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Cover Photograph: The Ninth District Court of Appeals building in San Francisco remained closed for repairs for more than four years after the Loma Prieta earthquake of 1989. (Courtesy of Lauren Bruder)

The Prohibition Agency's First Case: Official Zeal, Mistaken Identity, and Murder in Wyoming, 1919

Phil Roberts

On a cool September evening in 1919, thirty-three-year-old Frank Jennings was returning home to his family ranch, twenty miles north of Laramie. The son of former legislator Isaac N. Jennings, the young man had driven to Laramie earlier in the day to take his girlfriend, Viola Boughton, to the movies. Boughton, who worked as a stenographer at the University of Wyoming, remembered watching young Jennings pull his black Franklin touring car away from the curb in front of the apartment house where he had dropped her off. He clamped a cigar he had recently purchased at Cordiner's Drugstore firmly in his mouth and drove away.[1]

The next afternoon, the Reverend F.S. Delo, pastor of the Trinity Evangelical Church, and another man were returning from Rock River when they saw a car off the side of the Lincoln Highway some 3-1/2 miles north of Laramie. As they passed, the pastor noticed a raised knee barely visible over the dashboard. When they stopped to take a closer look, they found Jennings's body lying across the front seat. He had been shot at least three times in the head. One-third of a cigar was found in his lap. Apparently, he had been dead for hours.

The discovery led to a massive manhunt that ended with a surprise. Almost from the beginning, the case was to call into question the desirability of a state law enforcement agency being given broad powers to investigate Prohibition cases and

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[1]The story is drawn from the testimony in the case of *State v. Cordillo,* from the district court file held in the Wyoming State Archives.

bring actions anywhere in the state. Jennings's killers worked for Wyoming's newest agency charged with enforcing the Prohibition laws.

Except for federal officers with statewide jurisdiction, law enforcement in Wyoming before 1919 consisted of county sheriffs, local constables, and an assortment of other municipal officers. No centralized state law enforcement existed. It was clear to supporters of Prohibition that uniform enforcement would not be possible through conventional agencies. Many sheriffs and town officials either opposed Prohibition in principle or dismissed it as "unenforceable." With such local resistance toward the new law, Prohibition supporters demanded creation of a specific agency charged with that duty.

Members of the Anti-Saloon League had been very active in passage of the Prohibition Act in Wyoming. When it came time for the legislature to pass enabling bills to enforce the law, Governor Robert Carey turned to members of the league for help. Soon after the governor's message, which also included comments about Prohibition, the president of the state senate appointed a "Prohibition Committee" to consider measures to enforce Prohibition.[2] The Anti-Saloon League, already on record supporting centralized enforcement, was heavily represented. In fact, at least one of Carey's advisors claimed that the league's state president, Fred L. Crabbe, actually selected the committee from their various chapters to write the law. Crabbe himself took a leading role in the committee's deliberations.

The Republicans held the overwhelming majority in both houses of the legislature, and some of the leadership reportedly were unhappy with what they saw as Governor Carey's abdication of the issue to a nonelected group. Their unhappiness turned to anger when Crabbe's committee, without consulting with party leaders, had a legislator, state representative William E. Harden of Fremont County, introduce the bill. As one leading Republican put it years later, "Crabbe had evidently gathered pieces of prohibition bills from all the states of the Union and had tried to put them together, all the time having in mind that the bill was being built around a prohibition commissioner instead of the matter of first formulating a scheme for the practical operation of the law."

[2]A.C. Fonda, a Guernsey Republican, was named chairman. Other members were Archie Allison, Cheyenne; Clarence Gardner, Afton; and C.D. Oviatt, Jelm. The only Democrat appointed was Charles Myers of Knight, Uinta County. *Senate Journal*, 1919, p. 27. The Republicans held a 54–11 majority in the house.

Crabbe's motive, according to the writer, was the expectation that he would be named Prohibition commissioner.[3]

Governor Carey had not seen the bill until after it was introduced. He, too, was shocked at the sloppy draftsmanship and apparently was worried about the wide range of authority the law would place in the hands of the director. But Carey, aware of the political sensitivity of the issue, asked a close advisor, Cheyenne lawyer T. Blake Kennedy, to work with Crabbe and Harlan to come up with a cleaner proposal. During the meeting of the three men, Kennedy pointed out the deficiencies. After an hour, Harlan gave up and told Kennedy to take care of it. Both Kennedy and Crabbe were lawyers. After a short time, Kennedy was left to use his best judgment, Harlan still insisting that the bill remain close to his original framework. It took Kennedy much of the night to rewrite the document, retaining the proposed establishment of a centralized agency. The next morning, Carey read the revised draft and asked that Kennedy have it introduced as a substitute for the earlier bill. Kennedy urged him to allow the Anti-Saloon League committee to look at it first. The group concurred with the new language, including a provision allowing for sale of "2 percent beer."

When the measure finally reached the legislature, angry telegrams started pouring in from around the state. The proposed statewide enforcement mechanism was not the problem; angry temperance constituents insisted that the "2 percent beer" provision be stricken from the bill. Kennedy, who had fashioned the new law with the approval of the Anti-Saloon League, told the governor the provision would not be withdrawn unless the league committee agreed to the change.

A few Prohibition supporters in the legislature started backing away from the entire bill on the basis of other portions. Rumors were circulating that Crabbe had drafted the law for his own purposes, and there was talk that he might be "playing both ends of the game as far as intoxicating liquor was concerned."[4] Several legislators believed the office of the state enforcement commissioner should be eliminated. Not only would that solve what county sheriffs viewed as a possible encroachment on their authority; it would eliminate the possibility that Crabbe would be appointed to that position.

[3]Memoirs, T. Blake Kennedy, 410. T. Blake Kennedy Papers, American Heritage Center.

[4]T. Blake Kennedy, 409.

The governor disagreed, however. In his view, since Crabbe's Anti-Saloon League made the act possible, the league should be able to determine how the legislation would be fashioned. Further, Carey did not trust local officials to enforce the provisions of the act. Enforcement had to be statewide if the law were to function well. After all, in his message to the legislature in 1919, he had included with his call for a Prohibition agency a request to grant the organization broad authority to launch investigations.[5]

When the bill finally passed, just three legislators—confirmed opponents of Prohibition in any form—voted against it. The legislature passed House Bill No. 1 on February 15, 1919, to take effect June 30, 1919.[6] The first statewide law enforce-

[5] *Senate Journal*, 1919, 24.

[6] "Prohibition of Liquor Traffic," chap. 209, sections 3398–3439. *Wyoming Compiled Statutes*, 1920.

The position of Prohibition commissioner was established: "The governor by and with the consent of the senate is hereby authorized to appoint a prohibition commissioner whose duty it shall be to supervise the enforcement of the law providing for the prohibition of the liquor traffic. Such commissioner of prohibition shall hold office during the pleasure of the governor and shall be provided with an office at the state capitol and suitable furniture, stationery, and other facilities for transacting the business of his office."

Section 3432 allowed for appointment of a deputy by the commissioner "with the consent of the governor," and such clerical assistance as needed.

Section 3433 set the salary of the commissioner at $3,000 annually and the deputy at $1,800, "together with actual necessary expenses incurred in the performance of their official duties which, together with the necessary expenses of conducting said office shall be paid in the manner now provided for the payment of the salary and expenses of other state officers."

Sec. 3434 contained the oath.

Sec. 3435: "Commissioner shall assist attorneys" and "in the event of the failure of any prosecuting attorney to prosecute violations of this chapter said commissioner or deputy may institute proceedings according to law for such enforcement."

Sec. 3436 samples to state chemist.

Sec. 3437 annual report required. "The commissioner shall make an annual report to the governor on or before the first day of August each year and it shall be printed and published on or before the first day of September next thereafter, which report shall cover the doings of his office for the preceding fiscal year and it shall among other things, show the number of places inspected, by whom, the number of specimens analyzed, number of complaints against persons for violation of this chapter, the number of convictions had, the number of sentences imposed and the number and amount of fines imposed and collected and such other information as he deems valuable in securing the enforcement of the chapter, together with such recommendations relative to the statutes in force as his experience may justify and the prosecuting attorneys within the several counties shall upon demand furnish the commissioner with the date covering the prosecution and enforcement of this chapter within their several counties."

Sec. 3438 If vacancy, office devolves to the dairy, food, and oil commissioner of this state, without extra compensation.

ment agency was born, and Governor Carey appointed Crabbe the first state Prohibition enforcement commissioner.[7]

Crabbe received numerous applications from individuals interested in serving as his deputy. While some had law enforcement experience, none had dealt directly with enforcement of Prohibition. He settled on Earl M. Daniels, who became his deputy director in the summer of 1919.

With an inexperienced staff and with no personal experience in Prohibition enforcement, Crabbe relied heavily on advice from fellow members of the Anti-Saloon League in neighboring states.[8] A few days after the Prohibition Act took effect, Crabbe asked Robert J. Finch, president of the Colorado Anti-Saloon League, for advice about how to proceed against lawbreakers.[9] Finch recommended that Crabbe hire thirty-two-year-old John Cordillo, a deputy state Prohibition officer in Colorado, who would be able to show new Wyoming agency employees how the work should be done.

The 5-foot-4-inch, 129-pound Cordillo, a former Denver police officer, accepted the temporary job. Not wishing to move from Denver, where his wife and two young daughters lived, Cordillo planned to stay at the Plains Hotel in Cheyenne during the week, returning most weekends to his Colorado home.[10] Accepting an assignment to join him were his brother Pete, also a former lawman, and Walter Newell, a new employee of Crabbe's agency. Pete was to receive $100 for his services.[11] The other two were salaried workers.

On August 26, one of Crabbe's new employees began an undercover investigation of bootlegging activity along Front Street in Laramie. A few days later, Crabbe and his deputy, Daniels, accompanied by the Cordillos and Newell, set up a raid in cooperation with local lawmen. The Tuesday night operation was a spectacular success: Six establishments were raided, five men and one woman were arrested, and 400 gallons of illegal liquor, worth an estimated $22,000, were seized.[12] The local newspaper lauded the effort. "The manner in which the workers 'got the goods' on the bootleggers is deserving of special mention," the *Boomerang* report noted. Crabbe and Daniels were praised by name, while the

[7]Letter, Carey to Noblitt, March 25, 1919.

[8]"$22,000 in Booze Seized in Laramie," *Laramie Daily Boomerang*, September 3, 1919, 1.

[9]*State v. Cordillo*, trial transcript, 363.

[10]*State v. Cordillo*, transcript of trial, 410.

[11]*Laramie Daily Boomerang*, September. 20, 1919, 1.

[12]*Laramie Daily Boomerang*, Sept. 3, 1919, 1.

Raids by Fred Crabbe's officers yielded significant quantities of bootleg whiskey. (Courtesy of the Wyoming Division of Cultural Resources)

other three participants were mentioned only as employees of the agency.[13]

Two days later, a *Boomerang* article showed how much Crabbe appreciated the attention. The page 5 story was headlined, "*Boomerang* Thanked by Crabbe for Its Excellent Write-up on Bootleg Raid."[14] Three days later, the tragic murder of a popular local ranchman pushed the spectacular successes of Crabbe's "bootleg squad" off the front pages.

Frank Jennings's body, discovered in the car along Highway 30 north of Laramie, had been found and brought into town for autopsy. The afternoon newspaper described the crime scene, noting that the authorities had found "very little evidence." Nonetheless, although the victim's watch and loose change had not been taken, the article stated that robbery was the probable motive.[15] As the local paper noted, "[N]ot in years, has the city of Laramie been so wrought up over a murder."[16]

[13]Ibid.

[14]*Laramie Daily Boomerang*, September 5, 1919, 5.

[15]"Ranchman, with Bullet Hole in Head, Found Dead," *Laramie Daily Boomerang*, September 8, 1919.

[16]*Laramie Daily Boomerang*, September 11, 1919, 1.

Two days later, the *Boomerang* reported, "Mystery Still Cloaks Murder of Frank Jennings."[17] For the first time, however, the press noted that "three men from the State Prohibition Department's bootleg squad" were being examined "as much for the purpose of exonerating the men in the public mind if innocent as it is to prosecute them if guilty." The paper confidently concluded, "It seems probable that they can clear themselves and as yet no charges have been filed."[18] But the county attorney was less willing to accept their stories. Their testimony before the coroner's jury apparently contained too many suspicious elements.

All three men maintained that between 9 p.m. Sunday and 4 a.m. Monday they had been in the vicinity of Red Buttes, south of Laramie, in the direction exactly opposite from where the crime occurred. They claimed that two northbound passenger trains passed through about 9:30 that evening. They also asserted that two southbound trains roared past where they were parked at about 12:30 a.m. In both cases, their testimony was deficient. Logs showed both Union Pacific northbound trains had arrived in town by 8:20 p.m. Even worse, the two southbound passenger trains never passed through Red Buttes station, but took a different route through the Hermosa tunnel and east.

They had stopped along the highway south of Laramie, they claimed, in order to spot suspicious vehicles that might contain contraband. All three admitted stopping two cars during the evening in attempts to uncover illegal liquor. In both cases, however, the incidents occurred much later than the times the men told authorities.

When questioned individually, all three were asked to describe their route out of town that evening. One claimed they backed out of the courthouse yard, went south on Sixth Street, then west to the Lincoln Highway and out of town to the south. Another said they came up Thornburg (now Ivinson) and drove straight out on Second Street (Lincoln Highway).

At the end of three days of testimony, the coroner's jury evaluated the evidence and concluded with nothing definite except that "the death was caused by gunshot wounds, inflicted on the head by person or persons unknown."[19] Nonetheless, the finger of suspicion already was pointing toward the state officers.

[17]"Mystery Still Cloaks Murder of Frank Jennings," *Laramie Daily Boomerang*, September 10, 1919, 5.

[18]Ibid.

[19]Coroner's Jury Report, September 11, 1919, cited in *Laramie Daily Boomerang*, September 11, 1919, 1.

On September 11, Jennings's brother Roy filed a complaint with county attorney George Patterson alleging that his brother had been killed by the three agents. The three men were arrested, and the county attorney announced that he planned to hold a preliminary hearing. "Feeling, justifiably bitter and revengeful, has arisen," the *Daily Boomerang* reported, "until there has even been talk of a lynching." The paper cautioned readers, "Though the men held may be the guilty parties, it is hoped that violence will be withheld. If found guilty of such a dastardly, fiendish crime as the one committed, surely it is hoped that no mercy will be shown them in court." The paper added, "But for the sake of fair play, it should be remembered that a person is 'considered innocent until proved guilty.'"[20]

Less than a week later, the paper was to carry news that would shatter the Prohibition office's reputation. After an all-night interrogation conducted by a former Denver police chief, Pete Cordillo confessed to the murder, also implicating his brother and another man. While being transported to the county jail in Wheatland some eighty miles from Laramie in order to avoid the possibility of a lynching, Cordillo told his former employer that Jennings's death had happened as a result of some minor errors. The member of the "bootleg squad on loan" to Wyoming's new Prohibition enforcement agency then agreed to repeat the confession and sign a statement when he reached the Wheatland jail. In the statement, he accused Newell of shooting Jennings with a rifle. He claimed he witnessed the killing and had planned to turn Newell in later that night. It was accidental, he contended, the sort of thing that can happen when investigators make a couple of minor mistakes. Anticipating accolades for their resounding success, the Prohibition agents had misread evidence, trailed the wrong vehicle, and, in their zeal, ended up killing an innocent man.

Justice of the peace M.C. Brown set the preliminary hearing for January 5, but later postponed it until March 19. Laramie attorney Hugo Donzelman represented the Cordillos and Newell. Oddly, F.L. Crabbe, who had resigned under fire as Prohibition commissioner soon after the incident, signed on as assistant defense counsel. County attorney George Patterson would lead the prosecution team. The Jennings family retained C.P. Arnold to represent the family and serve as special prosecutor.[21]

[20]*Laramie Daily Boomerang*, September 11, 1919, 1.

[21]*Laramie Daily Boomerang*, January 5, 1920, 1. Veteran Laramie lawyer N.E. Corthell was set to assist Patterson for the state. Arnold's role as "special prosecutor" representing the family is noted in the *Laramie Daily Boomerang*, April 9, 1920, 4.

At some point during the next five weeks, Donzelman was replaced by a well-known Denver trial lawyer, C.A. Irwin. Crabbe became a trial "spectator" throughout the hearings and the trial, often sitting beside Finch, the Colorado Anti-Saloon League leader who had recommended that he hire the Cordillos. After the defense prevailed at a change-of-venue hearing in March, the trial was set to begin April 20 in the new Laramie County Courthouse in Cheyenne, the state capital some forty-eight miles east of Laramie.[22]

Meanwhile, an unrelated incident interrupted county attorney Patterson's concentration on the trial. On April 3, while Patterson's office was closed for lunch, eighteen-year-old Gladys McArthur Bergstrom climbed the stairs to his second-floor downtown office, planning to ask Patterson to represent her in a divorce action. Her husband, who had been stalking her, followed her up the stairs and, in a rage, shot her twice at close range with a .38 special. She died just outside Patterson's door. Ironically, the couple had married the day before Jennings's last ill-fated ride.[23]

In Cheyenne, carpenters had finished the interior of the courtroom, but the furnishings had not arrived by the time the preliminary motions were heard in mid-April. A makeshift jury box had to be thrown together from rough pine planks for the trial. The ornate rail separating spectators from court officers had not arrived.[24] During the delays, W.A. Newell sat in his cell in Cheyenne, playing songs on the mandolin. News accounts mention two of his favorites, "Hail, Hail, the Gang's All Here" and "I'm Forever Blowing Bubbles."[25]

Snow started falling the night before the scheduled trial date of April 20. By the next morning, the spring storm had made area roads impassable. The judge postponed the trial for a week because two items of evidence were still in Laramie—the two cars that would be exhibits in the case.[26]

The trial of all three men finally opened April 27, 1920, in the Cheyenne courtroom of Judge William C. Mentzer. During jury selection, defense attorney Irwin asked potential jurors

[22]*Laramie Daily Boomerang*, March 12, 1920, 8. The delay was not tactical. It resulted from the fact that the new courtroom in Cheyenne was not yet finished.

[23]The *Laramie Daily Boomerang* headlined the story, "Bold Murder Stuns City." The assailant was subdued four hours after the incident and confessed to the murder. *Laramie Daily Boomerang*, April 3, 1920, 1.

[24]*Laramie Republican*, April 27, 1920, 1. It was the first case heard in the new Laramie County Courthouse.

[25]*Laramie Boomerang*, April 17, 1920, 8.

[26]*Laramie Republican*, April 20, 1920, 8.

how they felt about enforcement of the Prohibition law, suggesting that the prosecutors were negligent in their duty to enforce the law. Charles E. Lane, the Laramie County prosecutor who examined the potential jurors for the state, asked each one if he was a member of the Anti-Saloon League and whether he had contributed to the defense fund the organization had set up for the Cordillos and Newell. George Patterson rejected Irwin's insinuation that prosecutors were attacking the league or the Prohibition legislation. "The case is about murder, not Prohibition," he told prospective jurors.[27] Despite the denials, many observers saw it, if not as a referendum on Prohibition, at least as a cause to reconsider the law enforcement mechanisms designed to enforce it.

Twelve male jurors were impaneled by late the first day. They included four farmers, a prominent stockman, two machinists, a civil engineer, a barber, a painter, and a janitor. The occupation of one juror was not specified.[28]

During opening statements, Irwin suggested that Jennings had been murdered by unknown parties who had mistaken his Franklin touring car for a similar one driven by Albany County sheriff George Trabing. According to the defense counsel, Trabing had made "powerful enemies" among the liquor interests for his strong support of Prohibition enforcement. "Might enemies of the sheriff have done the deed?" he asked. Prosecutors scoffed at Irwin's supposition. "We are here, not to discuss the Prohibition question, but to either convict or acquit this man," special prosecutor Arnold told the jury.[29] Mistaken identity seemed a slim reed to lean on.

The prosecution opened by calling as witnesses the two men who had found Jennings's body, the coroner, and Jennings's girlfriend, who was the last person to see him alive. Testimony indicated that Jennings was struck by five bullets, four of which were potentially fatal. All apparently had come through the back of the car, striking the victim in the head and exiting out the windshield. Jennings's girlfriend told the court that the victim had taken her to the Empress Theatre that night. After

[27]*Laramie Republican*, April 27, 1920, 1.

[28]Names, addresses, and occupations of the jurors were published in both Laramie papers. *Laramie Republican*, April 28, 1920, 1; *Laramie Daily Boomerang*, April 28, 1920, 1, 5.

[29]The opening statements are summarized in the *Laramie Republican*, April 28, 1920, 1, in an article written by *Wyoming State Tribune* editor John Charles Thompson, who had covered other famous Wyoming trials, including the Tom Horn case in 1903. In that case, he attended Horn's execution as the only member of press to receive an invitation from the condemned man. Thompson served as *Tribune* editor until shortly before his death in 1953.

the film had ended at about 9 p.m., Jennings had bought a cigar at Cordiner's Drugstore and, about twenty minutes later, had dropped her off in the street in front of her apartment. She remembered he had just lighted the cigar as he was driving away.[30]

Even though John Cordillo had confessed, implicating both his brother and Newell, the confession had been badly handled by authorities. Mike Delaney, the Denver detective who had first elicited the confession in the car en route to Wheatland, had "sold it" to Jennings's family for $2,500. Prosecutors, sensing that feeling was running high against Delaney for taking money from the victim's family, opted not to put him on the stand. Instead they chose to rely on the testimony of the second man in the car, a deputy sheriff from Laramie who was ill and bedridden when the trial began.[31] The man did not appear, and the prosecutors were reduced to entering the statement by deposition from the ill man.

In his confession, which, according to the defense, was offered when it was thought the only other option was lynching, Cordillo explained that he had been driving the unmarked, dark-colored Buick roadster on the fatal night. His brother was in the front passenger seat while Newell sat in the back. As they approached Jennings's car, thinking it belonged to a couple of known bootleggers en route to Medicine Bow, they pulled around it and motioned to the driver to halt. When he didn't, they gave chase. They came upon the car as it veered off the road, and, almost instantly, Newell was out of the Buick and standing on Jennings's running board with a rifle in his hand. Before Cordillo could say anything, according to his testimony, Newell opened fire. He could not explain his actions after the incident, however, or why he had not reported the incident to higher authorities.

Perhaps the most damaging testimony came from statements Cordillo himself had made to the coroner's jury. The prosecution picked apart contradictions in those statements, calling witnesses who disputed Cordillo's assertion that he was at Red Buttes because he had given incorrect information about the trains passing that night. Another man testified that he had passed Cordillo's car on the highway just north of town on the fateful night. Elmer Lovejoy, the builder of the first automobile in Wyoming, testified about how distinctive Cordillo's car was.[32]

[30]Testimony of Viola Boughton, *State v. Cordillo.*

[31]*Laramie Republican,* April 27, 1920, 1.

[32]For Lovejoy's role as first auto builder, see "Lovejoy's Toy: Wyoming's First Car," in Phil Roberts, ed., *Buffalo Bones: Stories from Wyoming's Past* (Cheyenne: Wyoming State Archives and Historical Department, 1979).

The defense put several character witnesses on the stand, including George Carlson, the former governor of Colorado; the head of the juvenile justice program for the Denver Police Department; and Finch, the Anti-Saloon League official from Colorado.[33] Cordillo's wife testified, followed by Earl M. Daniels, who, as Crabbe's deputy, had supervised Cordillo's "strike force."[34] In all cases, Cordillo was portrayed as a model police officer who always had done his duty conscientiously. A.S. Roach, who had been the sheriff of Platte County at the time of Cordillo's confession, testified in the trial. Ironically, from shortly after the incident, Roach had been serving as the new state Prohibition commissioner, appointed by Governor Carey to replace F.L. Crabbe.[35]

The case went to the jury on a Saturday afternoon. After deliberating most of the day, then taking the evening off, the jury delivered a verdict at 2 p.m. Sunday. Cordillo was found guilty of manslaughter and, on May 20, was sentenced to fifteen to twenty years in prison. The other two men received similar sentences.[36]

In the aftermath of the case, county attorney George Patterson called for state reimbursement to Albany County for $8,623, the cost of prosecuting the case. Patterson pointed out that "inasmuch as the crime was committed on a state highway, and inasmuch as the perpetrators of the crime were employees of a state agent appointed by Governor Carey, that the state should bear the burden of the expense."[37]

The agency had other difficulties overcoming its negative reputation after the Cordillo case. As the first full year of the agency's existence came to an end, director Roach submitted his annual report to the legislature. In it, he summarized the condition of Prohibition enforcement in each county. For Albany County, he wrote, "The County and Prosecuting Attorney reports that the Prohibition Law is being enforced very well." He noted that the county attorney reported "no open bootlegging, and but very little drinking." He concluded, "I find the city of Laramie to be in good condition, excepting

[33]Of particular note is Finch's testimony that he had raised $1,000 for the defense. Trial transcript, 363.

[34]Trial transcript, 379–409.

[35]Roach testimony is in the trial transcript, 301–312.

[36]Cordillo's sentence was commuted after he had served more than seven years. He was paroled on September 27, 1927, and, soon after, his voting rights were restored. Wyoming State Archives, Wyoming State Penitentiary Records, Log of Prisoners.

[37]*Laramie Boomerang*, January 4, 1921, 8.

for prostitution, but Rock River and Medicine Bow have several stills and several bootlegging joints."

Roach was harsh on some county sheriffs and attorneys. About Carbon County, for example, he wrote, "I have not had any special work done in this county as the sheriff and prosecuting attorney seemed to desire to enforce the law themselves, neither have many complaints been filed with this office." In Laramie County, "bootlegging cases were dismissed by the county and prosecuting attorney." In Sweetwater County, "all laws are openly and flagrantly violated." He gave similar reports for Lincoln, Uinta, and Fremont, where "gambling, bootlegging and prostitution are unchecked by the authorities." In Niobrara, Natrona, and Converse Counties, conditions were bad. "No effort, seemingly, on the part of the authorities to enforce the laws" was the situation in Weston County.

It was a gloomy report. Roach concluded with several recommendations: "I would respectfully recommend that the office of Prohibition Commissioner be discontinued and that the Legislature create a department of General Law Enforcement, composed of a commissioner and a number of deputies sufficient to handle the enforcement of all criminal laws." He argued that with such authority, all crimes could be handled at the same time "without any more expense to the State."

Even though his agency was suffering from adverse public attitudes resulting from the Cordillo case, more than half of his comments were critical of local authorities. He complained, "Under the present Prohibition Law, without authority to make arrests, the evidence has to be turned over to the local authorities, and by the time that they are able to get to the scene, the evidence in many cases has been destroyed and there is no case." But he added that there was willful wrongdoing as well. "At other times dilatory methods are pursued by the local officers; sometimes even arrests are refused, and evidence gained at expense of time and money of investigators, is useless. In other cases, as on record in Laramie County, two charges each against four men, were dismissed by the Prosecuting Attorney for what he termed 'lack of evidence.'"[38]

The Cordillo case and the publicity surrounding it gave the new Wyoming Prohibition Department a rocky start. To many observers, reform obviously was needed. Less than a year after the verdict in the Cordillo case, Governor Carey, in his message opening the 1921 session, announced he wanted to have the two-year-old department restructured. No longer would

[38]A.S. Roach, "Report of the State Prohibition Commissioner for the Year 1920," unpaginated, typewritten report, Wyoming State Archives.

the agency be charged with enforcing only Prohibition laws. Like Roach, Carey had a broader vision for the agency.

The governor, too, had become increasingly dissatisfied with what he considered the ineffectual enforcement of Prohibition on the part of Wyoming sheriffs and county attorneys. In his address, he expressed his frustration with city and county officials who, he believed, were disregarding many of the laws. "Our laws apply to the whole state and neither county or city officials have any right to decide whether or not a particular law be enforced in any community," he said. He challenged lawmakers, "If we want gambling, it is better to have open gambling; if we want houses of prostitution, legalize them; if we must have saloons, repeal the prohibition law." He quickly added that although neither he nor most of the people wanted such things legalized, "I think it better to legalize them than not provide means whereby those whose duty it is to enforce the law may be either compelled to do their duty or others be authorized to do for them what they themselves refuse to do."

Governor Carey emphasized that most local officials were honest and efficient, and, all being equal, their authority should be respected by the state. However, he pointed out that "during the past two years any number of crimes have been committed where County Attorneys for one reason or another have failed to prosecute." He pointed to one example involving the Workmen's Compensation Department head, who complained of more than 60 employers not complying with the law. Yet only two were prosecuted. He pointed to inheritance tax evasion, fraudulent bounty claims for wolf pelts, and state loss of $50,000 annually from willful failure to tag autos. "During a County Fair last fall I counted thirteen cars without license tags parked around a quarter of a mile track," Carey said. "I do not know of an arrest made by any sheriff in the State for the violation of the game laws within the last two years. As for the prohibition law, in some counties open saloons are being permitted," Carey noted.

Carey recommended that the legislature rectify the problems by establishing a "State Department of Law Enforcement with authority to enforce any and all laws of the State, and to both act in cases where local authorities are indifferent and to co-operate when called upon." He emphasized that, with just the revenues exacted from auto license tags, the department would be self supporting.[39] He asked that the new Department

[39]Governor Robert Carey, Message to the Legislature, 1921, in *House Journal* (1921), 27–28.

of Law Enforcement also be given primary responsibility over Prohibition, as well as the power to enforce all other state laws.[40]

The legislature responded by passing Senate File 46, introduced January 26 by Senator J.G. Hartwell, a Lusk Republican.[41] The Republicans dominated both houses. Just two Democrats served in the state senate, while in the house, state representative Thurman Arnold of Laramie was the only Democrat. When the bill came up for third reading on February 1, it passed 17–4, with four members absent. Three of the four voting against were Republicans: J.W. Johnson, Casper; Louis Kabell, Jr., Evanston; and Pete J. Shingzy, Rock Springs. They were joined by one of the two Democrats, W.S. Green of Worland.[42] In the house, the bill had equal success, passing on third reading the day after passage in the senate by a vote of 44–2, with eight members absent. The only two "no" votes were cast by Casper Republicans.

In an act that, for the first time, injected the governor into local law enforcement, the legislature passed a wide-ranging law giving him the authority to remove officers who were guilty of intoxication or drunkenness. Even more significant, the governor could remove any officer who willfully failed, neglected, or refused to perform any duties imposed on him by the Prohibition law.[43] Through Prohibition enforcement, a huge step would be taken toward a state police force.

Governor Carey was destined not to be able to use the law's provisions. In the primary election of 1922, he lost to a relatively unknown Rock Springs banker, who then promptly lost to Cheyenne attorney William Ross in the general election. Before Ross, a dedicated Prohibitionist like Carey, could apply some of the law's provisions to what he viewed as recalcitrant officials in northern counties of the state, he died suddenly in

[40]Governor's Message, *Senate Journal*, 1921, 27–28.

[41]*Senate Journal*, 1921.

[42]*Senate Journal*, 1921, 211.

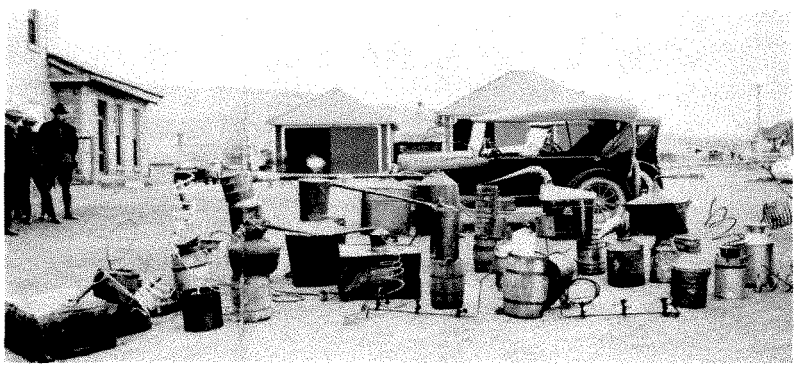
[43] "The governor shall have power after notice and hearing to remove from office any officer in the state who shall willfully fail, neglect, or refuse to perform any of the duties imposed upon him by this article or who shall be guilty of intoxication or drunkenness. Proceedings for the removal of any such officer may be commenced either by the governor on his own motion or on written complaint of any citizen of the state, filed with governor. Written notice of the time and place for the hearing of such charges together with a statement or copy of the charges filed against him shall be personally served upon such officer at least ten days before the day set for such hearing." (Laws, 1921, c. 117, sec. 36). Senate File 102, Approved February 22, 1921. Bill introduced by Committee on Prohibition. Wyoming Revised Statutes, 1931. Sec. 59-136.

the middle of his term. A month after his death, his widow, Nellie Tayloe Ross, was elected governor to serve out his term. The first woman governor in the United States, Mrs. Ross also became Wyoming's first governor to use the extraordinary powers granted by the 1921 legislature to remove county officers who were not vigorously prosecuting Prohibition cases. Some observers blame her narrow defeat two years later on her tough Prohibition stance and removal of popular local officials in Natrona, Park, and Hot Springs Counties.

Nellie Ross's successor, Frank Emerson, suffered similar disappointments with the Department of Law Enforcement. His first appointee, recommended by the WCTU, turned out to be accepting payoffs from bootleggers. Even though his next director was honest, the agency, still suffering from the stigma of the Cordillo case and Mrs. Ross's purges of "wet" county officials, became a public embarrassment after the corruption scandal.

Thousands of arrests and a scandal later, the new agency, too, was eliminated. The fourteen-year experiment in law enforcement had failed to stamp out illegal alcohol. Worse, it eroded public confidence in the ability of law officers to enforce the laws effectively.

The history of the Department of Law Enforcement provides evidence of how Prohibition, even in the least populated state, was a legal failure. Attempts to make it work led to creation of a centralized police force controlled by the governor that ultimately could have posed as much danger to the public good as open violation of Prohibition, had it not brought about its own demise by scandal and incompetence.



