

Chief Justices I Never Knew

By WILLIAM H. REHNQUIST*

To law students, law teachers, and the bar at large, the Supreme Court of the United States is thought of as consisting of nine members. While one of them is called the chief justice and presides over the Court while it is in session, lawyers and sophisticated laymen know perfectly well that his vote in conference counts no more than that of the most junior associate justice. He is generally considered, as the prime minister of Great Britain once was, to be *primus inter pares*—first among equals—taking precedence only because any group must have a nominal leader.

Although his vote carries no more weight than that of his colleagues, the chief justice undoubtedly influences the Court and its decisions. When a new chief justice accedes to the bench, newspaper editorials often suggest that by either his “executive” or his “administrative” ability he will somehow “bring the Court together” and eliminate the squabbling and bickering thought to be reflected in decisions of important issues by a sharply divided Court. The power to calm such naturally troubled waters is usually beyond the capacity of any mortal chief justice. He presides over a conference not of eight subordinates, whom he may direct or instruct, but of eight associates who, like him, have tenure during good behavior, and who are as independent as hogs on ice. He may at most persuade or cajole them.

This point is illustrated by an anecdote about Chief Justice Charles Evans Hughes. He was meticulous in his desire that the Court, which then convened at noon, come through the red velour curtains at the very stroke of the hour. On several occasions, however, the senior associate, Mr. Justice McReynolds, had barely made it to the robing room in time. On one particular day the hour of noon was almost at hand, and Mr. Justice McReynolds had not yet appeared. The chief justice dispatched one of his messengers to Justice McReynolds’ chambers to importune him to hurry. The messenger returned a

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moment or two later, but without Mr. Justice McReynolds. The chief justice asked the messenger if he had communicated the message to Mr. Justice McReynolds, and the messenger replied that he had. To the chief justice's next question the messenger replied, "He said to tell you that he doesn't work for you."

The influence of the eight associate justices is largely limited to their discussion of and vote on the cases that come before the conference, and to the opinions they write either for the Court or in dissent. It is quite otherwise with the chief justice. He has a number of responsibilities which, though they may appear peripheral to the casual observer, can be of substantial importance to the work of the Court, and indeed, to the nation as a whole.

In order to avoid making my remarks unnecessarily abstract, I would like to touch briefly upon the careers of John Marshall and Roger Taney, who presided over the Court for a consecutive period of sixty-three years in the nineteenth century, and of William Howard Taft, Charles Evans Hughes, and Harlan F. Stone, who presided over the Court for the much shorter period of twenty-five years in the twentieth century.

A glance at even the most perfunctory biographical sketches of these five individuals reveals that not one was, by any means, a stranger to politics at the time of his appointment. I suspect there is general agreement with the notion that judges, once appointed to the bench, should be divorced from partisan politics. Some would carry this notion further and suggest that the process of judicial selection should not be tainted by politics at all: even before the judge ascends to the bench, if that be the proper verb, he should have no connection with politics. Not only is this notion inaccurate, but I do not believe that it is a norm for which we should strive.

There is an old aphorism with respect to the federal judiciary: if you "scratch a federal judge you will find a former politician." Whether or not this is true of the entire federal judiciary, its truth certainly extends to a large number of the associate justices, past and present, of the Supreme Court. It can fairly be said of the five chief justices I have mentioned that before they donned their robes they were not only politicians, but heavily engaged at one time or another in important partisan politics.

My purpose in going into this matter is not to furnish you thumbnail biographical sketches of five of the chief justices, since I am certain that you have available to you far better sources; but rather to draw

two conclusions. First, the extensive careers in public life of each of these five chief justices were not unrelated to their appointments; and, second, it may well be that the office of chief justice of the United States calls for skills and abilities more readily honed in the give and take of political life than in the practice and teaching of the law. The chief justice not only casts one of nine votes in the decision of each case argued before the Court; but he presides over both the open sessions of the Court, during which oral argument is heard, and over the closed sessions of the Court's conference. Following deliberation and voting at these conferences of the Court he assigns to one of the associates or to himself the task of writing the opinion to support the result reached by the majority.¹ In addition to his purely judicial duties, the chief justice is frequently the spokesman for the Court or even for the entire judiciary. His opinions receive greater coverage in the press than those of an associate justice of the Court, or of a judge of any other court. On rare occasions, it may fall his lot to mastermind the defense of the Supreme Court as an institution. He must be not only a jurist, but interlocutor of the judicial minstrel show, a planner, and occasionally a statesman. Surely training in the rough and tumble of politics is no hindrance to the performance of these tasks.

