

3-1965

Chief Justice Taft at the Helm

Alpheus T. Mason

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



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

Recommended Citation

Alpheus T. Mason, Chief Justice Taft at the Helm, 18 *Vanderbilt Law Review* 367 (1965)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol18/iss2/1>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

3-1965

Chief Justice Taft at the Helm

Alpheus T T. Mason

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



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

Recommended Citation

Alpheus T T. Mason, Chief Justice Taft at the Helm, 18 *Vanderbilt Law Review* 367 (1965)
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol18/iss2/1>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Chief Justice Taft at the Helm

*Alpheus Thomas Mason**

The importance of the Chief Justice of the United States in guiding the work of the Supreme Court depends largely on the personality of the man who holds the position. Professor Mason here provides an intimate glimpse into the successes and failures of William Howard Taft in his efforts to achieve unity and efficiency in the disposition of cases before the Court.

The office of Chief Justice carries scant inherent powers. The Chief Justice manages the docket, presents the cases in conference, and guides the discussion. When in the majority, he assigns the writing of opinions. Whatever influence he exerts in the exercise of these prerogatives rests less on formal authority than on elusive personal characteristics. Charles Evans Hughes, who had served as Associate Justice from 1910 to 1916 and later had been able to observe Taft's role in the Court over a period of seven years, considered the Chief Justice "the most important judicial officer in the world." His actual power, Hughes wrote in 1928, depended upon "the strength of his character and the demonstration of his ability in the intimate relations of the judges." The office affords "special opportunity for leadership."¹

Certain Chief Justices, notably Harlan Fiske Stone, have held the office in low esteem. Disparaging its duties as janitorial, as "never enlarging the occupant's individual capacity for judicial work," he complained that the office "absorbs time and energies I should like to devote to what I consider more important things."² Not so with William Howard Taft. At the time of his appointment, it was confidently predicted that certain personal qualifications alone would make him an effective leader. "Mr. Taft has such tact and good humor," the

* McCormick Professor of Jurisprudence, Princeton University.

This article is a chapter from the author's forthcoming book, *William Howard Taft: Chief Justice*, to be published in 1965 by Simon and Schuster.

1. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 56-58 (1928).

2. Letter From Harlan Fiske Stone to Irving Dilliard, June 7, 1941. The Stone Papers, Library of Congress.

New York *Tribune* editorialized, "and has so unconquerable a spirit of fair play that he is greatly beloved of his fellow citizens." With Taft as moderator it seemed improbable that the asperities formerly jarring the "celestial chamber . . . will be softened and not quite so often in the future will the Court divide 5 and 4."³ Drawing on nearly every conceivable instrument and technique of command, Taft strove earnestly to fulfill this prediction.

ADMINISTRATIVE DETAIL

"Perhaps the main question as to a C.J.," Holmes remarked as Taft's first term began, "is his way of disposing of executive details." The new Chief Justice seemed likely "to take them easily and get through them without friction."⁴ The minutiae Stone considered boring and unimportant Taft tackled with great relish. Tasks large and small confronted him. At the outset he had to wrestle with the seemingly trivial job of making William Stansbury acting Clerk of the Court. No statute authorized the appointment. Uncertain of his power, Taft requested advice from his colleagues. Holmes said he did not know enough to advise; Day said only he was for Stansbury.⁵ McKenna bluntly told the Chief Justice what his office entailed. Other members of the Court expected him "to attend to the executive business of the Court and not bother them." Taft should realize "the Chief Justiceship was an office distinct from that of the associates in executive control. . . . All . . . the associates recognized . . . that in judicial decisions all were equal, but in management [he] must act and they would all stand by if ever question was made."⁶ Reassured, Taft began reorganizing his staff in line with his own personal needs. He was determined to make his loyal secretary, W. W. Mischler, chief assistant, but his predecessor's former law clerk had appropriated the title "Secretary to the Chief Justice." "Now that is not his function," Taft insisted; "by law, it is 'Law Clerk.' . . . Mischler is my Secretary and I intend to appoint him and he will use the title."⁷ The necessary legislative changes were made and "Misch" joined the Court's clerical force as Taft's private secretary.

No detail calculated to enhance the Court's independence and prestige was overlooked. Taft urged Congress to increase the compensation of the Clerk. In a lengthy letter to Representative Andrew

3. Quoted in Frankfurter, *Chief Justices I Have Known*, 39 VA. L. REV. 883, 899-900 (1953); reprinted in FRANKFURTER, *OF LAW AND MEN* 111-38 (1956).

4. Letter From Oliver Wendell Holmes to Frederick Pollock, Oct. 2, 1921, II HOLMES-POLLOCK LETTERS 79 (1941).

5. Letter From WHT to Helen H. Taft, Aug. 3, 1921.

6. *Ibid.*

7. Letter From WHT to Gus Karger, July 17, 1921.

J. Volstead he argued: “. . . the Clerk’s office is not supported in any way by appropriation, but . . . by what comes in by services rendered, from litigants and others having to do with the office.” Though stressing the Clerk’s expanding responsibilities, Taft’s primary motive was to enable the Court to “have large control in respect to the Clerk’s office and especially of that part of his expenditure which is made in the confidential printing of opinions of the judges for circulation among them for correction and amendment and approval before delivery.” With adequate salary the Court would be able to obtain clerks “who are proof against not infrequent corrupting efforts to secure advance information for sinister purpose.”⁸

Taft came to the bench determined to make promptness “a model for the courts of the country.” “As many men strive for riches,” the *Christian Science Monitor* noted, “Mr. Taft strove for a clear docket.”⁹ Justice Holmes, continually setting records in disposing of cases, was enthusiastic about the Chief’s “way of conducting business.”¹⁰ Though conferences for five or six hours at a stretch seemed “a pretty long pull,” the eighty-two-year-old Justice hailed Taft’s “disinclination to put cases over.”¹¹

In questions likely to call out attack, Chief Justice White had been a “great procrastinator.” Determined to remedy this situation, the new Chief Justice boldly took up the highly controversial Coronado case, holding that labor unions, though unincorporated, are suable in the federal courts.¹² The case had been argued October 15, 1920, and restored to the docket for reargument January 3, 1922. Taft’s opinion for a unanimous Court came down June 5, 1922. “I determined to have the thing decided and gotten out of the way,” he told brother Horace.¹³

Never did Taft work harder to speed up the Court’s business than at the start of each term. Certain colleagues complained. “It has been a mistake to press things so hard,” Holmes cautioned. “It wouldn’t matter if we disposed of only twenty certioraries a week as far as I can see.” Even the young and vigorous Stone felt the Chief Justice’s pressure to clear the docket. The struggle to “keep up” entailed strain. “But,” the Chief Justice warned, “we are not resigning on that account and we have got to face the music and I don’t know anyone better able to do it than you are.”¹⁴

8. Letter From WHT to Andrew J. Volstead, March 1, 1922.

9. Editorial, *Christian Science Monitor*, Feb. 5, 1930.

10. Letter From O. W. Holmes to Harold Laski, Dec. 22, 1921, I HOLMES-LASKI LETTERS 389-90 (1953).

11. Letter From Holmes to H. Laski, Oct. 22, 1922, *id.* at 457.

12. *UMW v. Coronado Coal Company*, 259 U.S. 344 (1921).

13. Letter From WHT to Horace D. Taft, June 16, 1922.

14. Letter From WHT to H. F. Stone, Sept. 4, 1925.

To accelerate the Court's business, Taft suggested the recess be shortened. "We had seventeen weeks last year. I would like to cut them down to twelve. I think we might sit a week or two later in June."¹⁵ To Taft's dismay his colleagues, some "lazy," others "old," demurred. They enjoyed these long recesses.¹⁶

A combination of factors sometimes frustrated the Chief Justice's attempt to keep everyone abreast. Van Devanter's wife was ill, delaying preparation of his opinions. The slowest member anyway, he produced practically nothing. McReynolds, the Court's problem child, was "always trying to escape work," unfailingly citing Sutherland's breakdown as an excuse for reducing the number of hearings. Holmes's advanced years always made it "easy to argue on that ground that we ought to cut down on the hearings."¹⁷ As the term drew to a close, the Chief Justice was often faced with "a cabal in the Court to try to influence me to reduce work."¹⁸ In 1928 his attempt to prevent his colleagues from decreasing the number of weeks allotted to hearings seemed hopeless. "I am afraid I could not carry a majority of them for the full time allowed."¹⁹

Yet, Taft's success was remarkable. At the end of the 1922 term the Court "broke all records in the number of cases disposed of by almost 100."²⁰ Formerly the period between the filing of a suit and the hearing of it had been approximately fifteen months. Now it was reduced to a little less than a year. Success only spurred greater determination "to keep up to the mark."²¹ Two years before he stepped down from the center chair, Taft hailed the outcome as "far and away the best showing the Court has made since before the Civil War"; and he added, "the present conditions are not comparable to those of that time."²²

Taft sought to speed up disposition of cases not only by appeals to his colleagues, but also by revising the Court's rules. He was incensed by criminals who looked to the Supreme Court as a refuge for delay. "We have determined to have no delays in criminal cases due to our Court," he wrote. "We find that it has been too often the case that a defendant convicted in a state court would get into our Court by some hook or crook of constitutional suggestion, and then that the case would be forgotten and not pressed to our attention by the state officers." Lawyers appearing before Chief Justice White's

15. Letter From WHT to Louis D. Brandeis, July 25, 1922.

16. Letter From WHT to H. D. Taft, April 27, 1922.

17. Letter From WHT to Robert A. Taft, March 4, 1928.

18. *Ibid.*

19. Letter From WHT to R. A. Taft, April 15, 1928.

20. Letter From William Stansbury to WHT, July 3, 1923.

21. Letter From WHT to Charles P. Taft II, March 18, 1923.

22. Letter From WHT to R. A. Taft, June 3, 1928.

Court had been unable to tell when a particular case would come up. Under pressure from Taft, the Court "adopted the rule of putting these cases out for hearing just as soon as they are ready."²³ Estimating the amount of business that could be done in a week, he notified the bar of the cases to be taken up. Lawyers would not be kept "hanging around the Court to await the possibility of a run on the docket."²⁴

Chief Justice Taft was a zealous economizer. Early in his tenure he cracked down on counsel who were slow to make an additional deposit to cover estimated costs in cases subject to dismissal. The Court rules required that this sum be paid within ninety days from the date of docketing. Chief Justice White never strictly enforced the requirement, because he "was opposed to drastic treatment of such cases."²⁵ Taft was more rigid. He also led a successful effort to cut the cost of printing the records. Solicitor General James M. Beck complained that the Justice Department had been compelled to pass a number of cases because the Court Clerk had insufficient funds to print the government records.²⁶ Instead of petitioning Congress for more appropriations, Taft reduced printing costs by "eliminating the unnecessary repetitions and a good deal of formal matter . . . not essential to an understanding of the record."²⁷ Printing fees were cut from fifteen to ten cents. Three years later Taft, discovering that the Court had made a \$12,000 profit, advocated reducing printing costs another 20 per cent—to eight cents. "I am itching," he told Brandeis, "to reduce expenses to the litigants in our Court."²⁸

Justice Brandeis, whose longhand draft opinions went directly to the printer and passed through numerous revisions, misconstrued the reasoning behind the economy drive. Aware that his own peculiar methods swelled printing costs, the dissenter assured the Chief Justice of his willingness to pay for corrected proofs running to "more than the traffic will bear. . . . It would not, in the least, embarrass me to pay," Brandeis insisted. "But it would embarrass me to feel that I should curtail corrections."²⁹ Taft assured his colleague that he need not be "troubled at all at the cost of your cancellations and changes in your opinions. I have been talking the matter over with Van Devanter, and I agree that of all things in our Court the most important thing is to get our opinions right. . . ." In words particularly applicable to Brandeis, he continued:

