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Cover Photograph:

Firing 100 guns on arrival of the news of Hawaiian annexation, 1898.

(Davey, Bishop Museum)

THE FEDERAL COURTS AND THE ANNEXATION OF HAWAII

BY HON. SAMUEL P. KING

The Hawaiian Islands became part of the United States of America at noon Hawaii time on August 12, 1898. A formal ceremony for the transfer of sovereignty took place with the unfurling of the largest of several American flags raised over the central tower of Iolani Palace exactly on the hour. As soon as all of the American flags were in place, United States Minister Harold M. Sewall read a proclamation to the government and people of the Hawaiian Islands continuing the existing government of Hawaii, except for foreign relations, until Congress provided otherwise.

The event was received with varying emotions among different groups in the local population, covering the spectrum from joyous elation to sullen resentment. Most Hawaiians and many Americans viewed the loss of sovereignty as the passing of a loved one. Hawaiians generally had remained at home, lonely and sad, their windows and doors closed.

There was grumbling among some participants over the arrangements. Rear Admiral Joseph N. Miller, Commander in Chief U. S. Naval Force, Pacific Station, and Minister Sewall, had their orders to keep it simple, and this they did. An Annexation Club member expressed the Club's dissatisfaction:

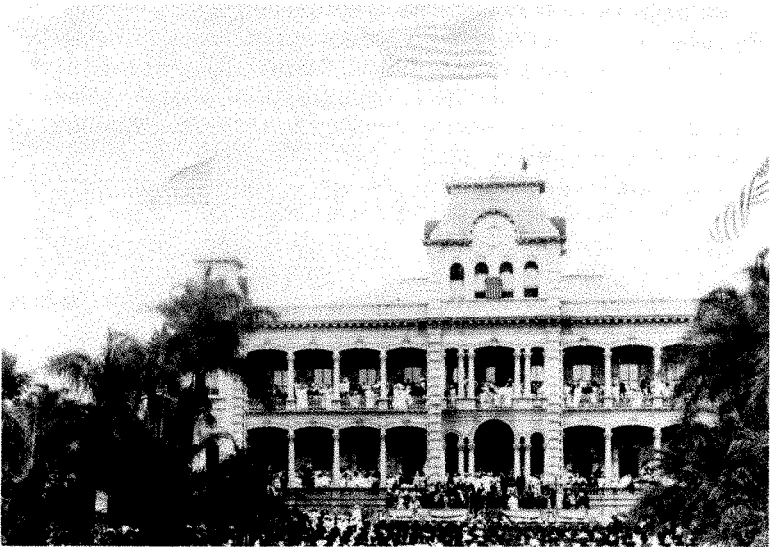
We have been led to believe that the rank and file would be given an opportunity to assist in some way in the consummation of the act we have been to some degree instrumental in bringing about. Now we learn at the last minutes that it is all to be solemn and straightlaced as a Scotch prayer meeting and that it's to be red tape only and stingy measure of that from beginning to end. There is no use having a holiday. The affair will be a touch and go matter of ten minutes. We may be sentimental and it may be that in five years and a half we have absorbed too much

Samuel P. King is chief judge emeritus of the United States District Court for the District of Hawaii.

enthusiasm with the idea that we would be allowed to explode on the great day. But it's to be strictly quiet and like a high church wedding.¹

After it was all over, the consensus was that what had been done was dignified, appropriate, and sufficient. Even so, there was still much to be done.

Hawaii's consent to annexation was by way of a Treaty of Annexation signed at Washington, D. C., on June 16, 1897. The senate of the Republic of Hawaii ratified this treaty on September 9, 1897, but the treaty languished in the United States Senate. Proponents could garner a majority vote in each house of Congress but could not garner a two-thirds vote in the United States Senate.



The American flag flying officially for the first time over Iolani Palace, in celebration of Hawaiian annexation, August 12, 1898. (Hedemann Collection, Bishop Museum)

Parliamentary strategists, recalling a procedure that had worked for Texas in 1845, decided to try an "end run" by means of a joint resolution containing the same provisions as the treaty. A joint resolution would require only a simple majority in each house. Pursuant to this strategy, Representative Francis Griffith Newlands of Nevada introduced H. Res. 259 on May 4, 1898. The

¹ *The Pacific Commonwealth Advertiser*, August 10, 1898, 1 (quoting "one of the [Annexation] Club officials" who spoke out "last evening [Tuesday, August 9, 1898.]").

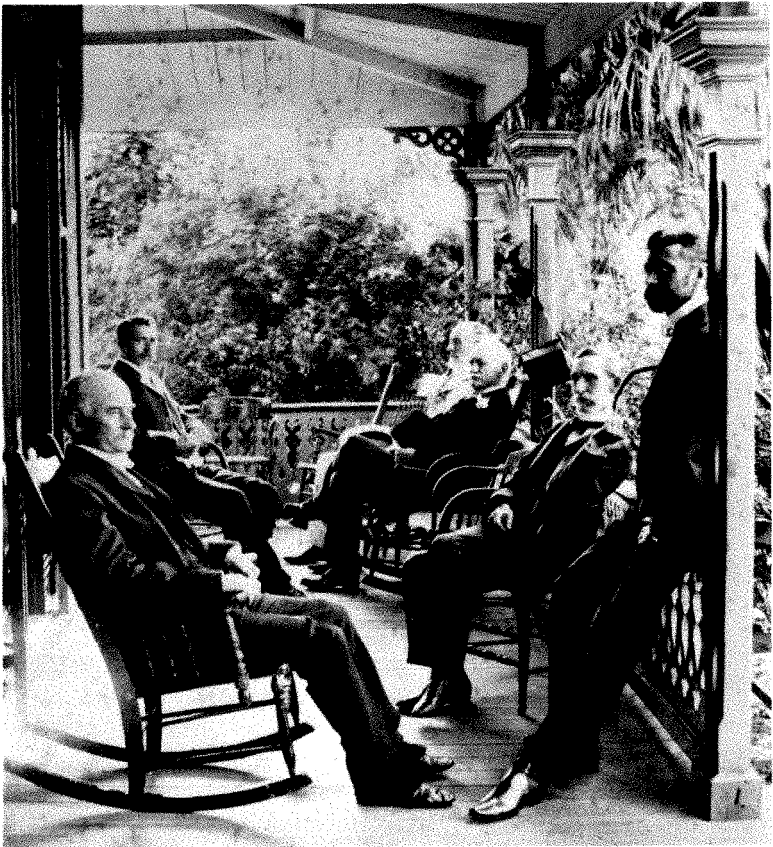
Spanish-American War hastened matters along. Dewey sank the Spanish fleet in Manila Bay on May 1, 1898, and the Hawaiian Islands became important to America's westward expansion. The House Committee on Foreign Affairs reported favorably on the Newlands joint resolution on May 17, 1898. Passage by a vote of 209 to 91 in the House of Representatives on June 15, by a vote of 42 to 21 in the Senate on July 6, and approval by President William McKinley on July 7 completed the process. The word got to Honolulu on July 13, 1898 by way of flag hoists aboard the Occidental & Oriental Steamship Company's 430-foot British flag vessel *SS COPTIC* as she rounded Diamond Head. Ashore, fire bells rang, firecrackers exploded, and shore artillery boomed out a one hundred-gun salute. In due course, the ship's master, Captain Inman Sealby, R.N.R., was presented a loving cup inscribed with the message that it was he who brought the good news to Honolulu.²

The treaty and the joint resolution both provided for the appointment by the president of the United States of five commissioners, two of whom would be residents of the Hawaiian Islands, to recommend to Congress "as soon as reasonably practical," legislation which they deemed necessary or proper concerning the Territory of Hawaii. President McKinley appointed Senator Shelby Moore Cullom of Illinois, Representative Robert Roberts Hitt also of Illinois, Senator John Tyler Morgan of Alabama, Republic of Hawaii President Sanford Ballard Dole, and Supreme Court of Hawaii Associate Justice Walter Francis Frear. All five men were supporters of annexation. Senator Cullom, a Republican, was a member and later chairman of the Senate Committee on Foreign Relations. Senator Morgan, a Democrat, was also a member of that committee and had previously been its chairman. Under his chairmanship, that committee had held hearings on the United States involvement in the overthrow of Queen Liliuokalani, and had rendered a report which was favorable to the revolutionists. Senator Morgan had visited Hawaii for several months in 1897. Representative Hitt, a Republican, was chairman of the House Committee on Foreign Affairs and had managed the passage of the Newlands resolution through the House of Representatives. As a resident of Illinois, he was a political associate and friend of Senator Cullom.

The Washington, D.C. members of the commission met there on July 16, 1898, elected Senator Cullom chairman, and resolved to meet next in Hawaii. Upon arrival in Honolulu, Senator Cullom and Representative Hitt checked into the Hawaiian Hotel and Senator Morgan moved in as the guest of S. M. Ballou at "Overseas."

² *The Evening Bulletin*, August 12, 1898, 5.

The commission's secretary, stenographer, and sergeant-at-arms, all men, were brought from Washington, D.C. The full commission met in Honolulu on August 18, 1898, at the home of Justice Frear. The Hawaii members were sworn in at this meeting. For subsequent official activities on Oahu, the commission met in the former throne room at Iolani Palace. Besides Honolulu and other areas of Oahu, the commissioners visited Hawaii, Maui, and Molokai, taking in the seaports of Hilo, Lahaina, Wailuku, Kawaihae, Kahului, and Kalaupapa. On these trips, they were "in company with persons representing important agricultural and commercial interests and others representing the Government."³ At public hearings and in executive sessions, individuals and organizations presented their suggestions.



Hawaii Commission members Robert Roberts Hitt (front, seated) and Walter Francis Frear (front, standing). (Davey, Bishop Museum)

³ S. Doc. No. 16, 55th Cong. 2d Sess. (1898).

REPORTING ON THE STATUS OF HAWAII

At the time of the territory's annexation, the people of Hawaii were representative of several ethnic groups. The last Hawaiian census of the islands had been taken in 1896 and the first United States census that included Hawaii was taken in 1900. The commission used the Hawaii 1896 figures, which were probably good enough for their purposes. These figures gave the total population in 1896 as 109,020, and the ethnic breakdown as follows: Hawaiians and part-Hawaiians 36%; Japanese 22%; Chinese 20%; Caucasians 21%, of which Portuguese constituted 14% and "Other Caucasians" 7%; all others 1%. "Other Caucasians" were about two-thirds Americans and one-third British and Germans with a sprinkling of French and Norwegians. The population of Hawaii, however, was increasing and changing in composition at a rapid rate.

Reliable estimates place the population of the Hawaiian Islands as of July 1, 1898 at about 120,600 inhabitants. Men outnumbered women two to one. About 73% of the population was rural. The residents were spread more evenly throughout the islands than today [1987], with approximately 38% on Oahu, 31% on Hawaii, 18% on Maui and Lanai and Molokai, and 13% on Kauai and Niihau. Half of the population could not speak English.

Most of the gain in population between 1896 and 1900 was due to an increase of 36,704 in the number of Japanese immigrants. Japanese increased from 22% to 40% of the total population, while Hawaiians and part-Hawaiians decreased from 36% to 26%. The commission's report had this to say about Hawaii's people:

The native Hawaiians are a kindly, affectionate people, confiding, friendly, and liberal, many of them childlike and easy in habits and manners, willing to associate and intermarry with the European or other races, obedient to law and governmental authority...

The Americans, although in ... a small minority, practically dominate the governmental affairs of the country, and, with the British and Germans, and part-blood Hawaiian-Americans together, constitute the controlling element in business. The Chinese and Japanese do not now possess political power, nor have they any important relation to the body politic, except as laborers. The Portuguese are largely immigrants from the islands and colonies of Portugal in the Atlantic, and have never been very closely tied to their mother country. With the certain attrition that is bound to exist between them and the Americans in Hawaii, and under the influence of the existing public school system, which makes the study

of the English language compulsory, they promise to become a good class of people for the growth of republican ideas.

It will, of course, be observed that this entire population ... is dominated, politically, financially, and commercially by the American element.⁴

An important subject of the commission's investigation was the perceived ability of the several races that inhabited the islands to adapt to American citizenship, and the ability of the residents to sustain the obligations that attach to the right of suffrage. The constitution of the Republic of Hawaii, adopted on July 3, 1894, did not give the populace much opportunity to exercise the right of suffrage. Restrictive provisions disenfranchised most of Hawaii's residents.



Chinese workers cutting sugar cane, ca. 1895. (Bishop Museum)

The franchise was limited to male citizens and denizens who had attained the age of at least twenty years. Aliens wishing to be naturalized had to meet strict conditions. Most Chinese and Japanese could not have qualified to become citizens of the Republic of Hawaii even if they had wanted to. Those males who qualified as prospective voters had to have paid all taxes due the government, and voters for senators must have satisfied a property requirement of unencumbered real property of the value of not less than \$1,500, or unencumbered personal property of the value

⁴ Ibid. at 3.

of not less than \$3,000, or net income for the preceding year of not less than \$600. The tax rolls listed fewer than 5,000 persons who owned real property.

In addition, supporters of Queen Liliuokalani, mostly Hawaiians, who might otherwise have qualified to participate in the government of the Republic of Hawaii, were kept out by the loyalty oath required by Article 101, that they "[would] not, either directly or indirectly, encourage or assist in the restoration or establishment of a Monarchical form of Government in the Hawaiian Islands."⁵

The February 12, 1900 report of the House Committee on Territories noted that Hawaii's registered voters in 1892 numbered 14,217, of whom 9,931 were Hawaiians. In 1897 the number of registered voters had been reduced to 2,693, of whom 1,126 were Hawaiians. The reduction in total registered voters exceeded 80%, and among registered Hawaiians it exceeded 92%. The next largest group of registered voters in each of these years was the Portuguese who rose from 16% to 22% of the total. Americans increased in percentage of registered voters from 5% in 1892 to 15% in 1894 and 1897.



Although native Hawaiians constituted thirty-six percent of the territory's total population in the 1890s, few of them met the property qualification for electing their own senators. Photograph, ca. 1900. [Davey, Bishop Museum]

⁵ *Hawaii Constitution* of 1894, art. 101.

To be eligible to be a member of the legislature, there were additional property qualifications. A 1971 research study by the Hawaii state statistician reported for the elections of 1887 a total of 14,598 registered voters on all islands, of whom only 2,997 were qualified to vote for senators. The study indicated that in 1894 there were 5,202 registered voters on all islands, of whom only 2,008 were qualified to vote for senators. Americans and "Other Caucasians" generally met the property qualification. Hawaiians generally did not.

The commission considered the question of the elective franchise and of representation in the legislature to be "a delicate and most important" one as "upon this depends the general character of the local government."⁶

Commission members believed that "[t]he only effective way to obtain a fairly conservative legislature under conditions such as exist at present in Hawaii, is to require proper qualifications of the voters themselves." There was no property or income requirement for voters for the lower house of the Republic of Hawaii, and none was proposed for the territory. For voters for the upper house, however, the commission recommended retaining a requirement of \$1,000 in real property or of \$600 in income. The report stated this "to be as great a reduction as can safely be made at the present time." The commissioners reasoned that the suggested changes were moving in the right direction at the right pace. The rationale, in which one detects the influence of the local members of the commission, was that "[t]o materially reduce the qualifications below what it is now proposed to make them would be to practically turn the legislature over to the masses, a large proportion of whom have not yet fully learned the meaning of representative government, and to practically deprive the more conservative elements and property owners of effective representation." As a concession to "the masses" the commissioners recommended doubling the membership of the lower house from fifteen to thirty.⁷

The courts of Hawaii were reported to be already established and functioning in the American model. Very little change was indicated. Hawaii had experienced constitutional government for almost fifty years, and the organization and procedure of the Hawaiian courts had been patterned after courts found on the mainland (particularly the courts of Massachusetts). The judiciary was independent and trustworthy.

One change which it was deemed desirable to make was the abolition of racial and mixed juries. Under the laws of the Republic

⁶ S. Doc. No. 16, *supra* note 3 at 149-50 [report of the Committee on the Judiciary].

⁷ *Ibid.* at 150.

of Hawaii, in criminal cases, foreigners were tried by juries composed of foreigners, and Hawaiians by juries composed of Hawaiians. Civil cases between foreigners were tried by foreign juries, and cases between Hawaiians by Hawaiian juries; those between foreigners and Hawaiians were tried by juries composed of an equal number of foreigners and Hawaiians. It was proposed to abolish juries based on "race" and to require instead merely that juries be composed of citizens of the United States who understood the English language, without regard to color or ethnicity.

It was usual for territorial courts, in areas which were being groomed for eventual statehood, to exercise jurisdiction over both local and federal cases. These territorial courts were the first and only courts in the areas being organized as territories. Texas had joined as a state without an intermediate step as a territory. Every other new state had first been governed by federal officials who were federally appointed. Hawaii was the first independent country with an operating modern court system to join the United States as a territory. This court system, consisting of a supreme court with justices appointed by the governor to serve for life, circuit judges appointed by the governor for terms of six years, and district judges appointed by the governor for terms of two years, could be trusted to handle all cases of a local nature.

It was deemed, however, that the federal interest would not be sufficiently served by the territorial courts. The commission envisaged extensive and rapidly increasing shipping in the Pacific, based upon the natural growth of commerce, the change in ownership of the Philippines, the near completion of the Siberian Railway, and the projected Nicaraguan Canal. Shipping would give rise to admiralty cases, some of which the commissioners understood could be of international importance. There was the possibility of war and accompanying prize cases that could most conveniently be decided in Hawaii, as well as other cases involving the United States government. The commission believed that all of these cases should be tried in a federal court presided over by a federal judge appointed by the president of the United States pursuant to Article III of the Constitution. Further, as circuit trial judges on the mainland were not readily available to Hawaii, the jurisdiction of the court should include both that of a district court and that of a circuit court.

THE HAWAIIAN QUESTION IN CONGRESS

The commission's report included the drafts of three proposed bills. The principally suggested legislation was a bill to provide a government for the Territory of Hawaii based largely on the 1894

constitution of the Republic of Hawaii. The two other proposed bills provided for the phasing out of Hawaiian silver coinage and silver certificates, and of the postal savings bank in Hawaii.

The commission's work done, Senator Cullom transmitted their report to President McKinley on December 2, 1898. Republic of Hawaii President Sanford Ballard Dole filed a minority report in which he endorsed most of the suggested legislation but objected to the concentration of power in the governor, and especially to the elimination of the Executive Council and Council of State. President McKinley sent the report to Congress on December 6, 1898. On the same day, the organic law drafted by the Hawaiian commission was introduced in the Senate by Senator Cullom as S. 4893, and in the House of Representatives by Representative Hitt as H. R. 10990.

The ensuing debate over the form of government for Hawaii came at a time when the United States had become a colonial power. Many Americans had reservations about this development. Serious questions were raised as to the extent to which the Constitution authorized territorial expansion, and as to the extent to which the Constitution followed the flag. By the Treaty of Paris of December 10, 1898, Spain ceded to the United States all Spanish holdings in the Philippines, Guam, and Puerto Rico, and agreed to the independence of Cuba. American armed forces occupied all of these islands, and Congress wrestled with the short-term and long-term management of the areas.

The Hawaiian bills were reported out of their respective committees with minor amendments. The work of the commission remained essentially untouched. Such minimal tinkering was not satisfactory to some of the members of the House of Representatives. The nature of the opposition was set forth in the "views of the Minority" to the Report of the House Committee on the Territories:

We cannot agree to the majority report of the committee for the reason that it indicates an intention on their part to make a new departure from our well-established custom of governing Territories. We believe that newly acquired territories should be governed as other Territories of the United States have been governed from the foundation of our Government, *with a view that they may be ultimately admitted into the Union of States.*

The general plan of this bill, while purporting to create the Territory of Hawaii, seems to be a new theory and erects a Territorial form of government essentially different in fundamental points from the government of other Territories of the United States.

We do not believe that Congress has the power to govern a Territory *except with a view to its ultimate*

admission to statehood, and we firmly believe, as decided by the Supreme Court of the United States [*Dred Scott* case, 60 U.S. (19 Howard) 446 (1865)], that "there is certainly no power given by the Constitution to the Federal Government to establish and maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure, nor to enlarge its territorial limits in any way except by the admission of new States...." (Emphasis added.)

The minority objected to making the territorial supreme court the judge of the qualifications of the members of the territorial legislature. They considered the idea to be a radical innovation that failed to preserve the separation of governmental powers, that degraded the judiciary by involving the court in partisan bickering, and that tended to increase "the growing and formidable power of the courts." It was their belief that each house should be the final judge of the election and qualification of its own members.

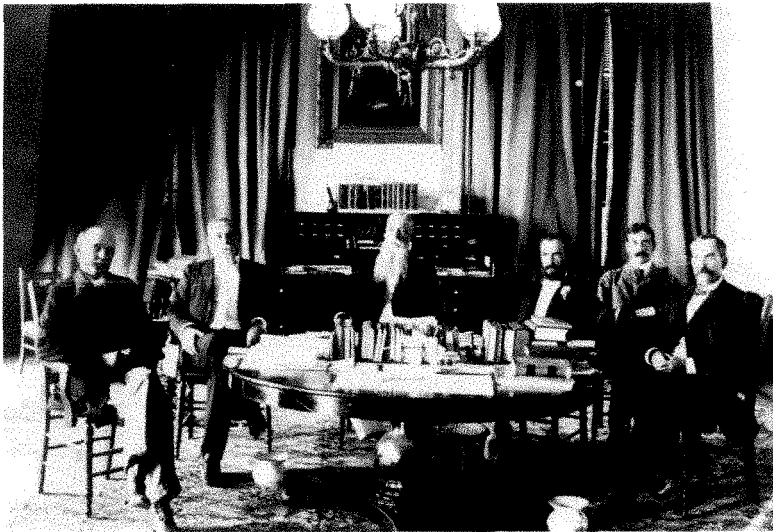
The signers of the minority report objected to the property qualification for voters and members of the upper house on the ground that such a provision adopted by Congress would give legal recognition to the right of wealth to govern, and in doing so be "a dangerous tendency in a Republic [the United States] already threatened by the too great power of concentrated wealth." They believed that a residency of three years before one could become a legislator should be reduced to not more than one year "[a]s our desire is, or should be, to encourage American immigration" and thus to make Hawaii "in reality" a part of the United States.

The power given to the governor, especially the power to name the judges of the territorial supreme court to serve for life, was another point of disagreement over the Hawaii bills. Among the views of the opposition was the belief that all judges, territorial and federal, should be appointed by the president and from bona fide residents of the territory for terms of four years, or should be elected by the people.

On March 1, 1899, with the Fifty-fifth Congress due to expire in two days, Senator Cullom made a public statement on the floor of the Senate in support of the work of the Hawaiian commission, of which he had been chairman. He took the occasion to set forth an expansionist view. His review of the history of American expansion began with the Northwest Territory which was owned by the United States at its formation, continued through the Louisiana Purchase from France in 1803, and the acquisition of Florida from Spain by treaty in 1819, and analyzed the forms of government that Congress had provided for these areas. He characterized these early territorial governments as "undemocratic, if not despotic" until 1821. After that, a certain

amount of local democracy was allowed. Senator Cullom stated that the Hawaiian commission had several choices based on historical precedent:

The Commission might have recommended a military form of government for the islands; or a government by commission, like that of the District of Columbia; or a government like that of the District of Alaska, which is indeed only a shadowy form of government, lacking the virility of sufficient authority; or ... the form of government which is called colonial government, a loose term which has not yet been clearly defined in its application to American governmental affairs.⁸



Territory of Hawaii Governor Sanford Ballard Dole (center, seated) and his cabinet, ca. 1900. (Hawaii State Archives)

The senator reported that the commission had given careful thought to the several alternatives and had concluded that Congress must give to the people of Hawaii "a government conferring upon them as complete control of their own affairs as was consistent with the Commission's idea of their best interests and the best interests of the United States." To those who objected that Hawaii should be held in permanent dependency as a colony because a territorial form of government implied eventual statehood, he replied that "[n]o name or form of government can

⁸ 32 Cong. Rec. 2612 (1899).

prevent a Territory or colony from ultimately becoming a State, nor can any name or form of government lead to statehood necessarily." He concluded with a ringing support of the Hawaiian commission's work and of the course of American imperialism:

It is obvious that the Congress should be troubled as little as possible with legislation for the islands...and...because it is in harmony with American and republican institutions, the islands should be given as liberal and representative a government as can safely be given them. Hawaii does not ask to be admitted as a State. If the time ever comes when the number and character of her population are such as to otherwise entitle her to statehood, it will be time enough to consider whether it is good policy to admit as a State a Territory separated from the mainland.

...Hawaii, an independent nation, has come to us upon her own motion, and we have dealt with her as an equal. We have accepted her sovereignty upon terms agreed upon, and...it will become us to deal with her liberally... whatever may be done with our other new acquisitions....

...We have accepted Hawaii, and henceforth she must walk with us along the pathway of our manifest destiny.⁹

THE HAWAIIAN ORGANIC ACT OF 1899

The Fifty-fifth Congress passed into history on March 3, 1899, without having acted upon an organic law for Hawaii. The Fifty-sixth Congress convened as required by the Constitution on the first Monday in December, 1899. Two days later, on December 6, Senator Cullom introduced S. 222 to provide a government for the Territory of Hawaii. The bill was referred to the Committee on Foreign Relations. On December 8, in the House of Representatives, Representative Hitt introduced H. R. 2972 for the same purpose; that bill was referred to the House Committee on the Territories.

A second conference committee report on S. 222, as amended, was finally adopted in the Senate on April 25, and in the House of Representatives on April 26. The vote in the Senate was by voice, but in the House of Representatives the "yeas" and "nays" were ordered with the surprising result that there were as many members "not voting" as there were "yeas." The count was: "Yeas" 138; "Nays" 54; answering "Present" 21; "Not Voting" 138. President

⁹ Ibid. at 2616-17.

McKinley gave his approval on April 30 and S. 222, as amended, became the Hawaiian Organic Act [31 Stat. 141], to take effect on June 14, 1900, forty-five days after approval. Section fifty-two, relating to appropriations, took effect immediately.

During this process, two groups of emissaries from Hawaii were active in Washington, lobbying for opposite results. Representatives of the ruling revolutionaries pressed for adoption of the Hawaiian commission's proposed bill without change. Representatives of the native Hawaiians pressed for more democracy. Hawaiian firebrand Robert William Wilcox, leader of the insurrection of July 30, 1889 against Hawaii's "Bayonet Constitution" of 1887, appeared before the House Committee on the Territories to plead for greater suffrage for Hawaiians and received a sympathetic audience. In the end, Hawaii gained very favorable treatment from a Congress that was not used to being so generous to new territories.

As finally passed, the Hawaiian Organic Act departed in important respects from the organic law proposed by the Hawaiian commission. All property qualifications for electors and for members of the legislature were dropped. The requirement that all taxes had to have been paid before a voter could register to vote was deleted. Cumulative voting for representatives did not survive. Appointment of the territorial supreme court justices and of the circuit court judges by the governor was changed to appointment by the president.

The Hawaiian commission had recommended that the power to grant a divorce in Hawaii be limited to cases in which the applicant had resided in the territory for at least one year. This was increased to two years. A provision was added that "no corporation, domestic or foreign, shall acquire and hold real estate in Hawaii in excess of one thousand acres; and all real estate acquired or held...contrary hereto shall be forfeited and escheat to the United States, but existing vested rights shall not be impaired."¹⁰

Impeachment of supreme court justices and of circuit court judges by the territorial house of representatives was rejected. The tenure of territorial supreme court justices and of circuit court judges was reduced to four years. The provision which gave the supreme court jurisdiction to decide election contests was rejected in favor of the more traditional provision that each house would be the judge of the elections, returns, and qualifications of its own members.

An earlier amendment that required that all laws be submitted to Congress was withdrawn. Imprisonment for nonpayment of taxes or for debt was prohibited. Specific performance of contracts

¹⁰ Hawaiian Organic Act, sec. 55, Haw. Rev. Stat. sec. 55 (1895).

for personal labor or service was prohibited, and labor contracts entered into since annexation "by which persons are held for service for a definite term" such as were used in the recruitment of labor for the sugar plantations were declared null and void.

Laws governing the importation of foreign labor, aimed principally at the Chinese, were made applicable to Hawaii. Chinese were prohibited from entering the United States by federal law dating from May 6, 1882.¹¹ Those who were already in the United States were required to have certificates of residence. The commission recommended that Chinese in Hawaii be given one year within which to obtain such certificates. Congress went along with that recommendation but added a proviso that "no Chinese laborer, whether he shall hold such certificate or not, shall be allowed to enter [any other part of the United States] from the Hawaiian Islands."

