

OPENING REMARKS

DEBATE AND SWITCH

WILLIAM HOWARD TAFT ON LAW AS A VOCATION

Ross E. Davies[†]

While he was President of the United States (1909-13), William Howard Taft struggled, as many presidents do, to advance his policy agenda. Who was to blame? Lawyers, at least when the subject was regulation of the justice system. So said Taft in 1909. Congress – the President’s chief national policymaking competitor in those days – had too many lawyer members, he argued. And those lawyers were abusing their authority to line the profession’s pockets:

I am a lawyer and admire my profession, but I must admit that we have had too many lawyers in legislating on legal procedure, and they have been prone to think that litigants were made for the purpose of furnishing business to courts and lawyers, and not courts and lawyers for the benefit of the people and litigants.¹

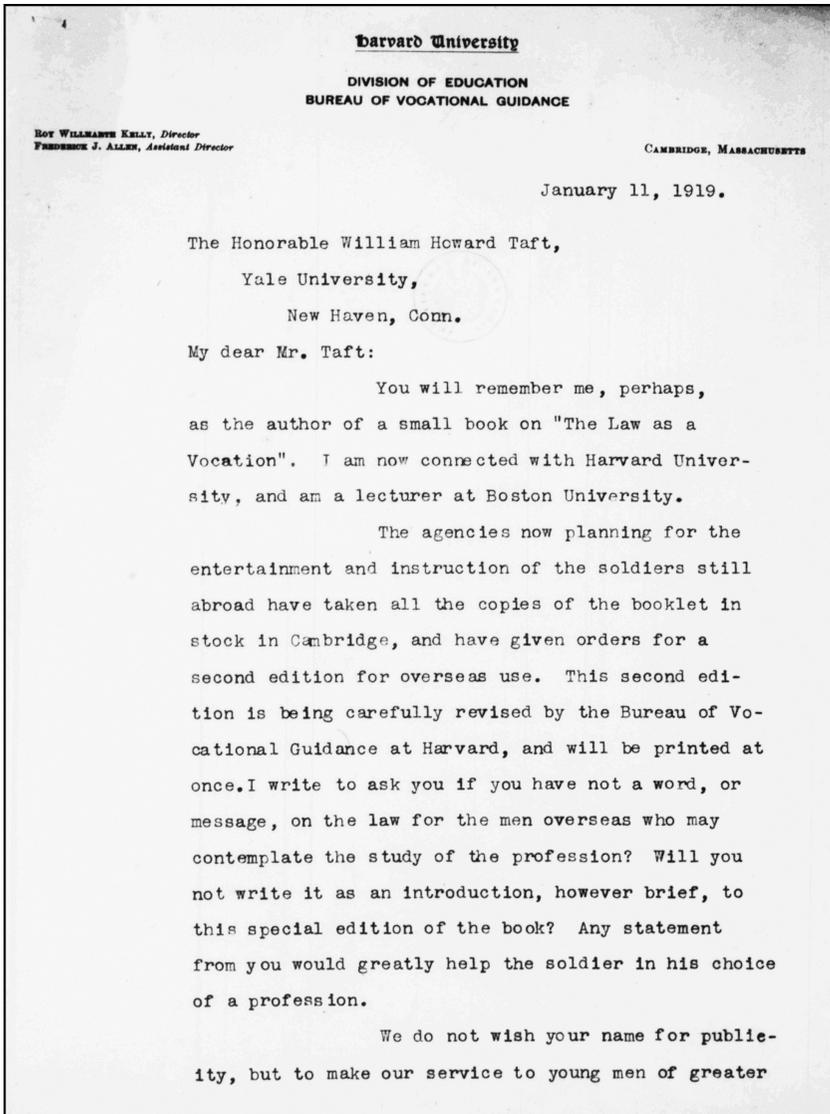
In other words, President Taft – himself the most powerful lawyer in the land – could do more good in the lawmaking arena if he had fewer lawyers to compete with in Congress. Get those #*%\$ lawyers out of the way and We The People can really get some good work done. Taft was not the only prominent figure making that argument at that time,² but as President he certainly had the bulliest pulpit.

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¹ *Taft Gives Word to Lend Labor Aid*, CHI. TRIB., Sept. 17, 1909, at 1, 2 (quoting Sept. 16 speech).

² See, e.g., *Michigan Is for Taft*, WASH. POST, May 18, 1911, at 3 (quoting Governor Chase Osborn: “[T]here are too many lawyers in Congress and public life. I say this with due respect for the legal profession, but it is time for business men to be more active in politics. It will be better for the country when we have fewer lawyers in Congress and more business men. We have had a majority of lawyers simply because they had the time to seek political honors and were not opposed.”).

