

Questions, Procedure in Adjudication of Cases, Rule Making and Judicial Review. The section on Adjudication of Cases — the so-called quasi-judicial function of administrative bodies — is particularly excellent. It is in this area that public criticism has been the most vociferous and perhaps the most justified. The author's approach to the topic is refreshingly dispassionate. He does not commence with an answer but rather with the problem. After making out a convincing case establishing that an administrative agency cannot function as a court if it is to accomplish its assigned task, he goes on to make specific recommendations for the improvement of administrative procedures. He calls for major revisions in pre-hearing conferences, the conduct of the hearing itself, the separation of prosecuting and adjudicative functions, the presentation of evidence and in post-hearing procedure.

The author treats the quasi-legislative and quasi-judicial functions of both state and federal agencies. If the book has any major shortcoming, it is that the breadth of the survey precludes much analysis in depth. The Administrative Procedure Act² which has brought considerable uniformity to the rule-making and adjudicative functions of the federal agencies, particularly in such areas as notice, hearing, separation of functions, admission of evidence and scope of judicial review, receives frequent but cursory mention. It could, and perhaps should, be the core of any current treatise on the subject of administrative law.

The author's style is somewhat turgid. There seems to be something about legal writing that stifles originality. Most treatises have the literary qualities of a law review note. But law books, fortunately, are not read for their stirring prose and it would be captious to make much of any deficiencies in this respect. *Administrative Agencies and the Courts* is a sane and well documented treatment of a subject that is becoming more important to the practitioner with each passing year. Professor Cooper's volume should take its place with the works of Benjamin, Dickens, Landis, Stason and other scholars in the field.

*Edmund A. Stephan**

CHARLES EVANS HUGHES. By Merlo Pusey.¹ New York: The Macmillan Company, 1951. 2 vol. Pp. xvi, vii, 829. \$15.00. — Within its planned confines this is an engaging book. It is an authorized biography, making use of the subject's own notes and aided by a series of personal interviews with him over the years looking to this publi-

² 60 STAT. 237, as amended, 5 U.S.C. §§ 1001 *et seq.* (1946).

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¹ Authorized biographer.

cation. And the family has co-operated with private memoranda, letters and advice, though not control. Undoubtedly it is as close to an official life as we shall get, or should expect. And so we have in plenteous detail and attractive form a typical American success story in — to speak only truly — exaggerated form.

For what a success story it was! Here is a poor minister's son who shows real brilliance at an early age, achieves a striking scholastic record, and, having chosen the law, seeks his laurel crown in the difficult area of metropolitan New York. True to the story book tradition, it does not elude him long and, having married his boss's daughter, he is soon a recognized leader of his profession. So far the pattern is not unusual; the metropolitan bar has continually enriched itself in just such fashion by talent culled from all over the country. But from then on he breaks forth from the mold, to go on to a career of thirty-five years of public service which brings him twice to the Supreme Court, once as its chief, and within a hairbreadth of the presidency itself. One reviewer has said recently that he had nine successful careers, instead of a single one.² Perhaps the number is still set too low. In any event the amazing thing is that he made a distinctive mark in each one.

Moreover, all this success was duly earned; none of it appears in the least fortuitous. (Any one who has lost the presidency by a mere 3775 votes in a single state cannot be held a special favorite of Lady Luck.) What he accomplished was the result of yoking his superb mental equipment to an unusual drive and capacity for sustained and orderly action. Even the typed step of marrying the boss's daughter was not trite, and was no departure from character; as Pusey is at pains to point out, he refrained from any attention until he was already a partner (at the age of twenty-five!). Indeed, Mrs. Hughes deserves mention in her own right for her part in this story and her husband's life. No more attractive sections of the book can be found than the accounts of their continuing love story, lasting for fifty-seven years, and their gay and affectionate letters to the end. And she seems to have been that rare person who grew equally with her husband and took her proper place by his side, no matter how high the summit he attained. The quip by one of Washington's great ladies that that city is full of poor boys who have become famous — and the wives they married before they became famous — is clearly wide of the mark in its implications, at least as to this gracious lady who contributed so markedly to her husband's success.

In what I have said I have perhaps indicated what is, to me, the more interesting part of the work — the recapturing of the man as a human being in his personal and family relationships. Pusey works

² Elliston, *The Integrity of Justice Hughes*, 189 ATLANTIC MONTHLY No. 4, 73, 74 (1952).

very hard to show that his hero was not the distant, austere being so commonly depicted. Possibly he works too hard, with almost a sense of strain. For after all, Hughes was not a jolly rotarian and cannot be shown as such. He was a man of innate dignity, and his mind worked faster than the minds of those he met. Inevitably that meant some gulf. But Pusey is quite right in showing the friendliness, the capacity for fun, the gayety underneath, which helped to attract those close to him and stimulate the intense loyalty he always inspired in those who worked with him.

