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Cover Photograph: The British Royal Navy's role in enforcing colonial law on Vancouver Island is explored in author Jane Samson's article in this issue. (British Columbia Archives, #A00268)

"A NEW FACE": IMPLEMENTING LAW IN THE NEW STATE OF ALASKA, 1958–1960

STEPHEN HAYCOX
CLAUS-M. NASKE

According to numerous writers, statehood for Alaska in 1959 represented a grand achievement, and at the same time, a once-in-a-lifetime opportunity. For those who were already in the territory or who went there for that reason, it was a chance to take part in creating a completely new state government, using the best advice possible and, with all the benefit that hindsight can provide, doing it right. In regard to making a state, it was an experience few people have ever had, and which fewer still will likely have in the future.¹

Yet one can get the impression from reading about it, and from talking to people who were there, that while everyone appreciated the nature of the opportunity and the challenges it represented, no one was particularly overawed by it. People expressed respect for what they were doing, but they did not tarry in celebration or indecision. Rather, within days of the vote in Congress in the summer of 1958, they put on their work gloves, so to speak, and began the planning and organizing that would effect as orderly a transition to statehood as possible.

At statehood in January 1959, the population of Alaska totaled about 215,000. Of these, 34,000 were military person-

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¹Claus-M. Naske, *An Interpretive History of Alaska Statehood* (Anchorage, 1973); Gerald Bowkett, *Reaching for a Star: The Final Campaign for Alaska Statehood* (Fairbanks, 1989), 93–100.

nel, stationed primarily at Elmendorf Air Force Base and Fort Richardson outside of Anchorage, at Ladd and Eielson Air Force Bases near Fairbanks, and at Fort Greely, the U.S. Army Cold Weather and Mountain School at Big Delta, about one hundred miles south of Fairbanks on the Richardson Highway. Of the civilian population of 180,700, about 139,200 were nonnative. Approximately 13,300 of these lived in Fairbanks (about 16,000 in the immediate area, including College, Aurora, and North Pole) and 44,200 in Anchorage (about 55,000 in the immediate Anchorage area, including Spenard, Nunaka Valley, Eagle River, and Birchwood), the two largest cities. The remainder lived in smaller urban centers such as Ketchikan (6,400), Juneau, the capital (6,700), and Sitka (3,200) in southeast Alaska, and Kodiak (2,600), Seward (1,900), Cordova (1,100), and Valdez (500) in south-central.² The 41,500 Eskimos, Aleuts, and Indians lived in about 220 mostly isolated villages, primarily dependent on subsistence use of natural resources.

In January 1959, a total of 95,500 Alaskans held jobs. Of these, 34,800 were military personnel; the federal government employed 16,800, and territorial-state and local governments 16,800 and 4,800, respectively; 39,100 were employed in the private sector.³ Mining, salmon canning (which investors in Seattle and California controlled), shipping, construction, retail, and service jobs comprised the private sector of the Alaska economy.

Although in the public mind the frontier was often associated with violence, and Alaska was regarded in 1958 as America's last frontier,⁴ in fact Alaska society was not lawless, and territorial citizens were law abiding and respected order. Most immigrants from the contiguous states came not to establish new modes of living, but to recreate the institutions and social and political forms with which they had always lived and were familiar. An essential aspect of the battle for

²George Rogers and Richard Cooley, *Alaska's Population and Economy: Regional Growth, Development and Future Outlook*, Vol. 2: *Statistical Handbook* (College, Alaska, 1963), 12, 27, 28. The Fairbanks area communities of College, Aurora, and North Pole were reported separately in the 1960 census, as were the Anchorage neighborhoods of Spenard and Nunaka Valley. The Fairbanks election district reported an urban population of 13,311, the Anchorage election district 53,311, which did not include the Matanuska Valley. U.S. Bureau of the Census, *U.S. Census of Population: 1960. Number of Inhabitants: Alaska* (Washington, D.C., 1960), 5, 9-11.

³*Ibid.*, 62.

⁴Automobile license plates in the new state for a time bore the phrase "The Last Frontier."

statehood had been convincing Congress that Alaskans were capable of effective self-government, that they constituted a responsible citizenry despite the fact that they had been willing to leave the settled regions of the country and strike out on their own as pioneers. In the years immediately preceding and following the grant of statehood, Alaskans of all walks of life and in all regions manifested a strong, patriotic commitment to responsible government and social order. Across the territory, rates of homicide were less in urban areas where most of the population resided than in rural areas where few nonnatives lived, and the urban rates in Alaska were lower than in most U.S. cities.⁵

However, constructing an effective state Department of Law and establishing a state judiciary were significant challenges for builders of the new state. While most citizens were law abiding, the mechanisms for law enforcement were primitive, there was jurisdictional confusion, and funding for law enforcement was inadequate. As most people who have a knowledge of the circumstances of the time remember, the territorial Department of Law was a small operation composed of a few dedicated individuals working under difficult conditions, often obstructed in what they wished to do.⁶ And the U.S. district (territorial) court was in many ways highly problematic, often inaccessible, and perceived by many as a federal impediment to the expression of the people's will.⁷ The new state government set out to remedy these problems and to make the law at once responsive and effective. Through the competence and perspicacity of those who did the work, that effort was largely successful.

Lack of clarity in jurisdiction and a certain amount of duplication were two problems that plagued the judicial process in Alaska at the end of the territorial period. Organic legislation in the U.S. Congress in 1884 and 1912 had estab-

⁵K.S. Kynell, *A Different Frontier: Alaska Criminal Justice, 1935-1965* (Lanham, N.Y., 1991), 85-88; William R. Hunt, *Distant Justice: Policing the Alaskan Frontier* (Norman, Okla., 1987).

⁶Gary Thurlow, former aide to Governor William A. Egan and former assistant attorney general, interview with Stephen Haycox, July 24, 1994, 3-4, Department of Law History Project, 1996; tapes and transcripts of this project, which includes interviews with fifteen of the sixteen state attorneys general and several other principals in the Department of Law, are housed in the Rasmuson Library, Fairbanks, the UAA Library in Anchorage, and the Department of Law in Juneau.

⁷Thomas B. Stewart, former state senator, former superior court judge, interview with Claus-M. Naske, June 20, 1983, Juneau, Alaska; tape deposited with the Alaska Supreme Court.

lished Alaska as a territory with an appointed governor and a biennially elected legislature. The 1884 act had created one federal judge for the whole territory. Because the territory was so large and the centers of population so distant from one another, two more judges were added in 1900, and a fourth in 1906.⁸ The U.S. District Court for Alaska was the only court in the territory. Each judge headed a judicial district of the single court, a geographical portion of the territory; there was no priority among the judicial districts of that single court.⁹ Appeals from that court went to the U.S. Ninth Circuit Court. Because Alaska was a U.S. territory, theoretically all crimes that occurred there were federal, and the Federal Code of Criminal Procedure was applied. Virtually all felonies were acted on through grand juries, and a grand jury true bill was needed to indict. But by the end of the territorial period, city magistrates handled all offenses against city ordinances, including petty theft, traffic violations, and drunk and disorderly conduct. Called U.S. commissioners, the community magistrates were *ex officio* justices of the peace, and functioned in informal lower courts, created by the several district judges.¹⁰ They handled misdemeanors, held preliminary hearings often in the form of informal citizens' courts of inquiry, and also handled probate. Still, the lines of jurisdiction were inexact, and the process was cumbersome. Some judges required commissioners to refer different categories of cases to them than did their judicial colleagues in the other districts. All actions in magistrates' or commissioners' courts could be appealed to the district judge, so many cases were heard twice in the same jurisdiction, once by the commissioner, again by the judge. Because the judges often handled much petty criminal and civil business, including divorce, cases backlogged.¹¹

⁸The U.S. District Court for Alaska was created by the civil government act in 1884 (23 Stat. 24), at which time the first judge was appointed; population increase associated with the gold rush era led Congress to create two additional internal districts within the same court in 1900 (31 Stat. 321), assigned to specific geographical regions of the territory. Congressional hearings in Alaska and the founding of the town of Valdez in 1904 led Congress to provide the fourth internal district and judge in 1906 (33 Stat. 617).

⁹Raymond Kelly was judge in the first district, at Juneau; he had replaced George Folta, a long-time, powerful figure in territorial affairs. Walter Hodge was judge in the second district, at Nome; James L. McCarrey, Jr., in Anchorage in the third district; and Vernon Forbes in Fairbanks, the fourth district.

¹⁰The commissioners were addressed as, and usually signed themselves as, "Judge."

¹¹Kynell, *Different Frontier*, 103–15.

The backlog was substantial. In addition to the problem of appeals, the lawyers and commissioners tended to put off troublesome cases that might take considerable time, particularly those that were complicated or dealt with difficult issues. Many of these were shunted aside while lawyers and judges addressed cases that could be more quickly disposed of. The backlog was so great that in the late 1950s the judge from Nome often went to Fairbanks to help, and judges from other federal jurisdictions traveled to the territory to hear cases.¹²

Finally, as a federal entity and as the only judicial agency, the territorial (U.S. district) court had enormous power, the exercise of which often bred considerable resentment within the territorial bar. U.S. commissioners served at the pleasure of the district judges; U.S. attorneys (later called federal district attorneys) were effectively appointed by the judges, as were the U.S. marshals. Over the years, some of the judges, many of whom did not have previous Alaska experience, acted somewhat imperiously in their relations with the local bar.¹³ As the territorial campaign for statehood gathered momentum in the mid-1950s, it was easy for statehood advocates to make the federal judicial apparatus a target of parochial criticism of federal control and power in the territory, a kind of "scape-goating" that proved irresistible to some Alaska attorneys and legislators and that, naturally, encouraged lay criticism as well.¹⁴ Alaska's economic dependence on the federal government and on the absentee-controlled salmon industry did not dissuade territorial residents from thinking of themselves as independent and resenting federal presence in the territory. In this, Alaskans acted and felt as did settlers in most of the American West.¹⁵

The territorial Office of the Attorney General, which performed functions that under statehood were delegated to the Department of Law, also confronted significant problems immediately prior to statehood. The highest-ranking elected official in the territory, Attorney General J. Gerald Williams was well known throughout Alaska. He was a gregarious, ebullient man, sometimes described as rather profane. He had

¹²Address of Hon. Thomas Stewart, Alaska Judicial Conference-Alaska Bar Convention, Anchorage, May 19, 1982, Department of Law, Juneau.

¹³Stewart interview; George Hayes, former attorney general, interview with Stephen Haycox, August 30, 1994, Department of Law History Project.

¹⁴*Anchorage Times*, January 29, 1957, 1, for example.

¹⁵Patricia Nelson Limerick, "Dependence and Denial," in *The Legacy of Conquest: The Unbroken Past of the American West* (New York, 1991).

come to Alaska from Washington in 1930 as a school teacher. In 1941 he went back to the University of Washington, to law school. He returned to Alaska and served as assistant attorney general in Anchorage before going into private practice. First elected attorney general in 1949 and re-elected twice, he had lost interest in the job by the late 1950s; traveling widely, he rarely used his office in Juneau. On occasion he would handle a Uniform Reciprocal Enforcement and Support Act proceeding. He had effectively turned over the office to his chief deputy, David Pree, who, along with six or seven assistant attorneys general, acquitted his duties responsibly.¹⁶

The attorney general's office was on the fourth floor of the Alaska Office Building, a cramped, overheated five-story structure in the center of Juneau; there were a few very small offices for the assistants. The same building housed nearly all of the territorial offices, including Revenue, Education, Highways, and Veterans' Affairs. The size and resources of all these departments were meager. There was a large number of territorial boards and commissions, most of which the territorial legislature had created in attempts to circumscribe the power of the federally appointed governor.

Although there was often good cooperation between the territorial Department of Law and the U.S. attorneys, some prosecutions that probably should have been taken up were not. Often the U.S. attorneys were reluctant to prosecute crimes that they considered minor, or that the judge was not particularly interested in, or that might become expensive and time consuming to litigate.¹⁷ At the same time, prosecution of some types of crime was often unsuccessful. In Anchorage, for example, raucous and dangerous bars in the Eastchester Flat area, outside the city limit, created a problem. Women working the bars encouraged construction workers and others to run up high bills. When they could not pay, the bar owners often resorted to violence. Sometimes the patrons were rolled when they were drunk. A number of local attorneys made their livings defending the bar owners and their employees. The regulations that the Alcoholic Beverage Control Board

¹⁶Mary A. Gilson, "Pre-Statehood," Department of Law History Project, 12-14; Gary Thurlow interview, 8.

¹⁷Alaska Bar Association, Anchorage Bar Association, Tanana Valley Bar Association, "A Plea from Alaska," to Hon. William P. Rogers, attorney general of the United States and to the delegates assembled at the Attorney General's Conference on Court Congestion, June 16, 1958, in the private papers of John Hellenthal, Anchorage.

could apply were not clear. A task force involving the U.S. marshal, the territorial police, and the Anchorage city police had been formed in the late 1950s to address the problem, but failure of the alcohol board to exercise authority, and difficulty in moving cases through the court system, had frustrated efforts to achieve a permanent solution.¹⁸

Another problem involved investment fraud. A group of promoters organized the Life Insurance Company of Alaska and the First Alaska Investment Company in 1957. These companies were essentially fronts for scam operations, and a number of Alaskans lost substantial money in them. Prosecutions were convoluted and involved, and inertia afflicted both the bar and the courts in pursuing them. Another group organized the First Equity Corporation, a similar operation. Still others had established savings and loans and building and loans, some of which may not have met the specifications for banking operations. At the time, no deposit insurance was required, but out-of-state promoters advertised deposit insurance, which, unbeknownst to the depositors, was written by corporations chartered in Morocco and other countries—corporations that did not have sufficient assets to cover losses. These are but two examples of significant problems that needed attention but that were not being addressed by the legal system or the courts.

Still another problem, the extent of which was not discovered until after statehood, was probate. When an inventory was taken, more than a thousand cases were found pending, some of which dated back to 1905 (25).¹⁹ Many of these involved unassigned property.

Yet another problem was discipline of attorneys. Although there were loose bar associations, they were not formally recognized by the courts, and the courts exercised disciplinary power. In 1953, Judge George Folta, the senior judge well versed in Alaska affairs and not known for reticence, rendered a disciplinary judgment against a popular lawyer that many in the bar interpreted as highly partisan politically.²⁰ With other considerations, this led the next legislature, in 1955, to pass a bill establishing an integrated bar, with disciplinary authority

¹⁸Gary Thurlow interview, 8–9.

¹⁹*First Annual Report, 1960. Alaska Court System, 22.*

²⁰Clifford Groh, chair, Alaska constitutional research committee, Alaska Constitutional Convention, 1955, interview with Claus-M. Naske, September 8, 1982, Anchorage; Wendell P. Kay, former member, territorial and state house, interview with Claus-M. Naske, July 8, 1982, Anchorage, Alaska; tapes deposited with the Alaska Supreme Court; Judge Stewart address, 1982.

vested in the bar association board of governors.²¹ Antifederal sentiment played a large role in the bill's adoption, but mainly it represented a partisan reaction to the most powerful judge in the territory.

With the passage of the statehood act in the summer of 1958, preparations began for the transition to state government. Remarkably, just at this critical moment, two of the people who might have been most deeply involved in those preparations were absent, and a third effectively absented himself. Governor William A. Egan was hospitalized with a badly diseased gall bladder on inauguration day. He remained in the hospital through the 1959 legislative session, incapacitated and virtually unable to govern. Acting Governor Hugh Wade, cautious and reluctant to usurp any prerogative of Governor Egan, did not do much. Attorney General Gerry Williams did not participate. In fact, he created some confusion in the matter by threatening to serve out his full, four-year elected term, to 1962. Thus, at the very moment of its creation, the executive branch of the new state government was directionless, and in many respects lay paralyzed. At the same time, most of the executive mechanism consisted of a confusion of territorial holdovers of uncertain authority and no effective mission.²²

Several men of considerable experience, capability, and determination stepped forward to undertake the tasks of establishing state government. Among these were Ralph Moody and Thomas Stewart in the State Senate, John Rader in the State House of Representatives, and Gary Thurlow and Jay Rabinowitz in the attorney general's office. Stewart was chair of the senate State Affairs Committee, while Rader was chair of the house majority caucus. Moody was chair of the senate Judiciary Committee. Rader and Stewart assumed the principal leadership. Working with the legislature, they decided first to fold the many territorial boards into a much smaller number of administrative offices intended to help execute the governor's policies. They thought that the number of executive departments, the heads of which would constitute the governor's cabinet, should not be unwieldy, but rather should be small enough for the administrators to provide meaningful advice and counsel. Then, throughout the 1959 session, Rader, Stewart, and others labored to define and clarify the authority

²¹1955 SLA, ch. 196.

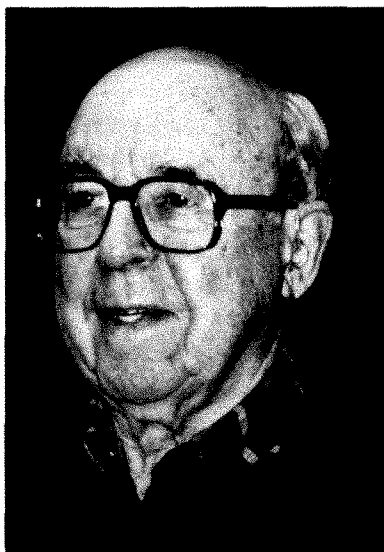
²²John Rader, former attorney general, interview with Stephen Haycox, August 5, 1994, Attorney General History Project, Department of Law, state of Alaska.

of the new boards, parceling out the authority and power of state government. In the meantime, Thurlow traveled to California to learn about administrative procedures. On his return he began compiling appropriate manuals, essentially copying broad categories of the California code, while looking always to streamline operations and make state government responsive to the public. In Anchorage, long-time attorney John Hellentahl helped in this work.

Back in the senate, Rader and Stewart went to work on building legislative support for the new code, which would become the Administrative Procedures Act. At the same time, the territorial attorney general's office began to function as the new state law department, although not without some confusion, since Gerry Williams's status was unclear. His elected term as the last territorial attorney general did not end until 1962, and he threatened to hold his position until then. But he absented himself from Juneau most of the time. Without his participation, personnel in the territorial office worked under Rader's direction and tutelage, putting into place the mechanisms of state prosecution and law enforcement.²³ The legislature implemented the state constitution by creating the Department of Law and the other cabinet-level departments early in 1959, but most functioned with skeletal budgets and unclear jurisdiction for many months.

In the meantime, work had proceeded toward establishing the judiciary. The statehood act provided that the new state should have three years for the task. Framers of the new state constitution established an integrated bar and court system, all courts being under the direct control of, and inferior to, the state supreme court. The constitution also mandates that the state bar association participate in the selection of all state judges. The article places the nomination of judges in the hands of a permanent Judicial Council made up of lawyers and laypersons—the lawyers chosen by the bar association, the laypersons by the governor. The governor makes selections from a list submitted by the Judicial Council. These provisions of the judiciary article were modeled on that of Missouri, the first state to provide for an integrated bar by constitutional means. Scholars and practitioners in the late 1950s considered the integrated bar a progressive constitutional innovation, and Alaskans adopted it for their constitution as part of an effort to construct an efficient, responsive state government, capitaliz-

²³Gary Thurlow interview, 12–15; personnel in the office included Jack O'Hair Asher, Doug Gregg, who was the last person to be admitted to the Alaska Bar who had not attended law school; Jerry Gucker, yet to pass the bar; and Virgil Forhuska, among others.



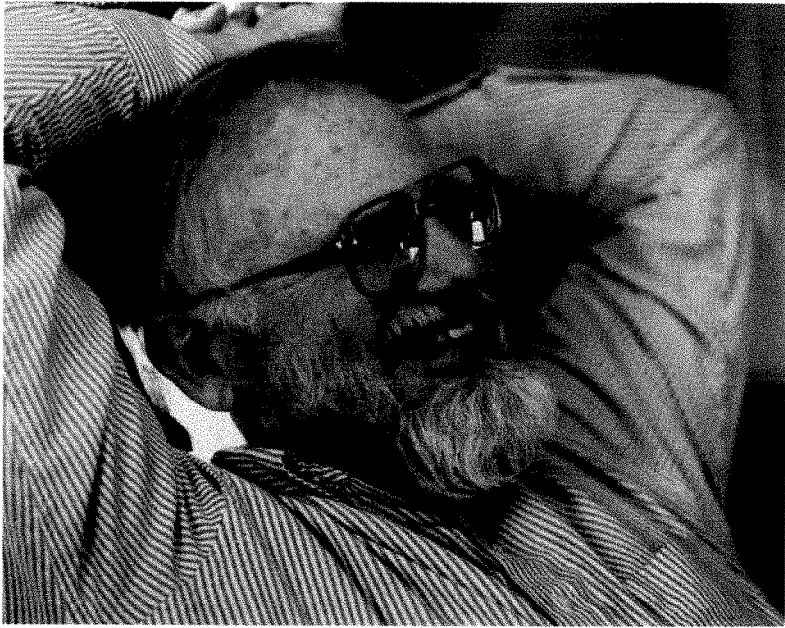
As state senators, John Rader, left, and Thomas B. Stewart, right, assumed principal leadership in the process of establishing state government in Alaska. Rader later served as the state's first attorney general, and Stewart became a superior court judge. (Courtesy of the authors)

ing on other states' experiences and eliminating from state government any provisions that had proved inferior elsewhere. In large part, the Alaska state constitutional convention copied the New Jersey constitution, the last state before Alaska to have incorporated the Missouri plan of a single, unified court system and an integrated bar into its constitution.²⁴

The bar association board of governors, meeting at Nome on September 6 and 7, 1958, had started the process of creating the judiciary by naming the attorneys to serve on the Judicial Council: Robert Parrish of Fairbanks, Ernie Bailey of Ketchikan—both Democrats—and Harold Stringer of Anchorage.²⁵ The nomination of Stringer, a Republican, was politically unpalatable to many, and he eventually withdrew in

²⁴Victor Fischer, *Alaska's Constitutional Convention* (Fairbanks, 1975), 113–16; Gerald A. McBeath and Thomas A. Morehouse, *Alaska Politics and Government* (Lincoln, Neb., 1994), 198–200, 123–34, 218.

²⁵Bailey was the half-brother of Wilfred Stump, who had figured in Judge Folta's disciplinary judgment in 1953. Bailey was known in the territory as a close friend of Michael Monagle, who hoped to be appointed to a judgeship. Monagle's appointment, if secured, would represent a triumph for the bar, and would somewhat balance the scales in response to Folta's actions against Stump. Alaska's bar politics were no less arcane or personal than elsewhere.



As the first state governor's aide and later as an assistant attorney general, Gary Thurlow helped establish and guarantee the integrity of the new state Department of Law, working to streamline operations and make state government responsive to the public. (Courtesy of the *Northern Mirror*, Wasilla, Alaska)

favor of Raymond Plummer. The lay members, appointed by Governor Egan—now fully recovered—were Dr. William Whitehead of Juneau, Roy Walker of Fairbanks, and John Werner of Seward. The chief justice of the supreme court was to serve as chair of the council, but as there was as yet no court system, Whitehead served as chair and the council operated with six members.²⁶

With the three years provided by the statehood act, there was no particular need for haste in implementing the judiciary article. But then, just as the legislative session was ending, a crisis arose that made swift completion of that work essential. The statehood act anticipated that the former U.S. District Court for Alaska would continue to function for a time as it had before statehood, but as a state rather than a federal court. That is, from January 3, 1959—the date statehood became official—it would be an interim court that would continue to

²⁶Minutes, Alaska Judicial Council, May 18, 1959, 1.

hear all cases above the level of magistrates' courts. However, a number of attorneys challenged the authority of the interim courts. Judge James L. McCarrey dismissed the first of these challenges. But the plaintiffs appealed to the Ninth Circuit, which had accepted all appeals from the U.S. District Court for Alaska during the territorial period. On June 16, 1959, the Ninth Circuit issued a ruling now famous in Alaska legal history, remembered as the *Parker* decision. The court announced that it would hear cases arising from the Alaska court before statehood, but not afterward. The circuit judges declared that "the territorial court is not the new court," and held that the Ninth Circuit could not continue to act as if the interim court had the same status as the old court.²⁷ That decision necessitated the immediate creation of the state court system. Why the circuit court was unwilling to give the state the three years provided by the statehood act is puzzling; state leaders now had little choice but to hasten establishment of the state court system.²⁸

While some people were quite surprised by the Ninth Circuit ruling, others had anticipated it. In fact, both the senate Judiciary Committee and the Judicial Council had already addressed the issue of how to proceed in this eventuality. John Rader, Tom Stewart, and Acting Governor Hugh Wade had met with Judicial Council members informally in the spring and decided that the council should proceed with nominations for the new state supreme court. The council held its first meeting in May; though not a member, John Rader was invited to participate in its deliberations.²⁹ The principal item of business was to craft rules for nominating petitions for judgeships, and to invite the nominations. The council also adopted a resolution regarding the new U.S. District Court for Alaska, a new federal court. Congress had provided a single judge for that court, but the Judicial Council, remembering the backlog of cases from the territorial period, called for a second judge. Although the new state courts would handle much of the litigation generated after January 3, 1959, state leaders felt there would be more federal litigation than one judge could handle.

²⁷(Leonard Wesley) *Parker v. (Hon. J.L.) McCarrey*, 288 Fed. 2d (1959) 907.

²⁸The decision could have been appealed to the U.S. Supreme Court, but since the state court system would have to be completed in any case, and an appeal would likely have taken the three years set aside for that work, there seemed little point in an appeal.

²⁹Minutes, Alaska Judicial Council, May 18, 1959, 5.

Meeting again in Juneau on June 29 and July 1, with both John Rader and Jack Asher of the now-constituted Department of Law attending, the council refined the rules and discussed the nominations received. Because of the urgency of the matter, some members wanted to winnow the list and submit names to the governor immediately. However, following discussion with Rader, the council voted to submit the list of nominees to the Bar Association for an advisory poll. Again, the council discussed the need for a second federal district judge.³⁰

The Judicial Council met a third time in Fairbanks on July 16 and 17. After considerable discussion and a failed motion regarding nominations for chief justice, the council voted to forward to the governor the names of Walter Hodge, a Republican and a former territorial district judge at Nome; and Buell Nesbett, a Democrat and a well-known Anchorage attorney, for chief justice. The council also submitted the names of John Dimond, Mike Monagle, William Bogges, and Robert Boocheever, all well-known attorneys in the territory, as nominees for associate justice appointments, and proposed that the candidate not chosen as chief justice be considered for an associate justice appointment. The council agreed not to release the names of the nominees, but to leave that responsibility to the governor. Upon his review of the list, Governor Egan appointed Buell Nesbett, John Dimond, and Walter Hodge to the state supreme court in September, and named Nesbett the chief justice.³¹

The Judicial Council met again in Seward on October 12 and 13, William Whitehead still presiding, to make its nominations for the superior courts; these appointments were made in November. Now constituted, the Alaska Supreme Court assumed its jurisdiction, including appellate authority for cases within Alaska, on October 5, 1959. The new U.S. District Court for Alaska, as well as the Alaska superior courts, were officially established on February 20, 1960.³²

When the legislative session ended in June 1959, Governor Egan had officially appointed John Rader as the first state attorney general. Although he actually had been functioning in that role for several months, Rader had refused to take the appointment until after the legislative session. He felt he

³⁰Minutes, Alaska Judicial Council, June 29–30, 1959, 3.

