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Salmon P. Chase: Chief Justice

David F. Hughes*

Professor Hughes here makes an overall survey of Salmon P. Chase as Chief Justice of the United States Supreme Court. The author details how, through a blend of subtlety, utter wilfulness, and personal integrity, Chief Justice Chase became, in most instances, an effective leader of the Court.

I.

This article is not an in-depth study of some aspect of Salmon P. Chase's career as Chief Justice. Nor is it a survey of his judicial career. Rather, it is an attempt to present an overall view of Chase as Chief Justice through an examination of a limited number of topics. Such an approach seemed appropriate, for the sweep of his days on the Court are not well enough known to make a detailed study of one aspect of his career particularly valuable, nor is enough known about him to make a summary more than an exercise in superficiality. In finally placing this effort on what is hopefully a feasible ground somewhere between breadth and depth, I find myself beset with misgivings, some of which should be shared.

Many signal events in Chase's career as Chief Justice are put to one side. The *Legal Tender* episodes, the impeachment trial of Andrew Johnson (probably Chase's moment of greatest public triumph as a judicial figure), his strong role in settling vexing legal and constitutional problems growing out of the Civil War, and his political adventures while on the bench are barely alluded to, not to mention many significant areas unnoticed by even an allusion. On the other hand, I find my prose is too often compelled to hasten over events and on to swift conclusions with little pause to share the reasoning and evidence with the reader. Lastly, and most important, I am struck by the way in which Chase tends to emerge on the pages that follow

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I could write a book and do nothing but thank those who have helped me in my work on Chase. Surely the financial assistance rendered by the American Philosophical Society and Centre College should be acknowledged with thanks. My research assistant, Frank Edelen of Centre College, has faithfully labored at the considerable task of informing his employer. In the shadow of a deadline, no less than four typists pitched in to bring about legibility where little had previously existed: Miss Virginia Mowery, Mrs. Edith Gover, Mrs. Hilda Taylor and Mrs. Ida Webster.

But foremost, I thank my teacher, Professor Alpheus Mason. I am in his debt not only for his skilled help and generous encouragement to me, but also for being living proof that one can be both a producing scholar and a producing teacher.

as a politician only incidentally on the bench, largely lacking in a proper sense of the judicial responsibilities of his office. Such a picture is a distortion, and if I have drawn it so, the result comes as an unintentional, unjust and regretted byproduct of the subjects it seemed best to discuss. I hope that the pages which follow will, nevertheless, be valuable as a cameo presentation of the last stage of the public life of a major figure in American politics and judicial history.

II. LINCOLN'S CHIEF JUSTICE

When the news spread that Salmon Portland Chase had at last become the sixth Chief Justice of the United States, radical Republicans¹ could not withhold their joy. "Surely," one wrote, "God has spared the life of the late Chief Justice until the fulness of time. His hand we now see. . . ."² John Stevens of New York enthused that the appointment was "the greatest civil war victory won . . . during Mr. Lincoln's administration."³ "The pulses of the nation beat a joyful accord and freedom's altar fires rekindle with illimitable blaze" at the appointment, according to Alabama's very radical federal district judge.⁴

Others were not so pleased. Crusty old Gideon Welles, Lincoln's Secretary of the Navy, had growled that Chase as an appointee was "impossible,"⁵ and Thomas Ewing of Ohio described the nominee as "knaveish, dishonest and corrupt."⁶ Within Lincoln's own office one of his secretaries thought that when Chase had left his post as Secretary of the Treasury, he had been "relegated to private life, where he belonged, and where he should have remained."⁷

That feelings ran to abnormal extremes at his appointment was only normal in Chase's life. Few were indifferent about Salmon P. Chase. Indeed, this man whom Lincoln now elevated had been in effect fired by the President as Secretary of the Treasury only the preceding June, after leading the Treasury through the bulk of the agonizing task of

1. I am aware that Professor Eric McKittrick has demonstrated that the cohesiveness and permanence of the group known as "radicals," was much less solid than had previously been supposed. Nevertheless, there was a distinguishable group identifiable as radicals with a generally common political orientation. See McKittrick, *ANDREW JOHNSON AND RECONSTRUCTION* (1960).

2. Letter from E. G. Cook to Salmon P. Chase [hereinafter referred to as SPC] December 7, 1864, Library of Congress, Chase MSS., Vol. 93.

3. Letter From John Stevens to SPC, December 30, 1864, New York Public Library, Misc. MSS., John Stevens.

4. Letter From Richard Busteed and Rufus F. Andrews to SPC, December 7, 1864, Library of Congress, Chase MSS., Vol. 93.

5. II *THE DIARY OF GIDEON WELLES* 183 (Beale ed. 1960).

6. II *THE DIARY OF GEORGE TEMPLETON STRONG* 592 (Nevins & Thomas ed. 1952).

7. *CULLOM, FIFTY YEARS OF PUBLIC SERVICE* 94 (1911).

financing the greatest war-bill ever presented to that time. Chase had become an intolerable political burden to President Lincoln. Especially was this true in regard to certain treasury posts which the President needed for patronage purposes in the coming election. This was most touchy in the lucrative New York Custom House and Treasury Office, from which the friends of Secretary of State William H. Seward and New York Republican Leader, Thurlow Weed, were excluded. Lincoln needed New York support at the Republican National Convention. Chase refused to cooperate. In June, 1864, he needlessly gave Lincoln the opportunity the President wanted. After a compromise settlement satisfactory to Chase had been reached in a dispute over an important post in the New York Treasury Office, Chase petulantly appended another of his long series of resignations to a letter that at least temporarily closed the affair. Lincoln hastily accepted. Chase suddenly and most unexpectedly found himself out in the political arctic waste. To many Republican "moderates," his removal was a Godsend. To Republican "radicals," it was yet another stab in their backs by a perfidious President.

Ironically, the deep antipathy which developed within the Radicals toward Lincoln probably had no little to do with Chase's appointment as Chief Justice. Shortly after Chase's unexpected departure from the Treasury had seemingly struck at the radical faction, the President had vetoed the Wade-Davis Reconstruction Bill. In attempting to steer a middle course between the radicals and moderates in the Republican Party, Lincoln had been increasingly at odds with Chase's radical friends. His generous amnesty proclamation of December 8, 1863 had probably stimulated the boomlet for Chase as an alternative Republican candidate for President. The Chase movement first gained substance at a meeting on December 9.⁸ The feeling against the President ran so deep that certain radicals proposed to run General John C. Fremont as a third candidate in 1864, hoping to force Lincoln out of the race. This movement did not die until the early fall. One of the uses the President made of the empty Chief Justice's chair was to keep Chase and his friends "honest" about the election. In addition, before Taney at last expired,⁹ Lincoln had repeatedly assured leading supporters of Chase that when the vacancy came, Chase would come to the Court.¹⁰ To have reneged on his promise would scarcely have

8. *The Original Chase Meeting and the Next Presidential Election*, 23 MISS. VALLEY HIST. REV. 62-63 (1936) [Hereinafter this journal is cited as MVHR].

9. Chief Justice Roger Brooke Taney died on October 12, 1864. He had been in ill health for years.

10. Letter From Charles Sumner to SPC., October 24, 1864, Library of Congress, Chase MSS., Second Series, Vol. 3. II THE DIARY OF ORVILLE HICKMAN BROWNING 686 (Pease & Randall eds. 1931); CULLOM, *op. cit. supra* note 7, at 686-87. Among

pleased the radical Republicans, and could have made matters impossibly difficult for him in his second administration.

Lincoln had a high regard for his often difficult custodian of the Treasury,¹¹ and played no little part in making Chase occupy, as the President put it, "the largest place in the public mind in connection with the office."¹² In spite of the extreme pressure bearing on him and his early expressed desire to appoint Chase, Lincoln waited to make the appointment until the December term of the Court began. While the President probably had little practical choice but to appoint Chase, two large problems concerned him about Chase as Chief Justice. First, Chase's appointment would irritate many who were the enemies of the "radicalism" Chase reputedly embraced. A Chief Justice with so many political enemies would bring a large disadvantage with him to the court. More important, Chase had been a perennial candidate for the Presidency, and he was still the major aspirant of the radical wing of the Republican Party. "If he does not give up that idea," Lincoln confided to George Boutwell, "it will be very bad for him and very bad for me."¹³

How Chase reached the radical position which he supposedly held at the time of his appointment illustrates the strengths and weaknesses of this remarkably complex man. Chase earned the title of "Radical." In spite of the hardships of a relatively impoverished early life, Salmon Chase was a privileged person for his time and age. After finishing Dartmouth College, he repaired to Washington, D.C., and there gained entrance to the rarefied circles of the capital's society. He studied law in the office of the Attorney General of the United States, and was well on his way toward a most distinguished and lucrative law practice in Cincinnati when he became immersed in the anti-slavery cause. By 1837 he was well on his way toward earning the epithet, "Attorney General for the Run-away Niggers," and subsequently he devoted much time to representing runaway slaves and those who assisted runaways. He sacrificed his popularity and, seemingly, the chance for an outstanding law practice, on what was commonly thought a "vile business."¹⁴ George Hoadly recalled that

those Lincoln promised that Chase would be the man were William Pitt Fessenden, Charles Sumner, John Sherman and the entire Senate Committee on Finance.

11. As Shelby Cullom put it, "Lincoln entertained a very exalted opinion of Chase's ability as a lawyer and as a man. He believed he possessed the qualifications of a great Chief Justice." CULLOM, *op. cit. supra* note 7, at 95.

12. II BOUTWELL, REMINISCENCES OF SIXTY YEARS 29 (1902).

13. *Id.* at 29. Chase conveyed his assurances that the Presidential bug would die with his ascension to the bench. The Presidential bug, of course, never dies. Lincoln was still concerned about Chase's ambitions a few days before making the appointment, in spite of the assurances he received. As usual, Lincoln was quite correct in his evaluation of Chase.

14. PIATT, MEMORIES OF THE MEN WHO SAVED THE UNION 100 (1887). Piatt

"When I entered his office . . . he was the most unpopular man in Cincinnati."¹⁵ As his one great cause was radical, so through association with it, he became known as a radical.

He first burst into national prominence in 1849 as United States Senator from Ohio, even though he was associated with a tiny radical fringe group at the time. Of the handful of Anti-Slavery Freesoilers in the lower house of the legislature, only two supported Chase. For various reasons, ten seats were still disputed when the legislature met. In a compromise move with party tensions high, the House was organized to rule on the disputed seats. The two pro-Chase men by voting together could control all votes taken. They voted on the disputed seats so that an equal number were added to both political parties, leaving these two men in control. As Chase wrote his wife on the eve of his election, "I have no strength to spare, as none of the Whig Freesoilers are in my favor."¹⁶ But nor could these Whig Freesoilers when acting with the regular Whigs command a majority in the House. After the smoke had cleared, it was apparent that some "arrangement" had been made between Chase's friends and the Democrats, because the organization of the House was favorable to the Democrats, and they and Senate Democrats in turn voted to place Chase in the Senate.¹⁷ Needless to say, this maneuver did not strike the Whigs favorably. This election originated a marked Whig antipathy toward Chase, which was to be long remembered among those who were Whigs in 1849.

As a Senator, together with a handful of other opponents of slavery, he led the intransigent assault on Senator Stephen A. Douglas' Kansas-Nebraska Act. Their action directly led to the formation of the Anti-Nebraska movements throughout the North that culminated in the Republican Party. Returning from the Senate as the best known anti-Nebraska man in Ohio, he was elected to the first of two terms as Governor in 1855. He was one of the few Republicans of prominence to survive the party's unhappy electoral experiences in 1857, narrowly winning re-election. When the Lincoln Administration was formed, Chase departed his newly won Senate seat to assume the second position in the cabinet, that of Secretary of the Treasury, in spite of frantic opposition from former Whigs in the party. The leader of this opposition within Lincoln's supporters was David Davis, by 1864

studied in Chase's Cincinnati law office, and records how he and his fellow students could not understand their "great man's" preoccupation with such a "vile business."

15. HOADLEY, SALMON P. CHASE 4 (1887).

16. Letter to "My Dearest Wife," February 19, 1849, Library of Congress, Chase MSS., Vol. 16.

17. *The Election of Salmon P. Chase to the Senate*, The Republic, March, 1875, pp. 179-85. Library of Congress, Chase MSS. Vols. 15-16, *passim*.

Associate Justice Davis. Throughout, Chase was generally thought to be a thorough-going radical due to his stout belief that Slavery must be destroyed and his subordination of all other questions to that end.¹⁸ It is probable that his image, like that of Senator William Seward of New York, who became Secretary of State under Lincoln, was the major stumbling block to his presidential aspirations. By 1863, however, Chase was clearly identified as the leader of those who favored a more vigorous and adventurous role in the war effort on behalf of anti-slavery and Negro rights. As such, he entered the Supreme Court both as a "radical" and as a leader of a major wing of his political party, and as such, a prime candidate for the Presidency, clearly identified with a highly partisan point of view.

More reflection on his political past might well have tempered the enthusiasm of the telegrams that poured in upon his nomination, and caused many of his partisans pause. For Salmon Chase had clearly shown himself to be a one-issue radical, thoroughly devoted to that one great issue, but not unmindful of other questions of public importance.

Indeed, his preoccupation with slavery had led him down some curious looking political paths. In 1840, he had supported a Whig, William Henry Harrison. In 1844 he lent his efforts to the formation of the Liberty Party, and in the following election he played a primary role in creating the unusual combination of Free Soil Democrats, Liberty Party men and Whigs who backed former President Martin Van Buren. Even though he made clear that the aim of these and later activities was the sharp curtailment of slavery, this aim had led him into variegated political involvements.

