

The President and His Powers

Commentary

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The President and His Powers is a grand book, unique among the reflections of former presidents. Taft draws on his experience in the presidency and in the executive branch, and he speaks to many of the political issues of his time—most obviously, his disagreement with Theodore Roosevelt’s “stewardship” theory of presidential power. But his argument is more than a polemic or a memoir. In the best sense of the word, Taft’s book is theoretical, concerned with the nature of executive power and its place in the American system.

Taft’s writing is suited to that design. His prose is Olympian; clear but stately, a little ponderous but remarkably balanced. He makes his case against Roosevelt’s doctrine without rancor and in terms of principle, as if indicating that the issues involved transcend personalities. Of course, Taft cannot resist the wry aside that TR’s identification of himself with Lincoln “might otherwise have escaped notice,” given

the differences, “presumably superficial,” between the two, but Taft’s humor is often directed against himself. The sly quality of his wit—a good many lines are delivered with the literary equivalent of a wink or raised eyebrow—hints at the subtler dimensions and subtexts of his thought. And his insistence that an executive needs a sense of humor prescribes a measure of amused observation, a philosopher’s appreciation for the comic side of human politics.

Perhaps Taft had too much of that sensibility to be a great president. Certainly, political scientists think so. Almost without exception, they rank him as a good administrator, but a mediocre chief executive. James McGregor Burns was comparatively generous in rating Taft as “average,” along with John Quincy Adams, Martin Van Buren, Chester Arthur, Benjamin Harrison, William McKinley, and Herbert Hoover, some good company, but hardly a collection of all-stars. Clinton Rossiter had positive things to say about Taft’s technical competence, but grouped him with McKinley and Coolidge as representatives of a conservatism inferior to that of Eisenhower. And Stephen Skowronek, perhaps the most distinguished contemporary student of the presidency, referred to Taft’s term as a “debacle.”

Some of this is unfair and more of it rests on Taft’s lack of sympathy for the activist theory of the presidency that has come to dominate political science. In the intellectual arena, so far, Theodore Roosevelt’s view or variations on it have won most of the laurels, relegating Taft to a “symbol of standpattism” if not political apostasy. In part, this is a caricature: Taft, no reactionary, was a conservative progressive, hostile to organized labor but also suspicious of big business, a more effective “trust-buster” than TR and able to point to a record of significant reform. (In fact, Taft’s “ultimate act

of betrayal,” in Theodore Roosevelt’s view, lay in his insistence on pressing an antitrust case against U.S. Steel, rejecting TR’s distinction between “constructive” and “destructive” trusts in favor of a strict adherence to the law.)

As president, Stephen Skowronek indicates, Taft inherited an impossible task. Theodore Roosevelt’s administration, by strengthening and legitimating progressives, had upset the old political balance. Taft honorably tried to follow TR in seeking reforms through existing institutions, only to discover that the center would not hold.

That Taft did not see as much indicates the extent to which he lacked the gift and the disposition for politics. Amiable, conflict-averse, often candid to a fault, he was not ruled by the great passions of democratic politics: ambition, the yearning for public favor, and the desire for revenge. Hampered by his rectitude, his concern for accuracy, and his devotion to the law, Taft was almost bound to be politically maladroit. His addresses, James David Barber writes, sacrificed “eloquence for accuracy. . . . He delivered an opinion when he might have preached a sermon.” Even his brother gave him low marks in the arts of politics.

But the very qualities that limited Taft’s success as president and in the practice of politics commend him as a *student* of the presidency. Temperamentally unsuited to be an advocate, he was superbly fitted to be a judge, looking beyond partisan claims in the effort to discern governing principles. His writing does not often scintillate, but his intellectual craftsmanship is deft, marked by evidence of learning and often by genuine profundity. Even Taft’s critics respect his arguments and his scholarship: for example, Harold Laski, Taft’s polar opposite ideologically, approvingly cited Taft’s views on the president’s term, on relations between the executive and Congress, and on the veto power.

And Clinton Rossiter referred to Taft's opinion in *Myers v. U.S.* as "breath-taking." Intellectually, Taft reached beyond practice toward theory, a quality of mind evident in the subtleties of *The President and His Powers*.

Taft's argument turns on his disagreement with Theodore Roosevelt regarding presidential power: Taft insists that all presidential power must be "fairly and reasonably traced to some specific grant of power or justly implied or included within such express grant as proper and necessary to its exercise"; the president has no "undefined residuum of power" to act for the public good. By contrast, TR held that the president is the "steward of the people," limited in his power to act for the common good *only* by some express provision of the Constitution, an "advocacy of the higher law and his obligation to execute it," Taft wrote, "which is a little startling in a constitutional republic."

Beneath this apparent contestation—Roosevelt for a plenary view of executive power, Taft for a more limited one—is a significant agreement on fundamentals: like Roosevelt's doctrine of "stewardship," Taft's view of the president as "Chief Agent" of the people presumes that the executive is "representative," charged with carrying out the people's will, rightly understood.

But they differ, crucially, in their view of law. Roosevelt saw the law primarily as a *restraint* on power *derived from* public opinion; for Taft, the law *empowers* the president precisely because it conveys a *claim on* public opinion. In that sense, in Taft's theory, the presidency is potentially *stronger* than it is in TR's terms, since it encourages a president who is psychologically more autonomous, less dependent on public sentiment, and more able to set his or her own course.

