

Michigan Law Review

Volume 64 | Issue 2

1965

Mason: William Howard Taft, Chief Justice

John P. Frank

Member of the Arizona Bar

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Legal Biography Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

John P. Frank, *Mason: William Howard Taft, Chief Justice*, 64 MICH. L. REV. 363 (1965).

Available at: <https://repository.law.umich.edu/mlr/vol64/iss2/16>

This Book Reviews is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

WILLIAM HOWARD TAFT, CHIEF JUSTICE. By *Alpheus Thomas Mason*. New York: Simon & Schuster. 1964-65. Pp. 354. \$6.50.

Chief Justice Taft was a one-man version of what a later vocabulary has come to call a multi-purpose project. He ran the Supreme Court, influenced the appointment of some of his colleagues,¹ directly helped choose a number of district and circuit judges, and almost single-handedly devised judicial reforms and rammed them through an often hostile Congress. He spent his spare time advising presidents on fiscal policy and in minding the general public business.

At one point, when Taft was busying himself over where an American Bar Association committee should erect a statue showing Blackstone in an English law court, Elihu Root indignantly told him to give that chore to his secretary and to restrict himself to matters of importance. But former Philippine Commissioner, former Secretary of War, former President, former Professor Taft had an interest reaching anything of concern to the law and his country, and it never abated. In 1922, the President and the Secretary of

1. See Murphy, *In His Own Image—Mr. Justice Taft and Supreme Court Appointments*, in 1961 SUP. CT. REV. 159, 162.

State heard from the Chief Justice of a new plan of the American Ambassador to England on financing war debts before the Ambassador directly communicated it to them.² During the Coolidge administration, the Chief had his nose and his pen into bonus legislation, post office pay, and farm relief.³ Obviously, this many-careered man needs appraisal from more standpoints than one.

I. JUDICIAL WORK

Taft believed that the importance of the Supreme Court lay in achieving uniformity of law among the federal courts and in expounding the Constitution; anything else was a drag. As he repeatedly said, so far as deciding cases was concerned, one trial and one appeal should be enough for any litigant.

Taking Taft at his own estimate of the important, his inheritance is trifling for purposes of the ordinary constitutional life of the 1960's. He built with great and seemingly solid bricks to bulwark the dominating conservatism of the 1920's; no structure ever had so aggressive a watchman. However, the flood came and the whole system is gone; the era of Harding, Coolidge, and Hoover is constitutionally extinct.

The 1920's were the apogee of the due process clause as a negative instrument of government. Within its compendious borders, Justices found the means for striking down wage and hour legislation, controls on judicial interference with strikes, and a wide variety of business regulations. In this respect, his views were not quite so extreme as those of his more conservative brethren. *Adkins v. Children's Hospital*⁴ illustrates limits to which he would not go; when the change came, it washed beyond the boundaries of his dissent. In other, unrelated areas, the landmarks he meant to leave for the ages have not stood even this short test of time.⁵ This is not to say that there is not an important residue of Taft in contemporary law. *Stafford v. Wallace*,⁶ on the commerce clause, for example, is part of that residue, giving an interpretation subsequently used at least as a step toward broader doctrines. There is not enough in all of this, however, to make Taft a major contributor to American constitutional development.

2. P. 284.

3. Pp. 146-47.

4. 261 U.S. 525 (1923).

5. Taft's major work on the presidential removal power, *Meyers v. United States*, 272 U.S. 52 (1926), was largely shorn away by *Humphreys v. United States*, 295 U.S. 602 (1935); *Olmstead v. United States*, 277 U.S. 438 (1928), on wiretapping, was undermined by *Lopez v. United States*, 373 U.S. 427 (1963).

6. 258 U.S. 495 (1922).

II. PROCEDURAL REFORM

The track of the Taft substantive jurisprudence is a path to nowhere, but the trail of Taft as a procedural reformer leads to today and to tomorrow as well, since we have not yet fully capitalized on all his visions. Mason, very wisely realizing this, gives more attention to Taft's accomplishments in procedure and administration than to his temporary achievements of substantive doctrine.

