

# WESTERN LEGAL HISTORY

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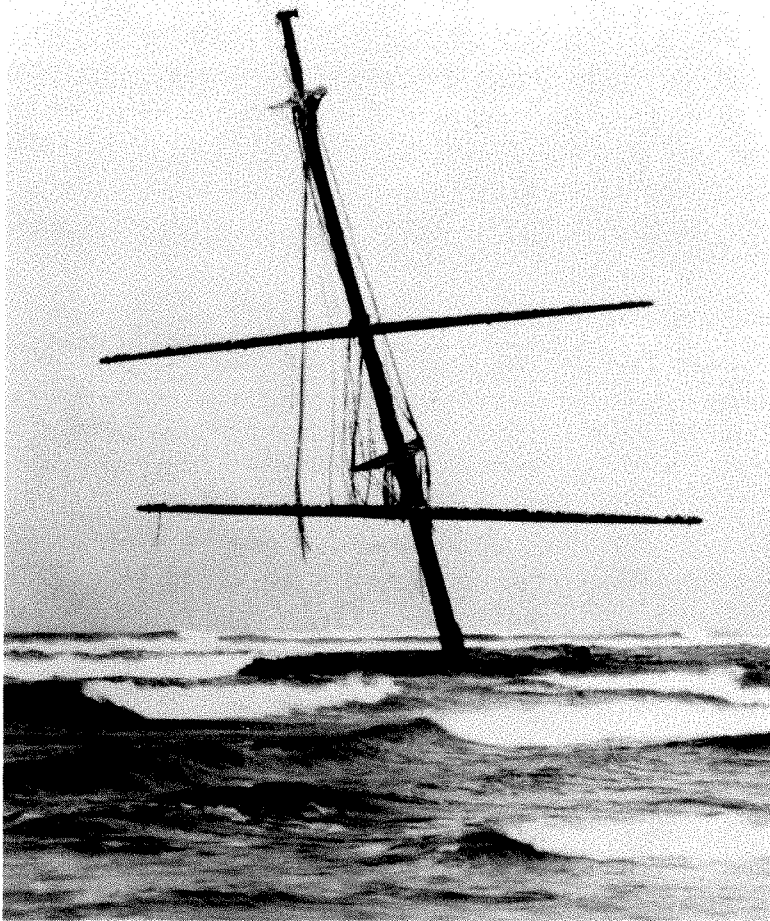
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*Cover Photograph:* Columbia River Indian dip netting in pools at  
Wishram, 1909 (Oregon Historical Society)



The French ship *Alice* was wrecked twelve miles north of the Columbia River, off southwest Washington, in November 1909. (Oregon Historical Society)

# EARLY MARITIME CASES IN THE NINTH CIRCUIT

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BY JOSEPH M. KADANS

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**T**he distinctive nature of the law of the sea and congressional solicitude for maritime litigants has resulted in unique judicial treatment of admiralty cases in the federal courts. When the Judiciary Act of 1789 established the district and circuit courts, the district courts had general jurisdiction over admiralty cases, among others. The circuit courts had jurisdiction over cases of common law and equity and the more important criminal cases, and also had appellate jurisdiction over admiralty cases, as well as most others subject to district court authority. A district court judge was appointed for each district, and each such judge could sit either as a district judge or a circuit judge. Such a judge could not, on appeal, sit on a case in which he had been the trial judge.

To provide for situations in which the circuit judge tried a case and an appeal was desired, the districts were grouped into larger units called circuits. Nine circuits were established so that each of the nine Supreme Court justices could be assigned to serve as an appellate court when the circuit judge had tried the case and was thus ineligible to serve as an appellate judge. It was not unusual for a justice of the Supreme Court to sit with a panel of two other judges to decide a case.

All admiralty appeals in circuit court were heard *de novo*, with the appeal taking up questions for review both of fact and of law. The evidence taken by the district judge during the trial was the evidence used in an appeal when no record was made of the testimony. As appeals were regarded as trials *de novo*, new evidence could be introduced in the appellate court. A party could further appeal an adverse decision to the Supreme Court in cases where the amount in question was over \$2,000. Here again, the second appeal was on both the law and the facts.

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Joseph M. Kadans formerly taught admiralty law in Maryland and now practices law in Nevada.

To lighten the load on the justices, in 1869 Congress enacted legislation allowing an additional judge to be appointed to each judicial circuit, to be called a circuit judge. Each judge could hold the circuit court in any district of his circuit.

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### THE APPELLATE COURTS' RELUCTANCE TO FIND FACTS

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Notwithstanding the intent of Congress to allow appeals on questions of fact and of law in appellate court, the result has been otherwise. One writer on admiralty law has commented that the doctrine of refusing to review questions of fact when witnesses were before the district judge was "largely an abdication of the trust confided in them, and, for an admiralty court, smack[ed] too much of the old common-law fiction as to the sacredness of the jury's verdict." The writer went on:

In fact, this theory about the trial judge being endowed with clairvoyance because he saw the witnesses has degenerated into a mere makeweight for that *filius nullius*, the *per curiam* opinion. The judicial ermine, unlike the mantle of Elijah, confers no supernatural powers. The most truthful men often make the worst witnesses. . . . To give this amiable fiction the scope which it has often been given is in effect to deny an appeal on questions of fact, which the statutes are supposed to give. That seeing the witnesses is an advantage cannot be denied. But its importance has been grossly exaggerated. Surely the combined intelligence of the three appellate judges as against the one trial judge ought to overbalance it.<sup>1</sup>

In a Ninth Circuit case in 1882, with opinion by Circuit Judge Lorenzo Sawyer of California and with two district judges—E.W. Hillyer of Nevada and Matthew P. Deady of Oregon—on the panel, a quantity of opium had been seized by harbor police in the Bay Area from a steamer (the *City of Tokio*) that had recently arrived from China. A factual question was presented to the court as to whether the opium had been transported from China or whether it were of domestic origin.<sup>2</sup>

The court held that the burden of proof to show that the opium was of domestic manufacture was on the claimant (the person claiming ownership of the opium packages), and that, since the

<sup>1</sup> Robert M. Hughes, *Handbook of Admiralty Law*, 2d ed. (St. Paul, 1920) 419-20.

<sup>2</sup> *United States v. 3,880 Boxes, etc.*, 12 Fed. 402 (1882).

best evidence of such domestic origin was not produced, any other evidence must be rebutted.

Thus, in an issue disputed as to the facts and the law, the circuit court decided the issues but in doing so took no new evidence.

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### THE SUPREME COURT AFTER 1875

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As the Supreme Court's docket became more and more crowded, in 1875 the Congress, by the act of February 16, raised the limit of appeals to the Supreme Court to \$5,000, and further provided that admiralty cases should no longer be appealed to the Court on questions both of fact and of law.

In addition, the act provided that in admiralty appeals to the circuit judge from a district judge, the circuit judge should make a finding of the facts and draw his conclusions of law therefrom. Should a further appeal to the Supreme Court be made, the circuit judge's finding of facts would be binding upon the Supreme Court. Nevertheless, a litigant did have one appeal from the findings of fact by the district judge, and that was in the appeal from the district judge to the circuit judge.

After passage of the act relieving the Supreme Court of fact finding, that Court made it clear, in an 1880 admiralty case in which a steamer ran into and sank a steamboat, that the court would not depart from the congressional fact-finding relief. The opinion by Chief Justice Morrison Waite stated: "The [District] court omitted to find the facts, and the case comes here on the evidence. This, since the act of 1875, we are not bound to consider . . . [and] our review is confined to questions of law."<sup>3</sup>

Another case decided in 1880, in which Waite also wrote the opinion, not only confirmed the policy of adhering to the 1875 statute but outlined the existing practice in the lower courts dealing with evidentiary matters:

It is conceded that upon the facts found by the Circuit Court the decree appealed from was right. That finding is conclusive upon us. *The Abbotsford*, 98 U.S. 440. No exceptions were taken to the rulings of the court in the progress of the trial. An appeal in admiralty from the District Court to the Circuit Court vacates the decree appealed from. The case is heard *de novo* in the Circuit Court, without any regard to what was done below. An entire new decree is entered, which the Circuit Court carries into execution. The cause is not remanded to the

<sup>3</sup> *The Richmond*, 103 U.S. 540, 26 L.Ed. 313 (1880).

District Court. After the suit once gets into the Circuit Court it is proceeded with substantially in the same way as it would have been if originally begun in that court. *The Lucille*, 19 Wall. 74; *Montgomery v. Anderson*, 21 How. 388; *Yeaton v. United States*, 5 Cranch 283. Affirmed.<sup>4</sup>

However, two years later, the Court left an opening for consideration of factual matters when Justice Stephen J. Field, speaking for the Court, said:

This case comes before us on appeal from a decree of the Circuit Court, with a finding of facts upon which it was considered. We are, therefore, relieved of much of the embarrassment experienced on the trial, both by that court and the District Court, from the difficulty of determining from the evidence the exact position of the vessels immediately preceding the collision. Here we must take the facts as found and apply the law to them. In cases of admiralty and maritime jurisdiction, on the instance side of the court, under the act of Congress of Feb. 16, 1875, c.77, the finding has the effect of a special verdict in an action at law.

There is, it is true, a bill of exceptions in the record, but it contains exceptions only to the finding, and to the refusal of the court to find otherwise. It presents no question for our consideration except such as arises upon the facts as found. There is no occasion in any case to except specially to a finding, as its sufficiency, in connection with the pleadings, to support the decree rendered, is always open to consideration on appeal.<sup>5</sup>

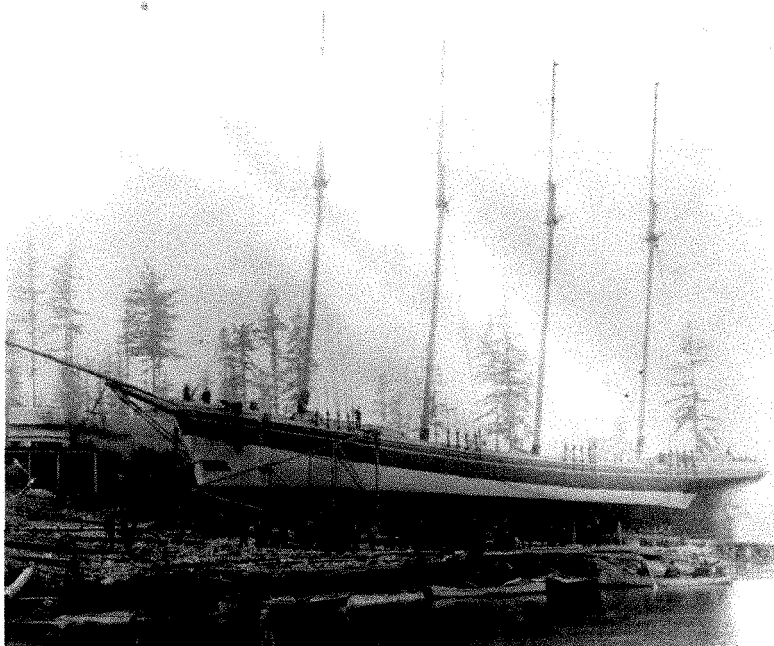
In other words, despite the act stating that the Supreme Court was relieved from fact finding in admiralty cases, the Court would be willing to modify or reverse fact findings in a case in which there was obvious error.

The rule was thus clear. While fact findings were highly regarded, they were not so sacrosanct that they might not be modified or reversed on appeal. The 1875 act did not compel logic and intelligence to absent themselves from the courtroom, nor did it bar correction of evident error.

In 1874 Waite had stated in an opinion the Court's willingness to reverse findings of fact. Pointing out yet again that the burden was on the appellant to show the error, he wrote, "We ought not

<sup>4</sup>*The Louisville*, 154 U.S. 657, 14 S.Ct. 1190, 25 L.Ed. 771 (1880, Ill.).

<sup>5</sup>*Marshall v. The Adriatic*, 107 U.S. 512, 2 S.Ct. 355, 27 L.Ed. 497 (1882).



Ship launching at Capt. Peterson's shipyard, Seattle, ca. 1890 (Oregon Historical Society)

to reverse unless the error is clear. Such is not the case here." He continued that "the claimants, by their own proof, established the fact that there was no lookout at the bow of the Wheeler when the collision occurred. This is so, but whether that was a contributing fault was a question of fact, and that has been twice found against the appellants. We are entirely satisfied with all the findings. Judgment affirmed."<sup>6</sup>

In a later case, adding clarification to the old practice of noting an "exception" to a ruling, Waite wrote:

A bill of exceptions is not necessary to give this court jurisdiction of an appeal in admiralty under the provisions of the act of Feb. 16, 1875, c. 77 (18 Stat., pt.3. p.315). That act expressly provides that the review here shall extend to the determination of the questions of law arising upon the record, and to such rulings of the court, excepted to at the time, as may be presented by a bill of exceptions, prepared as in actions at law. At law a bill of exceptions is only used to put into the record that which

<sup>6</sup>*The S.B. Wheeler*, 87 U.S. 385 [1874].

would not appear without. The findings which the statute requires must be stated by the court. These, therefore, become part of the record without any action of the parties, and errors of law arising on them need not be presented by exceptions. They are in the nature of a special verdict, as to which the inquiry is always open in the reviewing court, whether, when taken in connection with everything else that appears, it is sufficient to support the judgment.<sup>7</sup>

After a lengthy discussion of the facts of the case surrounding a collision between a steamship and a schooner, the lower court's decision was affirmed.

An 1857 case before the Supreme Court had set forth the Court's policy regarding the resolution of disputes when questions of fact were at issue. While the Court assented to the general rule stated earlier in *Hobart v. Dorgan* (10 Peters, 119) that it was "against policy and public convenience to encourage appeals of this sort in matters of discretion," it affirmed "that where the law gives a party an appeal, he has a right to demand the conscientious judgment of the appellate court on every question arising in the cause."<sup>8</sup>

In those days, a review before the Supreme Court in an admiralty case was considered tantamount to a new trial, there being no statutory inhibitions against any further consideration of resolved findings of fact.

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### THE THREE-JUDGE PANEL

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On March 3, 1891, the Appellate Courts Act (also referred to as the Judiciary Act) went into effect, creating an additional judge for each circuit, abolishing the appellate jurisdiction of the circuit court, and establishing a new appellate court in each circuit. This last was composed of the circuit justice and two circuit judges, with district judges filling vacancies as needed.

Under the act, admiralty appeals were to go from the district judge to the new appellate court, with no restrictions placed on the amount involved. The act provided for the full record of the district court to be forwarded with the appeal, with the appellate court to review questions both of fact and of law.

The new appellate court was to be the court of last resort in admiralty matters, except for forwarding to the Supreme Court for decision any questions on which it might want instructions.

<sup>7</sup> *The S.C. Tyron*, 105 U.S. 267, 26 L.Ed. 1026 (1881).

<sup>8</sup> *Post, et al., v. Jones, et al.*, 60 U.S. 150 (1857).

In addition, the Supreme Court could review cases in which a petition for review was presented and review was accepted when the issue, or issues, was, or were, deemed of sufficient importance.

In a Ninth Circuit case decided on October 4, 1897, a lengthy opinion by Circuit Judge William W. Morrow discussed the status of fact findings in appeals. Morrow was joined by judges William B. Gilberts and Erskine M. Ross.<sup>9</sup>

In referring to the 1875 statute, the opinion stated that in admiralty cases the act required circuit courts to make separate findings of fact and conclusions of law, and limited the Supreme Court on an appeal to review questions of law arising on the record.

Morrow pointed out that under the 1875 act an appeal in admiralty cases from a district court to a circuit court was, to all intents and purposes, a trial *de novo*. However, he stated, an admiralty appeal could not be heard upon its merits when there was no transcript of testimony in the lower court.

This seems to be a contradiction. If there is to be a trial *de novo*, it should not be necessary to know what transpired in the lower court. However, appellate courts simply will not allow themselves to be trial courts.

Admiralty Rule 52 of the Supreme Court, as well as the rules of the circuit courts of appeal, required that court clerks should make up the record to be transmitted to the circuit court when there was an appeal. The testimony of the libellant, as well as any exhibits not annexed to the libel, was to be included in the record sent to the circuit court.

Morrow's opinion contains the statement that a district judge in an admiralty case "is not required by law nor does it appear to be the practice, to make findings of fact. The general practice seems to be for the judge to render an opinion, written or oral, whenever the exigencies of the case require it, in which such facts are stated as the court deems the evidence supports and justifies the decree. But, however this may be, we are of the opinion that the act referred to [act of 1875] is inapplicable to appeals in admiralty from the existing district courts to the present circuit courts of appeal."

Quoting from a Second Circuit case, Morrow wrote that it was unreasonable to believe that Congress intended the legislation of 1875 to apply to appeals from the circuit court to the circuit court of appeals. From earliest times, original jurisdiction in admiralty matters was restricted exclusively to the district courts, and the circuit courts did not have jurisdiction in admiralty cases except on appeal from the district courts. "As the Act of 1875 provided

<sup>9</sup>*Nelson v. White*, 83 Fed. 215 (1897), and for all ensuing quotations from this opinion.

a method and system of review, through appeals, only for such cases in the circuit court as went to the supreme court," he wrote, "there seems no good reason for extending the general language of the eleventh section of the new act to cover cases in the circuit court which are not to go to that tribunal."

Morrow referred to an earlier case of the Ninth Circuit,<sup>10</sup> in which it was held that, as there was no transcript of record and no stipulation regarding omission of testimony on file, and there existed only the trial judge's notes of testimony, the circuit court of appeals could rule that the judge's notes of testimony were "sufficient to justify his conclusion, and to sustain the findings of the circuit judge."

It should be noted that, as district courts had exclusive "first-instance" jurisdiction of admiralty cases, there was already one appeal to the circuit judge and another appeal to the circuit court of appeals. As noted above, an appeal to the Supreme Court was barred by the 1875 act, except by petition for a writ of certiorari or by a request from the circuit court of appeals to the Supreme Court asking for directions for disposition of some special point of law.

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#### ADMIRALTY APPEALS AFTER 1891

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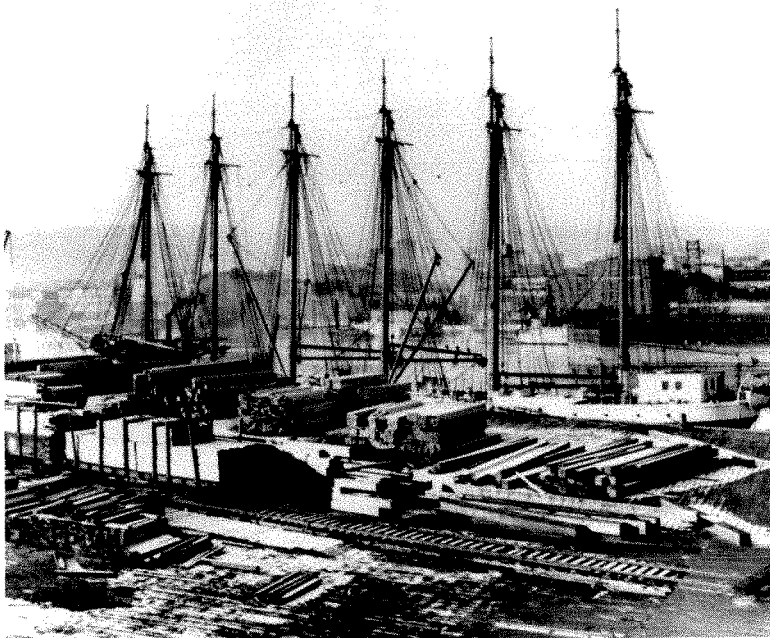
The act of 1891 deprived the circuit courts (sitting as appellate tribunals with a single judge) of their appellate jurisdiction. The circuit court system was finally abolished and its original jurisdiction transferred to the district court by the act of March 3, 1911, known as the Judicial Code. It will be recalled, however, that the circuit court judges lacked original (or first-instance) jurisdiction in admiralty cases, this class of case having to originate in district court.

A Ninth Circuit case in 1903 is a good example of how the admiralty appeal system functioned after 1891.<sup>11</sup> In an opinion written by Circuit Judge William W. Morrow, with judges William B. Gilbert and Erskine M. Ross on the panel, the circuit court of appeals considered the appeal of a libellant seeking damages against a tugboat, the *Oscar B*, alleging negligent towing. The district court had ruled against the libellant and, on appeal, the circuit court of appeals affirmed.

However, it did not affirm the decision until after the court had read the entire testimony, and concluded that "the negligence of the appellee ha[d] not been established." Morrow continued: "While the Circuit Court of Appeals is not limited to the review

<sup>10</sup> *The Alejandro*, 56 Fed. 621 (9th Cir.).

<sup>11</sup> *The Oscar B*, 121 Fed. 978 (9th Cir. 1903), and for the ensuing quotations from this opinion.



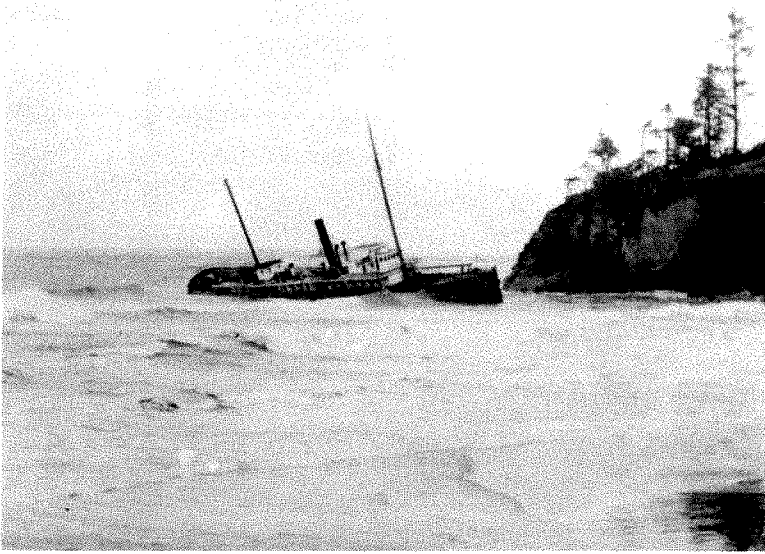
Loading Oregon fir on the docks at Portland, ca. 1900 (Oregon Historical Society)

of questions of law only, in admiralty appeals, it is the settled practice to give great weight to the findings of fact by the trial judge, and not to disturb such findings, in cases of conflicting testimony, unless they are found to be clearly against the weight of evidence."

In a later case, in 1936, the appellate practice was fairly well settled.<sup>12</sup> Circuit Judge William Denman was aided by district judges Curtis D. Wilbur of San Francisco and Francis A. Garrecht of Spokane in an appeal from the District Court of the United States of the Northern District of California, Southern Division, the district judge being Harold Lauderback.

Affirming the district court's decision, Denman referred to the adoption by the Supreme Court in October 1930, of Admiralty Rule 46 1/2, requiring the court of first instance in admiralty and maritime jurisdiction to find the facts specially and to state conclusions of law separately, all to be included in the record in the event of an appeal. Obviously, the rule was adopted in order to reduce appellate court procedures whereby discovery procedures would be followed, trials with jurors held, evidence taken, counsel's arguments to the jurors made, the judge's instructions given to jurors, and so on.

<sup>12</sup> *The Ernest H. Meyer*, 84 F2d 496 (9th Cir. 1936).



Wreck of the *Santa Clara* on the Coos Bay Bar, Oregon, November 1911  
(Oregon Historical Society)

Denman referred to a Supreme Court decision in 1873, in which the Court held that

An appeal in admiralty has the effect to supersede and vacate the decree from which it is taken. A new trial, completely and entirely new, with other testimony and other pleadings, if necessary, or, if asked for, is contemplated—a trial in which the judgment of the court below is regarded as though it had never been rendered. A new decree is to be made in the Circuit Court. This decree is to be enforced by the order of that court, and the record remains there. The case is not sent back to the District Court for executing the decree, or for any other proceeding whatever, and that court has nothing further to do with it. The decree should, therefore, be complete within itself.<sup>13</sup>

Based on the pleadings and record of the case, and affirming the district court, Denman found that the collision in San Francisco Bay in dense fog between two cargo steamers was due to excessive speed by the operators of the *Ernest H. Meyer*.

Before 1891, whenever an admiralty appeal went from district to circuit court, instead of remanding the case to district court for

<sup>13</sup> *The Lucille*, 86 U.S. 73, 22 L.Ed. 64 (1873).

future proceedings, the circuit court could examine new witnesses, enter its own decree, and issue its own execution of the judgment.

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### WITNESSES IN THE SUPREME COURT?

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Even when an admiralty case was further appealed to the Supreme Court, additional witnesses could be examined. However, that tribunal did not allow the taking of testimony in open court but instead required depositions to be taken. Moreover, additional evidence was not admitted if it could have been produced in the lower courts.

In the 1818 case of the *Diana*, for example, condemnation of the ship and its cargo was first pronounced in district and circuit court, then taken on appeal to the Supreme Court. The Court indicated that it had held a hearing during its previous term, and had ordered additional proof to be gathered. "[T]he farther proof not being satisfactory," reads the report, "the decree of the court below was affirmed at the present term."<sup>14</sup>

In another case, a lawyer offered to present a witness to testify before the Court. Rather than permitting this, the Court ordered a deposition to be taken. The official recorder of Court proceedings, Henry Wheaton, counsellor at law, reported the matter as follows:

This cause, being an instance, or revenue cause, had been ordered to farther proof at a former term.

Mr. Daggett, for the claimants, now offered to provide a witness to be examined viva voce, in open court on further proof; but the court, for the sake of convenience, ordered his deposition to be taken in writing out of court.

Mr. Chief Justice Marshall delivered the opinion of the court, reversing the decree of condemnation in the court below, and ordering the property to be restored as claimed.<sup>15</sup>

It should be noted that Daggett's offer for the witness to testify in open court before the Supreme Court was made on February 3, 1818, and the delivery of the opinion by the chief justice took place on February 11, 1818. Apparently a deposition was taken and submitted to the Court and an early hearing was arranged for the Court's decision.

While theoretically a witness could properly have been allowed

<sup>14</sup> *The Diana*, 16 U.S. 46 (1818).

