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(Supp. III, 1956), the FCC ruling allowing the use of the Hush-A-Phone and similar devices in interstate commerce is probably controlling on intrastate communication as well. Since the same equipment is used for both interstate and intrastate communication, the FCC ruling would be rendered virtually ineffective if a state regulation to the contrary were held valid. Cf. Western Union Tel. Co. v. State, 207 Ga. 675, 63 S.E.2d 878 (1951).

BOOK REVIEWS


The function of an advocate is to marshal evidence in such a fashion as to persuade his readers or audience that the person or cause represented by him is entitled to the judgment which he seeks. In carrying out this task, he is expected to interpret the facts in the light most favorable to his claim and to debase those data which he cannot turn to his own service. The role of a scholar is different. His obligation is to seek out all relevant information, to weigh impartially the information thus secured, and to render an unbiased judgment on it. Clearly, in this biography of Harlan Fiske Stone, Professor Mason has chosen to don the gown of the barrister rather than that of the student. It is not an uncommon choice. An “authorized” or “official” biographer tends to become an “admiring biographer.” 2 Indeed, it is difficult to think of judicial biography of the first rank which has not suffered this failing. It is certainly true of Beveridge’s classic on Marshall 3 and not much less so of Merlo Pusey’s Pulitzer Prize winning biography of Charles Evans Hughes. 4 It is not meant as a condemnation of this volume, therefore, to recognize it for what it is: a brief which may or may not be sustained by the ultimate judgment of history. 5

In support of Professor Mason’s cause, we have it on the highest authority that Stone was “a good man” and “a mighty sound and liberal-minded thinker.” 6 But not even Mr. Justice Holmes’ judgments are to be accepted uncritically. The issue remains whether Stone is worthy of the recognition which so surely belongs to others with whom he served on the Court: Holmes, Brandeis, Hughes, and Cardozo. This volume confirms the view that Stone’s claim on history must rest solely on his judicial career. For, unlike Holmes’, his pre-judicial writing

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1 McCormick Professor of Jurisprudence, Princeton University.
3 BEVERIDGE, THE LIFE OF JOHN MARSHALL (1916).
4 PUSEY, CHARLES EVANS HUGHES (1951).
5 See FRANKFURTER, Chief Justice Stone, in OF LAW AND MEN 157 (1956).
6 See HOLMES-LASKI LETTERS 737, 800 (Howe ed. 1953); 2 id. at 824; see Dunham, Mr. Chief Justice Stone, in Mr. Justice 47 (Dunham & Kurland eds. 1956); FRANKFURTER, Chief Justice Stone, in OF LAW AND MEN 151 (1956); L. HAND, Chief Justice Stone’s Concept of the Judicial Function, in THE SPIRIT OF LIBERTY 201-08 (2d ed. 1953); Wechsler, Stone and the Constitution, 46 COLUM. L. REV. 764 (1946).
offers little of enduring value—indeed some of it would best be
forgotten; unlike Cardozo's, his extrajudicial writings contain no
masterpiece; unlike Brandeis', his career at the bar is devoid of
participation in cases or causes of public importance; and unlike
Hughes', his service in public office, except as a member of the Court,
was of short duration and almost no importance. And much as one
would like to applaud his service as dean of the Columbia Law School
in doing battle with that ogre, Nicholas Murray Butler, on issues of
legal education and law-school personnel, it is not quite certain that
this was not one of the few times when Butler was on the side of the
angels.

Mason's primary techniques for persuading his readers of Stone's
great qualities as a jurist are two in number. The first is the denigra-
tion of all others who might have a claim to honor as jurists, presum-
ably on the theory that a giant will look still larger among pygmies.
Not even Holmes and Brandeis are exempt from this treatment. Thus:
"Judiciousness is not the word that clings to the lips of Brandeis's
warmest admirers. For those who regard the epitome of the judge's
function as majestic indifference, Brandeis lacked 'judicial tempera-
ment.'" (p. 775) His opinions "carried vehement assurance, rivaling
'the pronouncement of a believer in the Ptolemaic astronomy that the
new Copernican world will not do.' Even Brandeis's warmest friends
saw him as a proud, imperious man." (p. 349) Brandeis' opinions, in
Stone's view, presumably endorsed by Mason, were "pretentious and
made him suspicious. 'I have read every one of these cases,' he [Stone]
once commented in reference to one of Brandeis's long footnotes, 'and
not one of them supports his proposition.'" (p. 349) The opinions
of Brandeis were also labelled by Stone as "unduly ostentatious." (p.
219) Moreover, Brandeis resorted to "trickery" in a case in which
Stone had written for the majority, by relying in a separate opinion on
a jurisdictional question which had not been raised at conference. (p.
219) And if Brandeis was overconcerned with details, Holmes was too
little concerned with them. Only Stone arrived at the golden mean.
Holmes tended to dash off his opinions in a "cavalier" (p. 333) fashion
ignoring "'all the tough points'" (p. 327). Even so, Holmes' opinions
were "so cryptic as to leave his position unclear." (p. 351) Despite these