John Marshall had been, successively: a Federalist congressman from Virginia; one of President Adams' envoys in the "XYZ" negotiations with France; and secretary of state, the office he held when nominated by President Adams to be chief justice of the Supreme Court. Although when appointed he was perhaps a more moderate Federalist than some of his cohorts in that party, while still a Richmond lawyer he had been a strong advocate of Federalist principles. His position as chief justice thus made him the natural focal point for the struggle of the newly victorious Jeffersonian Republicans, who put their philosophy into practice. Additionally, Jefferson and Marshall, though distant cousins, were bitter enemies personally, politically, and philosophically. During the eight years in which one was chief justice and the other president the hostility between them was only thinly disguised.

John Marshall served as chief justice for thirty-four years, dying in office at the age of eighty-one in 1835.² To succeed him, President Andrew Jackson appointed Roger B. Taney of Maryland, who was even

1. When the chief justice votes with the minority in conference, the assignment of the opinion falls to the senior associate who voted with the majority.

2. It is interesting to note parenthetically that of all the chief justices from John Marshall to Fred Vinson, all but one—Charles Evans Hughes—died in office.

less a stranger to partisan politics than Marshall had been. Taney had been Jackson's right hand man in the latter's celebrated war with the Bank of the United States, serving Jackson as both attorney general and as secretary of the treasury. While attorney general, Taney had advised Jackson that it was within his authority as president to withdraw all funds of the United States on deposit in the Bank of the United States. Following this advice, Jackson instructed his secretary of the treasury to withdraw the deposit—the latter refused. Jackson then removed the secretary of the treasury, appointed Taney in his place, and Taney withdrew the deposits. As a result of the heated controversy between the president and Congress that surrounded these actions, the Senate tabled Jackson's nomination of Taney as an associate justice of the Supreme Court in 1834 so Taney never took his seat. The intervening congressional elections, however, had strengthened the Jacksonian forces, and Taney's nomination as chief justice encountered much less opposition.

John Marshall and his court encountered rough waters at the beginning of his term, their difficulties gradually subsiding. Unfortunately, Taney and his court encountered their roughest waters during the last days of Taney's tenure as chief justice. The *Dred Scott* decision, an opinion of the Court written by Taney in 1857, plunged the Court into a maelstrom of bitter recriminations from which it would not recover for a generation. This decision was a prominent subject of debate during the 1860 presidential campaign that resulted in Abraham Lincoln's election to succeed James Buchanan. When Taney swore Lincoln in as president on March 4, 1861, he was eighty-four years of age, and the triumphant Republicans were certain that the natural laws of attrition would give Lincoln an opportunity to appoint a new chief justice during his first term as president. But 1864 found Taney, though ill, still presiding over the Court. The disappointment of the Republicans was pungently, if indelicately, expressed in a story attributed to the president pro tem of the Senate, radical Republican Ben Wade of Ohio:

[O]ld Ben said he had for many weary years earnestly prayed that the author of the *Dred Scott* decision might live until a Republican President could name his successor—and he began to fear that he prayed too hard.³

He had not, however, overdone it: Taney died later that year. After some deliberation, Lincoln selected Salmon P. Chase, his former secre-

3. 2 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 390 n.1 (1926).

tary of the treasury, as the new chief justice. Chase's three immediate successors were Morrison R. Waite, Melville W. Fuller, and Edward Douglass White. Upon the latter's death in 1921, President Harding appointed William Howard Taft as chief justice. Alpheus Mason, in his work *The Supreme Court from Taft to Warren*, described Taft's career in these terms:

The biography of William Howard Taft is amazing both for length of public service (1880 to 1930) and for the variety of his activities: public prosecutor, solicitor-general, district and federal circuit judge, Cabinet member and administrator, President of the United States, law school dean, professor of law, and Chief Justice of the United States.⁴

During his relatively brief tenure as chief justice,⁵ Taft used the influence of his office in several ways. He wished to "mass" the Court, to subdue or prevent dissent, and to give the impression of unanimity or near unanimity in the opinions. The Court was at that time (as it has been almost constantly since) divided on important constitutional issues. Taft preferred the doctrine of substantive due process that favored the Court's review of economic regulatory legislation to make certain that it did not infringe upon property or contract rights thought to be protected by the Constitution. He would invite members of the Court allied with him on these issues to his home for Sunday afternoon discussions that were, in fact, extracurricular rump conferences devoted to outmaneuvering the minority faction on the Court.⁶ His correspondence reveals that he did not hesitate to urge new appointees to the Court to join the majority, and to repress any desires they might have to express their views in separate opinions.⁷

By all accounts, Taft's personality was congenial. Those of his associates who disagreed with him, as well as those who agreed with him, testified to his success in making the conference discussions as pleasant as possible. Both Holmes and Brandeis commented on his ability to make conferences less emotionally tiring and physically exhausting than they had been under his predecessor, Chief Justice White.⁸

During the first years of Taft's service as chief justice, liberals such as Holmes and Brandeis often appeared to acquiesce in decisions with

4. A. MASON, *THE SUPREME COURT FROM TAFT TO WARREN* 42 (1968) [hereinafter cited as MASON].

5. Taft was chief justice for nine years only, until 1930.

6. MASON, *supra* note 4, at 70.

7. *Id.* at 65.