<sup>15</sup> *The Samuel*, 16 U.S. 77 (1818).

to appear and testify and be cross-examined in an admiralty proceeding in the Supreme Court before the 1875 statute barring questions of fact to be presented to the Court, there seems to be no record that this was ever done. Nor does there seem to be a record of an admiralty appeal to the circuit court of appeals or to any of the U.S. courts of appeal, including the Ninth Circuit, in which a witness was allowed to testify in open court on any factual matter.

Once the door is opened for any *vive-voce* testimony in any appellate tribunal, the situation becomes rife with imponderables. What if some objection is made to the proffered testimony? And if so, which tribunal will rule on the admissibility of the evidence? Will there be an appeal from the ruling? No doubt these pitfalls were envisioned by the appellate judges and justices, which explains their chariness with regard to the admission of new or different allegations of fact.

# THE FRONTIER SHERIFF'S ROLE IN LAW AND ORDER

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BY LARRY D. BALL

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As pioneer Americans established communities on the frontier, instability and turbulence were often a part of their daily life. The need for a law-enforcement system thus became a matter of immediate concern. Within this system, the county sheriff soon occupied a prominent place.

Although the shrievalty was an English creation, settlers transplanted it to North America in the late 1600s. In the following century the Americans adopted the office with little change, and subsequently introduced it into the new territories west of the Appalachian Mountains. Even in the land seized from Mexico, whose inhabitants had different laws, the Americans imposed their own sheriffs, although the Hispanics continued to use the title of *alguacil* for the position.

The experiences of the county lawmen in the vast territories of New Mexico and Arizona illustrate the duties that sheriffs undertook elsewhere on the frontier, as well as the obstacles they encountered. Whatever the difficulties besetting the sheriffs—whether geography, limitations within the law-enforcement system, or the size and scope of those outside the law—they severely tested the office itself in the prolonged tenure of the two territories, from 1846 to 1912.<sup>1</sup>

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<sup>1</sup> William Alfred Morris, *The Medieval English Sheriff to 1300* (1927; reprint, New York, 1968) [hereafter cited as Morris, *Medieval Sheriff*]; *Encyclopedia of the Social Sciences*, s.v. "sheriff"; Cyrus Harreld Karraker, *The Seventeenth-Century Sheriff: A Comparative Study of the Sheriff in England and the Chesapeake Colonies, 1607-1689* (Chapel Hill, 1930); Julius Goebel, Jr., and T. Raymond Naughton, *Law Enforcement in Colonial New York: A Study in Criminal Procedure, 1664-1776* (Montclair, 1970); Robert M. Ireland, *The County Courts in Antebellum Kentucky* (Lexington, 1972); Marc Simmons, *Spanish Government in New Mexico* (Albuquerque, 1968) 160-99 [hereafter cited as Simmons, *Spanish Government*]; *The Kearny Code [Laws of the Territory of New Mexico]*, ed. Nolie Mumey (1846; reprint, Denver, 1970) 74-75, 80-81 [hereafter cited as *Kearny Code*].

Most units of government in the territories included a law enforcer—a constable in the precinct, a town marshal in the municipality, a sheriff in the county, and a U.S. marshal in the federal sphere. Other officials, both public and private, were present—Indian police, various federal agents, and private detectives—but were not a part of the central network of lawmen. The sheriff's role as an officer of the county was influential, even critical, at a time when the county represented "the most significant government for the largest number of people," as one historian put it. The inhabitants of a county looked to it for many essential services and, in turn, tended to demonstrate fervent loyalty.<sup>2</sup>

As chief executive officer of his county in the New Mexico and Arizona territories, the sheriff served the process of the county-probate and justice-of-the-peace courts. He kept the jail and preserved order. When his superiors, the county supervisors, wanted help, they turned first to the sheriff. George Curry, a veteran sheriff in New Mexico in the 1890s, recalled the passion with which men sought the post—which they considered "the most important county office"—and the extensive electioneering in which they engaged to win it.<sup>3</sup>

The sheriffs of New Mexico and Arizona answered to another master, the territorial district courts. The territories were divided into three districts, each of which held spring and fall sessions in the counties within its jurisdiction. The presiding judge, a presidential appointee and an outsider, rode long, dangerous circuits to each county seat. These tribunals were arranged to hear both territorial and U.S. cases, whereas two separate systems were maintained in the states. (Congress assumed that the territories had no need of such an elaborate judiciary.) Sheriffs served the territorial processes, while U.S. marshals served the federal ones. However, since sheriffs and their deputies frequently held commissions as deputy U.S. marshals, they often also served the federal documents. The *Revised Statutes of Arizona* defined "process" as "all writs, warrants, summons, and orders of courts of justice or judicial officers." These fell into two broad categories of offenses, criminal (against humans) and civil (often against property). Sheriffs initiated the preparations for each session of court by serving jury venires (both grand and petit) issued by the

<sup>2</sup> Frank Richard Prassel, *The Western Peace Officer: A Legacy of Law and Order* (Norman, 1972); Larry D. Ball, *The United States Marshals of New Mexico and Arizona Territories, 1846-1912* (Albuquerque, 1978) [hereafter cited as Ball, *United States Marshals*]; Philip D. Jordan, *Frontier Law and Order: Ten Essays* (Lincoln, 1970); Malcolm J. Rohrbough, *The Trans-Appalachian Frontier: People, Societies, and Institutions, 1775-1850* (New York, 1978) 47-49.

<sup>3</sup> George Curry, *George Curry, 1861-1947: An Autobiography*, ed. H.B. Hening (Albuquerque, 1958) 69.



George C. Ruffner, sheriff of Yavapai County, Arizona, 1897. Ruffner was the first Arizonan elected to the Cowboy Hall of Fame. (Arizona Historical Society)

court clerk. Since the supreme court sat in the territorial capital, the sheriff of the host county served its needs.<sup>4</sup>

The sheriff and his deputies served most documents by horseback and buggy, a time-consuming and perilous task in the great, sprawling counties of New Mexico and Arizona. In December 1883, a Tucson journalist encountered a weary deputy sheriff who had just returned from a five-hundred-mile journey in Pima County. The exhausted process server was so saddle sore that

<sup>4</sup>Earl S. Pomeroy, *The Territories and the United States, 1861-1890: Studies in Colonial Administration* (Philadelphia, 1947) 51-61 [hereafter cited as Pomeroy, *Territories and the United States*]; Aurora Hunt, Kirby Benedict: *Frontier Federal Judge* (Glendale, Calif., 1961) esp. 49-68 [hereafter cited as Hunt, Kirby Benedict]; *The General Laws of New Mexico; Including all the Unrepealed Laws from the Promulgation of the 'Kearny Code' in 1846, to the End of the Legislative Session of 1880. With Supplement, Including the Session of 1882*, comp. L. Bradford Prince (Albany, 1882); *Revised Statutes of Arizona* (Prescott, 1887) 142.

"he now takes his meals standing," said the newspaperman. The sheriff was permitted to mail process to recipients outside his county, either directly or through other lawmen. The telegraph might also be used in emergencies. Private citizens could sometimes serve a civil process, thereby avoiding payment of the sheriff's fee. Occasionally the sheriff employed the mails within his bailiwick. Nabor Pacheco, the sheriff of Pima County in Arizona, used this method in 1907 to arrest a murder suspect in a far-western precinct. Rather than make the long journey, he mailed a warrant and special deputy's commission to an acquaintance in the area. Failure to make timely delivery of court papers was a punishable offense, as the chief law officer of Cochise County, Arizona, learned in November 1882. When he neglected to serve a subpoena for a witness who lived only two and one-half miles from Tombstone, the district judge scolded him publicly and fined him \$5 for neglect of duty.<sup>5</sup>

The sheriff and his staff supported the court in other ways, including maintaining the building and grounds and providing supplies for the courtroom. The sheriff also proclaimed the session open and patrolled each sitting. Frontier trials could be hazardous. During one especially tense session in Las Vegas, New Mexico, in the 1880s, the sheriff reportedly collected forty-two revolvers from spectators and members of the bar. On another occasion, at a murder trial in Phoenix, Arizona, the widow of the murdered man suddenly sprang from the audience and thrust a cocked revolver against the defendant's chest. Fortunately the hammer of the weapon became entangled in her scarf, giving the sheriff and his deputies time to disarm her. These police duties extended to the protection of the jury from outside influences—an almost impossible task, given the incommensurable nature of early courthouses. One longtime deputy sheriff in New Mexico declared that the public did not see all that transpired during sessions. Many trials in frontier times, he asserted, "involved more law enforcement than that on the court's books."<sup>6</sup>

The sheriff's management of the county jail was equally necessary to the justice system in New Mexico and Arizona. The jail held not only local short-term prisoners, but others en route to longer sentences. It also housed prisoners sentenced to death, and sheriffs were the hangmen in both territories. (The profession-

<sup>5</sup> *Arizona Weekly Star*, December 27, 1883; *Arizona Citizen*, [September ?] 1907, reprinted in Joseph Miller, ed., *The Arizona Rangers* (New York, 1972) 163; *Tombstone Epitaph*, November 25, 1882.

<sup>6</sup> Arie W. Poldervaart, *Black-Robed Justice: A History of Justice in New Mexico from the American Occupation in 1846 until Statehood in 1912* (Santa Fe, 1948) 126; *Arizona Daily Gazette*, August 10, 1892; John Britt Montgomery, Biographical Files, Arizona Historical Society, Tucson; Dee R. Harkey, *Mean As Hell* (Albuquerque, 1948) 125 [hereafter cited as Harkey, *Mean As Hell*].

al executioner, dressed in black and traveling from gallows to gallows, is apparently a fabrication.)<sup>7</sup>

Since the preceding Mexican regime had maintained few prisons, it was up to the newly formed American county governments to build new ones. Many of them were poorly constructed, unsanitary, and primitive. Jailers' wages were paltry, and of all the law officials on the frontier jailers were perhaps the least reliable. County funding was seldom adequate. When Santa Fe County failed to provide the sheriff with resources to support prisoners in 1852, the governor authorized him to free all the prisoners on the condition that they leave the territory. While this bizarre case was exceptional, there were other embarrassments. Jail breaks plagued the New Mexico and Arizona sheriffs throughout the territorial era. Some were especially disturbing, as when Billy the Kid escaped from the Lincoln County Jail in 1881, murdering two deputy sheriffs in the process.<sup>8</sup>

Political opponents used problems at the local lockup to discredit the incumbent sheriff, and shrieval elections sometimes turned upon such scandals. Formal investigations of jailbreaks were not uncommon. When four prisoners overpowered the nightwatchman of the Pima County Jail in Tucson on New Year's night in 1875, the supervisors found that the guard had routinely disobeyed security rules and that the day guard was often absent from duty and gambling in the local saloon. (Sheriff William S. Oury was cavalier about the incident. Informed of the breakout, he reportedly replied, "Well, damn it, let them go. It will save the county a lot of trouble.") In two instances (in Las Vegas, New Mexico, and Solomonville, Arizona), investigators found that the guards had neglected to make their scheduled rounds and were asleep when the prisoners escaped. All the escapees were either accused murderers or convicted men awaiting hanging.<sup>9</sup>

Besides permitting breakouts, the insecure jails undermined the justice system by encouraging mobs to remove inmates and administer extralegal rites. Gov. Lionel Sheldon addressed this problem in his annual message to the New Mexico Legislature in 1884. He lamented that many of the sheriffs' lockups remained "small, filthy and insecure" and that "escapes are almost as easily

<sup>7</sup> *Kearny Code*, supra note 1 at 80-81; *Acts of the Legislative Assembly of the Territory of New Mexico, 1866*, 129-33; Hunt, *Kirby Benedict*, supra note 4 at 58.

<sup>8</sup> The primary jail under the Spanish regime, the *carcel real*, was in Santa Fe (Simmons, *Spanish Government*, supra note 1 at 164); Ball, *United States Marshals*, supra note 2 at 26; Robert M. Utley, *Billy the Kid: A Short and Violent Life* (Lincoln, 1969) 176-85; Donna Rees, *The History, Development and Present Administration of the Mohave County Jail* (n.p., 1974).

<sup>9</sup> Pima County Board of Supervisors, January 11, 1875, vol. 36, Pima County Original Documents, Special Collections Department, University of Arizona, Tucson; *Daily New Mexican*, November 13, 1880.

made as from a paper bandbox." Referring to a recent lynching in Socorro, he deplored the refusal of the county supervisors to provide Sheriff Pedro Simpson with extra guards. "There can be no certainty that criminals will be tried and punished," he concluded, "when there is so much insecurity."<sup>10</sup>

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### THE HAZARDS OF PEACE

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Of the county sheriff's many responsibilities, peacekeeping presented the most difficulties and dangers, and these increased dramatically in the post-Civil War era. With the settlement of Native Americans on reservations and the appearance of the railroads, the huge grazing and mining lands of Arizona and New Mexico were open to exploitation. Although most of the new arrivals were law abiding, many of those who followed in the wake of the railroads and the cattle and land companies harbored animosities inspired by the recent Texan revolution and the Civil War.<sup>11</sup>

This new wave of outsiders descended on the local inhabitants—Hispanos, Anglos, and Native Americans—so quickly that ethnic, racial, and religious tensions often provoked serious incidents. In his study of frontier violence, Robert V. Hine found that the "competitive" and "dynamic" society "placed a premium on physical toughness," but at the same time was "permeated with fear and doubt." In this highly charged atmosphere, the sheriffs were required to respond to a variety of disturbances: individual and family disputes, saloon brawls, cowboys "treeing the town," blood feuds, roving bands of desperadoes, and many confrontations over land-grant titles and other property disputes.<sup>12</sup>

As the larger economic institutions grew in power, public opposition began to coalesce in the Populist movement. Various violent corollaries to Populism arose in the form of labor agitation, White Capping, and other semisecret societies, as well as in individual acts of defiance, such as train and express robberies.<sup>13</sup>

<sup>10</sup>Message of Lionel A. Sheldon, Governor of New Mexico, Delivered to the Twenty-sixth Legislative Assembly, February 19, 1884 (Santa Fe, 1884) 3-4.

<sup>11</sup>See Calvin Horn, *New Mexico's Troubled Years: The Story of the Early Territorial Governors* (Albuquerque, 1963); Jay J. Wagoner, *Arizona Territory, 1863-1912: A Political History* (Tucson, 1970) 117.

<sup>12</sup>Robert V. Hine, *The American West: An Interpretive History*, 2d ed. (Boston, 1984) 333-34. Many works treat specific episodes of violence in the New Mexico and Arizona territories, but a survey is lacking. For a broader discussion, see Ball, *United States Marshals*, *supra* note 2.

<sup>13</sup>Robert W. Larson, *New Mexico Populism: A Study of Radical Protest in a Western Territory* (Boulder, 1974); Richard Patterson, *Train Robbery: The Birth, Flowering, and Decline of a Notorious Western Enterprise* (Boulder, 1981) 133-45.

A New Mexico law characterized the sheriff as "conservator of the peace" and declared that he "shall suppress assaults and batteries, and apprehend and commit to jail, all felons and traitors." The inherent dangers of such duties were enormously increased on the frontier. The practice of carrying deadly weapons and commonly held notions of the right of self-defense were dear to westerners, many of whom would certainly have agreed with William Blackstone's assertion that "self-defense . . . is justly called the primary law of nature." New Mexico's governor, Edmund Ross, was moved to lament this "loose interpretation of the law" but could do nothing about it.<sup>14</sup>

Sheriffs were often forced to kill or wound desperate men, and in turn experienced casualties themselves. Although few were killed in the line of duty, their deputies suffered heavily, since they performed much of the field work. Yet a handful of sheriffs, not their subordinates, are best remembered for their exploits against the lawless. Pat Garrett, Perry Owens, and John Slaughter became legends in popular Wild West literature, although they constituted only a fraction of the more than five hundred men in the Arizona and New Mexico shrievalties. This largely anonymous majority performed thousands of dangerous deeds that ensured the frontier public a measure of repose.<sup>15</sup>

When the scale of public disturbances overcame the resources of the sheriffs and their deputies, the chief lawmen were empowered to call upon the posse comitatus, which consisted of all able-bodied males in the county. Service in the posse was an obligation of citizenship, and the law prescribed a fine for refusal. However, county lawmen were reluctant to use this threat, since they might alienate potential supporters at the next election. To assess the effectiveness of these frontier posses is difficult. However, the death toll among posse men in Arizona and New Mexico reveals a widespread reliance on their services. In one five-year period,

<sup>14</sup> *Kearny Code*, supra note 1 at 106; William Blackstone, *Commentaries on the Laws of England*, ed. and abr. J.W. Ehrlich (San Carlos, Calif., 1959) 450; Ross to Augustus Garland, June 3, 1887, Governors' Papers, New Mexico State Records Center and Archives, Santa Fe.

<sup>15</sup> See William A. Keleher, *Violence in Lincoln County, 1869-1881: A New Mexico Item* (Albuquerque, 1957) [hereafter cited as Keleher, *Violence in Lincoln County*]; John P. Wilson, *Merchants, Guns and Money: The Story of Lincoln County and Its Wars* (Santa Fe, 1987) [hereafter cited as Wilson, *Merchants, Guns and Money*]; Philip J. Rasch, *New Mexico Historical Review* 39:257-73; Paula Mitchell Marks, *And Die in the West: The Story of the O.K. Corral Gunfight* (New York, 1989) [hereafter cited as Marks, *And Die in the West*]; Jim Berry Pearson, *The Maxwell Land Grant* (Norman, 1961); Donald R. Lavash, *Sheriff William Brady: Tragic Hero of the Lincoln County War* (Santa Fe, 1986); Leon C. Metz, *Pat Garrett: The Story of a Western Lawman* (Norman, 1974); Don Dederer, *A Little War of Our Own: The Pleasant Valley Feud Revisited* (Flagstaff, 1988) 139-54; Allen A. Erwin, *The Southwest of John H. Slaughter, 1841-1922* (Glendale, Calif., 1965) 213-54.

1896-1901, at least twelve citizens were killed in this line of duty. Most citizens were simply not equipped to deal with hardened criminals. Sometimes posse men were politically disloyal or even outlaws themselves. In February 1878, known outlaws joined a Lincoln County sheriff's posse and murdered a rancher, in an incident that helped set off the feud known as the Lincoln County War. Within weeks partisans of both sides had obtained the support of equally partisan lawmen and fought out the vendetta under color of the law.<sup>16</sup>

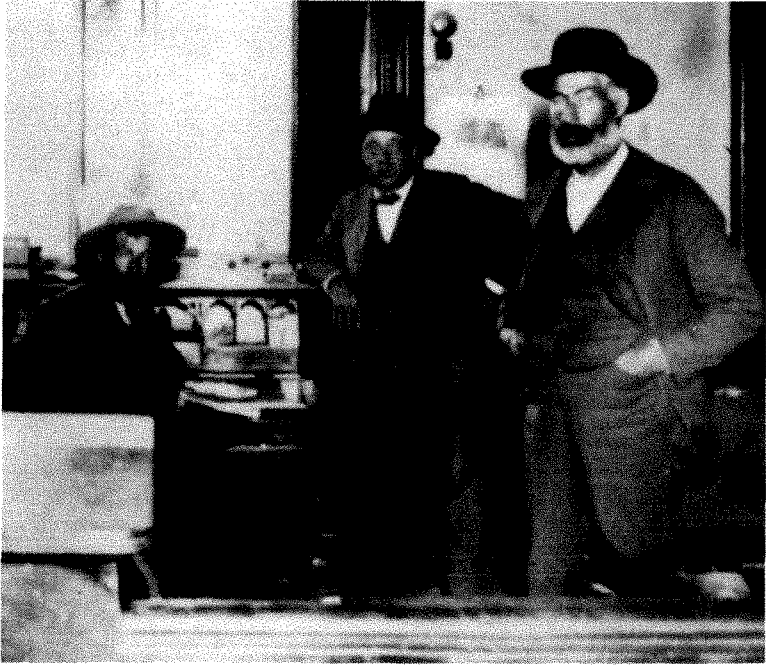
When people prevented sheriffs from serving process, the latter were constrained to ask for military assistance. This could come from the U.S. Army or the territorial militia. When feudists murdered Sheriff William Brady in Lincoln County in 1878 and began to vie for control of his office, Gov. Lew Wallace made federal troops available. (The bluecoats were necessary since the new sheriff could not rely upon the civilian population.) In the early years of the two territories, the federal government had recognized the army as a part of (and not separate from) the civilian posse comitatus, thereby permitting sheriffs and other law officers to requisition troops directly from the nearest post. However, Congress withdrew this privilege in 1878.<sup>17</sup>

Sheriffs could also turn to territorial militiamen, although neither Arizona nor New Mexico could afford to maintain such costly forces fully. Gov. Sheldon was most successful in this endeavor in the 1880s. In the face of public accusations that he was imposing a form of martial law and intruding on the civilian posse comitatus, he persisted with militia aid to the sheriffs. In a general order in September 1881, he instructed militia commanders to "furnish such posse comitatti . . . , as such sheriffs may require in their respective counties, to preserve the peace, guard jails and prisoners and make arrests."<sup>18</sup>

<sup>16</sup>For some discussion of the posse comitatus in England, see Morris, *Medieval Sheriff*, supra note 1 at 222, 226-27, 273, n.271; William Blackstone, *Commentaries on the Laws of England*, ed. William Hardcastle Brown, 4 vols. (1769; reprint, St. Paul, 1897) 109, 556, 623, 632, became a standard reference work; *General Laws of New Mexico*, art. 1005, ch. 85; *The Compiled Laws of the Territory of Arizona, Including the Howell Code and the Session Laws from 1864 to 1871, Inclusive*, comp. Coles Bashford (Albany, 1871) ch. 3, sec. 13, ch. 11, secs. 36, 38; Larry D. Ball, *Quarterly of the National Outlaw Lawman Association*, 6:2-10, 22; Wilson, *Merchants, Guns and Money*, supra note 15 at 79-82.

<sup>17</sup>Robert M. Utley, *High Noon in Lincoln: Violence on the Western Frontier* (Albuquerque, 1987) 118-36; General Orders No. 1, September 1, 1881, quoted in Larry D. Ball, "Militia Posses: The Territorial Militia in Civil Law Enforcement in New Mexico Territory, 1877-1883," *New Mexico Historical Review* 55:47-69 [hereafter cited as Ball, "Militia Posses"]; Pomeroy, *Territories and the United States*, supra note 4 at 13.

<sup>18</sup>Ball, "Militia Posses," supra note 17 at 47-69.



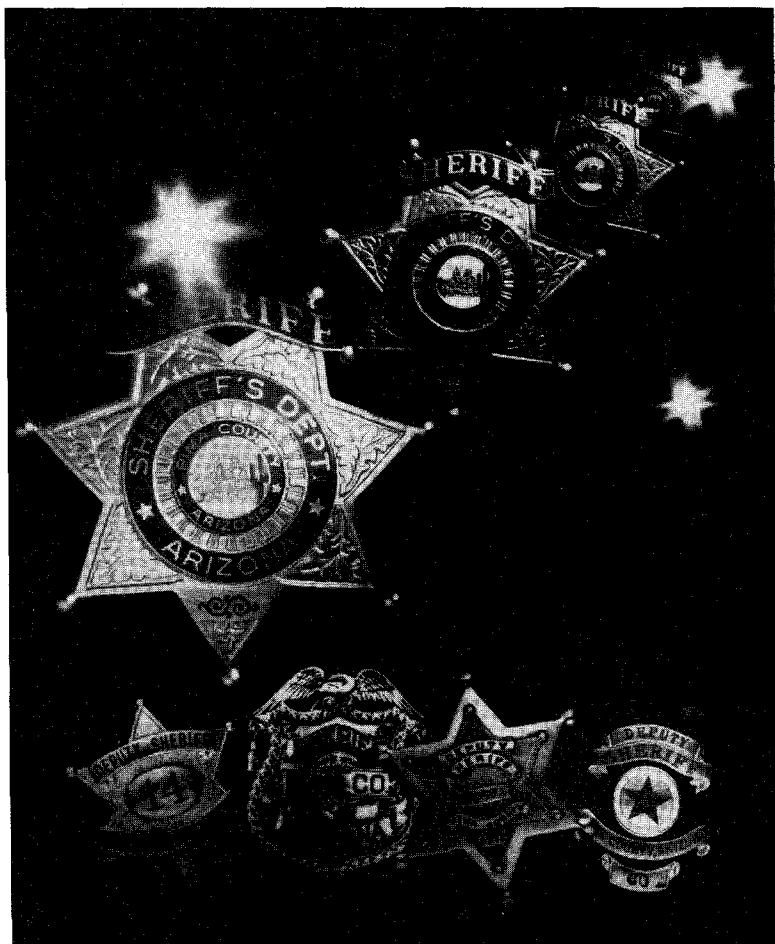
Pima County Sheriff Lyman Wakfield in his office, Pima County Courthouse, Arizona, ca. 1897 (Arizona Historical Society)

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### A QUESTION OF MONEY

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Other problems hindered sheriffs in performing their duties. The fee system, which reimbursed the sheriff and his deputies for services rendered only, restricted many to part-time service. These fees were woefully insufficient for expenses incurred in the long-distance pursuit of outlaws or in the suppression of large-scale disruptions. The standard payment for serving an arrest warrant was \$1 (later \$2) plus mileage, whether the wanted man surrendered peacefully or put up violent resistance and fled hundreds of miles. As one knowing observer remarked during the New Mexico governor's campaign against stock thieves in 1883, "Neither county nor territory allows mileage [fees], or pay[s] enough [to encourage a sheriff] to go over a few miles from his residence to serve a writ of any kind." Nor did the sheriff's superiors, the county supervisors, readily provide him with emergency funds. He had to obtain approval before incurring any extraordinary expense, or spend his own funds and run the risk of disavowal by the supervisors. In the meantime, the delay permitted the fugitive time to flee, perhaps to Mexico, where formal



Pima County sheriffs' badges (Arizona Historical Society)

requisitions were costly and often failed. Governors also lacked the necessary funds with which to assist their sheriffs. When Frederick Tritle assumed the governorship of Arizona during disorders in Tombstone in 1882, he received the niggardly emergency fund of \$500. He had requested \$150,000.<sup>19</sup>

The sheriffs of the territories had to divide their time (and that of their staffs) between law enforcement and many other duties.