Two dominant factors, however, should have tempered any simplistic evaluation of him as a "radical" in all things. First, he worked with great skill and ingenuity to make the anti-slavery movement more pragmatic and appealing to the concensus of the American electorate. Much of his legal efforts were devoted toward the aim of, as he put it before the United States Supreme Court, rescuing "the Constitution from the undeserved opprobrium of lending its sanction to the idea that there may be property in men."¹⁹ In much the same way, by 1847 he was attempting to capture one of the two political parties for the anti-slavery cause. In 1847, after pointing out the failures of the Liberty Party at the polls to John P. Hale, he concluded that "the Liberty Party can never hope to accomplish anything as

18. Probably the sole exception was his belief that winning the war was a pre-eminent necessity. Of course, anti-slavery was most intimately connected with this aim.

19. *Jones v. Van Zandt*, 46 U.S. (5 How.) 215 (1847). The material cited is from Chase's voluminous written argument, and is reprinted in: SCHUCKERS, *SALMON PORTLAND CHASE 64-65* (1874).

such, but can only [act effectively] through indirect action upon the other parties."²⁰ He proposed that a movement be formed which would support anti-slavery candidates of the major parties, and thus aspire to hold the balance between the parties, and thus accelerate their movement toward anti-slavery positions. Where there were no anti-slavery candidates, the movement would put third party candidates in the races. The result was the 1848 Free-soil candidacy of Martin Van Buren for President. This scheme involved, among other things, a position on slavery which would both end in its demise *and* be acceptable enough to the electorate to render an anti-slavery position feasible for a major political party. This aim led him into frequent conflict with more uncompromising abolitionists.

He developed a constitutional argument which he felt was both sound and would serve his purpose. Essentially he maintained that the United States Constitution was neutral on the subject of slavery, neither sanctioning it nor prohibiting it. Thus, slavery became a state matter in all respects. When a slave entered a free state from a slave state, therefore, that slave became free, having left the jurisdiction where slavery was in force through state law and entered into a jurisdiction where slavery had no legal status. Needless to say, this doctrine was convenient for one to maintain in a free state, but it failed to satisfy many firm opponents of the peculiar institution. In the first place, it affirmed the right of a state to maintain slavery if it wished, but perhaps more important, his view denied the federal government *any* power over slavery within the states, either to protect it *or* destroy it. In short, his position was limited to "urging abolition only in the District of Columbia and in the territories, where it existed without the support of state constitutions."²¹ This position was grounded in an exaggerated notion of states rights, and was bound to dissatisfy many more aggressive members of the anti-slavery ranks. As Chase wrote to the eastern abolitionist and friend, Gerrit Smith, in 1850:

I do not, as you are aware, coincide in your views as to the existing power of Congress over the subject; nor as to the *unconstitutionality* of Slavery in the States. In my view Slavery in the States is no more constitutional or unconstitutional than slavery in Brazil. It is extra-constitutional in every sense.²²

In the process of bringing "to the idealistic program of the Liberty

20. Letter from SPC to John P. Hale, May 12, 1847, p. 3, New Hampshire Historical Society, John P. Hale MSS.

21. HARLOW, GERRIT SMITH 165 (1939).

22. Letter From SPC to Gerrit Smith, May 3, 1850, Library of Congress, Chase MSS., Second Series, Vol. I.

Party a definitely pragmatic approach,"²³ Chase strongly identified the cause of the slave with advocacy of an extreme state's rights position. As he made this identification over a long period of time, it would be most unusual if he could shed this view with the triumph of anti-slavery and his ascension to the Supreme Court. As we shall see, he did not shed.

Together with a resolve to capture one of the two great parties went a decision as to which one best lent itself to the role of prisoner. Chase came to believe that by all odds the Democratic party offered the Liberty men their best opportunity. He wrote the anti-slavery Democratic leader of New Hampshire in 1847 that:

Many anti-slavery men look with most hope to the Whig Party. I do not. . . . I fear that the Whig Party will always look upon the overthrow of slavery as a work to be taken up or laid aside, like other measures, as expediency may suggest. Whereas if we can once get the Democratic Party in motion, regarding the overthrow of Slavery as a legitimate and necessary result of its principles, I would have no apprehension at all of the work being laid aside until accomplished.²⁴

Indeed, many more diehard opponents of slavery felt that Chases's intentions threatened the entire movement. As Lewis Tappan wrote to the same New Hampshire leader: "Mr. Chase has never had the entire confidence of the party. . . . He has shown too much desire to merge the Liberty Party in portions of the other parties and to accept of small advances from them."²⁵ Mr. Chase had been too moderate for abolitionist enthusiasts in the 1840's—and some felt he would sacrifice the movement to satisfy personal advancement. The circumstances of his election to the Senate scarcely diminished this suspicion.

If Chase's attachment to the Democratic Party had only been one of tactics for the profit of the anti-slavery movement, perhaps it would reflect little of the man's political orientation. The fact was, however, that Chase felt at home within the ranks of the Democratic party on a wide range of issues. Aside from his State's rights orientation, he was a fiscal conservative and hard money man of the Jacksonian school. He summed up his position well in 1851.

[U]phold slavery as a local institution—all wrong in itself—but within state limits beyond the control of the general government. . . . I think the signs of

23. Luthin, *Salmon P. Chase's Political Career Before the Civil War*, 29 MVHR 517 (1943).

24. Letter From SPC to Hale, May 12, 1847, p. 4, New Hampshire Historical Society, John P. Hale MSS.

25. Letter From Lewis Tappan to John P. Hale, July 1, 1848, p. 10, New Hampshire Historical Society, John P. Hale MSS.

the times indicate the necessity of the organization of the Radical Democracy. . . . We ought to welcome all Whigs who will join us, but not modify or lower our Democratic platform to accommodate them. Our motto should be no more slave states—no slave territory—no nationalized slavery—retrenchment in expenditure—reform in administration—power to the people and restriction upon the executive.²⁶

Even after the Republican Party was a going concern Chase lamented that it had not kept some reference to the radical Democracy in its name. Of course, most of his deviations toward moderation had been forgotten in the party struggles which developed after the middle of the 1850's and his defense of the administration's utilization of extraordinary powers during the war. Nevertheless, it would have been most remarkable had what David Donald called his "saving quality of moderation" deserted him by 1864.²⁷

It is doubtful if any man ever came to the Chief's chair with a more thorough grounding in the political process. Chase's accomplishments in practical politics were massive in the face of seemingly impossible handicaps, and he had been a successful Secretary of the Treasury under circumstances of unprecedented difficulty. His political experience and connections were not, however, unmixed blessings, for they posed some of his greatest difficulties, particularly when it is recognized that his deepest interest in public life, the lot of the Negro in American life, was not yet settled. Chase well recognized the difficulties which this fact presented to him in maintaining a posture of judicial neutrality. He also recognized that on the matter of Negro rights, he could not be—and had no intention to be—politically neutral.

Some people seem dreadfully afraid that I shall lower the dignity of the bench and damage my own by taking part in meetings for the promotion of the welfare of such low creatures as "niggers" or for the advancement of the cause of humanity and religion among men. I am sorry to disturb their sensitiveness; but when I see an opportunity to do some good to black or white I hope always to have courage enough to do it and let dignity take care of itself.²⁸

Thus, Chase defended an 1866 speech he made at Dartmouth in which he blessed the Civil Rights' Act as "progress." Any Supreme Court member who can defend this sort of public statement on the ground that he "said nothing about its constitutionality or unconstitu-

26. Letter From SPC to "A newspaper editor," February 26, 1851, New York Public Library, Misc. MSS., Salmon P. Chase.

27. RANDALL & DONALD, *THE CIVIL WAR AND RECONSTRUCTION* 638 (1961).

28. Letter From SPC to Flamen Ball, April 10, 1866, p. 91, Pennsylvania Historical Society, Chase MSS., Letterbook.

tionality,"²⁹ has at least one unfortunate attitude toward his function as a judge. He was open to the charge that he was dragging the "judicial ermine through the dirt to propitiate radicals,"³⁰ as former President Buchanan maintained in 1867. Nor did his behavior while Chief Justice do a great deal to mitigate partisan suspicions. On Lincoln's second inauguration, he visited a cabinet meeting and stayed a half-hour. He bombarded first Lincoln and then Andrew Johnson with political advice on behalf of Negro rights and his ideas on fiscal matters. He advocated Negro suffrage with a resolute and wide-ranging fervor. And, until very early in 1868, he was hopeful of being the Republican candidate for President. After his estrangement from the party over Reconstruction policy and the impeachment of Andrew Johnson, he was very nearly the Democratic candidate that same year. When Chase took judicial stands which favored the Democratic view of the Constitution, particularly after his 1868 break with the radicals, his apparent willingness to support political measures made him vulnerable to the charge that he was still using the Court for political advantage, though for different masters.

Since the days of John Marshall, the Supreme Court has been a meeting ground for strong personalities who often represent differing points of view. They must endure each other under strenuous circumstances, and often the manner in which their personalities mix must have been of no little importance in the development of our public law. As presiding officer, the personality of the Chief Justice can determine whether the everyday judicial social mixture is at least bearable, or is a little bit of hell. He can have a great deal of influence on the not inconsiderable style of the Court, beside determining to a large extent whether or not the judicial mill grinds smoothly. Chase's personality thus deserves attention.

His was a complex personality. Deeply and conscientiously religious, he was openly vain beyond belief. His diary records so many visits to his photographer that it almost seems he must have maintained an office there. Not the least of his formidable characteristics was his appearance, for he looked rather like a child's image of God. The immigrant Carl Schurz upon first seeing him in the Senate declared that "more than anyone else he looked the great man."³¹ A Washington doctor prescribed "a look at the heavenly face of Senator Chase" as the cure for those "who suppose the anti-slavery men wicked."³² Every Chief Justice finds it a part of his public role to act as the

29. Letter From SPC to C. D. Drake, April 24, 1866, p. 100, Pennsylvania Historical Society, Chase MSS., Letterbook.

30. XI THE WORKS OF JAMES BUCHANAN 446 (Moore ed. 1911).

31. II SCHURZ, REMINISCENCES 170 (1908).

32. I CONWAY, AUTOBIOGRAPHY 185-86 (1904).

physical personification of Justice. For this role, Chase obviously was more than amply endowed. A massive composure engulfed the man, so that even the ripe vegetables he sometimes caught full in the face during the early days of his anti-slavery career could not dispel the image of personal grandeur he presented.³³ It never hurts for a Chief Justice to look like a Chief Justice.

His imposing presence served to prevent many people from ever being friendly with him. Even Chase's young confidential secretary during a latter part of his career recalled that he never felt free to engage in small talk with so imposing a man. . . . Once the ice was broken, however, Chase proved to be most approachable. Virtually every memory of the man recorded by contemporaries either notes his personal warmth or his utter unapproachableness. Apparently, many were not able to bring themselves to make the attempt to become friendly with him, while those who did make the effort found him a most congenial soul.

His letters reveal a subtle, probably overrefined sense of humor, which can be seen through his reply to a man who wished to name his son Salmon Portland Rhodes.

I had the misfortune to be born about a year after my uncle Salmon Chase died at Portland; and to have a sort of memorial made of me by giving me the name of Salmon Portland. My uncle was an excellent man and Portland a very respectable city: but somehow I never liked the name derived from them. . . . If you have due regard to the feelings of your boy, fifteen years hence or twenty, I hardly think you will give it to him.³⁴

Chase's impenetrable public dignity could carry over into personal contacts. His overly refined sense of humor which helped make him so extraordinarily attractive to women could be a hindrance in the society of male Justices, many of whom came from the rough environment of the American frontier. He had what must have been an irritating habit of acknowledging the superiority of his own judgment. For example, in 1862 when an aide to General McClellan expressed regret that Chase and the General had not been able to agree on war policy, Chase replied that if McClellan had "acted in concert with me . . . the rebellion would have been ended now."³⁵ Of all the available traits to choose from, at Chase's death his brethren on the bench chose "pride of opinion" as his dominant characteristic.

33. PIATT, *op. cit. supra* note 14, at 100-01. Describes one of Chase's encounters with some eggs.

34. Letter From SPC to J. C. Rhodes, December 29, 1863, Pennsylvania Historical Society, Chase MSS.

35. DONALD, *INSIDE LINCOLN'S CABINET: THE CIVIL WAR DIARY OF SALMON P. CHASE* 169 (1954).

For all the pride in his make-up, if he was particularly devoted to a project or policy he could work effectively with individuals whom he disliked. Working out compromises on public issues about which he felt strongly was, however, another matter. Nevertheless, he had the knack of being able to fight most vigorously with individuals over issues and yet still regard himself as being on friendly personal terms with them. For all his hatred of slavery, he numbered numerous slaveowners among his friends. Chase's voluminous correspondence shows an amazing scarcity of personal criticism of his enemies. He could be rudely condescending, but even in the height of his campaign to be rid of Lincoln as a presidential rival in 1864, he testified to the honesty and character of the President, though he attributed a great deal of irresolution and weakness to Lincoln.

As his letters and diaries testify, he worked amazingly long hours in devotion to the always numerous tasks to which he set himself. Perhaps this trait added to the conviction, shared even by those who frankly hated him, that he was a man of tremendous personal ability—a conviction shared by Abraham Lincoln.

As a lawyer, the appointee was rather suspect. He admittedly had received legal training which was remarkably scant even for the early 19th century. Theoretically, he was trained under the watchful eye of Attorney General William Wirt, but only once did Wirt even ask him a question about his work. Had Chase not begged to be admitted to the bar because he had already made arrangements to practice in Ohio, it is unlikely that he would have been passed on his bar examination.³⁶ Setting up practice in Cincinnati, however, he seemed well on his way to becoming a most prominent and successful attorney when his interest in the anti-slavery cause distracted his energy. He often had contributed to periodicals, and his monumental and highly praised compilation of the laws of Ohio was a scholarly achievement in his profession. Upon coming to the Supreme Bench, however, he had not been active in the practice of law for almost fifteen years. When appointed to the bench, Chase held no public office for the first time in fifteen years.

