

THE INFLUENCE OF THE CHIEF JUSTICE IN THE DECISIONAL PROCESS

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The Chief Justice of the United States has a unique opportunity for leadership in the Supreme Court. He presides in open court and over the secret conferences where he usually presents each case to his associates, giving his opinion first and voting last. He assigns the Court's opinion in virtually all cases when he votes with the majority; and when the Court is divided, he is in a favorable position to seek unity. But his office does not guarantee leadership. His actual influence depends upon his esteem, ability, and personality and how he performs his various roles.

IN CONFERENCE

The conference is the matrix of leadership in the Court.¹ The Court member who is able to present his views with force and clarity and defend them successfully is highly esteemed by his associates. When perplexing questions arise, they turn to him for guidance. He usually makes more suggestions than his colleagues, gives more opinions, and orients the discussion more frequently, emerging as the Court's task leader. In terms of personality, he is apt to be somewhat reserved; and, in concentrating on the decision of the Court, his response to the emotional needs of his associates is apt to be secondary.

Court members frequently disagree in conference and argue their positions with enthusiasm, seeking to persuade their opponents and the undecided brethren. And always, when the discussion ends, the vote declares the victor. All of this gives rise to antagonism and tension, which, if allowed to get out of hand, would make intelligent, orderly decision of cases virtually impossible. However, the negative aspects of conference interaction are more or less counterbalanced by activity which relieves tension, shows solidarity, and makes for agreement. One Court member usually performs more such activity than the others. He invites opinions and suggestions. He attends to the emotional needs of his associates by affirming their value as individuals and as Court members, especially when their views are rejected by the majority. Ordinarily he is the best-liked member of the Court and emerges as its social leader. While the task leader concentrates on the Court's decision, the social leader concentrates on keeping the Court socially cohesive. In terms of personality, he is apt to be warm, receptive, and responsive. Being liked by his associates is ordinarily quite important to him; he is also apt to dislike conflict.

As presiding officer of the conference, the Chief Justice is in a favorable position to assert task and social leadership. His presentation of cases is an important task function. His control of the conference's process makes it easy for him to invite suggestions and opinions, seek compromises, and cut off debate which appears to be getting out of hand, all important social functions.

It is thus possible for the Chief Justice to emerge as both task and social leader of the conference. This, however, requires the possession of a rare combination of qualities plus adroit use of them. Normally, one would expect the functions of task and social leadership to be performed by at least two Court members, one of whom might or might not be the Chief Justice. As far as the Chief Justice is concerned, the following leadership situations are possible:

	Task Leadership	Social Leadership
I	1	1
II	2	1
III	1	2
IV	2	2

In situation I, the Chief Justice is a “great man” leader, performing both leadership functions. The consequences of such leadership, stated as hypotheses, are: (1) conflict tends to be minimal; (2) social cohesion tends to increase; (3) satisfaction with the conference tends to increase; (4) production, in terms of number of decisions for the time spent, tends to increase. The consequences in situations II and III are the same as in I, particularly if the Chief Justice works in coalition with the associate justice performing complementary leadership functions. However, in situation IV, unless the task and social functions are adequately performed by associate justices, consequences opposite to those in situations I, II, and III tend to occur.

Situation II prevailed in the Taft Court (1921–1930): Chief Justice Taft was social leader, and his good friend and appointee, Justice Van Devanter, was task leader. Evidence of Van Devanter’s esteem and task leadership is abundant. Taft, for example, frequently asserted that Van Devanter was the ablest member of the Court. If the Court were to vote, he said, that would be its judgment too. The Chief Justice admitted that he did not know how he could get along without Van Devanter in conference, for Van Devanter kept the Court consistent with itself, and “his power of statement and his immense memory make him an antagonist in conference who generally wins against all opposition.” At times, Van Devanter’s ability actually embarrassed the Chief Justice, and he wondered if it might not be better to have Van Devanter run the conference himself. “Still,” said Taft, “I must worry along until the end of my ten years, content to aid in the deliberation when there is a difference of opinion.” In other words, Taft was content to perform the social functions of leadership. And he did this well. His humor soothed over the rough spots in conference. “We are very happy with the present Chief,” said Holmes in 1922. “He is good-humored, laughs readily, not quite rapid enough, but keeps things moving pleasant,”