23. Letter From WHT to R. A. Taft, Nov. 28, 1926. See also Memorandum From WHT to Brethren, May 11, 1928.

24. Letter From WHT to H. D. Taft, Nov. 13, 1925.

25. Letter From W. Stansbury to WHT, Feb. 16, 1922.

26. Letter From James M. Beck to WHT, Sept. 25, 1923.

27. Letter From WHT to J. M. Beck, Sept. 25, 1923.

28. Letter From WHT to L. D. Brandeis, Dec. 18, 1926.

29. Letter From Brandeis to WHT, Nov. 3, 1923.

for some of us, especially those of us who go into subjects with some elaboration, it is necessary that we should have our opinions set up before we are able fully to determine the proper form to give them. . . . I think we would make a great mistake if we allowed the fear of expense to interfere with the necessary procedure in making our opinions what we wish them to be.³⁰

In the interest of efficiency the Chief Justice organized his associates into committees. Brandeis's skill in financial matters recommended him for the Committee on Accounts. Accounts reviewed in an organized way would inform the auditors that their work was "subject to our examination and . . . really examined. . . . We can sleep better if these are matters of regular routine."³¹ Willis Van Devanter, "more familiar with our rules than anyone on our bench,"³² headed the Committee on Rules. Many problems arose out of the Act of February 13, 1925, limiting the Court's obligatory jurisdiction. Van Devanter, McReynolds, and Taft altered the rules to meet the new situations. They also tried to "straighten out a good many inconsistencies and absurdities that have been handed down since the beginning of the Court."³³ Van Devanter carried the heaviest burden. He "drafted the last set of rules himself," Taft commented gratefully in 1927, "and he has had much to do with legislation that has enabled the Court to reduce the arrears and to catch up with its docket."³⁴

The Chief Justice's appointment of committees aroused little opposition. His power, however, was not absolute; it was subject to the approval of his colleagues. In December 1927 the United States circuit judge in Grand Rapids, Michigan, requested the Supreme Court to take up the question of fees for the clerks of the Circuit Court of Appeals. Taft replied that he would try to persuade the Court to appoint a committee "so that you can keep that member stirred up. My impression is that the best man to appoint for this is Stone, because he does things."³⁵ A majority of the Justices decided this was none of their business. Late in December, Taft informed Judge Arthur C. Denison that "application should be made to the Judiciary Committee of the Senate."³⁶

TEAMWORK

Taft brought to the Court a clear image of the Chief Justiceship—

-
- 30. Letter From WHT to L. D. Brandeis, Nov. 4, 1923.
 - 31. Letter From WHT to L. D. Brandeis, March 12, 1923.
 - 32. Letter From WHT to William Lyon Phelps, May 30, 1927.
 - 33. Letter From WHT to R. A. Taft, June 7, 1925.
 - 34. Letter From WHT to W. L. Phelps, June 7, 1925.
 - 35. Letter From WHT to Arthur C. Denison, Dec. 16, 1927.
 - 36. Letter From WHT to A. C. Denison, Dec. 29, 1927.

the office and its powers. Motivating his tenure was a passion for "teamwork"; it alone would give "weight and solidarity" to judicial decisions. "Massing the Court" was a consuming ambition. To this end, he persuaded by example, frowned on dissents, exploited personal courtesy and charm, maximized the assignment and reassignment powers, relied on the expertise of his associates.

Much depended "on the personal equation."³⁷ Following Senate confirmation, Taft received a note of congratulations from the Court pessimist, James McReynolds. "There is a hard road ahead of us, but under your wise leadership I like to hope that all will be well."³⁸ Meetings were more pleasant, thanks not only to the lubricating effects of Taft's personality but also to "the disappearance of men with the habit of some of our older generation, that regarded a difference of opinion as a cockfight and often left a good deal to be desired in point of manners."³⁹ After the first conference it was apparent that judicial business would be "turned off with less feeling of friction and more rapidly . . . than with his predecessor."⁴⁰ "We are very happy with the present Chief," Holmes commented. "He is good-humored, laughs readily, not quite rapidly enough, but keeping things moving pleasantly."⁴¹ On the bench since 1902, Holmes reported in 1925 that "never before . . . have we gotten along with so little jangling and dissension."⁴² Taft echoed Holmes's friendliness. "In many ways," the Chief Justice found him "the life of the Court: . . . it is a great comfort to have such a well of pure common law undefiled immediately next [to] one so that one can drink and be sure one is getting the pure article."⁴³ At long last Taft was in his element. "The truth is," the Chief Justice wrote in 1925, "that in my present life I don't remember that I ever was President."⁴⁴

Taft had long harbored a grudge against Brandeis for his participation in the *Ballinger* case of 1910. To forestall possible discord, Taft sent a cordial note touching a matter close to the Chief Justice's heart, but not likely to stir disagreement. "I am glad to hear that you are interested in readjusting the machinery of the Federal courts to better the dispatch of business," the letter began.

37. Letter From John H. Clarke to WHT, July 1, 1921.

38. Letter From James C. McReynolds to WHT, July 1921.

39. Letter From O. W. Holmes to F. Pollock, Feb. 24, 1923, II HOLMES-POLLOCK LETTERS 114 (1941).

40. Letter From O. W. Holmes to H. Laski, Oct. 9, 1921, I HOLMES-LASKI LETTERS 373 (1953).

41. Letter From O. W. Holmes to F. Pollock, May 21, 1922, II HOLMES-POLLOCK LETTERS 96 (1941).

42. Letter From WHT to R. A. Taft, May 3, 1925.

43. Letter From WHT to Learned Hand, March 3, 1923.

44. Letter From WHT to W. K. Hutchinson, Dec. 29, 1925, II PRINGLE, LIFE AND TIMES OF WILLIAM HOWARD TAFT 960 (1939).

The mere increase of courts or judges will not suffice. We must have machinery of a quasi-executive character to mass our Judicial force where the congestion is, or is likely to be. We must have teamwork and judges must be under some sort of disciplinary obligation to go where they are most needed. In this way, we shall get more effective work out of each judge and he will be made conscious of observation by someone in authority of the work he is doing. . . .

It seems to me that through a committee of the Chief Justice and the Senior Circuit Judges, a survey of the state of business in federal courts could be made each year and plans adopted to send district judges from one district to another in the same circuit and from one circuit to another, so as to take up slack and utilize it where needed. . . .⁴⁵

Such friendly appeals, brother Horace predicted, would enable the Chief Justice to "take them into camp." "I expect to see you and Brandeis hobnobbing together with the utmost good will. . . . The truth is," Horace reflected, "that, while Brandeis has been on the *New Republic* side, so to call it, in some cases, he has not put radical stump speeches into his opinions or done anything else to make him seem dangerous."⁴⁶ The hatchet had apparently been buried. Bubbling with enthusiasm, Taft reported that "Brandeis and I are on most excellent terms and have some sympathetic views in reference to a change in the relations of the Court to the Clerk as to financial matters. He can not be any more cordial to me, than I am to him, so that honors are easy."⁴⁷ Reciprocating the Chief Justice's good will, Brandeis reported that things were going "happily in the conference room with Taft. The Judges go home less tired emotionally and less weary physically than in White's day. When we differ we agree to differ without any ill feeling. It's all very friendly."⁴⁸

Brandeis's sophistication contributed greatly to harmony. He recognized that "the great difficulty of all group action . . . is when and what concessions to make."⁴⁹ Where fundamentals were not at stake, he would make tactical concessions. During the first term Brandeis submitted an opinion in a labor case which "very much pleased" the Chief Justice, except for "the last 4 or 5 sentences in respect to the growth of the Constitution. I object to those words," Taft informed the man whose confirmation he had strongly opposed in 1916, "because they are certain to be used to support views that I could not subscribe to. . . . Now it is possible—I have felt that way myself sometimes—

45. Letter From WHT to L. D. Brandeis, July 24, 1921. II PRINGLE, *op. cit. supra* note 44, at 995.

46. Letter From H. D. Taft to WHT, July 6, 1921, BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK* xix-xx (1957).

47. Letter From WHT to H. D. Taft, July 6, 1921.

48. Manuscript of conversation in Library of Harvard Law School, L. D. Brandeis to Felix Frankfurter, BICKEL, *op. cit. supra* note 46, at 203.

49. *Id.* at 18.

that these particular sentences constitute the feature of the opinion you most like, and that you don't care to eliminate them. If not, I can write a short concurring opinion, avoiding responsibility for those words."⁵⁰ Brandeis wrote back immediately: "I believe strongly in the views expressed in the last five sentences; but I agree with you that they are not necessary and I am perfectly willing to omit them." Concurring in the Chief Justice's drive for unanimity, he added: "I hope you will be able to induce some of our brethren to join us."⁵¹

"I can't always dissent," Brandeis observed. "I sometimes endorse an opinion with which I do not agree. I acquiesce."⁵² An example of cooperative acquiescence is *Board of Trade of City of Chicago v. Olsen*.⁵³ "You will recall," Brandeis wrote, "that I voted the other way and the opinion has not removed any difficulties. Indeed I differ widely from McReynolds concerning the functions and practice of the Trade Court—as you know from the *Gratz* case."⁵⁴ But I have differed from the Court recently on three expressed dissents and concluded that in this case, I had better 'shut up.'⁵⁵

By the beginning of Taft's second term, Justice Clarke believed that Brandeis, fulfilling brother Horace's prediction, had been taken "into camp." One of the reasons he gave Wilson for resigning was that he and Brandeis "were agreeing less and less frequently in the decision of cases involving . . . liberal principles." Remaining on the Court meant "a futile struggle against increasing odds." Clarke mentioned several cases, and there are several others he might have cited.^{55a} What Clarke may or may not have known was that Brandeis, in yielding to Taft, may have been playing a waiting game. Moved no doubt by strategic considerations, Taft also made concessions. It seems highly unlikely, as his letter to Wilson suggests, that Clarke would have been willing to sacrifice principle on the altar of strategy, whether the run be long or short. After listing certain cases in which he and Brandeis had disagreed, Clarke concluded: "There is much more, but this will suffice to show that in leaving the Court I did not

50. Letter From WHT to L. D. Brandeis, March 30, 1922.

51. Letter From L. D. Brandeis to WHT, March 30, 1922.

52. Conversations, L. D. Brandeis to F. Frankfurter, *BICKEL, op. cit. supra* note 46, at 18.

53. *Board of Trade of City of Chicago v. Olsen*, 262 U.S. 1 (1923).

54. *McKee v. Gratz*, 260 U.S. 127 (1922).

55. Letter From L. D. Brandeis to WHT, Dec. 23, 1922.

55a. *Milwaukee Publishing Co. v. Burleson*, 255 U.S. 407 (1921). Clarke delivered the opinion of the Court; Holmes and Brandeis dissented. *Frey & Son v. Cudahy Packing Co.*, 256 U.S. 208 (1921). Justice McReynolds, joined by Brandeis, delivered the opinion of the Court; Justice Pitney, joined by Day and Clarke, dissented. *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921). Chief Justice Taft delivered the opinion of the Court; Brandeis concurred in the substance of the opinion; Clarke dissented.

withdraw any support from Judge Brandeis. One or the other of us was shifting or had shifted his standards so that in critical or crucial cases we were seldom in agreement." In Clarke's eyes, the Chief Justice's ambition to "mass the Court" was extraordinarily successful. Some of Brandeis's carefully prepared unpublished opinions are a tribute to Taft.^{55b}

Taft persuaded by example as well as by precept. During the early part of his tenure especially, he displayed rare open-mindedness. On one occasion the Chief Justice requested Brandeis to prepare a memorandum on a complicated utility valuation case.⁵⁶ During the month devoted to it, some members became impatient. With Taft's active support, the matter was held up until Brandeis was ready. Then a whole day was set aside for discussion. "And," as Brandeis described it, "it was a thorough discussion. Some didn't grasp the facts and hadn't thoroughly mastered the memo, but it was a new method in the consideration of issues."⁵⁷

"I am not an obstinate man," the Chief Justice told Holmes,⁵⁸ The *Coronado* case had dramatically underscored the point. By a narrow vote the White Court had decided that the union was liable under the Sherman Act. Brandeis dissented and prepared an opinion. After Taft became Chief Justice, the case was restored to the docket and reargued. In conference the new Chief Justice presented the view that the union, though unincorporated, was suable, that evidence indicated intent to restrain interstate commerce.⁵⁹ Brandeis made it known that he would dissent, having already written the opinion. Meanwhile, Taft encountered difficulty in writing an opinion. Cautiously, Brandeis ventured: "I hesitate to [make] the few following suggestions. Please feel entirely free to discard any or all of them."⁶⁰ Taft replied the next day: "thank you for the suggestions you make, all of which I shall adopt."⁶¹

Brandeis's suggestions changed not only Taft's views but also those of other members of the Court. At the conclusion of the 1921 term the Chief Justice delivered a unanimous opinion holding that the unions were not liable.⁶² "They will take it from Taft but wouldn't take it from me," Brandeis remarked wryly. "If it is good enough for Taft, it is good enough for us, they say—and a natural sentiment."⁶³

55b. See, BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* (1957).