³¹Walter Hodge left the supreme court in March 1960 to accept appointment as U.S. district judge in Alaska; he was replaced on the supreme court by Harry Arend, a long-time Fairbanks district attorney and, after statehood, a superior court judge.

³²*First Annual Report, 1960, Alaska Court System, 1.*

needed to be in the house of representatives to see the organization of the executive branch through to completion. There was some trepidation about Rader's appointment, for territorial attorney general Gerry Williams had kept the keys to his office, and Rader and Governor Egan had considered whether he would have to be carried from the building in his chair if he refused to step aside. In the end, however, Williams vacated this last elected territorial position and allowed Rader to establish the Department of Law.³³

Soon after taking office officially, Rader undertook a recruiting trip, as a result of which a number of other attorneys joined the department who would go on to have distinguished careers in Alaska. Among them were John Havelock, Robert Lowell, Mike Holmes, and Herb Soll. A native-born Alaskan who joined the office at this time was Robert Erwin, and an experienced territorial attorney named Doug Gregg was hired. Personnel in the new state Department of Fish and Game were particularly anxious to get their operation up and running. They hired their own legal consultant, Avrum Gross, who later moved to the Department of Law.³⁴

In his work for the Department of Law, Rader had a very specific principle in mind: It was essential, he determined, that the state of Alaska demonstrate that the legislative will could be implemented. His view was that the legislature had done its work and now it was up to the executive branch to implement the law. Rader first appointed Gary Thurlow as his civil deputy and George Hayes of Anchorage as head of the criminal division.³⁵ With these men, and with the assistants in the department, Rader set out to make law effective and didactic in Alaska—that is, to show that the state of Alaska stood for integrity, honesty, and determination, and to communicate that message meaningfully to both the law-abiding and the criminal elements of Alaska society. As Rader put it, he intended “to put a new face on the law in Alaska.”³⁶

Predictably, a number of jurisdictional ambiguities had to be ironed out before much could be done. The *Parker* ruling

³³Other attorneys who joined the former territory staff at this time included Dickerson Regan and Jane Asher, wife of John Asher.

³⁴Thurlow interview; Rader interview.

³⁵The Department of Law established district attorneys in each of the former judicial districts: Juneau, Anchorage, Fairbanks, and Nome. The Anchorage district attorney provided leadership for the criminal work of the department. Warren Colver was the first district attorney in Anchorage, serving from January to April. In April, however, Rader asked Hayes to take over that position.

³⁶Rader interview, 14.

opened a host of questions, which the courts moved quickly to answer. The case of *Theodore v. Zurich General Accident and Liability Insurance Co.*, soon litigated, for example, decided which kinds of cases should go to which court.³⁷ When the state court system was created, cases that were "of such a nature as to be within the jurisdiction of a court of the United States" were to go to federal courts, while the rest were to be transferred from the territorial interim court to the new state courts. The new state supreme court sorted through all pending cases, making assignments within the state courts and inviting the federal court to assume those that were appropriate for it.

Another early case, *Application of House*, decided which court got which prisoner.³⁸ A man who had been convicted of murder in the territorial court was out on bail; when the state court obtained jurisdiction of his case, his bail was revoked. The supreme court denied his application for a writ of habeas corpus. A number of other, similar matters that had to be resolved were processed expeditiously.

Resolution of many of these matters was aided substantially by the work of Anchorage district attorney George Hayes, who previously had been a very successful prosecutor. Hayes, Thurlow, and Rabinowitz in the Department of Law supported Rader in his determination to put a new face on law in Alaska. Hayes assembled and argued many of the first state cases that set the tone for law in the new state. One of the more visible was *Boehl v. Sabre Jet Room, Inc.*, argued in the interim court and taken on appeal before the new state supreme court, which rendered its decision in February 1960.³⁹ The Sabre Jet Room was one of the more notorious of the clubs operating in the Eastchester Flats area of Anchorage. William Boehl, along with Bill Ray and Ernest Parsons, constituted the Alcoholic Beverage Control Board. Also named in the suit were John Rader, attorney general, and James Fitzgerald, commissioner of public safety. At issue was the authority of the Alcoholic Beverage Control Board to set closing hours for bars, a mechanism that the Department of Law could use to begin to exert some control over saloon operations. Wendell Kay of Anchorage and Warren Taylor of Fairbanks represented the Sabre Jet Room. A number of important issues were at stake, including the new Administrative Procedures Act, adopted by the 1959

³⁷Section 15, Alaska Statehood Act, 72 Stat. 350, 48 U.S.C.A. at section 21.

³⁸Alaska 352 P. 2d 131.

³⁹(William) Boehl (et alli) v. Sabre Jet Room, Inc., Alaska 349 P. 2d 585.

legislature.⁴⁰ John Dimond for the supreme court accepted the validity of the regulation in question, a victory for Rader and his initiative. In a similar case in Fairbanks, *Alaska Alcoholic Beverage Control Board v. Guys and Dolls*, the court found that the Alcoholic Beverage Control Board had not violated the law when it closed a club despite the absence of a charged violation of statute.⁴¹

A later case with similar implications came up after Ralph Moody replaced Rader as state attorney general. This was *Pin-Ball Machine v. State of Alaska*.⁴² Moody and Assistant Attorney General John Havelock argued the case for the state, asserting that a payoff for games won on the pinball machine constituted gambling in the same way as did cards and dice. An important test was whether territorial statutes in effect at the conveying of statehood continued in effect under the clause in the state constitution that so provided: Article XV, section 1.⁴³ In an undercover investigation, a state trooper in plain clothes had won ten games on a machine in a Fairbanks bowling alley, for each of which he had paid a nickel; he then won a fifty-cent payoff. Fred Crane of Taylor and Crane in Fairbanks represented the machine. Justice Harry Arend affirmed the lower court ruling that the activity did indeed constitute gambling.

Fraud was the issue in a later case, *American Building and Loan Association v. State and A.H. Rorick, Commissioner of Commerce*.⁴⁴ George Hayes and Robert Bradley argued for the state that the association, which was of questionable validity, was not a bank as defined in the statutes, an argument in which they prevailed in a decision rendered on November 21, 1962.

Other cases tested various rules and, at the same time, established the presence of the state and clarified its new legal system. George Hayes had written a manual on police and prosecutorial procedure, and he argued a number of such cases, not all of which he won. In *Hallback v. State*, the issue was whether a passenger in a vehicle carrying an assailant was an aider and abettor.⁴⁵ In this particular instance, Justice Arend

⁴⁰1959 SLA, ch. 136.

⁴¹Alaska 391 P. 2d 441.

⁴²*Pin-Ball Machine, Serial No. 2334 v. State of Alaska*, Alaska 371 P. 2d 805.

⁴³See also the statehood act, section 8(d), Pub.L. 85-568, July 7, 1958, 72 Stat. 339, 48 U.S.C.A.

⁴⁴376 P. 2d 370.

⁴⁵Alaska 361 P. 2d 336.

ruled that he was not, but such cases sent a clear signal that the state would try such matters in order to test the extent of the law. In a procedural case, *Mahle v. State*, a Jencks Act matter, the court ruled that written police reports were necessary in a criminal proceeding, that oral reconstructions from memory would not suffice.⁴⁶ But in another somewhat unusual case, *McBride v. State*, in which Justice Dimond ruled for the state, Hayes prevailed on a question of whether electronically recorded testimony could take the place of a live and, at the moment missing, witness.⁴⁷ Electronic recordings of court proceedings often were used in lieu of the traditional court reporter, reducing trial costs considerably.⁴⁸ This case confirmed their validity as testimony.

During the period between the passage of the statehood bill by Congress in 1958 and the actual conveyance of statehood, the attorney general's office undertook a number of condemnation proceedings for rights-of-way to build roads in various communities, particularly Anchorage. The U.S. Bureau of Public Roads had already done appraisals, which many property owners rejected. The Department of Law filed about sixty proceedings in the three months before statehood took effect officially. Some of these involved significant traffic corridors, including East Fifth Avenue, Jewell Lake Road, Sand Lake Road, and the Seward Highway in Anchorage, and International Airport Road in Fairbanks. In the Anchorage cases, the order to surrender possession had been obtained in Judge McCarrey's court, enabling the new state Highway Department, as soon as it was constituted, to begin construction on these important arteries. Soon after statehood, there were some challenges to these land condemnations, but the state prevailed in most instances.

Another area in which the Department of Law sought to establish the power and visibility of the state was in revenue. The 1949 legislature had established a 1 percent per annum property tax for real and personal property. The 1953 legislature had repealed the tax after the election of President Dwight D. Eisenhower. Anticipating repeal, some major businesses affected by it had not paid their total tax debt; these included the salmon canneries of American Can Company and Libby, McNeill & Libby. Following the territorial legislature's authorization, there had been a great deal of litigation over the issue; as the court commented,

⁴⁶Alaska 371 P. 2d 21.

⁴⁷Alaska 368 P. 2d 925.

⁴⁸*First Annual Report, 1960, Alaska Court System*, 32.

the cases had not been without their day in court.⁴⁹ By the time the new Department of Law got involved, with Ralph Moody and James Wanamaker representing the state and H.L. Faulkner and Robert Amis representing the canneries, the appellees had dropped their objection to the tax, complaining only of the penalties and interest. The state lost the case, but the recovery of the tax owed made the point that the state was not simply going to go to sleep on such issues, and that it did not shrink from taking on the salmon industry.

The new Department of Law found itself involved in other knotty issues, not always enthusiastically. The case of *Matthews v. Quinton* dealt with the old question of whether state-funded school buses could transport children to nonpublic schools. Against a stinging dissent by Justice Dimond, the court ruled that they could not.⁵⁰ In several interesting cases the department was mostly a bystander, but these cases had important implications. *Starr v. Hagglund* asked the question whether the location of the state capital at Juneau was constitutionally mandated or was a matter of legislation or initiative. The Alaska Supreme Court overruled Judge von der Heydt on that question, although Justice Arend delivered a measured dissent.⁵¹ The supreme court found that the state constitution could be amended by initiative or law; since then, however, repeated attempts to move the capital by initiative have failed. And there was the matter of Theodore Fulton Stevens, who, someone had the temerity to suggest, had not in fact been a proper resident of Alaska when he applied for admission to the state bar by reciprocity. The court disposed of the matter quickly, although the bar association had wrestled with it for some time.⁵² This might have been a "payback" for Stevens's defense of the federal judiciary against attacks made by Alaska local attorneys in the days before the statehood bill passed in Congress.⁵³

Of a wholly different character was a representative case, *Organized Village of Kake v. Egan*, filed in district court in 1959 and reaching the supreme court in 1960. This case dealt with the question of whether the state had the authority to

⁴⁹*State v. American Can Co.*, *State v. Libby*, *McNeill @ Libby*, Alaska 362 P. 2d 291.

⁵⁰Alaska, 362 P. 2d 932. ⁵¹Alaska, 374 P. 2d 316.

⁵¹Alaska, 374 P. 2d 316.

⁵²*Application of Theodore F. Stevens for admission to the Alaska Bar Association*, Alaska 355 P. 2d 164.

⁵³K.S. Kynell, *A Different Frontier*, 116-17.

prohibit the use of fish traps (elaborate wiers that guide hundreds of thousands of annually returning salmon into large bins, where they can be caught easily) in Indian villages. In 1958, much to the chagrin of the natives, Alaska voters had passed a statewide referendum abolishing the traps. Because no official treaties had ever been made with Alaska Natives and very few congressionally created reservations existed in the region, after statehood most of Alaska's native people were subject to state, not federal, law. So when the case reached the U.S. Supreme Court, the decision went in favor of state over federal law: The federal government could not protect the Indians' right to use fish traps. In a companion case, *Metlakatla v. Egan*, the court ruled that, because Metlakatla was a traditional Indian reservation, federal law would prevail and the village could operate its fish trap regardless of the state prohibition. These cases can be said to have introduced the state to a series of conversations with the federal government over the limits of Alaska state sovereignty. Those conversations continue today, but their significance probably was not as complicated or as fully understood in 1960 as it is now.⁵⁴

In the aggregate these cases suggest that just as the court system had to be organized and made functional and effective in an astonishingly short period of time, so too did the executive branch, and especially the Department of Law, need to be organized and made functional, again in the face of extraordinary circumstances. This was done effectively and with dispatch through the efforts of a group of unusually talented and determined people. The story of their achievements should be more prominent in the written record. In their work, also, the attorneys in the state Department of Law enjoyed cooperation and support from the U.S. attorney's office, particularly from Warren Colver in Anchorage, who later served as state attorney general.

Apparently, the legal community and the people of the state were confident that the new court system and the Department of Law would resolve the pre-statehood legal log jam, for in the first year of operation, case filings increased 20 percent over the last territorial year.⁵⁵ Chief Justice Buell Nesbett suggested that this was due partly to the fact that the state court system handled its cases quickly. Certainly the superior court judges early on addressed the issue of calendaring. In addition, a great deal of energy went into pre-trial work, which

⁵⁴Alaska 354 P. 2d 1108; 369 U.S. 60 (1962).

⁵⁵*First Annual Report*, 1960, Alaska Court System, 16.

had been one of the major concerns when eight newly appointed superior court judges traveled to New Jersey in December 1959 for a week-long seminar on the subject.⁵⁶ Whatever the reasons, it was clear to all by the end of 1960 that law in Alaska indeed had a new face, that it was functioning forcefully and well, and that important strides had been made in addressing the pre-statehood legal and judicial conundrum. The effect of this was to ensure that life in Alaska would be characterized by the reliability and evenhandedness of the law. Aggressive prosecutions that clarified the law itself and demonstrated the new state government's determination to protect the citizenry were consistent with the patriotic convictions of Alaska's people, and with their portrayal of themselves as moral and responsible. Later in Alaska's development, during the heady days of the pipeline construction boom and the subsequent period of greatest oil production and oil revenues, that image would be tarnished by stories of unprosecuted theft and murder, and uncontrolled prostitution and gambling.⁵⁷ White collar crime of the highest order would characterize the oil production bonanza, and suspicions remain that only the most vulnerable criminals were successfully brought to justice.⁵⁸ John Rader and his colleagues set out to prevent just such damaging laxity in the administration of law in the new state of Alaska in 1959, and during their period of influence, they largely succeeded in doing so.

There is a final point worth noting. These were people of great integrity. Ralph Moody, George Hayes, John Rader, and the others were tough-minded individuals. Clearly they placed the highest principles of morality and the interests of the state above all other considerations. They meant to establish the best state government and Department of Law possible—an ideal that they regarded with complete seriousness and without qualification. Alaskans take this for granted today; it was taken for granted by many people then. But it could well have been otherwise, with different people in positions of authority setting a quite different example. In similar circumstances in other times and places, situations have been quite different. Judge Stewart has commented that, to his knowledge, there has never been a complaint lodged to challenge the integrity of

⁵⁶*Ibid.*, 28.

⁵⁷Dermot Cole, "Power and Vice," in *Amazing Pipeline Stories: How Building the Trans-Alaska Pipeline Transformed Life in America's Last Frontier* (Fairbanks, 1997), 142ff.

⁵⁸John Strohmeier, "Corruption: Alaska Size," in *Extreme Conditions: Big Oil and the Transformation of Alaska* (New York, 1993), 123–50.

the people who undertook this work in Alaska and saw it through to completion.

The following story illustrates this point. Soon after Gary Thurlow began to work as an executive assistant to Governor Egan, the FBI agent for southeast Alaska came to him stating that he wanted a particular woman fired who was then working for an executive director in state government. The FBI had questioned the woman's parents about their involvement in a communist front organization in the 1930s, but the couple had been uncooperative. In the late 1950s the FBI had traced the couple's daughter to a school district in western Alaska; when she also was uncooperative, they spoke to the district superintendent, and the woman was fired from her job shortly thereafter. In Juneau the woman, who was unmarried, was living with her native employer in a mobile home north of the city; they had a five-year-old child. The FBI agent thought the cohabitation should be grounds for termination from her present job. Thurlow absolutely refused to consider the FBI request. He told the agent that if the state went after the woman, it would have to act against everyone else in state employ who might be in the same situation. The agent, incensed at Thurlow's response, went to the attorney general's office and apparently spoke with George Hayes. Hayes later told Thurlow something on the order of, "Boy, you sure made that guy mad." Of course, Hayes also had refused to consider the matter.⁵⁹

Perhaps it was a small thing, although it certainly would not have been small for the woman involved or for her employer. But it is representative. In addition to their other service, the men and women who established the executive branch and the judiciary—and particularly the Department of Law—provided a critical precedent and left a crucial legacy: their moral example. The state of Alaska owes them a great deal.

⁵⁹Thurlow interview, 24.

CALKINS VS. HANFORD: THE POLITICS OF THE APPOINTMENT OF WASHINGTON'S FIRST FEDERAL DISTRICT JUDGE*

CHARLES H. SHELDON

The struggle to gain the coveted appointment as federal district court judge in the new state of Washington began long before Washington moved from territorial status to statehood in 1889. In many respects, the politics surrounding the appointment more than one hundred years ago was not altogether different from what transpires today. Then, as now, presidents, senators, attorneys general, bar associations, interested groups, political parties, and politicians gave the appointment its political dynamics. Partisanship, separation of powers, patronage, and localism provided the frameworks for the politics.

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*Beginning in the 1930s, under a W.P.A. program, Dr. Arthur S. Beardsley, then law librarian at the University of Washington, began collecting materials on judges and lawyers during territorial and early statehood days. Beardsley, initially assisted by Judge Donald A. McDonald, drafted a 2,428-page manuscript based on the letters, memoirs, and documents he had collected, supplemented by newspaper accounts and standard state histories. Much of his information came from the appointment files of federal judges located then in the U.S. Department of Justice, with most now located in the regional Federal Archives in Seattle. The Beardsley collection is on file at the State Archives in Olympia and the University of Washington Law Library in Seattle. Much of this article is based on information provided by the Beardsley manuscript. However, unless otherwise noted, the interpretations of events are Sheldon's.

As the territory of Washington prepared for statehood in 1889, several respected lawyers and territorial judges also prepared themselves for appointment as U.S. district judge for the district of Washington with jurisdiction over the entire state.¹ Although a number of candidates organized their campaigns with endorsements, petitions, and letters, and gathered promises of support from prominent political and business leaders, the field ultimately narrowed to two: William H. Calkins and Cornelius H. Hanford, both territorial supreme court justices at the time.²

The early favorite, William H. Calkins, had recently arrived from Indiana, leaving a prosperous legal practice in Indianapolis and a prominent political career to further his ambitions in Washington.³ He had served as a member of the Indiana State Legislature, several terms as prosecuting attorney, and four consecutive terms as Republican congressman. He also made one unsuccessful run for governor of the Hoosier state. Nevertheless, in anticipation of a federal judicial appointment from his friend and Civil War comrade-in-arms, Benjamin Harrison, Calkins abandoned his solid political base and moved to Tacoma, Washington Territory, in order to establish residency, to become known to the legal profession and the citizenry, and to establish a reputation. His move appeared simply a prelude to the federal appointment.⁴

¹It wasn't until 1905 that the state was split into two federal districts and a separate judge (Edward Whitson) was appointed to the Eastern District, with two judges (Hanford and George Donworth) serving the Western District.

²Some of the leading candidates hoping for the appointment were Samuel C. Hyde, Potter C. Sullivan, Jr., James Z. Moore, Richard B. Blake, Henry G. Struve, William H. Pritchard, and John P. Hoyt.

³Calkins was born in Pike County, Ohio, February 18, 1842. His father was a Methodist preacher and a farmer. Young Calkins had little formal education, perhaps a few months of high school when he wasn't working on the family farm. At the outbreak of the Civil War, the family moved to Indiana, and Calkins volunteered in response to Lincoln's first call. He was in the thick of the fighting in the Fort Donelson and Shiloh campaigns. In the latter battle he was taken prisoner and held for nine months before he escaped and returned to service. Later, he rose to the rank of major. After the war, Calkins studied law and was admitted to the bar in Indiana.

⁴Then, as now, the federal appointments were made by the president with the advice and consent of the Senate. The appointee had to be a resident of the district to be eligible. Beardsley gives an unattributed quote in which the president promises Calkins a patronage appointment. Calkins presumably reminded Harrison, "General Harrison, in 1883, when a vacancy occurred in the office of postmaster general . . . you . . . went with it to President Arthur, and asked him to appoint me to that position, and . . . [he] said he would gladly do so if I could be spared from the House. If you should be elected President, I should expect you to offer as much as you would ask for of another." Harrison replied, "It shall be as you wish."



William H. Calkins, recently arrived in Tacoma from Indiana, was the early favorite for the appointment of Washington's first federal district judge. (Courtesy of the Washington State Archives)

Benjamin Harrison owed Calkins a large political debt. In 1888, the Indiana delegation to the Republican National Convention was split between supporters of Harrison and those who favored Walter Gresham as their candidate. After Harrison was nominated, several among the Gresham forces refused to give him their full support. Calkins, initially a Gresham supporter, and in control of the state's Republican party, persuaded the Gresham faction to back Harrison. He then focused the energies of the party on the election of his friend, who won Indiana by a small margin.⁵ As a result, Calkins understood that some patronage reward was forthcoming.

Shortly after Harrison's inauguration as president (sometime in March 1889), Calkins moved to Tacoma. It was as-

⁵Harrison said that he would rather lose the whole election than lose the electoral votes of his home state.

sumed that with Harrison in the White House, statehood for Washington would soon follow, and the campaign for the federal judicial appointment began in earnest. The new president had not forgotten his friend. He initially offered Calkins the position of federal land commissioner, which was promptly refused. Calkins correctly saw a territorial judgeship as holding greater promise for his ultimate goal. On March 24, 1889, while living at the Tacoma Hotel, Calkins wrote to his friend W.H. Miller, the newly appointed U.S. attorney general,

I came here sometime ago with my son. He intends staying. I am charmed with the country. Since I came, the good people of the territory have been very kind to me. It is said that Judge Nash of the Spokane Falls district will send his resignation as judge, on the same train that carries this to you. It has also been suggested that I should accept an appointment in his stead if you and the President were that way inclined. I confess to you, that should you think so too, I would stay here for a while at least, and run their courts, for they are badly in need of some good timber in that line, and all the lawyers who have talked with me are anxious for me to take the place. You can show this to the President. If he sees it that way: well. If not, it will be all right.⁶

Calkins did not have long to wait. Within a few weeks he received his commission as associate justice of the territorial supreme court, and was sworn in before retiring judge Lucius B. Nash at Sprague on May 6, 1889.⁷ His term was to expire when Washington became a state; accordingly, he lost no time in launching his campaign to secure the nomination for the U.S. district judgeship. Justice Calkins's effort was a well-planned campaign of endorsements spread out until the appointment was secured.

Each of the four territorial supreme court justices was assigned to one of four judicial districts and was responsible for presiding over trials within those districts. Calkins was assigned to the fourth district, which comprised most of the area east of the mountains, with his residence at Spokane

⁶This letter and others as dated were in Calkins's appointment file with the Department of Justice.

⁷Territorial judges, like federal district judges, were appointed by the president with the advice and consent of the Senate. However, territories had only a "delegate" in Congress without many of the prerogatives of a regular member, such as senatorial courtesy. Nonetheless, their opinion carried some weight.

Falls. His campaign began with endorsements from his home district. In August 1889, members of the Spokane County Bar Association joined in sending President Harrison a warm endorsement of Calkins. In a seemingly well-orchestrated effort, one after another of similar resolutions went forward signed by members of other county bar groups. Between August and November, the Lincoln, Kittitas, Pierce, and North Yakima County bars wrote the president, adding their names to the list of Calkins supporters.

Calkins was careful to enlist bipartisan endorsements. On July 4, 1889, Nathan T. Caton, the lion of the territorial Democrats, wrote the president from his eastern Washington office,

Notwithstanding the great pressure upon your time, I have the temerity to ask consideration of this communication from an old-time Democrat. I have thus boldly stated my political whereabouts in order that you might know that there is no attempt on my part made to either deceive or mislead. . . . Have been practicing law for a period of twenty-nine years, and thus, as you can see, have had a good opportunity to know something of the good and bad of Presidential appointments to judicial positions.

I am frank to say to Your Excellency that I was prepared to dislike any appointment you might make in Washington territory to any one of these offices. I have, however, the manhood to acknowledge that you have, in the person of Judge H. Calkins, agreeably disappointed me. . . .

We want a man [for the federal district court] learned in the law, prompt, conscientious, fearless, and, at the same time, courteous. Such a man I know W.H. Calkins to be. He is big, both in mind and body, whole-souled and kind. There is not one narrow conception in his whole composition. This man, should he receive the appointment named, would not only honor the position, give general satisfaction to the bar and the people, but would ever be a credit to the appointing power.

The letter writers were not limited to lawyers. Pierce County's petition on September 30 came from lawyers, bankers, and businessmen. The attorneys were joined by the assistant cashier of the Merchant's National Bank, the Tacoma City treasurer, the president of the Tacoma Coal Company, a

real estate dealer, the editor of the *Tacoma Daily Globe*, and so on. A total of forty-nine signatures was attached, stating that they "recommend and endorse honorable W.H. Calkins . . . for the appointment of United States district judge. . . ."

As part of the campaign, Calkins moved quickly about the fourth judicial district, meeting lawyers, business and political leaders, and citizens. He also made sure he became known outside his district. The *Seattle Post-Intelligencer* of August 27, 1889, noted that the judge was formally introduced to the Seattle bar by William H. White, U.S. attorney. The account praised the judge for his courtesy and his facility in dispatching the court's business.⁸

As the October 1, 1889 date neared for the vote on the new state constitution and for the anticipated presidential approval for statehood expected shortly thereafter, the campaign for Calkins's appointment intensified. Among those who wrote special letters or telegrams urging this appointment to the federal bench were W.C. Jones, of the famous Spokane firm of Houghton, Graves and Jones; W.H. Taylor, president of both the Spokane State Bank and the Board of Trade; J.M. Kinniard; A.M. Cannon; B.H. Bennett; and James M. Glover, all of Spokane. B.F. Dennison, former chief justice of the territory, wrote to the president from Vancouver endorsing Judge Calkins. He stated, "No man in the state is better qualified for the position." Attorney Hudson Applegate joined his Tacoma colleagues, writing the president on October 1 that Calkins should be his choice.

