Reconstruction and Reunion 1864-88

PART TWO

CHAPTER I

Grant Finds a Chief Justice

Monday October 13th 1873

At the Capitol of the United States in the City of Washington and District of Columbia, being the present seat of the National Government of the United States, on the Second Monday of October (being the thirteenth day of the same month,) in the year of Our Lord One thousand eight hundred and seventy three, and of the Independence of the United States, the ninety eighth, the Supreme Court of the United States met agreeably to law

Present

The Honorable	Nathan Clifford Noah H. Swayne Samuel F. Miller William Strong Joseph P. Bradley Ward Hunt	Associate Justices
John G. Nicolay Esquire		Marshal
Daniel Wesley Middleton		Clerk

The Minutes went on to record the announcement by Justice Clifford that on the morrow the Court would begin the call of the docket.

Three seats were unoccupied: Chief Justice Chase had died on May 7, and Justices David Davis of Illinois and Stephen J. Field of California were en route from their circuits.

Mr. Justice Clifford also announced to the Bar that hereafter the sessions of the Court will be from 12 to 4 o'clock instead of from 11 to 3 as heretofore.

The courtroom was thronged with leading practitioners: Benjamin R. Curtis, Benjamin F. Butler, and Richard Henry Dana, Jr., of

Massachusetts; William M. Evarts and Edwin W. Stoughton of New York; Jeremiah S. Black and J. Hubley Ashton of Pennsylvania; Reverdy Johnson and Montgomery Blair of Maryland; James M. Carlisle, Philip Phillips, and Richard T. Merrick of the District of Columbia; Henry Stanbery of Ohio; Benjamin H. Bristow of Kentucky; Lyman Trumbull of Illinois; Matt. H. Carpenter and John W. Cary of Wisconsin; William T. Otto of Indiana; George W. Paschal of Texas; and Thomas J. Durant of Louisiana—all these and others memorable in the annals of the Court.

After a few moments the Court rose, and the Justices, accompanied by Attorney General George H. Williams, drove to the White House to make the customary call upon the President. Clifford, the senior member of the Court, was in charge: an imposing figure, he was "the impersonation of the highest style of judicial decorum"; "the extreme punctiliousness with which he conducted that ceremony was interesting to behold."[1] Upon the great question uppermost in the minds of all, nothing could be said: Whom was Grant to nominate to be Chief Justice?

Meanwhile in the courtroom the members of the bar were holding proceedings in memory of the late Chief. Reverdy Johnson was called to preside; he had been arguing great causes there for nearly half a century. Carlisle was chairman of the committee to bring in resolutions. Merrick read their report, concluding that the bar of the Court "will wear the usual badge of mourning during the term," and that the Attorney General was requested to move that the Court enter the memorial upon the Minutes.[2]

[1] George H. Williams, "Reminiscences of the Supreme Court," *Yale L.J.*, 8:296–98 (1899). These recollections are not entirely trustworthy. For example, Williams wrote that "President Grant . . . nominated me [to be Chief Justice] after the rejection of Mr. Cushing." P. 299. Actually Williams came first, as will be seen.

[2] Carlisle asked Merrick to read the resolutions: he himself, a member of the bar of the Court since 1837, had now lost his sight, and yet so retentive was his memory that he had been able to continue in practice. See *Dictionary of American Biography*.

On October 23 the Attorney General performed his part, with a tribute to "a life rich in the world's opinion and men's praise." Justice Clifford, responding, gave a lengthy review of Chase's career. He recalled that the Chief Justice's suggestions to his brethren "were never marred by severity," and that even when disease had abated his strength, "it was unable to rob him of his accustomed air of grandeur." Minutes, Oct. 23, 1873.