56. *Southwestern Telephone Co. v. Public Serv. Comm'n*, 262 U.S. 276 (1923).

57. Brandeis-Frankfurter conversations, BICKEL, *op. cit. supra* note 46, at 199.

58. Letter From WHT to O. W. Holmes, March 30, 1922.

59. *UMW v. Coronado Coal Co.*, 259 U.S. 344 (1921).

60. Letter From L. D. Brandeis to WHT, May 28, 1922.

61. Letter From WHT to L. D. Brandeis, May 29, 1922.

62. Brandeis-Frankfurter conversations, BICKEL, *op. cit. supra* note 46, at 97.

63. *Ibid.*

An even more striking example of the Chief Justice's open-mindedness is *Sonneborn Brothers v. Cureton*.⁶⁴ Brandeis, joined by Clarke and Pitney, had dissented from a cursory opinion by Justice McReynolds. After reargument, Taft reassigned the opinion to himself. Again there were exchanges with Brandeis, leading to an unanimous opinion delivered by the Chief Justice. Brandeis was proud of his accomplishment. "That's my opinion," he commented. "Taft wrote it on the basis of a memo in which I analyzed all the cases."⁶⁵

"We haven't had many dissents and we have been pretty nearly solid in all cases,"⁶⁶ the Chief Justice boasted in 1925. Unanimity was achieved in the *Coronado* case,⁶⁷ and in *Sonneborn*,⁶⁸ near unanimity in the *Child Labor Tax* case,⁶⁹ all fraught with potential cleavages. With Taft in the center chair, it seemed that the bitter divisions which had characterized the White Court had been forever banished. Even in dissents, the Chief Justice would sometimes set an example of sweet reasonableness. "I have your dissenting opinion in Nos. 96,213 and 231," he wrote Brandeis, November 19, 1926, "and I think you may add that I concur with you in the dissent. I was at first not inclined to express my differing view, but as you have done so, I shall go with you."⁷⁰

The Chief Justice's willingness to make concessions influenced the entire Court. In the *Chicago Drainage* case⁷¹ Justice Butler had sought to modify Taft's broad construction of Congress's power to regulate commerce. Coming around to Butler's view meant "a real sacrifice of personal preference. . . . I was much opposed to striking out of the opinion . . . the constitutional arguments," he told Butler,

because I think there is no doubt of their soundness, and that any other result would shake the principles that have obtained since Marshall's day in respect to the absolute control by Congress of interstate commerce. . . . I have come to agree with you and Van that it will perhaps steady matters not to dismiss the other view when doubt on the question created in this argument might weaken the action of the Court by inviting Congressional interference in order to relieve Chicago of the burden which she ought to assume and meet. But it is the duty of us all to control our personal preferences to the main object of the Court, which is to do effective justice. . . .⁷²

64. *Sonneborn Bros. v. Cureton*, 262 U.S. 506 (1923).

65. Brandeis-Frankfurter conversations, BICKEL, *op. cit. supra* note 46, at 113.

66. Letter From WHT to Charles D. Hilles, June 9, 1925, MASON, *THE SUPREME COURT FROM TAFT TO WARREN* 58 (1958).

67. *UMW v. Coronado Coal Co.*, 259 U.S. 344 (1921).

68. *Sonneborn Bros. v. Cureton*, 262 U.S. 506 (1923).

69. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1921).

70. Letter From WHT to L. D. Brandeis, Nov. 19, 1926. The cases were *Risty v. Chicago, Minneapolis, & St. Paul Ry.*, 270 U.S. 378 (1925); *Reading Co. v. Koons*, 271 U.S. 58 (1925); *Chicago, Rock Island & Pac. Ry. v. Murphy*, 271 U.S. 642 (1925).

71. *Burke v. Sanitary Dist. of Chicago*, 280 U.S. 585 (1924).

72. Letter From WHT to Pierce Butler, Jan. 7, 1929.

An unwavering adherent of Taft's teamwork policy, Butler felt that dissents were seldom justified. "They often do harm. For myself I say lead us not into temptation."⁷³ "You can always be sure there will be no 'kicking' or hesitation or mental reservation on my part," Butler assured the Chief Justice. "To me it is genuine pleasure to help—if I can at all—to lessen your load and to make the road we are traveling easy and pleasant."⁷⁴

For a while, Harlan Stone shared the Chief Justice's passion for harmony. "You know I am a team player and I should not have kicked over the traces if you had not accepted any of my views. . . . I have only been trying to be helpful in this way which I believe we should all be, in carrying on the difficult work of this Court."⁷⁵ Four years later, when Stone "kicked over the traces" and deserted the team, Taft was distressed. "I have not been greatly impressed," he commented sadly, "with Stone's judgment of men or things."⁷⁶

Happy working relations were not accidental. Taft went to great pains to establish *esprit de corps*. Seemingly trivial personal considerations—the sending of salmon to Justice Van Devanter,⁷⁷ the customary ride he gave Holmes and Brandeis after the Saturday conference,⁷⁸ the Christmas card that always went out to Justice McKenna—all such personal attention to highly dissimilar human beings contributed immeasurably to judicial teamwork. "I cannot tell you how your tender note of sympathy touches my heart and comforts me," Justice Clarke wrote in response to a letter of condolence when his sister died.⁷⁹ Genuine warmth pervades the letter sent Justice Sutherland in 1927 while the Judge was recovering from a breakdown: "We all love you, George, and we would all regard it as the greatest loss to the country to have you become discouraged over your work, and we realize of what great importance it is to the country that you should be restored to your working capacity."⁸⁰ When Justice Holmes's ninety-year-old wife died, Taft immediately made arrangements for the funeral at Arlington Cemetery. Holmes was eternally grateful. "How can one help loving a man with such a kind heart?" he wrote.⁸¹

Taft's capacity for bearing more than his fair share of the Court's load re-enforced the magnetism of his personality. Reviewing cer-

73. Memorandum From P. Butler to WHT, May 19, 1928.

74. Letter From P. Butler to WHT, April 11, 1923.

75. Letter From H. F. Stone to WHT, Dec. 7, 1925.

76. Letter From WHT to B. A. Taft, Feb. 2, 1929.

77. Letter From Willis Van Devanter, to WHT, Aug. 27, 1923.

78. Letter From WHT to Helen H. Taft, April 13, 1924.

79. Letter From J. H. Clarke to WHT, March 7, 1922.

80. Letter From WHT to George Sutherland, Oct. 3, 1927, PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE 154 (1951).

81. Letter From O. W. Holmes to H. Laski, June 15, 1929, II HOLMES-LASKI LETTERS, 1158 (1953).

tioraris is the Chief Justice's primary responsibility. Though they were eventually read by all the members, Taft had to prepare a memorandum on each certiorari, stating the grounds for and against granting it.⁸² This function could not be delegated. Nor could he spare himself in taking cases which generated little enthusiasm. "As Chief Justice," Stone recalled, Taft "was extremely generous in the assignment of cases, often keeping for himself some of the least desirable ones in order to treat his brethren fairly."⁸³ Patent cases ranked high among those to be shunned—"just like a dead pull," Taft described them.⁸⁴ Patent cases were unappealing not only because the subject matter was technical but also because of the voluminous records. Once he had plunged in, he usually found patent litigation to his liking.^{84a} But much spadework was necessary before he could grasp the issues and master the vocabulary.⁸⁵ In one case the record was so lengthy that Taft had to spend three days reading it.⁸⁶ In another it took an entire week to write an opinion and even then he was not "entirely satisfied with it."⁸⁷

Justice Clarke shared patent-case assignments.⁸⁸ His resignation left only McKenna with a liking for them. By 1924, however, McKenna could not "dispose of any case with a big record and complicated facts or questions of law." "That," said Taft "throws the matter on me."⁸⁹ The Chief Justice's hope that Justice Sanford could be trained to take over was disappointed.⁹⁰ Five years after Sanford's appointment Taft found himself loaded with a patent case so complicated that his colleagues had taken the extraordinary step of not voting, leaving its disposition wholly to the Chief Justice's discretion. "We very rarely do such a thing as this in our Court," he explained, "but the character of the case is such, with the length of the record, that it is difficult to do otherwise. It is a very common thing in most Supreme Courts to refer a case to one Judge and let him work it out. We never, or certainly very rarely, do that."⁹¹

Because of his expertise in tax and rate litigation, Brandeis, as opinion writer, was a special source of gratification. Taft turned to

82. Letter From Harry A. Hollzer, Feb. 14, 1928.

83. Letter From H. F. Stone to Marshall and Lauson Stone, Nov. 24, 1939, MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 316 (1956).

84. Letter From WHT to H. D. Taft, Feb. 1, 1923.

84a. On the Sixth Circuit, Taft's patent opinions had been "generally accepted as guides along the right road." Judge Arthur C. Denison, 285 U.S. xiii (1931).

85. Letter From WHT to R. A. Taft, March 25, 1926.

86. Letter From WHT to H. D. Taft, Feb. 1, 1923.

87. Letter From WHT to R. A. Taft, Dec. 18, 1927.

88. Letter From WHT to P. Butler, Dec. 5, 1922.

89. Letter From WHT to R. A. Taft, Jan. 27, 1924.

90. Letter From WHT to Charles P. Taft, Feb. 18, 1923.

91. Letter From WHT to R. A. Taft, March 25, 1928.

him with confidence. In the October, 1922 term, Brandeis wrestled long and hard with a number of North Carolina Railroad Tax cases.⁹² "I have tried to be gentle with you on account of them," Taft wrote.⁹³ He had little choice, since no one else could be expected to do a competent job. "Admirable, compact, forcible, and clear," Taft said of the completed opinion. "It relieves me greatly to get rid of such a case so satisfactorily."⁹⁴

In May 1923 the Chief Justice was searching for a way to prevent *Hill v. Wallace* from becoming "an uncomfortable precedent." At one point the Court voted 5 to 4 against sustaining the Future Trading Act as a regulation of interstate commerce. Later, by vote of 5 to 3, Justice Brandeis not voting, its validity was upheld. Brandeis suggested that the tax imposed under the act was "in effect a penalty, because prohibitive and intended to stop. . . ." Accepting the suggestion, Taft wrote: "I shall try and add something to the opinion of that sort so as to relieve us from embarrassment in the future."⁹⁵ An "uncomfortable precedent" was finally avoided by invoking the *Child Labor Tax* case, which, as Taft said, "completely covers this case." The details of administration and the penalties imposed for violations made it impossible "to escape the conviction . . . that it was enacted for the purpose of regulating the conduct of boards of trade through supervision of the Secretary of Agriculture and use of an administrative tribunal consisting of that Secretary, the Secretary of Commerce, and the Attorney General."⁹⁶ Justice Brandeis agreed that the Future Trading Act was unconstitutional for the reasons assigned, but doubted whether the plaintiffs were in a position to require the Court to pass on the constitutional issue.

Justice McReynolds claimed expert knowledge in admiralty law—"the boss in Admiralty," Holmes called him, adding that "he has carried through a series of decisions that I don't believe in at all."⁹⁷ Taft recognized that McReynolds had "a great deal of experience in admiralty law," but shared Holmes's skepticism. "I don't know how deep it is. Perhaps he is more familiar with the constitutional features of that branch of our jurisdiction than he is with the everyday details and questions arising."⁹⁸ Despite Taft's misgivings, he tended to assign cases of this genre to McReynolds.

