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The Supreme Court and the Chief Justices

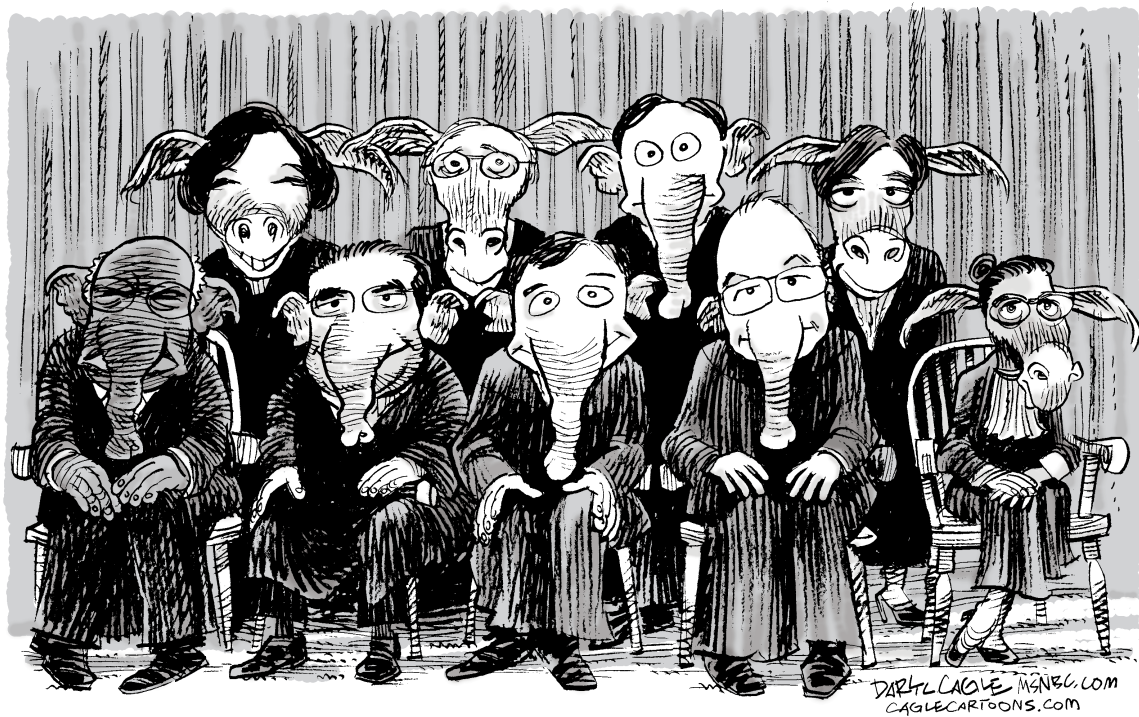
This is a splendid essay on the Supreme Court with comparisons between Chief Justice Taft and Chief Justice Roberts. Very often American history has been truncated, and is taught only as presidential history. The reality is that the court has often had more of an influence on American life than has the White House. It deserves more attention in the curriculum than it gets.

One lesson that we can learn is how we have been fortunate in the civility the court displays despite obvious profound differences in views. Either the justices come to genuinely like each other or are very careful to avoid public displays of hostility, because the collegiality they display is exceptional and in sharp contrast to recent behavior in the Congress.

The court does get some attention from educators. Every day of the week there are school buses parked near its columned building, unloading students who have come to Washington on class trips that include the court. One doubts if that happens anywhere else. Students in Mexico or Japan would be hard put to locate their highest court. The respect shown the court and the dignity with which it has carried itself through the centuries are remarkable. In truth there is not much exciting to see in comparison with the treasures of the Smithsonian. The museum in the basement tries to make legal history interesting, but it is an uphill task.

However, the Supreme Court's importance cannot be overstated. Chief Justice Taft was able to use his prestige as president in ways not available to Chief Justice Roberts, but Justice Roberts has already had his share of important constitutional cases that guarantee his place in history. This article is a resource that can be used to great effect in the classroom, bringing out the comparisons and similarities of two significant eras and two important chief justices.