It is commonly said that the late Judge Charles E. Clark was the father of the Federal Rules of Civil Procedure. If so, Taft was their grandfather because he, more than any other person, was their originator. Unlike his predecessors, Mr. Chief Justice Taft perceived that his office could and should be used to achieve the legislation needed for judicial reform. More than any of his predecessors, he saw the need to give the Court "legislative" power in the form of rule-making authority, in order for it to deal with cases by the thousands with a single rule rather than by one-at-a-time decisions. This was no late realization; Taft pressed for the revisions which led to the equity rules of 1912 when he was not in judicial work at all. Mason documents Taft's activity back to 1884, and presents an address in 1908 which outlined a program to revise both federal and state procedural codes which the bar still aspires to complete.⁷ As Chief Justice he originated the legislation which authorized the rule-making process, and dominated the choice of William D. Mitchell as President Hoover's Attorney General, working closely with Mitchell thereafter. While the necessary legislation did not pass until after Taft's death, Mitchell eventually became chairman of the committee from which the original civil rules came.

Taft was the first national leader to advocate the creation of a unified procedure for law, equity, and admiralty. It is nothing short of a miracle of the flexibility of the human mind that one person could have been as conservative as Taft in general outlook and yet as radical in procedural conceptions. This paradox fascinates Mason, who tries to explain it, but even a great political scientist is no psychoanalyst. We are necessarily left to marvel at the phenomenon which may make persons who are generally conservative in substantive areas advocates of procedural change, and which sometimes makes substantive liberals into procedural conservatives. Mr. Justice Black in our own day illustrates the latter half of this switch; in this he follows in the footsteps of Senators Walsh of Montana and Norris of Nebraska, Taft's opponents of the 1920's.

While the procedural union of law and equity was achieved by the civil rules of 1937, the unification with admiralty advocated by

7. Pp. 52-53.

Taft will not come to pass until 1966. It has taken the valiant efforts of Mr. Chief Justice Warren, Judges Albert Maris and Walter Pope, Professor Brainerd Currie, and many others finally to achieve what Taft advocated before a congressional committee in 1921.⁸

Taft's greatest legislative accomplishment was the Certiorari Act of 1925.⁹ Every close student of the Supreme Court since at least 1840 has known that the United States has outgrown the original court structure established by the Judiciary Act of 1789. The endless expanse of miles, people, and cases makes it impossible for the Court and its members to serve the original purpose of being traveling trial judges as well as final arbiters of any great portion of the country's disputes. By Taft's time, the travel portion of the job had become nominal, and the courts of appeal had been created to ease the appellate load; but the burden of the remaining factors was still impossible.

Taft conceived and pushed through the 1925 Act; Mason has caught the genuine excitement of that story. The preceding sentence may seem absurd—a bad illustration of the legal mind at work. Admittedly, finding excitement in a law concerning jurisdiction is a specialist's kick, like a botanist with a new leaf. However, the importance of the 1925 Act can hardly be overemphasized. The Court in recent years has often been, in many areas, the most consequential branch of the United States Government. Without the Certiorari Act of 1925, this could not be so; the Court would be so far behind on its docket that it would make the Southern District of New York look current, so buried in an avalanche of minutia that blasting power would not uncover it. The 1925 Act is the absolute essential of the Court's modern role; it permits the Court to be the most current court in the country. Nothing would please Taft, a passionate current-docket man, more.

The Act of 1925 solved the Supreme Court's problem, but there remained the problem of congestion and disorganization in the lower courts. When Taft came to the Court, the individual district judges were local satraps, controlled only rarely by anyone. Given life tenure, negligible supervision, and even less help, they floundered with the problems of their districts as though they ruled over unrelated principalities. This Taft thought all wrong. He conceived of the federal legal system as a unit headed by the Supreme Court. He wanted adequate statistical studies to show how well the individual judges were doing their jobs, methods of moving judges from underworked to overworked districts, and leadership for the system. To achieve that leadership, Taft conceived and carried through the creation of the Judicial Conference as a working division

8. See p. 115.

9. 43 Stat. 936, 942 (1925) (codified in scattered sections of 28 U.S.C.).

of the court system. As he saw it, the judges themselves could become a control committee, exercising the leadership so clearly needed.

