



THE JUDICIARY FUND

A MODEST PROPOSAL THAT THE BAR GIVE TO JUDGES
WHAT CONGRESS WILL NOT LET THEM EARN

Ross E. Davies

UNDERPAID FEDERAL JUDGES have always had ways to increase their income. The obvious first resort (other than quitting for some other, higher-paying job) is to Congress and the President for a law granting judges a raise. But reputable minds differ on the proper scale and form – and, rarely, even the policy – of judicial pay increases. Perhaps as a result, raises have been low and slow in coming.¹

So what is a poor judge to do? Look elsewhere, of course. Since the early Republic, individual judges have occasionally taken the initiative to top off the family budget, albeit with mixed results. They have, for example, marketed reports of their own opinions²

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¹ Compare John G. Roberts, Jr., *2006 Year-End Report on the Federal Judiciary*, with RICHARD A. POSNER, *HOW JUDGES THINK* 158-73 (2008); see also 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 44-45 (Max Farrand ed., 1937) (Gouverneur Morris arguing “the Legislature ought to be at liberty to increase [judges’] salaries as circumstances might require,” and James Madison disagreeing).

² E.g., THOMAS BEE, *REPORTS OF CASES ADJUDGED IN THE DISTRICT COURT OF SOUTH CAROLINA* (1810); B.R. CURTIS, *REPORTS OF DECISIONS IN THE SUPREME COURT* (1856); ROBERT W. HUGHES, *REPORTS OF CASES DECIDED IN THE CIRCUIT & DISTRICT COURTS* (1880).

and the opinions of others,³ taught in law schools,⁴ and written books.⁵ There are grounds for objecting to these pursuits and other moneymakers, mostly involving concerns about distractions, improper influence, and conflicts of interest. But for present purposes those objections are beside the point, which is simply that some judges did and do engage in a little moonlighting. In other words, those judges don't just complain about low pay, they show they are serious about the need for more money: They go out and get it.

Judges are, however, not the only ones who have stepped up when Congress and the President fail to legislate satisfactory judicial salaries. Attentive outsiders, especially members of the bar, have from time to time professed a willingness to contribute to the sustenance of the bench. Which brings us to the Taney Fund.

THE TANEY FUND: 1871

Like many judges before and since, Chief Justice Roger B. Taney “had gone on the Bench ... when he was in full practice at the Bar, and was thereby cut off from all possibility of adding to his very small fortune,” other than by moonlighting, which he apparently did

³ *E.g.*, WILLIAM CRANCH, REPORTS OF CASES ARGUED & ADJUDGED IN THE SUPREME COURT (2d ed. 1812); SAMUEL F. MILLER, REPORTS OF DECISIONS OF THE SUPREME COURT (1874). Judges are no longer active reporters, but they still could be. Recent compilations (by non-judges) of thematic books of judicial opinions suggest there is still money to be made by new entrants in the case-reporter market. *E.g.*, BLACKIE THE TALKING CAT & OTHER FAVORITE JUDICIAL OPINIONS (1996); SCALIA DISSENTS (Kevin A. Ring, ed., 2004). Some judges do produce casebooks, which are in large part edited collections of judicial opinions. *E.g.*, KIMBERLY A. MOORE et al., PATENT LITIGATION & STRATEGY (3d ed. 2008).

⁴ *See, e.g.*, R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY 240 (1985) (Story at Harvard); LINDA PRZYBYSEWSKI, THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN 44-52 (1999) (Harlan at what is now George Washington); www.law.uchicago.edu/faculty/index.html (Richard Posner, Frank Easterbrook, and Diane Wood at Chicago).

⁵ *E.g.*, JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON (1832); JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE MANUAL (2008). Some judges, however, explicitly eschew royalty income. *E.g.*, DAVID B. SENTELLE, JUDGE DAVE & THE RAINBOW PEOPLE iv (2002); SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW dustcover (2003).

not do.⁶ When he died in office in 1864, he left behind a tiny estate, and several children. Two of them, his daughters Ellen Taney and Sophia Taylor, were still his dependants.⁷

Almost seven years later, in February 1871, Taney's former colleagues publicly noticed that Ellen and Sophia had fallen on hard times. "It was announced from the bench of the Supreme Court ... that there would be a meeting of the bar of that court on Saturday [February 11th] with reference to the proposed Taney fund."⁸ When the bar met,⁹ speakers extolled the virtues of Roger Taney, indicted the federal government for a stinginess with respect to judicial salaries that had deprived Taney of the ability to provide for his heirs, and bemoaned the resulting sufferings of the Taney daughters. A committee was formed to raise funds to support Ellen and Sophia, and the meeting adjourned. The proceedings were publicized in a pamphlet, which is reproduced below at pages 373 to 383.

Reading that pamphlet, one is left with the impression – almost certainly false – that gentlemen of the bar had learned only recently that Ellen and Sophia were not well provided for. William Evarts, formerly Attorney General under Andrew Johnson, declared,

The circumstances of the surviving members of Judge Taney's family have been brought to the attention of members of the profession during the last year, and the mere statement of the case has been sufficient to excite much feeling on the part of the gentlemen who had the subject thus brought under their observation. But, for the want of some organization, I am sorry to say, as yet, no fruits have come from a consideration of the matter. (p. 375)

⁶ SAMUEL TYLER, *A MEMOIR OF ROGER BROOKE TANEY* 479 (1872).

⁷ CARL B. SWISHER, *THE TANEY PERIOD* 967 (1974). Taney had, alas, invested heavily before the Civil War in bonds issued by Virginia. TYLER, *A MEMOIR* at 479-82; CARL BRENT SWISHER, *ROGER B. TANEY* 579-80 (1935).

⁸ *The Taney Fund*, CHI TRIB., Feb. 9, 1871 at 1.

⁹ The meeting was apparently held without official sanction beyond the earlier announcement from the bench. The Court's minutes for that week are free of references to it. *Minutes of the Supreme Court of the United States* (Oct. 14, 1869-Feb. 15, 1872) (National Archives Microfilm Pubs., Microcopy No. 215, Roll 9).

Remarks by others, among them Attorney General Amos Akerman, implied a similar innocence about the conditions under which the Taney daughters had been living.

It is unlikely that the plight of Ellen and Sophia was news to anyone attending the February 11 meeting. Washington – home of the Supreme Court and its bar – was a town where everyone knew about everyone. It had become an increasingly important center of power during and after the Civil War (and thus also a magnet for the public scandal-mongering of a big city), but it had retained much of the back-fence-gossip culture of the small town it had been. Just read the work of contemporary Washington newspaper correspondents.¹⁰ In fact, the impecunious and undignified lives led by the two women had been in the news since at least 1869.¹¹

More likely, the situation of the Taney daughters had long been common knowledge, at least in the circles in which Evarts, Akerman, et al. traveled. But it became a suitable topic for convocation of the bar only when a confluence of other forces created a political environment in which there was both space to publicly extend a helping hand and a reason – other than simple charity – to do so.