If, as is expected, the result of today's ballot should make our people a state in all but your proclamation of the fact, it is quite likely that Major W.H. Calkins will desire the appointment of United States district judge within its boundaries. Such an appointment would be very gratifying to me personally, as it was my pleasure to well know Major Calkins for many years. . . . Of his fitness for the place, whether as a man or as a lawyer, it would be superfluous for me to speak to one who probably knows him better than I do.

It was clear that the legal profession was backing Calkins; if legal qualifications were to be weighed heavily, his appointment was assured. Illustrative of the support of lawyers was

⁸Having received his appointment late, Calkins did not hear even one appeal as a Supreme Court justice. At that time, justices rode circuit and met only once or twice a year in Olympia as a Supreme Court to hear appeals from their district court decisions.

the November 12, 1889, letter to the president from Elwood Evans, pioneer lawyer and elder statesman, sent from his Tacoma office:

As a senior member of the bar by date . . . of admission to practice in the courts north of the Columbia river—then Oregon territory—yesterday Washington territory, now the *State* of Washington, I beg to be permitted to join in the position of his Honor, Judge W.H. Calkins, late associate justice of the supreme court of Washington territory, so abruptly terminated by your proclamation yesterday terminating the official lives of all territorial federal appointees.

The appointment was expected to be made shortly after the November 11, 1889, proclamation officially welcoming Washington into the Union.⁹ However, by late January in the new year nothing of substance had been heard from the Harrison administration regarding the appointment. An unanticipated problem concerning the nomination explained the delay. The issue was a matter of whose prerogative prevailed under the separation of powers system: the Senate's or the president's.

As was the custom then as well as now, the choice of federal district judges was not entirely the president's. Senatorial courtesy had been a long-established and carefully observed practice before the entry of Washington State into the Union.¹⁰ It was clear that President Harrison wanted to appoint Calkins to the judgeship. They were friends and political allies, and the promise had been made. Nonetheless, it was not clear to the state's new senators that Calkins should be the choice.

Territorial Chief Justice Cornelius H. Hanford of Seattle had the full support of Washington's Senator John B. Allen and apparent agreement on his choice from Senator Watson C. Squire. In addition, some concern remained that Calkins was but a newcomer to Washington, while Hanford was a long-established resident. Appointment of an "outsider" would have political repercussions for the senators and the Republi-

⁹Not having heard about his expected appointment, a worried Calkins wrote his friend Senator Voorhees of Indiana, "Excuse me, but I have no one else to unload on and so here it is. Can't you write me something definite about this?" (Letter dated October 26, 1889)

¹⁰Actually, senatorial courtesy began to be practiced in George Washington's administration. To protect themselves against the president's appointing a political opponent to a judgeship or other posts, senators presented a united front, which they discovered served their purposes well.



Territorial Chief Justice Cornelius H. Hanford of Seattle was a long-established resident of Washington. With the support of Washington senators Allen and Squire, he became a strong contender for the judgeship. (Courtesy of the Office of the Administrator for the Courts)

can party. Justice Hanford may have started late in his quest for the coveted appointment, but with the belated backing of the senators, he became a strong contender.¹¹

Cornelius Holgate Hanford was born in Van Buren County, Iowa, on April 21, 1849. His family ventured west in 1853 and

¹¹Before he was elected senator, Allen's name showed up on an August 1889 petition endorsing Calkins for the appointment. Hanford's name is absent from the early speculations concerning interested and qualified candidates.

came directly to Puget Sound, expecting to secure a donation claim in the Duwamish Valley, which is now part of Seattle. Such a claim had been chosen for them in 1850 by John C. Holgate, Mrs. Hanford's brother, but before they arrived it was taken by another settler. Instead they chose a claim farther north, lying mostly on the upland, which also is now within the boundaries of Seattle. Through losses suffered during the Indian War, and other reverses, they later parted with this claim. In 1861, the family moved to California, remaining there until 1866, when they returned to the Seattle area.

As a child, the future judge attended such schools as existed in the struggling frontier villages; later, in California, he took a course in a business college. He studied law with George M. McConaha, Jr., son of Seattle's first lawyer, and was admitted to the bar in 1875.

Hanford earned substantial political credentials during his long residency in the Puget Sound area. In 1875 he became U.S. commissioner, and the following year he was elected to the Territorial Council, the upper house of the territorial legislature. In 1882 he was appointed Seattle's city attorney and was subsequently elected to that post for two terms, during which he played a prominent role in maintaining law and order in the courts as well as in the streets during the Chinese riots.¹² The new Seattle charter was largely his product. He also served a short time as assistant U.S. attorney.

In 1888, Hanford became chairman of the Republican Territorial Committee, responsible for planning Republican campaigns. His successful management of the campaigns solidified political control of the territory for the Republicans and secured the election of John B. Allen as delegate to Congress. Thus began Allen's and the Republicans' debt to Hanford. Upon the resignation of Chief Justice Burke of the Territorial Supreme Court, Hanford was rewarded with appointment as his successor on March 13, 1889; at the early age of 40 he was the territory's last chief justice.

Hanford did not seriously consider the federal appointment until later, and he made no sustained effort to obtain a great number and variety of endorsements, perhaps relying on his friendship with the two senators. The only endorsements sent to the president directly, so far as the files disclose, were from Governor Elisha P. Ferry, Secretary of State Allen Wier, the

¹²Hanford was concerned more with the threat to property from the riots than with the rights of the Chinese. According to Beardsley, Hanford was the Seattle city attorney during the Chinese incident, and he lost a subsequent election as a result of his activities during the riots. See Roger Sale, *Seattle: Past and Present* (Seattle, 1976), pp. 39-48.

delegation to the state legislature from King County, state senator H.W. Fairweather of Lincoln County, and several members of the new state House of Representatives. Missing from the endorsements were petitions and letters from attorneys.

Others who aspired to the appointment soon withdrew as support coalesced around Calkins and Hanford. Judge John P. Hoyt had received some encouragement from the leadership of the Republican State Committee, but when he was elected to the new state supreme court, he urged his supporters to back Hanford. A group of Spokane Falls political and legal leaders, realizing that their candidate had little chance, dropped their endorsement of Sam C. Hyde and threw their support behind Calkins, apparently upon the urging of George Turner, a prominent Republican leader.¹³ The switch to Calkins was natural, since he was regarded as a Spokanite, having resided there during his short tenure as territorial judge. Another candidate, W.H. Pritchard, graciously wrote the president, "My withdrawal in favor of Calkins . . . will be cheerfully made if desired."¹⁴ The field narrowed, and the appointment would go to either Calkins or Hanford.¹⁵

The politics of the appointment took on an added dimension in the bitter struggle between Seattle and Tacoma. The rivalry often overrode partisanship, with Democrats joining Republicans in support of one city or the other. By locating its terminus in Tacoma, the Northern Pacific Railroad had done everything it could to wrest the crown of leadership from Seattle. The two cities were about equal in population at the time, and each was straining to outstrip the other. Spokane was allied with Pierce County in support of Judge Calkins, who had gained the near-unanimous support of the bar there after Hyde's withdrawal. His announcement that he would move to Tacoma upon statehood brought Pierce County to his cause. Nonetheless, Calkins still lacked any signs of support from Allen and Squire. The *Tacoma Daily Ledger* of

¹³Beardsley attributed Turner's bitterness with Hyde to his less than luke-warm support for Turner's senatorial ambitions.

¹⁴Letter dated January 21, 1890.

¹⁵Calkins hinted at Richard Blake's lack of support. He had written the attorney general that Blake "wants the place, but you and I know, that such an appointment won't do" (letter dated March 24, 1889). He also regarded Pritchard as a "mugwump." Potter Sullivan was "only twenty-seven, and not ripe for such a place. . . . As to Hyde, well, the least said the better" (letter dated December 24, 1889). Another early aspirant, James Z. Moore, endorsed Calkins in August. Henry Struve's candidacy seems simply to have faded from lack of enthusiasm. Except for a lengthy endorsement from the *Tacoma Daily Ledger* of November 25, little is heard in the subsequent campaign.

November 25, 1889 editorialized on the absence of enthusiasm from the senators:

It is probably safe to assume that the appointment will not be conferred upon anyone unless he has the support of at least one of the Senators of this state. It is to be conceded that Judge Calkins, although well qualified in every respect, and possibly the favored candidate in this county, will not receive the endorsement from either of the Senators on account of his being so short a time a resident among us.

The strategy of Calkins's supporters was to create some hesitancy on the part of the senators so that a single and solid endorsement would not be forthcoming from Washington's delegation, and the president would be left with the initiative.¹⁶ Appeals to party unity and to the near universal support from attorneys provided the foci of their efforts. President Harrison received letters and telegrams urging Calkins's appointment: There was "absolutely no comparison between Hanford and Calkins. Give us a judge with ability" (January 13, 1890); "the appointment of a Seattle man named would cause great dissatisfaction and probably disruption in the party in the state" (January 16); "Calkins . . . would strengthen and conserve [the] harmony and best interests of the Republican party" (January 19); and his appointment "would be approved by the bar" (January 18).

Senator Allen was reminded that Calkins's appointment would "operate as a great factor for success next fall" (January 12), and Senator Squire was told that the "best interests of the public service and the party will be subserved by the appointment of Calkins" (December 2). The appointment of another King County (Seattle) federal official would further antagonize Tacoma Republicans, whose support was needed to retain the party's dominance of the state.

The Washington correspondent of the *Spokane Falls Chronicle* wired that paper on December 23, 1889, about a rumor that Calkins was out of the race. His late arrival in the territory was the issue. On reading the report in the *Chronicle*, Calkins wrote to his friend Indiana senator Voorhees on December 24. Apparently not quite resigned to losing something he regarded as having been promised, he made a final appeal:

¹⁶Washington's sole congressman, John L. Wilson, could have contributed to a split in the Washington congressional delegation with his endorsement of Calkins in a letter to the president dated January 9, 1890. However, the *Seattle Post-Intelligencer* reported, on February 11, 1890, that Wilson said, "It was not part of my patronage. . . . I endorsed Judge Calkins, but further than that I took no part in the fight."

You asked me once to speak to general H. for you. I did. You were appointed. I have asked you to speak for me. You have. I see by today's paper, that I am not to be appointed. Very well. Say to the President that more than half of the people of his new state have not been here any longer than I have. And that the suggestion of the Senators that I am a *tenderfoot* is a mere makeshift. I know the bar and the best men of the state want me appointed. Enough of this:—As to *Hyde*, well, the least said the better. It will create a scandal, if he should get the place. As I said before, if I am not to get it, for God's sake, have some good lawyer get it. Judge H.E. Houghton, of this place, would make a splendid officer. Whitson of Yakima or the chief justice of the state [Thomas J. Anders] would be creditable men and reflect honor upon all. Don't let the place go into the political pool box, and be given for political ends. This will hurt.

By mid-February the long struggle was over. In the issue of February 11, 1890, the *Seattle Post-Intelligencer* printed the following news items:

The President sent to the Senate the name of Judge Hanford to be justice of the United States Court in the district of Washington at two o'clock and the agony over the judgeship was then settled. It is settled without any Senator being 'turned down,' and as shown by the Senators who had endorsed him, there is hardly a possibility of objection to his confirmation. The appointment of Judge Hanford causes more surprise among Washington men than the appointment of Judge Calkins would have done, for the delay of nearly a month since he was recommended had led to the current belief that the President could make his own appointment. When the name was sent to the Senate, the Senators from Washington smiled, Senator Allen more particularly.

....

Senator Squire . . . said, "I am pleased that [the President] appointed the Seattle man. . . ."

But the *Tacoma Daily Ledger* of February 12, 1890, was more critical in regard to the Seattle appointee:

The appointment of C.H. Hanford of Seattle as judge of the United States district court was a political mistake.

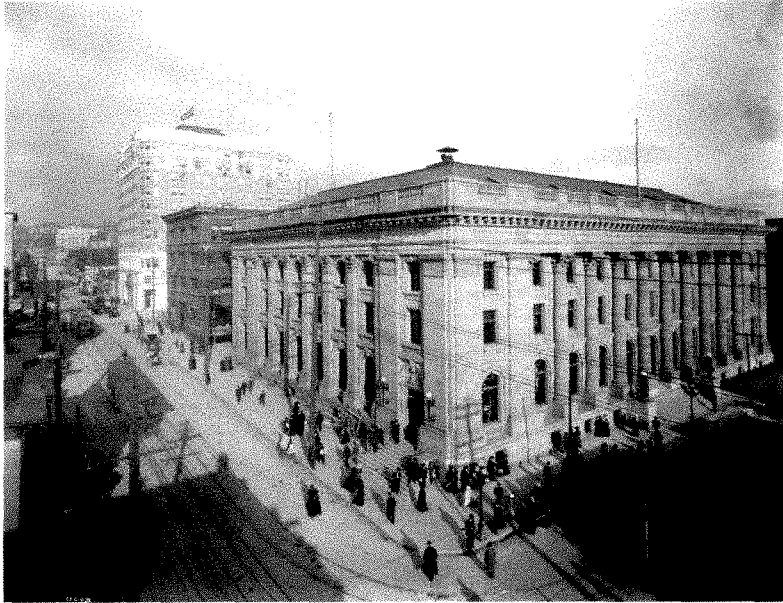
We do not question his ability or integrity, but this appointment should not have gone to King county. It was not good politics for King county to ask it, nor for the Washington Senators to recommend it, nor for the President to make it. King county now has the Governor, a United States Senator, a supreme court judge for seven years, and the United States district judge. This is entirely too much. In all fairness, the appointment of district judge should have been given to a Tacoma lawyer.

There is substantial evidence of Allen's debt to Hanford, beginning with the latter's efforts to assure Allen's election as territorial delegate to Congress in 1888. However, Squire's preference was unclear at the time. When it became apparent that his coveted appointment was slipping from him, Calkins let it be known that he might run against Senator Squire when his term ended in 1891. The *Spokane Falls Review* of February 16, 1890, a week after Hanford's appointment, printed the following account:

Commenting on Washington state politics, the *Washington Post* says: "There is talk that Congressman Calkins of Indiana will be a candidate to succeed Senator Squire, whose term expires on the third day of March, 1891. . . . He was defeated for [district judge] on the grounds that he was an Indianian and not a Washingtonian. He is fairly settled in Washington state, however, and is said to be about to begin an active campaign to supplant Squire in the United States Senate a year hence."

Likely, Squire and Calkins had had some disagreements in the past, prompting Calkins's threat to challenge the senator should the appointment fail. Perhaps, also, there remained a slim hope that the threat of a challenge and the split in the party that would result could bring Squire around to endorse Calkins.¹⁷ In any case, the endorsement never came, and Squire joined Allen in urging the appointment of Hanford.

¹⁷Calkins did in fact challenge Squire unsuccessfully for his Senate seat. Before the 18th Amendment to the U.S. Constitution (1913), state legislatures elected the senators. In Calkins's run for the Senate in 1891, a House investigation disclosed that, unbeknownst to Calkins, a state representative had solicited a bribe from a Calkins supporter. It was shown clearly that the action was undertaken with a view toward creating a scandal that would result in the defeat of the judge. *Washington House Journal*, 1891, Appendix C.



United States District Courthouse, Seattle, Washington, circa 1910.
(Courtesy Washington State Historical Society)

Despite the efforts of Calkins's supporters from both Spokane and Tacoma, and despite President Harrison's preference, Calkins was denied what he thought he had earned. The stated reason for Calkins's loss was that he had only very recently established residency in Washington. To many, this reason was sufficient. The "carpetbag" image of territorial appointees still angered the citizenry, who were proud now of their newly found independence as full and equal members of the Union. However, aside from the stated reason and the fact that most Washingtonians were recent arrivals, it was a fortuitous mix of factors on Judge Hanford's side that made the difference. Congressman Wilson's deferral to the senators, Hanford's close political and personal friendship with Senator Allen, and Senator Squire's political suspicions of Calkins contributed to the outcome. Hanford's close identity with Seattle, the absence of opposition toward him from the legal profession, his previous efforts on behalf of Allen and the Republican party, and his long residency in the territory simply overrode what President Harrison could offer with Judge Calkins.¹⁸

¹⁸After Calkins's defeat in the Senate race, Governor Ferry offered him an appointment to the Pierce County Superior Court. Calkins refused. See *Tacoma Ledger*, January 3, 1894.

Shortly after the appointment became official, the *Seattle Post-Intelligencer* of February 24, 1890, commented on the nature of the campaign:

Senators Allen and Squire had a hard time of it trying to reach an agreement that would be satisfactory at home, and at best there must be a good many disappointed if the telegrams they sent really expressed the feelings of the senders. The wires were hot for two weeks. . . . They came stamped with all the partisanship of the men who sent them. . . . The longer the question was delayed the more perplexing the situation became. . . . It put the two Senators in a box. Right in the thick of it the President took a hand. A pointer was given out to the two Senators, by no less a personage than Attorney General Miller, that the President had his own choice in the matter and preferred Judge Calkins. This would have been pretty good assurance, under ordinary circumstance. . . . They did not take the hint but went straight against it. . . . Senator Allen came to the front first with his recommendation, and Senator Squire made it unanimous.

Judge Cornelius H. Hanford had a long tenure, serving as Washington's only U.S. district judge until 1905 and then until July 22, 1912, as one of two judges representing the new Western District.¹⁹

¹⁹Hanford's judicial career did not remain unblemished, however. He had been serving on the federal court for about twelve years when he became the subject of an impeachment investigation by the U.S. House of Representatives in June 1912 (62d Congress, 2d Session, House Report 1152). A legislative subcommittee was appointed to come to Seattle to hold hearings and take testimony. A great deal of the testimony concerned the financial dealings surrounding the development of the Hanford irrigation project. The judge was also said to be a heavy drinker and apparently guilty of appointing friends in the bar to conduct various hearings, bankruptcy proceedings, receiverships, patent litigations, and the like. On July 22, 1912, Judge Hanford unexpectedly tendered his resignation to the president. It was accepted, and the impeachment proceedings were ended (see John N. Rupp, "Hanford: An Almost Impeachment," unpublished manuscript, Washington State Law Library, 1985). However, the congressional committee concluded,

[I]t clearly appears that Judge Hanford's usefulness as a Federal judge is over, that his personal and judicial conduct disqualify him from his position and that this subcommittee recommend that his resignation be accepted.

After leaving the bench, Judge Hanford practiced law in Seattle until his death on March 2, 1926.

Nearly all the components of federal judicial appointments observed today were at play a hundred years ago. Although Article II, section 2, of the U.S. Constitution assigns to the president the apparently prime responsibility for appointing judges, the "advise and consent" provision in the form of senatorial courtesy brings the role of Congress sharply into focus. It was clear in 1890 that the president wanted and seemingly was obligated to appoint Calkins, but his preference and obligation failed to override the formidable combination of factors surrounding Hanford. From the very beginning of Washington's statehood, the power to appoint federal district judges shifted from the president to the Senate. Federal judicial appointments in the 1890s were not much different from those of today.

BRITISH AUTHORITY OR "MERE THEORY?" COLONIAL LAW AND NATIVE PEOPLE ON VANCOUVER ISLAND

JANE SAMSON

The growing field of western Canadian legal history has been documenting the complexities of social control under the Hudson's Bay Company and the colonial government, and raising important questions about the general relationship between law and colonialism. The expansion of British jurisdiction in Rupertsland, the Indian Territories, and the Oregon Territory was by no means a straightforward exercise of imperial hegemony. "The rule of law" was very different in theory and in practice, and was perceived differently by different individuals and peoples before and after colonial rule officially began in western Canada.¹ The influence of Michel Foucault and other theorists

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¹The relevant literature is large; recent examples include Hamar Foster, "Long-Distance Justice: The Criminal Jurisdiction of Canadian Courts West of the Canadas, 1763–1859," *American Journal of Legal History* 34 (1990): 1–48; J. McLaren, H. Foster, and C. Orloff, eds. *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West* (Regina, 1992); Tina Loo, "The Road from Bute Inlet: Crime and Colonial Identity in British Columbia," and Hamar Foster, "The Queen's Law Is Better than Yours: International Homicide in Early British Columbia," in *Essays in the History of Canadian Law V: Crime and Criminal Justice*, ed. Jim Phillips, Tina Loo, and Susan Lewthwaite (Toronto, 1994), 41–111; Loo, "Tonto's Due: Law, Culture, and Colonization in British Columbia" in *Essays in the History of Canadian Law VI: British Columbia and the Yukon*, ed. Hamar Foster and John McLaren (Toronto, 1995), 128–70; and Russell Smandych and Rick Linden, "Co-existing Forms of Aboriginal and Private Justice: An Historical Study of the Canadian West" in *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia, and New Zealand*, ed. Kayleen M. Hazlehurst (Aldershot, 1995), 1–38.

of social control has inspired a growing literature on the subjugation of native peoples to British law, but other theoretical developments suggest that we must not emphasize hegemonic discourses to the exclusion of pluralism.²

Arguments about the inexorable power of law in imperial domination are being challenged by evidence of indigenous resistance and subversion, and of debate about the justice of different forms of social control between colonists and their governments. We need to know much more about how encounters with indigenous legal systems affected colonial perceptions of law, identity, and cultural supremacy.³

Some subjects remain curiously untouched by this revisionism, notably the relationship between Royal Navy activities and colonial law in British Columbia. Barry Gough's extensive writings on this subject reveal the richness of the naval record,⁴ but his provocative conclusions have generated little debate. In 1978, he published a discussion of naval punitive expeditions against native people in Vancouver Island and British Columbia in which he argued that gunboats were "the means of enforcing law . . . on the coast."⁵ Gough recognized that "the British sometimes but not always possessed the power to compel Indians," but still agreed with nineteenth-

²Peter Fitzpatrick, "Crime as Resistance: The Colonial Situation," *The Howard Journal of Criminal Justice* 28 (1989): 272-81; John Griffiths, "What Is Legal Pluralism?" *Journal of Legal Pluralism* 24 (1986): 1-55; Louis A. Knafla and Susan W.S. Binnie, "Beyond the State: Law and Legal Pluralism in the Making of Modern Societies" in *Law, Society, and the State: Essays in Modern Legal History* (Toronto, 1995), 4-33; Sally Merry, "Law and Colonialism," *Law and Society Review* 25 (1991), 889-922; and Bonaventura De Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law," *Journal of Law and Society* 14 (1987): 279-302. These developments are paralleled in the historiography of imperialism, which since the 1960s has tempered studies of metropolitan power with the complications raised by resistance, collaboration, and subversion by peoples on the imperial periphery. A good overview of this subject is Andrew Porter, *European Imperialism, 1860-1914* (London, 1994).

³Merry, "Law and Colonialism," 55.

⁴The records of the Pacific Station are in the British Columbia Archives and Records Service collection in Victoria, and are described in Barry M. Gough, "The Records of the Royal Navy's Pacific Station," *Journal of Pacific History* 4 (1969): 146-53. Related Admiralty and Colonial Office documents are readily available on microfilm in Victoria and at the Public Archives of Canada in Ottawa.

⁵Gough, "Official Uses of Violence Against Northwest Coast Indians in Colonial British Columbia," in *Pacific Northwest Themes: Historical Essays in Honour of Keith A. Murray*, ed. James W. Scott (Bellingham, Wash., 1978), 60. Similar conclusions are found in B.A. McKelvie, *Tales of Conflict* (Vancouver, 1949), and G.P.V. Akrigg and Helen B. Akrigg, *British Columbia Chronicle 1847-1871* (Vancouver, B.C., 1977).

century claims that a "superb *Pax Britannica* [sic]" brought "order and justice to many far-lying regions of the earth."⁶ Robin Fisher's *Contact and Conflict* (1979) countered with a convincing case for seeing British Columbia's early colonial history as a negotiation between its aboriginal and non-aboriginal populations,⁷ and although Gough's next book *Gunboat Frontier* (1984) was more cautiously worded, it still concluded that "[t]he ultimate arbiter of empire is the power wielded by the ruler, and in this particular case the British held the upper hand with their gunboats."⁸ In a recent *Western Legal History* article, Gough recognized the legal "duality" that insisted on the primacy of British law while (in some cases) legitimizing the operation of indigenous systems of social control. However, he blamed this state of affairs on inadequate financial and moral support from London, rather than on the questionable connection between naval power and the enforcement of British law among British Columbia's indigenous peoples.⁹

Hamar Foster has made some use of naval records, and Tina Loo documents contemporary doubts about the effectiveness of gunboats in a footnote to her study of the 1864 Bute Inlet murders, but the issue of naval authority seems to be of relatively little interest to today's legal historians.¹⁰ Loo's pioneering legal history of British Columbia emphasizes the role of military and police forces and the colonial judiciary, while barely mentioning the Royal Navy.¹¹ We are still without significant debate about the vast archives and important issues unearthed by Gough's pioneering work. The purpose of this essay will be to question the status of naval power as a self-evident fact, and to explore it instead as a historical phenomenon that could be expressed, perceived, and contested in different ways. In so doing I hope to build bridges between legal historiography and the maritime aspects of the rela-

⁶Gough, "Official Uses of Violence," 43, 59.

⁷Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890* (Vancouver, 1977); comments about the Royal Navy's relationship with Indians are at 64-66, 135, 148-49, 168-69.

⁸Gough, *Gunboat Frontier: British Maritime Authority and Northwest Coast Indians, 1846-1890* (Vancouver, 1984), 211.

⁹Gough, "Law and Empire: The Extension of Law to Vancouver Island and New Caledonia," *Western Legal History* 6:2 (1993): 226-27.

¹⁰Foster, "The Queen's Law Is Better than Yours," 62-65 and Loo, "Tonto's Due," 133, n. 20.

¹¹Loo, *Making Law, Order, and Authority in British Columbia, 1821-1871* (Toronto, 1994).

tionship between indigenous peoples and colonial law in British Columbia.

In 1864, Governor Arthur Kennedy ordered a naval investigation of the capture of the schooner *Kingfisher* and the killing of its crew by the Ahousat people of Clayoquot Sound.¹² The investigation led to chastisement when Rear Admiral Joseph Denman ordered HMS *Sutlej* and HMS *Devastation* to bombard several Ahousat settlements before capturing one of the suspects and a witness for trial in Victoria. However, Chief Justice David Cameron dismissed the case when he judged the witness incapable of testifying under oath. In the wake of Cameron's decision, Vancouver Island's attorney general wondered about the legal status of native testimony, and indeed, whether the colonial government had any jurisdiction over native communities outside areas of European settlement. Meanwhile, it appeared that the Ahousat had failed to learn the lesson that Admiral Denman intended to teach: The community was undaunted by his exhibition of force, and probably never connected his activities with the distant government in Victoria or the abstractions of British law.