Despite the Department of Law Enforcement's confiscation of distilling equipment, the fourteen-year effort to stamp out illegal alcohol failed. (Courtesy of the Wyoming Division of Cultural Resources)

But the agency provided another legacy, in the form of increasing public suspicion of law and law officers. What was once labeled the "Noble Experiment" brought widespread disregard for law and organized efforts to flout it. Otherwise law-abiding citizens became bootleggers or their customers, while nearly everyone watched law enforcement officers either try in vain to stamp out the activity or join in by accepting payoffs. Perhaps, in no state did the effort begin and end so badly as in Wyoming.

Alaska's Floating Court

Claus-M. Naske

When President William McKinley appointed Tacoma lawyer James Wickersham, an active Republican, to the position of U.S. District Court judge in Alaska in 1900, Congress had recently passed a civil code and a code of civil procedure for Alaska. Among other provisions, the measure divided Alaska into three judicial districts and added to the already-established district court at Sitka, in Alaska's panhandle, additional district courts at Nome on the Seward Peninsula and at Eagle City on the Yukon River.[1]

The Department of Justice assigned Wickersham to the third judicial division, encompassing 300,000 square miles, with fewer than 1,500 Caucasian residents, according to the just-completed 1900 census. During 1900, Wickersham held court at Eagle City, Circle, and Rampart, but he soon realized that there would be little litigation in the immediate future. At the close of the year, the judge rendered his report to the Department of Justice. He was of the opinion that the routine business in Eagle City was small and not likely to increase. Since the courts in the first and second divisions were swamped with litigation, he offered to help out by holding special terms of court for them. On March 28, the attorney general directed Judge Wickersham to hold a special term of court at Unalaska in the Aleutian Islands, located in the second judicial division, "provided Judge [Arthur H.] Noyes made no objection." Judge Noyes, headquartered in Nome, welcomed the help.[2]

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[1]Thomas A. Morehouse and Victor Fischer, *The State and the Local Government System* (College, Alaska, 1970), 3:8.

[2]Ibid., 321–22.

Alaska's vast size, difficult terrain, and lengthy coastline dictated that people travel by boat during the short summers. On August 3, 1901, at Eagle City, Judge Wickersham boarded the Alaska Commercial Company's steamer *Leah*, the first of three ships he would take en route to Unalaska. Down the Yukon River, Wickersham and the other passengers transferred to another vessel, the *Herman*, and had to lay by for a day while the ships' crews moved the cargo from one boat to the other. At the town of St. Michael, where the Yukon emptied into Norton Sound on the Bering Sea, the judge transferred ship again and went to Nome on the steamer *St. Paul*.[3]

While briefly in that city, Judge Wickersham was told by U.S. marshal Frank H. Richards that he would be unable to summon enough jurors from Unalaska's small population. Consequently, the judge ordered that the needed individuals be summoned in Nome. The marshal complied and called sixteen grand jurors and eighteen trial jurors, all of whom boarded the *St. Paul* to accompany the judge and his party to Unalaska. Thus was born Alaska's "floating court."[4]

Wickersham convened court in Unalaska on August 19. Five days later, the judge celebrated his forty-fourth birthday, and to commemorate the day climbed the three-thousand-foot peak overlooking the settlement. He noted in his diary that he saw mountain marmots and fox tracks and delighted in the numerous ravens that swooped down from the sky, uttered their distinctive sound, and quickly rolled over on their backs in midflight for a few seconds with their "feet uppermost." On the eastern side of the Unalaska harbor rose another mountain about two thousand feet high. A physically active and vigorous man, Wickersham climbed that peak on another occasion and discovered a pole planted on top inscribed with the words "agreed to call this peak Wickersham Peak" and dated August 24, 1901, the judge's birthday. He was moved by the gesture of the two men who inscribed the pole. The judge enjoyed Unalaska's setting, especially the breezes caused by the Japan Current, and concluded that the area possessed the "most wonderful climate" he had known, observing that "it does not get warmer than 65 above nor colder than 10 above—a range of only 55 degrees!"[5]

Wickersham cleared the court calendar in Unalaska and returned to Eagle City in the fall, proud of having conducted

[3]Ibid., 323–24.

[4]Judge Wickersham diary, August 16, 1901, University of Alaska, Fairbanks, Archives.

[5]Ibid., August 19, 20, 22, September 1, 1901, August 26, 1901.

the first court ever convened in the Aleutian Islands. He held several more, utilizing the revenue cutters of the Treasury Department instead of commercial ships, for transportation.

Alaska certainly was remote from the rest of the United States, and members of Congress and the executive branch had little understanding of this vast territory, which the United States had purchased from Russia in March 1867. The U.S. had assumed ownership of the territory when American occupation troops arrived in New Archangel (Sitka), the capital of Russian America, in October of that year. On July 27, 1868, Congress passed a customs act extending over Alaska the U.S. laws of customs, commerce, and navigation. It also prohibited the sale, importation, and use of firearms and distilled liquors, and provided that suspected criminals be prosecuted in the U.S. district courts of California, Oregon, or the territory of Washington. The act, however, contained no law enforcement provisions, and consequently it fell to the military, which governed the new possession, to enforce the laws.[6]

Congress passed Alaska's Organic Act in 1884, which made the region a civil and judicial district. It was a wholly imperfect piece of legislation, widely criticized. For example, in an 1887–88 annual report to Congress, the secretary of the interior described Alaska's conditions in its civil relations as "anomalous and exceptional." He referred to the Organic Act as "an imperfect and crude piece of legislation," because it provided only "the shadow of civil government, without the right to legislate or raise revenues." It had not extended the general land laws of the United States to Alaska, but declared the mining laws to be fully operational. There was no mechanism to incorporate towns and villages, and this deprived district residents of the benefits and protections of municipal law. It had created a single district court with "many of the powers of a federal and state court, having a more extensive territorial jurisdiction than any similar court in the United States, but without providing the means of serving its process or enforcing its decrees." The Organic Act had been well described as a "legislative fungus, without precedent or parallel in the history of American legislation."[7]

Despite these shortcomings, the act gave Alaska its first resident judge. He was a statutory rather than constitutional

[6]15 Stat. 240.

[7]Jeannette P. Nichols, *Alaska: A History of Its Administration, Exploitation, and Industrial Development During Its First Half Century under the Rule of the United States* (New York, 1963), 73; *Annual Report of the Secretary of the Interior*, 50th Cong., 1st sess., 1887, *Executive Documents of the House of Representatives*, vol. 1, 64–65.

judge, serving renewable four-year terms. The territory also received a U.S. attorney, a U.S. marshal, and other court personnel. For the next seventy-five years these federal officials, later increasing in number, administered civil and criminal laws in the huge region under the close supervision of the U.S. attorney general and Justice Department staff in Washington, D.C.[8]

The Department of Justice soon realized, albeit reluctantly, that Alaska was unlike any other territory or state in the Union. It was a remote, maritime frontier, with both arctic and subarctic climates and a difficult geography. It possessed subcontinental proportions and only a rudimentary transportation system. In short, Alaska baffled and challenged Department of Justice personnel in the nation's capital who supervised operations in the far-off territory.

As noted above, the Department of Justice had authorized Judge Wickersham to hold the first "floating court" in 1901, and Wickersham had utilized commercial transportation. In 1910, when Peter D. Overfield, the district court judge of the fourth division, headquartered in Fairbanks, proposed to hold a "floating court" along the west coast of Alaska and the Aleutian Islands, he asked the U.S. Revenue Cutter Service to make available one of its vessels stationed in the Bering Sea. Congress had established the U.S. Revenue Cutter Service, the forerunner of the U.S. Coast Guard, in 1790. The Bering Sea Patrol Fleet was established after the acquisition of Alaska to control and protect the territory's islands and coastline in that region and to halt incursions by foreign vessels. Of particular concern to the U.S. was the taking of seals by ships from Canada, Russia, and Japan, and the Bering Sea Patrol Fleet was called into action many times from 1886 to 1911, when the practice was halted by treaty.[9]

Judge Overfield was born in Auburn, Pennsylvania, in 1875. He fought in the Spanish-American War, and afterwards earned a law degree from the University of Pennsylvania. In 1903, he went to Nome and worked as a miner and a lawyer. Six years later, President Howard Taft appointed him district court judge for the fourth division in Fairbanks, where he served until 1912. He took over the third division judgeship in Valdez, serving just a year before leaving Alaska for California.[10]

Overfield had proposed to hold the "floating court" and had requested that a revenue cutter steam to Valdez in mid-July to

[8]23 Stat. L, 24. (May 17, 1884).

[9]Briton Cooper Busch, *The War Against Seal Fishery* (Kingston and Montreal, 1985), 292, 145, 151–52.

[10]Evangeline Atwood and Robert N. DeArmond, *Who's Who in Alaskan Politics* (Portland, Ore., 1977), 75.

pick up and transport court officials to the various towns and settlements along the coast, including Kodiak, Chignik, Unga, Unalaska, Dillingham, and Koggiung, locations accessible only by water, for the most part. Making the case for the floating court, Overfield pointed out that the Bristol Bay precinct, for example, was open to navigation only from July to September. Transportation to Valdez was intermittent at best. Many petitioners for citizenship naturalization were not afforded a reasonable opportunity for a hearing at the court in Valdez, the judge argued, except at considerable cost amounting to more than five hundred dollars, including the expenses of the necessary two witnesses per case. As for criminal and civil cases, the judge noted that, by trying the cases in the distant parts of the division, the floating court would eliminate the cost of bringing government witnesses to Valdez. Both a trial juror and a grand juror from Valdez would be brought along, he proposed, to assist jurors summoned locally. A former U.S. commissioner in the Bristol Bay precinct, Dr. J.H. Romig, had already presented this idea to the Department of Justice, and the Revenue Cutter Service had indicated its willingness to make one of its ships available.[11]

It is likely that Judge Overfield was aware that the Departments of Justice and Treasury had entered into a formal agreement three years earlier to investigate and prosecute officers and crewmen in the whaling fleet who allegedly were sexually exploiting native women and girls. The agreement called for the skipper of a revenue cutter to be appointed as a U.S. commissioner, and for the ship also to carry an assistant U.S. attorney and a U.S. marshal. For several years, court officials out of Nome had roamed the northern seas aboard revenue cutters, alighting at native villages and boarding whaling vessels in pursuit of sexual offenders.[12]

[11]Peter D. Overfield to attorney general, February 2, 1910; attorney general to the secretary of the treasury, March 19, 1910; secretary of the treasury to attorney general, April 18, 1910, File 146772, Section 1, Box 904, Straight Numerical Files, Department of Justice Central Files, R.G. 60, National Archives.

[12]Subsequent investigation revealed, however, that native women offered "themselves and their daughters, and husbands their wives to accompany these officers" on whaling cruises and regarded the trip as "a privilege." Nevertheless, the federal government pursued cases of fornication and adultery for several years. See "Interdepartmental Arrangement as to Whaler's Offense," April 29, 1907, file 151267, Section 1, Box 1009A, Straight Numerical Files, Department of Justice Central Files, R.G. 60, National Archives; 62d Cong., 3d sess., Senate Document No. 1093, The Joint Committee on Territories of the Senate and House of Representatives, *The Compiled Laws of the Territory of Alaska* (Washington, D.C., 1913), chap. 7, Sec. 2000, 2001, 2003, 673; J.J. Glover, "Memorandum for the Attorney General," March 19, 1910, File 151267, Section 1, Box 1009A, Straight Numerical Files, Department of Justice Central Files, R.G. 60, National Archives.

Before the court got under way in 1910, however, a number of problems had to be resolved. Judge Overfield had indicated that he desired to sail from Valdez on the cutter about July 15. The Department of Justice, however, had transferred Overfield, much against his wishes, to the newly created fourth judicial division (formerly the third judicial division), headquartered in Fairbanks. The transfer was effective the first of July.[13]

In 1903, on a visit to Alaska, four members of the Senate subcommittee of the Committee on Territories had taken testimony on the subject of adding judges. They had found that the third judicial district was so geographically extensive and its business so large that it had recommended "that a portion of it be set off to form [a] fourth judicial district" with its own judge. Members of the subcommittee asked Judge Wickersham, who at that time was holding a term of court in the third judicial district, for his opinion. Wickersham stated that his division was indeed huge, extending from "the British [now Canadian] lines to the outer Aleutian Islands; from the Pacific to the Arctic oceans." As a result, he traveled constantly. He told the subcommittee that during the navigation season he had to travel the whole length of the American Yukon River, some fifteen hundred miles, holding courts at Eagle and Rampart. If he had to go to the Koyukuk country, that trip added another eleven hundred miles of river navigation and 120 trail miles to his annual journey into Alaska's interior. At St. Michael, the government placed a revenue cutter at his disposal, which took him to Bristol Bay, Dutch Harbor, and then along the southern coast of Alaska as far as Valdez. This made for a sea journey of sixteen to eighteen hundred miles. In 1905, a measure to create a fourth judicial district passed the Senate, but was defeated in the House.[14]

It was not until 1909 that Congress passed a measure that amended the Civil Government Act of June 6, 1900. Among other provisions, such as raising the annual salary of district court judges in Alaska from $5,000 to $7,000, the amendment created another judicial division, with a court and the necessary personnel. The new district court, designated the third judicial division, was to be headquartered at Valdez. Fairbanks lost its designation as the third judicial division and became the fourth.[15]

[13]Overfield to attorney general, April 1, 1910, File 1, Box 904, Straight Numerical Files, Department of Justice Central Files, R.G. 60, National Archives.

[14]59th Cong., 1st sess., House Document No. 5, *Report of the Governor of Alaska*, 10–11.

[15]*Report of the Governor of the District of Alaska to the Secretary of the Interior, 1909* (Washington, D.C., 1909), 43–44.

The judge then sitting in Fairbanks, Thomas R. Lyons, was sent to Juneau, and Judge Overfield was assigned to Fairbanks. Overfield was not happy with this new position. Writing to the attorney general, he predicted that he would be greeted with skepticism in Fairbanks, since he was considered to be a supporter of Alaska's recent delegate to Congress, former judge James Wickersham, who had used his influence to secure Overfield's appointment. In addition, Wickersham could be expected to argue cases before his court in Fairbanks during congressional summer recesses. Any decision Overfield rendered in favor of Wickersham would be criticized, Overfield predicted, and regarded as repayment of a political debt.[16]

Furthermore, Overfield was worried that Judge Lyons, who had made a splendid record in Fairbanks, would meet with disaster in Juneau, because he was the former partner of lawyer Louis P. Shackleford, then the national Republican committeeman for Alaska. Shackleford practiced law in Juneau and represented some of the largest mining corporations in the territory. Overfield was certain that Lyons would be charged with conflict of interest in decisions favorable to his former law partner. Overfield conceded, however, that if the department insisted on the change, Judge Lyons could "conquer the situation at Juneau," and his own difficulties at Fairbanks did not appear insurmountable. Alaska's governor, Walter E. Clark, dismissed Overfield's reasons for resisting the reassignment and remarked that the judge preferred Valdez as his residence, and that his professed feeling of embarrassment about fancied political obligations to Wickersham was "unworthy of a courageous judge." The transfer took place as planned.[17] The implementation of the next "floating court" would come from Overfield's successor, Judge Edward E. Cushman.

Although the Departments of Treasury and Justice had signed an agreement to investigate the whaling fleet in 1907, the question remained in 1910 which agency would foot the bill for the next "floating court." After some internal inquiries, the attorney general determined that his department "could and would pay all related costs from a

[16]Overfield to attorney general, March 20, 1910, File 146772, Section 1, Box 904, Straight Numerical Files, Department of Justice Central Files, R.G. 60, National Archives.

[17]Ibid.; Clark to attorney general, April 1, 1910, File 146772, Section 1, Box 904, Straight Numerical Files, Department of Justice Central Files, R.G. 60, National Archives.

variety of accounts available." Just as this issue was resolved, Judge Cushman, who was to convene the "floating court," wrote the attorney general that there were no attorneys licensed to practice west of Seward. Since U.S. commissioners handled misdemeanors, the only necessity for the district court in this region was to try felonies. The judge doubted that any felony case could be tried in the western part of the third division unless a government-paid defender accompanied the floating court. He suggested that he had the authority to pay the salary from discretionary funds accumulated from fines and forfeitures. The attorney general agreed that Cushman was authorized to pay for a public defender.[18]

Next the Treasury Department wished to know whether the judge could appoint officers of the Revenue Cutter Service as U.S. commissioners and deputy U.S. marshals. If so, the officers of the Bering Sea Fleet would be able to maintain law and order in places not reached by the court. Research into the applicable statutes revealed that, although Congress had intended U.S. commissioners to have a fixed residence, their jurisdiction was coextensive with the district, and any act performed within the limits of the district was clearly valid. Assistant Attorney General J.A. Fowler reasoned that the failure of commissioners to have permanent residence provided grounds for removal but did not deprive them of their official position. Therefore, it was perfectly legal and proper to appoint members of the Revenue Cutter Service as U.S. commissioners. The appropriate statute showed that U.S. deputy marshals were not required to maintain fixed residences, and therefore it was possible to appoint officials of the Revenue Cutter Service to such positions. In his research, Fowler discovered that the U.S. District Court for the third division had appointed the captain of the cutter *Thetis* U.S. commissioner for the last three successive years, and that officers of merchant vessels had been appointed deputy marshals by the U.S. marshal in previous years. With the legal questions clarified, the Treasury Department recommended that the captains of the cutters *Perry, Bear, Tahoma,* and *Manning* be appointed U.S. commissioners and one junior officer on each of these vessels receive a commission as deputy

[18]Secretary of the treasury to attorney general, April 18, 1910; attorney general, April 29, 1910; attorney general to E.E. Cushman, May 11, 1910, File 151267, Section 1, Box 1009A, Straight Numerical Files, Department of Justice Central Files, R.G. 60, National Archives.

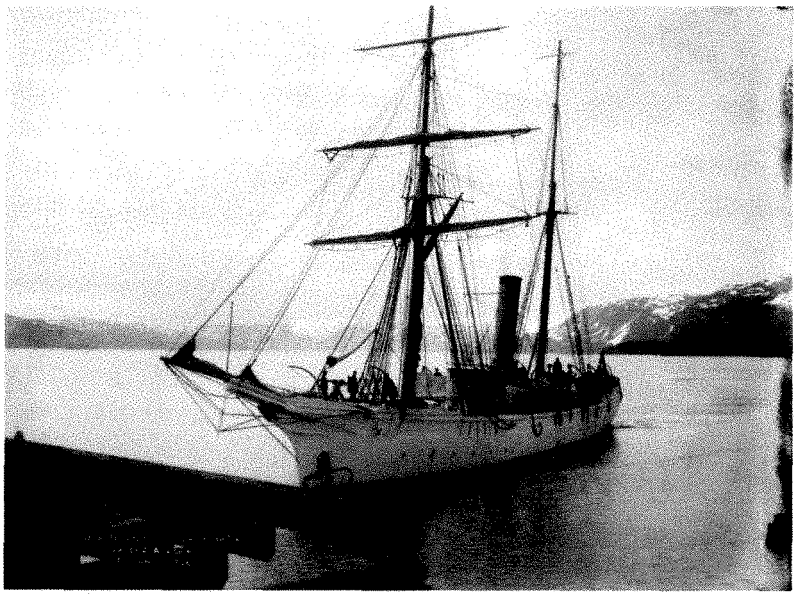
The captain of the cutter *Manning* was appointed a U.S. commissioner, and a junior officer of the vessel received a commission as deputy marshal. (Courtesy of the Amelia Elkinton Photo Collection [acc. 74-175-378N] in the Archives, Alaska and Polar Regions Department, University of Alaska Fairbanks)

marshal. Judge Overfield and Marshal Harvey P. Sullivan made the appointments.[19]

Judge Edward E. Cushman adjourned court on June 21 in the first division and had assumed his duties in the third judicial division when he left the next day on the revenue cutter *Rush* for the Alaska Peninsula and the Aleutian Islands. Judge Cushman convened court at various remote locations and returned to Valdez on August 13, having covered 3,724 miles. At the end of the trip, he reported that he was very satisfied with the floating court. The clerk of court estimated that the experiment had saved the government more than $8,000. The judge, therefore, recommended that the court repeat the voyage the next summer.

The *Rush* picked up Cushman in Juneau on June 22 and left Valdez with the rest of the court personnel on July 2. Cushman

[19]Memorandum for Assistant Attorney General Fowler, April 13, 1910; J.A. Fowler to attorney general, April 27, 1910; attorney general to secretary of the treasury, April 27, 1910; acting secretary of the treasury to attorney general, April 29, 1910; J.J. Glover memorandum for the attorney general to Sullivan, May 7, 1910, File 151267, Section 1, Box 1009A, Straight Numerical Files, Department of Justice Central Files, R.G. 60, National Archives.



Aboard the revenue cutter *Rush*, Judge Edward E. Cushman convened court at various locations over a distance of 3,724 miles of the Alaska Peninsula and the Aleutian Islands before returning to Valdez. (Courtesy of the Whalen Photo Collection [acc.75-84-130N] in the Archives, Alaska and Polar Regions Department, University of Alaska Fairbanks)

held court at Unalaska for a few days, and then arrived in Bristol Bay in mid-July, when the canneries there were still operating. Unfortunately, criminal and other cases arose after the court departed from Bristol Bay, requiring that prisoners and witnesses be brought to Valdez at great expense. It certainly was not feasible to detain prisoners until the court returned a year later. So Cushman reasoned that, to enable the court to clear the docket of all cases, he should arrive later the following year, around August 10, the approximate time when the fishing season ended and the canneries shut down.

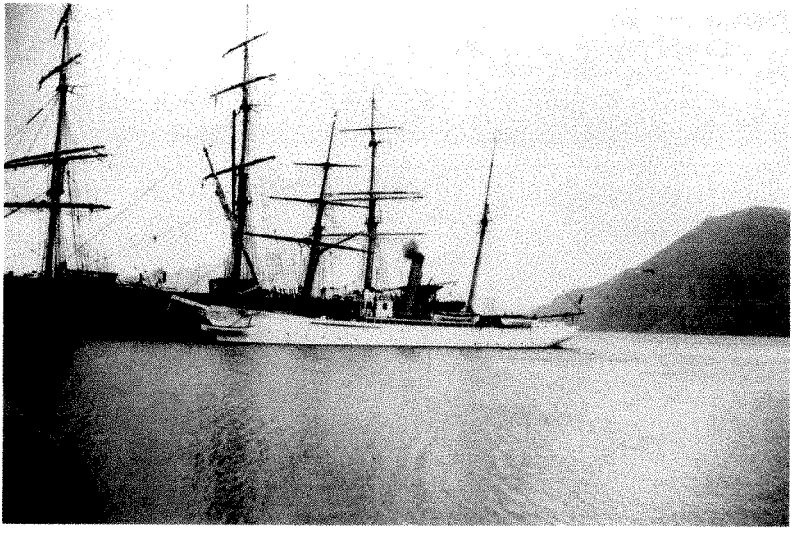
In his report, Cushman praised the officers and men of the *Rush*, who had done everything in their power to make the trip an agreeable one. He noted, however, that the ship was far too small for carrying court personnel and that everyone had suffered from the lack of space. He asked that a larger cutter be assigned for the work of the floating court in 1911.[20]

[20]Cushman to attorney general, June 21, 1910, File 146772, Section 1, Box 904, Straight Numerical Files, Department of Justice Central Files, R.G. 60, National Archives.

D.P. Foley, the senior captain of the Revenue Cutter Service in command of the Bering Sea fleet, had also been generally satisfied with the work of the floating court. He did, however, have several complaints and recommendations. Unalaska had no suitable jail to confine prisoners accused of sealing violations. The existing facility was a jail in name only, located in the center of the village and possessing no locks or bars. Few men were willing to serve as guards, and even those few were none too reliable. Foley recommended Expedition Island in Unalaska Harbor as a suitable site for a jail. In addition, on the beach near the village lay a nearly completed sternwheeler built during the Nome gold rush. It was decaying slowly, but it could probably be bought for a small sum, moved to the island, and converted into a jail at a modest cost.[21]

The captains of the *Tahoma*, *Manning*, and *Perry* did not perform duties as U.S. commissioners during the 1910 season. They had not received their commissions until July, after which time their duties confined them to the patrol of the

[21]D.P. Foley to secretary of the treasury, October 20, 1910, File 151267, Section 1, Box 1009A, Straight Numerical Files, Department of Justice Central Files, R.G. 60, National Archives.



Judge Cushman noted that the U.S.R.C. *Rush* was far too small for carrying court personnel, and asked that a larger cutter be assigned for the floating court in 1911. (Courtesy of the Brooks Photo Collection [acc. 68-32-21N] in the Archives, Alaska and Polar Regions Department, University of Alaska Fairbanks)

Pribilof Islands. Any cases occurring there, Foley contended, "could be tried with better grace before the commissioner at Unalaska who would not be in the position of accuser and judge." Japanese sealers frequently landed on the Pribilof Islands and, if apprehended, were charged with illegal sealing. The commanding officers of either the *Tahoma* or the *Manning* could have tried the Japanese, but both officers had received their commissions only recently and were not prepared to try these cases. Foley believed, however, that all cases involving the subjects or vessels of foreign nations should be reported to the commander of the Bering Sea Patrol before any other action was taken. Foley felt that captains and junior officers acting as U.S. commissioners and deputy marshals, respectively, could probably deal with cases that arose while they were patrolling the coast on their way to the Bering Sea. He recommended that the men obtain their commissions before starting the cruise.[22]

Foley suggested that, since the fleet traversed parts of the first and third judicial divisions, the captain of the *Rush* should be commissioned by the district court in that division. The commissions of the others should be for the third judicial division. In 1910 their jurisdiction was restricted to the waters and islands of the Bering Sea; this limitation was a mistake, since their services were most needed along the coast to the east of Unimak Pass in the vicinity of Sannak, Chirikof , and Kodiak Islands, where in the past both Canadian and Japanese sealers had committed depredations. Well into the 1910 season, Judge Cushman finally extended the jurisdiction of the captain commissioners to cover the whole of the third judicial division. The judge for the second judicial division issued commissions for the cutter *Bear,* which patrolled the Arctic coast. Foley concluded that the commissioning of Revenue Cutter Service officers meant that the laws would be enforced in parts of Alaska where it was but little known or regarded. Since officers had to be well prepared for this work, he recommended that each patrol vessel be furnished with a copy of Carter's annotated code of Alaska, while the commander of the Bering Sea Patrol should have a copy of the United States annotated statutes.[23]

On March 15, 1911, the attorney general instructed Judge Thomas R. Lyons of the first division to conduct the floating court during that season, departing Valdez early in the summer. The attorney general directed Judge Cushman to hold a term of court at Juneau in May and at Fairbanks in June

[22]Ibid.

[23]Ibid.

through August. He also suggested that notices be posted of the terms of the floating court, one in the Valdez paper and one at Seward, and others at least thirty days in advance, at the commissioners' offices in each of the places where court was to be held.[24]

In the meantime, a complication had arisen with the discovery that individuals being paid $2,500 or more per annum could not "be appointed to, or hold the position of United States Commissioner." This ruled out the captains of the revenue cutters, but it left junior officers eligible. The attorney general recommended that the applicable statutes be amended to enable the commanding officers of revenue cutters to be appointed commissioners and ex-officio justices of the peace at large in Alaska, serving without compensation at such places where no officials existed.[25]

The floating court, presided over by Judge Lyons, finally departed on the *Thetis,* and the voyage convinced Lyons that the court should make the trip annually. He estimated that, by trying cases in the home regions of the witnesses rather than transporting them to Valdez or Seward, the floating court saved at least $8,000. He was also convinced that the very presence of the court made a desirable impression on violators of the law. In fact, many offenses committed in the Bristol Bay region probably would remain untried if witnesses were compelled to appear at Valdez or Seward. In short, Lyons had "a very enjoyable experience, with good weather nearly all the time."[26]

While the floating court tried cases in the Bristol Bay region and the Aleutian Islands, the cutter *Bear* steamed northward to Point Barrow on its annual patrol. Unlike in previous years, no court officials from Nome accompanied the *Bear* because of a heavy work schedule in town. The district court judge of the second division appointed Lieutenant Jones as U.S. commissioner, and instructed him to distribute copies of Carter's code to the various other U.S. commissioners along the way. During the voyage, from early July to late August, Commis-

[24]Attorney General Lyons, March 15, 1911; Cushman to attorney general, April 4, 1911, File 146772, Section 2, Box 904, Straight Numerical Files, Department of Justice Central Files, R.G. 60, National Archives.

[25]Secretary of the treasury to attorney general, April 22, 1911; J.J. Glover to attorney general, May 24, 1911, File 146772, Section 2, Box 904, Straight Numerical Files, Department of Justice Central Files, R.G. 60, National Archives.

[26]Thomas R. Lyons to Edward E. Cushman, September 26, 1911, File 151267, Section 1, Box 1009A, Straight Numerical Files, Department of Justice Central Files, R.G. 60, National Archives.

A successful voyage on the *Thetis* convinced Judge Thomas R. Lyons that the court should make annual trips to outlying regions. (Courtesy of the Thetis Photo Collection [acc. 81-163-3N] in the Archives, Alaska and Polar Regions Department, University of Alaska Fairbanks)

sioner Jones settled a variety of minor disputes among the Eskimos in various villages. At a couple of settlements, Jones investigated certain allegedly insane Eskimos, but decided not to take the individuals to Nome for sanity hearings, because they were nonviolent and it would cost a great deal "to have them adjudged insane and sent outside." Another issue arose when the superintendent of the native schools, who had accompanied the *Bear* on its northern voyage, discovered that the owners of a couple of shore whaling stations, who also conducted general merchandising and bought furs, took unfair advantage of the Eskimos, bordering on "peonage." The captain, the commissioners, and the superintendent thereupon met with the owners of the enterprises and reached agreements as to how the natives were to be treated. The matter was to be investigated again in the 1912 season. On several occasions, the *Bear* saw service as a jail, when culprits were incarcerated on the way north and delivered to their home villages on the way south. In response to a complaint, the captain of the *Bear* removed one troublesome native from his village, took him north a long way, "got him a job and secured his promise to stay there."[27]

[27]B.S. Rodey to attorney general, August 19, 1911, File 151267, Section 1, Box 1009A, Straight Numerical Files, Department of Justice Central Files, R.G. 60, National Archives.

Nome's U.S. attorney, B.S. Rodey, was delighted when the *Bear* brought no prisoners or witnesses to town on its return. This saved the government much money, because indicting an accused in Nome, securing a conviction, and returning the witnesses home—all to be done before the close of the two-month navigation season—entailed heavy expenses. The captain of the revenue cutter, at the request of the court in Nome, had distributed the latest regulations regarding fur-bearing animals among the natives and had discovered only minor infractions of the law. In short, Rodey was satisfied with the work the *Bear* had accomplished in the 1911 season.[28]

In early 1912, Judge Cushman requested that the *Thetis*, a larger vessel than the *Rush*, be assigned once again to the floating court. He intended to hold terms of court at Nushagak, Unalaska, Unga, and Kodiak, and requested that Deputy Marshal Willard B. Hastings of Unalaska, together with a Revenue Cutter Service officer appointed as commissioner, make the first trip of the season west from Unalaska and visit Atka and other outlying islands of the Aleutian chain. He also requested that he be allowed to employ an attorney at the rate of $250 per month to represent individuals indicted for felonies. Once these minor matters were straightened out, the floating court left Valdez for the work of the 1912 season.

In the meantime, the *Bear* had once again sailed north. As on previous voyages, the commissioner, Lieutenant Dempwolf, and the deputy marshal closed the saloon of Smith & Emerson for selling liquor after the expiration of its license; and the commissioner investigated a charge against S.O. Gurney, a Caucasian, for "cohabiting in a state of adultery and fornication" with a native woman. The commissioner bound Gurney over to appear before the next session of the grand jury at Nome, fixing a bond of $1,000, which the resident of Kotzebue furnished.

At Point Hope, the deputy marshal arrested Daniel Nakok and charged him with committing adultery. Brought before commissioner Dempwolf, Nakok pleaded guilty and was sentenced to a three-month term in the Nome jail. Captain J.G. Ballinger, commander of the *Bear*, observed that this was "a particularly flagrant case, the offense having been committed at various times with the same woman during the last four years and, as the Native was defiant, it was deemed best to make an example of him." Still, the case bothered the captain. Nakok apparently had associated with the woman for some years "in direct opposition to the advice and admonitions of the school teacher and the missionary at Point Hope."

[28]Ibid.

Ballinger thought that Nakok's case illustrated "the evil effects caused by the action of the missionaries in Alaska in seeking to substitute white men's morals and marriage customs for the satisfactory Native custom of marriage." Natives had long been used to trial marriage and were easily persuaded to be married in the white man's fashion. When the affected parties changed their minds, "not having fully realized the firmness of the tie which binds them together, they are anxious for a divorce, which cannot be legally obtained at any other place except Nome." Distances and the difficulties of the trip proved prohibitive, so Natives in this situation considered themselves free to form other ties, although still legally married. This then brought them into violation of the law. Ballinger proposed that it should be made easier to get a divorce or a "greater caution should be exercised in marrying them."

Another Native of Icy Cape, who previously had been warned not to steal, had committed the offense again. Captain Ballinger reported that, since no official complaint was made before the U.S. commissioner on board, he ordered the man confined in the brig on the ship and taken to Point Barrow. There Ballinger landed him with a severe lecture and a warning as to his conduct in the future. Ballinger believed that "the trip on foot back to Icy Cape from Point Barrow may have a salutary effect."