Paul Rich
President, Policy Studies Organization



Separate but Interdependent: Will we see a return of the Taft Model to the Supreme Court?

Christi Scott Bartman, American Public University System

While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.¹

Justice Robert H. Jackson *Youngstown Sheet & Tube Co. v Sawyer*

Arguably, no one exemplifies this comment more so than Chief Justice William Howard Taft. Certainly Chief Justice Taft was in a unique position.² He was US Solicitor General from 1890-92, Secretary of War from 1904-8, President of the United States from 1908-1912 and Chief Justice from 1921-1930. It is only with this resume one would have the ability to write to newly elected President Coolidge stating, "In the strain of the campaign, you and Mrs. Coolidge have the warmest sympathy of Mrs. Taft and myself. The next two months will pass, but I remember that the same two months in 1908 were as hard to get through as any I ever experienced, and they seemed to be harder on Mrs. Taft than they were on me."³

But what of our current Chief Justice John G. Roberts, Jr.? He was confirmed as Chief Justice on September 29, 2005. Prior to coming to the Court, Chief Justice Roberts served as a special assistant to the US Attorney General and then as Associate Counsel to the President and Deputy Solicitor General before being appointed to the US Court of Appeals for the District of Columbia Circuit.⁴ I propose that, though the days of penning a letter to the President or Congress advocating an issue are over, Justice Roberts is not as far removed from the ideals promoted by Justice Taft as one might imagine.

William Howard Taft was confirmed as Chief Justice in June 1921 and served for nine years. Her Honor Sandra Day O'Connor wrote of his success, "When he took over the job, he found a federal system overwhelmed with cases, causing the Supreme Court's docket to be as much as five years behind and placing the other federal courts in similarly dire straits... He also founded the predecessor to the Judicial Conference of the United States, the job of which it became to keep statistics on the work of the federal courts and to suggest reforms to keep the federal system functioning smoothly."⁵

Almost immediately after taking the position, on January 17, 1922, Taft wrote to Senator Henry Cabot Lodge asking him to support putting George Pepper on the Judiciary Committee.⁶ Senator Lodge replied that he was in agreement on the suggestion of Pepper but that there was no current vacancy and that he was glad Taft had also written the chairman as he was, "Happily for myself, not a member of the Committee."⁷

In 1923 Chief Justice Taft became the first member of the Supreme Court to testify on the high court's budgetary needs before the congressional appropriations committee.⁸ This followed testimony in 1921 to the House and Senate Judiciary Committees on the number of district court judges and the creation of a conference of judges.⁹ In fact, he testified 12 times before committees other than appropriations and nominations.¹⁰ Other committees before which he testified included Military Affairs (House), Immigration and Naturalization (House), Claims (House) and Public Buildings and Grounds (House).¹¹ Rishikof and Perry concluded that testimony by federal judges was somewhat ad hoc, addressed pressing issues of the day, drew upon particular expertise of the individual and lent prestige to complex legislative debates.¹² They found that judges and legislators periodically discussed issues that blurred the line between judicial independence and autonomy. No one illustrates this finding better than Chief Justice Taft.

Alpheus Thomas Mason, in his chapter on Taft in *The Justices of the United States Supreme Court 1789-1969: Their Lives and Major Opinions*, commented that Taft "utilized and exploited an intricate web of personal relations. By 1926 Taft's influence with legislators seems presumptuous. Following the annual judicial conference, the Chief Justice, presenting his recommendations to Congress, simply called the chairman and the ranking member of the Judiciary Committee in to ask them to take up the subject and see if there could not be some plan devised."¹³ Mason also noted that Taft made every attempt to promote unanimous or near-unanimous consensus from the Court through his role of assignment of opinions as the Chief Justice.¹⁴ Robert Post also came to this conclusion noting that Taft thought it was part of his duty to suggest reforms and actively press them before Congress.¹⁵ Soon after appointment on October 5, 1921 Taft testified before the Senate Judiciary Committee, where he was determined to "exercise such influence as I have to help the judicial system of the country."¹⁶ Post concluded that Taft struggled with the tension between political elements on all sides of the separation of powers and judicial nonpartisanship, "[A]cting in ways that fell on different sides of what today might be regarded as obvious ethical boundaries."¹⁷

