

REVIEWS

WILLIAM HOWARD TAFT: CHIEF JUSTICE. By Alpheus Thomas Mason. New York: Simon and Schuster, 1965. Pp. 354. \$6.50.

THIS "by-product of a comprehensive study of the office and powers of the Chief Justice of the United States"¹ is not the elaborate, personal and professional history that we might have expected of the biographer of Stone and Brandeis. Rather, it is a perceptive portrait of William Howard Taft in such varied capacities as judicial reformer, lobbyist and jurist. Its sources, appropriately recognized, are Henry Pringle's biography of Taft published in 1939,² the subsequent large body of legal literature, (including Mason's own writings) on Taft and other judges, and the Taft papers in the Library of Congress. It should provoke thought concerning judicial biography, Taft himself, and the unique judicial institution over which he presided for nearly a decade.

If biography, as we now know it, is a recently developed art, judicial biography may be called hyper-modern. Justice Frankfurter, whose own reminiscences are so fascinating, expressed the view in 1948 that "most worlds of exciting judicial biography still remain to be conquered."³ However, discerning biographies of Taney, Field, Miller, Hughes and others challenge the Justice's statement that "[o]nly of Marshall have we an adequate biography."⁴ More recently, Mark de Wolfe Howe's studies of Justice Holmes promise us the major achievement in this field; and no recent book has made so thorough a study of a Justice's decisions as Fowler Harper's *Justice Rutledge and the Bright Constellation*.

The political scientists have frequently written better judicial biography than the lawyers and, Lord Campbell notwithstanding, Supreme Court Justices are a more interesting subject than their British counterparts who have done their more exciting work as trial lawyers. The reason is the same: the public law aspects of the Supreme Court require political and social, as well as legal evaluation.

The need for such biographical material is suggested by Justice Frankfurter's observation that "the work of the Supreme Court is the history of relatively few personalities. . . . The fact that they were 'there' and that others were not, surely made decisive differences."⁵ That Taft got "there" can be explained largely by a combination of ambition, politics, and attractive personality. Although Holmes said Taft "did well as a judge," he questioned whether Taft could "go higher than first rate second rate."⁶ No lawyer in our history took

1. MASON, *Acknowledgments*.

2. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* (1939).

3. Frankfurter, *The Writing of Judicial Biography*, 24 *IND. L. REV.* 363, 367 (1949).

4. *Ibid.* This view of Beveridge's *Marshall* was qualified somewhat by the confession that "time has lessened for me the significance of Beveridge's *Marshall*." *Ibid.*

5. *Ibid.*

6. 1 *HOLMES-LASKI LETTERS* 346 (Howe ed. 1953). It is interesting to note that Holmes' distinguished ancestor Wendell Phillips once described Lincoln as "a first-rate, second-rate man." MCPHERSON, *THE STRUGGLE FOR EQUALITY: ABOLITIONISTS, AND THE*

the Chief Justiceship as the fixed star in his constellation so early and steadfastly as Taft. The greater judges, Holmes and Augustus Hand, could not comprehend such ambition.⁷ There is something unseemly in this undistinguished *nisi prius* judge seeking a Supreme Court appointment at the age of thirty-two. For, in 1890, the day of intellectual prodigies like Hamilton, Jefferson and Story was long past. One is not mollified by Taft's modesty: "My chances of going to the moon and of donning a silk gown at the hands of President Harrison are about equal."⁸ His close attention to the failing health of Supreme Court Justices whose positions he desired, even his presidential nomination of White instead of Hughes for Chief Justice, have a touch of Richard III. White's principal qualification seemed that of age, giving Taft a greater hope of an ultimate vacancy on the bench which he could fill.⁹

Taft came from a politically and socially prominent family; his father had been a member of President Grant's Cabinet, a state court judge and a foreign Minister. The elder Taft had set the stage by advising Chief Justice Waite of his own availability for Supreme Court appointment. It is less clear from Mason than from Pringle precisely how important this background was in Taft's life; the Taft heritage seems to have enjoyed continued viability, and one can observe similar patterns of power in families so politically varied as the Roosevelts, the Tydings and the Morgenthaus.