"MANY RUN, THOUGH ONLY ONE RECEIVES THE PRIZE"

THE ANNOUNCEMENT OF CHASE'S DEATH on May 7 had instantly generated public guessing and private cogitating about the succession, although it was hardly to be expected that the President's choice would be announced until a nomination was sent to the Senate after the 43d Congress convened on December 1. As it turned out, it was only after two tenders had been declined, and two nominations had woefully miscarried, that on January 21, 1874, Morrison R. Waite of Ohio was confirmed as Chief Justice. As Secretary of State Fish commented, "It has been a hard parturition."[3]

In giving a full account of these vicissitudes we shall be quoting reports and editorials in the press; comments by prominent lawyers; the advice of law journals; and a mass of correspondence of Justices and others closely interested in the outcome. The narrative will be unhurried. Many of these letters have not hitherto been brought into view and merit quotation at length: quite aside from the message conveyed, they are most valuable in enabling one justly to estimate the character of men who will figure prominently in chapters to follow.

A dispatch in the *New York Tribune* of May 8 reported the first reactions in Washington:

> Among those whose chances have been . . . canvassed are Justice Miller of the Supreme Court, now on his way to Europe. To him has been intrusted the preparation of some of the most important of the recent opinions of the Court, notably that in the New-Orleans slaughter-house case, recently delivered, and in which the first judicial interpretation of the XIIIth and XIVth Amendments was given.[4] His opinions have been distinguished by their freedom from partisan bias, and this fact, though he has always been a firm supporter of the President, is thought by some to weaken him as a present candidate for promotion with an Executive whose advisers make everything bow to party ends. . . .

Attorney General Williams was spoken of "as one of the President's favorites." William M. Evarts and Circuit Judge Lewis B. Woodruff of New York were mentioned; conceivably their prospects would be lessened by the recognition New York had received when Justice Ward Hunt was appointed last December.

[3] Letter of Jan. 19, 1874, to Robert C. Schenck, Minister to England. Letterbook, Hamilton Fish Papers, L.C.

[4] Slaughter House Cases, 16 Wall. 36 (1873). Discussed, VI, 1320–63, 1368–77, 1387–88.

Senator George F. Edmunds of Vermont, chairman of the Judiciary Committee, had long been supposed to aspire to a place on the Court: but it was pointed out that at this juncture he was barred by Article I, Section 6, clause 2, of the Constitution:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time . . . .

The Justices' salaries had been raised by an Act of March 3, 1873,[5] which was within Edmunds' then present term. Senators Roscoe Conkling of New York and Timothy O. Howe of Wisconsin, it was noted, had chanced to come to the end of a six-year term on that day. So too had Senator Oliver P. Morton of Indiana, whose name came to be mentioned.

Conkling, the dispatch continued, "was long considered a standing candidate" for the Chief Justiceship, but "is believed now to have even higher aspirations, and to prefer, at any rate, the greater activity of political life."

The Washington dispatch appearing in the *Boston Advertiser* of May 8 added the names of Benjamin R. Curtis of Massachusetts and Edwards Pierrepont of New York; it forecast that no Associate Justice would be promoted. Then on May 10 the *Advertiser*'s special correspondence was to the effect that the advocates of the several Justices were producing such a difficult situation as to make any promotion from the Bench unlikely; "Judge Bradley appears to have the best chance."

The *New Orleans Picayune* of May 11 noticed the prominence of the names of Justices Swayne and Miller, "with the odds in favor of Swayne over all competitors"; to the list of possibilities it added the name of Caleb Cushing.

On July 1 the Chicago *Inter-Ocean*, the *Boston Advertiser*, and perhaps other papers carried a dispatch from Washington that the impression was growing that Judge Ebenezer R. Hoar of Massachusetts

[5] 17 Stat. 485, 486, from $8,000 to $10,000; as in all earlier provisions, the Chief Justice received $500 more than the Associate Justices. At VI, 68n., the pay of the Justices is traced from 1789 to the Act of Feb. 12, 1903.

In 1873 the salary of the President was raised to $50,000 from the original figure of $25,000.