The captain had also acted on his own account in the case of Solly Augninak, whom he transported from Point Hope to his village, Shischmareff. The year before, Ballinger had punished the man for the crime of incest. Although there had been insufficient evidence to convict him in court, the captain had been convinced of his guilt. The man's daughter had died the previous winter, and according to reports, he had been exemplary during the year. Therefore, Ballinger had decided "to allow him to go back to the village from whence he was taken."[29]

Within a short time, the floating court had proven its effectiveness, and it quickly became an institution. The cutter *Bear* continued to make its annual trip along the Arctic coast to as far north as Point Barrow. In the 1913 season, the district court in Nome, as usual, appointed one of the officers as commissioner. In that year, the court hired an Eskimo interpreter to join the *Bear,* making the work of the commissioner a little easier. The cutter stopped at most Eskimo settlements on its way north, except at Cape Prince of Wales. There was

[29]Cushman to attorney general, March 12, 1912; J.G. Ballinger to secretary of the treasury, August 19, 1912; Ballinger to secretary of the treasury, December 6, 1912, File 146772, Section 3, Box 904, Straight Numerical Files, Department of Justice Central Files, R.G. 60, National Archives.

very little work for the commissioner and deputy marshal that season, except for a number of domestic relations problems, which the officials did not "consider of sufficient importance to do anything about, owing to the expense, inconvenience and uncertainty of getting the parties back to their homes before the freeze up." Taking his cue from the captain of the *Bear*, Nome's U.S. Attorney Rodey recommended to the attorney general that divorces among Natives be made easier.

Captain Ballinger reported that the relations between the Eskimos and the shopkeepers had vastly improved over the previous year. Indeed, it had been a prosperous year. Sufficient numbers of whales had been caught, and fox trapping had been successful.[30]

In the 1914 season, the cutter *McCulloch* left Valdez on July 15 and steamed to Seward, Seldovia, and Knik. From there it proceeded to Iliamna Bay on the west coast of Cook Inlet. There all members of the marshals' and clerks' offices disembarked and went overland some fourteen miles to Iliamna village; thence by launch about ninety miles across Iliamna Lake and down the Kvichak River another ninety miles to Naknek, on the south shore of Bristol Bay. From there, the officials took cannery steamers about the same distance to Dillingham on Nushagak Bay, the first location where a term of court was held.

While the judge and U.S. attorney were still traveling on the cutter, the marshal summoned the necessary numbers of people for grand and petit juries for the term. The marshal chose these individuals from approximately two hundred men who wintered at and around the canneries and claimed their Alaska residence on Bristol Bay and its tributaries. During the fishing season, the population picture changed drastically. Approximately twenty-five hundred men, most of whom the fishing operators imported annually from San Francisco, Astoria, Portland, and Seattle, worked in the eight active canneries on the Nushagak River and Bay, at the northern end of Bristol Bay. Another four thousand transients worked in the thirteen active canneries and fisheries located on the Naknek and Kvichak Rivers along the southern shores of Bristol Bay.[31]

While the marshal was summoning grand and petit juries, the *McCulloch*—carrying Judge Fred M. Brown, Assistant U.S.

[30]Rodey to attorney general, August 26, 1913, File 146772, Section 3, Box 904, Straight Numerical Files, Department of Justice Central Files, R.G. 60, National Archives.

[31]William H. Whittlesley, assistant U.S. attorney, to William N. Spence, U.S. attorney, October 28, 1914, File 146772, Section 3, Box 904, Straight Numerical Files, Department of Justice Central Files, , R.G. 60, National Archives.

Attorney William H. Whittlesey, and J.L. Reed, the attorney appointed to represent defendants in felony cases—left Iliamna Bay and proceeded directly to Unga, where one case awaited disposition. Whittlesey, knowing that Unga did not contain enough qualified individuals to summon grand and petit juries, directed the resident deputy marshal to subpoena the necessary witnesses, and took them aboard the cutter to appear before the grand jury at Dillingham. The *McCulloch* then steamed to Unalaska, arriving at the end of July. That little settlement also did not have enough residents qualified for jury service. The defendants at Unalaska had employed private counsel, and the assistant U.S. attorney, with court approval, agreed with the request of the defense attorney to transfer the cases to the term of court to be held at Seward on October 2, 1914.[32]

On the eve of the departure from Unalaska, Lieutenant Hutson, the U.S. commissioner on the *Tahoma*, held hearings on the Pribilof Islands in the cases of *United States v. Hatton* and *United States v. Tongue*, where the defendants were charged with having given liquor to Natives. They were held for the grand jury, but the *McCulloch*, with its floating court, was unable to proceed to the Pribilofs to investigate or to have the witnesses taken to Dillingham in time for the term of court. The floating court arrived at Dillingham and convened on August 3. Grand and petit juries were impaneled, and the court conducted its business. Then the *McCulloch* carried the court officials, prisoners, witnesses, and guards to the Pribilofs, investigating conditions for a day, and arrived at Unalaska on August 13. It held court the next day. There were no jury trials. The same was true at Unga, where Judge Brown convened the court on August 19. Prisoners held at Unga, having been indicted at the Dilligham term, pleaded guilty. Thirteen individuals received citizenship papers, twelve applied for final papers, and another three applied for liquor licenses. The court also transacted some minor civil business.[33]

Next, the *McCulloch* moved to Kodiak, where the court disposed of accumulated business. There were no criminal cases, except an alleged murder at a cannery at the lower western end of the island. The marshal detained witnesses, all foreign nationals, but it proved impossible to find a sufficient number of qualified jurors for either grand or petit juries. The prisoner and the witnesses were put aboard the *McCulloch* and taken to the term of court at Seward. Deputy U.S. mar-

[32]Ibid.

[33]Ibid.

shals and U.S. commissioners were stationed at Kodiak, Unga, Naknek, and Dillingham. If a felony was committed some distance from the headquarters at Kodiak or Unga, the deputy marshal had to charter a launch or take the monthly mail boat to investigate and make an arrest. At Unalaska, the deputy marshal depended for transportation mainly upon the revenue cutters, while the court officers at Naknek and Dillingham took advantage of the free use of the cannery steamers and launches.[34]

Assistant U.S. Attorney Whittlesey's participation in both the 1913 and 1914 floating courts led him to realize that Unalaska, Unga, and Kodiak did not contain enough individuals who were qualified to serve on grand and petit juries. Many of the residents spoke Russian and understood and spoke but little English. He recommended that terms of court be discontinued at these locations and advocated that an annual term should be held at Naknek or Dillingham. Holding court in Bristol Bay, he argued, helped minimize crime among the thousands of foreigners and others who gathered there each year to work in the fisheries. Whittlesey believed that the court would need no more than three weeks each year to finish its business in that region.[35]

Soon thereafter, the U.S. attorney at Valdez, William N. Spence, suggested to the attorney general that henceforth the court should utilize regular steamers and should go from Valdez to Iliamna, a trip of about three days. From there it should proceed over the portage to Iliamna Lake and then by boat on the Kvichak River to Bristol Bay and Dillingham. After the term of court at the latter location, the court officials should return by the same route. Prisoners, if any, should be transported on regular mail steamers from Bristol Bay. All other terms of court usually held on the trip should be abandoned to save the government money. Early in 1915, the attorney general directed the *McCulloch* to Valdez to pick up the court for yet another, though abbreviated, season. Court was to be held at Naknek, Dilligham, and Unga.

On January 25, 1915, an act of Congress combined the Revenue Cutter Service with the Life-Saving Service, creating the U.S. Coast Guard. Cooperation continued between Alaska's federal courts and the new organization, with judges and U.S. marshals for the second and third divisions still appointing officers as U.S. commissioners and U.S. deputy marshals, to serve without compensation. Beginning in 1916, however, the floating court was no longer held annually. That

[34]Ibid.

[35]Ibid.

year the secretary of the interior, anticipating labor troubles connected with the construction of the Alaska Railroad, asked that Judge Brown remain in the third division instead of conducting the floating court. The attorney general agreed, and no floating court was held.[36]

In early 1925, Judge E.E. Ritchie asked the permission of the attorney general to hold a term of court on Bristol Bay. The commissioner there was holding for the grand jury one man accused of murder and another of incest, and about eighty individuals had applied for naturalized citizenship. If the felony cases had to be brought before a grand jury in Valdez or Seward, the expenses for witnesses promised to be heavy. The applicants for naturalization could not afford the long trip to either Seward or Valdez. Unfortunately, the coast guard had no vessel suitable for the proposed floating court, so none was held that year.[37]

In May 1934, Judge Cecil H. Clegg responded to instructions from the Department of Justice and called for terms of court to be held in June at Seldovia, Kodiak, Unga, Unalaska, Naknek, and Dillingham. The coast guard agreed to make the cutter *Tahoe* available. Clegg resigned, however, and Judge E. Coke Hill of the fourth division took his place. U.S. Attorney Joseph W. Kehoe and Clerk of Court Robert Roming accompanied Judge Hill on the trip. The judge naturalized about twenty-five aliens and accepted approximately forty-five declarations of intention and also a number of petitions for naturalization. He passed upon two motions dealing with civil suits. Satisfied with what had been accomplished, Hill recommended that the headquarters of the U.S. commissioner and the deputy marshal, then located at Dillingham, be moved five miles east to Snag Point, a much larger community with a post office, a school, and large stores dealing in liquor. During the summer, transient workers increased the population of Snag Point considerably, and, with the easy availability of liquor, conditions often were deplorable. U.S. marshal C.J. Todd complied, moving the deputy marshal's office to Snag Point. The district

[36]William N. Spence to attorney general, November 2, 1914; Fred M. Brown to attorney general to Robert W. Jennings, April 13, 1916, File 146772, Section 1, Box 904, Straight Numerical Files, Department of Justice Central Files, R.G. 60, National Archives.

[37]Wayne Andrews, ed., *Concise Dictionary of American History* (New York, 1962), 200; T.J. Spellacy, assistant attorney general, to secretary of the treasury, April 9, 1920, File 151267, Section 3, Box 1009B; E.E. Ritchie to attorney general, March 28, 1925; John Marshal to E.E. Ritchie, May 25, 1925, File 151267, Section 4, Box 1009B, Straight Numerical Files, Department of Justice Central Files, R.G. 60, National Archives.

court judge followed suit and moved the commissioner's office as well.[38] The record indicates that Judge Simon Hellenthal conducted a floating court on a regular basis from the time of his appointment to the third division in Valdez in 1935. He did not hold one, however, in 1938. After the headquarters of the court of the third division were moved from Valdez to Anchorage, Hellenthal and his successors resumed the practice and held floating courts as late as the 1950s.[39]

What did the floating courts accomplish? They helped establish respect for the law among rural residents and unruly transient populations of fishermen and cannery workers in remote districts. They familiarized court personnel with regions of Alaska not easily accessible to those not involved in Native education or in the fishing and canning industry. Perhaps most importantly, they made justice accessible to many who could not afford to travel to Valdez or Seward for a term of court.

[38]Cecil H. Clegg to E.C. Stewart, May 4, 1934; Anthony J. Dimond to Homer S. Cummings, attorney general, May 18, 1934; Hill to attorney general, July 18, 1934; C.E. Steward to C.J. Todd, August 11, 1934, File 151267, Section 5, Box 1009B, Straight Numerical Files, Department of Justice Central Files, R.G. 60, National Archives.

[39]S.A. Andretta to Stephen B. Gibbons, assistant secretary, Department of the Treasury, February 5, 1937; Hellenthal to attorney general, January 6, 1938, File 151267, Section 6, Box 1009B, Straight Numerical Files, Department of Justice Central Files, R.G. 60, N.A

The Loma Prieta Earthquake and the Ninth Circuit Court of Appeals[1]

Stephen L. Wasby

Late in the afternoon on October 17, 1989, wrote a judge of the U.S. Court of Appeals for the Ninth Circuit,

> Most of the court staff had gone home to watch the World Series game between the Oakland A's and the San Francisco Giants. Ninth Circuit Court of Appeals Clerk of Court Cathy Catterson, however, was still at her desk in the ornately carved, wood paneled room that had been the office of the Postmaster when the 1906 earthquake hit San Francisco. When the building began to shake and the plaster began to fall from the ceiling and crash to the floor, Clerk Catterson was under the desk.
>
> My first inkling of something wrong came when I returned home at approximately 6:30PM that evening to watch the World Series game, and I saw on the TV screen only a picture of the San Francisco Ferry Building clock,

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1. The author wishes to express his appreciation to former Chief Judge Alfred T. Goodwin of the U.S. Court of Appeals for the Ninth Circuit for sharing his recollections; to Judge Mary Schroeder for recording hers; and to the court staff members who generously agreed to be interviewed: Cathy Catterson, clerk of court, and Helen Hill, assistant librarian, U.S. Court of Appeals for the Ninth Circuit; and Gregory Walters, circuit executive, Ninth U.S. Judicial Circuit, and Franco Mancini, assistant circuit executive. An earlier, less extensive version of this article appeared as "Disruption, Dislocation, Discretion, and Dependence: The Ninth Circuit Court of Appeals and the Loma Prieta Earthquake," *The Judges' Journal* 37:4 (Fall 1998): 33–39. Material used by permission of The American Bar Association.

> stuck at a few minutes past five. Then I turned on the news and watched the scenes of fire.
>
> Knowing that the building had survived the 1906 earthquake, we did not panic, and waited through the next day for some contact from San Francisco. Our Chief Judge had no better information.[2]

Busy dealing with the frightening situation of "big cracks" and "falling things" in the building, and with a "crack through which we could see outside," court staff did not reach Chief Judge Alfred Goodwin in Southern California until that night because he had been attending a party for former Ninth Circuit judge Justice Anthony Kennedy at the Pasadena courthouse.

Earthquakes are sudden disasters. Floods are usually preceded by extensive rains, and rising rivers are visible. There are weather warnings for hurricanes. Although seismologists can identify areas of greatest vulnerability to earthquakes and may be able to predict when, within a large span of time, a major earthquake is probable, they do not know in advance exactly when an earthquake will occur and where its greater damage will take place.

For the U.S. Court of Appeals for the Ninth Circuit, the Loma Prieta earthquake, 7.1 on the Richter scale, followed by multiple aftershocks, produced disruption and dislocation. Indeed, it was not until almost seven years after the earthquake that the court returned to its San Francisco headquarters at Seventh and Mission Streets. The disruption to the court's processing of cases was relatively minor. A key court actor's evaluation was that in the "big picture," there was "almost no disruption of court operations," with disruption "relatively minimal, overall."[3] Indeed, one judge's repeated theme in recollecting that experience was, "Not a single calendar was lost."[4] That this was an appellate court whose judges were dispersed in many cities served to minimize the effect on its work, at least in comparison to what might happen to a trial court with a more circumscribed jurisdiction. However, the effects, particularly dislocation, were substantial, and were concentrated on the headquarters court staff. To get through the dislocation, the court exercised significant

2. Mary Schroeder, "Recollections of a Court Coping with Disaster Oct. 17, 1989," October 20, 1997.

3. Quotations without attribution are drawn from interviews conducted by the author.

4. Schroeder, "Recollections."

discretion in dealing with rules confronting it, but it was dependent on other entities as it tried to "dig out."

This examination of the earthquake's effect on the U.S. Court of Appeals for the Ninth Circuit will emphasize the themes of disruption, dislocation, discretion, and dependence. Because it is important to examine a variety of the earthquake's effects on the court, attention will be given to case processing, including filing and docketing, and on holding sittings of the court; availability and location of work space; and personnel. This article is based on discussions with key court personnel; the recollections of some judges; and available documents. We turn first to the immediate effects of the earthquake. Then we will look at case-processing elements; and at the various alternative spaces the court occupied, particularly the court's several moves to alternative facilities and back to its original headquarters.

SHORT RUN EFFECTS

The extent of damage to the court's headquarters building was not known immediately. As Chief Judge Goodwin wrote to all the judges in the Ninth Circuit, "Even after three weeks of inspections, it is not yet possible fully to assess the damage to the Court of Appeals building at Seventh and Mission."[5] The initial picture was that there were some serious cracks, a settling of the building at its Seventh and Mission corner, plaster off the ceilings, and books overturned in the library. Several groups of structural engineers who examined the building shortly after the earthquake "were unanimous: there *appears* to be no damage to the steel structure of the building, but it is unsafe to occupy until repaired"; however, "complete analysis of the damage" could not come until early 1990.[6] Most crucial was that the city had "red-tagged" the damaged courthouse on the second day. This meant that one entered the building at one's own risk. While "the experts tend to agree that the basic structure is sound . . . , it is presently uninhabitable."[7]

5. Chief Judge Goodwin to all Judges and Magistrates of the Ninth Circuit, November 7, 1989, 1 [hereafter cited as Goodwin to All Judges].

6. "Court of Appeals Homeless After Quake," *9th Circuit News* (Winter 1989–1990), 1, 18 [hereafter cited as "Homeless After Quake"].

7. Goodwin to All Judges, supra note 5 at 1.

The Loma Prieta earthquake opened substantial cracks in the walls of the Ninth Circuit Court of Appeals building. (Courtesy of Lauren Bruder)

The quake "was a big blow to the staff" in a number of ways. Many of them had been in the middle of it. As reported in the *9th Circuit News*,

> Many court employees were in the building during the tremblor—some stood in doorways or dove under desks for protection. . . . many bookcases and file cabinets toppled over, and chunks of plaster fell from cracks in the walls and ceilings. When power went out and alarms started sounding, everyone escaped in darkness down stairs and outside to the the street. . . . many walked or had to wait hours to get home.[8]

Thus it was no surprise that the quake's effect on the court's employees was "bad initially" and "the clerk's staff suffered." "A lot of staff were very freaked" in the immediate post-quake period. The greatest stress was fear of going back into the building at Seventh and Mission. The city told people to return and get their belongings under strict "hard-hat" rules. The situation was "chaotic," and people were "fearful to be in

8. Ibid.

the building"; some were "scared of the building," and two dozen workers would not go into it.

Because of the considerable uncertainty, with some staff members "fearful of losing their jobs," in the quake's immediate aftermath many people "wanted to come back" to the building, but they weren't allowed to do so. In a situation that was "frustrating to a lot of staff: they wanted to help, but there was nothing to do—there was no way to go," the most senior staff gave supervisors "instructions to call and sit tight." That no staff lost their homes—the worst damage was minor—helped prevent additional stress.

During the initial post-quake period, the court staff were in the "strange situation" of not having "enough information to know how to proceed." Over objections by other agencies, they engaged in considerable ad hoc self-help. They exercised discretion in order to "get on with the job," and their responses were crucial to the court's continuing to function effectively. For example, court staff and computer people moved the computers themselves, upsetting the Administrative Office of the U.S. Courts (AO) and the contractors.[9] In one of many demonstrations of "much unselfishness," they worked twenty-hour days, putting in "enormous overtime that [the computer people] didn't keep track of." This was but one instance showing that the court proved it "was tough, resilient, and caring, and could pull together."[10] In a similar demonstration, although staffers were allowed in the building for only one hour per day, the court's library staff obtained permission to go in for longer periods to obtain needed books; however, two staff members were stuck in an elevator for some time, and the General Services Administration was not happy ("We got yelled at for going into the building to get the books"). That the GSA, the principal government agency affecting the court, was spread thin at the time because of other earthquake-related matters certainly allowed the court staff some added flexibility.

It should be noted here that the Ninth Circuit, although a part of the federal government, was not part of, or connected to, any interagency disaster network. This disconnectedness seems to result from the related facts that disaster planning is primarily an executive branch function, thus perhaps not including courts, and that the Ninth Circuit is a *federal* court,

9. Chief Judge Goodwin reported, "It was good that we had our own computer people as the private contractors were unable to meet the sudden emergency." Goodwin to All Judges, supra note 5 at 5.

10. Interview with Judge Alfred T. Goodwin, October 14 1994.

making it less likely to be part of an interagency network of state, county, and municipal agencies.

Communication

A "main immediate problem" was that the telephones were not operating and the court lacked a "telephone infrastructure," which it had to build. The list of judges' home telephone numbers was not up-to-date, nor did staff have each other's numbers. Even when phone service was restored, communication remained limited because of a "scarcity of working telephones" and because less than half the staff had a desk and phone.[11] Moreover, the earthquake had "crashed" the core of the court's e-mail system, located in the basement of its San Francisco courthouse, so that members of the court could not communicate with each other. Nonetheless, with external help that system was back in operation within a couple of days.[12] In an example of important assistance from an external entity, the court's opinion-printing contractor, Electrographics Corp. in South San Francisco, provided computer technicians and those who worked on the court's opinions. Systems staff from the Fourth Circuit also helped the court's own computer staff.[13] As a result,

> [o]n the third day after the earthquake, a message came on our E-mail that the [headquarters] building was closed, that the computer center had been moved to a location near the airport, at the site of our opinion printer's facility, and that the Clerk's office was trying to get communication up between the court and the judges.

Then, "approximately a week after the earthquake, we received word that GSA had closed the building until further notice because of structural damage; we needed to find 'temporary' quarters."[14] (Further showing the importance of communications systems, the court moved over the weekend, but still was without telephones in a city where obtaining telephone service under normal circumstances took two to three weeks.)

11. Goodwin to All Judges, supra note 5 at 2–3.

12. It took the library a bit longer (six days) to get its computer system—with LEXIS and WESTLAW—working.

13. See Alfred T. Goodwin to Chief Judge Sam J. Ervin III, November 6, 1989.

14. Schroeder, "Recollections."

Few Ninth Circuit judges had chambers in San Francisco and thus most were distant from circuit headquarters.[15] The speed with which electronic communication was restored (e-mail was back "up" three days after the earthquake), coupled with the relatively mild impact on case processing, meant that the judges did not quickly or fully appreciate the degree of difficulty at headquarters. (Had the court's full complement of twenty-eight active-duty judges been located in San Francisco, "it would have been more disruptive.") According to a court staff person, the restored e-mail system permitted access to the judges, and even to Chief Judge Goodwin, who had gone to Alaska.[16] The e-mail made it possible to send earthquake update memos to all judges, but "outlying judges couldn't know what was going on in San Francisco" and, despite communication from the chief judge, "had no sense of the chaos" there and "were removed from the reality of a homeless court." Indeed, one staff person "wished the e-mail hadn't been up" so soon, so that otherwise the judges might have developed a better understanding of the staff's plight.

Filing, Docketing, and Case Files

Definitely affected were case filing and docketing, which took a lot longer than usual. The court immediately issued a press release explaining its activities in the aftermath of the earthquake, and a notice that filing deadlines would not be enforced. The court attached this "Special Earthquake Notice" to opinion slipsheets:

> This opinion is being filed while the Clerk's office in San Francisco is closed due to severe earthquake damage. Once the Clerk's office is operational, notices will be placed in legal newspapers throughout the Circuit. At that time parties may seek additional time to file a petition for rehearing if they desire to file one.

15. See Stephen L. Wasby, "Communication Within the Ninth Circuit Court of Appeals: The View From the Bench," *Golden Gate University Law Review* 8 (1977): 1–25; Wasby, "Communication in the Ninth Circuit: A Concern for Collegiality," *University of Puget Sound Law Review* 28 (Fall 1987): 73–138; and Wasby, "Technology and Communication in a Federal Court: The Ninth Circuit," *Santa Clara Law Review* 11 (Winter 1988): 1–28.

16. The chief judge, whose chambers were in Pasadena, had been scheduled to go to Anchorage two days after the earthquake. "People told me to go," he said, and he did take the trip. Interview of Alfred T. Goodwin by author, October 14, 1994.

Attorneys wishing to file cases with the court no longer had access to "walk-in filing"—their great concern, according to one court staff person. However, fax and overnight mail prevented that from becoming "that big a deal," except that the lawyers could not get the confirmed copy of the filing. Installation of a few more fax machines alleviated that minor aspect of the filing problem. Lawyers were able to receive notification once the machine for the court's AIMS docketing system was moved to the computer room of the local district court—the move consumed three hundred person-days—supplemented by the work of staff who had terminals at home. Nevertheless, the court's computer staff had to work extended hours to prepare computer terminals for docketing work.

Problems with the mail complicated matters. In addition to serious postal delivery problems, all mail had to be x-rayed—at the district court building, not at the court of appeals—because of the recent letter-bomb murder of Eleventh Circuit Judge Robert Vance. Mail went first to one location, then to court security, then to the mail room in the old Federal Building and then, finally, a court van delivered it to the various, and dispersed, buildings into which staff units had been moved. (Mail arriving on Monday morning was not likely to reach the addressee before Tuesday noon.)

No court records were destroyed in the earthquake. (The same was true for books in the court's library; only two hundred of the sixty-eight thousand volumes fell off the shelves.[17]) However, access to the records was an immediate serious problem as the records room was the most damaged part of the courthouse. After the room was made somewhat more safe with timbers and plywood shoring, for a couple of months Records Unit staff, wearing hardhats and using flashlights, went in and out of the damaged building retrieving records,[18] so they could be sent to judges who needed them to prepare for their calendars of cases.

Once the records were retrieved, new space had to be found for storage. The ballroom of the abandoned Del Webb Hotel at Eighth and Market, "the only space locatable with a floor strong enough to handle tons of briefs and records," was set up

17. A librarian said, "In the sets of volumes, one can see the waves went laterally." However, "only three or four stacks were pulled out of the wall; none were on the ground—they leaned on others."

18. Judge Schroeder calls the Records staff the "true heroes and heroines of the first few months after the case." Schroeder, "Recollections."

as the records unit.[19] Some records were in transit, the result of moving some docketing staff to the court's Pasadena courthouse to carry out their tasks. Once records were trucked to Southern California, the staff, assisted by six volunteer docketing clerks from the Fourth Circuit, entered the information from the records, and then returned them by truck to San Francisco. Thus "monitoring was impossible, because we couldn't know" the location of the documents. Indeed, one senior court staff person said the earthquake's most important effect on managing the court was on "input—there was no monitoring of caseload; no inventory was done." Although the help from the Fourth Circuit meant that "we made some progress in catching up" in docketing, the clerk of court reported that it was "still behind" as of February 1990.[20] (Later, on hearing of the appalling conditions in which staff attorneys were working in San Francisco, two Pasadena judges suggested that some staff attorneys move their offices to the Pasadena courthouse to work. The clerk of court responded that there were difficulties with this "quite enticing" offer because of space problems in Pasadena and central staff's need for access to materials in San Francisco.[21])

Calendars

On the whole, the judges' work was hindered little.[22] Judges continued to file opinions without interruptions, but some meetings of judges were cancelled because staff, "without computers, telephones, or copying machines," could not provide appropriate support.[23] There was no immediate problem with the court's oral argument calendars, because, at the time of the earthquake, the court was not scheduled to sit again until the beginning of the following month. The document retrieval by the records staff allowed the court to handle

19. Ibid.; "Competing with the homeless for a clear stretch of sidewalk, Ninth Circuit U.S. Court of Appeals staff workers push shopping carts laden with court files from the ballroom of a former hotel on Market Street . . . to the clerk's office at 10 United Nations Plaza. . . ." "No Place Like a Home for Ninth Circuit Staff," *The Recorder* (February 20, 1990).

20. U.S. Court of Appeals for the Ninth Circuit, Minutes of Court Meeting, February 14, 1990, 2 [hereafter cited as Minutes, February 14, 1990].

21. Cathy Catterson to all judges, December 20, 1990.

22. "Our judges have been able to work at about 90% of normal," wrote Chief Judge Goodwin to Chief Judge Sam J. Ervin III, of the Fourth Circuit, November 6, 1989.

23. "Homeless After Quake," supra note 6 at 19.

its January and subsequent calendars, although there were delays in sending briefs from the court to judges, and lawyers were asked to supply additional copies. (Judges already had material for the November and December calendars.) To repeat the theme of one of its judges, the court of appeals "never cancelled a calendar," even after "the first rocky month," nor after the move to the court's "permanent-temporary" quarters, nor in the move back to Seventh and Mission. As Chief Judge Goodwin reported three weeks after the earthquake, "The court does not want to cancel calendars except as a last resort because the staff has worked long hours to keep things running as normally as possible."[24]

Evidence that problems with space could be mitigated was that one or two panels of judges scheduled to sit in San Francisco were moved to Pasadena, while other panels also sat at 450 Golden Gate, the home of the federal district court. En banc sittings of the court were also moved to Pasadena, which had an appropriate courtroom not available in San Francisco. The court had to call on "the good graces" or "limited charity" of the Northern District of California, and was allowed to use that court's ceremonial courtroom. Also used were a tax court facility and a bankruptcy courtroom, although with a "scheduling issue," and the moot court courtroom at nearby Hastings College of Law. In addition, in June 1990, a student lounge with a high ceiling in a Hastings dorm was leased and a bench was moved in "to provide us a space that would be at least available." This courtroom, which Chief Judge Goodwin is said to have called the "Judge Bean courtroom," and which he commented "will make a lot of the older lawyers feel at home if they practiced in places like Gold Field, Nevada, and Alturas, California,"[25] was used regularly for eighteen months. Consideration was given to converting rooms in a United Nations Plaza building into courtrooms until the move to the Rincon Center space, but it was rejected, in part because much time would be necessary to prepare the space, making it not worth the cost, and because "[t]he judges would have to mingle with the lawyers and spectators in using the toilets."[26]

Immediately after the earthquake, "when there was virtually no space at all" but "emergency matters and motions needed to be handled," judges demonstrated their ingenuity. "The first motions panel convened after the quake loaded up all of the papers into cars and drove to Reno to

24. Goodwin to All Judges, supra note 5 at 4.

25. Chief Judge Goodwin to Judge [Richard] Chambers, July 19, 1990.

26. Ibid.

conduct their deliberations."[27] Affected more were screening calendars, in which judges determined whether less complex cases (those given low "weights" by staff) were to be decided on the basis of an already-prepared staff attorney memo or were to be calendared for argument before a regular panel. At first, the court's almost forty central staff attorneys, working without an operating docketing system, "were unable to undertake new cases, except emergencies."[28] Without office space, they had to come to court facilities to pick up the necessary materials and then had to work on them at home; this made them the most detached of the court staff.[29] Then, for four to six weeks, all staff attorneys, except for the motions attorneys, were temporarily assigned to individual judges. However, the screening function was maintained rather than pushing cases through to the oral argument calendars without screening.

DISLOCATION: THE "HOMELESS COURT"

It was not until two years after the earthquake that the court's staff was able to work together in one place again, with obvious effects on morale. At first, the court, and thus its material, was spread out over numerous buildings—up to *seven* for most of the time until the court moved to its long-term temporary facilities in the Rincon Center. The court moved to allegedly temporary quarters for what turned out to be a lengthy stay before moving to other, also temporary, quarters for an even longer period. The latter facility, however, united court employees in one place and was considered superior in many ways.

Alternate Space I

Judge Schroeder has described it well:

> Approximately a month after the earthquake came a cheerful, in the circumstances, memorandum from Clerk Catterson: "I have good news and bad news. The good

27. Schroeder, "Recollections."

28. "Homeless After Quake," supra note 6 at 19.

29. Conference attorneys "conducted settlement conferences from their kitchen tables."

> news is that there is now a restaurant in the Court of Appeals. The bad news is that it is a Carl's Jr."[30] Our Circuit Executive's office, which was in charge of finding space, got the court in temporary quarters, albeit scattered over a number of buildings in the Tenderloin District. The clerk and motions attorneys were in the building with Carl's Jr. The other staff attorneys and staff director were in a crumbling federal building close by, on United Nations Plaza. About seven of the staff attorneys were housed in one large room, which was soon dubbed "the romper room."[31]

One result was that it was difficult for senior staff to keep other staff apprised because "they are in several different places." The earlier-mentioned docketing difficulties were also "caused by trying to run an operation that [was] spread over varying floors of six different buildings."[32]

Even the dispersed, inadequate set of locations for the court did not come about without the court's staff using discretion—that is, bending the rules. One staffer has observed, "We violated every procurement law possible to make sure everyone was housed. We ran from person to person to get their approval to lease space. We ran to the GSA and busted their arms to get them to agree." As this employee added with some understatement, "There are times you set priorities contrary to regulations."

At first, until late December 1989, the four Court of Appeals judges resident in San Francisco were housed apart from the court's staff. Initially, they were "nowhere," then in a Social Security Income (SSI) building at United Nations Plaza. It was, reported one observer, a "horrible building," "an inhospitable place" inhabited by the "dregs of humanity" who "used the elevator as a urinal." So, the unhappy judges moved to "a relatively new building," One Trinity Center, on Market Street, across the street from the Carl's Jr. facility—which Chief Judge Goodwin called "Karlsplatz."[33] In this facility, one floor was devoted to the separate offices of each of the resident judges and to space, in six chambers, for judges and their staff visiting San Francisco for calendars and meetings. There was

30. "Carl's Jr." is a fast-food hamburger chain. Gregory Walters, the Ninth Circuit's circuit executive, was quoted as saying that the court now had "an executive dining room."

31. Schroeder, "Recollections."

32. Minutes, February 14 1990, supra note 20 at 1.

33. "Homeless After Quake," supra note 6 at 18.

also "a huge space in the middle for secretaries and clerks that was soon dubbed 'the crib.'"[34]

The library was first placed at 10 UN Plaza, in small offices into which were crammed ten employees, "as many reference books as they could carry and shelve in such a small space," and two WESTLAW/LEXIS terminals. The latter were crucial at that time not only for general use but also for use by the displaced staff attorneys.[35] The library shortly moved to 1155 Market Street, where there was some room for books, but about only 5 percent of the court's collection of books. The mailrooms of the library and the court were at separate locations, which caused problems, so the library moved its mailroom to the court's mailroom and stationed someone there to bring the books to the library area for cataloging. This meant, however, that the library staff were divided between two locations.