First, space. By 1871, the limits of Congressional Reconstruction were becoming apparent. The signs included the Court's own early 2 cents in *Ex parte Garland* in 1867,¹² the failed impeachment of President Andrew Johnson in 1868,¹³ the survival of the Democratic Party nationwide, and the persistent (if diminished) sway of traditional political and social forces in the South, to name just a few.¹⁴ These signs were also indicators of political feasibility for a gradual rehabilitation of the Taney of *Dred Scott v. Sandford* infamy.¹⁵ The

¹⁰ See generally, e.g., MARY CLEMMER AMES, TEN YEARS IN WASHINGTON (1874).

¹¹ See, e.g., *A Misstatement Corrected*, N.Y. TIMES, July 16, 1869, at 5 (noting earlier coverage in the *Washington Republican*).

¹² 71 U.S. 333 (1867); cf. *Ex parte McCordle*, 73 U.S. 318 (1868); William W. Van Alstyne, *A Critical Guide to Ex parte McCordle*, 15 ARIZ. L. REV. 229 (1973).

¹³ See generally 2 & 3 TRIAL OF ANDREW JOHNSON (1868).

¹⁴ See, e.g., ERIC FONER, RECONSTRUCTION ch. 8 (1988).

¹⁵ 60 U.S. 393 (1857). For example, legislation was afoot (though it would take several years to bear fruit) to commission a bust of Taney to be displayed in the

man himself being gone, his family was a good, and less controversial, second-best beneficiary.

Second, a reason. There was pending legislation that the Supreme Court bar – or at least that part of it represented at the February 11 meeting – strongly supported.¹⁶ Federal judges had not had a raise in pay since 1855, and the purchasing power of those unchanging salaries had dropped by at least 25 percent over the years.¹⁷ At the same time, the judges' workload was ballooning, courtesy of a variety of new laws extending federal jurisdiction and adding new federal crimes and regulations, as well as the growth of the nation more generally.¹⁸ After years of dithering and half-measures, Congress was seriously considering a judicial pay raise, as well as other reforms.¹⁹ While there is no direct evidence of a connection between the deliberations of Congress and those of the bar, there are some signal coincidences, all of which suggest that the comments of the speakers at the February 11 bar meeting were directed at least as much to members of Congress who were about to vote on judicial pay raises as they were to lawyers considering writing checks for the Taney daughters. Among those signals:

- The meeting of the Supreme Court bar was called for the Saturday before the Wednesday on which the Senate took up the issue of judicial pay.

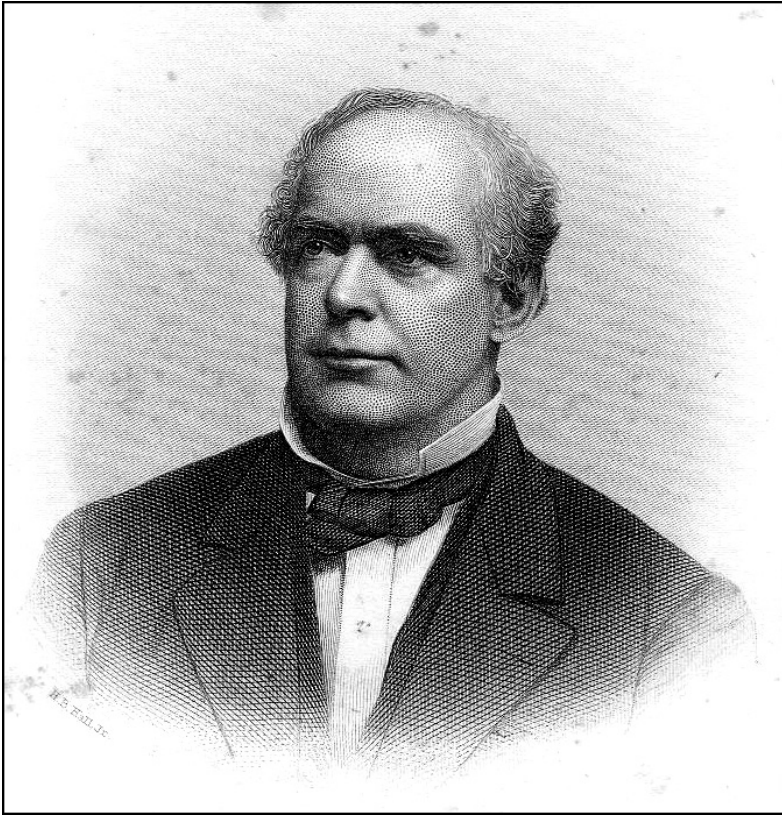
Court's chamber with the busts of previous Chief Justices. CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 393-96 (rev. ed. 1926).

¹⁶ Competitive concern that lawyers elsewhere were about to preempt the Supreme Court bar's leadership in supporting the family of a Chief Justice might also have been a motivating factor. Compare, e.g., *Chief Justice Taney's Family*, CHI. TRIB., Jan. 26, 1871, at 3 (New York), with p. 374 below (Montgomery Blair invoking "the sanction of the authority of the members of the bar of this court").

¹⁷ See CONG. GLOBE, 41st Cong, 3d Sess., 1259 (Feb. 15, 1871); RICHARD A. POSNER, *THE FEDERAL COURTS* 34, 385-87 (2d ed. 1996).

¹⁸ See, e.g., FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* ch. 2 (1928).

¹⁹ S. 1159, 41st Cong, 3d Sess. (Dec. 21, 1870); H.R. 2683, 41st Cong, 3d Sess. (Jan. 9, 1871); CONG. GLOBE, 41st Cong, 3d Sess., 557-60 (Jan. 17, 1871), 1256-63 (Feb. 15, 1871), 1294-1301 (Feb. 16, 1871), 1428 (Feb. 20, 1871).



Salmon P. Chase, Chief Justice of the United States (1864-1873)

Chase was not in Washington when the bar met on February 11, 1871. In August 1870 he had suffered a stroke. After convalescing in Rhode Island, he moved to New York City in January 1871 and stayed there until his return to the bench in March. On hearing of the meeting from Marshal of the Court Richard C. Parsons, Chase wrote in reply on February 13, "I am very glad that the Bar took up the subject of Judge Taney's family and that it was a success. I have repeatedly urged this upon the lawyers here and I think that if the Bar Association of New York would take hold of it and appoint a Committee which would correspond throughout the country, a sum might be raised which would put the ladies beyond the need of want. If I belonged to the class of millionaires, I would ask nobody to help me in that work." Papers of Salmon P. Chase, Library of Congress, Manuscript Division, Box 28.