<sup>19</sup> *Kearny Code*, supra note 1 at 74-76; *Revised Statutes of Arizona* (Prescott, 1887) [hereafter cited as *Revised Statutes of Arizona*] Title 28, ch. 1, 347-48, provided \$2 for service of a writ in criminal cases, \$1.50 in civil cases; *Silver City Enterprise*, May 4, 1883; *Weekly Epitaph*, June 17, 1882. The issue of April 24, 1882, reported that Tritle had asked Congress for \$150,000, but received nothing.

By far the most demanding was assessing and collecting taxes, ex-officio tasks that sheriffs had carried out for centuries. The frontier reinforced the practice of combining several offices in one person, so as to ensure the officer a living wage; unfortunately, the sheriffs enjoyed the more lucrative income from tax collecting and often neglected peace keeping. In addition, they were distracted by many odd jobs, including census taking, supervising roads and public health, and conducting public auctions. They were the handymen of their counties.<sup>20</sup>

As the post of sheriff was an elective one, any citizen with the minimal property qualification could serve. This opened the door to amateurism. Moreover, the geographic isolation of many counties, and domination of some by one ethnic or religious group, could promote extreme parochialism, tending to discourage sheriffs from cooperating with their counterparts and with other territorial officials elsewhere. Such localism came through clearly when New Mexico's governor, Lew Wallace, asked the sheriffs—since he could not command them—to gather in Santa Fe in summer 1879. The purpose was to study ways of concerting action against the widespread lawlessness. However, not a single officer—not even the sheriff in Santa Fe, the governor's place of residence—put in an appearance. As a local journalist remarked, "Not a mother's son came near. . . . Like foolish virgins," he continued, the county lawmen "sent in their excuses" and ignored the governor's call. Such a gathering would have constituted the first county law-enforcement conference in the territory. A similar lack of cooperative spirit prevailed among sheriffs in Arizona.<sup>21</sup>

The system of territorial government itself was not designed to help the sheriffs, being a mixture that embodied the contrary elements of republicanism and arbitrary authority. Republicanism called for the division of power among many elected, rotating positions, each of which was largely autonomous. While the more mature eastern states could support such an approach, the younger and often volatile territories were less able to do so. At the same time, the governor, the district judges, and other officers were appointed by the president. In turn, the governors (who were

<sup>20</sup> *Revised Statutes of Arizona*, supra note 19 at Title 13, ch. 3, 138; Harkey, *Mean As Hell*, supra note 6 at 72-73; J. George Hilzinger, *Treasure Land: A Story* (Tucson, 1897).

<sup>21</sup> Wallace to Sheriff Juan M. Garcia, Socorro County, June 5, 1879, Box 8, Lew Wallace Papers, Indiana State Historical Society, Indianapolis (copies were sent to the sheriffs of the counties of Dona Ana, Colfax, Grant, San Miguel, and Valencia). Unidentified newspaper clipping, [August?] 1879, Wallace Scrapbook No. 6, Box 32, idem.

usually politicians from the East) filled lesser positions, including that of the first sheriff of each new county. These territorial executives also had the power to remove sheriffs with cause and to make temporary replacements. During the emergencies of the late 1870s and early 1880s, governors Samuel Axtell of New Mexico and John C. Fremont of Arizona aroused much public anger and contributed to an increase of violence with their arbitrary shrieval appointments and removals.<sup>22</sup>

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### A GROWING PROFESSIONALISM

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By the time of statehood in 1912, a measure of law and order nevertheless prevailed in the New Mexico and Arizona territories. For several reasons the sheriffs had contributed significantly to this achievement. However thinly spread and clumsy in response they were, they functioned continuously and maintained some pressure on the criminal element. One asset was the increase in the number of counties, and hence in the number of sheriffs. In 1870 Arizona and New Mexico had contained, between them, only eighteen counties, making each sheriff, on average, responsible for one hundred and thirty-one thousand square miles of terrain. By 1912 the number of counties in the two territories combined had reached forty-two, with each sheriff's task reduced to fifty-six thousand square miles.<sup>23</sup>

The job was still daunting. However, sheriffs were beginning to demonstrate some professionalism. In 1884 some of them formed the New Mexico Sheriffs' Association, and in the next decade their Arizona counterparts followed suit. While these movements were partly inspired by a desire to influence or restrain regulatory-minded legislators, they also fostered communication and an exchange of new law-enforcement techniques among them. Sheriffs in the more heavily populated counties in both territories were divested of their tax-collecting duties, and could thus devote more time to law enforcement. New territory-wide police forces—the Arizona Rangers and the New Mexico Mounted Police—were introduced just after the turn of the century. Besides helping the sheriffs, they enabled the governors to monitor the performance of county lawmen. The ensuing rivalry may have spurred

<sup>22</sup> See Pomeroy, *Territories and the United States*, supra note 4 at 16-17; Norman Cleveland, comp., *An Introduction to the Colfax County War, 1875-78* (n.p., ca. 1975); and Keleher, *Violence in Lincoln County*, supra note 15 at 124-27; Marks, *And Die in the West*, supra note 15 at 118-20.

<sup>23</sup> Henry P. Walker and Don Bufkin, comps., *Historical Atlas of Arizona* (Norman, 1979) maps 29-33; Warren A. Beck and Ynez D. Haase, comps., *Historical Atlas of New Mexico* (Norman, 1969) maps 41-50.

the sheriffs to greater efforts and made them more cognizant of modern techniques.<sup>24</sup>

The growth of sophisticated means of communication, especially the telegraph and railroads, brought about prompter responses to violations of the law. In 1883, Gov. Sheldon successfully mustered the sheriffs of counties along the Santa Fe Railroad to prevent the escape of James Whitney, a wealthy easterner who had killed Manuel Otero, an influential Hispano, in a land-grant dispute. San Miguel County Sheriff Santiago Baca made the arrest by rail.<sup>25</sup>

While New Mexicans and Arizonans could by no means claim that their lands were free from lawlessness, by 1912 both new states were far more law abiding than when the settlers had arrived more than six decades earlier. The sheriffs could claim some of the credit for this achievement.

<sup>24</sup> *Albuquerque Daily Democrat*, February 16, 1884; *Weekly New Mexican*, July 30, August 5, 12, 1885; *Arizona Republican*, February 22, 1899, October 2, 1902, March 9, 1905; Bill O'Neal, *The Arizona Rangers* (Austin, 1987); Chuck Hornung, *The Thin Gray Line—The New Mexico Mounted Police* (Fort Worth, 1971). See 35-36 for the mounted police's charges against an errant sheriff of Torrance County.

<sup>25</sup> Erna Fergusson, *Murder and Mystery in New Mexico* (Albuquerque, 1948) 33-48; the *Weekly New Mexican*, August 23, September 27, 1883, reports the cooperation of sheriffs with Sheldon.



*Foreground* Judge Alfred T. Goodwin, and Judge Richard C. Chambers, chief judge of the U.S. Court of Appeals, Ninth Circuit, from 1959 to 1976 (USCA 9th)

# JUDGE ALFRED T. GOODWIN: AN ORAL HISTORY

Editor's Note: Alfred T. Goodwin joined the U.S. Court of Appeals, Ninth Circuit, on December 17, 1971, and served as its chief judge from 1988 until 1991. A 1951 graduate of the University of Oregon School of Law, he practiced law in Eugene until 1955, when he was appointed to the state circuit court. In 1960 he joined the Oregon Supreme Court; nine years later President Richard Nixon appointed him a district judge for the District of Oregon. Judge Goodwin's oral history, excerpts from which are published here, was given to interviewer Rick Harmon of the Oregon Historical Society during several sessions held in Portland between May 10, 1985, and September 3, 1986. *Western Legal History* acknowledges with appreciation the Oregon Historical Society's permission to quote extensively from this interview.

Harmon: For the approximately fifteen years that you've been on the Ninth Circuit Court of Appeals, have you been able to discern, or do you think it's possible to discern, some broad categories of cases that stand out as being particularly prominent in this circuit, compared with other circuits in the United States? Does it take shape like that in one circuit compared with another?

Goodwin: There's not much regional differentiation among the circuits except to this extent: the coastal areas of the country definitely have more marine and admiralty cases than the interior circuits. The Tenth Circuit is a land-locked circuit consisting largely of Rocky Mountain and prairie states. The Eighth Circuit consists largely of prairie and Mississippi and Missouri River drainage. The Sixth Circuit is Ohio River drainage, and so on. Now those circuits have the problems of farm bankruptcies and problems involving the closure of plants, the heavy industry. The Sixth Circuit has heavy-industry closings, and steel-mill closings, blamed on cheap imports. There are regional-interest areas and regional concerns.

The Ninth Circuit has a great pan-Pacific trade with China, Japan, Korea, the Philippines. We have tremendous ports of entry for narcotics, both from Asia and Latin America.

We have Indian problems. I was just reading in this morning's paper about a treaty problem up in Yakima. Some Indians who have been found guilty of criminal violations of federal law

(there's a warrant for their arrest) are being given sanctuary inside the tribal lands of the Yakima Indians. There's a contest between the U.S. marshals and the Indian police coming up on the horizon. That could happen probably in a couple of other circuits, but it's fairly common in the Ninth Circuit. We have the Mexican immigration problem, with local statutes, local city ordinances, testing bilingualism—the Quebec-type approach to Spanish language in Southern California, for example. These are questions that might be unique to the Ninth Circuit.

The entertainment business in Hollywood generates a lot of copyright and intellectual-property law, which is found to some extent in the Second Circuit in New York but not too much elsewhere. Florida has some unique problems with the Marielitos, the people that Castro sent here when he cleaned out his jails, sent to Florida; that's in the Eleventh Circuit. Florida also has the Haitians, a French Creole-speaking immigrant group, which is creating some interesting problems in south Florida.

As you go around the country you see regional problems, but more impressive is the commonality of the legal questions nationwide. Chicago has a large Mexican-immigration problem, and it impacts the Seventh Circuit. So even though Chicago is a long way away from the Mexican border, the immigrants have followed the drinking gourd and gone all the way to Lake Michigan. In our circuit there is a kind of a sawtooth effect. If you look at a chart like a stockmarket chart or a graph, there is a picture of the rise and fall of certain kinds of litigation. During the Vietnam war we had a high point on selective-service cases.

When the Reagan administration came in and had time to restructure their welfare program, we had a big increase in the challenges to the administration of the welfare laws, the entitlements programs.

When the next administration comes in we may see a bump in antitrust cases, an upward curve in antitrust cases, or we may see a further decline. We are enjoying a kind of decline in antitrust cases now.

A historian could look at some of these things on a sort of a chart model and the chart would tell you something about history, about the actual impact of certain changes in legislative and executive policies.

The court is an interesting instrumentality because we're under an oath of office that says that we will support the Constitution and the laws of the United States. Then we're handed the job of interpreting what the Constitution and the laws of the United States really mean. So it's an exciting kind of work, and because we are lifetime appointees we can sit back and look out over the political swings of the pendulum. Already in my short time on the Ninth Circuit I've served under presidents Nixon, Ford, Carter, and Reagan, and I'm looking forward to living long

enough to serve under a fifth president and maybe a sixth or so on down the line. One can see changes in the executive branch and then see how this presses buttons on our keyboard that we have to react to as judges.

Harmon: You made the interesting distinction when we talked yesterday between memorable cases and important cases. And of course I would be interested in hearing about either one that you have, maybe, some special recollection of during the fifteen-year period. That's kind of a bald question, but . . .

Goodwin: Well, I wish I had a better orientation for remembering specific cases. Once in a while something will remind me of a case and then I'll remember it. But when you're participating in two hundred or three hundred cases a year and writing opinions in about a third of them, it's hard to remember specific cases unless they have some colorful fact, and usually the colorful fact questions arise in cases that aren't very important except to the people involved.

One of the most interesting and conspicuously unimportant cases I recall was some years ago, when the United States District Court was the only court in Guam—at least the only court in Guam that could grant a divorce—and a Navy captain got involved in a complicated property-settlement agreement with his spouse, and they ended up in the United States District Court in Guam and the appeal came to our court. Until that case came along I had not known that the Ninth Circuit ever heard divorce cases. I mean, if someone had asked me on a bar-exam question I would have said, "No, the United States courts of appeal do not hear divorce cases." But I ended up hearing one from Guam. Now the law has been changed and Congress has created a superior court out there in Guam that hears divorce cases, and those appeals do not come to Ninth Circuits. That case had no importance in the history of the world, but it was an interesting little footnote.

A more interesting Guamanian case was one involving the right to "tap tuba." Most people who don't know anything about the Philippines wouldn't know what tapping tuba means. It might conjure up a vision of some type of a wrong way to play a musical instrument or something. But in the Philippines for many, many years the local people have had the custom of tapping palm trees with a hollow tube that penetrates the cambium, I guess, or some layer of the wrapping around the tree under the bark, and the sap exudes into a receptacle very much like the Vermont sugar-maple tapping. This product is called tuba; it comes out of the tree. The right to tap trees is a right that one landowner can convey to another person. If I own a hundred acres of coconut trees, I can say to any number of individuals, "You have a license to go and tap tuba on my property." (In

English common law it would be like a covenant running to a person, not running with the land, it could run with the land but it doesn't need to. In English common law it could be called an easement, or a profit, and a person could have a right to collect this substance.) It's turned then into an alcoholic beverage, which is in great demand by the local population.

When Spain was running the Philippines it used Guam as a penal colony, somewhat like England used Australia. There were antisocial elements in the Philippines that weren't death deserving, and of course in those days a lot of things were punished by death, so the Spanish didn't waste a lot of time on heavy criminals, but the minor undesirables they transported off to Guam, where they colonized. The Chamorro culture in Guam has a heavy infusion of Philippine culture and ethnicity, as well as racial stock. But the tapping of tuba is one of the cultural traits. So we're sitting in Hawaii listening to cases, and here came a case involving the right to tap tuba on another guy's property. It's not the sort of thing you learn in law school about cases heard in federal court. It's the sort of thing you'd expect if you'd get it at all in state court. Those cases aren't important, but they are interesting.

Harmon: You've made this characterization of importance and nonimportance in several different instances, and I wonder if you could define a little bit more what you mean by that. Does it have to do with adjudicating a case that clarifies law, or does it have to do with the social effect of the decision?

Goodwin: Both. I think an important case is one that becomes precedent and clarifies the law as applied to an important social question. I would include cases involving separation of church and state, freedom of speech, some prison-reform questions, some questions about the civil rights of individuals against government units. Those are important cases because they redress imbalance of power between the individual and the government, and they reflect our social agenda, maybe, or our political commitment to certain values that seem to be permanent and yet are constantly being challenged one way or another.

For instance, we have a kind of a permanent commitment in this country to some degree of autonomy. That is, the individual citizen has a sense that he or she has the right to make important decisions about his or her own life without being told by the government how to do it. Opposed to autonomy is a busybody urge by government and government bureaucracies and individual officers. There seems to be a powerful urge to be paternalistic and tell people how to run their lives. And the more power a government—whether it's municipal, state, or county or federal—[has], the more power that government bureau or bureaucrat or group of bureaucrats can get, the more they like it. They seem to thrive on

building up their turf or their ability to influence other people. The more powerful they get, the more people they can hire. The middle-management people become top management. They get promotions. Sergeants become captains, captains become majors, and so on. And it's true in bureaucracy just as it is in the military, which is just another form of bureaucracy.

Anyway, one of the interesting things that a judge sees is this constant tension between individuals trying to do their own thing and governments trying to stop them and interfere with them or tell them how to do it better or tell them not to do it so often, or whatever. It's just a constant contest of people trying to live their lives and the government trying to "help" them, frequently in a paternalistic way. And so we get laws about motorcycle helmets, we get seat belts, we get air bags. The government-as-nanny becomes a big thing, the government looking after people to keep them from hurting themselves. We have laws that make it a crime to try to commit suicide. It's okay if you succeed, but if you botch the job then you have to go to jail for attempting suicide. Those kinds of laws very rarely ever get repealed. Sometimes they fall into disuse, but no senator wants to be identified by his opponent in the next election as the man who came out with a bill to legalize sodomy, for instance. So these laws just sort of stay on the books and don't ever get changed.

People become weary of waiting for the legislature to change obsolete or unwanted laws and so they'll go to the courts and say, "Declare it unconstitutional." And some courts will look at it and say, "Well, we don't see anything in the Constitution about this." Or other judges will look at it and say, "Well, maybe it does impinge some way upon some broad reading of Article Nine of the Bill of Rights" or something. You'll find judges responding to these stimuli in different ways, depending on how they feel about autonomy and government and the relations between individuals and their governments. It makes it an interesting kind of subject matter when you try to say what's not important and what is, on a scale of one to ten. A lot of it is in the eye of the beholder.

It's terribly important to some persons that we stop subsidizing tobacco, for instance, because tobacco is known to be harmful to human lung tissue, or if it's ingested by other means, I suppose, if people find they get lip cancer from chewing snoose, or get carcinoma of the lower colon by anal suppositories. Does the government have to tell people not to put Copenhagen in anal suppositories, or can it be that people will have to figure it out for themselves? The role of government is always the question in these cases. And then what's important is so often a matter of the trend of the times.

Since I've been a judge we have had all kinds of social changes and a lot of them [have been] aided by legislation, such as various statutes that give women the right to equal pay for equal work,

and so on. We have this whole area of what's equal work, and that gets litigated all the time. We have a case I may have mentioned, about the salaries of persons employed by the Oregon State Board of Higher Education and statistical disparities between salaries paid to men and women over a long period of time. How much of that is attributable to good collective bargaining by bulldozer operators versus non-collective bargaining by typewriter operators we don't know. There are a lot of imponderables in that area. But those are important cases because they affect lots of people. A decision in a divorce case usually just affects two or three people and the nonvoting shareholders, the children, but a decision in a payroll disparity case can affect thousands of people and can affect millions of dollars of public funds.

Harmon: I'd like to ask you if you would characterize any kind of noticeable evolution in the philosophy of the circuit as it has grown during the fifteen years that you've been on the Ninth Circuit. Can you characterize the ways that the judicial attitude of the court has evolved during those years?

Goodwin: Well, it's hard to generalize about the attitude of the court, but I think the role of the court has expanded in terms of judicial—I don't mean activism exactly, but judicial outreach into areas of activity that were, in the first half of this century, not really dreamed of as federal judicial business. Part of that is caused by acts of Congress in federalizing questions that had previously been left to the states, and part of it is in an expanded reading of certain statutes and constitutional provisions by the Supreme Court which have created a kind of open invitation to litigants to bring cases to the federal court that probably would not have been brought up until as recently as the 1960s.

A lot of people talk about the Warren Court having been the big active growth agent in developing a wider federal jurisdiction, but it's been more of an accretion rather than an avulsion, in terms of what rivers do. It's been a gradual building up of a delta of federal jurisprudence reaching into areas [that] I think most people traditionally, when I was in law school clearly, thought of as state law matters. Things like employment tenure.

Nobody ever thought in the 1950s that a person who lost his job as a city police officer or lost her job as a deputy county clerk would have a federal court case to review that personnel decision, but that's a routine kind of litigation in our court today. That grows out of acts of Congress, equal-opportunity laws. Well, Section 1983 of Title 28 has been on the books since the post-Civil War period, but nobody paid much attention to it except in cases where southern sheriffs would arrest minority persons without cause and hold them incommunicado in jail without charges and then maybe beat a confession out of them or something. The so-called civil-rights statutes of the late 1800s we

generally think of as post-Civil War implementing acts of Congress to implement the Fourteenth Amendment and the Thirteenth Amendment, and so on. Those statutes have been discovered by personal-injury and tort lawyers for contingent fees now. They are a cottage industry in the various federal courts now throughout the country. It's not peculiar to the Ninth Circuit. But that's been a big area of growth.

Another area of increased private litigation has been a kind of a watchdog function that used to be performed by the press and by opposition party politicians [and] is now being performed by private attorneys with a contingent fee in mind. And all kinds of political decisions are being challenged in court. Building dams or building highways or building most anything that disturbs the environment will produce a lawsuit, and it'll be in federal court. And then the wisdom of the environmental impact of that activity is challenged, not by the opposition political party, which was the traditional way to challenge government, but by private lawyers who can collect a fee if they win. Even if they don't win sometimes they are paid for some of their activity. So you get a lot of litigation that is really challenging governmental action, and it's brought by private attorneys general, private lawyers representing interested litigants. The most notorious are, because of their colorful names, cases like [that of] the snail darter, which almost brought the Tennessee Valley Administration to a screaming halt a few years ago; the desert pup fish, a little cyprinid down in a salty waterhole in Nevada, practically brought the government to a halt on some project down there because this fish was determined to be an endangered species.

Now the fish didn't file their lawsuit, some interested citizen who was interested in preserving endangered species filed the lawsuit. Cleveland Amory, who is a noted figure in our culture, has made a great contribution in enhancing the public awareness about the rights of animals. He's always suing somebody in federal court to make the government stop doing something to animals. Cleveland Amory didn't like the way the Navy was disposing of surplus goats on some of the islands, the Channel Islands in Southern California, or the way the Interior Department was disposing of surplus burros in Death Valley. You know, all these things produce federal litigation now. Thirty, forty years ago they would have produced a few letters to the editor and some opposition-party politician, if he thought he could get any votes out of it, would challenge the government. When I say "government," it might be state government or county government or city government. All governments need to be challenged frequently, and early, and often. But it's being done quite a bit now in federal court by litigation when it used to be done by campaign speeches. So that's been a change since I've been watching the scene.

There hasn't been any shrinking of jurisdiction, and, I suppose, like any bureaucracy, the federal courts will continue to expand. It seems to be inherent in the nature of a bureaucracy to grow. So don't look for any sudden shrinkage of business. But, as the business grows, it denigrates the position of the court in a sense. For example, when I joined the court fifteen years ago it had thirteen judges, and they were important people. Now it has twenty-eight active judges, and they are less important people because they're diluted. Their impact is diluted just by the numbers. People say, "Good grief, another federal judge." Anything that expands, particularly if it expands rapidly, any institution tends to lose a little bit of its majesty and prestige by expanding too fast.

Harmon: My question about the judicial philosophy of the court as a whole over the years and what your perception of it might be was partly connected to the Judicial Omnibus Bill of 1978 that added so many people wholesale to the court, and that was a measure that occurred during the Carter administration. These were all appointees of the Carter Justice Department, so that would seem to me to have had a noticeable ideological impact.

Goodwin: It did, except that in an intermediate appellate court individual personnel changes don't make that much difference. I don't want this to sound critical, but you'll never see a rapid expansion of the federal judiciary unless the White House and the Senate and the House of Representatives are in the same political hands; in other words, until the majority of the Senate, the majority of the House, and the White House were all Democrats, and they said, "Aha, now's our chance to get some federal judges and really change the judicial complexion of this country." They were worried about the Nixon administration and a kind of a conservative reaction that had resulted from the Nixon appointments. So there was this almost doubling of the federal judiciary in a very short period, two years. And it made some changes, but they struck out on the Supreme Court. That administration never appointed anybody to the Supreme Court.

The intermediate courts started with these new ideas and new hotspurs that had their agenda of reform, and so on. A few of their cases made their way to the Supreme Court and were promptly reversed. While there was an impact, it was not the kind of impact that the sponsors of the legislation had in mind when they enlarged the court; I don't think it was the kind of impact that they were looking for. I think they were probably disappointed because the doubling of the federal judiciary didn't produce remarkable changes in the actual operation of the federal courts.

If Carter had been reelected and had gotten the chance to make a couple of appointments to the Supreme Court in his second

term, all that history might have been different. So it's interesting. . . . Now in this Congress the Senate is just barely Republican, I think by one or two votes, and that may change in November of this year; there won't be any expansion of the federal judiciary until the Senate and the House and the White House are all the same party again. So we may have to do all of our business with the judges on hand now for quite a while until we see another constellation of planets that produces a rapid expansion of the judiciary.

Harmon: Well, speaking of that discrepancy between the ability of the Carter administration to pack the federal judiciary in a way and at the same time being unable to make any Supreme Court appointments, that probably has something to do with those twenty-two consecutive decisions from the Ninth Circuit up to 1984 that were reversed by the Supreme Court.

Goodwin: I think so, yeah. As one of the justices said, "The trouble with the Ninth Circuit is they can't turn down a hard-luck story."

Harmon: Who said that?

Goodwin: Bill Rehnquist. These are interesting times, really. It'll be very interesting to see what finally happens if Rehnquist is confirmed. I don't think that there's any serious danger that he won't be, but the Democrats on the Senate Judiciary keep digging around trying to find something that they can use that will stop the confirmation. But this thing that came out early this week on a family trust, where he had drawn the trust instruments, I don't think even approaches being a smoking gun. It's a Mickey Mouse issue that his detractors have seized upon for want of anything better. There was no conspiracy of secrecy to defraud this disabled relative, who was himself a lawyer and was quite capable of finding out what was going on if he was interested. So I don't think there's going to be anything to it other than the typical family, a kind of a family disagreement which has been made public now. But those are problems that I have never had to worry about because my family was never affluent enough to have trusts. I regard these as sort of like gout that the royalty used to suffer from in medieval England. I could never afford to get gout because I couldn't afford that rich diet.

Harmon: Well, going back to that twenty-two consecutive-reversal string, that has now been broken, hasn't it?

Goodwin: Oh yes, we get affirmed once in a while. We still get reversed about 76 percent of the time, I think, which is about the national average now for courts of appeal. The Supreme Court doesn't take cases to affirm, ordinarily. When they take a case they are probably going to reverse it. There are two or three

reasons why the Supreme Court will take a case. Out of the nearly four thousand cases that we disposed of last year I think the Supreme Court took about twenty-eight of them. Well, they didn't take them to affirm. They took them because either there was something seriously wrong with them, or somebody at least thought there was something wrong with them, or—and this is important—there was a split between two or more circuits and a divergence of opinion among the circuits, and the Supreme Court felt that the time had come to take a case from some circuit and straighten out the division so that you didn't have one kind of law in Norfolk, Virginia, and another kind of law in San Diego, California, two big seaports. So they would take a case and straighten it out.

It's pretty much a matter of random luck whether they take the Ninth Circuit case or the Fourth Circuit case. If they take the Ninth Circuit case we might get affirmed. When we get affirmed, it's usually when they want to straighten out a division among the circuits and they just happen to choose one of our cases to declare the law for all of the circuits and then, if they happen to agree with us, as they do sometimes, they may affirm it. That's how we pick up our affirmances. We pick up our reversals when the attorney general or the solicitor general will read one of our opinions and say, "Oh my God, they didn't, did they?" And yes, they did, and so then they'll take it up to the Supreme Court to get it straightened out. Usually that's when we have deviated from Supreme Court precedent on matters of immigration or criminal law or occasionally on Indian law, but Indian law is such an unknown wilderness of single instances that there's really no body of coherent Indian law. It changes all the time. It changes with the Supreme Court's view of this schizophrenic sovereignty we have.