Stress

The working conditions, particularly dispersion of court staff units, led to frustration and stress beyond that stemming from the quake's initial effects. The Tenderloin District in which staff were dispersed was dangerous, and they had a long walk from the parking lot to their buildings. "There were drug deals and stabbings next to Carl's Jr. on a pretty regular basis" and "gunshots at noon." A couple of staff members were mugged and Judge Schroeder was attacked while taking a picture of the Seventh and Mission courthouse.[36]

The chief judge, who met regularly with San Francisco police to discuss improving security in the area, remarked, "Because of the lack of appropriate space after the earthquake, there are 175 good people out on the street in terrible conditions."[37] Two months after the quake, the minutes of a Court Executive Committee meeting included the statement that "the Clerk's Office staff is . . . experiencing morale problems as a result of long work hours and less than ideal work conditions."[38] Two months later, Chief Judge Goodwin

34. Ibid.

35. Ibid., 19.

36. As she later put it, "Life during The Tenderloin Captivity was not a barrel of laughs." Schroeder, "Recollections."

37. Conversation with Judge Alfred T. Goodwin, September 9, 1990.

38. U.S. Court of Appeals, Minutes of Court Executive Committee Meeting, January 17, 1990, 3 [hereafter cited as Minutes, January 17, 1990].

reported to his colleagues, "The surroundings in which the staff is working are less than hospitable. Despite the happy face we are showing the world, there are still very serious recovery problems."[39]

The temporary facilities themselves were not secure from visits by the area's homeless. "The homeless liked to visit our rest room facilities, and one person left the water running after washing her hair in the sink, thereby causing a partial roof collapse in the room where our motions' materials were stored."[40] There were also repeated leaks of raw sewage into the space used by the docketing office at 10 UN Plaza, and overflowing sinks and stopped up toilets in restrooms.

Despite the stress, absenteeism was not higher than average, although immediately after the quake a few people didn't come to work perhaps because "we were unclear in our directions," and it "took a while to have space to come back to and it was crowded at 10 UN Plaza." The building—and perhaps the related stress—did take a toll on the staff, as reported to the court in a memo from chief of staff attorneys Thomas Sponsler, accompanied by a detailed letter to Chief Judge Goodwin signed by almost one hundred staff attorney and Clerk's office personnel. Sponsler reported not only "the sense of frustration and anguish experienced by all who work here" but also the "presence of menacing street people right outside of the buildings," exposure of the staff to a "significant increase in verbal sexual harassment," and increased illness caused by a building with poor ventilation and noxious odors.[41] The letter also pointed to the toll taken by "cramped and noisy" workspace and time-consuming travel between units. Moreover, "The concept of 'the Court' is falling apart in an atmosphere of finger-pointing as more and more filings fall through growing cracks in an overburdened system constructed only as a temporary measure." As a result, the staff continued, there was a decline in morale, with frustration leading to "discontent, which results in people leaving the court."[42]

Beyond offering counseling and some social activities, the court did not appear to do much specifically directed to alleviating the workers' stress. Most obvious was a big "earth-

39. Minutes, February 14, 1990, supra note 20 at 1.

40. Schroeder, "Recollections."

41. Memo, Thomas Sponsler to Judges, December 17, 1990.

42 Letter, Ninth Circuit San Francisco Staff to Alfred T. Goodwin, December 7, 1990. Reacting to the letter, one judge said it "makes me feel like a slumlord." Stephen Trott to associates, December 19, 1990.

quake stress reliever party" held after the court had been in its new quarters for a month. Judges, including the chief judge, attended, wearing buttons that read "I survived the quake of '89 . . . pretty much." Various bar associations and some judges sponsored similar events as a way of bringing the staff back together.

Discerning the extent of counseling is difficult. One senior staffer observed that there were "lots of counseling sessions," with counseling offered to those who wouldn't go into the building to retrieve their possessions, but the overall picture of assistance to staff is more understated. A senior staff person said, "We had a couple of counselors come in at some point. We had counseling available," but it was "much later before we had a place to have a meeting." Until then, we "encouraged people to talk to the EAP counselor if they were unhappy," but lack of a pre-existing connection with the EAP program probably served to limit its post-quake use. Moreover, monitoring staff reactions to the earthquake was not easy, and "[I]t was difficult to sort out the post-traumatic element." As one senior staffer observed, when "staff were working at home, and at seven locations, it is difficult to tell what has happened to them." Finally, however, "we invited the whole office to a session, to discuss stress." This session, which was "very good," "may have been through the EAP program for federal agencies in San Francisco." However, "not a lot of people went" to the session. (Someone else reported "only 20 to 30 people showed up.") A San Francisco judge's secretary reinforced the limited character of the assistance when she expressed uncertainty about what services had been offered, although she did indicate that "we could go talk to people if we wanted; people were available."

The judges did make sure that staff members were recognized for their extraordinary work. The chief judge sent special letters to a number of individuals, such as those who had gone to Pasadena to facilitate docketing of cases.[43] Cash awards were given to some support staff from funds from the Administrative Office of the Courts (AO); and the judges made a special presentation to Clerk of Court Cathy Catterson.

Alternate Space II

Before returning to Seventh and Mission, the court relocated once more, in November 1991, to the Rincon Center.

43. See, e.g., Alfred T. Goodwin to Jereldine Curtis, February 1, 1990: "Soon we will be caught up and we couldn't have gotten this far without your help."

This move brought the court's staff back together in one place for the first time in well over two years. As Judge Schroeder noted,

> After two years, we launched our second complete move of the entire court headquarters: staff, furniture and records, computers, phones, paper clips, and all. After what seemed endless negotiations, the Circuit Executive finally found "permanent-temporary" quarters for us in a shopping center-apartment high rise in the Embarcadero.[44]

This move did not come easily. "It took a lot of work to build a courthouse from scratch in a year and a half—getting money, getting leases." The GSA arranged, in mid-December 1989, to lease space, with the lease signed in mid-January, 1990. That space was "build to suit," which meant that the court had only a month after the lease-signing "in which to lay out its space, traffic, and security requirements."[45] It also meant that at least six months would elapse before the move could take place, although the owners' use of private contractors was likely to move matters along more rapidly than

44. Schroeder, "Recollections."

45. Chief Judge Goodwin to Associates, January 18 1990.

Clerk's office staff stand outside temporary headquarters at 10 UN Plaza before the move to Rincon Center. (Courtesy of Cathy Catterson)

otherwise. Then, new delays cropped up, particularly over who would be responsible for space and design costs and over the length of the lease, and the GSA did not sign a supplemental lease until late in 1990, a year past the initial lease-signing. At that point, the move to the Rincon Center was projected to occur in stages in May, July, and August, and November 1991,[46] but the move was not actually completed until June 1992, more than two-and-one-half years after the earthquake. A celebration took place on July 15, 1992, simulataneously with the commemoration of the bicentennial of the Bill of Rights.

Relations between the court and the GSA over the new space have been described as "warfare," a situation that resulted largely from an error attributed to the GSA. Court personnel started with the GSA's assumption of needing 97,000 square feet; having been told the court would be back in its original facility in one-and-a-half years, they sought 100,000 square feet of temporary space, based on a GSA estimate of the size of the permanent facility. But "the GSA was wrong: we had actually occupied 135,000 square feet." When the court found the error and "went out for 150,000 square feet, they fought us every step of the way, trying to shoehorn us into an empty box and have us call it a home."[47] There was also a dispute over the length of the lease, with the GSA wanting a maximum of five years—the GSA's estimate of the time to repair the building at Seventh and Mission—while the court wanted an option to extend. The court staff, suspecting "we would be there a long time" because they "had seen courts go into temporary facilities and never come out," successfully fought to overcome the GSA. As it turned out, the court staff were correct: "time grew and grew, from one-and-one-half years to two-and-one-half years, to seven (what we originally thought, and a staffer's educated guess)."[48]

Decision-Making

The decision-making process concerning new space was committee-based, said a senior staff member, and "structurally

46. "2001: A Space Odyssey: Housing the Court of Appeals," *9th Circuit News* (Winter 1990/1991), 1, 16.

47. An article in the *9th Circuit News* indicated that the GSA's supplemental lease would "increase the total space under lease to 159,000 square feet. . . ." "2001: A Space Odyssey," 16.

48. In mid-1990, Chief Judge Goodwin wrote to his colleagues that, with no construction schedule announced, "we will be in the Rincon building for a minimum of five years and probably for a long time thereafter." Chief Judge Goodwin to associates, July 25, 1990, 2.

and organizationally no different" from pre-earthquake methods. The staff's work with this committee proceeded "the way we would work with any other committee." It was, however, another said, "an extension of the regular process," and the portions dealing with finding a new facility were far more intensive—six to seven meetings a week, including meetings with many architects. This process was not without friction; one observer remarked that the circuit executive and one of the judges involved in the planning for new space "nearly killed each other over several things, including whether judges should be allowed to deal directly with architects."

Chief Judge Goodwin's participation seems to have been minimal. He was not in San Francisco very much because his chambers were elsewhere, a decision he had made in taking the position. The earthquake, he said, was "the one time I wished I was in San Francisco rather than in Pasadena." He realized that "there was nothing I could do except be a monsignor and sprinkle holy water." His "only regret," he continued, was that "it was the only crisis during his chief judgeship and I was not on the ground." In fact, because the earthquake happened early in his term as chief judge, he felt as if "someone handed me an apple and I bit into it and found this worm."[49]

As a general matter, the earthquake placed the circuit executive, already "doing a good job before the quake," under a "superhuman burden"; the same was true of the clerk of the court, and of other units as well. For example, the court's procurement unit was initially reported "overwhelmed with the amount of work that has occurred since the earthquake."[50] Space and facilities, which had been 20 percent of the circuit executive's job, "[had] become 80 percent—although that may be a slight exaggeration." He obtained a new deputy (from his own staff) and "picked up some new staff," but "a lot was done in addition." Perhaps most important is the extent to which the aftermath of the earthquake "consumed people" involved in management of the court. Despite the quake's becoming an excuse "for about everything," with central staff proclaiming, "We haven't got to that because of the earthquake," the work did get done.

49. Interview with Alfred T. Goodwin, by author, October 14 1994. Goodwin further observed, "One judge said I played Nero while Rome burned," but "I have sufficiently cordial relations with that judge that I treated the criticism as constructive." In comments five years after the earthquake, Judge Goodwin observed further that "once matters were on course, there was nothing major left" to do; that "may have been one of the things that helped me make up my mind to leave the chief judgeship" after only two-and-a-half years. Certainly, he said, the earthquake "changed my view of what was important and what is a tolerable inconvenience—other events fade into nothing."

50. Minutes, January 17, 1990, supra note 38 at 2.

Space Quality

The new space at the Rincon Center was called "heaven." This was not so much because some offices had views of San Francisco Bay[51] and "all the restaurants and cappucino bars" in the city in the area were nearby. It was "heaven" because it brought the entire court back together under one roof, and because the facility had been designed "to accommodate all our needs." That had been done by a committee of Judge Betty Fletcher, who as chair received some calendar relief; former Chief Judge James Browning; and the circuit executive. "[M]uch [was] involved in the planning."[52] The GSA's inclusion in the process created even more work, with "increasing demands on the time of the chair occasioned by the GSA's methods of operations," and by "difficulties in funding," with "constantly shifting positions about who is going to pay for what."[53]

"We were able to design this space efficiently," reported one court staff member, and so it was an "improvement over the old building, which was not the most efficiently designed." One of the court's judges not resident in San Francisco said that the time at the Rincon Center was the "most collegial" time for the judges because of the way Judge Fletcher and her committee had designed the facilities. It was, said the judge, far more collegial there than in the "magnificent edifice" to which the court returned, where judges are in greater isolation from each other.

The move even improved the situation of some units. For example, the library's entire collection was in one place for the first time; previously, superceded materials had been in vaults in the basement, while "some things were in Judge Sneed's mezzanine." That the building was *not* in the unsafe Tenderloin also played an important part in how staff evaluated it. Much as many of them literally loved the Seventh and Mission building, the area in which it was located made them hesitant about being there. One person put the location problem well, "If we could put the old courthouse on rollers and move it to the bay, it would be heaven."

The improvement in the court's "workspace" helps explain why, once the move to the Rincon Center was completed, staff

51. With the Embarcadero Freeway torn down, the view of the Bay Bridge, the author can attest, was spectacular.

52. Judge Browning's wife, active in the court's activities while Judge Browning was chief judge, was said to have been very much involved in designing the judge's new chambers.

53. Chief Judge Goodwin to associates, July 25, 1990, 1.

performance there rose to a "much higher" level than before the earthquake. The comment, "There is an improvement in morale . . . in this environment," captures the possibility that moving from scattered sites to new space can substantially increase morale even if the new space is not permanent quarters or the remodeled original home, and that morale will be higher still if the long-term temporary quarters are well planned for better use.

Planning

When people are deciding the fate of a damaged facility, the decision to repair or rebuild is affected by possible alternate uses for the space as well as possible demolition. Part of the Ninth Circuit's problem was the difficulty of obtaining information about the condition of the Seventh and Mission courthouse. At first, "no one appreciated the extent of the damage," which had to await GSA engineers' assessment, but "the GSA was spread thin." Although the engineers' first indications were that it would take months before the court could return to the building, subsequent reports indicated there was "lots more damage than initially thought."

The GSA engineer's report of early 1990 outlined three possibilities for the future of the courthouse. The first was an expenditure of $12 million for a 24- to 32-month project to restore the building to its previous state, which was not seismically safe. The second and third were for four-and-a-half year projects—one to repair the building to withstand a big earthquake ($27 million), the other to do that and but also add an inner building ($43.5 million).[54] The GSA submitted a prospectus to Congress out of cycle for funds for the project, but did so without complete information. As the court was told in mid-1990, "Although [the out-of-cycle submission] is good news in the sense that GSA is proceeding swiftly, the bad news is that the information used for the prospectus is incomplete and inadequate."[55] Not surprisingly, the cost of the

54. U.S. Court of Appeals for the Ninth Circuit, Minutes of Court Executive Committee, March 15, 1990, 1. Later, all the architects bidding on the project "expressed doubt" about constructing a tower building in the center of the building. U.S. Court of Appeals for the Ninth Circuit, Court Meeting, August 15, 1990, p. 1 [hereafter cited as Minutes, August 15, 1990]. There was a flap within the court when Judge Chambers prematurely called for a vote of the judges to determine which scheme they preferred, and a number of judges objected to Chambers's preference for a combination of a "base-isolation" system for the building and construction of a new interior building.

55. U.S. Court of Appeals for the Ninth Circuit, Minutes of Court Meeting, June 12, 1990.

project was substantially greater than envisioned in the early 1990 scenarios. Indeed, by late 1990, the court was told that $40 million for the seismic upgrade would have to be followed by $53 million to complete the upgrade and modernization.[56]

An important element in considering how to proceed was that the Seventh and Mission building, which someone said would be "a white elephant except as a courthouse," was included on the National Register of Historic Buildings. This meant that "demolition would have been a 20-year battle" so that "the only real option was to repair." It also meant it had to be "restored in keeping with its former appearance," which would require careful removal and storage of wood paneling and marble veneer, with plaster ceilings having to be "carefully duplicated in several areas"—all of which was "labor-intensive, slow, and costly" work.[57]

The difficulties associated with the building's historic status may explain why, initially, not all judges viewed a move back to Seventh and Mission as the only option, but also why, finally, circumstances dictated the decision to remain there. The choice was neither an easy nor a quick one. Some judges, particularly one characterized as a "minor but vocal voice," did not want to repair the damaged building, and others "wanted to see the economics" before deciding. Although the U.S. Postal Service, which had shared the building, had quite early (in November 1989) announced its departure,[58] some people raised the question of whether the rebuilt Seventh and Mission courthouse would be large enough for all the court's components. Because some judges wanted to study other options, the circuit executive and Judge Joseph Sneed (one of the judges resident in San Francisco) examined the Presidio, as well as Letterman General Hospital in the same area, for possible sites, but that exploration did not produce viable options, in large part because the government's decision about disposing of the Presidio would not come for several years. Judge Kozinski, who had searched for potential buildings in downtown San Francisco, told his colleagues that, while there might be options, they were not practical because a "tremendous amount of work" would be necessary to prepare them for court use.[59]

56. U.S. Court of Appeals for the Ninth Circuit, Minutes of Court Meeting, October 10, 1990, 1.

57. Goodwin to all judges, supra note 5 at 1.

58. Judge Chambers saw to it that the name of the building was changed from "U.S. Court of Appeals and Post Office Building" to "U.S. Court of Appeals Building."

59. U.S. Court of Appeals for the Ninth Circuit, Minutes of Court Executive Committee, April 18, 1990, 1; Minutes, August 15, 1990, supra note 54 at 2.

At that point, the judges of the court of appeals needed to make a formal decision. With only one judge dissenting because of the unsuitability of the neighborhood, they chose to go back to Seventh and Mission if the building were seismically upgraded, renovated as a modern appellate court, and historically restored to the court's satisfaction.[60] The judges' decision was conveyed to the General Services Administration.

The negative character of the area did lead to meetings between Judge J. Clifford Wallace, who had become chief judge while the court was in the Rincon Center, and Representative Nancy Pelosi (D-California), in an effort to change the neighborhood—by eliminating the "robbery and mayhem" that existed there, as someone commented. Chief Judge Wallace even proposed a plan to revitalize the neighborhood, perhaps by placing a federal building across the street from the courthouse.[61] This was characterized by someone close to the matter as a "very tricky political issue" in which it would have taken many years to agree on a site. Moreover, no one was willing to come forward to press the proposal, even with funding assured. Nor did the city's interest in revitalizing the "Mid-Market" area, with a major architect working on alternatives, lead to desired results.

Once a return to Seventh and Mission accepted, a four-member committee was formed to work on the project. Committee members included Judges Procter Hug and Mary Schroeder, as chief judges-in-waiting; Judge Sneed; and former Chief Judge Richard Chambers. Judge Chambers, long concerned about the circuit's buildings, had been chief judge when, years before, the court had narrowly decided to stay in the building rather than join the district judges in their new courthouse. Very soon after the earthquake, he had "retained, with the Administrative Office's approval, [an] architect to make sure that restoration [was] done correctly."[62]

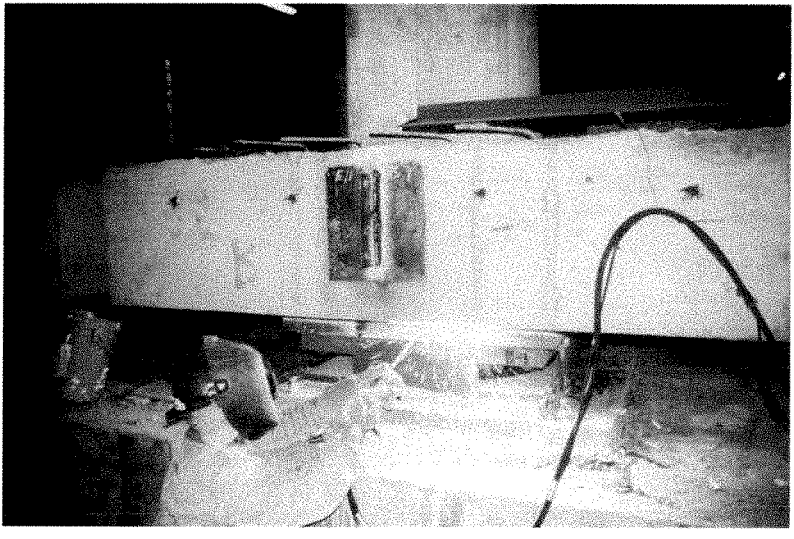
One committee member reported part of what was entailed:

> Restoration of the old building had to go forward. This meant getting an architect and an engineer, the appropriations, assessing the court's needs for the next forty years and taking a hard look at the neighborhood for space for expansion. . . .The engineers designed a "base-isolation" scheme that separated the building from the

60. Minutes, August 15, 1990, supra note 54 at 2.

61. See "Chief Judge Unveils Plan to Revitalize Court's Neighborhood," *9th Circuit News* (Fall 1992), 1, 7.

62. Goodwin to all judges, supra note 5 at 6.



Restoration of the old court building included constructing a base-isolation system that separated the building from the earth and placed it on rollers. (Courtesy of Skidmore, Owings and Merrill)

> earth, placed it on rollers with an 18-inch moat surrounding the building. Sheer walls had to be constructed to help the building withstand the torque of an earthquake, and this meant taking down all of the ornate plaster, wood, and marble in the building, marking and numbering the small pieces and storing them all far away. Many times Judge Hug and I walked through the building wondering if they could ever put humpty-dumpty together again. They did.[63]

The architect chosen for doing the seismic rehabilitation and historic restoration work was the nationally known Skidmore Owings and Merrill. Earthquake Protection Systems built the base-isolation system, which "involved placement of 256 ball bearing isolators in the foundation" so that the building would not be directly anchored to the ground.[64]

63. Schroeder, "Recollections."

64. "GSA Conducts Gala Reopening Ceremony for 7th & Mission Headquarters," *Ninth Circuit News* (Fall 1996), 1, 13. See also "7th & Mission Restoration Continues on Schedule," *Ninth Circuit News* (Winter 1994/Spring 1995), 1, 11.

GSA

The court appears to have been content to avoid interaction with the Federal Emergency Management Agency (FEMA). One judge observed, "We didn't need FEMA coming in and doing studies," which he felt would have delayed recovery further. There were, however, other government agencies to contend with—particularly the GSA, the court's landlord. Even under normal (pre-earthquake) conditions, judges and court staff did not speak favorably of the GSA; in fact, mention of the organization sometimes prompted profanity. Thus discontent with the GSA in the earthquake's aftermath should be no surprise. One of the more charitable comments about the GSA was that it "is extremely regulatory. There can be a great flood; they want to follow regulations; they want to be technical, rather than follow their spirit." The result, said this court staffer, again indicating the importance of discretion, was that "[w]e broke all the rules."[65]

Complaints about the GSA included its slow responses and the conflicting messages it conveyed (that something would happen, and then that it would not, or it would occur at a much later date). This led Judge Fletcher, chair of the committee to relocate the court to its temporary quarters, to request that GSA appoint a project manager, explaining, "One person in GSA Region 9 responsible from day one for appropriately rehousing the court would have been enormously helpful."[66] Conflicting objectives also divided the GSA and the court. The judges working on returning the court to Seventh and Mission felt that GSA was interested only in making the building safe for occupancy as quickly as possible, while the judges had broader objectives, including providing expansion space as part of the rebuilding instead of trying to obtain it later.

More than competing objectives was at issue, and matters boiled over in late 1990. Difficulties with the GSA led Chief Judge Goodwin to write then to a member of the California congressional delegation in support of a bill to transfer control of court space management from the GSA to the Administrative Office of the U.S. Courts. Among Judge Goodwin's complaints were that "the GSA made numerous promises but delivered nothing in the way of temporary housing" and that

65. An example of the tone of other comments is Judge Goodwin's remark about "the frustrations of work with the General Services Administration, who must have employed all of the Civil Service rejects from the rest of the governmental agencies." Chief Judge Alfred T. Goodwin to Richard M. Schmidt, Jr., October 30, 1990.

66. Judge Betty B. Fletcher to Edwin W. Thomas, August 2, 1990.

GSA "had been discovering new reasons for delaying the negotiations for the leasing and preparation for occupancy of the Rincon space." This was a repetition of "the pattern of resistance and noncooperation that marked GSA's role . . . from beginning to end" in the reconstruction of the Pasadena courthouse. Goodwin wrote that the judges would not mind allowing the GSA "manage our courthouses . . . if the GSA could do the job. It can't."[67]

Judge Goodwin's letter led the GSA regional administrator to complain about court staff misrepresentations, but Goodwin replied: "I think our difficulty can be classified as irreconcilable differences. We need a no-fault divorce." Continued the judge, "When the relations between a landlord and tenant get to the point exemplified by our exchange of correspondence, it is probably a good time to look for a different kind of relationship," such as that in the proposed legislation.[68]

Chief Judge Goodwin's letter to Representative Cox was part of the lobbying of high-level officials that had begun earlier. A few weeks after the earthquake, the judges had approached Senator Mark Hatfield (R-Oregon), ranking Republican on the Senate Appropriations Committee and a friend of Goodwin's,[69] to seek funding for the Seventh and Mission repairs. Later, former Chief Judge James Browning, a Montana native, had written regarding the court's situation to Senator Max Baucus (D-Montana), who in turn contacted GSA Administrator Richard Austin; Baucus did not see Austin's response as particularly helpful.[70] In addition, six months after the earthquake, Judge Goodwin asked his former Ninth Circuit colleague Justice Anthony Kennedy for some ideas about to how to deal with the situation with the GSA and particularly the "dreadful" surroundings in which the court was located. Kennedy made some suggestions, including a Washington, D.C.-level meeting with GSA and action through Justice O'Connor, the Ninth Circuit's circuit justice.[71] Also within

67. Chief Judge Alfred T. Goodwin to Rep. Christopher Cox, October 17, 1990.

68. Edwin W. Thomas to Alfred T. Goodwin, November 14, 1990; Alfred T. Goodwin to Edwin W. Thomas, November 27, 1990.

69. While governor of Oregon, Hatfield had named Goodwin to the Oregon Supreme Court, and, as senator, sponsored Goodwin's nominations to the federal district and appellate court.

70. See Max Baucus to James Browning, January 26, 1990 ("I'm not sure this letter does much to ease your concerns about the Court's immediate needs.")

71. Alfred T. Goodwin to Anthony M. Kennedy, March 22, 1990; Kennedy to Goodwin, March 19, 1990.

the judiciary, Goodwin wrote to a U.S. magistrate from Montana who had been reappointed to the Committee on Space and Facilities of the U.S. Judicial Conference, to state the court's particular concern with "the repair and restoration of the San Francisco Court of Appeals building." Goodwin commented that the AO "is being very helpful" but nonetheless wanted "your committee to know about it."[72]

AO

The GSA played a larger role—if often, from the perspective of court personnel, a negative one—than did the AO, despite the latter's direct role in the judicial system. The AO, said one observer, "was involved in an ancillary manner."[73] When court funds did not suffice for hiring an architect, the AO sent an architect to work with the circuit executive's office on the Rincon Center space; the office also authorized hiring a lawyer to review the Rincon Center lease to resolve problems that had developed. However, the AO was seen "more as an irritant than anything else" because it "promised to help and then never did." The AO "set up a task force to work on the matter, then a person went on a month-and-a-half vacation." AO staff were said to be "argumentative as to the budget" for rebuilding. It was not until after the Oklahoma City bombing, which affected U.S. courts there, that the AO created a disaster response team, drawn from several of its divisions.

The Move Back

The rebuilding project finally began in spring 1993, but it was to be more than three additional years before the court could occupy the building. Finally, on October 17, 1997, seven years to the day from the earthquake, the court circuit, in a brief ceremony, was able to celebrate its return to Seventh and Mission. The court had actually moved back into the building, in phases, over a three-month period starting in November 1996, to avoid disruption to docketing and calendar processing, and had already held its own "homecoming" reception on January 24, 1997.

72. Alfred T. Goodwin to Jack D. Shanstrom, November 24, 1989.

73. Writing about the AO's lack of responsiveness, Chief Judge Goodwin said, "Our homeless status after the San Francisco earthquake reminds us daily that we are a long way from Washington." Alfred T. Goodwin to Carolyn G. Dimmick, May 23, 1990.

This move, like the planning preceding it, itself involved planning. Judge Schroeder, a major participant, tells the story of getting the court out of its Rincon Center:

> This was headed up by certain geniuses in our clerk's office . . . who designed a phased move over a period of months. The old restored building, of course, was late in completion, and we needed a last-minute extension of our lease in the shopping center. The main trick in this move was to get all our furniture, records and supplies and computers down the single elevator that went from our upper floors to the loading dock in the basement. This, as one of my friends remarked, was roughly akin to emptying out Lake Superior with an eye dropper.[74]

Everything worked out, however, and the court, with invited officials and "assembled multitudes," was able to celebrate. And one of the matters that the court could celebrate most was that "not a single calendar was lost."

A LOOK AHEAD

The Ninth Circuit had lived through a natural disaster that did not, despite difficulties and dislocation, become a full-scale catastrophe for the court. Were any lessons learned? Perhaps the federal judiciary outside the Ninth Circuit may have learned from the Ninth Circuit's experience. As the Supreme Court at that time was considered developing a disaster plan, the chief justice sent his administrative assistant to San Francisco, along with security and telecommunications people, "to talk and to learn" about alternative communication systems and a security network. More recently the chief justice's staff have again expressed interest.

But what about the Ninth Circuit itself? Has it done anything with respect to the future? Although the courthouse itself is now far more "earthquake-proof" than it was before 1989, the court's headquarters remain in San Francisco, which is likely to have more earthquakes. Another of the circuit's major courthouses is in Pasadena, which, like most of Southern California, experiences earthquakes. Indeed, the Southern California earthquake of January 17, 1994, in one judge's office shattered a window and knocked over a file cabinet, which

74. Schroeder, "Recollections."

broke the computer printer, while a broken pipe on another floor of the building leaked water into the library area. More serious were problems caused by freeway damage, power outages, and airport closures. [After material was put back on shelves, an aftershock knocked some of it off again.][75]

The regional relevance of the Ninth Circuit's experience is shown by the effects of a 1993 earthquake in Oregon, as a result of which the Klamath County Courthouse was declared unsafe,[76] and perhaps even more so by the January 1994 Southern California earthquake. That quake, which damaged numerous state courthouses, including the downtown Los Angeles County Superior Court building, was reported to have "thrown the state court system into utter chaos," with lawyers in the immediate aftermath "trying to get information about possible courtroom closures and continuances." Just as the Ninth Circuit had extended deadlines, the state's chief justice, after requests from presiding judges, "issued a series of orders . . . permitting area courts to hold sessions anywhere within Los Angeles County and extending time periods for preliminary hearings and trials in criminal cases."[77]

As to what the Ninth Circuit has done to prepare for future disasters, one court staffer declared directly, "There was no disaster plan before. There is none now." A few things have been done. Emergency supplies have been placed throughout the headquarters courthouse. And much greater attention has been given to communication: staff now carry cellular phones; there is an up-to-date list of judges' and staff members' home telephone numbers; and the marshals are "tied in a lot better" to the phone intrastructure. Computer staff and the clerk of court formulated disaster recovery plans for the court's computers after they reviewed what they had done right and wrong in 1989, and new plans were developed for offsite storage of computer tapes. In general terms, however, matters are "not elaborate planned"—"a little bit but not much." There are "no further disaster plans," perhaps because, in the words of

75. Telephone conversation between Alfred T. Goodwin and author, January 17, 1994. The Ninth Circuit encompasses areas affected by typhoons as well as earthquakes. Typhoon Paka damaged to the federal courthouse in Guam on December 16 1997, but only insofar as water and wind marred ceilings, carpets, and furniture, and repairs were quickly made. "Guam Court Weathers Typhoon Paka," *The Third Branch* (February 1998), 6.

76. "Quake, shocks rock Oregon," *Albany [New York] Times-Union*, September 22, 1993.

77. Victoria Sind-Flor and Milt Policzer, "California Lawyers Rallying After Quake," *National Law Journal* (January 31, 1994), 1, 33.

someone who lived through the entire experience, "we're not sure what good they'd do." And the court is still not part of a disaster network with state or local agencies.

A CONCLUDING COMMENT

The U.S. Court of Appeals for the Ninth Circuit is back in its reconstructed "old" home. Throughout the post-earthquake period, case processing proceeded apace, with barely a "blip" on the screen. However, in order to return to Seventh and Mission, the court passed through two years of significant physical dislocation, with serious negative effects on the court's staff, although the remainder of the court's "time away from home" did not disrupt production or staff. Perhaps a principal reason for the lack of greater disruption is that, except for the D.C. Circuit, the U.S. Courts of Appeals, like many appellate courts, are dispersed institutions with respect to where its judges and their immediate chambers staff work, and they thus can absorb the shock of disasters such as earthquakes in a way other courts could not. However, particularly if intra-court communications are affected, decentralization may also mean that disaster-caused damage in one location may not become known to other members of the court, resulting in leading to a failure by many judges and others to appreciate fully how damaged their court is. As the recounting this article demonstrates, disruption and dislocation were minimized because the court allowed itself to be dependent on some other entities for assistance, while senior court staff intelligently exercised discretion in dealing with rules developed for more normal times.

Railroad Consolidation and Late Nineteenth-Century Federalism: Legal Strategy in the Organization of the Southern Pacific System*

Philip L. Merkel

The American railroad industry underwent dynamic changes following the Civil War. One transformation was a relentless movement toward consolidation, as lines that originally served local areas were integrated into regional and national systems. Railroadmen battled one another for supremacy in the nation's transportation corridors, buying and selling existing companies and creating new entities as links in their through lines.[1] Competition and overbuilding had taken a number of railroads to the brink of insolvency, and many believed consolidation could help solve their financial problems. By merging their corporate holdings, transportation moguls sought not only to enhance their competitive positions, but also to centralize management and streamline operations, thereby reducing costs.[2]

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[1]Kent R. Healy, "Development of a National Transportation System," in *The Growth of the American Economy*, ed. Harold F. Williamson (New York, 1951), 366–87; John F. Stover, *American Railroads* (Chicago, 1961), ch. 6. Maury Klein has described the business aspects of railroad consolidation in two excellent books, *The Life and Legend of Jay Gould* (Baltimore, 1986) and *Union Pacific: The Birth of a Railroad* (New York, 1987).

[2]For a discussion of the economic necessity for railroad consolidation, see Alfred D. Chandler, *The Visible Hand* (Cambridge, Mass., 1977), chs. 4 and 5; and Thomas K. McCraw, *Prophets of Regulation* (Cambridge, Mass., 1984), ch. 2.

When organizing the consolidated lines, railroad officials sought advice from some of the nation's most prominent lawyers. Quickly realizing that corporate restructuring could produce legal benefits far beyond their clients' immediate organizational expectations, these attorneys concentrated on arranging consolidations in ways that limited the power of state governments over railroads. Their specific targets were what they perceived as burdensome state taxes and regulations.