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- All five of the substantive speeches delivered at the February 11 bar meeting devoted more attention to the issue of judicial pay than to charity for Ellen and Sophia.
- Four of those speeches were delivered by federal legislators – Senators Matthew Carpenter and George Edmunds and Representatives James Garfield and Clarkson Potter.²⁰ All supported the judicial pay raises in Congress as well.
- Consider, for example, Senator Carpenter. At the bar meeting on February 11, he declared, “I shall be very happy to advance, to the utmost of my power, the object it is intended to promote,” and then went on at length about the dangers of “the niggardly compensation which is made to the judicial magistrates of this country,” mentioning Taney’s daughters only briefly. (pp. 376-78) On February 16, he argued in the Senate in favor of the bill containing pay raises for judges, citing as evidence: “Judge Taney [was] a man whose ability and capacity, had he exerted them at the bar, would have yielded him a handsome return and enabled him to leave his children a handsome competence. He labored there like a slave for twenty-nine years, and died poor, and his children to-day are begging bread.”²¹
- In contrast, no one at the bar meeting suggested the most straightforward path to government relief for the heirs of a self-sacrificing public servant: a relief bill. Such bills were quite common. In fact, much of the work done by Congress while the bar met on February 11 consisted of pension bills and other forms of individuated legislative largesse.²²

²⁰ And not because there was a shortage of available bar members. *See generally* UNITED STATES REPORTS, vol. 77-80 (identifying, inter alia, counsel in cases argued during February 1871, most of whom were not employed in Congress).

²¹ CONG. GLOBE, 41st Cong, 3d Sess., 1297 (Feb. 16, 1871) (the reference to “slave” appears to have been made without irony, and without objection); *see also id.* at 558-59 (Jan. 17, 1871) (similar argument in the House of Representatives).

²² CONG. GLOBE, 41st Cong, 3d Sess., 1136-51 (Feb. 11, 1871); *see also The Tired Senate*, CHI. DAILY TRIB., Mar. 2, 1879, at 1 (reporting on relief legislation for Kate Chase Sprague, daughter of Chief Justice Chase, and Senator Allen Thurman’s assertion that Taney’s daughters never applied for government relief).

- Finally, the terrible burden of working for a living – which is what Ellen and Sophia had been reduced to – seems overdrawn. More an excuse to come galloping to their aid than a reason to do so. Plenty of women of comparable social station were wage-earners, including, for example, “two grandnieces of Daniel Webster,” “Mrs. Stephen A. Douglas, the widow of the ‘Little Giant,’” and “the orphan daughter of Robert J. Walker, once Secretary of the Treasury. . . . The list could be made a very long one.”²³ As Congressman Jacob Ela observed, “If we are to accept the argument [that the fate of the Taney daughters proves the need for judicial pay raises], then we must pay every office-holder under the Government such a salary while he holds office that his family may be able to live forever afterward without working for a living, as most people have to do.”²⁴

Thus, Ellen and Sophia appear to have been of interest primarily as tools for members of the bar to use in advancing what they thought to be sound public policy.

Although the main purpose of the February 11 meeting probably was to support judicial salary increases, rather than to support the daughters of Roger Taney, the prospects for the Taney Fund nevertheless appeared good at first. In March 1871, the *Atlanta Constitution* noted that the “bar of New Orleans promise at least \$3,500 for the fund.”²⁵ The *Albany Law Journal* reported in May that “[t]he fund for the relief of the daughters of Chief Justice Taney will, it is said, reach the snug sum of \$50,000,” and in June the *Journal* added that a “circular [perhaps the pamphlet reproduced below] will soon be issued to the profession at large soliciting contributions to the fund for the relief of the family of the late Chief Justice Taney.”²⁶

²³ *Personal*, HARPER’S BAZAAR, Oct. 20, 1877, at 659; *Women Are the Experts*, CHI. DAILY TRIB., July 11, 1891, at 16; see also *Resignation of Chief Justice Fuller*, 26 AM. L. REV. 411, 412 (1892) (“a daughter of Mr. Justice Miller supports herself and her widowed mother in a similar way”).

²⁴ CONG. GLOBE, 41st Cong., 3d Sess., 559 (Jan. 17, 1871).

²⁵ *Personal*, ATL. CONST., Mar. 3, 1871, at 4.

²⁶ *Legal News*, ALBANY L.J., May 13, 1871, at 290 & June 24, 1871, at 420.

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But the money did not pour in. It did not even trickle. Two years later, in February 1873, the *Atlanta Constitution* was still reporting on the continuing distress of the Taneyes:

The daughters of the late Chief Justice are in straitened circumstances, being compelled to earn their subsistence by working as copyists for lawyers in Baltimore. Members of the legal profession throughout the country are about starting a fund to relieve the necessities of these ladies.²⁷

It seems that the members of the bar did not keep their word.

The Taney Fund was probably doomed almost from the outset by the very success of the February 11 bar meeting putatively called to create the Fund. On March 3, 1871, a big salary increase for federal judges finally became law,²⁸ achieving what seems to have been – as suggested above – the real primary purpose of that very public meeting to establish the Fund. The table below shows the changes in federal judges' pay:²⁹

	Old salary ³⁰	New salary ³¹	Raise
Chief Justice:	\$6,500	\$8,500	31%
Associate Justices:	\$6,000	\$8,000	33%
Circuit Judges:	\$5,000	\$6,000	20%

In fairness to the bar, it should be noted that other events probably contributed to the failure of the Taney Fund. First, as discussed

²⁷ ATL. CONST., Feb. 5, 1873, at 4.

²⁸ Although in fact it barely returned their spending power to 1855 levels. See POSNER, THE FEDERAL COURTS at 386-87.

²⁹ District Court judges are not included in the table because their salaries varied by region in the 19th century and they did not receive across-the-board raises in the 1871 law. *Id.* at 34, 385-87; note 31 below; see also CONG. GLOBE, 41st Cong, 3d Sess., 1266 *et seq.* (Feb. 15, 1871).

³⁰ *An Act making Appropriations for the legislative, executive, and judicial Expenses of the Government for the Year ending the thirtieth of June, eighteen hundred and seventy-one*, 16 Stat. 249 (July 12, 1870); Federal Judicial Center, *Authorized Judgeships*, www.uscourts.gov/history/tablek.pdf.