The requirement that territorial officials be residents of Hawaii was amended to a requirement that they be citizens of Hawaii. During debate on the floor of the Senate on April 25, 1900, Senator Tillman questioned this change. Senator Cullom reported that the House of Representatives had made the change and would not yield the point in conference. Senator Tillman felt obliged to get in a final pitch for federal patronage:

I want the Senate to understand that we are making a difference in this Territory from any other Territory, by which the President is limited in the appointment of these important officers to residents or citizens of Hawaii, whereas he can send into Arizona or New Mexico or Oklahoma or Alaska a citizen from outside. I never could see the reason why this special favoritism should be given to the Hawaiians; but if the Senate is to support the conference report and the bill is to become a law with that provision in it I shall not resist it.¹²

A provision which had the effect of disenfranchising Chinese and Japanese was retained in an amended form. The newly naturalized United States citizens were described as "all persons who were citizens of the Republic of Hawaii" on August 12, 1898. All but a few Chinese and Japanese were aliens in relation to the Republic of Hawaii on that date and therefore remained aliens in relation to the United States.

The section of the Organic Act which established a federal court in Hawaii raised questions in the U.S. Senate [see Appendix at the end of this article]. Members of the Senate who had lived under

¹¹ Act of May 6, 1882, ch. 126, 22 Stat. 33 (1882).

¹² 33 Cong. Rec. 4650 (1900).

territorial governments saw the separate federal district court in Hawaii as an aberration. They were used to territorial courts that exercised federal jurisdiction. The issue was further complicated by the fact that the proposed section did not mention any term for the federal officials, so that they served during good behavior.

Senator Teller sought to reduce these terms to four years. Senator Morgan was troubled by what he saw as a constitutional difficulty in limiting the term of the United States district judge, thus creating a legislative court pursuant to the power of Congress to govern territories, yet giving the judge the same powers as those exercised by federal district and circuit trial judges appointed for life pursuant to Article III of the Constitution. He also desired to protect federal district court judges in Hawaii from political pressures. To reduce political considerations, Senator Cullom suggested that the term be increased to six years.

The concerns expressed by Senator Morgan were based in part on his vision of a federal district court judge in Hawaii having also the powers of a circuit court trial judge, appointed for a limited term, sitting as one of three members of a circuit court of appeals on cases arising in one of the states, or, by assignment, as a district judge outside of Hawaii. No one intended that result. To make it clear that Hawaii's district judge possessed no powers elsewhere, it was made explicit that he would have and exercise his powers "in the Territory of Hawaii."

THE APPOINTMENT OF FEDERAL OFFICIALS

The passage of the Hawaiian Organic Act brought on the immediate necessity for the presidential appointment of territorial and federal officials. Even before the Hawaiian commission began hearings, claimants to the office of governor of Hawaii surfaced. Dr. John Strayer McGrew, the "Father of Annexation" and sometime editor of the *Hawaiian Star*, felt he should be rewarded for his efforts. Henry Ernest Cooper thought that the fact that he had read the proclamation abolishing the monarchy gave him some claim to consideration. Cooper had been chairman of the Committee of Safety that had masterminded the overthrow of Queen Liliuokalani, and was attorney general of Hawaii by appointment on March 20, 1899. Chief Justice Albert Francis Judd and Francis March Hatch both wanted the position. Hatch had been vice-president of the provisional government, minister of foreign affairs under the provisional government and the Republic of Hawaii, and Hawaii's minister to the United States by appointment on November 6, 1895.

The *Pacific Commercial Advertiser* promoted its owner, Lorrin

Andrews Thurston, for governor and William N. Armstrong, a New York attorney who had advised Thurston in connection with Washington developments, for secretary. The *Evening Bulletin* suggested United States Minister Sewall. Political mavericks Robert William Wilcox and Samuel Parker sought appointment as governor. Wilcox was recognized as a leader and the principal agitator among the Hawaiians. Parker had been Queen Liliuokalani's minister of foreign affairs. The *Independent* suggested Liliuokalani as first governor, and if not her then Joseph Oliver Carter, Jr, the Queen's trusted adviser and confidant. If the appointment had to go to one of the American revolutionists, then rather than Dole, the *Independent* preferred Samuel Mills Damon, who had served as minister of finance under Kalakaua and under the provisional government and republic.



The Territory of Hawaii's first governor, Sanford Ballard Dole, ca. 1900.
(Hawaii State Archives)

President McKinley moved with dispatch to name the new territorial officials. On May 4, 1900, the Senate received his nominations of Sanford Ballard Dole to be governor and of Henry Ernest Cooper to be secretary of the Territory of Hawaii. They

were confirmed five days later and sworn in on June 14, 1900. On June 5, the Senate received the president's nominations for territorial supreme court justices and circuit court judges. Some were incumbents, others were new appointees. Albert Francis Judd had died on May 20, 1900. First Associate Justice Frear was nominated to be chief justice. Antonio Perry was promoted from first judge of the first circuit court to associate justice of the territorial supreme court. Clinton A. Galbraith was named as the other supreme court associate justice. (The designation of associate justices as first and second was discontinued.) The nominees were all confirmed the same day and sworn in on various days from June 16 to July 30, 1900.

The appointment of the new federal officials was also done promptly. John M. Oat, Postmaster General of the Republic of Hawaii, was nominated on May 7 and confirmed on May 9, 1900, to be postmaster at Honolulu. E. R. Stackable of Honolulu was nominated on May 26 and confirmed on June 4 of that same year to be collector of customs for the District of Hawaii. To the new federal court, on June 2, President McKinley named Daniel A. Ray of Illinois as United States Marshal, John C. Baird of Wyoming as United States District Attorney, and Morris March Estee of California to be United States District Judge. The Senate received the nominations on June 4, and confirmed Ray the same day and Baird and Estee the next day. William Haywood of Honolulu was nominated and confirmed on June 5 as Collector of Internal Revenue for Hawaii.

The Territory of Hawaii was ready for business and awaited its elective officers. At the first general elections held on November 6, 1900, the Home Rule Party, one of whose slogans was "Hawaii for the Hawaiians," swept the field, electing Robert William Wilcox as Hawaii's first delegate to Congress and garnering comfortable majorities in both houses of the territorial legislature — nine of fifteen senators and seventeen of thirty representatives.

The United States District Court for the Territory of Hawaii opened for business in Honolulu on August 4, 1900. Hawaii's lawyers were quick to present the court with important questions regarding the application of the United States Constitution to this new territory and the body of laws it had inherited from the days when it was an independent country.

APPENDIX

After all amendments, the section of the Hawaiian Organic Act regarding a federal court read as follows:

Sec. 86. That there shall be established in said Territory a district court to consist of one judge, who shall reside therein and be called the district judge. The President of the United States, by and with the advice and consent of the Senate of the United States, shall appoint a district judge, a district attorney, and a marshal of the United States for the said district, and said judge, attorney, and marshal shall hold office for six years unless sooner removed by the President. Said court shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizable in a circuit court of the United States, and shall proceed therein in the same manner as a circuit court; and said judge, district attorney, and marshal shall have and exercise in the Territory of Hawaii all the powers conferred by the laws of the United States upon the judges, district attorneys, and marshals of district and circuit courts of the United States. Writs of error and appeals from said district court shall be had and allowed to the circuit court of appeals in the ninth judicial circuit in the same manner as writs of error and appeals are allowed from circuit courts to circuit courts of appeals as provided by law, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii. Regular terms of said court shall be held at Honolulu on the second Monday in April and October and at Hilo on the last Wednesday in January of each year; and special terms may be held at such times and places in said district as the said judge may deem expedient. The said district judge shall appoint a clerk for said court at a salary of three thousand dollars per annum, and shall appoint a reporter of said court at a salary of twelve hundred dollars per annum.

FEDERAL DEFENDER ORGANIZATIONS IN THE NINTH CIRCUIT

BY HON. PAMELA J. FRANKS

Indigent criminal defendants¹ in the Ninth Circuit, as a class, receive quality defense representation. This is due in large part to the establishment in this circuit of a network of well-staffed and administered federal defender organizations. Due to the backing of the courts and the Defender Services Division of the Administrative Office of the United States Courts,² federal defender organizations have been able to hire well-qualified lawyers and to spare those lawyers from the overwhelming case loads that face many county public defenders. The Administrative Office provides federal defenders with budgets that include funds for expert services and investigations. In many areas, federal defender offices are active in educating and managing the lists of panel attorneys established to handle overflow and conflict cases.

Many people in the Ninth Circuit were influential in developing this nationwide system of federal defender offices. The history of the establishment of federal defender offices and this circuit's contribution to that history are the subject of this article.

APPOINTMENT OF COUNSEL PRIOR TO 1965

An indigent defendant's Sixth Amendment right to the assistance of counsel in any federal court felony prosecution was clarified by the United States Supreme Court in *Johnson v. Zerbst*.³ Even prior to 1938, many district courts appointed counsel in all

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¹ Individuals who, for want of financial or economic resources, cannot afford the cost of maintaining their own paid counsel.

² The Administrative Office is responsible for the budgets and finances of federal defender organizations and panel attorneys appointed under the Criminal Justice Act, and for conducting feasibility studies for new defender offices.

³ *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L.Ed. 1461 (1938).

felony cases as had been required in capital cases since 1932.⁴ Nevertheless, prior to 1965 the right was frequently illusory as no method existed for the payment of court-appointed counsel. Young attorneys present in the back of a courtroom were routinely appointed without compensation to handle cases. In some areas, volunteer lawyers were furnished by bar associations.

In 1963, the United States Supreme Court in *Gideon v. Wainwright*,⁵ extended to state court indigent defendants the right to court-appointed counsel, under the Fourteenth Amendment. One month earlier, in February of 1963, the National Defender Project of the National Legal Aid and Defender Association had been established. The project was formed without any government money and was funded by a grant from the Ford Foundation that ultimately totalled \$6.1 million. The project was established due to the sad status of indigent criminal defense in the country and with a stated purpose of implementing and strengthening defender services in the United States.

In January of 1964, Major General Charles L. Decker, Judge Advocate General of the United States Army, was appointed as the director of the National Defender Project. General Decker had been chairman of the Criminal Justice and Legal Education Sections of the American Bar Association and had also established many innovations in the Army by creating the Judge Advocate School. General Decker hired John Cleary in July of 1964 to be his deputy director at the National Defender Project. Cleary had been the first judge advocate with the Green Berets and was to become in later years legendary for his hard driving and somewhat unorthodox policies established while he was director of Federal Defenders of San Diego, Inc.

The National Defender Project sought to establish model programs for representing indigent defendants that could be replicated across the country. Although the project focused not only on federal courts, it played an invaluable role in establishing the first federal defender organizations throughout the country.

In August of 1964, shortly after the Federal Defender Project was established, Congress passed the Criminal Justice Act of 1964, which allowed bar association or legal aid agencies to accept criminal defendant appointments. A proposal that would have authorized the establishment of organized federal defender offices was removed from the bill due to dislike of the House Committee on the Judiciary for the idea of a government-employed defender. The act took effect in August of 1965 and authorized for the first time payment by the federal government to defense counsel in federal court at the rate of ten dollars per hour for out-of-court work and fifteen dollars per hour in court.

⁴ *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L.Ed. 158 (1932).

⁵ *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963).

MODEL FEDERAL CRIMINAL DEFENSE OFFICES

In 1965, the National Defender Project, armed with Ford Foundation grant money, began establishing model federal criminal defense offices. In 1965, due largely to the efforts of Chief Judge George B. Harris, the first federal criminal defense office in the country was opened in San Francisco. The office received \$68,942 in Ford Foundation grant money from the National Defender Project to be used over a three-year term. The office was established as a branch of the Legal Aid Society of San Francisco and, as such, was able to augment the Ford Foundation grant money by billing the federal government under the 1964 Act at the rate of ten dollars and fifteen dollars per hour. Valentine Hammack was named as the first attorney in charge, but stepped down after several months and was replaced by James Hewitt.

Shortly thereafter, model federal criminal defense offices were established in Phoenix, Arizona, Chicago, Illinois, and San Diego, California under the direction of Tom Karas, Terry McCarthy, and Harry Steward, respectively. Three of the first four model federal criminal defense offices in the country, therefore, were located in the Ninth Circuit.

In Arizona, the Honorable Walter E. Craig asked Tom Karas, then Chief Criminal Deputy in the United States Attorney's Office, to take over the establishment of a federal criminal defense office in Phoenix. The National Defender Project awarded a three-year, \$32,377 grant to the Maricopa County Legal Aid Society. Additional seed money was obtained from local county and state bar associations. As was the case in San Francisco, the office was established as part of the county legal aid society. Due to effective management, after three years the Arizona office was able to return to the National Defender Project the entire initial grant. Arizona was the only federal criminal defense office that was ever able to return the entire establishing grant fund.

Although the office in Arizona officially opened in October of 1965, its only employee was Tom Karas, who worked without a secretary, assistants, or even an office or desk. In February of 1967, Tom O'Toole was hired as first assistant. An actual office complete with secretary was established in the courthouse at that time.

San Diego next opened a federal criminal defense office in September of 1966 at about the time of the formation of the Southern District of California. A grant of \$100,046 was received from the National Defender Project to cover the first three-year term. Under the guidance of the Honorable James M. Carter, San Diego elected to establish a separate defense nonprofit corporation that was not an adjunct to an established legal aid office such as existed in San Francisco and Phoenix. Harry D. Steward, who later became United States Attorney for the Southern District of

California, was employed as director of the project with Warren P. Reese and John Hart Ely acting as staff counsel.

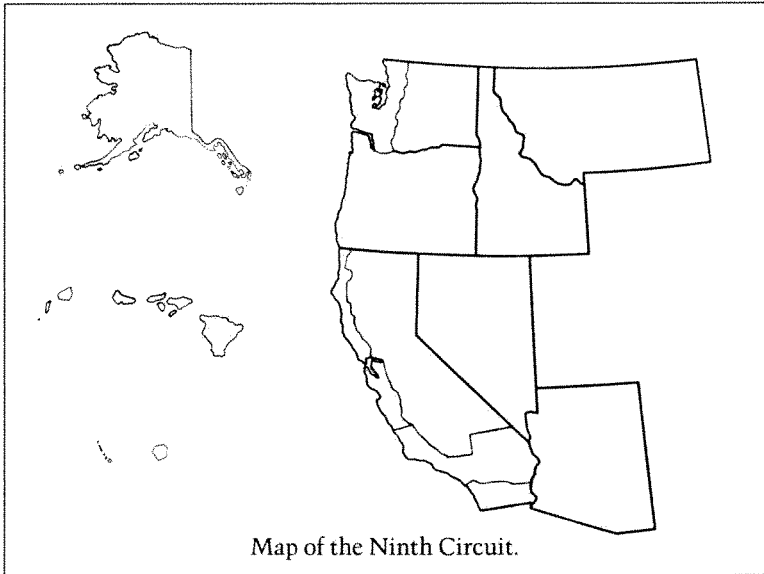
THE ESTABLISHMENT OF FEDERAL DEFENDER OFFICES

In the meantime, the concept of a federal defender office had not completely died despite Congress' mistrust of the idea at the time the 1964 Criminal Justice Act was passed. Congress had delegated to the Department of Justice and the Administrative Office of the United States Courts the job of conducting a study to determine the feasibility of establishing a full-time defender office. Professor Dallin Oaks, a former law clerk to Justice Earl Warren, who later became a justice of the Utah Supreme Court and president of Brigham Young University, was commandeered to complete the study. In 1968, Professor Oaks evaluated the pilot federal defense projects. His study recommended to Congress the implementation of federal defender organizations, with each district being given the opportunity to elect either a government-employed defender office, similar to what existed in San Francisco and Phoenix, or a private defender nonprofit organization such as had been established in San Diego and Chicago.

As a result of Professor Oaks' study, S. 1461 was introduced in March of 1969 with bipartisan support from Senators Sam Ervin (Democrat, North Carolina), Roman Hruska (Republican, Nebraska), Barry Goldwater (Republican, Arizona), and Edward Kennedy (Democrat, Massachusetts). Under the bill, each federal district court would be required to adopt a plan for furnishing representation of persons charged with felonies or misdemeanors in federal court, who were unable to afford a lawyer. Attorneys in charge of the various National Defender Project pilot offices testified before Senate subcommittees about their experiences and the viability of establishing federal defender organizations.

In October of 1970, President Nixon signed the bill into law as an amendment to the Criminal Justice Act of 1964. The law for the first time authorized the establishment of federal public defender and community defender organizations in addition to previously authorized alternatives of representation by private bar members, bar associations, or legal aid agencies. These new offices would be funded by the federal government and would operate on a yearly budget as opposed to filing vouchers for reimbursement on a case-by-case hourly basis. The ten dollar and fifteen dollar per hour rates established under the 1964 Act were also increased, authorizing higher reimbursement of panel attorneys appointed to handle conflict or overflow cases or all cases in areas that did not establish a federal defender organization. Since 1970, the rates have

again been increased. Currently, panel attorneys are reimbursed at the rate of forty dollars per hour for out-of-court work and sixty dollars per hour in court.



Map of the Ninth Circuit.

ARIZONA

On April 30, 1971, the United States District Court for the District of Arizona created the office of Federal Public Defender, as authorized under the new law. Tom Karas, who had been director of the Maricopa County Office of the Federal Criminal Defense pilot project, was appointed as Federal Public Defender for the District of Arizona, making Arizona the first district in the country to implement the 1970 Criminal Justice Act amendment. Almost immediately, Arizona opened a branch office in Tucson. Tom Karas remained Federal Defender until January of 1976 when he was replaced by his first assistant, Tom O'Toole. Tom O'Toole left the office to become a judge on the Maricopa County Superior Court bench in 1984 and is currently Chief Presiding Criminal Judge for Maricopa County. Fred Kay, who had joined the office in Tucson shortly after it opened in 1971, became Federal Defender for the District of Arizona at that time.

In addition to being the first federal defender office in the country, the Arizona office is distinguished from most other defender organizations in the country due to the make-up of its case load. A large portion of the state of Arizona is comprised of Indian reservations. Violent crimes on the reservations are

prosecuted in federal court under the Major Crimes Act.⁶ As most of the charged Native Americans qualify for court-appointed counsel, a large percentage of the case load in Arizona involves representation of Indians charged with having committed violent crimes on the reservations.⁷ Due to the proximity of the border with Mexico, the Arizona offices also handle a large number of immigration-related criminal charges and drug offenses.

NORTHERN DISTRICT OF CALIFORNIA

Although the court in Arizona managed to establish the first federal defender office in the country, the Northern District of California also moved quickly to do so under the new law. The Northern District of California, in fact, had made elaborate plans for a gala celebration to install James Hewitt as the first Federal Public Defender in the country. Chief Judge Oliver Carter orchestrated the installation ceremony for Hewitt and sent engraved invitations throughout the country. Quick-working judges in Arizona, however, at the eleventh hour on Friday, April 30, 1971, snatched glory away from San Francisco and Hewitt by appointing Tom Karas as Federal Defender shortly before the planned gala celebrations in San Francisco. James Hewitt remained the Federal Defender for the Northern District of California and was in charge of the San Francisco and San Jose offices until 1987 when he was replaced by his long-time assistant Barry Portman.

SOUTHERN DISTRICT OF CALIFORNIA

The Ninth Circuit has continued to play a guiding role in the formation of federal defender organizations even after the establishment of the model projects and the San Francisco-Phoenix race to be "first." In April of 1971, John Cleary, who had left the National Defender Project as it was phased out, came to San Diego and was appointed as the first director of the Federal Defenders of San Diego, Inc. This was the third federal defender organization in the country established under the new law, all three of which were located in the Ninth Circuit. The San Diego office was the first *community* defender office. It is run by an independent board of directors whose employees do not work for the federal government. In spite of its independence, the office is eligible

⁶ 18 U.S.C. § 1151, et seq.

⁷ Jay Hardison, a retired City of Phoenix policeman, has been an investigator in the Phoenix office since 1980. He and his wife, Wanda, have traveled for years to the Navajo reservation on a regular basis investigating cases and know this remote part of the state and the culture of its people better than most other non-Navajos.

under the 1970 law to apply for funds from the Administrative Office of the United States Courts as are the federal defender offices whose employees actually work for the government. Professor Oaks, in his report, expressed a preference for this latter community defender alternative as he felt such an organization could better appear to be independent from the government. With the influence again of Judge Carter, support and finances were obtained from the California State Bar to establish the San Diego office as an independent corporation.

John Cleary became immediately infamous as a hard driving administrator and boss who demanded a sixty-hour work week from his staff complete with Wednesday and Saturday training sessions. Cleary's unorthodox style is probably best illustrated by his hiring of Benjamin Franklin Rayborn to work in the appeals section of his office. Rayborn had been convicted of bank robberies in the 1940s after World War II and was serving a life sentence on state charges followed by a thirty-year federal term. Representing himself on *habeas corpus* petitions, Rayborn managed to secure his release from prison in 1959. He, however, robbed another bank and was returned to prison. Cleary met Rayborn in 1966, when the former was Deputy Director to the National Defender Project. Rayborn was a brilliant self-taught lawyer and accountant who was one of the most renowned "jailhouse lawyers" in the country and had been qualified in one federal court as a federal law expert.

The National Defender Project awarded Rayborn and another inmate, Robert White, fellowships to work at Emory Law School for one year to eighteen months as assistants to student clinical projects designed to aid inmates. Rayborn, however, was unable to accept the grant until he was released on parole. In 1969, the National Defender Project was closing and, as Rayborn was still incarcerated, his last opportunity to take advantage of the grant was quickly passing. Once again, representing himself, he managed to secure his own release and went to Emory in 1969.

As Cleary was opening the San Diego office in 1971, Rayborn was finishing his fellowship at Emory and was hired by Cleary to handle appeals in the San Diego office. Although Cleary left Federal Defenders of San Diego, Inc. in 1983 to enter private practice, Rayborn remains as the office's "secret weapon" who, without the benefit of a law degree, is the genius behind many of the office's appeals.

Today the San Diego office is the only community defender office in the Ninth Circuit. It also claims the highest volume of cases of any defender office in the entire country, with a large number of immigration-related crimes and petty offenses. In 1976 the office began publishing yearly the quintessential text of federal criminal defense, an excellent and all-encompassing volume entitled *Defending A Federal Criminal Case*, which is provided free

of charge to all federal defender offices and judges, and may be purchased by anyone else. The office also began publishing in the mid-70s the *Federal Defender Newsletter*, which provides a synopsis of Ninth Circuit and Supreme Court opinions. This publication, likewise, is provided free of charge to federal defenders and judges, and is available by paid subscription to all others.

The board of directors of Federal Defenders of San Diego, Inc. appointed Judy Clark as director when John Cleary left to go into private practice with one of his assistants, Charles Sevilla, in 1983. Clark has continued Cleary's active role in educational projects and issues that affect federal criminal defense attorneys. Federal Defenders of San Diego, Inc. led the charge in challenging the federal sentencing guidelines that went into effect November 1, 1987, and brought the case to the Court of Appeals for the Ninth Circuit which declared the guidelines to be unconstitutional.⁸ Both Cleary and Clark adamantly believe that the office's ability to play an active role in important federal defense issues stems from the fact that it is a community defender organization whose director is appointed by an independent board of directors outside the control of the courts.

CENTRAL DISTRICT OF CALIFORNIA

Since 1971, the majority of districts in the Ninth Circuit have established federal defender organizations. The Federal Defender Office for the Central District of California was opened in Los Angeles in 1971 shortly after the establishment of the Phoenix, San Francisco, and San Diego offices. John K. Van de Kamp, now the Attorney General for the State of California, was appointed Federal Defender. He was succeeded in 1976 by James R. Dunn, who served until 1984. Peter M. Horstman has served as the Defender in Los Angeles since that time. The Office of the Federal Public Defender for the Central District of California is one of the largest federal defender offices in the country with a total of twenty attorneys staffing the Los Angeles office and the Santa Ana branch office.

EASTERN DISTRICT OF CALIFORNIA

A federal defender office for the Eastern District of California was also established in 1971 with E. Richard Walker's being appointed as Federal Defender. Walker retired in 1987. He was

⁸ *Gubiensio-Ortiz v. Kanahele*, 857 F.2d 1245 [9th Cir. 1988]. The U.S. Supreme Court subsequently determined the sentencing guidelines to be constitutional. *Mistretta v. United States*, ____ U.S. ____, 109 S. Ct. 647, 102 L. Ed. 2d 714 [1989].

replaced by Art Ruthenbeck, a former assistant in both the San Francisco and Sacramento offices. Ruthenbeck had also worked for four and one-half years as Assistant Chief of the Criminal Justice Act (now Defender Services) Division of the Administrative Office of the United States Courts.

The Eastern District of California main office is in Sacramento and a branch office is in Fresno. Additionally, from mid-May through September the office hires a full-time temporary attorney to live at Yosemite National Park and handle the approximately 200 federal cases that are charged in the park during these months. Although most of these cases are misdemeanors and petty offenses, felonies such as assaults and drug-related crimes also come before the magistrate court at the park. The Eastern District of California handles more government-related crimes, such as theft of government property, political corruption and government contract fraud, than other offices in the circuit due to the presence of six Air Force bases, one Navy shipyard, and one Army depot. Two-thirds of the state of California is located in the Eastern District with much of the land being quite remote. From these remote areas come a large volume of methamphetamine lab and marijuana cultivation cases.

DISTRICT OF OREGON

In 1974, the District of Oregon followed San Diego's example and established a community defender office as a federal defender unit of the Metropolitan Defender's, Inc., which already handled the defender work for Multnomah County courts. In 1977 a separate private defender nonprofit organization was established with David Teske serving as director. In 1983, due to disagreements between that office, the courts, and the Administrative Office, the community defender plan was scrapped and a federal defender office under the control of the courts was established. The amount of independence that a community defender office actually has, therefore, is questionable. Steven T. Wax was appointed as Federal Defender at that time and is in charge of the Portland office and a branch office in Eugene.

The case load in Oregon is unique as virtually no petty offenses or misdemeanors are charged. Instead, the case load is almost strictly felonies with a large number of bank robberies. (Oregon has more bank robberies than any other state in the nation per capita.) The office also handles an inordinately large number of *habeas corpus* petitions. Unlike most other districts, the court in Oregon makes a discretionary assignment of counsel in most *habeas corpus* cases where request for counsel is made.

DISTRICT OF NEVADA

The Federal Defender Office for the District of Nevada opened on January 28, 1974 with Kenneth C. Corey being appointed as Federal Defender. In 1980, Daniel Markoff replaced Corey as Federal Defender. Markoff had been an assistant in the office since 1975. The Nevada Federal Defender has its chief office in Las Vegas and a branch office staffed by one attorney in Reno. Due to the presence in Nevada of legalized gambling, the office gets a large number of counterfeiting, fraud, and bank robbery cases.

In 1987, Markoff argued and won a case before the United States Supreme Court that challenged on Eighth and Fourteenth Amendment grounds Nevada's mandatory death penalty for persons who commit murder while serving a sentence of death or life in prison without possibility of parole.⁹ The office also brought a civil suit, with permission of the Administrative Office, attacking the conditions of the local county jail in which many federal prisoners were incarcerated while awaiting trial. As a result of that suit, the jail was closed and a new \$50 million jail facility was constructed.¹⁰

WESTERN DISTRICT OF WASHINGTON

The Federal Defender Office for the Western District of Washington was established in early 1975 with the appointment of Irwin H. Schwartz as Federal Defender. The office began operating full-time in May of 1975. Irwin Schwartz resigned in 1982 and Thomas Hillier, who had started at the office with Schwartz in 1975 as an assistant, became the second Federal Defender for the Western District of Washington.

The newest federal defender office in the Ninth Circuit was opened in Alaska in the Spring of 1986. Although located in the District of Alaska, the office was opened as a "branch" to the Federal Defender Office for the Western District of Washington and is under Hillier's direction. The Alaska branch office is probably the most unique aspect of the Western District of Washington Office. The "branch" is located 1,500 miles away and

⁹ *Sumner v. Shuman*, 483 U.S. 66, 107 S. Ct. 2716, 97 L.Ed.2d 56 [1987].