Taft began more than he could finish and left a heritage of work still to be carried on. It took the Chief Justiceship of Hughes to bring into existence the Federal Rules of Civil Procedure, and, as noted, not until Mr. Chief Justice Warren has the admiralty consolidation finally been achieved. The Judicial Conference of Taft's day was open to the charge then made that it would become only a gentlemen's dining association; not until Warren picked it up, revised its membership, and put it hard to work has the Conference been able to realize much that Taft hoped for it.

Some of Taft's ideas have not been tried at all, and deserve to be revived. First, a plan which originated with Taft's archenemy, Senator Tom Walsh, but which Taft later advocated, was the transfer of petty federal criminal cases to the Court Commissioners.¹⁰ In the federal district courts (other than in the District of Columbia) there were about 33,000 defendants in 1964, of whom 29,000 were convicted. Of this number, over 11,000 were put on probation, and 4,000 had sentences shorter than 366 days. Many offenses must have been extremely minor; for example, there were over sixty traffic cases.¹¹ Taft's suggested plan might well give some relief to the criminal dockets.

Second, Taft believed that the best method for cutting congestion would be a task force of district judges subject to roving assignment directly by the Chief Justice to districts needing their services. Taft's request for eighteen such judges brought opposition he could not budge. His opponents saw in it a chance for him to make himself dictator, sending his minions to work his will in every corner of the country. Anti-prohibitionists saw in it the prospect of a parade of "hanging" judges snooping around the country's liquor cabinets. The alternative solutions adopted were to permit transfers only within circuits by the senior judge, or between circuits, subject to cumbersome requests, and to add more permanent judges to congested districts.¹²

The compromises are not good enough to get the job done, and second thought forty years later makes Taft look all the wiser. The transfer system is at best patchwork, although the special task force sent to the Eastern District of New York made real headway with the backlog there. The mere increase of judges is now lamentably a demonstrable failure. The recent prodigious increase of judges under the 1961 Act, with appointments duly recommended by then

10. P. 125. For a discussion led by Senator Walsh, see 62 CONG. REC. 4845 (1922).

11. See 1964 ADMIN. OFFICE OF U.S. COURTS ANN. REP. Tables D4, D5 (1965).

12. Taft had trouble enough on this more modest proposal, both from "wets" and others. See his excellent *Address to the American Bar Association, Sept. 10, 1922*, in 8 A.B.A.J. 601 (1922).

Deputy Attorney General Byron White and concurred in by Bernard Segal for the American Bar, were almost always of high quality, yet the increase in case output is nothing like that which was anticipated.¹³ More judges require more administration among themselves, more talk, more rules; also, Parkinson's law of work expanding to fill the time available for those who do it has some application to judges.

The Taft task force is probably even more impossible politically today than in the 1920's. If the "wets" were concerned with letting Taft assign judges, one can imagine the complaints of the "Impeach Earl Warren" fringe at the prospect of having Warren make direct assignments.¹⁴ These objections are foolishness. Taft did not suggest that the Chief Justice should appoint or confirm the judges, although the thought may have crossed his mind. The suggestion was only that the central authority should be able to use the judges chosen for this purpose by others, sending them where they are needed and then moving them on. Every other plan has been tried and has failed; this one is still worth trying.

III. THE BOOK

This book is doubly needed. First, Taft, as the only man to be both President and Justice, needs at least two biographies. The work on his early career and his presidency is well enough done.¹⁵ Indeed, so far as the general histories are concerned, the host of works on Roosevelt and the Progressive Era, on Wilson, and on the first two decades of the twentieth century are fairly adequate on Taft as well. However, there was nothing even remotely adequate on Taft as Chief Justice. Second, all too little has been written on the Supreme Court of the 1920's from the conservative Justices' point of view, and too little which approaches these Justices in terms of their goals and their achievements. This sector Mason has by now made his own by student spin-off. Paschal's excellent book on Sutherland¹⁶ is a work of one of Mason's students, and Danelski's recent book on Butler's appointment,¹⁷ although it does not directly touch Butler's judicial career, is also Mason-inspired.