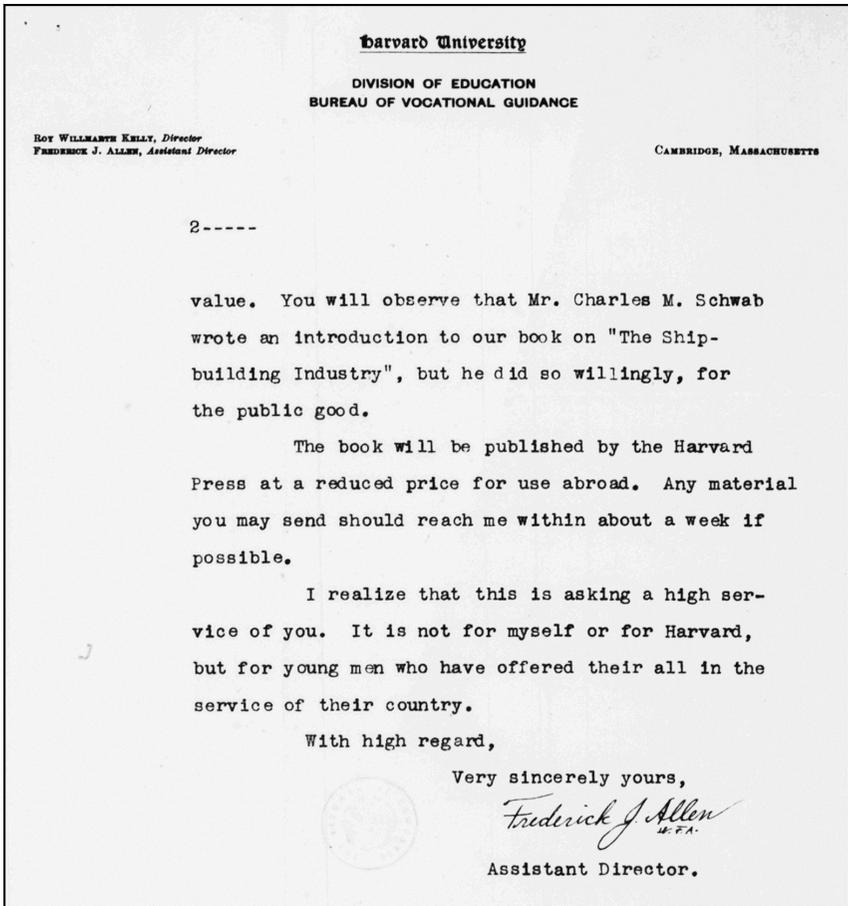
ROSS E. DAVIES



Later on, Taft lost a different kind of competition to a fellow lawyer-politician when Woodrow Wilson won the presidential election in 1912.

In need of a job, Taft settled on being a professor at Yale Law School (1913-21). He was now in the business of producing lawyers, rather than competing with them. (That is what law schools do, mostly: supply lawyers, and law review articles, to the world.) While a professor at Yale, Taft

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adopted a view of lawyers that was at odds with the one he had expressed as President. Lawyers now belonged in the driver's seat when it came to the development and implementation of public policy.

His most eloquent expression of this new view appeared in print in 1919. In response to a solicitation from Frederick J. Allen of Harvard's Bureau of Vocational Guidance (see the letter on the facing page and this page),³ Taft wrote this short essay that became the introduction to the second edition of Allen's book, *Law as a Vocation*⁴:

³ John M. Brewer, *Describes Work of Vocation Guidance Bureau*, HARV. CRIMSON, June 11, 1921.

⁴ LAW AS A VOCATION vii-viii (2d ed. 1919); Letter from William H. Taft to Frederick J. Allen, Jan. 14, 1919, in William H. Taft Papers, Library of Congress, Manuscript Division, reel 553 ("I send you herewith a statement which perhaps will serve your purpose.").

INTRODUCTION

THE importance of the law as a profession has not been reduced but is greatly increased by the new era which is to follow this war. The formulation into a practical advance of the new ideals must be the work of lawyers. Lawyers in their profession are synthetic and constructive. Many a man can deliver an oration, painting in beautiful colors the principles which should guide and the purposes which should be achieved, but the number of men who can draft the statutes and prepare the machinery by which the principles can be sustained and the ideals realized is limited. The study of the profession of the law giving, as it does, familiarity with the actual operation of statutes, the difficulty of their enforcement growing out of the defects of human nature in those whose compliance with the law is necessary, and a knowledge of the administration of justice — all fit lawyers to lead in the real progress of a nation. More than this, in the progress likely to take place, the nice balance between private right and public necessity must be preserved in order that individual initiative and the spur of the advance of all by the advance of each shall not be lost. It is lawyers who are to defend this private right. It is lawyers who are to assert the necessity of the public weal. It is lawyers on the bench who

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are to hold the balance even between the two. Never in the history of the world is the profession of the law to play a greater part than in the century to follow this great upheaval of fundamental elements of society.