To understand the legal significance of this consolidation strategy requires a familiarity with American corporation law as it stood in 1860. In the antebellum legal order, the states controlled virtually every facet of corporate life. The ability even to conduct business as a corporation depended on the state legislature's willingness to grant a charter. States often placed conditions on corporations, including reserving the right to regulate their activities and to assess corporate taxes. This level of state involvement is not surprising, because most corporations initially limited their business to the state of incorporation. Early railroad corporations certainly fit this pattern. They were chartered by state legislatures to build lines that served local markets. Thus the states regulated railroads, sometimes even fixing shipping rates, and they determined railroad tax liability. Lawsuits involving railroads were tried in state courts where state law governed.[3] Federal involvement in railroad affairs was minimal. Although Congress granted and sold public lands for transportation development, it did not create railroad companies in the states or attempt to regulate state-chartered companies.

The postwar consolidation movement presented a golden opportunity to challenge this state-centered approach to corporation law, for the nature of the railroad business was changing profoundly. Companies chartered by individual states were merging with those of other jurisdictions to form new lines; traffic that once had been intrastate expanded across vast regions; and national interests in rail transportation began to predominate over local concerns. Moreover, a growing hostility to railroads in the South and West convinced many railroadmen that parochial state interests hindered the development of interstate systems. These considerations provided the impetus for developing consolidation strategies designed to alter fundamentally the balance of federalism with respect to state power over corporations. The time had come to curb state power over the interstate aspects of the

[3]James Willard Hurst, *The Legitimacy of the Business Corporation, 1780–1970* (Charlottesville, Vir., 1970), 16.

railroad business. Many in the industry hoped that if state legal control over interstate transportation were weakened, Congress would be forced to intervene and provide a more rational, uniform approach to regulation.[4]

This constitutional struggle over the role of the states in railroad affairs was the backdrop for the creation of the Southern Pacific Company of Kentucky and the organization of the first southern route transcontinental railroad.[5] Many historians have recounted the epic story of the building of the Southern Pacific, but little has been written about the legal maneuvering surrounding the chartering of the Southern Pacific Company of Kentucky, the holding company under which a number of existing and new lines were consolidated.[6] The Southern Pacific, a road linking cities in California with New Orleans, was the creation of the Golden State's legendary "Big Four:" Charles Crocker, Mark Hopkins, Collis P. Huntington, and Leland Stanford.[7] These men were

[4]David Wagner, "The Power of the State and National Governments to Regulate and Control Railroads," *Southern Law Review* 7 (1882): 377; Henry Clews, "Legislative Injustice to Railways," *The North American Review* 148 (1889): 319, 321. See also Gabriel Kolko, *Railroads and Regulation, 1877–1916* (New York, 1965), ch. 1, in which the author argues that railroad leaders also favored federal regulation as a means of ending cutthroat competition.

[5]At the outset, it is important that the reader recognize the difference between the Southern Pacific Railroad Company and the Southern Pacific Company of Kentucky. The Southern Pacific Railroad Company was a California corporation chartered in 1865. Congress granted it authority to participate in federal railroad building projects in California. Stuart Daggett, *Chapters in the History of the Southern Pacific* (New York, 1922), 119–23. The Southern Pacific Railroad Company was one of many companies that would comprise the Southern Pacific system. The Southern Pacific Company of Kentucky, on the other hand, was the holding company that leased the Southern Pacific Railroad Company and other lines when the Southern Pacific system was consolidated.

[6]Histories of the building of the Southern Pacific include Neill C. Wilson and Frank J. Taylor, *Southern Pacific, the Roaring Story of a Fighting Railroad* (New York, 1952); Daggett, *Chapters;* Ward M. McAfee, *California's Railroad Era, 1850–1911* (San Marino, Calif., 1973); Lewis B. Lesley, "A Southern Transcontinental Railroad into California: Texas and Pacific versus Southern Pacific, 1865–1885," *Pacific Historical Review* 5 (1936): 52.

[7]There are a number of biographies of the Big Four, including Oscar Lewis, *The Big Four* (New York, 1938); George Clark, *Leland Stanford* (Stanford, Calif., 1931); Norman E. Tutorow, *Leland Stanford: Man of Many Careers* (Menlo Park, Calif., 1971); David Lavender, *The Great Persuader* (New York, 1970) (biography of Huntington); Cerinda W. Evans, *Collis Porter Huntington* (Newport News, Vir., 1954) (2 vols.).

Mark Hopkins died in 1878, before the Southern Pacific consolidation was completed. Thereafter, his family's interests were represented by his adopted son, Timothy Hopkins. Even after Mark Hopkins's death, the press continued to refer to the Southern Pacific's owners as the Big Four. I will follow that convention in this article.

pioneers in national railroad development, for they also owned the Central Pacific Railroad Company, the California corporation that joined with the Union Pacific Railroad to complete the first transcontinental line in 1869.[8]

The Central Pacific-Union Pacific project introduced the Big Four to the world of political intrigue surrounding railroad empire building. Initially, the public supported the first transcontinental line because it promised to open the West for settlement. Congress enacted the Pacific Railroad Acts of 1862 and 1864, which called for the creation of rail, postal, and telegraph service from the Mississippi River to California. It chartered the Union Pacific and awarded the Central Pacific a federal franchise to complete the work. Federal largess in the form of land grants and bond guarantees was forthcoming.[9]

California aided the project by enacting laws favorable to railroad development, and its citizens anxiously awaited the road's completion.[10] Public opinion soured, however, as stories of lavish subsidies, profiteering, shoddy construction, and political corruption abounded. Anti-railroad sentiment surged in the 1870s with the Credit Moblier revelations and the ensuing congressional investigations of the Pacific Railroads.[11] The emergence of the Granger movement added to the railroads' political woes as they were beset with demands for state regulation of rates and higher taxes on the lines.[12]

To strengthen their position in transnational railroad traffic and to maintain their virtual monopoly in California, the Big Four decided in the late 1870s to open a new route across the states and territories of the Southwest. But the Southern Pacific project was conceived at a time when the political climate had already turned against the railroads. As the line neared completion in the 1880s, anti-railroad feeling ran high, and the builders of the new system expected little government support. While the Big Four acquired a number of federally chartered companies and franchises from their

[8]See, generally, Nelson Trottman, *History of the Union Pacific* (New York, 1923); Charles E. Ames, *Pioneering the Union Pacific* (New York, 1969); and John Hoyt Williams, *A Great and Shining Road* (New York, 1988).

[9]12 Stat. 489 (1862); 13 Stat. 356 (1864).

[10]Californians' early attitudes toward railroads are described in William Deverell, *Railroad Crossing: Californians and the Railroad, 1850–1910* (Berkeley, Calif., 1994), 10–19.

[11]The results of the investigation, known as the Poland Report, are found in House Report No. 77, 42d Cong., 3d sess. (1873) (serial no. 1577).

[12]Solon J. Buck, *The Granger Movement* (Cambridge, Mass. 1933).

private owners, Congress provided no new assistance.[13] The four men created the Southern Pacific in a piecemeal fashion by purchasing companies in California, Texas, and Louisiana, and by obtaining charters for new roads from the territorial legislatures of Arizona and New Mexico.[14] With the work nearly finished, the Big Four decided to consolidate the companies under one "umbrella" corporation, a move they believed would promote efficiency. In an essay in *The North American Review,* Huntington would later describe the advantages of consolidation for railroadmen and consumers alike:

> As a simple business proposition . . . it can be readily seen that much of the expense of maintaining separate organizations and separate offices will be cut off, and a great multitude of agents and agencies will be dispensed with. . . . The accomplishment of this would reduce the cost of transportation to the minimum, which would admit to the lowest possible rates to shippers and passengers.[15]

Consolidation was desirable from an economic standpoint, but what was not so obvious was where and how the umbrella organization should be formed. The Big Four were Californians, and their most profitable lines were the Central Pacific and Southern Pacific Railroads, both California corporations. California law allowed domestic corporations to acquire and lease railroads based in other states, so consolidation could have been accomplished by using a California holding company.[16] But

[13]Congressional land grants for railroad building effectively ended when the House of Representatives passed the Holman resolution in 1870, declaring that "the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued. . . ." After this resolution, Congress granted only one more subsidy, to the Texas Pacific Railroad, in 1871. Paul W. Gates, *History of Public Land Law Development* (Washington, D.C., 1968), 380.

[14]The acquisitions and incorporations are detailed in Daggett, *Chapters,* chs. 7 and 8.

[15]Collis P. Huntington, "A Plea for Railway Consolidation," *The North American Review* 153 (1891): 272, 277.

[16]"Railroad corporations doing business in this State and organized under any law of this State, or the United States, or of any State or Territory thereof, have power to enter into contracts with one another whereby the one may lease of the other the whole or any part of its railroad, or may acquire of the other the right to use, in common with it, the whole or any part of its railroad." Cal. Amend. to the Civil Code, Sup. Par. 5456, ch. 2, p. 21, approved April 3, 1880. See also *Lee v. Southern Pacific Railroad Co.,* 116 Cal. 97 (1897).

the political climate advised against consolidation in California. Forces opposed to the Big Four controlled California's 1878–79 Constitutional Convention, and they included a number of anti-railroad provisions in the new state constitution.[17] The railroads also pursued many highly publicized lawsuits against California taxation and rate regulation laws in the early 1880s.[18] Company officials doubted that the legislature would be party to creating what many saw as another monopoly for the Big Four.

Southern Pacific strategists instead considered consolidation options that not only made sense from an efficiency perspective, but also might curb state government interference with their operations. Following the lead of other companies doing business on a national level, the Southern Pacific tried to benefit from a postwar legal trend toward limiting state power over interstate business.[19] Like many of the day's railroad developers, the Big Four had a reputation for using both legal and illegal means to gain legislative support for their projects.[20] But they were also very innovative in petition-

[17]Ward N. McAfee, "A Constitutional History of Rate Regulation in California, 1879–1911," *Pacific Historical Review* 37 (1968): 265; Carl B. Swisher, *Motivation and Political Technique in the California Constitutional Convention, 1878–1879* (Claremont, Calif., 1930), chs. 4 and 5. For a discussion of popular anti-railroad feeling in California at this time, see Deverell, *Railroad Crossing*, 34–56.

[18]The reported cases reveal an ongoing battle between the companies and various governmental entities in California. The railroads attempted to remove suits for the collection of taxes from state to federal courts. *Central Pacific Railroad Co. v. Superior Court of Tulare County*, 62 Cal. 618 (1882); *Southern Pacific Railroad Co. v. Superior Court of Los Angeles County*, 63 Cal. 607 (1883); *People v. Southern Pacific Railroad Co.*, 65 Cal. 553 (1884). They claimed the state had no authority to tax their federal franchises, and they raised the novel argument that corporations were persons under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, so that unequal taxation of railroad property was illegal. *Central Pacific Railroad Co. v. State Board of Equalization*, 60 Cal. 35 (1882); *County of San Mateo v. Southern Pacific Railroad Co.*, 13 F. 722 (1882); *County of Santa Clara v. Southern Pacific Railroad Co.*, 18 F. 385 (1883). In other cases, they challenged local licensing fees. *City of Los Angeles v. Southern Pacific Railroad Co.*, 61 Cal. 59 (1882); *City of Los Angeles v. Southern Pacific Railroad Co.*, 67 Cal. 433 (1885).

[19]See, for example, Charles W. McCurdy, "American Law and the Marketing Structure of the Large Corporation," *Journal of Economic History* 38 (1978): 631; Philip L. Merkel, "Going National: The Life Insurance Industry's Campaign for Federal Regulation after the Civil War," *Business History Review* 65 (1991): 528; Richard F. Hamm, *Shaping the 18th Amendment: Temperance Reform, Legal Culture, and the Polity, 1880–1920* (Chapel Hill, N.C., 1995), ch. 2.

[20]The Big Four's attempts to influence legislation are described in Daggett, *Chapters*, ch. 12.

ing the courts to protect their interests when their influence in Congress and the state legislatures began to wane. They spent considerable sums on legal fees and employed highly competent attorneys in their legal departments to develop strategy.[21] The activities of these attorneys in cases leading up to the Southern Pacific merger reveal that they understood that consolidation could be accomplished in ways that might limit state power over railroad affairs. Their advice no doubt led to the two consolidation approaches that the Big Four ultimately pursued when they centralized the Southern Pacific's operations.

Both options were recent innovations in corporate organization that promised advantages to an enterprise conducting business in numerous jurisdictions. The first was to obtain a federal charter from Congress so as to merge the existing railroad corporations comprising the Southern Pacific into a single national company. A congressional charter promised important legal benefits at a time when hostility to railroads was high in many states. Railroads possessing federal charters claimed their relationship to the national government pre-empted state authority in significant ways. Relying on the United States Constitution's Supremacy Clause, they argued that states were prohibited from taxing railroad property and regulating rates. They also maintained that federal corporations were entitled to litigate lawsuits filed by and against them in federal courts, where many believed railroads enjoyed an advantage.[22]

[21]Before the Southern Pacific Company of Kentucky was incorporated, the Big Four's legal expenses appeared in the accounts of the Central Pacific. From 1864 to 1886, they totaled more than $2.3 million.

Beginning in 1869, the Central Pacific employed S.W. Sanderson as its general solicitor. Sanderson's annual salary reached $24,000 by 1885. He was succeeded by Creed Haymond in 1886. These men were two of the Central Pacific's highest-salaried employees. They tried cases in state and federal courts for the Central Pacific and other Big Four lines. Other attorneys worked in the Legal Department as salaried employees. United States Pacific Railway Commission, *Testimony Taken by the United States Pacific Railway Commission* (Washington, D.C., 1887), 2501, 2942–45.

My research reveals that the Southern Pacific Company's Legal Department records for the nineteenth century were destroyed in the San Francisco earthquake and fire of 1906. Fortunately, other sources have allowed me to piece together the legal strategy behind the Southern Pacific consolidation.

For an excellent discussion of the careers of the Big Four's principal lawyers and of legal culture during the period, see Daniel W. Levy, "Classical Lawyers and the Southern Pacific Railroad," *Western Legal History* 9 (1996): 177.

[22]Michael G. Collins, "The Unhappy History of Federal Question Removal," *Iowa Law Review* 71 (1986): 717, 742–48; Merkel, "The Origins of an Expanded Federal Question Jurisdiction: Railroad Development and the Ascendancy of the Federal Judiciary," *Business History Review* 58 (1984): 336.

If the Southern Pacific could not secure a federal charter, there was a second option. A new corporation would be chartered in a state friendly to the railroad. This holding company would lease the state and territorial companies forming the Southern Pacific route. This would enable the company to avoid restrictive state laws and some state taxes. In light of federal statutes and case precedents governing the diversity jurisdiction of the lower federal courts, the new corporation also could litigate railroad lawsuits in federal forums.

This article examines the Big Four's legal strategy as they planned the consolidation of their southern route transcontinental railroad under one corporate entity. Part I describes legal developments in the years preceding the consolidation. It reveals how companies conducting business on a national scale began seeking corporate powers from Congress during the 1860s and 1870s. Companies holding congressional privileges argued that these grants significantly altered the balance of federalism in the corporate arena, thereby limiting the states' traditional power over the companies' affairs and allowing them to take their litigation to federal courts. Part II discusses Collis P. Huntington's unsuccessful attempt to secure a federal charter for the Southern Pacific in the early 1880s. The effort failed because many in Congress had come to realize that federal charters were being used to restrict the states' power over corporations operating within their borders. Part III details Huntington's decision to charter the Southern Pacific Company in Kentucky after his unsuccessful gambit to obtain a federal charter. This section explains how the state and territorial companies constituting the Southern Pacific were brought under a central management. Part IV considers the legal significance of the Kentucky incorporation. Special attention is given to litigation involving the Southern Pacific Company and to whether the company's legal status proved beneficial when it attempted to remove lawsuits from state to federal courts.

I. FEDERAL CHARTERS, FEDERAL FRANCHISES, AND ATTEMPTS TO CURTAIL STATE POWER OVER CORPORATIONS AFTER THE CIVIL WAR

Before the Civil War, the chartering of business corporations in most cases was a power exercised by the states.[23] But the struggle for the Union inspired Congress to enter the corporate arena when important national interests, such as banking and transportation, were at stake.[24] The federal government intervened in corporate matters in two ways. First, Congress created new corporations, endowing them with federal charters. The National Banking Acts of 1863 and 1864, for example, were general incorporation statutes that provided for the creation and regulation of a national banking system.[25] Other federal corporations were chartered by special legislation. From 1862 to 1871, Congress created a number of railroad companies to build lines west of the Mississippi River.[26] These companies usually received subsidies, such as loans, land grants, and bond guarantees, as incentives for work on national projects.[27] Second, Congress conferred federal "franchises" on state-chartered companies to encourage their participation in federal endeavors. A federal franchise was the

[23]The most complete analysis of state incorporations during the antebellum period is found in Erwin Merrick Dodd, *American Business Corporations until 1860* (Cambridge, Mass., 1954). The major exception to the dominance of the states over corporate charters was in the area of banking. Congress chartered the First and Second Banks of the United States, but the charter for the Second Bank expired in 1836. Walter B. Smith, *Economic Aspects of the Second Bank of the United States* (Cambridge, Mass., 1953); G. Edward White, *The Marshall Court and Cultural Change, 1815–1835* (New York, 1988), 542–67. Congress also granted charters to local companies in the District of Columbia. Russell H. Curtis, "National Corporations," *Central Law Journal* 21 (1885): 428–29.

[24]Felix Frankfurter and James M. Landis, *The Business of the Supreme Court* (New York, 1927), 60–64; Morton Keller, *Affairs of State: Public Life in Late Nineteenth Century America* (Cambridge, Mass., 1977), 162.

[25]12 Stat. 668 (1863); 13 Stat. 99 (1864).

[26]These corporations included the Union Pacific Railroad Company, 12 Stat. 489 (1862); the Northern Pacific Railroad Company, 13 Stat. 365 (1864); the Atlantic and Pacific Railroad Company, 14 Stat. 292 (1866); and the Texas and Pacific Railroad Company, 16 Stat. 573 (1871).

For a general discussion of congressional policy concerning railroad development, see Lewis H. Haney, *A Congressional History of the Railways of the United States* (1910; reprint New York, 1968).

[27]Ibid.

grant of special rights and privileges empowering the holder to conduct business at the behest of Congress.[28] Federally chartered corporations sometimes worked in tandem with state companies enjoying federal franchises to achieve a common goal. The first transcontinental railroad, for example, was built by the Union Pacific Railroad, a congressionally chartered company, and the Big Four's Central Pacific, a California concern holding a federal franchise.[29]

Federal laws creating corporations and bestowing federal franchises often were quite detailed regarding the work to be accomplished and the terms of congressional subsidies, but they did not address other important questions. A fundamental issue was whether these grants altered the balance of federalism regarding the states' power over companies operating within their borders. The courts were soon inundated with railroad claims that the Constitution's Supremacy Clause prevented the states from interfering, directly or indirectly, with national transportation. Railroads presented two major issues regarding congressionally authorized projects: First, did the states retain the power to tax the property and franchises of these lines operating within their borders? Second, did a railroad's federal charter or federal franchise enable it to litigate suits in federal courts rather than in state courts?

The question of whether a federal charter or a federal franchise might allow a corporation to elude the power of the states was first raised in a number of Marshall Court opinions concerning the congressionally chartered Second Bank of the United States. The venerable decision in *McCulloch v. Maryland* (1819) held unconstitutional a state tax on notes issued by the bank.[30] Recognizing that the power to tax involves the power to destroy, Chief Justice John Marshall found a Maryland tax constitutionally repugnant because it threatened the supremacy of the federal government.[31] He wrote that the

[28]For a general discussion of corporate franchises, see Seymour D. Thompson, *Commentaries on the Law of Corporations* (2d ed.) (Indianapolis, 1909), vol. 3, 774–77. The Supreme Court defined a railroad company's franchise as "rights or privileges which are essential to the operations of the corporation, and without which its roads and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the company could not be successfully worked." *Morgan v. Louisiana*, 93 U.S. 217, 223 (1876).

[29]12 Stat. 489 (1862). Likewise, Congress authorized the Southern Pacific Railroad Company of California to connect with a line built by the federally chartered Atlantic and Pacific Railroad. 14 Stat. 292 (1866).

[30]17 U.S. (4 Wheat.) 363 (1819).

[31]Ibid., 431–32.

states "have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."[32] It is important to recognize that the bank's immunity from state taxation did not derive from an express exemption in its federal charter, for the document was silent on the point. The exemption, whether emanating from the charter or the Constitution, was implicit.[33] On the other hand, Marshall did not envision that a federally chartered company could escape all state taxation, for he stated in dictum that the states could levy nondiscriminatory taxes against the bank's real property.[34] The implied immunity from state taxes related to those with the design or effect of frustrating a congressional purpose. Since the banks of the United States were the only federally chartered corporations of significance before the Civil War, the Supreme Court never had occasion to refine the *McCulloch* limits on state taxation of congressionally chartered companies.

Other antebellum Supreme Court decisions considered the ability of the Second Bank of the United States to litigate claims by and against it in federal courts rather than in state forums. In *Osborn v. Bank of the United States* (1824)[35] and *Bank of the United States v. Planter's Bank* (1824),[36] the Supreme Court determined whether language in the bank's charter stating that it was capable of suing and being sued "in any circuit court of the United States" conferred subject matter jurisdiction on the circuit courts in cases where the bank was a party. Writing for the Supreme Court, Marshall answered the question in the affirmative for much the same reason that he championed the bank's position in *McCulloch*. If the bank were not given ready access to the federal courts, state courts might decide controversies in ways that frustrated Congress's purpose for chartering the company.[37]

[32]Ibid., 436.

[33]David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years* (Chicago, 1985), 165–68.

[34]Ibid., 167–68; 17 U.S. (4 Wheat.) 436.

[35]22 U.S. (9 Wheat.) 738 (1824).

[36]22 U.S. (9 Wheat.) 904 (1824).

[37]Currie, *The Constitution in the Supreme Court*, 103–4. Before the Civil War, Congress often selectively expanded the federal question jurisdiction of the lower federal courts when it suspected that state courts might frustrate a federal policy. Stanley I. Kutler, *Judicial Power and Reconstruction Politics* (Chicago, 1968), ch. 8; Merkel, "Origins," 347–48.

A. Railroad Challenges to State Property and Franchise Taxes in the Postwar Era

With these Marshall Court precedents serving as guideposts, federal corporations chartered during the 1860s brought numerous cases to define the limits of state power over their activities. The first Civil War era cases challenging state taxes of federal corporations concerned levies against the newly created national banks. In *The Bank Tax Cases* (1865), the Supreme Court held that a state tax on a national bank's capital that was invested entirely in tax-exempt federal securities violated the Supremacy Clause.[38] This and other decisions involving national banks reaffirmed *McCulloch's* implicit prohibition on state taxation of federal corporations but only so long as the tax threatened the national purpose for which Congress created the company.[39] Agencies of the federal government were exempt from state taxes "so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they were designed to serve the government."[40] Yet the national bank cases were not especially instructive about the kinds of state taxes that might incapacitate a federal instrumentality unconstitutionally.

In *Thomson v. Pacific Railroad* (1869), the Supreme Court had its first opportunity to consider the constitutionality of a state property tax against a railroad company holding a federal franchise.[41] *Thomson* involved the Union Pacific Railroad Company, Eastern Division, a company incorporated by Kansas. Congress had given it a franchise to participate in building the first transcontinental railroad. The railroad challenged a Kansas assessment against its real and personal property located within the state. Other railroad companies holding federal franchises, including the Big Four's Central Pacific Railroad Company, recognized the appeal's importance and filed *amicus curia* briefs with the Supreme Court.[42]

The railroads argued that state property taxes against the real and personal property of a company holding a federal franchise were unconstitutional because they could disrupt the opera-

[38]69 U.S. (2 Wall.) 200 (1865).

[39]*Van Allen v. Assessors*, 70 U.S. (3 Wall.) 573 (1865); *National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353 (1869).

[40]*National Bank*, 76 U.S. (9 Wall.) 362.

[41]76 U.S. (9 Wall.) 579 (1869). This company should not be confused with the federally chartered Union Pacific Railroad Company.

[42]Ibid., 586.

tions of the transcontinental railroad. If a state could seize assets, such as roadbeds, rolling stock, buildings, and other equipment, for nonpayment of taxes, Congress's plan to have an operational national line would be frustrated.[43] Faced with dictum in *McCulloch* that a state could tax the real property of the bank, the companies claimed that their property was qualitatively different and needed constitutional protection because they could not run the railroad without these assets.

A unanimous Supreme Court found the tax constitutional. Writing for the Court, Chief Justice Salmon P. Chase recognized that Congress had the power to exempt railroads holding federal franchises from state property taxes, but he found that the Pacific Railroad Acts were silent on the point. The question then centered on whether the Court should widen the constitutional exemption by implication that it had recognized in *McCulloch*. The Court declined to take this step because it might prove fatal to the states' taxing power. Any company or individual tangentially related to a federal project would claim the exemption, thereby destroying the states' tax base.[44]

Although *Thomson* was a defeat for railroads participating in congressional projects, railroad attorneys doggedly pursued two other related avenues against state taxation in the 1870s. The first challenged state property taxes against the assets of federally chartered corporations; the second targeted state taxes on the franchises of companies holding federal charters or federal franchises. The railroads lost on the first point, but achieved an important victory on the second.

In its *Thomson* opinion, the Supreme Court noted that the appealing railroad differed from the Second Bank of the United States in *McCulloch* because the bank was a corporation created by Congress.[45] Attorneys for railroads holding congressional charters seized on this perceived distinction. In *Railroad Company v. Peniston* (1873), they presented the Court with a constitutional challenge to a Nebraska tax on

[43]Ibid. 584–86.

[44]"It would remove from the reach of State taxation all the property of every agent of the government. Every corporation engaged in the transportation of mails, or of government property of any description, by land or water, or in supplying materials for use of the government, or in performing any service of whatever kind, might claim the benefit of the exemption. The amount of property now held by such corporations, and having relations more or less direct to the National Government and its service, is very great. And this amount is continually increasing, so that it may admit of question whether the whole income of the property which will remain liable to State taxation, if the principle contended for is admitted and applied to its fullest extent, may not ultimately be found inadequate to support the State governments." Ibid., 591–92.

[45]Ibid., 589.

the real and personal property of the federally chartered Union Pacific Railroad Company.[46] The Union Pacific's attorneys attempted to distinguish *Thomson* by noting that a federally chartered railroad actually is an agent of the national government, not merely a state company in its employ.[47] In this sense, it was in precisely the same position as the bank in *McCulloch*. A state's tax against the assets of a federal agent was really a tax on the national government. While *McCulloch's* dictum allowed state taxation of bank real property, railroad lawyers again tried to show that railroad assets were different because they were necessary to accomplishing the national purpose.[48]

A divided Court disagreed, however, and sustained the constitutionality of the property tax.[49] While conceding that the Union Pacific was an agent of the national government, the majority held that a tax on a federal agent was not necessarily unconstitutional. Rather than focusing on agency, a court should examine the effect of the tax:

> It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent . . . upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. . . . A

[46]85 U.S. (18 Wall.) 5 (1873).

[47]Ibid., 26.

[48]"It is not necessary to suggest that the intimated liability in *McCulloch v. Maryland* of the *real estate* of the bank to the State taxation, could not by parity of reason be held to expose the real estate of a railroad—the very *corpus* of its structure for the operations of the government for which the company was created and endowed—to State taxation." Ibid., 28 (emphasis in original).

[49]Justices Strong, Clifford, Miller, and Davis joined in the majority opinion, and Justice Swayne concurred. Justices Bradley, Field, and Hunt dissented.

Justice Bradley, who also wrote for Justice Field, penned a vigorous dissent, stating that the Union Pacific's federal charter exempted it from all state taxation. "The inference is obvious, that any corporation rightfully created by Congress, being necessarily public and national in its object, is beyond the reach of State taxation." Ibid., 43. Bradley agreed with the Union Pacific's attorneys that, in a worst-case scenario, nonpayment of state taxes by a United States corporation could result in the total frustration of the national goal. "If the road-bed may be taxed, it may be seized and sold for non-payment of taxes—seized and sold in parts and parcels, separated by State lines—and thus the whole purpose of Congress in creating the corporation and establishing the lines may be subverted and destroyed." Ibid., 50.

> tax upon their operations is a direct obstruction of Federal powers.[50]

Peniston was a defining case in railroad law, for it distinguished between forms of corporate property for taxation purposes. The railroads had suffered a serious legal setback in their battle against state taxation, but all was not lost. Absent a specific exemption in the congressional statute authorizing it to participate in federal projects, the real and personal property of a federally chartered corporation or of a state company holding a federal franchise were subject to state taxes. The Supreme Court was unwilling to imply the broad constitutional exemption the railroads wanted because it feared eroding the tax base of the states. On the other hand, the Court indicated that the states could not lawfully tax federal franchises or the operations of agencies of the national government.

In the years leading up to the Southern Pacific consolidation, railroads holding federal charters and franchises turned their attention to challenging state taxes against their franchises. As was noted earlier, these taxes differed from those on tangible property in that they were an assessment on the right to do business in a state.[51] States often levied these taxes against gross or net earnings, or on the value of a company's capital stock.[52] No companies attacked franchise taxes more vigorously than the Central Pacific and the Southern Pacific, two of the Big Four's California corporations holding federal franchises. The California constitution of 1879 required the Board of Equalization to tax all property of state-chartered railroads, including their franchises.[53] No provision was made for exempting a company's federal franchise from levy. Relying on *Peniston*, the Big Four's attorneys argued in state and federal courts that the state tax on their federal operations violated the Supremacy Clause,[54] a point on which they eventually prevailed in the Supreme

[50]Ibid., 36–37.

[51]Thompson, *Commentaries*, vol. 6, 841.

[52]Ibid., vol. 6, 847–49.

[53]"The franchise, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county in this State shall be assessed by the Board of Equalization at their actual value. . . ." Cal. Const. art. 13, sec. 10 (1879). Pol. Code sec. 3665 implemented the constitutional provision.

[54]*Central Pacific Railroad Co. v. State Board of Equalization*, 60 Cal. 35 (1882); *Los Angeles v. Southern Pacific Railroad Co.*, 61 Cal. 59 (1882); *Santa Clara County v. Southern Pacific Railroad Co.*, 66 Cal. 642 (1885).

Court.[55] When Collis P. Huntington sought a federal charter for the Big Four's southern route transcontinental railroad in the early 1880s, he knew that congressional endorsement of the project would likely prevent unfriendly states from taxing its operations.

B. The Flight of Railroads to the Federal Courts

Another way railroads tried to limit state interference with their activities was to litigate lawsuits in federal trial courts rather than in state forums. Railroads, like other corporations conducting business across state lines, often found federal courts more "friendly" for a number of reasons. First, federal judges were likely to be supportive of the national purpose that justified the creation of a federal corporation or the award of a federal franchise. Conversely, state courts could not be trusted to defend national projects that were unpopular locally. The theme that federal courts would more vigorously protect national interests recurred as justification for the expansion of the federal question subject matter jurisdiction of the U.S. courts throughout the nineteenth century.[56] Second, the substantive law applied to disputes in federal courts often differed from that followed in state courts. Under the regime of *Swift v. Tyson* (1842),[57] federal courts were able to reject state laws when they conflicted with the "general law" followed in U.S. courts. Historians have argued that these general law principles often favored business interests.[58] Third, companies feared local prejudice in state courts, especially in

[55]*California v. Central Pacific Railroad Co.*, 127 U.S. 1 (1887). This consolidated appeal challenged franchise taxes for 1883 and 1884 against a number of the Big Four's California railroads. Citing *McCulloch*, the Court found the taxes unconstitutional because they could frustrate a congressional project. The court found that a franchise tax, unlike property taxes, was easily subject to abuse. Justice Bradley wrote, "It has no limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the legislature may choose. Or, without any valuation of the franchise at all, the tax may be arbitrarily laid." Ibid., 41–42.

[56]Federal question subject matter jurisdiction refers to cases concerning federal laws or the U.S. Constitution. For a discussion of the expansion of the federal question jurisdiction of the lower federal courts in the nineteenth century, see the authorities cited in note 37, supra.

[57]41 U.S. (16 Pet.) 1 (1842).

[58]Tony Freyer, *Forums of Order: The Federal Courts and Business in American History* (Greenwich, Conn., 1979); Merkel, "Origins," 353–58.

Collis P. Huntington sought a federal charter for the Big Four's southern route transcontinental railroad in the early 1880s. (Courtesy of the Henry E. Huntington Library and Art Gallery)

areas where railroads were unpopular. Even corporations without federal charters and franchises attempted to litigate in federal courts by taking advantage of diversity jurisdiction rules.[59] Fourth, corporations preferred bringing suits in federal courts for the simple reason that a federal forum often created practical problems for the opposing party.[60] While state claims

[59]Diversity jurisdiction refers to suits between citizens of different states in federal trial courts. For a discussion of the use of diversity jurisdiction by corporations, see Edward A. Purcell, Jr., *Litigation and Inequality* (New York, 1992).

[60]Editorial, "Federal Court of Appeals," *Western Jurist* 10 (1876): 202–3.

were tried in local courts before jurors chosen from the area, litigants and witnesses sometimes had to travel great distances to the nearest federal court. Federal court litigation was more costly and inconvenient for persons of limited means.