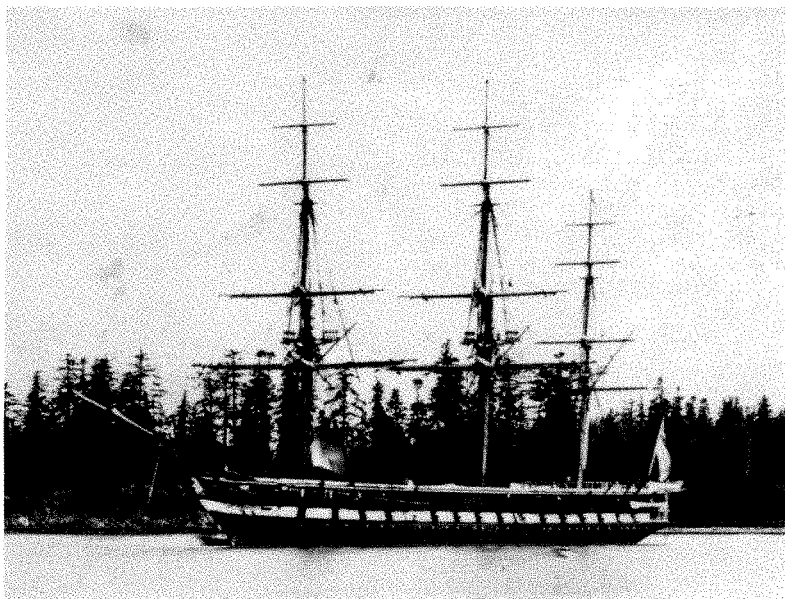
The Ahousat episode and the controversy it provoked make an ideal case study of the contradictory perceptions and expectations surrounding naval power and its relationship to law enforcement. It has been discussed before, in ways that reveal tension between an ambivalent historical record and the desire of historians to see the Royal Navy as an effective representative of legal authority. For G.P.V. and Helen Akrigg, Denman's bombardment made the Ahousat realize "that they were helpless against [the navy's] superior arms."¹³ B.A. McKelvie declared that only "a legal technicality" had thwarted the navy's law enforcement role, suggesting that neither the effect of naval power nor fundamental legal jurisdiction was in doubt.¹⁴ Anthropologist Philip Drucker, despite research findings highlighting the "inconclusive results" of Denman's bombardment,¹⁵ concluded that "[r]espect for the Crown had been imposed for years by warships on station at

¹²Today's Ahousat and Clayoquot consider themselves Nuuch'na'ltsh peoples; the designation "Nootka," found in many historical texts about this region, is no longer used. See Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver, B.C., 1990), 4.

¹³Akrigg and Akrigg, *B.C. Chronicle*, 308.

¹⁴McKelvie, *Tales of Conflict*, 77.

¹⁵Philip Drucker, *The Northern and Central Nootkan Tribes* (Washington, D.C., 1951), 13.



As part of a naval investigation into the capture of the schooner *Kingfisher* and the killing of its crew by the Ahousat people of Clayoquot Sound, the HMS *Sutlej* was ordered to bombard several Ahousat settlements before capturing one of the suspects and a witness for trial in Victoria. (Courtesy of the B.C. Archives)

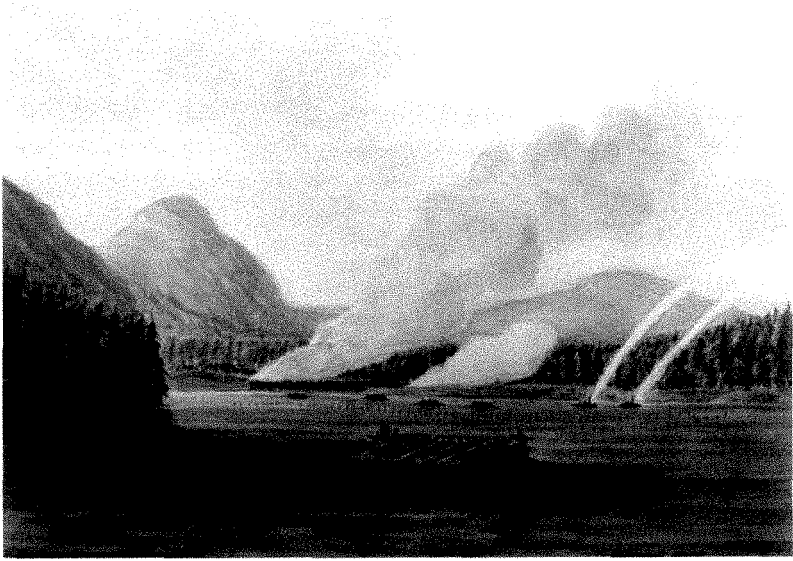
Esquimaux [sic]."¹⁶ Gough detailed the episode with attention to its ambiguous results, but subordinated it to his overall theme of "the extension of law and order on the coast with the aid of maritime authority."¹⁷ By scrutinizing various aspects of this episode—the expectations of officials and naval personnel, the reactions of Indians, and the complex issues raised by the dismissal of the case—I hope to show that British authority, legal jurisdiction, and naval "policing" formed an uneasy partnership that was open to interpretation and debate.

* * * *

Debate about British jurisdiction over native people on Vancouver Island had reached a critical stage by 1864, when

¹⁶Drucker, *Cultures of the North Pacific Coast* (San Francisco, 1965), 226.

¹⁷Gough, *Gunboat Frontier*, xv; discussion of the Ahousat episode is at 114–25.



J.R. Mackay's 1884 painting, *H.M.S. Devastation attack on Indian Village*. . . depicts the naval vessel bombarding Ahousat settlements in Clayoquot Sound. (Courtesy of B.C. Archives)

Arthur Kennedy replaced James Douglas as governor. Kennedy, who believed that his experiences in Sierra Leone and western Australia would equip him to govern Vancouver Island better than his predecessor, was finding Douglas's legacy frustrating. He had to pardon How-a-matcha, a Cowichan man convicted of murder, because of Douglas's precedents: The jury had recommended clemency on the basis of "the understood custom of the Indian tribes" in vengeance killings.¹⁸ Solicitor W. Sebright Green explained to the new governor that a member of the man's family had been killed during a feud, and the family had asked Green whether they should bring the matter to Victoria or pursue traditional retaliation. Douglas had told Green "that he could not interfere, and must leave the Indians to settle the matter themselves," and sent word to the Cowichan accord-

¹⁸Public Record Office, Kew (hereafter PRO), Colonial Office (hereafter CO) 305/23, Cameron to Kennedy, 12 August, 1864. The toleration and even adoption of vengeance killings had a long history in the Hudson's Bay Company; see John Phillip Reid, "Principles of Vengeance: Fur Trappers, Indians, and Retaliation for Homicide in the Transboundary North American West," *Western Historical Quarterly* 24:1 (1993): 21-43.

ingly.¹⁹ The present offense, therefore, was a retaliatory killing sanctioned by the former governor himself. Chief Justice David Cameron added that Douglas had issued other pardons in similar cases, and Kennedy felt that his hands were tied.²⁰

The How-a-matcha case confirmed Colonial Office opinion that Douglas's term had seen "a great deal of mismanagement and erroneous judgment," and the British colonial secretary, the Duke of Newcastle, instructed Kennedy to make native people "understand the necessity of conforming to Christian laws" in all future cases.²¹ In fact, Douglas was often as firm as Newcastle could have wished, sending naval expeditions to the Cowichan Valley in 1863 to pursue Indians accused of killing white men or, in one case, a mixed-blood Iroquois who had worked for Douglas.²² We will return to these 1863 expeditions; for now, it is important to note that the Colonial Office's general position and its response to Douglas's policies, in particular, reflected changing attitudes about indigenous peoples. The influence of Enlightenment and humanitarian ideas about the equality of races had prompted greater tolerance for aboriginal "custom" in earlier decades. In the 1840s in West Africa, the British government established mixed courts in order to facilitate antislavery operations, and Royal Navy officers signed treaties with West African chiefs that recognized, to some extent, the legitimacy of African political and legal procedures.²³ The 1840 Treaty of Waitangi in New Zealand also reflected this approach. By the 1860s, however, the British government was likelier to call for the uniform enforcement of British law, even in areas outside British jurisdiction. In the South Pacific islands, for example, government support was growing for naval expeditions to

¹⁹PRO, CO 305/23, Green to acting colonial secretary, August 1, 1864. Paul Tennant has shown how Douglas's approach to land policy shifted from signing treaties with native people to hoping for their eventual assimilation into colonial society. Perhaps Douglas's laissez-faire approach to "custom" was based on this belief and on confidence in his own high reputation in many native communities; see *Aboriginal Peoples and Politics*, 26–38.

²⁰For more on this case, see John Hayman, ed., *Robert Brown and the Vancouver Island Exploration Expedition* (Vancouver, B.C., 1989), 44, and Foster, "The Queen's Law," 82 n. 171 and 84.

²¹PRO, CO 305/23, Minute by Elliot, October 27, 1864 on Kennedy to CO, August 23, 1864, and CO to Kennedy, October 29, 1864.

²²See Foster, "Queen's Law," 63–65.

²³W. Ross Johnston, *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Later Nineteenth Century* (Durham, N.C., 1973), 3–31.

punish the murderers of British subjects.²⁴ Discussions of law and order were shifting away from humanitarianism and recognition of indigenous sovereignty, toward an emphasis on the open demonstration of British power. At a time when ideas about international law were still in their infancy, such shifts in emphasis had a direct effect on the way British officials viewed the question of colonial jurisdiction over native people.

British Columbia governor Frederick Seymour's brisk handling of the Bute Inlet incident earlier in 1864 (assisted by the voluntary surrender of the Chilcotin suspects) must have put pressure on Kennedy when news of the attack on the *Kingfisher* reached Victoria in August. He and Admiral Denman both seemed anxious to put an end to the image of leniency that the Vancouver Island administration had inherited. By the time Newcastle penned his instructions to uphold British law more forcefully, Denman's first report was on its way to London, declaring that attacks on British traders on Vancouver Island and in British Columbia were increasing because of "long continued impunity."²⁵ Kennedy expected Denman's "decisive measures" to "check the piratical and bloodthirsty practices of the coast Indians which have been left too long unpunished."²⁶ These statements remind us that personal rivalry can lie beneath the rhetoric of law and order: One of the things that the Royal Navy upheld at Clayoquot Sound was Kennedy's reputation as a sterner man than Douglas.

This concern with prestige helps explain why the issue of British authority so quickly eclipsed questions about Ahousat motives for the *Kingfisher* incident. Initial interpretations of the incident's significance actually varied considerably. Commander John Pike of HMS *Devastation*, conducting a preliminary investigation at Clayoquot Sound in September, noted Indian claims that the *Kingfisher's* crew brought trouble on themselves by deliberately provoking men of high rank.²⁷ The British government was used to reports about misbehaving traders, and, after receiving Pike's report, an official at the

²⁴For a discussion of punitive naval actions in the South Pacific and their relationship to changing views of Pacific Islanders and the nature of British imperial prestige, see Jane Samson, *Imperial Benevolence: Making British Authority in the Pacific Islands* (Honolulu: University of Hawai'i Press, 1998), 130-47.

²⁵BCARS, Micro B1349, F 1223 *Sutlej*, Denman to Admiralty, October 19, 1864.

²⁶PRO, CO 305/23, Kennedy to Denman, October 14, 1864.

²⁷BCARS, Micro B1349, F 1223 *Sutlej*, Pike to Denman, September 27, 1864.

Colonial Office noted that "there appear indications of [the Ahousat] being not mere senseless savages, but people who can be dealt with. Their complaints of ill usage by the White Traders seem to me very noteworthy."²⁸ After all, Pike himself had found the *Kingfisher* smuggling liquor to the Nass Indians near Fort Simpson earlier in 1863.²⁹ There was more: The chief interpreter during Pike's investigation was the Clayoquot chief Ceda-kanim, a man renowned for his desire to monopolize British trade on the west coast of Vancouver Island, and who had promoted false reports of Ahousat atrocities before.³⁰ The Ahousat had been consolidating their Clayoquot Sound territory recently, attacking both the Clayoquot and Oo-tsus-aht people in a series of territorial disputes during the 1840s and 1850s.³¹ Ceda-kanim's eagerness to help the colonial government, to the point of putting his warriors at its disposal, warns us that the *Kingfisher* incident must be set into both British and indigenous contexts. At the time, it quickly became clear that colonial and naval prestige was going to dominate any discussion of the Ahousat attack.

Kennedy reported to the Colonial Office, "The Natives on this coast will require constant and regular supervision till they are impressed with the danger of breaking the law, and the certainty of punishment,"³² a statement that appealed to London's concern about the enforcement of British law among all of Vancouver Island's inhabitants. Admiral Denman's report to the Admiralty noted "the audacity of the piracy committed, and the open defiance of British authority," thus making a legal connection between that authority and naval action.³³ Piracy was a crime of special significance for the Royal Navy, one which it had long been legally competent to deal with.³⁴ This is notable, for instead of arguing that the case called for the enforcement of colonial laws forbidding theft and murder, Denman focused on the navy's traditional war against piracy on the high seas. By invoking piracy, Denman constructed the case as one especially requiring naval atten-

²⁸PRO, CO 305/23, Minute by Elliot, December 1, 1864.

²⁹PRO, ADM 1/5829, Pike to Spencer, April 28, 1863.

³⁰*Evening Express*, July 8, 1863.

³¹Peter S. Webster, *As Far As I Know: Reminiscences of an Ahousat Elder* (Campbell River, B.C., 1983), 59–62.

³²PRO, CO 305/23, Kennedy to CO, October 14, 1864.

³³PRO, ADM 1/5878, Denman to Admiralty, September 30, 1864.

³⁴Based on international law, the suppression of piracy had been administered by the court of the lord high admiral since the fourteenth century; William Holdsworth, *A History of English Law 1903–1956*, vol. 1 (London, 1956), 545.

tion and—significantly—as a crime that the navy had long used force to suppress. The admiral spoke of damaged “British authority” rather than broken laws, and it was this damage that led him to urge “severe measures” against the Ahousat.³⁵

Denman’s interpretation of events must have found endorsement in the way Ahousat aggression forced an abrupt end to Commander Pike’s investigations. Although Pike had taken Police Chief Smith with him, presumably as a symbol of colonial authority during negotiations for the surrender of the murder suspects and *Kingfisher* property, the commander also had orders from Denman not to put the lives of his ship’s company at risk. When the Ahousat refused to “hold any further communication with the ship, being determined to fight,” Pike returned to Esquimalt for instructions.³⁶

The colonial press was outraged at what appeared to be a defeat at the hands of “savages.” The *Evening Express* denounced Pike’s inability to use force to capture the suspects. “The first part of a solemn farce has been played out on the Southern coast of this Island,” it intoned, blaming the government in Victoria for enabling the Ahousat to defy “the power and majesty of the law.”³⁷ British cultural superiority was at stake, and the *British Colonist* explored the implications of this in terms worth quoting at length. On one hand, it demanded “a policy that will draw the Indian into closer connection with the Government and more immediately under its control,” suggesting that the main issue was the effective enforcement of British law throughout the colony.³⁸ However, the editor’s primary concern was not government control, or even British justice, but national and cultural prestige:

It is not difficult to perceive that the retreat of civilized power from imperfectly armed barbarians will create a feeling, if not crushed in the bud, of dangerous bravado amongst the Indian tribes. Hitherto the gunboat was an object—indeed the only object—of wholesome terror. Let the Indians, however, feel that they are safe from the offensive power of a vessel of war, and we shall soon have an increase in those overt acts which aim so serious a blow at the settlement of the country. We do not doubt that the authorities will follow the matter swiftly up; for the mischief in every imbroglio with savages is delay.

³⁵PRO, ADM 1/5878, Denman to Admiralty, September 30, 1864.

³⁶PRO, CO 305/23, Pike to Denman, September 27, 1864.

³⁷*Evening Express*, September 28, 1864.

³⁸*British Colonist*, September 29, 1864.

Better to punish on the spur of the moment, even if injustice is done to some, than to wait until every Indian or every tribe is infected with a disdain or contempt for our power.³⁹

Here we see the concept of "law and order" stretched to the breaking point. The Royal Navy was to produce "wholesome terror," by illegal means, if necessary, in order to reinforce authority. The exercise of power to maintain order was better than restraint in favor of law.

We need to note the *Express's* reaction to an earlier example of naval restraint. Governor Douglas dispatched Lieutenant Horace Lascelles in HMS *Forward* to capture suspects in the murder of a Saturna Island settler and his daughter in April 1863. The Lemalchi people were believed to be responsible for the attack, but they defied *Forward* when Lascelles and Police Superintendent Smith confronted them at their village on Kuper Island. After a warning, Lascelles ordered the village shelled. The answering small arms fire from the Lemalchi killed one of *Forward's* boys, and the natives then retreated to the woods. Although Lascelles burned the Lemalchi village, he had to return to Victoria without any of the murder suspects. This contrasted with a concurrent naval investigation at Cowichan, where four suspects in another murder case "were arrested without conflict, their friends having made no effort to protect them from Justice."⁴⁰ The crucial difference between these two incidents was not naval firepower but rather the degree to which different Indian peoples were willing to recognize and collaborate with the colonial authorities.

HMS *Forward's* failure to capture any suspects prompted *Express* editor Charles Allen to publicize alleged Lemalchi boasts "that the gunboat was 'very good to cut down timber, but no use for catching them, and that all her efforts had failed to kill *one klutchman*,'" and he concluded that "[s]mall doubt can be felt that the adoption of the motto, 'he that fights and runs, etc.' by the *Forward* has excited in the minds of the Indians a supreme contempt for the powers of the gunboats."⁴¹ An insulted Lascelles summoned Allen aboard HMS *Forward* and sailed out of harbor; the editor jumped overboard to

³⁹Ibid.

⁴⁰PRO, CO 305/20, Douglas to Newcastle, May 21, 1863. For more about this episode, see Gough, *Gunboat Frontier*, 139–47 and Foster, "The Queen's Law," 67–69.

⁴¹A summary of these events is found in the *Victoria Weekly Chronicle* 26, May 1863.

escape. In January 1864, Allen sued Lascelles for unlawful imprisonment, and the lieutenant paid one thousand dollars to avoid a trial. In the meantime, a task force of four vessels and a campaign of hostage-taking and village-burning had been required to obtain the Lemalchi suspects, four of whom were hanged in July 1863. Douglas had said that there was "no alternative consistent with our dignity, and with the safety of other men's lives than to resort to coercive measures."⁴² There had been several punitive naval raids in the area over the previous fifteen years, however, and they obviously had failed either to enhance colonial authority or to act as deterrents.

After the *Kingfisher* incident, Denman and his officers were probably anxious to avoid further accusations of weakness. When Denman told the Admiralty that the Indians' "open defiance of British authority" made stern measures necessary in order to reinforce "the certainty of prompt retribution," did he mean retribution for the violation of British law, or for the Ahousat defiance of Commander Pike and the *Devastation*? Conscious, perhaps, of the way his report was tending to blend these issues together, Denman hastened to reassure the Admiralty, "My efforts however will be limited to the arrest of the actual murderers."⁴³ We will see how quick he was to plan a much more forceful display of power.⁴⁴

Philip Hankin, a former naval survey officer and then chief of police in Victoria, sailed with Denman aboard HMS *Sutlej* to act as interpreter. He recalled that Denman began talking of bombardment as soon as the ship entered Clayoquot Sound. Hankin preferred negotiating first and offered to go himself, unarmed, with only two men as escort. "I had some trouble to get the Admiral to consent to this, as he said we should all be most certainly shot," recalled Hankin, who countered that he "knew the Indian character" and that his unarmed appearance before a large force of warriors would impress the Ahousat more than a service revolver or cutlass would.⁴⁵ He was right;

⁴²PRO, ADM1/5829, Douglas to Spencer, 9 May, 1863.

⁴³PRO, ADM 1/5878, Denman to Admiralty, September 30, 1864.

⁴⁴Gough notes Denman's bombardment of slave factories during earlier duties off West Africa; *Gunboat Frontier*, 116. There were legal complications then, too: Denman (whose father had been lord chief justice) found himself being sued by the slave-dealers of the Gallinas factory. *Buron v. Denman* (1848) was considered a test case, and Denman was defended by the British attorney general. He was found not guilty of trespass and other charges relating to the bombardment, and was invited by the government to draw up instructions for officers on antislavery patrols; see Christopher Lloyd, *The Navy and the Slave Trade* (London, 1949), 98–99. It is easy to see why being thwarted by a colonial judge in the *Kingfisher* case so incensed Denman fifteen years later.

⁴⁵BCARS, Micro 199 "Memoirs of Captain P. Hankin, RN," 288–89.

the Ahousat treated him courteously, explaining that the leading suspect, Chief Cap-chah, had fled. When Denman heard this news, Hankin had to talk him out of bombardment once again. Only after an attempt to take hostages had failed and his men had come under fire did Hankin resign himself to the use of force.⁴⁶

Supporting the navy's reputation might be equated with upholding "British authority" in naval correspondence, but we must question this and other assumed connections between naval power and the rule of law. The navy had the legal right to employ force as an act of war, or in cases of piracy or slaving on the high seas, but this was an offense committed within the boundaries of a British colony. Later in the nineteenth century, as the field of international law developed, various theorists would point out the legal and moral contradictions that surrounded the use of armed force to enforce domestic laws.⁴⁷ An observer of the Clayoquot Sound incident, Alberni sawmill manager Gilbert Malcolm Sproat later wondered, "What would be said if a white Nova Scotian village were bombarded and plundered by one of Her Majesty's ships? . . ." ⁴⁸

Two of Denman's and Kennedy's assumptions about the naval action at Ahousat were particularly problematic: their perceptions of its effectiveness as punishment and deterrent, and their belief that in Indian eyes it would symbolize the rule of British law. With four Ahousat villages and many canoes destroyed, the two men reported unqualified success on all fronts, despite the fact that the expedition had failed to capture the leading suspect, Cap-chah, and had obtained only two lower-ranking men out of the many participants and witnesses it sought. Nevertheless, Denman was certain that "the severe example" made by his ships would punish the Ahousat for their attack on the *Kingfisher*, and prevent future incidents.⁴⁹ He assumed that his burning their villages was "after the fashion of their own tactics," speculating that the Ahousat attitude must now be one of "profound discouragement, Cap-chah being in hiding and pursued by his own people, who abandoned all ideas of resistance and look on him as responsible for all the evils that have befallen them." ⁵⁰

⁴⁶Ibid., 293.

⁴⁷See William Hall, *A Treatise on International Law*, 3d ed. (Oxford, 1890), 63–67 and M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (London, 1926), 143.

⁴⁸Quoted in Loo, "Tonto's Due," n. 20.

⁴⁹BCARS, Micro B1349, F 1223 *Sutlej*, Denman to Admiralty, October 19, 1864.

⁵⁰PRO, ADM 1/5878, Denman to Admiralty, October 12, 1864.

These speculations, and later statements by Denman and Kennedy about the "salutary" nature of the expedition, were based on assumptions that the Ahousat understood the purpose of the naval raid, accepted its success on those terms, and connected that success with concepts like "the rule of law" and "British authority." However, it is doubtful whether the Ahousat fully understood the navy's relationship with the government in Victoria. Sproat's Indian employees at Alberni, who were in close contact with the Ahousat, told him that

they regard the sailors in Her Majesty's ships as belonging to a separate, distinct tribe of whites. Being themselves all fighters, the Ahts cannot understand why the great King-George tribe should leave all their fighting to a few individuals.⁵¹

Here the Royal Navy appears as a sort of mercenary force—a conception far removed from the British belief that the navy not only symbolized British interests, but also embodied British sovereignty in its right to make war. Sproat observed that the Indians did not even connect him with the "King-George tribe," telling him all about the Ahousat bombardment "as if I were an indifferent person, and the affair had been, not between them and my own countrymen, but between the Ahousahts and some other tribe."⁵² Sproat's comments raise doubts about whether the Ahousat and their neighbors recognized "the British" as a national group at all. These were also the findings of William Banfield, a former Royal Navy sailor who became the colony's Indian agent on the west coast of Vancouver Island. Writing in 1859 to Captain Prevost of HMS *Virago* to request help in sponsoring a Christian mission station at Barclay Sound, Banfield declared that a stronger naval presence would help deter the Indians from slaving raids, since "the fear of a man of war (manaway) among them is powerful [and] they consider them a distinct people from King George or Boston's."⁵³ In other words, the Indians acknowledged naval fighting power, but detached that power from other British or American interests. British assumptions of how the Ahousat interpreted *Sutlej's* activities cannot simply be taken at face value.

⁵¹Gilbert Malcolm Sproat, *Scenes and Studies of Savage Life* (London, 1868), 9.

⁵²*Ibid.*, 202.

⁵³BCARS, Church Missionary Society, North Pacific Mission, C.2/0, W.E. Bamfield [sic] to Prevost, October 30, 1859. Banfield would die in 1862, apparently at the hands of the Ohiat chief Klatsmick.

From Denman's point of view, however, the naval "example" in Clayoquot Sound had reinforced British authority, and its success would completely demoralize the Ahousat, who, he believed, would be eager to surrender Cap-chah and the other suspects to the next naval vessel he promised to send.⁵⁴ Denman sailed to Victoria with his prisoners, and with another tangible reminder of his ship's destructive power: a little girl found trapped under her mother's body in the main Ahousat village of Marktosis. Mrs. Denman, who had accompanied the expedition, renamed her "Margrette Sutlej Davis" and tried to take care of her, but the child died shortly afterward.⁵⁵

After the warships' departure, the destruction of canoes and equipment forced the Ahousat to winter with allies, but they were jubilant about their chief's escape from capture. At Alberni, Sproat heard that the Ahousat

had gained a victory over the ships, and, in consideration of such a triumph, all the trouble of making new canoes has been forgotten. Cap-chah has added to his reputation; he is the great chief who defied and baffled the English on King-George war-vessels.⁵⁶

Father Augustin Brabant, the first missionary to nearby Hesquiat, recalled hearing the Ahousat say that canoes could be built again, but Cap-chah's escape and the return of the captured Ahousat from Victoria meant that "they claimed a big victory over the man-of-war and big guns."⁵⁷ By 1865 they had enough confidence to threaten to attack Robert Torrens's gold prospecting expedition when it camped near Marktosis, and the Hesquiat, who lived just north of Clayoquot Sound,

⁵⁴PRO, ADM 1/5878, Denman to Admiralty, October 12, 1864 and CO 305/27, Denman to Admiralty, November 8, 1864.

⁵⁵Little "Maggie" bore the names, respectively, of Mrs. Denman, the warship, and Royal Marine Corporal Davis, who had insisted on bringing her away from the village; BCARS, E/D/D32, Frank J. Dawson correspondence, Dawson to Ponsley, October 14, 1909. Dawson was writing many years after the fact to a former shipmate, one of *Sutlej's* lieutenants, because he still cherished Maggie's memory. Ponsley, on the other hand, could only remember presenting her to *Sutlej's* commander as "the prisoner" (undated reply to Dawson's letter of August 29, 1909). Although he brought an Ahousat woman and her baby to the hospital in Victoria, Admiral Denman never mentioned his "adopted" Ahousat child in correspondence.

⁵⁶Sproat, *Scenes and Studies*, 201-2.