His history shows him to be a man of great ability, capable of bearing an immense burden of work. He was in general moderate in his political outlook, but, he had been thoroughly devoted to whatever measures were necessary in his judgment to the winning of the war. Seldom did he come into contact with anyone who was not impressed by his ability. Basically, he was a kind man in his feelings for other people, but he could be a vain and domineering person, quite used to getting his own way. Though his ability was recognized

36. SCHUCKERS, *op. cit. supra* note 19, at 29-30.

by all and he could arouse individuals to vehement hostility. He was ambitious and perhaps aware of his own ability to the point of giving offense. In his career he had left many a bruised foe and some injured friends behind who were never to forget the injuries. But, he had shown a high degree of political acumen in attaining sought-after policy goals, and had shown a willingness to work with others toward those goals—and to work very hard.

Such was the man Lincoln placed at the head of the Supreme Court during what were to prove to be some of the most turbulent days of our history. His performance as Chief Justice can perhaps be illustrated most clearly in two areas. First, an examination of his Court's relationship with Congress during the Reconstruction period, when, as Professors Kelly and Harbison tell us, "the modern conception of judicial review began to make its appearance. . . ."³⁷ Secondly, an evaluation of Chase's performance in the ultimate role of a Chief Justice, as leader of the Court, should be attempted.

III. THE COURT AND CONGRESS

The Supreme Court could just as easily have been the object primarily ticketed for destruction by the famous 40th Congress of 1867-68 as was President Andrew Johnson. Not only was the Court's influence probably at an all time low during the period from its ill-fated 1857 decision in the *Dred Scott* case through the Civil War,³⁸ but the Court was widely distrusted even by moderate Republicans. So much so that in the spring of 1865, some prisoners were dispatched to South Florida so that, in Secretary of War Edwin M. Stanton's words, "old Nelson or any other judge would not try to make difficulty by habeas corpus."³⁹

A brief glance at the personnel on the bench in 1865 quickly reveals a major cause for such distrust. If ever a Court was eminently qualified to get into such trouble, it would have been the Chase Court from 1865 to the beginning of the Grant administration. The extraconstitutional attitude of Lincoln's wartime administration failed to revert to "normalcy" in the even more confusing period of Reconstruction. Congress went from a fairly conservative body in 1865 to a point in 1868 where it was willing to try to impeach the President from what its leaders frankly admitted were political motives. The

37. KELLY & HARBISON, *THE AMERICAN CONSTITUTION* 481 (1963).

38. This would seem to be a well-established conclusion. See, for example, the contemporary comment of: Nation, Dec. 23, 1869 quoted in III WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 228 (1923). Edward S. Corwin is also quoted by Warren, *Id.* at 38-39. David Donald, probably the leading historian of the period who has an interest in the Court's history, agrees. DONALD, *op. cit. supra* note 35, at 4.

39. II *THE DIARY OF GIDEON WELLES* 334 (Beale ed. 1960).

radical-dominated Congress which was willing to be rid of a President for reasons of political expediency could scarcely be expected to treat the Supreme Court with any more consideration. Especially considering the low esteem with which the Court was held, it would seem that the Court would have been most susceptible to emasculation by Congress during this period.

The personnel of the Court appeared tailor-made to court disaster. Of the nine men effectively on the bench⁴⁰ three were holdover appointees of pro-Southern Democratic Presidents before the war, and a fourth was a Georgian, Justice James Wayne. He was an appointee of Andrew Jackson who, though somewhat of a nationalist, was also a strong States Rights Democrat. Although his son had fought in the Confederate Army, Justice Wayne remained loyal during the war. However, he could scarcely be expected to view with pleasure any stern measures imposed upon his native South in peacetime. Robert C. Grier of Pennsylvania was closely attached to the pro-Southern wing of the Democratic Party and its pre-war leader, his friend and fellow Pennsylvanian, former President James Buchanan. Though distinctly a supporter of the Northern War effort, he manifested great impatience with some war measures even while the conflict was in progress. To expect such a man to extend his support of the war power of the central government beyond the war was to expect too much. Even during the war, Nathan Clifford of Maine and Samuel Nelson of New York had actively opposed the Republican's conception of the extent of the national government's legitimate area of power. Since a radical-dominated Congress was bent on establishing federal military rule in the defeated South, this four-man block with its narrow view of the federal government's constitutional power represented a distinct threat to Congress' Reconstruction plans. For example, every time a southerner was held by the military authorities, he was the proper subject for a habeas corpus petition which could reach the Supreme Court, to name only the most probable way a case involving the constitutionality of Reconstruction could reach Washington.

Although the five remaining members of the Court had been appointed by President Lincoln, a close look at these men made the odds for a head-on clash even heavier. Of course, only one desertion from the five would be necessary to create a hostile majority of the Court. Stephen J. Field of California, the last of the Associate Justices appointed by Lincoln, was the most likely candidate. He was actually a "War Democrat." He had joined the "Union Party" created to entice Democrats to Lincoln's support in the 1864 election. Field was to make no attempt to conceal his narrow view of the powers

40. The tenth, John Catron of Tennessee, was seriously ill and died in 1865.

which he felt the Constitution allowed the national government in peacetime. In addition, he was perhaps the last man alive to run from a fight—any fight. He was abundantly deserving his reputation as a headstrong product of frontier California, and it is doubtful that any man ever sat on our Supreme Court who would more eagerly seize the opportunity to enforce his will on his country.

David Davis of Illinois might never have become a Republican had not Abraham Lincoln departed the defunct Whig Party for Republican company. Lincoln was not only an idolized personal friend, but Davis served him as his most trusted political lieutenant. Much, and probably most, of his love in the party died with Lincoln. Far from ever being in any sense “radical,” Davis once wrote that abolitionist leaders were “as corrupt and unprincipled . . . hypocrites as ever disgraced the human family.”⁴¹ He thought the Emancipation Proclamation outrageous and urged Lincoln to rescind it. Once shortly after the war he believed: “The people are mad now and, if they don’t recover soon, civil liberty will be entirely gone . . . Congress claims omnipotent power like the British Constitution. Why then a written Constitution? Majorities don’t need any.”⁴² He was, however, basically a skilled politician, more than amply endowed with prudence. Nevertheless, here was another potential enemy of the radical program. Indeed, Davis was to bitterly leave the Republican Party over the impeachment of President Johnson.

Of the eight Associate Justices only two could be considered “safe” supporters of the radicals. Noah H. Swayne of Ohio had bitterly departed his native Virginia out of hatred for slavery. His son, General Wager Swayne, was an agent of the congressionally sponsored Freedman’s Bureau in Alabama. Swayne’s carefully maintained political connections were primarily with the radicals. The eighth Justice was Samuel Miller of Iowa, one of the great judicial figures of our history. He was certainly no less firm in his ties with the dominant group in the Republican Party. Although his correspondence with his brother-in-law reveals that his radical friends went beyond merely straining his constitutional scruples, he proved to be safe.

In the popular eye, Chief Justice Chase was still regarded much as the *Richmond Examiner* viewed him: as the “high priest of radicalism.” With slavery now a thing of the past, he had whole-heartedly turned his reformer’s zeal to the cause of ensuring Negro suffrage in the defeated South. With this aim in mind, he supported and tried to give direction to radical Reconstruction well into 1867. Nevertheless, there was a time-bomb ticking away for the congressional

41. KING, LINCOLN’S MANAGER, DAVID DAVIS 51 (1961).

42. *Id.* at 257.

radicals in this dominant figure. As already pointed out, Chase had spent a good portion of his political life trying to convince the Democratic Party that he was a good, conservative States Right Democrat—except as to slavery and the political rights of Negroes. So long as his great cause was unrealized and the “former” states of the South were not in “their proper relationship” with the Union, the time bomb only ticked. With his ample political experience and universally recognized ability together with a personal presence to go with his olympian position as leader of the Supreme Court, he could be a formidable opponent. He recognized both the intensity of radical purpose and the danger it could pose for his Court.

As a devoted partisan of the Negro with particular reference to their right to vote, Chase had one excellent personal reason to keep the judiciary out of Reconstruction’s path. As Chief Justice and circuit judge⁴³ for much of the South he was in a good position to prevent troublesome causes from coming before the Court. And, this he proceeded to prevent with great dedication. One might as well have attempted to get him to expose himself to some dread, infectious disease as accept jurisdiction over a habeas corpus petition—of course, in 1865-1868 the two bore striking similarities. He cautioned southern federal district judges to stay out of the army’s way as much as possible.⁴⁴ Also, he got the other Justice with southern circuit responsibilities to agree not to attend circuit court in the South until the legal status of the federal presence there was regularized by Congress or the President.⁴⁵ Besides his personal reasons for fostering Reconstruction, he felt that otherwise, Supreme Court Justices would be at the mercy of the military authorities. For, if they failed to cooperate with the military, they would appear impotent, and if they did cooperate, their courts would be in fact and in the public eye “quasi-military courts.” Neither alternative was attractive. Chase snapped angrily at his friend Horace Greeley of the *New York Tribune*⁴⁶ that “The Chief Justice and Justices of the Supreme Court of the United States represent the highest Judicial Power of the Nation, which cannot, with propriety or decency, be subordinated to

43. Under federal practice at the time it was customary for a Supreme Court Justice to join with a federal district judge to constitute the intermediary appellate court in the federal system. A district judge could hold circuit court by himself, however. When *McCardle* came to the Court, it came via an 1867 statute allowing direct appeal from the district court to the Supreme Court.

44. See, for example, his advice to North Carolina District Judge George W. Brooks. “If I were you and if conflict with military powers should occur, I would submit for the occasion . . . of course I should take care to avoid all unnecessary conflicts.” Letter From SPC to Brooks, March 20, 1866, Library of Congress, Chase MSS., Vol. 96.

45. Letter From James M. Wayne to SPC, May 30, 1867, Library of Congress, Chase MSS., Vol. 98.

46. He wanted Chase to go into his circuit to preside at Jefferson Davis’ treason trial.

any military authority."⁴⁷ Without a Supreme Court Justice present, it was virtually impossible for a Southern case to get before the Supreme Court through the federal judiciary.⁴⁸ Chase also speedily made himself an expert on that portion of the Judiciary Act governing appeals from state courts.

When the Judicial Act of July 23, 1866 reduced the authorized number of Justices to seven, Congress carelessly forgot to specifically assign Justices to the altered judicial circuits. By at least August, Chase noted that technically he had not been assigned circuit duties, and in September began researching the matter.⁴⁹ He soon became convinced that he now had another excellent reason to avoid the dangers awaiting him in his southern circuit. By October he had carefully documented and reasoned out his position, and was ready to ask his brethren for their views on the problem. His question was followed by a detailed argument for his view of the situation.⁵⁰ Not surprisingly, at least five of his colleagues agreed with him, and the Chief Justice felt justified in staying from the troublesome South until he was formally assigned the following March. He did not sit in that part of his circuit which had been within the Confederacy until the summer of 1867.

Plainly the Chief Justice wanted no cases before his Court likely to lead to trouble with Congress. When trouble made its first appearance, it came from outside the South.

In January 1867, opinions were released in three cases which immediately sent the congressional radicals into an uproar. The most famous of these is the classic habeas corpus case, *Ex parte Milligan*.⁵¹ Reputedly a disloyal civilian "Copperhead" in Indiana, Milligan had been sentenced to death by a military tribunal. Although an 1863 act of Congress governing military arrests plainly voided the sentence,⁵² Mr. Justice Davis' hatred of such "arbitrary" arrests led him to

47. Letter From SPC to Horace Greeley, June 1, 1866, Pennsylvania Historical Society, Chase MSS.

48. The major manner in which causes came from the circuit court to the Supreme Court was through a "Certificate of Division." *I.e.*, the circuit court was unable to agree on the law in the particular case. It was understandably difficult for one judge to disagree with himself.

49. Letter From District Judge Ballard (Kentucky) to SPC, August 16, 1866, Library of Congress, Chase MSS., Vol. 97. Pennsylvania Historical Society, Chase MSS., Diary, 1865-1868. Entry of September 15, 1866, p. 37.

50. Letter to All Justices, October 5, 1866, Pennsylvania Historical Society, Chase MSS., Personal Papers, 1864-1872.

51. 71 U.S. (4 Wall.) 2 (1866).

52. Act of March 3, 1863, ch. 81, 77 Stat. 755. The authority for Milligan's arrest came from the Presidential Proclamation of September 15, 1863, suspending the writ of habeas corpus in certain areas. The proclamation was issued under the March Act of Congress, which provided for the release of prisoners arrested as was Milligan, if the next session of the grand jury did not return an indictment. None was returned against

determine to rid the land of them forever. As Circuit Judge he made certain that the case would come to the Supreme Court.⁵³ Speaking for the majority of himself, Nelson, Clifford, Grier, and Field, he needlessly forbade Congress as well as the President from suspending the writ outside of an actual theater of war. Speaking for the four man minority Chase would have set aside the sentence on the basis of the statute.⁵⁴ Thus Davis and company emphatically ruled against the exercise of military authority over civilians outside of a war zone. The South was no longer a war zone and Congress was preparing legislation to set up military Reconstruction in the South.

The other two cases involved Missouri and United States statutes requiring that a rigid "test oath" of loyal conduct during the war be subscribed to before anyone could be licensed in certain professions—an oath which few southerners could take. Justice Wayne took Davis' place with the other four members of the *Milligan* majority to hold both oaths unconstitutional.⁵⁵ Thus in all three cases either potential or actual radical legislation was blasted out of the judicial sky by five to four margins.

The way in which the Missouri test oath became a political fiasco in judicial clothing points up this Court's political involvement. The oath was included in the Missouri Constitution which was ratified in June, 1866. The political campaign prior to the fall election began late that spring and there was no more bitterly contested issue than that between the pro-oath Republicans and the anti-oath Democrats. The case had been before the Court early in the spring, but it was announced on the last day of the term that the case was being continued.