Taft usually assigned land claim cases and Indian litigation to

92. *Southern Ry. v. Watts*, 260 U.S. 519 (1923).

93. Letter From WHT to L. D. Brandeis, Dec. 18, 1922.

94. BICKEL, *op. cit. supra* note 46, at 204.

95. Letter From WHT to L. D. Brandeis, May 18, 1923.

96. *Hill v. Wallace*, 259 U.S. 44, 66 (1922).

97. Letter From O. W. Holmes to H. Laski, Feb. 22, 1929, II HOLMES-LASKI LETTERS 1035 (1953).

98. Letter From WHT to P. Butler, Dec. 5, 1922.

the former Chief Justice of Wyoming, Willis Van Devanter.⁹⁹ Justice Sutherland of Utah, well grounded in the complicated and technical law involving boundary lines, water rights, and irrigation projects, usually received the lion's share in these fields, especially if they came from the Far West.¹⁰⁰

Ability to gauge the capacities of his colleagues contributed greatly to Taft's success in the assignment of opinions. Apart from his "radical" views, Holmes was a source of much satisfaction. The old man was really "a great feature" of the Court.¹⁰¹ In the assignment of opinions, however, Holmes's age made heavy demands on Taft's customary tact. Once the Chief Justice telephoned to ask whether "a case that he proposed to assign . . . would be too troublesome." Considerably annoyed, Holmes commented: "if he spared me in that way I ought to leave."¹⁰² When Mrs. Holmes died, Taft assigned Holmes a larger number of cases, hoping that the extra load would help take his mind off her passing. Lighter assignments did, in fact, go to Holmes, but Brandeis assured him that the "C.J." did not give him easy ones in consideration of his age.¹⁰³ "Of course I don't give him the cases that have very heavy records and that require a great deal of work in reading them," Taft explained, "but I give him important cases and try to give him cases that he likes."¹⁰⁴ The rapidity with which the eighty-five-year-old judge turned out opinions caused continual wonder. "The only thing that tries him," the Chief Justice observed, "is not to be able to announce the opinion assigned to him on one Saturday night on a week from the following Monday."¹⁰⁵

Assignments to Holmes were simple compared with the difficulties encountered with some others. McKenna was "so unsatisfactory in his opinions that [Taft had] to select the simplest . . . in order that he may not work damage to the Court."¹⁰⁶ Sutherland was a "very strong man," but he had to drive himself unmercifully to get his opinions out,¹⁰⁷ thus preventing Taft from giving him any considerable number. In 1924 he felt constrained from pressing Pierce Butler and Edward Sanford until they became accustomed to "quick

99. Letter From WHT to Joseph H. Jones, Feb. 4, 1926; Letter From WHT to W. L. Phelps, May 30, 1927.

100. II PRINGLE, *op. cit. supra* note 44, at 1027.

101. Letter From WHT to R. A. Taft, May 3, 1925.

102. Letter From O. W. Holmes to H. Laski, Dec. 17, 1925, I HOLMES-LASKI LETTERS 806 (1953).

103. Letter From Holmes to Laski, April 25, 1927. *Id.* at 938.

104. Letter From WHT to R. A. Taft, May 3, 1925.

105. *Ibid.*

106. Letter From WHT to Helen H. Taft, April 28, 1924.

107. Letter From WHT to R. A. Taft, May 3, 1925.

disposition" of their assigned cases.¹⁰⁸

Van Devanter presented a unique problem. Though the "strongest man on the Court" and indispensable in conference, the Associate Justice was "opinion-shy." He was, moreover, a perfectionist, "never content to let an opinion go until he has polished it and worked on it until it is a gem. But he is only able to get out a few opinions during the year on that account."¹⁰⁹ The Chief Justice took every possible step to relieve him.¹¹⁰ Once when Van Devanter, near collapse due to his backlog of cases, posed "a nerve straining situation," the Chief Justice told brother Horace: ". . . we have all got to unite to help him out."¹¹¹ The extra load usually fell on Taft himself. During the eight full terms of the Taft regime, Van Devanter wrote a total of only ninety-one opinions for the Court compared with Taft's two hundred and forty-nine.^{111a}

Physical breakdowns often required the Chief Justice to reassign opinions, a task calling for the utmost tact. Sanford, though often lagging behind, created no trouble. Van Devanter, on the other hand, became "very sensitive, cross and unreasonable."¹¹²

He does not write [Taft explained] and yet he hates to have any comment made or action taken in respect to the matter. I turned over two of his cases to Brandeis but B. though[t] Van would cherish resentment against him. So I had to take Van's cases myself and turn over some of mine to Brandeis. I told Brandeis that the experiences of a Chief Justice were those of an impresario with his company of artists.¹¹³

Van Devanter was also upset by the reassignment of *Fiske v. Kansas*¹¹⁴ to Sanford. The shift seemed reasonable, since Sanford was at work on a number of opinions in other syndicalism cases. It would have been an easy matter to take over the *Kansas* case.¹¹⁵ Yet Van Devanter voiced strong protest, insisting that Sanford had shown "some weakness on the subject." Reassignment should be delayed, he thought, until Sanford had written opinions in similar cases already assigned him.¹¹⁶

Taft himself was well aware of those among "his company of artists" who might show "some weakness." Reassignment did not correspond to a game of chance, nor did it always mean a second

108. Letter From WHT to Helen H. Taft, April 28, 1924.

109. Letter From WHT to R. A. Taft, May 3, 1925.

110. Letter From WHT to Helen H. Taft, April 28, 1924.

111. Letter From WHT to H. D. Taft, Jan. 17, 1927.

111a. The count varies slightly, depending on how the record is compiled.

112. Letter From WHT to Helen H. Taft, May 3, 1927.

113. *Ibid.*

114. *Fiske v. Kansas*, 274 U.S. 380 (1926).

115. Letter From WHT to Edward T. Sanford, Jan. 26, 1927.

116. Letter From W. Van Devanter to WHT, ca. June 1927.

opportunity to tighten the bonds of judicial friendship. Although necessitated by uncontrollable factors, reassignment afforded Taft another opportunity to promote what he deemed the Court's best interests. In the summer of 1926 Taft concluded that it was beyond his strength to consider the long, heavy *Chemical Foundation* case.¹¹⁷ He selected Pierce Butler to take it. "Pierce is young and strong," the Chief Justice explained, "able and willing, and I thought I would trespass on him." But there was a more compelling reason. "He is the only one to whom I can properly give it. He was appointed by Harding and not by Wilson, and I rather think we ought to have somebody other than an appointee of Wilson to consider and decide the case."¹¹⁸ Safe and sound Justice Butler, not the less dependable Brandeis, got the reassignment. In another instance Taft reassigned two cases from Van Devanter to Holmes, who had originally voted with the majority in both cases.¹¹⁹ Much to the Chief Justice's surprise, Holmes returned both cases, stating that he could not write the opinions. "In other words," Taft told Butler, "I think he is going to vote the other way. As a consequence, I shall have to assign it to a more solid person, and you are it."¹²⁰

When the need for reassignments arose, Taft often found he had a narrow choice of potential assignees. In the spring of 1929 he was casting about for work horses to take on extra cases. To his chagrin he discovered that Brandeis was busy filing a great dissenting opinion in an interstate commerce case,¹²¹ running forty-five pages, compared with the majority opinion of only eight. Patience tried, the Chief Justice noted that this had delayed "getting rid of 5 cases that he had assigned to him, but now that he has got rid of this, I hope he may get through . . . so that he can leave a clean list."¹²² At least one goal—a clear docket, for which Taft vigorously employed his assignment power—would be reached.

Near the end the Chief Justice was forced to relieve himself of burdens he knew were his. Shortly before he resigned, he turned over to Sanford a patent case. "I thought I ought to take it myself; but the truth is that I have been sick for nearly a month and I haven't been able to do any work."¹²³

Illness was not the only cause for reshuffling. If the judge to whom an opinion had been initially assigned failed to enlist the

117. Letter From WHT to W. Van Devanter, July 9, 1926.

118. *Ibid.*

119. *Davis v. Kentucky*, 274 U.S. 76 (1926).

120. Letter From WHT to P. Butler, Jan. 28, 1927.

121. *St. Louis & O'Fallon R.R. v. United States*, 279 U.S. 461 (1929).

122. Letter From WHT to C. P. Taft II, May 12, 1929.

123. Letter From WHT to E. T. Sanford, July 4, 1929, II PRINGLE, *op. cit. supra* note 44, at 1077.

largest possible support, Taft reserved the right to reassign it. In 1924 McReynolds had been assigned an important case under the Transportation Act of 1920.¹²⁴ Brandeis could not endorse McReynolds's opinion because it would "bother us in the future."¹²⁵ Although Van Devanter persuaded McReynolds to change it, the revisions still did not satisfy Brandeis. Thereupon, "the Chief took over . . . and put out what is now the Court's opinion."¹²⁶ Holmes found Taft's revised opinion "so powerfully put" that he decided to change his vote and join the majority.¹²⁷ The Chief Justice was elated. Brandeis "came over, saying that he too would shut his mouth."¹²⁸ "I suppressed my dissent," Brandeis commented, "because after all, it's merely a question of statutory construction and the worst things were removed by the Chief."¹²⁹ McReynolds was furious. Threatening to retire, he vowed he would file his old opinion. The only effect was a burst of laughter from Van Devanter.¹³⁰ Within two days the irascible Justice capitulated.¹³¹ Taft could barely restrain his sense of triumph. "By writing it anew," he gloated, "I brought Brandeis and Holmes over."¹³²

Taft used his assignment power to promote unanimous or near-unanimous opinions. Obsessed by fear of dissents, he especially hated "an exactly divided Court" merely affirming the judgment below.¹³³ "The chief duty of a court of last resort," he wrote, "is not to dispose of the case but to elaborate the principles, the importance of which justify the bringing of the case here at all, to make the discussion of those principles and the conclusion reached useful to the country and to the Bar in clarifying doubtful questions of constitutional law and fundamental law."¹³⁴ To achieve this, the Chief Justice must round up a convincing majority. In his early years Taft was successful. Holmes and Brandeis's concurrence in the *American Steel Foundries* case¹³⁵ prompted Max Pam to write: "I think it marks the beginning of one of the greatest achievements to be had in the Court under your leadership, and that is to win, and if possible continue, unanimity in the Court."¹³⁶ The subsequent defection of

124. *Railroad Comm'n v. Southern Pacific Co.*, 264 U.S. 331 (1924).

125. Brandeis-Frankfurter conversations, BICKEL, *op. cit. supra* note 46, at 209.

126. *Id.* at 209-210.

127. Letter From WHT to Helen H. Taft, April 5, 1925.

128. *Ibid.*

129. Brandeis-Frankfurter conversations, BICKEL, *op. cit. supra* note 46, at 210.

130. Letter From WHT to Helen H. Taft, April 3, 1925.

131. Letter From WHT to Helen H. Taft, April 5, 1924.

132. Letter From WHT to Helen H. Taft, April 3, 1924.

133. Letter From WHT to R. A. Taft, Dec. 26, 1926.

134. Letter From WHT to C. P. Taft II, Nov. 1, 1925.

135. *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921).

136. Letter From Max Pam to WHT, Dec. 16, 1921.

Holmes, Brandeis, and Stone marred the bright prospects envisioned in 1921. With rare exceptions, a solid core held "steady in the boat." Van Devanter and Butler were joined by that "real good fellow,"¹³⁷ George Sutherland. For a while Taft could turn to Mahlon Pitney for advice.¹³⁸ Justice McKenna, though "never . . . a very strong Judge,"¹³⁹ was "a good fellow and a good man, a man of high principles, somewhat narrow in view."¹⁴⁰ With the help of these Associates, Taft sought to achieve efficiency, unanimity, and harmonious relations.

OBSTACLES TO TEAMWORK

Taft did not always succeed in his drive to "mass the Court." Impaired health of some of his Associates and his own declining physical strength constantly threw monkey wrenches in his path. Personal idiosyncrasies also contributed to the growing disharmony, the break finally taking the form of bitter dissents. During Taft's last years at the helm these came fast and furious.