8. *Id.* at 60-61.

which they might not have been in complete agreement.⁹ Part of this atmosphere may have been due to Taft's practice in assigning opinions—a practice that was generous to a fault, according to Justice Stone, who became the junior associate justice during Taft's tenure. Taft would parcel out the more desirable opinions among the associates, frequently retaining the least desirable ones for himself.¹⁰

During his tenure as chief justice, Taft took a tremendous interest in the functioning of the federal judiciary as a whole. He apparently intervened quite actively with the president and the attorney general in connection with their selection of nominees, not only for associate justiceships on the Supreme Court, but for vacancies on the district courts and the courts of appeals.

Chief Justice Taft, so far as I know, has not made anybody's list of the ten, or even of the twenty, greatest members of the Supreme Court. His writing style was not particularly lucid, and many of the constitutional doctrines that he espoused have not withstood the test of time. Yet as an arbiter at the conference table, and perhaps more importantly, as a man who felt a great responsibility for the overall functioning of the federal judicial system, with the ability to do something about it, he was by no means an insignificant chief justice.

Nor was his successor, Charles Evans Hughes. I again resort to Mason's work for a thumbnail description of Hughes' career:

Charles Evans Hughes is, by any standard, one of the most important and truly national public figures of this century. His life represents not one but at least eight careers: law teacher and eminent lawyer, feared and fearless investigator, crusading governor, Associate Justice of the Supreme Court, Republican Presidential candidate—and near winner—in the 1916 race for the Presidency . . . , Secretary of State, World Court judge, and Chief Justice of the United States.¹¹

Almost fifteen years intervened between Hughes' resignation as an associate justice and his appointment as chief justice. Compared to the opinions he wrote as an associate justice, Hughes' later opinions read better the first time through than they do upon a second or third reading. His style gives the impression that the law marches through the pages of the opinion to its inexorable conclusion; that there simply is no other way the case could have come out. The result of a style

9. *Id.* at 61.

10. *Id.* at 68-69 n.82, *citing* letter from H.F. Stone to Marshall and Lauson Stone, Nov. 24, 1939 (Stone Papers, MSS LIB. CONG.).

11. *Id.* at 83-84.

that conveys such magisterial overtones and conviction is frequently to obscure the genuinely difficult questions in a case.

I would by no means suggest that such a style is not perfectly permissible, nor even that a style that does not achieve the advantages of Hughes' magisterial progression may not also encounter all of its drawbacks. I would suggest that writing a judicial opinion for a nine person court is a very different task from composing an article or treatise on the subject for a single individual. When you write for the Court, you speak not only for yourself but for at least four other members of the Court, each of whom understandably has his own way of expressing an idea. While of necessity much latitude is given to the opinion writer, there are inevitable compromises. Labeled by critics as due to confusion or lack of logical perception, these compromises may in fact be simply a very necessary effort to *avoid* deciding an issue that might seem to some to be inextricably entwined with those issues which *are* decided in the opinion.

A knowledgeable commentator has described Hughes' technique in the following words:

He approached his own opinions with his usual meticulous care, turning out innumerable drafts in order to be certain of the most correct and precise language. But he had no particular pride of authorship, and if in order to secure a vote he was forced to put in some disconnected or disjointed thoughts or sentences, in they went and let the law schools concern themselves with what they meant.¹²

Hughes also had the misfortune, if it may be called that, of being chief justice at a time when the Court was sorely torn from within by philosophical divisions among its members, and subjected to a frontal assault from without by President Franklin D. Roosevelt. The criticism that his opinions during his eleven year tenure as chief justice may not have been entirely consistent with one another, and that he may have bent with the winds of change in order that the institution might not break, should be made only after the most careful examination of the circumstances in which he acted.

Professor Freund has noted that Charles Evans Hughes was masterful when presiding over the open sessions of the Court during oral argument.¹³ Those who sat on the bench with him and those who practiced before him have echoed this sentiment. Justice Frankfurter

12. McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 HARV. L. REV. 5, 19 (1949).

13. Freund, *Charles Evans Hughes as Chief Justice*, 81 HARV. L. REV. 4, 13 (1967).

observed of Hughes that he did not exert authority, "he radiated it."¹⁴ Robert H. Jackson, who argued many controversial cases to the Hughes Court before he himself became an associate justice, commented:

Even when passions were running high and his own associates were in sharp division, he never lost his poise. He was an ideal presiding judge.¹⁵

But the role of the chief justice in presiding over the closed conference sessions can be of even greater importance than his role in presiding over the open sessions. When he presided over the conference Hughes was, from almost every account, admirable. Such diverse personalities as Owen Roberts, Robert H. Jackson, Felix Frankfurter, and William O. Douglas have commented that he was without peer in discharging this responsibility.

