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Charles Fairman

Excerpt

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# Reconstruction and Reunion

## 1864-88

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PART ONE

## CHAPTER I

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### *Chief Justice Chase*

WHEN THE SUPREME COURT began its term on the first Monday in December 1864, the life of the Confederacy was ebbing. Lee's Army of Northern Virginia was wasting behind the earthworks at Petersburg. Sherman, marching from Atlanta to the sea, was approaching Savannah. The end of the struggle was at hand.

Amid these events the coming in of the Court was of small interest. The *National Intelligencer*—the capital's best newspaper—waited until January 20, 1865, to make this mention:

The present term of the Supreme Court of the United States commenced on Monday, the 5th ultimo, with the chair of the Chief Justice vacant, occasioned by the death of the Hon. Roger B. Taney. His successor, the Hon. Salmon P. Chase, took his seat on the bench on Thursday, the 15th of December last, and the Court was thus constituted, the Associate Justices ranking by seniority, as follows:

Mr. Chief Justice Salmon P. Chase

Mr. Justice James M. Wayne

Mr. Justice John Catron

Mr. Justice Samuel Nelson

Mr. Justice Robert C. Grier

Mr. Justice Nathan Clifford

Mr. Justice Noah H. Swayne

Mr. Justice Samuel F. Miller

Mr. Justice David Davis

Mr. Justice Stephen J. Field.

The Reporter of the Court is J. W. Wallace, Esq., of Pennsylvania.

Clerk—D. W. Middleton, Esq.

Marshal—W. H. Lamon, Esq.

## RECONSTRUCTION AND REUNION, 1864–88

The *Intelligencer* recalled that the 37th Congress in 1863 had enlarged the Court to ten and had rearranged the circuits, providing an additional Justice to perform circuit duties in the Pacific States. The account explained the grouping of the States into circuits, to each of which was assigned a Justice who went about trying cases during the months from spring to late autumn when the Supreme Court was not in session. The Chief Justice presided over the Fourth Circuit, which extended from Delaware to North Carolina and West Virginia. Justice Wayne was assigned to the Fifth, comprising the Southeastern States; Justice Catron to the Sixth, stretching from Kentucky to Texas. Progress through these circuits had, of course, been interrupted by the war.

The Court, the *Intelligencer* continued, had begun its term with a docket of three hundred and sixty cases, sixty of which came from the South and were being passed over until peace was restored.<sup>1</sup> It might have explained that normally a case after being filed had to wait about two years before in turn it came up for argument. Thereupon it was considered in conference, assigned to a Justice for the writing of an opinion, and finally announced in open court as a decision. At this period of the Court's history the cases, in the main, were not difficult; ordinarily agreement came easily, and judgment might be rendered within perhaps three weeks after argument.

The 38th Congress also met on the first Monday in December, in its Second Session, that would expire on March 3, 1865. President Lincoln's message drew attention to the proposed amendment to the Constitution, abolishing slavery; it had passed the Senate, and now in the recent national election the people had clearly declared their will that it be adopted. On January 31, the House concurred with the Senate, and thus the Thirteenth Amendment was submitted to the States for ratification by their legislatures.

Chief Justice Taney had died on October 12, 1864. On December 6, shortly after the reading of the President's message, the Senate went into executive session, where it considered and forthwith consented to the nomination of Salmon P. Chase to be the Chief Justice. The appointment had been expected and gave general satisfaction.

## CHASE'S ASSOCIATES

WHEN CHASE TOOK HIS SEAT, on December 15, 1864, he joined a group widely varied in age, experience, and talents. James M. Wayne of Georgia, the senior Associate Justice, had come to the Court in 1835,

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<sup>1</sup> *Infra*, p. 135.

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by appointment of President Jackson. Now venerable, calm, steadfast in his devotion to the Union under the Constitution, he awaited the day when “with a spirit exempt from the corruptions of party, our country will again be what it was before it became distracted by rebellion and scourged by civil war.”<sup>2</sup>

John Catron of Tennessee, at seventy-eight the eldest of the Justices, was absent throughout the term and died on May 30, 1865. His place was not filled and, as will presently be seen, Congress in 1866 reduced the size of the Court.

Samuel Nelson, seventy-two, was completing twenty years on the Supreme Bench, after an even longer service on the courts of New York. Nelson walked straightly in the settled paths of the law, fearful of the precipitate course of the party in power.