¹⁰ Like many other offices, Nevada has its own set of interesting employees. One in particular is investigator Jack Ruggles who authored the book *Thicker Than Thieves* about his days as a Los Angeles policeman and the graft and crime that occurred among crooked policemen in Los Angeles in the 1940s. The book was adapted as a made-for-television movie in 1987 entitled "Shakedown on the Sunset Strip."

covers the largest district in the United States.¹¹ The geography of Alaska results in the office having a unique set of problems and challenges. The court sits in Fairbanks and Anchorage, making it difficult for lawyers to cover cases when the court is sitting in both places at once. Investigation is time consuming and sometimes dangerous. Lawyers and staff are frequently called to the bush to meet with clients or witnesses. More often than not this means hopping a small aircraft or mail plane to a small village that has neither an airport nor a hotel. Staff are often put up in local high schools or stay with families and, after conducting business, wait for the next plane out. Sometimes this can take up to a week, depending upon the weather. The travel budget for Alaska is enormous. The cases out of Alaska are also unique. Few other places in the country ever get cases where a defendant is charged with killing polar bears.

DISTRICT OF HAWAII

Last but far from least, the Federal Defender Office for the District of Hawaii was opened in July of 1982, with the appointment of Michael R. Levine as Federal Defender. Although Hawaii has a wide diversity of federal cases ranging from drunk driving on a military base to \$40 million fraud and embezzlement schemes, many of Hawaii's cases involve crimes on military bases, drugs, and immigration offenses. The Hawaii office has also been quite successful in federal *habeas corpus* cases.¹²

The true independence of a Federal Defender Office, as discussed by Professor Oaks in his original report to Congress, was tested quite graphically in Hawaii when Federal Defender Levine, while representing Ronald Rewald in 1985, was ordered to show cause why he should not be held in contempt by Chief Judge Harold Fong. Rewald was charged with running a \$20 million "ponzi scheme." In his defense, Rewald claimed, in part, that he was a front for the CIA, which was using his company to funnel money to CIA agents and projects throughout the world. Levine and his assistant, Brian Tamanaha, who had just passed the bar and was trying his first case, were both charged by Judge Fong with four counts of contempt. The chief contempt allegation stemmed from

¹¹ This point is disputed by the District of Hawaii, which claims to be the largest district, extending many thousands of miles into the Pacific to include Palmyra Island as well as Kwajalein Atoll where there is a government missile range. It seems the dispute over which district is largest depends upon whether one argues in terms of sea miles or land miles.

¹² See, e.g., *Iaea v. Sunn*, 800 F.2d 861 (9th Cir. 1986); *Jennings v. Oku*, 677 F.Supp. 1061 [D. Hawaii 1988].

a bizarre fact scenario in which Levine had reason to believe that a retired CIA agent testifying for the government was not who he claimed he was. Judge Fong denied Levine's request for handwriting exemplars from the witness to prove identity saying that he did not want to get involved in the issue. Levine instructed his investigator to serve the witness with a subpoena as he left the stand and to ask him if he would sign his name to the subpoena to acknowledge receipt. When the prosecution discovered that this occurred, it moved to have Levine held in contempt for violating the court's order. Judge Fong did so and issued an order to show cause why Levine should not be held in contempt for violating the spirit of his order to not get involved.

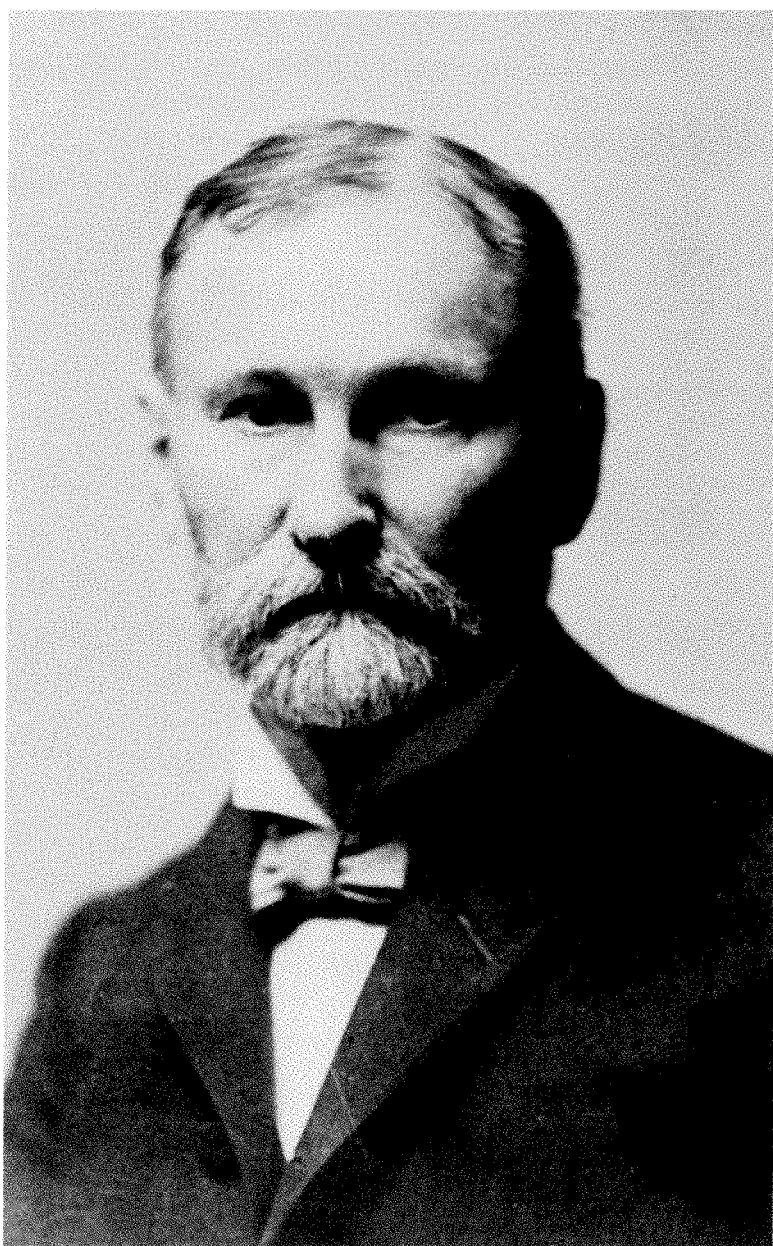
Rewald was ultimately convicted. The contempt trial of Levine and Tamanaha was set to begin on the day of Rewald's sentencing. The very prosecutor who had been prosecuting Rewald, and who was sent from Washington, D.C. for that purpose, was appointed by the court to prosecute Levine and Tamanaha. The Honorable Marilyn H. Patel of the United States District Court for the Northern District of California came to Hawaii to try the case. Judge Patel dismissed the contempt charges out-of-hand on the defense's motion before the evidentiary part of the trial even began.

Despite this battle between the federal defender and Chief Judge Fong, and despite the Chief Judge's and the U.S. Attorney's vigorous opposition to Levine's reappointment, Levine was nevertheless reappointed by an en banc vote of the Court of Appeals for the Ninth Circuit when his four-year term expired in 1986. Although it is not the result that one would expect, the federal defender in Hawaii succeeded in maintaining more independence than the independent community defender that had been established in Oregon.

CONCLUSION

The only districts in the Ninth Circuit that do not have federal defender organizations are the Eastern District of Washington, Idaho, Montana, Guam, and the Northern Mariana Islands. Due to sparse populations, many of these districts do not have a sufficient case load to qualify for the establishment of a federal defender organization. The District of the Northern Mariana Islands, in fact, has yet to prosecute a federal indigent criminal defendant.

During the fiscal year that ended September 30, 1987, the federal defender organizations in the Ninth Circuit opened 15,139 new cases in addition to those cases that had already been opened and remained active. Federal Defenders of San Diego, Inc. opened 7,681 of these cases, meaning that that office handles nearly half of all the cases opened in the Ninth Circuit. (Of course, it must be remembered that the number is deceiving due to the volume of immigration-related and petty offense cases that are charged and resolved on a rapid basis in San Diego.) Nationwide, during the same period of time, federal defender organizations opened a total of 33,412 new cases. Nearly one-half of the federal defender cases in the country, therefore, arise in the Ninth Circuit. Truly one of the ways in which the history of the Ninth Circuit differs from that of the rest of the country is the role that it has played in establishing model defense offices and implementing active, well-organized, federal defender organizations under the 1970 law.



Judge James H. Beatty, "the federal presence in Idaho" from 1889 to 1907.
[Idaho Historical Society]

THE FEDERAL COURT IN IDAHO, 1889-1907: THE APPOINTMENT AND TENURE OF JAMES H. BEATTY, IDAHO'S FIRST FEDERAL DISTRICT COURT JUDGE

BY MONIQUE C. LILLARD

In 1882, James H. Beatty, a man from the Ohio Valley with a law degree, a meticulous writing style, a dedication to the political and legislative process, and an elegantly trimmed goatee, walked into Hailey, Idaho, a boom town exploding with miners, drinkers, gamblers, and prostitutes. He came seeking personal glory and high political office, reaching for such titles as "Governor" and "Senator." He became a federal judge. A review of Beatty's life's work reveals that he, along with others, did earn the title of "Civilizer." Beatty applied East Coast traditions of jurisprudence, legislation, and parliamentary rules of order to tame the Wild West, and moved the business and legal order of the Gem State into the twentieth century. As a federal judge, Beatty was among the first to lay down rules defining water rights and mining claims. He wrestled with the problems of pollution, and refereed culture clashes among whites, Indians, Chinese, Mormons, labor agitators, capitalists, farmers, and industrialists. His life and work embody the transitions between East and West, territory and state, the nineteenth and twentieth centuries, and primeval nature and man-imposed rules of land use.

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James Beatty was the federal judicial presence in Idaho from 1889 to 1907. His judicial career paralleled the transition of Idaho from territory to state. He sat on the federal bench as a justice of the territorial supreme court from 1889 to 1890, the last year of that court's existence. When the new state of Idaho was created in 1890, Beatty became the first federal district court judge for the District of Idaho. Beatty's life embodied that of the educated man who moved west, and his decisions guided the court into the mainstream of the Western legal tradition.

IDAHO'S TERRITORIAL DAYS

Elias D. Pierce's discovery of gold in 1860 in the center of the region now known as Idaho touched off a population influx into the area such that by 1863 nearly 35,000 immigrants had arrived.¹ The region was then part of the Washington Territory, but the population rush had by 1863 created such intolerable sectional divisions that Washington's territorial politicians prevailed upon Congress to consider the creation of a new territory. Congress patched together pieces of various existing territories, including a large portion of Washington Territory and parcels left over from the Dakota Territory (now the states of Montana and Wyoming), and in 1863 passed the Organic Act creating a territory called Idaho. By 1864 Idaho Territory had very nearly assumed the boundaries now associated with the state.²

By 1863 federal lawmakers were well used to creating new territories, and since the creation of Wisconsin in 1836 had been using the same formula for territorial organization.³ The standard Organic Act created a system of government whereby people were governed on federal, territorial, and local levels, with federal control being the strongest. The relationship of the territorial citizen to Washington, D.C., analogous to that between a colonist and an imperial power, was remarkably undemocratic and underrepresentative. "There seemed to be no logic in a contradictory federal

¹ "Census of 1863," *Reference Series No. 129* (Boise: Idaho Historical Society, 1964), cited in Ronald H. Limbaugh, *Rocky Mountain Carpetbaggers: Idaho's Territorial Governors 1863-1890* (Moscow, ID, 1982) 15 [hereinafter cited as Limbaugh, *Rocky Mountain Carpetbaggers*].

² In 1868 a small parcel to the southeast was annexed.

³ The Wisconsin Organic Act was the model for the Organic Acts of Iowa, Oregon, Minnesota, New Mexico, Utah, Washington, Nebraska, Colorado, Nevada, Dakota, Arizona, Idaho, Montana, Wyoming, Alaska, Oklahoma, and Hawaii. William Wirt Blume and Elizabeth Gaspar Brown, "Territorial Courts and Law: Unifying Factors in the Development of American Legal Institutions," 61 *Michigan Law Review* 39, 477 et seq. [1962].

policy which on one hand encouraged western settlement and on the other punished settlers by denying them the full rights of citizenship."⁴

The president of the United States appointed territorial governors and other territorial executives. The people of the territory elected the territorial legislature, but that body was not nearly as autonomous as its counterpart in a sovereign state. Congress had the power to determine the length of the legislative sessions, the number of legislative members, and, most importantly, had absolute veto power over territorial legislation.⁵ Only one man in Washington, D.C. spoke as the representative voice of the citizens of a territory. That individual was the delegate to Congress, who was elected by popular vote within each territory. Since this delegate had no vote in Congress, he could at most express the point of view of the citizens.⁶

Territorial residents had no control over the selection of the federal officials who had extensive power over them. They could not even vote in the national election for president, a disenfranchisement many felt keenly because most of them had recently come from established states. Earl Pomeroy, the first territorial scholar of substance, has stated, "Citizens resented the territorial status not only because they were Westerners, but also because recently they had been Easterners."⁷

Idaho's Organic Act provided that the president appoint three justices, one designated chief justice, for four-year terms.⁸ The territory was divided into three judicial districts. Each justice sat as trial court judge for a given district.⁹ The three justices, sitting en banc as the territorial supreme court, heard appeals from the trial courts. This meant that the very judge who rendered a trial

⁴ Limbaugh, *Rocky Mountain Carpetbaggers*, supra note 1 at 82.

⁵ Ibid. at 9.

⁶ Limbaugh's detailed work, *Rocky Mountain Carpetbaggers*, supra note 1, gives the full flavor of the politics of the era, and the conflicts among the appointed officials and the citizens of the state.

⁷ Earl S. Pomeroy, *The Territories and the United States 1861-1890: Studies in Colonial Administration* (Seattle, 1969) 106 [hereinafter cited as Pomeroy, *Territories*].

⁸ The short tenure of the territorial judges, contrasted with the life tenure of other federal judges, might have been useful when the president had appointed an incompetent judge, but certainly ensured that every man on the bench had functioned actively in partisan politics within the last four years. Presidents often removed judges for reasons of political expediency or in order to punish or reward, which led to charges that the territorial judges were "puppets of the executive." Note, "Removal of Territorial Judges," 24 *American Law Review* 308, 310 (1890).

⁹ The territorial trial courts were referred to as "district courts." This nomenclature has remained with the state trial courts in the former territories.

court decision would sit on the appeal of that decision. This was a sore spot with the citizens of the territory,¹⁰ and a flaw in the fundamental fairness of the system. The United States Supreme Court heard appeals from the territorial supreme court if they involved more than \$1000 or a federal question.¹¹

The territorial legislature had little control over the territorial court. At first the legislature paid over one-half of the justices' salaries. Thomas Donaldson, an early Idaho lawyer, notes that the judges were at the mercy of the legislature, and not much love was lost between the Democratic legislature and the Republican judges. In 1871, however, the legislature lost all leverage it may have had when, through dislike of a certain chief justice, it reduced its portion of the judges' salary to zero.¹² The judges were then poorer, but also freed from economic pressure to decide as the territorial legislature wished.

The territorial legislature did have control over lesser courts, including the justice courts and the probate courts. To relieve congestion in the territorial courts and to strengthen local control of the judicial process, the legislature attempted, with varying degrees of success, to expand the jurisdiction of the justice and probate courts.¹³

The territorial court on which Beatty was destined to sit exercised chancery as well as common law jurisdiction.¹⁴ The court's jurisdiction covered what would now be within the province of a state court, as well as all federal matters which arose in the territories. The written opinions issued by the territorial supreme court are reported in the first volumes of the *Idaho Reports* and form part of the body of Idaho state law.¹⁵

EARLY IDAHO JURISPRUDENCE

Idaho jurisprudence got off to a unique and rocky start. Over the years, Congress had carved new territories out of previously existing territories. In order to bridge the gap over the time before the

¹⁰ Arizona had a system identical to Idaho's, and at one point the Supreme Court of Arizona was popularly referred to as the "Supreme Court of Affirmance." Pomeroy, *Territories*, supra note 7 at 52-53.

¹¹ Blume and Brown, "Territorial Courts and Law," supra note 3 at 77.

¹² Thomas Corwin Donaldson, *Idaho of Yesterday* (Caldwell, ID, 1941) 185-87.

¹³ For a detailed discussion of this effort, see John Albert Goettsche, "The Idaho Territorial Supreme Court on Conflicts in Law Before 1874" (Unpublished M.A. thesis, Washington State University, 1961).

¹⁴ Erwin C. Surrency, *History of the Federal Courts* (New York, 1987) 352-53; Organic Act of March 3, sec. 9, 12 Stat. 808 [1863].

¹⁵ See supra note 9.

citizens of a new territory could elect a legislature to enact laws, Congress provided for the continuation of the earlier territory's laws. This procedure could not be used for Idaho, however, because Idaho's boundaries encompassed land from various existing territories, each with its own laws. Congress neglected to make specific provision for which earlier territory's laws should be in effect before the Idaho territorial legislature could convene. Early in Idaho's legal history the first territorial supreme court determined that no law was in force during those first few months of the territory's existence.¹⁶ As a result, an accused murderer went free and several convicts were released. Historian Ronald Limbaugh notes that the national government could have and should have stepped in to settle the issue in a less embarrassing way.¹⁷ The Idaho territorial legislature did meet promptly after the territory was created, and drafted some statutory law based on the code of California. This was recodified in 1887 — with the help of James H. Beatty — and formed the basis for Idaho's state law.

John Guice has studied the territorial courts in the neighboring states of Wyoming, Colorado, and Montana, whose territorial histories parallel Idaho's both chronologically and geographically.¹⁸ He has found that almost all of the territorial justices, especially in the early years, were accused of some impropriety, a conclusion which is supported by Limbaugh's tales of complaints and squabbles. These accusations, both accurate and inaccurate, may have been more of an indictment of the system of territorial administration than of the character and ability of the judges.

The territorial justices were young¹⁹ and underpaid.²⁰ The Reconstruction era appointment system was rife with political intrigues and personal spats; the Grant administration in particular is best remembered for its rank spoils system. Also, as Limbaugh highlights, the citizens of the Rocky Mountain territories were bitterly opposed to the appointment of out-of-state officials. "Home Rule" was the cry of the day, but in the first twelve years of Idaho's territorial history only two territorial residents were appointed to the territorial bench.²¹ This is perhaps not too

¹⁶ *People v. Williams*, 1 Idaho 85 (1866).

¹⁷ Limbaugh, *Rocky Mountain Carpetbaggers*, *supra* note 1 at 32-33.

¹⁸ John D.W. Guice, *The Rocky Mountain Bench: The Territorial Supreme Courts of Colorado, Montana and Wyoming, 1861-1890* (New Haven, 1972) 78-80 [hereinafter cited as Guice, *Rocky Mountain Bench*].

¹⁹ *Ibid.* at 79.

²⁰ *Ibid.* at 38, et seq.

²¹ James H. Hawley, ed., *History of Idaho, The Gem of the Mountains*, 4 vols. (Chicago, 1920) i: 587-88.

surprising since no white man had been "at home" in the brand new territories for very long, except for an occasional fur trapper or missionary.

Injured pride and party rivalries were not the only sources of the settlers' objection to out-of-state appointments. The most frequent complaints against territorial judges arose from their absence from the district²² when the budding new territory needed prompt resolution of business, water, and mining cases. These absences would have been shortened or avoided had appointments been made from within. Some of the judges appointed from the East considered the territorial service "as an exile, a political and physical Siberia."²³ Others viewed the service as a valuable stepping stone to other federal positions, to which they were quick to jump. Still others had misjudged the Rocky Mountain West and soon tired of the harshness of the rugged country. All of this led to a high turnover in judges, which caused further delays and increased the residents' irritation.

The settlers were also in the ironic position of resenting the amount of control exercised over them from Washington, D.C., while at the same time feeling neglected by the nation's capital 2,300 miles away. With the exception of the Department of the Treasury, whose obligation to keep the books balanced mandated reasonably close fiscal supervision, the departments of state, interior, and justice engaged in what Limbaugh has called "benign neglect" of the Rocky Mountain territories.²⁴ The territories had problems which seemed foreign in the District of Columbia, and territorial political brouhahas seemed far removed from Washington politics. The tangled and overlapping jurisdictions of the executive departments which were charged with overseeing the territories, and the severe travel and communication problems of nineteenth-century America,²⁵ hampered the efficacy of the meager advice and guidance offered by the federal government.

²² Surrency, *History of the Federal Courts*, supra note 14 at 351.

²³ Pomeroy, *Territories*, supra note 7 at 64.

²⁴ Limbaugh, *Rocky Mountain Carpetbaggers*, supra note 1 at 9-10; Pomeroy sums up the situation by saying, "Control was ineffective rather than either tyrannical or generously moderate." Pomeroy, *Territories*, supra note 7 at 106.

²⁵ Dubois recalls that in 1886 mail facilities still were in "wretched condition," but the national administration gave no recognition to the problem. Fred T. Dubois, *The Making of a State* (Louis J. Clements, ed., Rexburg, 1971) 136.

EARLY JUDICIAL DECISIONS IN THE IDAHO TERRITORY

When statehood for Idaho was imminent, ten members of the state constitutional committee drafted an address to the people to persuade them to support statehood. Listed as the "most intolerable evil" of their territorial status was the judicial system, including the "changing and shifting nature" of judicial decisions, the lack of precedent, the turnover in judges, the insufficient number of judges, and the unavailability of true appellate review because the trial judge reviewed his own decisions.²⁶

Despite Pomeroy's blanket disparagement of the territorial judicial system as "one of the weakest parts of the territorial institution,"²⁷ the territorial judges were not all bad and corrupt. Some anecdotal stories tell of lamentable judging,²⁸ but a review of the early reported decisions of the Idaho territorial court show

²⁶ William I. McConnell, *Early History of Idaho* (Caldwell, ID, 1913) 378.

²⁷ Pomeroy, *Territories*, *supra* note 7 at 54, 61.

²⁸ James H. Hawley, an early Idaho lawyer, tells of one of the first court sessions held in Idaho after long delays: "[The] learned judge . . . , so the legend goes, without explanation, comment or reasons given, proceeded to decide the legal questions involved in the various cases by overruling the demurrer in the first case argued and sustaining it in the second; . . . and, with absolute impartiality, alternately so continued until all were disposed of. The members of the bar were in consternation, as no enlightenment had been vouchsafed them as to the mooted legal questions involved by the decision rendered. E. D. Holbrook, who afterwards represented the territory in congress for two terms and who was then one of the most prominent members of the bar, rose to his feet and stated to the court that, at the request of all of the lawyers present, he would respectfully ask the court to give the reason prompting him to make his rulings upon the several demurrers in order that the attorneys could have the benefit of such reasons in preparing their amended pleadings and in the future conduct of the cases. The learned judge immediately responded, 'Mr. Holbrook, if you think a man can be appointed from one of the eastern states, come out here and serve as a judge in Idaho on a salary of \$3,000 a year, payable in greenbacks worth forty cents on the dollar, and give reasons for everything he does, you are mightily [sic] mistaken.'" James H. Hawley, "The Judiciary and Bar," in Hiram T. French, *History of Idaho, A Narrative Account of Its Historical Progress, Its People and Its Principal Interest*, 3 vols. (Chicago, 1914) i: 510-11.

Donaldson tells how a miner came in to Boise in 1870 announcing a gold strike in Loon Creek (about 80 miles northeast of Boise). A judge of the supreme bench immediately asked Donaldson, then district court clerk, to get him continuances of the case on the trial docket. "Thanks! Can't wait! Lord knows I'm losing time." And with that the judge scrambled off toward Loon Creek on a "forlorn, spavined white horse the size of an elephant, and disappeared in a cloud of dust, belaboring the animal, coattails flying, harness flapping and jiggling like mad." Donaldson finishes the anecdote with the dry observation that the only person to make money on that particular strike was a woman who broke an arm due to the tortious behavior of a stagecoach driver. Donaldson, *Idaho of Yesterday*, *supra* note 12 at 29-30.

that most of the judges wrote reasonable, conscientious decisions.

Teaching lawyers the proper practice of law took much of the first territorial judges' time and effort. Again and again they explained that an appeal must be perfected before it could be heard, that an indictment must be complete. Procedural rules were strictly enforced, although where the appeal of a man sentenced to death for murder was regrettably ill-presented, with no bill of exceptions or certified or authenticated presentation of the record, the justices noted, "Upon this state of facts we should be fully warranted in dismissing the appeal, but considering the importance of the case, we have thought it proper to examine the record."²⁹ The court found no error and the judgment was affirmed.

The federal territorial judges have accurately been called "civilizers,"³⁰ not only bringing the common law west of the Mississippi and teaching the procedural skills necessary to a court system, but also overseeing elections³¹ and setting bar standards. The arrival of the courts also gradually quelled the vigilante movements which had arisen to deal with crime. William T. Stoll, a lawyer in northern Idaho in the 1880s and 1890s, lamented the passing of the vigilantes' strict control over common criminals. With the passing of what he termed the "old order," he once felt so threatened by the friends of a criminal defendant that he was obliged to make his closing arguments for the prosecution with "two heavy Colts" sitting on the table.³² Even if the courts were occasionally less effective than the vigilantes, certainly their procedures were more in keeping with the American constitutional system.

The enforcement of contracts, and the enunciation of new rules tailored for the American West regarding water rights and mining, established a jurisprudence which set in motion and then oiled the gears of the Western economy.³³ The decisions of the territorial justices reshaped the common law, as developed in the East, to fit the climate, terrain, politics, and social realities of the West. Settlers

²⁹ *People v. O'Conner*, 1 Idaho 759 [1880].

³⁰ Guice, *Rocky Mountain Bench*, supra note 18 at 137 et seq.

³¹ Several cases in the first volume of the *Idaho Reports* were actions in *quo warranto* to oust officials because they were improperly elected. See, e.g., *People v. Lindsay*, 1 Idaho 394 [1871], where two men claimed the office of Ada County sheriff. Donaldson, *Idaho of Yesterday*, supra note 12 at 211-13 provides some background to this controversy which involved the first three black votes ever cast in Idaho.

³² William T. Stoll, *Silver Strike: The True Story of Silver Mining in the Coeur d'Alenes* (Boston, 1932) 164-68.

³³ Guice, *Rocky Mountain Bench*, supra note 18, concludes at 113: "In this light, the judiciary might be the real heroes of the period." Guice's words ring equally true in Idaho as in the neighboring states he studies.



Agriculturalists demanded the prompt resolution of water rights claims. Threshing near Moscow, Idaho, ca. 1900. (Idaho Historical Society)

could not reap fruitful harvests from the arid land without prompt determination of water rights; miners could not dig bullion out of laden veins without prompt resolution of mining claims; sawyers could not fell the mighty trees in the coniferous mountains without prompt definition of public land uses. While this natural resource economy boomed and busted, Protestant Easterners confronted the seemingly incompatible cultures of Mormons, Indians, and Chinese. Society demanded prompt legal resolution of the inevitable conflicts among the people of the Idaho Territory.

The quality and complexity of Idaho's territorial court's decisions improved with time. By the 1880s the territorial bar had learned its lessons in court practice and a new influx of college-educated men had come to practice as lawyers in the state.³⁴ The federal executive had begun to exercise more care in the selection of judges. After the spoils system of appointments reached its peak under Ulysses S. Grant, the Hayes, Cleveland, and Harrison administrations took some pride in appointing qualified men of good moral character.

By the late 1880s Idaho was no longer a dusty outpost of sagebrush camps and gold booms. Sophisticated capitalist organization, permanent population bases, completed rail and telegraph connections, settled laws, and the pervasive ethic of "progress" had synergized to ripen the young green territory. Residents began to champ for the badge of maturity: statehood.

³⁴ John F. MacLane, *A Sagebrush Lawyer* (New York, 1953) 21.

BEATTY'S APPOINTMENT AS CHIEF JUSTICE OF THE TERRITORIAL SUPREME COURT

By April of 1889, amid the swirl of statehood activity, it had become apparent that Chief Justice Hugh W. Wier was going to be removed from the territorial bench. Wier had fallen into political disfavor in Alturas County, a hub of territory-wide political power in central-southern Idaho. In order to dissipate this power, the territorial legislature had divided Alturas County, flush with money from a silver and lead strike a decade earlier, into Logan and Elmore Counties. The resulting political, governmental, and fiscal fracas was to plague Idaho politics, state and federal courts,³⁵ and to some extent the federal appointment process, for years to come.