We have two nations under God under our Constitution, the Indian nations and the non-Indian nations. It's a weird system, where you have treaties that were made on the European diplomatic pattern. A treaty between the Algonquin Nation and the secretary of state, Hay or Adams, whoever it was back in those days, was treated just like a treaty between France and Bulgaria or a three-party treaty among the United States, France, and Bulgaria. Then you have a treaty between the United States and the Chickasaw, the Chickahominies, the Apaches, or the Shoshones, as they moved west, the new names would appear on these treaties. And most of the time the treaties were predatory on the part of the federal government. We were taking outrageous advantage of the Indians and putting the result in treaty form. Well, we still follow the fiction that there are two nations under God living on this land—the Indian nation in the treaty and the Great White Father back in Washington. Here we are in 1986, trying to decide the rights of American people under these

treaties, and there are all kinds of vested interests in keeping it that way.

The Bureau of Indian Affairs wants to keep its bureaucracy and keep the Indians as dependents and the jolly little wards of the BIA. As a result they pauperize them and keep them socially and economically retarded. Then there's the desire of some Indians to mainstream and become full-fledged Americans, which they could very quickly if they wanted to and were allowed to merge into the general population. But they would disappear as Indian nations. They don't want to disappear as Indian nations. So they consciously refrain from mainstreaming because they know it's dangerous. It's just like Mormons or Jews or Baptists or Lutherans or anybody else, if they start mainstreaming they start intermarrying with other kinds of people and pretty soon you don't have a strong ethnic or religious or racial identity. Look at French Canada. The Indians virtually disappeared in French Canada. They mainstreamed.

There are very few reservations in eastern Canada. When the French came over they didn't bring women with them. The Anglos, the English and the Scotch, when they came over they brought their own women with them and they retained their racial separatism. The French came without women, took up with the local women, and the Indians disappeared and they all became French Canadians. Most of the American Indians now don't want to become hyphenated Americans. I mean, they prefer to be Navajos, Hopis, Shoshones, what have you. The old Cherokee and Chickasaw, Chickahominies, and so on, they pretty much disappeared, there are a few Cherokees left in Oklahoma but none left in Georgia. A lot of them became mainstream Americans. But as long as we maintain this schizophrenia that we have to have two nations living in this country, why, we're going to have problems with Indian law, and the Supreme Court's going to be kind of a weathervane and treat these cases on an ad hoc basis. The intermediate federal courts are having a hard time trying to figure out just what is called for because the precedent goes all over the place. One of the problems before the Ninth Circuit right now is to try to find a coherent body of Indian law to use on Indian cases. Different social pressures will come up, people will discover interesting little loopholes in the law, like selling cigarettes tax free. If you've got a 25 cent-per-package tax on cigarettes at a local grocery store and an Indian reservation can sell them tax free, you can see an enormous amount of business flowing over to the Indian reservation to buy cigarettes. These cases come up all the time in all kinds of different contexts. That's just one context.

Some of the most divisive cases on our court are not constitutional questions, but are cases arising out of Indian taxation questions or Indian gambling. You take a state like California that

has rather rigorous laws against gambling. Then you have an Indian nation living on a reservation making its own laws. And they say, "Well, gambling is all right. We'll tax it. We'll let the tourists come in here and play bingo and we'll rake off 10 percent of every pot for the tribal fund." Well, should California gambling laws apply on Indian reservations? And the next question is, who wants to know and what do you want to know for, because that's going to decide the case.

Harmon: Referring again to the twenty-two consecutive reversals, it's clear from the explanation that you just gave that that's not as outrageous as it might seem on the surface. It's about 25 percent difference from what the standard is really, 75 percent to 100 percent.

Goodwin: Yeah. This year we're right in the middle of the national average.

Harmon: In this streak here, did you ever stop and look to see how your own individual standings on these cases?

Goodwin: Oh, once in a while. In one case I wrote a dissent from what our court was doing and the Supreme Court adopted my position and reversed the court. I didn't take a lot of comfort in that kind of positive reinforcement, because I sort of felt unhappy that the court had gone as far as it did. It was a kind of a dumb thing for our court to do, but it was just feeling its oats and that was, well, that was one case that I think could be traced to the infusion of new blood on the court during the Carter administration. On another case I was on a panel that was reversed summarily without so much as a full-fledged opinion, and I was swept downstream along with my liberal colleagues on that panel. That was a case involving the Los Angeles police using the choke hold on people they'd arrested over a period of some years, I don't remember, maybe it was ten years. They'd had maybe twelve fatal incidents of people being choked to death by police officers putting a stranglehold on the neck and it would cut off the supply of blood from the brain and the person would be irretrievably lost by the time the officers discovered that the guy had stopped kicking and resisting arrest. Well, a district judge in Los Angeles enjoined the practice at the request of some plaintiffs. A guy who had been strangled had survived. He sued and asked for injunction, and the district judge granted the injunction. We affirmed it with a rather perfunctory opinion. I think Shirley Hufstедler wrote it, and I concurred. The Supreme Court took the case and summarily reversed it on the ground that the guy didn't have any standing to get an injunction against that practice because he couldn't prove that he was likely to be strangled again and therefore he didn't have standing to sue.

Harmon: If he had died then he could have sued.

Goodwin: His widow could have sued, yes. When I got reversed on that case, I thought, "Well, the Supreme Court just must not have anything more important to do," because that was, I thought, a mistake on their part. And that was during that string of twenty-two that you mentioned, *Lyons v. City of Los Angeles*.<sup>1</sup> So I don't know, I don't worry a whole lot about my batting average with the Supreme Court. I do my work and they do theirs; we have different jobs.

Harmon: What about the previous case you mentioned where your opinion was adopted by the Supreme Court?

Goodwin: That was the Korean family that were trying to avoid deportation on the ground of extreme hardship. They'd come over here on a student visa or something and had just forgotten to go home. They liked the good life in the United States and they raised a bunch of children, the children spoke English and the family was in business here and they were making a good living. As Asians frequently are in this country, they're tough competitors and they're good people. They're the kind of people who made America great. But, anyway, they ran afoul of the immigration authorities, just like poor people do. This family, most of their extreme hardship consisted in reduction in the standard of living if they had to go back to Korea and wait for a quota, which is very, very slow—almost nonexistent, or a preference, immigration-preference basis. Anyway, I dissented from this decision letting them stay here, finding extreme hardship. I said that the statute vests that authority, rightly or wrongly, in the attorney general. It's not up to this court to substitute our judgment for that of the attorney general in this kind of a case, and the Supreme Court took it and agreed that I was right. I didn't enjoy being right. That was a case where I would have been personally happier if we could have told that nice Korean family to stay here and make money and pay taxes and contribute to the economy of the United States because they were doing a good job, but the law doesn't read the way my court thought it did, or tried to make it read. The law leaves that decision in the executive branch.

Harmon: That puzzles me a little bit, your disappointment at being right, having the Supreme Court adopt your decision.

Goodwin: I wasn't really disappointed, I just was sorry that the law was as harsh as it is on that kind of a case. I guess that's where I differ from some of my colleagues [in that] I don't care—I

<sup>1</sup> 656 F2d 417, 449 U.S. 934.

mean I care personally, but professionally it's none of my business whether the law is harsh or not. The law is the law, and I took an oath that says I will enforce it. So it may be painful sometimes. It's always painful, it was when I was a trial judge and had to send some poor wretch to the penitentiary, but the law is the law. Of course in those cases I didn't feel much agony about it, either. I just figured he made his own decision and he can pay the fiddler.

Harmon: Are you saying, though, that in that case you wouldn't have written the dissent if it had been meaningful to the decision? In other words, you maybe knew that the other two people were going to vote together and so you felt free to write the dissent?

Goodwin: This was an *en banc* case in which we had taken a panel decision and it had gone *en banc* and I thought a majority of the court was acting a little bit in excessive exuberance for its position in trying to regulate the immigration service. This is a recurring theme in our court. You may notice from time to time [that] I mention immigration, because it's an area where feelings will sometimes carry a group of judges in one direction where the law tends to go in another, and those cases are always difficult. Selective-service cases during the Vietnam war, which I've mentioned earlier, had some of the same effect on the court. The personal feelings would be different, maybe, than what your reading of the law required.

Harmon: We've spoken quite a bit now about the business of the Ninth Circuit during the fifteen years that you've been there, and we've arrived at some general characterizations about how they've functioned as a judicial body. I wonder if we could move to a little more personal level now and talk about some of your colleagues, both the past and the present, that may stand out in your mind as deserving some special mention.

Goodwin: Well, of course, the number one person on that list would be John Kilkenny, who is in the hospital here in Portland today. He's eighty-five years old, and he's still working as a senior judge. You've already interviewed him, and you know John and you know why he's so lovable and so memorable; and he was a great lawyer, a great trial lawyer, and a distinguished district judge and then he served for a couple of years on our court as an active judge, and all of the fifteen years that I've been an active judge he's been a very active senior judge. We officed down the hall from each other for ten, twelve years, I guess, and had lunch two or three times a week for all those years, and so, in a lot of ways, he is closer to me than most of my relatives.

There are other judges that are great characters and have an impact on the court and on my life. Dick Chambers, who was chief judge during the first several years, I can't remember exactly when he stopped being chief judge—it's recorded somewhere,

possibly 1976, I don't remember—but let's say eight or ten years ago, he became a senior judge. Dick was very influential in my development as a judge on the court because he's a very wise person who has a good understanding of human nature and he has kind of a soft hand on the reins, but he's got a lot of leadership. He can cause you to want to do the right thing, cause you to do the thing he wants you to do without you knowing it.

Dick was a very important person in the court because he has, I don't know how much you've heard about Dick from John Kilkenny or Otto Skopil or others of us, but Dick has a speech impediment, so he's a slow talker. When he calls you on the telephone you kind of clear off your desk and get busy with some other work to do while he's talking because it takes him a long time to finish a conversation. But he's very effective in spite of his speech handicap. I always wondered why he wanted to be a lawyer, because lawyering is such a vocal kind of occupation, and here is a man with a speech impediment, a very serious one, who was apparently a hell of a good lawyer, a very effective lawyer and a very effective judge, and I think he was chief judge of our circuit for, oh, gosh, from some time in the early sixties up until about 1976 or '77 or something like that, one of the longer tenures of a chief judge. I never knew William Denman, who preceded Dick Chambers as chief judge. He was a character, though, by all accounts. I knew Judge [James A.] Fee, who was not chief judge but who was on the court for a short time. I knew him mostly as a district judge. History will have to deal with Fee in its own way. . . . I didn't know him well enough to have anything except anecdotal kinds of lawyer accounts of his courtroom demeanor. He did scare the dogwater out of the young lawyers, though, and the old lawyers too, as far as that goes.

Clifton Matthews I did not know personally but I know his son, who lives here in Portland and is in the drayage business, the transfer business, John Matthews. The judges I knew back to the older group on the court when I joined were Fred Hamley of Seattle, a former Supreme Court justice from Washington State, a very scholarly and wise person who was an excellent judge; Oliver Hamlin of Oakland, California, another very wise and scholarly man who came from an old California family and was a kind of a patrician, I think originally of French ancestry on one side at least, one of the few Catholic judges that we had in the early days of my time on the court; Gilbert Jertberg of Fresno was a great judge and a wonderful person, well loved by the lawyers and other judges. Gilbert died a few years after I came on the court. Jim Carter of San Diego was another great character and great judge. He was a former U.S. attorney, and then I think he was appointed to the district court by President . . . Kennedy, and the circuit court by President Johnson. He was never a doctrinaire party-line Democrat, though. He was one of the most conserva-

tive judges on the court, but he was a Democrat. That was Jim Carter. Charles Merrill of Nevada and Oliver Koelsch of Idaho were on the court when I came on and are still working as seniors.

Herbert Choy, who is now a senior judge, came on the year before I did, the first judge ever on the court from Hawaii and the first judge on the court ever of Asian ancestry. He was a Korean Hawaiian, a brilliant student at Harvard Law School and a very successful lawyer in Honolulu. He was born on a little farm in Kauai—an American dream if there ever was one: an Asian immigrant family, native-born an American, but from Hawaii, became a distinguished member of this court and gave us an insight which we just couldn't have had any other way to figure out immigration cases. He was a Republican, a Nixon appointee, very conservative in a lot of ways but on immigration cases he really scrutinized the fine print very carefully. Tom Tang, who was appointed later by President Carter about the same time that Otto Skopil was appointed to our court, was the first Chinese American to join our court. One time we had a panel, I think Bob Takasugi of the district court in Los Angeles sat with Choy and Tang and we had an all-Asian panel, which is kind of interesting. The court when I came on board had one woman and twelve men, all white, more or less demographically clones of each other. We had some slight differences in religious upbringing and so on, but basically the middle-American Norman Rockwell *Saturday Evening Post*-cover type, all of them gifted and talented people. Walter Ely was a great Texan with a great sense of humor and a hero in the Marines as an enlisted man in World War II. Walter was a brilliant trial lawyer, a good personal friend of Lyndon Johnson, politically fairly liberal in many ways, although economically he'd frequently find for the defendant in cases involving private law questions.

Shirley Hufstедler was a brilliant legal scholar, a female whose gender difference immediately disappeared. The court accepted her as a full-fledged sibling and we didn't refer to our brother judges, we referred to our siblings, but Shirley earned her professional spurs and was highly regarded by both the liberals and the conservatives. She was a little bit on the liberal side, a Johnson appointee, in fact the only Johnson appointee who survived the Abe Fortas problem. When Abe Fortas was nominated for chief justice, the Senate Judiciary Committee held up all of the other Lyndon Johnson nominees for all lower federal courts but they let Shirley Hufstедler go through because I think they considered it would be ungallant to hold up their first chance to put a woman on the bench in a long time. Shirley made it, and Cecil Poole and Herb Schwab of Oregon, whose names had gone over at the same time, Cecil Poole of San Francisco, a black former U.S. attorney, and Herb Schwab, a good, solid Democrat from Oregon who would have been the first Jew, I think, on the Ninth Circuit if



*Left* Judge Alfred T. Goodwin, and Judge James R. Browning, chief judge of the U.S. Court of Appeals, Ninth Circuit, from 1976 to 1988 (USCA 9th)

he'd been appointed, but his appointment and that of Cecil Poole were shelved because of the Fortas fiasco. Cecil was later appointed by President Carter in 1979.

I didn't forget Ben Duniway. I was sort of saving him for last. Ben Duniway was the only Rhodes Scholar, I think, on our court. Ben was a true scholar in the classical sense. He was a Latin scholar, a humanities scholar, who went to Stanford Law School and distinguished himself there and had a fine law practice in San Francisco, and was appointed by President Roosevelt or Truman . . . I forget whether he was early in the war or late in the war, but, anyway, he headed the Office of Price Administration in the western region. And then he went back into private practice, where he just had a good, solid general practice. He was appointed to the Ninth Circuit by President Kennedy in about 1961, or make that '62, shortly after Jim Browning, who is now our chief judge, was appointed. Ben Duniway became a senior judge about seven years ago but remained active until about three months

ago. He went in the hospital and recovered a little bit but then had further complications, and he died last Saturday. Ben lived a good life and he will be remembered, I think, for his quiet good humor and his excellent opinions and his ability to point out foibles in legal research by other judges. He'd point out a bad use of Latin or a misquotation or something, but he always did it gently and with a very pleasant kind of a memo that was fun to read. He'll certainly be missed. Well, as we get older we start losing our old friends, but they're not gone completely. I mean, they made their mark, and he'll be remembered a long time by everyone who knew him and by people who read his opinions.

Harmon: You've characterized many of your colleagues here pretty freely in terms of conservative or liberal or moderate, or somewhere along that spectrum. How do you think most of them see you or would characterize you in similar terms?

Goodwin: Oh, I think they'd probably—depending on where they themselves would fit on a continuum—see me as conservative. I think Judge Hall and Judge [Robert R.] Beezer, one of our newer judges from Seattle, would probably consider me somewhat of a maverick, fallen-away conservative, or maybe even as a sort of a closet liberal. Other, more liberal judges, like, say Fletcher, Schroeder, Norris, and [Warren] Ferguson would probably consider me as basically conservative, predictably conservative on some questions and unpredictable on others. I don't know, because I'm an Oregon Republican, and Oregon Republicans are not like California Republicans in some respects. The people in our court who were appointed by Democratic presidents were conditioned early in life to see California Republicans as the enemy. They see the Anaheim Republican as a kind of a predictably parsimonious conservative who plays along with the religious right, and that sort of thing. Oregon Republicans are different. I mean, we're the McCall, Hatfield, McNary, Morse (before his fall from Republican grace) Republicans. Morse never really had both hands on the Republican ladder, I don't think. But Oregon Republicans are just a different breed. They're kind of nonpartisan in a lot of ways. I think that it's just part of the Oregon milieu. We go back to the old Oswald West kind of Populism, along with a kind of a Civil War Union hereditary Republicanism and great infusion of new blood into the Oregon Country in the 1930s. The Dust Bowl brought in a lot of Democrats, but as soon as they made money and paid for their property many started voting Republican. So Oregon Republicans just don't fit a pattern, and I think I'm probably an Oregon Republican. I don't know how my colleagues would see me, but I think, depending on their own prism that they're looking through, they would see me as somewhere to the left of the Reagan Republicans and somewhere to the right of the Carter Democrats.

Harmon: It seems to have become conventional wisdom now that judicial appointments to the federal court are essentially political appointments, or they're part of the political process.

Goodwin: Well, it's been that way for a couple hundred years.

Harmon: As a student of history, I wasn't aware of it before I started doing these interviews with federal judges. And so I think it's something that a lot of people aren't aware of, and yet, if you begin to look at it, there's no secret about it, really, and [in] every interview that I've done now in this series with federal judges certainly nobody has tried to maintain that it's not a part of the political process—a mild form of patronage, I guess you could say.

Goodwin: There's an element, I suppose, of patronage. Historically it may have been even stronger than it is today. But more important than patronage, I think, is the desire of the party in power to perpetuate its life beyond its elected term. A Republican president knows that he or she will be out of office in eight years, and that the next president may be of the same party but very likely can be of a different party. And if the president wants to leave an impact on the country, the best way to do it is to pack the federal courts with people of the president's own persuasion. Wilson did it, Taft did it, Lincoln tried to do it, although Lincoln was working with a very divided country at the time. The federalists, well, go back into American history to the midnight appointments of federal officers that brought about the case of *Marbury v. Madison*.<sup>2</sup> Judges were appointed by the outgoing administration.

Every administration has tried to leave a legacy, I guess, of federal judges, because they're the only lifetime appointees provided for in the Constitution. So it's not surprising that Republican presidents appoint Republican judges, and Democrats appoint Democrats. In fact, it usually makes a kind of gee-whiz headline when they deviate from that, and there's always a good reason when they do. President Carter appointed Otto Skopil to our court because both of the Oregon senators insisted on it, and Skopil was very highly regarded by the profession as a district judge, as he had been as a lawyer. It gave Carter a chance to tell his critics, "Stop badgering me about appointing all these Democrats. I appointed a Republican out there in Oregon, wherever that is." And that got him off the hook nationwide. He could point to one Republican that he had appointed in the Ninth Circuit. As far as I know, that's the only one he ever appointed. People couldn't accuse him of appointing one hundred percent Democrats. Nixon undoubtedly appointed some Democrats in

<sup>2</sup> 1 Cranch 37 (1803).

the South to various judicial offices. And then he could tell people, "Look, I'm nonpartisan. I've appointed some Democrats."

Harmon: He tried to appoint one that didn't go over very well.

Goodwin: Yeah. So each president, for his own reasons, has made an exception once in a while, but they aren't statistically imposing. They are just very scarce. Now, that doesn't mean that once a judge is appointed he's going to be the puppet of some president. If anybody thinks so, look at Bill Brennan, who was pulled off the New Jersey Supreme Court, where he was regarded as a good, solid, substantial, Democrat, conservative justice. Eisenhower put him on the Supreme Court, and Brennan has been going his own headstrong way ever since. Republican presidents have deplored him, and Democratic presidents have rejoiced that he was there as a voice of liberal sanity during Republican administrations.

# THE 1811 SAN DIEGO TRIAL OF THE MISSION INDIAN NAZARIO

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BY DOYCE B. NUNIS, JR.

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**A**n essay by Richard L. Carrico on "Spanish Crime and Punishment: The Native American Experience in Colonial San Diego, 1769-1830" appeared in the Winter/Spring 1990 issue of *Western Legal History*.<sup>1</sup> One of the cases he cited in his study was the trial of a mission neophyte, Nazario, who served as a cook at Mission San Diego. In November 1811 Nazario was charged with the attempted murder of Fr. José Pedro Panto. Carrico wrote:

According to the records, Nazario poisoned Panto's soup with powdered *cuchasquelaa*, a herb, in revenge for repeated beatings. In his defense of Nazario, José María Pico urged that the Indian be acquitted because the poison was not fatal and the beatings—fifty, twenty-five, twenty-four, and twenty-five lashes over a twenty-four-hour period just preceding the poisoning—were unjustified. The prosecutor, Domingo Carrillo, agreed, but stated that other Indians must be warned that such actions would not be tolerated, and successfully argued for eight months of labor as the penalty. Pedro Panto died seven months later of what appeared to be the effect of the poisoning.<sup>2</sup>

Among his sources, the author inserted a note, referencing Hubert Howe Bancroft's seven-volume *History of California* (vol. 2, p. 345).<sup>3</sup>

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<sup>1</sup> *Western Legal History* 3 (1990) 21-22.

<sup>2</sup> *Ibid.* at 29.

<sup>3</sup> *Ibid.* at 29, n. 34, 35.

The purpose of the following discussion is to set the record straight on this case, often referred to by contemporary revisionists as a classic example of the Indians' struggle against the mission system and that system's reputed cruelty to its neophyte population.<sup>4</sup>

The Bancroft account runs as follows:

Panto was a rigorous disciplinarian and severe in his punishments. One evening in November 1811 his soup was poisoned, causing vomiting. His cook Nazario was arrested and admitted having put the "yerba," powdered *cuchasquelaa*i, in the soup with a view to escape the father's intolerable floggings, having received in succession fifty, twenty-five, twenty-four, and twenty-five lashings in the twenty-four hours preceding his attempted revenge. There is much reason to suppose that the friar's death on June 30th [1812] was attributable to the poisoning.<sup>5</sup>

A note concludes: "In the investigation [that followed] . . . Pico urged that Nazario's offense was justifiable on account of Panto's cruelty, and asked acquittal especially as the dose was not fatal. Carrillo admitted the friar's cruelty, but insisted on a penalty of 8 months' presidio work as a warning. The sentence is not given."<sup>6</sup>

Though it may come as a surprise to some, Bancroft did not write volumes 2-5 of his famous *History*. Those four volumes were the handiwork of Henry L. Oak.<sup>7</sup> His scholarly reputation was aptly described more than a century ago:

Nothing was taken for granted; evidence was everywhere insisted upon. Quiet speech, few words—chapter and verse of every authority, cited and shown by every advocate—replied to by objectors with a merciless analysis of the conditions under which the authority was quoted has produced the said chapter and verse—all

<sup>4</sup>Edward Castillo, "The Assassination of Padre Andrés Quintana by the Indians of Mission Santa Cruz in 1812: The Narrative of Lorenzo Asisara," *California History* 58 (1989) 117-23, 150-52; idem, "The Native Response to the Colonization of Alta California," in *Columbian Consequences*, ed. David D. Thomas (Washington, 1989) 1:377-94 [hereafter cited as "Native Response"].

<sup>5</sup>Hubert H. Bancroft, *History of California*, 7 vols. (San Francisco, 1884-1890) 2:344-45.

<sup>6</sup>Ibid. at 345, n. 12.

<sup>7</sup>Ruth F. Axe et al., eds., *A Visit to the Missions of Southern California . . .*, by Henry L. Oak (Los Angeles, 1981) 2, lists the specific contributions by Oak to the Bancroft Works.



Mission San Diego de Alcalá in the late nineteenth century, fallen into ruin, with an olive grove on the right (Los Angeles County Museum of Natural History)

this to substantiate the most trivial fact, if disputed. We used to think this was how history should be written.<sup>8</sup>

Most historians hold that same view today. However, as we shall see, even the best of historians can occasionally misinterpret or misread sources, not as a deliberate act of distorting the evidence, but through human frailty. No historian is infallible.

What follows is a verbatim translation of the contemporary proceedings surrounding this 1811 case, from transcripts made by one of Bancroft's research minions. It was summarized from the original records in the California Archives, Provincial State Papers, which were tragically destroyed by fire after the 1906 San Francisco earthquake. The complete summary follows.

\* \* \*

*1811. December 18. San Diego.*

On the 17th of November Corporal Antonio Guillén, commandant of the guard detail at the Mission San Diego, reported that he had been called by Fray Pedro Panto on Saturday the 16th at 4:30

<sup>8</sup>Ibid. at 1, quoting from Walter M. Fisher, *The Californians* (San Francisco, 1876).

a.m. to examine the soup he had been served. Both the corporal and Sergeant Mariano Mercado detected a very bitter taste in the soup.

The corporal had the person of the cook, Nazario, taken into custody.

In consequence, he ordered that an indictment be drawn up against said Indian, "accused of having given an herb to the Reverend Father Fray Pedro Panto in a plate of soup on the night following the day of November 16, from which resulted strong vomiting."

Cadet Don Domingo Carrillo was named prosecuting judge in the case, and he named Sergeant Joaquin Arce to act as clerk.

Father Panto, minister of the mission, was the first witness examined. He said that he noticed a kind of powder, between white and brown [in color] and very burning and bitter [in taste] in the soup; that, "partly because of its effects and partly from anxiety, it caused him considerable nausea and, after drinking a glass of warm water, strong vomiting that continued for a long half hour."

Asked whether there were bad feelings between the Indian and his companions and overseers, "Oh, yes, he had given him some lashes, for which he had taken offense. He said that he had not noticed anything before; on the contrary, he had taken him for a pacific and calm Indian. As for the whippings, he said that yes, he had punished him."