Robert Cooper Grier, old at seventy, had spent more than thirty years in judicial office—on an inferior court of Pennsylvania and, since 1846, on the Supreme Court. He was forthright, even rugged, and a staunch Unionist. Thanks to a thorough classical education and a tough mind, his opinions had been vigorous and admirably concise.

Nathan Clifford of Maine, sixty-one years of age, came last among those appointed by Lincoln’s Democratic predecessors. His mental habits showed the pinch of early circumstance. *Nathan Clifford, Democrat*, is the title justly given to his biography;<sup>3</sup> he held fixedly to the tenets of that party, seemed little moved by the nation’s new birth of freedom, and was a narrow constructionist opposed to expansive judicial movements.

Chase’s other four brethren were Swayne, just turned sixty, and Miller, Davis, and Field, all in their late forties. Noah H. Swayne, Virginia-born but opposed to slavery, had early hung up his shingle in Ohio. He had been United States Attorney under President Jackson, and thereafter had held high rank at the Columbus bar. Lincoln appointed him to the Court as successor to Justice McLean, in January 1862.<sup>4</sup> Swayne was affable and ingratiating, well-connected among Ohio Republicans, and highly regarded by the bar of his circuit. His opinions, sometimes sententious, showed a marked regard for authority, especially of the English cases.

Samuel Freeman Miller was one of the most remarkable men ever to reach the Supreme Bench, and certainly one of the greatest.

<sup>2</sup> 2 Wall. xii.

<sup>3</sup> Philip G. Clifford, *Nathan Clifford, Democrat (1803–1881)* (New York and London: G. P. Putnam’s Sons, 1922).

<sup>4</sup> John McLean (1785–1861) of

Ohio, Postmaster General under Presidents Monroe and John Quincy Adams, was appointed to the Court by President Jackson in 1829. He was assigned to the Seventh Circuit, in what was then the Northwest.

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Born in Kentucky in 1816, he had practiced medicine in a village near Cumberland Gap, belatedly read law, and in 1847 was admitted to his new profession. After Kentucky rejected gradual emancipation, in 1850 he moved with his wife and children to Keokuk, Iowa, a growing town of 2,500 at the head of low-water navigation on the Mississippi. Thanks to a natural bent for the law, a vigorous intellect, and sustained application, by 1862 he stood at the head of the Iowa bar. He took leadership, too, among the State's active Republicans. Here was an authentic representative of the great Northwest, a section entitled to a major voice in the national councils. With no false modesty, Miller sought a place on the Court, and with united support from his State attained it, in July 1862.

David Davis, of Bloomington, Illinois, was a Marylander by birth; he had attended Kenyon College in Ohio, read law in New England, and begun practice in Illinois. For fourteen years he had been judge of the Eighth Judicial District, in central and eastern Illinois, where Lincoln practiced. He had managed Lincoln's interests in the Chicago convention in 1860. To obtain for Davis an appointment to the Supreme Court had been the sustained endeavor of the lawyers of the old circuit, and at long last the President's judgment concurred in that desire. To Judge Davis, a seat on the Court was a place, not a calling; he had professed to prefer the District Judgeship for Northern Illinois, "because I know I could discharge the duties of the one satisfactorily, but am diffident about the other."<sup>5</sup> Never renouncing politics, he developed an obvious preoccupation with the Presidency, and in 1877 left the Court to become a Senator through the votes of Democrats and Independents. Justice Davis was absent by reason of illness throughout the December term, 1864.

In 1863, when Congress created a tenth seat on the Court, the President appointed Stephen Johnson Field, the Chief Justice of California—a strong judge and in politics a War Democrat. Field had grown up in a New England parsonage. On graduating from Williams College he read law and then practiced with his brother, David Dudley Field, in New York City. In 1849 he sailed for California via the railroad at Panama—a route he was to pass and repass as a Justice until, in 1869, the transcontinental railroad was opened. He remained on the Court until his resignation in 1897. Field sat with Wayne, who had sat with Marshall, and Marshall had come to the Court in 1801. Three overlapping periods of service thus spanned almost a century of judicial history.

<sup>5</sup> Willard L. King, *Lincoln's Manager, David Davis* (Cambridge, Mass.:

Harvard University Press, 1960), 191.