Citizens of Hailey, Idaho, the population center and political stronghold of Alturas County, were opposed to the division of the county, fearing the diminution of their property values and their political power at Boise. When they challenged in court the act of the territorial legislature dividing the counties, Chief Justice Wier opined that the legislative act was valid, and that the county could properly be divided.³⁶

Shortly after this decision, members of the Hailey bar, which included many of the most powerful politicians in Idaho, began agitating for Wier's removal. They charged that he had been absent from court, causing cases to pile up for over two years, and that he had appointed his son as deputy clerk, in violation of a federal anti-nepotism statute. Justice Weir replied that his unpopular decision was the catalyst for his removal.³⁷ Although Weir's opponents asserted that the newly-elected Republican president, Benjamin Harrison, was removing all the Democratic appointments of his predecessor, Grover Cleveland, Justice Charles H. Barry, a Democrat who had dissented from Justice Wier's opinion on the county division, was not removed. President Harrison ultimately removed Wier, over bitter protests. It was to Chief Justice Wier's seat that James H. Beatty was appointed in 1889.

³⁵ The issue of which county was responsible for the former Alturas County's bonds was still being litigated in federal court in 1898. *Robertson v. Blaine County*, 85 F. 735 [C.C.D. Id. 1898].

³⁶ *Burkhart v. Reed*, 2 Idaho 503, 22 P. 1 (1889).

³⁷ Wier wrote Attorney General Miller on April 11, 1889: "If I had decided the cases in their favor, they would have applauded me with as much enthusiasm as Shylock did Portia in the Merchant of Venice, when he exclaimed, 'O noble judge! O wise and upright judge!'" This letter appears in the Records Relating to the Appointment of Federal Judges, Attorneys, and Marshals for the Territory and State of Idaho, 1861-1893. National Archives, Seattle Branch, Record Group 60, Microfilm M681, Rolls 1-9 [hereinafter cited as *Records*].

Born in 1836 in Fairfield County, Ohio, of "old Revolutionary stock,"³⁸ Beatty graduated in law from Ohio Wesleyan University in 1856, then fought in the Fourth Iowa Battery during the Civil War. His military experience took him to Missouri, where he settled when the war was over. After seven years in Missouri as the registrar in bankruptcy, he moved to Utah to be Assistant U.S. Attorney, quickly becoming a strong anti-Mormon. In 1882, ten years after he had moved to Utah, he went to Idaho, and settled in the newly prosperous town of Hailey in Alturas County.

Beatty had been a political man throughout his life. In Missouri he had served as a member of the Republican State Central Committee and had used his political savvy to gain appointment as Assistant U.S. Attorney in Utah. After his arrival in Idaho in 1882, Beatty entered the Idaho political scene, where he served in the fourteenth territorial legislature in 1886-87. In the spring of 1889 he was strongly in the running for the appointment to the territorial governorship of Idaho. Influential politicians and newspapers, including the powerful secretary of the interior endorsed him.³⁹ Ultimately, President Harrison appointed George Shoup to the position, and Beatty wrote of suffering the "depression of the defeat of [his] first political aspiration."⁴⁰ Someone — it is not clear who — then suggested Beatty for appointment to the territorial supreme court.

The appointment process began with the submission of a candidate's name. The candidate himself then wrote to the U.S. attorney general, William A. Miller, indicating his interest and including letters of recommendation. Other letters, both favorable and unfavorable, were then sent in to the attorney general's office. Some of these resulted from coordinated political efforts either for or against the candidate. Others were earnest pleas from individuals acting alone urging appointment or rejection. The attorney general then passed the compiled correspondence and his accompanying recommendations on to the president, who made the final appointment.

In his correspondence with the attorney general, Beatty did not seem immediately enthusiastic about campaigning hard for the appointment. He agreed to have his name placed in the running, but declined to travel in August heat to Washington, D.C. to fight for the appointment.⁴¹ As the contest grew more heated, Beatty did write and cable to clear his name from criticism, although even

³⁸ *Los Angeles Times*, October 22, 1927, I, 7.

³⁹ Dubois, *The Making of a State*, supra note 25 at 167.

⁴⁰ *Records*, supra note 37. Beatty to Attorney General, April 1, 1889.

⁴¹ *Ibid.* Beatty to Attorney General, August 14, 1889.

then he pointed out that he was not making exertions for the appointment.⁴²

Perhaps Beatty's excitement over the prospect of the appointment was limited not only because he was demoralized over losing the governorship, but also because his attention was diverted elsewhere. During that summer of 1889 he spent much of his time actively participating in the Idaho constitutional convention, which had been convened in July 4, 1889 in anticipation of statehood. Beatty served as chair of the committee on election and rights of suffrage, and as a member of the committees on the judiciary, municipal corporations, revision and enrollment, and rules. One member of the convention recollected fifty years later that Beatty "was a stickler for plain, understandable language and [was] dubbed the school master of the convention."⁴³ Beatty's gift for plain, understandable prose was to stay with him throughout his tenure on the federal courts of Idaho.

The appointment letters⁴⁴ reveal that the leaders of the powerful political "ring" from Hailey⁴⁵ actively opposed Beatty although the ring, like Beatty, was Republican. Ring members worked hand in hand with Fred T. Dubois, a leading Republican and Idaho Delegate to Congress, thereby the "chief dispenser of territorial spoils."⁴⁶

It is not clear what Beatty had done to so anger Dubois and his friends. One newspaper reported that in the prior year "no man did more toward piling up the majorities" for Dubois' election as delegate.⁴⁷ Yet many of the contemporary writings make reference to Beatty's vitriolic attacks on Dubois. In Dubois' autobiography Dubois claims to have been "a devoted friend" to Beatty "at all times,"⁴⁸ and to have met Beatty's appointment as chief justice with "great delight and with most cordial approval and endorsement,"⁴⁹ but the attorney general's letter file makes clear that Dubois did all he could to work against Beatty's appointment.

⁴² Ibid. Beatty to Attorney General, March 24, 1889.

⁴³ The *Idaho Statesman*, July 2, 1939, 8.

⁴⁴ These appointment records, primarily handwritten, are currently available only on microfilm. See *supra* note 37.

⁴⁵ Milton Kelly, a former territorial supreme court justice, and powerful Republican political journalist and editor of the *Idaho Statesman*, described the so-called Hailey Ring as "as corrupt a gang as the Tweed ring in New York." *Records*, *supra* note 37. Telegram from John S. Gray, future Idaho state senator, to Attorney General, April 20, 1889, describing the editorial in the *Idaho Statesman*.

⁴⁶ Limbaugh, *Rocky Mountain Carpetbaggers*, *supra* note 1 at 7.

⁴⁷ *Wood River Times*, January 14, 1889.

⁴⁸ Dubois, *The Making of a State*, *supra* note 25 at 167.

⁴⁹ Ibid. at 168.



Idaho politician and author Fred T. Dubois, 1890. (Idaho Historical Society)

On Beatty's side were other influential people, including prominent Republicans from Alturas County and the Republican Central Committee. In addition, Beatty ably marshalled letters on his own behalf from pastors in Utah, Missouri, and Idaho, lawyers from other states, members of county bars across the Idaho Territory,⁵⁰ a former chief justice of Idaho, and various U.S. congressmen and senators who had supported him for governor.

⁵⁰ Certain county bars also presented resolutions against Beatty. The candidacy of another Alturas County Republican lawyer, John R. Harris, complicated the scene. He had been the mainline Republican choice before Beatty was considered for the job. Some lawyers already committed to him did not wish to switch to Beatty, although they might have endorsed Beatty at the beginning. *Records*, supra note 37. Arthur Brown, lawyer, to Attorney General, May 23, 1889; See also, J.S. Waters, District Attorney of Alturas County, to Attorney General, May 17, 1889. Some lawyers and other citizens endorsed Beatty after Harris had been eliminated from the race.

To the eyes of a late-twentieth century, litigation-conscious lawyer, the letters opposing Beatty and other contenders are shockingly, brutally straightforward in their criticisms. Ironically, the law of defamation has been softened in the latter part of this century, as First Amendment concerns and the desire to protect speech and discussion about public figures and matters of public interest have overridden worry over the damage to a person's character ensuing from the utterance of unflattering falsehoods. Although truth has always been a defense, today the omnipresent specter of a lawsuit has a chilling effect on all but the most provable charges. The nineteenth-century law of libel and slander evidently gave these men no pause as they pursued their political vendettas. For instance, an opponent of John H. Harris, Beatty's chief competitor, wrote of Harris:

[He is] the laziest man I ever saw and spends much of his time frequenting saloons. He drinks, plays cards, is noisy, turbulent, swears, is an Infidel, and one of the most thoroughly unpopular men who ever lived in this city. He has the reputation of a gambler and a man who seldom pays his bills. I regard him as an unreliable man. I think that out of the entire bar of Idaho Territory the selection of John H. Harris for this office the worst that could be made.⁵¹

Another example of the vitriolic tone of the era came from one of Beatty's supporters denouncing Dubois:

I know that our famous Delegate in Congress is a man who enjoys himself better in a brothel than in a Sunday School and the Saloon and Gambling room is more congenial to his enjoyment than the House of God.⁵²

Attorney General Miller may have been particularly receptive to these references to temperance and religion. The *Wood River Times*, while praising him as an able lawyer of the highest integrity, thought him "rather too religious a man to be in the Cabinet, as he seems to think that to be a good Presbyterian is ample qualification for any office to which an applicant aspires."⁵³

The political combatants of the era pulled no punches, but could not be called honest fighters either, for they engaged in hyperbole, selective truth, and, certainly on some occasions, outright falsehoods. Opponents declared that "no lawyer in the state supports

⁵¹ Ibid. Declaration of L. Young, Mayor of Bellevue, May 3, 1889.

⁵² Ibid. Waters to Attorney General, November 10, 1890.

⁵³ *Wood River Times*, May 18, 1889.

Beatty," yet petitions, resolutions, and letters from numerous county bars and law firms appear in Beatty's support. At one point Beatty's opponents sent an anti-Beatty telegram to Washington, and took the liberty of signing the telegram with the names of the men who were in fact supporters of Beatty's; indignant protests were hastily lodged.⁵⁴

Unfortunately, most of the letters critical of Beatty and others were not sufficiently specific to satisfy either the historian of 1989 or the candidates of 1889. Several letters from Beatty and other candidates beg the attorney general to let them know what specific charges had been levied against them so that they could respond with equal specificity.⁵⁵ A historian can only agree with them, while hungering for the details of the political or personal fuss. Apart from a few general allegations of "lack of legal ability," the criticisms of the candidates did not address what one would hope would be the primary concern of those appointing a supreme court judge: legal reasoning or lawyering skill.⁵⁶

What swung President Harrison to Beatty's side? Currently available records allow for only conjecture. Beatty's chief contender, Harris, was apparently knocked out of the race because of the stories about his debauched drinking and atheism.⁵⁷ Beatty was a good Presbyterian, and even his enemies cast no aspersions on his personal morality. It may well also be that the judgeship was awarded to Beatty as consolation for having lost the governorship.

On November 21, 1889, Beatty was commissioned as chief justice of the Idaho territorial supreme court. He thus began his eighteen year judicial career by presiding over the last year of that court's existence.

⁵⁴ *Records*, supra note 37. See, e.g., Waters to Attorney General, May 17, 1889; V. Bierbower, Deputy District Attorney, to Attorney General, November 11, 1889.

⁵⁵ *Ibid.* Beatty deplored the "cowardly, mean, secret assault against me — an insinuation, without being a charge of evil." Beatty to Attorney General, November 5, 1889.

⁵⁶ Surrency says that it was not until the administration of Theodore Roosevelt that consideration was given to a candidate's jurisprudential qualifications. Until then, the primary consideration was loyalty to the party in power. Erwin C. Surrency, "Federal District Court Judges and the History of Their Courts," 40 *FR.D.* 139, 150 (1967).

⁵⁷ Harris, not surprisingly, denied the charges, saying that he took a drink only "now and then" and that the purveyors of such stories were actually those who favored Wier's retention because of Wier's view on the county division. "Not daring to assail my integrity and knowing the earnest and laudable desire of this Administration to place only sober and upright persons in positions of trust, they selected the charge of drunkenness as the most likely to effect their end, not that they believed it true but as some of them indiscreetly expressed it 'any thing is fair in War.'" *Records*, supra note 37. Harris to Attorney General, June 11, 1889.

BEATTY'S TERRITORIAL COURT DECISIONS

Justice Beatty's reported decisions during his brief tenure on the territorial court addressed water rights,⁵⁸ Mormonism,⁵⁹ mining claims,⁶⁰ attachments,⁶¹ commercial paper,⁶² unlawful fishing,⁶³ and, true to the pulp novelist's image of the Wild West, a criminal prosecution against the madam of a brothel.⁶⁴

Beatty's deepest imprint on the jurisprudence of Idaho and the West may be *Drake v. Earhart*, a water law decision.⁶⁵ There Justice Beatty was faced with conflicting claims to the water in Quigley Gulch. Plaintiff Drake and others had arrived in 1879 and taken possession of land at the mouth of the stream running through the gulch, and had posted notice indicating that they had appropriated all of the water in the stream. Several years later Earhart and others purchased lands up the gulch from Drake's property, and began to use the water which flowed through their land. Drake and his friends sued to stop Earhart from using the water. The one earlier Idaho water rights case⁶⁶ had established that "the first appropriation of water for a useful or beneficial purpose gives the better right thereto; and when the right is once vested, unless abandoned, it must be protected and upheld."⁶⁷ This was in keeping with the Western tradition concerning both mining and water claims: the rights of the first person to find the ore or use the water are honored against all second-comers.

Remaining open was the very question Beatty now faced: Would the rights of this prior appropriator be upheld even if the subsequent appropriator had riparian status? Under the laws of many states, a riparian owner's rights would have been superior; thus Earhart and his associates would have been entitled to use the water from the stream flowing through their property.

⁵⁸ *Drake v. Earhart*, 2 Idaho 750, 23 P. 541 [1890].

⁵⁹ *Chamberlain v. Woodin*, 2 Idaho 642, 23 P. 177 [1890]; *Territory v. Evans*, 2 Idaho 651, 23 P. 116 [1890].

⁶⁰ *Burke v. McDonald*, 2 Idaho 679, 33 P. 49 [1890]; *Gilpin v. Sierra Nevada Consolidated Mining Co.*, 2 Idaho 696, 23 P. 547, 1014 [1890].

⁶¹ *Martin v. Atchison*, 2 Idaho 624, 33 P. 47 [1890]; *Fury v. White*, 2 Idaho 662, 23 P. 535 [1890]; *Barnett v. Kinney*, 2 Idaho 740, 23 P. 922, 24 P. 624 [1890].

⁶² *Murphy v. Bartsch*, 2 Idaho 636, 23 P. 82 [1890].

⁶³ *Territory v. Neilson*, 2 Idaho 614, 23 P. 537 [1890]; *Territory v. Evans*, 2 Idaho 658, 23 P. 115 [1890].

⁶⁴ *Territory v. Bowen*, 2 Idaho 640, 23 P. 82 [1890].

⁶⁵ *Drake v. Earhart*, 2 Idaho 750, 23 P. 541 [1890].

⁶⁶ *Malad Valley Irrigation Co. v. Campbell*, 2 Idaho 411, 18 P. 52 [1888].

⁶⁷ *Ibid.* at 414.

Beatty, purporting to follow settled Western law or, as he put it, the decisions of courts "between Mexico and the British possessions, and from the shores of the Pacific to the eastern slope of the Rocky Mountains,"⁶⁸ decided, "the maxim, 'First in time, first in right,' should be considered the settled law here."⁶⁹ He noted that the doctrine was necessary to, and had become the custom in, the arid areas of the West. "This did not mean that the first appropriator could take all he pleased, but what he actually needed, and could properly use without waste."⁷⁰

Beatty understood the importance of the appropriation doctrine to the economic development and public peace of the West. In view of the large distances between rivers and streams, if only riparian owners had the right to water, vast areas would go undeveloped. Beatty wrote, "Instead of attempting to divide [the little water there was available] among all, thus making it unprofitable to any, or instead of applying the common-law riparian doctrine, to which they had been accustomed, [the new inhabitants of the West] disregarded the traditions of the past, and established as the only rule suitable to their situation that of prior appropriation."⁷¹ A modern analyst has noted that the system promoted investment and action. "Prior appropriation said in effect: Come West, take up land and water, and they shall be yours. Thus the national (as well as regional) goals of settlement and development of the West were served (and continue to be served) by the appropriation system."⁷²

In this 1890 opinion Beatty was able to affirm the importance of priority of appropriation, which he feared had been unduly weakened at the Idaho constitutional convention a year before. At the convention the delegates had wished to adopt the appropriation doctrine but also to install a "beneficial use" hierarchy of allocation whereby domestic use of water would take priority over agricultural uses, which in turn had priority over manufacturing uses. Beatty had argued that the two doctrines were incompatible and would lead to economic instability. "I put the question to any of you, who of you would invest your money in establishing any large manu-

⁶⁸ 2 Idaho at 753. Actually, water law in California depends on a complex dual system, involving both riparian and appropriation doctrines. Oregon and Washington did not adopt the appropriation system until the early part of the twentieth century.

⁶⁹ Ibid.

⁷⁰ Ibid at 754.

⁷¹ Ibid.

⁷² Charles J. Meyers, *A Historical and Functional Analysis of the Appropriation System* [U.S. Dept. of Commerce, National Water Commission, National Technical Information Service, 1976].

facturing establishment when you know that the water that you desire to use in running that establishment may at any time be taken away from you by either of these two other interests, that is, the agriculturalists, or for domestic use?"⁷³

Beatty's decision in *Drake* did not conflict with the Idaho constitution, for the issue of the hierarchy of use had not arisen in the case, nor, for that matter, did the constitution have any legal effect in the territory. *Drake's* emphasis on the rights of the first appropriator has continued as good law in the state of Idaho.

Two of Beatty's territorial cases were particularly Idahoan, for they dealt with the tensions created by the sizable Mormon minority in the territory. In *Chamberlain v. Woodin*,⁷⁴ the loser contested an election for sheriff in the precinct of Rexburg, a Mormon stronghold in southern Idaho. The crux of the case was that in order to vote in the territories, electors, besides having certain qualifications, could not be members of any "organization which teaches its adherents to commit the crime of bigamy or polygamy." Not accidentally, the Mormon Church at that time was just such an organization. The effect was that Mormons were not permitted to vote in the territory. A large group of Mormons in Rexburg attempted to solve this problem by withdrawing from the Church two weeks before the election. Justice Beatty, with the support of his two brethren on the territorial bench, did not believe that the Mormons' withdrawal was in good faith and hence found that they were not entitled to vote. Beatty's stated basis for this finding was that the men had all acted together on the same day, "most likely in counsel with their leader" and,

[w]hile claiming they had acted in good faith, most of them admitted they still wore their "endowment garments." The general explanation of this was, they would wear them until they wore out, but one explained, "they will wear never out."⁷⁵

Beatty concluded:

Should it prove true that they acted in good faith, we will much regret our present doubt. Gladly would we see them in the enjoyment of all the rights accorded to American citizenship, but only through voluntary allegiance to the government, and full obedience to all its laws.⁷⁶

⁷³ I. W. Hart, ed., *Proceedings and Debates of the Constitutional Convention of Idaho 1889*, 2 vols. (Caldwell, ID, 1912) i: 1118.

⁷⁴ *Chamberlain v. Woodin*, 2 Idaho 642, 23 P. 177 (1890).

⁷⁵ *Ibid.* at 650.

⁷⁶ *Ibid.*

This decision reflected the strong anti-Mormon bias of the men in political power in Idaho during this period. The Idaho constitutional delegates worked hard to disenfranchise the Mormons. During the debates Beatty said to his fellow delegates, "Now I believe you all agree with us and want every Mormon disenfranchised," but urged that Mormon disenfranchisement be left in the hands of the legislature, because statutes would be more flexible than the constitution:

We know they change their brand from time to time. It makes no difference what law we enact, they will change their brand; they will make some change in their organization so as to meet the laws we may enact and hence I was anxious, for one, to leave this power absolutely in the control of the legislature.⁷⁷

The Mormon problem surfaces in the very next case in the *Idaho Reports*, where Justice Beatty discusses the difficulty of jury selection from the election rolls when those belonging to the Mormon Church were not "electors."⁷⁸ In concluding that a Mormon juror should have been excluded, Beatty wrote:

It is, unfortunately, true that in some counties such a large proportion of the people belong to said "organization" that juries cannot be selected from the mass of the people, and courts may at times find it even inconvenient to procure them. [Nevertheless] we think the legislature meant to exclude from jury service those belonging to the so-called "Mormon church." By section 501 they are distinctly enjoined from "holding any position or office of honor, trust or profit." [...] We are justified in supposing the lawmaker took notice of the generally admitted fact that the members of that church are more obedient to its teachings, which are antagonistic to the laws of the land, than to the latter.⁷⁹

* * *

That this conclusion will lead to inconvenience in some localities may be true, but we cannot change what seems to be a positive and clear statute. If there is any need of change, we respectfully refer it to the legislative department.⁸⁰

⁷⁷ *Debates*, supra note 73, at 967. The constitutional delegates did not agree with Beatty's suggested method of depriving Mormons of the vote. Instead they wrote the disenfranchisement into the constitution itself.

⁷⁸ *Territory v. Evans*, 2 Idaho 651, 23 P. 116 (1890).

⁷⁹ *Ibid.* at 654. This decision did not result in the reversal of the conviction of the defendant/appellant because the statute did not allow an exception to an order overruling a challenge to a juror for general cause. *Ibid.* at 655-56.

⁸⁰ *Ibid.* at 655.

THE CREATION OF THE U.S. DISTRICT COURT FOR IDAHO

The goal of all of the territories was to achieve statehood, and between 1889 and 1912 ten were successful. Although some territories were obliged to struggle for years, Idaho achieved statehood in July of 1890 with astonishingly little difficulty, probably because Republicans in Congress and in the Harrison administration desired the admission of a Republican state.

With the creation of the new state, Congress dissolved the territorial court. While Idaho established a state court system, Washington lawmakers undertook the task of placing the new jurisdiction within the federal system.

The United States Constitution allows Congress to establish "inferior" federal courts, which include all courts other than the Supreme Court. The first Congress attended to the matter at once, drafting and passing the first Judiciary Act in 1789. That act established the basic federal court system as we know it today, despite subsequent adjustments in jurisdiction, structure, and nomenclature.

The biggest difference between the earlier structure and the modern system is that in 1789 Congress created two trial courts — the district court and the circuit court. The latter circuit court — which has not been in existence since 1911 — should not be confused with the circuit court of appeals which was created in 1891 and still exists today. A single trial judge presided over the district court, whereas the circuit court was designed to be held by a panel of three judges, including two Supreme Court justices and a district court judge. Very soon the circuit court was allowed to be held by a single judge, and as early as 1808 Justice Marshall approved the practice of having a district court judge preside over the circuit court.⁸¹ In 1869 the separate office of circuit judge was created to relieve the congestion in the courts. Then the circuit court could be held by one of three people: a Supreme Court justice, a district court judge, or a circuit court judge. As might be expected, it was the exception for a Supreme Court justice to preside, although each was obliged to do so every two years. In reality, the district court judge performed most of the work of the circuit courts.⁸²

From the beginning, the geographical boundary of the state in which the district court sat defined the geographical boundary of the district court. The geographical area of the circuit court, on the other hand, originally covered several states, as does that of the circuit court of appeals today.

⁸¹ *Pollard and Pickett v. Dwight*, 8 U.S. [4 Cranch] 421 (1808).

⁸² Surrency, *History of the Federal Courts*, supra note 14 at 32, 45-47.

By 1890 a district court judge presided over both the district court and the circuit court for the portion of the circuit within his state.⁸³ The records and minutes of the two courts, however, were kept scrupulously separate, and an action brought in the wrong court was summarily dismissed,⁸⁴ even though the properly brought case would have been heard before the same judge in the same courtroom.

The subject matter jurisdiction of the circuit court and the district court varied over the years, but by 1890 the district court had jurisdiction over crimes if the punishment was not more than a \$100 fine or six months in jail; civil cases involving admiralty, seizures or trade; and land seizures under federal statutes. The district court and the circuit court had concurrent jurisdiction over tort actions brought by an alien, and matters involving U.S. treaties and suits where the federal government was a party. The circuit court was the primary federal trial court, having jurisdiction over appeals from the district court, civil suits brought by citizens from diverse states where the matter in controversy was over \$500, and civil and criminal matters involving federal statutes, except federal crimes on the high seas.⁸⁵

As this federal system was already well established by 1890 when Idaho became a state, there was no discussion over whether a district should be created for Idaho or what its geographical boundaries should be. Rather, Congress routinely created the District of Idaho and placed it within the Ninth Circuit.

The result was that even as Congress abolished the three federal offices of territorial justice, it created a new federal position, that of United States District Judge for the District of Idaho. The person who filled that job would have life tenure to preside over the district and the circuit courts for the new state. By the fall of 1890, applications from politically hungry Idahoans had begun to pour into Washington. On October 1, 1890, James Beatty telegraphed the secretary of the interior, "Please ask my appointment as U.S. Judge for Idaho."

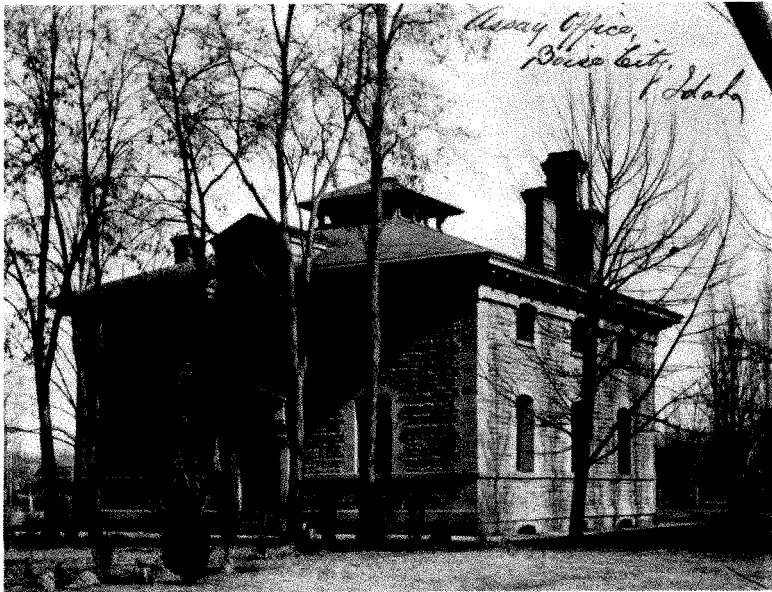
Appointment to the federal district court followed the same procedure as appointment to the territorial supreme court. In 1890-91, when Beatty was being considered for appointment to the

⁸³ The larger circuit, however, continued to exist, and occasionally a circuit judge would sit with the district court judge. For instance, in the first session of the Circuit Court for the District of Idaho, Judge Sawyer sat with Judge Beatty, and authored two opinions.

⁸⁴ See, e.g., *Jones v. Vane*, unpublished opinion, District Court, November 15, 1906 (Opinion Book 1881-1911).

⁸⁵ Surrency, *History of the Federal Courts*, supra note 14 at 15.

federal district court bench, William A. Miller was still attorney general and Benjamin Harrison was still the president. It must have been with a sense of *deja vu* that they reviewed several of the same candidates and saw similar conflicts between the same Republican factions as they had only one year before when Beatty had been up for the territorial court seat.



Assay Office, Boise City, Idaho, ca. 1890. (Idaho Historical Society)

BEATTY'S APPOINTMENT

Beatty's appointment to the district court bench was even more hotly and vehemently contested than his appointment to the territorial bench. Over the intervening year he had added fire to the opposition of his old enemies, and incurred the wrath of more mainstream Republicans.

In 1890-91, four U.S. senators were elected from Idaho. The first Idaho state legislature met on December 18, 1890 in joint session and elected George Shoup to the U.S. Senate for the term ending March 4, 1895. William McConnell, of northern Idaho, was elected for the term ending March 4, 1891 — only three months hence. Fred Dubois was elected to a full six-year term as McConnell's successor. All three were Republicans, as would be expected from a Republican-controlled legislature.