³¹ *An Act making Appropriations for the legislative, executive, and judicial Expenses of the Government for the Year ending June thirty, eighteen hundred and seventy-two*, 16 Stat. 493-95 (Mar. 3, 1871); Federal Judicial Center, *Authorized Judgeships*.

above, working for a living was not the tragedy it was implied to be at the February 11 meeting. Thus an appeal on that basis would not have been particularly moving. Second, Ellen died on September 28, 1871, halving any need for contributions.³² Moreover, Sophia had a son, Roger Taney Taylor.³³ He would have been 16 by then and old enough to provide some aid to his mother, further undermining any sense of obligation that might have been felt at the bar.³⁴

Strong claims about cause and effect in the legislative process are risky business. And there is insufficient evidence here to support an argument that the February 1871 meeting of the Supreme Court bar was decisive in the passage of judicial salary adjustments in March 1871. On the other hand, it would be an exercise in excessive timidity to disclaim any impact by the bar during that time, when it did engage in extraordinary efforts on behalf of the judiciary. In any event, for present purposes such equivocations are beside the point, which is simply that in 1871 some lawyers did attempt a little fundraising. In other words, those lawyers didn't just complain about low pay for judges, they showed they were serious about the need for more money: They went out and got it – or at least publicly promised to do so. Which brings us to the Judiciary Fund.

³² Thus the reference to “daughters” rather than “daughter” in the February 3, 1873, *Atlanta Constitution* article quoted above was probably an error. See note 27 above.

³³ BERNARD C. STEINER, *LIFE OF ROGER BROOKE TANEY* 44, 534 (1922); SWISHER, *ROGER B. TANEY* at 580.

³⁴ There was something of a happy ending to the story of the Taney Fund. Under the heading “An Anecdote of David Dudley Field,” the editors of the *American Law Review* quoted an earlier article by Irving Brown in the *London Law Journal*:

[Field] wrote me ... : “It may interest you to know, since I have been charged with parsimony, that in my chagrin at the failure of the bar of the country to keep its promise, made at a meeting in Washington, after the death of Chief Justice Taney, to look after his family, I gave to the clerk of the Supreme Court my personal bond to pay to a daughter [probably Sophia] of the chief justice 500 dollars a year, during her life or mine, I forget which; and that I paid this annuity from the date of the bond in 1873 till the daughter's death in 1891, so that I actually contributed out of my private funds 9,000 dollars to save the credit of the bar.”

28 AM. L. REV. 584 (1894).

THE JUDICIARY FUND: 2008

According to the American Bar Association, federal judges are in bad shape these days – seemingly as bad as they were in 1871: “Judicial salaries already are so inadequate that they threaten the vitality of the judiciary.” And “[j]udicial pay has reached such levels of inadequacy that it threatens the quality of justice in our nation.”³⁵

In the spirit of ’71, the modern bar should come to the aid of our federal judiciary. The bar should do more than just talk about the need for more money for judges: It should go out and get it – or at least some of it. The reasoning is the same as it was more than 130 years ago. Congress and the President have repeatedly failed to make proper provision for judicial compensation. While there are reasons to hope they will soon rectify the problem, that is no excuse for the bar to do anything less than everything it can, both to prevail upon the lawmakers to make the right laws, and to support underpaid judges and their families. Put another way, until Article I and Article II do right by Article III, those who know best the extent and urgency of the situation – and who can best afford to help out – have a duty to step up. That would be us. The bar. As Attorney General Akerman said at the February 11, 1871 bar meeting, “It is incumbent upon the members of this profession to supply the deficiencies of the public action of the country.” (p. 374)

Unfortunately, today there are no figures like the Taney daughters around whom to rally – no orphaned offspring of a famous judge who live (or who might be characterized as living) on the far side of the boundaries between frugality and poverty, between dignity and humiliation. And so advocates of judicial pay hikes lack poster children to rescue from the neglect of the legislature and the executive. All that means is that they must make do with a more generic, and more accurate, name: The Judiciary Fund.

But the fact that no one in the judicial family is visibly suffering does not mean that the system isn’t. The basic argument persists as

³⁵ Letter from Robert D. Evans, ABA Government Affairs Director, to every Member of the U.S. House of Representatives, Dec. 8, 2006; ABA, *Background Information on the Need for Federal Judicial Pay Reform* 1 (May 17, 2007).

it was made by Alexander Hamilton in 1782 (p. 356), by Clarkson Potter in 1871 (p. 381), and by Chief Justice John G. Roberts, Jr. in 2006: “The dramatic erosion of judicial compensation will inevitably result in a decline in the quality of persons willing to accept a lifetime appointment as a federal judge.”³⁶ That should be a sufficient call to arms for the bar in any era. And action is the best evidence of commitment: Not chatter on television, not another resolution from the ABA, not another installment of eloquent testimony delivered by a giant of the profession. Instead, members of the bar should put their money where their mouths are.

The Cost

\$ 44 million is the rough price of the increases Congress is looking at now for Article III judges. Here is how it breaks down:

District Courts and Court of International Trade. Judges on these courts currently earn \$169,300 per year.³⁷ The leading judicial-pay bill before Congress now – S. 1638, the Federal Judicial Salary Restoration Act of 2008, sponsored by Senator Patrick Leahy and several others – would raise that to \$218,000, which translates to a \$48,700 per judge increase. There are 687 authorized judgeships on the district and international trade courts.³⁸ So, the total annual price of their proposed increase would be \$33,456,900.

Courts of Appeals. Appellate judges’ salaries are \$179,500. S. 1638 would hike them to \$231,100 – a \$51,600 raise. With 179 authorized court of appeals judgeships, the annual price of their proposed increase would total \$9,236,400.

Supreme Court. The annual salary for associate justices is \$208,100 and the salary for the chief justice is \$217,400. S. 1638 would raise them to \$267,900 and \$279,900, for a total annual cost increase of \$540,900.

³⁶ Roberts, 2006 Year-End Report.

³⁷ See www.uscourts.gov/salarychart.pdf.

³⁸ See www.uscourts.gov/cfapps/webnovada/CF_FB_301/index.cfm?fuseaction=Reports.ViewJudgeships.

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Making for a grand total annual price of \$43,234,200 – about \$44 million for simplicity's sake.³⁹

The Fund

The ABA boasts “more than” 400,000 members.⁴⁰ If it increased annual dues by \$110, it would raise more than \$44 million.⁴¹ That would provide enough cash to cover the cost of the raises currently hanging fire in Congress. If an across-the-board dues increase would be too hard on the left tail of the ABA's income distribution curve, it could impose a progressive dues structure instead. Even a very steep one would impoverish no one. The elite of the bar can afford it. There are, for instance, dozens of firms in the AmLaw 100 that could, each on their own, cover the full \$44 million and still have well over \$1 million in annual profits per partner.⁴²

So, the money is there. All that remains is, first, a commitment to support the judiciary, and, second, a way to channel the money to the judges.