Justice Frankfurter, speaking at the University of Virginia twenty-odd years ago, described Hughes' performance in these words:

I've often used a word which for me best expresses the atmosphere that Hughes generated; it was taut

Hughes was dynamic and efficient. That's a bad word to apply to Hughes, because it implies regimentation. It implies something disagreeable, at least to me. I don't like to have a man who is too efficient. He's likely to be not human enough. That wasn't true of Hughes. He simply was effective—not efficient, but effective It has been said that there wasn't free and easy talk in Hughes's day in the conference room. Nothing could be further from the truth. There was less wasteful talk. There was less repetitious talk. There was less foolish talk. You just didn't like to talk unless you were dead sure of your ground, because that gimlet mind of his was there ahead of you.¹⁶

Hughes' colleague for eleven years, Justice Owen Roberts, described Hughes' methods at conference in these words:

His presentation of the facts of a case was full and impartial. His summary of the legal questions arising out of the facts was equally complete, dealing with the opposing contentions so as to make them stand out clearly. When this had been done, he would usually look up with a quizzical smile and say, "Now I will state where I come out," and would then outline what he thought the decision of the Court should be. Again in many cases his treatment was so complete that little, if anything, further could be added by any of the Justices. In close and difficult cases, where there were opposing views, the discussion would go round the table from

14. Frankfurter, *"The Administrative Side" of Chief Justice Hughes*, 63 HARV. L. REV. 1, 4 (1949).

15. Jackson, *The Judicial Career of Chief Justice Hughes*, 27 A.B.A.J. 408, 411 (1941).

16. Frankfurter, *Chief Justices I Have Known*, 39 VA. L. REV. 883, 902-03 (1953).

the senior to the junior, each stating his views and the reasons for his concurrence or his difference with those outlined by the Chief. After the Chief Justice had finished his statement of the case and others took up the discussion, I have never known him to interrupt or to get into an argument with the Justice who was speaking¹⁷

In 1941, Charles Evans Hughes retired, and Franklin Roosevelt appointed Associate Justice Harlan F. Stone to succeed him as chief justice. A strong case can, and indeed, has been made by Professor Mason, Stone's very able biographer, that Stone's opinions throughout his tenure on the Court—from 1925 until 1946—were both analytically more sound and doctrinally more consistent than those of Chief Justice Hughes.¹⁸ These two chief justices also differed significantly in their manner of presiding over the Court's conference—in the opinion of most knowledgeable observers, Stone's performance does not compare favorably with that of Hughes. Professor Mason approvingly cites Warner Gardner's evaluation of Justice Stone as a "careful and wise judge . . . ,"¹⁹ but then goes on to say that

[a]s Chief Justice, Stone was less impressive The bench Stone headed was the most frequently divided, the most openly quarrelsome in history. If success be measured by the Chief's ability to maintain the *appearance* of harmony, he certainly was a failure.²⁰

Stone had by far the least political experience prior to coming to the Court of any of the five chief justices being discussed. This contrast is particularly striking between Stone, on the one hand, and Hughes and Taft on the other. To me a plausible conclusion is that Hughes' superiority to Stone in presiding over the conference has a definite connection to their different amount of exposure to active political life.

When Hughes was presiding, the conference finished its weekly business in sessions lasting roughly from four to six hours. When Stone presided, the same amount of business often took two or three days to complete. Justice Frankfurter in his diary entry for Tuesday, March 9, 1943, said:

The long hours of our Conferences seem to me a very bad way of doing business that we have to do, and I am greatly disturbed about the future if the Chief does not make it a flat rule to terminate Conferences after four hours. . . .²¹

17. 2 M. PUSEY, CHARLES EVANS HUGHES 675 (1951), quoting Justice Roberts' memorial address before the New York Bar, Dec. 12, 1948.

18. MASON, *supra* note 4, at 113, 131.

19. *Id.* at 169, citing Gardner, *Mr. Chief Justice Stone*, 59 HARV. L. REV. 1203, 1208 (1946).

20. *Id.* at 169-70.

21. J. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 207 (1975).

In another passage from the same diary, Frankfurter comments: [T]here followed what is in danger of becoming a habit with the C[hief] J[ustice], of not allowing a Justice to state his views uninterrupted when contrary to those of the C[hief] J[ustice] but to argue almost every word that is uttered, thereby breaking up the discussion and making of it a needless contention, and, of course, causing a frightful waste of time. Several of the Brethren, especially Roberts and Black, have talked to me complainingly of this. When, last year, Lauson Stone, the Chief's oldest son, asked me confidentially how his Dad was carrying on as C.J., I told him that I had only one qualification to make, and that is precisely the practice of which today's performance was an egregious example, namely, his failure to observe what seems to me to be an indispensably wise order of procedure—for the C.J. to have his say, and then in order of seniority, for every other member of the Court to have his say without any interruption.²²