Also in the Act of 1873 the pay of a Senator or Representative was increased from $5,000 to $7,500, with effect *retroactive to the beginning of that Congress*. This was the "Salary Grab," which proved exceedingly embarrassing in the autumn election. By the Act of Jan. 20, 1874, 18 Stat. 4, this increment in legislative salaries was repealed.

would be chosen; "this is known to be the belief of several judges of the court themselves, who understand that none of themselves will receive the appointment." Quite possibly this story started with Justice Davis, who was holding the Circuit Court at Springfield, Illinois, and of course was conversing with his old friends. Orville H. Browning was in Springfield on July 2 and recorded that at a gathering "Judge Davis gave it as his opinion that Hoar of Mass: or Howe of Wisconsin would be appointed . . . ."[6]

These representative clippings from the newspapers suffice to introduce the names that figured prominently in speculations on the vacancy.

Roscoe Conkling (1829–88) was admitted to practice law at twenty-one, and immediately became district attorney of his county. Plunging into politics, at twenty-nine he was mayor of Utica; next year, a Member of Congress where he served three terms; at thirty-seven a Senator; by 1873, controller of federal patronage and lord paramount of Republican politics in New York. It was expected that he would be a serious candidate for the Presidential nomination in 1876. But so far as his supposedly superior talents had been demonstrated, it was simply as a party manager; *The Nation* on October 2, 1873, reported that "the gossip about the Chief-Justiceship grows louder, and points more plainly than before that Roscoe Conkling is the probable nominee . . . ." The editorial reaction was that "he has spent most of his life in what is called 'practical politics,' and very little at the bar."[7]

When the offer did come, Conkling took his own time to reply that the office was "beyond my own interest and wishes."[8]

In December 1871 Grant had chosen George H. Williams, formerly Senator from Oregon, to be Attorney General. The qualifications were meager, as was exposed when the Credit Mobilier Act of March 3, 1873,[9] directed the Attorney General to bring suit in the name of the United States against the Union Pacific Railroad and others to recover what in equity belonged to the railroad or to the Government. In the suit in the Circuit Court for Connecticut, Williams was brought into most unequal contest with Curtis and Evarts.[10] When in Decem-

[6] *Diary of Orville Hickman Browning* (Springfield: Illinois State Historical Library, Vol. I [1850–64], Theodore C. Pease and James G. Randall, eds., 1925; Vol. II [1865–81], Randall, ed., 1933), II, 350–51. If Davis is accurately quoted, pretty surely he regarded Hoar's prospects as much brighter than Howe's. Infra, p. 19.

[7] 17: 218–19.

[8] A. R. Conkling, *Life and Letters of Roscoe Conkling* (New York: Charles L. Webster & Co., 1889), 460.

[9] 17 Stat. 485.

[10] United States v. Union Pacific R.R., Fed. Case No. 16,598 (1893). Dismissal affirmed, 98 U.S. 569 (1879).

ber 1873 the President nominated Williams to be Chief Justice, revulsion throughout the country caused the nomination to be withdrawn.[11]

The office of Solicitor General was created by an Act of June 22, 1870.[12] The first appointee was Benjamin H. Bristow of Kentucky, a most excellent selection. One consequence was that the disparity between Williams and Bristow suggested that a promotion to the Chief Justiceship from within the Court, with the appointment of Bristow to the resulting vacancy, or even his appointment as Chief Justice, seemed an attractive solution.[13]

Evarts and Curtis had been counsel defending President Johnson on his impeachment, and then Evarts had been Attorney General to the close of Johnson's term. Justice Nelson's resignation on December 1, 1872, created a vacancy to which Grant might have appointed Evarts; on Conkling's urging, however, the succession was given to Ward Hunt, a far less able man.[14]

Edwards Pierrepont had been briefly a judge of the Superior Court of the city of New York, and otherwise had engaged in practice. In politics he had been a Democrat, a supporter of President Johnson, and then adherent to Grant. In 1873 he declined to serve as Minister to Russia, choosing apparently to be on hand when the Chief Justiceship was awarded.[15]