The first part is easy. The Supreme Court bar in 1871 had no problem meeting about, agreeing on, and publicizing its commitment to raise money “to supply the deficiencies of the public action of the country.” Surely the ABA can do the same. The ABA and other bar organizations have no difficulty expressing strong views on a wide range of subjects within the purview of legislatures, including judicial compensation.⁴³ The ABA's commitment to increasing judicial pay in particular is unmistakable. In February 2007, for

³⁹ Yes, yes, it is true that these numbers do not account for salaries of senior judges (or for any number of other costs). On the other hand, they also fail to account for the possibility that some authorized judgeships might go unfilled. But the idea here is merely to get a rough sense of the scale of the cost, not a perfect accounting. Nor, in any case, is this a call for the bar to pay the entire price, all the time.

⁴⁰ See www.abanet.org/about/.

⁴¹ Assuming that the number of current members for whom the higher dues would be unpalatable would not exceed the “more than” portion of the current membership plus new members.

⁴² See *More Firms Enter Seven-Figure Territory*, AM. LAWYER 195-96 (May 2008).

⁴³ See generally, e.g., www.abanet.org/poladv/priorities/judicial_pay/.

instance, it resolved not only to endorse Chief Justice Roberts's characterization of low judicial pay as a "crisis that threatens to undermine the strength and adequacy of the federal Judiciary," but also to urge Congress "to take immediate action to enact a substantial pay increase for the federal judiciary."⁴⁴ The only question — one only the ABA can answer — is whether its commitment goes beyond mere words.⁴⁵

The second part — actually delivering money to judges — could be difficult, but need not be. There are severe statutory and canonical constraints on wealth transfers to judges for just about anything other than teaching and writing, and there are substantial limits even on the teaching.⁴⁶ There is no law or rule, however, preventing the ABA from volunteering to Congress that its members are prepared to pay a special tax (perhaps \$110 per member per year, or a progressive variation thereon that would result in total annual payments of about \$44 million) to forestall a crisis in the judiciary.⁴⁷ It could adopt a "Judiciary Fund" resolution to that effect at its 2008 meeting in New York City. Alternatively, Congress might (relatively) easily authorize the ABA to channel the proceeds from a dues increase directly to judges. Even the fiercest legislative guardians of judicial integrity appear to view bar associations as ethically safe

⁴⁴ *Federal Judicial Compensation Policies*, www.abanet.org/poladv/priorities/judicial_pay/judpaypolicies.pdf; see also American College of Trial Lawyers, *Judicial Compensation: Our Judges Must Be Fairly Paid* (Mar. 2007).

⁴⁵ Even if the ABA's commitment turns out to be purely rhetorical, the integrated state bars could do more. They have the power to collect dues from their members and to spend those dues to "promote the public interest by maintaining high standards of conduct in the legal profession and by aiding in the efficient administration of justice." *Lathrop v. Donohue*, 367 U.S. 820, 832-33 (1961) (plurality) (citing Wisconsin integrated bar statute, and bar-integration opinions of the Wisconsin Supreme Court); *id.* at 848 *et seq.* (Harlan, J., concurring).

⁴⁶ 5 U.S.C. § 7353 (gifts); 5 U.S.C. App. § 501 *et seq.* (compensation); ABA MODEL CODE OF JUDICIAL CONDUCT 2007, Rules 3.13 (gifts) & 3.12 (compensation). Naturally and constitutionally, they are entitled to their government salaries.

⁴⁷ See *Regan v. Taxation With Representation*, 461 U.S. 540 (1983); see also *Jackson v. Leake*, 476 F. Supp. 2d 515 (E.D. N.C. 2006); *New Jersey State Bar Ass'n v. Berman*, 11 N.J. Tax 433 (1991).

conduits for judicial subsidies that would be soiled by other, less impartial hands.⁴⁸ And then there is the brute fact that the laws and canons governing judicial conduct and compensation are for the most part creations of Congress and the ABA. If those bodies want to change the rules to enable the ABA to help out with judicial pay, they can. They have the power.

But to some extent the actual transmission of dollars to judges is beside the point, which is simply that lawyers today needn't just complain about low pay for judges, they can follow the example of the Taney Fund. They can show they are serious about the need for more money: They can go out and get it – or at least publicly promise to do so.



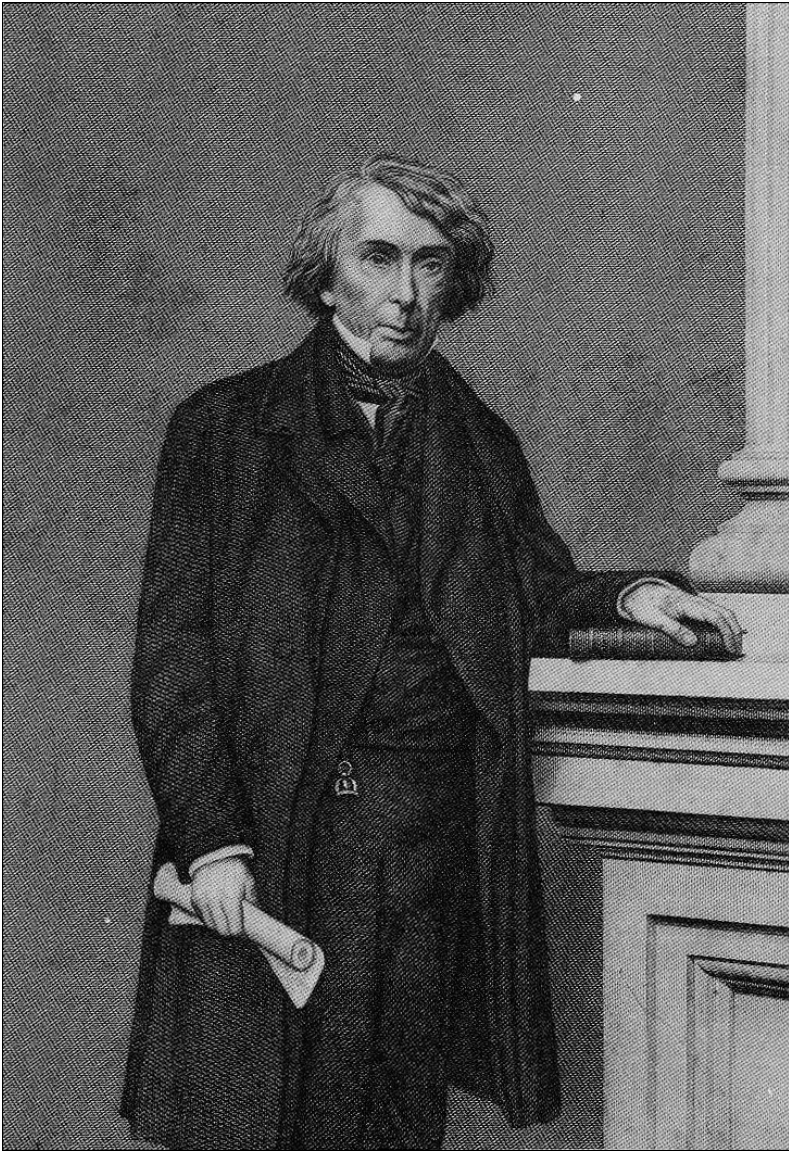
Which brings us full circle, back to the moonlighting judges. Are there rich federal judges out there, grown financially fat on wise investments,⁴⁹ or inheritance, or wedded wealth, or their own enterprise, or even the writing of books from the bench? If such judges exist, perhaps they can lead the charge – or at least serve in the ABA's vanguard – of those seeking to shore up the finances of federal judges. Recall the words of Salmon P. Chase, Chief Justice of the United States, in February 1871: "If I belonged to the class of millionaires, I would ask nobody to help me in that work."⁵⁰