The physical deterioration of several colleagues continually plagued the Taft Court. In 1922 Holmes was suffering from asthma and the Chief Justice suspected it was of a "cardiac character."¹⁴¹ Pitney, with a breakdown, and Day, suffering from the grippe, were "weak members of the Court to whom [Taft could] not assign cases."¹⁴² The Court's senior member, Joseph McKenna, posed the most delicate problem. Appointed by President McKinley, he was seventy-eight years old and failing. "In case after case he will write an opinion," Taft commented, "and bring it into conference, and it will meet objection because he has missed a point in one case, or, as in one instance, he wrote an opinion deciding the case one way when there had been a unanimous vote the other, including his own."¹⁴³ In 1924 the senile judge completely missed the main point in the case assigned him. "It seems to me, with deference," Taft wrote, "that you have not stated the real point of the case as agreed upon in Conference."¹⁴⁴ Assisted by a statement from the Chief Justice covering the central issue, McKenna tried again. "It seems to me, with deference," the despairing Chief repeated, "that you still miss the point in your opinion upon which the Conference determined that this case should turn."¹⁴⁵

137. Letter From WHT to R. A. Taft, May 24, 1925.

138. Letter From WHT to Mahlon Pitney, March 31, 1922.

139. Letter From WHT to Helen Taft Manning, March 2, 1924.

140. Letter From WHT to H. D. Taft, Nov. 2, 1923.

141. Letter From WHT to H. D. Taft, April 17, 1922.

142. *Ibid.*

143. *Ibid.*

144. Letter From WHT to Joseph McKenna, May 9, 1924.

145. Letter From WHT to J. McKenna, May 23, 1924.

As Senior Associate Justice, McKenna ran the Court during the Chief Justice's absence. In May 1923 Taft was ill and missed a conference. "I had all my cases prepared in typewriting," he explained to former Justice Clarke, "and sent them to brother McKenna to use, but he preferred not to read them at all, and the Conference did not amount to much, so that we had to do most of it over again the next week."¹⁴⁶ At the end of the term Taft was at his wit's end, complaining to his daughter: "He [McKenna] is an Irishman . . . and makes up his mind now on the impressionistic principle. He is a Cubist on the bench, and Cubists are not safe on the bench."¹⁴⁷

Cubist McKenna had yet to perform the *coup de grace*, circulating an opinion which left the Chief Justice in doubt as to its identity. McKenna's "language is as fog," the baffled Chief commented. "He does not know what he means himself. Certainly no one else does. I try to give him the easiest cases but nothing is too easy for him."¹⁴⁸

McKenna interpreted polite criticisms as thinly veiled attempts to force him off the bench. "He is exceedingly sensitive," the Chief Justice noted, "and loses his temper and at times creates little scenes in the Conference."¹⁴⁹ In the final conference, June 1924, "McKenna, just in order to show that there was life left in him, printed a dissenting opinion in which he differed from the entire Court and made a lot of remarks that seemed to me to be quite inapt and almost ridiculous."

The situation was critical, for, as Taft said, "McKenna's vote may change the judgment of the Court on important issues, and it is too bad to have a man like that decide when he is not able to grasp the point, or give a wise and deliberate consideration of it."¹⁵⁰ "I don't know exactly what we are going to do."¹⁵¹ A partial solution was found November 10, 1924, when, after a meeting at Taft's house, it was agreed not to decide cases in which McKenna's vote was crucial.

The long-run cure was to persuade McKenna to resign, but this was much easier said than done. McKenna's firm conviction that "when a man retires, he disappears and nobody cares for him," made him balk.¹⁵² By the end of 1923 Taft's patience had worn thin. "If he [McKenna] doesn't show some intention of withdrawing," Taft

146. Letter From WHT to J. H. Clarke, May 3, 1923.

147. Letter From WHT to Helen Taft Manning, June 11, 1923, II PRINGLE, *op. cit. supra* note 44, at 969.

148. Letter From WHT to Helen H. Taft, May 8, 1924.

149. Letter From WHT to H. D. Taft, Nov. 2, 1923.

150. Letter From WHT to H. D. Taft, April 17, 1922.

151. Letter From WHT to Helen Taft Manning, March 2, 1925.

152. Letter From WHT to C. D. Hilles, Sept. 9, 1922, II PRINGLE, *op. cit. supra* note 44, at 1059.

wrote brother Horace early in the 1923 term, "we may before the end of the year have to adopt some united action in bringing to bear influence upon him. Of course that will fall on me as the spokesman, and is not a pleasant duty to look forward to, because I shall never be forgiven."¹⁵³ In the spring of 1924 the Chief Justice made an unsuccessful attempt to persuade McKenna to retire. Holmes refused to give his assent, disliking, Taft explained, "to agree tho' he agrees it ought to be done." Older than McKenna, Holmes might have suspected that once his junior colleague retired, the next move might well be aimed at him. Taft thought Brandeis refused "because . . . he would like to have a Democratic President appoint."¹⁵⁴

Taft pushed on. He and Van Devanter consulted McKenna's physician, who confirmed the judge's incompetence. The Associates finally authorized the Chief Justice to confer with the ailing Justice. Despite Taft's extremely tactful approach, McKenna refused to cooperate, but he finally agreed that the Court's opinion must control. Taft "told him how deeply regretful all the members of the Court were, how deeply they loved him, how chivalrous they found him, how tender of the feelings of others he always was, and how peculiarly trying it was, therefore, to act in the present instance from a personal standpoint."¹⁵⁵ Painful duty disposed of, a farewell ceremony was arranged at the final Court session, and, as Taft said, "it was really quite impressive."¹⁵⁶

Another major obstacle to judicial teamwork was James C. McReynolds. Taft had never held the former Attorney General in high regard. Describing President Wilson's appointee as "too stiff-necked and too rambunctious," he predicted McReynolds would be "a weak man on the bench."¹⁵⁷ As a colleague, the Chief Justice complained that "McReynolds tries my patience."¹⁵⁸ He was, Taft said, "the greatest censor of the Court" and the most irresponsible.¹⁵⁹ "In the absence of McReynolds," the Chief Justice wrote in the spring of 1924, "everything went smoothly."

McReynolds was difficult, not because of his views, which usually did not differ basically from Taft's, but because of personal shortcomings. Though an "able man," he was "selfish to the last degree, . . . fuller of prejudice than any man I have ever known . . . one who delights in making others uncomfortable. He has no sense of duty.

153. Letter From WHT to H. D. Taft, Nov. 2, 1923.

154. Letter From WHT to Helen H. Taft, April 5, 1924.

155. Memorandum From WHT to Brethren, Nov. 10, 1924.

156. Letter From WHT to George W. Wickersham, Jan. 8, 1925.

157. II PRINGLE, *op. cit. supra* note 44, at 951.

158. Letter From WHT to R. A. Taft, Feb. 1, 1925.

159. Letter From WHT to R. A. Taft, April 20, 1924.

He is a continual grouch; and . . . really seems to have less of a loyal spirit to the Court than anybody."¹⁶⁰

McReynolds's barbs, usually aimed at Brandeis and Clarke, occasionally hit the Chief Justice. "I do not like your opinion in #206,"¹⁶¹ McReynolds commented bluntly. "I think . . . you can put the case in a much more condensed and lucid way. The opinion is hard for me to follow and is almost sure to produce confusion and add to our difficulty." "Of course," he added reassuringly, "I have no purpose to make even a mild row in public."¹⁶² McReynolds could not always be counted on to hold his fire. Of his performance in the *Carroll* case, Taft reported: "McReynolds delivered himself without reference to his written opinion" in a grandstand play to the galleries. Turning to the new member of the Court, Harlan Stone, Holmes remarked "that there were some people who could be most unmannerly in their dissenting opinions."¹⁶³

Strongly addicted to vacations, McReynolds took off more time "than any of the rest of us." In 1929 he cavalierly asked the Chief to announce the opinions assigned him, explaining that "an imperious voice has called me out of town. I don't think my sudden illness will prove fatal, but strange things some time happen around Thanksgiving."¹⁶⁴ Duck hunting season had opened and the judge was off to Maryland's Eastern "sho'" to fire away. In 1925 the "imperious voice" had called so suddenly that he had no opportunity to notify the Chief Justice of his departure. Taft was infuriated; he had wanted to deliver two important decisions, and McReynolds had made off before handing in a dissent in one of them, thereby holding up the Chief's opinion.¹⁶⁵ "He came back with few ducks," Taft reported tartly, and "the weather was icy."¹⁶⁶

For McReynolds the Court's *bête noire* was fellow Democrat Justice Brandeis. In 1922 Taft proposed that members of the Court accompany him to Philadelphia on a ceremonial occasion. "As you know," McReynolds responded, "I am not always to be found when there is a Hebrew abroad. Therefore my 'inability' to attend must not surprise you."¹⁶⁷ McReynolds even refused to sit next to Brandeis for the Court photograph. "The difficulty is with me and me alone," McReynolds wrote the Chief Justice in 1924. "I have absolutely

160. Letter From WHT to Helen Taft Manning, June 11, 1923, MURPHY, *In His Own Image*, 1961 SUP. CR. REV. 166.

161. *Railroad Comm'n v. Chicago B. & Q. R.R. Co.*, 257 U.S. 563 (1921).

162. Letter From J. C. McReynolds to WHT, ca. 1922.

163. Letter From WHT to R. A. Taft, March 8, 1925.

164. Letter From J. C. McReynolds to WHT, Nov. 23, 1929.

165. Letter From WHT to R. A. Taft, Feb. 1, 1925.

166. Letter From WHT to Helen H. Taft, Feb. 1, 1926.

167. Letter From J. C. McReynolds to WHT, ca. Feb., 1922.

refused to go through the bore of picture-taking again until there is a change in the Court and maybe not then."¹⁶⁸ The Chief Justice had to capitulate; no photograph was taken in 1924.¹⁶⁹

McReynolds's hates included Justice John H. Clarke. The Chief Justice suggested this explanation: "McReynolds has a masterful, domineering, inconsiderate and bitter nature. He had to do with Clarke's selection as district judge and felt, therefore, that Clarke, when he came into the Court, should follow him. And when Clarke, yielding to his natural bent, went often with Brandeis, McReynolds almost cut him."¹⁷⁰ Clarke once asked Taft to urge McReynolds to modify some of his harsh language, explaining: "I never deign—or dare—to make suggestions to McReynolds as to his opinions." Listing his proposed changes, Clarke concluded: "There are others but these are so glaring that they are respectfully submitted to the Head of the House."¹⁷¹ McReynolds's meanness emerged in all its dinginess when he refused to sign the joint letter sent Justice Clarke on his resignation. The Chief Justice, thoroughly annoyed, commented: "This is a fair sample of McReynolds's personal character and the difficulty of getting along with him."¹⁷² Taft let McReynolds's silence proclaim its spiteful message.