William Claggett, also a Republican, argued that Dubois' election had been procedurally incorrect. Claggett had Dubois' election declared invalid, and himself elected — with correct procedure — in February of 1891. His success was short-lived, however, as the U.S. Senate itself was obliged to vote to determine which man was entitled to sit, and declared that Dubois was legally elected and had the valid claim to the seat. Beatty publicly supported Claggett during this fight, obviously alienating Dubois and a large part of the core of the Republican party which was angered because the Claggett forces combined with the Democrats to attempt to unseat Dubois.⁸⁶

Beatty's conduct at and after the 1890 Idaho State Republican Convention further fanned his opposition. This was the first convention in the brand new state, and the Republicans were anticipating starting off the state with a Republican majority. Dubois was particularly impressed with the importance of the convention. He later asserted, "[I] hope I may be pardoned for saying that I absolutely controlled it."⁸⁷ Imagine his anger if the story, gleaned from a statement hostile to Beatty,⁸⁸ were true, that Beatty disagreed with the choice of Lyttleton Price as a candidate for representative in the state legislature, walked out of the convention in disgust, then actively campaigned against Price, his fellow Republican, during the election. Although Price won the election, he was also Beatty's primary opposition for the federal judgeship.

Due to these and perhaps other transgressions, Beatty was opposed by all members of the Idaho delegation to Washington, and by many influential Idaho Republicans, including all three members of the Idaho supreme court, who did not hesitate to write their protests on official supreme court stationery.⁸⁹

Again the thrust of the criticism by Beatty's opponents went more toward his politics than his legal abilities. Again and again,

⁸⁶ Hawley, *History of Idaho, The Gem of the Mountains*, supra note 21 at i: 224; See also, *The Sun*, February 13, 1891, relating that McConnell opposed Beatty because "he had been a traitor to his party by bringing about the election of Mr. Claggett as a Senator by illegal methods and with the aid of Democratic votes." See also *Washington Post*, February 1, 1890. *Records*, supra note 37. Beatty to Harrison, February 3, 1890; William H[—]lelagite (illegible) to Attorney General, January 9, 1891, saying that the reason all three senators were backing Price was that Price engineered a trading of votes by which they got elected. The writer goes on to say that this vote trading was a felony. This story is contradicted by the *Wood River News-Miner* of February 27, 1891, which states that Beatty had no connection with the Claggett/Dubois contest.

⁸⁷ Dubois, *The Making of a State*, supra note 25 at 181.

⁸⁸ *Records*, supra note 37. Sworn affidavit of W.S. Mack, a Hailey merchant, October 27, 1890, sent to Attorney General.

⁸⁹ *Ibid.* Sullivan, Huston, Morgan to Shoup, October 27, 1891.

his opponents cited his disloyalty to the Republican party as a reason the president could not and should not appoint him. "His appointment as a U.S. Judge would seem like placing a royalty on party disloyalty."⁹⁰ There were also references to his "venomous" personal style and use of character assassination — the pots calling the kettle black?

Dubois was so incensed at the possibility of Beatty's appointment that in one telegram he made the seemingly impolitic remark to the very men who had chosen Beatty for chief justice that Beatty's appointment to the territorial bench was "against protest of best men in Idaho and without endorsement of any respectable attorney."⁹¹

The one reference to Beatty's conduct during his brief tenure on the territorial court questioned his deciding a case on which he might have had a conflict of interest. Beatty, who was much feistier in his campaign and self-defense than he had been when running for chief justice, defended himself by explaining that he had been an attorney in a non-related but similar action, so he had suggested withdrawing from the case. The other judge and counsel found this unnecessary. After the other judges had debated and had been unable to agree, Beatty took a position and cast the deciding vote. He had not considered himself disqualified, but would have preferred not to have decided the matter. In retrospect, he regretted having made a decision in the case.⁹²

One specific personal charge was lodged against Beatty. A New York lawyer named Hyndman charged that on the night before the inauguration of President Harrison,

Mr. Jas. H. Beatty and another gentleman "picked up" a couple of strumpets in front of the Ebbitt House, and tramped around in the rain hunting a place. He never had seen either of them before. Mr. Beatty spent an hour or two in Solari's drinking with the girls, in a private room up stairs, next door to Willard's, and the end of the escapade was most ridiculous on Beatty. He was a candidate for Governor of Idaho then.⁹³

⁹⁰ Ibid. Unsigned telegram to Attorney General, January 17, 1891.

⁹¹ Ibid. Telegram from Dubois to Harrison, September 29, 1890.

⁹² Beatty's version of what happened is corroborated by his words in the reported opinion. His one paragraph concurrence states: "Having been of counsel between the same above-named parties in a cause, in the same lower court, but with a different attaching creditor, I desired to take no part herein further than to sit at the hearing. I have not participated with my associates in the discussion, but, they having reached opposite conclusions, the disagreeable duty rests upon me of breaking the deadlock, which, in following my convictions and what seems to me the weight of authority, I do, by concurring in the able opinion of Mr. Justice Sweet." *Barnett v. Kinney*, 2 Idaho 740, 747, *supra* note 61.

⁹³ *Records*, *supra* note 37. Hyndman to Harrison, January 31, 1891.

Beatty's reply to the charges was in Washington within two weeks. Beatty said that it was Hyndman who was the "other gentleman," that Hyndman introduced him to two ladies who seemed entirely respectable, and that he himself had *one* drink, "what I do not remember, but nothing I would hesitate to drink at any time with any lady." After the one drink, Beatty left, feeling rather uncomfortable.⁹⁴ The drink lasted one-quarter hour, and the entire episode took no more than one-half to three-quarters of an hour. He never saw the two women again.⁹⁵

The attorney general, in forwarding Beatty's reply to the U.S. Senate committee, included the comment, "from what I know of all the circumstances surrounding this case, I believe it speaks the truth."⁹⁶

The historical records available today do not make it easy to determine why President Harrison chose Beatty for appointment.⁹⁷ Even Beatty recognized that the president had had to fly in the face of some strong opposition, writing, "As I was so bitterly opposed by both Senators I almost wonder you did not conclude there was enough wrong in me to be left to my fate."⁹⁸ Various possible explanations for the president's choice emerge.

Beatty's chief competitor, Lyttleton Price, had one sordid episode in his past, to which even Senator Dubois admitted in his endorsement of Price: at one point Price, abandoned by his wife, openly took up with "Cara," an unmarried woman of ill repute. Although Dubois said the episode lasted only a few weeks, Price's opponents seized on the affair and linked it to other stories of debauchery.⁹⁹ Also, one lengthy and earnest letter from the owner of the Red Elephant Mines tells of double dealing by Price as a lawyer, making him appear at best negligent and at worst fraudulent.¹⁰⁰ No responses

⁹⁴ Dubois reports that Beatty was one of the few teetotalers among the Idaho politician-lawyers at the time. Dubois, *The Making of a State*, supra note 25 at 99. This abstinence from drink — and perhaps an accompanying holier-than-thou prissiness — may be the origin of the uncomplimentary nickname given Beatty of "Aunt Nancy." See Wood River News-Miner, June 28, 1889.

⁹⁵ *Records*, supra note 37. Beatty to Attorney General, February 12, 1891.

⁹⁶ *Ibid.* Attorney General to Hon. George Edmonds, U.S. Senate, February 20, 1891.

⁹⁷ The difficulty of making such an appointment was summed up by Idaho governor Norman Willey in a letter to Senator Shoup on January 23, 1892. Writing of filling a vacancy on the state supreme bench, he said, "Our Idaho lawyers are generally either too large or too small for the position."

⁹⁸ *Records*, supra note 37. Beatty to Harrison and Attorney General, February 9, 1891.

⁹⁹ One of Price's primary opponents reported: "He is such a notorious male prostitute that he is frequently called by his fellow townsmen 'The Town Bull.'" *Ibid.* Waters to Attorney General, November 25, 1890.

¹⁰⁰ *Ibid.* G.V. Bryan to Attorney General, January 3, 1891.

from Price appear in the attorney general's records. Several contemporary newspaper accounts report that the president would not nominate Price "on account of certain charges filed against him which seem to be of a purely domestic nature,"¹⁰¹ evidently a reference to the Cara episode.

Another explanation for Beatty's appointment appears in Dubois' recollections. Dubois, who admits that he opposed Beatty for the district court position, says that he had no objection to Beatty's moral character or his ability as a lawyer, that Beatty was an "honorable, conscientious gentleman," but that he was a politician "and not of very high order. He will be in politics while he is on the bench. He cannot help himself."¹⁰² Dubois' surprise and displeasure at this seems misplaced in view of the insouciance with which many men of the day moved blithely back and forth between the legislative chambers and the judicial bench. Lyttleton Price, Dubois' candidate, had been elected to the state legislature; Willis Sweet, the first U.S. congressman from Idaho and a member of the Idaho delegation headed by Dubois, had one year earlier sat with Beatty on the territorial court.

Nevertheless, according to Dubois, he and Shoup defeated Beatty's nomination, so that finally Attorney General Miller decided to send in the name of someone else. Dubois does not tell us who this was, but the man was so objectionable that Dubois, Price, and others decided that they could not submit to the other appointment, so, fully aware of Beatty's weaknesses, they allowed him to be confirmed.¹⁰³

The New York *Herald* of the day presents yet another version of what happened: Harrison appointed Beatty to punish Senators Shoup and McConnell for voting against the Force Bill "which Mr. Harrison loved with all his soul."¹⁰⁴ The Force Bill provided for soldiers to monitor elections in the South to ensure the counting of the black vote. Dubois opposed the bill because "[his] sympathies were all with the southern people."¹⁰⁵ The *Herald* conjectured:

So apparently [President Harrison] regards with undying malevolence every republican who voted against it, and as

¹⁰¹ Lewiston *Teller*, January 29, 1891; Moscow *Mirror*, January 23, 1891.

¹⁰² Correspondence in 1906 between Beatty and Idaho State Supreme Court Justice James F. Ailshie indicates that Beatty did remain politically active and coveted the party's nomination for U.S. senator. He was never on the ballot in a statewide primary or general election. Ailshie Materials, Northwest/Day Collection, University of Idaho Library, Moscow.

¹⁰³ Dubois, *The Making of a State*, supra note 25 at 190-91.

¹⁰⁴ New York *Herald*, February 2, 1891.

¹⁰⁵ Dubois, *The Making of a State*, supra note 25 at 189.

these two Idaho men were particularly conspicuous that way they were the first to get their punishment, good and strong.

According to the *Herald*, a few days after the Force Bill vote, the entire Idaho delegation, including the senators and Congressman Sweet, recommended Price for the judgeship. While usually if the delegation agreed on someone he was appointed, this time the president received the delegation "with more than his usual frigidity," and refused to appoint Price. According to the *Herald* article, the delegation then tried Sweet himself for the nomination,¹⁰⁶ then Idaho State Supreme Court Justice Sullivan, and finally another Idaho lawyer, Texas Angel.¹⁰⁷ Finally, the *Herald* concluded, the president announced that he would give the place to none of the men recommended for it. Certainly, by February 7, 1891, the Idaho state attorney general, a Republican, was cabling Dubois, "For Heavens sake have some appointment made now. Either Sullivan[,] Angel or any good man will do. It is the apparent want of influence of Senators that is killing."¹⁰⁸

The most straightforward explanation for Beatty's appointment to the federal bench is that the president and the attorney general reviewed the correspondence in favor of Beatty and deemed him a respectable choice. Judging from the records which remain, Beatty received many more recommendations than any of his competitors. Letters and petitions came in from citizen groups, clergy, lawyers from Idaho and other states, delegates to the Republican conventions in Idaho and other states, thirty-one out of the fifty-four members of the Idaho legislature, members of the Idaho Republican committee, a former member of the Idaho territorial supreme court, and many local officials all over Idaho. Judge Beatty had sat on the United States District Court in San Francisco when the docket there became overcrowded, and over ten San Francisco law firms endorsed him. Even some prominent Democrats wrote to recommend his integrity.¹⁰⁹

For whatever reasons, President Harrison sent James H. Beatty's

¹⁰⁶ This is contradicted by other contemporary accounts that Sweet declined being placed in the running because he did not want to decrease the Republican majority in the House. *Weekly News-Miner* of January 23, 1891 quoting Salt Lake *Herald* of January 20, 1891.

¹⁰⁷ Ibid. Texas Angel's name often appears in the attorney general's files; he was clearly a crony of Dubois. The *Herald* wrote that "despite his somewhat unpropitious name [he] is a reputable lawyer and excellent gentleman, and not a member of Buffalo Bill's troupe, as you might think."

¹⁰⁸ *Records*, supra note 37. Telegram from Roberts to Dubois, February 7, 1891.

¹⁰⁹ Ibid. James W. Reid, a Lewiston attorney and important Idaho politician, to Attorney General, November 5, 1890; John Hailey, Territorial Delegate to 51st Congress, to Attorney General, November 3, 1890.



Downtown in Idaho's capital city of Boise, looking south on 8th Street, ca. 1895. (Idaho Historical Society)

name to the United States Senate in March of 1891. Beatty was commissioned as federal judge for the District of Idaho on March 7, 1891, and immediately began holding court, although his appointment had not yet been confirmed by the Senate. Dubois did all he could to prevent confirmation, including securing the aid of Senator Farwell of Illinois to object to the confirmation without giving a reason. This objection threw over the confirmation to the next legislative session, and Beatty worked as federal judge throughout the summer and fall of 1891 under constant and understandable stress. In November, 1891, he wrote the attorney general, "To perform onerous duties with an indefinite, but constant feeling of unrest is burdensome, and I have now been holding court here and in California, almost constantly since the 6th of April."¹¹⁰

By December of 1891, former Senator McConnell had endorsed Beatty, saying he thought there was no opposition to his appointment,¹¹¹ which perhaps indicates that his former opposition to Beatty had been primarily to keep peace with Dubois, or for unknown reasons of political expediency. The Senate finally confirmed Beatty in February of 1892.

¹¹⁰ Ibid. Beatty to Attorney General, November 18, 1891.

¹¹¹ Ibid. McConnell to Attorney General, December 1, 1891.

BEATTY'S TENURE AS DISTRICT COURT JUDGE

Dubois has sugar-coated much of history in his published recollections, yet an analysis of Beatty's decisions while on the federal bench bears out Dubois' assessment that Beatty served with honor and credit, and deservedly had the respect of the people.¹¹² Beatty's conscientious decisions on various fundamental subjects provide insight into the economic and social development of Idaho and the American West.¹¹³

On April 6, 1891 in Boise, Judge Beatty opened both the District Court and Circuit Court of the United States for the District of Idaho.¹¹⁴ Both court sessions began with proclamations from President Harrison which were read into the record, declaring his "special trust and confidence in the Wisdom, Uprightness and Learning of James H. Beatty of Idaho." The record reflects that Beatty was appointed only until the end of the next session of the U.S. Senate, presumably because he had not yet been confirmed.

The first lawyer to be admitted to practice before each of the new courts was John R. McBride, a prominent lawyer who himself, twenty-five years before, had sat on the territorial supreme court.¹¹⁵ The first business of each new court was to allow the withdrawal of demurrers and to give three days for an answer to be filed in the new jurisdiction.

THE TRANSITION FROM THE TERRITORIAL ERA

In the first session of the circuit court, Beatty sat with Circuit Judge Lorenzo Sawyer. Immediately arose the problem of the actual physical transfer of the original files and records from the territorial courts to the federal courts.¹¹⁶ Particularly troublesome were entries in journals, minute books, judgment books, and

¹¹² Dubois, *The Making of a State*, supra note 25 at 191.

¹¹³ The jurisdiction and the records of the district court and the circuit court were kept strictly separate, but in the following discussion the decisions have been together insofar as they provide insight into legal problems of the era.

¹¹⁴ For the first year the terms of the circuit and district courts were held in Boise. By 1892, the District of Idaho had been divided into three districts. Court sessions were then held in Moscow, Boise, and Pocatello to reduce the inconvenience of travel across the vast state. Occasionally, special sessions were held elsewhere, as when northern Idaho's labor troubles necessitated a special session in Coeur d'Alene.

¹¹⁵ See supra note 16.

¹¹⁶ *Burke v. Bunker Hill & Sullivan Mining & Concentrating Co.*, 46 F. 644 [C.C.D.Id. 1891].

such¹¹⁷ which "would, doubtless, contain entries, indiscriminately, in both classes of cases —those that go to the state, and those that go to the national courts." These would "involve a practical difficulty, if not impossibility," as "[o]bviously, both courts could not have the custody of these parts of the records." Judges Beatty and Sawyer concluded that since the majority of the territorial cases would go to the state courts, the state courts ought to keep the books and records, and that duly authenticated copies of the original territorial files and record could be used in the federal court. The court further noted that it had no power to compel the state court to transmit the records.¹¹⁸

IMMIGRATION

Many immigration cases came before the district court. Appearing in the minute books are seemingly perfunctory naturalizations of Englishmen, Canadians, Scots, Irishmen, Germans, and other Europeans. The law made it less easy for the Chinese, although Judge Beatty himself seemed eager to enforce the laws so as to permit the Chinese to remain in this country. One judgment book names only Chinese defendants, and contains judgments declaring the Chinese to be lawful residents despite their failure to register as provided in the Chinese Exclusion Act of May 5, 1892. The judgments divide into three groups: cases decided in 1895-96, in 1898, and in 1903-04. Within each time group the judgments are nearly identically worded. In 1895-96 the formula ran:

It clearly appearing [from the evidence which has been heard] to the satisfaction of the Court that by reason of unavoidable cause to wit: impassable roads and inaccessibility, the defendant was unable to procure a Certificate of Registration as provided in the Chinese Exclusion Act of May 5th, 1892, as amended November 3rd, 1893.

It is hereby ordered, That a Certificate of Residence be granted _____, a Chinese laborer, lawfully in the United States, described as follows [...]

The description of the individual included name, age, residence,

¹¹⁷ The records of the territorial courts, and of the early federal courts well into the twentieth century, were handwritten in cursive script in hefty, leatherbound, two-foot-by-one-foot volumes, which can now be found in the National Archives, and which, if nothing else, are evidence of the formidable finger and arm muscles of the court clerks of years past.

¹¹⁸ *Burke v. Bunker Hill*, 46 F. at 649-50. This decision was affirmed by Beatty a few days later in *Back v. Sierra Nevada Consolidated Mining Co.*, 46 F. 673 [C.C.D.Id. 1891].

height, eye color, complexion, and identifying marks. The eye color and complexion were usually described merely as "dark." The residence was nearly always within Idaho County, near where gold was originally discovered in Idaho, reflecting the large number of Chinese miners.

By 1898 the formula excuse had been shortened to "unavoidable cause." By 1903 the rule had changed so that if the Chinese was here by the time of the passage of the Chinese Exclusion Act "he was at that time lawfully entitled to remain."

In 1904 a few cases appear reciting more individualized findings of fact. Judge Beatty wrote out an opinion on April 6, 1905¹¹⁹ reversing a decision of a commissioner who had ordered Wey Ling deported. Mr. Ling had come into the country at San Francisco as a merchant and had failed, and had since been working in Boise. If it could have been shown that Mr. Ling had become a laborer he could have been deported, for only Chinese working as merchants were allowed to stay. Judge Beatty placed the burden of proof on the United States and decided in favor of the Chinese, stating that a condition, once established, is presumed to continue until it is shown to have changed.

Judge Beatty further pointed out that the purpose of the Chinese Exclusion Act was to deport laborers. "A chinaman here doing nothing cannot endanger the interests the law is designed to protect." Judge Beatty thus demonstrated that he had progressed beyond the anti-Chinese sentiment which marred Idaho history well into the 1880s. One of Idaho's last territorial governors had advocated the total exclusion of the Chinese from Idaho because of their alleged "filthy habits," and Idaho had recently seen anti-Chinese violence.¹²⁰ Judge Beatty's fairness enabled him to contribute in his own way to the cultural diversity of the state of Idaho.

CRIMES

Many crimes came before Judge Beatty as he sat on the federal district court bench. A survey of the Criminal Register of the Southern Division for 1892-1906, the years covering most of Judge Beatty's tenure on the court, reveals a wide spectrum of criminal actions: post office offenses such as posting unmailable matter, robbing mail pouches, and embezzling money orders and stamps; larceny; murder; smuggling; possessing and manufacturing opium; receiving cigars from the factory without a stamp; counterfeiting; having carnal knowledge with a female under sixteen years of age;

¹¹⁹ *United States v. Wey Ling*, unpublished opinion, District Court, April 6, 1905 [Opinion Book 1891-1911].

¹²⁰ Limbaugh, *Rocky Mountain Carpetbaggers*, *supra* note 1 at 177-78.

selling liquor without a license; inciting Indians to break laws and/or to create disturbance; purchasing Indian cattle; and returning to an Indian reservation after being removed by a federal agent.

By far the most widespread crime, judging from the district court records, was selling liquor to Indians. Several opinions reflect Beatty's decidedly low opinion of liquor traffickers, "a vampire class, totally reckless of the Indians' Welfare, of law and of society."¹²¹

INDIANS

Beatty's attitude toward the Indians was sympathetic while somewhat paternalistic. He held the Nez Perces in high esteem, describing them as a "subjected and dependent people" but "far above the average Indian in intelligence, and many of whom have had long Christian training and who know the evils of the liquor traffic upon their race." In contradiction to this, he also referred to them as "untutored savage[s]."¹²²

In *Robinson v. Caldwell*,¹²³ Judge Beatty felt constrained to allow a white settler to remain on a parcel in the middle of the Nez Perce reservation because the settler's predecessor in interest, William Craig,¹²⁴ had validly settled the land. In the course of the decision Beatty revealed his attitudes about Indians and their treatment at the hands of whites:

It is unnecessary to now indulge in any reflections upon the systems of ethics which governed the Christian world in the acquisition of this country. Our aggressions upon the rights of the native race may continue to be, as they have been, a subject for pathetic song and for the casuist's pen, but not one for the present consideration. It has long been settled that the Indians had no title to this continent which we felt bound to consider during the process of its acquisition. When the Christian princes of Europe commissioned their subjects upon voyages of discovery, it was not doubted that all lands found by them in the possession only of the heathen could lawfully be taken by the discoverer, and from then until now the Indian heritage has been transferred from one government to another, and to

¹²¹ *United States v. Schissler*, unpublished opinion, District Court, May 26, 1905 (Opinion Book, n.d.).

¹²² *Ibid.*

¹²³ *Robinson v. Caldwell*, 59 F. 653 [C.C.D. Id. 1894].

¹²⁴ Hawley dubbed Craig "the first real settler in Idaho." Craig married a woman who was one-half Nez Perce, and settled in Lapwai in 1840. Hawley, *History of Idaho, Gem of the Mountains*, *supra* note 21 at i: 99.

their subjects, in total disregard of any claim or title thereto by the natives... The only right ever conceded to the Indian was that of occupancy, which has generally proven to be the merest shadow of a right when it became inconvenient to the dominant race.¹²⁵

Judge Beatty ended the decision allowing white settlement:

The court appreciates the baneful results that may follow this conclusion. It leaves a tract of land within the reservation subject to the occupation of white men, which is contrary to the wise policy of the government of excluding them as far as possible. Gladly would the court aid the Indian department in such exclusions, for there is nothing in the management of the Indians which results in so much annoyance as the residence among them of the whites, and especially of the lawless and abandoned: but, being convinced that the government, by its laws, authorized this settlement, and afterwards ratified it, my convictions are followed, regardless of consequences. The matter being important, I presume and hope it will be reviewed by a higher court.¹²⁶

The matter was in fact reviewed and affirmed on appeal.¹²⁷

Beatty's sympathy for the Indians and dislike of both official and unofficial treatment of them by whites showed a few years later as well, when a railroad sought to restrain settlers from cutting timber on land which it claimed as its own.¹²⁸ The opinion traced the ownership of the land, which was granted to the railroad by the government, then set apart by the government as part of the Coeur d'Alene Indian reservation, then ceded back to the government by the Indians for restoration to the public domain. In the course of the decision, Beatty stated,

Examination of the facts in this case recalls how a most pacific and intelligent tribe of Indians, who had long manifested their friendship for the white race, were greatly neglected, and their appeals to congress for an adjustment of their claims and the security of their homes from intrusion were overlooked, while the interests of more warlike and savage tribes were promptly settled.¹²⁹

¹²⁵ *Robinson v. Caldwell*, 59 F. at 654.

¹²⁶ *Ibid.* at 660.

¹²⁷ *Robinson v. Caldwell*, 67 F. 391 [9th Cir. 1895].

¹²⁸ *Northern Pacific Railway Co. v. Dudley*, 85 F. 82 [C.C.D. Id. 1897].

¹²⁹ *Ibid.* at 84.

He asserted that Indian title of occupancy "has always been unceremoniously brushed aside when in conflict with the government's interest," and demonstrated his commitment to respecting their desire for a homeland. "[D]ue regard for [the Indians'] welfare, as well as the dictates of humanity, would suggest that some place within the country they had long claimed and occupied should be selected as their permanent home."¹³⁰

In 1907 Judge Beatty found in favor of Pocatello Tom and other Indians living in the Fort Hall Indian Reservation, who were joined by the United States government in seeking to prevent subsequent upstream settlers from taking water the Indians needed for irrigation.¹³¹ The judge remarked, "I feel it especially a duty to encourage and induce the Indians into the walks of civilization by fully protecting them in all their rights."

Judge Beatty's writings reveal a moral and probably Christian basis for his concern and sympathy for Indians, and a disgust at what other white Christians had done to the Indians. He reflects the better educated thought of the time, which respected the position of the Indians on their native lands and rejected the "only good Injun's a dead Injun" mentality often associated with the white settler. Thus again Beatty showed himself as a contributor to the civilized thought of his time, ahead of many of his contemporaries, and a constructive influence on the transition from old prejudices to new tolerance.

MORMONS

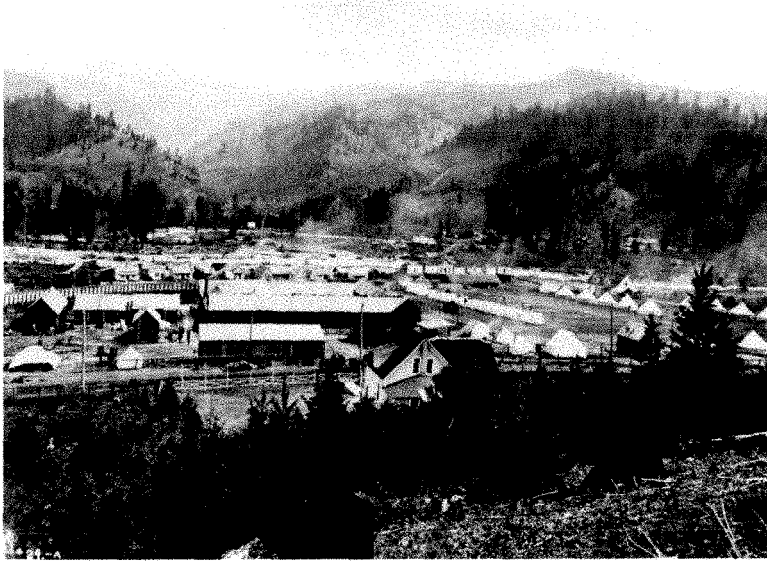
In view of Beatty's acceptance of the diversity of the Indians and the Chinese, his intolerance of Mormons seems out of character, although lamentably in keeping with the attitudes of his time. As a Presbyterian and a jurist he was appalled by the lawlessness and, to him, moral atrocity of polygamy; perhaps as a politician he was worried by the potential political strength of a Mormon voting block.

LABOR RELATIONS

Judge Beatty's courtroom was also the stage for a few of the many dramatic scenes in the Coeur d'Alene labor disputes. In 1892 he was required to call a special term of court in Coeur d'Alene to deal with criminal and civil litigation arising out of the violent

¹³⁰ Ibid. at 85.

¹³¹ *United States and Pocatello Tom, et al. v. Daniels*, unpublished opinion, Circuit Court, April 1907 (day missing) (Opinion Book 1903-1908). Again Beatty was able to implement the prior appropriation doctrine of water use.



Bird's-eye view of a "bull pen" for incarcerated miners, 1892.
(Barnard-Stockbridge Collection, University of Idaho Library)

labor turbulence.¹³² The situation in the Coeur d'Alenes was so volatile that martial law was imposed and hundreds of men were confined in "bull pens." Judge Beatty was called upon to enjoin the miners' union from entering or interfering with the mines or using force, threat, or intimidation to prevent employees from working in the Coeur d'Alene Consolidated and Mining Company.¹³³ The matter was in federal court under its diversity jurisdiction. After much argument and evidence, Beatty decided the case for the mine owner, and exercised his equitable power to enjoin the workers.¹³⁴

While he expressed sympathy for both sides, he had clearly accepted the company's viewpoint. He duly recited its doomsday predictions:

The unrestrained execution of the designs [of the union], which it would seem from the record in this case the defendants entertain, would result unfortunately. Carried to their logical conclusion, the owner of property would lose its control and management. It would be worked by such laborers,

¹³² Hawley, *History of Idaho, Gem of the Mountains*, supra note 21 at i: 246.