Sergeant Mariano Mercado confirmed what the padre said, adding "that he was not aware that the Indian Nazario had been evilhearted nor that he had done harm to any of the overseers with whom he had been [previously]; only, he *had* heard that he had been given 25 lashes, but he did not think that for such a short punishment he should have held a grudge against the said padre."

In further action, [the judge] had the accused released from prison to take his declaration under oath "to God and the Holy Cross to tell the truth regarding the point upon which I am going to interrogate you." He answered affirmatively and swore the oath. "Asked what he had been doing on Saturday the 16th of the current month, where he was, in whose company, and, in this case, to tell in minute detail what occurred at that time, he said that on the said day in the evening he was in the kitchen of the padres making their supper, and that he was there with the Indian cook named Torelano, who was washing dishes. Since, at 7 that evening he was asked for the Reverend Padre Panto's supper, and having first sent in the roast, the waiters replied that he should hurry up with the soup. He poured it into a plate, and then he took out a small piece of paper with the herb that he carried in the sleeve of his jacket, and then he poured it into the said plate. All

day he had carried it with him with the sole aim of seeing if he could dose the said *padre* [with it] to see if, in this way, [the *padre*] would not punish him so much, since for the last two days the whippings had never ceased, so that he did not know what to do . . ."

He said that no one had given him the herb, called *cuchas-quelaai*. He himself had obtained it and reduced it to a powder. "He had no other complaint against the said *padre* except that on the morning of the 15th he had given him 50 lashes, and on that night of the same day, 24; on the morning of the 16th, 25; on the afternoon of the same day, another 25. With this I saw myself so tormented by the multitude of lashes I was given, I found no other way to revenge myself, and for the many more that I was given I decided on the night of the 16th to put the said herb in the plate of soup to see if in this way I and the other Indians of the mission would be given some rest, since he was an unbearable *padre*. There were times when I did not save lunch (*merienda*) for the family of Sergeant Mercado, or because there was not enough food to go around, or even when I forgot, these were excuses for his giving me fifty, and while he was punishing me, when he was not doing it himself, he would get one of the pages to sing to me in a loud voice, '*merienda, merienda.*' No Indian of the mission likes him, nor do any of the gentiles, while Padre Sánchez is as beloved by the gentiles as he is by the Christians. While I was at the San Fernando Mission learning to cook, [Fr. Panto] passed through that mission one time and gave me 25 lashes."

In this proceeding, the defender of the accused, Sergeant José María Pico, alleged that the herb was not poisonous enough to cause death, since it was nothing but bitter broom (*escoba amarga*); that Nazario had never done such a thing with any other overseer he had had; that he is a very simple savage Indian,<sup>9</sup> and that this was proved by the very ingenuousness with which he made his confession. Moreover, consideration should be given to the desperation which overcame him in view of the continual chastisement by whipping that Padre Panto had been giving him. He concluded by asking that the defendant be given his liberty.

Prosecuting Judge Carrillo, in his opinion, said: "It is evident that, according to the testimony of the accused, in only two days he was punished with more than 200 [*sic*] lashes without having given serious cause"—that he put the herb, oregano, and pepper in the soup "for the annoyance which the said *padre* would feel for him" . . . "to see if, by this means, he could get out of the kitchen."

<sup>9</sup>The word "*bruto*" is used, meaning savage, in the nineteenth-century sense of unsophisticated, ignorant of white people's ways.

He concluded by saying that he does not find the accused "worthy of execution," and asking, in the name of the King, "that Nazario serve the sentence of eight months in the Presidio of San Diego to teach a lesson to the others."<sup>10</sup>

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With the documentary evidence laid out before the reader, the case requires additional comment. First, Nazario was supposedly administered a total of 124 lashes within approximately thirty-six hours, not twenty-four. Later the figure was erroneously increased to two hundred.<sup>11</sup> Think of the number! Medically speaking, if he was whipped in conformity with the prevailing style of flogging then in vogue in the British and U.S. navies, he would have been physically unable to move, let alone work; more likely he would be incapacitated for some days or weeks if he was whipped in the fullest sense of the word. In respect to Nazario's charge of 124 or two hundred lashes, take your pick: one must be suspect. His testimony was never corroborated.<sup>12</sup> Instead, Sgt. Mercado testified, "he *had* heard that he [the cook] had been given 25 lashes, but he did not think that for such a short punishment he should have held a grudge against the said padre."<sup>13</sup>

But there are other important considerations. First and foremost, in administering punishment to neophytes, according to one scholar, "the missionaries treated the neophytes like their own children, correcting them with words and for serious offenses with from twelve to twenty-five lashes applied but once for any misdeed, a regulation no missionary would dare to disregard."<sup>14</sup> At most, then, Nazario's punishment was no more than twenty-five lashes, which comports with Mercado's testimony and Franciscan policy. Were these "lashes" symptomatic of the use of the discipline (*disciplina*) by the padres in administering punishment to wayward neophytes who violated rules or infringed on the prescribe code of conduct? (Note that the lashes were not inflicted by a cat-o'-nine-tails, an instrument used in contemporary naval floggings, or a bull whip.) The number of *azotes* (a word that can mean spanking, strokes, strikes, lashes, and so on, depending on the context) set by Franciscan policy suggests a

<sup>10</sup>Santa Barbara Presidio Archive, Bancroft Microfilm, Reel CA17, 191-96. I am grateful to John C. MacGregor IV, who made this translation and kindly gave his permission to publish it here.

<sup>11</sup>Zephyrin Engelhardt, O.F.M., *San Diego Mission* (Santa Barbara, 1920) 163-64 [hereafter cited as *San Diego Mission*].

<sup>12</sup>Engelhardt dismisses the number of lashes as "too absurd to need disapproval." *Ibid.* at 153.

<sup>13</sup>Italics in summary as quoted.

<sup>14</sup>Engelhardt, *San Diego Mission*, *supra* note 11 at 165.

mild form of punishment, an argument ably expressed in a recent scholarly article by Francis F. Guest.<sup>15</sup>

One historian has described the use of punishment in mission life as follows:

Punishment within the mission community not only reflected the monastic discipline experienced by the regular clergy but also was infused with the fervor of the Counter Reformation. The padres brought to the New World a profound sense of sin and a belief in the expiating influence of penance. Above all, they were convinced in the subjugation of the flesh through such austerities as vigils, fasts and self-flagellation with *la disciplina* (a two- or three-strand hempen rope with knotted ends used by the laity and by the Franciscans at least three times a week). The number of *azotes* on the Indians was regulated by law. Indeed, the principle of "spare the rod and spoil the child" was firmly fixed in the European thought of the day.<sup>16</sup>

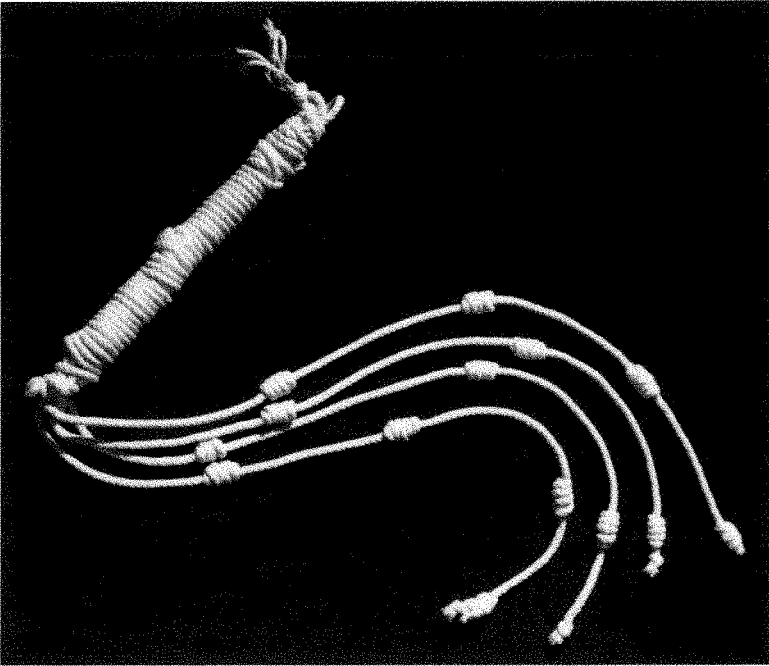
The accepted view of the time, according to Guest, was that "the intellectual capacity of Indian commoners was limited to that of boys about nine or ten years of age, as the European missionaries who labored in Spanish America seem firmly to have believed. Thus, that "the clergy of the Spanish empire . . . restricted the physical punishment of an Indian adult to what would normally be given to a boy of nine or ten was a matter of justice."<sup>17</sup>

An added consideration of great importance was the prevailing manual of pastoral theology used by the missionaries. This work, by Alonso de la Peña Montenegro, made it plain that, for the reasons stated as well as others he mentions, it was a mortal sin for anyone to whip an Indian so severely that the Indian suffered grave injury. De la Peña further declared that "civil and ecclesiastical superiors . . . were not only obliged to avoid cruelty in punishing Indians; they also had a duty to treat them with politeness, gentleness, and love, for they were recent converts to the Church, and to behave offensively toward them, with roughness and injustice, would be but to alienate them from the faith."

<sup>15</sup> Francis F. Guest, O.F.M., "An Enquiry into the Role of the Discipline in California Mission Life," *Southern California Quarterly* 71 (1989) 1-68 [hereafter cited as "Discipline in California Mission Life"].

<sup>16</sup> Gloria R. Lothrop, "El Viejo: Serra in Context," *The Californians* 7 (November/December 1989) 25.

<sup>17</sup> Guest, "Discipline in California Mission Life," supra note 15 at 37.



*La disciplina*—the discipline—which Franciscans used on themselves as a religious practice (mortification of the flesh). They also used it to punish wayward neophytes. (Santa Barbara Mission)

Cruel practices would only destroy the missionaries' evangelical efforts.<sup>18</sup>

In the use of flogging as a principal punishment imposed on Indians, neophyte and gentile alike, as summarized by Carrico in the chart concluding his article, three things should be noted. First, the floggings were imposed by the civil authorities, not the church. Second, the sentences ranged from moderate to severe, the most severe being for twenty-five lashes for twenty-seven days—a total of 675! The likelihood of survival from such a whipping, unless it were mild, would appear medically impossible. Lastly, the death penalty was imposed on two accused in one case, but was commuted in favor of flogging.<sup>19</sup>

A second important aspect of the Nazario case is the cook's intent. Clearly, from his own testimony he had no intention of killing the priest; it appears that he simply wanted to make him sick. In summing up the case, Carrillo declared that Nazario had "put the herb, oregano, and pepper in the soup 'for the annoyance

<sup>18</sup>Ibid. at 37-38.

<sup>19</sup>Carrico, *supra* note 1 at 32-33.

which the said *padre* would feel for him [after eating it and] to see if, by this means, he could get out of the kitchen.'" Pure and simple: annoy the priest, who in turn would fire Nazario as a mission cook.

However, two things must be pointed out. First, the herb Nazario used has at last been clearly identified. According to the author of a forthcoming book on California's Indians and their medicinal use of plants, the word *cuchasquelaai* is the name of a plant in the Kumeyaay Indian language.<sup>20</sup> Among the Pima Indians it was called *Shooshk vakch* (wet shoes). In Spanish it went under several names: *escoba amarga* (bitter broom) in California and Arizona; *hierba del pasmo* (lockjaw herb) in Baja California; *romerillo* (small rosemary) in northwest Sonora. In English the plant is variously referred to as broom baccharis, Indian broom, desert broom, or rosinbrush.<sup>21</sup> Its botanical name is *Baccharis sarothroides* A. Gray (syn. *B. arizonica* Eastwood). One of its essential characteristics is that its leaves are extremely bitter. It is indigenous to "the San Diego coastal sage scrub, west through the Colorado Desert to Arizona and southwestern New Mexico, south through Baja California, Sonora, and Sinaloa"; and is found "growing on the banks of arroyos and in other lowlands, often in highly saline soils."<sup>22</sup>

In the main, Indians in California and Arizona used the stems of the plant in making brooms and building houses. In Baja California the plant was used to cure tetanus, while three closely related species were used in home remedies for colds in Mexico.<sup>23</sup> Three related *Baccharis* species, native to the southwestern United States, "have been known to poison sheep and cattle. Known symptoms include various internal lesions in sheep (not uniformly characteristic); in cattle, a stiff-legged gait as though the animals were sore-footed, advancing to trembling and convulsions." However, large quantities must be consumed to cause animal deaths. The foliage is so bitter that animals will eat it

<sup>20</sup> Again, I am indebted to John C. MacGregor IV for providing his study of the plant in question, which will be published in his forthcoming book, hereafter cited as MacGregor MS.

<sup>21</sup> Ibid. MacGregor provides the following sources for this nomenclature: Maximo Martinez, *Catologo de nombres vulgares y cientificos de plantas mejicanas* (Mexico, D.F., 1979) 333, 1017; Philip A. Munz and David K. Keck, *A California Flora* (Berkeley and Los Angeles, 1970) 1337; and Peter Raven, *Native Shrubs of Southern California* (Berkeley and Los Angeles, 1964) 883.

<sup>22</sup> MacGregor MS, *supra* note 20.

<sup>23</sup> Ibid., citing Lowell J. Bean and Katherine S. Saubel, *Temalpakh: Cahuilla Indian Knowledge and Usage of Plants* (Morongo, Calif., 1972) 46, who use another species, "*B. Vinnea* Persoon, commonly known as 'mule fat' or 'seep willow,' to make a decoction employed as an eyewash, to arrest balding, and as a feminine hygienic douche."

only "in times of extreme drought when more palatable forage is unavailable."<sup>24</sup>

Panto probably had no more than one or two spoonfuls of the soup at most. As he testified, "he noticed a kind of powder, between white and brown [in color] and very burning and bitter [in taste] in the soup . . . [and] 'partly because of its effects and partly from anxiety, it caused him considerable nausea and, after drinking a glass of warm water, strong vomiting [ensued] that continued for a long half hour.'"<sup>25</sup>

It is obvious that Panto did not die until *seven months* after the food tampering. At the time of the incident, he immediately vomited, which means he expelled what little soup he had ingested from his stomach, a standard therapeutic procedure in such cases, either voluntary or induced. The added point to underscore is that the powder used was not poisonous, as stated by the defense and as discussed above ("it was nothing more than bitter broom [*escoba amarga*]"). Obviously, the padre died of other causes; in no way can his death be attributed to a small, nonfatal dose of bitter broom ingested seven months previously.

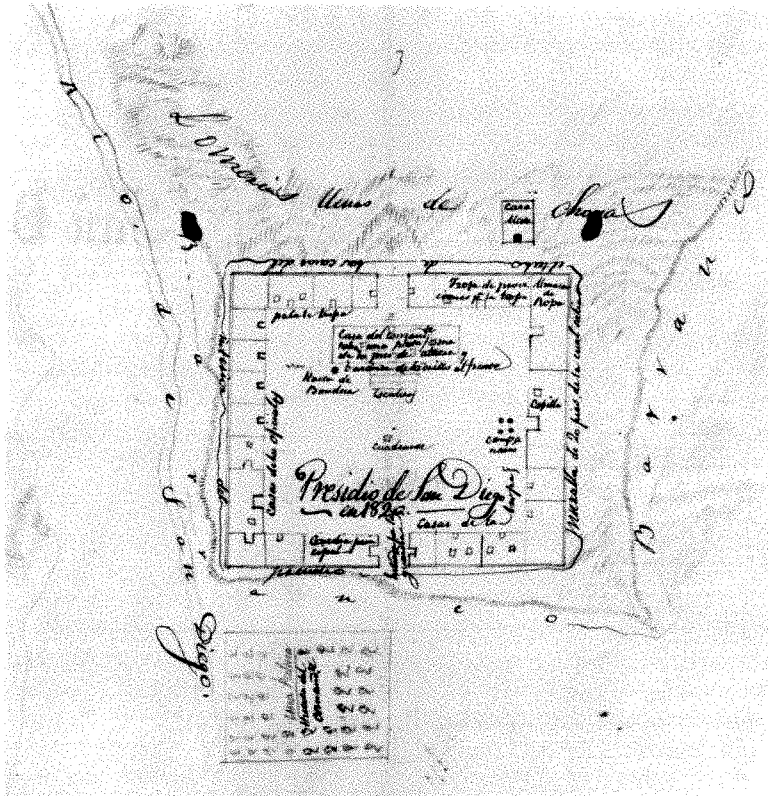
Yet, when he died early in the evening of June 30, 1812, the attending priest, Fr. Geronimo Boscana, appended this concluding comment in the Register of Deaths for Mission San Diego: "He [Panto] died, according to opinions, from poisoning at the hands of the cook."<sup>26</sup> Although this would have been medically impossible, it was this entry that led Bancroft (or Oak) astray, as it did two subsequent distinguished historians of the Franciscan missionary era as well as others.<sup>27</sup>

<sup>24</sup>Ibid., citing W.H. Duncan and T.J. Jones, "Toxicological Studies of Southeastern Plants. II. Compositae," *Economic Botany* 11 (1957) 75; C.D. Marsh, *Stock-Poisoning Plants of the Range*, U.S. Department of Agriculture Bulletin No. 1245 (Washington, 1938) 1245, 1924; and Walter C. Muenscher, *Poisonous Plants of the United States*, rev. ed. (New York, 1970) 226.

<sup>25</sup>It should be recalled that Cpl. Guillén and Sgt. Mercado also tasted the soup and "detected a very bitter taste," but they did not get sick, nor did they die several months later.

<sup>26</sup>Quoted in translation in Engelhardt, *San Diego Mission*, supra note 11 at 162-93.

<sup>27</sup>Ibid. at 163. Commenting on Panto's death, Engelhardt writes, "The poisoning had occurred seven months before and an attack of violent vomiting appears to have brought on a lingering disease from which the good Father finally died." There are no medical grounds for his supposition. Vomiting thirty minutes, as Panto did, aided and abetted by drinking a glass of warm water, would have produced the necessary therapeutic results, and the thorough cleansing of the stomach of any residual substances. One result of the half-hour of vomiting on Panto's part may have resulted in a hiatal hernia, but that affliction is not life threatening. Maynard J. Geiger, O.F.M., *Franciscan Missionaries in Alta California, 1767-1848* (San Marino, 1968) 181-82, in his biographical sketch of Panto, follows Engelhardt's conclusions. Others who follow the Bancroft treatment of the Nazario case, in addition to Carrico, include Castillo, "Native Response," supra note 4 at 383.



Plan of the San Diego Presidio, drawn in 1820. It was here that the investigation of Nazario took place, and where he served his sentence of eight months of hard labor. (The Bancroft Library)

An interesting point that goes unnoticed by contemporary scholars treating the Nazario case is that, at the outset of the formal investigation into the charges against the cook, Panto declined to prosecute or even to testify against him. His motive was purely Christian, for he knew that, if convicted, the Indian would face a death sentence, since the felony was a capital crime. Another historian has opined that the good father, in refusing to cooperate with the investigation, "wanted no revenge but conversion," a conjecture that is purely subjective.<sup>28</sup>

However, it was obvious to Domingo Carrillo, who had been appointed prosecutor by the acting *comandante* of the San Diego Presidio, Ignacio Martinez, that there was no case without the testimony of the intended victim. He therefore wrote to the father president of the California Missions, Estevan Tapis, asking

<sup>28</sup>Engelhardt, *San Diego Mission*, supra note 11 at 163.

him to direct his subordinate friar to testify. Tapis replied on November 27, 1811, from Mission Purisima Concepcion:

By official note of the 21 instant, you ask me to concede my permission to the Rev. Fr. Pedro Panto, so that he may give his declaration in the investigation which Alfrez Don Ignacio Martinez of the presidio of San Diego has committed to you regarding the arrangement for trial of the Indian neophyte called Nazario, the cook of the Rev. Missionary Fathers, for having put poison or poisonous herbs in the soup of said Fr. Panto in the evening of Saturday, the 16 instant.

While I protest that I do not desire in any manner whatever that from my permission or from the declaration of the Rev. Fr. Pedro Panto any capital punishment befall any person, I in virtue of this allow the said Religious, after making the same protest, to give the necessary declaration in order that precautionary steps be taken to prevent, as far as possible, similar attempts against his person or against others in the future.<sup>29</sup>

Tapis clearly underscored the standing Franciscan position in respect to capital punishment: the Order was adamantly opposed to it, and on more than one occasion voiced its objection to such punishment's being inflicted on any neophyte.

Nowhere in the summary of the proceedings of the trial does the word "cruelty" appear. Yet Oak, writing for Bancroft, infers this word and has both Pico, the cook's defender, and Carrillo, the judge, using it to describe Panto's punishment of the accused Indian. The trial summary has Pico saying, "consideration should be given to the desperation which overcame him [Nazario] in view of the continual chastisement by whipping that Padre Panto had been giving him." Carrillo accepts that same view in these words: "It is evident that, according to the testimony of the accused, in only two days [he] was punished with more than 200 [*sic*] lashes without having given serious cause." True, Panto himself testified he had given Nazario "some lashes," and that "he had punished him." But no number is stated, unlike Nazario's testimony, which went uncorroborated. Pico and Carrillo accept the latter's accusation at its face value. But nowhere is the word "cruelty" used to describe Panto's punishment of the Indian cook.

It is hoped that this discussion will clarify the facts and circumstances surrounding the Nazario case of 1811; moreover, that it will clarify the historical record and establish a reliable account of the episode, which dates from the days of Hispanic California.

<sup>29</sup>Ibid. at 163-64.

# SOUTH ASIANS, CIVIL RIGHTS, AND THE PACIFIC NORTHWEST: THE 1907 BELLINGHAM ANTI-INDIAN RIOT AND SUBSEQUENT CITIZENSHIP AND DEPORTATION STRUGGLES

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BY JOHN R. WUNDER

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**T**he partnership between law and race in the Pacific Northwest has never been an easy one, the struggle for civil rights there—as elsewhere in the nation—having been marked by antipathy, hostility, and suffering. There have been successes, but more often than not there have been failures.

One of the primary purposes of the United States' legal system is to maintain and provide order for a community within fundamental forms of fairness. It must peacefully resolve disputes, and protect individuals and groups from discrimination and oppression. This laudable goal has evolved over several centuries within the American framework of constitutional and legal experiences. In times of relative public quiet, the legal system functions with minimal friction. But in times of stress, the system undergoes scrutiny, and over time the Pacific Northwest has been the setting of significant legal crises directly related to questions of race. At the beginning of the twentieth century, South Asians witnessed legal pressures at first hand.

In her recent book, *The Legacy of Conquest*, Patricia Nelson Limerick discusses in detail her views on the burdens of western history. She suggests that the concept of "conquest" helps explain the meaning of the West as a region, and that within this concept serious racial tensions have existed that have not been resolved with the help of the legal system. She states, "Americans had

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used the West as a mechanism for evading these 'problems.' Much of what went under the rubric 'Western optimism' was in fact this faith in postponement, in the deferring of problems to the distant future."<sup>1</sup>

In the Pacific Northwest, some "problems" would not wait. Anti-Chinese riots in Seattle and Tacoma, the trial of the Nisqually nationalist Leschi, the 1857 Oregon State constitutional provision that excluded free African Americans from Oregon soil, Japanese internment, are all bellwether events of the Pacific Northwest's past stress points in law and race, and historians, legalists, and the general public have been slow to recognize them. Limerick has an explanation for this. "The West," she writes, "is remote and vast; its isolation and distance will release us from conflict; this is where we can get away from each other. But the workings of history carried an opposite lesson. The West was not where we escaped each other, but where we all met."<sup>2</sup>

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#### IMMIGRANTS FROM INDIA

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In the early part of the twentieth century, immigrants from India journeyed to the Pacific Northwest only to confront an ugly legal reality. Joan Jensen, in her excellent recent book, *Passage from India: Asian Indian Immigrants in North America*, tells us that few of them had come before, but that by 1907 at least two thousand Indians were working on the West Coast. Unlike the Chinese, no immigration laws excluded them. They had come for many of the same reasons other groups had migrated to North America. They sought economic improvement and political freedoms, wanting a new beginning to overcome a less desirable past. Some had no choice but to accept a forced migration.<sup>3</sup>

Most of the Indians coming to North America arrived in Vancouver, British Columbia. From there they migrated south, seeking work in lumber camps and on railroads, or in other jobs. Most of them were male. Almost from the beginning, complaints emanated from the Pacific Northwest about these latest immigrants, reaching a crescendo in Bellingham in 1907.<sup>4</sup>

<sup>1</sup>Patricia Nelson Limerick, *The Legacy of Conquest: The Unbroken Past of the American West* (New York, 1987) 291 [hereafter cited as Limerick, *Legacy of Conquest*].

<sup>2</sup>Ibid.

<sup>3</sup>See especially the first three chapters of Joan M. Jensen, *Passage from India: Asian Indian Immigrants in North America* (New Haven, 1988) [hereafter cited as Jensen, *Passage from India*]. Jensen's work is a definitive treatment of South Asian migration to the United States and the violent reception Indians received.

<sup>4</sup>Ibid., 24-41.

That year, Bellingham was a boom town. The Great Northern Railway connected it to the outside world, guaranteeing the distribution of its extractive-industry products—salmon, coal, timber—to markets. With these worker-intensive industries, cheap, physical labor was in demand.