Situation I prevailed in the Hughes Court (1930–1941): task and social leadership were combined in Chief Justice Hughes. He was the most esteemed member of his Court. This was due primarily to his performance in conference. Blessed with a photographic memory, he would summarize comprehensively and accurately the facts and issues in each case he presented. When he finished, he would look up and say with a smile: “Now I will state where I come out.” Then he would outline his views as to how the case should be decided. Sometimes that is all the discussion a case received, and the justices proceeded to vote for the disposition suggested by the Chief. Where there was discussion, the other Court members gave their views in order of seniority without interruption, stating why they concurred or dissented from the views of the Chief Justice. After they had their say, Hughes would review the discussion, pointing out his agreement and disagreement with the views expressed. Then he would call for a vote.

As to the social side of Hughes’ leadership, there is the testimony of Justice Roberts: Never in the eleven years Roberts sat with Hughes in conference did he see him lose his temper. Never did he hear him pass a personal remark or even raise his voice. Never did he witness him interrupting or engaging in controversy with an associate. Despite Hughes’ popular image of austerity, several of his associates have said that he had a keen sense of humor which aided in keeping differences in conference from becoming discord. Moreover, when discussion showed signs of deteriorating into wrangling, Hughes would cut it off. On the whole, he was well liked. Justice Roberts said: “Men whose views were as sharply opposed as those of Van Devanter and Brandeis, or those of Sutherland and Cardozo, were at one in their admiration and affectionate regard for their presiding officer.” Roberts could have well added justices Holmes, Black, Reed, Frankfurter, Douglas, McReynolds, and perhaps others.

Situation IV prevailed during most of Stone’s Chief Justiceship (1941–1946). When Stone was promoted to the center chair, Augustus Hand indicated in a letter to Hughes that Stone did not seem a sure bet as task leader because of “a certain inability to express himself orally and maintain a position in a discussion.” Hand proved to be correct. Stone departed from the conference role cut out by Hughes. When he presented cases, he lacked the apparent certitude of his predecessor; and, at times, his statement indicated that he was still groping for a solution. In that posture, cases were passed on to his associates for discussion. Court members spoke out of turn, and Stone did little to control their debate. Instead, according to Justice Reed, he would join in the debate with alacrity, “delighted to take on all comers around the conference table.” “Jackson,” he would say, “that’s damned nonsense.” “Douglas, you know better than that.”

In other words, Stone was still acting like an associate justice. Since he did not assume the Chief Justice’s conference role as performed by Hughes, task leadership began to slip from his grasp. Eventually, Justice Black emerged as the leading contender for task leadership. Stone esteemed Black, but distrusted his unorthodox approach; thus no coalition occurred as in the Taft Court. Justices Douglas, Murphy, Rutledge, and, to a lesser degree, Reed acknowledged Black’s leadership which he was able to reinforce by generally speaking before them in conference. Justices Roberts, Frankfurter, and Jackson, however, either looked to Stone for leadership or competed for it themselves.

The constant vying for task leadership in the Stone conference led to serious conflict, ruffled tempers, severe tension, and antagonism. A social leader was badly needed. Stone was well liked by his associates and could have performed this function well, but he did not. He did not use his control over the conference process to cut off debates leading to irreconcilable conflict. He did not remain neutral when controversies arose so that he could later mediate them. As his biographer, Alpheus T. Mason, wrote: “He was totally unprepared to cope with the petty bickering and personal conflict in which his Court became engulfed.” At times, when conference discussion became extremely heated, Justice Murphy suggested that further consideration of certain cases be postponed, but in this regard, Stone was a failure.