Taft's own opinion of Justice Clarke was not unqualified. "Clarke had certain predilections that injured much of his usefulness on the Bench. There were certain cases which came to him which he decided in advance. Even Holmes spoke to me of this."¹⁷³ "He really acted in the Court as if each case was something to vote on as he would vote on it in the Senate or House, rather than to decide as a judge."¹⁷⁴ Despite misgivings about his philosophy, Taft still considered Clarke a "good fellow."¹⁷⁵

Brandeis presented a somewhat different problem. Surface friendliness and a remarkable degree of give and take on both sides obscured Taft's deep-seated distrust. When Brandeis strayed, the Chief Justice tended to erupt, in later years with extreme vehemence. Brandeis's appointment to the Court had been for the ex-President "one of the deepest wounds that I have had as an American and a lover of the Constitution and a believer in progressive conservatism."¹⁷⁶

168. Letter From J. C. McReynolds to WHT, ca. March, 1924.

169. Letter From WHT to J. C. McReynolds, March 28, 1924.

170. Letter From WHT to Elihu Root, Sept. 13, 1922.

171. Letter From J. H. Clarke to WHT, n.d.

172. Letter From WHT to C. D. Hilles, Sept. 9, 1922.

173. *Ibid.*

174. Letter From WHT to E. Root, Sept. 13, 1922.

175. Letter From WHT to H. D. Taft, May 15, 1922.

176. Letter From WHT to G. Karger, Jan. 3, 1916, II PRINGLE, *op. cit. supra* note 44, at 952.

Taft retained an abiding suspicion. In 1924 there were widespread rumors that the Justice might be named Robert La Follette's running mate on the Progressive ticket. "I know enough about Brandeis," Taft commented to Max Pam, "to know that that [the Vice-Presidency] is the last position which he would accept, but his sympathies may be with La Follette, though I should not think he would go so far as La Follette with reference to the abolition of the power of the Court."¹⁷⁷

Taft's suspicions deepened when Brandeis refused to join in pressing Congress for enactment of a bill enabling the Court to limit its jurisdiction and thereby ease the pressure of increasingly heavy dockets. By the late fall of 1924, a clear majority of the judges had expressed their support. But Brandeis had "grave doubts whether the simple expedient of expanding our discretionary jurisdiction is the most effective or the safest method of securing the needed relief."¹⁷⁸ Though he did not approve the bill, Brandeis agreed that the Chief Justice had a mandate from the Court. "I am willing," Brandeis wrote, "that you should say that the Court approves the bill—without stating whether or not individual members approve it. For, in relation to proposed legislation directly affecting the Court, the Chief Justice, when supported by a clear majority, should be permitted to speak for it as a unit; and the difference of view among the members should not be made a matter of public discussion."¹⁷⁹

But this was not what the Chief Justice wanted. He sent a copy of Brandeis's reply to loyal teammate Willis Van Devanter with the indignant comment: "Because Walsh [Senator Thomas J. Walsh of Montana] is opposed to it, as he told me, because he [Brandeis] talked with Walsh, and because he always wishes to appear on the off side and a champion of the offsidiers, he declines to help us."¹⁸⁰ By mid-December 1924, the outlook for the bill had brightened and Taft was less inclined to arraign the dissenter. "He tries hard to be a good fellow," Taft commented magnanimously, "but he misses it every little while."¹⁸¹

Brandeis missed it again when the Chief Justice sought support for making the bankruptcy procedures in New York more efficient. A majority of the district and circuit judges in New York approved, but not Brandeis. "I am sorry to say," the Chief Justice wrote, "that, what so often occurs in dealing with our reformer Brandeis, he always finds some reason for interfering with the course necessary

177. Letter From WHT to M. Pam, Sept. 12, 1924.

178. Letter From L. D. Brandeis to WHT, Nov. 30, 1924.

179. *Ibid.*

180. Letter From WHT to W. Van Devanter, Dec. 1, 1924.

181. Letter From WHT to R. A. Taft, Dec. 14, 1924.

to accomplish real reform. Brandeis contents himself with saying that what we ought to do is to reform the whole educational system in law." Lashing out at Brandeis's motives, Taft concluded: "The truth is that when we make rules that interfere with the young Russian Jews [who composed the bulk of the bankruptcy petitioners] . . . we find him a real obstructionist."¹⁸² Taft thought, apparently, that Brandeis's action after 1925 was in violation of Canon 19 of the code of judicial ethics drawn up by a committee headed by the Chief Justice:

It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision. A judge should not yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.

Having returned to the "liberal principles" Clarke thought his colleague had abandoned in 1922, Brandeis incurred the Chief Justice's vehement ill will.

Taft feared that Brandeis's diabolical influence engulfed Justice Holmes. He was "so completely under the control of Brother Brandeis that it gives to Brandeis two votes instead of one." Holmes has "more interest in, and gives more attention to, his dissents than he does to the opinions for the Court, which are very short, and not very helpful."¹⁸³ The Chief Justice suspected Holmes's advanced years made "him a little more subordinate and yielding to Brandeis, who is his constant companion, than he would have been in his prime."¹⁸⁴ A "very poor constitutional lawyer," lacking "the experience of affairs in government that would keep him straight on constitutional questions,"¹⁸⁵ Holmes's "unsound" constitutional views were due in great part "to the influence which Brandeis has had on him."¹⁸⁶ If the Court had followed Holmes, "I don't think we would have had much of a Constitution to deal with."¹⁸⁷

Evidence of Brandeis's influence is scattered through the Holmes-Laski correspondence: "unless I let Brandeis egg me on to write a dissent in advance"; "on that day came down an opinion that stirred the innards of Brandeis and me and he spurred me to write a dissent";

182. Letter From WHT to C. P. Taft II, Nov. 3, 1929.

183. Letter From WHT to H. L. Stimson, May 13, 1928, II PRINGLE, *op. cit. supra* note 44, at 969-70.

184. Letter From WHT to Helen Taft Manning, June 11, 1923. *Id.* at 969.

185. Letter From WHT to C. P. Taft II, Mar. 7, 1926.

186. Letter From WHT to R. A. Taft, Mar. 7, 1926.

187. Letter From WHT to R. A. Taft, Mar. 4, 1928.

"When I can get calm I am catspawed by Brandeis to do another dissent on burning themes"; "Brandeis . . . reminded me of a case argued last term in which he said I should have to write a dissent"; "but meantime a dissent that the ever active Brandeis put upon my conscience waits untouched."^{187a}

The troubles stirred up by Taft's recalcitrant colleagues were accentuated by the Chief Justice's own physical disabilities. After his heart attack in April, 1924, Taft's impaired physical vigor forced him to curtail his working hours. The result was "a good deal of difficulty in keeping up." As Chief Justice, he felt compelled to be "a little ahead of all the rest."

I am conscious [he wrote his son Robert] that I am not doing the thorough work I used to do in the first three years, but it seems impossible for me to examine as minutely as I should the records in each case. The others have an advantage of me in that they are able to examine certain cases closely and then let the others go, because they are not subject to cross-examination on any case; and they can merely vote, so that I find myself constantly exposed to the humiliation of not discovering things in cases, especially in matters of jurisdiction which are very intricate and most exasperating.¹⁸⁸

The Chief Justice's lack of sure command at the conference table forced him to turn increasingly to Willis Van Devanter. The Montana Justice exercised "a good deal more influence than any other member of the Court, just because the members of the Court know his qualities. . . . His experience, his judicial statesmanship, his sense of proportion and his intimate familiarity with the precedents established by the Court" made Van Devanter a tower of strength.¹⁸⁹ On him fell the primary responsibility for "keeping the Court straight and consistent with itself." Declared the grateful Chief Justice: "His power of statement and his exactness and his immense memory for our cases make him an antagonist in the Conference who generally wins against opposition."¹⁹⁰ He was "the mainstay of the Court"—"my Chancellor," Taft called him. Even if Van Devanter wrote no opinions at all, "we could hardly get along without him," the Chief Justice declared.¹⁹¹

The honorific title "lord chancellor"¹⁹² seemed apt for Van Devanter, not only for the assistance he rendered in the conference but also

187a. KONEFSKY, *Holmes and Brandeis, Companions in Dissent*, 10 VAND. L. REV. 269, 270 (1957).

188. Letter From WHT to R. A. Taft, Jan. 25, 1925.

189. Letter From WHT to James Rowland Angell, Dec. 2, 1926.

190. Letter From W. L. Phelps, May 30, 1927.

191. Letter From WHT to R. A. Taft, Jan. 16, 1927.

192. FRANKFURTER, *OF LAW AND MEN* 129 (1956).

for the effective chain of command the Chief Justice was able to establish through him. Time and again Van Devanter played reconnaissance scout: "Justice Brandeis just telephoned asking for a talk this afternoon about the Keokuk Bridge tax case¹⁹³ and of course I told him to come along," Van Devanter wrote the Chief Justice. With this conference in the offing, "there may be a good prospect of putting the matter on its right foot."¹⁹⁴

Taft's memorandum opinions regularly went out to Van Devanter. Sending his opinion in the historic *Truax* case,¹⁹⁵ Taft wrote: "I have not sent this to the whole Court because I want to have the benefit of your suggestions and corrections before doing so." Taft told Van Devanter to "cut and slash," because "I found on looking into the case that it seemed necessary to take up the due process feature rather more than I had anticipated."¹⁹⁶

Forthright criticism from Van Devanter was not unusual. After reading Taft's opinion in *Wolff Packing Company v. Court of Industrial Relations*,¹⁹⁷ Van Devanter wrote: "Candidly, I think the opinion does not get off well or do what it is intended to do. It halts a tendency for the moment, but does not conduct us into or build a sound road for the future." Van Devanter, feeling the Court was incapable of handling the case "at the end of what has been rather a perplexing term," cautioned the Chief Justice: the case "presents a real opportunity, and the muddled state of pronouncements in its near vicinity emphasizes the need of a thoroughly considered and carefully prepared opinion. I almost feel like suggesting that you carry the case over. Would it not be well for you to take also the judgment of one or more among McReynolds, Sutherland and Butler?"¹⁹⁸ As in the *Wolff Packing* case, such effort sometimes resulted in unanimity.

After 1927, Van Devanter's health failed, and his effectiveness as conference leader declined. This loss, combined with Taft's own failing health, made the Chief Justice increasingly despondent. A little more than a year before he died, Taft complained: "The work of the Court is not so much in writing opinions as in getting ready for Conferences [which] grows heavier and heavier. I feel tired over it and suffer from a lack of quickness of comprehension, which has not heretofore troubled me much. The truth is that my mind does not work as well as it did, and I scatter."¹⁹⁹ "Still I must worry along

193. *Keokuk & Hamilton Bridge Co. v. Salem*, 258 U.S. 122 (1921).

194. Letter From W. Van Devanter to WHT, Feb. 9, 1922.

195. *Truax v. Corrigan*, 257 U.S. 312 (1921).

196. Letter From WHT to W. Van Devanter, Dec. 7, 1921.

197. *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923).

198. Letter From W. Van Devanter to WHT, ca. May 1923.

199. Letter From WHT to J. M. Dickinson, Dec. 12, 1928.

until I get to the end of my ten years, content to aid in the deliberations when there is a difference of opinion."²⁰⁰ "There was," Justice Stone recalled, "much more inclination to rush things through, especially if he thought he had the support of certain members of the Court."²⁰¹

When the Chief fell short of the goal, as he frequently did in his latter years, he placed the blame on a hard core of "knockers." "Three of the nine," he complained, "are pretty radical, and occasionally they get some of the other brethren, which is disquieting."²⁰² In 1922 dissenters were merely "disquieting"; by 1928 they had moved beyond the pale of both rationality and patriotism. "The three dissenters act on the principle that a decision of the whole Court by a majority is not a decision at all, and therefore they are not bound by the authority of the decision, which if followed out would leave the dissenters to be the only constitutional lawbreakers in the country."²⁰³ To the very end Taft could usually round up a safe majority on his side, leaving the minority in the posture of irreconcilables. "I would not think of opposing the views of my brethren," he commented somewhat self-righteously in 1927, "if there was a majority against my own."²⁰⁴ True to his word, Taft rarely dissented,^{204a} and he suppressed at least two hundred dissenting votes during his Chief Justiceship.^{204b} Explaining his position to Justice Clarke, he observed: "I don't approve of dissents generally, for I think in many cases where I differ from the majority, it is more important to stand by the Court and give its judgment weight than merely to record my individual dissent where it is better to have the law certain than to have it settled either way."

Evenly divided situations sometimes required calculated manipulations. In the *West Virginia gas case*,²⁰⁵ for example, Justice Day, who voted with Taft and Van Devanter in the majority, was about to retire. Realizing the case would have to be reargued, if not decided

200. Letter From WHT to R. A. Taft, Oct. 23, 1927, Murphy, *Marshalling the Court* 29 U. CH. L. REV. 640, 643.

201. Letter From H. F. Stone to John Bassett Moore, May 17, 1943, MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 790 (1956).