Even prior to his time on the Supreme Court, Taft was testifying before the House Committee on the Judiciary. In 1914, as the president of the American Bar Association (ABA), he addressed the committee on the matter of reforms in judicial procedure. He opened with a pleasant thank you for permission to appear before them and urged support of a bill that would enable the Supreme Court to adopt a model form of procedure to regulate pleadings, procedure and practice on the common law side of the courts.¹⁸ He set the stage for his future philosophy dealing with Congress when he stated, "I had a great deal of doubt about the wisdom of coming here, not because I do not have confidence in the judgment of this committee, but because when the bill reaches the consideration of a large popular body like the House or of the country, the fact that I favor the bill might lead a great many people to be against it, in the view that nothing good could come out of Nazareth. But, in the long run it is better to say what you think, no matter whether it helps or hurts at the time, with the hope that some time it may help and that

somebody may be influenced ultimately who can bring about the reform you recommend.”¹⁹

In fact, the American Bar Association has been a major actor in moving among the branches of government to promote change. As a previous president of the American Bar Association, it is not surprising to see Chief Justice Taft work closely with that organization on pending legislation. As an example, in a letter dated April 4, 1924 from Thomas Shelton, the chairman of the ABA Committee on Judicial Procedure, Shelton commented on a bill “designed to deprive the Federal judges o[f] the power to “sum up” and to instruct the verdict in proper cases.”²⁰ Shelton noted that the bill was going to pass the House “unless the most strenuous action is taken. I went against quite a number of my acquaintances in the House yesterday by taking a position in the cloak room and having them brought out.” He summarizes “I have almost lost my faith in Congress. As I said yesterday, the disposition is strong to sacrifice law and take up journalism in a way that would enable one to smoke these people out. I am trying not to let indignation get the better of common sense in the matter of the campaign before Congress.”²¹ Chief Justice Taft often seemed to be the one to bring the “common sense” to bear on the situation.

Earlier that year, Thomas Shelton wrote to Senator Cummins regarding, among other things, appearance of members of the Bar at a hearing to support two bills. Shelton suggested Cummins hold the hearings to coincide with the annual meeting of the American Law Institute. He further commented on, “The habit of the people, as well as of the judges and lawyers, to look to Chief Justice Taft. They have always held in pious reverence the great office of Chief Justice, but I think you will concede that Mr. Taft occupies a position peculiar to himself in the hearts of the people. The known cooperation between him and the statesmen of the Senate Committee would produce a friendly and confident feeling to and confidence in the necessary legislative that nothing else could achieve. It would solidify the Bench and Bar as to any change made...May I express the sincere hope that the Chief Justice will be formally requested to appear.”²² In response to hearing of this, Taft wrote to Senator Cummins to emphasize that Shelton did not speak for him on this matter. “I am strongly of the view, knowing what I do about your committee and the Senate, that it is a great deal wiser for you to depend on evidence of Judges McReynolds, Van Devanter and Sutherland than it is to have me appear in the attitude of urging bills. I think my view is generally known at any rate, and that it might injure the bill with those – of whom there are a number – who object to any activity on my part in matters of legislation.”²³