A consideration of the personalities of the task and social leaders on the Court from 1921 to 1946 is revealing. Of his friend, task leader Van Devanter, William D. Mitchell said: “Many thought him unusually austere, but he was not so with his friends. He was dignified and reserved.” Of task leader Black, his former law clerk, John P. Frank, wrote: “Black has firm personal dignity and reserve. ... [He] is a very, very tough man. When he is convinced, he is cool hard steel. ... His temper is usually in close control, but he fights, and his words may occasionally have a terrible edge. He can be a rough man in an argument.” On the other hand, social leader Taft was a warm, genial, responsive person who disliked conflict of any kind. Stone had a similar personality. He, too, according to Justice Jackson, “dreaded conflict.” Hughes’ personality contained elements conducive to both task and social leadership. He was “an intense man,” said Justice Roberts; when he was engrossed in the work of the Court, “he had not time for lightness and pleasantries.” Nonetheless, added Roberts, Hughes’ relations with “his brethren were genial and cordial. He was considerate, sympathetic, and responsive.”

The consequences of the various Court leadership configurations from 1921 to 1946 may be summarized as follows:

	Taft (II)	Hughes (I)	Stone (IV)
Conflict	Present but friendly.	Present but bridled by C. J.	Considerable; unbridled and unfriendly.
Cohesion	Good; teamwork and compromise.	Fair; surface. personal cordiality; less teamwork than in Taft Court.	Poor; least cohesion in 25-year period; personal feuds in the Court.

Satisfaction	Considerable.	Mixed; Stone dissatisfied prior to 1938; Frankfurter, Roberts, and others highly satisfied.	Least in 25-year period; unrelieved tension and antagonism.
Production	Fair; usually one four- to five-hour conference a week with some items carried over.	Good; usually one conference a week.	Poor; frequently more than one conference a week; sometimes three and even four.

Except in production, the Taft Court fared better than the Courts under his two successors. The consequences of leadership in the Stone Court were predictable from the hypotheses, but Hughes' "great man" leadership should have produced consequences more closely approximating those in the Taft Court. The difference in conflict, cohesion, and satisfaction in the two courts can be perhaps attributed to the fact that Taft was a better social leader than Hughes.

OPINION ASSIGNMENT

The Chief Justice's power to assign opinions is significant because his designation of the Court's spokesman may be instrumental in:

1. Determining the value of a decision as a precedent, for the grounds of a decision frequently depend upon the justice assigned the opinion.
2. Making a decision as acceptable as possible to the public.
3. Holding the Chief Justice's majority together when the conference vote is close.
4. Persuading dissenting associates to join in the Court's opinion.

The Chief Justice has maximal control over an opinion when he assigns it to himself; undoubtedly Chief Justices have retained many important cases for that reason. The Chief Justice's retention of "big cases" is generally accepted by his associates. In fact, they expect him to speak for the Court in those cases so that he may lend the prestige of his office to the Court's pronouncement.

When the Chief Justice does not speak for the Court, his influence lies primarily in his assignment of important cases to associates who generally agree with him. From 1925 to 1930, Taft designated his fellow conservatives, Sutherland and Butler, to speak for the Court in about half of the important constitutional cases² assigned to associate justices. From 1932 to 1937, Hughes, who agreed more with Roberts, Van Devanter, and Sutherland than the rest of his associates during this period, assigned 44 per cent of the important constitutional cases to Roberts and Sutherland. From 1943 to 1945, Stone assigned 55.5 per cent of those cases to Douglas and Frankfurter. During that period, only Reed agreed more with Stone than Frankfurter, but Douglas agreed with Stone less than any other justice except Black. Stone had high regard for Douglas' ability, and this may have been the Chief Justice's overriding consideration in making these assignments.

It is possible that the Chief Justice might seek to influence dissenting justices to join in the Court's opinion by adhering to one or both of the following assignment rules:

Rule 1: Assign the case to the justice whose views are the closest to the dissenters on the ground that his opinion would take a middle approach upon which both majority and minority could agree.

