avoided using materials involving present justices or held off publication until those Justices had retired or died. One of these courses of conduct would seem called for by the special nature of the Supreme Court, and it is hard to see that either scholarly analysis or biographical essence would have suffered in *Harlan Fiske Stone* from such treatment.

In conclusion, it would be fair to say that *Harlan Fiske Stone* is a treasure-store of Supreme Court history, a book filled with much good writing, and a useful portrait of the man characterized quite accurately by Professor Mason as a "pillar of the law." It is also fair to say that other books on Stone and the "Stone Court" can still be written, and that *Harlan Fiske Stone* should be a caution that the writing of extended histories of the Supreme Court may not be consistent with the special demands of biography, even judicial biography.

ALAN F. WESTIN†

43. 317 U.S. 1 (1942).

44. Pp. 667-71.

45. Pp. 765-69.

46. P. 701.

†Senior Fellow, Yale Law School.