

science for realistic consideration of legal problems.) It certainly should be sent to those in high places who might put it to good use.

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SOME REFLECTIONS ON THE READING OF STATUTES. By Felix Frankfurter. New York: The Association of the Bar of the City of New York. 1947. Pp. 29. \$1.50.

It is not surprising that Mr. Justice Frankfurter chose as his topic for the sixth annual Benjamin N. Cardozo Lecture the reading of statutes. Federal judging today is almost exclusively concerned with statutory material,¹ and on this subject the federal judge has become increasingly articulate, not only because the Bar is in need of instruction on how to treat problems of legislation, but also because the judge's artistic urge, now that his creative common law function has largely atrophied, is directed toward the interpretative.² Thus, Mr. Justice Frankfurter has "gone to great masters to get a sense of their practice of the art of interpretation"³: Holmes, Brandeis, Cardozo.

Together with these three masters, Mr. Justice Frankfurter himself has been an exponent of the new art. He has done as much as any one else—in his opinions as well as in this volume—to enunciate the modern doctrine of statutory construction.

This doctrine—though it is doctrinaire to call it such—is that a statute must be examined, in order to "accord the words the sense in which Congress used them,"⁴ in its total context. The search for meaning in the words of a statute does not differ from the same search in "a wider non-legal context. Anything that is written may present a problem of meaning, and that is the essence of the business of judges in construing legislation The troublesome

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1. Frankfurter, "Some Reflections on the Reading of Statutes" 5 (1947).
2. See Frank, "Words and Music: Some Reflections on Statutory Interpretation" 47 Col. L. Rev. 1259 (1947).
3. Frankfurter, "Some Reflections on the Reading of Statutes" 9 (1947).
4. *Id.* at 16.

phase of construction is the determination of the extent to which extraneous documentation and external circumstances may be allowed to infiltrate the text on the theory that they were part of it, written in ink, discernable to the judicial eye."⁵

The problem, then, is one of relevance, and the chief danger is that the practitioner will have too narrow a conception of what is relevant. Mr. Justice Frankfurter was criticized when in his dissenting opinion in *United States v. Monia* he stated that "the notion that because the words of a statute are plain the meaning is also plain, is merely pernicious over-simplification."⁶ Yet though the choice of words may not have been happy, it is undoubtedly the doctrine of the Supreme Court today that no statute, no matter how clear on its face, can be adequately construed without the assistance of the legislative history of the act itself,⁷ which act, in turn, must be placed within a setting of federal legislation generally.⁸

But if the attorneys too infrequently look to the history of a statute, i.e., the hearings, committee reports, debates,⁹ and too infrequently look for the crosslight shed by other statutes previously enacted, even more rarely do they look to the subsequent history of the statute. Yet the use of this subsequent history represents the most recent development of the modern doctrine of statutory construction. Today what has been said or done after the passage of a law must be weighed against what has been said or done before the passage of the law. Administrative interpretation of a statute—or indeed

5. *Id.* at 6, 8.

6. 317 U.S. 424, 431 (1943).

7. See *Utah Junk Co. v. Porter*, 328 U.S. 39 (1946), where the Court recognized that if there were only the words of the statute itself, the result it reached would be "dubious", but the legislative history giving meaning to the provision was "decisive".

Yet, Mr. Justice Frankfurter states on p. 25 of his book, "when Mr. Justice Holmes came to the Court, the United States Reports were practically barren of references to legislative materials."

8. See *Keifer & Keifer v. R.F.C.*, 306 U.S. 381 (1939); *United States v. Monia*, 317 U.S. 424, 431 (1943) (dissenting opinion).

Mr. Justice Frankfurter states on p. 21 of his book: "Statutes cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes"

9. Mr. Justice Frankfurter warns on p. 25 that "the importance that such materials play in Supreme Court litigation carry far-reaching implications for bench and bar."

silence¹⁰—is meaningful, and, to judge from *United States v. Lovett*,¹¹ so is presidential interpretation of a statute which he has signed.¹² The interpretation of statutes by subsequent Congresses must be set against the interpretation of a statute by the Congress which passed it;¹³ and, indeed, there is more than a suggestion in some recent cases that the *policy* of later statutes may be retroactively read into earlier ones,¹⁴ though perhaps this retroactivity may be limited to those statutes which like “constitutional provisions at times embody purposeful ambiguity or are expressed with a generality for future unfolding.”¹⁵

How far the use of subsequent history has been taken is shown by Mr. Justice Frankfurter’s concurring opinion in *Estep v. United States*,¹⁶ where he relied, in part, on a committee report which was issued with reference to the reenactment of the statute. He found relevant to the meaning of this statute the understanding of a committee of a subsequent