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THE CHIEF JUSTICESHIP

THERE HAD BEEN NO NEED for the President to act before the Senate convened. In the meantime, with characteristic shrewdness and propriety, he held the matter in suspense.<sup>6</sup> As Secretary of the Treasury in Lincoln's Cabinet, Chase—assuming a lofty superiority in ability and in moral perception—had never given an unqualified support to his chief.<sup>7</sup> He had been more than receptive to a movement among impatient Republicans to put Lincoln aside and make Chase their candidate. On June 29, 1864, on the occasion of a difference with the President in the matter of an appointment, Chase offered his resignation (as he had at other junctures) and was chagrined when, this time, it was accepted.<sup>8</sup>

<sup>6</sup> He could have made no more than a *recess* appointment, which must expire by the end of the Senate's next session. Constitution, Art. II, Sec. 2, cl. 3. Or he could have announced what nomination he purposed to make when the Senate convened.

When Taney died, on Wednesday, October 12, the Presidential canvass was in full swing. On October 11, State elections in Indiana, Ohio, and Pennsylvania had shown a preference for Republicans—substantial, moderate, and narrow, respectively. The great test would come on Tuesday, November 8. Chase, now a private citizen, was bestirring himself in the canvass.

For Lincoln to designate Chase prior to the election would have made further campaigning on his part improper and would have tended to alienate conservative Unionists.

(Two years before, in October 1862, after months of waiting, Lincoln had given David Davis a recess appointment to the Court—an action that gave great satisfaction in Illinois. King, *Davis*, 199. However, when the Court came in on Monday, December 1, Davis did not present himself. He waited until December 10, when he offered letters patent of his permanent appointment, made on December 8 with the advice and consent of the Senate. Minutes of the Supreme Court.)

<sup>7</sup> An illustration is the Administration's crisis in December 1862, when Republican Senators sought to subordinate the President's action to the "combined wisdom" of a Radical-minded Cabinet—aiming to exclude Seward and make Chase the central figure. In bringing about this situation, Chase—in Professor Allan Nevins' words—"had spread his poison into every channel he could reach." *The War for the Union* (New York: Charles Scribner's Sons, 1959, 1960), II, 350–63. By contriving a meeting where Chase was brought face-to-face with the Senators he had incited and where he made a miserable showing, Lincoln managed to restore his own authority with a Cabinet representing the various shades of Unionist sentiment.

<sup>8</sup> "Chase you see hung on as long as possible and dropped off at last like a rotten pear unexpectedly to himself & everybody else. He supposed he would bully Lincoln by threatening to resign unless he was permitted to make the Treasury appts. without control . . ." So wrote rancorous Francis P. Blair, Sr., to his son, Frank, Jr., on July 4, 1864. Ford Collection, New York Public Library. The enmity of the Blair family toward Chase would soon have something more to feed upon, when he was appointed to the Chief Justiceship coveted by Blair's other son, Montgomery.

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He spent two months sojourning in New England, “peddling his griefs in private ears, and sowing dissatisfaction about Lincoln,” at a season of despair when men were scheming to force Lincoln to withdraw in favor of some new candidate who might inspire confidence.<sup>9</sup> But September saw Republicans carry elections in Maine and Vermont—victories by Sherman at Atlanta and Sheridan at Winchester—and a new resolution by Chase to join in the effort to win the election for Lincoln.<sup>10</sup>

The death of Taney, at eighty-seven, had seemed imminent for months. At the time of Chase’s departure from the Cabinet, Lincoln had given visitors to understand that he might have the Chief Justiceship when it became vacant. As soon as that moment arrived, Chase and his supporters became importunate.

Among these Senator Sumner was the most persistent, although neither he nor any other advocate had any dominant influence upon Lincoln. Under date of October 12, Sumner wrote from Boston, calling on the President to act:<sup>11</sup>

Providence has given us a victory, in the death of Chief Justice Taney. It is a victory for Liberty & for the Constitution.

Thus far the Constitution has been interpreted for Slavery. Thank God! it may now be interpreted surely for Liberty. The importance of this change cannot be exaggerated.

Still further, the powers of the govt. in the conduct of the war, may now be vindicated, whether as regards the rebels or foreign nations.