An able and informed critic of the Court urges that Stone's virtues are preferable to those of Hughes. When issues of great moment are pending before the conference, the rule should be full and free debate, even if it takes several days to decide the eight, ten, or twelve cases that are before the conference.²³

This proposition is undoubtedly meritorious, but having participated in the conferences of the Court for slightly more than four years now, I wish to dissent from it. Certainly conference discussion should not be throttled. Even the most junior justice should be given the impression that he is entitled to make the fullest statements of his views. But the realistic alternatives are not gag rule or full and free discussion. Instead, the choice is between orderly, relevant discussion, on the one hand, and stream of consciousness reflections or *seriatim* lectures, on the other. Indeed, a give and take discussion between nine normal human beings, in which each participates equally, is not feasible. Even between two or three persons, such exchanges can get out of hand. Yet few people can muster the patience to sit still to receive in silence eight verbal broadsides, each lasting from ten to fifteen minutes, and each reflecting the speaker's analysis of the fine points of the case at issue. Even the most patient of listeners would find himself towards the end of such a performance champing at the bit to begin his turn at dishing it out rather than receiving it. I can speak with experience on this score, since for four years I have sat in the conference in the position of its junior member, doing more than my share of champing at the bit waiting for my turn.

22. *Id.* at 160.

23. Frank, Book Review, 9 STAN. L. REV. 621, 629 n.31 (1957).

Furthermore, if the purpose of the conference is to influence the final decision, *seriatim* lectures are entirely ineffectual. The conference is less often than expected the forum in which the Court's critically important cases are actually decided. Each of the justices will have prepared himself, hopefully, on the critical issues in such a case by reading briefs, listening to oral argument, reading cases, talking to law clerks, and simply pondering. The preparation process itself tends to invite not an absolute, knife-edged neutrality, but rather a preference, at least tentative, for one side of the case or the other. When nine justices thus prepared assemble around the conference table on Friday morning to decide an important case presenting constitutional questions that they have all debated and written about before, the outcome may be a foregone conclusion. In such a case only a truly insightful and concise contribution may provoke a change of mind—a stream of rhetoric which begins with the laws of the Medes and the Persians and slowly works forward in time is a wasted effort.

By virtue of his own preparation and economy of statement, Charles Evans Hughes presided magisterially and yet without offending the brethren. Stone, on the other hand, though an extraordinarily able lawyer and excellent writer of opinions, had less sensitivity for the different kinds of responsibilities associated with presiding over the conference. If the chief justice conceives his role to be akin to that of the presiding officer at a political convention, who can always grab the microphone away from the opposition when necessary, he will create resentment without actually advancing the cause that he champions. Justice Cardozo has written that "the sovereign virtue for the judge is clearness,"²⁴ and most members of the profession would agree with him. The chief justice has a notable advantage over his brethren: he states the case first, and analyzes the law governing it first. If he cannot, with this advantage, maximize the impact of his views, subsequent interruptions of colleagues or digressions on his part or by others will not succeed either. Theodore Roosevelt described the presidency as a "bully pulpit." The chief justice, as president of the conference, occupies no such position.

Another disadvantage of endless conference discussions is the very visible tension which prolonged dispute, even of the most friendly kind, engenders among nine justices deciding cases of great significance both to themselves and to the country. It is at least in part due to our training as lawyers that the conference at all times since

24. Cardozo, *Law and Literature*, 48 YALE L.J. 489, 491 (1939).

I have been a member has been the cordial group that it is. An attorney learns to contest hotly a case in the courtroom and, after court adjourns, to go out for a drink with his opponent. In my own experience, one can discuss a case with one's law clerks, or in a law school seminar, or a continuing legal education program for an hour or more without any visible intellectual drain. But if the decision of the court of last resort hinges on the outcome of the discussion, an entirely new dimension in terms of frustration, irritability, and tension is added as the discussion becomes prolonged.

Harlan Stone and Felix Frankfurter had notorious reputations for championing their own views at great length. That they nonetheless apparently failed, in spite of their very notable abilities, to win many converts in conference supports the conclusion that the power of persuasion is a subtle skill, dependent on quality rather than quantity.

I have thus far adverted to the role of the chief justice as the officer presiding over the Court in open session, as assignor of cases, and as the leader of conference discussions. Perhaps more important than any of these roles, however, is that of the chief justice as spokesman for the Court in nonjudicial matters. I would first like to mention Chief Justice Taft's contribution in this regard, then I will discuss in a little more detail the reactions of Chief Justice Marshall and Chief Justice Hughes to political assaults on the Court from other branches of government.