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7 Even Mason is apologetic, see pp. 115, 125, 434, about the Hewitt lectures,
printed in STONE, LAW AND ITS ADMINISTRATION (2d ed. 1924). A discussion of
Stone's legal but nonjudicial writings is to be found on pages 888-91.

8 Stone served, during the first world war, on a board of inquiry charged with
determining the propriety of the denial of relief from service to some who claimed
to be conscientious objectors. For about a year prior to his appointment to the
Court, Stone served as Attorney General in President Coolidge's cabinet, to which
post he was called to lend an aura of respectability to a Department of Justice
therefore headed by the infamous Harry M. Dougherty. In this post his most
noteworthy actions were the appointment of J. Edgar Hoover to head the FBI
and the recommendation of the promotion of Judge Learned Hand from the United
States District Court for the Southern District of New York to the United States
Circuit Court of Appeals for the Second Circuit.

9 For an uninformative account of this contest, see A HISTORY OF THE SCHOOL
OF LAW, COLUMBIA UNIVERSITY cc. IX-XI (Goebel ed. 1955).
faults, much of Stone's reputation is rested by Mason on his alignment with Holmes and Brandeis. Among the great figures in American constitutional law, only Holmes, Brandeis, and Stone clearly emerge as a team and as a trio of equals." (p. 774) Among these equals, however, Stone is pre-eminent. "Above all, Stone was a judge." (p. 776) Mason's final judgment is an adoption of an expression by A. A. Berle, Jr., whose wisdom is, of course, beyond question: Brandeis was a "social architect," Holmes, an "essayist," but Stone was a "judge." (p. 776)

If Holmes and Brandeis suffer from belittlement by sniping, it is Charles Evans Hughes, the bête noir of this volume, who is bombarded. Starting with the preface, where there is a somewhat less than subtle pinprick, Mason carries on a vehement campaign of destruction against Stone's predecessor as Chief Justice. One example is the contrast between the series of motives attributed to Hughes for assigning himself important cases and those motives which Mason says led Stone as Chief Justice to undertake to write for the Court. This reaction is, perhaps, not an unnatural one, so frequently have less biased commentators compared Stone unfavorably with Hughes in the conduct of the highest judicial office in the land. The result is that though the book is replete with reference to Hughes, as it could not fail to be, the reader will be hard put to find remarks which could be construed as complimentary. Indeed, the vendetta is carried so far as to include Hughes' biographer, Merlo J. Pusey, as a target. It would be equally unfortunate if Mr. Justice Roberts' place in history were to depend on the picture painted by Professor Mason.

The second peculiar method of proof is the copious quotation of approving comments about what Stone has written. It may well be

10 See especially pp. 251-62, 774-77.
11 Mason notes that Stone "had no chance, even if there had been inclination, to sort them [his papers] out, make selections, impose restrictions, much less prepare notes for the guidance of his biographer." (p. xiii) All these things Hughes had and exercised the opportunity to do. See i Pusey, CHARLES EVANS HUGHES at vii (1951).

What Mason does not recognize is the fact that Stone, always with an eye on history, exercised every opportunity for the preparation of self-serving memoranda. Indeed, as one of his law clerks has observed, the weekly letters to his sons were written in anticipation of their use by his biographer.

12 Perhaps it has been put most kindly in i FRIEND, SUTHERLAND, HOWE, & BROWN, CASES AND OTHER PROBLEMS ON CONSTITUTIONAL LAW at xlvi (1954): "Though Stone knew the satisfaction of becoming Chief Justice, one suspects that his name will be remembered more for his role as Associate Justice than for his achievements as Chief." More direct and invidious comparisons with Hughes may be found in Pritchett, CIVIL LIBERTIES AND THE VINSON COURT (1954); Schlesinger, THE SUPREME COURT, 1947, Fortune, Jan. 1947, p. 211.