One feature of his personal life I wish Pusey might have developed more as it would have been of particular interest to lawyers. That is, how he managed to achieve the security he actually had when he returned to the bench. From various details we can deduce the following: When Hughes first went on the bench in 1910 his salary was \$12,500, later increased to \$14,500. After he lost the presidency in 1916, he had to sell his Washington house in order to start in practice again. He left the office of Secretary of State because he needed to recoup his private means. Hence his real start, monetarily speaking, seems to have been in 1925; in 1930 he was Chief Justice. In his best year in the interim he made \$400,000. But his private practice was interrupted for his term of service as Judge of the International Court at The Hague, and significantly reduced when his son became Solicitor General, since he thereafter refused cases affecting the Government. Moreover, a long time and much effort was devoted to service as a Supreme Court master in an important case where his fee was only \$30,000. Interspersed also were continuous speaking engagements and semi-public service of many kinds. One infers that during the short period of his active practice — even in those days of lower taxes — he must have received a number of very substantial fees to have made him so swiftly a millionaire. When he retired from the bench in 1941, he still had a fortune of about \$1,200,000 and did not need the retirement allowance, but on consideration took it as desirable policy for the Court.

On the public side of Hughes' career the book should provoke more controversy — naturally enough in view of the many-sided facets of his life. Further the book is here marred by that hero worship which seems an usual occupational disease for authorized biographers, but is perhaps inevitable for one with such close contacts with so towering a figure. In a sense this is a disservice to Hughes; Pusey's picture of him is not of a person growing in power and strength, but of a figure always the same and always a god. It does, however, supply a notable set of villains who worked to subvert the hero's high purposes, including two presidents and several nations. One may say that even in his choice of enemies Hughes was great!

Nevertheless much material is provided, some of it quite new. As widely heralded as any is the well-kept secret (till now) that the

justices asked Holmes to retire; even that wise realist did not leave the Court of his own initial volition. The material dealing with Hughes' tenure as Secretary of State is the most extensive. Pusey evidently regarded this period with particular satisfaction. He devotes some 200 pages or 50 percent more space to these four years than to the eleven years of the Chief Justiceship. By contrast the Court crisis of 1937 in the controversy with President Roosevelt — surely one of the historic events in the history of the Court, if not of the nation — merited only fifteen pages of direct account and fifteen more of background.

In future discussions of this great lawyer it is clear that the material of this book will be a prime source, particularly for the personal reactions of the subject. But since Hughes touched so many parts of American life, beginning with his utility and insurance investigations which first brought him deserved fame, and his fighting governorship of New York, through his several careers in Washington, there is sure to continue an interest in his accomplishments. And discussion and dispute will inevitably ensue. Now we are too close to evaluate his real historic stature, as is shown by the responses to the man himself, in the universally favorable reviews of this book now appearing.³ When near contemporaries mark him "excellent" in each of his nine careers, the total impact is so overpowering that one career alone may hardly be separately dissected. But that comparison with others of stature in each field will come with time. So, with some temerity, I suggest future possibilities for discussion in the area which will remain of lasting concern to the lawyer, namely, that of his service on the Supreme Court.

Now it can hardly be gainsaid that Hughes was a great judicial administrator in the conduct of his Court, probably the greatest we have seen. His devotion to civil rights is beyond all question, being more consistent than that of even Holmes, as his supporters are justified in pointing out. And he has shown his mastery of other judicial fields — the Commerce Clause, the Contract Clause, to name two. But I suggest that he is not a great Chief Justice in the sense of impressing his individuality upon the status and function of the Court, and of that, in turn, upon the country, in the sense that Marshall and Taney were. Consider the claims of his idolaters in this regard. All they claim in effect is that his was a holding operation, to keep the Court as it was, to "save" it from the attack of the democratic leader elected by the people. There appears to be some doubt how much was saved; but if we concede that the symbolic function of the Court was pre-

³ A partial exception is the interesting review by the contemporary lawyer and statesman, George Wharton Pepper, who expresses high admiration for Hughes and then points out some details of difference on important measures. Pepper, *Charles Evans Hughes: Publication of New Biography Is Major Event*, 38 A.B.A.J. 200 (1952).

served in form, we must still inquire what was preserved in substance. And we are compelled to answer that we do not yet know — except that generally the Court's is now a different and a lessened role. The things it stood for so boldly in the 20's and early 30's vanished with those opinion days of the spring of 1937; no more complete overthrow of a conception of judicial function, with not a single open or expressed regret, can be imagined. For a time it seemed that the Court might concentrate on civil liberties; more recently it has shown that such will not be its objective. It had already rejected a role for which older generations of justices had shown it well fitted, perhaps best fitted, namely, as an expert court of common law.

All this poses some significant questions. What happened in the 30's that affairs could so suddenly develop to a crisis without careful planning and forethought of the judiciary's role? And was that crisis really resolved by preserving the form and letting substance go? What the answers may be for future protagonists, for presidents with democratic programs, or for chief justices who desire their court to be a continuing effective part of republican government, is anything but clear. Given a repetition of such strains — and history indicates that repetition is inevitable — I doubt if the active contestants in that future crisis will be able to look back to the Hughes period of the Court with assurance that it contains a lesson; all we can deduce with assurance is that some change will out.