The fun started when the eminent attorney—and eminent Democrat—Reverdy Johnson informed conservative Congressman John Hogan of Missouri that the Court had already voted to hold the oath unconstitutional. Johnson's letter was made public, in Justice Miller's alarmed words to Chase, "with fatal effect on the radicals." From Iowa, Miller urged Chase to get a correction to some "radicals of reputable standing," since "while we may well feel restrained from . . . stating what *did* take place, there is nothing wrong, but a manifest propriety in contradicting the assertion." Miller would have been glad to supply the corrective himself, but unfortunately no one had asked him. Rather odd, that with all his political friends next door in

Milligan, 71 U.S. (4 Wall.) at 22-84. DONALD, *op. cit. supra* note 35, at 196. I THE DIARY OF GIDEON WELLES 433-34 (Beale ed. 1960).

53. KING, *op. cit. supra* note 41, at 250.

54. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 132 (1866) (dissenting opinion).

55. *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867).

Missouri, Miller did not think of sending one of them the "confidential communication" that he urged Chase to write from far-off Washington.⁵⁶

It seemed even more odd when Chase played Alphonse to Miller's Gaston. The Chief Justice likewise demurred from sending the correction. At first, he stoutly refused to condone such a move, as it would be considered "mere partisanship."⁵⁷ But upon further thought, he suggested to Miller: "If *you* think it wise . . . write to Swayne and Davis" and suggest that they spread the glad tidings to the faithful in Missouri.⁵⁸

Somehow the news got to the faithful, but there was nothing odd in neither Chase nor Miller wanting to go on record as denying what Johnson revealed. While it was technically true that no vote had been taken on the merits of the case, both men knew that a vote which would have struck down the Missouri statute had been narrowly headed off at the final conference of the term. Note that Chase can correctly identify in Swayne and Davis the other members of the minority-to-be, and in addition Miller was able to correctly identify the division on the Court in a letter in July.⁵⁹

What happened was that the Court was anticipating that a vote on the merits would be taken at the final conference held on the morning of the last day of the term, and that the decision would be announced without opinion at the final public session. Justice Grier so informed Orville Browning on March 25, correctly identifying which Justice was on which side. When no decision was forthcoming, Justice Nelson explained to Browning "that the postponement was by Grier's vote." Later, Field told Browning that at the last conference "Miller made a personal appeal to have the test oath . . . postponed till next term, and that Grier in the kindness of his heart consented."⁶⁰ Chase's letter to Miller on June 9 apparently confirms that considerable maneuvering went on that last day of the term, for Nelson tried to get something changed later in the day, and was stopped only by Clifford's refusal to "have anything to do with disturbing what was already decided."

The Court had plainly chosen sides in a vicious political battle. And both sides did their part to place the Court in the middle of the unpleasanties. Both the motives of Miller and company, on the

56. Letter From Samuel Miller to SPC, June 5, 1866, Library of Congress, Chase MSS., Vol. 97.

57. Letter From SPC to Miller, June 9, 1866, p. 225, Pennsylvania Historical Society, Chase MSS., Letterbook.

58. Letter From SPC to Miller, June 15, 1866, p. 234, (Emphasis added.) Pennsylvania Historical Society, Chase MSS., Letterbook.

59. FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 130-31 (1939).

60. II THE DIARY OF ORVILLE HICKMAN BROWNING 686 (Pease & Randall eds. 1931).

one hand, and Field and Nelson on the other were far too political for safety's sake, not to mention some other obvious reasons.

The congressional majority was somewhat more than peeved with the Court. Although there had been a healthy Republican radical majority in the 39th Congress, after the battle between Congress and President burst into high gear, the fall elections of 1866 had transformed this majority into one of overwhelming size. The import of these three cases could scarcely have escaped the radicals—or anybody else. It denoted an intention to invalidate the Reconstruction laws even then being drafted. Whatever else may be said about the 40th Congress, its majority did not suffer from timidity, and was unlikely to let a mere bagatelle-like respect for the Supreme Court as an institution stand in its way. Their response was immediate, angry and pointed. For example, influential Ohio Congressman John Bingham proposed legislation which would have virtually stripped the Court of its appellate jurisdiction. Even Justice Field was struck by the viciousness of the assault.

Exactly what happened within the Court between January and April of 1867 we can never know, but certainly it transformed its stance from one of belligerent assertiveness to one of retiring prudence. In April the Court unanimously refrained from accepting jurisdiction over a motion in equity seeking to restrain President Johnson from administering the March Reconstruction Acts.⁶¹ Speaking through Chase, the Justices unanimously maintained that the bill asked the Court to prevent the President from performing an essentially "executive and political" duty. Chase pointed out that such a Presidential power was beyond the constitutional reach of the Court. Two other slightly altered attempts met a similar fate on different grounds, with opinions to follow in the next term.⁶² As the Court adjourned until the following December, Chase must have breathed a relieved sigh when he privately described the decisions as being "as sound in law as beneficial."⁶³

This tactical retreat was probably not solely determined by an ironclad view of the law in the case, as shown by the Court's later actions. The sudden air of self-restraint might have partly come from the close personal relationship Chase had developed with the two leading intransigents on the bench, Nelson and Clifford. Mr. Justice Field had for some time gone out of his way to ingratiate himself with Chase, and perhaps he was drawn toward prudence by Chase's capitalizing on Field's desire to please his Chief. The deep respect

61. *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867).

62. *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867).

63. Letter From SPC to I. Stanley Jones, May 17, 1867, p. 119, Library of Congress, Chase MSS., Letterbook.

Miller enjoyed with all his brethren probably made its mark, and certainly Congress made the dangers of the situation clear in a most blunt manner.

By the time the Court reconvened several changes had either taken place or were in the making.⁶⁴ Not the least of which was the fact that the Chief Justice had already begun his departure from the radicals' constitutional ship—or from his point of view, the radicals had sailed away from the moorings of the Constitution. By the summer of 1867, it is apparent that the Republican Congress was going further than Chase was willing to go with them. If one were forced to name the date when he realized that he was no longer in complete agreement with the Reconstruction course Congress was pursuing, the time would probably be the night of July 8, 1867. Congress had hurriedly convened to enact legislation to counteract Attorney General Stanberry's interpretation of the March Reconstruction Acts, an interpretation which had been most lenient to the South. On the 19th, a bill was enacted which in effect tried to place the military commanders beyond the control of the President.

On July 8, Chase wrote a letter to one of his favorite newspaper friends, Theodore Tilton. The next day, he edited the previous effort and came to a very different result. In both letters he expressed the hope that Congress would not basically change its Reconstruction policy. In the first letter, however, he suggested additional measures, which, although milder than what Congress did enact, were along the lines eventually followed. He advised that:

[T]he Military Commanders should be . . . authorized to remove officers . . . of the provisional Governments, who wilfully obstruct . . . the acts, and provide for the filling of the vacancies by election with universal suffrage, or by appointment . . . affirmed by the Military commander.⁶⁵

The second letter made no such recommendation. Rather he expressed doubts as to the efficacy of additional stringencies.

I shall be sorry if [Congress] attempt[s] to supercede the President as the Commander of the army, or to make the District Generals Superior to all civil authority as well as all military. For I do not think it is necessary to the great ends for which the country longs—restoration as the basis of justice and equal rights, firmly secured by the Constitution and laws.⁶⁶

64. Mr. Justice Wayne died in 1867, leaving the Court's membership at eight. Congress had previously reduced the authorized number of Justices to seven in order to prevent Johnson from making any appointments, so Wayne was not replaced. After the election of Grant, the permanent membership of the Court was again placed at nine, where it has remained ever since.

65. Letter From SPC to Theodore Tilton, July 8, 1867, pp. 211-14 (not sent), Library of Congress, Chase MSS., Letterbook I.

66. Letter From SPC to Theodore Tilton, July 9, 1867, pp. 221-23 (sent), Library of Congress, Chase MSS., Letterbook I.

With the exception of this significant change, the letters are identical.

What Chase wanted out of Reconstruction remained constant. On July 11, he wrote his youngest daughter that "[i]t is to be hoped . . . that the amendments will be so formed as to insure the earliest possible reorganization, under Constitutions securing to all equal rights and equal security for rights."⁶⁷ It was during this special session of Congress that we have the first positive evidence that he believed the Republican majority was not working wisely towards those ends, and not working by means he could bring himself to approve. By January, 1868, he was expressing his opinions caustically to Horace Greeley, and finding the motive for the harsh Reconstruction policies of "a majority" of the Republicans in their fondness for "whatever seems most harsh on the rebels," not on any genuine concern for human rights.⁶⁸ Chase wanted fair treatment and suffrage for the Negro, but he otherwise favored a more lenient policy toward the South. An attempt to remove the military commanders in the South from Presidential control was a step Chase could not condone, although at the time his position was apparently thought a minor deviation and was apparently scarcely noticed.

The impasse between the President and Congress had deepened, and the President's determination to avoid complying with the Tenure of Office Act, which required Senatorial approval before a cabinet member could be removed, was pushing inevitably toward the clash which would give Thad Stevens and the extreme radicals in the House the opportunity to pass their bill of impeachment.

Worse yet, the lawyers for a Mississippi newspaperman named William McCardle noticed that an 1867 habeas corpus statute⁶⁹ designed to protect pro-Reconstruction individuals in the South from State officials would also apply to their militarily imprisoned client. Courtesy of a Reconstruction statute, therefore, *Ex Parte McCardle*⁷⁰ ironically went winging its way to the Supreme Court, directly bringing the backbone of Reconstruction before the Court.

On into February, 1868, however, the Court appeared to be sailing on a relatively calm sea. The Court's opinion covering the last two reconstruction cases of the previous spring was at long last released in early February, and "old Nelson," himself of all people, was its author.⁷¹ In light of this decision few at the time thought the Court would accept jurisdiction over the *McCardle* case.⁷²

67. Letter From SPC to Nettie, July 11, 1867, *Ibid.*, Vol. 99.

68. Letter From SPC to Horace Creeley, January 17, 1868, New York Public Library, Horace Creeley MSS.

69. Act of February 5, 1867, ch. 27, 14 Stat. 385.

70. *Ex parte McCardle*, 73 U.S. (6 Wall.) 318 (1868).

71. *Georgia v. Stanton*, *op. cit. supra* note 62.

72. Both the Democratic *New York Herald* ("The Court is out of this reconstruction

There was a problem, however. The 1867 habeas corpus statute all too plainly covered *McCardle*. On February 18 the Court unanimously agreed to hear the case on its merits with Chase himself writing the opinion, noting that "This legislation is of the most comprehensive character. . . . It is impossible to widen this jurisdiction."⁷³ While the case was being argued, the storm of impeachment broke over Johnson's refusal to abide by the Tenure of Office Act. On February 24, the President was impeached, with Chase as Chief Justice specifically required by the Constitution to preside at his trial before the Senate. From the time of the first communications of the Senate with the Chief Justice it became obvious that a "cruel" blow was being dealt the radicals. Their one-time darling; the original radical himself; that "d . . . d Abolitionist" from Ohio not only insisted in conducting the trial in a non-partisan, judicial manner, but privately—and in a none too well-concealed manner—he bitterly opposed the attempt to remove the President. "To me," he wrote his old abolitionist friend, Gerrit Smith, "the whole business seems wrong."⁷⁴ The radicals' "reliable" Chief Justice irrevocably departed their ship.

All things considered, the radicals had ample grounds to believe the Court was going to declare a significant portion of their Reconstruction handiwork unconstitutional. And they were right.

Had the merits of the *McCardle* case been reached, the decision would have been in his favor. Chase so advised Mississippi District Judge Robert A. Hill, and Justice Field later told Orville Browning the same thing.⁷⁵ If Field was correct, even Justice Miller was prepared to go along, leaving only Swayne in dissent. But plainly the Court had no wish to place its own head beside Johnson's on the chopping block in that wild spring of 1868, when the very nature of the Presidency was openly challenged by a congressional majority intoxicated with its own program and power. Chase wanted to postpone a decision in *McCardle* on the grounds that he could not guarantee his presence due to his duties presiding over the Senate.⁷⁶

fight") and the Republican *New York Times* ("It is believed that a similar decision awaits the *McCardle* case.") thought so. Once the implications of Nelson's opinion were absorbed, however, the *Times* became convinced it was "likely" that the Court was prepared to deal harshly with the Reconstruction Acts. The decision to hear the merits in *McCARDLE* was therefore viewed by Congress as a direct threat. *N.Y. Times*, Feb. 15, 1868, p. 4, Col. 3; *N.Y. Herald*, Feb. 12, 1868, p. 4.

73. *Ex parte McCardle*, *supra* note 70, at 326.

74. Letter From SPC to Gerrit Smith, April 19, 1868, Library of Congress, Chase MSS., Second Series, Vol. 3.

75. Letter From SPC to Robert A. Hill, May 1, 1868, p. 654, Library of Congress, Chase MSS., Letter Book. II THE DIARY OF ORVILLE HICKMAN BROWNING 191-92.

76. Letter From SPC to John Van Buren, April 5, 1868, p. 199, Pennsylvania Historical Society, Chase MSS., Letterbook.

Such a pretext for delay was too thin for his colleagues to act on.

Help was on the way, however. For Congress had not the slightest desire to have the highest court in the land officially inform the nation that its basic legislation was unconstitutional. After hearing the *McCardle* jurisdiction decision, Senator Lyman Trumbull of Illinois went directly to the Senate from the courtroom to introduce a bill repealing the statute on which *McCardle's* appeal was solely based.⁷⁷ It passed but was met with a Presidential veto. The case was reached in its regular turn for a decision in conference before the veto message reached Congress, but in the words of Chase and several of the Associate Justices, the Court thought it undignified to "run a race with Congress." So, they consciously waited for relief from the necessity of making a decision. As expected, they were relieved when Congress overrode Johnson's veto. Now, at any rate, argument had to be held on the question of whether Congress could deprive the Court of jurisdiction in a case already argued. After some futile attempts to have such an argument, the Court rather hastily adjourned until the following December.⁷⁸ An opinion by Chase early that term maintained that Congress could so deprive the Court of jurisdiction.⁷⁹ Thus the Court's strategic retreat was complete.