⁴⁸ See Doug Lederman, *Law Schools Fight Proposed Limit on Judges' Travel*, www.inside-highered.com/news/2008/02/12/lawschools (Feb. 12, 2008) (reporting on positions taken by Senator Russ Feingold).

⁴⁹ Perhaps some judges are, like the average Senator, blessed with uncanny stock market savvy. See A.J. Ziobrowski et al., *Abnormal Returns from the Common Stock Investments of the U.S. Senate*, 39 J. FIN. & QUANT. ANAL. 661 (2004).

⁵⁰ Or Justice Oliver Wendell Holmes's bequest: "All the rest, residue and remainder of my property of whatsoever nature, wheresoever situated, of which I may die seized and possessed, or in which I may have an interest at the time of my death, [roughly \$290,000] I give, devise and bequeath to the United States of America." *Holmes Left Half of Fortune to U.S.*, N.Y. TIMES, Mar. 10, 1935, at 1.



Roger B. Taney, Chief Justice of the United States (1836-1864)

*From the note on page x of his authorized biography: "The engraved likeness of the Chief Justice ... is a perfect representation of him in his eighty-fifth year. It was thought best to represent him as a private citizen, as he appeared every day." Samuel Tyler, *A Memoir of Roger Brooke Taney* (1872).*



THE TANEY FUND

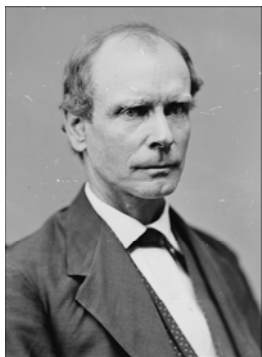
PROCEEDINGS OF THE MEETING OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES

In accordance with previous notice, the members of the bar of the Supreme Court of the United States assembled in the court-room on Saturday, February 11, at 11½ o'clock, a.m.

J.M. CARLISLE, Esq., called the meeting to order, and nominated Hon. AMOS T. AKERMAN, Attorney General of the United States, as Chairman of the meeting, and D.W. MIDDLETON, Esq., Clerk of the court, as secretary.

These nominations were unanimously agreed to.

REMARKS OF HON. A.T. AKERMAN.



The Attorney General, on taking the chair, said:

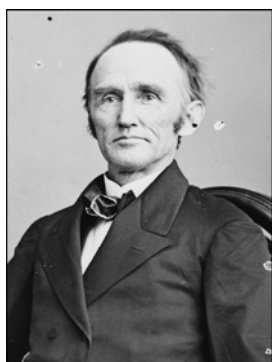
GENTLEMEN OF THE BAR: I am informed that the object of the meeting is to take some action in reference to a provision for the family of the late Chief Justice of the United States. He spent his life in the profession and in judicial service. There is information that those for whom he might have amply provided, in case he had been

"The Taney Fund" originally appeared in pamphlet form (without illustrations), published in "Washington City" by "McGill & Witherow, Printers and Stereotypers" in 1871.

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less devoted to the public service, are needy. It is incumbent upon the members of this profession to supply the deficiencies of the public action of the country; and I understand the gentlemen who are aware of that necessity have arranged that this meeting of the bar should be called, to institute proceedings in reference to making this provision. I shall be happy to hear any proposition that may be submitted.

PROPOSITION OF HON. MONTGOMERY BLAIR.



Mr. BLAIR. Mr. Chairman, I would move for the appointment of a committee by the chair, with a view to take measures to raise the fund which has been suggested. I suppose a committee of five would be all that would be required for that object.

Mr. CARLISLE. To report to another meeting?

Mr. BLAIR. No, I do not suppose that to be necessary. The course of proceeding at New Orleans was, that a meeting of the bar was held, and a committee were appointed to make such arrangements as they deemed proper; that committee having power to appoint other committees for collections, and to make an address to their associates throughout the country. I presume that would be about the action this committee would take, having the sanction of the authority of the members of the bar of this court. I move that a committee of five be appointed by the chair, whose duty it shall be to appoint such subcommittees and take such further action as may seem to be necessary to carry into effect the object of this meeting. It does not appear to me to be necessary or desirable that we should again call the members of the bar from their duties to attend a further meeting with regard to this matter. All that is required is, that we should have the sanction of the bar at a general meeting, as this is, for the appointment of a committee to carry into effect the general desire of all the members of the bar; because it is the universal feeling of the bar, as I understand, not only of this court, but throughout the

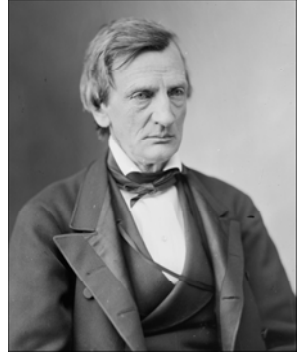
The Taney Fund

country, that some suitable provision should be made for the family of the late Chief Justice.

REMARKS OF HON. WM. M. EVARTS.

Mr. EVARTS. Mr. President, it gives me pleasure to second this motion, as it has been a matter of great interest with me to be able to be present at this meeting.