In the years leading up to the Southern Pacific consolidation, the nation's law journals published numerous articles about the flight of corporations from state to federal courts. Many protested the ascendancy of the federal courts at the expense of the states. Chancellor W.F. Cooper of Tennessee complained that the federal courts "have sometimes unnecessarily, perhaps unconsciously, treated the state courts with scant courtesy, as alien and hostile tribunals."[61] The use of the *Swift* doctrine to avoid state legal rules was widely criticized. J.M. Woolworth of the Iowa State Bar Association decried "the liberty of the Federal court to disregard and ignore State Law."[62] William B. Hornblower echoed these sentiments in the *American Law Review*: "To have a Federal court sitting in the same jurisdiction arbitrarily disregard such decisions, and follow decisions of the Federal court at Washington, is to abrogate the laws of the State, and to set at defiance the will of the people as expressed in those laws."[63] Other writers examined hardships faced by litigants when they were forced to try lawsuits against corporations in federal courts. One critic noted the high cost of federal court trials and claimed that "litigants, jurors and witnesses in the Federal Courts are dragged away from their homes and forced to appear, and often are subjected to severe and crucial tests, among those who are strangers to them."[64] Iowa's Governor John H. Gear complained of railroads removing even simple negligence cases to federal courts, where the injured plaintiff "must suffer a deprivation of his rights, compromise upon such terms as the corporation may see fit to enforce upon him, or follow the defendant to the Federal Court, at an expense and prolonged delay, the effect of which is to make justice finally secured of little value to him."[65]

Caseload statistics of the United States district and circuit courts reveal that the corporate exodus from state to federal courts was not imaginary; it was very real. In 1873, the number

[61]W.F. Cooper, "Removal of Causes from State to Federal Courts," *Southern Law Review* (n.s.) 3 (1877): 3, 4.

[62]Editorial Department, *Western Jurist* 15 (1881): 256–57.

[63]William B. Hornblower, "Conflicts between State and Federal Decisions," *American Law Review* 14 (1880): 211, 225.

[64]Editorial, "Federal Court of Appeals," 202.

[65]"Current Topics," *Western Jurist* 16 (1882): 16–17.

of pending cases in these courts was 29,013, of which 5,108 were bankruptcies. In 1880, despite the fact that the Bankruptcy Act had been repealed, ending that source of business, the number of pending cases had increased to 38,045.[66] John F. Dillon, a federal judge who wrote a highly regarded treatise on removal of causes from state to federal courts, commented on this explosion in federal court litigation:

> The history of the Federal jurisdiction is one of constant growth, slow, indeed during the first half-century and more, but very rapid within the last few years. For various reasons, which we need not stop to indicate, the small tide of litigation that formerly flowed in Federal channels has swollen to a mighty stream. Certain it is that of late years the importance of the federal courts has rapidly increased, and that much, perhaps most, of the great litigation of the country [is] now conducted in them. This is noticeably so in the Western states.[67]

By the early 1880s, lawyers for federally chartered railroads had made great strides in taking claims by and against their clients to federal courts. Relying on a postwar removal statute relating to federally chartered corporations[68] and the sweeping jurisdictional power given the federal trial courts over federal questions by the Judiciary Act of 1875,[69] they litigated numerous cases in federal courts. The railroads cited the Marshall Court's holdings in *Osborn* and *Planter's Bank* to justify the extension of federal jurisdiction. By convincing federal judges that any suit against a congressionally chartered corporation was one "arising under the laws of the

[66]Frankfurter and Landis, *Business*, 60.

[67]John F. Dillon, "Removal of Causes from State Courts to Federal Courts," *Southern Law Review* (n.s.) 2 (1876): 282, 284.

Dillon's *Removal of Causes from State Courts to Federal Courts*, first published in 1875, went through numerous editions. Dillon later resigned his judgeship and became solicitor for the Union Pacific Railroad Company. Dillon represented the Union Pacific before the Supreme Court in the Pacific Railroad Removal Cases, 115 U.S. 1 (1885). Clyde E. Jacobs, *Law Writers and the Courts* (Berkeley, Calif., 1954), 111–12.

[68]15 Stat. 226 (1868).

[69]18 Stat. 470 (1875). Section 1 of the act for the first time gave federal trial courts original jurisdiction over civil suits involving claims exceeding $500 "arising under the Constitution or laws of the United States. . . ." Section 2 provided for the removal from state to federal court of any civil suit involving more than $500 "arising under the Constitution or laws of the United States. . . ."

In 1875, Federal Judge John F. Dillon published a highly regarded treatise on removal of causes from state to federal courts. (Courtesy of the State Historical Society of Iowa)

United States," the roads were able to remove even simple tort claims to federal courts.[70]

The legality of this sweeping expansion of federal court jurisdiction over suits involving federally chartered companies was tested in the Supreme Court in *The Pacific Railroad*

[70]See, for example, *Turton v. Union Pacific Railroad Co.*, 24 F. Cas. 391 (C.C.D. Neb. 1875).

Removal Cases (1885).[71] This appeal involved four negligence suits and a property claim that plaintiffs had brought in state courts against a number of federally chartered railroads. Although the substantive claim in each case involved state law issues only, the railroads contended that they could remove the suits to federal court for the sole reason that they held federal charters. The Supreme Court agreed, concluding that the Judiciary Act of 1875 demanded this result.[72] One historian commented that this decision "opened the floodgates for a staggering number of tort and corporate cases onto an already overburdened federal docket."[73]

The Pacific Railroad Removal Cases were working their way through the courts as Collis P. Huntington was seeking a federal charter for the Southern Pacific line. The Big Four's legal advisors undoubtedly knew about the appeal and its significance, because they were making similar arguments for removal on behalf of the Central Pacific and Southern Pacific Railroads, both holders of federal franchises. Relying on a recent Supreme Court precedent[74] sanctioning removal of a case to federal court if a federal question was raised in a defensive pleading, the Big Four's attorneys attempted to transfer numerous claims for unpaid taxes filed by various California taxing authorities. They answered these lawsuits with two defenses grounded in federal law and the Constitution: First, taxes assessed against their federal franchises violated the Supremacy Clause; and second, discriminatory assessments against railroad property denied them equal protection of the laws as guaranteed by the Fourteenth Amendment.[75] These

[71]115 U.S. 1 (1885).

[72]Justice Bradley wrote for the majority, "[T]here is no escape from the conclusion that these suits against plaintiffs in error, considering the said plaintiffs as corporations created by and organized under the acts of Congress referred to in the several petitions for removal in these cases, were and are suits arising under the laws of the United States." Ibid., 14.

[73]Kutler, *Judicial Power*, 157.

[74]*Railroad Company v. Mississippi*, 102 U.S. 135, 141 (1880).

[75]The California Supreme Court tried to frustrate these removal efforts. *Central Pacific Railroad Co. v. Superior Court*, 62 Cal. 618 (1882); *Southern Pacific Railroad Co. v. Superior Court*, 63 Cal. 607 (1883); *People v. Southern Pacific Railroad Co.*, 65 Cal. 553 (1884). The federal courts, however, found that removal was proper. *County of San Mateo v. Southern Pacific Railroad Co.*, 13 F. 145 (1882).

In *County of Santa Clara v. Southern Pacific Railroad Co.*, 118 U.S. 394 (1886), the Supreme Court agreed with the railroad's argument that a corporation is a person under the Fourteenth Amendment and sustained the equal protection defense.

removal efforts were highly successful. They culminated in the Supreme Court's 1886 decision in *Southern Pacific Railroad Company v. California*, which held that a Supremacy Clause defense to a levy against the railroad's federal franchise justified removal to a federal court.[76]

II. EFFORTS TO SECURE A FEDERAL CHARTER FOR THE SOUTHERN PACIFIC

The owners of the Southern Pacific system attempted to obtain a federal charter for their southern route transcontinental railroad in 1882 and 1883. Supporters in Congress introduced bills designed to consolidate the state and territorial companies into one corporation under federal auspices.[77] Had they been successful, a federally chartered corporation would have replaced and superceded eight existing companies.[78]

The Big Four had already decided against having the Central Pacific or the Southern Pacific serve as a California holding company for the new road. While state law permitted California railroads to lease lines in other jurisdictions, and the Central Pacific already was leasing a number of roads, reorganization was not feasible in California.[79] California's laws were unattractive because they placed a ceiling on the capital stock of railroad corporations and did not recognize limited liability for shareholders.[80] The Big Four also were very un-

[76]118 U.S. 109 (1886).

[77]H.R. 6316, 47th Cong., 1st sess. (1882); S. 2046, 47th Cong., 1st sess. (1882); H.R. 7242, 47th Cong., 2d sess. (1883).

[78]The companies included in the proposed congressional consolidation were the Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company of Arizona, the Southern Pacific Railroad Company of New Mexico, the Galveston, Harrisburg, and San Antonio Railroad Company of Texas, the Louisiana Western Extension Company of Texas, the Louisiana Western Extension Company of Louisiana, and the Louisiana Central Railroad Company of Louisiana. The length of the route, excluding branch lines, was 2,400 miles. S. Rep. No. 950, 47th Cong., 2d sess. (serial no. 2087) (1883), 2.

[79]W.H. Whittaker, "Statutory Provisions for Leasing Railroads," *Central Law Journal* 14 (1882): 484, 487; Cal. Amend. to Civil Code, Sup. Par. 5456, ch. 2, p. 21, approved April 3, 1880; Daggett, *Chapters*, 140–43.

[80]United States Pacific Railway Commission, *Executive Documents of the United States Senate* (Washington, D.C., 1887), 2670; Cal. Const., art. 12, secs. 2 and 3 (1879).

popular in the state. California was economically depressed, and critics blamed the Big Four for an assortment of evils ranging from Chinese immigration to monopolization of commerce to political corruption.[81]

Anti-railroad forces controlled the 1878–79 Constitutional Convention, and they included many provisions directed against the Big Four's interests. The constitution created an elected Railroad Commission with rate-making authority, and it prohibited rate discrimination. Commission rate decisions were not subject to judicial review.[82] The constitution provided that a State Board of Equalization, not individual counties, must assess railroad property for taxation.[83] It required that railroad land be valued without deducting the amount of outstanding mortgages, a formula not applied to other real estate. This discrimination resulted in the bitter court challenges mentioned in the previous section, which led the Supreme Court to void the taxes on equal protection grounds in the landmark case, *County of Santa Clara v. Southern Pacific Railroad Co.* (1886).[84]

With consolidation under California law out of the question, and with the legal advantages of congressional incorporation so obvious by this time, Collis P. Huntington, who was living in New York City, coordinated the effort to obtain a federal charter for the Southern Pacific. Benjamin Butterworth of Ohio, a member of the House Committee on Pacific Railroads, guided the legislation through Congress for Huntington. He introduced two consolidation bills in the House of Repre-

[81]A lawsuit brought by the widow of a former business associate resulted in public release of correspondence indicating that Central Pacific officials had bribed legislators and congressmen. Daggett, *Chapters*, chs. 9 and 12. The press also blamed the Big Four for the Mussel Slough incident over land titles in Kings County, which ended in a number of deaths. McAfee, *California's Railroad Era*, 175–76; David J. Bederman, "The Imagery of Injustice at Mussel Slough: Railroad Land Grants, Corporation Law, and the Great Conglomerate West," *Western Legal History* 1 (1988): 237.

[82]Cal. Const., art 12, sec. 22. Enabling legislation is found at Laws of California, ch. 59 (1880).

[83]McAfee, *California's Railroad Era*, ch. 11; Gerald D. Nash, *State Government and Economic Development* (Berkeley, Calif., 1964), 173; Daggett, *Chapters*, 185–86.

[84]See the discussion at pp. 235–36.

A summary of the tax litigation cases is found in *Sixth Annual Report of the Board of Railroad Commissioners*, 37–41 (minority report of Commissioner W.W. Foote), published in *Appendix to the Journals of the Senate and Assembly, 27th Session* (Sacramento, 1887) [hereinafter cited as *Sixth Annual Report of the Board of Railroad Commissioners*]. The report is for 1885. Foote alleged that many governmental units were forced to settle cases because they could not afford to litigate.

sentatives during the forty-seventh session.[85] Butterworth wrote Huntington in July 1882, predicting that opposition would not be "strong or active," but also warning that "the prejudice against Corporations is such and denounciation [*sic*] of them so popular that the stupidest man in the House could defeat any bill relating to Corporations which was not conspicuously fair and just in its provisions."[86]

The draft bill that Butterworth eventually brought to the floor of the House empowered the state and territorial corporations forming the Southern Pacific line to consolidate and merge their corporate powers and franchises "for the purpose of forming a through line of railroad between the city and bay of San Francisco, in California, and other ports of the Pacific Ocean . . . and such ports and places as may be selected on the Mississippi River or Gulf of Mexico. . . ."[87] A new corporation would be created, subject to the use by the federal government, for postal, military, naval, and other governmental services.[88] The new company would be responsible for the debts of its predecessor corporations. It would receive no new congressional land grants.[89] Included among the powers of the new company was the right "to sue and be sued, defend and be defended, in all courts of law and equity within the United States."[90]

Huntington's correspondence with Charles H. Sherrill, his lobbyist in Congress, reveals that he believed the consolidation bill would pass with only minor amendments,[91] and, initially, he had reason for optimism. Committees of the House and Senate both recommended passage.[92] The House Committee on Pacific Railroads found that due to "economy in organization and management, and consequent reduction of rates, a consolidation is desirable, both in view of the public interests and in the interest of the stockholders of the several roads." The committee attempted to allay fears that the

[85]See note 77, supra.

[86]B. Butterworth to C.P. Huntington, July 10, 1882. Huntington's correspondence has been reproduced on microfilm by Syracuse University. All references to letters in this article are from the Syracuse University microfilms.

[87]H.R. 7242, 47th Cong., 2d sess. (1883).

[88]Ibid.

[89]Ibid.

[90]Ibid.

[91]C.P. Huntington to C.H. Sherrill, Feb. 26, 1883.

[92]S. Rep. No. 950, 47th Cong., 2d sess. (serial no. 2087) (1883); H. Rep. No. 1856, 47th Cong., 2d sess. (serial no. 2159) (1883).

consolidated company's rate-making power would be unchecked. "The regulation of rates to prevent unreasonable charges would be within the power of Congress, so that any attempted abuse by the common carrier of the privileges herein conferred could be corrected by legislative enactment."[93]

But matters did not go smoothly for the railroad forces, as opposition quickly surfaced. The source of the objections was the California Legislature. While Congress was considering the consolidation bill, news of the plan to create a federal corporation reached California. Realizing that Huntington's proposal could limit the state's ability to tax and regulate virtually all major through lines in California, essentially nullifying the victories won during the Constitutional Convention, railroad critics rallied against the measure. They introduced resolutions instructing California's congressional delegation to oppose consolidation.[94] Charles Crocker wired Huntington from San Francisco about a pending state senate resolution declaring the consolidation bill "disastrous to interests in California, because it transfers the Lines from State to Federal control."[95]

With the federal charter in jeopardy, the railroad's leadership moved to counter the opposition. The Big Four sent their chief lawyer to a meeting of the California Senate Committee on Foreign Relations. He attempted to downplay the effects the consolidation bill would have on state power over railroads, but when pressed with hard questions, he was not convincing.[96] Anti-railroad forces in the state assembly and senate had their way when both houses adopted resolutions urging Congress to defeat the consolidation bill.[97]

On March 2, 1883, Butterfield brought the Southern Pacific bill to the House floor for debate. Despite his attempts to allay suspicions, many members were skeptical of the legislation, and it was defeated easily.[98] Some feared the bill must have had a sinister purpose because powerful railroad interests were behind it. David Culberson of Texas, one of the House's most

[93]H. Rep. No. 1856, 1–2.

[94]*Daily Alta California*, Jan. 16, 1883; Feb. 2, 1883; Feb. 6, 1883.

[95]C.F. Crocker to C.P. Huntington, Jan. 30, 1883.

[96]*Daily Alta California*, Feb. 6, 1883; *San Francisco Chronicle*, Feb. 6, 1883.

[97]*Daily Alta California*, Feb. 9, 1883; *San Francisco Chronicle*, Feb. 9, 1883.

[98]The bill lost, with 87 members voting yea and 128 nay. *Congressional Record*, 47th Cong., 2d sess., 3615.

persistent opponents of the expansion of federal power, voiced the constitutional reservations of many congressmen:

> [T]he effect of the bill would be to take from States their jurisdiction over the question of freights and fares over their companies, and to deprive the State courts of jurisdiction over controversies between the citizens of those States and Territories and these railroad corporations. While the bill ostensibly provides against this result, it is not improbable that the courts will hold that if Congress creates a federal "corporation citizen" that such citizens shall be entitled to all the rights of any other citizen, and that provisions abridging such rights are inoperative and void. Such is the tendency of decisions now in respect of the rights of corporations.[99]

Another opponent summed up prevailing sentiment when he stated that the bill was "full of unseen results, pitfalls, and snares."[100] The debate concluded with Rep. Berry of California referring to the resolutions of the state legislature and then entering "the solemn protest of California against the passage of this bill."[101]

After the vote, Butterworth wrote Huntington, attempting to explain the defeat: "You are aware that our forces broke and ran at the last moment, frightened by the cry of 'Monopoly,' 'Land Grab,' 'Huntington,' . . . combination, etc." The bill's opponents "were afraid that there might lurk in the meshes of the bill some where concealed some special right or privilege or provision they were unable to discover by a careful reading."[102] Whether Huntington replied to this letter is unknown. What is certain is that he realized that consolidation of the southern route transcontinental railroad could not be accomplished by federal charter. But the Big Four still needed to restructure their corporate holdings, and they turned to an alternative plan for consolidation, one that did not require the approval of Congress or of the California Legislature.

[99]Ibid., 3614.

[100]Ibid., 3615.

[101]Ibid., 3615.

[102]B. Butterworth to C.P. Huntington, March 4, 1883.

III. THE INCORPORATION OF THE SOUTHERN PACIFIC COMPANY OF KENTUCKY

Anti-railroad feeling in California continued unabated in 1884. The political climate was so charged that Governor George Stoneman called an extra legislative session to consider "the railroad problem."[103] The Big Four's attempt to secure a federal charter was fresh in the minds of many legislators who feared losing control over the state's major railroads. In response to this threat, a bill was introduced during the extra session that would have prohibited any California railroad corporation from accepting a corporate charter or franchise from another government. It also would have prevented companies chartered in other jurisdictions from operating within the state.[104] The bill's sponsor feared that companies chartered outside California would challenge the state's authority to regulate their rates. Additionally, he believed that "foreign corporations," those created in other jurisdictions, would litigate their lawsuits in federal rather than California courts.

> And being non-residents of the State of California, would they, in a proceeding of that character, have the right to go into the Federal Courts? . . . Why should we permit a railroad corporation to enjoy the privileges not given to other citizens, or permit them to derive an advantage of great investment and corresponding profits in the State of California, and at the same time be independent and free from the control of her Courts? Is that the policy, or is it the statesmanship, which should govern the legislators of the State of California, looking out for the best interests of the State?[105]

Railroad forces narrowly defeated the bill in the Senate, but it was clear that consolidation of the Southern Pacific could not be accomplished in California.[106] While the California

[103]McAfee, *California's Railroad Era*, 176.

[104]*Report of the Committee of the Judiciary of the Assembly of California, Appendix, 25th Sess. (Extra)*, Assembly Bill No. 10, sec. 4, p. 211 (Sacramento, 1884). The bill was introduced on March 25, 1884.

[105]Ibid., 206–7. Rep. Barry of San Francisco introduced the bill and spoke on its behalf.

[106]McAfee, *California's Railroad Era*, 176–79.

Legislature condemned the Big Four during its extra session, Huntington quietly planned to reorganize their holdings in Kentucky. On March 17, 1884, the Kentucky General Assembly enacted special legislation creating the Southern Pacific Company. Although the Big Four were not named as incorporators, the company was chartered at their behest.[107] Kentucky was selected as the place for incorporation because railroad officials knew they could obtain a favorable charter there.[108] The Southern Pacific Company became the holding company under which the nation's first southern route transcontinental railroad was consolidated.

The Kentucky charter was attractive because it gave the board of directers wide latitude in operating the company, while containing none of the restrictions and taxes confronting railroads in California. The law authorized the Southern Pacific Company to purchase or lease any railroad or steamship corporation created by the United States or any other state or territory. The opening capital stock was set at one million dollars, but the board was given unrestricted power to increase the amount. The company was required to pay only an annual license fee and property taxes on assets located within Kentucky. Because the company had few assets within the state, these assessments were minimal. Taxes were not chargeable against the company's franchise. Although the corporation was required to maintain a local office, the board of directors could conduct business outside the state.[109]

An interesting feature of the charter is that it prohibited the Southern Pacific Company from owning, leasing, or operating any railroad within Kentucky.[110] The corporation that would oversee one of the country's largest railroad systems could not engage in the railroad business within the state that created it. This restraint was of little practical consequence, however, because the Southern Pacific route did not pass through Kentucky. The company's relationship with the state was so insignificant that Leland Stanford, the Southern Pacific

[107]Laws of Kentucky, ch. 403, p. 725 (1883–84).

[108]United States Pacific Railway Commission, *Testimony*, 2809. Huntington chose Kentucky because he had other significant railroad holdings in the state. Evans, *Collis Porter Huntington*, ch. 55. One author has suggested that the Big Four obtained a favorable charter by "dispensing money" in the state. McAfee, *California's Railroad Era*, 179.

[109]Laws of Kentucky, 726–28.

[110]The law states in pertinent part, "Provided, however, That said corporation shall not have power to make joint stock with, lease, own or operate any railroad within the State of Kentucky." Ibid., 726.

Company's first president, was uncertain where the Kentucky office was located.[111]

Once the holding company was chartered, the actual consolidation was planned during a series of meetings in New York City that ran from August through October 1884. Crocker, Timothy Hopkins, Huntington, and Stanford attended.[112] The participants secured the resignations of the Southern Pacific Company's original board of directors and placed themselves and their designees in leadership positions.[113] They voted to raise the capital stock to $100 million.[114] Next they proposed two contracts whereby the Southern Pacific Company would lease the individual railroads constituting the transcontinental route. In the first agreement, known as the omnibus lease, the Southern Pacific Company leased the Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company of Arizona, the Southern Pacific Railroad Company of New Mexico, the Galveston, Harrisburg and San Antonio Railway Company of Texas, the Texas and New Orleans Railroad Company of Texas, the Louisiana Western Railroad Company of Louisiana, Morgan's Louisiana and Texas Railroad and Steamship Company of Louisiana, and the Mexican International Railroad Company of Connecticut, all for a ninety-nine-year term.[115] The second contract was another ninety-nine-year lease in which the Southern Pacific Company acquired the Central Pacific Railroad Company of California and lines the Central Pacific was leasing.[116]

The Southern Pacific Company was divided into two segments: the Pacific System, which embraced 3,004 miles of track west of El Paso, and the Atlantic System, which included 1,693 miles running to the east. Each section was

[111]United States Pacific Railway Commission, *Testimony*, 2809. The company's actual headquarters were in San Francisco.

[112]The meetings are described by Timothy Hopkins in testimony he gave in 1915 in *United States v. Southern Pacific Co.*, 239 F. 998 (D. Utah, 1917), an antitrust action against the company. Minutes of the meeting are found in the case file, defendants' exhibit 21. The meetings are discussed in Daggett, *Chapters*, 149–53.

[113]The new officers were Stanford (president), Huntington (vice president), Charles Crocker (second vice president), C.F. Crocker (third vice president), E.H. Miller, Jr. (secretary), and Timothy Hopkins (treasurer). *Poor's Manual of Railroads, 19th Annual Number* (New York, 1886), 937.

[114]Case file, 663–64.

[115]Ibid., defendants' exhibit 20.

[116]United States Pacific Railway Commission, *Testimony*, 3446–49.

managed separately from the company's headquarters in San Francisco.[117] The Southern Pacific Company's railroad holdings stretched from Portland, Oregon, through California, and on to New Orleans, where the line linked with steamships to eastern American and foreign ports.[118]

The consolidation was completed in April 1885, when the lease of the Central Pacific became effective. When news of the merger reached California, critics immediately questioned the Big Four's motives in using a Kentucky holding company. W.W. Foote, a railroad commissioner who usually opposed the Big Four, voiced his suspicions in an official report. Commenting on the fact that its Kentucky charter forbade the Southern Pacific Company from operating within the state, he wrote, "The object of this limitation is not perceptible to the ordinary mind, unless upon the somewhat illiberal theory that the commonwealth of Kentucky is quite willing to grant extraordinary powers to corporations which are to control the internal commerce of other States, provided her own territorial limits are protected from their exactions and influences."[119] Others attacked the company's leaders, who, "[b]y their omnibus lease and the lease of the Central Pacific . . . have practically all the roads in the State under a foreign corporation, the Southern Pacific Company. . . ."[120]

Southern Pacific Company officials defended their move by declaring that the consolidation would benefit the railroad and the public alike. "[A] consolidation and concentration of the operating, mechanical, and accounting departments may, therefore, be expected to lead to a reduction in expenses, and the saving of a large amount paid out as commissions, duplicate salaries, and advertising. . . . Moreover, the public will be gainers in having a united, single responsibility to deal with. . . ."[121] When

[117]Southern Pacific Company, *First Annual Report of the Southern Pacific Company of Kentucky for the Year 1885* (San Francisco, 1886), 3–4. Minutes of the New York meetings show that the Big Four planned to locate the company's general offices in San Francisco. Case file, 1692.

[118]Evans, *Collis Porter Huntington*, 265. The Southern Pacific Company also leased the Central Pacific's portion of the Union Pacific-Central Pacific transcontinental route, which ran from San Francisco to Ogden, Utah. *Poor's Manual*, 933.

[119]*Sixth Annual Report of the Board of Railroad Commissioners*, 34.

[120]Statement made at a mass meeting held in San Francisco to protest the consolidation, quoted in Evans, *Collis Porter Huntington*, 266.

[121]Statement of President Charles Crocker explaining the lease of the Southern Pacific Railroad Company of California to the Southern Pacific Company. Southern Pacific Railroad Company, *Annual Report of the Board of Directors of the Southern Pacific Railroad Co. of California for the Year 1884* (San Francisco, 1885), 9.

the consolidation was discussed during hearings held by the United States Pacific Railway Commission in 1887, Stanford and Huntington insisted the merger was simply a good business decision.[122] Huntington explained that the Central Pacific was not chosen as the holding company for the new transcontinental line because "[t]he Southern Pacific got to be a greater company, and it looked a little like the tail wagging the dog for the 800 miles of [Central Pacific] road to run the 4,000 or 5,000 miles of road."[123] Railroad spokesmen also denied that any sinister motive was behind the creation of the Southern Pacific Company. In a conversation with Commissioner Foote, C.F. Crocker reportedly stated that the object of the Kentucky incorporation "was purely an economical one, to save expenses, and no ulterior purpose was had in view."[124] When questioned about whether the consolidation would affect railroad litigation, Crocker stated that "he desired to be particularly understood that, the operation of these various lines of road under a foreign charter was never intended, and would never be used, as a means of evading the jurisdiction of the State Courts of California."[125]

IV. THE LEGAL SIGNIFICANCE OF THE KENTUCKY INCORPORATION

The chartering of the Southern Pacific Company of Kentucky and its lease of the Central Pacific and other Big Four–owned railroads proved to be a controversial way of organizing the southern route transcontinental railroad. The consolidation had negative consequences for the company beyond the scope of this study, including clouding the debate over an attempt to refund the Central Pacific's debt to the federal government in the 1890s and serving as the basis for a successful antitrust suit against the company in the early twentieth century.[126] But the

[122]United States Pacific Railway Commission, *Testimony*, 2808–11.

[123]Ibid., 40.

[124]*Sixth Annual Report of the Board of Railroad Commissioners*, 31.

[125]Ibid., 33.

[126]For a discussion of the refunding controversy, see Daggett, *Chapters*, ch. 21; John T. Doyle, *The Central Pacific R.R. Debt: California's Remonstrance against Refunding It* (San Francisco, 1896). The Southern Pacific Company's incorporation and holdings were an issue when the United States sued the company for violating the Sherman Antitrust Act. *United States v. Southern Pacific Co.*, 239 F. 998 (D. Utah, 1917), reversed, 259 U.S. 214 (1922).

immediate results were positive. Although it was headquartered in San Francisco, the Southern Pacific Company was a Kentucky corporation, so it was not subject to California laws that its leadership saw as unfair and punitive. Under Kentucky law, the company could increase its capital stock at will, and its shareholders enjoyed limited liability.[127] And California's taxes against railroads, which the Big Four claimed were the most onerous in the nation, could not be assessed against the railroad's operations in other states and territories.[128] Under its charter, the Southern Pacific Company was exempt from virtually all Kentucky taxes.[129] Essentially, the Big Four incorporated its holding company in a jurisdiction extending favorable treatment. This concept of "jurisdiction shopping" would sweep the corporate world in the late nineteenth century as companies relocated to states more friendly to their interests.[130]

The most immediate and visible result of the merger was that the Southern Pacific Company quickly used its Kentucky citizenship to accomplish what its owners specifically said they would not do: remove railroad litigation from state to federal courts. As was described earlier, attorneys for the Big Four's railroads holding federal charters and federal franchises removed lawsuits to federal courts for resolution of important public policy questions, such as the limits of state taxation and the application of the Fourteenth Amendment's Equal Protection Clause to corporations. Relying on the Judiciary Act of 1875, the railroads were able to argue cases presenting federal questions in federal courts.[131] The same statute confirmed a long-standing rule giving federal trial courts jurisdic-

[127]Company lawyers maintained that California's law providing for unlimited liability of shareholders kept foreign investors from participating in California corporate ventures. United States Pacific Railway Commission, *Testimony*, 2670–71.

[128]Stanford claimed the Central Pacific paid more than $1.4 million in taxes in California from 1880 to 1886. He produced statistics showing that the Central Pacific paid more taxes than any other line in the country. Ibid., 2510–11.

[129]The Southern Pacific Company remained in Kentucky until it moved to Delaware in 1947, ironically over a tax dispute. Wilson and Taylor, *Southern Pacific*, 103.

[130]Charles W. McCurdy, "The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1863–1903," *Business History Review* 53 (1979): 304; Lawrence M. Friedman, *A History of American Law* (2d ed.) (New York, 1985), 522–25.

[131]See the text at pp. 233–35.

tion over disputes between citizens from different states.[132] This legislation enabled the Southern Pacific Company to litigate cases involving private law issues, such as railroad accident claims, in federal courts. Suits regarding state law, which usually had been tried in state courts, could now be resolved in federal forums.

This revolutionary expansion of federal trial court jurisdiction was made possible by a number of U.S. Supreme Court decisions recognizing corporations as citizens for diversity purposes. Before the Civil War, the Court vacillated over whether a corporation was a "citizen" under Article III, Section 2, of the Constitution. The Marshall Court initially held that a corporation was not a citizen, so that a federal court's diversity jurisdiction must turn on the citizenship of the natural persons behind the company.[133] In light of an earlier decision requiring that all plaintiffs be citizens of states different from all defendants, the effect was that corporate claims rarely ended up in federal courts.[134] But in 1844, the Taney Court abandoned this approach, holding that a corporation is a citizen of its state of incorporation for diversity purposes and creating what amounted to a conclusive presumption on corporate citizenship.[135] The Taney Court, which is usually identified with states' rights, ironically had a nationalizing effect on the resolution of interstate business disputes through its interpretation of corporate citizenship in diversity cases. Corporations could litigate claims in federal courts, and federal judges, applying the rule in *Swift v. Tyson*, were able to create uniform rules governing these disputes.

The railroad consolidation movement in the postwar era raised new questions about corporate citizenship in diversity

[132]18 Stat. 470 (1875). The Judiciary Act of 1789, 1 Stat. 73, gave the lower federal courts jurisdiction over claims between citizens of different states so long as the amount in controversy exceeded a statutory minimum. The justification for diversity jurisdiction was to provide a neutral forum for resolving disputes where parochial state interests were likely to result in prejudice to a nonresident in a state court. Frankfurter and Landis, *Business*, 5–9.

[133]*Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86 (1809).

[134]*Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

[135]*Louisville, Cincinnati, and Charleston Railroad Co. v. Letson*, 43 U.S. (2 How.) 497, 555 (1844). See also *Marshall v. Baltimore and Ohio Railroad Co.*, 57 U.S. (16 How.) 314 (1853). For a discussion of corporate citizenship and diversity jurisdiction, see Gerald C. Henderson, *The Position of Foreign Corporations in American Constitutional Law* (Cambridge, Mass., 1918), ch. 4; and David M. Billikopf, *The Exercise of Judicial Power, 1789–1864* (New York, 1973), 248–64.

cases. As business took on a national dimension, consolidations increasingly joined companies chartered by different jurisdictions. As Southern Pacific officials were planning the line's consolidation, the appellate courts were grappling with how to determine the citizenship of these new entities for jurisdictional purposes. Ultimately, Supreme Court pronouncements revealed that the way in which consolidation was accomplished was the defining factor. For example, some mergers were completed by having an existing railroad that was chartered in one state apply for incorporation in another. A variation on this approach was for a new company to simultaneously request charters in more than one jurisdiction. In both cases, the result was that a company received multiple charters from different states. When a railroad company with multiple charters attempted to remove to federal court a suit filed by a citizen of one of its chartering states, the Supreme Court held that diversity did not exist. A company with multiple charters was a citizen of each chartering state, thereby destroying diversity with respect to citizens of those states.[136]

But if consolidation was accomplished by having a holding company lease railroads created by other jurisdictions, as in the case of the Southern Pacific Company, the holding company was treated as a citizen of its state of incorporation only for diversity purposes. The Supreme Court recognized this distinction in its 1881 decision in *Railroad Company v. Koontz*.[137] In this case, a Maryland corporation leased a railroad chartered by Virginia. After an accident on the leased line, the plaintiff, a Virginia citizen, sued for damages in a Virginia court, and the railroad tried to remove the case to federal court. The Supreme Court held that removal was appropriate because the Maryland corporation was not a citizen of Virginia: "The Maryland corporation simply occupies the position of a company carrying on an authorized business away from its home, with the consent of its own State and of that of the State in which its business is done."[138] The *Koontz* opinion was applied by federal trial courts in the

[136]*Memphis and Charleston Railroad v. Alabama*, 107 U.S. 581 (1882). For a contemporary discussion of the issue, see John F. Dillon, *Removal of Causes from State to Federal Courts* (4th ed.) (St. Louis, 1887), 91–92; and Charles B. Elliott, "The Consolidation of Corporations Existing under the Laws of Different States," *New Jersey Law Journal* 6 (1883): 360.