Taft became a state Assistant Prosecuting Attorney at twenty-seven and Solicitor General of the United States at thirty-two. Mason characterizes his performance in the latter position as "undistinguished" although we have only Taft's modest agreement in support.¹⁰ Taft recognized that the position proved important for his entire political and judicial career because of his political associations in Washington. Subsequently, Taft was appointed to a federal Circuit Court where his decisions caused Samuel Gompers to label him the "father of injunctions." His work as President of the Philippine Commission and as first Civil Governor of the Philippines appears to have been of first-rate com-

NEGRO IN THE CIVIL WAR AND RECONSTRUCTION 113 (1964); STAMPP, *THE ERA OF RECONSTRUCTION, 1865-77* 44 (1965). Oddly enough, Bickel ascribes to Brandeis the following comment on Taft: "He is a first-rate, second-rate mind." BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* 203 (1957).

7. Holmes wrote Pollock: "Taft did not surprise me by saying (according to the papers) that the CJ-ship had been the ambition of his life. I think I wrote what I thought of that kind of ambition as against the aspiration to touch the superlative in one's work." 1 *HOLMES-LASKI LETTERS* 346 (Howe ed. 1953); 2 *HOLMES-POLLOCK LETTERS* 72 (Howe ed. 1941). Hand, writing Brandeis about himself, said that he was "almost abnormally without ambition." WYZANSKI, *WHEREAS — A JUDGE'S PREMISES* 70 (1965).

8. MASON 17.

9. In Mason's view, President Taft probably assumed that White's appointment would facilitate his own as White's successor. MASON 35-40. Another view is that White's fellow Justices urged his appointment. 1 *PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* 534-35 (1939). For a third: "I don't know what the influences were that led Taft to name White. I never ventured to ask him." 1 *HOLMES-LASKI LETTERS* 797 (Howe ed. 1953); see also 2 *HOLMES-LASKI LETTERS* 846 (Howe ed. 1953).

10. MASON 18.

petence; his devotion to it led him to reject Theodore Roosevelt's offer of appointment as an Associate Justice of the Supreme Court.¹¹ His Presidency, which he owed to his wife's ambition and Roosevelt's friendship, disappointed himself and others.

Taft has meaning in the context of a period of American history marked by the new concentration of economic and political power in the great corporations. The revolt against such power is reflected in the very names of Greenbackers, Grangers, Populists, Knights of Labor, and Anarchists; in Haymarket, Homestead, Pullman, Coxey's Army, and in the largest Socialist vote ever cast in a presidential election. In the 1890's, many forward-looking and respectable citizens were concerned about the power of this new wealth and the suffering of the working class. Mason shows that Taft, imbued with the respective social and legal philosophies of William Sumner and Justice Brewer, was more frightened by the popular revolt than affronted by its causes. His constitutional creed was simple: the main purpose of the Constitution was to protect private property. "[P]rincely profits" were proper for "men of judgment, courage and executive ability . . . for the general good they have done."¹² The courts were necessary for the protection of the rich because "[t]he appeal of the rich to the Constitution and courts for protection is still an appeal by the weak against the unjust aggressions of the strong."¹³ Taft agreed that there were corporate evils, but those he believed were the result of political corruption which was "beyond the power of the Federal courts to prevent or eradicate."¹⁴ On the other hand, when organized labor committed "open defiant trespass upon property rights"¹⁵ the labor injunction was a necessary weapon.

Taft has a reputation for concern with the administration of justice. The praise given to him for his speeches on judicial reform and for his criticism of the "unequal burden which the delays and expenses of litigation under our system impose on the poor litigant"¹⁶ may be deserved; but since he regarded the constitutional rights of the accused as "fetishes,"¹⁷ his efforts were hardly a crusade for social justice. Rather, viewing the courts as guardians of property rights, he apparently recognized the critical importance of having an instrument effective for, and judges sympathetic to, the task.