The instinct of group—or self—preservation had won. Two members of the Court did share in the madness of Washington, however. Grier and Field objected. They objected through Grier in one of the most insulting, aspersion-casting opinions a minority ever aimed at a majority of the Court. "By the postponement of this case, we shall subject ourselves, whether justly or unjustly, to the imputation that we have evaded the performance of a duty imposed on us by the Constitution. . . ." And for anyone willing to translate a quotation from the Roman poet Ovid, Grier and Field affirmed that in their eyes this imputation was all too true. "It fills me with shame that these reproaches can be uttered, and cannot be repelled."⁸⁰

Opponents of the radicals were indeed most disappointed. Orville Browning, for example, bitterly recorded some untypically harsh words in his diary after learning that the Court would have decided

77. N.Y. Times, Feb. 18, 1868, p. 4, col. 1.

78. III WARREN, *op. cit. supra* note 38, at 196-203. Letter From SPC to John Van Buren, April 5, 1868, p. 199, Pennsylvania Historical Society, Chase MSS, Letterbook. N.Y. Times, May 1, 1868, p. 4. The latter conveyed the impression to this reader that the Court acted to discourage argument at that term.

79. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868).

80. FIELD, REMINISCENCES OF EARLY DAYS IN CALIFORNIA 209-10 (1893). The translation is the one given here by Field. The *Springfield Republican* reported that the dissent caught the other members of the Court by surprise. III WARREN, *op. cit. supra* note 38, at 205.

for *McCardle* had the merits been reached. "This exhibition of cowardice on the part of the Court, and their readiness to surrender the inalienable rights of the citizen to the usurpation and tyranny of Congress is among the alarming symptoms of the times."⁸¹

The number of people in Washington who kept their wits about them in the spring of 1868 was certainly not large. For three people who had been so acutely aware of the dangers of the Court's situation as were Chase, Miller, and Davis, the discretion of taking the out offered by Congress is most understandable. It is most interesting to note, however, that the two oldest incorrigibles, who were willing to risk congressional and executive retaliation during the war, were on the side of prudence this time. Why Nelson and Clifford did not join Grier and Field can never be known; but it is certainly a most interesting question, especially since Nelson had virtually offered an invitation for a challenge to Reconstruction through equity proceedings in his opinion in *Georgia v. Stanton* on February 10.⁸² Whatever the reason, Clifford and Nelson together with their four colleagues deserve to be ranked among the sane in the insane spring of 1868. Since the beginning of the Court's history, it has striven with considerable consistency to take into account outside repercussions in choosing the time to hand down decisions. Much of its difficulties in controversial decisions has come from errors in timing, and if ever there was a time when the Court could have expected repercussions of the most damaging nature, it was in the spring of 1868. The Court did run away from a fight, but in running, it could always turn around when those chasing lost interest.

When Chase gave the Court's full opinion confessing that it no longer had jurisdiction over the *McCardle* case, he specifically reminded anyone who might be interested that the Court retained all its habeas corpus jurisdiction under the Act of 1790.⁸³ Somebody named Edward M. Yerger was most interested.

Yerger applied for the writ in 1869 while being held by the mili-

81. II THE DIARY OF ORVILLE HICKMAN BROWNING 191 (entry of April 9, 1868).

82. *Supra* note 62. The opinion held that the Court lacked jurisdiction. Nelson pointed out that the Court could "grant relief so far only as the rights of persons or property are drawn into question, and have been infringed." Three times he repeated that if a case concerned rights "of persons or property, not merely political rights," the jurisdiction might not be withheld. He pointed out the petition's deficiency in this regard. Although property was mentioned, "it is neither stated as an independent ground, nor is it noticed at all in the prayers for relief. . . . Such relief would have called for a very different bill from the one before us." Chase concurred only in the result. It is worth noting that the preceding May he thought that the opinion would be "sound in law," but apparently recognized the dangers in Nelson's opinion when it finally came down. He must have been urging caution on the stubborn New Yorker earlier in the 1868 term.

83. 74 U.S. (7 Wall.) 506, 515 (1869).

tary authorities in Mississippi. In Willard Kings's words, "Grant's inauguration brought some relief from radical excesses."⁸⁴ Actually, the fever pitch of radicalism began passing immediately after the failure to convict Johnson, which coincided with the nomination of Grant in May of 1868.⁸⁵ The timing element was much more propitious for the Court in 1869.

Yerger's attorneys first attempted to get the District Judge, Robert A. Hill, to accept his petition, but Hill merely took the matter under advisement. Next they tried Justice Swayne; but Swayne was not the circuit judge for Mississippi, and it was still an open question whether or not a Justice had jurisdiction to entertain such a petition outside his circuit. Chase had been turning down such petitions with great devotion on this ground since the war, but it was possible that a recent statute could be interpreted as granting jurisdiction outside one's own circuit. Swayne decided to let his Chief handle the matter, and sent the attorneys to take their application to Chase, to have it "granted or denied according to [his] views of the law." At this convenient juncture, Chase concluded that the time had come to decide such a vexing jurisdictional question. He wrote Nelson and Clifford, asking their views. He noted, however, that "under the circumstances I have no doubt of my duty, if I have the power."⁸⁶

To make certain the petition would be accepted, Chase also wrote a most leading letter to Judge Hill. Hill's authority to entertain the petition as district judge, Chase reminded him, "cannot be questioned." Swayne and Chase's could be, and considering that Yerger would have to be surrendered by the military subject to orders from Washington, care obviously must be taken to be above suspicion. Hill was told he had but two alternatives: He could entertain the writ, or he could kick the question upstairs to the Supreme Court. "[Y]our duty," Chase informed Hill none too subtly, "is a necessary inference from your authority."⁸⁷ In short, the Chief Justice told a District Judge that he had to act.

The following day, Chase learned the happy news that Swayne had decided to accept the writ. Further, as Chase wrote Clifford with obvious relief, "the discharge of the prisoner was approved under the direction of the War Department, and *the jurisdiction was not questioned . . .*"⁸⁸ Only Miller questioned the jurisdiction when

84. KING, *op. cit. supra* note 41, at 272.

85. MCKIRRAICK, *op. cit. supra* note 1, at 506-08.

86. Letter From SPC to Nathan Clifford, June 22, 1869, Pennsylvania Historical Society, Chase Papers.

87. Letter From SPC to Robert A. Hill, June 22, 1869, Pennsylvania Historical Society, Chase Papers.

88. Letter From SPC to Nathan Clifford, June 22, 1869, Pennsylvania Historical Society, Chase Papers.

Chase wrote the opinion on appeal to the Supreme Court, and he did so without opinion.⁸⁹ In this correspondence, one can almost hear the judicial axe being honed for the benefit of military Reconstruction,⁹⁰ as Mississippi was one of the three states not yet readmitted to representation in Congress.

Senator Lyman Trumbull responded on cue in the Senate with a bill which flatly forbade judicial review of congressional Reconstruction. Four days later on December 13, Senator Drake of Missouri took the next logical step, and in effect proposed an end to judicial review, period. To judge from the newspaper accounts, there was not a great deal of support for these measures. It made no difference. Yerger's counsel and the Attorney General agreed to take no further action in the case, and to turn Yerger over to the state authorities when Mississippi was readmitted early in 1870.⁹¹ With the other states bordering on admission, Reconstruction became a dead issue before the Court.

From *Milligan* to *McCardle*, the Court performed like an expert, if aged, escape artist. It asserted its authority up to the danger point and then retreated, always just avoiding accepting the invitation to court disaster. Awareness of the dangers was indeed forced upon the Court by Congress' explosive manifestations. But awareness of danger is never necessarily synonymous with caution, and it was certainly not generally synonymous in Washington in 1867 and 1868. The long-time awareness of the danger which Chase and Miller shared, their experience in politics within the Republican ranks, and their influence within the Court indicate that these two probably deserve the main credit for steering their brethren away from the hemlock cup. In light of Chase's habit of closely conferring with Nelson and Clifford, it may well be that he exercised a considerable moderating influence on these two long-time foes of the Republicans. Such an attitude of self-restraint was typical judicial behavior for Miller. It was most atypical for Chase. Once the political temperature shot downward, Chase was free to behave typically—and so was the Court.

This group of Justices demonstrated over and over again that they were scarcely timid about their power. They had been under restraint

89. On October 25, 1869; *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869).

90. For example, just before the 1868 election, Justice Davis—no political novice—frankly feared that Congress might be intent on “destroying the Supreme Court.” Nevertheless, he advised Justice Clifford that “for us there is but one course to pursue. Do our duty—leaving the consequences which we cannot control to God.” When the heat proved to be less intense than expected, he was no doubt even more inclined to leave “the consequences . . . to God.” Letter From David Davis to Nathan Clifford, November 2, 1868, Nathan Clifford Mss., Maine Historical Society.

91. WARREN, *op. cit. supra* note 38, at 213-19.

from outside pressures since Chase became their Chief. When this restraining wrap began to slip off in 1868, one might logically expect them to become self-assertive. With the Chief Justice leading the way, this is exactly what they became.

Before 1865, only two acts of Congress had ever been declared unconstitutional. By the time Chase died, the total was twelve, seven of them between 1869 and 1873. Besides the congressional *Test Oath Case, Ex Parte Garland*, two innocuous statutes were invalidated prior to 1869. One of these, *Gordon v. United States*⁹² had to be overruled by implication in *United States v. Klein*,⁹³ in order to reach a conclusion which would invalidate the act of 1870 designed by Congress to reverse the Court's lenient interpretation of the confiscation acts. By far the most spectacular of the cases invalidating congressional legislation was *Hepburn v. Griswold*,⁹⁴ in which Chase wrote the opinion declaring unconstitutional at least in part the Legal Tender Act which he supported as Secretary of the Treasury. Within fifteen months *Hepburn* was reversed, and the act declared constitutional *in toto*.⁹⁵ The unprecedented speed of this reversal was in itself a daring bit of judicial audacity.

In *The Alicia*,⁹⁶ an 1864 act of Congress granting immediate appeals in prize cases from the district court to the Supreme Court was struck down as awarding jurisdiction to the Court not warranted by the Constitution. In March, 1870, a portion of the Habeas Corpus Act of March 3, 1863, was struck down.⁹⁷ In the famous case of *Collector v. Day*,⁹⁸ the Court's state's rights bias, which Chase shared, was showing when a tax on the salaries of state judges was held unconstitutional as a tax on a necessary instrumentality of the state governments; and, hence, a violation of the reserved rights of the states. A section of the Internal Revenue Act of 1864 disappeared

92. 69 U.S. (2 Wall.) 561 (1865). The other was *Reichert v. Felps*, 73 U.S. (6 Wall.) 160 (1868).

93. 80 U.S. (13 Wall.) 128 (1872).

94. 75 U.S. (8 Wall.) 603 (1870).

95. *Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1871). There was one vacancy on the Court that decided *Hepburn*, and Justice Grier retired effective six days before the decision was announced on February 7, 1870. The matter had become a straight party issue with Democrats opposing the act's constitutionality, and Republican's favoring it. President Grant appointed two new Justices the same day that *Hepburn* was announced. William Strong of Pennsylvania and Joseph P. Bradley of New Jersey, changing the five men majority to a four man minority. I would like to note with thanks the information and insights on Legal Tender and numerous other matters during this period of the Court's history which Professor Harold Hollingsworth of Arlington State College has so generously shared with me.

96. 74 U.S. (7 Wall.) 571 (1869).

97. *Justices of the Supreme Court of New York v. Murray*, 76 U.S. (9 Wall.) 274 (1870).

98. 78 U.S. (11 Wall.) 113 (1871).

under the Court's edict in 1873.⁹⁹ Together with *Garland, Gordon v. United States, United States v. Klein, Hepburn, and United States v. DeWitt* in 1870, a total of ten acts of Congress fell before the Court during Chase's eight and one-half years on the bench. *Milligan* should probably be considered on the list, since five members of the Court in effect limited congressional power to suspend the writ of habeas corpus and wiped out any authority to permit military trials of civilians outside of the zone of actual warfare. No succeeding decade of Court history would see more than five acts of Congress declared unconstitutional until 1904-1913.¹⁰⁰ Acts of Congress were far more vulnerable to the judicial axe in 1869-1873 than at any time in the previous history of the Court.

It should be noted that only four of the eleven cases attacked what was strictly speaking war legislation. The Court's aggressive tendencies apparently went beyond an assault on "extraordinary" war-time legislation.¹⁰¹

In the light of the job later done by the Court on legislation regulating property, it is interesting to note that in *United States v. DeWitt* in 1871, for the first time an act of Congress regulating the sale of goods was declared unconstitutional. The Revenue Act of 1867 had made the selling of oil for illuminating purposes illegal if it was inflammable at a temperature lower than 110 degrees. Speaking through Chase, the Court unanimously struck down this attempted regulation by turning Taney's "police power" doctrine around and using it to deny Congress the right to interfere with the police power of the states. The regulation was "too remote" from the taxing power to be sustainable, and Chase felt the commerce power was too thin a reed to lean upon.

But this express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate states This has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion.¹⁰²

The "former occasions" were the *License Cases* and *Passenger Cases*¹⁰³ in which the police power had been tested against the federal commerce power to determine the validity of a state's exercise of the

99. *United States v. B. & O. R.R.*, 84 U.S. (17 Wall.) 322 (1873).

100. HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* app. I (1928).

101. *Ex parte Garland*, *supra* note 92; *Hepburn v. Griswold*, *supra* note 94; *Ex parte Milligan*, *supra* note 51; *United States v. Klein*, *supra* note 93.

102. 76 U.S. (9 Wall.) 41, 43-45 (1869).

103. 46 U.S. (5 How.) 504 (1846); 48 U.S. (7 How.) 293 (1948).

police power. In 1867, the Court for the first time invoked the other side of "dual federalism" and struck down federal legislation as infringing on a state's right. The states rights emphasis which Chase shared with his Court struck at a federal power, and at the same time prevented a regulation of property rights.