As I have earlier indicated, Chief Justice Taft has not gone down in the annals of the Court as one of its great luminaries. But in my opinion his contribution to the structure of the federal judicial system is immeasurable. His very active part in shepherding through Congress, with the help of Justices Van Devanter and Brandeis, the Jurisdictional Act of 1925,²⁵ entitles him to a high place among judicial statesmen. This law abrogated the obligation of the Supreme Court of the United States to hear certain cases without regard to their lack of significant national importance, and made its docket almost entirely discretionary. I think it fair to say that this Act of 1925 alone has enabled the Supreme Court of the United States to survive the second and third quarters of this century. Without it the Court would be completely inundated by cases that it would by law be required to decide on the merits, the volume of which would be simply beyond its capacity.

Chief Justice Taft foresaw the need for this grant of discretionary

25. Act of Feb. 13, 1925, ch. 229, 43 Stat. 936.

jurisdiction before it became indispensable. It is due to his foresight and to his willingness to perform tasks outside of the normal business of the Court that the Supreme Court today is as currently abreast of its docket as it is.

The Court throughout its history has needed not only chief justices who built for the future, but chief justices who were willing to defend it against attack from without. The two principal assaults against the Court occurred during the administrations of Presidents Thomas Jefferson and Franklin Delano Roosevelt. During the Jefferson era the House of Representatives voted to impeach Supreme Court Justice Samuel Chase, who was then tried before the Senate. During his administration, President Roosevelt proposed to, in his words, "reorganize" the Court; or, in the words of his opponents, to "pack" the Court. Both of these situations posed very real and very dangerous threats to the Supreme Court as an independent institution.

When the Court finds itself in such a situation, or, more specifically, when the chief justice finds the Court in such a situation, he has no rules to guide him. At this juncture he is, in the public eye, a spokesman for the institution, no longer bound by the ordinary rules applicable to official Court proceedings. Certainly the conduct of the chief justice in such situations is a test of his ability. A comparison of John Marshall's reaction to Chase's impeachment to the reaction of Charles Evans Hughes to Franklin Roosevelt's plan to pack the Court is instructive.

Associate Justice Samuel Chase was tried in February, 1805, before the United States Senate on a charge brought against him by the House of Representatives. At this time the Supreme Court was a fledgling institution, bearing out Alexander Hamilton's observation in *Federalist Paper No. 78* that it was the "least dangerous" branch.²⁶ Thus many observers believed that if the Jeffersonian faction in Congress should succeed in removing one of the associate justices by impeachment and conviction the same fate might well lie in store for every other appointee of a Federalist president. Charles Warren, a leading historian of the Supreme Court, summarized the effect such a course of events would have had upon this institution:

[The Republican leaders] contended that impeachment must be considered a means of keeping the Courts in reasonable harmony

26. THE FEDERALIST No. 78, at 504 (Mittell ed. 1938) (A. Hamilton). The seeds of the Court's later claim to equality, if not primacy among the branches had been sown only two years earlier in Marshall's opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

with the will of the Nation, as expressed through Congress and the Executive, and that a judicial decision declaring an Act of Congress unconstitutional would support an impeachment and the removal of a Judge, who thus constituted himself an instrument of opposition to the course of government.²⁷

Marshall's only public participation in these proceedings was his appearance as a witness in the Senate trial. Marshall's very sympathetic biographer, Albert Beveridge, says: "Friendly eyewitnesses record that the Chief Justice appeared to be frightened . . ."²⁸

A Federalist senator by no means sympathetic with the Jeffersonians recorded in his diary that:

John Marshall is the Chief Justice of the Supreme Court of the United States. I was much better pleased with the manner in which his Brother testified than with him.

The Chief Justice really discovered too much caution—too much fear—too much cunning—He ought to have been more bold—frank [and] explicit than he was.

There was in his manner an evident disposition to accommodate the Managers. That dignified frankness which his high office requires did not appear. A cunning man ought never to discover the art of the *trimmer* in his testimony.²⁹

Marshall's testimony simply went to his knowledge of Virginia practice and procedure, and to his observation of Chase's conduct of a trial conducted in Richmond. It is doubtful that Marshall's testimony played any significant part in the Senate's ultimate decision to acquit Chase, but the impression he made during his testimony is not one of the brighter spots in his public career. The judgment of history has been that the acquittal of Justice Chase provided vital and necessary support for an independent judiciary, yet the chief justice of the Supreme Court decided to hunker down before the political storm that appeared to be brewing.

Charles Evans Hughes, on the other hand, showed himself to be a master strategist for the Court when its independence was once again threatened by President Franklin Roosevelt's court-packing plan in 1937. The Supreme Court, from approximately the beginning of Chief Justice Taft's term in 1921, had been increasingly asserting its authority to review state economic legislation designed to alleviate the lot of the working class. The Court attempted to ascertain whether that legislation deprived employers and businessmen of the "freedom

27. 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 293 (1926).

28. 3 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 192 (1919).