His concern with both the machinery of the courts and their personnel is probably the most interesting and informative aspect of his judicial career. The

11. It is not unfair to note that the Chief Justiceship was Taft's objective and that Mrs. Taft was insistent upon the Presidency and opposed to a judicial post for her husband. MASON 17, 27. Under Roosevelt's pressure, Taft did accept an appointment as Secretary of War. MASON 24.

12. Taft, *The Right to Private Property*, 3 MICH. L.J. 215, 223 (1894).

13. *Id.* at 232.

14. Taft, *Criticisms of the Federal Judiciary*, 29 AM. L. REV. 641, 652-53 (1895).

15. *Id.* at 669.

16. Taft, *The Delays of the Law*, 18 YALE L.J. 28, 30-31 (1908).

17. *Administration of Criminal Law*, Address to the Graduating Class of the Yale Law School, 1905, reprinted in TAFT, *PRESENT DAY PROBLEMS: A COLLECTION OF ADDRESSES DELIVERED ON VARIOUS OCCASIONS* 333, 337 (1908).

story of Taft's success in securing the passage of the Act of September 14, 1922¹⁸ creating the judicial conference and giving the Chief Justice a powerful administrative weapon is now well known. The prestige of a Chief Justice and former President, his indefatigability before Bar Associations and Congress, and his organizational ability also resulted in passage of the Judges' Bill of 1925,¹⁹ which substantially reduced the obligatory jurisdiction of the Supreme Court. Frankfurter, otherwise critical, is unstinting in his praise of this phase of Taft's work.²⁰

What is a newer tale — and one now being told by Mason and others — is Taft's ceaseless intervention to assure the filling of federal judicial positions by "sound" men. Brandeis' nomination made Taft say bitterly that "*es ist zum lachen*,"²¹ and he led the bitter and unsuccessful campaign against confirmation. He opposed Learned Hand because while on the district bench he had run on the Bull Moose ticket for the Court of Appeals. Cardozo was "what they call a progressive judge"²² and even Cuthbert Pound was a "kind of an off-horse," who had "dissented with Cardozo."²³

Any study of Taft poses the question of how active the Chief Justice should be in political affairs generally and in political appointments particularly. There are many sound reasons for a strict construction and application of the separation of powers doctrine which go beyond *Hayburn's Case*.²⁴ Whether or not national crises may justify publicly disclosed exceptions, a close private working relationship between the judicial and other branches of the government is wrong doctrinally, dangerous politically, and not justified practically by the familiar claim of a shortage of qualified non-judicial presidential advisors. In any event, Taft went to an extreme in his persistent lobbying for and against particular judges, other public office-holders, tariffs, veterans' bonuses, and general legislation. However convinced he was that his actions were for the country's good, this behavior, whose propriety he and others questioned, hardly makes for impartiality in adjudicating disputes between the citizen and his government. Mason's description of Chief Justice Taft's campaign to make Pierce Butler an Associate Justice of the Court is not a pretty picture. It was

18. 42 Stat. 837 (1922).

19. 43 Stat. 936 (1925). Taft also unsuccessfully sought to secure rule-making power for the Court; not until 1934 did Congress grant such authority. 48 Stat. 1064 (1934).

20. FRANKFURTER & LANDIS, *THE BUSINESS OF THE SUPREME COURT* 235, 241-42, 259-60 (1927); Frankfurter, *Chief Justices I Have Known*, 39 VA. L. REV. 883, 898 (1953), reprinted in FRANKFURTER, *OF LAW AND MEN* 129-30 (1956).

21. Letter, Taft to Gus Karger, January 31, 1916, quoted at MASON 72.

22. MASON 170. Taft also feared that Cardozo and Hand might "herd" with Holmes and Brandeis, and that Stimson was infected with "Frankfurtism." MASON 163.