The evidence shows that both Chase and the Court were more than politically aware—they were politically involved. The Court's general lack of sympathy with Congress during the Reconstruction period was manifest. But, as the Court was involved, so was it aware. With awareness came a saving prudence. In 1866 and again in early 1868, the Court acted aggressively, only to retire from the field of battle each time before Congress had been goaded into doing real harm. This prudence contributed immeasurably to the Court's renewed prestige and esteem after 1869. A prestige which would assist the Court in largely vitiating the effect of the Civil War amendments, and later so strongly to defend property rights. Considering the heated political times of the 1860's, it is perhaps most fortunate that such a politically oriented Court sat during these years. Had the Court followed the "simple"¹⁰⁴ route of merely laying the Constitution as they understood it beside Reconstruction legislation, the nation's political health would have been put to an even more grievous strain, and the Court's institutional health would probably have become as marginal as that of the Presidency.

Underneath this prudence was the willfulness which over and over again took the Court to the brink from which it had the good sense not to leap. Once the jump became less dangerous, this Court was most willing to take the first concerted leap into what has been called "Judicial Supremacy."

In all of this, the Chief Justice loomed most significant. While we can never know the exact influence he exercised in discussing matters in Court conferences, there is much evidence to indicate that he played a considerable role in determining the Court's actions. The tenor of the Court's performance followed his own preferences to a high degree. Although with the minority in the *Test Oath Cases* and *Milligan*, his strong sympathies with the plight of the South are reflected in the confiscation cases as well as in his private correspondence. In general, the Court's policy during the dangerous days of Reconstruction followed his views. Once the Court began strongly to assert itself, it was doubtless following a course which

104. In his reminiscences, Field stated his views with stark simplicity. "Many things, indeed, were done during the war, and more after its close, which could not be sustained by any just construction of the limitations of the constitution. . . . [T]here was but one course to pursue, and that was to apply the law and the constitution. . . ." FIELD, *op. cit. supra* note 59, at 191. One rather doubts it was all that simple.

Chase encouraged. Since the available evidence indicates that Chase was a formidable advocate in conference,¹⁰⁵ apparently a large share of the praise and blame for what the Court did in these years must rest on his shoulders. An examination of how Chase handled his task as Chief Justice within the Court is thus in order.

IV. CHASE AS JUDICIAL LEADER

The Chief Justice of our court while held responsible by the public for all its acts has but little influence over these acts by reason of the position and it is only when the character, or rather quali[fications?] of the Chief Justice are such [as?] would give him a controlling influence without the position, that he can exercise that which is justly his due.¹⁰⁶

—Mr. Justice Samuel Miller

As Justice Miller pointed out, the Chief Justice's leadership on and responsibility for the actions of the Supreme Court is perhaps too freely acknowledged by the public at large. Within the Court, the Chief must fight to establish himself as leader.

As already indicated, Chase encountered several obstacles to any assumption of leadership within the Court. The lamentable public reputation of the Court was itself a handicap. In a large part of the public mind, he was to reform what an Iowa newspaper called "that fossilized circle of venerable antiquities which constitutes the Bench of the Supreme Court of the United States."¹⁰⁷ Chase was appointed at least in part for that purpose and everyone expected he would actively try to bring the Court to an advanced, and perhaps radical, position on the issues of the day. Such an anticipation could only make his task more difficult in initially dealing with the members of the Court, especially those with an ardent determination not to be reformed by this professional reformer.

Aside from the difficulties to which reputation and public expectation exposed Chase, the Court as a whole was by no means an easy one to deal with. In the first place, it was a badly split Court on public issues. And, of course, it was in this more exposed, political

105. For an extreme example, Justice Miller was the able and strong-willed leader of the five man majority attempting to get a reversal of *Hepburn*. Chase led the new minority and pulled out all the stops to prevent a case getting on the docket which would enable Miller and company to get their reversal. With only a minority to back him, Chase put up such a struggle that the leader of the majority faction lamented to his brother-in-law that "My own position as leader in marshalling my forces, and keeping up their courage, against a domineering Chief, and a party in court who have been accustomed to carry everything their own way, has been such a strain on my brain and nervous system as I never wish to encounter again." FAIRMAN, *op. cit. supra* note 59, at 170.

106. FAIRMAN, *op. cit. supra* note 59, at 256. Chase died in May, and Miller was prominently mentioned as his possible successor.

107. *Id.* at 52.

area that the Court attracted public attention and courted political danger. "There is not much talent in [the Court]," Miller wrote. "There is much Prejudice, or rather pre-occupation. There is much political feeling of which perhaps I have my share."¹⁰⁸ While Miller's comment as to talent is merely typical of Miller, otherwise it well describes the situation throughout Chase's tenure. With the "old set"¹⁰⁹ by and large rigidly adhering to a position antagonistic to the party dominating outside political events, and the "new set" just as rigidly taking at least a permissive stand, Chase as Chief had to preside over a factionalized group. Of course, he could not completely play the part of neutral moderator, even had he by nature been inclined to so passive a role—which he obviously was not. He had to vote and take sides. The rigidity of opinion on political issues is no better illustrated than in the affair of the Missouri test oath.

Individual Justices presented Chase with specialized difficulties in exercising leadership. David Davis probably had not a dram of kindly disposition toward Chase when he came on the Court. Although personal contact would move him away from his initial hatred, some reservations would remain. For example, the epitome of wild political ambition to Davis resided in Stephen A. Douglas. While Chase lay stricken with his 1870 stroke and his return to the Court was uncertain, Davis wrote that "Chase is the most ambitious man, except Douglas, that I ever knew personally."¹¹⁰

Justice Samuel Miller was also a problem. Serene in his self-confidence, Miller could never quite understand why anyone other than himself should lead, or anyone else's position be followed in preference to his own. Yet, he was popular on the Court, and his elevated view of his own ability was probably not much exaggerated. His independence of mind is shown by the volume of his written dissents. Even Chase testified to his "dominant" influence within the Court, "felt by the Court more than any other."¹¹¹ Able, self-assured almost to a fault, jealous of the very idea that anyone other than himself should be a leader, Miller was probably a problem to every Chief he sat under.¹¹²

The impulsive, able and probably unscrupulous Stephen J. Field was never known to make for harmony. A showboat who always

108. *Ibid.* "Perhaps" seems a mild term for Miller to use.

109. The other Justices' term describing Clifford, Nelson and Grier. Field was, of course, at least a spiritual member of the group, and Davis sometimes sided with it.

110. KING, *op. cit. supra* note 41, at 276-77. Letter of November 30, 1870.

111. FAIRMAN, *op. cit. supra* note 59, at 3. See also pp. 62 & 88-89 *infra* for an estimate of Miller's dissents and influence on the Court.

112. Except, of course, Taney, who was not on the bench very often either term Miller sat during his Chief-Justiceship.

responded to a full courtroom with a great, too obvious display of industriousness,¹¹³ he had firm, in many ways, absolutist beliefs to go with his impulsive nature.¹¹⁴ Among the "old set," Clifford and Grier were distinct characters. Clifford's obstinacy of opinion and fondness for attention (he, too, was a stand-out showboat before a full court gallery) did not lead him to an inclination to follow another individual's lead. Grier, described by Lincoln's Attorney General Edward Bates as a "natural-born vulgarian, and, by long habit, coarse and harsh,"¹¹⁵ also had a fiery temper, one manifestation of which has already been seen, and a marked lack of understanding of how his outbursts affected others.

The circumstances under which Strong and Bradley were appointed could scarcely have been expected to make for ease between them and their Chief. Swayne had been one of Chase's leading rivals for the Chief's chair in 1864, and Chase was the political enemy of Swayne's political friends in Ohio. All of which did not make Chase's relations with Swayne completely easy.

Chase's personality was in some ways a bar to his exercise of effective leadership. As Miller put it, "he liked to have his own way,"¹¹⁶ and his experience had mainly been as an administrator who gave orders, not as a collaborator. His naturally aloof appearance and other personal traits would certainly keep him from being a back-slapping, happy-spirited leader in the pattern of John Marshall.

His continued espousal of outside causes was not precisely calculated to gain his brethren's approbation. The vastly increased case load which obligated the Court reporter to issue two fat volumes per year beginning with the December 1867 term, could have scarcely made his colleagues look at his outside interests with delight, no matter how hard he himself worked. Yet, the fact of the matter was that Chase first performed his Court duties, and then pursued his other interests, often at odd hours.

On top of a lifetime of arduous work, the outside causes he labored for combined with the increasingly heavy duties of his office to ruin his health. Chase's physical infirmities after a major stroke in 1870 prevented him from exercising his personal influence to the degree he probably wished. Although he had complained of occa-

113. Smith, *The Supreme Court and its Judges in Days Following the Civil War*, Washington Star, April 22, 1923, § 5, pp. 5-6.

114. See SWISHER, STEPHEN J. FIELD 423 (1930) for an evaluation. Swisher makes an interesting case study demonstrating these traits of Field's through the income tax cases. *Id.* at 396-412.

115. *The Diary of Edward Bates*, IV ANNUAL REP. OF THE AM. HIST. ASS'N 340 (Beale ed. 1930).

116. FAIRMAN, JOHN MARSHALL AND THE AMERICAN JUDICIAL TRADITION, 94 (Jones ed. 1956).

sional bad health, much as would anyone else, a pattern of illness began in 1867 when he was struck by "the worst cold" he "ever had in [his] life," lasting over a month.¹¹⁷ In 1868, he became alarmed over an irregular heart beat and became seriously ill shortly after the Court adjourned in 1870. The stroke in August left marks which never disappeared, and he may have shortened his life by returning to hear the legal tender cases. Malaria, necessitating remedies almost as disturbing as the disease, afflicted him the last year of his life, as did other difficulties resulting from his weakened condition. His health could only have made effective work more difficult. For example, he felt it was two years before he returned to anything like as effective a role as he had played in conference before the stroke.¹¹⁸ Always agonizingly careful as an opinion writer, after the stroke the task must have been nearly unbearable. He noted in June, 1871, (to his daughter) that it took him two hours to write a four-page letter on small note paper.¹¹⁹

The signs of his failing must have been obvious to the Court and could scarcely have failed to excite the ambitions for his place that Miller, Bradley, Strong and Swayne nursed.¹²⁰ After Morrison R. Waite became Chief Justice, he was feted at a party attended by all the Justices and three other candidates for the job. One of the lay-hopefuls, Attorney General George H. Williams, remarked after looking about, "did you ever see so many corpses at one funeral?"¹²¹ Before they became corpses these four Justices were at least potential vultures, circling around the failing Chase waiting for their chance. Vultures seldom work together very well.

Chase had to face these difficulties. How he went about attempting to exercise leadership where no dominant leader had existed since Taney began to lose control of his Court around 1850 is a curious blend of subtlety, utter wilfulness and personal integrity.

The first method Chase used was the traditional position of the Chief Justice as opinion leader of the Court. Volumes 69 to 82 of the *United States Reports* show Chase wrote more opinions than any

117. Letter From SPC to Nettie, March 8, 1867, Library of Congress, Chase MSS., Vol. 98.

118. Letter From SPC to Hiram Barney, July 12, 1872 and November 9, 1872, Pennsylvania Historical Society, Chase Papers. Letter From Dr. John G. Perry to SPC, December, 1872, Library of Congress, Chase MSS., Vol. 106.

119. Letter From SPC to Nettie, June 23, 1871, *id.* Vol. 103.

120. Both Swayne and Miller encouraged friends to push their candidacy when it appeared Chase would not resume his duties in 1870. Bradley joined them as an active candidate when Chase died in 1873, and Strong encouraged the mention of his name in the right places. FAIRMAN, *op. cit. supra* note 59, at 265. Letter From William Strong to MacVeagh, May 14, 1873. Pennsylvania Historical Society, J. Wayne MacVeagh MSS.

121. TRIMBLE, CHIEF JUSTICE WAITE 134 (1938).

other member in every term except those when he was presiding at the impeachment trial and after his stroke.¹²² Seldom did he write in cases involving the common-law rights of litigants in private law. Unquestionably he simply did not know enough law to venture into these fields too often, nor was he very interested in such mundane matters. As Justice Field later pointed out, he concerned himself principally with litigation growing out of the war, of which there was more than enough to keep him occupied.¹²³

The statistics show, for example, that of the sixty-four noteworthy prize and confiscation cases, Chase wrote the majority opinion thirty-three times. Of the twenty-two cases of importance in the areas of general property rights (exclusive of the confiscation and prize cases) and taxation and banking cases in which Chase was with the majority, he wrote the opinion eight times. And, of the forty-one cases of determining importance in public law when he had the opportunity to speak for the Court, he spoke thirty-two times.¹²⁴ Obviously, he took upon himself the role of opinion leader in the area of public and constitutional law.

He followed the procedure of writing initial opinions and then leaving subsequent loose ends to be tied up by other members of the Court in subsequent cases. For example, in spite of his great personal interest in the *Slaver Cases*,¹²⁵ after writing the leading opinions he assigned the second wave of *Slaver Cases* to Clifford and took *Mrs. Alexander's Cotton*,¹²⁶ which involved important questions under the Confiscation Acts, and was handed down on the same day. Other of his enforced specialties were admiralty and prize law. This was a touchy area of international relations, since often controversies centering around seizures during the war involved the shipping of European powers. Chase had to learn a good deal of admiralty law—and be quite imaginative on occasion—but he handled most of the

122. A precise determination is impossible here. Mere announcements are sometimes very difficult to distinguish from short written opinions. Subtracting all apparent announcements shows that during his term he wrote more opinions than any other judge, writing thirty-five more than Clifford, forty-one more than Miller, and eighty-nine more than the least productive Justice, Stephen J. Field. Before his stroke, he wrote majority opinions in about twenty-two per cent of the cases. Of the cases he heard during his entire tenure, he wrote opinions about nineteen per cent of the time. Nelson wrote sixteen per cent of the opinions in cases he heard, followed by Clifford and Miller. Of the healthy Justices, Davis, and especially Field, did not carry their share of the case burden.