¹³³ *Coeur d'Alene Consolidated & Mining Co. v. Miners' Union of Wardner*, 51 F. 260 [C.C.D.Id. 1892].

¹³⁴ The underlying action was common law criminal conspiracy. *Ibid.* at 264-65.

during such hours, at such wages, and under such regulations, as the laborers themselves might direct. Under such rule, its possession would become onerous. Enterprises employing labor would cease, and, instead of activity and plenty, idleness and want would follow.¹³⁵

Judge Beatty continued in what might seem to be language in favor of labor unions:

The association of laboring men into organizations for social enjoyment, mental improvement, for the protection of their interests, and the amelioration of their conditions, is not condemned, either by the people or the law. On the contrary, it is their right so to do, and they have the sympathy of all classes in their efforts to advance their interest by lawful means. No one will view with envy their lawfully acquired success, their comfortable homes and congenial surroundings, all attainable through industry, sobriety, and reasonable economy.¹³⁶

Beatty's stated desire that the worker improve his lot reflects no perception of the inherent weakness of the workers' bargaining position, and the importance of concerted activity to achieving their goals. Underlying Beatty's words is the message: "Better yourselves if you can, but do not challenge the capitalist economy."

Judge Beatty was not blind to the accelerating violence and adamancy on both sides,¹³⁷ and was ahead of many contemporaries in recognizing the compatibility of interests between labor and management:

Unfortunately, combinations of labor are met by associations of employers, each trying to baffle what it deems the aggressions of the other. It is to be regretted these opposing forces have in late years gone so far in their efforts for supremacy that they now operate upon the principle that their interests are antagonistic.¹³⁸

He carefully did not take a position on the wage dispute which precipitated the labor trouble, but dealt only with the issue before

¹³⁵ Ibid. at 263.

¹³⁶ Ibid.

¹³⁷ On the very day Beatty was issuing the injunction in Boise, July 11, 1892, mine workers and the mine owner's agents were waging "pitched battle" in Wallace at the Frisco Mill. Six men died and the mill was blown up. MacLane, *A Sagebrush Lawyer*, supra note 34 at 131.

¹³⁸ *Coeur d'Alene Consolidated & Mining Co. v. Miners' Union of Wardner*, 51 F. at 264-65.



Helena-Frisco Mill after an explosion, 1892. (Barnard-Stockbridge Collection, University of Idaho Library)

him which he defined as "whether the defendants, in attempting to maintain their position, are likely to employ unlawful means..."¹³⁹

Before he could grant the injunction requested by the company, Judge Beatty needed to rule on the union's argument that the company itself had acted in such bad faith that it was not entitled to an equitable decision in its favor: "he who asks equity must not by his pleadings or acts attempt to mislead either the court or his opponent."¹⁴⁰ According to the union, when the company had closed its mines in January, thereby putting laborers out of work in the middle of a freezing northern winter, the company had alleged

¹³⁹ Ibid. at 264.

¹⁴⁰ Ibid.

that the reason was to secure an adjustment of the railroad freight rates. By the time the company appeared before Beatty it had changed its story and was alleging that it had been compelled to shut down the mine "because the defendants interfered with the working thereof." The union alleged that the real object was to reduce wages and to bust the union, which the union argued amounted to bad faith. Judge Beatty refused to so find, and issued the injunction.

Also on July 11, 1892, Judge Beatty sentenced nine men to six months in the Ada County jail for criminal contempt in violating a restraining order issued two months earlier ordering the members of the miners' union to desist from interfering with the mining company's laborers.¹⁴¹ Judge Beatty scolded the defendants, telling them they had done their cause more harm than good, opining,

the people are always in sympathy with those who labor for their bread so long as you are right and will aid you...I know there are many human parasites who will cling to you and absorb your substance and rob you of your earnings of honest wit[,] who will encourage you to lawless acts, and others from selfish motives will wink at and condone the wrongs you may commit, but among such you will not find your true friends.

In September of 1892, he held criminal conspiracy trials against labor agitators, including George Pettibone, who would later be included as a defendant with Big Bill Haywood and Harry Orchard in the famous trial for the murder of Frank Steunenberg.¹⁴² The trial resulted in convictions which were later overturned for insufficient allegations in indictment,¹⁴³ but which fueled the anti-government rhetoric of the labor movement.

It has been charged that Beatty was tied to management at the mines because a wealthy mining investor worked hard for Beatty's appointment to the circuit court as well as for Claggett's election to the U.S. Senate.¹⁴⁴ The sources available leave it unclear whether

¹⁴¹ *United States v. Pat Day, Thomas O'Brien, et al.*, unpublished opinion, Circuit Court, July 11, 1892 (Opinion Book 1891-1904). The opinion, as recorded, is a transcript of an oral opinion issued from the bench. According to MacLane, the Supreme Court's decision in *Pettibone v. United States* cast such doubt upon this finding of contempt that upon motion Judge Beatty threw out these convictions as well. MacLane, *A Sagebrush Lawyer*, *supra* note 34 at 132. See *infra* note 143.

¹⁴² *United States v. Peter Breen, et al.*, no written opinion, District Court [See, Minute Book 1892-1900].

¹⁴³ *Pettibone v. United States*, 148 U.S. 197 (1893).

¹⁴⁴ Richard H. Peterson, "Simeon Gannett Reed and the Bunker Hill and Sullivan: The Frustrations of a Mining Investor," *Idaho Yesterdays* 23 (Fall 1979) 7. See also, Stanley Steward Phipps, "The Coeur d'Alenes Miners' Unions in the Post Bullpen Era, 1900 to 1915: the Socialist Party and I.W.W. Connections" [Unpublished M.A. thesis, University of Idaho, 1980] 3.

the investor wanted these men in office because they were biased in his favor, or because they were aware of problems concerning northern Idaho, which included the need for a judiciary competent in mining matters.

Even if they had no improper ties to particular businesses, federal judges of late-nineteenth and early-twentieth century America were legendary for their support of management against labor.¹⁴⁵ This was natural since the judges were appointed by and from the ranks of those in power, who at the time were the capitalist industrialists. The very real violence and the potential economic power of workers, many of whom were foreign-born (Irish, in Idaho), threatened the judges and their world as well as the owners and their pocketbooks. Judge Beatty appears to have been no exception, although he may have had more sympathy for the workers' situation than others of his class and position.

COMMERCIAL AND GENERAL BUSINESS

The mundane commercial cases which accompany a thriving, if erratic, economy filled the circuit court docket. Judge Beatty heard many mortgage and lien foreclosure cases, as well as cases involving sureties on official bonds, insurance, partition actions, and enforcement of contracts. He wrote opinions on a few public law cases, including one upholding a county's right to tax timber separately from land despite a challenge from the mighty Potlatch Lumber Company;¹⁴⁶ one upholding the constitutionality of a statute requiring land owners to pay for sewers;¹⁴⁷ another upholding the right of Idaho state officials to prevent the entry of sheep into Idaho from Utah and Nevada in order to prevent an infectious sheep disease from becoming epidemic within Idaho;¹⁴⁸ and a few tax challenges. Then, as now, the usefulness of the court in resolving certain commercial disputes was questionable. Observed Beatty, "It often happens as it does in this case, that the questions found by Counsel for discussion far exceed in number the pecuniary value of the interest involved."¹⁴⁹

¹⁴⁵ In order to combat the effects of this bias, reflected even in the opinions of the reasonably-enlightened Judge Beatty, Congress passed the Norris-La Guardia Act in 1932 which forbade federal judges from issuing injunctions against labor except in certain limited circumstances.

¹⁴⁶ *Potlatch Lumber Co. v. James Langdon*, unpublished opinion, Circuit Court, June 19, 1905 [Opinion Book 1903-1908]. Langdon was the Latah County assessor.

¹⁴⁷ *Wilson v. Boise City*, unpublished opinion, Circuit Court, March 21, 1901 [Opinion Book 1891-1904].

¹⁴⁸ *Smith v. Lowe City*, unpublished opinion, Circuit Court, October 24, 1901 [Opinion Book, 1891-1904].

¹⁴⁹ *Miller v. Fox*, unpublished opinion, Circuit Court, undated [circa 1905] [Opinion Book 1903-1908].



A Northern-Pacific train at the Idaho-Montana Divide, 1890.
(Barnard-Stockbridge Collection, University of Idaho Library)

Judge Beatty's decisions expose the conflicts caused by "progress" as economic and technological development swept through the virgin West. In one case, two railroads claimed the same right of way through public land in Wallace, Idaho.¹⁵⁰ In another, two people sought incompatible uses for the Spokane River.¹⁵¹ In still another, a telegraph company clashed with a railroad over whether the telegraph company could obtain through eminent domain the right to erect its telegraph line along the railroad right-of-way.¹⁵² Judge Beatty set the tone for the analysis by first addressing the public benefit which would result from the erection of the telegraph line:

The result contemplated would give two telegraph lines, instead of one, with such possible competition as would give

¹⁵⁰ *Washington & Idaho Railway Co. v. Coeur d'Alene Railway & Navigating Co.*, 52 F. 765 [C.C.D.Id. 1892].

¹⁵¹ *Spokane Mill Co. v. Post*, 50 F. 429 [C.C.D.Id. 1892]. Judge Beatty stressed the importance of compromise in carrying out industrial uses so that others could use the waterway as well. He further noted that first pioneers could not lock up and control the natural resources or thoroughfares simply because they were first to arrive.

¹⁵² *Postal Telegraph Cable Co. v. Oregon Short Line Railway Co.*, 104 F. 623 [C.C.D. Id. 1900]. The matter was in federal court apparently under diversity jurisdiction.

to all the choice of service, and possibly a better service at lower rates.¹⁵³

Beatty allowed the condemnation of the small strip of land required for the telegraph lines. He cited the Idaho statute extending to telegraph companies the right of eminent domain "provided the use to which it proposes to devote what it acquires is more necessary or would better subserve the public interest than the use to which the property is now devoted."¹⁵⁴

Judge Beatty then articulated the standard test that active use of land is better than passive or inactive use, reiterating the American point of view that the highest use of land is the most economically productive use of the land:

It cannot for a moment be doubted that the use to which plaintiff proposes to put that portion of defendant's right of way would be of greater public utility than that for which it is now used. Practically, it is not now used for any purpose. It is simply so much idle property and the new use promises to be one of public utility.¹⁵⁵

During the last decades of the nineteenth century, public domain law was particularly liberal in the West, and a broad statement of what constituted public use was written into the Idaho constitution. Beatty's decision was within the tradition of his era, which has been called the "heyday of expropriation as an instrument of public policy designed to subsidize private enterprise."¹⁵⁶

NATURAL RESOURCES

The nineteenth-century attitude favoring business interests over "aesthetic niceties" or what we would now term environmental concerns is today lamented by ecologists and longed for by industrialists. In 1906 Judge Beatty was forced to deal with just this problem as he confronted the effects of the mining industry on downriver agrarian enterprises. Plaintiffs in *McCarthy v. Bunker*

¹⁵³ Ibid. at 624.

¹⁵⁴ Ibid. at 625.

¹⁵⁵ Ibid.

¹⁵⁶ Harry N. Scheiber, "Property Law, Expropriation, and Resource Allocation by Government, 1789-1910," in Lawrence M. Friedman and Harry N. Scheiber, eds., *American Law and the Constitutional Order: Historical Perspectives* (Cambridge, MA, 1978) 137-38.

*Hill v Sullivan Mining v Coal Co.*¹⁵⁷ owned low flat lands along the Coeur d'Alene River, and charged that lead and other poisons from the Bunker Hill mining operations had "rendered impure the water" which, when it overflowed, poisoned and destroyed vegetation, grass, hay, and domestic and wild animal life. Also, charged the plaintiffs, mining deposits had filled the river channel so that "its banks rise but little above the stream at low water" and any slight rise caused it to overflow "so that places once navigable for large boats cannot now be navigated by even small boats..." Beatty reasoned that,

...Admitting the allegations of the complaint as true, the conclusion would follow that these defendants, by their mining operations, are making the valleys below them a besom of waste; that the Coeur d'Alene river, beautiful in name and by nature, is being obliterated, and that soon its polluted waters must flow unvexed by prow or rudder.¹⁵⁸

Beatty made a personal examination of the premises. His conclusion was that the allegations were exaggerated. Experts were paraded before him, and a predictable battle ensued. A steamboat captain said the river was as deep as it had been in 1884. Some chemists and medical experts said stock were dying from the water; others said they were not, and that dogs in Wallace and Wardner drank the very same water with impunity, "and both stock and dogs, instead of dying by its use, thrive upon it."¹⁵⁹

Judge Beatty decided not to issue the restraining order or, 1,400 pages of testimony later, a permanent injunction. He was angered by the unjustified, "wild assertions" of the complaint, remarking on the duty of counsel to avoid either intentional or negligent deception of the court. He also found another "potent reason" not to issue a restraining order. The cost of an injunction to the Coeur d'Alene region would be greater than the cost of damage to the plaintiffs' interests:

[S]uch an order would mean the closing of every mill and mine, of every shop, store, or place of business, in the Coeur d'Alenes. There are there about 12,000 people, the majority of whom are laboring people, dependent upon the mines for their livelihood. Not only would their present occupation cease, but all these people must remove to other places, for the mines constitute the sole means of occupation, and when they finally close, Wallace and Wardner, Gem and Burke, and their

¹⁵⁷ *McCarthy v. Bunker Hill v Sullivan Mining v Coal Co.*, 147 F. 981 (C.C.D. Id. 1906).

¹⁵⁸ *Ibid.* at 982.

¹⁵⁹ *Ibid.* at 983.

surrounding mountains will again become the abode only of silence and the wild fauna. Any court must hesitate to so act as to bring such results.¹⁶⁰

On the other hand, Beatty specifically declined to agree with the contention that a first comer has the right to monopolize use of the waterway.¹⁶¹

[Defendants'] mining operations must be so conducted as to protect as far as possible the rights and properties of others. They have not, however, ruthlessly destroyed complainants' property, but have attempted to protect it by building the dams and reservoirs to impound the tailings.¹⁶²

Judge Beatty's choice of remedy followed a middle course. Although he refused to grant an injunction, he stated that if the parties could establish harm he would award damages. Thus Judge Beatty displayed a willingness to exercise his equitable jurisdiction in a flexible manner to allow the economy to keep running while not allowing the downstream residents to go uncompensated.

Perhaps the ultimate "civilizing" process occurs when humans trained to believe in exclusive property rights seek to impose the surveyor's straight line onto nature's curves and swells. It became



Bunker Hill and Sullivan North Mill, Kellogg, Idaho, ca. 1890.
(Barnard-Stockbridge Collection, University of Idaho Library)

¹⁶⁰ *Ibid.* at 983-84.

¹⁶¹ This was in accord with Beatty's position in *Spokane Mill Co. v. Post*, see *supra* note 151.

¹⁶² *McCarthy v. Bunker Hill & Sullivan*, 147 F. at 984.

Judge Beatty's task to determine who owned rights to the rivers that splashed downhill, or to the veins of ore that lay contorted under the mountains.

Water disputes, mining claims, and timber cutting cases continued to cross Judge Beatty's desk throughout his years in the federal court. His obituaries stated that he was remembered best for his mining decisions. He published in the *Federal Reporter* three of these detailed, factually-oriented opinions regarding the boundaries of the Emma, the Tyler, the Stenwinder, the Skookum, and the Last Chance claims. No less than nine opinions in the books, including both Beatty's circuit court decisions and Ninth Circuit appeals, seek to resolve the contest between the Bunker Hill & Sullivan Mining & Concentrating Co. and the Empire State-Idaho Mining & Developing Co. for ownership of the multimillion-dollar claims in the Coeur d'Alenes.

Judge Beatty's natural resource decisions were rendered with an eye to establishing order and assuring maximum economic development.

BEATTY'S LIFE AFTER RETIREMENT

In March of 1907, at the age of seventy-one, after seventeen years on the federal bench, James Beatty resigned from the federal judiciary. He and his wife toured the world, sending back letters to the Boise *Evening Capitol News* which were ultimately published in book form.¹⁶³ They lived briefly in Coeur d'Alene, Idaho, then eventually continued the westward movement of their lives, settling in Hollywood, California in the 1920s. It is hard to imagine an elderly, teetotaling jurist from Idaho living amid the raucous glamour of Hollywood in its heyday, but it was there Beatty spent the last years of his life. He died at the age of ninety-one of pericarditis and was buried in the Hollywood Cemetery not far from Rudolph Valentino.

In endorsing him for federal office, the Burlington, Iowa *Hawk-Eye* described Beatty, who had lived in Burlington as a law student, as a "typical ambitious young American: He went west and evidently has been 'growing up with the country,'..."¹⁶⁴ A review of his career indicates that while he grew up with the country, the country also grew up with him. As a legal and political leader in a state which entered the union in 1890, toward the end of the frontier, he helped shape the young West. His decisions helped guide Westerners as they matured and faced the responsibilities, regulations and encroachments of "civilization."

¹⁶³ James H. Beatty, *Letters of James H. Beatty While Traveling Around the World During 1907-08* [Coeur d'Alene, 1911].

¹⁶⁴ Burlington, Iowa *Hawk-Eye*, February 10, 1889.

FRONTIER JUSTICE: THE COURT RECORDS OF WASHINGTON TERRITORY, 1853 – 1889

BY DAVID W. HASTINGS

The settlement and development of the West is one of the most interesting periods in United States history. What is now the state of Washington was a part of what was originally called the "Oregon Country." The earliest settlements were Hudson's Bay Company trading posts, established to exploit the fur trade with the Indians. American traders, trappers, and missionaries began arriving in the area as early as the mid-1830s, and within ten years settlers began to arrive in significant numbers. A potential conflict with Great Britain over the sovereignty of the region was settled by the Oregon Boundary Treaty in 1846, which established the northern border of U.S. possessions at the 49th parallel.

In 1852 the Americans living north of the Columbia River petitioned Congress for the establishment of a new territory, to include the land west of the Rocky Mountains, north of the Columbia, and south of the Canadian border. The Organic Act of 1853 which created the Washington Territory provided for the elements of territorial government, including an executive branch, legislative branch, and a judicial system. Judicial power was vested in the Washington territorial supreme court, three district courts, and probate and justice courts of limited jurisdiction.

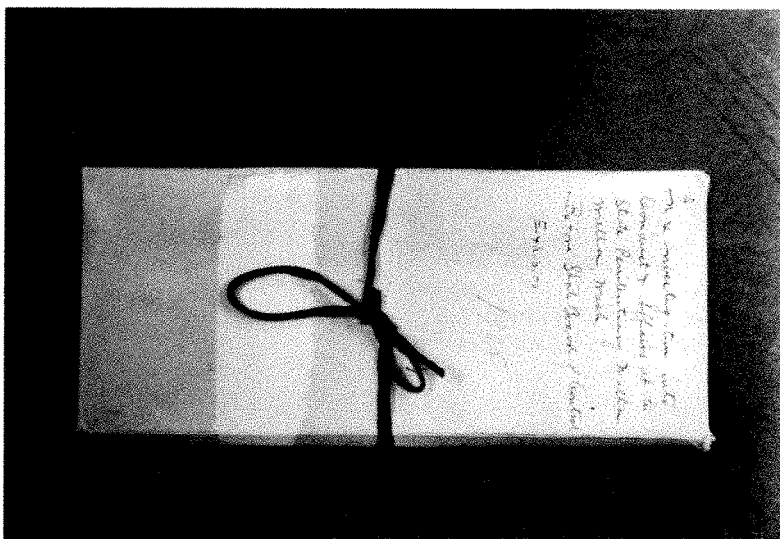
The territory was divided into three judicial districts, with a judge appointed by the president of the United States for each one. Together, the three judges also comprised the territorial supreme court. This meant, of course, that the justices of the territorial supreme court were ruling on appeals from their own district courts, a situation which was not corrected until 1886.

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The district court judges each had several counties within their districts. They would hold court for several weeks at each county courthouse, hear the cases which were pending, and then would move on to the next county. The district courts had original jurisdiction in all cases arising under U.S. law and the laws of Washington Territory. In addition, they heard cases in chancery and admiralty, and appeals from the probate and justice courts.

In 1886 a fourth district was added to the territory to meet the needs of the rapidly growing population. The fourth judge also joined the territorial supreme court, which allowed the district court judge of record to be excluded from appeals from his own court. When Washington became a state in 1889, superior courts were established in each county which took over the district court's jurisdiction in all cases except those involving federal law. The state superior courts inherited the district court files, which came under the care of the county clerks. Folded in thirds and tied with red tape,* the territorial district court case files remained in the courthouse vaults or were moved to the basements or attics of the courthouses as vault space for more current records was needed.

*"Government Red Tape": documents were folded in thirds, and all of the documents pertaining to a particular case were bundled together and tied with narrow red cotton ribbon — government red tape. Quick access to the papers was gained by "cutting through the red tape."



Archival court documents folded in thirds and bound by "government red tape." (Washington State Archives)

Thus the files languished for over one hundred years, gathering dust and becoming yellow and brittle with age. A 1977-78 survey of all of the historical records in Washington discovered the old files. In most cases they seemed fairly intact, but there was significant physical deterioration due to poor storage conditions. In all cases they were dusty, but some of them had also suffered water damage or smoke damage, and in at least two cases mice had nested in them. Due to their age, physical condition, and high research potential, the files were earmarked by the survey as the first priority for further work.

Subsequently, in 1983, the Washington State Archives submitted a proposal to the National Historical Publications and Records Commission (NHPRC) requesting grant funds to catalogue, index, microfilm, and accession the files into proper storage facilities. The preservation of the files was the immediate concern, but making them available for research was also important. At the time, research into the files was virtually impossible. They were stored in thirty-three different courthouses and there was no central index or even good local indexes. Consequently a researcher seeking a particular case would have to know the county in which the case was heard and the date, and then would be faced with rummaging through hundreds of folded, dirty packets until, if lucky, the case was found. Any sort of overview of cases was impossible. Even historians have limited time and patience, so it was rare for anyone to study the files.

With an NHPRC grant of \$110,500 the project got underway in early 1984. Candace Lein-Hayes, fresh from Western Washington University's Archival Administration Program, was hired as the project administrator and a crew of helpers was brought on to process the more than 37,000 files.

The first step was to gain the cooperation of the county clerks who had custody of the files. Some of the clerks personally identified with the files, and there was a question whether they were federal, state, or county records, but eventually the project was allowed access and most of the files were transferred to the regional branches of the State Archives. The files were cleaned and microfilmed, then each file was read for the names of the people involved, the nature of the case, date, and disposition. Since all of the files were hand-written and there was no set way of filing the information, this process rapidly became tedious. Once the data on the files was gathered it was entered into a computer system, and print-outs were generated, including abstracts of the cases, a name index, and a subject index. The project was finally completed in January of 1987.

The Frontier Justice collection includes many interesting cases and some surprising finds, such as the Confederate money someone tried to pass in Walla Walla in 1873. Murder cases were

found to be relatively rare; only 257 cases were tried during the thirty-six year period. Contrary to the popular image of the West, it was actually a crime in Washington to "exhibit a dangerous weapon." Less than half of the criminal cases could be categorized under the heading of "substance abuse," including sales of liquor to the Indians and opium use by Chinese. The courts dealt most frequently with civil disputes, and it becomes clear that the typical frontiersman was not standing on Main Street poised for a shoot-out or riding in a posse chasing rustlers (or being chased). More likely, he was in court suing his neighbors. Rustling, gunfights, and stagecoach robbery did take place, but unfortunately for the romantic image of the West, there were far fewer such cases than popular histories and Western movies would have us believe. Life, for the majority, was difficult and not very exciting. This, too, is reflected in the case files, as one sees the agony of families who had moved west for a better life, only to lose everything they had in foreclosure procedures and law suits.



Judge Edward Lander, the first chief justice of the Washington Territory.
{Washington State Archives}



Washington Territory's first governor, Isaac I. Stevens.
(Washington State Archives)

A close study of the statistics generated by the Frontier Justice project and the case files themselves reveals a much clearer picture of daily life on the frontier than has ever been available. Also revealed is how the judicial system worked and evolved over time. As might be expected, the files offer a tremendous amount of information about legal procedures, attitudes towards the law, and how and why the courts were used. Some of the cases might also be considered precedent-setting. The most famous resulted from Washington's first territorial governor Isaac I. Stevens' declaration of martial law in the face of an Indian uprising. The territory's chief justice, Edward Lander, defied the governor's proclamation and declared it void. When Stevens went ahead with arrests of individuals suspected of aiding the Indians, Lander ordered the



Arthur A. Denny, a founder of the city of Seattle, was among many whose names appear frequently in Frontier Justice court records. (Washington State Archives)

Many citizens resented the judicial system imposed on the territory. Since Washington was not a sovereign state it was assumed that the citizenry was not mature enough to select its own judges. Consequently, judges were appointed by the president of the United States. There are few recorded complaints concerning the judges, most of whom were from the East and were unfamiliar with conditions and circumstances in the territory. The patronage system by which judges were selected was suspect since it was not known if they were appointed because of their qualifications or because they had aided the political party in power. The most important issue was that the citizens of the territory had no voice in the selection of those who judged them. It was this irritation, along with similar objections to territorial status, which popularized the fight for statehood for Washington.

The Frontier Justice guide has been available for almost two years. To date, the largest user group has been genealogists with ancestors who lived in Washington Territory. With over 100,000 names in the index, they are almost sure to find some mention of their relatives, at least the "black sheep." For the advanced family historian the files can contain a wealth of information. Of particular note are the probate files, which often itemize every pot, pan, book, and horse owned by the deceased. This type of information shows how people lived, insofar as their life-styles are reflected by the material goods they accumulated.

A few historians have also discovered Frontier Justice, although the news of how it has opened up the territorial court files seems to be rather slow in reaching them. One researcher spent several weeks with the files, tracking an early-day confidence man through fraud cases, land speculation schemes, phony mining claims, and cases of failing to pay on promissory notes. Through the case files, the researcher has been able to plot the man's movements in Washington. Through the details provided in the depositions and other filings, it has been possible to build up a fairly complete picture of the con man's character, such as it was.

In addition to families, criminals, and "low-lives" who can be studied through these files, many of the most reputable and well-respected citizens of the territory also appear. The founders of the city of Seattle, for instance, were repeatedly in court, as they sued one another in sorting out their land claims. Arthur A. Denny, who led the party that first settled Seattle, was one of the most respected men in the territory; he appeared in court ninety-four times as a plaintiff or defendant. If one were to study the cases in which he and the other founders of Seattle appeared, a rich body of information would emerge to tell of the settlement of the city and the characters of the people who established it.

The files contain many interesting and sometimes amusing cases, but of greater value is how the whole body of information details life on the frontier. Admittedly, the frontiersmen did not spend all of their time in the courtroom (although it was usually the best entertainment in town). As people sought land, there was a parallel increase in legal disputes, documenting Washington's settlement patterns. Details of daily life show up in many small ways throughout the files. For instance, periods of economic depression and recession can be traced through a study of the frequency of foreclosure proceedings. A criminal case testimony might touch on modes of transportation, patterns of social life and economic issues, and might mention articles and objects in current use. In a similar manner, a civil case might talk about attitudes toward property and, in passing, illuminate the economic concerns of the time.

The pioneer period in Washington was a time of rough justice, speculation, and frontier bravado, but in most respects the concerns of the people and their reasons for going to court differ little from today. The need for a peaceful means of settling disputes and lawful ways to deal with criminals was something the settlers brought with them to the West. Good courts to resolve issues were regarded as essential to a civilized existence, and the early courts of Washington were well used. The records of those early court cases contain information on the concerns of the people of the time, the morals of society, the progress of settlement, the rise and fall of economic and social trends, and, of course, the nature and scope of criminal activity.

The records of Washington's territorial district courts are now open to study, and it is expected that as the news reaches more historians these files will become a major source for research. The Frontier Justice publication consists of a brief history of the court system, graphs showing the incidence of various categories of civil and criminal proceedings, an index to the names appearing in each case, and an abstract of each of the over 37,000 cases. The case files themselves are on 500 reels of microfilm and are not included in the basic publication, but copies may be purchased separately from the Washington State Archives.