Taft demonstrated a good degree of judgment based on his extensive experience and appeared either in the limelight or remained in the background as necessary. He wrote to his son Bob on February 8, 1925, “We have brought about a great result, I hope. We have succeeded in getting through our long complicated bill for the simplification of our appellate procedure and that of the Court of Appeals, and into the hands of the President...Van Devanter, McReynolds and I spent two full

days at the Capitol, and Van and I one full day more in order to get the bill through. One has to see things done up there, if you expect to get them done.”²⁴ He further explained that Senator Cummins and Chairman Graham were helpful. “And then we had the assistance of Congressman Sumners of Texas, the leading Democrat on the Judiciary Committee...The only opposition was in the Senate by Walsh and some others, but we ameliorated that by one or two concessions that really did not amount to much. Considering the kind of Congress that we have here and its history, it certainly is good come out of Nazareth.”²⁵

During the 67th Congress Chief Justice Taft made a statement before the House Committee on the Judiciary discussing a version of a bill to add additional judges to US District Courts. In his usual style he started with a comfortable address to the members, stating “On the general subject I hope the committee will find no difficulty in perceiving the necessity of some action by Congress to relieve the Federal courts, not to relieve them so much as to relieve the litigants who are suffering very much by delay, chiefly from the fact that we have not judges enough.”²⁶ Taft concluded with an equally respectful “I am very much obliged to you gentlemen for giving me this opportunity at this hour, and I am quite ready to answer questions that may occur to the members of the committee.”²⁷ His demeanor and candor made him a welcome invitee to hearings.

Taft not only appeared before numerous committees, but he also advised others appearing as well. In January 1924, he cautioned Judge McReynolds who was about to appear before the sub-committee of the Judiciary Committee of the Senate. He explained the chairman, Senator Cummins, was anxious that the argument be presented as fully as possible. He suggested where McReynolds should put emphasis based on “my talk with Senator Cummins.”²⁸ Taft left nothing to chance when it came to an issue about which he was passionate. He worked the issue from all angles, both in open hearings and behind the scenes through meetings and letters.

We are fortunate to have those letters. They give us a glimpse of not only his waltz among the branches of government on issues that concerned the judiciary, but also exemplify his public response versus the open conversations with his family. On numerous occasions Taft responded to individuals who write asking for his opinion on a political matter. Normally his response was “I am on the Bench and can not take any part in politics.”²⁹ In fact, he noted in a letter to another individual “I have your letter of September 24th, in which you ask me to express my opinion in reference to the choice of candidates in the coming election. I do not expect to vote, and my understanding is that the Judges of the Supreme Court do not vote.”³⁰

He did not, however, hold back from discussing upcoming elections with his family. In a letter to his daughter Helen, he noted, “I am a good deal interested in several things in Congress, even though it has long outlived its usefulness. I am urging the passage of a bill which will enable our Court to catch up with its work, but Walsh of Montana and Shields of Tennessee have no patriotic purpose in what they do... Walsh is opposed to the Federal Judiciary at any rate and therefore he

does not wish to facilitate the dispatch of justice with them. For a narrow, vindictive, small-minded man, he has attained more reputation than he deserves.”³¹

On November 4, 1928 Taft wrote to his brother Horace. After discussing whether the Republicans would carry certain states, he ended with a comment about the politics of his daughter, “I am ashamed that a daughter of mine should be so lacking in foresight as to be earnestly hoping that Tammany will march into the White House, with all that that entails in obstruction to progress in this country.”³² Taft followed in a handwritten addition that he might regret that statement and that Helen needs “the cultivation of a wise sense of proportion.”³³ In 1928 he wrote to Helen, “The election has come and gone with entirely satisfactory results, and I hope will leave a free hand to Hoover, so that he can carry out the policies he has had in mind, including the strengthening of the Prohibition Act and the appointment of competent men to help him enforce it. The enormous victory increases the enormous burden that he assumes in going into the Presidency.”³⁴

When writing to his son, Bob Taft commented, “We are going to make an effort at this session of Congress to try and get our Supreme Court bill through. I don’t know whether we can do it, but the only way is to keep trying and after a while may induce some action. I asked the President to help us and he told me to write him something, which I did. I am afraid he won’t put in all I have written, but I can get him started, it will perhaps attract the support of the party members.”³⁵