Bellingham had a history of strained race relations. In the 1880s Chinese had been driven from town by a mob, though this did not attract the attention of other, more violent anti-Chinese demonstrations at Rock Springs, Wyoming; in Montana and Idaho; and in Seattle, Tacoma, and the Issaquah Valley. By local custom, Chinese were not allowed to live in Bellingham except during the salmon season. Japanese workers had followed the Chinese to Bellingham and elsewhere in the Pacific Northwest. The town's reaction was once again hostile. In this case the Japanese were loggers, who resisted and armed themselves. A restive peace followed. In 1907 the Japanese loggers were estimated at 5 percent of Bellingham's population.<sup>5</sup>

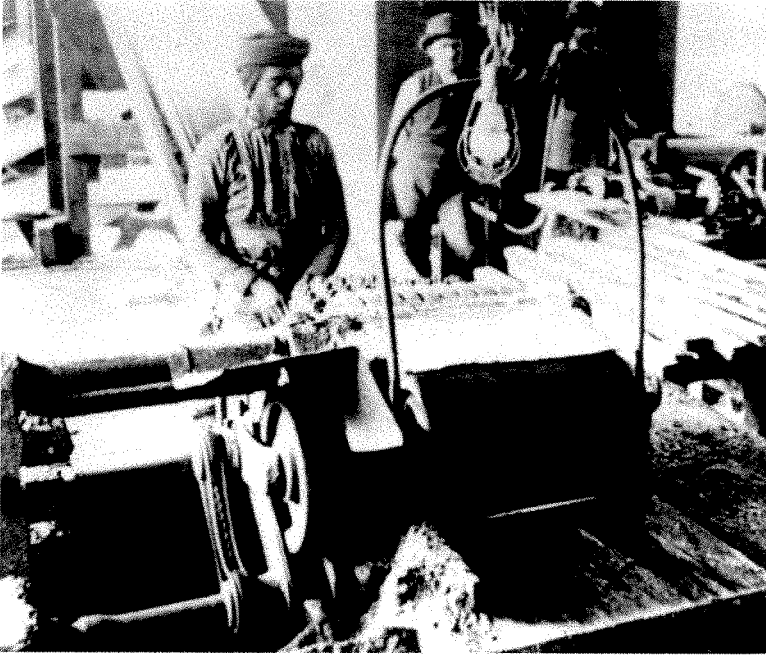
Like the Japanese, Indians were attracted to Bellingham to work in the lumber industry. Many of them wore turbans, and became known as "rag-heads," or were called other pejorative terms. Some could pass as southern Europeans, but Sikhs and others could not. White workers were upset with this new influx of what they considered unacceptable Asiatic labor. To them, it was the Chinese all over again. *The Bellingham Reveille* commented:

From every standpoint it is most undesirable that these Asians should be permitted to remain in the United States. They are repulsive in appearance and disgusting in their manners. They are said to be without shame, and while no charges of immorality are brought against them, their actions and customs are so different from ours that there can never be tolerance of them. They contribute nothing to the growth and upbuilding of the city as a result of their labors. They work for small wages and do not put their money into circulation.<sup>6</sup>

An anti-Indian movement in the town began with union representatives warning mill owners that no Indians should be

<sup>5</sup> Ibid., 42-44. See also John R. Wunder, "The Chinese and the Courts in the Pacific Northwest; Justice denied?," *Pacific Historical Review* 52 (1983) 191-211, and Robert Edward Wynne, "Reaction to the Chinese in the Pacific Northwest and British Columbia, 1850-1910" (Ph.D. diss., University of Washington, 1964).

<sup>6</sup> *Bellingham Reveille*, September 6, 1907, quoted in W. Eugene Hollon, "Frontier Violence: Another Look," in *People of the Plains and Mountains: Essays in the History of the West Dedicated to Everett Dick*, ed. Ray Allen Billington (Westport, 1973) 100.



Sikh sawmill laborer, British Columbia, ca. 1910 (University of British Columbia Library)

employed in Bellingham after Labor Day, Monday, September 2, 1907. On that day, more than a thousand union members paraded in Bellingham. The previous day, Indians had gathered to show their resistance to this threat; on Tuesday, September 3, they went back to the mills to work as usual. That night violence increased. Indian homes were vandalized, and five specific assaults against Indians were reported to the Bellingham police.

On Wednesday, September 4, the violence got out of control when several hundred white mill workers demanded that the Indians be driven out of Bellingham. The police attempted to arrest two demonstrators who had thrown rocks at Indians, and the mob harassed the officers until the assailants were released. Realizing that the police would not try to stop the violence, the whites moved to the waterfront, where most of the Indians lived. In what had become a full-scale riot, the crowd systematically routed all the Indians it could find. Landlords forced their tenants out into the street, for fear that rioters would destroy their apartments. Fires were set, and the townspeople herded over two hundred Indians to City Hall, where the police allowed them to set up a holding pen.<sup>7</sup>

<sup>7</sup>Jensen, *Passage from India*, *supra* note 3 at 44-47.

At that point negotiations began. Nand Singh, Attar Singh, and Sergeant Singh were chosen to appear before the Bellingham City Council. The mayor, Alfred Black, defended the Indians, and asked for fifty new deputies to help restore order. The council took all of this under advisement after it polled the mill owners for their views. Public reaction to the riot in Bellingham was largely supportive of the non-Indian mill workers. Although there were objections to the use of violence because of the potential embarrassment to Bellingham, the desired end was applauded. According to the *Bellingham Herald*, "The Hindu is not a good citizen. It would require centuries to assimilate him, and this country need not take the trouble. Our racial burdens are already heavy enough to bear. . . . Our cloak of brotherly love is not large enough to include him as a member of the body politic."<sup>8</sup> Or, as Patricia Limerick has described western anti-Chinese riots, "Since the government could not control its citizens and since they persistently harassed the Chinese, there was simply no way to protect the Chinese in America. This was, in other words, the old 'humanitarian' argument for Indian [Native American] removal—the solution to crime was to banish the victim."<sup>9</sup>

The riot attracted the attention of the entire Northwest and Pacific Coast. Anti-Indian sympathizers journeyed to Bellingham to observe the situation firsthand. By then many of the Indians were trying to leave, but some of the means of escape were dangerous. When several of them attempted to board a Seattle steamship, they were forced off, and one of them was thrown over the rail. A group of Swedes attempted to beat up several other Indians trying to leave, and police intervened. Newspapers in Seattle covered the continuing violence, and urged the state to use the occasion also to disarm and discourage Chinese and Japanese from staying in Washington.

A week after the Bellingham riot, the city council met to condemn not the rioters but the mill owners, for hiring the Indians in the first place. The council declared that it "would not grant the right of citizenship" to any Indians, and rather belatedly authorized an additional fifty police deputies.<sup>10</sup> Indians in Bellingham quickly grasped the situation. Neither state nor local officials were going to stop the violence. The last Indian left on September 17.

In November 1907 riots occurred in Everett and Danville, Washington. Indians who moved north to Canada and Alaska did not escape the violence. A mob in Wrangell, Alaska, prevented them from landing at the pier. In Juneau Indians were forced onto

<sup>8</sup> *Bellingham Herald*, September 5, 1907, quoted *ibid.* at 48.

<sup>9</sup> Limerick, *Legacy of Conquest*, *supra* note 1 at 265.

<sup>10</sup> *Ibid.* at 52.

ships leaving the capital. Farther south, the Southern Pacific Railroad in California hired Indians for work crews, but citizens in several towns, most notably Marysville, organized for anti-Indian resistance.<sup>11</sup>

Clearly, anti-Indian violence was especially virulent in Washington at the turn of the century. Little evidence indicates that the legal system was able to prevent or calm the riots. Only until Indians themselves migrated elsewhere did the violence cease. Nevertheless, they still sought permanent residence in the Pacific Northwest and tried to become American citizens, thinking that would deter future aggression toward them.

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### THE STRUGGLE FOR CITIZENSHIP

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From its beginning, the United States has defined naturalization statutes in terms of race. In 1790 Congress stated that naturalized citizens had to be "white." By 1890 that notion persisted, pressure on such statutes having been maintained in order to exclude Chinese. However, a fundamental question remained: how was the legal system to classify South Asians who applied for citizenship? At first judges declared that Indians were white within the meaning of the federal census, until in 1910 the Bureau of the Census began to classify Indians with Koreans and Filipinos as "other." U.S. attorneys were instructed to challenge any Indians seeking citizenship, and legal battles began anew for Indians in the Pacific Northwest.<sup>12</sup>

The first challenge for South Asians desiring U.S. citizenship came in 1912 in Spokane, when Akhay Kumar Mozumdar sought to become an American citizen. He filed his petition for citizenship on July 11, and appeared before federal District Court Judge Frank Rudkin on December 28. Mozumdar was supported by two witnesses who testified that he had been a continuous resident of the United States living in the state of Washington, was of good moral character, and was a white person within the meaning of the Naturalization Acts.<sup>13</sup>

It was not until 1875 that the United States had first passed a statute concerning immigration. Prompting the federal action were the states clamoring for restrictions. Most of the uproar came from the West. In 1875 Congress excluded alien prostitutes and convicts, and in 1882 extended that exclusion to the mentally ill and mentally retarded and the poor. That same year the first racial exclusions were authorized by Congress. They were aimed

<sup>11</sup> Ibid. at 52-53.

<sup>12</sup> Ibid. at 252-54.

<sup>13</sup> *In re Akhay Kumar Mozumdar*, 207 Fed. 115 (1913).

at the Chinese only.<sup>14</sup> Thus Indians could legally migrate to the United States.

Becoming a citizen was another matter. The first, controlling act of Congress on naturalization in 1790 stated that any alien who was a "free white person" could become a citizen of the United States.<sup>15</sup> After the Civil War, the naturalization laws were amended to allow aliens of African descent to become citizens.<sup>16</sup> The question before American courts eventually became one of interpretation of the word "white."

On the day Mozumdar appeared before Judge Rudkin, the Indian was not represented by legal counsel. The naturalization examiner, George W. Tyler of Seattle, simply stated that Mozumdar was a native of India and that his ancestors were Indian. Rudkin noted that Mozumdar had a dark complexion, and that the court was not satisfied as to whether Mozumdar was indeed "white" within the meaning of the Naturalization Acts. Thus Rudkin denied the petition, but allowed Mozumdar to file for a rehearing and appointed Will G. Graves, a lawyer from Spokane, to prepare a brief on the issue as a friend of the court.

On May 3, 1913, Mozumdar again appeared before Judge Rudkin, together with his attorney, Graves. This time Mozumdar addressed the issue of whether an Indian should be classified as "white" within the meaning of the Naturalization Acts. He testified that he was from Hindustan in northern India, and was a "high-caste Hindu of pure blood."<sup>17</sup> Moreover, he claimed, his ruling class seldom emigrated. Those who did were of mixed blood, "the laboring class, those who do the rough manual labor."<sup>18</sup> Mozumdar adopted a position of setting himself apart from his fellow countrymen and the victims of the Bellingham riot. He concluded by observing that "high-caste Hindus always consider themselves to be members of the Aryan race, and their native term for Hindustan is Arya-vartha, which means country or land of the Aryans."<sup>19</sup>

Rudkin was obviously pleased with such testimony. He concluded that "white" for legal purposes meant Caucasian race, not pigmentation or appearance. He discussed the intention of

<sup>14</sup>United States, 18 Stat. 477 (1875); 22 Stat. 214 (1882). The Chinese Exclusion Acts begin with 22 Stat. 58-61 (1882). See also Milton R. Konvitz, *The Alien and the Asiatic in American Law* (Ithaca, 1946) 1-3 [hereafter cited as Konvitz, *The Alien in American Law*].

<sup>15</sup>United States, 1 Stat. 103 (1790).

<sup>16</sup>*Ibid.*, 16 Stat. 256 (1870). See also Konvitz, *The Alien in American Law*, supra note 14 at 79-81.

<sup>17</sup>*In re Akhay Kumar Mozumdar*, 207 Fed. 115 (1913) at 116.

<sup>18</sup>*Ibid.*

<sup>19</sup>*Ibid.* at 117.

Congress in 1790, and wrongly concluded that it was meant to exclude South Asians and retain northern Europeans. There is no evidence about what Congress really had in mind, and it is extremely doubtful that its members were worried about Indian immigration. According to Rudkin, the legal evolution from anti-Indian views to allowing some Indians to become naturalized citizens took place over a century, and the judge cited a variety of cases establishing doctrines that allowed for his extension. On May 3, 1913, Akhay Kumar Mozumdar was made a U.S. citizen. He was the first Indian granted citizenship in the United States under the Naturalization Acts, but this expansion of racial categories had been at a cost to all other Indians in this country.

Soon thereafter new restrictions were made on Indian immigration and naturalization. In 1917 a new immigration act created a "barred-zone" provision that in effect acted as an exclusion act against all Asian immigrants.<sup>20</sup> Five years later, the U.S. Supreme Court overruled the Mozumdar precedent. In *United States v. Thind*, an Indian who was a "high-caste Hindu of full blood" and lived in Oregon had been granted citizenship based upon the Mozumdar decision. However, federal naturalization examiners appealed the decision all the way to the Supreme Court. In his decision, Justice George Sutherland held that a person may be Caucasian, such as an Indian, and yet not be white. "White" within the meaning of the statute was to be seen as a color, and as a common person would view it. This in effect overruled the Mozumdar precedent.<sup>21</sup>

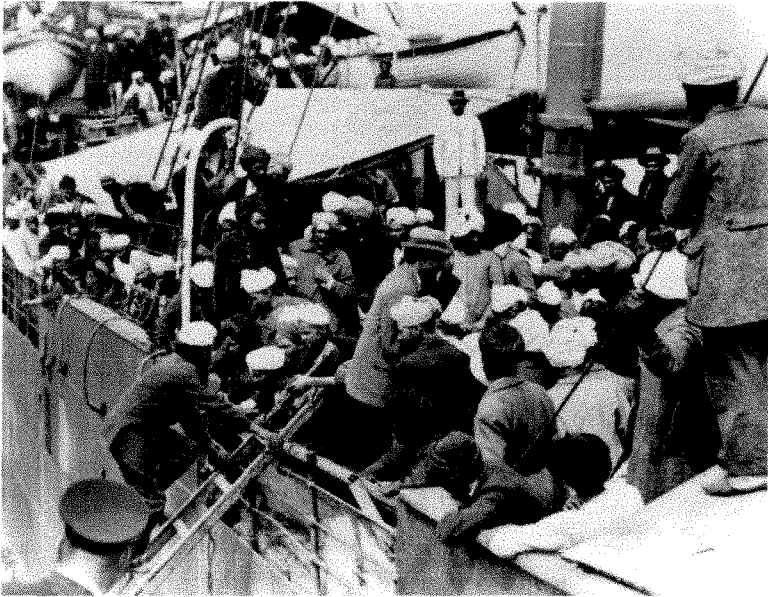
By 1922 Mozumdar had moved to California, but federal officials tracked him down. They filed in federal court to denaturalize him, and in November 1923 a federal judge granted the petition entered by federal officials forcing him to lose his citizenship. Mozumdar was defended by an Indian attorney, S.G. Pandit; because of his advocacy, federal representatives filed a petition against Pandit. The case continued in the courts until 1927, when Pandit finally won a narrow decision preventing his deportation.<sup>22</sup>

Thus, what had begun as an extralegal riot against a specific ethnic group in Bellingham eventually found its way to the courts of the Pacific Northwest. After some initial narrow victories by Indians attempting to remain in Washington and elsewhere in the West, the federal government, with substantial public support, launched a legal attack aimed at racial exclusion. This was ultimately successful during the fearful decade of the twenties. In the Pacific Northwest, the seeds had been sown in turn-of-the-

<sup>20</sup>United States, 39 Stat. 874 (1917). See also Konvitz, *The Alien in American Law*, supra note 14 at 26.

<sup>21</sup>*United States v. Thind*, 261 U.S. 204 (1922).

<sup>22</sup>Jensen, *Passage from India*, supra note 3 at 260-64.



Immigrants from India arriving in Vancouver, B.C., on the *Komagatu Maru*, 1914. The ship was refused entry and returned to Calcutta. (Vancouver Public Library)

century expressions of racism, and the legal system proved incapable of intervening responsively.

Although the region has changed since then, the relationship of law and race remains cloudy. One need only mention such recent post-1960 events as the busing controversies in Seattle, Native American desires to have burial remains and grave goods returned, or discrimination against Latino workers in the Yakima Valley. There is also the current paranoia over Chinese migration to British Columbia in the face of the takeover of Hong Kong by China, or the attraction of the Northwest to racist groups such as the Aryan Nations, headquartered at Hayden Lake in northern Idaho, and the violence caused by one of its splinter groups, the Order, which in 1984 was involved in a fatal shootout on Whidbey Island. "Everyone knows," writes Limerick, "that the nineteenth-century West was a rough place, where unfortunate and extreme acts of nativism occurred. But conventional thinking would have it, the frontier eventually settled down, the wildness ended, and the twentieth century began. People soon behaved better. This conventional image was reassuring, progressive—and inaccurate."<sup>23</sup>

<sup>23</sup>Limerick, *Legacy of Conquest*, supra note 1 at 269.

Law and race in the Pacific Northwest are in a constant, dynamic relationship. The present and the past provide evidence of the law's failing to keep pace with events of codes of silence, and of outbreaks of racially based lawlessness. The Pacific Northwest has never been immune from such happenings, nor is it immune from them now.

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# HISTORICAL ANTECEDENTS TO THE BOLDT DECISION

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BY KENT D. RICHARDS

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United States v. State of Washington, or the Boldt decision, as the 1974 ruling is commonly referred to, focused in large measure on the sentence "the right of taking fish at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory." Judge George Boldt interpreted the term "in common with" to mean that Native Americans were entitled to catch up to 50 percent of the available runs. Justice Byron White interpreted the same phrase to mean only that the Indians must be allowed the opportunity to fish. Both jurists focused primarily on semantic interpretation of the phrase "in common" as they believed it to be understood in the nineteenth century. They paid relatively scant attention to the historical context of the treaties, although there was voluminous testimony on the location, fishing practices, and way of life generally of the Puget Sound tribes that were party to the 1854-1855 treaties.<sup>1</sup>

The Washington Territory treaties must be seen in the context of nineteenth-century U.S. Indian policy. After the bloody conflicts of the French and Indian War and the War of Independence, during which the Indians were allied with one side or the other, it was essential that the new American Republic should formulate a course of action toward the Indians. Under the Articles of Confederation, it was determined that only the national government could buy land or make treaties with the aboriginal inhabitants. In the first decades of the nineteenth century, Thomas Jefferson clearly articulated the nation's philosophical position on

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<sup>1</sup>"Findings of Fact," *United States v. State of Washington*, 384 F. Supp. 312 (1974); *Washington, et al., v. Washington State Commercial Passenger Fishing Vessel Assn., et al.* 439 U.S. 909 (1978).

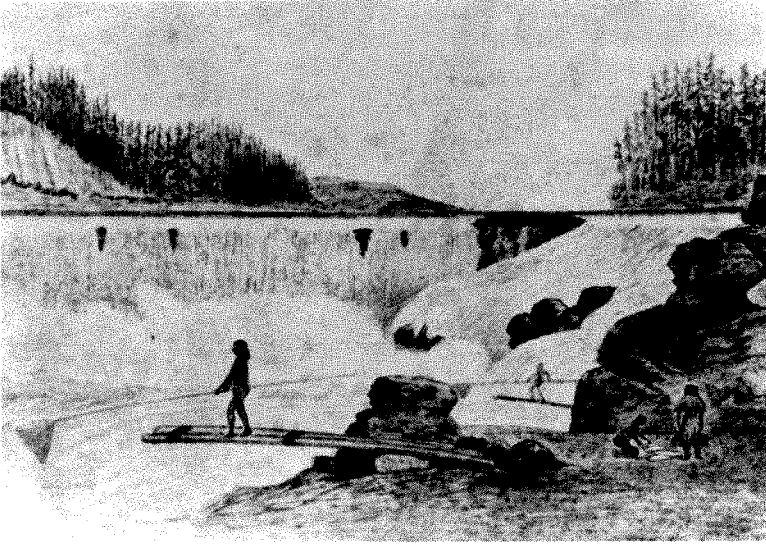
the matter. In his *Notes on Virginia*, he defended Native Americans against those European intellectuals who claimed that Indians were physically, intellectually, and morally inferior. He argued that they were innately equal to Europeans, but needed training and education to evolve from savagery to civilization, just as the Europeans had moved from the Dark Ages to civilized society. Urging the Indians to accept the white man's ways, he proposed that the hunter state be exchanged for an agricultural state; the haphazard life of the chase give way to a secure existence marked by industry and thrift; private property replace communal ownership. By example and education these changes could be wrought.<sup>2</sup>

When Andrew Jackson came to the White House in 1829, he brought a different perspective to Native American Affairs. As a prominent leader in Indian conflicts during the War of 1812 and after, he was convinced there were irreconcilable differences between the two races. He proposed removing all Indians in the eastern United States to a territory where they could pursue their traditional ways, free from harassment by the increasing number of whites moving into the region between the Appalachians and the Missouri River. Even Thomas L. McKenney, head of the Office of Indian Affairs in the 1820s and a vigorous proponent of Jeffersonian policy, was increasingly disillusioned about the prospects for assimilation. Removal prevailed, and was completed by the early 1840s; most policymakers believed the permanent frontier line would not be breached. However, the nation was just beginning a new era of expansion, and by the end of the decade the Oregon Country, California, Texas, and the Southwest had been gained. The notion of a permanent frontier line was irrevocably destroyed.<sup>3</sup>

In 1849 control of the Indian Office was shifted from the army to the Department of the Interior, under the supervision of a commissioner of Indian Affairs. This was symbolic of a new direction in Indian policy. The nation's expansion in the 1840s and 1850s was paralleled by the rise of a reform movement throughout the country. Among its aims were rights for women; prohibition; care of the insane, poor, and feeble; and a humanitarian Indian policy. Two men who did as much as anyone to reform opinion and expansionism into a new policy were Charles E. Mix, who served as second-in-command in the Indian Office from 1850 to 1868 (and was commissioner for a few months in 1858), and George W. Manypenny, commissioner from 1853 to 1857.

<sup>2</sup>Francis Paul Prucha, *The Great Father*, 2 vols. (Lincoln, 1984) 1:139 [hereafter cited as Prucha, *Great Father*].

<sup>3</sup>Thomas L. McKenney, *Report of March 22, 1830*, Senate Doc. 110, 21st Cong., 1st sess., ser. 193, 2-3.



Dip netting salmon at Willamette Falls, Oregon Country, 1841, sketch by Joseph Drayton (Oregon Historical Society)

Mix argued that three fatal errors had characterized Indian policy before the 1850s: "[the Indians'] removal from place to place as our population advanced; the assignment to them of too great an extent of country, to be held in common; and the allowance of large sums of money, as annuities, for the lands ceded by them."<sup>4</sup> Manypenny was firmly committed to a policy that assigned the Indians to reduced reservations with a provision for the allotment of land in severalty; on the reservations "civilizing forces" would be applied until the Indians were able to fend for themselves in white society. As he put it, the alternative to extermination was for the Indians to be "colonized in suitable locations, and, to some extent at least, be subsisted by the government, until they can be trained to such habits of industry and thrift as will enable them to sustain themselves."<sup>5</sup>

Manypenny became commissioner at the start of the Franklin Pierce administration in March 1853, and by June of the following year had negotiated nine treaties with tribes living in the eastern portions of the newly created territories of Kansas and Nebraska. The treaties were all of a piece; typical was the one negotiated with the Oto and Missouri. This provided for annuities paid over a thirty-eight-year period, with additional provisions for schools,

<sup>4</sup> *Annual Report of the Commissioner of Indian Affairs, 1858* (Washington, 1859) ser. 974, 354.

<sup>5</sup> *Annual Report of the Commissioner of Indian Affairs, 1854* (Washington, 1855) ser. 746, 222.

gristmill, sawmill, and blacksmith shop. All the treaties provided for the allotment of farm-sized plots to individual Indians. The president could have the land surveyed and assigned in specified amounts at his discretion, with a quarter-section of 160 acres going to a family and lesser pieces to individuals; restrictions were placed on the lease or sale of the allotted lands and any land left after allotment could be sold for the benefit of the Indians. The government's intent in these treaties of the 1850s and 1860s was to provide a transition, during which the Indians would be partially supported by the government while they learned new skills in order to adapt to the life of the nation. Reservation lands not allotted could then be sold to white settlers; there would be no need to retain them for the Indians as tribes and the reservation system would cease to exist.<sup>6</sup>

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#### SPECIAL CASE OF THE PACIFIC NORTHWEST

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Indian relations with settlers in the Pacific Northwest were complicated by passage of the Oregon Donation Land Act in 1850, which allowed immigrant families to claim as much as 640 acres of any unsettled land in the Oregon Country. The wave of newcomers placed intense pressure on the Indian population. In line with reservation policies, government officials instructed the negotiators in western Oregon to move the bands in the Willamette Valley to a reserve east of the Cascade Mountains. The commissioners suggested that, because the bands did not wish to move, "general satisfaction we believe would be felt by the Indians and the citizens to allow them small reserves of a few sections and a portion of their fishing grounds." This is probably the first reference to the two things that most distinguish Northwest treaties from those being negotiated elsewhere at the time: the desirability of numerous small reservations, and provision for access to certain fishing locations. George Gibbs, who was to play a key role in the western Washington treaty arrangements, served as commissary for the Oregon negotiations and the next year as one of the federal treaty negotiators in northern California, where the same issues arose. However, the federal government did not accept the commissioners' arguments, and the western Oregon treaties were not ratified.<sup>7</sup>

Against these events, Isaac I. Stevens was named governor and superintendent of Indian affairs for the newly created Washington

<sup>6</sup>"Treaty with the Oto and Missouri, 1854," and "Treaty with the Omaha, 1854," in Charles J. Kappler, comp., *Indian Affairs, Laws and Treaties*, 4 vols. (Washington, 1904) 2:608-610.

<sup>7</sup>Prucha, *Great Father*, supra note 2 at 1:399.

Territory in March 1853. A highly intelligent military man who was also an astute politician, Stevens took his new duties seriously. He assumed, as would any citizen of the United States during that era of Manifest Destiny, that the Pacific Northwest was destined to become a major port and an agrarian, mining, fishing, and lumbering region in the not-too-distant future. On his way west with the railway survey he was assigned to command, he observed the Indians he encountered closely, met with them frequently, and asked men like Gibbs, who was attached to the western survey party of George McClellan, to make reports on the various tribes.<sup>8</sup>

Soon after arriving in Olympia late in 1853, Stevens outlined his plans to Manypenny, his commissioner of Indian affairs. He noted the conflict that apparently existed between the Donation Act and laws governing Indian affairs, and urged speed in defining Indian lands before settlers spread over the whole Territory and further complicated an already tense situation. Stevens predicted that within a year it would be difficult to create reservations without removing settlers from land claims, and estimated that some five thousand Indians belonging to forty tribes lived in western Washington subsisting on roots, berries, and fish. He believed that they cherished hereditary spots near the graves of their ancestors, but were willing to part with other lands. Manypenny concurred, informing Congress that "An enlightened forecast indicates that the present is a favorable time to institute and establish definite relations of amity with the wild tribes of Indians. . . . With many of the tribes in Oregon and Washington territories, it appears to be absolutely necessary to speedily conclude treaties for the extinguishment of their claims to the lands now or recently occupied by them." He reminded Congress that it had promoted settlement in the Northwest, "yet the Indian tribes still claim title to the lands on which the whites have located, and which they are now cultivating." This, he reported, led to hostilities and resulted in "the murder of white settlers, and in hindering the general growth and prosperity of the civil communities of these territories." When Stevens arrived in Washington, D.C., in the spring of 1854 to lobby for the interests of the Washington Territory, Manypenny was in the midst of treaty making with the Kansas-Nebraska tribes. Stevens and Manypenny relied on these treaties when they conferred on provisions for the Washington Territory.<sup>9</sup>

<sup>8</sup> Isaac I. Stevens, *Reports of Explorations and Surveys to Ascertain the Most Practicable and Economical Route for a Railroad from the Mississippi River to the Pacific Ocean* (Washington, 1854) 1:146.