FRONTIER JUSTICE, 1853 - 1889: GUIDE TO THE COURT RECORDS OF WASHINGTON TERRITORY. 2 volumes. Abstracts of each of the more than 37,000 cases heard in the civil, criminal, and probate divisions of the Washington Territorial District Courts, 1853-1889. Includes an 1100-page index to all proper names in the cases, and a history of the court. The abstracts are on two reels of 16mm microfilm packaged together with the hard-copy index and history in an archival document case. \$50.00.

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THE KNOW NOTHING JUSTICES ON THE CALIFORNIA SUPREME COURT

BY GERALD F. UELMEN

The "Know Nothing" party was a political movement rooted in bigotry and racism. Committed to the proposition that "Americans must rule America," the party advocated opposition to all political candidates who were not native-born citizens, or who practiced the Roman Catholic religion. The party originated as a secret society, whose members were instructed to respond, "I know nothing," when questioned about their membership.

In 1855, candidates of the "Know Nothing" party accomplished a clean sweep of California state elections, including governor, attorney general, two of the three justices on the state supreme court, and a majority of both houses of the state legislature. This phenomenal success followed closely on the heels of a sweep of local elections in the state's largest cities of San Francisco, Sacramento, and Marysville. A year later, the party virtually disappeared from the political terrain. Those who were in leadership positions drifted into the new Republican party, or back into the Democratic fold. By and large, the Know Nothings were a "do nothing" party. Little of consequence emerged from the state legislature, and Know Nothing Governor John Neely Johnson "could no more control the hybrid legislature than could a child."¹ The Know Nothing justices elected to the state supreme court, however, remained in office as long as four years after. Many others

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¹ Hubert Howe Bancroft, *The Works of Hubert Howe Bancroft* (San Francisco, 1888) xxiii:700. The comparison of Neely to a child was particularly apt as he was twenty-seven years old when he was elected governor.

who were prominent leaders or candidates of the party later found places on the high court.² Since the issues coming before the court during this era frequently involved the rights of aliens, minorities, and the interests of the Catholic Church in mission lands, the Know Nothing legacy may have left its most lasting imprint on early decisions of the California Supreme Court. This article will attempt to assess that impact.

ORIGINS OF THE KNOW NOTHING PARTY

The "Know Nothing" label was a commonly used synonym for the Native American party, which first appeared on the American political scene in the 1830s. The swelling tide of immigration brought thousands of Irish to eastern seaport cities. A million and a half immigrants arrived in America in the decade of 1840-50, and nearly fifty percent of them were Irish. Another 2.7 million immigrants arrived in the decade of 1850-60, when the entire population of the United States was less than thirty million.³ Hostility to the immigrants and their Catholic religion erupted in many of America's largest cities. In Boston, lurid newspaper stories inspired a mob to attack and burn a girls' boarding school operated by Ursuline nuns in Charlestown. Anti-Irish riots were a common occurrence in New York, Philadelphia, and even in Baltimore, where many of the earliest settlers were Catholic.

Occasionally, political rallies fermented full scale warfare. In Philadelphia in 1844, a Native American rally in an Irish section of the city was attacked by local ruffians. The retaliation soon escalated to include the burning of Catholic churches. Martial law was proclaimed, and armed conflicts continued for weeks, with a death toll of more than twenty persons. The climax was a siege of a church by a mob equipped with cannons.

The Native American party first made an impressive electoral showing in the elections of 1844. They elected four congressmen in New York, two in Pennsylvania, and sent nine legislators to Pennsylvania's assembly. The party did not nominate a presidential

² Know Nothing Attorney General William T. Wallace served on the court from 1869 to 1879, including seven years as chief justice. Lorenzo Sawyer, narrowly defeated for the Know Nothing nomination in 1855, received the Republican "Union" nomination in 1863 and served six years on the court, including two years as chief justice. Defeated for reelection, he was then appointed a federal circuit judge. Know Nothing Governor John Neely Johnson later served on the Supreme Court of Nevada.

³ Richard B. Morris, *Encyclopedia of American History, Bicentennial Edition* (New York, 1953) 649, 653.

candidate, but was closely allied with Whig efforts to elect Henry Clay. Clay lost to Democratic dark-horse James Polk, who was solidly supported by the slaveholding South and immigrant workers in northern cities.

From 1844 to 1854, interest in the Native American party declined, as the nation became preoccupied with the Mexican War, political compromises over the extension of slavery into the territories, and westward migration inspired by the gold rush. The structure of the party remained intact, however, through an organization known as the "Order of United Americans," later supplanted by the "Order of the Star Spangled Banner." The Order closely paralleled the organization of a fraternal lodge, with a secret ritual of admission and various "passwords." The "sign of recognition" was to grasp the right lapel of one's coat with the right hand, the forefinger extended inward. The "cry of distress" to be used to assemble the brethren in time of danger, was "oh, oh, oh," to be greeted with a response of "hio, hio, hio." Membership was restricted to native-born Americans, and prohibited to Roman Catholics. All members were required to take an oath promising never to vote for anyone "unless he be an American-born citizen, in favor of Americans ruling America, nor if he be a Roman Catholic."⁴ Those who qualified for a higher order, deemed competent to hold office in the society, took an oath that, when elected or appointed to any political office, they would "remove all foreigners, aliens or Roman Catholics from office or place, and that you will in no case appoint such to any office or place in your gift."⁵ By the close of 1854, the Order was thriving in every state and territory with a membership of at least one and one-half million.

Politically, the Order first operated with greater discipline than an ordinary political party. A secret council of the Order selected candidates from the traditional parties for endorsement, and the membership of the Order voted *en masse* for the selected candidates. Frequently, the selections were not revealed to the members until shortly before the election. As the Order began selecting candidates for state and national office, it took on more of the trappings of traditional political parties. In June of 1855, the national council abandoned the requirement of secrecy, permitting local chapters to hold open meetings and publicly acknowledge their membership.

By 1854, the decline of the Whig party reached its nadir. The Republican party was organized to consolidate the abolitionist elements. The chief beneficiaries, however, were the Know

⁴ Peyton Hurt, "The Rise and Fall of the 'Know-Nothings' in California," *California Historical Society Quarterly* 9 (1930) 22.

⁵ *Ibid.*

Nothings. Electing dozens of state legislators and a bevy of congressmen, the Order was perceived as an important new political force to be reckoned with on the national scene. When Congress convened in December of 1855, the Know Nothings actually held the balance of power with their forty seats straddling one hundred five Republicans and seventy-four Democrats.

The Order made the transformation to a political party complete when it held a presidential nominating convention in Philadelphia in 1856. Calling themselves the "American Party," the Know Nothings nominated Millard Fillmore for the presidency. Fillmore had been elected vice president as a Whig in 1848 and served out Zachary Taylor's term as president after Taylor's sudden death. The party platform declared, "Americans must rule America; and to this end, native-born citizens should be selected for all state, federal or municipal offices of government, in preference to naturalized citizens."

The national platform also called for a requirement of twenty-one years of continued residence to qualify for naturalization as a citizen.

To summarize, the phenomenal success of the Know Nothing party on a national basis can be attributed to the concurrence of three factors: (1) the vacuum created by the disintegration of the Whig party, which left many searching for a new political home; (2) the massive increase in immigration following European political unrest in 1848 and the Irish potato famine of the 1840s, which engendered fear and resentment among American workers; and (3) the organization of the party along the lines of a fraternal lodge, which was socially appealing.

THE KNOW NOTHINGS IN CALIFORNIA

All of the factors which contributed to the national rise of the Know Nothings were present in California. The Whig party virtually disbanded, not even holding a convention in 1855. The tide of the Irish immigration engulfed San Francisco and the gold fields, as many immigrants headed for California as soon as they disembarked on the East Coast. In the face of this, the initiation into a secret lodge that didn't charge dues was an attractive social inducement for many forty-niners. In addition, the Know Nothings offered an attractive alternative to the widespread corruption of California office holders. The Order presented itself as a reform movement in the municipal elections in 1854, achieving widespread success.

While the rituals of the national organization were maintained, some of the basic principles which gave birth to the party on the East Coast were jettisoned on the West Coast. Most notable was

the purge of anti-Catholic sentiment. The oath of admission for the national Order included the pledge "that you will not vote, nor give your influence for any man for any office in the gift of the people, unless he be an American born citizen, in favor of Americans ruling America, nor if he be a Roman Catholic..." The last seven words were eliminated from the oath utilized in California.⁶ The California state convention of the party went a step further in 1855, and adopted a platform endorsing "universal religious toleration." Despite these formal concessions, few if any Catholics were nominated by the California Know Nothings. In the 1854 municipal elections in San Francisco, a last-minute change in the party slate unceremoniously dumped Lucien Hermann as the Know Nothing candidate for mayor. The only reason offered for replacing him was the revelation that he was Roman Catholic.

The basic nativist tenets were honored, however. The 1855 state platform included the proposition that "eligibility to office, both in the states and the nation, should be restricted to persons born on some part of the territory included within the jurisdiction of the United States."

The leadership of the California Know Nothing party was drawn both from the remnants of the Whig party and from disaffected Democrats unhappy with a badly-split party. The Democratic party was divided between pro-slavery Southern elements, led by Senator William Gwin, and anti-slavery "Tammany" types, led by William Broderick.

The Know Nothing nominee for governor, John Neely Johnson, had been a prominent Whig, presiding over the state Whig convention in 1854. The nominee for attorney general, William T. Wallace, had been a candidate for the Democratic nomination for a congressional seat in 1854.

THE NOMINATION OF JUSTICE HUGH C. MURRAY

The state constitution of 1849 provided for three justices to sit on the California Supreme Court. While their terms were to be six years in duration, there was a frequent turnover of justices in the early years. In 1855, the term of sitting Justice Hugh C. Murray was to expire, so a new full six-year term was open. The death of Justice Alexander Wells created a second vacancy. Until an election could be held, Democratic Governor John Bigler appointed Charles Bryan to serve the remainder of Wells' term.

While Murray wanted to remain on the court, there was little likelihood he would be renominated by the Democrats. His reputa-

⁶ Ibid. at 121.

tion for profligate drunkenness was notorious, and he had made a number of enemies since his election as a Democrat in 1852. When the state Democratic convention met in June of 1855, Murray's name was not even placed in nomination. Myron Norton was given the Democratic nomination for the six-year term. Charles Bryan was nominated for the vacancy to which he had been appointed. Thus, Justice Hugh C. Murray became an active candidate for the Know Nothing nomination.

Murray's record on the court offered much to commend itself to the Know Nothings. He was a self proclaimed bigot. His opinion in *People v. Hall*⁷ stands high among the greatest embarrassments in the *California Reports*. Ruling that a statutory provision that "No Black or Mulatto person, or Indian, shall be allowed to give evidence in favor of, or against a white man," applied to Chinese witnesses, Murray offered three reasons:

1. Everyone who is not white is black, therefore Chinese are Black.
2. American Indians are descended from the Mongolian race, therefore Chinese are Indians.
3. Sound public policy required that white citizens be protected from the "corrupting influences of degraded castes."

He concluded with the following *argumentum ad horrendum*:

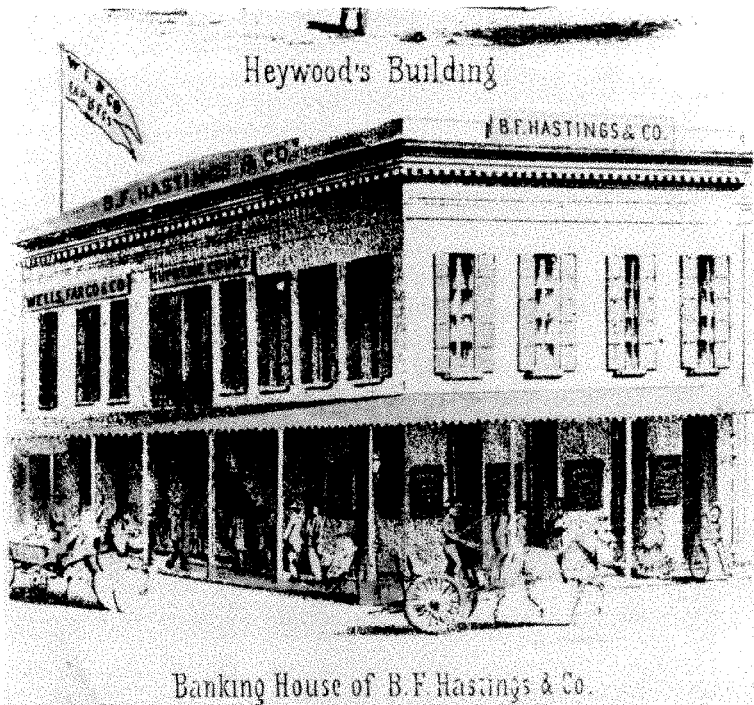
The same rule which would admit them to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls.

This is not a speculation which exists in the excited and over-heated imagination of the patriot and statesman, but it is an actual and present danger.

The anomalous spectacle of a distinct people, living in our community, recognizing no laws of this State, except through necessity, bringing with them their prejudices and national feuds, in which they indulge in open violation of law; whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference, is now presented, and for them is claimed, not only the right to swear away the life of a citizen, but the further privilege of participating with us in administering the affairs of our Government.⁸

⁷ *People v. Hall*, 4 Cal. 399 [1854].

⁸ *Ibid.* at 404-05.



The Banking House of B.F. Hastings & Co., San Francisco, early home of the California Supreme Court. (California State Library)

In July of 1855, prior to the nominating convention of the Know Nothings scheduled for August, the case of *People v. Reyes et Valencia*⁹ came before the California Supreme Court. The defendants, both Mexican citizens and both apparently Catholic, were charged with a criminal assault in Calaveras County. When a prospective juror was sworn for *voir dire*, defense counsel propounded the following questions:

1. Are you a member of a secret and mysterious order known as, and called, Know Nothings, which has imposed on you an oath or obligation, beside which, an oath administered to you in a court of justice, if in conflict with that oath or obligation, would be by you disregarded?
2. Are you a member of any secret association, political or otherwise, by your oaths or obligations to which, any prejudice exists in your mind against Catholic foreigners?

⁹ *People v. Reyes et Valencia*, 5 Cal. 347 (1855).

3. Do you belong to any secret political society known as, and called by the people at large in the United States, Know Nothings? And if so, are you bound by an oath, or other obligation, not to give a prisoner of foreign birth, in a court of justice, a fair and impartial trial?

4. Have you at any time taken an oath, or other obligation, of such a character, that it has caused a prejudice in your mind against foreigners?

5. Are you under any obligation not to extend the same rights, privileges, protection, and support to men of foreign birth, as to native born American citizens?

6. Have you any prejudice whatever against foreigners?

All of the questions were disallowed by the trial judge. Justice Charles Bryan wrote an opinion reversing that ruling. Noting the relevance of the questions to ascertaining potential bias, Bryan stressed the significance of the Know Nothing oath:

If the person called had not taken an obligation which would prejudice him against foreigners in such a manner as to imperil their rights in a court of law, he could say so, and the question and answer would be harmless. If, upon the other hand, he had taken oaths, and was under obligations which influenced his mind and feelings in such a manner as to deny to a foreigner an impartial trial, he is grossly unfit to sit as a juror, and such facts should be known.¹⁰

Although Murray was at that very moment actively campaigning for the Know Nothing nomination, he did not disqualify himself in the case. Although he joined in Bryan's ruling, he crafted a carefully ambiguous concurring opinion:

I am of opinion that some of the questions were pertinent, and should have been asked; because, if the juror had answered in the affirmative, he would have shown that he was incompetent. Other questions were improper. On the whole, the judgment should be reversed.¹¹

Murray's nomination by the Know Nothings faced other obstacles. A state temperance convention dispersed in June without naming any candidates, resolving to endorse candidates of other parties who were "sober men." The Democratic convention adopted a resolution that, "in the opinion of this convention, the time has come when sober men, and sober men only, should be

¹⁰ Ibid. at 350.

¹¹ Ibid. at 351.

presented for the suffrages of moral and intelligent freemen."¹² When the Know Nothing convention convened, it resolved, by a vote of 185 to 62, "that this convention approve of the temperance reform now going on throughout the state, and that we will nominate none for office but men of high moral character and known habits of temperance."¹³

Despite this resolution, Hugh C. Murray received the Know Nothing nomination for the full term vacancy on the California Supreme Court on the first ballot. Apparently a great deal of traditional political logrolling and back room maneuvering preceded Murray's nomination. The nomination engendered more criticism than any other emerging from the Know Nothing convention. The *Union*, strongly pro-Know Nothing in sentiment, commented on "the very strongest electioneering" done to secure Murray's nomination:

We confess to have been sadly disappointed. In our experience in political conventions, we have never known one subjected to a greater extent to those arts and influences relied upon by trading politicians to accomplish their ends. Results were apparently controlled by combinations, formed outside the convention, and founded upon anything else than the good of the state or of the Order."¹⁴

The Democratic *Alta California* chimed in:

The nomination of Hugh C. Murray, to the Supreme Court, for the term of six years, is the one that excites the most attention. No ticket can bear such a load. The people of San Francisco who know him best, will not vote for him under any possible contingency.¹⁵

Included in the attention excited by Murray's nomination was a reconvening of the temperance convention, which promptly adopted the following resolution offered by E.B. Crocker:¹⁶

That this convention has met for the purpose of nominating new and independent candidates for the supreme court of the state, and we invite all moral, religious, and temperate men who are in favor of such nominations to co-operate with us,

¹² Winfield J. Davis, *History of Political Conventions in California, 1849-1892* (Sacramento, 1893) 41.

¹³ *Ibid.* at 43.

¹⁴ *Union*, August 11, 1855.

¹⁵ *Alta California*, August 9, 1855.

¹⁶ Crocker himself served briefly on the California Supreme Court in 1864.

and take such further action as may be proper. That the orders of Sons of Temperance and Templars are hereby relieved from all responsibility for the action of this convention, as it is a meeting of citizens opposed to the present nominees for the supreme court.¹⁷

Under the name of the "People's Party of California," the temperance activists nominated Charles H.S. Williams for Murray's seat on the court.

THE NOMINATION OF DAVID S. TERRY

The appearance of David S. Terry as a Know Nothing nominee for the California Supreme Court can only be explained as political opportunism. His pro-slavery sentiments were widely known, and his alliance with the Gwin "chivalry" faction of the Democratic party was firm. In 1853, Terry bolted the Democratic party to oppose the election of Governor Bigler, who was allied with the Broderick faction. Terry rejoined the party in 1854, but bolted again when the Broderick faction reasserted its dominance.

Terry had established a solid reputation as an attorney in Stockton, but had already exhibited the penchant for violence that later made him a California legend.¹⁸ He had been fined for contempt for drawing his Bowie knife and stabbing a witness in court, and prosecuted for physically attacking a newspaper editor who refused to retract an article Terry deemed defamatory. His penchant for dueling probably motivated the following resolution by the temperance convention of those opposed to "present nominees" for the state supreme court: "As a cardinal principle of our organization, that we shall oppose the election of all duelists to office."¹⁹

Terry was nominated for the short term vacancy on the court on the second ballot at the Know Nothing convention, defeating Lorenzo Sawyer, R. N. Wood, G. N. Mott, D. O. Shattuck, and John Currey.²⁰ At the time of his nomination, Terry was thirty-two years old. His "runningmate," Hugh C. Murray, was thirty years old.

¹⁷ Davis, *History of Political Conventions in California*, supra note 12 at 47-48.

¹⁸ While on the court, Terry was imprisoned, tried, and convicted by the San Francisco Vigilantes for stabbing one of their members, and responsible for the death of U.S. Senator William Broderick in a duel. Terry himself was killed in 1888 by a bodyguard assigned to U.S. Supreme Court Justice Stephen Field, while attempting to assault Field in a Lathrop railway station. See, A. Russell Buchanan, *David S. Terry of California, Dueling Judge* (San Marino, 1956).

¹⁹ Davis, *History of Political Conventions in California*, supra note 12 at 49.

²⁰ Both Sawyer and Currey were subsequently elected to the state supreme court as Republicans. Shattuck served as a superior court judge in San Francisco.



*
California Supreme Court Justice David S. Terry, ca. 1850. (Photograph Collection, California State Library)

THE KNOW NOTHING COURT

In the general election, the entire slate of Know Nothing nominees swept the state. The ticket generally outpolled the Democratic nominees by 3,000 to 5,000 votes. Johnson defeated incumbent Governor Bigler by a vote of 50,948 to 45,937. Terry defeated Justice Charles Bryan by a vote of 49,677 to 46,734. The weakest showing of all Know Nothing candidates was posted by Justice Hugh C. Murray, who narrowly defeated Myron Norton 48,141 to 47,734.

Hugh C. Murray sat on the California Supreme Court as chief justice for another two years after his election as a Know Nothing. He died in September of 1857, from causes attributed to acute alcoholism. Terry served for four years, resigning immediately after his duel with Senator Broderick. From 1857 to 1859, Terry presided as chief justice. The third seat was occupied by Justice Solomon Heydenfeldt. Heydenfeldt was a Democrat and the first Jew to serve on the court. Heydenfeldt was succeeded by Peter Burnett, a Democrat who also served as the first governor of California. Burnett was a Roman Catholic. Upon Murray's death, Stephen J. Field, a Democrat, was named to the court. Field was later appointed to the U.S. Supreme Court by President Abraham Lincoln. Despite wide differences in political and religious persuasion, there was little division in the decisions emanating from the state supreme bench. Two exceptions are worth noting: the right of aliens to inherit land, and the validity of Sunday closing laws.

RIGHTS OF ALIENS TO INHERIT LAND

The right of aliens to acquire title to California land by inheritance first came before the state supreme court in two cases decided immediately after the 1855 election, but before Terry replaced Bryan. In *People v. Folsom*,²¹ Chief Justice Murray delivered a confusing opinion stating that title to California land held by a Mexican citizen who died before the transfer of California from Mexico to the United States, vested in his alien mother, and could not be taken by the United States government. He intimated that under "natural law" anyone may inherit who is not expressly prohibited. In *People v. Gerke*,²² Justice Heydenfeldt upheld the right of citizens of Prussia to inherit California land pursuant to provisions of a treaty between Prussia and the United States extending mutual protection to citizens of each to inherit the land in the other's territory. Murray noted that he did not participate in *Gerke*, hence did not concur or dissent in its conclusion.

The question was again presented a year later in *Siemssen v. Bofer*.²³ There, non-resident aliens who claimed San Francisco land by inheritance brought an action in ejectment. They were protected by the same kind of treaty provisions presented in *Gerke*. Joined by Justice Terry, Chief Justice Murray ruled that they could not maintain an action in ejectment. Noting "great doubts" as to the correctness of *Gerke*, he argued that the treaty making power

²¹ *People v. Folsom*, 5 Cal. 379 (1855).

²² *People v. Gerke*, 5 Cal. 381 (1855).

²³ *Siemssen v. Bofer*, 6 Cal. 250 (1856).

could not impinge on matters which belong to state sovereignty. Resorting to his favorite device of *argumentum ad horrendum*, Murray asserted,

...under the cover of a resort to the treaty-making power, every outrage and injustice which illiberality can conceive, or fanaticism execute, may be perpetrated. By a treaty with England, her free black citizens may be introduced into South Carolina and other slave States of the Union, contrary to the police regulations of those States. The Asiatic, and the convicts of the penal colonies of the South Pacific, may be introduced into California on the same footing as the intelligent and virtuous population of the more favored portions of Europe; and every branch of trade, agriculture, commerce and manufactures, may be prostrated at the feet of this unconstitutional mastodon. Nay, more; by a treaty of amity and friendship with the Emperor Soulouque, of Hayti, every slave in the Southern States may be emancipated, and turned loose upon their present masters.²⁴

The most startling assertion in Murray's opinion, however, was that inheritance by aliens was forbidden by the California constitution. The constitution provided that "Foreigners who are or may hereafter become bona fide residents of this State shall enjoy the same rights, in respect to the possession, enjoyment and inheritance of property, as native born citizens."²⁵ Murray interpreted this affirmative protection to negate any general right of inheritance for aliens. Murray's conclusions about the treaty power were later disapproved in *Forbes v. Scannell*,²⁶ in an opinion by Justice Baldwin. His interpretation of Article I, Sec. 17 of the state constitution was rejected in *People v. Rogers*,²⁷ where the court upheld a legislative enactment granting aliens a limited right of inheritance against a claim such a right violated the constitutional provision.

CLOSING LAWS

The second issue that engendered some division on the court involved the validity of Sunday "closing laws." In *Ex Parte Newman*,²⁸ the court heard an appeal by a Jewish tailor who was

²⁴ Ibid. at 253.

²⁵ Calif. Const. of 1849, art. I, sec. 17.

²⁶ *Forbes v. Scannell*, 13 Cal. 243 (1859).

²⁷ *People v. Rogers*, 13 Cal. 160 (1859).

²⁸ *Ex Parte Newman*, 9 Cal. 502 (1858).

convicted of violating a prohibition of the sale of goods on Sunday, entitled "An Act to provide for the better observance of the Sabbath." The petitioner was represented by Solomon Heydenfeldt, who had left the bench the previous year. All three justices wrote extensive opinions in the case. Terry, by then chief justice, ruled the law was unconstitutional because it granted preference to one religion over another. Noting that the one day of rest is a purely religious idea, "whether it be the Friday of the Mohammedan, the Saturday of the Israelite, or the Sunday of the Christian," he insisted that religious liberty encompass complete separation between Church and State "and a perfect equality without distinction between all religious sects."²⁹ Justice Burnett concurred, but on the ground that the law established "a compulsory religious observance."³⁰ Justice Field dissented, asserting that the law was a civil regulation to promote health and welfare, and any religious motivation was immaterial. After Terry and Burnett left the California Supreme Court, *Newman* was overruled and Field's position was upheld in *Ex Parte Andrews*.³¹ It took another century to undo the hypocrisy of Sunday closing laws.

CATHOLIC RIGHTS TO MISSION LANDS

With respect to other issues involving minority rights or religious issues, the Know Nothing justices of the California Supreme Court spoke with one voice. In *Nobili v. Redman*,³² the court was presented with a claim by a Jesuit priest to title in the orchard lands surrounding the former mission of Santa Clara. Father Nobili was the founder of Santa Clara University, and the land in dispute is now part of Santa Clara's campus, but not with any help from the California Supreme Court. Rejecting the claim that mission lands were ceded to the Catholic Church by Mexican Governor Michaeltorena, Justice Heydenfeldt ruled that "the missions were political establishments, and in no manner connected with the church." Rather,

...the mission establishments arose directly from the action and authority of the government of the country; laws and regulations were made for them by its legislative authority, without referring to, or consulting, the authority of the Church; the lands settled by them were not conveyed to

²⁹ Ibid. at 507, 509.

³⁰ Ibid. at 513.

³¹ *Ex Parte Andrews*, 18 Cal. 679 (1861).

³² *Nobili v. Redman*, 6 Cal. 325 (1856).

any one, neither to priest nor neophyte, but remained the property of the governments; and there is not a word in all the decrees and acts of the government, which would even show that the church building, devoted to worship alone, ever became the property of the church corporate, until the decree of secularization of 1833.³³

Chief Justice Hugh C. Murray concurred in the opinion. The decision actually came six months after Father Nobili died of tetanus contracted by stepping on a nail. It required his successors to invest limited resources in buying out the claims of squatters who occupied the lands. As one of those successors put it, the founding fathers "would have done better financially had they never touched the ruins of Santa Clara."³⁴ The result could not be attributed to Know Nothing anti-Catholic bias, however, coming at the hand of Justice Heydenfeldt.

FUGITIVE SLAVES

The issue of fugitive slaves was an especially troublesome one, since many Southern emigrants to California brought slaves with them. The status of those slaves when their masters left California was a frequently-litigated question. The legislature, dominated by pro-slavery Southern sympathizers, enacted a Fugitive Slave Act in 1852, authorizing the arrest, restraint and return of fugitive slaves to their masters. The act was upheld in an opinion by Justice Hugh C. Murray in 1852.³⁵ Murray made no attempt to reconcile his conclusion with the provision in Art. I, Sec. 18 of the California constitution of 1849 that "Neither slavery nor involuntary servitude, unless for punishment of crime, shall ever be tolerated in this State." A concurring opinion by Justice Anderson suggested that Art. I, Sec. 18 had no effect in the absence of legislative action to enforce it. Murray's opinion purported to honor a legislative policy to eliminate a free negro population from California:

Although I have no doubt that the section of the act now under consideration, was originated for the purpose of securing the rights of the master, yet I am satisfied the desire to purge the State of this class of inhabitants, who, in the language of a distinguished jurist, are "festering sores upon

³³ Ibid. at 342-43.