202. Letter From WHT to Sir Thomas White, Jan. 8, 1922.

203. Letter From WHT to H. L. Stimson, May 18, 1928.

204. Letter From WHT to L. Hand, Sept. 7, 1927.

204a. Hughes, 285 U.S. xxxiv (1931), fixes the number at 17, in only three of which did Taft write a dissenting opinion. A record of high output and a minimum of dissent had been established in the Sixth Circuit, where in eight years he wrote 200 opinions of the court, 4 separate opinions, and only 1 dissenting opinion.

204b. David J. Danelski, "The Influence of the Chief Justice in the Decisional Process of the Supreme Court," Unpublished Paper, Sept. 1963, p. 20 n.122.

205. *Bluefield Water Works and Improvement Co. v. Public Serv. Comm'n*, 258 U.S. 622 (1921).

before the resignation took effect, the Chief Justice wrote Van Devanter: "We ought to decide the West Virginia gas case before he [Day] goes off, because we need his vote. . . ."206 In the *Prohibition* cases, the Chief Justice invariably encountered trouble. "It would seem," Taft remarked, "as if more feeling could be engendered over the Prohibition Act than almost any other subject that we have in the Court unless it is the technical questions of jurisdiction."²⁰⁷ Once opposed to Prohibition, Taft as Chief Justice favored strict enforcement. Detesting the unavoidable dissension these cases aroused, he complained: "There are certain members of our Court who I dislike to say are becoming a bit raw in their opposition to the Volstead Act. There is something about the issue that seems to engender bitterness."²⁰⁸

In the October term of 1924, the prospect of unanimity in Prohibition cases was almost nil. Of the difficulties presented, often resulting in close margins, sometimes five to four, Taft wrote: It is "a good deal easier to write an opinion when the Court is all with you than where the distinctions are narrow, the record is badly made and some rather new principle is to be established against a vigorous opposition."²⁰⁹ Taft hoped to bring Justice Butler over by use of gentle persuasion. "I note what you say about Brother Butler," he wrote Van Devanter, "and shall try to steer [him] away from the suggestion that we are introducing any new law and new principle of constitutional construction, but are only adapting old principles and applying them to new conditions created by the change in national policy which the 18th Amendment requires."²¹⁰ Less than a week later Justice Brandeis, usually with the dregs, abandoned the majority. He had gone up to Harvard where, according to the disgusted Chief Justice, he "must have communed with Frankfurter and that crowd, and he came back with a notice to me that he was going to change his vote."²¹¹ Although Holmes, Van Devanter, Brandeis, and Sanford were usually "still steady in the boat,"²¹² the Chief Justice's "dear friends" Pierce Butler and George Sutherland tended to oppose him in Prohibition cases. Stone, a connoisseur of fine wines, presented a puzzle. Said Taft: "Stone wobbles a good deal on the

206. Letter From WHT to W. Van Devanter, Aug. 19, 1922.

207. Letter From WHT to C. P. Taft II, Dec. 28, 1924.

208. Letter From WHT to H. D. Taft, Dec. 12, 1926.

209. Letter From WHT to C. P. Taft II, Dec. 22, 1924.

210. Letter From WHT to W. Van Devanter, Dec. 23, 1924, II PRINGLE, *op. cit. supra* note 44, at 984.

211. Letter From WHT to H. D. Taft, Dec. 26, 1924, *Id.* at 971.

212. Letter From WHT to H. D. Taft, Dec. 12, 1926.

subject, and I don't quite see where he stands, and I am not quite sure that he does."²¹³

An entirely different situation arose in the historic Myers case²¹⁴—a “monument,” Taft called it. Failure to win unanimity for the sweeping dictum that the President's power to remove officials appointed by him is plenary stirred bitter feelings. After the conference, Taft issued an invitation to those “whose votes can be counted on” for a Sunday afternoon meeting at his house.²¹⁵ The Chief Justice invited Van Devanter, Sutherland, Butler, Sanford, and the new judge, Stone. “I don't know how the other three [Brandeis, Holmes, McReynolds] will stand,” he explained to Sanford, “but I want to get it [the opinion] into shape so that it will be ready for their careful consideration.”²¹⁶ At this preliminary meeting, six judges agreed on the conclusion. A majority assured, Taft thought it “well not to make any concession but to take the position that we have already taken.”²¹⁷

For Taft, the Myers case was a test of loyalty to the American system of government. A majority stood firmly with the Chief Justice,²¹⁸ though Stone seemed “a little bit fuzzy and captious in respect to form of statement, and [betrayed] in some degree a little of the legal school master.”²¹⁹ Taft's attack on Brandeis bordered on the irrational:

Brandeis puts himself where he naturally belongs. He is in favor evidently of the group system. He is opposed to a strong Executive. He loves the veto of the group upon effective legislation or effective administration. He loves the kicker, and is therefore in sympathy with the power of the Senate to prevent the Executive from removing obnoxious persons, because he always sympathizes with the obnoxious person. His ideals do not include effective and uniform administration unless he is the head. That of course is the attitude of the socialist till he and his fellow socialists of small number acquire absolute power, and then he believes in a unit administration with a vengeance.²²⁰

After receiving the dissenting opinions of Brandeis and McReynolds, the Chief relented: “I am old enough to know that the best way to get along with people is to restrain your impatience and consider that, doubtless, you have your own peculiarities that try other people.”²²¹ Aware that the Chief Justice abhorred long opinions, especially long

213. *Ibid.*

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

215. Letter From WHT to P. Butler, Nov. 7, 1925.

216. Letter From WHT to E. T. Sanford, Nov. 7, 1925.

217. Letter From WHT to W. Van Devanter, July 9, 1926.

218. Letter From WHT to H. D. Taft, Nov. 23, 1925.

219. *Ibid.*

220. *Ibid.*

221. Letter From WHT to R. A. Taft, Jan. 10, 1926.

dissents, Brandeis offered to pay the cost of printing his dissent out of his own pocket. "I think we can have too much economy in the matter of perfecting opinions [for publication]," Taft replied. "The appropriation for that purpose is large and ought to be."²²² Still he felt resentment. "I thought mine was pretty long," he wrote brother Horace, "but his is 41 pages, with an enormous number of fine-print notes, and with citations without number."²²³ "Brandeis can not avoid writing an opinion in a way in which he wishes to spread himself, as if he were writing an article for the Harvard Law Review. When that is not in his mind, he writes a very concise and a very satisfactory opinion, but his dissents are of a different character."²²⁴

Even the lapse of nearly a year failed to allay the bitterness aroused by these strange bedfellows in dissent. "McReynolds and Brandeis belong to a class of people that have no loyalty to the court and sacrifice almost everything to the gratification of their own publicity and wish to stir up dissatisfaction with the decision of the Court, if they don't happen to agree with it."²²⁵ Taft's castigation of McReynolds exceeded that against Brandeis: "The more agitation against [the Court] growing out of any opinion of his, the better he likes it, because it exalts in a way that tickles in him the spirit of opposition. His exhibition in the Court room was such as to disgust Holmes."²²⁶

The Chief Justice grew more and more impatient with differences. In *Olmstead v. United States*,²²⁷ Brandeis, after agreeing to limit discussion, explored the ethics of wiretapping. "Where we make a limitation we ought to stick to it," Taft said, "and I think anyone would have done so but the lawless member of our Court. Nevertheless, I think we might as well meet the issue as it is, and provide hereafter for making people shinny on their own side."²²⁸ Even Butler refused to stay in line; but Holmes, Brandeis, and Stone, not Butler, infuriated the Chief Justice. "They went on general principles completely unsustained by the great mass of precedent."²²⁹ Justice Holmes wrote "the nastiest opinion in dissent."²³⁰ "Holmes has no respect for Marshall, he exaggerates the power of Congress."²³¹ That

222. Letter from WHT to L. D. Brandeis, Jan. 4, 1926.

223. Letter From WHT to H. D. Taft, Jan. 5, 1926.

224. Letter From WHT to R. A. Taft, Oct. 24, 1926.

225. Letter From WHT to H. D. Taft, Oct. 27, 1926, II PRINGLE, *op. cit. supra* note 44, at 1025.

226. Letter From WHT to C. P. Taft II, Oct. 30, 1926.

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

228. Letter From WHT to E. T. Sanford, May 31, 1928.

229. Letter From WHT to H. D. Taft, June 8, 1928.

230. Letter From WHT to H. D. Taft, June 12, 1928.

231. Letter From WHT to H. D. Taft, June 8, 1928.

Holmes had abandoned ship at the crucial moment was even more galling. "The truth is," Taft charged, "Holmes voted the other way till Brandeis got after him and induced him to change on the ground that a state law in Washington forbade wiretapping."²³²

An ardent supporter of the thousands of law-enforcement officers responsible for the success of the National Prohibition Act, Taft saw the automobile as a new and powerful weapon in the hands of criminals. Agents of the underworld had seized upon new inventions, "and these idealist gentlemen urge a conclusion which facilitates the crime by their use and furnishes immunity from conviction by seeking to bring its use by government officers within the obstruction of the bill of rights and the 4th Amendment."²³³ The Court must follow "the old-time common-law practice . . . that if evidence is pertinent it is admissible however obtained."²³⁴

Stressing civil liberties, Brandeis had written:

In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.²³⁵

"It is rather trying," Taft complained, "to have to be held up as immoral by one who is full of tricks all the time. . . . But," the Chief Justice added, "he can become full of eloquent denunciation without great effort."²³⁶ Worse, Brandeis could obtain allies; he had kidnaped Holmes right out from under Taft's nose and had corrupted Justice Stone. Of the latter, the Chief Justice observed bitterly: "Stone has become subservient to Holmes and Brandeis. I am very much disappointed in him; he hungers for the applause of the law-school professors and the admirers of Holmes."²³⁷ Sharing Taft's wrath, Van Devanter predicted: "Every communist in the country and every sympathizer with communism naturally will be against the decision, and so will those who call themselves reformers but in truth are infected with communism."²³⁸

232. Letter From WHT to H. D. Taft, June 12, 1928.

233. *Ibid.*

234. *Ibid.*

235. *Olmstead v. United States*, 277 U.S. 438, 485 (1928).

236. Letter From WHT to H. D. Taft, June 8, 1928.

237. *Ibid.*

238. Letter From W. Van Devanter to WHT, June 16, 1928.

Excepting Butler, the dissenters in *Myers* and *Olmstead* were so hopeless that Taft could only roundly denounce them. In *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association of North America*,²³⁹ the line-up was marginal. Two of the four who voted against Taft's majority in conference wavered. They must be brought into line lest Brandeis's labor views gain the ascendancy. Taft had never seen Brandeis "in such a state of rejoicing after getting Sanford and Stone apparently into his army and into his plan of weakening the Court by boring from within."²⁴⁰ Effort must be exerted to "convince Sanford that he is very much out of plumb with respect to the Bedford Stone Company against the Stone Cutters' Union. . . . It seems to me," Taft explained,

that it is impossible to follow the reasoning in the *Loewe v. Lawler*, the *Hitchman Coal* case and the *Duplex* case, without reaching the conclusion that the use of such a combination to interfere with interstate trade and prevent interstate sales is an illegal restraint under the Anti-Trust law, and if we so hold we will be doing exactly what the Court has done since the questions have arisen, and that to take a different view is to side with Justice Brandeis, who has been against the Court on every decision of the Court on such issues.²⁴¹

Sanford was apparently unconvinced.

Stone might be more cooperative. "The continuity and weight of our opinions on important questions of law," Taft pleaded, "should not be broken any more than we can help by dissents. . . . There are some [presumably Holmes and Brandeis] who have deep convictions on the subject of the law governing relations between employer and employee. . . . It is to be expected that in their attitude of protest in the past they should find distinctions enabling them to continue their attitude in cases presenting what are substantially the same issues."²⁴²

In the campaign for Stone's vote,²⁴³ McReynolds came to the Chief's support. Bombarded, Stone promised to "go over the whole matter afresh."²⁴⁴ He seemed inclined to yield: "I, of course, appreciate the importance of avoiding dissents which do not seem necessary. . . . My vote should not be taken to have the finality which perhaps it appears to have."²⁴⁵ Thus encouraged, the Chief Justice

239. *Fiske v. Kansas*, 274 U.S. 380 (1926).