It is perhaps pertinent at this point to quote from Judge Learned Hand's remarks about Hughes: "You might differ with him as radically as you chose; you might believe that he had gone clean astray; but to question the sincerity and purity of his motives betrayed either that you had not understood what he was after, or that your own standards needed scrutiny." HAND, Charles Evans Hughes, in THE SPIRIT OF LIBERTY 222 (2d ed. 1953).

13 See pp. 283, 415 n.*, 457.
14 Compare pp. 455-64 with FRANKFURTER, Mr. Justice Roberts, in OF LAW AND MEN 204 (1956).
that Stone's personality was sufficiently well known to his correspondents that they wrote nothing but praise. There were surely some, like Sterling Carr, too blinded by adoration to be critical. But it is extremely hard to believe that such critics as Professors Thomas Reed Powell and Felix Frankfurter were so all-approving as the quotations from their letters reveal. And it is highly unlikely that all newspaper comment was as completely favorable as the quotations chosen for inclusion would suggest.

Lest the foregoing mislead, it should be stated that the various approaches adopted by Mason are to be applauded rather than condemned, if properly understood. For Mason deals with these matters as Stone himself would have done. The result is that the reader gets a somewhat idealized picture of the Justice: not an objective portrait, but rather the man as he saw himself. Indeed, probably few biographers have so completely and successfully identified themselves with their subjects as Mason has with Stone. This is carried to the point that Mason's views change from chapter to chapter as Stone's did from year to year. Thus, Hoover's stature seems to rise and fall in accordance with his consultation of Stone; Hoover is in disfavor for his failure to appoint Stone to the Chief Justiceship and returns to grace when Roosevelt fails to call on Stone for guidance. Professor Frankfurter's capabilities as a student of the Court (perhaps, in Mason's eyes, best revealed in his complimentary letters to Stone), which qualify him as the most worthy successor to Mr. Justice Cardozo, seem to disappear when Mr. Justice Frankfurter fails to follow where Stone would lead. To repeat, this is obviously not an objective history of the Court and its personnel, but clearly a history as Stone would have written it, with himself cast in the role of Moses. Accordingly, we should not ask whether Hughes was what Mason says he was. (We have ample evidence that the picture of Hughes is not a fair one.) But we should realize that this was Hughes as Stone saw him. For example, if we cannot accept the suggestion that it was hesitancy concerning the decision which caused Hughes to assign United States v. Darby to Stone, we can be sure that this was Stone's understanding as to why he received the assignment, though Mason never comes out and ascribes such thoughts to Stone. And if we know that Hughes, Frankfurter, and Jackson were responsible in large measure for persuading President Roosevelt to make Stone Chief Justice (pp. 566-68), we also know that this must have invoked little feeling of gratitude or indebtedness on Stone's part, for Roosevelt, Hughes, Frankfurter, and Jackson continue to be assigned the roles of "bad guys" even after the Stone promotion.

Of the personal qualities of Stone as thus revealed by his alter ego, perhaps the most striking is his vanity. A former colleague of his on the Columbia faculty, to whom Mason turns time and again as an

15 312 U.S. 100 (1941).
16 See p. 551.
17 See also 2 PUSEY, CHARLES EVANS HUGHES 587-88 (1951).
authority on Stone's behavior, has described Stone as one of the three
vainest men to sit on the bench since the turn of the century. Two
of the many incidents recounted by Mason provide some proof for
this evaluation. The first is as revealing of the author as it is of his
subject. Harold Laski had written to Stone reporting that he had
received from Holmes letters which contained great praise of Stone's
capacities. On receipt of this information, Stone bombarded Laski
with requests for copies of such letters and even went to the extent of
asking Professor Frankfurter to help secure them. Laski, in typical
fashion, found it easier to recreate such letters than to search his files for
them, and he sent Stone these creations as the work of Mr. Justice
Holmes. Stone exulted in them. Professor Mark Howe's evaluation
is quoted in part: "It seems to me quite clear that Laski sat down and
manufactured for Stone's satisfaction the string of compliments . . . ." *(pp. 334–35 n.)* Mason's somewhat snobbish comment concerns itself
not with Stone's vanity in soliciting these letters, but rather with
Laski's forgeries, or, more charitably, with what Mr. Justice Frank-
furter has termed Laski's tendency to "reinforce . . . . . . . . .
history by fancy." *(pp. 334–35 n.)* The Laski thus self-revealed," writes Mason, "was the
man who for nearly two decades continued a warm and intimate
correspondence with Justice Holmes." *(pp. 334–35 n.)* This knowledge
of Laski's imaginative capacities, however, does not deter Mason from
relying on Laski as an authority when the views Laski expressed are
in accord with what Mason would like to think to be the truth, at least
for the purposes of this volume. *(pp. 334–35 n.)*