⁵⁷Charles Moser, *Reminiscences of the West Coast of Vancouver Island* (Victoria, B.C.: Acme Press, 1926), 190.

killed the shipwrecked crew of the *John Bright* in 1869.⁵⁸ It appears that we must not only question the category "British" when exploring Indian responses to naval operations, but we must also ask whether there was any generalized "Indian" identity on the west coast of Vancouver Island. The Hesquiat certainly seemed undeterred by what had happened to their neighbors. Although Denman's actions were meant as an example to the whole area, other Indian groups might have regarded the bombardment as a matter between the King George warships and the Ahousat alone. If so, this would help explain why punitive naval raids in this area and elsewhere on the Northwest Coast, usually failed to act as deterrents.

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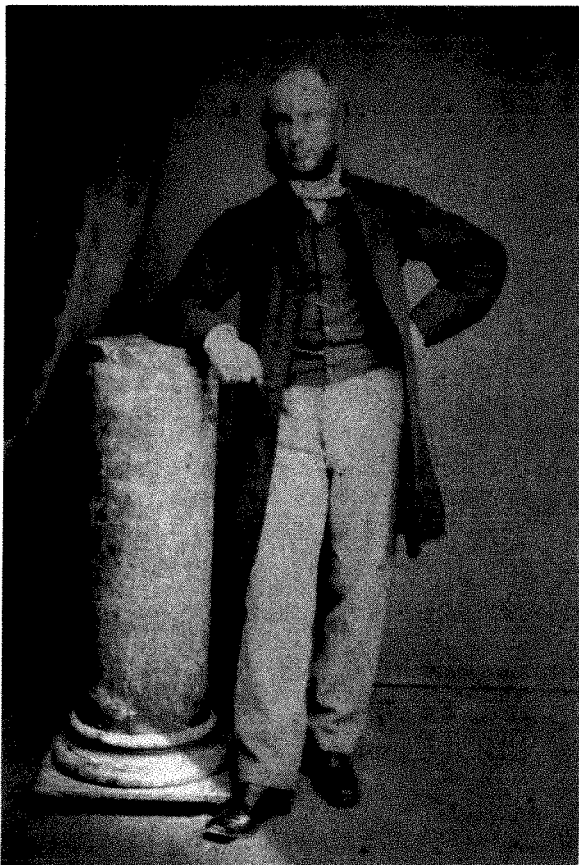
British opinion was divided about the success of Denman's expedition. While the participants and the Admiralty congratulated one another on the vigorous reinforcement of law and order at Clayoquot Sound, Vancouver Island's legal officials took a less sanguine view. The sole Ahousat witness Denman had obtained, a man named Ea-qui-ok-shittle, was brought along to the trial of the Ahousat man Kah-cus-a-lah on November 3. The witness was not a Christian, and Attorney General Thomas Wood reported that "it was clear he was utterly ignorant of the nature of an Oath." He could not be sworn, the jury could find no indictment, and Chief Justice Cameron dismissed the case.⁵⁹

The development of criminal jurisdiction on Vancouver Island had been haphazard, and Cameron's own appointment as chief justice was particularly controversial: He had no formal legal training, and was Governor Douglas's brother-in-law.⁶⁰ This peculiar situation was aggravated by the fact that

⁵⁸BCARS, A/C/30/T63.1, Torrens to colonial secretary, September 19, 1865. When investigating at Hesquiat, Commander Mist of HMS *Sparrowhawk* took along a large complement of marines, the New Westminster magistrate, and Attorney General Crease in order to convene a legal inquiry on the spot; PRO, ADM 1/6092, Hastings to Admiralty, June 29, 1869 and Gough, *Gunboat Frontier*, 125-28.

⁵⁹BCARS, Micro B1302, attorney general to acting colonial secretary, November 24, 1864.

⁶⁰Foster, "Law Enforcement in Nineteenth-Century British Columbia: A Brief and Comparative Overview," *B.C. Studies* 63 (1984): 3-28; Desmond H. Brown, "Unpredictable and Uncertain: Criminal Law in the Canadian North West Before 1886," *Alberta Law Review* 17:3 (1979): 497-512; and James E. Hendrickson "The Constitutional Development of Colonial Vancouver Island and British Columbia," in *British Columbia: Historical Readings*, ed. W. Peter Ward and Robert A.J. McDonald (Vancouver, B.C., 1981), 249-50.



Attorney General Thomas Lett Wood, above, reported that the sole, non-Christian Ahousat witness against Kah-cus-a-lah was "utterly ignorant of the nature of an Oath," and the case was dismissed. (Courtesy of the B.C. Archives)

the colony did not have a complete set of British statutes to consult.⁶¹ Kennedy, Cameron, and Wood (who had just arrived as attorney general in 1864) apparently were unaware that since 1843 the British Parliament had permitted colonies to create evidence law allowing indigenous people to testify unsworn, even if such legislation was at odds with British law itself. The Colonial Evidence Act (1843)⁶² was the product of a

⁶¹PRO, CO 305/23, Kennedy to CO, August 31, 1864.

⁶²"An Act to Authorise the Legislatures of Certain of Her Majesty's Colonies to Pass Laws for the Admission, in Certain Cases, of Unsworn Testimony in Civil and Criminal Proceedings" (1843) 6&7 Vict., c. 22.

sustained campaign by the Aborigines' Protection Society to remove what the society regarded as an obstacle to justice for indigenous peoples.⁶³ By the 1850s, however, even the Colonial Office seemed to have forgotten about the 1843 act. Douglas had asked for instructions in December 1851 when a grievance brought by an Indian chief raised the issue of non-Christian aboriginal testimony in court. He believed (for unstated reasons) that it would be inadvisable to use unsworn Indian testimony in cases between white men, but that it was vital in disputes between whites and Indians. It was unjust to reject the only form of testimony that most native people had to offer. Douglas added that

nothing will tend more to inspire confidence in the governing power, and to teach them that justice may be obtained by a less dangerous and more certain method than their own hasty and precipitate acts of private revenge.⁶⁴

The Colonial Office made no reference to the Colonial Evidence Act in its reply to Douglas, but simply instructed him to swear in Indian witnesses by whatever means he thought would be culturally suitable and in all types of cases, not only those directly involving Indians.⁶⁵ Thus, when Admiral Denman demanded an explanation of the *Kingfisher* decision, the attorney general replied, "I cannot find any authority for the reception of evidence in a Criminal case *not upon Oath*." He also referred to the recent trial of Ohiat chief Klatsmick for the murder of agent Banfield, observing that this

⁶³For summaries of the society's legal campaign, see Saxe Bannister, *Humane Policy, or, Justice for Aborigines* (London, 1830), and *British Colonization and Coloured Tribes* (London, 1838), and Standish Motte, *Outline of a System of Legislation for Securing Protection to the Aboriginal Inhabitants of All Countries Colonized by Great Britain* (London, 1840). For an analysis of the background and a comparative study of the resulting aboriginal evidence legislation, see Jane Samson, "British Voices and Indigenous Rights: Debating Aboriginal Legal Status in Nineteenth-Century Australia and Canada," *Cultures of the Commonwealth* 2 (1996-97), 5-16.

⁶⁴CO 305/3, Douglas to CO, December 16, 1851. Compare this remark with Denman's claims that only retribution "after the fashion of their own tactics" would teach Indians about the government's power.

⁶⁵PRO, CO 305/3, CO to Douglas, March 18, 1852. The Colonial Evidence Act was designed to provide for unsworn testimony from peoples whose religious beliefs were obscure (or absent) from the British point of view. Alternative swearing-in, for example on Ganges water in British India, or on ancestral grave soil in Barbados, had long been legally acceptable; this is probably what the CO was referring to.

case had also revolved around the evidence question. There had been several witnesses, but they were "found incompetent from utter Ignorance of the nature of an Oath" and their evidence taken down (over objections from the defense counsel) only "for what it was worth." Wood believed that the witnesses had simply endorsed their chief's statements without any real knowledge about what had happened, and this might also have been the feeling of the jury members, who refused to convict Klatsmick.⁶⁶

In what seemed to be a legal vacuum, Denman pressed for legislative measures to admit more Indian testimony. Wood had grave reservations. One of them concerned the way fairness was already compromised by attempting to extend the full force of law to the remote, native-populated areas of the colony. He explained that because trials took place so far from the scene of the crime

the majority of cases [would] terminate in acquittal, and I think reasonably so, if the Prisoners be properly defended and the Jury impartial. It may be otherwise when the confessions or admissions are made to white men or reliable Indians but I do not think the matter would be materially mended by the admissions of the testimony of persons who do not admit the binding nature of any description of Oath.⁶⁷

One wonders how "reliable Indians" were to be identified, and by whom, but Wood's assumptions about jury behavior are understandable in light of several recent trials of Indian murder suspects. Indian testimony from distant areas had produced acquittal in the Banfield murder case, for example, but the successful Lemalchi prosecutions had witnesses from Chemainus who were

for Indians, intelligent and enlightened, their conduct in Court showed them to be persons of superior cultivation, they gave sensible accounts of their knowledge of the nature of an Oath and their testimony evidently carried conviction to the minds of the jury.⁶⁸

⁶⁶BCARS, Micro B1302, attorney general to acting colonial secretary, 24 November, 1864.

⁶⁷Ibid.

⁶⁸Ibid.

Differences between local Indians familiar with European procedures, and distant ones with little experience of white people, led Wood to question the justice of current legal procedures. Prisoners from distant areas were often brought in the same warship as the witnesses against them and were "practically without any assistance" in Victoria.⁶⁹ They did not understand the idea of a court trial, and could neither call their own witnesses nor cross-examine the prosecution's. In contrast, English trials were held in the county where the murder was committed, where witnesses could be produced by either side and confessions tested against other evidence. To accept admissions as proof in Indian cases, for example, might produce

many cases of judicial Murder from Indians swearing away the lives of their enemies in the Tribe or slaves, whom they would sacrifice, instead of giving up the real Murderer, a thing already believed to be done.⁷⁰

As to a remedy for this unsatisfactory situation, Wood made an extraordinary suggestion: The colonial government should accept the fact that British law did not apply throughout Vancouver Island. He believed that there was a clear British jurisdiction in areas of white habitation, a belief that recalled Lord Mansfield's famous judgment that Englishmen carried their law with them wherever they settled. But were colonial boundaries—artificial as they were—an accurate reflection of those areas of settlement? Wood thought not, recommending that the governor treat "unsettled" districts as effectively independent. Close to British habitations, he wrote, the indigenous population should be liable "to the laws of England in all Particulars precisely as in Victoria District and security of life and property among Indians as jealously guarded as among White men." However, in "unsettled" areas, he believed

⁶⁹They were often without any sort of legal representation, even in court; see Foster, "The Queen's Law," 66–70; 75–77. The solicitor W. Sebright Green, last seen explaining Douglas's policies to Kennedy, became so incensed by the unfair treatment of Indians that he contacted the Aborigines Protection Society in London in 1869. His correspondence was added to extracts from Sproat's *Scenes and Studies*, and forwarded with a letter of protest to the colonial secretary, Lord Granville; *The Colonial Intelligencer* (December 1869), 191–94.

⁷⁰BCARS, Micro B1302, attorney general to acting colonial secretary, November 24, 1864.

it is a mere theory to suppose that English law prevails. The Indians on the West Coast and in Queen Charlotte's Island are to all intents and purposes Independent tribes and I think it is a mistake to extend or to profess to extend British law to them or to interest ourselves in their quarrels or broils.⁷¹

He went further, challenging the conventional connections between punitive naval actions and the upholding of British law. Because Indians in "unsettled" areas were independent, there could be no legal means of interfering in their affairs, and therefore

If they commit outrages on White men H.M. Ships may visit the Coast and insist on the tribe itself punishing the Offenders or submitting to an investigation at the hands of Commissioners who might be Officers of the Ship or others appointed by The Governor to investigate the matter in a summary way & proceed to execution if advisable without delay.⁷²

In making these suggestions Wood did not confuse law with order. On the contrary, he assumed that the type of commission he envisioned, with its large and arbitrary powers, would keep order at the expense of justice: "As a lawyer naturally prejudiced in favor of a trial by Jury at Common law I may be forgiven the opinion that it may not unfrequently [sic] happen that the wrong man will be hanged."⁷³ Wood feared that Indians might manipulate the British legal system to pursue traditional rivalries, or to substitute slaves for the real suspects. As a result, he felt unable to make any recommendations with confidence and

put forward these latter suggestions with great diffidence. I have never heard any discussion on the matter, and am without treaties on such subjects, or precedents elsewhere. I feel myself called on to make suggestions on matters beyond my usual professional range, at a short

⁷¹Ibid.

⁷²Ibid. The grand jury made similar recommendations at the end of the autumn assize; see their report of November 18 submitted by Cameron in BCARS, Micro B/1313, Cameron to colonial secretary, November 24, 1864.

⁷³BCARS, Micro B1302, attorney general to acting colonial secretary, November 24, 1864.

notice, and to gentlemen doubtless better experienced & informed on such matters than myself.⁷⁴

That a colonial attorney general believed it was beyond his duty to consider the legal status of the indigenous population, and that it was "mere theory" to talk about British authority over them, is a fact that should be better known in British Columbia's legal history. The main point lies in the contradictions that Wood exposed in the relationship between law, order, power, and justice across cultural boundaries. He faced these contradictions with remarkable candor, concluding that their translation into just and workable legal practice was all but impossible.

British Columbia's attorney general, Henry Crease, had similar doubts about the justice of applying British law to Indians. Worried about the issue of indigenous testimony, Crease drew up a "Native Evidence Ordinance" in 1865 to permit unsworn testimony from Indians.⁷⁵ However, writing to missionary William Duncan the following year, he declared, "An Experience of several years has given me grave doubts whether Indians and Indian matters should not be dealt with by a code of laws materially different from & simpler in every respect than the forms of English law."⁷⁶ Perhaps qualms of this kind prevented the passage of similar evidence legislation on Vancouver Island. Although a bill imitating the British Columbia ordinance was considered in March 1865, it lapsed in committee, and two later attempts met the same fate.⁷⁷ Only after Seymour became governor of the combined colony in 1867 was an Indian Evidence Act passed, based on the earlier British Columbian legislation.⁷⁸

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⁷⁴Ibid.

⁷⁵James E. Hendrickson, ed., *Journals of the Colonial Legislatures of the Colonies of Vancouver Island and British Columbia 1851-1871* (Victoria, B.C., 1980), vol. 4, 250, 263, 273. Crease may have been influenced by his knowledge of Australian enabling legislation based on the Colonial Evidence Act; see Samson, "British Voices and Indigenous Rights," 12.

⁷⁶BCARS, Micro A1705, William Duncan papers, Crease to Duncan, May 2, 1866.

⁷⁷Hendrickson, *Journals of the Colonial Legislatures*, vol. 1, xxxv, 173, 338-40; vol. 3, 321, 452, 463; vol. 4, 250, 263, 273; see draft bill of "An Act to amend the law of evidence" in BCARS, GR 1527, Vancouver Island Legislative Council, box 2, file 3.

⁷⁸Ibid., vol. 1, 62-70, and PRO, CO 60/27, Seymour to CO, January 12, 1867.

After Cameron's dismissal of the *Kingfisher* case, Kennedy wrote to Denman declaring that the judgment made it "worse than useless" to pursue Cap-chah and the other Ahousat suspects.⁷⁹ This decision seems odd in light of his earlier declaration that "[t]he Natives on this coast will require constant and regular supervision till they are impressed with the danger of breaking the law, and the certainty of punishment."⁸⁰ By telling Denman not to send a follow-up expedition, Kennedy undid everything he had recommended. Before Cameron's judgment, Denman, too, had emphasized the importance of the promised second visit, explaining that failure would make him "lose the prestige dependent on the exact fulfillment of my word, which is of immense importance in maintaining due influence with the Natives. . . ." Even though he feared that any new suspects he obtained would be acquitted, he preferred to arrest them "and so maintain the consistency of the Naval proceedings, rather than to let the matter drop without fulfilling my promise."⁸¹ However, once he learned about Cameron's dismissal of the *Kingfisher* case, Denman endorsed Kennedy's decision to drop the follow-up visit to the Ahousat. His response to the decision arose from his own bitterness and from the reaction he assumed would occur among the Ahousat after the release of the prisoners he had captured:

I can conceive nothing more mischievous, or calculated to multiply the already frequent atrocities committed by the Natives, than the return to their tribes of these avowed and notorious murderers with perfect impunity; as it cannot fail to produce in their minds an absolute contempt of British law.⁸²

As we have seen, it was the navy—not "British law"—that the Ahousat believed they had defeated. This quotation shows how easily Denman equated naval prestige with British legal authority. Like many disappointed litigants before and since, Denman was prepared to support only those legal provisions that delivered the end result he sought. Unsworn testimony was inadmissible in the colony because neither Douglas nor

⁷⁹BCARS, Micro B1349, F 1223 *Sutlej*, Denman to Kennedy, November 29, 1864.

⁸⁰PRO, CO 305/23, Kennedy to CO, October 14, 1864.

⁸¹BCARS, Micro B1349, F 1223 *Sutlej*, Denman to Kennedy, November 29, 1864.

⁸²*Ibid.*, Denman to Kennedy, November 18, 1864.

Kennedy had given effect to the Colonial Evidence Act, making Cameron's decision the correct one in legal terms. Nevertheless Denman declared it to be "a complete bar to the ends of justice."⁸³ It was the maintenance of order rather than the enforcement of law that was associated with "the ends of justice" in the admiral's mind, producing ambivalence about the legal system he was supposed to represent and reinforce as a naval officer. From the beginning of the *Kingfisher* investigation, Denman's language revealed a preoccupation with prestige that left little room for the details—and frustrations—of due process. He projected his own confusion onto the Ahousat, speculating about their response to the release of his prisoners. In the end it was he, not they, who felt "an absolute contempt of British law" in the wake of Cameron's decision.⁸⁴

* * * *

This essay has explored the problematic nature of concepts like "British authority" and "naval policing" on colonial Vancouver Island. These terms carry complex and controversial meanings, even among Britons. Applied across a cultural frontier, "lessons" in justice were difficult, if not impossible, to teach; in particular, we must question assumptions about Indian responses to exhibitions of naval power. But there was no monolithic British view of these matters, either. Colonial officials, naval officers, and administrators in London could confuse fundamental issues and disagree among themselves. Discussions about "law and order" produced debate rather than certainty, and actions based on this shifting foundation were more controversial than decisive.

Such conclusions are familiar ones in legal history, but I have applied them here to the neglected subject of British naval operations against Indians, and to the relationship between the Royal Navy and the rule of law. In the naval historiography there are too many assumptions about lessons learned and salutary examples conveyed. It is true that the Royal Navy was a crucial symbol of British authority in the eyes of settlers, the colonial administration, and officials in London, and we need to know much more about the way contemporaries interpreted the navy's role. We also need to explore the tensions in that role when it was deployed against the indigenous peoples of British Columbia. Records of naval operations and their aftermath help us scrutinize the issue of

⁸³Ibid.

⁸⁴Ibid.

indigenous legal status under British law—a question of great importance in today's debate about aboriginal land claims and self-government. We must unearth and analyze all relevant historical material; I hope this paper will encourage historians to take a greater interest in the naval archives. The law-and-order debate spawned by the *Kingfisher* incident reveals significant differences of opinion about issues fundamental to indigenous legal status: At least one colonial law officer believed many indigenous peoples to be sovereign, even within colonial boundaries, almost twenty years after colonization. British Columbians have a complicated historical inheritance, but complicated histories can be both challenging and enabling.

JUDGE JOHN HEMPHILL, THE HOMESTEAD EXEMPTION, AND THE “TAMING” OF THE TEXAS FRONTIER *

TIMOTHY S. HUEBNER

During his eighteen years as the antebellum chief justice of the Lone Star State, John Hemphill labored to bring “civilization” and stability to the Texas frontier. A South Carolina gentleman known for his studious habits and strongly held political beliefs, Hemphill arrived in Texas in 1838 and spent the next two decades in judicial service to the state, before being elected to the United States Senate on the eve of the Civil War. Through his judicial opinions in cases involving the state’s homestead exemption laws, Hemphill sought to engraft upon Texas society his vision for a free, democratic, and industrious populace. Homestead exemption laws guaranteed that the family home and property, up to a certain dollar value, would be protected from seizure for payment of debts. Although the Republic of Texas first enacted a homestead exemption statute in 1839 and later added an exemption provision to its state constitution of 1845—the first state to do so—it was the work of Hemphill as chief justice that gave form to these measures over the next several years. By broadly interpreting these laws to the benefit of debtors, Hemphill and his judicial colleagues viewed themselves as bringing the blessings of liberty and law to an

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untamed frontier. The security of property holders, they believed, was an essential ingredient of social stability.

Hemphill's record on the homestead exemption exemplified the eagerness of state judges during the mid-nineteenth century to assume a policy-making role in the American legal order. Although legal historians have long recognized the significant expansion of the power of the antebellum judiciary, most of their scholarship focuses on the northern states and emphasizes the economic underpinnings and implications of this outburst of judicial creativity.¹ The experience of Hemphill demonstrates that in the Southwest as well, state judges actively shaped the law to fit the needs of their society. Moreover, throughout Hemphill's opinions, cultural and ideological assumptions worked together with economic considerations. By promoting debtor relief, expansion of opportunity, and respect for law among new white settlers, Hemphill acted as a judicial agent of Manifest Destiny.²

JUDGE JOHN HEMPHILL

Born in 1803 in Chester District, in the South Carolina upcountry, Hemphill was the son of the Reverend John Hemphill and his wife Jane Lind, both of Scotch-Irish stock and adherents of the most rigid form of Presbyterianism.³ The

¹Morton J. Horwitz, *The Transformation of American Law, 1790-1860* (Cambridge, Mass., 1977), 1-30; Kermit Hall, *The Magic Mirror: Law in American History* (New York, 1989), 106-28; Lawrence Friedman, *The History of American Law* (New York, 1985), 107-201; G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges* (New York, 1976), 35-63; Leonard Levy, *The Law of the Commonwealth and Chief Justice Shaw* (Cambridge, Mass., 1957).

²On Manifest Destiny and the notion of "civilizing" the West during this period, see Anders Stephanson, *Manifest Destiny: American Expansionism and the Empire of Right* (New York, 1995), 28-65; Thomas R. Hietala, *Manifest Design: Anxious Aggrandizement in Late Jacksonian America* (Ithaca, N.Y., 1985); Reginald Horsman, *Race and Manifest Destiny: The Origins of American Racial Anglo-Saxonism* (Cambridge, Mass., 1981), 189-248; Frederick Merk, *Manifest Destiny and Mission in American History: A Reinterpretation* (New York, 1966); Albert K. Weinberg, *Manifest Destiny: A Study of Nationalist Expansionism in American History* (Baltimore, 1935), 100-189.

³Rosalee Morris Curtis, *John Hemphill: First Chief Justice of the State of Texas* (Austin, Tex., 1971), 1-8. On Rev. John Hemphill, see Robert Lathan, *History of Hopewell Associate Reformed Presbyterian Church, Chester County, South Carolina, Together with Biographical Sketches of Its Former Pastors* (Yorkville, S.C., 1879), 22-29. Mrs. Hemphill's death in 1806, however, left her son to be reared by his father and older siblings, assisted by a local schoolmaster, until the reverend remarried in 1811.

young Hemphill received his primary education in the "old field schools" in and around Chester District, and in 1825 he graduated from Jefferson College (now Washington and Jefferson College) in Pennsylvania. Though under some pressure from his father to enter the ministry, Hemphill returned to South Carolina and taught in various classical academies for a few years before undertaking the study of law. In 1828, he entered the Columbia law office of D.J. McCord, the most prominent compiler and codifier of the state's statutes, and soon became certified to practice in the courts of common pleas. In 1829, McCord and Hemphill established their own law practice in Sumterville, in the Sumter District of South Carolina, and two years later, Hemphill earned the right to practice in courts of equity.⁴

But just as Hemphill had left teaching for lawyering, a new interest—politics—soon drew his attention away from the law. In 1831, he began to write essays for a local newspaper, the *Sumter Gazette*, and within a year he had become a prominent pro-slavery, pro-nullification voice in the community.⁵ When the Virginia legislature engaged in its incisive, month-long debate over the slavery issue in 1832, the respected editor of the *Richmond Enquirer*, Thomas Ritchie, angered many in the South by publishing the whole of the debates in his newspaper. Many, especially in South Carolina, feared the consequences of such open discussion. Writing in the *Gazette*, Hemphill urged slave patrols to be on the alert and condemned Ritchie as "the apostate traitor, the recreant and faithless sentinel, the cringing parasite, the hollow-hearted, hypocritical advocate of Southern interests . . . who has scattered the firebrands of destruction everywhere in the South."⁶ In keeping with this fiery rhetoric, over the next few years Hemphill brawled with an opposition newspaper editor, took the oath of nullification during South Carolina's showdown with the national government, and engaged in a duel with a Camden, South Carolina, merchant over statements made in a newspaper essay.

⁴John Hemphill to William Hemphill, December 29, 1833; John Hemphill to Robert R. Hemphill, December 23, 1859; McCord-Hemphill Copartnership Agreement, December 13, 1829; all located in Hemphill Family Papers, Special Collections Library, Duke University, Durham, N.C. (hereinafter cited as Family Papers).

⁵Thomas McAlpin Stubbs, "The Fourth Estate of Sumter, South Carolina," *South Carolina Historical Magazine*, no. 54 (January 1953): 186.

⁶*Sumter Gazette*, April 28, 1832, as quoted in William Freehling, *Prelude to Civil War: The Nullification Crisis in South Carolina* (New York, 1965), 83.

Although his conduct as a gentleman was deemed "irreproachable," the young Hemphill often had a difficult time keeping his passions in check.⁷ In 1835, Hemphill's sense of duty and honor—as well as his passions—drew him to battle. When United States forces became embroiled in a second war with Florida's Seminole Indians, Hemphill attempted to raise a militia company in Sumterville. His recruiting efforts met with little success, however, and he joined a company from Columbia, which embarked by steamboat for St. Augustine, Florida. During the campaign, Hemphill contracted a serious illness, probably malaria or hepatitis. In spring 1836, General Winfield Scott signed Hemphill's honorable discharge for disabilities arising out of what was described as a "sequela to measles." Upon his release, Hemphill spent some time in the hot springs of Virginia recovering from his illness, before returning to South Carolina to practice law.⁸

Soon, however, Hemphill was again on the move. In 1838, he changed the course of his life and career by leaving the South Carolina upcountry for the Texas frontier. Hemphill's reasons for departing South Carolina are unclear, but economic and political considerations were probably an important part of his decision. Financial opportunities for lawyers were diminishing in his home state; in addition, his post-nullification partisanship might have seemed excessive to his political seniors. Like Louis Wigfall, another South Carolina firebrand with an uncertain future in the Palmetto State, Hemphill apparently envisioned new opportunities in the Republic of Texas.⁹

⁷Anne King Gregorie, *History of Sumter County, South Carolina* (Sumter, S.C., 1954), 152–53; Stubbs, "Fourth Estate," 186; Nullification Oath, in John Hemphill Papers, South Caroliniana Library, University of South Carolina, Columbia, S.C. (hereinafter cited as Hemphill Papers). Curtis, *John Hemphill*, 18–19; certificate from Rev. John L. Preply, December 15, 1826, copy in Hemphill Papers. Hemphill's seemingly violent proclivities prompted one observer to describe him as "an expert skullbuster in a streetfight." See James Farber, *Texas, C.S.A.: A Spotlight on Disaster* (New York, 1947), 10. Mordecai Levy and Hemphill duelled with smooth-bore pistols, and Levy's bullet hit his opponent squarely on the shooting hand. Afterwards, the combatants settled on an "adjustment honorable to both parties," and Hemphill wore a scar from the incident for the rest of his life.