<sup>9</sup> Stevens to Manypenny, December 26, 1853, and Manypenny to Secretary of Interior, February 6, 1854, S. Ex. Doc. 34, 33d Cong., 1st sess., ser. 698.



Isaac I. Stevens, ca. 1850 (University of Washington Libraries)

Returning to Olympia in December, Stevens set to work immediately on treaty negotiations. He planned to meet with the tribes on Puget Sound during the winter and then to move east of the Cascade Mountains in the spring. The first council took place at the mouth of Medicine Creek, on the Nisqually Flats between Olympia and Fort Steilacoom. On the governor's commission were Michael Simmons, the Indian agent for Puget Sound; James Doty, secretary; Benjamin F. Shaw, interpreter; and George Gibbs, surveyor. Simmons and Shaw were veteran frontiersmen and early settlers on the Sound, while Doty had just arrived after a year's residence among the Blackfoot Indians. All but Doty had visited the Puget Sound tribes with Stevens during the spring to prepare the way for the treaties.<sup>10</sup>

<sup>10</sup>Stevens to Simmons, March 22, 1854, Records of the Washington Superintendency of Indian Affairs, 1853-1874 [hereafter cited as WSIA], Record Group 75, National Archives; Col. B.F. Shaw, "Medicine Creek Treaty," *Proceedings of the Oregon Historical Society* (1903) 27-29.



George Gibbs (University of Washington Libraries)

Acting Commissioner of Indian Affairs Charles Mix instructed Stevens to place the Washington tribes "on a limited number of reservations, or on contiguous reservations in a limited number of districts of the country apart from the settlements of the whites." He suggested six treaties or fewer (and presumably six reservations) for all the natives in the Territory, and forwarded copies of the treaties with the Omaha and Oto-Missouri tribes that Stevens had reviewed with Manypenny. Mix called particular attention to the provisions for annuities over a fixed period of years and provisions for schools. Drawing on these treaties, their knowledge of the Puget Sound region, and the policies enunciated by Manypenny and Mix, the commissioners adopted the following guidelines: to concentrate the tribes as much as practicable; to encourage soil cultivation and other civilized habits; to pay for the land with annuities consisting of useful goods rather than cash; to provide teachers, doctors, farmers, blacksmiths, and carpenters; to prohibit war between the tribes; to end slavery; to

halt the liquor trade; to allow the Indians to hunt, fish, and gather berries and pasture horses in common; and, in time, to allow division of the reservation lands in severalty.<sup>11</sup>

With the exception of the "in common" provision, all these principles derived from current federal policy. How did that provision arise, and what did the commissioners intend? It is apparent that a key figure was George Gibbs. The short, barrel-chested frontiersman had trained in law at Harvard, but in New York City had chiefly been interested in history and ethnology. The California gold rush gave him the excuse to come west, where he settled first in Oregon City and then Astoria, embarking on a career as customs official, road surveyor, and in various other government positions. Between 1850 and 1855 these duties, particularly those with treaty commissions and the railroad survey, brought him in contact with many native peoples of the Northwest, including most of the groups or tribes within the present state of Washington. He compiled voluminous notes, constructed vocabulary lists, and attempted to converse or correspond with missionaries, military personnel, and others who shared his interests.<sup>12</sup>

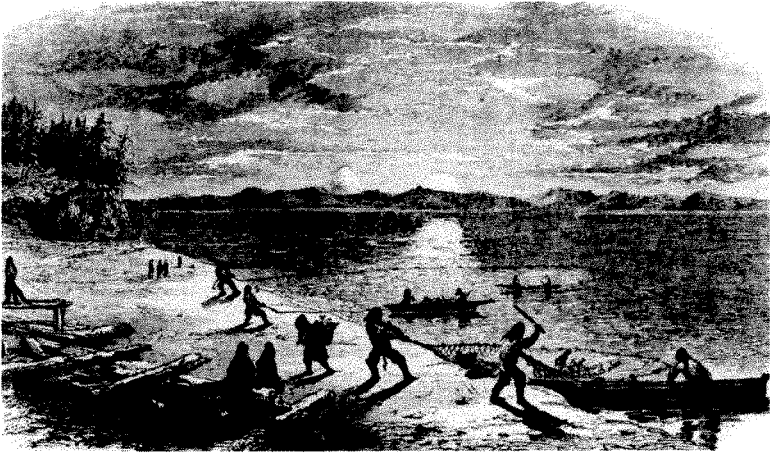
Gibbs's report of March 1854 on the Indian tribes of the Washington Territory was included with others in Stevens's final report on the railroad survey. Like his nineteenth-century contemporaries, Gibbs found the horsemen of the interior of more interest than the fishing cultures of the Puget Sound. For example, he characterized the Yakimas as "much superior" in moral attributes to the Columbia River bands of Chinook stock. The relative importance he attached to each region is reflected by his devotion of twenty-six pages to the eastern Washington bands and seven to those west of the Cascades. Gibbs found some of the latter so diminished by the ravages of disease and alcohol that he wrote, "The speedy extinction of the race seems rather to be hoped for than regretted, and they look forward to it themselves with a sort of indifference."<sup>13</sup>

In his report, he went beyond ethnographic description to make policy recommendations. The Indians of eastern Washington, he said, "require the liberty of motion for the purpose of seeking, in their proper season, roots, berries, and fish, where those articles can be found, and of grazing their horses and cattle at large; but

<sup>11</sup> Hazard Stevens, *Life of Isaac Ingalls Stevens*, 2 vols. (Boston, 1900) 1:454; Mix to Stevens, August 30, 1854, WSIA, supra note 10.

<sup>12</sup> Stephen Dow Beckham, "George Gibbs, 1815-1873, Historian and Ethnologist" (Ph.D. diss., University of California, Los Angeles, 1969) 1, 50, 144-46.

<sup>13</sup> George Gibbs, Report of Mr. George Gibbs to Captain McClellan on the Indian Tribes of the Territory of Washington, March 4, 1854, reprinted as *Indian Tribes of Washington Territory* (Fairfield, Wash., 1978) 11, 35.



"Salmon Fishing, Chinook," drawing by James G. Swans (Oregon Historical Society)

they do not need the exclusive use of any considerable districts." He suggested that large portions of the arid plateau would never be occupied by whites, believed it necessary and just to reserve "small tracts of good land" as permanent homes, and stated that "the use of their customary fisheries, and free pasturage for their stock on unenclosed lands, should be secured."<sup>14</sup>

Gibbs proposed that the way to set aside Indian lands was to "acquire the right of settlement at pleasure" anywhere except on the Indians' reserves, "leaving the remainder as lands common to both." (As non-Indians moved in, less and less land would be left for use in common.) Although he urged that the reserves be in the native homelands, he saw no objection to combining small, interrelated bands on one reservation under a single leader, pointing out the problems that occurred when groups were scattered and leaders lacked authority. He suggested that annuities be distributed in the form of useful goods or equipment. These recommendations were consistent with government policy and were included in the Washington treaties. Stevens accepted Gibbs's report, but pointedly noted that all policies affecting the natives had to be determined by officers of the Indian department.<sup>15</sup>

Gibbs believed most of his recommendations for the areas east of the Cascade Mountains could also be implemented in the Puget Sound area. There were, however, two complications. One was the "great number of small bands into which most of the Indian population is broken up." The second was the Donation

<sup>14</sup>Ibid. at 29.

<sup>15</sup>Ibid. at 29-30, 33, 40.

Act, which had allowed settlers to "unceremoniously thrust [the Indians] from their homes and [had] driven them forth to shift for themselves." Gibbs thought that small reserves would secure the Indian fishing sites, and that the freedom to gather and pasture would in some measure protect the bands from intrusion. He argued that the Indians needed to be isolated from white neighbors because their resources could be "speedily destroyed in the neighborhood of settlements. A drove of hogs belonging to one white man will consume the winter provision of a tribe of Indians."<sup>16</sup>

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### FISHING RIGHTS AND THE GREAT FATHER

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The treaty commissioners met as a group on December 7, 1854. The official minutes of the commission are more cryptic than a historian would wish, but important points are clear. The treaties with the Oto-Missouri and Omaha Indians were read and "fully discussed." Then, "after considerable discussion upon Reservations, Fishing Stations, Farms, Schools, etc., the Commissioners directed Mr. Geo. Gibbs to prepare a programme of a Treaty in accordance with the views of the Commission." Three days later the commission considered Gibbs's draft treaty and, after making slight modifications, adopted it as the basis for the Puget Sound and Pacific Coast councils. Under Article II, the draft included the following:

the right of taking fish at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries and pasturing their horses upon open and unclaimed lands. Provided however that they shall not take shellfish from any beds staked or cultivated by citizens.<sup>17</sup>

The last clause was quite likely a proposal of Gibbs's, as he was intimately familiar with the shellfish industry from visits to San Francisco and Shoalwater bays in the early 1850s.

<sup>16</sup>Ibid. at 28-29, 34-35, 39.

<sup>17</sup>Records of the Proceedings of the Commission to Hold Treaties with the Indian Tribes in Washington Territory and the Blackfoot Country, December 7, 10, 1854 [hereafter cited as *Proceedings of the Commission*], Documents Relating to the Negotiation of Ratified Treaties, Record Group 75, National Archives.



Encampment with clams on the Strait of Juan de Fuca (University of Washington Libraries)

In his speech at the Medicine Creek Council on December 26, Gov. Stevens explained that many white children of the Great Father were coming to build mills and to farm, and "some to fish." "And," the governor continued, "the Great Father wishes you to have homes, pastures for your horses and fishing places. He wishes you to learn to farm and your children to go to a good school." After the speeches, the Puyallup, Nisqually, and others discussed the treaty among themselves and pronounced themselves satisfied. The treaty commissioners met that evening to review progress and plan future negotiations. The discussion was vigorous and perhaps heated. James Doty wrote in the official record of proceedings that the number of reservations to be allowed for western Washington (in addition to the three established that day) was considered, and "Messrs Simmons and Gibbs thought that several Reserves would be necessary for the remaining Tribes on the Sound on account of their differences in language and disposition and because they needed a number of fishing stations." Doty and the others returned to this topic later in the evening:

The question of bringing all the remaining Tribes upon the Sound together in one Treaty, and if possible locating them upon one Reservation, was fully canvassed and different opinions entertained. Gov. Stevens and the Secretary thought it practicable. Messrs Simmons Gibbs and Goldsborough dissented. After considerable argu-

ment and explanation of the views of the Indian Department upon the question of Reservations, and after taking the opinions and advice of the gentlemen present, Gov Stevens decided to bring all the Indians upon the East side of the Sound and Island into one Treaty to be held at the mouth of the Sno-ho-mish River.

Doty noted, "It was also thought necessary to allow them to fish at all accustomed places, since this would not in any manner interfere with the rights of citizens, and was necessary for the Indians to obtain a subsistence."<sup>18</sup>

Gibbs's philosophy was to some extent Jacksonian, in that he wished to separate the Indians from the settlers as much as possible by putting them on numerous reservations that contained fishing stations and other means of support. Doty's language in the minutes regarding the Gibbs-Simmons position connects the reservations with the fishing stations. It is reasonable to assume, based on Gibbs's comments in his "Report on the Indian Tribes" and elsewhere, that he well understood that each band or tribe had major fishing sites although they might fish incidentally at other locations. (Simmons, who had spent more time with the Puget Sound bands than any other white, also knew this.) It was access to these major sites that Gibbs and Simmons were attempting to secure.

Stevens, however, was more attuned to the directives he received from Washington, D.C. When he submitted the Medicine Creek Treaty to the federal government, he was in a delicate position. An agreement that placed fewer than seven hundred Indians on three reserves appeared to violate the Indian Department's orders to the governor and to create the same situation that had led to disapproval of the earlier western Oregon treaties. Stevens emphasized the severalty provision, which allowed an eventual breakup of the reservations in favor of individual allotments. He believed the provision, together with the president's authority to combine reservations, would remove any government objection to three separate reserves on Puget Sound. He explained that, unlike other places, the Indians on Puget Sound had lived among the whites for many years and provided a good share of the labor force working for families, in lumber yards and mills, and on farms. Also, he said, "they catch most of our fish, supplying not only our people with clams and oysters but salmon to those who cure and export it. Whilst they cultivate small patches of potatoes, their principle food is fish and roots and berries." He argued,

<sup>18</sup>Ibid., December 25, 26, 1854. Hugh A. Goldsborough was a lawyer practicing in Steilacoom.

The provisions as to reserves and as to taking fish, pasturing animals and gathering roots and berries had strict reference to their condition as above, to their actual wants and to the part they play and ought hereafter to play in the labor and prosperity of the Territory. It may be here added that their mode of taking fish differs so essentially from that of the whites that it will not interfere with the latter. They catch the salmon with spears in deep water and not with seines or weirs.<sup>19</sup>

Stevens's last statement was manifestly incorrect, but it is indicative of his thoughts on fishing, which seemed to assume that much of the Indian catch would come from the waters of the Sound, the Strait, or the Pacific Ocean. When the Point Elliott Council was held near the mouth of the Snohomish River, the governor told the bands that had assembled from the area east of the Sound and from what is now King County north to the Canadian boundary, "We want to give you houses and having homes you will have the means and the opportunity to cultivate the soil to get your potatoes and to go over these waters in your canoes to get your fish. We want more, if you desire to go back to the mountains and get your roots and berries you can do so and you shall have homes and shall have these rights, the Great Father desiring them."<sup>20</sup>

In saying these things, Stevens was suggesting that the Indians could in part provide their own support. The comments correspond to Doty's minutes of the commissioners' December 26 conference in which he noted the need to allow fishing because it was necessary for the Indians' subsistence. Stevens regarded the Puget Sound Indians as already well integrated into the work force of the region. The treaties and the reservations would permit an orderly and complete assimilation into society. It was Stevens's position, not Gibbs's, that was aligned with government policy and with the realities of settlement patterns in western Washington.

At a subsequent council at Neah Bay, Keh-chook, a Makah whaler, told Stevens that all he wanted was the "right of fishing." The governor responded that he certainly did not wish "to stop their fisheries," and that he intended to send them oil kettles and fishing apparatus. He added, however, that "the whites should fish also. Whoever killed the whales was to have them."<sup>21</sup> This remark was not an idle one. Beginning in the early 1850s, the

<sup>19</sup> Stevens to Manypenny, December 30, 1854, *WSIA*, *supra* note 10.

<sup>20</sup> Proceedings of the Commission, *supra* note 17 at January 22, 1855.

<sup>21</sup> Journal of George Gibbs, No. 2, 1854-55, January 30, 1855, Records Relating to the Northwest Boundary, 1853-1901, Record Group 76, National Archives; Proceedings of the Commission, *supra* note 17 at January 30, 1855.



Makah whalers (University of Washington Libraries)

oyster trade from Shoalwater Bay supplying the San Francisco markets was one of the most prosperous activities in the region. (Between February and August 1853, cargoes of oysters and piles valued at \$74,000 were shipped from the bay.) As the editor of the *Pioneer and Democrat* wrote in a typical article, “chances for fisheries [are] unequaled in the world.” Salmon, herring, flounder, halibut, sturgeon, clams, oysters, crabs, and lobsters, he noted, all abounded and were there for the taking. In addition, editors, settlers, businessmen, and political leaders all envisioned a rapid expansion of the sawmills, mines, and agricultural developments that already existed. In June 1854, the *Pioneer and Democrat* summed up this vision: “At no distant day [Washington Territory will] attract hither the capitalist and collier of the Alleghanies, and the fishing smacks of the hardy and enterprising sons of New England—those of Nantucket, New Bedford, Cape Cod, etc., and then will the true value of Puget Sound to the western world, be properly felt and duly appreciated.” Three months before the Medicine Creek Council, the same editor had noted the rapid growth of the previous two years. Three sawmills on the Sound had become thirty-three, a dozen mercantile houses had expanded to fifty, and “the oyster beds of the coast are being improved—the fisheries of the Sound and Straits hold out the hand of invitation to the smacks of the Atlantic.”<sup>22</sup>

<sup>22</sup>Olympia *Columbian*, August 27, 1853; Olympia *Pioneer and Democrat*, January 29, 1853, June 17, September 16, 1854.

The governor shared this vision. In a letter to Joseph Grinnell and others in New Bedford, he touted the good harbors and the best whale fishery on the Pacific. The timber was unsurpassed and fertile areas existed for farming and grazing on both sides of the Cascades. Moreover, Stevens told the New Englanders, "the policy of the territory and of the country at large, is to cultivate simultaneously and equally all of those sources of national wealth. I desire to further that policy to the utmost of my ability."<sup>23</sup>

Stevens was only repeating a universally accepted canon of the western frontier—the right of free access to the public domain. Regulation of fishing, timber, and mineral resources often came only after the frontier period, usually in the face of threatened diminution or exhaustion of the resource. Settlers who came to Puget Sound assumed they could take fish in unlimited quantities from ocean or river waters. The governor's remarks at the Point Elliott and Neah Bay councils indicate that he assumed most Indian fishing would take place in the Sound or the Strait, and that those who killed or caught the fish were entitled to them.

In any case, the fishing clause in the ratified treaties must be placed in context. Certainly there could be no interference with the progress of civilization for Indians or non-Indians. The treaty commissioners were juggling a number of different issues. Most important were the requirement to have few reservations and the need to promote agricultural and educational opportunities. The fishing clause was a bow to regional needs, but it did not change the thrust of treaties made in the Washington Territory or elsewhere. The clauses in the treaties providing for farming, industrial training, education, and division of the lands in severalty defined the future for Native Americans as policymakers in Washington, D.C., or the Washington Territory saw it. Rights to hunt and fish, or gather berries and roots, or pasture horses on common grounds were defeasible as the land was settled by non-Indians.<sup>24</sup>

It is difficult to argue that this eventuality was not foreseen by the treaty makers. If not, why did government officials insist that the treaties' purpose was to set aside lands so that the Indians could become civilized agrarians and part of the community? Clearly, the governor believed the Puget Sound natives would catch fish for some undetermined period, but not to the detriment of white fishermen or settlers. It was commonly accepted that the Pacific Northwest would be the home of a great fishing industry.

<sup>23</sup> Stevens to Jos. Grinnell et al., January 9, 1854, published in the *Pioneer and Democrat*, June 17, 1854.

<sup>24</sup> A specific indication for this is the provision added to the "in common" clause prohibiting the taking of shellfish from areas claimed by citizens. The shellfish industry had developed before the treaties, and the steps taken to protect it show the treaty commissioners' thinking at the time.



Cleaning fish on the beach at Port Townsend, Washington (University of Washington Libraries)

As Stevens said, the Indians would not compete because they had different (and assumedly less efficient) methods. When he told the Makahs that whoever killed the whales would be entitled to them, he had no doubt as to where most of the catch would go. In the short run, to allow Indians to hunt, fish, gather berries, and pasture horses on open and unclaimed lands would harm no one, and would benefit both the natives and the government.

Many Native Americans in western Washington relied less on fishing in the last half of the nineteenth and the first decades of the twentieth centuries than at treaty time. As Stevens had foreseen, other activities had reduced fishing to a secondary occupation, if it were one at all. However, some individuals and groups, especially those on the coast and the Strait, continued to rely on fishing. A change in the political climate began in 1934 with the Indian Reorganization Act and continued with the Indian Claims Commission. This change emphasized the validity of traditional cultures and religions. Among other things, it led to appeals to the courts to increase the Indians' share of much-diminished fish runs, and eventually resulted in the Boldt decision of 1974.

Was it the correct decision? In the context of U.S. history in the last half of the twentieth century, it may have been, but it is probable that Isaac Stevens, George Gibbs, and George Manypenny would have been surprised to know that the issue would arise more than a hundred years after the signing of the Washington treaties.

# BACKFIRE FROM BOLDT: THE JUDICIAL TRANSFORMATION OF COAST SALISH PROPRIETARY FISHERIES INTO A COMMONS

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BY RUSSEL L. BARSH

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**H**ailed by some as one of the greatest legal victories for Native Americans,<sup>1</sup> and by others as an exemplary model of public-policy litigation,<sup>2</sup> the Boldt decision (*United States v. State of Washington*, 1974) has unquestionably had a profound impact on its intended beneficiaries, the Coast Salish Indians of western Washington State. Native American salmon harvests have quadrupled since the court's ruling, Native Americans who fish have nearly doubled, and Indian reservations proudly display the latest aquaculture programs. Tribal leaders have become a consideration in state, regional, and even international fisheries management.

Overall, Native American power has increased as a result of the court's decision. The decision has also achieved in fifteen years what nothing else succeeded in doing in the previous century: the complete "modernization" of the Indian fishery, with its attendant social problems. New forms of social conflict have arisen as a result, including class opposition and intertribal economic disputes, which have arguably diverted much of the political energy and organization of Coast Salish people into unproductive internal struggles.

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<sup>1</sup> Fay G. Cohen, *Treaties on Trial: The Continuing Controversy over Northwest Indian Fishing Rights* (Seattle, 1986); Alvin M. Josephy, Jr., *Now That the Buffalo's Gone: A Study of Today's American Indians* (New York, 1982).

<sup>2</sup> Charles F. Broches, "Public Law Litigation and Marine Affairs: the Boldt Decision," *Coastal Zone Management Journal* 13 (1985) 99-130.

Understanding why this has occurred, and how the court might have avoided it, depends upon an analysis of the organization and social function of fisheries in aboriginal Coast Salish society. Aboriginal fishing was proprietary; access to the resources was controlled by extended families and was shared through networks of widely dispersed kinfolk. Unwittingly, perhaps, the federal court reorganized the Indian fishery along "tribal" lines, with each "tribe" assigned a small, discrete geographic fishing zone. Within these exclusive economic zones, families were to fish in common. This transformed the aboriginal system, which consisted of hundreds of interlocking family proprietorships, into twenty independent and competing groups. It replaced a legal regime that promoted the sharing of resources throughout the region with one that encourages competition, at tribal and family levels, for the largest possible share of the harvest.

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#### COAST SALISH SOCIAL ORGANIZATION

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Aboriginal Coast Salish society was not organized in sharply bounded geographical packages, but resembled a web of interrelated settlements, some of them more closely tied by kinship and economic alliances than others. Geographically and socially distinct tribes are a consequence of the establishment of Indian reservations and, since the 1930s, the organization of autonomous governments on each reservation.

The basic social and political unit of the Coast Salish people of Puget Sound was the house group—one or more related extended families sharing a single, collectively owned and maintained house. Some settlements, like the late-nineteenth-century Samish community on Guemes Island, consisted of only a single house, containing a few families of diverse backgrounds, allied by marriage.<sup>3</sup> Others combined a number of loosely affiliated houses. Families were described as high-class, "good" people, worthless people, or slaves, but there was some mobility among them, based upon personal conduct.<sup>4</sup>

Marriages were generally arranged outside the settlement, often with relative strangers. Each person could therefore trace his or her ancestry to a number of settlements, and to some degree all families in the region were interrelated.

<sup>3</sup> Wayne P. Suttles, "The Economic Life of the Coast Salish of Haro and Rosario Straits" [hereafter cited as Suttles, "Economic Life of the Coast Salish"], in *Coast Salish and Western Washington Indians*, comp. and ed. James Horr Agee (New York, 1974).

<sup>4</sup> Wayne P. Suttles, *Coast Salish Essays* (Seattle, 1987) 11-13 [hereafter cited as Suttles, *Coast Salish Essays*].

Families, and sometimes entire households, frequently switched allegiances, aided by the vast web of interknit relationships. Thus, while some groups undoubtedly had strong leaders, some of whom were able to organize large confederacies of settlements for trade and defence, no sharp social or territorial boundaries divided the region.

The fluid social system reflected the availability of food, which was not always abundant. Although some fish and game could be found year-round, large concentrations of shellfish and wild vegetables occurred in few places, and heavy runs of salmon, herring, smelt and other easily preserved fish were limited to certain times of the year, along their migration routes. Controlling these fishing places at the critical moment could lead to great prosperity. Since the most prolific resources were also the least predictable from year to year, however, food security depended upon an extensive system of trade and exchange.<sup>5</sup>

The patchiness of resources dictated a characteristic pattern of seasonal movement. Permanent settlements were occupied chiefly in winter, where food could be secured all year—near shellfish beds or streams where steelhead could be caught, for example. In spring the families began a round of visits to widely dispersed fishing and gathering sites, which they either used exclusively or shared with related families from other settlements. Thus, when the settlement reunited the following autumn, its members brought harvests from diverse environments, thanks to kinship relations elsewhere.

Coast Salish people therefore thought not in terms of broad territorial boundaries, but of a universe of family food-gathering sites. Asked to describe the boundaries of Cowlitz country, for instance, Mary Kiona (born 1883) indicated the direction each Cowlitz family traveled in summer.<sup>6</sup> Territoriality was conceived in terms of the food supply: "They got their own river where they can get all the fish they want," or, "They have plenty of it in their own place."<sup>7</sup>

This began to change in the 1850s, with the concentration of Coast Salish people on a small number of reservations. Territorial Gov. Isaac Stevens wanted to consolidate all Puget Sound Indians

<sup>5</sup>Suttles, "Economic Life of the Coast Salish," supra note 3, and June M. Collins, "The Influence of White Contact on Class Distinctions and Political Authority Among the Indians of Northern Puget Sound," in *Coast Salish and Western Washington Indians*, comp. and ed. James Horr Agee (New York, 1974).