Deserving consideration at all times were a group of able and hard-working Circuit Judges, notably Lewis B. Woodruff of the Second Circuit, William B. Woods of the Fifth, Thomas Drummond in the Seventh, and John F. Dillon in the Eighth: here was a plateau of character and competence that towered over the general level of Grant's appointments. Woodruff was a Yale graduate of 1830 who had prepared for the bar in Connecticut; coming to New York, he had been fortunate in his professional associations. From 1850 to 1861 he sat on the Court of Common Pleas and then on the Superior Court, distinguishing himself among able judges. In 1868–69 he sat on the Court of Appeals by appointment. On the Circuit Court he promptly mastered the complexities of federal jurisdiction with its special fields. He was conscientious, energetic in his work, perhaps somewhat austere on the bench; while he aspired to judicial promotion, he never resorted to "any secret or dubious means." This was a man who would have been

[11] Infra, p. 59.
[12] 16 Stat. 162.
[13] VI, 657, 1343, 1451, 1473.
[14] VI, 1473.
[15] *New York Tribune*, May 20. The *Missouri Republican*, a respected Democratic journal, commented: "Judge Edwards Pierrepont must be a mighty hard man to satisfy. He never contributed but $20,000 to the perpetuation of the undying principles of the party of great moral ideas, and yet he declines the Russian Mission . . . and won't take anything less than the chief-justiceship . . . ." May 31.

instantly capable in the office of Chief Justice, and whose record gave hope that he would take leadership in improving the effectiveness of the Court—something then urgently needed. Presently Woodruff was overtaken by infirmity that brought death on September 10, 1875.[16]

While correspondents were reporting rumors, editors were admonishing the President to make a distinguished appointment. *The Independent* on May 22 said that

> Justice Miller is one of the ablest judicial minds of the country. He has had a large experience on the Bench . . . . We do not know where the President can look for a better man or one that would give more general satisfaction to the people, as well as to the legal profession. . . .[17]

The *Boston Advertiser* saw "A Great Opportunity"; the President should exercise "extraordinary caution and judgment," to select someone of "excelling wisdom, known and confessed by all men." It suggested appointment from within the Court.[18]

This called forth a letter to the editor: "The two justices . . . who are, in the judgment of the bar, best fitted for the chief-justiceship are Mr. Justice Miller and Mr. Justice Strong—jurists who would have adorned the bench at any period of its history . . . ." But to promote the former would pass over two and to go to Strong would go over five Associate Justices, which would cause "heartburnings which are very deleterious to cordial understanding and efficient coöperation . . . ." The writer mentioned Judge Hoar as well as Curtis and Evarts; to appoint Conkling "would be something of a scandal."[19]

The *New York Times* was treating President Grant with the utmost deference. It stressed that the Chief Justice must be "a man of the very highest order." "We are confident that the country can depend on the President"; so plain was the duty that it was "impossible for the President to err . . . ."[20]

Harper's Weekly, edited by the sweet-spirited George William Curtis, chairman of the board that framed the civil service rules, was being very kind in attributing virtues to the simple soldier who had been lifted to the Presidency: "There is no reason to doubt that the President is fully aware of the gravity of his responsibility . . ."; his "own character and renown, and the good name of his administration, . . . are concerned in the matter. . . ."[21]

[16] The characterization is drawn from memorial remarks by Evarts and others, long his intimates. 30 Fed. Cases 1,356–60.

[17] 25:689.

[18] May 9.

[19] July 4.

[20] Editorial on "The Chief Justiceship," May 12. It expressed the same unquestioning trust on September 15.

[21] 17:866. Oct. 4.

Such professions only betrayed the want of confidence that prevailed among Grant's best-wishers.

The Nation made no such pretense: "General Grant's recent appointments would lead us to think" that he would select on the basis of "political considerations."[22] So too the *New York Evening Post* was mistrustful: recently Grant had "permitted himself to be influenced in his appointments, sometimes by merely personal reasons, sometimes by the advice of politicians who surround and constrain him to acts contrary to his own better judgment."[23]

The *New York World*, the great Democratic organ, demanded, "The line of the Chief Justices . . . must ever be the most select and exalted among the titled dignitaries of the republic. . . ."[24] In New Orleans, the *Picayune* exclaimed, "what a chance is here for Grant to perform one noble act . . . , spurning party and the hordes of parasites around him . . . ."[25]

