

Harlan Fiske Stone: Pillar of the Law. By Alpheus Thomas Mason. New York: Viking Press, 1956. Pp. xiii, 914. \$8.75.

This nine hundred page biography of a very great judge of the United States Supreme Court is the most ambitious biographical work which political scientist Mason has yet attempted. Unlike his books on Brandeis, which paid only cursory attention to the subject's judicial career, this volume purports to be a judicial biography as well as a treatment of Stone's pre-judicial career as law teacher, lawyer and Attorney-General of the United States. Indeed about three-fourths of the volume is devoted to the more than twenty years which Chief Justice Stone spent on the Supreme Court.

While I would have liked more on his years of teaching and writing and an attempt to relate his research and deep grounding in equity to his work as a judge, the book must be judged as what it attempts to be—a judicial biography.

As a judicial biography its uniqueness lies in its use of and extensive quotation from letters which the Justice wrote his sons and others immediately after an opinion day at the Court, and the use of draft opinions and memoranda to and from other members of the Court. Authorization to use these papers (now on deposit with the Library of Congress) as he wished was given to Mason by Mrs. Stone. Through their use we now have something in the nature of a "legislative history" of many decisions, or at least that history as seen by one of the participants in the great drama of deciding cases in the Supreme Court. It is difficult to determine whether the cases selected for treatment are all of those on which the judge left letters and memoranda or only those which Mason wished to use. If the former, the selection would afford real insight into Stone's own ideas about the significance of his work; if the latter, we know only what Mason has selected. Since the theme of the cases selected is very similar to that used in Mason's Brandeis work we can only surmise that Mason's idea of important cases and not that of the judge prevails.

Those who, with Mr. Justice Frankfurter,¹ welcome knowledge of the background of decisions will be appreciative of Mason's skillful use of the Stone letters and memoranda to give an interesting story of the cases selected for biographical treatment. If the reader recalls that the author of this review is referred to as source for some information concerning cases decided when the writer was law clerk to the Justice, the reader may question the propriety of writing this review, but he will be able to formulate his own judgment of the opinion it expresses.² The basic conclusion which Mason draws concerning Stone's work is his consistent striving toward judicial self-restraint, "not because he believed a judge's preference should not enter law, but precisely be-

¹ Frankfurter, *Law and Politics* 113-14 (1939).

² "A bias against bias may be as likely a result of some buried crisis, as any other bias." L. Hand, *Thomas Walter Swan*, 57 *Yale L. J.* 167, 172 (1947).

cause it inevitably did" (P. 784). The author remarks in his introductory profile that "Stone's essential work does not lend itself to drama. . . . Stone was a judge's judge" (P. 5). Unfortunately for a full picture of Stone's greatness as judge and lawyer Mason was not content to proceed on the basis that the work was undramatic. He attempts to dramatize the essential work by selecting cases and incidents worthy of journalistic comment. By playing up the element of human conflict and personal predilections we tend to get a picture of "good guys" and "bad guys" fighting it out, sometimes rather petulant-ly. We lose sight in this approach to the Supreme Court of the fact that we probably have nine "good guys" trying to use reason and honest judgment to resolve a conflict or to express a conclusion. This approach does an injustice to Stone. Unlike Hughes, whose forceful personality sometimes tended to sweep all before it, Stone's impact on his colleagues was not derived from his personal influence but from his creativeness and skill in the use and development of judge-made doctrine. More so even than the work of Holmes and Cardozo on the Court, Stone's work exhibits the use of the union of the common-law tradition and equity jurisprudence as an asset in resolving constitutional controversy. The case-by-case approach of Stone, deciding no more than the case before him in a manner reminiscent of the great Chancellors, enabled him to maintain continuity and yet introduce change and flexibility, while at the same time reducing the tendency to make ad hoc decisions of a type which might be made by a citizen in a more open political arena.

The chronological organization of the book into chapters dealing with one or two years does not lend itself easily to conveying the idea of a judge's judge. Sometimes the periods become confusing if calendar years are the organizational basis rather than court years. Thus the *Classic*³ case, decided in the 1940 term of court, before Stone became Chief Justice, is placed in the first years of the Chief Justiceship apparently because it was decided in calendar year 1941 when Stone became Chief Justice. A more basic criticism is that the chronological approach requires an assumption that a civil liberties case in 1928 is more closely related to an anti-trust case of that year than it is to a civil liberties case decided in 1926 or 1940. A much clearer, although less dramatic, picture of the judge molding the law could have been obtained by a topical organization.

Perhaps because he hunts for drama and controversy like a crusading journalist Mason's case selection ignores much of the creative impact of Stone's work. Thus *Apex Hosiery*,⁴ *Classic*⁵ and *Gobitis*,⁶ involving a sit-down strike, the white primaries and a compulsory flag salute respectively, are dis-

³ *United States v. Classic*, 313 U.S. 299 (1941).

⁴ *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

⁵ *United States v. Classic*, 313 U.S. 299 (1941).