Through the letters and testimony it is not hard to see the confident role Taft saw for himself, one of judicial independence but interdependence and reciprocity when it was necessary. It is not so easy with a sitting Chief Justice. We are not privy to the letters or emails of Chief Justice Roberts. By all appearances, he takes a more cautious approach to blurring the lines among the branches. That is not to say though, that many of the ideals espoused by Taft are not echoed today by Roberts. If we look at the first day of the hearing before the Senate Committee on the Judiciary for his nomination as Chief Justice, Roberts stated, “Mr. Chairman, I come before the committee with no agenda. I have no platform. Judges are not politicians who can promise to do certain things in exchange for votes.”³⁶ On day two, when asked by Senator Leahy about Presidential overstepping of the separation of powers, he responded, “I believe very strongly in the separation of powers. That was a very important principle that the Framers set forth that is very protective of our individual liberty. It makes sure the legislative branch legislates, the Executive executes, and the judicial branch decides the law.”³⁷

When asked by Senator Grassley whether he agrees that when the Congress is slow to act, it is the Court that should create the solutions, Justice Roberts replied that it is not the job of the Court to solve society’s problems. The Court’s role is to decide specific cases.³⁸ Finally, on day three of the confirmation hearings Senator Kohl asked about Justice Roberts’ views as head of the Judicial Conference. Justice Roberts notes that through his membership on the Advisory Committee on Appellate Rules he understands the process and that any need for legislative action

for the courts is addressed at that level.³⁹ But there is not as much difference as one might expect on the way they handle judicial business. For instance, as presiding Justice of the Judicial Conference which Taft was instrumental in forming, Roberts hosted the Attorney General (as was often the case with Taft) and Senators Leahy and Johanns and Representative Conyers, Jr. to speak on areas of interest to the Conference on September 17, 2013.⁴⁰ Besides the budget discussion, one of the Executive Committee actions was to approve a recommendation from the Committee on Court Administration and case management to seek legislation abolishing one of the southern districts of Mississippi. They also approved a recommendation from the Committee on Space and Facilities to process projects on the *Five-Year Courthouse Project Plan*.⁴¹ This is reminiscent of many of the priorities set by Taft, none more prominent than the building in which the Court currently sits!

Later in the confirmation hearings, when asked by Senator Graham what he could bring to the table as Chief Justice, more so than an Associate Justice, Justice Roberts replied, "Well, if I am confirmed, I think one of the things that the Chief Justice should have as a top priority is to try to bring about a greater degree of coherence and consensus in the opinions of the Court." He commented that it would be important to bring the Justices together if possible and if a separate concurrence could be brought into the majority with some accommodation it should be. "That is something that the priority should be, to speak as a Court."⁴² This echoes the feeling of Chief Justice Taft when he took the position. Although his term did not end with the harmony with which it started, both Taft and Roberts understood the need for the Court to speak as a body.

Responding to Senator Cornyn on day three Justice Roberts noted, "I've had many questions before this Committee about the importance of deferring to the legislature in areas in which Congress is given authority under the

Constitution. Well, as a judge, before I would propound the idea of right, that it does not matter what the issue is on the other side, I would like to know if a legislature had addressed that issue.... I do not think members of a legislative body would accept the principle that you would decide a case like that without even knowing what the legislature had enacted or what the issue was or why they had decided that this was an appropriate area of legislation. That is not deciding the controversy. It is just saying we need to have the issue narrowed in a way that courts are familiar with addressing."⁴³ So it seems Chief Justice Roberts is not shying away from promoting a better understanding of legislative intent, it is just very difficult with a sitting justice to see if he takes the additional steps Taft did to influence that legislation. By all accounts, having questioned the Supreme Court administrative staff and perused the Congressional hearings at the Library of Congress, I cannot say that he does. With the exception of budgetary and nominations input, I was unable to find any direct or indirect contact with Congress.