240. Letter From WHT to G. Sutherland, Jan. 25, 1927.

241. Letter From WHT to E. T. Sanford, Jan. 24, 1927.

242. Letter From WHT to H. F. Stone, Jan. 26, 1927, MASON, HARLAN FISKE *STONE: PILLAR OF THE LAW* 256-57 (1956).

243. Letter From J. C. McReynolds to H. F. Stone, n.d.

244. Letter From H. F. Stone to WHT, Jan. 26, 1927.

245. *Ibid.*

persisted. "I don't think we ought to let up in seeking to have them take the proper view," he had told Sutherland. "I am inclined to think that it is better not to have the case rushed through but to give time enough to let us discuss with these people carefully what the issues are—in other words, to let the matter grow cold and take it up again."²⁴⁶ Two months later, the case still under consideration, the Chief Justice advised Sutherland, the majority's spokesman: "I don't think you quite meet the second phase of Stone's difficulties. . . . I am anxious to meet what will trouble Stone, and I think, too, will trouble Sanford."²⁴⁷

Though Sanford and Stone concurred, Taft was far from satisfied. "We have an important labor opinion to deliver which Sutherland wrote, and in which Brandeis has written one of his meanest opinions," Taft commented in mid-April, 1927. "Holmes sides with him, and while Sanford and Stone concur in our opinion, they do it grudgingly, Stone with a kind of kickback that will make nobody happy."²⁴⁸

By 1927 Stone was definitely on the wrong team. In the same month the *Bedford* case came down, he told the Chief Justice of certain difficulties encountered in writing a memorandum opinion in *Fidelity National Bank and Trust Company v. Swope*.²⁴⁹ An article in the *Yale Law Journal* by Professor Edwin M. Borchard indicated the desirability of reopening the issue in *Liberty Warehouse v. Grannis*.²⁵⁰ Without Stone's knowledge, Borchard himself had sent the Court an apparently indiscreet letter urging such action. Suspecting a dark conspiracy, Taft told the former Columbia Law School dean how "Borchard has roused the indignation of the members of the Court at his method of attempting to induce the Court to reconsider or rehear the issue in which he is so much interested."²⁵¹ Belatedly aware of this unwitting coincidence, Stone tried to convince the Chief Justice that his suggestion "was entirely on my own initiative and for the reasons stated. It was not inspired by Borchard's letter, as I did not receive it until the day after I had sent my letter to you." Exhibiting independence Taft may not have suspected, Stone concluded: "I am more concerned with the thoroughness and scientific quality of our decisions and opinions than I am with the lack of propriety of others for whom we are not responsible."²⁵²

As his sense of balance and fair play declined, Taft became ever

246. Letter From WHT to G. Sutherland, Jan. 25, 1927.

247. Letter From WHT to G. Sutherland, March 11, 1927.

248. Letter From WHT to R. A. Taft, April 10, 1927.

249. *Fidelity Nat'l Bank v. Swope*, 274 U.S. 123 (1926).

250. *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70 (1926).

251. Letter From WHT to H. F. Stone, April 24, 1927.

252. Letter From H. F. Stone to WHT, April 25, 1927.

more rigid in his determination to have everyone endorse the opinion on his side. This effort had been frustrated, first by Clarke and McReynolds; later by Brandeis, Holmes, and Stone. Nevertheless, the Chief still hoped for harmony. On returning from his last summer vacation, he echoed the tolerance and optimism of early years: "They are all in a good frame of mind, and I hope that we shall not be very much disturbed by differences of opinion."²⁵³ By this time, however, the gulf was too wide to be spanned by a bridge built of tact, good humor, and the strategic application of pressure.

In December 1929 the Chief Justice was fatally stricken. Preoccupation with executive details, coupled with unwillingness to spare himself, contributed to his physical breakdown. From 1921 to 1930 the Court delivered fifteen hundred and ninety-six opinions. Of these Taft wrote two hundred and fifty-three for the Court, or one sixth of the total.²⁵⁴ Whenever his Associates became incapacitated, he felt obligated to assign himself a heavier load. In the fall of 1922 the Court was "shot to pieces." Justice Day, on the eve of retirement, had "been doing no work," Van Devanter had trouble with his eyes, and McReynolds suffered from the gout. Pitney was "ill at home," never to return; Clarke, depreciating the Court's work, wanted to quit.²⁵⁵ "Somebody has to do the work," as the Chief Justice said, so he assigned to himself two or three opinions more than to his colleagues.²⁵⁶ From 1921 to 1928 he wrote an average of 30.25 opinions per term, while his colleagues averaged only 20.25.²⁵⁷

In 1924 he was forced to halt this hard-driving pace. "The truth is that I have attempted to do too much, and I have got to be more moderate," he promised.²⁵⁸ This meant he was "not going to bother about the cases of others of the judges who have not kept up with their allotments." His resolution was more than justified: "I shall have written, I think, quite my share of the cases and if others don't keep up, I am not just now in a situation to join in relieving them."²⁵⁹ On this reduced schedule, Taft in 1924 wrote fewer opinions than he had the previous year, but four more than any other judge.²⁶⁰ The next year he complained: "It doesn't seem to me that I write as rapidly as I used to."²⁶¹ But he could still say that

253. Letter From WHT to C. P. Taft II, Oct. 13, 1929.

254. Attorney General William D. Mitchell, 285 U.S., xxiv (1931).

255. Letter From WHT to L. Hand, Nov. 9, 1922, II PRINGLE, *op. cit. supra* note 44, at 1057.

256. Letter From WHT to H. D. Taft, Nov. 14, 1922.

257. Letter From W. Stansbury to Robert Von Moschzisker, Dec. 23, 1929.

258. Letter From WHT to Clarence H. Kelsey, Feb. 14, 1924.

259. Letter From WHT to Helen H. Taft, May 4, 1924.

260. Letter From WHT to H. D. Taft, June 12, 1924.

261. Letter From WHT to R. A. Taft, Feb. 15, 1925, II PRINGLE, *op. cit. supra* note 44, at 1074.

"up to this time I have pulled my weight in the boat of the Court."²⁶² He did so, in part, by assigning himself difficult cases. In early January he had chosen to take "a very heavy case" which he thought "appropriate that I should handle, although it contains an enormous record."²⁶³ Later that same year he again made a serious effort to reduce his work load. He found the other judges "most considerate."²⁶⁴ At the "earnest insistence of Mr. Justice Holmes," he was persuaded to "cut down the distribution of certiorari from 50 to 30 a week."²⁶⁵ Holmes had long advocated a less hectic pace, but it was not until the Chief Justice himself felt it necessary to limit his activities that other members of the Court could expect relief.

CHIEF EXECUTIVE AS CHIEF JUSTICE

For Taft a kind of futility had encumbered the position of President.²⁶⁶ The work was onerous and frustrating; on the Court it was relatively easy, congenial, and rewarding. Things proceeded by "systematic routine, and at the end of the day you have the satisfaction of knowing that something tangible has been accomplished."²⁶⁷ Taft savored judicial leadership; for the most part he was free from the endless wrangles inseparable from the Presidency.

The highest executive office, requiring swift *ex parte* decisions, had been isolating and exhausting. On the bench, "you have the assistance of your colleagues, who share in the responsibility of the conclusions, the benefit of oral argument by counsel and of briefs submitted on both sides of the controversy."²⁶⁸ Work and responsibility were divided. The weighing of evidence, the fusion of reason and authority, the deliberative character of the judicial function were extremely satisfying. Steady and regular by nature, Taft strove to make the judicial process more so. It allowed "control of your time for careful study" and enabled one to "order life, if you do not overdo the social part." It is "consistent with long life, hard as the work is."²⁶⁹ Holmes believed that Taft had been "all the better Chief Justice for having been President."²⁷⁰

In a speech prepared shortly after the death of Chief Justice White, Taft expounded the requirements of the highest judicial office. "The

262. Letter From WHT to C. P. Taft II, March 27, 1925.

263. Letter From WHT to R. A. Taft, Jan. 8, 1926.

264. Letter From WHT to J. M. Dickinson, Aug. 21, 1926.

265. Letter From WHT to H. D. Taft, Oct. 21, 1926.

266. Tittle, *Glimpses of Interesting Americans*, 110 CENTURY 570 (1925).

267. *Ibid.*

268. WHT Interview With the Associated Press. N.Y. Times, July 7, 1927, p. 8.

269. *Ibid.*

270. II HOLMES-LASKI LETTERS, 848 (1953).

Chief Justice is the head of the Court, and while his vote counts but one in the nine, he is, if he be a man of strong and persuasive personality, abiding convictions, recognized learning and statesmanlike foresight, expected to promote teamwork by the Court, so as to give weight and solidarity to its opinions." A great Chief Justice, referring to both Marshall and White, "was winning in his way, strong in his responsibility for the Court, earnest in his desire to avoid divisions, and highly skilled in reconciling difficulties in the minds of his brethren."²⁷¹

As President, Taft possessed extensive power. But since he did not know, as T.R. said, the "joys of leadership," the experience had been frustrating.²⁷² "The Presidency," he said, "is the office that attracts in the sense of power one is supposed to exercise, and there are those who greatly enjoy its constant exercise."²⁷³ Taft was not among them. As Chief Justice, he wielded the kind of authority he thoroughly enjoyed. To realize it in full measure required definite goals and qualifications. Success demanded "leadership in the Conferences, in the statement of the cases, and especially with respect to applications for certiorari."²⁷⁴ It meant ability, through sheer force of personality, to "mass" the Court. "John Jay did not think much of the power of the Court," Taft recalled, "and so declined to exercise it; but times have changed."²⁷⁵ Justice Clarke's voluntary relinquishment of judicial power was puzzling. "You are 65 and leaving the bench," the Chief Justice commented. "I am 65 and have just begun. Perhaps it would have been better for me never to have come on to the Court, but I could not resist an itching for the only public service I love. Few men have laid down power as you are doing."²⁷⁶

Taft had brought to the Court a truly magisterial conception of the office and powers of the Chief Justice. Under him the incumbent was more than merely *primus inter pares*. Certain control was exercised not only over his colleagues but also over the entire third branch of government. Thanks to his effort, the formal powers of the Chief Justiceship were augmented. Nor was this all. No technical canon of judicial propriety prevented him from using his wide-ranging informal powers in what he considered the right direction.²⁷⁷ Enamored of "the executive principle," the need for "teamwork," a policy of "no dissent unless absolutely necessary," he set out to maximize the limited powers of the Chief Justice in a way that contrasts sharply

271. WHT typewritten manuscript, May, 1921.

272. FELIX FRANKFURTER REMINISCES 54 (1960).

273. Letter From WHT to J. H. Clarke, Sept. 5, 1922.

274. Letter From WHT to Frank H. Hiscock, Oct. 24, 1926.

275. Letter From WHT to John S. Seymour, Aug. 5, 1921.

276. Letter From WHT to J. H. Clarke, Sept. 5, 1922.

277. Compare the words of Judge A. C. Denison, 285 U.S. xiii (1931).

with his failure to exercise the actual powers of the Chief Executive. Although he had viewed presidential power narrowly, as being circumscribed by specific grants in the Constitution, he saw the Chief Justiceship in terms analogous to John Locke's "prerogative" theory of executive power. The President, Taft had written in 1916, has "no undefined residuum of power which he can exercise because it seems to him to be in the public interest."²⁷⁸ As Chief Justice, he tried to endow the office with executive prerogatives he had abjured as President.

Taft did not sit with the Court after January 6, 1930. His resignation on February 3 evoked from his colleagues a heart-warming appraisal, stressing the qualities that had made his years at the helm significant.

We call you Chief Justice still, for we can not quickly give up the title by which we have known you for all these later years and which you have made so dear to us. We can not let you leave us without trying to tell you how dear you have made it. You came to us from achievements in other fields, and with the prestige of the illustrious place that you lately had held, and you showed in a new form your voluminous capacity for work and for getting work done, your humor that smoothed the rough places, your golden heart that has brought you love from every side, and, most of all, from your brethren whose tasks you have made happy and light. . . .²⁷⁹

278. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 140 (1916).

279. 280 U.S. at v (1930).