23. MASON 171. Mason suggests that Pound was objectionable because he "had written the first judicial opinion in America upholding Workmen's Compensation." MASON 171, citing as support *Ives v. South Buffalo Ry. Co.* 201 N.Y. 271 (1911), which held the Workmen's Compensation Law unconstitutional. Pound did not sit on the court that decided the case, or on the court that overruled it in *Matter of Jensen v. Southern Pacific Co.*, 215 N.Y. 514 (1915); Pound was appointed to the Court of Appeals August 20, 1915.

24. 2 Dall. 408 (1792).

highly improper for Taft secretly to mobilize the Catholic hierarchy in the West to offset that of the East, even if Martin Manton was the latter's candidate and Pierce Butler was a sound railroad lawyer.

As Chief Justice, Taft fulfilled his non-judicial functions most competently. Holmes' correspondence emphasizes Taft's ability in the field of administrative detail, his achievement of greater harmony in conference than his predecessor, and his success in disposal of the docket.²⁵ Everyone agrees that Taft was a genial, likeable man, and it must have been so. "We are very happy with the present Chief," wrote Holmes, "as I may have told you. He is good humored, laughs readily, not quite rapid enough, but keeping things moving pleasantly."²⁶ He was a great compromiser and was sometimes successful in preventing dissents or dissenting opinions. Taft also carried a heavy work load, assigned uninteresting cases to himself, and was helpful in the personal affairs of his fellow Justices.

No one appears to have made a detailed study of Taft's decisions, particularly in the Supreme Court. Mason's "Constitutional Creed" chapter sets forth the judicial decisions for which Taft is best known. They make strange reading today, particularly most of the labor decisions. Under Taft, peaceful picketing was permitted, secondary boycotts were enjoined, and the anti-trust laws were vigorously applied against labor unions, although he was persuaded by Brandeis in the first *Coronado* case²⁷ to require proof of the union's intention to restrain interstate commerce. Later decisions, such as *Apex Hosiery Co. v. Leader*,²⁸ have wiped out all trace of Taft's influence. Taft's *chef d'oeuvre* was *Truax v. Corrigan*,²⁹ declaring unconstitutional the Arizona anti-injunction law. This was destroyed by successor courts influenced by Brandeis and Frankfurter,³⁰ not to mention Frankfurter and Greene.³¹ Taft's dissent from the Court's minimum wage decision in *Adkins*,³² unlike his views on federal child labor regulation,³³ is now the law.³⁴ *Wolff Packing Co. v. Court of Industrial Relations*,³⁵ declaring unconstitutional the Kansas compulsory arbitration law, would probably be decided the same way today, and Mason's view that its "principle was the same" as that of *Adkins* is questionable.³⁶

In the non-labor field, Mason discusses principally Taft's views on the Presi-

25. 2 HOLMES-POLLOCK LETTERS 79, 113-14, 205 (Howe ed. 1941).

26. *Id.* at 96.

27. *United Mineworkers of America v. Coronado Coal Co.*, 259 U.S. 344 (1922).

28. 310 U.S. 469 (1940).

29. 257 U.S. 312 (1921). Holmes thought it "rather spongy." 1 HOLMES-LASKI LETTERS 390 (Howe ed. 1953).

30. See, e.g., *Senn v. Tile Layers Union*, 301 U.S. 468 (1937) and *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323 (1938).

31. THE LABOR INJUNCTION (1930).

32. *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

33. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

34. See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *United States v. Darby*, 312 U.S. 100 (1941).

35. 262 U.S. 522 (1923).

36. MASON 251.

dent's removal power³⁷ and on wire-tapping.³⁸ The Court later came to a different conclusion on the first issue³⁹ and Congress disposed of the *Olmstead* case by passing the Communications Act of 1934.⁴⁰ Mason, like Holmes, gives Taft credit for his broad conception, following Marshall's lead, of the federal power over interstate commerce.⁴¹ Some of the most interesting of what we now call First Amendment cases are not discussed by Mason. I refer to such cases as *Gitlow*,⁴² *Schwimmer*,⁴³ *Pierce*⁴⁴ and *Meyer*.⁴⁵ A full study of Taft as Chief Justice would also include analysis of *United States v. Lanza*⁴⁶ on the two-sovereignty rule, *McGrain v. Daugherty*⁴⁷ on the congressional power of investigation, *Carroll v. United States*⁴⁸ on search and seizure, and *Berizzi Bros. v. S. S. Pesaro*⁴⁹ on sovereign immunity. The last decade has seen many significant variations of these themes.