29. *Id.* at 196, quoting 2 PLUMER, *DIARY, PLUMER MSS LIB. CONG.* (Feb. 15, 1805).

of contract" thought to be embodied in the Fourteenth Amendment. During the presidencies of Harding, Coolidge, and Hoover, when Congress passed little innovative legislation, the Court invalidated a considerable amount of state legislation, but very few acts of Congress. With the election of President Roosevelt in 1932, however, the country witnessed a dramatic expansion in the role of the federal government. Congress, in the exercise of its power under the commerce clause, enacted laws regulating many phases of the nation's economy. When challenges to this legislation reached the Supreme Court in 1935 and 1936, it invalidated a number of the laws. The president's reaction was foreseeable. At a press conference shortly after one of the decisions he denounced the Supreme Court for taking the country back to the horse-and-buggy days.

After his landslide re-election victory in 1936, Roosevelt's first order of business was to devise a plan to bring the Court into line. In early February, 1937, he proposed a law, drafted by Attorney General Homer Cummings, providing that for each justice on the Court who had attained the age of seventy but had not retired, the president would be entitled to appoint an additional justice. Since six of the nine justices on the Court at that time were over seventy, if the law had passed the president would have been empowered to appoint six additional justices.

The arguments first advanced by the administration for the enactment of the bill did not reveal the real reason for it—that the administration believed the Court was using an archaic and unjustified constitutional doctrine to frustrate the attempt of the people's elected representatives in Congress to deal with a national emergency. The justification urged instead was that the Court, with so many superannuated justices, was unable to keep current with its docket. It became apparent during the first month after the plan was unveiled that this explanation would not wash either with Congress or with the public. Therefore the president, in a speech delivered early in March, 1937, figuratively took off the glove and made plain his real reasons for advancing the plan:

The Court in addition to the proper use of its judicial functions had improperly set itself up as a third House of the Congress—a super-legislature, as one of the Justices has called it—reading into the Constitution words and implications which are not there, and which were never intended to be there.

We have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal

from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution—not over it. In our courts we want a government of laws and not of men.

. . . .

During the past half century the balance of power between the three great branches of the Federal Government has been tipped out of balance by the Court in direct contradiction of the high purposes of the framers of the constitution. It is my purpose to restore that balance. You who know me will accept my solemn assurance that in a world in which democracy is under attack, I seek to make American democracy succeed.³⁰

As a result of the 1936 electoral landslide, the Republican minorities in the House of Representatives and the Senate were so small that they could barely impede the passage of the legislation, let alone defeat it, by themselves. The Republican leadership therefore agreed that Republicans would remain in the background, and that Democratic legislators who opposed the plan would lead the attack upon it. In the Senate, where the bill's first trial was to take place, the leader of the opposition was Senator Burton K. Wheeler of Montana. His liberal credentials were impeccable, since he had been a long time supporter of reform legislation and had run as a vice presidential candidate on the LaFollette Independent presidential ticket in 1924.

Senator Wheeler was scheduled to testify as the opening witness for the opposition before the Senate Judiciary Committee on Monday, March 22, 1937. A three-man delegation representing the senators opposed to the bill called on the chief justice on the preceding Thursday, and asked him to appear personally and testify before the committee. He was willing to do so, but only to rebut the president's charge that the Court was behind in its work. Hughes wanted Justice Brandeis, a respected member of the liberal wing of the Court, to appear with him, but the latter strenuously objected to a personal appearance by either or both of them before the committee. Brandeis felt their presence would improperly involve the Court in a political issue. Brandeis did, however, agree with Hughes that it would be proper for the chief justice to send Wheeler a letter, to be read before the Judiciary Committee, outlining the facts from the Court's point of view.

Wheeler, apparently still uncertain as to what to do, finally called

30. R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 344-45, 351 (1941). Franklin Roosevelt's "fireside chats" were magnificent examples of partisan political oratory. This short quotation from his speech of March 9, 1937 can convey only partially the flavor of the occasion and the message.

upon Justice Brandeis on Saturday, March 20th. Brandeis told him that if he would ask Hughes for a letter Hughes would oblige. Wheeler was hesitant to call upon Hughes since he did not know him personally and had opposed his confirmation as chief justice seven years earlier. Failing in his attempts to reassure Wheeler, Brandeis simply picked up the telephone and called Hughes. When Hughes answered Brandeis handed the receiver to Wheeler. Hughes immediately invited Wheeler to his house where he assured the latter that he would have a letter in time for presentation to the Judiciary Committee on the following Monday morning. The chief justice assembled the necessary data, and completed the letter on Sunday, September 21st. He took it to Justice Brandeis and Justice Van Devanter, and each reviewed and approved its contents. "Wheeler called at the Hughes home for the letter late Sunday afternoon. 'The baby is born,' said the Chief Justice with a broad smile as he put the letter into Wheeler's hand."³¹

The letter was the *pièce de résistance* of Senator Wheeler's testimony before the Senate Judiciary Committee. Its effect was devastating. The chief justice had taken up and factually rebutted, one by one, each of the administration's claims of incompetence on the Court. The letter itself has been described by Hughes' principal biographer as "cool, judicial, and factual,"³² as the following excerpts prove:

The Supreme Court is fully abreast of its work. When we rose on March 15 (for the present recess) we had heard argument in cases in which certiorari had been granted only 4 weeks before—February 15 There is no congestion of cases upon our calendar.