⁸James Hemphill to William R. Hemphill, March 17, 1836, and Certification of Honorable Discharge, April 12, 1836, both in Family Papers; Curtis, *John Hemphill*, 20–21. On the formation of these southern volunteer companies for military service, see John K. Mahon, *History of the Second Seminole War, 1835–1842*, rev. ed. (Gainesville, Fla., 1985), 135–37.

⁹Alvy L. King, *Louis T. Wigfall: Southern Fire-eater* (Baton Rouge, La., 1970), 46–47; Curtis, *John Hemphill*, 23. Perhaps Hemphill simply believed Texas offered a climate more conducive to recovery from the bouts of malaria he occasionally suffered after his service in Florida.

With its abundance of land and shortage of attorneys, Texas seemed the perfect destination for an ambitious young lawyer. Anglo-Americans, most of them southern-born, had been steadily flocking to Texas since the early 1820s, while it was still a Mexican territory. The Panic of 1819, which prompted the United States government to stop issuing general land grants on credit, provoked the initial burst of settlers, while the even more severe economic collapse of 1837 further encouraged migration. The Republic's newly won independence and cheap prices for land made Texas all the more attractive to potential residents, many of whom were debtors seeking to escape their obligations and start anew.¹⁰ Lawyers found the Republic particularly alluring, since the insecurity of land claims arising out of the recent war for independence promised plenty of litigation. Many of these new members of the Texas bar, most of whom were young and inexperienced, envisioned attaining great heights of prestige and power in their new homeland. As a contemporary observer remarked, "Such men easily worked themselves up to the belief that in this new country in a very short time, they could become generals or statesmen."¹¹

Hemphill, too, hoped to begin anew. In 1838, after arriving at a settlement called Washington, located along the Brazos River, Hemphill set himself to the task. He received a license to practice and opened his law office, but, according to Texas tradition, immediately went into seclusion to learn the Spanish language and Spanish civil law, which at that time was still in effect throughout the Republic. Described by his brother as "always a student," Hemphill realized immediate dividends from his studies. In January 1840, after only a two-year residence in the Republic, Hemphill was appointed judge for the fourth district of Texas by President Mirabeau B. Lamar. At that time, the Republic's supreme court consisted of its seven district judges, headed by a chief


¹⁰Stanley Siegel, *A Political History of the Texas Republic, 1836-1845* (Austin, Tex., 1956), 5-7; William Ransom Hogan, *The Texas Republic: A Social and Economic History* (Norman, Okla., 1946), 10-11; Randolph B. Campbell, *An Empire for Slavery: The Peculiar Institution in Texas, 1821-1865* (Baton Rouge, La., 1989), 2; Terry G. Jordon, "The Imprint of the Upper and Lower South on Mid-Nineteenth Century Texas," *Annals of the Association of American Geographers* 57 (1967): 667-90.

¹¹Quoted in Hogan, *Texas Republic*, 247. See also Maxwell Bloomfield, "The Texas Bar in the Nineteenth Century," *Vanderbilt Law Review* 32 (January 1979): 261-76.

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In 1837, Texas's newly won independence and cheap land prices made it attractive to potential residents, many of whom were debtors trying to escape their obligations. (Courtesy of Texas State Library and Archives Commission)

justice, so Hemphill's appointment placed him among the leading jurists in Texas.¹²

During his brief tenure as district judge, Hemphill impressed his fellow Texans both with his legal talents and his martial prowess. Soon after his appointment, he earned a somewhat heroic reputation as an Indian fighter for his role in an episode known as the Council House fight. While Hemphill was serving as an observer to negotiations between whites and Comanches at a San Antonio courthouse, a bloody riot erupted, and an Indian "assailed" and "slightly wounded" the judge. Hemphill struck back with his bowie knife and "reluctantly" disemboweled the Comanche. When the fighting had ceased, thirty-three Comanches, six Texans, and one Mexican had lost their lives. After the incident, vengeful Texas volunteers, including Hemphill, banded together to chase the Comanches away from white settlements. In a political culture defined by military glory, where citizen-soldiers earned the highest honors and won the most prized political positions, Hemphill's exploits complemented his legal career.¹³ Eleven months after his appointment as a district judge, Hemphill ascended to the position of chief justice upon the resignation of Chief Justice Thomas J. Rusk.

Hemphill's work as chief justice in the Republic period proved insignificant in comparison to his achievements during the era of statehood. The court faced persistent difficulties

¹²Curtis, *John Hemphill*, 25–26; Reuben Reid Gaines, "John Hemphill, 1803–1862" in *Great American Lawyers: A History of the Legal Profession in America*, ed. William Draper Lewis (Philadelphia, 1908), 5; Rt. Rev. Alexander Gregg, D.D., "Eulogy on the Hon. John Hemphill and Gen Hugh McLeod, Delivered in the Capitol, Austin," *February 1, 1862* (Houston, 1862), 5; Commission to Practice Law in the Republic of Texas, September 10, 1838, copy in Hemphill Papers; James Hemphill, undated biographical sketch of John Hemphill, Family Papers; James W. Paulsen, "A Short History of the Supreme Court of the Republic of Texas," *Texas Law Review* 65 (1986): 241; *Telegraph and Texas Register*, December 16, 1840, as quoted in James P. Hart, "John Hemphill—Chief Justice of Texas," *Southwestern Law Journal* 3 (1949): 398. In 1839 Hemphill had received an appointment from Lamar to be secretary of the treasury of the Republic. Hemphill declined the offer. (Hemphill to Lamar, March 3, 1839, as published in C.A. Gulick and K. Elliot, eds., *The Papers of Mirabeau Buonaparte Lamar*, vol. 2 [New York, 1973]).

¹³John Henry Brown, *Indian Wars and Pioneers of Texas* (Austin, Tex., n.d.), 78; Curtis, *John Hemphill*, 29–35; Gaines, "John Hemphill," 6–8; Mildred P. Mayhall, *Indian Wars of Texas* (Waco, Tex., 1965). On Texas's military-oriented political culture, see Mark E. Nackman, "The Making of the Texan Citizen Soldier, 1835–1860," *Southwestern Historical Quarterly* 78 (January 1975): 231–53.

that interfered with its judicial tasks. White Texans continued to struggle against periodic Mexican invasion, and beginning in early 1842 the court held no sessions for nearly a year and a half. Hemphill, in fact, joined General Alexander Somervell's military expedition to the Rio Grande as adjutant general and did not return to hold court again until June term, 1843.

Politics also drew Hemphill's attention away from judicial matters. He was considered a candidate for president of the Republic in both 1843 and 1844, although both times he declined to run. By 1845, annexation had become the most pressing political issue in the Republic, and Hemphill served as delegate to the convention charged with taking action on annexation and drawing up a constitution. An advocate of annexation, he chaired the convention's judiciary committee, which recommended the establishment of a three-member supreme court and a system of district courts, as well as the merging of separate courts of law and equity. The convention approved all the recommendations, and J. Pinckney Henderson, the first governor of the new state of Texas, subsequently appointed Hemphill to the position of chief justice.¹⁴ Judge Abner Lipscomb, the former chief justice of Alabama, and Royall T. Wheeler, a member of the supreme court during the Republic period, joined Hemphill on the bench.

The members of the Texas Supreme Court, especially Hemphill, viewed themselves as the carriers of civilization to a vast, uncultivated land. Part of the attraction no doubt had to do with their romantic idea of bringing liberty and law to this remote outpost of America. Like most white Texans, Hemphill frequently wrote and spoke of the war for independence in heroic terms. Securing autonomous rule for Texas had not been a battle "for mere glory" or "for aggrandisement [sic]," he once asserted. "This was a struggle by freemen who were born free, for their country, for their homes—for liberties secured to them by the most sacred guarantees, and which, without fault on their part, were threatened with utter extinc-

¹⁴Paulsen, "Short History," 237-303; Hart, "John Hemphill," 400-402; Gaines, "John Hemphill," 8-10; Curtis, *John Hemphill*, 37-53. Hemphill apparently had not always favored annexation. See John Hemphill to James Hemphill, February 13, 1845, as published in *Southwestern Historical Quarterly* 57 (1953): 222-24. The president of the constitutional convention, Thomas J. Rusk, appointed Hemphill chairman of the convention's judiciary committee. See Annie Middleton, "The Texas Convention of 1845," *Southwestern Historical Quarterly* 25 (July 1921): 31, 37-41. On Rusk's work as president of the convention, see Mary Whatley Clarke, *Thomas J. Rusk: Soldier, Statesman, Jurist* (Austin, Tex., 1971), 49-58; Cleburne Huston, *Towering Texan: A Biography of Thomas J. Rusk* (Waco, Tex., 1971), 113-20.

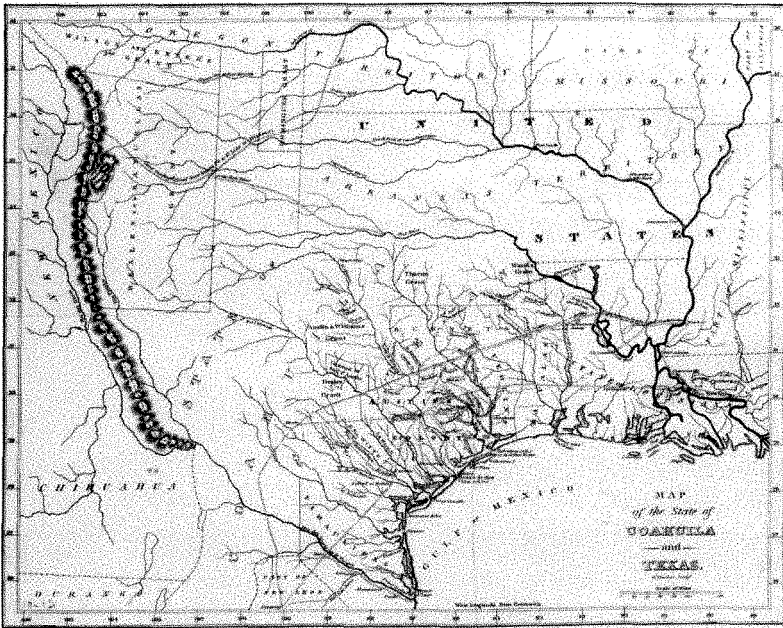
tion." Hemphill and his colleagues sought to preserve and expand this notion of liberty, which included the right of individual settlers to till the soil, engage in commercial pursuits, or hold slaves, unfettered by state interference. The great goal of the settlement of Texas, Hemphill believed, was to fight "the tomahawk and scalping knife of the savage" and to fill "the wilderness with a christian [sic], civilized, and laboring population."¹⁵ Only through law, Hemphill believed, could such ends be achieved.

THE HOMESTEAD EXEMPTION

One way to bring "civilization" to the frontier was to make it easier for debtors to acquire and maintain homesteads. Texas had offered limited assistance to debtors ever since 1829, when the Mexican state of Coahila y Texas recodified Spanish exemption principles and extended them to land grants. Large-scale migration of debtors to Texas dictated continued interest in the issue. Although every state in the Union possessed some chattel exemption—which shielded basic items such as furniture, tools, and clothing from the reach of creditors—no state had passed legislation extending the principle of exemption to real estate. In 1839, in addition to providing exemptions for "household and kitchen furniture," "all implements of husbandry," and other items essential to one's trade or livelihood, the Congress of the Republic also exempted "fifty acres of land or one town lot" from the grasp of creditors. This measure, based on the act of 1829, protected the "homestead and improvements not exceeding five hundred dollars in value" from forced sale for payment of debts.¹⁶

¹⁵John Hemphill, "Eulogy on the Life and Character of the Hon. Thomas J. Rusk, Late U.S. Senator from Texas" (Austin, Tex., 1857), 13–14, copy located in Hemphill Papers; *Heirs of Holliman v. Peebles* (1847), 1 Tex. 673, 690.

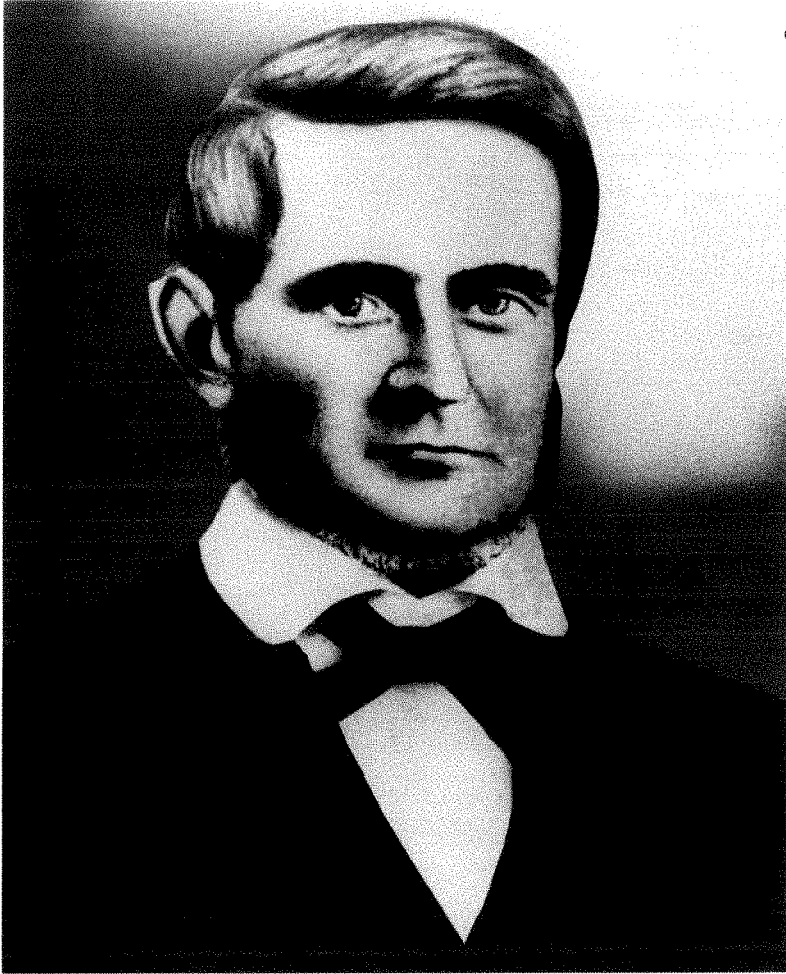
¹⁶Lena London, "The Initial Homestead Exemption in Texas," *Southwestern Historical Quarterly* 57 (April 1954): 432–53, esp. 435–42; Joseph W. McKnight, "A Century of Development in Texas Law," *Texas Bar Journal* (November 1973): 1054; Homestead Act quoted in C.W. Raines, "Enduring Laws of the Republic of Texas," *Quarterly of the Texas State Historical Association* 1 (July 1897): 101; Gerald Ashford, "Jacksonian Liberalism and Spanish Law in Early Texas," *Southwestern Historical Quarterly* 57:578 (July 1953): 8–10; McKnight, "Protection of the Family Home from Seizure by Creditors: The Sources and Evolution of a Legal Principle," *Southwestern Historical Quarterly* 86 (January 1983): 392–99; McKnight, "Mexican Roots of the Homestead Law," in *Estudios Juridicos en Homenaje al Maestro Guillermo Floris Margadant* (Mexico, 1988), 291–304.



Anglo-Americans, mostly southern-born, had been flocking to Texas since the early 1820s, while it was still a Mexican territory. (Courtesy of Harvard Map Collection, Pusey Library, Harvard University)

By the time of the 1845 constitutional convention, Texans, well-versed in concepts of exempt property, incorporated this concept into the new constitution and expanded the size of the homestead exempted. Lipscomb, serving with Hemphill as a delegate to the convention, initially introduced the idea of a homestead exemption provision, in order to alleviate the "distress I have often seen come upon families, who have been so paralyzed by it as to be incapable of exertion." Owing to the efforts of Lipscomb, Hemphill, and others, the new constitution conferred upon the legislature "power to protect by law from forced sale . . . the homestead of a family not to exceed two hundred acres of land not included in a town or city, or any town or city lot or lots in values not to exceed two thousand dollars."¹⁷ The homestead exemption did not release the debtor from his obligation; it simply prevented the homestead from being taken for payment of debts.

¹⁷William P. Weeks, *Debates of the Texas Convention* (Houston, Tex., 1846), 423; Constitution of the State of Texas, 1845, article 7, section 22.



Judge John Hemphill's judicial opinions in cases involving homestead exemption laws reflected Hemphill's desire to engraft on the state of Texas his vision for a free, democratic, and industrious populace. (Courtesy of the Texas Jurists Collection, Rare Books and University of Texas at Austin)

Supported by both Spanish tradition and Texas law, in a series of decisions Hemphill and his colleagues interpreted the exemption broadly in order both to protect debtors and expand economic opportunity. Like so many others who struggled to come to grips with the enormous changes wrought by the "market revolution" in antebellum America, Hemphill sought to protect

families and small property owners from the perils of the marketplace at the same time that he desired his state to reap the benefits of economic expansion.¹⁸ Reared in the southern tradition of Jefferson, Jackson, and Calhoun, Hemphill believed that powerful banks and monopolies, as well as tariffs and nationally funded internal improvements, threatened to concentrate economic power in the hands of a few, undermine the economic opportunities of small property holders and businessmen, and interfere with the autonomy of states. Homestead exemption, in contrast, was a beneficial use of state power, a positive way to promote the public good through facilitating economic independence. Along with the state's constitutional provisions outlawing imprisonment for debt, forbidding monopolies, and requiring legislative approval of corporate charters, homestead exemption reflected Texans' concern with minimizing economic concentration and maximizing economic liberty.¹⁹

Over the next several years, Hemphill and his colleagues interpreted the exemption broadly, so that it applied to a great number of situations and individuals. In *Sampson and Keene v. Williamson* (1851), for example, Hemphill ruled that the Texas constitution prohibited not only the forced sale of the homestead but also "any forced disposition of the property," including a foreclosure on a mortgage.²⁰ Hemphill conceded that the defendants in the case had voluntarily pledged their property as a security for a debt, but, he argued, they could not "waive or renounce the guarantee of immunity with which the Constitution shields the property." With an eye toward protecting the debtor, Hemphill criticized the mortgage as a device whereby creditors could circumvent the constitutional protection of homesteads. "The form [of the mortgage] in use is deceptive and fictitious," he wrote. "It conveys the estate, with the right of taking it back on the payment of the money, while its legal effect is to give a mere lien upon the land to secure this payment, with the right of foreclosure on default of the mortgager."²¹ Relying on Spanish legal sources that defined a mortgage as "a species of sale," Hemphill broadly defined the notion of a "forced sale" to include a mortgage. "The

¹⁸Charles Sellers, *The Market Revolution: Jacksonian America, 1815–1846* (New York, 1991); Paul Goodman, "The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840–1880," *Journal of American History* 80 (1993): 470–98.

¹⁹Constitution of the State of Texas, 1845, article 1, sections d15, 18; article 7, section 31.

²⁰*Sampson & Keene v. Williamson* (1851), 6 Tex. 102, 117.

²¹*Ibid.*, 115.

Constitution obviously intended that the homestead should be exempted from the operation of any species of execution, or from any forced disposition of the property, whether partial or total," he reasoned. Because the framers of the Texas constitution sought to protect struggling families from the vicissitudes of the marketplace, Hemphill concluded, the exemption protected "the domestic sanctuary from every species of intrusion which, under color of law, would subject the property, by any disposition whatever, to the payment of debts."²²

Hemphill also argued against limitations on the value that could be exempted. In *Wood v. Wheeler* (1851), the court took up the case of a widowed Mrs. Wheeler, who had assumed ownership of the family's house and town lot, appraised at a value of \$2,000. Although a probate court had exempted this property from her husband's creditors, a district court later reversed the probate court's ruling and ordered that the house and lot be turned over to a creditor for payment of debts. The widow and her child were to receive five hundred dollars from the proceeds of the sale. The case presented the problem of having to reconcile the state's homestead exemption statute of 1839 with the state's constitutional provision of 1845. Under the 1839 statute, the value of the homestead exemption was limited to five hundred dollars on improvements on the lot, while under the constitution the two-thousand-dollar limitation was placed on the total value of the lot with improvements. Given the rulings of the probate and the district courts, the supreme court had to decide how much of the widow's property was subject to seizure by creditors under the law.

Because the value of property was constantly changing, according to Hemphill, the constitutional provision limiting the exemption to two thousand dollars failed to offer sufficient protection to individuals. The value of a town lot, without improvements, he reasoned, might increase over time beyond the limits of the exemption and thus fall subject to forced sale for payment of debts. Compelled to relocate, the family might very well find itself in the same situation again, as property values continued to rise. "This round of domiciliation in a home with its endearments, and expulsion with its miseries," Hemphill stated, "may be several times repeated in the course of a few years; and ultimately, the ejection may take place at a time when the price of property is so excessive that the portion of the proceeds of the homestead awarded the owner, may be wholly insufficient to procure a comfortable home suitable for the family."²³

²²*Ibid.*, 115.

²³*Wood v. Wheeler* (1851), 7 Tex. 14, 22.

Hemphill thus saw potential danger in the constitutional limit set on the value of the exemption and feared that such limitation undermined the policy's intended purpose. "The object of such exemption," he wrote, "is to confer on the beneficiary a home as an asylum, a refuge which cannot be invaded nor its tranquility or serenity disturbed, and in which may be nurtured and cherished those feelings of individual independence which lie at the foundation and are essential to the permanency of our institutions." Limitations on the exemption, in Hemphill's mind, ran counter to the "wise and beneficial purpose" of the legislation.²⁴ Bound by the constitution and the homestead exemption statute, Hemphill could not simply remove all limitations on the exemption. He did, however, overrule the district court and offered the widow a judgment under which she would be able to retain a homestead.²⁵

Hemphill even interpreted the exemption to apply potentially to all inhabitants of Texas. Under the 1839 law, the exemption applied to "every citizen or head of family in this Republic." *Cobbs v. Coleman* (1855) presented the question of whether a single man qualified for the exemption, in light of his dubious citizenship in the state of Texas as well as the fact that he was not a "head of family." Interpreting the intentions of the authors of both the 1839 act and the 1845 constitutional provision, Hemphill dismissed such queries as irrelevant. "[T]he statute employs the phrase 'every citizen,' yet this is not to be taken in a restricted sense as designating only the native-born or naturalized citizen," he claimed, "but in its general acceptation and meaning as descriptive of the inhabitants of the country. . . . [T]he statute extends as well to simple men or individuals as to married men or heads of families." As he had before, Hemphill supported his position with reference to Spanish authorities. Examining the *Institutes of Asso & Manuel*, as published in Joseph White's *New Collection of Laws, Charters, and Local Ordinances of the Governments of*

²⁴*Ibid.*, 22.

²⁵*Ibid.*, 25–26. The chief justice offered the widow two options, both of which were more favorable than the district court's ruling. The widow could either pay the excess of the value of the improvements over five hundred dollars and retain the homestead, or the lot and improvements could be sold and out of the proceeds she would receive the value of the lot (not the improvements), plus five hundred dollars. The remaining sum, under this second option, became subject to her husband's debts. Regardless of the widow's choice, under Hemphill's order she would still have a homestead—either the one she possessed or one purchased with the money from the sale of the first. As a practical matter, however, the widow faced sale of her home because of her inability to raise the cash value of improvements in excess of five hundred dollars.

Great Britain, France, and Spain, Hemphill observed that "nothing is said [in the law] about single men or heads of families." Utilizing Spanish legal principles to sweep aside the literal wording of the statute in question, Hemphill ruled that status as neither a citizen nor a head of family mattered. The homestead exemption applied to all Texas residents.²⁶

Further, neither remaining absent from the homestead nor leasing it for a time, according to Hemphill, rendered property subject to forced sale. In *Shepherd v. Cassidy* (1857), the court took up the case of a woman whose lot in the town of Bastrop had been purchased by another in a sheriff's sale six months after she had moved away. Living with her children in Austin, but without acquiring a homestead, the woman sued to reacquire the supposedly abandoned piece of property. Hemphill conceded the difficulty of questions about what constituted abandonment of a homestead and when one forfeited the right to the homestead exemption. Yet, relying on Joseph Story's *Commentaries on the Conflict of Laws* and citing the Massachusetts Supreme Court, Hemphill reasoned that "every man must have a domicile somewhere and . . . that his existing domicile continues until he can acquire another." Hesitating to assert the proposition that "the old homestead remains until a new one is gained," a judicial pronouncement that would, he wrote, "too much embarrass and obscure the condition and rights of property," Hemphill nonetheless held that the woman retained the homestead in question. "The homestead is not to

²⁶*Cobbs v. Coleman* [1855], 14 Tex. 594, 597-98; Raines, "Enduring Laws," 101; Joseph M. White, ed., *A New Collection of Laws, Charters, and Local Ordinances of the Governments of Great Britain, France, and Spain, Relating to the Concessions of Land in Their Respective Colonies: Together with the Laws of Mexico and Texas on the Same Subject*, vol. 1 (Philadelphia, 1839), 322-23. In the same case, moreover, Hemphill broadly defined the exemption of other articles of property listed under the 1839 statute. In this instance, the court had to decide whether the exemption of a horse under the law extended to the saddle and bridle. Hemphill entertained no doubts on the matter. "A horse was not reserved because he was a horse, but because of his useful qualities and his almost indispensable services," Hemphill observed. "But what would be the benefit of a horse without shoes, or without saddle and bridle, or without gears, if employed for purposes of agriculture?" In Hemphill's view, debtors needed all of those ancillary articles that might be necessary for the enjoyment and use of the exempted article. Under Spanish law, those items necessary for the practice of one's trade were exempt from creditors, and Hemphill rendered a similarly expansive interpretation of the law. "It would seem that by fair construction the grants in the statute must include not only the subject itself," he explained, "but everything absolutely essential to its beneficial enjoyment." By extending the state's debtor exemption statutes to include more than just the specific items listed under law, Hemphill again demonstrated his pro-debtor position (*Cobbs v. Coleman*, 598-99; J.M. White, *New Collection*, I, 322-23).

be regarded as a species of prison bounds, which the owner cannot pass over without pains and penalties," he wrote. "His necessities and circumstances may frequently require him to leave his homestead for a greater or less[er] period of time. . . . Let him leave for what purpose he may, or be his intentions what they may, provided they are not those of total relinquishment or abandonment, his right to the exemption cannot be regarded as forfeited."²⁷ In this way as well, Hemphill broadened the application of the homestead exemption.