The work of the Supreme Court in Taft's period was quite different from that of the present time. In part, this was due to Taft's success in ultimately securing passage of the Judges' Bill. Before its passage the cases which the Court was required to decide usually involved matters of statutory construction, private law and jurisdiction. It is odd to note Holmes' comment to Pollock on the "pretty important cases"⁵⁰ which he was deciding. What would he have said about *Youngstown*, *Dennis*, *Barenblatt*, *Sabbatino* and *Dombrowski*?⁵¹ The change in the Court's work was due to at least two factors other than the limitation of its obligatory jurisdiction: the New Deal legislation (which ran counter to Taft's views on private property, labor and judicial review), and the state and federal legislation inspired by the fear of international Communism which has replaced domestic Populism as our *bête noire*.

One can fairly guess how Brandeis and Holmes would have reacted to the New Deal legislation, if we pass over some of the "delegation running riot."⁵² How they (although not Taft) would have reacted to the "anti-Communist"

37. *Myers v. United States* 272 U.S. 52 (1926).

38. *Olmstead v. United States*, 277 U.S. 438 (1928).

39. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

40. 48 Stat. 1064, 1103; 47 U.S.C. § 3605 (1934). See *Nardone v. United States*, 308 U.S. 338 (1939); *United States v. Coplion*, 185 F.2d 629 (2d Cir. 1950) *cert. denied* 342 U.S. 920 (1952).

41. *Stafford v. Wallace*, 258 U.S. 495 (1922).

42. *Gitlow v. New York*, 268 U.S. 652 (1925).

43. *United States v. Schwimmer*, 279 U.S. 644 (1929).

44. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

45. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

46. 260 U.S. 377 (1922).

47. 273 U.S. 135 (1927).

48. 267 U.S. 132 (1925).

49. 271 U.S. 562 (1926).

50. 2 HOLMES-POLLOCK LETTERS 95 (Howe ed. 1941).

51. *Youngstown Co. v. Sawyer*, 343 U.S. 579 (1952); *Dennis v. United States*, 341 U.S. 494 (1951); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Dombrowski v. Pfister*, No. 52, Oct. Term, 1964, 33 U.S.L. WEEK 4321.

52. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935).

legislation is a matter of speculation. Would the realistic Brandeis and the skeptical Holmes have been less likely than their distinguished junior, Felix Frankfurter, to accept the government's double-barrelled argument of national emergency and legislative discretion? The problems which have faced the Court in recent years are more difficult than those decided by the Taft Court. They call for greater men; the modern judges, on the whole, are intellectually superior, write better opinions, and, it must be admitted, much longer ones.

Professor Mason does not discuss Taft's teaching career as professor of constitutional law at Yale College and Law School. It appears to have been undistinguished.⁵³ Taft gave his students the working knowledge of government which he certainly possessed. He supplemented this work on the lecture circuit. He would not have approved of today's *Journal* or of the Dean's recent reports on the philosophy of the law school and on the scholarly and forensic achievements of its faculty. But the *Journal* and the reports were also different in Taft's day. It is a long step from Taft's teaching of constitutional law to that of Professor Emerson and his colleagues.