Rule 2: Where there are blocs on the Court and a bloc splits, assign the opinion to a majority member of the dissenters' block on the grounds that (a) he would take a middle approach upon which both majority and minority could agree and (b) the minority justices would be more likely to agree with him because of general mutuality of agreement.

There is some evidence that early in Taft's Chief Justiceship he followed Rule 1 occasionally and assigned himself cases in an effort to win over dissenters. An analysis of his assignments from 1925 to 1930, however, indicates that he apparently did not adhere to either of the rules with any consistency. The same is true for Stone's assignments from 1943 to 1945. In other words, Taft and Stone did not generally use their assignment power to influence their associates to unanimity. However, an analysis of Hughes' assignments from 1932 to 1937 indicates that he probably did. He appears to have followed Rule 1 when either the liberal or conservative blocs dissented intact. When the liberal bloc dissented, Roberts, who was then a center judge, was assigned 46 per cent of the opinions. The remaining 54 per cent were divided among the conservatives, apparently according to their degree of conservatism: Sutherland, 25 per cent; Butler, 18 per cent; McReynolds, 11 per cent. When the conservative bloc dissented, Hughes divided 63 per cent of those cases between himself and Roberts.

Hughes probably also followed Rule 2. When the left bloc split, Brandeis was assigned 22 per cent of the cases he could have received compared with his 10 per cent average for unanimous cases. When the right bloc split, Sutherland was assigned 16 per cent of the decisions he could have received compared with his 11 per cent average for unanimous cases. He received five of the six cases assigned the conservatives when their bloc split.

Of course, there are other considerations underlying opinion assignment by the Chief Justice, such as equality of distribution, ability, and expertise. It should be noted that opinion assignment may also be a function of social leadership.

UNITING THE COURT

One of the Chief Justice's most important roles is that of Court unifier. Seldom has a Chief Justice had a more definite conception of that role than Taft. His aim was unanimity, but he was willing to admit that at times dissents were justifiable and perhaps even a duty. Dissents were proper, he thought, in cases where a Court member strongly believed the majority erred in a matter involving important principle or where a dissent might serve some useful purpose, such as convincing Congress to pass certain legislation. But, in other cases, he believed a justice should be a good member of the team, silently acquiesce in the views of the majority, and not try to make a record for himself by dissenting.

Since Taft's conception of the function of the dissent was shared by most of his associates, his efforts toward unity were well received. Justices joining the Taft Court were indoctrinated in the "no dissent unless absolutely necessary" tradition, most of them learning it well. Justice Butler gave it classic expression on the back of one colleague's opinions in 1928:

I voted to reverse. While this sustains your conclusion to affirm, I still think reversal would be better. But I shall in silence acquiesce. Dissents seldom aid in the right development or statement of the law. They often do harm. For myself I say: "lead us not into temptation."

Hughes easily assumed the role of Court unifier which Taft cut out for him, for his views as to unanimity and dissent were essentially the same as Taft's. Believing that some cases were not worthy of dissent, he would join in the majority's disposition of them, though he initially voted the other way. For example, in a 1939 case involving statutory construction, he wrote to an associate: "I choke a little at swallowing your analysis, still I do not think it would serve any useful purpose to expose my views."

Like Taft, Hughes mediated differences of opinion between contending factions, and in order to get a unanimous decision, he would try to find common ground upon which all could stand. He was willing to modify his own opinions to hold or increase his majority; and if this meant he had to put in some disconnected thoughts or sentences, in they went. In cases assigned to others, he would readily suggest the addition or subtraction of a paragraph in order to save a dissent or a concurring opinion.