Except for the biography of Sutherland, there has been no direct discussion of the old Taft crew. Van Devanter is lost to posterity as

13. For a gloomy report, see 1964 ADMIN. OFFICE OF U.S. COURTS ANN. REP. 111, 115 (1965).

14. The opposition boils down to the observation of Senator Broussard in 1922 that it would lead to having "men tried by judges who possibly are not altogether in sympathy with the ideas of the persons over whom they are presiding." 62 CONG. REC. 4847 (1922). The general debate at this point gives a cross-current on the idea.

15. While there are other books, the two-volume work, PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* (1939), seems the best.

16. PASCHAL, *MR. JUSTICE, SUTHERLAND, A MAN AGAINST THE STATE* (1951).

17. DANELSKI, *A SUPREME COURT JUSTICE IS APPOINTED* (1964).

a consistently negative-voting, non-writing Justice inevitably must be; Taft could get few opinions out of this Justice, and Hughes almost none.¹⁸ Butler, an immensely able developer of the thought of the period, has attracted no biographer, Sanford enjoys warranted obscurity, and no biographer has had either the interest or the stomach to put up with McReynolds. The field has been abandoned to the heroes of the liberals and the intellectuals—Holmes, Brandeis, and Stone. This is wrong even from the standpoint of devotees of this holy trinity; just as Job needed his tempters so that he might shine brighter by comparison, the great trio need their adversaries to reflect their better judgment. Taft is the conservative counterpart of the labors of Brandeis, and Mason's book was imperative if the history of the Court in the 1920's is to be seen in its entirety.

William Howard Taft, Chief Justice is a grand piece of work. The material, much of it from Taft correspondence, is predominantly new to the public. John H. Clarke's letter on his resignation, written to Wilson, is perhaps the most illuminating document in the book and is new, at least to me. Mason's emphasis is wise; in an excellent chapter he outlines Taft's intellectual outlook, and in a later discussion concisely relates the development of that philosophy into constitutional law. A choice had to be made as to whether to give primary, secondary, or equal emphasis to Taft the administrator and procedural reformer; Mason, wisely perceiving that this is the part of Taft which has lived, gives his primary attention to the lasting work in procedure and administration.

Taft and his team are remote enough now to permit objectivity, and Mason accomplishes this by presenting Taft with sympathy, understanding, respect, and restraint. The richness of original materials is so great that Mason need not comment, though he does reach conclusions; it is usually possible to let the Chief speak for himself. This he does, energetically and, alas, in later years both querulously and, sometimes, meanly. The Taft who emerges was changeable in personal judgments, excitable, diligent and, within the limits of fairly narrow prejudices, open-minded.

The book is a remarkable achievement for Professor Mason, who stands forth as the country's foremost judicial biographer. His biographies of Brandeis¹⁹ and Stone²⁰ reach broader plateaus than does this volume, because here he restricts himself predominantly to Taft's years as Chief Justice. In the other works he covered whole lives, and lives of men more able and more significant in the growth of the law than Taft. Nonetheless, this intriguing and thor-

18. The best available material on Justice Van Devanter is the Memorial, March 16, 1942, reported at 316 U.S. v (1942).

19. MASON, BRANDEIS—A FREE MAN'S LIFE (1946); MASON, THE BRANDEIS WAY (1938); MASON, BRANDEIS—LAWYER AND JUDGE IN THE MODERN STATE (1933).

20. MASON, HARLAN FISKE STONE—PILLAR OF THE LAW (1956).

oughly workmanlike job makes Mason the only major biographer of three Justices in American history. This could have been done only by prodigious effort and skill and puts every lawyer, historian, and political scientist deeply into his debt.

*John P. Frank,
Member of the Arizona Bar*