SOME PROFESSIONAL OPINION

THE *New York Herald*, inconstant and irresponsible but always enterprising, instructed its correspondents in half a dozen cities to ask leading lawyers and judges what they thought should be done in filling the vacancy. More than a dozen dispatches reported the results of some sixty interviews. At Pittsburgh, George Shiras, Jr., said emphatically, "not a politician," preferably some member of the Court; Miller and Swayne were admirably qualified; the elevation of Strong over them seemed unlikely.[26]

"Glorious Old Tom" M. Marshall, Irish-born Democrat and celebrated jury lawyer, favored Evarts or Hoar, or some other distinguished practitioner who was "free from all interests or tendencies on behalf of any one litigated interest." District Judge Wilson McCandless, a Buchanan appointee, named Jeremiah S. Black; many active Democrats agreed. Prominent Republicans favored Justice Strong. Circuit Judge William McKennan, appointee and friend of the President, declined to comment.[27]

At Philadelphia, James Thompson, Justice and Chief Justice of the Supreme Court of Pennsylvania 1857–72, and in politics a Demo-

[22] 16:345. May 22.
[23] July 18.
[24] May 15.
[25] May 17.
[26] He added that it had been wise in the statute of 1869 to provide salary for life for Judges who resigned after reaching seventy with ten years of service. In 1892 Shiras was appointed to succeed Justice Bradley; in 1903, at the age of seventy-one and as early as was convenient for the Court, he quit the Bench.
[27] Sept. 9, 30.

crat, urged promotion of some Associate Justice, preferably Strong; the resulting vacancy should then be filled from the South. Theodore Cuyler, counsel of the Pennsylvania Railroad and a distinguished corporation lawyer, thought that Curtis would be the choice of the bar throughout the country—but that professional opinion would have no influence with Grant.[28]

At Memphis, in Justice Swayne's circuit, Bedford M. Estes favored an appointment from the Bench, preferably Swayne or Miller: the former was preeminent in suavity, while Miller, "with less polish, had . . . Doric strength . . . ." Estes spoke from close observation: he had just been through two arguments of the important case of *Murdock v. Memphis*, then awaiting the decision of the Court.[29] If appointment were from the bar, Evarts was his first choice, Caleb Cushing his second. During the interview, Henry T. Ellett, formerly a Judge of the Supreme Court of Mississippi, and Archibald Wright, formerly of the Tennessee court, came into the office: in times past they had admired Caleb Cushing, but now they did not want him on the Supreme Court. Ex-Governor Isham G. Harris and others said that Evarts was their preference. There was sentiment in favor of Swayne, but also dissent.[30]

The correspondent at Chicago called on Charles Hitchcock, a Republican, recently president of the State's constitutional convention, a lawyer held in highest respect. He "supposed that the appointment would be a political one"; he ran over prominent names, and inquired, "Where is there a better man than Drummond of this circuit?" Others, including Leonard Swett, made the same comment. "It is worth living for to secure the reputation that man possesses," was one observation; "with all his learning he has the simple manners of a child." Mrs. Myra Bradwell[31] paused in reading proof for her *Chicago Legal News* to say that either Evarts or Conkling "would make a good Chief Justice," although the latter's political activities "may be objectionable to many people."[32]

In New York City a reporter called upon Edwards Pierrepont, who spoke at length on the importance of the Chief Justiceship: no

[28] Oct. 27. In March 1872 and again in February 1873 Cuyler had argued Barnes v. The Railroads, 17 Wall. 294, on behalf of the defendants in error. VI, 1436n., 1452.

[29] 20 Wall. 590 (1875). See infra, p. 403.

On the brief was Estes' partner, Howell E. Jackson, a Justice of the Supreme Court, 1893–95.

Estes' characterization of Miller, presumably reflecting experience in the hearing of the case, was most apropos: Miller's opinion for the Court held strictly to the scope of review established by the Judiciary Act of 1789, whereas dissenting Justices would have accepted an elaboration.

[30] Sept. 16.

[31] VI, 1364–68.

[32] Sept. 13, Oct. 7.