The second revealing episode concerns Stone's failure to write a
separate opinion in the Minnesota-mortgage-moratorium case. According to Mason, all the good ideas contained in Hughes' opinion
for the Court in that case are attributable to Stone. Nevertheless
"Stone himself may have regretted his hesitancy to speak out. 'The
opinion [Hughes'] was given such widespread publicity, and C.E.H.
praised so highly, one article likening him to Marshall,' Miss Jenkins
recorded, 'that I think H.F.S. was cured and will write his dissents and
concurrences in the future for all his hesitation to do so.'" *(p. 365)*
That Stone cherished the praise of newspapers is recorded in his own
words as well. In a letter to his sons, after the gold-clause cases, he
wrote: "'My opinion has been a good deal commented upon in the papers
in this part of the country. The *Washington Post* ran a long editorial on
it, and several of the New York papers have mentioned it. . . . So I feel
well satisfied with my somewhat anomalous position in agreeing with the
result in the Government Bond case, but not with the reasoning of my
brethren.'" *(p. 391)*

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18 See *Holmes-Laski Letters* 737, 800 (Howe ed. 1953); 2 id. at 824.
19 Id. at xv (foreword by Justice Frankfurter).
20 See, e.g., the quotation from Laski on Brandeis at 349 n., and at 532 on the
(Stone, J., dissenting).
This love of praise, when combined with another of Stone's facets, his capacity to talk too much and to the wrong people, often put him in hot water. His "confidential" remarks were constantly reported in the Washington press. In a town in which the newspapers live in large part on intentional "leaks" and cocktail-party gossip, Stone did much to keep happy the reporters who felt their power to make or break a government official's reputation. Presumably, he did this knowingly. "In utilizing their columns as purveyors of his ideas, he cherished the illusion that 'if you treat them all right they'll give you a break.'" (p. 700) Thus, when Mr. Justice Black joined the Court and soon demonstrated that he was fully capable of performing his task without the necessity of guidance from Stone, Stone spent his morning walks to Court in the company of Marquis Childs, talking to him of Black's deficiencies as a jurist. Of course these views, with little camouflage of source, soon showed up in the columns of the St. Louis Post-Dispatch, for which Childs then worked. Stone thought: "'Fine, just what is needed to educate the public.'" (pp. 472-73) At Stone's suggestion, Childs elaborated the story in an article in Harper's. Stone denied responsibility for the resulting explosion. (p. 474) But then, courage was not Stone's strong point, as is revealed by the partially told story of the Roberts retirement letter, even in the version recounted by Mason. (pp. 765-69) As Mr. Justice Jackson politely put it in his statement to Mason about this incident: "'Stone dreaded conflict, and his dread was so strong that it seemed to me that he feared action which would bring it about.'" (p. 769)

If vanity, garrulity, and weakness were Stone's personal deficiencies as a judge, they were more than compensated for by other great judicial capacities. As Professor Thomas Reed Powell has said: "There was never any question as to the strength of his brain... He always had a capacity for growth." To quote equally impressive authority: "Throughout his judicial career he endeavored to look beyond those formulas which offered the indecisive comforts of familiarity to considerations of a more conclusive sort..." This, however, is not the place for a detailed evaluation of Stone's opinions and positions. Mason quotes extensively in this very lengthy book from the opinions, and he makes full use of the Justice's files, which include both his self-serving annotations and the detailed memoranda exchanged with other members of the Court, memoranda on which future historians of the Court will have to place great reliance and in which current

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23 Thus, "Stone's gesture reached the press with dramatic effect..." (p. 336) The gesture was Stone's offer to President Hoover to resign to make a place for Cardozo.