WILLIAM H. TAFT.

WASHINGTON, D.C.

January 14, 1919.

After reading this inspiring introduction by the professorial ex-President, a reader would never guess that the book being introduced was pretty close to pessimistic about the professional prospects of young lawyers.⁵

Then, in late middle age, Taft received the invitation every law professor dreams of: The President (then Warren G. Harding) asked him to be the next Chief Justice of the United States. Taft spent most of the rest of his life in that job (1921-30). While on the Court, he adopted a view of lawyers that was at odds with the one he had expressed as a law professor, but consistent with the one he had expressed when he was President. There were, again, too many lawyers.

In 1922, at a conference on legal education held by the National Conference of Bar Associations, Chief Justice Taft gave a speech in favor of tightening requirements for admission to the bar. In the course of bemoaning the incompetence of under-educated lawyers and extolling the virtues of a formal legal education, he said:

the country already has too many lawyers, and I cannot feel there is going to be a dearth of them, no matter how thorough the preparation insisted upon.⁶

In an amusing piece of carefully lawyered reporting, the editors of the *ABA Journal* quoted extensively from Taft's speech, but when they got to the passage quoted above, they shifted from quoting to paraphrasing. Here is the result:

The country had all the lawyers it needed now and there was no likelihood of a dearth of them, however thorough the preparation insisted upon.⁷

Indeed. Others paraphrased him differently. For example, the International Brotherhood of Papermakers reported, with obvious irony (Taft being no great friend of organized labor), "Lawyers' Closed Shop Urged by Justice Taft."⁸

But was it really that simple? Were Taft's shifting views on the proper

⁵ See, e.g., LAW AS A VOCATION at 66 ("One of the important tendencies of the present time is to increase rather than diminish the overcrowding of the legal profession, mentioned in Chapter III.").

⁶ *College Term Debated by Bar Association*, BALT. SUN, Feb. 24, 1922, at 2 (quoting Feb. 23 speech).

⁷ *Conference on Legal Education*, ABA J., Mar. 1922, at 137, 141 (paraphrasing Feb. 23 speech); see also SPECIAL SESSION ON LEGAL EDUCATION OF THE CONFERENCE OF BAR ASSOCIATION DELEGATES 27 (n.d.) (treating the *ABA Journal's* paraphrasing of Taft's speech as quotation from that speech).

⁸ THE PAPER MAKERS' J., Mar. 1922, at 47.

roles and supply of lawyers really just manifestations of crass professional self-interest? Did President Taft talk trash about lawyers in Congress to get a leg up on policy competitors without regard to the collateral effects of America's most powerful lawyer impugning the integrity of a whole category of other powerful lawyers? Did Professor Taft write enthusiastically about careers in law to a generation of young Americans serving their country in World War I knowing full well – at least according to himself just three years later – that back home the nation was already oversupplied with lawyers? (A ploy known to a later generation as a law school scam.) And did Chief Justice Taft demean as incompetent and unnecessary many members of the bar – those who lacked a college education, at a time when access to higher education was far more limited than it is today – in order to prop up the profession for those who already had (or would be able to get) a college degree?

Or, instead, was Taft getting wiser with age? Or were his views shifting in keeping with changing times? Or did someone or some new idea trigger a shift? Reasonable minds can differ about the answers, but Taft himself could have made it easy. He could have explained himself – why he was reversing, or at least refining, his thinking. Or how circumstances had changed while his thinking had not. Isn't that what good leaders⁹ (and scholars¹⁰ and judges¹¹) do?

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I should disclose what some might judge to be a conflict of interest. The *Green Bag* published an unsigned and very positive review of the first edition of Allen's *Law as a Vocation*.¹² In addition, the editor of the *Green Bag* at that time, Arthur W. Spencer, was thanked by Allen in *Law as a Vocation* "for helpful suggestions on legal publications."¹³ Spencer also produced an enthusiastic endorsement that made its way into promotional materials for the book.¹⁴ I have done my best not to channel Spencer.

⁹ See, e.g., GEORGE W. NORRIS, FIGHTING LIBERAL 373-74 (1945; 1992 prtng.); ALPHEUS THOMAS MASON, HARLAN FISKE STONE 198-99, 572-73 (1956); 87 CONG. REC. 5618-19 (1941).

¹⁰ See, e.g., Richard A. Epstein, *Waste and the Dormant Commerce Clause – A Reprise*, 3 GREEN BAG 2D 363 (2000).

¹¹ See, e.g., *State Oil v. Khan*, 522 U.S. 3 (1997).

¹² *The Law as a Vocation: Advice to Young Men*, 26 GREEN BAG 164 (1914).

¹³ LAW AS A VOCATION at iv.

¹⁴ See "An early circular" in William H. Taft Papers, reel 203.