Although the Supreme Court website does not list any speech given by Chief Justice Roberts, he did recently appear before the American Bar Association. On August 11, 2014, he delivered an address on the importance of the *Magna Carta*. Within that talk, he noted that there was a hint of the principle of separation of powers and spoke to the dangers of concentrated authority. He noted that, in its early years, the *Magna Carta* was invoked in times of crisis and kindled the views of those who drafted our Constitution.⁴⁴ It defined limits on the exercise of power among other things. He noted that we live in an era of sharp partisan divides in political branches but the bench can bolster public confidence by exercising independent judgment. The bench relies on the Bar to help carry out that function. The judiciary also looks to the Bar to rise above partisan debates and participate as problem solvers. He challenged the Bar to help by explaining to the public the role that courts play, distinct from other political branches.⁴⁵

It seems the line is a little brighter than it was with Taft but no one since has had the pulpit, if you will, that William Howard Taft had coming into the office.⁴⁶ Have times changed? Yes. Have the lines between the branches become a little less blurry? Yes. Is Congress just as difficult to traverse? Yes. But are the ideals of bringing the best of the judicial branch, the executive branch, the legislative branch and the Bar together to improve the pursuit of justice still present? Let's hope so!

END NOTES

¹ *Youngstown Sheet & Tube Co. v Sawyer*, 343 US 579, 635 (1952) (Jackson, J., concurring). Cited in this context by Harvey Rishikof and Barbara A. Perry, *Federal Judicial Independence Symposium: Separateness but Interdependence, Autonomy but*

² For more information, see JOAN BISKUPIC AND ELDER WITT, *GUIDE TO THE US SUPREME COURT* 255 (3rd ed. Vol. 1. Washington DC, CQ Press 1997). Thirty-three Justices of the Supreme Court served in the executive branch before or after their appointment, including ten Chief Justices. Eighteen held cabinet level positions, nine were attorneys general and four held more than one cabinet level position by the time of their publication.

³ Letter from William Howard Taft to Calvin Coolidge (September 11, 1924) TAFT PAPERS Reel 267 (Library of Congress).

⁴ For more background and his opinions, see *John G. Roberts, Jr.*, *The Oyez Project* at IIT Chicago-Kent College of Law, http://www.oyez.org/justices/john_g_roberts_jr (last visited September 2, 2014).

⁵ Sandra Day O'Connor, *William Howard Taft and the Importance of Unanimity*, 28 *JOURNAL OF SUPREME COURT HISTORY* 157, 157-8 (2003)

⁶ Letter from William H. Taft to Hon. H. C. Lodge (January 17, 1922) TAFT PAPERS Reel 238. (Library of Congress)

⁷ Letter from the Hon. H.C. Lodge to William Howard Taft (January 18, 1922) TAFT PAPERS Reel 238. (Library of Congress).

⁸ Rishikof, *supra* note 1 at 674.

⁹ *Id.* at FN 28.

¹⁰ *Id.* at Figure 1.

¹¹ *Id.* at Figure 1.

¹² *Id.* at 687. As a demonstration of the good relations between these committees and the Chief Justice, the Chairman on the Committee on Immigration and Reclamation sent apples to Taft. Reference Letter from Charles McNary to William Howard Taft (November 23, 1922) TAFT PAPERS Reel 247 (Library of Congress).

¹³ Alpheus Thomas Mason, *William Howard Taft*, in *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS*, 2110 (Friedman, Israel eds. 1969).

¹⁴ *Id.* at 2114.

¹⁵ Robert Post, *Judicial Management: The achievements of Chief Justice William Howard Taft*, *MAGAZINE OF HISTORY* 13.1 at 5 (Fall 1998)

¹⁶ *Id.* referencing FN 39, a letter from Taft to Horace Taft, 6 October 1921.

¹⁷ *Id.* at 6.

¹⁸ Reforms in Judicial Procedure American Bar Association Bills, Before the H. Comm. On the Judiciary, 63rd Cong. 2 at 14 (1914) (statement of the Hon. William H. Taft, President of the American Bar Association) (Library of Congress).