The circumstances of the surviving members of Judge Taney's family have been brought to the attention of members of the profession during the last year, and the mere statement of the case has been sufficient to excite much feeling on the part of the gentlemen who had the subject thus brought under their observation. But, for the want of some organization, I am sorry to say, as yet, no fruits have come from a consideration of the matter. I am quite sure that the meeting now held is all that was needed to put in some course of practical realization what was felt to be the duty, as it was the desire, of the profession of the country. These ladies, whose circumstances we are met to consider, in the course of a full professional service by their father, were likely to have received an ample provision from the eminent abilities and the great capacity of labor of the celebrated Chief Justice; but, by his withdrawal from the bar in the very height of his professional career, and his devotion for nearly thirty years to the service of the country on the bench, they have been left in a condition of almost actual dependence. This position they have accepted bravely and modestly, and have undertaken, by such labors as were suitable to their condition, to support themselves. We feel that this should be so no longer, and I am quite sure that the constitution of this meeting gives the amplest evidence that there is not the least remnant of political feeling on the subject, if indeed it ever existed. We are here as lawyers, and in reference to judicial service, which entitles all who have the close relationship which the objects of our present interest bear to the Chief Justice, to a recognition by the profession



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of its obligation, in the absence of distinct public provision in the matter, to see that an honorable competency is provided for persons thus situated. I have conversed with members of our bar in New York, and also with gentlemen eminent in the profession in Boston, and they participate in the feeling for which this meeting is called. I see that in a more distant city, New Orleans, the same sentiment begins to find expression; while in Baltimore, as we all know, there has been for some time a nearer sense of obligation and responsibility in this matter than there were felt in the country at large.

As to any details of this undertaking, we shall very gladly leave them to this committee of five, which you, sir, shall appoint, both in regard to the manner of making up the subscription — the amount that will be proper — and the specific application of it, presently and permanently. There is no lawyer who is ready to give what he shall think suitable to his own circumstances but that will be ready to place it at the discretion of this committee. In whatever form the subscription may be opened, it will give me very great pleasure to take part in it as a member of this bar, practising in this court, and again, if need be, as a member of the bar of New York, in connection with my brethren of that city.

REMARKS OF HON. M.H. CARPENTER.



Mr. CARPENTER. Mr. Chairman, it is a pleasure to me to participate in this meeting, and I shall be very happy to advance, to the utmost of my power, the object it is intended to promote.

Everything in this world has its bright side and its shade; evil and good are mingled in all things; advantages and disadvantages result from every human contrivance. Free institutions of civil government form no exception. Although the general balance is greatly in favor of such government, yet it produces some unpleasant consequences, and one of the results to be deplored is the niggardly compensation which is made to the judicial magistrates of this country.

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Indeed, without a decided reform in the compensation made for all public service, the inevitable result must be, that the practical administration of this Government will pass into the hands of rich men. Poor men, with children growing up around them, dependent upon their exertions for the means of education and suitable establishment in life, will heed the calls upon their affections, and gradually abandon the public service to those who are able to live without salaries, and can therefore afford to exchange their time for the honors which may be achieved in high position.

The people, in regard to other public servants – for example, our generals – have recognized the necessity for supplementing the compensations made by the Government, and handsome fortunes have been raised for them by voluntary contribution. A similar duty seems to fall upon the members of the bar, when we are informed that the daughters of one who for thirty years presided as chief in this illustrious court are now actually in want, within the very shadow of the National Capitol.

The lawyers of America will ever cherish the great name of TANEY. It would be out of place to speak of the living; but of those of our judges who have gone to the higher life the names of MARSHALL and TANEY will ever be mentioned together; and their opinions, which are masterpieces of reasoning and store-houses of learning, will remain pre-eminent in our judicial literature.

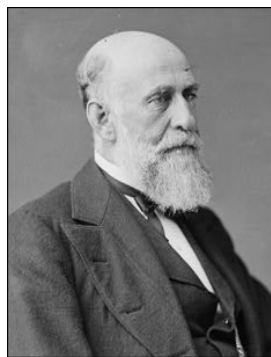
The purity of Taney's character, the frugality and temperance of his life, his devotion to the duties of his office, from which he never cast a longing look upon other places or preferments, the eminence of his abilities, his grasp of the most complicated causes and the most difficult questions, all are remembered with pride; and the members of a profession which he so illustrated while at the bar, and which stood in so intimate relations with him in his great administration of national justice, will not allow his descendants to want. Especially all the young members of the bar, who came here for the first time when TANEY was upon the bench, and experienced his condescension and courtesy, his willingness, nay, eagerness, to relieve their embarrassment, and smooth to their steps the rugged points of a new practice; the apparent interest with which his be-

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nevolent face was always turned towards a young, and consequently embarrassed, advocate – these members of the bar will find this not the occasion merely to perform a duty, but will take pride and pleasure in contributing this great testimonial of professional reverence for one who has passed beyond the possibility of making any return for our kindness.

I think I can predict for the bar of the West that, in this great mustering for professional charity, it will not be found wanting.

REMARKS OF HON. GEORGE F. EDMUNDS.



Mr. EDMUNDS. Mr. President, it seems hardly necessary that I, being a younger member of the bar, should add anything to what has been so well said. I am sure we may safely agree to what my brother Evarts has stated touching the fact that whatever of political feeling may have existed toward any act of the life of this eminent man, who has left his family in indigence, has long since passed away, and it is quite right for me to say, as one of those who would have been most likely to criticise and to find fault with any one act of the character to which I refer, and representing, perhaps, a bar that would be most likely to feel, in the heat of the moment, something of a disposition to criticise, that we never forgot, even in times of excitement, that this man, as much perhaps as any other who has adorned the bench, could bear criticism of that character upon any one act of his life, because, taking him all in all, through his long career, he displayed to our people a purity, a skill, an industry that has given renown to our most permanent institution – that of the judiciary; which has taught our people a reverence for law, for stability, for order; a lesson, I need not say, most eminently necessary in a free country – more so, if free government is to be a success, as we hope and believe it will be, than in any other.

So that even the stress of the occasion, to which allusion has been made, cannot but have had, on the whole – whatever individu-

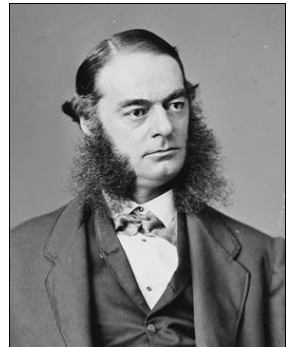
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als may think of it as an error in law – a most beneficial effect; because, as I have said, it has taught us all the lesson, which we from day to day so much need, that the law must not change to suit us or our notions; it must go on for the good of the whole, and over long spaces, and must only change, suiting itself to the will of the people, by that gradual process, such as those by which nature brings about results in her operations.

We may then truly say that, on the whole, there is no ground for the lawyer or citizen to criticise in any unkind sense either the professional or the judicial life of the late Chief Justice. And I am extremely glad, for one, that the bar – a brotherhood, perhaps, as pure and as close as any that exists in the country, and more intimately connected, it may be, with the real prosperity and the real stability of society than any other one of the business pursuits of life – should feel it not only its duty, but its pleasure, to see that the families of those who have been eminent in the heights of that profession, on the bench, should not suffer when their protectors have passed away.