Hemphill also held, through a liberal interpretation of what constituted a homestead, that shopkeepers, lawyers, and other independent businessmen could reap the benefits of exemption. In *Pryor v. Stone* (1857), he ruled that a home and eight lots owned by a family in the city of Dallas were subject to the exemption provisions. The limits of the exemption pertained only to the value, not the number, of the lots, and the properties did not have to be contiguous to each other. The widower head of the family in question resided in a two-room house that also served as his law office, while his children lived with another family. Hemphill held that the man's home was protected from forced sale. "The exemption should not be construed as reserving merely a residence where a family may eat, drink and sleep," he wrote, "but also a place where the head or members may pursue such business or avocation as may be necessary for the support and comfort of the family." He thus held that the exemption applied to the "office of a lawyer or shop of a mechanic," even if it did not serve as part of the residence of the family.²⁸ Hemphill appeared willing to define the homestead exemption as containing almost no limits or restrictions. In fact, the only stipulation he ever imposed on the exemption was that it actually apply to a home—a physical structure—rather than merely land.²⁹

Hemphill's and his colleagues' work in the area of homestead exemption proved significant for the subsequent legal development of both Texas and the nation. The Texas consti-

²⁷*Shepherd v. Cassidy* (1857), 20 Tex. 24. Hemphill reiterated this decision later that term in *Gouhenant v. Cockrell* (1857), 20 Tex. 96. In a previous case, *Trawick v. Harris* (1852), the court held that a married woman who had left Texas and "domiciliated in another state" could not claim the exemption (8 Tex. 312).

²⁸*Pryor v. Stone* (1857), 19 Tex. 371, 373. See also *Hancock v. Morgan* (1856), 17 Tex. 582. Justice James Bell later apparently overturned, or at least ignored, *Pryor* in *Philleo v. Smalley* (1859), where he ruled that the home of a man in a similar situation did not constitute a homestead.

²⁹*Franklin v. Coffee* (1857), 18 Tex. 413, 417. Hemphill's opinion in this case apparently simply made explicit what the court had already decided in 1856 in *Methery v. Walker* (17 Tex. 593).

tutions of 1861, 1866, and 1876 all included homestead exemption provisions, and over the next several years the state's legislature followed the court's lead by expanding the amount of the value of the homestead that could be exempted, in part due to high economic inflation after the Civil War. As early as 1850, fourteen states had copied the Texas example and enacted homestead exemption laws of their own, and by 1870 forty states and territories had adopted exemption laws of some form.³⁰ The exemption received not only extensive acceptance in state legislatures, but widespread praise from state courts. The California Supreme Court deemed the idea "beneficent," the high court of Iowa called it "liberal and benevolent," and the Vermont Supreme Court referred to the homestead exemption as "being of a humane character." Eager to take credit for the increasing popularity of this Texas innovation, a later member of the state supreme court, Judge Alexander S. Walker, hailed the homestead exemption as the "crowning glory of Texas jurisprudence" and the "greatest idea of the age." Judge John F. Dillon of the Iowa Supreme Court similarly credited Texas in his *Laws and Jurisprudence of England and America*, by referring to the exemption as "the great gift of the infant Republic of Texas to the world." Moreover, in an 1862 article on the homestead exemption, Dillon repeatedly cited the work of the Texas Supreme Court as foundational for understanding and interpreting the homestead exemption.³¹ In Texas, the confluence of a large debtor

³⁰Goodman, "Emergence of Homestead Exemption," 472 (table 1). Delaware, Rhode Island, and Maryland did not enact homestead exemption laws during the nineteenth century. Connecticut and South Carolina repealed their exemption laws in 1848 and 1858, respectively.

³¹*Cook v. McChristian* (1854), 4 Cal. 23, 26; *Charless v. Lamberson* (1855), 1 Iowa 435, 441; *True v. Morrill* (1856), 28 Verm. 674; William L. Prather, "Economic Effects of the Homestead Exemption and Exemption Laws, with Special Reference to the Development of the Homestead and Exemption Laws in Texas" (M.A. thesis, University of Texas, 1903), 21; John F. Dillon, *The Laws and Jurisprudence of England and America, Being a Series of Lectures Delivered Before Yale University* (Boston, 1894), 360; Dillon, "The Homestead Exemption," *American Law Register* 10 (1862): 641-717. Dillon cites Texas decisions forty-six times in the article, more than any other state court except California, which he cites forty-nine times.

After the Civil War, southern states in particular expanded their homestead provisions, as they sought to alleviate the disastrous economic situation in which they found themselves. Most of these measures remained in place until the late nineteenth century, when legislatures, envisioning a new South built on credit, began to scale the value of the exemption back to antebellum levels. See Goodman, "Emergence of Homestead Exemption," 491-96, esp. 493 (table 2). For a contemporary criticism of these Reconstruction era homestead laws, see J.H. Thomas, "Homestead Exemption Laws of the Southern States," *American Law Register* 19 (1871): 1-17, 137-50.

population, an expansive frontier, a traditional southern hostility to concentrated economic power, and the presence of Spanish law created a legal principle that soon spread throughout the nation.

Hemphill's and his colleagues' consistently broad interpretation of the state's homestead exemption provisions demonstrated the justices' ambivalence toward the market revolution of the mid-nineteenth century. Clearly, the court aimed to protect debtors from the perils of the unrestricted marketplace. The design of the exemption, Hemphill once stated, was "to protect citizens and their families from the miseries and dangers of destitution."³² At the same time, through an expansive reading of the state's homestead law, the court hoped to foster expansion and development by attracting more settlers and new wealth to the state. Almost all the promotional literature about Texas from the middle of the nineteenth century trumpeted the advantages of the exemption. For example, a booklet entitled *Information About Texas*, published in 1857, devoted nearly seven pages solely to the benefits of the state's exemption law. During this period, older southern states such as Mississippi, Alabama, and Georgia steadily lost population to Texas because of its leniency toward debtors. Not surprisingly, these same states, along with Florida, were the first four to copy the Texas example by passing their own homestead exemption statutes.³³ The court's enshrinement of the homestead principle also lessened the risk of capital investments. Like the limited liability associated with the corporation, homestead exemption assured an individual investor that no matter how much money he invested, he still could not lose everything he owned—he would still be assured of retaining his home. Exemption offered the individual or family whose fortunes had plummeted, in Lipscomb's words, "a point from which they can start, relieved from any fear of their families being turned out without a home." Such a family could "commence again, Antaeus-like with renewed energy and strength and capacity for business."³⁴

According to historian James Willard Hurst, by preserving a nucleus of working capital, debtor exemptions like those in Texas helped foster economic liberty for small entrepreneurs and reflected the nineteenth century's "preference for keeping open

³²*Franklin v. Coffee*, 415–16.

³³Prather, "Economic Effects," 24. Georgia (1841), Mississippi (1841), Alabama (1843), and Florida (1845) all passed exemption laws soon after Texas. Goodman, "Emergence of Homestead Exemption," 472 (table 1), 477.

³⁴Prather, "Economic Effects," 25–26; 18 Tex. 413, 415–16; *Trawick v. Harris* (1852), 8 Tex. 312, 316.

the door to change, as against commitments or equities asserted by the past." The homestead exemption, in other words, was characteristic of the "release of energy" principle that so distinguished nineteenth-century American legal development.³⁵

THE "TAMING" OF THE TEXAS FRONTIER

More important than protecting debtors or promoting development, Hemphill and his colleagues thought that the homestead exemption furthered the values of democracy, citizenship, and domesticity that they believed were necessary for the "civilization" of Texas. By guaranteeing the right of struggling families to hold onto their homes, the exemption fostered, according to Hemphill, "those feelings of sublime independence which are so essential to the maintenance of free institutions." Judge Lipscomb, Hemphill's colleague, expressed himself even more directly on this point. Misfortune, he wrote, "should not permit the unfortunate to be treated as animals and hunted down, by the aid of the law, as culprits. Where this is not done, some of the most benevolent hearts are driven, by such omissions and defects in the law, into ultraism, socialism, and Fourierism, and an opposition to all municipal regulations." "It is natural," he reasoned, "for the unfortunate to be grateful to those from whom they received aid in their affliction, and they will love and venerate the laws when they protect misfortune, and not force them into the class of culprits." The homestead exemption, in other words, encouraged respect for law and for democratic institutions. Hemphill and Lipscomb no doubt agreed with Senator Thomas Hart Benton, the famous contemporary advocate of free land, who wrote in his memoirs, "The freeholder . . . is the natural supporter of free government." Their judicial opinions relied on the very same principle. Whether agriculturalists or businessmen, Texas debtors could rest assured that the legal system guaranteed protection of their homes and families, a comfort which would, in turn, make them more respectful of the law and more productive as citizens.³⁶ Finally, Hemphill's belief that the exemption preserved the "domestic

³⁵James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison, Wisc., 1956), 66.

³⁶*Franklin v. Coffee*, 416; *Trawick v. Harris*, 316; Thomas Hart Benton, *Thirty Years' View, or a History of the Working of the American Government for Thirty Years, From 1820 to 1850* (1854-56; New York, 1968), 104.

sanctuary" signaled that he had imbibed the mid-nineteenth-century conception of the home as a civilizing influence upon the larger society—that the security of the homestead would help to tame the "wild men of Texas."³⁷

In short, offering a liberal interpretation of the homestead exemption was one way the Texas Supreme Court attempted to "civilize" the frontier. Like most public figures in the nineteenth-century United States, Hemphill imbibed and espoused the language of devotion to liberty and respect for law. These notions, in his mind, were the twin pillars of Anglo-American civilization. Ironically, of course, Hemphill often relied upon Spanish tradition to expand the homestead exemption laws. The exemption, after all, had its roots in the laws of Spain and Mexico, and early upon his arrival in Texas Hemphill had demonstrated an affinity for the "intrinsic equity" of the civil law.³⁸

Despite his deep admiration for the legal system of Spain, Hemphill never expressed a similar admiration for Mexicans or their government. The liberties of white settlers in Texas, while under Mexican rule, he believed, "were threatened with utter extinction." "The dark masses of the enemy," he once wrote, describing the Texas revolution, "were pouring over the land, with havoc and extermination for their watchword—and desolation marking their path." At the same time, white Texas confronted the possibility of war with Indians, whom he conceived as an equally dangerous threat to liberty.³⁹ Mexicans and Native Americans obviously existed outside of the social and political order envisioned by Hemphill. In his mind, only by encouraging white settlement and fostering adherence to democratic principles and the rule of law could the cherished liberties of Texans be ensured.

Judge John Hemphill thus sought to make the Texas frontier a haven for sturdy, industrious homesteaders, who would transform the social and cultural landscape into a "civilized" American state. During this "Age of Discovery" in American

³⁷*Sampson & Keene v. Williamson*, 117. On the notion of the home as a civilizing force, see Barbara Welter, "The Culture of True Womanhood, 1820–1860," *American Quarterly* 18 (1966): 151–74; Catherine Beecher, *Treatise on Domestic Economy* (Boston, 1841); John C. Abbott, *The Mother at Home* (New York, 1833), 159–61.

³⁸*Means v. Robinson* (1852), 7 Tex. 502, 510. During the Republic period, Hemphill often urged those arguing cases before him to take account of the Spanish law, rather than just common law precedents. See *Scott v. Maynard* (1843), Dallam 548, *Smith v. Townsend* (1844), Dallam 569. Moreover, he once noted that he should "much have preferred the civil law to have continued in force for years to come" in Texas. Weeks, *Debates*, 271.

³⁹Hemphill, "Eulogy of the Hon. Thomas J. Rusk," 14.

legal development, Hemphill worked actively to create a body of legal principles conducive to the type of society he envisioned.⁴⁰ The "taming" of the frontier first required a reshaping of the law.

⁴⁰Grant Gilmore, *The Ages of American Law* (New Haven, Conn., 1977), 19–40. Hemphill's activism might also be understood as a continuance of the Spanish tradition of imposing a centralized state in Latin America. The problem with this interpretation, however, is that the Mexican government never exerted much influence on the borderland areas that later became Texas, so statism was weakest in the area where Hemphill eventually served as judge. Nevertheless, see Claudio Veliz, *La tradicion centralista de America Latina* (Barcelona, 1980).

BOOK REVIEWS

Forster vs. Pico: The Struggle for the Rancho Santa Margarita, by Paul Bryan Gray. Spokane: Arthur H. Clark Company, 1998; 256 pp., illustrations, appendices, bibliography, index; \$29.50, cloth.

This book is a model for western legal historians. Paul Bryan Gray uses a historian's tools and a lawyer's insight to analyze the lawsuit between Pio Pico and John Forster over Rancho Santa Margarita in San Diego County. As a historian, Gray sets the case in the larger context of the dispossession of the Californios. As a practicing lawyer, he closely scrutinizes the facts of the case, the evidence presented, and the practice of the attorneys on both sides. When the jury verdict comes in, it is no surprise to readers, but the findings might surprise those who see Hispanic losses in the legal system only in terms of racism. The outcome of the case was not caused by a racist legal system. Lawyers were at fault.

This case touches many facets of California history. First, it involved two of the state's most important nineteenth-century figures: Pio Pico, a Mexican governor, and John Forster, a prominent rancher. Second, the rancho was security for a loan made in the context of a chaotic credit environment. Third, the case was part of a larger story of Mexican dispossession from the land brought about by military conquest, which imposed a new culture, a new tax system, and a new concept of land title. Drought and Mexican improvidence also were part of the etiology of dispossession. Finally, this case was part of a nineteenth-century legal system dependent on a bench and bar schooled more in legal practice than in professional schools.

Gray contextualizes the case with a detailed history of the Pico family and its close relationship with the Forsters. John and Pio were brothers-in-law and shared in the profits of the land business and rancho life. Both Pio and his brother Andres were prominent members of Southern California society.

The transaction is set in its historic and historiographic context, demonstrating the author's remarkable grasp of secondary sources and his adept use of manuscript sources, particularly those of the Huntington Library. Biographies of the lawyers and of Judge Horace C. Rolfe also establish part of the context. Most importantly, Gray explains the issues of

civil procedure, evidence, and witness preparation. Too often, history passing as legal history neglects this critical part of analysis.

Gray does not allow results to drive his interpretation. Rather he looks at the total transaction and its presentation in court. Pio Pico's lawyers were unprepared for trial. They failed to offer any proofs regarding exchange values to establish a factual basis for fraud. Pio Pico claimed that he had agreed to convey a one-half interest in the rancho in return for John Forster's assumption of his debts, but that he had unknowingly signed a deed for all of the rancho. Pico and his lawyers offered a general idea of what the contract should have been, but they "utterly failed to set forth hard facts and details to support it" (p. 169). Further, because of his attorneys' failure to prepare him as a witness, "Pio's turn on the witness stand was a disaster" (p. 170).

On the other hand, Forster's defense was an example of clarity and specificity backed by documents. Given the surrounding circumstances of the transaction and the facts that Forster held rodeos, laid claim to unidentified cattle (*orejanos*)—which only an owner could—paid the taxes, and invested more than \$30,000 in improvements on the rancho, it was no surprise that the jury returned a verdict in his favor after just twenty minutes.

Pio Pico's defeat in court was not the result of a racist legal system. He lost his case because "crucial evidence was not presented to the jury because Pio's counsel failed to recognize it. They were not assisted by Pio or Andres in understanding the case because neither of the Pico brothers had a firm grip on the details of their contract with Forster" (p. 206). The blame falls on bad lawyering, poor client preparation, poor client cooperation, and better lawyering on the other side. Yet the evidence that would have won the case for Pio Pico was entered by Forster, and neither Pio nor his attorneys saw its significance.

Gray explains that Forster's motivation was to keep the ranch from going to Pio's creditors. The author concludes by reviewing the subsequent lives of the participants—lives that were, after all, at stake in this case over a contract and a deed.

Multiarchival manuscript material forms the center of Gray's work, with issues of historiography and ideology clearly delineated. Gray understands and communicates the significance of procedure, evidence, and practice issues. He has produced a model of research and interpretation in legal history.

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On the Limits of the Law: The Ironic Legacy of Title VI of the 1964 Civil Rights Act, by Stephen C. Halpern. Baltimore: Johns Hopkins University Press, 1995; 352 pp., appendix, notes, index; \$55.00, cloth; \$18.95, paper.

For those who believe in using law to promote the interests of racial minorities and are convinced that equality can be achieved through the legal system, these are not the happiest of times. The Supreme Court's ruling in *Adarand Constructors, Inc v. Peña* (1995) is discouraging, as is the likelihood that the voters of California will soon join the regents of their state university in prohibiting affirmative action. Stephen Halpern's *On the Limits of the Law*, a history of Title VI of the Civil Rights Act of 1964, provides further cause for concern, contradicting an optimistic story familiar to students of constitutional law and history. According to that tale, *Brown v. Board of Education*, although a noble statement of principle, failed to bring about the desegregation of southern schools, and the decade of litigation that followed that decision was equally unproductive. But then in 1964 Congress passed Title VI, which forbids any program or activity receiving financial assistance from the federal government to discriminate on the basis of race. That law, and fear of losing their share of a massive congressional appropriation for primary and secondary education adopted the following year, induced southern schools to do what the courts previously had been unable to compel them to do: integrate.

Although Halpern does not deny that Title VI increased integration, he denigrates both that accomplishment and the statute itself. He views *Brown* as part of a historic struggle by African Americans to win equal educational opportunity, as a means to the attainment of greater economic and political power. Title VI and efforts to secure its enforcement side-tracked that struggle into unproductive channels, he believes. Mixing black and white children in schools, which had originally been only a means to an end, became for civil rights lawyers, federal bureaucrats, and even judges the objective of their labors. A well-intentioned effort to counter the Nixon administration's politically inspired unwillingness to enforce Title VI resulted in a sweeping injunction that dictated in great detail how the then Department of Health, Education and Welfare must administer the law. Besides curtailing administrative discretion, this court order left the department without sufficient resources to respond adequately to the complaints of other victims of discrimination, such as women and the disabled, leaving them with little choice but to file lawsuits of their own. It also diverted everyone's attention

from substantive issues regarding the quality of education that black children were receiving (particularly in large, urban school districts) to managerial and procedural questions related to the deadlines that the injunction set for processing cases. In Halpern's opinion, Title VI has provided "the illusion of progress and change, while simultaneously ensuring that the existing social and educational order will not be changed" (p. 12). Its history "should caution us about the limits of law and litigation" (p. 310).

Halpern supports this pessimistic conclusion with impressive research. Although a political scientist, he has examined most of the secondary and published primary sources that a historian would utilize to chronicle the enactment and enforcement of Title VI. He has even made some use of manuscript material, such as lawyers' briefs and letters.

Although well documented, Halpern's account is flawed by the excessive attention he devotes to his own disillusionment with the legal system. The final chapter, entitled "A Personal Epilogue," adds little to the book; in fact, it would be better had he omitted it. What Halpern styles the "Conclusions" of his chapters and of the book as a whole really are not; he has an annoying habit of taking up new issues in these sections and chapters when what the reader needs is a concise summary of arguments already made. Also, at one point he seems to undercut his own attack on litigation as a means of advancing civil rights by asserting that, for political and bureaucratic reasons, federal agencies will enforce firm standards against racial discrimination only if compelled to do so by the courts (p. 304).

Despite these blemishes, *On the Limits of the Law* is a powerful and effective monograph. Halpern's account of the litigation directed at integrating Mississippi's public universities, which reached a climax with the Supreme Court's decision in *United States v. Fordice* (1992), is particularly well done. He writes skillfully and makes a persuasive case for his depressing thesis. Although liberals will not like the book's conclusions, twentieth-century historians, as well as political scientists and lawyers, should read *On the Limits of the Law*.

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Law and the Transformation of Aztec Culture, 1500–1700, by Susan Kellogg. Norman: University of Oklahoma Press, 1995; 285 pp., glossary, bibliography, index; \$34.50, cloth.

Focusing on native resistance to colonial authority, political organizations, economic activities, and religious transformation, scholarship dealing with Spain's presence in the Americas commonly emphasizes either the force of conquest that restructures the indigenous cultures' social organization or the continuity in the successful maintenance by indigenous people of their separate cultural values and behavior. Susan Kellogg finds such traditional explanations incomplete. To complement the usual scholarly emphasis on the role of disease, the exploitation of divisions among indigenous people, and the impact of Spanish technological and military superiority, Kellogg examines Spain's success in achieving "cultural hegemony" over indigenous populations through a transformation of law and legal institutions.

Kellogg's primary concern is the process of transformation, wrought through conflict, negotiation, and dialogue, by which native people drew on pre-Hispanic norms and Spanish values to create a new cultural synthesis distinctly evident in the law's role in cultural conflict and accommodation and its catalytic power to propel and reflect cultural change and adaptation. Without discounting violent resistance, Kellogg argues that, in contrast to the long-lasting rebellion in Mayan and Andean regions, the dominant theme in the Valley of Mexico was "a complex, uneven process of cultural accommodation and negotiation" taking place within Spanish structures, and the legal system (along with the Church) played a significant role in undercutting and transforming indigenous values and normative principles. The indigenous population's reliance on Spanish legal institutes undermined traditional authority and sovereignty and bonded the native population to Spanish power. Conflict and discourse in contested legal cases frequently pitted pre-Hispanic and Hispanic views of property, family, gender, kinship, and inheritance against each other. Building on a highly developed legal system, Spain succeeded in establishing in the Valley of Mexico a legal system influencing native beliefs and behavior, channeling conflict, and diffusing indigenous discontent. Law is seen as a tool of cultural hegemony, supplying models of belief, behavior, and language through which conflict was resolved within indigenous society and between Indians and Spaniards.

To support this view, Kellogg examines court records (mainly the Real Audiencia) of Tenochican Mexica, focusing on the rhetoric and form of argument employed by indigenous

people to prove or legitimate property ownership. Focusing on property rights, gender, kinship, and inheritance, Kellogg describes shifting patterns of legal argument and discourse between 1500 and 1700. During this time, property claims based on chains of inheritance and customary land use gradually yielded to rights predicated on purchase or inheritance from a parent who had acquired property by purchase, grant, donation, or rental. The rights, status, and juristic position enjoyed by women in the pre-Hispanic period declined as husbands became driving forces in litigation. Inheritance claims, which, in the pre-Hispanic period, were based on links spanning two to five generations among wide sibling groups, gradually become rooted in shallower genealogies (one or two generations) and patrifilial relations. Drawing from Spanish legal codes and Catholic beliefs, Spanish judges eventually were not willing to recognize ownership claims based on extended kinship relations; instead they emphasized marital relations or parent-child ties, so that by the seventeenth century litigants frequently made wills framing legal argument into terms of relations based on nuclear families or on parent-child, rather than sibling, ties. Between 1500 and 1700, litigants shifted their arguments from customary rules, a rigid hierarchy, and kinship patterns to wills, bills of sale, and grants. Moving away from paternalistic regard for the individual circumstances of indigenous people, judicial decisions increasingly reinforced the legitimacy of property sales and conveyance, replete with some less-than-savory racial overtones marked by a tendency to reject valid Indian documents as false while honoring fraudulent non-Indian documents.

Kellogg's study, which primarily contributes to an anthropological debate, provides the legal community with insight into the dynamics by which law, as an image of core values and a shadow of institutional process, is formed and shaped. By carefully describing the actors in the legal drama, the author clarifies and brings to life the exotic ways of a distant people; her useful diagrams and glossary aid the uninitiated in penetrating complex legal relationships and language. For members of a modern legal community too frequently embroiled in a process not unlike that described by Kellogg, this study offers a retreat into a sophisticated past that may lead to a better understanding of how cultural dialectics framed in legal discourse, argument, and process yield normative syntheses that, for lack of a more precise description, we describe as law.

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Land Grants and Lawsuits in Northern New Mexico, by Malcolm Ebright. Albuquerque: University of New Mexico Press, 1994; 399 pp., illustrations, notes, bibliography, glossary, index; \$27.50, paper.

Malcolm Ebright's *Land Grants and Lawsuits in Northern New Mexico* contributes significantly to the history of private land grants in New Mexico. Having first established the broader legal and historical context, Ebright explores the subject through the disputes over five land grants. In these case studies Ebright seeks to explain how and why New Mexico Hispanics lost considerable land and water rights under the American legal system. He traces the history of the settlement of each selected land grant under the laws and customs of New Mexico prior to 1846 and then examines their adjudication by the United States.

The book's central theme is that an injustice was perpetrated by the United States on Hispanic land grant claimants. Ebright asserts that the U.S. Court of Private Land Claims rejected most of the land claims after misapplying the law. The crucial failure of the American courts, according to Ebright, was in not recognizing that the settlers on a community land grant possessed both communal rights—designed to remain inalienable—and rights to alienable, private lots. The court's disregard for this distinction led to erroneous legal decisions denying claims, as well as to practices (such as partition suits) that wrongfully converted community land into private property.

Ironically, the source of the book's strength is also its primary weakness. Ebright's strongest suit is the clarity of his argument and his systematic assembly of evidence supporting his conclusion of inequitable adjudication of these claims. The single-mindedness of his argument establishes his book as forensic or argumentative history. Ebright employs alternative arguments to advance his central conclusion (a time-honored technique in legal argumentation) and marshals evidence to buttress his claim that earlier courts committed reversible error. Ebright states his objective clearly: "It is necessary to acknowledge the error of earlier court decisions if there is to be any hope for justice in current litigation with the government (state or federal) concerning land and water rights in New Mexico" (p. 54). Indeed, "[b]y documenting the unfairness and injustices that accompanied land loss in New Mexico, history can be made to bear witness to current policy and legal decisions" (p. 272).

There is nothing inherently wrong with forensic history; indeed, as legal historian John Phillip Reid has pointed out, it

may very well serve salutary contemporary purposes. Rectifying unjust past judicial decisions arguably constitutes such a purpose. But the point is to recognize forensic history for what it is and is not. Ebright acknowledges that much study of New Mexican land grants has been stimulated by ongoing litigation, but too lightly dismisses its consequences for historical inquiry. Quite simply, history in the service of legal goals begins with a conclusion and works backwards to advance the best evidence consistent with its objectives. On the other hand, the goal of studying history is to approach the past on its own terms, striving to assess historical sources objectively and control one's preconceptions about the meaning of those sources. The attainment of historical objectivity—which ultimately is impossible—is less the point than the self-conscious subordination to that ideal. Forensic history not only eschews the constant struggle to deal even-handedly with historical evidence, but explicitly embraces that which most historians try hardest to avoid: partisan interpretation.