Professor Mason's book says little that has not been said elsewhere by him or by others. The pre-1939 materials are for the most part to be found in Pringle. Taft's intra-court amiability, tactics and reduction of dissents are discussed more fully in Walter F. Murphy's *Elements of Judicial Strategy*; the same author has elsewhere discussed Taft's court-packing operations.⁵⁴ The *Coronado* situation is excellently analyzed elsewhere by Professor Bickel.⁵⁵ Taft's fight against Brandeis and his support of Butler are the respective subjects of two recent books.⁵⁶ Taft's constitutional views are discussed in Mason's *The Supreme Court from Taft to Warren*.⁵⁷

There is also some repetition within the book under discussion, *e.g.*, some of the same cases are discussed in the different chapters treating of Taft's judicial creed and his functioning as Chief Justice. More important, I question Professor Mason's statement that "[t]he irony of . . . [Taft's] career is that the revisions he sponsored and pushed through to enactment should now be helpful to causes he profoundly distrusted."⁵⁸ Mason speaks in this fashion of the "remodeled Federal judicial organization," Taft's "broad construction of the commerce power," and his "support of the minimum wage" as contributing to "the dreaded collectivism he had struggled desperately to prevent."⁵⁹

53. HICKS, WILLIAM HOWARD TAFT, YALE PROFESSOR OF LAW AND NEW HAVEN CITIZEN (1945).

54. Murphy, *In His Own Image: Mr. Chief Justice Taft and Supreme Court Appointments*, 1961 SUP. CT. REV. 159; Murphy, *Chief Justice Taft and the Lower Court Bureaucracy: A Study in Judicial Administration*, 24 J. POL. 453 (1962).

55. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS 77-99 (1957).

56. TODD, JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS (1964); DANIELSKI, A SUPREME COURT JUSTICE IS APPOINTED (1964).

57. See also Mason, *The Labor Decisions of Chief Justice Taft*, 78 U. PA. L. REV. 585 (1930).

58. MASON 16.

59. *Ibid.*

But some mechanism would eventually have been created to limit the impossibly growing work load even if the Court had been forced to improvise without legislation, and certainly the Supreme Court's decisions upholding New Deal legislation found their real inspiration in Marshall's views on federal power, in the urgent economic necessities of the 1930's and in the changes in the Court's membership.

Despite the absence of original material, this is a worthwhile book to have and to use. It is well written, less discursive (though less original) than Pringle's; it brings up to date the additional materials and puts them in a single readable volume. Some chapters, such as that on judicial reform, discuss aspects of Taft's work more coherently than have been done elsewhere. The numerous quotations from Taft and others are illuminating rather than distracting. The book gives us another look behind the judicial curtain with the aid of that dreaded modern weapon, intra-court memoranda, as well as of the uninhibited private correspondence between the Chief Justice and his relatives. As Matthew Josephson wrote of Pringle's biography, Mason's "attitude toward the hero is a mixture of decent sympathy and pained critical disapproval."⁶⁰ With the added knowledge of the years, Mason quite properly shows less of the first quality and more of the second. Mason's words may not be harsh but the resulting portrait is merciless. The reader is left with melancholy in the reminder that well-meaning men often make up that "blind" Court⁶¹ of which Taft himself wrote, that our governmental masters are usually not great men, and that under their guidance each age finds new devils to exorcise.

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EQUALITY IN POLITICAL PHILOSOPHY. By Sanford A. Lakoff. Harvard University Press, 1964. Pp. 270.

THE LIBERAL IDEA OF FREEDOM. By David Spitz. The University of Arizona Press, 1964. Pp. 210.

THESE studies of the political ideals of Liberty and Equality may serve to remind us, in the first place, of the unfortunate decline of the third ideal of the French Revolution. Political philosophies appear to be unacquainted with the ideal of Fraternity, and practical politicians, at once cynical and mawkish, prefer to invoke the unavailable powers of Love. The memorable modern considerations of the notion of fraternity — Dostoyevsky's, Freud's, Malraux's — are not philosophical in manner, nor are they designed to enforce fraternity as a political ideal. Freud's totemic brotherhood confronts the ideal of fraternity with the impulse to fratricide, and the Illusha brotherhood inspired by Alyosha Karamazov is pointedly extra-political. Malraux may seem to provide an ex-

60. Josephson, *Taft in His Times*, 101 *The New Republic* 174 (Nov. 29, 1939).

61. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37 (1922).

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