24 "This biting indiscretion, picked up and reported in a Washington gossip book, was not calculated to foster wholehearted co-operation." (p. 339) The "indiscretion" was a "sarcastic" comment on a Hughes opinion: "Whenever I read one of his opinions I feel as if I'd been through a cyclone with everything but the kitchen stove flying in my face." (p. 339)

25 Powell, Vagaries and Varieties in Constitutional Interpretation 46 (1956).

26 I FREUND, SUTHERLAND, HOWE, & BROWN, op. cit. supra note 12, at xlvii.
readers will have much interest. The current controversy over Stone's place in history, however, does not depend on a detailed examination of all his judicial writings, for everyone seems agreed that Stone was one of the more important jurists of his day. The question which is mooted is the ground on which his fame must rest. His supporters are divided into two camps. One of the groups, which includes Professor Thomas Reed Powell and Judge Learned Hand, applauds him for his exercise of "a sincere respect for the legislative judgment. Such a respect as a judge became characteristic of him, whatever he may have thought as a private person. Stone once told me that Mr. Justice Holmes had impressed upon him that it was not his function to try to play God." 26 These acclamers of Stone's greatness assert that his views of judicial restraint were applied alike to cases involving "property interests" and "personal rights." Thus, Judge Learned Hand has written:

It needed little acquaintance with the robust and loyal character of the Chief Justice to foretell that he would not be content with what to him was an opportunistic reversion at the expense of his conviction as to the powers of a court. He could not understand how the principle, which he had all along supported, could mean that, when concerned with interests other than property, the courts should have a wider latitude for enforcing their own predilections than when they were concerned with property itself. There might be logical defects in his canon, but it deserved a consistent application or it deserved none at all; at any rate it was not to be made into an excuse for having one's way in any given case. Most of all was its even-handed application important to the judges themselves, since only by not intervening could they hope to preserve that independence which was the condition of any successful discharge of their duties.

It was because he was throughout true to this view that, it seems to me, we should especially remember him with gratitude, and honor him as a judge. 27

Not so, says the other school of Stone admirers, represented by Mason and Professor Allison Dunham, a former law clerk of Stone's. Judge Hand's applause resulted from "imputing his own ideas to Stone." (p. 512) The fact of the matter, they say, is that, "at the very moment the Justices [Stone and his colleagues] abandoned guardianship of economic interests, they seemed ready to shoulder a special responsibility for speech, thought, and religion." (p. 512) This group of Stone admirers finds that, beginning with "the most famous footnote in constitutional history, footnote 4 in United States v. Carolene Products, 304 U.S. 144, 152-53 (1938)," 28 Stone enunciated and

26 Powell, op. cit. supra note 24, at 47.
28 I. Freund, Sutherland, Howe, & Brown, op. cit. supra note 12, at xlii. The footnote as quoted by Mason reads:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
applied a principle calling for a different role for the Court in "civil liberties cases" from the rule of self-abnegation in "property cases." Mason contends that "it is difficult to square Judge Hand's interpretation with Stone's record . . ." (p. 512) Professor Dunham is more cautious: "The idea of a difference between civil liberties cases and other Due Process cases attracted some supporters from other members of the Court, but the untimely death of Stone before full development of the theory has put the testing and refining of the political restraint idea in the hands of others." 29 Followers of "box-score jurisprudence" indicate that the record supports Judge Hand rather than Mason. 30

It might be suggested, however, that the answer to this question, and to many others, may be found in Stone's records, which would reveal Stone's voting in cases in which certiorari was denied and appeals either affirmed or dismissed per curiam. For here would be ample evidence of whether Stone, or other members of the Court, really applied to "civil liberties cases" a standard which rejected "the presumption of constitutionality" which Holmes, Brandeis, and Stone, among others, struggled so valiantly to achieve as the standard of the Court, at least with regard to cases which involved "only property rights."

In conclusion, it should be said that this "authorized biography" has fulfilled the function of presenting us with a most adequate picture of the man who was Mr. Justice Stone. It is a work which all students of the Court should feel compelled to examine, for it contains much information about Stone and the Court which has never before been published. Of course, it must be read with an appreciation of the author's strong bias on behalf of his subject. An authoritative biography is still to come. But it probably should not be attempted until the papers of other Justices who served with Stone are also accessible. And then it should be written, if possible, by one who has the capacity for a "deep understanding of the judicial process, delicate analysis of character, and the creative humility of the artist." 31

PHILIP B. KURLAND *

It is unnecessary to consider now whether legislation which restricts those political processes, which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of these political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. (p. 513) Mason records that the second and third paragraphs were written by Stone's law clerk, Louis Lusky, and adds: "It was not unusual for Stone to allow his law clerks to use footnotes as trial balloons for meritorious ideas." (p. 513 n.4)

29 Dunham, Mr. Chief Justice Stone, in Mr. Justice 62 (Dunham & Kurland eds. 1956).


31 Frankfurter, A Note on Judicial Biography, in Of Law and Men 109-10 (1956).

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