³⁴ Gerald McKevitt, S.J., *The University of Santa Clara, A History 1851-1977* (Stanford, 1979) 35-36.

³⁵ *In Re Perkins*, 2 Cal. 424 (1852).

the body politic" entered largely into the consideration of the Legislature in passing this act.³⁶

The issue was back before the court, shortly after Murray's death, in January of 1858. In the interim, the U.S. Supreme Court had handed down the infamous *Dred Scott* decision on March 6, 1857, stating that a slave's residence in a free state did not make him a free man. In *Ex Parte Archy*,³⁷ however, a negro slave contended that his master had taken up permanent residence in California, and his freedom was directly mandated by Art. I, Sec. 18 of the state constitution. Archy's master had remained in California for over a year, farming and operating a private school. Archy escaped to avoid returning to Mississippi with his master, and was arrested and held in the Sacramento jail. His master brought a petition for *habeas corpus*, to order the return of his slave. The opinion was authored by Justice Peter Burnett, who adroitly ruled that Art. I, Sec. 18 was self-executing, and required the freedom of any slave whose master employs him in any business in California. Burnett ruled that slave holders who were merely visiting, however, could retain the ownership of slaves who are personal attendants. He found justification for the distinction in the desire to promote tourism in California:

But our position, climate, and productions, all naturally invite our fellow-citizens as visitors. When they come to visit us for health or pleasure, shall they be permitted to bring their domestic servants with them, to attend upon them or their families as waiters? The citizens of the free States can bring their confidential servants with them — why should not the citizens of the slave States be allowed the same privilege? It is true, the domestics in the one case are hired servants, while in the other they are slaves. But should this induce us to exclude the one and admit the other? Persons who live in the slave States, and long been accustomed to their own domestics, who constitute, in fact, a part of the family, very naturally desire, in making visits, to take these domestics with them, especially when they come as invalids seeking for health. It is our policy and duty not to clog the privilege of visiting us, with unnecessary restrictions. We look forward to the day when California will be frequented by visitors from all parts of the Union. We have every reason to expect it.³⁸

³⁶ Ibid. at 439.

³⁷ *Ex Parte Archy*, 9 Cal. 147 (1858).

³⁸ Ibid. at 168.

While this decision should have resulted in Archy's freedom, Burnett perceived some unfairness in applying his ruling retroactively:

From the views we have expressed, it would seem clear that the petitioner cannot sustain either the character of traveler or visitor. But there are circumstances connected with this particular case that may exempt him from the operation of the rules we have laid down. This is the first case that has occurred under the existing law; and from the opinion of Mr. Justice Anderson, and the silence of the Chief Justice, the petitioner had some reason to believe that the constitutional provision would have no immediate operation. This is the first case; and under these circumstances we are not disposed to rigidly enforce the rule for the first time. But in reference to all future cases, it is our purpose to enforce the rules laid down strictly, according to their true intent and spirit.³⁹

Justice David S. Terry concurred, with an opinion presaging the difficulty of applying Burnett's distinction. He concluded that Archy's master remained a "visitor," since his labor was necessary to support himself during a delay in his return.

The fury that greeted Chief Justice Taney's *Dred Scott* opinion in the North was fully matched by the California reaction to Burnett's opinion in *Archy*. Abolitionists and freed blacks in San Francisco organized a waterfront patrol to prevent Archy's return to Mississippi. They succeeded in rescuing him from a ship in the bay, and brought him before a U.S. commissioner in San Francisco. The commissioner ruled that Archy was a free man, triggering a celebration that one historian labeled "a turning point in the history of negroes in California."⁴⁰

CONCLUSION

The California Know Nothings, unlike their eastern compatriots, pledged religious toleration. That pledge appears to have been honored in decisions of the Know Nothing California Supreme Court regarding religious rights. The Know Nothing justices exhibited a more tolerant attitude than their Democratic brethren. With respect to the rights of aliens and minorities, however, the decisions of the Know Nothing court continued a

³⁹ Ibid. at 171.

⁴⁰ L. M. Evans, *A History of California Labor Legislation* (1910) 103. See, Robert F. Heizer and Alan F. Almquist, *The Other Californians* (Berkeley, 1971).

dismal record of repression. Yet, one cannot attribute this record entirely to the Know Nothing agenda. The participation of Justices Heydenfeldt and Burnett in these decisions confirms that the attitudes of the Know Nothing justices were shared by politicians of every stripe. The Know Nothing movement simply provided a convenient vehicle to advance the ambitions of two individuals whose impact on the law of California was mercifully short and soon extinguished. At worst, one can conclude that the Know Nothing justices fully shared in the judgment which Hubert Howe Bancroft expressed for the entire Know Nothing movement:

Why, these lawyers, judges, and fire-eating politicians were the scum of the state! They were thieves, gamblers, murderers, some of them living upon the proceeds of harlotry, and all of them having at heart the same consideration for the people than had the occupants of the state prison, where these ought to have been; yet they were no whit worse, and could not possibly be, than the politicians of today.⁴¹

At best, one can conclude that this sorry experience offers a lesson in how to go about the business of selecting justices to sit upon our highest courts. A system of party conventions and nominations and the frequent turnover of justices certainly ensured that judges reflected the passions of their times. The Know Nothing justices simply manifested the prevailing winds of public sentiment. Unfortunately, prevailing winds seldom offer much solace to the minorities and aliens who look to our courts for protection.

⁴¹ Bancroft, *The Works of Hubert Howe Bancroft*, supra note 1 at 700.

REFLECTIONS ON BECOMING A JUDGE

BY DOROTHY W. NELSON

Judge Dorothy W. Nelson (born 1928) was appointed to the United States Court of Appeals, Ninth Circuit, in 1979 by President Jimmy Carter. Prior to her appointment, Judge Nelson was dean of the law school at the University of Southern California and served on many regional and national advisory committees and boards dealing with the judiciary. She was interviewed for the Ninth Judicial Circuit Historical Society's oral history program by Los Angeles attorney Selma Moidel Smith on June 16 and 21, 1988 in Pasadena, California. The following excerpts are taken from these interviews.

S: When did you get the first intimations that you were being considered for a position on the federal bench?

N: Well it's a long story, beginning when I was getting my master's at USC and was in a seminar called Judicial Administration. The professor of that seminar was called away to Europe. He actually was vice president of the university. Because I was working on my master's and knew all the judges, and had become quite familiar with all the issues in judicial administration, I was asked to teach the last nine weeks of the course. The course had not been very interesting, to put it mildly, and because I had all the connections downtown I said, "We're going to leave the law school, and we're going to go downtown and start at the drunk tank, and we're going to move through the criminal justice system. One day a week is going to be a field trip. Everyone is going to do a paper with a judge on how to improve the system, either in the juvenile courts, the traffic courts, the probate courts, whatever they are, and then we are going to do the same with the civil justice system."

Justice Tom Clark was a dear, dear man, and he agreed to come and meet with my seminar the very last day when we had a brunch, to talk about the administration of justice from the perspective of a Supreme Court justice. As you undoubtedly recall, Justice Clark was responsible for many innovations — the National Center for State Courts, the Institute for Court Management — and was a real inspiration. At the end of that course the students marched in and said to the dean, "Hire her, hire her!," and, oddly enough, I was hired. I was the first woman member on the USC faculty. I maintained my



Judge Dorothy W. Nelson
U.S. Court of Appeals, Ninth Circuit
Appointed 1979

interest in judicial administration and always taught — no matter what else I taught, and I taught practically everything in the curriculum — my seminar in judicial administration.

There were few law faculty in the country with that interest and also few women. As advisory boards were established through the American Bar, the National Center for State Courts, and the Federal Judicial Center, I became a member of many of them and, as a result, came to know Griffin Bell quite well.

When Carter and President Ford were running against each other for the Presidency, I was at that point chairman of the board of directors of the American Judicature Society, my favorite society because it admits lay persons and its prime purpose, when it was organized in 1914, was to improve the selection of federal judges. And we asked Mr. Jimmy Carter and President Ford, "If elected, would you adopt a merit system for selecting federal judges?" Both replied that they would. Much to my surprise, shortly after President Carter was elected, his new attorney general, Griffin Bell, called me up and said, "All right, Dorothy, bring your people to Washington, and let's figure out how we all are going to do this." With some members of the American Judicature Society we met in Martha Mitchell's — the wife of the former attorney general — old dining room. I remember it well because it had red flocked wallpaper and red velvet roses in the center of the table. It was still so soon in the Carter administration that none of this had been changed. We plotted out a system for merit selection of federal judges during the Carter administration. President Carter indicated that he wanted special emphasis on the selection of women and members of minority groups. Little did I think that a couple of years later I would be approached by Mr. Sam Williams, calling and saying they wanted to submit my name for consideration and did I have any objection?

It took me a couple of weeks to think about this. Being the first woman dean of a major accredited school, I had been asked to serve on many boards of directors, including the Federal Reserve Board, Farmers Insurance, the Southern California Edison, and the like. I did this for two reasons: I learned a great deal by being on the boards and it was a good fund-raising source for the law school. My job as dean was to bring a good deal of money to the law school, and as a result of serving on those boards a good deal of money was brought to the law school. My income as dean had been heavily supplemented by membership on those boards; and with various members of my family being in school and in graduate school, it meant taking a decrease in salary. But it was my dear husband who said, "Look, you have been studying the judiciary from the outside all these years. Why don't you go on the inside and see if all of your theories are correct?" So it was really with his encouragement that I went on the bench.

The first intimation came with the phone call from Sam Williams, and then twenty-seven of us were proposed for investigation by the American Bar, by the FBI, by all of these various groups. I received questionnaire, upon questionnaire, upon questionnaire.

S: What kinds of questions were they asking you?

N: Well, some of them were basically improper, not by merit commissioners, but by peripheral groups. Some of them were, "How would you vote on such and such an issue?" — abortion, desegregation, on issues of this kind. Other questions came from minority groups, "What have you done for minorities lately?" Others from women's groups, "How do you feel about the women's movement?" Those from the FBI were just basically checkups, "Do you have an alcohol problem, do you have a drug problem? Tell us about your family. Have you ever been arrested?" From the American Bar Association more serious questions about my lack of a great deal of trial experience, and it was true I had some trial experience but I had been a law professor all of these years, and they wanted to know whether or not I felt that I could handle the job. So there were just far-ranging questions. Most of the questionnaires I filled out. Some questions I refused to answer.

Then it was narrowed down to seventeen of us, and we were interviewed by a group of lay persons and lawyers, the persons selected on the basis of our recommended plan. The first question I was asked during these interviews was, "You have been a law school dean and, after all, that just involves taking care of the students and the faculty. What makes you think you can be a federal judge?" Happily, on the interviewing committee was John Frank, who had been a law professor at Yale, was now a Phoenix lawyer, and who knew what law school deans had been through — everything from the Kent State Cambodia days to fund raising, to many, many constituencies such as students, faculty, school alumni, school supporters, the board of trustees, other universities, and community groups as well. And the law school faculty had changed. We had moved from a regional school to a major national school dealing with publications, dealing with all of these kinds of things. So he gave a little lecture to the committee on what law school deans really did and that, if anything, it would be retirement to go on the federal bench. After his kind words of encouragement all the other questions appeared to be quite friendly, and the list was narrowed down to six of us, five from Southern California, only one from Northern California, who were recommended to the president.

The fact that five were recommended from Southern California infuriated the Northern Californians. I understood that Senator Hayakawa was not too happy about the geographic distribution of the nominees. Because of this, my nomination was held up for a

period of seven months, along with the nominations of some of my other colleagues. And ultimately, when I went back for my Senate hearing with the Senate Judiciary Committee, Senator Cranston said to me, "Now Dorothy, Senator Hayakawa will probably just introduce you very formally and then I will give you proper introduction." Senator Hayakawa asked to meet with me before he was to introduce me. I was very familiar with his book called *The Meaning of Words*, which my mother had used in her classrooms for years, and I started off on this note. We had the most wonderful conversation, and when he introduced me to the Senate Judiciary Committee it really was if I were his daughter. He went through practically line by line of my resume; and Senator Cranston, in great amazement, looked at me and then stood up and said, "I really have nothing to add to what my colleague, Senator Hayakawa, said." But the very first question I was asked by a Democratically-dominated Senate Judiciary Committee — and I should add I have always been an independent, I have never belonged to a political party — was "What have you done for minorities lately?" And I gave what I felt was an adequate answer. And then I was before the committee for quite a long period of time, but I was followed by Terry Hatter, a black law professor who had headed the Western Center on Law and Poverty that we created at USC after the Watts riots. And when he sat down, he said to the Senate Judiciary Committee, "Before I answer your questions I want to amplify Dean Nelson's answer to the question that was posed, 'And what has she done for minorities lately?'" And I treasure his words to this day. It was a sweet and wonderful thing for him to do, but he described our affirmative action programs at the USC Law School, our Western Center on Law and Poverty, our National Senior Citizens Law Center, the Black Students' Law Association, the kinds of things that we had tried to develop, and then went on and said, "Now you may ask me any questions you want of me."

So the day that I was officially sworn in, Terry Hatter had his swearing-in ceremony, I gave him his oath of office for the district court and then my formal swearing-in was at USC, and then we had a joint reception together, and it was a lovely way to start out my career as a federal judge.

S: Referring now to decision-making itself, is it your view, as it is of certain others, that decisions should be innovative? Should they point the way, or should the decisions be more conservative, following what the precedent has been?

N: I guess you're talking about, "Should there be an activist court as opposed to a non-activist court?" Well, I'll take you back to my academic background. One of the courses I taught was Legal Process with some marvelous materials by Professors Hart and Sacks of the Harvard Law School. I taught this course for seven years, before I became a dean. One of the things that we talked

about in that course was that words have no single, plain meaning. And what that means to me is this: that one of the strengths of our system is *stare decisis*, our system of precedent, which gives stability to the law. Uniformity enables us to predict our lifestyles and how we should behave. But anyone who says to me that you can look at a case and say it can tell you exactly what's going to happen in all cases to follow, I think, to me, doesn't understand the legal process, for even in cases where you have precedent, where you have a statute, there is always room for interpretation. My bias is toward stability and toward giving words the common meaning, or the meaning based upon the internal social, economic, and legislative history and the external social, economic, and legislative history. But there comes a time when you have a case where some people will say, "It's very clear," and I say to myself, "Nothing is absolutely clear."

So I hope that no one can ever predict how I will vote on a given case. I will feel that I have been a successful judge if I am known to be a judge who looks at everything that is involved in a given case — the precedent, internal, external, legislative history, the social, the political, the economic history. I am not one who believes that you can determine how a case should go by looking to the intent of the original writers of the Constitution, those forty-four men who in those hot days in Philadelphia wrote what was originally a four-page document, leaving out the rights of women, leaving out the rights of minorities, and so forth. Until it was amended four years later, we didn't even have a bill of rights. I think it's a good starting point, but I think there were so many things put into the Constitution — equal protection under the law, the due process clauses, and the like — which showed the genius of the original framers of the Constitution, that there were certain open-ended questions where rights of persons would have to evolve over a period of time, depending upon the immaturity of our nation, depending on social, economic, political developments. So I think we ought to start with the original framers and look to the purpose of these various clauses. It is just those framers who left these open-ended clauses for us in the federal judiciary to interpret. I think it makes a great deal of difference if we interpreted certain clauses in a certain way over a long period of time. I think that lends a certain stability which should not be overturned unless we have very, very good reasons for overturning it.

S: What do you think are the most valuable attributes of a good judge?

N: That is a very interesting question and one which might take several hours to which to respond. But very quickly, I am more interested in the character of the person than I am in either academic achievements or worldly achievements, although both of those can be a good indication of character. But it is easier, it seems

to me, to teach an honest, trustworthy, compassionate, bright person to be a good judge than it is to train someone who happens to be very successful in the legal profession to be trustworthy, warm, and compassionate if those traits are not currently apparent. I think oftentimes when committees go out looking for people, they ask the wrong people; they ask the person's partner, "Is he a good lawyer?" and so forth, and "Is he all right as a person?" I would ask the persons who worked for the people, such as the secretaries; the people in the office can often give you a greater insight into judicial temperament, for instance, or the balance of the person, if there is a problem with self-starting and hard work, and so forth. Some of these are attributes that I think are very important in a judge, yet are not often measured in worldly terms.

BOOK REVIEW

A Guide to the San Diego Historical Society Public Records Collection by Richard W. Crawford. San Diego, CA: San Diego Historical Society, 1987; 86 pp., photographs, map, appendix, index; paperbound, \$9.95.

A Guide to the San Diego Historical Society Public Records Collection, prepared by Richard W. Crawford, is the result of a major archival project spanning close to five years and sustained by generous grants from Virginia McKenzie Smith and David McKenzie Smith [long-time patrons and supporters of the San Diego Historical Society]. The *Guide* includes descriptions of more than twelve hundred cubic feet of city, county, and federal documents — for most of which detailed finding aids have been prepared — as well as a short, insightful introductory essay and an appendix providing a chronological listing of San Diego public officials.

Crawford properly emphasizes the need for general local histories constructed from primary sources, such as the Society's holdings represent, to take the place of "anecdotal narrative and boosterism" (p.9). He also notes the collection's potential usefulness to legal historians and scholars interested in the history of crime and law enforcement; the judicial records alone comprise approximately two-thirds of the holdings. Records of the county court, court of sessions and district court, and the papers of coroners' inquests, provide excellent opportunity for research into the lives and legal concerns of individuals in San Diego County in the mid-to late-nineteenth century. Municipal and justice court records and those of the county sheriff and district attorney offer a rich lode of data concerning crime and punishment in later years [in some cases, such as the felony and misdemeanor records, up to the 1950s]. [The *Guide* similarly provides a variety of information and sources for researchers from many fields including genealogy, public administration, environmental resource management, and education.]

The identification, preservation, and arrangement of historically significant public records in California, as in many states, are the responsibilities and concerns of the state archivist. At the local level, where the authority of the state archivist is at times reduced to exhortation, this care and concern in preserving and arranging public records may not be as well developed or staffed. A recent pilot project [discussed in this issue] in the state of Washington, funded in part by the National Historic Publications and Records Commission, has placed a circuit-riding archivist in a several-county area in an attempt at a more coordinated and aggressive

approach to local records inventorying and preservation. Whether or not this admirable effort is successful, however, the principal burden for protecting and making accessible local public documents will likely remain with organizations like the San Diego Historical Society. The *Guide* sets a standard worthy of emulation.

Roland L. De Lorme
Western Washington University

A LETTER FROM JUDGE RICHARD H. CHAMBERS

Office of Richard H. Chambers
United States Court of Appeals
The James A. Walsh Courthouse
55 E. Broadway, Tucson, Arizona 85701

September 16, 1988

Honorable Abner J. Mikva
U.S. Circuit Judge
United States Court of Appeals
District of Columbia Circuit
Washington, D.C. 20001

Dear Judge Mikva:

I have your letter of September 8 and its questionnaire about long opinions, and I rejoice that someone your age is trying to do something about it. None my age (except me) seems to care about it other than to comment.

I think we should shorten the opinions and reduce the number published.

I would reduce by attrition the number of law clerks to two. That we have three is an historical accident. In the Nixon years when we needed more judges, the Congress gave us more law clerks. When Carter came along, Congress gave us the judges we had asked for, each with three law clerks.

My appointment occurred because of the retirement of Judge Clifton Mathews of Arizona. In my opinion, he was the greatest judge we ever had in our circuit and not just acerbic. He wrote all of his opinions out by hand. That kept them short. I followed that practice for over twenty years, because he was my idol. I confess that I slipped away from it when my administrative duties became crushing, and even today they are because I still oversee the new buildings and major remodelings in our vast territory.

But Mathews was more than a cynic. Before my appointment in 1954, increases in judicial salaries since 1789 were few. They had been far apart for the first 150 years.

There were eight ahead of me on our court and seven had been eligible to retire, but they were waiting for the next salary increase that never came. Seldom was there ever a time that there was not a bill before Congress to increase the salaries, most of which died in committees.

Immediately after I got to the court, Mathews took that in hand and devoted no more than fifteen minutes of his time to the retired

judge problem. He redrew 28 USC 371 to provide that retired judges would always have the salary of the office. He simply sent copies of the amendment to the venerable Senator Hayden of Arizona and a courtesy copy to the Director of the Administrative Office of the Courts. (Incidentally, I have met at least a dozen judges who thought they put it over, but it was he who put it over really, and none other.) At the time, before the three changes herein listed, circuit-wide we had seven retired because of health; now we have 49, and few because of health.

Again the idea of retirement at 65 with fifteen years of service came from judges of the Ninth Circuit. That met little opposition in Congress.

Then we came up with graduated retirement: retirement at 69 with eleven years of service, 68 with twelve, 67 with thirteen years, 66 with fourteen. For several years we were blocked by two Eastern judges who wanted to carry this Rule of 80 (age and service) down to 60 years and twenty of service so they could have a second career. Congress balked until after the two had reached 65, and then it went through as we had originally proposed it—the Rule of 80 beginning at 65.

Mathews gave up on others for shortened opinions, saying that it could be done only by requiring us to write our opinions with quill pens or by paying each circuit judge \$2,000,000 a year with the proviso that he pay for national publication out of his salary of all of his opinions.

California has state rules on publication, and non-publication of opinions. I get mixed reviews on it from California judges, so I would rather that they explain it themselves to you, and that they evaluate them.

I would be willing to contribute liberally to an annual *la Devitt* Medal to the judge who most succinctly does his job thoroughly in the fewest words. But perish the thought that I would want it dubbed the Chambers Medal. I would disown it. We could call it the Mathews Medal. But I suggest there are a few other Mathewses somewhere in the country.

Sincerely,

Richard H. Chambers

Unindicated copies to:

Honorable Alfred T. Goodwin
Honorable Thomas F. Murphy
Honorable M. Oliver Koelsch
Honorable John F. Kilkenny

Honorable Howard B. Turrentine
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REPORT ON THE NINTH JUDICIAL CIRCUIT HISTORICAL SOCIETY

Publications The Society has begun planning for a special issue of *Western Legal History*. The Summer/Fall 1990 issue will commemorate the bicentenaries of the United States Courts and the Bill of Rights with the publication of eight selected essays on the history of the Bill of Rights in the American West and the Pacific. The Society is inviting submissions of proposals for articles from Society members, legal scholars, judges, lawyers, historians, and political scientists. In addition to the journal's regular readership, this special issue will be distributed to colleges, schools, and libraries throughout the West along with a teacher's guide to the essays to be published by the Constitutional Rights Foundation of Los Angeles.

Prospective contributors to this special issue of *Western Legal History* are being encouraged to consider such themes as (but not limited to) freedom of speech, the press, and religion; rugged individualism and the right of privacy; property rights; racial discrimination against blacks, Hispanics, the Chinese, and other minorities; criminal justice and the right to jury trial; vigilantism and due process of law; the right to bear arms; and search and seizure. Proposals that consider the three Civil War amendments, as capstones of the first ten, are also being invited. Special issue guest editor, Stephen F. Rhode, and the journal's editorial board are seeking essays that explore these and related topics as they illuminate the social, political, and legal history of the American West. Readers of *Western Legal History* who are interested in submitting a proposal for an article are invited to contract the Society's office.

Author Lynn C. Schneider of San Francisco has begun research for her forthcoming book on western courthouses, to be published by the Society in 1990. The book will be a substantial documentary on the legal and architectural history of county, state, and federal court buildings, and will be richly illustrated with historical images as well as photographs taken by Ms. Schneider. The Society is submitting an application to the National Endowment for the Humanities for partial support of the publication of this book.

Exhibits The Society has launched an innovative exhibit program titled the "Western Legal History Exhibit Series." The Society is producing several small, portable displays — suitable for court and office lobbies, libraries, and schools — on such topics as the San Francisco Court of Appeals and Post Office Building; district courts; mining, land, and water law; eminent and infamous

personages; and civil, criminal, and Constitutional law [among some of the subjects to be illustrated in future exhibits]. The exhibits, which include three 30-by-40-inch hinged panels, will be available for temporary loan to public and private organizations and agencies. Pictured below is the first exhibit in the series, on the Court of Appeals and Post Office Building in San Francisco.

The National Archives in Washington, D. C. is producing an exhibit on the Judiciary Act of 1789. The exhibit, which includes several posters illustrating the founding document of the United States Courts as well as major cases from each circuit, will be sent to every federal courthouse. The Society's director, Chet Orloff, has served as a consultant to the Archives in the development of this exhibit, which will be completed in fall 1989.

Research and Meetings The National Endowment for the Humanities and the American Association for State and Local History have awarded the Ninth Judicial Circuit Historical Society a grant to help underwrite the Society's "Guide to Western Legal History Resources" project. The grant, important national recognition for the Society, is helping support the collection of information relating to law and court-related materials held by libraries, colleges, historical agencies, and courts in the western states. The "Guide" will provide researchers with a comprehensive list of documents and archival collections relating to the history of law in the American West.

As part of the 1989 annual meeting of the American Society for Legal History that will be held in San Francisco October 19-21, the Society is organizing a panel on the topic of western legal history. Participants in the panel discussion, tentatively entitled "Whether, What, and Whither Western Legal History," will include noted legal historians Gordon Bakken, Lawrence Friedman, Christian Fritz, David Langum, John Reid, Harry Scheiber, and Theodore White. Focusing on the definition of western legal history and the future work to be done in the field, the discussion will be taped for transcription and publication in *Western Legal History*.

Oral History The Society's oral history program would not exist without the participation of Society members who serve as volunteer interviewers. The program insures the preservation of priceless, first-person perspectives on the practice of law and judging while, at the same time, offering interviewers the opportunity to work with some of the eminent practitioners of law in the American West. To date, Society volunteers have completed or commenced more than thirty oral histories, which will serve as a growing resource for original research in western legal history. Members interested in doing interviews are invited to contact Society director Chet Orloff.

Birthday Parties for the Courts September 24, 1989 marks the

bicentenary of the United States Courts, the 200th anniversary of the Judiciary Act of 1789. The Society, along with local and federal bar associations, will commemorate the date with a series of birthday parties throughout the Ninth Circuit. These occasions will include brief presentations about the history of the Courts and, of course, the cutting of cakes with 200 candles. Members interested in helping organize an event in their area should call the Society's office at (818) 405-7059.

REPORTS FROM OTHER ORGANIZATIONS

Legal Papers of Abraham Lincoln

We request assistance in locating any document, record, letter, contemporary printed account or after-the-fact recollection that relates to Abraham Lincoln's entire law practice. All communications should be sent to *The Lincoln Legals*, IHPA Drawer 20, Old State Capitol, Springfield, Illinois 62701 (Phone 217-785-9130).

Bench and Bar Historical Society of Santa Clara County

The Bench and Bar Historical Society of Santa Clara County was formed in San Jose, California in the Spring of 1988, with a membership of forty. During the past year, the Society sponsored three events. On May 5, 1988, a "Then and Now" program offered reminiscences from all four federal judges who have sat in San Jose: Judges Robert F. Peckham, William A. Ingram, Spencer M. Williams and Robert P. Aguilar. On November 2, 1988, the Society presented a Court of Historical Inquiry in San Jose's Old Courthouse, pitting the claim of Benicia to be home of "California's first capitol" against San Jose's claim to be the first capital of California. Benicia's claim emphasized the difference between a "capitol" and a "capital", offering photos of their well-preserved capitol building as "Exhibit A." After hearing the testimony of San Jose Mayor Tom McEnery, however, Judge Mark Thomas rendered a verdict in favor of San Jose. On November 29, 1988, the Society presented a lecture by retired San Jose *Mercury News* Reporter Harry Farrell, entitled "The Last Lynching." Farrell has done extensive research and interviews into events surrounding the Hart kidnapping case and the lynching of the kidnappers in 1933. All three of these Society

events were videotaped, and the tapes will be preserved in the Society's archive in the Warburton Room of the Heafey Law Library on the campus of Santa Clara University.

Other events include another Court of Historical Inquiry held on March 31, 1989 at the "Winchester Mystery House" in San Jose. The Court conducted a hearing on whether a conservator should have been appointed for Sarah Winchester. Plans are also underway to compile oral histories of senior lawyers and judges. The Society can be contacted through President Geoff Wright, in care of the Santa Clara County Bar Association, 2001 Gateway Place, Suite 220 West, San Jose, California 95110.

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