This gratifying condition has obtained for several years. We have been able for several terms to adjourn after disposing of all cases which are ready to be heard.³³

Hughes then addressed the administration's contention that fifteen justices would be able to transact more business than the present nine:

An increase in the number of Justices of the Supreme Court, apart from any question of policy, which I do not discuss, would not promote the efficiency of the Court. It is believed that it would impair that efficiency so long as the Court acts as a unit. There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide.³⁴

The proponents of the court-packing plan can best testify to the ultimate success of the chief justice's letter. Almost to a man they

31. 2 M. PUSEY, CHARLES EVANS HUGHES 755 (1951).

32. *Id.* at 756.

33. *Id.*

34. *Id.*

conceded that it had been the most lethal weapon in the hands of their adversaries. The old "curmudgeon," Secretary of the Interior Harold L. Ickes, said:

The whole world knows that, while at first it appears that the President would be strong enough to carry his reform through Congress, he was outmaneuvered in the end, largely by Chief Justice Charles Evans Hughes.³⁵

Robert H. Jackson, one of the president's principal lieutenants in the court-packing fight, expressed similar views, as recounted by his biographer:

Chief Justice Hughes's handling of the fight was "masterly," to use Jackson's own characterization. Jackson later said to the President, "The old man put it over on you," a fact which Roosevelt always conceded.³⁶

Hughes has been criticized for not convening the full Court to discuss the propriety of his drafting this famous letter. When he brought the matter up at conference following the release of the letter not a single member disapproved. Subsequently, however, Justice Stone did voice his objections to Hughes's action, and observed that Justice Cardozo shared his sentiments. To the extent that the letter expressly gave the impression that all of the justices agreed with all of the statements it contained, Hughes undoubtedly erred since he had consulted only Justices Brandeis and Van Devanter. But in responding on extremely short notice to a request for help from a group of senators who were fighting what appeared to be at the time a losing battle to save the independence of the Court, I believe he acted in a truly statesmanlike way.

Of course, as Stone later observed, Hughes could have quickly convened the Court, which was in recess, either at his home or at the Court, to discuss an appropriate response to Senator Wheeler's request. But until one has sat in a conference of nine judges and heard them

35. *Id.* at 766.

36. E. GERHART, *AMERICA'S ADVOCATE: ROBERT H. JACKSON* 117 (1958). Jackson was one of Roosevelt's ablest lieutenants in the executive branch and was certainly not disposed to underestimate the president in comparison to the chief justice: "Charles Evans Hughes was one of the two great personalities of my time. The other was the President. Purely apart from their abilities or attainments, merely as personalities, they outshone every other presence. They were quite different, but when they were together, as I saw them on several occasions when the Court called upon the President and as Solicitor General I accompanied them, one saw two magnificent but very different types. The Chief Justice had an external severity that contrasted with the President's external urbanity. But he was one of the kindest men, and no person who saw him preside over the Supreme Court will ever have any other standard of perfection in a presiding officer." *Id.* at 145-46.

discuss *seriatim* what they believe would be a proper response or a proper action in an area in which the Court is unaccustomed to acting, one does not realize the extraordinary difficulty in obtaining any sort of agreement. Given the shortness of time, the fact that the letter itself was over seven pages long, and that in all probability all of the remaining members of the Court would not have acquiesced to it in its entirety, it seems to me that Hughes saw what he had to do and did it. Perhaps his action was marginally deficient in giving an unwarranted impression of unanimity, but his responsibility as the chief justice for the independence and integrity of the nation's highest Court supports my assertion that his conduct made him a greater, and not a lesser, person.

Hughes never had the opportunity to be the judicial innovator that Marshall did simply because he served as chief justice more than a century after Marshall did. Perhaps even had he had that opportunity, he would not have utilized it as magnificently as Marshall did. But while Hughes must be ranked below Marshall as a jurist, I believe that he has the strongest claim to be ranked at least the peer of Marshall in the field of judicial statesmanship.

Conclusion

I have attempted to give you, by means of brief sketches of the careers of five of the men who have served in that office, some view of the role which the chief justice can play and has played in developing and protecting the Supreme Court's place in our federal system. The chief justice is in many ways merely *primus inter pares*, but on occasion he is given the opportunity to strike a blow for the cause, an opportunity which is simply not accorded to even the most gifted of his associates. Examination of the manner in which they make use of these opportunities affords some measurement of the stature of the men who have sat in the center chair of the Court.