To this end, the successor of Chief Justice Taney must be a person, who, besides an acknowledged mastery of his profession, is an able, courageous, & determined friend of Freedom, who will never let Freedom suffer by concession or hesitation, & he must also have an aptitude for public law.

<sup>9</sup> The comment is from Samuel Bowles of the *Springfield Republican*. George S. Merriam, *Life and Letters of Samuel Bowles* (New York: Century Co., 1885), I, 413; James Ford Rhodes, *History of the United States from the Compromise of 1850* (New York: Macmillan Co., 1893-1906), IV, 527-29; James G. Randall and Richard N. Current, *Lincoln, the President: Last Full Measure* (New York: Dodd, Mead, 1955), 210-31.

<sup>10</sup> Chase’s diary entry of September 17, in Jacob W. Schuckers, *The Life and Public Services of Salmon Portland Chase* (New York: D. Appleton and Co., 1874), 511; also in David

Donald, ed., *Inside Lincoln’s Cabinet. The Civil War Diaries of Salmon P. Chase* (New York, London, Toronto: Longmans, Green and Co., 1954), 254-55. Letter of October 2 to John Sherman, in Sherman, *Recollections of Forty Years* (Chicago, New York, London, Berlin: Werner Co., 1895), I, 340-42.

<sup>11</sup> Lincoln Papers, L.C. Taney died at about 11 P.M. on the twelfth. Carl B. Swisher, *Roger B. Taney* (New York: Macmillan Co., 1936), 577. Hence Sumner wrote in anticipation or instantly upon advice by telegraph—or misdated his letter.

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At this moment, I think Mr. Chase fulfills more of these requirements than any other person, & I write at once to express my hope that he may be nominated. Let it go forth that he is Chief Justice & our cause will gain every where.

In a letter of October 14, Sumner informed Chase that he had promptly written to the President and had “urged anew the considerations to which he yielded last spring in favor of your nomination”; now, he wrote, “accept, & complete our great reformation by purifying the Constitution, & by upholding those measures through which the Republic will be saved.”<sup>12</sup>

Chase’s reply, from Cincinnati on the nineteenth, contained this passage:

It is perhaps not exactly *en règle* to say what one will do in regard to an appointment not tendered to him; but it is certainly not wrong to say to you that I should accept. I feel that I can do more for our cause & our country & for the success of the next Administration in that place than in any other. Happily it is now certain that the next Administration will be in the hands of Mr Lincoln from whom the world will expect great things. God grant that his name may go down to posterity with the two noblest additions historian ever recorded—Restorer and Liberator.<sup>13</sup>

Sumner copied this ingratiating profession and sent it to the President, in a letter of October 24; anti-slavery men, he wrote, were “trembling” lest the opportunity be lost of appointing a Chief Justice who would sustain the War Powers and “deal a death-blow to Slavery”; no “old-fashioned lawyer who has accepted for years pro-Slavery glosses can do this.”<sup>14</sup> Also on October 24 he wrote to Chase, advising him of a reported effort on behalf of Justice Swayne:

I do not think this possible. It so happened that the Presdt. last spring mentioned Judge Swayne to me as the ablest of the new judges & a candidate for C.J. I spoke very frankly of the effect of such an appointment, & insisted that he had not the elements required for the head of the bench now. It was after this conversation that he said that he would tender the place to you, & I understand he has repeated this determination since, especially to the Senate Com<sup>ttee</sup> when it visited him to know the occasion of your resignation. He then con-

<sup>12</sup> Chase Papers, L.C.

<sup>13</sup> Ibid.

<sup>14</sup> In a third urgent letter, on November 20, he repeated his call for

an announcement for Chase: “I thought it ought to have been made on the evening of Taney’s funeral.” Lincoln Papers, L.C.



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fessed that you & he could not get along together in the Cabinet, but that he should be glad to make you C.J. John Sherman knows about this conversation.<sup>15</sup>

## CANDIDACIES

THE ARRAY OF QUOTATIONS that follow will serve two purposes: to afford a narrative, and to demonstrate what were the qualifications regarded as important. As is usual when a seat on the Court is to be filled, names were suggested that never entered into the reckoning. Three candidacies are to be kept in view: that of Chase, sometime Senator, Governor, and recently Cabinet officer, and foremost public figure; that of Justice Swayne, senior among Lincoln's appointees to the Court; and—seemingly contingent upon Chase being passed by—that of William M. Evarts of New York, active practitioner who had distinguished himself in a wide range of public matters.