[137]104 U.S. 5 (1881).

[138]Ibid., 13.

years leading up to the Southern Pacific consolidation.[139] The case was widely reported and discussed in legal publications.[140] One federal judge concluded that railroads were using leasing instead of multiple incorporations to preserve diversity jurisdiction. "The operation of this [multiple charter] rule is now usually avoided by chartering the company in a single state, and merely authorizing that identical company to do business in other states. In such a case, it remains always a citizen of the first state."[141]

The flight of corporations from state to federal courts through the innovative use of diversity jurisdiction helped account for the burgeoning caseloads in U.S. courts in the late nineteenth century. More than one-third of the Supreme Court's docket in the early 1880s was composed of diversity cases, leading one critic to call for abolishing this branch of jurisdiction.[142] Most commentators, however, believed that corporations caused the problem and that forcing them to litigate in state courts was the solution. A writer in the *Harvard Law Review*, for example, called for an end to federal court jurisdiction over corporations because they abused the system:

> The State courts are not distant from the door of any suitor. But a corporation, composed perhaps of his own neighbors and fellow-citizens (who have signed articles under the law of another State), may summon him from his home court, hundreds and even thousands of miles, into Federal tribunals, when all the real parties, and all the witnesses, and the subject-matter of the suit, may be located at the place of his home State. It is really a wonder that the States have submitted to the oppression and hardship undergone by their citizens in such cases.[143]

[139]*Callahan v. Louisville and Nashville Railroad Co.*, 11 F. 536 (C.C.M.D. Tenn. 1882); *Missouri, Kansas, and Texas Railway Co. v. St. Louis Railway Co.*, 10 F. 497 (C.C.N.D. Texas 1882).

[140]John F. Kelly, "The Test of Citizenship of a Corporation within the Judiciary Article of the Constitution of the United States and the Judiciary Acts," *Central Law Journal* 13 (1881): 482; W.H. Whitaker, "Statutory Provisions for Leasing Railroads," *Central Law Journal* 14 (1882): 485. See also the sources cited in note 136, supra.

[141]*Horne v. Boston and Maine Railroad Co.*, 18 F. 50 (C.C.D.N.H. 1883).

[142]William M. Meigs, "The Relief of the Supreme Court of the United States," *American Law Review* 32 (23 n.s.) (1884): 360, 365.

[143]Alfred Russell, "Congress Should Abrogate Federal Jurisdiction over State Corporations," *Harvard Law Review* 7 (1893): 16, 22.

No company was more severely criticized for taking lawsuits to federal courts than the Southern Pacific Company. Judge Henry C. Caldwell of the U.S. Court of Appeals for the Eighth Circuit wrote to a congressman in 1894 that the company was incorporated in Kentucky for the sole purpose of evading the state courts:

> The sole object of the creation of such corporations is to avoid the jurisdiction of the State courts in the States where they do business. To illustrate. There is the Southern Pacific Railroad [*sic*]; it is a Kentucky corporation. It has not now, and never had an inch of road or a dime's worth of property in that State, and it never expected or intended to have. The object was to use its technical citizenship (under the decisions of the Supreme Court) in Kentucky, to escape the jurisdiction of the State courts in the States in which it carried on its business.[144]

Seymour D. Thompson, editor of the *American Law Review* and a leading critic of the Southern Pacific Company, wrote of its officials, "A bolder and more reckless set of pirates never scuttled ship or cut a throat."[145] Like Judge Caldwell, he claimed that the company was incorporated in Kentucky "to defraud the courts of the various States through which their roads should lie, of jurisdiction of all important actions by and against them, and to place such actions exclusively within the cognizance of Federal tribunals."[146]

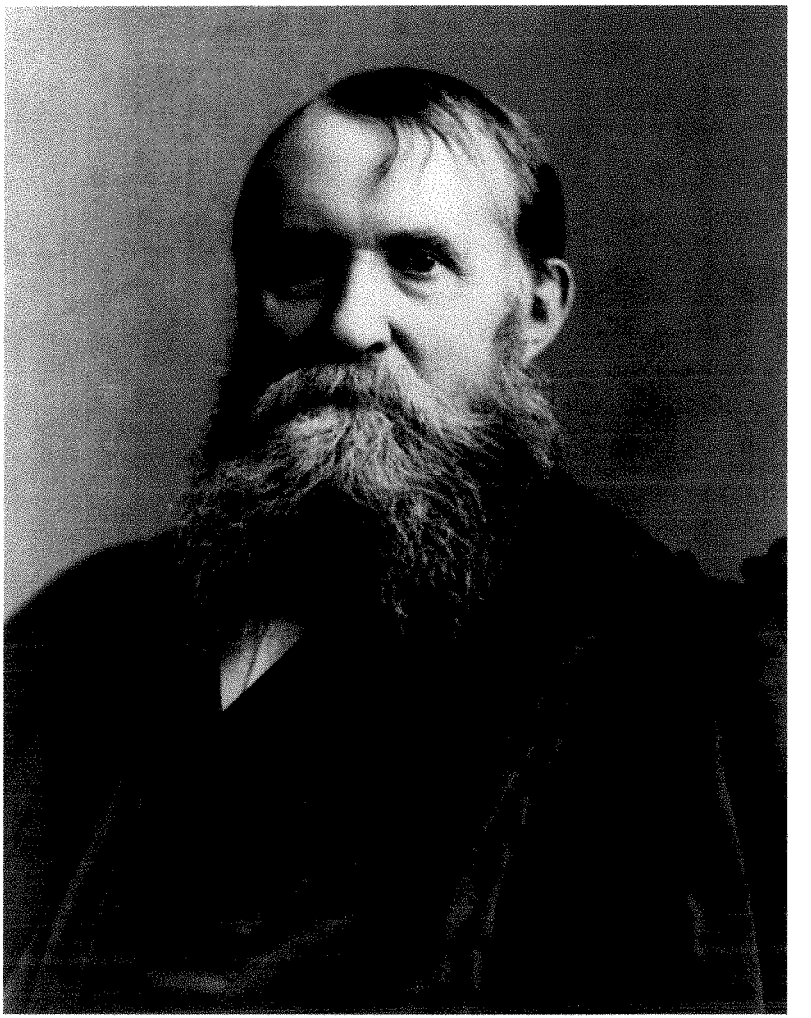
Whether the Big Four chartered their holding company in Kentucky primarily to satisfy federal court diversity jurisdiction requirements is debatable, but there is no doubt that their lawyers understood the significance of the move.[147]

[144]The letter is reprinted in Seymour D. Thompson, "Federal Jurisdiction in the Case of Corporations: Proposed Act of Congress to Restore the Early Rule on this Subject," *American Law Review* 29 (1895): 864, 869.

[145]"Notes of Recent Decisions," *American Law Review* 29 (1895): 617, 635. Thompson was a prolific treatise writer, and he edited a number of prominent law reviews. He was a reformer who criticized corporate abuses of power. His career is described in Arnold M. Paul, *Conservative Crisis and the Rule of Law* (Gloucester, Mass., 1976), 43, n. 11.

[146]Thompson, "Federal Jurisdiction in the Case of Corporations," 876.

[147]A number of historians have concurred with the assessments of Caldwell and Thompson regarding the motive behind the Kentucky incorporation. Daggett, *Chapters*, 151; McAfee, *California's Railroad Era*, 179.



Judge Henry C. Caldwell of the U.S. Court of Appeals for the Eighth Circuit believed that the Southern Pacific Company was incorporated in Kentucky strictly to evade the state courts. (Courtesy of the U.S. Courts for the Eighth Circuit)

Soon after the company was created, it started taking advantage of its status. Reported decisions show that the Southern Pacific Company's citizenship enabled it to take cases involving state law issues to federal courts. Most reported cases were passenger negligence claims and suits by workers

who were injured on the job.[148] Of course reported cases constitute only a fraction of the federal trial courts' caseload in the nineteenth century, and final conclusions regarding railroad litigation await a painstaking analysis of federal trial court records by scholars. Lawrence M. Friedman recently examined the personal injury caseload of the U.S. District Court for the Northern District of California for the years 1880 to 1900, and, fortunately, his findings relating to cases involving the Big Four's railroads are enlightening.[149] Of the Northern District's 110 personal injury cases, no fewer than thirty-four were "against the Southern Pacific Railroad or one of its incarnations."[150] Friedman discovered that of the 110 cases, eighty-one originally had been filed in state court and were later removed to federal court. Of the cases that were tried, sixteen resulted in plaintiffs' verdicts and eleven were for the defense. His data also show that plaintiffs did not do as well at trial in federal court as they did in the California Superior Court for Alameda County.[151] Other more general studies confirm that railroads and other national corporations relied on diversity jurisdiction in the late nineteenth century to transfer enormous numbers of cases to federal courts where, they believed, the change worked to their benefit.[152]

An analysis of federal court docket books and case files alone cannot fully reveal how the railroads' ability to remove cases to federal trial courts served their interests. An important recent study of diversity jurisdiction as it relates to

[148]*Rawley v. Southern Pacific Co.*, 33 F. 305 (C.C.E.D. Texas 1887) (worker injury); *Wedekind v. Southern Pacific Co.*, 36 F. 279 (C.C.D. Nev. 1888) (passenger injury); *Watkins v. Southern Pacific Co.*, 14 Saw. 30 (C.C.D. Ore. 1889) (negligence); *Davidson v. Southern Pacific Co.*, 44 F. 476 (C.C.W.D. Texas 1890) (worker injury); *Issacs v. Southern Pacific Co.*, 49 F. 797 (C.C.D. Ore. 1892) (worker injury); *Zion v. Southern Pacific Co.*, 67 F. 500 (C.C.D. Nev. 1895) (passenger injury); *West v. Southern Pacific Co.*, 85 F. 392 (8th Cir. 1898) (worker injury).

[149]Friedman, "Civil Wrongs: Personal Injury Law in the Late 19th Century," *American Bar Foundation Journal* 1987 (1987): 351.

[150]Ibid., 368. To give the reader some perspective, Friedman found that 340 personal injury cases were filed in the Superior Court of Alameda County, California, from 1880 to 1900. Ibid., 359. The federal court for the Northern District encompassed the entire state until 1886, after which nine southern counties in California were broken off to constitute the United States District Court for the Southern District of California. Ibid., 368.

[151]Ibid., 368–69.

[152]See generally, Purcell, *Litigation and Inequality*.

corporations suggests that the railroads' ability to take cases to federal courts affected the informal resolution of disputes in ways that favored companies over individuals, and that the spotlight of legal history should be focused on the extent to which substantive and procedural rules influenced outcomes in settled, dismissed, and abandoned cases.[153] Impressionistic statements in contemporary law reviews certainly support the view that plaintiffs' lawyers disliked practicing in federal courts because they were unfamiliar with the process, and that their clients found federal courts to be inconvenient and unfriendly. These burdens sometimes induced plaintiffs to make unfavorable settlements.[154] The prospect of facing a powerful company in court, along with the railroads' policy of offering settlements, probably kept many injured parties from suing at all.[155]

While the chartering of the Southern Pacific Company and the use of its Kentucky citizenship to litigate claims in federal court aroused vociferous criticism, no significant steps were taken in the nineteenth century to curb the practice. Instead, the use of a state-chartered holding company as a vehicle for corporate consolidation became more popular in the remaining years of the century.[156] State laws designed to punish nonresident corporations if they removed cases from state to federal courts were struck down by the Supreme Court for imposing unconstitutional conditions.[157] The Southern Pacific Company played a major role in protecting corporate removal rights when it successfully challenged a Texas law providing that a foreign corporation forfeited its right to transact business in the state if it transferred litigation to federal courts.[158] Petitions to Congress to change diversity jurisdiction rules were not fruitful. Responding to complaints against the federal courts, Congress enacted a new judiciary act in 1887, but the law hardly

[153]Ibid., 248–54.

[154]Editorial, "Federal Court of Appeals," 203; "Current Topics," 16–18; W.S. Strawn, "United States Courts—Reform Needed," *Western Jurist* 15 (1881): 497–99.

[155]Friedman, "Civil Wrongs," 371–73.

[156]Liberalization of corporation laws in New Jersey and Delaware contributed to a wholesale movement toward incorporating in one state and doing business in others during the period.

[157]*Barron v. Burnside*, 121 U.S. 186 (1887).

[158]*Southern Pacific Co. v. Denton*, 146 U.S. 202 (1892).

affected diversity jurisdiction over most claims involving corporations.[159]

Law reviews published articles suggesting that the states possessed the tools to confront the merger challenge by prohibiting consolidated companies from doing business within their borders or by revoking the charters of domestic corporations that participated in unlawful mergers.[160] Judge William Howard Taft of the U.S. Court of Appeals for the Sixth Circuit emphasized that the states, not the federal courts, were in the best position to address the problem. "The abuses which too liberal charters and insufficient visitorial power permit are either for the state legislatures or for the state executive and courts, by *quo warranto*, to correct and remedy."[161] But while the states theoretically had power to revoke charters and exclude foreign corporations, economic realities kept them from taking such drastic steps.[162] Mergers were unpopular, but the consequences to a state from excluding important enterprises were less palatable. These practical considerations were very important in California, where the Southern Pacific Company had a virtual monopoly over railroad transportation.[163] No one seriously proposed the self-defeating step of excluding the Southern Pacific Company from operating in California over the issue of federal court diversity jurisdiction.

[159]24 Stat. 552 (1887). The act provided that a plaintiff could not remove a suit filed in state court to federal court, and it raised the jurisdictional amount from $500 to $2,000. It did not prevent defendants from removing cases to federal forums. Nor did it affect Supreme Court pronouncements regarding citizenship in diversity cases as they applied to state-chartered corporations. For a discussion of the background of the Judiciary Act of 1887, see Tony A. Freyer, "The Federal Courts, Localism, and the National Economy, 1865–1900," *Business History Review* 53 (1979): 343.

[160]H. Campbell Black, "The Territorial Limits of Corporate Powers," *Central Law Journal* 25 (1887): 555; D.R.N. Blackburn, "Sister State Corporations," *Central Law Journal* 26 (1888): 623; Seymour D. Thompson, "Consolidation of Corporations," *Central Law Journal* 31 (1890): 4; Thomas Thacher, "Incorporation in One State for Business to Be Done in Another," *Yale Law Journal* 1 (1891): 52.

[161]William Howard Taft, "Recent Criticism of the Federal Judiciary," *American Law Review* 43 (1895): 576, 588.

[162]McCurdy, "The Knight Sugar Case," 336–42; James May, "Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880–1918," *University of Pennsylvania Law Review* 135 (1987): 495, 510–17.

[163]Moreover, as was noted earlier, the Southern Pacific Company's lease of California railroads was legal under a 1880 California statute. See note 79, supra.

CONCLUSION

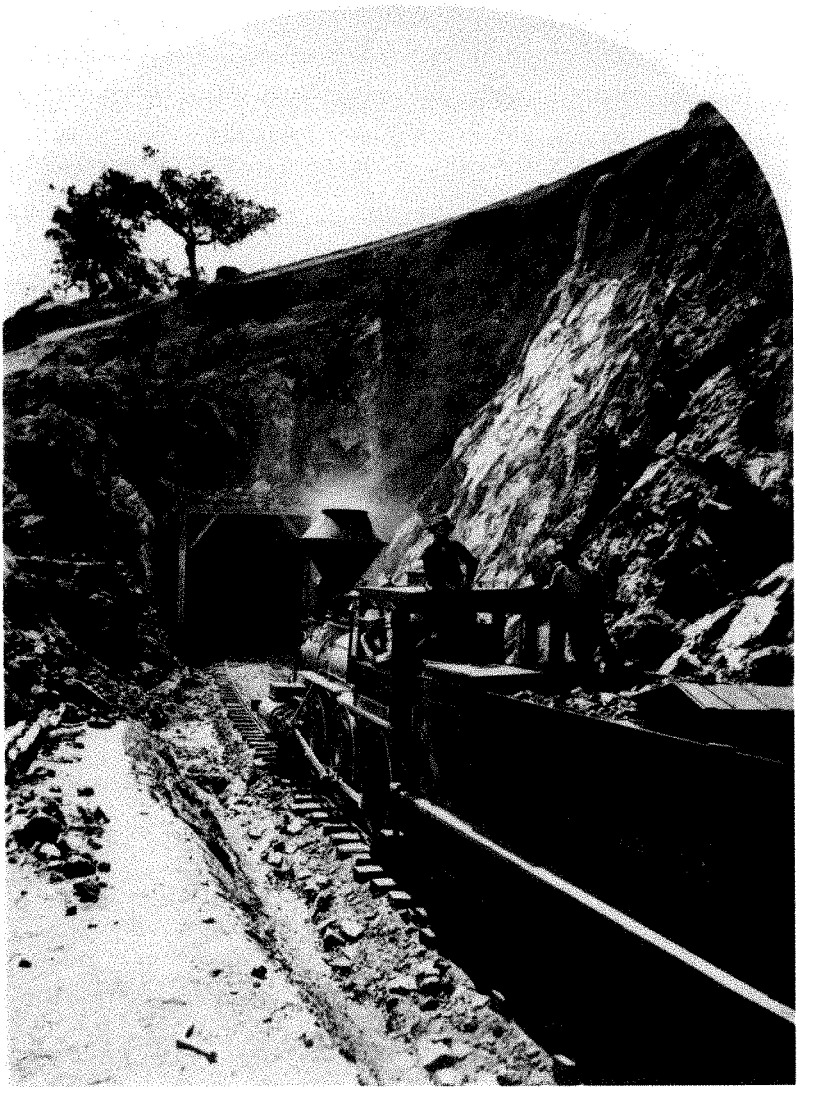
When writing in 1895 about a railroad that the Southern Pacific Company was leasing as part of its transcontinental system, railroad critic Seymour Thompson commented wryly on the corporation's practice of using its citizenship "as would best serve its purposes in the particular litigation, or in the particular business affair."[164] Thompson's statement was not meant as a compliment, but it certainly was penetrating in light of the Big Four's strategy for consolidating the Southern Pacific system. By unifying their corporate holdings under a Kentucky corporation, the Big Four advanced their legal interests in a number of ways. They obtained a charter in a friendly jurisdiction that gave them free rein over corporate decision making, with minimal legislative oversight. Because the new company was not created in California, the Big Four also avoided that state's antidevelopmental corporation laws, and their out-of-state operations were not subject to California taxes. Finally, the Southern Pacific Company was a citizen of Kentucky for diversity jurisdiction purposes. Its legal status allowed it to remove lawsuits to federal courts, where it enjoyed legal, practical, and psychological advantages over its opponents.

From the perspective of legal history, the Big Four's legal strategy in consolidating the Southern Pacific system is an informative microcosm, illustrating that railroad officials and their attorneys in the late nineteenth century had an instrumental view of the law. Railroads were among the first American industries to conduct business across jurisdictional borders and, as a result, were among the first to confront state-imposed barriers to development. Companies responded to the challenge in the judicial arena, where they relied increasingly on the Constitution in seeking relief. Thus it is no coincidence that many major Gilded Age constitutional law controversies, including commerce clause-based restrictions on state regulation,[165] "fair value" due process limits on state-imposed railroad rates,[166] and a corporation's right to equal protection of

[164]"Notes of Recent Decisions," *American Law Review* 29 (1895): 915, 939. Although the note is not attributed, Thompson was editor of the review, and the comments are written in his inimitable style.

[165]*Wabash, St. Louis, and Pacific Railway Co. v. Illinois*, 118 U.S. 557 (1886).

[166]*Smyth v. Ames*, 169 U.S. 466 (1898).



The Southern Pacific Company's legal status as a citizen of Kentucky allowed it to remove lawsuits to federal courts, where it enjoyed considerable advantages over its opponents. (Courtesy of the Henry E. Huntington Library and Art Gallery)

the laws under the Fourteenth Amendment,[167] involved railroad companies.

Nor is it a coincidence that the Big Four's railroads were directly involved in many of these battles. Just as they were pioneers in interstate transportation, the Big Four also broke new ground by relying on the law to surmount governmental barriers to business. They were innovators in maintaining a legal department staffed by lawyers who pressed their interests in Congress, the state legislatures, and the courts. The Big Four have long had a reputation for using means, both legal and illegal, to exert influence over the legislative process. But their activities went well beyond lobbying, especially after their unethical practices in the legislatures were disclosed. Over the years in the judicial arena, their attorneys developed an expertise for influencing the substantive law by bringing test cases to the appellate courts. They also manipulated the judicial process to their clients' advantage in more subtle ways, such as by threatening expensive, protracted litigation to force public and private opponents alike into settlements.

The Big Four's plans for consolidating the Southern Pacific system spotlight the interplay between the law and the aspirations of an industry in the late nineteenth century. The goal in this instance was to alter the balance of federalism by undermining the power of the states over national railroads. Although the Big Four's efforts to restrict state legislative and judicial power were not completely successful, the Kentucky incorporation produced immediate, tangible legal benefits. It is not surprising that by century's end, many entrepreneurs followed the Big Four's approach by relocating their companies to more friendly states and taking full advantage of their status as citizens of those jurisdictions.[168]

[167]*Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394 (1886).

[168]Purcell, *Litigation and Inequality*, 16–19.

Book Reviews

Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age, by Paul Kens. Lawrence: University Press of Kansas, 1997; 376 pp., illustrations, notes, bibliography, index; $39.95, cloth.

Stephen Field looms large in American legal and constitutional history. An uncommonly intelligent, opinionated, ambitious product of western New England, he studied and first practiced law with his brother, David Dudley Field, in New York City. In 1849, at age thirty-three, he departed for California, where he served briefly in the new state legislature and for six years on the state supreme court. Then in 1863 President Lincoln appointed him an associate justice of the United States Supreme Court, a position he held for thirty-four years. He sought the Democratic presidential nomination in both 1880 and 1884, but by then his growing reputation as judicial guardian of wealth and privilege was far too widespread, especially in California.

Like many large-looming figures, Field is an elusive biographical subject. Early writing about him tended to be critical. Carl Swisher, whose 1930 biography remains a principal resource, emphasized Field's strong belief in property rights and his career-long campaign to read a "laissez-faire order" into the Constitution. Others like Howard Jay Graham and Robert McCloskey largely concurred, portraying Field as an early, influential expositor of "substantive due process" and "laissez-faire constitutionalism." For some Field critics, the most absorbing question seemed to be, When was he expressing his true constitutional beliefs and when was he simply promoting either entrepreneurial railroad interests or his own political ambitions?

More recent work on Field, however, has been much more sympathetic. Leading revisionist Charles McCurdy has argued, persuasively to many, that Field was far from a result-oriented, pro-business apostle of substantive due process; he was instead the principal architect of a rigorous, coherent body of constitutional doctrine designed to "separate the public and private sectors into fixed and inviolable spheres." If an enterprise was fundamentally "public," government could

promote or regulate it at will; but if it was fundamentally "private," government could do neither. McCurdy and others, such as Alan Jones, Michael Les Benedict, and Howard Gillman, also trace Field's distrust of government regulation to praiseworthy Jacksonian ideals of equal opportunity and free labor. In that view, Field's most fundamental opposition was not to government regulation but to government-bestowed special privilege.

The only apparent consensus about Stephen Field is that he was a prototype "activist" judge. From an early age, and throughout his career, he had great confidence in his own abilities. On the bench, that translated into an abiding belief that the judiciary, not the legislature, was the institution most likely to craft principled, workable solutions to clashes between public interest and private right. Thus he felt little need to defer to legislative policy judgments, even when accused of simply reading his own political views into vague constitutional language like "due process." At times his activism extended well beyond the courtroom, to attempts to influence public land legislation, judicial appointments, and even federal patronage.

Paul Kens, professor of political science and history at Southwest Texas State, has written a timely, welcome, new Field biography. Though generally a story about "law, society, and politics during the last half of the nineteenth century," its principal focus is on efforts by Field and his contemporaries to "shape" the constitutional ideal of liberty. Kens writes clearly and, for the most part, gracefully. He describes and engages fairly both traditional and revisionist Field scholarship, and, in my view, he offers balanced, sensible judgments about Field and his contributions to American law and history. In short, this is quite a good book, one that will entertain and educate any reader interested in either early California history or classical American legal thought.

Kens's central argument is that Field's vision of constitutional liberty was, at its core, "entrepreneurial." True, one can trace certain of its ideas and much of its rhetoric back to laudable Jacksonian and free-labor ideals. But America in 1875 differed greatly from Andrew Jackson's America of half a century earlier. By 1875, freedom from government intrusion into the economy no longer meant ending special privilege; it meant, instead, freedom for powerful entrepreneurial groups to dominate the nation's politics and economy.

In Kens's view, the Jacksonian and free-labor traditions both had split by Stephen Field's time. On one side were progressives with a substantive conception of liberty, who saw corporate enterprise as the new dispenser of excess privilege

and a principal threat to personal autonomy; on the other were "radical individualists" with a formal conception of liberty, who continued to define it primarily as freedom from government restraint. Over time, Kens argues, Field became a principal spokesperson for—indeed, he "came to symbolize"—the latter conception invoked so often by entrepreneurial litigation interests.

Field, of course, wrote important opinions in areas other than government-business relations, and Kens provides useful summaries of them as well. While still on the California court, Field contributed a great deal toward regularizing state and federal public land law. Here again, however, Kens is somewhat more critical of Field than the revisionists have been, noting how in the zero-sum game of public land and resources law, Field's strong preference for formal paper title disadvantaged and angered many small farmers and miners.

On the other hand, Kens's brief description of Field's important Chinese-rights decisions is perhaps too sympathetic. Although acknowledging that those decisions contain "fodder for competing theories," he treats them largely as principled extensions of earlier, liberty-related precedents. My own view of them, as I have written elsewhere, is that sometime in 1884 Field and other California federal judges, feeling the heat of white public opinion, largely abandoned their own earlier precedents and became stridently anti-Chinese in both result and tone.

Paul Kens certainly has not written the definitive Stephen Field biography. Indeed, it is hardly a biography at all in the purest sense, because it largely omits the first thirty years of Field's life. Moreover, it is too brief and, at times, conclusory to be a definitive study of such an important and complex person as Stephen Field.

Still, as I have said, I find most of Kens's judgments about Field and liberty both balanced and sensible. There is undeniable appeal in a view of Field as a true Jacksonian, fighting the good fight against special privilege . . . or, perhaps, as a quintessential classicist, simply constructing a bright-line, value-neutral model of public and private. But the more one reads Field, and about Field, the harder it is to ignore the fact that, intended or not, the quite apparent result of his many pronouncements on liberty was or would have been to restrict government efforts to counteract entrepreneurial excess.

Ralph James Mooney
University of Oregon Law School

Braid of Feathers: American Indian Law and Contemporary Tribal Life, by Frank Pommersheim. Berkeley: University of California Press, 1995. 267 pp., notes, index; $30.00, cloth.

Professor Frank Pommersheim lived and worked on the Rosebud Sioux Reservation in South Dakota for ten years, and he is an appellate tribal judge for two Sioux tribes. It is from that perspective that he has written an interesting and timely book on Indian law.

Pommersheim makes an irrefutable case that federal Indian law, as it is conventionally taught and understood, takes a "top-down" approach; it reflects the problems and solutions of the dominant society in dealing with the tribes. Its worst aberration, in the view of Pommersheim and several other Indian law scholars, is the doctrine of the "plenary power" of Congress over Indian affairs. He makes a good case. Plenary power makes perfectly good sense when the question is whether the federal government or the states should have the power to deal with the tribes. In that sense, the federal power must be plenary, i.e., exclusive of the states, as it is in foreign affairs. The doctrine of plenary power took a wrong turn, however, when it was applied to the division of power between the federal government and the tribes. The laws of Congress are supreme over those of the states, but no one supposes that Congress could legislate the end of any statehood. Yet it has legislated the juridical end of many tribes, and the courts have not interfered.

To counter this top-down federal thinking, Pommersheim has taken an "inside-out" approach, concentrating on the view from the tribal side. He begins, most appropriately, with a chapter on "The Reservation as Place," establishing that the reservation is as much a valued state of mind and spirit as it is of geography, and that neither can be separated from the other. After reviewing the federal colonizing effect on the reservation, the author turns to the tribal courts.

Pommersheim describes extremely well the legal and cultural position in which the tribal courts now find themselves. He points out that tribal courts have had to contend with hints of illegitimacy from two directions: They are viewed by many tribal Indians as an institution imposed by the dominant culture, and they are viewed by the dominant culture as not quite up to the standard of its own courts. Pommersheim is optimistic with regard to both problems, and justifiably so: Tribal courts are gaining respect in their communities, and the training and expertise of tribal judges has improved dramatically in the past decade alone.

The Supreme Court in recent years has recognized that tribal courts may exercise broad civil jurisdiction over both Indians and non-Indians in Indian Country. Pommersheim argues that the tribal courts should seize this opportunity to develop a "contextual legitimacy" that reflects reservation values. Tribal courts must not simply reflect the views of the dominant federal powers, or assimilation will be complete. They must develop a language of "assembly and union" rather than one of "disconnection and distance," and should employ narrative and story to deal with federal arrogance. Above all, they must recognize the enduring nature of tribal sovereignty.

Pommersheim writes well and with feeling. There are times, however, when a reader from the dominant culture will feel an absence of specific direction. We are told that the tribal courts must achieve contextual legitimacy and view rights in terms of relationships, but with one exception we are not given examples of how this approach will affect the decision of cases. Pommersheim might well say that this criticism simply makes his point: The dominant culture tends to "reify abstractions" in a manner that slights "the sacredness of people and cultures." Certainly the reader's problem will be minimized by an understanding that primarily Pommersheim is trying to establish a mindset. Or, more accurately, he is trying to get rid of one colonial mindset and establish a new, tribal one. Thus his book is not a plan, but a call for a type of understanding that will enable a plan. As he writes, "The contours of . . . a jurisprudence of place remain to be fashioned, but the necessity of engaging its challenge already calls to us." Pommersheim is probably right in believing that, for both the dominant and tribal cultures, a change in attitude must precede the development of a viable, mutually respectful federal-tribal legal regime. His well-written book is a good start along that path.

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Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600–1800, by Robert A. Williams, Jr. New York: Oxford University Press, 1997; 192 pp., illustrations, notes, index; $29.95, cloth.

In *Linking Arms Together,* Robert Williams investigates how Native Americans, primarily of the Eastern Woodlands, forged treaties with English and French colonists during the Encounter Era of the seventeenth and eighteenth centuries.

Williams reveals the practices of diplomacy between these groups with a dual focus on detail and meaning. While his descriptions of particular rituals enable readers to visualize treaty-making events, he also articulates the significance of these rituals and the mutual obligations created by treaty partners. For example, his discussion of how Native Americans conferred kinship identities such as "father" and "brother" upon individual colonists, who assumed these identities pursuant to treaty obligations, is a particularly insightful and well-crafted part of his text. His explanation of the role of narrative storytelling in communicating Native American positions about treaty issues and in periodically renewing treaty obligations with colonial officials similarly, and successfully, blends historical detail with interpretive analysis.

This combination enables Williams to communicate a legal understanding of the economic and political developments of the Encounter Era through particular events and individuals. Toward this end, the text is indebted to Eric Wolf's *Europe and the People Without History*, in particular Wolf's analysis of the North American fur trade and his method of tracing history through exchanges of commodities, lines of distributions, and competition for access to resources.[1] Taking Wolf's work as a foundation, Williams advances the understanding of these developments by grounding them in relationships between groups and the treaties they formed, revealing the culturally specific and practical rationales for agreements and alliances and how they served both Native American and colonialist economic, political, and military objectives. The text therefore captures the legal efforts to contend with the highly ambiguous and uncertain political future of North America.

From this contextual background, Williams argues that the treaties of the Encounter Era embody a Native North American vision of "law and peace" and that the processes used to create Encounter Era treaties constituted a language. Clearly the evidence of ritual pipe smoking, reciprocal gift giving, use of messengers who traveled with accompanying assistants, and the invocation of kinship terms to define legal obligations facilitated, if not enabled, the making of treaties and contributed to the maintenance of treaty relations. Whether such conduct, although ritualized, coded, and precise, can be described as a language, however, seems to be a semantic

[1]Eric R. Wolf, *Europe and the People Without History* [Berkeley, Calif., 1982], 1–23, 158–94.

argument, and the characterization may obscure the value of these practices as a medium through which communication and negotiation could transcend language barriers between disparate Native American and European cultures.

Williams's broad conceptual interpretation of language makes conduct during the Encounter Era and his interpretation thereof the basis for what he terms "law and peace" throughout the book. He defines "law and peace" as the "two core ideals reflected in the language of Indian diplomacy during the Encounter Era," but claims they were "virtually synonymous"(pp. 150–51 n. 57). Although he explains that "[t]here could be no peace without law, and no law without peace," this asserts the conceptual interdependence of law and peace and leaves the distinctions between the concepts and how each one complements the other unclear (id.). Williams's constant references to law and peace may serve as a device to distinguish his text from the national mythologies about Native Americans that he summarizes and critiques in the first chapter. They may also reveal a nuanced understanding of Native American law. However, the subtle undercurrent of violence that permeates the text examples, both motivating and serving to enforce treaties, requires greater reconciliation with Williams's argument and the ideals of law and peace. Although Williams does not dismiss the violence of the Encounter Era, it lies largely outside the scope of the vision of Native American legal systems that he offers.