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10. Perhaps “inaction” is a better word. See *Federal Trade Commission v. Bunte Brothers*, 312 U.S. 349, 352 (1941), “But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.” Cf. *United States v. American Union Transport*, 327 U.S. 437 (1946).
 11. 328 U.S. 303 (1946).
 12. President Truman has adopted a practice of sending a message to Congress narrowly construing legislation which he has signed, but of which he disapproves. See his message to Congress to accompany the Portal-to-Portal Act of 1947. 93 Cong. Rec. 5418 (1947).
 13. The question remains, however, as to whether inaction by a subsequent Congress constitutes “interpretation.” In *Helvering v. Hallock*, 309 U.S. 106 (1940), it was held that where Congress had not considered a previous decision of the United States Supreme Court as to a statutory matter, it did not adopt that decision and the Court consequently was free to overrule it. On the other hand, in *Girouard v. United States*, 328 U.S. 61 (1946), the Court split on whether the failure of Congress to pass bills introduced to overrule a previous decision, constituted an adoption of that decision. The majority concluded that the Congressional inaction was consistent with the desire to leave the problem fluid.
 14. *United States v. Hutcheson*, 312 U.S. 219 (1941); *United States v. Aluminum Co.*, 148 F.2d 416, 429 (C.C.A. 2d 1945).
 15. Frankfurter, “Some Reflections on the Reading of Statutes” 7 (1947).
Mr. Justice Hughes in *Appalachian Coal, Inc. v. U. S.*, 288 U.S. 344, 359-60 (1933) states: The Sherman Law, “as a charter of freedom . . . has a generality and adaptability comparable to that found to be desirable in constitutional provisions.”
 16. 327 U.S. 114, 134 (1946).

Congress. But the danger of such a practice is obvious. If the expression by a congressional committee is given too much weight, it would allow the amendment of a law by a committee instead of by Congress.

But a lawyer's concern with the concrete problems of relevance which these examples illustrate should not blind him to Mr. Justice Frankfurter's lesson that "while courts are no longer confined to the language, they are still confined by it."¹⁷ For Mr. Justice Frankfurter in his volume repeats what he has so often stated from the Bench that "in a democracy the legislative impulse and its expression should come from those popularly chosen to legislate and equipped to devise policy, as courts are not."¹⁸ Though recognizing the function of the "external" and "extraneous," he gives no comfort to those who would use these aids as a means for reading into a statute "their own personal views of policy."¹⁹

And though some may deny that this philosophy of judicial self-denial is possible completely to realize in practice, nevertheless few will deny that the ideal is worthy. There may indeed be room for the courts in some instances to act in their age-old tradition of protecting the poor, the ignorant and the oppressed;²⁰ but the performance of that function, must never conflict with what is a court's highest duty in a democracy: to respect the popular will constitutionally expressed.²¹

17. Frankfurter, "Some Reflections on the Reading of Statutes" 26 (1947).

18. *Id.* at 29.

19. Frank, n. 2 *supra*, at 1265.

20. And since in our society that tradition is respected, a court, when dealing with a statute, will not presume that the legislature has intended to violate it. More often, indeed, a statute will be a means for extending that tradition to a new area. See *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 199 (1944): "But we think that Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority."

21. See Frank, *supra* n. 2, at 1269, "The theory of our democratic government is that as (subject only to constitutional restraint) the legislature expresses the popular will, legislation is the voice of the people." Judge Frank goes on to say that because this is the theory of our government, courts refuse to admit that they do make law in interpreting statutes. But in making law the courts do not subvert the legislative function; they act as does a conductor of music, faithful, as far as possible, to the composition, remembering, however, that the "spirit giveth life."

Mr. Justice Frankfurter's thesis has been best summarized by a different judge. Judge Learned Hand too knows the "anguish of judgment,"²² and though the quotation is lengthy his exquisite language is worth repeating.²³

"What then are the qualities, mental and moral, which best serve a judge to discharge this perilous but inescapable duty? First, he must be aware of the difficulty and the hazard. He must hesitate long before imputing more to the 'enactment' than he finds in the words, remembering that the 'policy' of any law may inhere as much in its limits as in its extent. He must hesitate long before cutting down their literal effect, remembering that the authors presumably said no more than they wanted. He must have the historical capacity to reconstruct the whole setting which evoked the law; the contentions which it resolved; the objects which it sought; the events which led up to it. But all this is only the beginning, for he must possess the far more exceptional power of divination which can peer into the purpose beyond its expression, and bring to fruition that which lay only in flower. Of the moral qualities necessary to this, before and beyond all, he must purge his mind and will of those personal presuppositions and prejudices which almost inevitably invade all human judgements; he must approach his problem with as little preconception of what should be the outcome as it is given to men to have; in short, the prime condition of his success will be his capacity for detachment. There are those who insist that detachment is an illusion; that our conclusions, when their bases are sifted, always reveal a passional foundation. Even so; though they be throughout the creatures of past emotional experience, it does not follow that that experience can never predispose us to impartiality. A bias against bias may be as likely a result of some buried crisis, as any other bias. Be that as it may, we know that men do differ widely in this capacity; and the incredulity which seeks to discredit that knowledge is a part of the crusade against reason from which we have already so bitterly suffered. We may deny—and, if we are competent observers, we will deny—that no one can be aware of the danger and in large measure provide against it."

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22. Frankfurter, "Some Reflections on the Reading of Statutes" 27 (1947).

23. Hand, "Thomas Walter Swan" 57 Yale L. J. 167, 171-172 (1947).

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