Evarts was then forty-six; Chase was fifty-six; Swayne would reach sixty in December.

Orville H. Browning—recently a Senator from Illinois, now busy with law and politics in Washington—on the morning after Taney's death called on Secretary Fessenden at the Treasury Department and inquired whether he would accept the Chief Justiceship if his friends procured it for him. As Browning recorded in his diary, Fessenden rejected the proposal, decisively; he said that

he knew that the place was designed for Mr Chase, and that the appointment would be tendered to him, and accepted by him—that when Mr Chase resigned as Secretary of the Treasury, and [ex-Governor] Tod, of Ohio, was nominated to the vacancy he, Fessenden, as Chairman of the Finance Committee of the Senate called on the President to induce him to withdraw Tod's nomination and reinstate Mr Chase—that the President refused to do so, and showed a determination not to take him back into the cabinet, but remarked that he had great respect for Mr Chase, and that if the Chief Justiceship of the Supreme Court was now vacant he would appoint him to that place—that previously when it was thought the Chief Justice was near his end, he had made up his mind, in the event of his death to appoint Mr Chase, and that he had not changed his mind, and would appoint him now if the place was vacant. . . .<sup>16</sup>

<sup>15</sup> Letter of Oct. 24. Chase Papers, L.C. Senator Sherman was a member of the Committee on Finance, and William Pitt Fessenden (now Secretary of the Treasury, *vice* Chase) had then been its chairman.

<sup>16</sup> *Diary of Orville Hickman Brown-*

*ing* (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). Entry for Oct. 13, 1864. I, 686-87.

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(Tod had promptly declined; whereupon the President nominated Fessenden, without his knowledge.<sup>17</sup>)

Browning's objective was to avert the appointment of Chase. Of like mind was the venerable Thomas Ewing of Ohio—former Senator, Cabinet officer, and recently Browning's partner in a practice that consisted largely in influencing action within the Government.<sup>18</sup> Henry Stanbery, Ewing's friend and former partner, recommended Swayne, with an implication adverse to Chase.<sup>19</sup> Glancing ahead, in 1866 Stanbery and Browning would sit together in Andrew Johnson's Cabinet, while Ewing would be his trusted counsellor. Reactions to the prospect of having Chase as Chief Justice have a close correlation with later attitudes on the issues of Reconstruction and the future status of the Negro.

Edwin M. Stanton was gladdened by the thought that the President might now relieve him of the burden of the War Department by a transfer to Taney's place. Justice Grier, well acquainted with Stanton's great power as a lawyer, encouraged him in that thought by the following letter from Philadelphia on October 13:

I have just received your telegraph [*sic*] announcing the death of Chief Justice Taney. Although often differing in opinion with him I had the highest respect and esteem for him & sincerely lament his loss.

I see speculations are already rife as to his successor. It is a question in which I feel a deep interest. I know of no man more competent to fill the place, or who *deserves it so much* as yourself. You have been wearing out your life in the service of your country & have fulfilled the duties of your very responsible & laborious office with unexampled ability, and I think the president owes it to you & that you should be suffered to retire in this honorable position.

I see the papers are already beginning to put forward the name of Mr Chase, but I presume the president will not be persuaded thereby, that he is the choice either of the bar or the people—or attend to the dictation of the *journalocracy*.

It would give me the greatest pleasure and satisfaction to have you preside on our bench. I am sure you would be the *right man* in the *right place*.<sup>20</sup>

<sup>17</sup> Carl Sandburg, *Abraham Lincoln; The War Years* (New York: Harcourt, Brace and Co., 1939), III, 109–17.

<sup>18</sup> Belatedly, Ewing on December 3 advised the President that Chase "would not be acceptable to the Bar of Ohio . . . . He is a politician rather than a lawyer" and, Ewing feared,

would be "intriguing & trading for the Presidency." Lincoln Papers, L.C.

<sup>19</sup> He wrote of Swayne: "I do not know of any one in this region of the Country whose appointment . . . would give such general satisfaction . . . ." Letter from Cincinnati on Oct. 31. Lincoln Papers, L.C.

<sup>20</sup> Stanton Papers, L.C.