And in fact, while Taft insists that every presidential power be traceable to a specific grant of power, he construes

those provisions very generously, affording the president a broad imperium. He allows the president virtually complete control over the executive branch, for example, including the power to interpret statutes—often outside any potential judicial scrutiny, so that such administrative applications determine the effective meaning of the law. This extends to a vaulting definition of executive privilege. Congress, Taft argues, cannot elicit “confidential information” if the president “does not deem the disclosure . . . prudent or in the public interest.” Similarly, Taft contends that to subpoena the president as a witness “would interfere with his public duties,” and that while in office the president may be “beyond the compulsory processes” of the courts. Evidently, the contemporary Supreme Court has afforded the executive much less protection; Taft’s position, if adopted, would have allowed President Clinton to avoid testifying in the Jones case, possibly sparing the country the tragicomedy of impeachment.

Similarly, Taft argues that the president’s duty to see the laws executed confers power which is “inferable” from the “general code of duties under the laws,” though nowhere made explicit, rehearsing the bizarre story behind *In Re Neagle* and agreeing with the Court’s discovery in that case of inherent executive power “implied by the nature of government under the Constitution.” Similarly, Taft indicates that the president’s powers as Commander-in-Chief effectively convey an authority “quite beyond his power under the Constitution directly to effect,” just as the president’s powers in foreign affairs extend well beyond ordinary constitutional or statutory limits.

Moreover, beyond the president’s formal powers, Taft saw a need and title for symbolic leadership, including the direction of national opinion. The president, he wrote, is the

“personal embodiment and representative” of the “dignity and majesty” of the people, an appropriate spokesperson for the country as a whole. Approving Wilson’s decision to deliver his messages to Congress in person as a way to focus “the attention of the country,” Taft gave a measure of support to the development of the “rhetorical presidency”—the president conceived as a manager of public opinion.

Loving the Constitution and the laws, Taft was no less devoted to the theory that underlies both. Like the framers, Taft saw the laws as conventions, contrivances rooted in contract, a fenced area of order surrounded by a fundamentally lawless nature. The rule of law requires protecting this space against invasions and disruptions which are external to law and only partly subject to its control. A constitutional regime, consequently, must include some power—Locke had called it “prerogative”—capable of responding to such challenges and changes on their own terms. Almost necessarily, that power belongs to the principate, especially in the modern world, where new forces are ever more threatening and transformations ever more rapid. In these terms, while the presidency is created *by* law, the president’s duties leave her or him with one foot *outside* the law. Restrictions on presidential power, Taft wrote, are themselves limited by the need for “discretion and promptness” in pursuing the public good in “times of emergency or legislative neglect or inaction.”

It was precisely because Taft recognized that presidential power is, in so many ways, illimitable in *content* that he insisted on limits in *form*, demanding that the president appeal to the specific provisions of the Constitution, the imperatives of action acknowledging the moral authority of words. As a champion of the rule of law—it was his desire to subordinate private power *to* law that made him a progressive, just

as his insistence that public power respect law made him a conservative—Taft was concerned to maintain the supremacy of law in *principle* the more it seemed questionable in practice.

Taft begins his book by emphasizing the Constitution's forms, reminding his readers that the separation of powers is more strictly defined here than it had been in Britain. But immediately, he indicates that the Constitution's separation of powers is much less clear than Montesquieu's. Theory informs American law, but yields ground to practice. Executive power, especially, eludes firm definition by "treatises" or "judicial decisions," reaching beyond the effective authority of courts and laws. In fact, Taft goes on to observe, the line between what is subject to judicial control and what is not "offers an opportunity for the study of nice distinctions which I shall not, for lack of space, further pursue." Yet surely this "nice" distinction is *crucial*, particularly for a thinker like Taft who stresses the forms. Is his reluctance to pursue the question really to be explained by lack of space? Or is it that, pushed to the limit, the argument would point to the extent that all judicial power, all constitutional government, and certainly all limits on executive power finally depend on political judgment?

At decisive points, Taft indicates, any restraint on the executive depends on political institutions (the courts not included) and on the people as "ultimate sovereign." As that suggests, constitutional government relies on the education of citizens, a pedagogy in which the president has a vital role. Taft's own title for the book speaks of the president as chief *magistrate* precisely because he wanted to underline the president's responsibilities as a teacher, by word and conduct influencing the public's understanding of and respect for constitutional life.

He is counseling both presidents and citizens, for example, when he comments that, while opposition from Congress is often irksome, it is also *useful*. The “bane of political methods,” Taft argues, is the “overwhelming mass of ill-digested legislation,” so that a “respite” has considerable value. Strikingly, Taft’s language echoes that of the Antifederalist Cato, who observed that a democracy should be “well-digested,” its laws thoroughly assimilated to habit and opinion. Taft’s position indicates a similar concern for law that has become internalized, enforced not in the courts but in the souls of citizens. The great test of republican government, in fact, lies in its ability to develop a public that accepts the law’s constraints and forms as rightful restraints on its own will. That challenge also marks, for Taft, the measure of a president: since the people are inclined to hold presidents accountable for all sins “of omission and commission,” they create a tendency to expand authority, pushing and tempting executives to seek power as unlimited as their responsibility. The truly great presidents, Taft suggests, are those who resist that temptation, reminding the people that their capacity for self-government, and hence their dignity, depends on a government of forms and laws.