⁶ *Minersville District v. Gobitis*, 310 U.S. 586 (1940).

cussed extensively (and rightly so), while the *Horst*⁷ case, *Milwaukee County v. White Co.*⁸ and *International Shoe Co. v. Washington*,⁹ involving an unromantic but important principle of income taxation, of full faith and credit to foreign judgments, and of personal jurisdiction of courts respectively, are omitted. If one determines significance on the basis of law review comment, the omitted cases almost equal in importance the cases treated by Mason, and if one bases significance on the number of times the judgments or opinions have been referred to by other judges in other cases, the importance of the omitted cases far exceeds that of those included. If one sticks to the theme that Stone is a lawyer's judge, the three omitted cases also rank high on a list of important cases. When all this is said, however, it must be noted that Mason writes well and fervently on his selected cases and re-creates the atmosphere of the great period of the 1930's.

The really controversial feature of this judicial biography is the use of the letters and memoranda concerning cases and court matters. There is no doubt that Stone wrote many of these letters with his biographers in mind, so the late Chief Justice must bear some responsibility at least for their availability for use. At the same time there is little doubt that the decision to make use of such papers as are available is that of the biographer. The propriety of his making use of them to open avenues of thought and research about cases, events and court administration is beyond question. Mr. Justice Frankfurter has pointed out that papers such as the Holmes-Pollock letters help us understand the judge,¹⁰ while at the same time he warns against breaking the secrecy of the decision room (until time enervates the reasons for secrecy) and publishing "tittle-tattle" and self-serving declarations.¹¹ That these factors are not easy of determination is illustrated by the Justice's inclusion in the same article of an explanation prepared for him by Mr. Justice Roberts wherein the latter explains his votes in the minimum wage cases of 1936 (undoubtedly an explanation consistent with the official records). If we were to apply these tests to Mason's book, the most any objector could say is that Mason has been indiscreet.

But Professor Mason is a social science scholar, and the real question is whether the publication of these accounts is a significant contribution to scholarship, or at least one which outweighs any disadvantages attendant upon publication. By so stating the question I hope to eliminate from consideration as justification for publication the delight of the reader in accounts of what

⁷ *Helvering v. Horst*, 311 U.S. 112 (1940).

⁸ 296 U.S. 268 (1935).

⁹ 326 U.S. 310 (1945).

¹⁰ Fairman, *The Writing of Judicial Biography*, 24 *Ind. L. J.* 363, 367 (1949) (quoting a Frankfurter letter at length); Frankfurter, *Of Law and Men* 107 (1956).

¹¹ Frankfurter, *Mr. Justice Roberts*, 104 *U. of Pa. L. Rev.* 311 (1955), reprinted in Frankfurter, *Of Law and Men* 204 (1956).

happened, or his pain in reading how distinguished men were incited to childish behavior over the wording of a conventional note of appreciation on the resignation of Mr. Justice Roberts (Pp. 765-69).¹²

It would seem to me that for an evaluation and understanding of Supreme Court decisions and opinions the publication of these materials serves no useful purpose. In deciding whether *X v. Y* is a good or bad decision, or whether the opinion enunciates a good or bad principle, or whether the rule it establishes is likely or unlikely to survive, it does not help us to know that the Court did not even discuss the issues written about in the opinion, or that the opinion was modified to accommodate views of colleagues on the Court or sensibilities of co-ordinate departments, or that a judge thought the approach or conclusion finally adopted by his colleague was suggested by a law clerk. Unlike most decision-makers in and out of government, judges by convention are required to state publicly reasons for conclusions reached, and these stated reasons influence, or fail to influence, the law and other judges. There is no contribution to advancement of knowledge in this area by reason of publication of these letters.

It is possible that such material may give insight into the judge's conception of his role or roles as judge, and that from such material we can discern and evaluate the possible roles a judge may play. Mason has not organized the material for this purpose, nor does he draw much in the way of conclusions from it, although he has limited himself in part by his selection of cases and in much larger part by an attempt to tell a story about the cases used. Mason, in making use of these materials, has not helped to disclose Stone's concept of his judicial role in making decisions. Absent this use, or publication for literary value, disclosure of such memoranda and letters is more than indiscreet; it is useless.

Unless these memoranda and letters contribute to an understanding of the decision-making process, there is very little excuse for publication. They may not be tittle-tattle but they are used as such.

If Mason had hunted for this type of significance in Stone's work on the Court, we would have had a much better picture of desirable judging roles for our judges and of the great contributions to law development which Chief Justice Stone made in playing one or more of these roles.

ALLISON DUNHAM*

¹² The suggestion in the correspondence concerning the Roberts incident, that if words were omitted from the letter at the request of one judge the Court would be affirming the opposite of the omitted words, may provide insight into the rise of the concurring opinion. If a judge cannot leave a matter out without risk of interpretation that he no longer holds the omitted ideas, there is no alternative for the opinion writer but to insist on no changes in his opinion. To put it another way, a colleague dare not suggest a modification; he must concur specially.

* Professor of Law, University of Chicago.