123. SOME ACCOUNT OF THE WORK OF STEPHEN J. FIELD 474 (Black & Smith eds. 1875).

124. These are the leading cases from the above-mentioned areas, plus cases involving constitutional questions.

125. 69 U.S. (2 Wall.) 135 (1865).

126. 69 U.S. (2 Wall.) 404 (1865).

leading prize cases in a satisfactory, yet conciliatory, way.¹²⁷ This threw him into close contact with the two specialists in this area, Clifford and Nelson.

Obviously, for a man away from the concentrated practice of law for almost fifteen years to carry so large a share of the Court's burden required a great deal of work. Chase set an example for his Court through his hard work. "When I am at the capitol I am always at work," he wrote his daughter Nettie in 1867.¹²⁸ In 1866, he proposed to go through the basic legal treatises with his son-in-law, William Sprague.¹²⁹ In the same letter he outlined his plans for the rest of 1866, which was before the case load of the Court became so immense and before he assumed full circuit duties. He planned a six-weeks vacation, after which he was to spend two weeks of September and all of October and November "hard at work on my cases," in preparation for the December term. He hoped to escape from distractions "by taking rooms on Capitol Hill and studying in the conference rooms." That he intended this as an example is indicated by the way he reminded other Justices how hard he had to "study."¹³⁰

He tried to set an example in opinion writing. Drafts of opinions in Chase manuscript collections show what a painstaking draftsman he was.¹³¹ "Yesterday," he wrote Nettie in 1866, "I spent at the Consultation room writing *an* opinion."¹³² Opinions resulted which were terse, yet clear and forceful. Chase-hater that he became, Rutherford B. Hayes characterized Chase's writing as "terse, elegant, forcible and convincing."¹³³ In open Court, he not only appeared to take copious notes, but surviving note pads show he paid close attention to oral arguments and recorded accurate notes, writing

127. *E.g.*, *The Sea Witch*, 73 U.S. (6 Wall.) 242 (1868); *United States v. The Schooner Jenny*, 72 U.S. (5 Wall.) 183 (1868); *The Science*, 72 U.S. (5 Wall.) 180 (1868); *The Volant*, 72 U.S. (5 Wall.) 179 (1868); *The Dashing Wave*, 72 U.S. (5 Wall.) 170 (1868); *The Springbok*, 72 U.S. (5 Wall.) 28 (1868); *The Herald*, 70 U.S. (3 Wall.) 768 (1866); *The Hart*, 70 U.S. (3 Wall.) 559 (1866); *The Bermuda*, 70 U.S. (3 Wall.) 514 (1866).

128. Letter From SPC to Nettie, April 4, 1867, Library of Congress, Chase MSS., Vol. 98.

129. Letter From SPC to William Sprague, July 25, 1866, Pennsylvania Historical Society, Chase Papers.

130. Letter From SPC to Samuel Miller, March 11, 1867, p. 35, Library of Congress, Chase MSS., Letterbook.

131. *Id.* Vol. 99. Item nos. 5. 1495ff. *Id.* Vol. 107. Items nos. 16418, 16422, 16450, 16502, 16512.

132. Letter From SPC to Nettie, May 19, 1866, *id.* at Vol. 97. (Emphasis added.)

133. 4 WILLIAMS, *THE DIARY AND LETTERS OF RUTHERFORD B. HAYES* 64 (1926). See also, *SOME ACCOUNT OF THE WORK OF STEPHEN J. FIELD* 474 (Black & Smith eds. 1875).

out comments as he listened.¹³⁴

Secondly, Chase took pains to get on good terms with his Court, individually and collectively. And, apparently, he consciously took steps to overcome the suspicion that he was attempting to be an excessively domineering chief. The running correspondence between Chase and Court Marshal Richard Parsons while the Chief Justice was convalescing from his 1870 stroke offers an inside view of Chase's close observations of his Court. Parsons apparently paid heed to what Chase wrote him near the beginning of their correspondence. "Nothing that concerns the Court or any member of it will be uninteresting to me,"¹³⁵ for each letter contained reports as to what the Justices were doing. Where the judges were staying, what entertainments they were attending and giving, even the cost of their homes and their opinion of Chase's new house were objects of Chase's interest.¹³⁶

Surviving correspondence gives some indication of his relations with individual judges, and how he made an attempt to inspire their confidence. In 1865, when a case on circuit involved two possible precedents,¹³⁷ Chase was disposed to the one which Clifford advocated. So, he sent Clifford a copy of his opinion. Clifford not unexpectedly agreed with Chase and hoped the case would be appealed. If so, Clifford assured his Chief, "I shall be ready to lend my humble assistance to support your views." That Chase was already on close terms with this stern New Englander is indicated by Clifford's touching description of his son's illness, which was expected to be fatal.¹³⁸ To judge from the constant expressions of esteem which flowed between Nelson and Chase, apparently Chase also enjoyed this Justice's confidence.¹³⁹

As is by now abundantly evident, Justice Davis was a special problem. Shortly after Chase came on the bench, he and Davis had an altercation in open court as to rules governing notice to attorneys. The following day, Chase announced that Davis had been correct.¹⁴⁰ Apparently, Chase made considerable progress in his first two terms in winning Davis' respect. When Chase sent Davis a copy of his

134. The Library of Congress, Chase MSS., Vol. 107. Item nos. 16520-36. *Id.* Vol. 108. Item nos. 16572ff.

135. Letter From SPC to R. C. Parsons, December 9, 1870, p. 67, *id.*, Letterbook.

136. See, *e.g.*, Letter From SPC to R. C. Parsons, December 15, 1870, p. 77, *id.*, Letterbook. Letter From R. C. Parsons to SPC, December 12, 1870, *id.*, Vol. 102.

137. *The Mary Washington*, 16 Fed. Cas. 1006 (No. 9229) (C.C.D. Md. 1865).

138. Letter From Nathan Clifford to SPC, April 21, 1865, Pennsylvania Historical Society, Chase Papers.

139. See, *e.g.*, Letter From Samuel Nelson to SPC, October 20, 1870, Library of Congress, Chase MSS., Vol. 102. Letter From R. C. Parsons to SPC, item no 15631, *id.* ("Judge Nelson sends his warmest regards.")

140. 2 BROWNING, *op. cit. supra* note 10, at 61 (entry of February 14, 1866).

conciliatory address to the North Carolina bar in 1867—which Chase must have known agreed with Davis' own opinion—he also took occasion to apologize for the altercation. Davis wrote a long reply, much of which bears repeating.

I have learned to like and esteem you, and if I was allowed to speak for my brethren, I think I could say you had been growing in their confidence and attachment, ever since yr. accession to the bench. You certainly have in mine. No one ever questioned yr. ability. . . . My intercourse with you has satisfied me [that] you have a good heart, and that considerations of hatred, malice, or revenge would never influence you on any question. . . . In all differences of opinion, I feel assured that each of us will do justice to the motives of the other. The little matter of notice to attorneys on which we differed, and which for the moment may have affected our feelings toward each other has long ago been forgotten. It left no sting with me, and it did not need the assurance of your letter to satisfy me that it left none with you, for your bearing towards me has been uniformly kind and considerate. . . .¹⁴¹

Note that Davis comes right to the point, almost admitting what Chase already knew, that Davis had suspected him of "hatred, malice" and "revenge," but that since being together on the bench, a new view was being taken of him. Chase, for all his habits of imperiousness, obviously had been very careful in his "bearing" toward all the judges. And finally, Davis avoids mentioning the two strong reservations he had about Chase to the end of his life, his ambition and his ability as a lawyer.

That Davis wrote an honest letter is bolstered by later conduct. After the Democratic Convention of 1868 failed to nominate Chase, Davis wrote Justice Clifford, complaining in near bitter terms at the failure to adopt the Chief Justice as a candidate.¹⁴² In 1871 he accepted and acted on Chase's volunteered "advice" and issued a writ of habeas corpus. One of Chase's relatives felt free to call on Davis to ask that he get her a Federal job and he agreed to help her.¹⁴³ Chase wrote Judge C. C. Church in 1872 that Davis "is my friend and I hold him in the highest esteem as a man of honor and ability. I differ from him on some important points of principle, but do not question the integrity of his convictions; nor, I think, does he question mine."¹⁴⁴ Chase's description of his relationship with this former enemy would seem in general to be accurate. It

141. Letter From Davis to SPC, August 12, 1867, Library of Congress, Chase MSS., Second Series, Vol. 3.

142. Maine Historical Society, Nathan Clifford MSS. Letter From David Davis to Clifford, November 2, 1868. Davis thought the failure to nominate Chase was evidence that although "The Democratic Party in ancient times had wisdom, lately it has none."

143. Letter From David Davis to SPC, September 1, 1871, Library of Congress, Chase MSS., Vol. 104.

144. Letter From SPC to C. C. Church, March 26, 1872, p. 62, *id.*, Letterbook.

also illustrates what a survey of the correspondence between Chase and his associates demonstrates, that the fierce Legal Tender infighting left no debilitating scars on the Court as a whole.

With Miller, Chase enjoyed a cordial relationship in the first few years, which evidently cooled as Chase was revealed as more conservative than had been suspected and as the two became antagonists within the Court. At any rate, from a frequent correspondent on whom Chase strongly relied for advice, Miller disappeared from Chase's letterbook and Chase turned increasingly to Nelson and Clifford for counsel—whom he well knew were usually in agreement with him.

Miller could scarcely have been pleased with the way Chase passed him by in majority assignments. In important property, taxation and banking cases, cases involving Southern problems including confiscation and the prize cases, Chase had eighty-two chances to assign majority opinions to Miller, but the strong-minded Iowan received only three opportunities from his chief to speak. Nelson was assigned twelve times. On the other hand, Chase was uncommonly willing to silently acquiesce to Miller's dissenting opinions when both were in the minority. Seven separate times the two were together in dissent in the categories of property, taxation and banking and cases of determining importance. Six times Chase allowed Miller to write without competition.¹⁴⁵ Such treatment could scarcely have helped bridge the gap which progressively widened between these two egotistical and able men. Miller, Charles Fairman notes, wrote majority opinions in twice as many important constitutional cases as the average Justice during his career. Had Chase lived, the number would not have been so impressive.

With Field, Chase apparently felt somewhat uneasy. At least, Field's description of Chase as a person strongly indicates that Field never got close to him. Nevertheless, of all the Justices on the bench with Chase, Field gave the most glowing report of his character and influence,¹⁴⁶ and Chase reciprocated in a rather typical letter of personal esteem in 1866.¹⁴⁷ In the Chase-Parsons correspondence, Field is reported as expressing affection and concern for Chase more often than any other Justice.¹⁴⁸

Chase dealt with the infirmed, yet ill-tempered, Justice Grier in a kind, yet often firm manner. As Grier's health faded badly after

145. The seventh was *Milligan*.

146. *SOME ACCOUNT OF THE WORK OF STEPHEN J. FIELD* 474.

147. *PIATT, MEMORIES OF THE MEN WHO SAVED THE UNION* 128-29 (1887).

148. See, e.g., Letter From R. C. Parsons to SPC, December 2, 1870, Library of Congress, Chase MSS., Vol. 102. ("He speaks most generously and affectionately about you.")

1866, Chase went well out of his way to arrange Grier's quarters in the Court to his best advantage, even to the point of volunteering to bring a couch for him into the conference room.¹⁴⁹ Chase watched his impetuous colleague rather closely, and on at least two occasions asked him to alter or withdraw dissenting opinions.¹⁵⁰ In an 1868 case Grier, as he put it, "hastily" wrote "in *great wrath* at what I considered an unjust decision." He added that he saw "it is capable of a construction offensive to my brethren. . . . I thank you for returning it to me and take the liberty to withdraw it *altogether* from the files."¹⁵¹ Grier's scathing dissent in *Texas v. White* as it appears in the *Reports* apparently is more gentle than the original. Chase took offense, wrote Grier telling him he did, and suggested some "amendments" to the dissent. Grier apologized and sent Chase's note to the Court reporter with instructions to make the changes Chase suggested.¹⁵² The pattern of cautious ingratiation which Chase followed was repeated with Bradley and Strong.¹⁵³

In his dealings with his Court as a group of individuals, Chase cannily took advantage of his opportunities to demonstrate his good will—and play the game according to the rules. He seems to have felt his way slowly into the task, relying to a large extent on his own good qualities—which he doubted he possessed only in moments of religious reflection—to win the esteem of his colleagues. Apparently, he was careful in conversation, or else Field would not have made the following statement.

During my whole association with him for over eight years, I never heard him utter an unkind word of a single human being, although his conversation was frequently of persons who at that time were assailing his conduct and maligning his motives. I doubt whether so much can be said truthfully of any other man of this generation.

The intimacy of years only augmented admiration for his abilities and respect for his character.¹⁵⁴

149. Letter From R. C. Grier to SPC, October 22, 1866, *id.* at Vol. 97. Pennsylvania Historical Society, Chase MSS., Letterbook. Letter From SPC to R. C. Grier, October 20, 1866, p. 371. *Id.*, Chase Papers. Letter from R. C. Grier to SPC, October 9, 1866.

150. Chase apparently kept a close watch over what the *Reporter* planned to print.

151. Letter From R. C. Grier to SPC, May 28, 1868, Library of Congress, Chase MSS., Vol. 100.

152. Letter From R. C. Grier to SPC, April 28, 1869, *id.* at Vol. 101. *Texas v. White* is not mentioned by name in the letter. The only other dissent he could possibly have been referring to would have been in *Doe v. Conidine*, which preceded *Texas v. White* by over a year. In that case, Grier's dissent is innocuous, and aimed at an opinion by Swayne. 73 U.S. (6 Wall.) 458, 481 (1868). Since Grier's acidic verbiage in *McCardle* does not appear in the *Reports*, it is not unlikely that Chase had it removed as well.

153. Letter From SPC to R. C. Parsons, December 9, 1870, and December 15, 1870, pp. 66 and 67. Library of Congress, Chase MSS., Letterbook.