REMARKS OF HON. CLARKSON N. POTTER.

Mr. POTTER. Mr. Chairmen, the late Chief Justice Taney lived to a very advanced age. During all his many years his private life was a model of modesty, of kindness, and of Christian courtesy. He came to the bench after he had passed the meridian of life; and yet so great were his talents, and so wonderfully were they preserved, that for twenty-eight years he, nevertheless, continued to fill the most



exalted judicial station in the Government, with credit to himself, with high satisfaction to the bar, and with honor to the country.

Within a very few days, I heard one of Judge Taney's associates upon this bench, Mr. Justice Miller, declare that the Chief Justice was the only man he had ever known who showed at a very advanced age no imperfection in his mental faculties. He declared,

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too, that, up to the close of his life, the Chief Justice's mental powers were, in all respects, equal to those of his earlier years, and that the opinions that he delivered in his eighty-eighth year would do credit to his best days.

It did so happen, Mr. Chairman, that it became the duty of Chief Justice Taney to deliver the decision of this court in a case involving the right of persons of African descent to citizenship. That decision was delivered at a time when the country was greatly excited upon that subject. The decision, and some expressions of opinion which accompanied it, gave great dissatisfaction to a large portion of our people. I was one of those who were dissatisfied. I believed the decision to be in some respects erroneous, and the consequences that might result from such opinions disastrous. But, sir, I entirely agree with our distinguished brother, Mr. Evarts, that whatever feeling against Chief Justice Taney may have been thus created has now happily passed away. And while that feeling might at one time have prevented the country from doing justice to his memory, I cannot believe that it would ever have prevented the bar of the country from making such adequate provision for those of his family who were in need, as is now at any rate, as our distinguished brother very properly said, its duty and its privilege to make.

And yet, Mr. Chairman, it is to be remembered that this gentleman, whose family, as we now learn, were left upon his death in actual want, was for twenty-eight years the Chief Justice of this Supreme Court – this court, whose province it is, not merely to determine questions of right between individuals, but even to settle those great political questions which lie at the foundation of the Government itself – and that so “niggardly,” as the Senator from Wisconsin has well said, was the compensation he received for his great services, that, notwithstanding his modest and simple life, he died without leaving any provision for his family whatever.

I know very well, sir, that the founders of this Government provided no adequate physical force with which the decrees of this court could, in case of organized resistance, be enforced. I know very well that the controlling influence which the court has for seventy years exerted has been owing to the wisdom and the character

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of the men who have sat here, and to the caution and consistency which have marked their judgments.

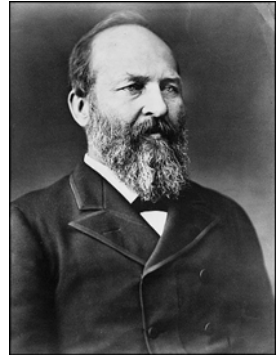
This would indeed seem, at first thought, to be an argument against the suggestion of the Senator from Wisconsin in respect of the insufficient compensation paid to our judges; and yet, sir, he is entirely right. For though this Government has, by reason of the ambition or the patriotism of its lawyers, been so long able, for wholly inadequate salaries, to secure judges qualified even for this Supreme Tribunal, we have no just reason to expect that such a condition of things can always continue; and unless wiser counsels shall prevail in this regard, I am sure that our descendants will have occasion to regret, if we do not, this unfortunate policy.

For myself, I shall consider it a privilege to be permitted to do my part toward whatever provision may be found necessary for the descendants of this great lawyer and jurist. At the same time I cannot but feel that the world will consider it another instance of the injustice and ingratitude of republics that any such necessity as that disclosed to us this morning has existed.

REMARKS OF HON. JAMES A. GARFIELD.

Mr. GARFIELD. Mr. Chairman, little remains to be said after the excellent remarks we have just heard on this subject; but I cannot let the opportunity pass without stating what seems to me the great lesson of the occasion which has called us together.

I am disposed to believe that in the final analysis of human life and action, it will be found that character is almost the only thing that permanently survives and lives forever; and I doubt if we shall find in the history of distinguished Americans a more illustrious example of a character severely tested than that of the late Chief Justice. Few characters have been tried as his was tried. He saw, from its beginning, a long train of public events steadily developing, gaining in its course an unheard-of strength of national sentiment



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and national passion, and finally culminating in an issue whose supreme weight fell upon him, and almost on him alone. And I do not doubt that in meeting that great issue he followed his own convictions of duty, and was true to himself.

Probably in no part of the northwest did his action in that crisis meet with a sharper dissent than in northern Ohio; and in that dissent I fully concurred. But during those stormy days, in all the severe criticism of which he was the object, I do not remember that a word was ever spoken against the pure and high personal character of the late Chief Justice. And because he stood this crucial test — the severest by which men are tried in this life — those who most sharply differed with him now cheerfully join in recognizing and honoring his incorruptible personal character.

One other thought only, and in continuation of what our distinguished brother from Wisconsin has so well said. He alluded to the danger that the niggardly treatment of its public servants by the Government may ultimately change the character of the Republic, and make it an official aristocracy based on wealth. This occasion affords us ground of hope that such may not be our fate. It is probable that the example of the late Chief Justice is at the present moment doing much to correct the evil so justly complained of. Within the last few days the Congress of the United States, with great unanimity, have taken measures to remedy, in some degree at least, this defect in the judicial department of the Government. I am quite sure that no member of the American bar, however humble, who appreciates the personal character of the late Chief Justice, will hesitate to join most cheerfully in the movement here inaugurated, to lift this family out of the condition of penury in which their father's virtue left them. I give the effort my hearty support.

APPOINTMENT OF COMMITTEE.

The CHAIR put the question on the motion of Mr. Blair, and it was agreed to unanimously.

Mr. BLAIR. I should add to the motion that in case any of the members of the committee should for any reason fail to act, the committee be authorized to fill vacancies.

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Mr. PEABODY. And I suggest that the committee be authorized to add to their number if it is desirable, whether for the purpose of filling vacancies or not.

Mr. BLAIR. I accept that amendment.

The motion, as amended, was agreed to.

The CHAIR appointed as the committee: Mr. Montgomery Blair, Hon. W.M. Evarts, Hon. M.H. Carpenter, Mr. J.M. Carlisle, and Solicitor General B.H. Bristow, stating that the selections were made partly with a view to the representation of the various portions of the country, and partly with a view to the necessity of having a quorum present in Washington for convenient conference.

Thereupon, the meeting adjourned.