The ultimate problem with forensic history is that by its nature it rigorously oversimplifies the past, driven by the necessity to establish a winning argument supported by incontrovertible evidence. The past on its own terms is rarely so uncomplicated, and New Mexico's land grant history is no exception. The loss of land is clear, but in characterizing that loss Ebright cannot afford to dwell on ambiguities and undercurrents that undermine his central theme that bad faith by the United States in the adjudication of the land grants warrants contemporary legal relief. No matter that much of the underlying dynamic entailed sheer ignorance rather than bad faith and that considerable land losses occurred at the hands of Hispanic speculators and sharp-dealers as well as government officials. Ebright is too conscientious not to acknowledge, if only parenthetically, such countervailing trends. But he deals with them as aspects of the historical record that need to be minimized because they undermine the depiction of the United States government as liable in deliberately denying valid land claims.

In the final analysis, *Land Grants and Lawsuits in Northern New Mexico* represents thorough research into the primary documents dealing with land grant legal history in New Mexico. It is an important achievement and a valuable contribution to our knowledge. However, the full and balanced story of New Mexico's land grants—with all their complexities, subtleties, and ironies—still remains to be written.

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Delinquent Daughters: Protecting and Policing Adolescent Female Sexuality in the United States, 1885–1920, by Mary E. Odem. Chapel Hill and London: University of North Carolina Press, 1995; 266 pp., illustrations, notes, bibliography, index; \$39.95, cloth; \$14.95, paper.

Recent political campaigns have been laden with children's issues. How timely, then, to have Mary Odem's book to put many of these issues into historical perspective. In the late nineteenth and early twentieth centuries, writes Odem, "the sexuality of young single women became the focus of great public anxiety and the target of new policies of intervention and control by the state" (p. 1). Reformers called for laws to protect the chastity of teenage girls. Special courts were convened in which the girls themselves were disciplined for failing to guard their chastity.

Odem's book traces two stages of legal reform and their effects. Initially, in the 1880s, women activists campaigned nationally to raise the age of sexual consent from 10–12 years to 16–18 years of age. They believed that naive young "fallen women" had been victims of male seduction; the solution was to prevent men from preying upon young girls. The second stage, after the turn of the century, involved Progressive reformers and social workers. They did not see girls as passive victims, but as sexually active "delinquents" acting under immoral societal and family influences. New measures strove to control the young women rather than their male partners. Thus, the first women police officers, juvenile courts, juvenile detention centers, and reformatories were instituted.

Odem asserts that protecting and policing girls' sexuality was fueled by gender, class, race, and ethnic tensions. Age-of-consent reformers challenged male privilege and the sexual double standard. Middle-class Progressives targeted poverty and job-related issues that threatened vulnerable working women. Yet they were also disturbed by the girls' sexual autonomy. While women reformers worked to reverse the double standard that resulted in harsh treatment of female moral offenders but released their male counterparts, they participated in coercive measures to control the lives of the girls and their families. This need to control was prompted by racist and eugenic ideas that deemed immigrants, native peoples of color, and the poor as innately oversexed, depraved, and/or feeble minded. Reformers instituted a "maternal justice" in juvenile court to forcibly "guide" these families to middle-class standards of propriety.

Odem argues that the reformers lost control of the criminal justice system's handling of the new state protections and

institutions involving young women. Policemen sympathized with male statutory rapists—even letting them go—yet they apprehended girls for sexual misconduct or being in “moral danger.” Even new women officials became part of repressive policies toward girls who violated middle-class notions of purity and femininity. They humiliated girls in court by demanding specific details of their sexual pasts, just as male jurists had done; they removed girls from parents over all parties’ objections; they subjected all detained girls to mandatory vaginal exams; and they quarantined and confined girls—but not boys—in detention centers who had venereal disease.

Odem’s final point is that, in nearly half the cases in 1920, family members used the juvenile court to discipline teenaged delinquent girls. The social and sexual autonomy of working daughters, then, was also a source of family conflict that led them all to court.

Delinquent Daughters is really two stories: One is the story of middle-class women’s efforts to expand their authority within the legal system; the other is that of the teenagers—girls who were seeking intimacy or excitement, rebelling against rigid standards of behavior, or using sex “as a strategy for survival in the face of poverty, abuse, and family hardship” (p. 187). As such, *Delinquent Daughters* covers an immense amount of material useful for lawyers, social workers, historians, or casual readers interested in the intersection of female sexuality and the law. The book teaches readers much about Progressive reform and growing class, racial, and ethnic tensions, as well as the impact of gender ideology on the law and vice versa.

Because of the importance of these two stories—their ties to past and present issues—*Delinquent Daughters* is rich enough to be two books. I found myself asking questions about women social workers, lawyers, and doctors involved in other aspects of child protection reform during this period and what their connection was to Odem’s players. And the girls’ struggle with the legal system is certainly ripe for further exploration. Yet these questions attest to the strength of Odem’s research. *Delinquent Daughters* provides a glimpse of cause and effect when individuals call on government to “protect” its citizens. Moreover, it reveals that efforts to restructure law and order may ultimately serve to maintain the status quo. For despite the reformers’ “successes,” Odem reminds us, sexual exploitation of women flourished.

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Lone Wolf v. Hitchcock: Treaty Rights and Indian Law at the End of the Nineteenth Century, by Blue Clark. Lincoln: University of Nebraska Press, 1995; 182 pp., illustrations, appendices, notes, bibliography, index; \$37.50, cloth.

Blue Clark has taken a reflective look at a much-cited Supreme Court decision, and warns that Indians still need to be vigilant as another century turns. The case, *Lone Wolf v. Hitchcock* (187 U.S. 553 [1903]), is reprinted in the book as an appendix. The rest of the book is the commentary.

Lone Wolf not only approved the confiscation of Indian lands at the turn of the last century, but for nearly eighty years the case more or less rationalized the pattern of broken treaties and fraudulent agreements by which consent was obtained for massive disinheritance. The case had its juridical roots in the Treaty of Medicine Lodge, 1867, which became one of many chapters in our history as a colonial power in lopsided competition with its aboriginal inhabitants over the use and enjoyment of land.

The man who gave his name to the *Lone Wolf* case observed the shrinking reservations, the allotment of lands to individuals, and the rapid changes in the honoring of treaties. The allottees could be, and shortly were, induced to alienate their allotments to speculators, ranchers, railroads, and both wholesale and retail opportunists. These groups all had more clout in Congress and in the courts than did the Kiowas, Comanches, and Plains Apaches.

Lone Wolf, a traditional Kiowa leader, lived until 1923 and saw the beginnings as well as the aftermath of his bill in equity. The issues were familiar political issues of the day: Did Congress have the power to abrogate treaties with Indians? Yes. Did the takings clause of the Fifth Amendment apply? No. Was the exchange of land for money merely a change in the form of a trust investment? Yes. Did the political interests of white settlers trump the treaty rights of Indians? Yes. How much fraud had to be proven to overcome the presumption that the government agents had acted in good faith? Fraud did not matter. And so on. A large portion of Oklahoma was at stake. Railroads had opened the West. Cattle had replaced bison as the harvesters of grass. Something had to give. In thirty-six short years, the Treaty of Medicine Lodge became just another scrap of paper.

To nobody's surprise at the time (except possibly that of Lone Wolf and his supporters), Justice Edward Douglas White delivered the unanimous opinion of the court. The court used all the familiar rhetorical tools to work the will of manifest destiny. It said, for example, that the judiciary "cannot ques-

tion or inquire into the motives which prompted the enactment of this legislation" and that "if injury was occasioned, which we do not wish to be understood as implying," relief must be sought in Congress and not in the courts (187 U.S. at 568). In 1978, 110 years after the Treaty of Fort Laramie, the results of which for the Sioux Nation were similar to those for the Kiowa and Comanche, and an even century after the statute which deprived the Sioux of most of their lands, Congress did enact legislation that permitted redress in the U.S. Court of Claims for property taken in violation of the Fifth Amendment. But that came too late to do much for Lone Wolf and his fellows.

Some cases get overruled, others just wear out or rust out with the passage of time and from the intentional or unintentional failure of other courts to cite them. Neither fate overtook *Lone Wolf*. Clark points out that when he "Shepardized" the case, he found it to be one of the most cited cases in all of federal Indian law between 1900 and 1980 when *Sioux Nation* at least limited the plenary power of Congress over Indian property by applying constitutional principles, including the takings clause. But *Lone Wolf* has not been overruled, and Congress still has plenary power, somewhat limited as it may be. In *Sioux Nation of Indians v. United States* (601 F.2d 1157 at 1173), the U.S. Court of Claims, with new legislation in hand, held for the Sioux that the Act of February 28, 1877 constituted a taking for which damages had to be paid. Judge Nichols, concurring in the result, characterized *Lone Wolf* as "the Indians' Dred Scott decision." The Supreme Court affirmed in *Sioux Nation v. United States* (448 U.S. 371 [1980]), where Justice Blackmun characterized *Lone Wolf's* reasoning as "discredited." In distinguishing *Lone Wolf* on the political question issue (the power of courts to review acts of Congress with respect to the plenary power to deal with Indian property), the Supreme Court did reject the dogmatic approach of *Lone Wolf*, and did assert the power of judicial review. But *Lone Wolf*, though wounded, lives on.

Although the last half of the nineteenth century was a disaster for tribal use and enjoyment of traditional lands and for the lifestyle and culture of the tribes, the last half of the twentieth century has belatedly offered a variety of remedies short of giving back any substantial amount of land. A combination of liberal guilt, antipathy to colonialism and racism, and the employment of better lobbyists than those that flourished in the Washington environment of the last century has produced legislation such as the 1978 act that opened the way for the U.S. Court of Claims to grant "takings" relief to the Sioux a century after the fact of the taking. Other no doubt

well-intended legislation has produced a few native millionaires from tribal gambling concessions, and other legislation and affirmative action in the Bureau of Indian Affairs has produced some modest steps toward self-government and education for life in a modern technical economy.

The book is well written, well documented, and makes a significant contribution to the kind of history we were never taught in public schools. As usual with academic printing, a lot of good material is relegated to the endnotes, and one must go back and forth with two bookmarks to get the most out of the work. But it is worth the effort, especially for those who are interested in Indian law and in a good case with which to start.

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Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law, by Lucy E. Salyer. Chapel Hill: University of North Carolina Press, 1995; 338 pp., illustrations, appendix, notes, bibliography, index; \$45.00, cloth; \$17.95, paper.

The publication of this book is timely for a variety of reasons. There are not many scholarly studies on how local and state government attempts to restrict and exclude Chinese immigration during the nineteenth century have shaped the immigration and naturalization laws crafted by Congress. This is one reason why Salyer's book is important. Another reason why this book should be a cause for celebration for immigration historians and the general reader is the current debate regarding restricting immigration to the United States.

The present volume presents the author's understanding of how Chinese immigrating to America became frustrated by government attempts to restrict and exclude them legally, of how they coped with such legal instruments through litigation in federal courts, of how Chinese litigants drove a wedge between immigration law administrators and federal courts, and of how the finality clause in the 1891 immigration law that denied the immigrant a judicial review came to be conceived and legislated by the Congress of the United States.

The book is divided into eight chapters and an epilogue. The chapters are grouped into three major sections. Chapter 1, "From Counting to Sifting Immigrants," stands alone probably because the author uses it as an introduction to her argument

that "judicial justice" had been operative in the administration of immigration laws between 1891 and 1905, while executive justice had been functioning in enforcing immigration laws between 1905 and 1924. In chapter 1, the author explains how Congress came to legislate the 1891 immigration law in response to various charges that states were incompetent to enforce immigration laws. The finality provisions in this law were very important because not only did they restrict judicial review in immigration cases, but they also established a dual system of administration of immigration laws—one for the Chinese immigrant and the other for all other immigrants. The author also discusses the doctrine of inherent powers of sovereignty used by Justice Stephen F. Field when the U.S. Supreme Court handed down its decision in the case of *Chae Chan Ping v. United States*. In view of the grave importance of this doctrine in influencing litigation of subsequent Chinese immigration cases, a more thorough explanation of the doctrine by the author could have helped those who are still confused about why the doctrine was not consistently maintained by Justice Field in his decision in the case of *Fong Yue Ting v. United States*.

In chapter 2, "Contesting Exclusions: The Chinese and the Administrators," the author examines the process established to administer justice in implementing exclusion laws, and analyzes the government's reasoning for the process and the criticism it received from the Chinese community. Chapter 3, "Captives of Law: Judicial Enforcement of the Chinese Exclusion Laws," examines how Chinese organizations in San Francisco developed litigation strategies to fight blatantly unjust exclusion laws. Chapter 4, "The Eclipse of Judicial Justice," examines the process through which the court lost its jurisdiction over immigration.

The case of *Ju Toy*, decided on May 8, 1905, was a catalyst in bringing about a major shift from judicial to executive justice in administering Chinese exclusion and deportation cases. In delivering the majority opinion, Justice Oliver Wendell Holmes stated that the Chinese litigant did not have the right to a habeas corpus proceeding. Furthermore, he ruled that the decision made by an executive officer responsible for implementing exclusion and deportation laws constituted due process.

In chapter 5, the author examines how these two aspects of immigration law in the United States have been applied further to other immigrants under the strong influence of nativism. Chapter 6, "Bureaucratic Tyranny: The Bureau of Immigration and Its Critics," examines a variety of criticism leveled against the Bureau of Immigration for its summary

procedures, while the following chapter shows the failure of this criticism in bringing about even modest changes to the judicial barriers. The last chapter shows what happened when the Bureau of Immigration, an administrative instrument, was left alone to implement immigration laws that continued to deny aliens' rights.

Lucy Salyer has made a tremendous contribution to our understanding of how legal alien residents gradually came to lose their constitutional rights in the United States. What is stunning to most of us who have studied the legal history of Asian immigration to America is that "executive justice" continued to function for so long; it was "executive justice" that left American citizens of Japanese ancestry unprotected by the Constitution during World War II because they seemed to be like Japanese "enemy" aliens.

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The Chief Justiceship of Melville W. Fuller, 1888–1910, by James W. Ely, Jr. Columbia, S.C.: University of South Carolina Press, 1995; 248 pp., illustrations, bibliography, table of cases, index; \$49.95, cloth.

Only John Marshall and Roger B. Taney have served longer as chief justice than Melville W. Fuller. Despite Fuller's long tenure, the reputation of the Fuller court has never been a particularly lustrous one. The consensus among historians has ranked the Fuller court among the worst, and Fuller himself fares no better, often being dismissed with derogatory remarks.

Against this backdrop, James W. Ely, Jr. has undertaken the valuable and challenging project of reassessing the court's work during Fuller's tenure and, in a number of areas, making the case that the traditional criticisms are unjustified or at least overstated. This is the first volume in a contemplated series, with each book in the series examining one or more chief justiceships. Herbert A. Johnson, the general editor of the series, in his preface to Ely's volume describes Ely's approach as "mildly revisionist" (p. x), but that is an unfairly bland description of a forceful book. Ely takes on Fuller's critics at every turn, and—if one accepts his conclusions—more than a mild revision of the prevailing view of Fuller's era is called for. Ely argues that "the jurisprudence of the Fuller years may be seen as pointing toward modern American society" (p. 214) and that the Fuller court "made an enduring contribution to

the constitutional system by establishing the Supreme Court as a key participant in American governance" (p. 215).

Ely provides a detailed and informative description of Fuller's roles as a congenial chief justice organizing the internal operations of the Supreme Court, a conciliator adept at melding the nine justices into a harmonious court, and a lobbyist effectively securing for the federal courts the much-needed procedural reforms contained in the Circuit Court of Appeals Act of 1891. At the same time, Ely concedes that "Fuller did not lead the Court by the force of his ideas, and he delivered few significant opinions" (p. 70). Even so, Ely generally finds something of merit in discussing each of Fuller's opinions, and in this respect even mild revisionism may go too far.

Ely canvasses the work of the court during Fuller's tenure in a manner that is thorough, balanced, and reliable. Often, he carefully marshals evidence to show that criticism of Fuller and his colleagues has been unreasonably harsh, and he endeavors to refute "the old image of the Supreme Court as a servant of business interests" (p. 69), to defend the court against the charge that it was "a partisan of the wealthy" (p. 123), and to establish "that the Fuller Court was no monolith dedicated to defining congressional power over commerce in narrow terms" (p. 140). One strength of the book is its broad coverage of the issues coming to the Supreme Court during Fuller's service as chief justice, coupled with a calm and informed analysis of the court's degree of success in handling the questions. However, the book fails to analyze rigorously and in depth the major controversial cases that remain of current interest. Thus, *United States v. E.C. Knight Co.*, *In re Debs*, *Pollock v. Farmer's Loan & Trust Co.*, and even *Plessy v. Ferguson* and *Lochner v. New York* are dealt with in only summary fashion.

Ely's effort to rehabilitate the reputation of Chief Justice Fuller and his associates is composed of three principal strands. The first two strands, offered to rebut the charge that the justices acted "as the single-minded champions of corporate interests," provide a more complete picture of the degree to which the decisions handed down by the court were based both on a principled "solicitude toward property rights and the growing national market" and on the desire "to preserve a large measure of autonomy for the states in handling social issues and criminal justice" (p. 213). However, the relatively cursory treatment that Ely gives to the most important cases seriously undercuts his ambitious effort to challenge the validity of the traditional criticisms of the Fuller era.

The third strand of Ely's argument is that, whatever we may think of such cases as *Lochner* and *Plessy*, the "justices shared

the economic and social views of the age and spoke for the dominant political alliance. . . . The Court tended to ratify majoritarian preferences and rarely challenged legislation clearly reflecting the wishes of the majority" (pp. 213–14). That may be an accurate description of what the court did under Chief Justice Fuller's leadership, but it does not amount to much of a defense of the court's work. The responsibility that Chief Justice Marshall claimed for the Supreme Court in *Marbury v. Madison* was that of going against the prevailing political winds in appropriate circumstances. While the Supreme Court has been more successful in carrying out this mission at some times than at others, even after considering Ely's defense of the chief justiceship of Melville W. Fuller, few will assert that the Fuller era represents a high watermark in our constitutional history.

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Jailed for Freedom: American Women Win the Vote, by Doris Stevens. Reprint edited by Carol O'Hare. Troutdale, Ore.: NewSage Press, 1995; 220 pp., illustrations, appendices, bibliography, index; \$12.95, paper.

It boggles the mind that until recently, comparatively little was known or taught about the heroism and the passion of the suffragettes in their struggle for the right to vote. With the exception of an occasional reference to Susan B. Anthony, an early leader in the movement, or an amused remark about "women chaining themselves to the White House fence," this period of history has been hugely neglected. All the more welcome then is this seventy-fifth anniversary edition of Doris Stevens' work—not only as a chronicle of events in which the National Woman's Party (NWP), under the leadership of Alice Paul, played such a significant role, but as a penetrating study of a political movement during the time when its leaders were gaining in militancy and political acuity.

At first the activities of the protagonists were fairly low key, at least by today's standards. In their campaign for a congressional committee to study the issue of suffrage for women, the leaders were willing to meet and confer. And the congressmen, while disguising their lack of interest, did go through the motions without actually doing anything of substance. But as the perception grew that little or nothing was being accomplished by Congress, a more militant and inventive faction began to emerge. Finally tiring of the lack of

congressional response, this faction decided to stage a parade to focus the incoming president's attention on the issue of suffrage. On March 3, 1913, the day before the inauguration, Inez Milholland led eight thousand women up Pennsylvania Avenue until the women were attacked by an "unruly mob." Order was not restored until the U.S. Cavalry intervened.

President Woodrow Wilson, in referring to the "agitation," expressed the view that the matter should be "settled" by the states and not by the federal government, an opinion shared by a number of women outside the NWP. The president said that unless he was "instructed" by members of his own Democratic Party to push for federal suffrage, he could do little more than express his personal support.

Congress would remain immovable, the suffragists believed, without a presidential "push," and when it was not forthcoming, they turned to states in the West where women's suffrage was already the law. In 1914 and again in 1916, women voters were asked to defeat Democratic candidates opposed to suffrage for women. Although only twenty of the forty-three Democrats running for office in the nine suffrage states were elected, the president and Congress continued to be unperturbed.

With the death of Inez Milholland, the NWP leadership stepped up the fight. When the presentation of a memorial resolution was rebuffed by Wilson, the NWP turned to Alice Paul's proposal for picketing the White House. The president's seeming indifference to these "silent sentinels" turned to irritation as the country entered World War I. With the approach of his second inauguration, Wilson summoned the District of Columbia's chief of police to tell the women that if they did not stop picketing, they would be arrested. They did not stop, and the first women to be arrested were charged with "obstructing traffic." They were released on their own recognizance. When the picketing continued, the later arrests resulted in trials, and the convicted women were given the choice of fines or jail. At Alice Paul's trial, she and several other members of the NWP refused to enter pleas on the grounds that they were "an unenfranchised class" with "nothing to do with the making of the laws which have put us in this position." The women were found guilty, but their sentences were suspended.

The next time Alice Paul was arrested, she began a hunger strike and, after three days, was given a psychiatric examination, a tactic sometimes used to discredit political activists. Paul and other prisoners were subjected to the horrors of forced feedings. Eventually the women were released, and the president made his first declaration of support for federal

suffrage, advising a committee of Democratic congressmen to vote in favor of a constitutional amendment granting women the right to vote.

The amendment passed in the House, but failed in the Senate by two votes. The women discovered that, even after Wilson's first inclusion of a suffrage message to Congress, they were no nearer to achieving the support they needed. In a reaction, the NWP decided in December 1918 to burn Wilson's speeches on the topic of democracy. The first "watchfire" was lit on New Year's Day in 1919, in direct view of the White House. When the Senate again defeated the amendment in 1919, this time by only one vote, they burned Wilson's portrait. Another "watchfire" was set on Boston Common when President Wilson landed at the harbor on his way home from the Paris Peace Conference.

In an attempt to induce the president to call a special session to vote on the passage of the amendment, yet another demonstration was staged on March 4, 1919, when Wilson went to New York. During his address at the Opera House, the demonstrators were attacked by the police. These demonstrations did not go unnoticed by the Republican majority in the 66th Congress. On May 21, 1919, the measure was passed in the House by a vote of 304 to 89. It passed the Senate on June 4 by a vote of 66 to 30. The Nineteenth Amendment was submitted to the states for ratification, and on August 6, 1920, it became the law of the land. All women were permitted to vote for the first time in a national election in November 1920.

While one can only speculate, one does wonder: If women had had the vote at an earlier date, would they have influenced the Senate to vote for the entrance of the United States into the League of Nations, instead of against it?

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The Black Book and the Mob: The Untold Story of the Control of Nevada's Casinos, by Ronald A. Farrell and Carole Case. Madison: University of Wisconsin Press, 1995; 286 pp., illustrations, appendices, bibliography, index; \$44.00, cloth; \$17.95, paper.

How does legalized gambling survive, given the common belief that where gambling exists, the mob cannot be far behind? *The Black Book and the Mob* promises, by its subtitle, to tell an untold story, one that, presumably, will outrage

the reader as to the heretofore hidden truth about the control of the casinos. It is a promise that goes unmet.

The Black Book is the common name for the "List of Excluded Persons." Originally neither black nor a book, the list was established in 1960, and since then thirty-eight people have been entered. Listed persons truly are excluded—they cannot enter the casinos to gamble, drink, or do anything else. A Nevada statute now authorizes regulators to enter people in the Black Book if they meet certain criteria, including having a "notorious or unsavory reputation" that would adversely affect public confidence that the gaming industry is free from criminal elements.

The authors trace the history of the Black Book—an early period when eleven names were entered, the "relative calm" when Howard Hughes became heavily involved in Las Vegas in the mid-1960s, and then a period following 1985 when a large number of names were entered. In large part, this history consists of vignettes describing the people entered on the list and the proceedings for their entry. Unfortunately, that really is the most that this book has to offer. The authors are grounded in the discipline of sociology—Ronald Farrell is a professor of criminal justice and Carole Case is an associate professor of criminal justice, both at the University of Nevada, Las Vegas—and they argue a sociological thesis. Regulators used the Black Book as a symbol, they say, to control the industry in the face of perceived threats, by overdramatizing the evil of the people included and focusing on outsiders, mostly Italians who migrated from the Midwest and Northeast.

Except for a description of the early period, however—the Mormon background and culture, and the division between northern and southern Nevada—*The Black Book* lacks a development of context from which these theories could be established. The story of the threat that Nevadans perceived is sparse. In *Marshall v. Sawyer* (301 F.2d 639 [9th Cir. 1962]), a decision concerning one of the persons entered in the Black Book, a concurring opinion lays out the perceived threat as of 1962. There, Judge Pope took the unusual step of taking judicial notice—that is, the facts are so apparent that they need not be proven by evidence—that Nevada could not afford to lose its gambling business because of the tax revenues, that Nevadans hold the justifiable fear that the wrong kind of people will come into the industry, that gambling tends to attract the criminal element, and that if not controlled by the state authorities, it would be controlled by the federal government, which has the power to do so. The authors quote a portion of this opinion, but they do not appear to appreciate the importance of a judge on the Ninth Circuit Court of

Appeals stating that judicial notice may be taken of these matters. Nor do the authors develop the context much beyond this. What were the political figures saying at the time? Were campaigns focusing on these perceptions of threat? Was the federal government in fact putting pressure on the Nevada state government to do something or risk federal intervention?

A similar void surrounds the later period. The authors mention a 1985 gubernatorial mandate to revitalize the Black Book. From aught that appears, that mandate materialized out of thin air. What political forces shaped it? Who are the politicians who championed it, and why? Did federal intervention loom at that time? These questions, too, remain unanswered.

While the vignettes themselves are interesting, they also often are left hanging. The authors present the case of William Gene Land, entered into the Black Book in 1988 on the basis of a 1984 transgression of cheating at blackjack. Land made a moving appeal against entry, stating that entry would tarnish his family's reputation, too, and that his only reason for being in Nevada was to seek help for his cancer-ridden wife and to visit his children. Still he was entered in the Black Book, although his was the only non-unanimous entry. What is to be made of this supposed deviation (if I may use a sociological term, but in the vernacular) from the kinds of transgressions that landed others in the Black Book? Again, the authors leave us wondering.

In the end, we are told that everyone listed in the Black Book had been convicted of felonies, 90 percent of which had been gaming violations. For the most part, these are not particularly sympathetic individuals to support the claim that the exclusion process has been misused, and the authors' thinly veiled criticisms sink under the weight of this one salient fact. They do not make things better by apologizing for this fact, stating that constant surveillance may be the reason for the high conviction rate—the Black Book entrants got caught because they were being watched.

This book is a disappointment. So much more could have been done with the history, politics, and concerns raised by guilt-by-association and selective prosecution. In the end, however, the authors have left us unconvinced that the Black Book did much at all, either actually or symbolically; that is too bad, for a book and a subject that promised so much.

Hon. Ralph Zarefsky
Magistrate Judge, U.S. District Court
Central District of California

ARTICLES OF RELATED INTEREST

Below we list articles recently published in journals of history, law, political science, and other fields that we believe may be of interest to readers. Although comprehensive, the list is not definitive, and the editor would appreciate being informed of articles not included here.

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Compiled with the assistance of Helen Petersen.

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