¹⁹ *Id.* at 15.

²⁰ Letter from Thomas W. Shelton to William H. Taft (April 4, 1924) TAFT PAPERS Reel 263. (Library of Congress). The words “the bill” and “deprive the Federal judges o[f] the power to “sum up” are underlined by hand.

²¹ *Id.*

²² Letter from Thomas Shelton to Senator Albert Cummins (January 29, 1924) TAFT PAPERS Reel 260 (Library of Congress).

²³ Letter from William H. Taft to Senator Albert Cummins (January 31, 1924) TAFT PAPERS Reel 261 (Library of Congress).

²⁴ Letter from William H. Taft to Robert A. Taft (February 8, 1925) TAFT PAPERS Reel 271 (Library of Congress).

²⁵ *Id.*

²⁶ Additional Judges, United States District Courts Before the H. Comm. on the Judiciary, 67th Cong. 1 (November 7, 1921) (statement of the Hon. William H. Taft, Chief Justice Supreme Court of the United States). (Library of Congress)

²⁷ *Id.*

²⁸ Letter from William H. Taft to Justice McReynolds (January 29, 1924) TAFT PAPERS Reel 260. (Library of Congress).

²⁹ Letter from William H. Taft to C. S. Hutson (October 1, 1928) TAFT PAPERS Reel 304 (Library of Congress).

³⁰ Letter from William H. Taft to Ray Denslow (October 1, 1928) TAFT PAPERS Reel 304 (Library of Congress). Taft also notes in a letter to his son Charlie November 3, 1928 that he objects to his wife voting because he thought she was not qualified and that she was the wife of a sitting Supreme Court Justice. Another example to an unnamed individual of November 18, 1924 explains Taft cannot be of assistance in processing a VA claim. He noted he had nothing to do with the Bureau of Veteran’s

Affairs and that it would be improper, as a member of the Supreme Court, to interfere with executive matters.

³¹ Letter from William H. Taft to Mrs. Frederick Manning (Helen) (November 30, 1924) TAFT PAPERS Reel 269 (Library of Congress).

³² Letter from William H. Taft to Horace D. Taft (November 4, 1928) TAFT PAPERS Reel 305 (Library of Congress)

³³ *Id.*

³⁴ Letter from William H. Taft to Mrs. Frederick Manning (Helen) (November 11, 1928) TAFT PAPERS Reel 306 (Library of Congress).

³⁵ Letter from William H. Taft to Robert A. Taft (November 30, 1924) TAFT PAPERS Reel 269 (Library of Congress).

³⁶ *John G. Roberts, Jr. Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States*. Before the S. Comm. on the Judiciary. 109th Congress 1 at 56 (2005) (Statement of John G. Roberts, Jr. Nominee to be Chief Justice of the Supreme Court).

³⁷ *Id.* at 150.

³⁸ *Id.*, at 178.

³⁹ *Id.* at 341.

⁴⁰ Report of the Proceedings of the Judicial Conference of the United States, Sept. 17. 2013.

⁴¹ *Id.*

⁴² *John G. Roberts, supra* note 36, at 371.

⁴³ *Id.* at 382.

⁴⁴ “ABA Annual Meeting 2014 video highlights: Magna Carta relevant 800 years after it was sealed at Runnymede, says US chief justice.” Speech by Chief Justice John Roberts at the ABA House of Delegates, Annual Meeting, August 11, 2014 http://www.americanbar.org/news/abanews/aba-news-archives/2014/08/aba_annual_meeting2.html (last visited September 7, 2014)

⁴⁵ *Id.*

⁴⁶ Doris Kearns Goodwin, *THE BULLY PULPIT: THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, AND THE GOLDEN AGE OF JOURNALISM* (Simon & Schuster; 1st ed. November 5, 2013) provides a good background leading up to Taft’s time on the Court.