When Stone was an associate justice, he prized the right to dissent and occasionally rankled under the "no dissent unless absolutely necessary" tradition of the Taft and Hughes Courts. As Chief Justice, he did not believe it appropriate for him to dissuade Court members from dissenting in individual cases by persuasion or otherwise. A Chief Justice, he thought, might admonish his associates generally to exercise restraint in the matter of dissents and seek to find common ground for decision, but beyond that he should not go. And Stone usually went no further. His activity or lack of it in this regard gave rise to new expectations on the part of his associates as to their role and the role of the Chief Justice regarding unanimity and dissent. In the early 1940's, a new tradition of freedom of individual expression displaced the tradition of the Taft and Hughes Courts. This explains in part the unprecedented number of dissents and separate opinions during Stone's Chief Justiceship.

Nonetheless, Stone recognized that unanimity was desirable in certain cases. He patiently negotiated a unanimous decision in the Nazi Saboteurs case.³ It should be pointed out, however, that this case was decided early in his Chief Justiceship before the new tradition was firmly established. By 1946, when he sought unanimity in the case of General Yamashita,⁴ the new tradition of freedom was so well established that Stone not only failed to unite his Court, but his dissenters, Murphy and Rutledge, apparently resented his attempt to do so.

The unprecedented number of dissents and concurrences during Stone's Chief Justiceship can be only partly attributed to the displacing of the old tradition of loyalty to the Court's opinion. A major source of difficulty appears to have been the free-and-easy expression of views in conference. Whether the justices were sure of their grounds or not, they spoke up and many times took positions from which they could not easily retreat; given the heated debate which sometimes occurred in the Stone conference, the commitment was not simply intellectual. What began in conference frequently ended with elaborate justification as concurring or dissenting opinions in the United States Reports. This, plus Stone's passiveness in seeking to attain unanimity, is probably the best explanation for what Pritchett characterized as "the multiplication of division" in the Stone Court.

CONCLUSION

Interpersonal influence in the Supreme Court is an important aspect of the judicial process which has been given little attention. Of course, the "why" of the Court's decisions cannot be explained solely or even predominantly in those terms. Yet interpersonal influence is a variable worthy of consideration. Take, for example, the Court's about-face in the flag salute cases. With task leader Hughes presiding in 1940, not a single justice indicated in conference that he would dissent in the *Gobitis*⁵ case. Subsequently, Stone registered a solo dissent, but such militant civil libertarians as Black, Douglas, and Murphy remained with Hughes. Only three years later, the Court reversed itself in the *Barnette*⁶ case with Black, Douglas, and Murphy voting with Stone. One might seriously ask whether the presence of Hughes in the first case and not in the second had something to do with the switch. Much more work has to be done in this area, but it appears that in future analyses of the Court's work, task and social leadership will be useful concepts.

The importance of the Chief Justice's power to assign opinions is obvious. Equally if not more important is his role in unifying the Court. Taft's success in this regard greatly contributed to the Court's prestige, for unanimity reinforces the myth that the law is certain. In speaking of the Court in 1927, Hughes said that "no institution of our government stands higher in public confidence." As Court unifier, he sought to maintain that confidence after his appointment in 1930. That the Court's prestige is correlated with unanimity was demonstrated in Stone's Chief Justiceship: as dissent rose, the Court's prestige declined.

Thus the activity of the Chief Justice can be very significant in the judicial process. If he is the Court's task leader, he has great influence in the allocation of political values which are inevitably involved in many of the Court's decisions. More than any of his associates, his activity is apt to affect the Court's prestige; this is important, for ultimately the basis of the Court's power is its prestige.

¹This study is based largely on private papers of members of the Supreme Court from 1921 to 1946. The theory of conference leadership is derived primarily from the work of Robert F. Bales. See his "Task Roles and Social Roles in Problem-Solving Groups" in Maccoby et al., *Readings in Social Psychology* (New York: Holt, Rinehart & Winston, 1958), pp. 437-447.

²"Important constitutional cases" were determined by examination of four recent leading works on the Constitution. If a case was discussed in any two of the works, it was considered an "important constitutional case."

³*Ex parte Quirin* (1942).

⁴*In re Yamashita* (1946).

⁵*Minersville School District v. Gobitis* (1940).

⁶*West Virginia v. Barnette* (1943).