I realize that one may well urge that no one individual could have inspired a permanent or lasting solution, that even a John Marshall could have done no more. That may well be true. It was Marshall's good fortune to serve his time well; a like feat may now be beyond the power of any individual man. That truly is a frightening thought! Americans may make advances in science and physical betterment that are the wonder of the world; but in the science of living together they are enmeshed by their past. So we improve the automobile each year; but we do not improve our methods of meeting and taking care of the toll of injury and death the machine brings. But underneath the form, institutions of government do change; unfortunately if we submit to being bound by the form, then we may not control the change, but must accept it blindly, whatever its direction. Today we seem to be suppressing freedom of thought and of expression — suppression being the present climate of opinion — through the very forms of law designed to preserve those quite fundamental American rights. So the Supreme Court's function continues to change as was begun under Hughes, but without conscious plan or debate as to direction and course.

I mentioned above the few pages here devoted to the Court fight. Practically everything stated by Pusey as to it was already publicly known. The only new factor I noted — and it is one suggesting intriguing speculations — is that Harlan Stone was disturbed by the

submission to the Senate Committee of the famous Hughes letter as to the work of the Court without consultation of the full Court. But I expect no more space was devoted to this crisis, and to the drift before it, because actually there was no more to tell. These profound changes in the Court's function and position were occurring with the justices hardly more than puppet figures swept along by fate or destiny. Surely there is an insistent question: Couldn't a John Marshall actually have done more?

Of course all of us, even the greatest, are conditioned by our own experience. Marshall certainly was a child of his times and his experience; it happened that this coincided with a country's need. And so we may in part explain Hughes by his background as a modern urban lawyer, one eminent in the profession. What is the special forte of the lawyers of our day? One may suggest that it has been not innovation, but adjustment, within the norms of known experience. Hughes certainly showed this. He was, in the best sense of the term, an ameliorator. He cannot be called a compromiser — that signifies a viable conscience and a lack of courage, neither of which could be said of the man who defied the New York Assembly to support the Socialist members or who consistently and outspokenly upheld all civil rights. But he did try to work within a given framework. His campaign for the presidency was but cautious liberalism. Though he supported the League of Nations in the 1920 campaign, as Secretary of State he saw that pressure for it was useless and took another course, that of reduction of armaments. As a justice he went to rather extreme lengths to distinguish away, rather than overrule, outworn cases. This, as I pointed out here not long ago, is perhaps the chief defect in his craftsmanship as a justice;⁴ but it is entirely in keeping with his entire career. To attempt to control or shape the future of the Court, or to direct it into strange waters, would have been foreign to his nature. And yet may not bold steps be the wiser in the end? Perhaps we ask too much to expect this of the brilliant and successful lawyer; what we may need is something more uncouth, possibly a country rail-splitter or a doctrinaire college professor!

It appears to be the function of reviewers not only to state, but shortly to solve, momentous issues overlooked in the books under review. I have no desire to take such a course; indeed, I have no ready answers to the questions I raise. But I do think the career of this great man suggests such questions; having so much we are justified in asking why he could not have been yet greater. And without belittling the worth of this book in the slightest,⁵ we may hope for

⁴ Clark, Book Review, 26 NOTRE DAME LAW. 765 (1951), where HENDEL, CHARLES EVANS HUGHES AND THE SUPREME COURT (1951) was reviewed.

⁵ Errors seem very few. Taft, while a professor, was never dean of the Yale Law School, text at 306; Daugherty was not acquitted, but the jury disagreed, *id.* at 508.

further search into the complexities of greatness and the response of genius and near-genius to problems of unusual magnitude. We are bound to take this book as the first step in any such search. And beyond it we can read it for what it also is, an attractive narrative of a most interesting person, who was not merely a razor-sharp intellect, but also a gay and happy husband, father and friend.

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SOCIETY AND THE CRIMINAL. By Sir Norwood East.¹ Springfield, Illinois: Charles C. Thomas, 1951. Pp. x, 437. \$8.50.—This book covers a broad range of topics dealing with law, psychiatry and various aspects of criminal law administration and penology. It comprises nineteen chapters, most of which represent extensions of previous addresses or articles by the author. For this reason there is some repetition of views, but not in sufficient degree to detract from the solid worth of the presentation. In fact, this arrangement has some advantages for it enables one to select a particular topic of interest and secure a fairly complete exposition of the author's views by studying one chapter.

The first thing that impresses one about the book is the exceptional experience of the author qualifying him to deal with the wide range of subjects the book covers. He brings to his task a fine scientific training in medicine and psychiatry and also the practical experience of one who has worked extensively as an important official and administrator of the criminal law in England, specifically as a Prison Commissioner and Director of Convict Prisons.

Perhaps the outstanding impression one receives from the book is the hard-headed practicality of the author who refuses to accept simple solutions offered by medical authorities for problems which he recognizes from practical experience as being extremely complex. He holds strongly to the view that the rights of the individual must always be weighed against the rights and interest of society and he feels that frequently scientific experts emphasize the individual without due regard for society.

One major thesis which he emphasizes is the distinction between criminal responsibility as recognized by the legal profession and culpability as regarded by medical men. He believes also that many

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