154. SOME ACCOUNT OF THE WORK OF STEPHEN J. FIELD 468, 475-76.

In a private letter, Justice William Strong came to roughly the same conclusion, referring to Chase as a "great and upright man." Strong, interestingly enough, blames all the continuing accusations against himself growing out of the legal tender controversy not on Chase, but on "the chief Justice's family and, especially, his biographer"¹⁵⁵—a more than generous estimate. Chase was generally more than fair in evaluating his enemies and had the gift of forgetting antagonism against even the most underhanded. Even Edwin M. Stanton received generous verbal treatment, for example.¹⁵⁶ However, Chase was certainly much more careful within the Court than he had ever been before.

As the Justices were generally scattered attending to their circuit responsibilities from May till December, Chase made a most adroit use of the opportunity to consult his court by mail. In the matter of the circuit allotment in 1866, for example, he consulted with every Justice. In numerous other matters he consulted with one or several Justices. He did not, however, merely state the problem and ask for an opinion on matters he considered important. He stated *his* view at well-prepared length and put his brethren in the position of having to argue against and overrule him.¹⁵⁷ From a Circuit case we know Chase used this device at least once in conference,¹⁵⁸ and the notes he took on oral argument gave him the raw material enabling him to enter conference very well prepared. William Strong recalls how he could argue with "great power" on "semi-political" topics, which were the ones Chase was really interested in—and knew something about. The indications are that Chase, having built up a respectful working relationship with most Justices, used his priority to initiate subjects with considerable success in discussion.

Mr. Justice Miller wrote five years after Chase's death that when Chase

came upon the bench it was admirable to see how quietly and courteously

155. Letter From William Strong to William M. Evarts, September 10, 1874, Library of Congress, Misc. MSS., William Strong.

156. Chase had felt the back of this most devious gentleman's hand, and had washed his own hands of the former Secretary of War. Yet, upon Stanton's death, Chase wrote Schuckers: "He had faults—who has not! But he had great merits and rendered vast if not unqualified service to the country in trying days." Letter From SPC to J. W. Schuckers, December 27, 1869, Library of Congress, Chase MSS., Second Series, Vol. 3.

157. Letter From SPC to all Justices, October 5, 1866, Pennsylvania Historical Society, Chase Papers (1864-72).

158. The fourteenth amendment disqualified many Southern State Judges from their offices. The validity of sentences made by these judges was disputed. On circuit Chase upheld their validity, adding to his opinion that he was "authorized to say" that the Justices of the Supreme Court "unanimously concur in this opinion." *Caesar Griffin's Case*, 11 Fed. Cas. 7 (No. 5815) (C.C.D.Va. 1869).

the Court resisted his imperious will, never coming to direct conflict, and he finally had to take the position which he held . . . the Moderator and presiding officer over the Supreme Court, and not possessed of any more authority than the rest of the Bench chose to give him.¹⁵⁹

In a way, this estimate is truistic. The Chief Justice has only a certain amount of explicit authority. On paper, this is largely the power of a chairman of a board in constant session, who may use his *position* to gain as much influence as he can, but who does not necessarily gain influence by the position.¹⁶⁰ If Chase had any intention of being the overt boss of the Court, he soon realized that was impossible. Chase, who was after all a politician of considerable skill, then fell back on ways and means of exerting influence through his own personality and ability, augmented by the subtle tools at his disposal. As Chief, he had access to more information than any other member of the Court through a wide and carefully nurtured information net in the lower judiciary. He and Miller and Davis maintained close contacts with political events, but as much of Chase's circuit was near Washington, he had the advantage of being in the Capital more often. He had the opportunity to assign opinion writers and he alone kept in contact with all the Justices as individuals as a matter of normal procedure. In addition, he was Salmon P. Chase, one of the most formidable public figures of the day, so he had the weight of his own prestige outside the courtroom making his support, both as Salmon Chase and Chief Justice, something worth compromising for in conference. In short, it appears that Chase used most of the tools which his position made available so as to be willful in a skillful manner. How successful he was in specific instances is quite another question.

There are instances of record in which members of the Court relied on Chase. Davis and Swayne both followed his lead in habeas corpus cases. Clifford once asked Chase about an important tax case. Nelson had already decided the point at law in circuit court contrary to Clifford's view. "Will you suggest what you think I had better do," Clifford asked. "I will be greatly obliged if you will write me upon the subject."¹⁶¹

The Court as a whole seems to have relied on Chase in such matters as formulating a consistent rule regulating the execution

159. FAIRMAN, *op. cit. supra* note 115, at 94.

160. For a more detailed and excellent analysis on this point, see MURPHY, *THE ELEMENTS OF JUDICIAL STRATEGY* 82-89 (1964). Unfortunately, this article was drafted before I read Professor Murphy's book.

161. Letter From Nathan Clifford to SPC, May 22, 1867, Pennsylvania Historical Society, Chase Papers.

of final decrees¹⁶² and Reconstruction matters in general. Chase wrote the decisions avoiding a liberal interpretation of the 1867 amendment to the 25th section of the Judiciary Act which seemed to open completely the Court's jurisdiction over state causes. He had to perform some gymnastics, but he managed to avoid a decision on this Reconstruction measure until after the white-hot portion of Radical domination was past.¹⁶³ All this being true, it is nevertheless on the crucial matters of the day that Chase's effectiveness must be judged.

What successes can be attributed to Chief Justice Chase? In the area of Reconstruction and questions growing out of the war the most illuminating example is the handling of habeas corpus questions. Most of the tools of a Chief Justice with resourcefulness enough to apply them can be seen. A case Lincoln worried about in February 1865, was withdrawn at the suggestion of Maryland District Judge William Giles before Chase's identical advice reached him. Giles not unreasonably felt the case should not be tried during the turmoil subsequent to Lincoln's assassination.¹⁶⁴ It did not appear again. In January 1866, Chase turned down a petition for habeas corpus on the grounds that such a petition should be addressed "to a Court Judge of the United States in the District within which the prisoner was held."¹⁶⁵

No Supreme Court Justice was involved in a habeas corpus matter in the South before 1869. A Maryland attorney's plea for Chase to entertain a petition in December 1866, fell on deaf ears.¹⁶⁶ *Milligan* came to the Court through Justice Davis' long-time preoccupation with martial law in the North, which was at least less volatile than a case directly dealing with Reconstruction. *Mississippi v. Johnson* and related cases came up through an appeal in equity and the only habeas corpus case to reach the Court from the South before 1869, *McCardle*, came up through a specific Reconstruction statute. No other habeas corpus cases reached the Court during the high-tide of radical Reconstruction, and one must suspect that Chase worked effectively to achieve this result.

162. Letter From SPC to William Giles, May 31, 1867, p. 166, Library of Congress, Chase MSS., Letterbook.

163. Justice Miller finally interpreted the amendment away in the comparative safety of 1875. 3 WARREN, *op. cit. supra* note 38, at 402-05. See, *e.g.*, *West v. Aurora*, 73 U.S. (6 Wall.) 139 (1868).

164. Letter From William Giles to SPC, April 17, 1865, Library of Congress, Chase MSS., Vol. 95.

165. Pennsylvania Historical Society, Chase MSS., Letterbook. To "Dear Judge," January 5, 1866, p. 468. (The index of the letterbook lists a letter to Giles as appearing on this page.)

166. Letter From S. Ridgely to SPC, December 28, 1866, Library of Congress, Chase MSS., Vol. 98.

In the relative calm of 1869, Chase was ready to get a southern habeas corpus case before the Court. In the *Yerger* controversy, Chase covered his bets quite well. He turned for advice, and prior commitment, to Nelson and Clifford, not to the entire Court. From these two, he knew what the answer to his question, do "I have the power" to entertain a habeas corpus position outside my circuit would be.¹⁶⁷ He then turned to District Judge Hill and gave him advice which absolutely precluded any refusal to either grant the petition or allow an appeal, unless that judge disregarded the Chief Justice's admonition, "your duty is a necessary inference from your authority."¹⁶⁸ Such explicit "advice" was unlikely to be disregarded.

Chase was able to get his colleague in the South, Justice Wayne, to agree not to hold circuit court, and apparently the acquiescence of the Court itself grounded his position firmly. His determination to interpret the confiscation and amnesty statutes so as to give them "such a liberal construction as will give effect to the beneficent intention of Congress"—of which Congress was unaware—and his defense of the pardoning power of the President was ratified by the Court, as was his general policy of leniency toward the South in all matters but Negro suffrage as enunciated on circuit in *Shortridge v. Macon*.¹⁶⁹

Perhaps the unanimous decision in *Mississippi v. Johnson* should be catalogued as a striking success. Chase was obviously pleased at the "beneficent" effect of the decision. It was unanimous, and of the "new set" he alone had any perceptible influence with all of the "old set." The none-too-graceful but highly expedient retreat in *McCardle* saw only Grier and Field keep the Court from unanimity. In light of the heat of the controversy and the ominous signs that the Justices were preparing to go down together on the case, the wonder of it is that only Grier and Field refused to duck the issue. It is worth noting that after the *Test Oath Cases*, the Court, whether ruling the way the radicals wished or not, ruled with near unanimity on politically explosive cases.

Chase undoubtedly exerted his influence in favor of the assertive path the Court took after 1868. In light of the Court's personnel, perhaps this should be cited as a negative leadership success in that

167. Letter From SPC to Nathan Clifford and Samuel Nelson, June 22, 1869, Pennsylvania Historical Society, Chase MSS.

168. Letter From SPC to Robert A. Hill, June 23, 1869, Pennsylvania Historical Society, Chase MSS.

169. *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 542-43 (1869); see, e.g., *Armstrong's Foundry v. United States*, 73 U.S. (6 Wall.) 766 (1868); *United States v. Nelson Anderson*, 76 U.S. (9 Wall.) 56 (1870); *McKee v. Rains*, 77 U.S. (10 Wall.) 22 (1870); *Bigelow v. Forest*, 76 U.S. (9 Wall.) 359 (1870); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). See also, DORRIS, PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON chs. 14 and 17 (1953).

he merely did not try to stop the Court. Certainly, however, he helped propel the Court in this direction.

There were also failures in leadership. The most obvious one, perhaps, is the legal tender controversy when Chase led the Court to invalidate that act, and then precipitated an intra-Court fight which spilled into public view, attempting to prevent a reversal when two new Justices changed his five man majority to a four man minority. Several other cases should probably be added to the failure side of the ledger. The most obvious example being the test oath chaos in 1866. *Milligan* might be added to the list. It should be noted in both these matters that the positive positions of the members of the Court would probably have precluded a John Marshall from any success. Both cases were decided, also, before congressional reaction against the Court's attitude began. The danger of the situation which these cases revealed must have been a great help in achieving unity. It should also be recalled that Chase attempted to limit *Milligan* to a construction of the statute involved, and that this could have been a factor in winning Justice Wayne to his side. One wonders what the result of the case would have been had it not involved a question which Davis had long since determined must be settled for all time at the first opportunity. No matter how determined each member was to carry out his views, the Court as a whole was considerably split in these cases.

It should be noted also that Chase was not able to convince the Court that federal authority should be interpreted broadly under the thirteenth, fourteenth and fifteenth amendments. His conduct indicates that he felt a door should be left ajar in case the states completely frustrated his racial aims. Hence, his objection in *Crandall v. Nevada*¹⁷⁰ to Miller's failure to rest his decision on a broad interpretation of the rights of a United States citizen which could be protected under the commerce clause. By 1867, Chase must have known that Miller's narrow opinion would spell trouble for the privileges and immunities of United States citizens protected by the fourteenth amendment.¹⁷¹ Chase claimed suffrage for the freedmen while the states were being reconstructed. By the time explicit definition of this clause came to the Court, Chase was too ill to write an opinion,¹⁷² though he hoped to do so in *Bradwell v. Illinois*.¹⁷³ Considering how important the matter was to him, perhaps it should

170. 73 U.S. (6 Wall.) 35 (1867).

171. Which Chase probably had a hand in writing. His proposed text is very nearly identical with the final version. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 526 (1956); PIATT, *op. cit. supra* note 146, at 130-31.

172. Slaughter House Cases, 83 U.S. (16 Wall.) 136 (1873).

173. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873).

be listed as a failure, although one wonders what the outcome would have been had Chase lived in good health. Both these later cases were decided five to four.

Throughout his term, Chase never lost his sense of independence, recording dissents in thirty-three cases, the same number as Justice Miller. The interesting fact is that Chase seldom called attention to his dissents by writing an opinion. Never timid or weak-minded, perhaps it can be inferred that he realized he would invoke a detrimental effect on his leadership in the Court if he paraded his disagreements to an outside world always glad, either from admiration or distrust, to pay attention to what he said. For example, displeased as he was at Nelson's reasoning in *Georgia v. Stanton*, which left the door open to a challenge to Reconstruction through equity, in the heat of political 1868 he merely stated very briefly his dissent from the reasoning. It may be that the fact of his recording dissents thirty-three times, but going beyond the mere act of recording on only nine occasions is the most revealing fact of all. It must show that Chase learned on the bench at least some of the utility of holding his own tongue.

That Justice Miller was often opposed to Chase within the Court and came to regard him as an enemy seems well established. Perhaps some measure of Chase's impact within the Court can be gained by looking at what his chief rival said about him. On one occasion the unmodest Miller remarked that he had "often said" he knew "of no one against whom I should undertake to measure myself with more diffidence than Chase."¹⁷⁴ Again, Miller, after listing to his brother-in-law Chase's bad qualities, added, "but he was a great man and a better man than public life generally leaves one, after forty years of service."¹⁷⁵ Like Caesar, praise from Miller is praise indeed. The man who receives such a recommendation must have had an impact—and he must have understood the leadership potential the position of Chief Justice of the United States Supreme Court affords.

174. FAIRMAN, *op. cit. supra* note 115, at 94.

175. FAIRMAN, *op. cit. supra* note 59, at 252.