Williams nevertheless rises to the challenge of investigating law as a plural facet of American life. He persuasively demonstrates how legal pluralism has persisted among contemporary Native American populations of the United States by connecting its role in the Encounter Era to the subsequent history of North America. In doing so, Williams is constrained by neither the concepts nor the classifications of Western jurisprudence, and the success of his text stems from the openness of his inquiry.

Robert H. McLaughlin
Chicago

Indian Territory and the United States, 1866–1906: Courts, Government, and the Movement for Oklahoma Statehood, by Jeffrey Burton. Norman: University of Oklahoma Press, 1995; 336 pp., illustrations, notes, bibliography, index; $28.95, cloth.

My late father, an avid reader of history, constantly warned me to "be wary of reformers." That wisdom is demonstrated

by Jeffrey Burton in this examination of the forces that propelled into statehood the territory that is now Oklahoma. Burton, an independent scholar and an Englishman, researched court records, official and unofficial government documents, contemporary newspapers, and Indian tribal sources in his quest to determine how the Five Civilized Tribes (the Cherokee, Chocktaw, Chickasaw, Muskogee, and Seminole) lost their independence in the late nineteenth century. His thesis is that the United States government deliberately used a series of judicial reforms, which expanded federal court jurisidiction, to achieve the goal of making Indian Territory into another state of the Union. Burton wants to show that government policy toward Indian Territory "was, predominantly, one of political expansion for its own sake" (p. xii), challenging the traditional argument that it was a political response to a changing economy and a growing, restless population.

The historical events begin with the establishment of Indian Territory in the 1830s, and proceed through Reconstruction and railroad expansion, and end with the congressional act of conferring statehood on Oklahoma. The most important occurrences, for both the government and the tribes, include the Cherokee Treaty of 1866, which established a United States court in Indian Territory but allowed the tribal courts to remain; the resumption of railroad building in 1881–82 after an eight-year hiatus, which brought more non-Indians into the area and convinced many in Washington that the powers of the federal courts needed to extend into Indian Territory; the growth of the cattle industry, with its attendant erection of fences and cabins, and the ultimate establishment of ranches; the work of the Dawes Commission beginning in 1884, which set out to turn Indians into American citizens, resulting in the Severalty Act of 1887, which stripped Indian tribes of their legal standing and divided their land among tribal members; and the Oklahoma territorial act of 1890, which opened the land for white settlement and set up three judicial districts in Indian Territory with jurisdiction over all federal criminal and civil cases, thereby depriving the Five Civilized Tribes of their last vestige of sovereignty.

Burton's research is thorough. His effective use of sources in the Indian Archives of the Oklahoma Historical Society provides us with the actions and reactions of tribal leaders, a subject too often neglected. His narrative, however, fails to make a case for his thesis that judicial reform was instituted to ensure that Indian Territory would become a state. Rather, his evidence rarely touches that idea but supports the traditional arguments that so-called reformers were guided by prejudice, economic expansion, industrialization, a growing

population, and a genuine, if exaggerated, concern for law and order. For example, backers of the courts bills stated that expansion of federal jurisdiction was necessary because the dual system of federal and tribal courts was inadequate to deal with periodic outbreaks of violence in Indian Territory (often caused by tribal election contests), and especially because the court with jurisdiction over Indian Territory, at Fort Smith, Arkansas, was becoming increasingly costly and overburdened. Its judge, Isaac Parker, was frequently accused of self-aggrandizement and creative interpretation of the law. The head of the Dawes Commission, according to Burton, "was devoted to a policy of doing for the Indian what he believed to be best for the Indian" (p. 130). Members of Congress, whose maneuverings Burton admirably describes, repeatedly commented about conditions per se in Indian Territory, but, as Burton's discussion shows, the goal of statehood was not a major issue until the 1890s, after the area was opened to settlers.

Burton also omits two important events that not only contributed to the suppression of Indian sovereignty and led to Oklahoma statehood, but provided an explanation for why this happened: President Jackson's defiance of Chief Justice Marshall's decision in *Cherokee Nation v. Georgia,* which forced the Indians westward; and the Homestead Act of 1862, which encouraged western movement of white Americans.

Despite the evidence that Burton presents that argues against his own thesis, his book is valuable for its chronological presentation of government and Indian actions during a significant period in American history—a period in which judicial reform was but one component of a multifaceted situation.

Isabel Levinson
University of Minnesota

Forging New Freedoms: Nativism, Education, and the Constitution, 1917–1927, by William G. Ross. Lincoln: University of Nebraska Press, 1994; 277 pp., illustrations, notes, index; $40.00, cloth.

It is quite possible to devote substantial time to constitutional law and constitutional history without developing any real intimacy with *Meyer v. Nebraska* (262 U.S. 390 [1923]) or *Pierce v. Society of Sisters* (268 U.S. 510 [1925]). Since it seems unthinkable that today a state would ban the teaching of

foreign languages in nonpublic schools or require all grammar school students to attend public schools, the facts of those controversies do not seem particularly relevant. Moreover, the doctrinal significance of *Meyer* and *Society of Sisters* has always been somewhat clouded. Although William G. Ross would have us see the opinions as "Janus-faced" because they use "concepts borrowed from the old doctrine of economic due process to create a new theory of personal freedoms" (p. 197), the "old" economic substantive due process was soon to suffer ignominious repudiation, and the "new" substantive due process would lie dormant until its controversial invocation in such cases as *Griswold v. Connecticut* (381 U.S. 479 [1965]) and *Roe v. Wade* (410 U.S. 113 [1973]).

Forging New Freedoms elegantly places *Meyer, Society of Sisters,* and a number of related cases in a much broader historical context. Although all the cases on which the book focuses concern education, the origins of the controversy are not so much to be found in concerns about schooling as in a fierce hostility to all things German that built from the outbreak of World War I and reached a fever pitch after the United States entered the war in 1917. Use of the German language, whether in churches, in parochial schools, or in less formal settings, was seen as preserving the cohesiveness of ethnic German communities that were feared as potentially disloyal to the United States. Even after the Armistice in 1918, efforts to suppress the German language continued. The Nebraska statute, enacted in 1919, that was challenged in *Meyer* prohibited all instruction in a foreign language in any public, private, or parochial school for students below the ninth grade. Teacher Robert T. Meyer of the South School at Zion Lutheran Church near Hampton, Nebraska, was convicted when he continued to have his fifth-grade students read Bible stories in German even after the county attorney entered his classroom to observe.

Wartime anti-all-things-German sentiments easily blended into a campaign against parochial schools, since there were many Lutheran schools, most of them serving German congregations. However, the more numerous parochial schools operated by the Roman Catholic Church were also targets of the ardent supporters of "Americanization," even though classes were overwhelmingly conducted in English. The Catholic and other parochial schools were criticized as being of poor educational quality, and especially for failing to instill appropriate moral and patriotic principles. For example, it was argued that "any saving on expenditures for public schools [that resulted when students attended parochial schools] was more than counterbalanced by increased public spending for

the 'children's homes, reformatory schools, charity hospitals, insane asylums, courts of justice and prisons' that were needed to accommodate parochial school alumni and their progeny" (p. 70). The Oregon initiative measure invalidated in *Society of Sisters* required that children between the ages of eight and sixteen attend public school through the eighth grade. (There were exceptions for children who were physically or mentally disabled, who lived a long distance from public schools, or who obtained permission to receive instruction from a parent or tutor [p. 151].)

Ross engagingly describes the social and political circumstances under which the Nebraska and Oregon statutes were adopted, and he presents a full account of the litigation that achieved the invalidation of the legislation by the Supreme Court. A third major case, *Farrington v. Tokushige* (273 U.S. 284 [1927]), which struck down Hawaii's hostile regulation of schools providing instruction in Japanese, closes out the 1917–27 period promised in the title of *Forging New Freedoms.* The author also provides an enlightening treatment of the constitutional reasoning contained in the Supreme Court's decisions in the cases.

Perhaps the most intriguing aspect of the book is its depiction of the diverse tactics and arguments used to defend against and mostly defeat the many attacks launched by nativists against the parochial schools. Lutherans and Catholics sought and obtained support from other religious groups (such as Jews, who did not operate many full-time schools, but who were mindful of the broader risks posed by nativist campaigns), from newspapers and other opinion-shapers, and from the full range of other allies to be found in the political arena. For each repressive statute that was adopted, there were a great number of others that were defeated, sidetracked, or watered down by amendment. The churches operating parochial schools often achieved this result by accepting greater regulation than had previously been imposed on them. Voters and legislators in most states "were willing to allow parochial schools to teach distinctive cultural and religious beliefs if the schools would conform to the pedagogical standards and political orthodoxy of the public schools" (p. 205).

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University of the Pacific

Reclaiming the Arid West: The Career of Francis G. Newlands, by William D. Rowley. Bloomington and Indianapolis: Indiana University Press, 1996; 216 pp., illustrations, notes, index; $27.50, cloth.

In this biography, William D. Rowley, a history professor at the University of Nevada, Reno, focuses on Francis Griffith Newlands's political career. As a Nevada congressman in 1902, Newlands introduced the bill that led to enactment of the National Reclamation Act, which launched the federal government into the regional management of water resources for irrigation agriculture.

Newlands made his case for a national and public approach to water management by arguing that only the federal government could efficiently manage water resources whose origins, courses, and outlets were in different states. To counter Eastern farmers who feared competition from an irrigated West, Newlands argued that the water projects he proposed were just like the federal river and harbor improvements the East had enjoyed for many years, and that the West was owed its share.

None of this was new. In the late nineteenth century, congressional committees had rejected various Western irrigation schemes, but with Western enthusiast Theodore Roosevelt in the White House and a Republican Congress increasingly sympathetic to the expansion of federal power and sanguine about the rational management of just about everything, the time had come for federally sponsored irrigation. The act became one of the key accomplishments of the Progressive Era. At the opening of the Derby Diversion Dam on the Truckee River on June 17, 1905, Newlands, by then a Nevada senator, attended the ceremonies marking the first water project completed under the act.

Newlands believed the scientific beneficence of federally funded irrigation would turn Nevada, indeed the entire arid region, from a rough mining frontier into a civilized, model democracy of many small landholders engaged in subsistence farming. To this Jeffersonian end, he limited to 160 acres the land for which any one landowner could receive water. Newlands expressed great pride in this feature and anticipated it would cause the painless breakup of the existing land monopolies in California and the intermountain states. In California today, probably no provision of any federal act has been so ignored as the 160-acre limitation; land monopoly is alive and well, and large landholders are still getting plenty of Bureau of Reclamation water. In Nevada, even with irrigation, farming proved largely impracticable; today the state's economy relies on providing wide-spectrum entertainment.

Despite the book's title, Rowley devotes little of this biography to federally sponsored irrigation. Half the book is

given to Newlands's origins in southern poverty; his bootstraps climb to a law career in California and, through marriage into a wealthy Nevada mining family; and, finally, his elevation into the intricacies of Gilded Age politics in the silver state. His political career, until his death in 1917, occupies the rest. The conservation and management of natural resources, especially water, remained Newlands's principal interest, but he thought that national planning and management could apply to other resources as well. For example, he wanted to nationalize the railroads.

Newlands also had ideas in the area of social engineering. He took an anti-imperialist stance while simultaneously advocating the removal of the Black population of the United States to those Caribbean islands that could become available by means of the Spanish-American War. Short of this removal, Newlands thought that at the very least the Fifteenth Amendment should be repealed, so that African Americans could not vote. Newlands also campaigned against Asian immigration and against the property rights of already resident Asians in the West. On the other hand, he supported women's suffrage—presumably only for white women.

A workmanlike chronicle of Newlands's life, this biography is long on local politics but short on discussion of the evolution of Newlands's ideas. Rowley tells us that Newlands's political philosophy resembled that of fellow Democrats in some ways and that of contemporary Republicans in others. He explains how Newlands's views reflected his times, but he does not tell us about Newlands's own epiphanies. For example, as a lawyer in the late 1870s defending the monopoly his father-in-law's Spring Valley Water Works had on the water supply of San Francisco, Newlands argued that private corporations should provide public utilities, and government had no power to regulate corporations (p. 25). The next time the private-public issue comes up, we learn that Newlands, having moved to Nevada, becomes interested in irrigation agriculture in 1889 and sees national legislation, as opposed to private enterprise, as a solution (p. 46). We are left to wonder what wrought this shift.

Finally, the book's production values require comment. A few typos, even in a university press-produced book, though regrettable, may be graciously forgiven. Occasional awkward prose can evade even the best of editors. But printing a photograph, even of the relatively featureless Nevada desert, upside down (p. 147) is just too much.

Beverly E. Bastian
University of California, Santa Barbara

Homicide, Race, and Justice in the American West, 1880–1920, by Clare V. McKanna. Tucson: University of Arizona Press, 1997; 208 pp., illustrations, notes, index; $40.00, cloth.

Clare McKanna has compiled a groundbreaking study of homicide in the old West by focusing on homicide statistics in three counties over a period of forty years as the West evolved from an unsettled frontier to a twentieth-century society. As a social historian, the author has taken our intuitive knowledge that the frontier was a violent place and reduced it to statistics that attempt to categorize homicide and deduce its causes.

The book examines homicides in Douglas County, Nebraska (Omaha); Las Animas County, Colorado (Trinidad); and Gila County, Arizona (Miami and Globe). Approximately nine hundred homicides are analyzed among the three localities over a forty-year period commencing in 1880. McKanna focuses on these three counties because he believes that they offer paradigms for the West during the period in question. The information offered in the publication is drawn from coroners' records, indictments, and trial reports. Charts and graphs are used to display the statistical results on the basis of occurrences per 100,000 population.

From these records and statistics, numerous conclusions are offered about the causes of homicide and the relative justice that various racial and ethnic groups might receive from time to time. Most homicides involved men who used alcohol and concealed weapons, usually firearms. In these frontier or old West communities, it was accepted behavior for men to carry concealed weapons for protection, and they were used more readily if the bearer was intoxicated. The statistics show a great majority of the homicides were related to these two factors. A very high percentage of the homicides were never prosecuted because of the perception that a person had the right to defend himself without the obligation to retreat and that a man had the right to protect his home from any kind of harm, including extramarital affairs.

Because saloons and red light districts were the meeting places of choice during leisure hours in each of these communities, there was a high concentration of homicides in and immediately around such places, including interracial and inter-ethnic violence and death. According to the author, statistics show a racial bias in the application of justice to homicide, especially the interracial homicides in Douglas County. Few whites of northern European descent were prosecuted, and even fewer were convicted in the counties studied. In the aftermath of the fourteen interracial

slayings in Douglas County, the seven whites who killed Blacks were not convicted of murder, but each of the seven Black defendants was convicted. In all of the counties, plea bargaining, in particular, sent more poor minorities to prison than whites, who may have had a greater opportunity to secure legal representation. This phenomenon was especially evident during the preliminary hearing phase, when poor defendants were not provided with counsel paid for by the county.

McKanna's book offers numerous useful insights into the process and disposition of violence and homicide. However, the writer seems predisposed, on occasion, to find racism in the administration of justice, and he uses statistics to support his preconceptions. Unfortunately, the statistical analysis of convictions in Douglas County fails to indicate the relative merits of the cases involving white perpetrators versus those involving Blacks. The fact that poor minority defendants were often denied effective representation during the plea-bargaining process does not mean ineluctably that the process suffered from a racial bias; it may mean that the system offered inadequate protection to poor defendants in general. In Las Animas County, no statistical variation could be shown between the various races and ethnic groups in regard to indictment and conviction for homicide offenses. The author's only conclusion is that this is "surprising." Possibly, a statistical study of defendants without counsel at the preliminary hearing level would also show a lack of variation in racial statistics.

McKanna's study suffers from a liberal use of sociological jargon, which often obscures the presentation of an important thesis. Additionally, the forty-year span of the study distorts the results from county to county and from era to era. For example, comparing the violent, sparsely populated Gila County of 1880 with the same county in 1920, occupied by large mining operations, offers little useful analysis. However, McKanna's book generally survives its flaws. Publication of further studies of this kind will add to our understanding of law in the old West.

Marshal A. Oldman
Jayne Hotchkiss Oldman
Encino, California

Murder and Justice in Frontier New Mexico, 1821–1846, by Jill Mocho. Albuquerque: University of New Mexico Press, 1997; 256 pp., illustrations, notes, bibliography, index; $50.00, cloth; $19.95, paper.

Jill Mocho has produced a scholarly study of reported homicide cases in New Mexico during the Mexican colonial period between 1821 and 1846. Fifty-eight of the 242 pages consist of the glossary, notes, bibliography, and index. The notes alone consume thirteen pages. The first five pages contain thirty notes. These comments are not intended to disparage the scholarly content of the book but, instead, to candidly warn the reader that this is not a compilation of fascinating detective stories.

Mocho's research is held together by vignettes describing eleven homicides divided into three categories: murder between family members, murder between neighbors, and murder against and between foreigners. Under the category of "domestic violence," the colorfully written vignettes include "The Bad Life," "Death Before Christmas," "The Servant Boy," and "Murder in the Basque." "The Servant Boy" involves Don Francisco, a wealthy resident of the patron class, who, in a foul mood, viciously beat his twelve-year-old servant with a horsehair rope in front of several witnesses for some alleged delay in following his orders. During an escape attempt, the boy stepped on a sharp stick and incurred a wound that became infected, and from which he eventually died. Legal proceedings resulted in a jail sentence of barely eight months for Don Francisco. The lesson from the case confirms the common belief that money and influence are important, and that class distinction is inevitable.

The vignettes concerning violence toward women involve strangulation, stabbing, and bludgeoning by rock. It is remarkable how much vitality the author is able to give to these cases given the limited records available. The entire book demonstrates the author's ability to translate a snippet from an old legal record into an interesting and descriptive event.

The category of "violence toward foreigners" even includes an acquittal. In almost all of the other categories there appear to be convictions, but without completion of a sentence or execution. In most cases, whatever incarceration was involved occurred between the time of arrest and completion of the last appellate procedure, which could take up to six years. From all of these cases, the author draws certain conclusions about which there can be no argument. It is clear that sexism, class

discrimination, racism, resentment of foreigners, and contempt for those conquered were alive and well in the 1820s.

I found this relatively brief book difficult to read. The constant use of Spanish nouns followed immediately by English translations was extremely distracting. However, the glossary of Spanish legal terms is excellent. This book would not hold much interest for those looking for details of Mexican criminal practice, trial tactics, or comparative law. It does illustrate the truth of the evaluation made by Licenciado Antonio Barreo, a government-appointed legal advisor quoted in chapter 2: "Crime is never punished because there is absolutely no one who knows how to conduct an examining trial, to prepare a defense, or to prosecute a case."

The author concludes that this was a class-conscious society where the wealthy were contemptuous of the lower economic and social classes. The poor felt threatened by foreigners. The domestic violence cases indicate a patriarchal society in which women were controlled by males. The Americans brought their racial prejudices with them. The Mexicans were prejudiced against the Indians and vice versa.

Although *Murder and Justice in Frontier New Mexico* is limited to a brief period in what was then a foreign land, the author's analysis and conclusions leave one wondering, Have we really accomplished anything? Mocho's book provides no answers, but it promotes serious reflection about how little we have progressed. This volume should prove invaluable to scholars, historians, and sociologists with a serious interest in this very limited period and place in history.

Ray Hayes
Surprise, Arizona

Rosellini: Immigrant's Son and Progressive Governor, by Payton Smith. Seattle: University of Washington Press, 1997; 271 pp., illustrations, notes, index; $24.95, cloth.

Payton Smith's biography of Governor Albert D. Rosellini provides an informative history of the individual and his place in the history of Washington State in the 1950s and 1960s. As a public servant from 1935 to the present, and specifically as governor from 1956 to 1964, Rosellini has been involved in, and in many cases spearheaded, the major achievements that shaped the state of Washington as it exists today. Rosellini was the first governor of Italian descent west of the Mississippi, and his public image was shaped by his heritage and upbringing as the son of immigrants.

Smith recalls the lives of Italian immigrants in the so-called Garlic Gulch district of Seattle in the early part of this century. Rosellini's father, Giovanni, immigrated to the United States in 1901 and worked at various jobs, including operating a restaurant, a grocery store, and a saloon. From his father, Albert absorbed a strong work ethic and gained familiarity with the restaurant business, which was to follow him through his legal and political career. The author underscores the importance of Rosellini's heritage as a source of cultural and personal identity that he felt set him apart from the mainstream business circles of Seattle and Washington. Unfortunately, Rosellini also suffered throughout his political career from the public's association of Italians with organized crime and political corruption; he was a victim of that type of innuendo on several occasions, as Smith documents.

The primary focus of Smith's work is Rosellini's political career in the state senate, and then as governor. The author describes Rosellini as a politician who "was attracted to issues where progress could be made and measured, and was less comfortable articulating a broad philosophy of government." Those issues include reform of the state prison system, reform of the budget process (under Rosellini, double-entry accounting was introduced in Washington), expansion of the state's higher education system—including development of a strong community college system—and economic development. Of particular note is Rosellini's role in transportation issues, including the construction of the Evergreen Point Bridge, spanning Lake Washington and connecting Seattle to the eastside suburbs, where much of the state's recent economic growth is centered.

Also of interest is Rosellini's decision to combine several state departments into the Department of Community and Economic Development, focusing on industrial development, tourism, and regional planning. That focus encouraged the diversification of state industry from aircraft and resource-based industries, while introducing business leaders to government and giving Rosellini an opportunity to interact with those circles in which he was perceived as an outsider. The Department of Community and Economic Development was also instrumental in the state's partnership with the city of Seattle in the Century 21 exhibition, the Seattle World's Fair of 1962, chronicled in the book.

Smith describes Rosellini's various election campaigns, tracing his political ambitions from his years in the state senate and describing how he used institutional reform as a springboard to higher office. Smith discusses Rosellini's victory over Governor Arthur Langlie in 1956, his reelection

in 1960, and his subsequent defeat by Dan Evans in 1964. Rosellini's themes of progress and achievement are detailed, as are his opponents' campaigns, plus what Smith describes as "a feud with the (Seattle) *Times* and (reporter Ross) Cunningham" that lasted throughout Rosellini's political career.

Smith's biography is an easy-to-read history of post–World War II Washington, providing an interesting background to many of the issues that the state faces today, including transportation development, world trade, and reform of state government and institutions. Smith's admiration for Governor Rosellini is apparent. However, Smith tempers that admiration with even-handed criticism where appropriate and, in so doing, delivers a welcome addition to the history of the state of Washington.

Andrew R. Williams
Edmonds Community College

Necessary Fraud: Progressive Reform and Utah Coal, by Nancy J. Taniguchi. Norman: University of Oklahoma Press, 1996; 319 pp., illustrations, notes, bibliography, index; $39.95, cloth.

Common wisdom has it that bad facts create bad law. In this intriguing study, Nancy Taniguchi demonstrates, conversely, how bad law precipitates both bad facts (or, more precisely, bad acts) and bad resolutions.

Between 1890 and 1905 nearly all of eastern Utah's best coal lands were snatched illegally from the public domain. Although the schemers were numerous, *Necessary Fraud* focuses primarily on frauds perpetrated by three diverse groups of entrepreneurs, probably because the nature of their particular scams and the ultimate disposition of the properties involved best illustrate this book's thesis.

The largest and most heinous defrauder was a railroad and mining company conglomerate spearheaded by the Denver and Rio Grande Railway (D&RG). A second set of malefactors were Arthur and Frederick Sweet, and a consortium referred to as the Milner-Gilson Group. Two bad laws both encouraged and fostered the fraud practiced by the D&RG. The Sweets and the Milner-Gilson Group utilized only one of these laws. The first piece of defective legislation was the Coal Land Act of 1873, which allowed private purchases of federally owned coal-bearing lands in parcels so small that development by decently capitalized companies was impossible. To circum-

vent these unreasonable federal restrictions, D&RG agents, from 1890 to 1894, procured many valuable parcels through individual "dummies," who, for a small price, would file claims with the General Land Office covering the meager coal acreage legally allowed. These claims to title ultimately vested in one of the D&RG's alter egos.

The second bad law was imbedded in Utah's 1894 State Enabling Act, by which thousands of acres of "school lands" were granted by the federal government to the new state. Although other congressional statutes forbade the transfer of any mineral-bearing "school lands," Utah's State Enabling Act was silent on this point, and was rendered even more ambiguous by either including or excluding salt, a known mineral, from the overall prohibition. Although these ambiguities were not generally relied on to promulgate the ensuing coal land frauds, the legal issues were eventually argued by both the Sweets and Utah in a landmark 1918 U.S. Supreme Court decision.

In any event, the D&RG as well as the Sweets and the Milner-Gilson Group utilized Utah's Enabling Act to obtain known coal-bearing "school lands" and/or "in lieu" lands by claiming the properties as "grazing lands." The Sweets and the Milner-Gilson Group each obtained approximately five thousand acres of rich coal lands in this manner. They laid claims to these lands in their own names or in the names of their respective companies. Once again, however, the D&RG used a host of "dummies," many of them Mormon Church members, to file entry claims on "grazing lands." Utah's Land Office looked the other way for nearly a decade while eighty thousand acres of the finest coal land in Utah passed into the hands of the D&RG conglomerate under the auspices of the state's Enabling Act.

By 1905, however, the federal government had taken notice of land frauds occurring throughout the West. In 1906, the Justice Department brought bills in equity against the D&RG under the defective Coal Land Act. Although the cases garnered initial support from Theodore Roosevelt and his Progressive Party, enthusiasm waned as time passed. In 1909, the suits were settled for very little money and restoration of only a minuscule portion of the coal lands fraudulently obtained by the D&RG. Not surprisingly, much of the blame for this sorry result is placed on the faulty Coal Land Act. Prosecution was long suspended pending a U.S. Supreme Court decision determining whether indictments for state and federal "dummy" land frauds could even be maintained under this act. By the time a favorable federal ruling was returned, economic and political realities dictated a hasty resolution highly unfavorable to the United States.

However, in 1907, the Sweets and the Milner-Gilson Group became the targets of federal prosecution. While it took almost twenty-five years (and return of only the Milner-Gilson Group's lands to the public domain), legal precedent set by these two cases finally determined that federal properties known at statehood to contain coal could never be transferred to the states, regardless of any ambiguities in enabling act language. This was true whether the properties in question were "school lands" or "in lieu" sections proffered in place of such lands.

Necessary Fraud's closing chapters describe how "justice" was belatedly accomplished through the passage of various federal acts (particularly the Mineral Leasing Act of 1920 and the Coal Trespass Law of 1926), which at last abolished the infamous, unworkable Coal Land Act; mandated the leasing of all mineral rights from the federal government; and unequivocally proscribed the "dummy" system formerly used by the D&RG and others to gain title to coal-bearing lands.

Overall, *Necessary Fraud* is a fascinating if sometimes frustrating account to follow. The major problem lies in the book's organizational structure. The first fifteen chapters are almost exclusively devoted to events occurring (and characters acting within) the confines of eastern Utah. The frauds and the feuds conducted there by both major and minor players are meticulously described. However, the reader must wait until final chapters 16 through 18 to place most of these local events within a broader national context, including the economic, political, cultural, and legal concerns of the day. Once provided this background, the reader is better equipped to perceive the lasting significance of the eastern Utah coal land frauds.

Finally, I have one substantive criticism. By far the major portion of the coal land frauds portrayed in this book involved "school lands" misappropriated through Utah's Enabling Act. As noted above, this act was ambiguous respecting salt, but *Necessary Fraud* provides conflicting descriptions of this ambiguity. At one point, the act is said to exclude only salt lands from federal grants. At a later point, the act is said to *include* salt lands, thereby providing the much weaker argument that Congress also intended to grant other mineral-bearing lands to Utah. This issue raises questions of federal statutory interpretation and thus could be critical from a legal historian's perspective. However, neither the text nor the footnotes provide any explanations, and the pertinent language of the act is never quoted. In an otherwise excellent work of scholarship, this omission is too significant to ignore, particularly since Utah's Enabling Act, and the legal arguments

presumably proffered by both the Sweets and Utah in efforts to retain their coal-bearing lands, are extremely relevant to the central theme of this book.

Ardis M. Conant
Pasadena, California

Reel Justice: The Courtroom Goes to the Movies, by Paul Bergman and Michael Asimow. Kansas City: Andrews & McMeel, 1996; 338 pp., illustrations, appendix, notes, index; $14.95, paper.

If the study of law sharpens the mind by narrowing it, which was Burke's view, lawyers might be advised to steer clear of fields like film criticism that require a more expansive outlook. On the other hand, the interplay between law and the arts is long standing. In the late medieval Inns of Court, students studied music and dance as well as law; indeed, Shakespeare's *Twelfth Night* was first performed at the Middle Temple. Many artists and entertainers began their working lives as lawyers, or at least as students of law. A wholly random sampling would include Robert Louis Stevenson and Sir Walter Scott, both of whom studied and practiced law in Scotland; Schiller, who studied law for a time in Germany; the poets Edgar Lee Masters and Wallace Stevens, and popular composers Hoagy Carmichael and Arthur Schwartz. Charles Dickens worked as a solicitor's clerk and as a court reporter, and obviously made the most of the experience. And film director Leo McCarey practiced law for a short time, before making his mark in screwball comedy.

So when Paul Bergman and Michael Asimow, two professors at the UCLA School of Law, turned from grading papers to grading movies, they were part of an honorable pedigree. In *Reel Justice: The Courtroom Goes to the Movies*, they have chosen to synopsize and critique sixty-nine films that involve trials of one sort or another, from a naval court martial in *Billy Budd*, to a courtroom battle of the sexes in *Adams Rib*, to a judicial reckoning with crimes against humanity in *Judgment at Nuremberg*. I am hard pressed to find any major trial movie that has escaped their notice, although, in his foreword, Judge Kozinski lists a few, including the Supreme Court-sited comedy *First Monday in October*. For my own part, I would have included *Leave Her to Heaven*, in which the cinema's most negligent lawyer fails to raise a single objection to the cinema's most improper cross-examination, by Vincent Price

of poor Jeanne Crain. And I challenge the good professors to get more esoteric (or bizarre) than *You're a Sweetheart*, in which prosecutor, defendant, and judge (future Senator George Murphy) sing and dance their way through a swing version of "When You and I Were Young, Maggie."

Reel Justice is a curious hybrid, at once a book of lists, a video guide, a pedagogical tool, and a collection of historical, legal, and critical essays. As a video guide it is least successful. The authors assign each movie from one to four gavels based on "the quality, dramatic power, and authenticity of the trial scenes in the movie." Since authenticity and dramatic power do not always go hand in hand, this makes for some problematic ratings and questionable rental advice. Even lawyers, I imagine, would not rent a movie on the basis of its fidelity to actual courtroom practice. As often as not, it is the deviation from realism that makes the movie work.

Bergman and Asimow obviously recognize this. They disapprove of a wholly unrealistic "grandstand play" in *Philadelphia*, whereby Tom Hanks "unbutton[s] his shirt to reveal a chest full of ugly lesions," but they refer to it as one of "the trial's dramatic moments." Similarly, they concede that had the judge in *Miracle on 34th Street* dismissed the committal proceeding against Kris Kringle at the conclusion of the state's case, we would have missed the courtroom theatrics that put Santa Claus back on the streets (or in the air) just in time for Christmas Eve.

Nonetheless, such legal license often impairs a film's rating. *The Verdict*, for example, is clearly penalized (a paltry two-gavel rating) for its admittedly farfetched pretrial and courtroom shenanigans. For my money, *The Verdict* is a great movie, a stirring drama about degradation and redemption, with a scalding script by David Mamet and fine direction by Sidney Lumet, for whom its theme of urban corruption is a specialty; its exaggerations are at worst beside the point, at best what makes the movie work. The authors are undoubtedly correct that the judge should have stopped the trial and entered a directed verdict for the defendants; but, as John Ford responded when asked why in a famous chase scene the Indians did not just shoot the stagecoach horses, that would have been the end of the movie.

But if *Reel Justice* fails as a guide for the video perplexed, it excels as a legal and historical primer, amplifying an astonishing number of topics from conservatorship proceedings to the legal status of POWs, to the insanity defense, to the best evidence and hearsay rules. Bergman and Asimow scour each film for story lines that permit them to display their wide-ranging knowledge and anticipate questions such as, Why can

the defendant in *They Won't Forget* address the jury without undergoing cross-examination? What contract defenses are available to undo a pact with the devil? And was it ethical for the lawyer in *The Letter* to purchase evidence incriminating his client? Moreover, the background and context that the authors provide for trial movies based on fact, such as *I Want to Live* and *Breaker Morant*, are invaluable correctives to often misleading screenplays.

That said, I have a few quibbles with the legal commentary. The absence of judicial review in Great Britain is a consequence of the principle of parliamentary sovereignty, not (as suggested in the comments to *In the Name of the Father*) of the fact that the British constitution is unwritten rather than written. In discussing *Inherit the Wind*, the authors should have kept in mind Henry Drummond's distinction between power and right before stating that "the jury has the inherent right to nullify a criminal law by finding a defendant innocent," a sentiment echoed in their discussion of *Twelve Angry Men*. Finally, Bergman and Asimow foolishly compare comments by American officials in *Judgment at Nuremberg* questioning the wisdom of the war crimes trials "to the same sort of political pressure the Nazis placed on" their judges.

Despite these reservations, I enjoyed *Reel Justice*. Movies have the special capacity to provoke an interest in the real world on which the fictional one is modeled. *Reel Justice* satisfies the need to go beyond what is on the screen, to use the movie-going experience as a jumping off point to explore other issues. While I may differ with Bergman and Asimow on their judgment of individual movies, I salute them for the prodigious research that has broadened my perspective of many familiar cinematic friends.

Alan Diamond
Beverly Hills

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.

Ball, Larry D., "A Contractor's Cussedness: Politics, Labor, Law, and the Keets Mine Incident of 1877," *South Dakota History* 26:2 & 3 (Summer–Fall 1996).

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