<sup>6</sup>Transcript of Proceedings, Indian Claims Commission Docket No. 218 (*Cowlitz Tribe v. United States*), August 5, 1953, at Seattle, 60-61.

<sup>7</sup>Transcript of Proceedings, Indian Claims Commission Docket No. 234 (*Chinook Tribe v. United States*), August 4, 1953, at Seattle, 56, 153, 157 (Emma Lucier, b. 1868, and Roland Charley, b. 1883).

on a "general" reservation at Tulalip, but many refused to leave the "temporary" reservations set aside for them by treaty, or tried to remain in their ancestral villages. Some were removed by gunboat, others were granted permanent rights to remain where they were, and some unauthorized settlements simply persevered in a state of federal neglect.<sup>8</sup> By the 1880s a complex new demographic situation had evolved, with arbitrarily mixed populations on many reservations, and roughly half the Native Americans living off reservation.

Federal bureaucrats hoped to turn the ad hoc settlements on reservations into "civilized" farming communities, and introduced programs of agricultural assistance, special Indian schools, and the subdivision and individual allotment of reservation lands. This required a means for determining individual eligibility for land and services; Indians living on reservation were enumerated, "tribal" (actually *reservation*) rolls were compiled, and patrilineal-inheritance rules were adopted. This created new ethnic identities. In the 1900 federal census, for example, 8 percent of the Indians enumerated on the Tulalip Reservation said they were Tulalips, although every one of them identified their parents as Snohomish, Snoqualmie, Skagit, Squally, or Clallam. In the 1910 census, an even larger proportion had adopted this new identity.

The 1934 Indian Reorganization Act continued the process of segmenting Coast Salish society, identifying the Native Americans on each reservation as a distinct tribe and giving them a limited degree of internal legislative authority, including some control of their own tribal membership. Although many intertribal ties persisted, including those in religious life,<sup>9</sup> the reservations and reorganization divided access to many new forms of economic resources (federal aid, Indian programs, public employment) along tribal lines.

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### COAST SALISH FISHERIES MANAGEMENT

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Aboriginal Salish fishery tenure not only managed the harvesting of fish stock, but distributed economic power within and

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<sup>8</sup>For example, the Clallams camped at Port Gamble were allowed to remain there by the Pope & Talbot sawmill, and the Bureau of Indian Affairs purchased the site and made it a reservation in the 1930s. The Nooksacks and Upper Skagits carved out homesteads in the Cascade foothills, far from encroaching white farmers and loggers, and were only accorded formal legal status in the 1970s. The Samish were forced out of their traditional settlements on Samish and Guemes islands by settlers between 1880 and 1910, and continue to be denied any official federal recognition.

<sup>9</sup>Suttles, *Coast Salish Essays*, *supra* note 4 at 221-22.

among families. It was a way of managing social and political relationships, as well as managing fish.<sup>10</sup>

In general terms, it is probably fair to characterize Coast Salish fishery-tenure systems as designed to achieve a wide but somewhat unequal distribution of income, preserving class and rank distinctions. How this was done depended on local topography and ecology. The common element was the control of strategic harvesting sites, where water flow, access, and salmon-migration habits made fishing relatively productive.<sup>11</sup>

These sites were controlled in different ways, among others by collectively operated large nets or traps in the mouths or main-stems of rivers,<sup>12</sup> from which the harvests were divided by rank.<sup>13</sup> People of the middle and upper Columbia sometimes used long seine nets,<sup>14</sup> made up of pieces contributed by individual fishermen. The catch was divided according to the size of each piece.<sup>15</sup> Small family-owned traps, weirs, or net sites were used in larger coastal streams or upland tributaries.<sup>16</sup> These were handed down from generation to generation.<sup>17</sup> At LaPush and Queets, family

<sup>10</sup> See, for example, John Cordell, "Carrying Capacity Analysis of Fixed-Territorial Fishing," in Alexander Spoehr, ed., *Maritime Adaptations: Essays on Contemporary Fishing Communities* (Pittsburgh, 1980) [hereafter cited as Spoehr, *Maritime Adaptations*].

<sup>11</sup> The condition of the fish for smoking or drying was also a major consideration, since preserved food was a basic medium of trade. Steven Romanoff, "Fraser Lillooet Indian Fishing," *Northwest Anthropological Research Notes* 19 (1985) 144 [hereafter cited as Romanoff, "Fraser Lillooet Indian Fishing"].

<sup>12</sup> Edward Swindell, *Report on Source, Nature, and Extent of the Fishing, Hunting, and Miscellaneous Related Rights of Certain Indian Tribes in Washington and Oregon Together with Affidavits Showing Location of a Number of Usual and Accustomed Fishing Grounds and Stations*, prepared for the Office of Indian Affairs (Los Angeles, 1942) 187 [Frank Fisher, b. 1867], 138-42 [Mrs. Sam Ulmer, b. 1876; John Mike, b. 1862; and Charley Hopie, b. 1864] [hereafter cited as Swindell, *Report*].

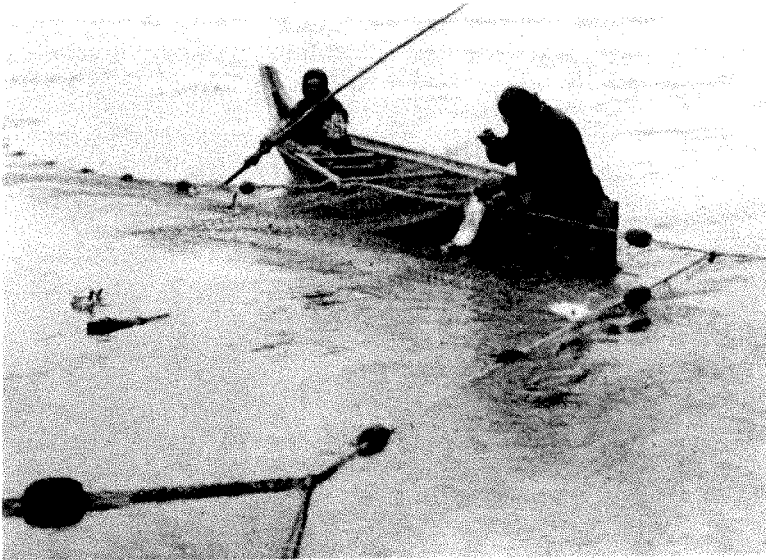
<sup>13</sup> See Ronald L. Olson, "The Quinault Indians," *University of Washington Publications in Anthropology* 6 (1936) 94-96.

<sup>14</sup> James A. Teit, "The Salishan Tribes of the Western Plateaus," in *45th Annual Report of the Bureau of American Ethnology, 1927-1928* (Washington, 1930) 349; Leslie Spier and Edward Sapir, "Wishram Ethnography," *University of Washington Publications in Anthropology* 3 (1930) 176.

<sup>15</sup> A similar system has evolved among Sinhalese beach seiners in Sri Lanka. Paul Alexander, "Sea Tenure in Southern Sri Lanka," in Spoehr, *Maritime Adaptations*, supra note 10 at 91-111.

<sup>16</sup> Transcript of Proceedings, Indian Claims Commission Docket No. 234 (*Chinook Tribe v. United States*), August 4, 1953, at Seattle, 59 [Roland Charley, b. 1883], and November 17, 1953, at Washington, D.C., 123-24 [Dr. Herbert Taylor]; Plaintiff's Exhibit No. 93 [Arthur Howeattle, 1916], Indian Claims Commission Docket No. 155 (*Quileute Tribe v. United States*).

<sup>17</sup> Swindell, *Report*, supra note 12 at 192 [Joseph Sly, b. 1858].



Until the 1970s, most Native Americans fishing along the sea coast and in Puget Sound employed fixed gear, like this set net. Quinault Indian Reservation, 1912 (University of Washington Libraries)

ownership of river-fishing sites continued long after the traps and weirs were replaced by gillnets.<sup>18</sup> As late as the 1930s, strategic headlands and reefs in the San Juan Islands were still owned individually, by men who served as captains of canoe-dragged net teams. Members of each team shared the catch in proportion to their contributions of pieces of the net.<sup>19</sup> Fishing platforms along rapids in the Columbia were family owned, and were shared through partnerships with kinfolk from distant settlements.<sup>20</sup> Among the Lillooet, the site's owner built the platform and

<sup>18</sup>George A. Pettitt, "The Quileute of La Push, 1775-1945," *University of California Anthropological Records* 14 (1950) 41; Russel L. Barsh, "The Economics of a Traditional Coastal Indian Salmon Fishery," *Human Organization* 41 (1982) 170-76 [hereafter cited as Barsh, "Traditional Coastal Indian Salmon Fishery"].

<sup>19</sup>Bernard J. Stern, *The Lummi Indians of Northwest Washington* (New York, 1934) 43-44 [hereafter cited as Stern, *Lummi Indians*].

<sup>20</sup>Swindell, *Report*, supra note 12 at 148a, 152, 165, 170, 175, 177, 179-80.

supplied the gear, but shared its use fairly freely. His wealth depended on being able to organize relatives for the intense labor of fishing and preserving the catch.<sup>21</sup>

It is important to bear in mind that fishing methods did not differ according to tribe. The same fishermen might troll for salmon in deep water during the spring, use beach seines at fixed family sites in summer, and set traps or weirs at family stream sites in autumn.<sup>22</sup> During some seasons, the settlement fished together as a cooperative; at other times of year, families used their individual fishing sites. Legal regimes as well as gear varied with the seasonal availability and habits of the fish.

No precise distinction was made between individual and corporate ownership. An individual owned the site, in the sense of directing its use. At the same time, inheritance was within the extended family, and family members could expect to use the site with a minimum of supervision and without any explicit rent. "Ownership" is a poor approximation of the legal content of the Salish norm, moreover, since it was not strictly exclusive of others. Use was shared with kinfolk reciprocally, and expressed the nature and history of the relationship.<sup>23</sup> As among aboriginal Australians, the owner had the "right to be asked," and to negotiate, rather than the right to refuse.<sup>24</sup>

The relative character of site ownership is reflected in the following explanation, made by a Lillooet fisherman:

A fishing rock can't be sold from way back. It can be handed down to relations like son, nephew, or anybody else, whoever the older guy that owns the rock, that fixes the platform, whoever he thinks will be capable to keep doing it, keep fixing it. But it doesn't mean for just himself. When he fixes that platform or that rock where he fishes, it's not only him that fishes. Everybody. When he sees anybody come and set, they wait for him, and he just calls them over. He tells them, "Come on and fish."

<sup>21</sup> Romanoff, "Fraser Lillooet Indian Fishing," supra note 11 at 139. Another element of cooperative fishing is sharing knowledge, which can be a major determinant of fishing success. James A. Wilson, "Fishing for Knowledge," *Land Economics* 66 (1990) 12-29; Shepard Forman, "Cognition and the Catch: The Location of Fishing Spots in a Brazilian Coastal Village," in Spoehr, *Maritime Adaptations*, supra note 10 at 15-24.

<sup>22</sup> As among the Lummi. Stern, *Lummi Indians*, supra note 19 at 42-49.

<sup>23</sup> Suttles, *Coast Salish Essays*, supra note 4 at 20-21.

<sup>24</sup> Fred R. Myers, "Always Ask: Resource Use and Land Ownership among Pintupi Aborigines of the Australian Western Desert," in Nancy M. Williams and Eugene S. Hunn, eds., *Resource Managers: North American and Australian Hunter-Gatherers; AAAS Selected Symposium* 67 (Boulder, 1982) 173-95 [hereafter cited as Williams and Hunn, *Resource Managers*].

They don't hog the rock. If he gets what he needs, the other fellow gets a share, and everybody else gets a share.<sup>25</sup>

Community leaders generally served as organizers of work and arbitrators of disputes, not as landlords. Typically, they lacked the authority to prevent anyone from fishing, or to charge rent. High-class families tended to control the most productive fishing places, however, affording them the surplus wealth they need to maintain their influence.<sup>26</sup> Indeed, assertions of ownership were generally restricted to relatively productive sites, where a surplus could be obtained by organizing the collective efforts of kinfolk.<sup>27</sup> Less productive areas often lacked owners, and were freely used by relatively unrelated family groups.

Political power among Northwest coastal Indians was based on the control and, through kinship and trade, the sharing of food-gathering sites. Some of these sites became the centers of complex regional trade networks, among them Willapa Bay (shellfish), Longview (smelt), and Celilo Falls (salmon), which supported large annual gatherings, and gave nearby houses great influence. The Chinooks' great power resulted from their control of both the Columbia estuary and the rich shellfish beds in Willapa Bay. They exchanged dried salmon and clams for otter fur and whale oil from the north, and camas and wapato from the east—distances of more than a hundred miles.<sup>28</sup>

High-class Coast Salish families carefully sought marriages with distant houses that controlled different resources, in terms of seasonal availability as well as species. As in-laws they could thus increase their influence and distribute food more widely among settlements. "A chief is always anxious to marry his children to people of various tribes," an elder explained in 1916. "This makes him famous."<sup>29</sup> Every high-class family in the lower

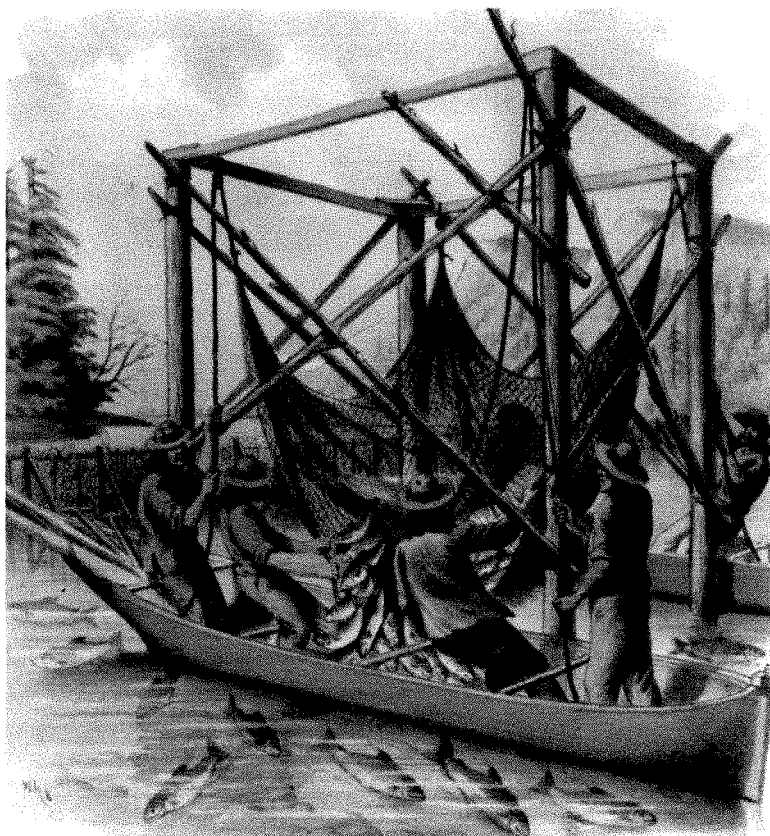
<sup>25</sup> Romanoff, "Fraser Lillooet Indian Fishing," *supra* note 11 at 139.

<sup>26</sup> See Erna Gunther, "Klallam Ethnography," *University of Washington Publications in Anthropology* 1 (1927) 200, 214 [hereafter cited as Gunther, "Klallam Ethnography"]; Barsh, "Traditional Coastal Indian Salmon Fishery," *supra* note 18; Transcript of Proceedings, Indian Claims Commission Docket No. 218 (*Cowlitz Tribe v. United States*), August 5, 1953, at Seattle, 62 [Mary Kiona].

<sup>27</sup> Allan Richardson, "The Control of Productive Resources on the Northwest Coast of North America," in Williams and Hunn, *Resource Managers*, *supra* note 24 at 93-112.

<sup>28</sup> Report of Isaac I. Stevens, superintendent of Indian Affairs, Washington Territory, September 16, 1854, in *Annual Report of the Commissioner of Indian Affairs, 1854* [Washington, 1855].

<sup>29</sup> Notebook 5, p. 5, H.K. Haeberlin Papers, National Anthropological Archives, Smithsonian Institution [hereafter cited as Haeberlin Papers].



"Indian Fishing Troop on Quinault River," Washington, 1890 (Oregon Historical Society)

Columbia basin tried to marry some of its daughters to the Clatsops, for example, because they controlled excellent beach fisheries and clam beds near the river's mouth.<sup>30</sup>

Within individual Puget Sound watersheds, downstream houses, with their year-round access to shellfish and the opportunity to take the largest share of migrating salmon, served as the hubs of trade with smaller upriver hunting and gathering settlements.<sup>31</sup> The Snohomish River drainage typified this kind of

<sup>30</sup>Transcript of Proceedings, Indian Claims Commission Docket No. 240 (*Tillamook Indians v. United States*), November 23, 1953, at Washington, D.C., 108 (Dr. Herbert Taylor).

<sup>31</sup>Astrida R. Blukis Onat, "The Interaction of Kin, Class, Marriage, Property Ownership, and Residence with Respect to Resource Locations among the Coast Salish of the Puget Lowland," *Northwest Anthropological Research Notes* 18 (1984) 86-96.

arrangement. Large settlements along the estuary near present-day Everett had ready access to saltwater fishing, salmon, and shellfish on south Whidbey Island.<sup>32</sup> They maintained an active trade with upriver settlements scattered along the Skykomish and Snoqualmie rivers, purchasing hides and mountain-sheep wool with shell money, seal meat, and dried clams.<sup>33</sup> Many upriver families fished and clammed in summer with their saltwater kinfolk. From this alliance, the downriver houses gained great prestige, and the upriver houses a more secure food supply.

A similar regional system evolved along the middle Columbia River, involving people living close to the river and those who had their main settlements farther inland. As one elder put it, the riparian and inland groups were "one big family" and their "chiefs were old friends."<sup>34</sup> All congregated in summer or fall at strategic points in the river where salmon could be harvested and dried in large numbers, working in partnerships as well as trading fish for inland products.

Fishing rights were chiefly valuable to the extent they were used to attract allies, organize labor, and maintain ties of reciprocity. No one family could possibly marshal enough labor to take full advantage of the potential surplus from a productive fishery such as Celilo, much less to defend it. Trade was therefore necessary, not only to overcome seasonal and annual variability in the distribution of food resources, but as a basis for mobilizing seasonal labor.<sup>35</sup> "Hogging" was likely to result in loss of rank, and relative poverty.

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### THE IMPACT OF NON-INDIAN COMPETITION

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This economic system began to change as soon as Europeans established trading posts in the region. By the 1820s, posts on the Columbia and Fraser rivers were routinely feeding employees

<sup>32</sup> Transcript of Proceedings, Indian Claims Commission Docket No. 125 (*Snohomish Tribe v. United States*), August 10-12, 1953, at Seattle, 128-50 (Dr. Colin Tweddell); William Belcher, "Coast Salish Social Organization and Economic Redistribution," *Northwest Anthropological Research Notes* 20 (1986) 203-211.

<sup>33</sup> Notebook 19, Haeberlin Papers, *supra* note 29 at 28-31 (Annie Sam and Little Sam).

<sup>34</sup> Swindell, *Report*, *supra* note 12 at 161, 163 (William Yallup, b. 1866).

<sup>35</sup> Of course Coast Salish people, like people elsewhere in the world, valued variety in their diet, and would have felt quite deprived if they had to subsist year-round on the product of a single fishery. See Trinita Rivera, "Diet of a Food-Gathering People, with Chemical Analysis of Salmon and Saskatoons," in Marian W. Smith, ed., *Indians of the Urban Northwest* (New York, 1949) 20-21.

with fish purchased from their Coast Salish neighbors. Although the volume of this trade was not large compared with total Indian harvest levels,<sup>36</sup> it increased the value of fish relative to other indigenous products, and thus the power to be gained from successful fishing.

The impact of European trade on the underlying structure of Indian fishing was limited until the 1850s, however, when canning made it possible to export salmon from the Northwest to the East Coast and abroad. Export production then grew rapidly over the next fifty years, creating a virtually limitless demand for salmon fishermen. During this period, Indian fishing for export markets increased briefly, then fell sharply.<sup>37</sup>

At first non-Indian commercial fisheries relied chiefly on the same technology as that of the Indians, such as traps and beach seines, and thus competed for fish by competing for fishing sites. Non-Indians had an advantage in being able to acquire titles to land, and licences to maintain traps in particular locations. They also gradually devised larger traps that could be driven in deeper water, in front of smaller ones. By the 1890s, the best Indian trap and seine sites had been blocked off by non-Indian licensees.<sup>38</sup>

Improvements in marine-net fishing made the situation worse. Fishing from small boats with gillnets was relatively inexpensive—about one-twentieth of the cost of a licensed trap site—and was thus within reach of a growing number of immigrants from Europe. Ocean fishing increased when the demand and prices for salmon rose during the First World War. State law failed to protect fixed-gear fishermen from offshore competition by this growing fleet of small gillnetters, permitting a de facto conversion of the fishery into a commons.

The owner of a fishing site has an incentive to spare fish needed for spawning, since overharvesting reduces future harvests and reduces the capital value of the site. In the Coast Salish system, moreover, the owners of neighboring sites along the same stream were bound by kinship and reciprocity, deterring any downstream

<sup>36</sup>George A. Rounsefell and George B. Kelez, "The Salmon and Salmon Fisheries of the Swifsure Bank, Puget Sound, and the Fraser River," U.S. Bureau of Fisheries, *Bulletin* 27 (1938); James A. Craig and Robert L. Hacker, "The History and Development of the Fisheries of the Columbia River," U.S. Bureau of Fisheries, *Bulletin* 32 (1940).

<sup>37</sup>In the 1890s, Indians constituted one-fourth of the commercial fishermen in Pacific County, Washington, at the mouth of the Columbia River, and 90 percent of the commercial fishermen in Clallam County, along the Strait of Juan de Fuca. William A. Wilcox, "The Fisheries of the Pacific Coast," *1893 Report of the U.S. Commissioner of Fish and Fisheries* (Washington, 1894) 254, 259.

<sup>38</sup>Daniel L. Boxberger, "In and Out of the Labor Force: The Lummi Indians and the Development of the Commercial Salmon Fishery of North Puget Sound, 1880-1900," *Ethnohistory* 35 (1988) 161-90.

proprietor from taking too many of the migrating fish. In a commons, however, a fish spared by one fisherman will simply be taken by someone else.<sup>39</sup> Fishing continues until the cost of finding and catching fish exceeds the price at which they can be sold.

The combination of expanding markets and the organization of fishing as a commons therefore introduced the danger of region-wide overfishing, and the need for a system of harvest regulation.<sup>40</sup>

While most Native American fishermen exchanged their traps and weirs in favor of European-style nets, they were unable to obtain the credit to acquire large motorized boats, and were thus increasingly left behind in the rivers while the non-Indian industry moved farther out to sea. This not only meant that their harvests declined but that they could not take advantage of external markets. It also meant that their fishing remained proprietary and largely oriented to subsistence<sup>41</sup>—or, more precisely, to a “mixed economy,” in which fishing provided a large share of food and supplemental cash. Most cash needs, however, were met by wage labor.<sup>42</sup>

Clallams fishing coastal streams along the Strait of Juan de Fuca abandoned community-built traps for family-owned net sites, for example.<sup>43</sup> This entailed smaller work units, but maintained the proprietary character of fishing rights, and a relatively stable initial distribution of the catch. At Lillooet, declining runs of spring salmon reduced the productivity of fishing rocks as platforms for dip netting, and Indian fishermen shifted to large

<sup>39</sup> See, for example, James A. Crutchfield, *The Pacific Salmon Fisheries: A Study of Irrational Conservation* (Baltimore, 1969); Ralph W. Johnson, “Regulation of Commercial Salmon Fishermen: A Case of Confused Objectives,” *Pacific Northwest Quarterly* 55 (1962) 141-45.

<sup>40</sup> I use the phrase “regionwide” in recognition of the fact that, even under the aboriginal system, there were undoubtedly examples of poor judgment and hogging. A family that engaged in such behavior was unlikely to survive for long, however.

<sup>41</sup> “Subsistence” is used here in the sense of an economy that produces no surplus or savings, but only sufficient cash income to purchase supplemental food and refinance gear. *Seals and Sealing in Canada; Report of the Royal Commission* (Ottawa, 1986) 2:231. In most other parts of the world, the term “artisanal” would be more familiar.

<sup>42</sup> Victoria Wyatt, “Alaskan Indian Wage Earners in the 19th Century: Economic Choices and Ethnic Identity on Southeast Alaska’s Frontier,” *Pacific Northwest Quarterly* 78 (1987) 43-49; June M. Collins, “Johnny Fornsby: The Personal Document of a Coast Salish Indian,” in Marian W. Smith, ed., *Indians of the Urban Northwest* (New York, 1949) 287-341.

<sup>43</sup> Swindell, *Report*, supra note 12 at 138-42 (Mrs. Sam Ulmer, b. 1876; John Mike, b. 1862; Charley Hopie, b. 1864): “The locations for the nets after they had been first established were recognized as the property of the individual families who first started using the place.”

gillnets in slower and deeper parts of the stream. Nets were set in habitual locations each year, however.<sup>44</sup>

The survival of some traditionally organized Indian fishing may have helped offset the social impacts of Native Americans' integration into the wage economy, since it sustained a system of traditional trade, food-sharing and cooperative work connecting Coast Salish people throughout the region. Declining harvests did reduce the usefulness of fishing as a path to personal prestige, however, shifting the balance of power in Coast Salish communities to men who devoted themselves to farming, logging, and, beginning in the 1930s, employment in the tribal bureaucracies organized by the Bureau of Indian Affairs.<sup>45</sup>

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### THE COURT'S ANALYSIS

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In a previous study, I argued that the federal court in *United States v. Washington* had addressed the wrong problem.<sup>46</sup> It believed that the salmon fishery had always been a commons, and identified fishing areas with "tribes" rather than families. Instead of restoring the rights of Coast Salish families to their traditional fishing sites, the court decreed the creation of a score of new, "tribal" commons.

Using the tribe as the unit of analysis was in part because the case was brought by tribal councils organized under the 1934 Indian Reorganization Act. For tactical reasons the plaintiffs tried to oversimplify historical reality, each claiming to have enjoyed a discrete, independent territorial fishery. Most of the ethnographic material presented focussed on the *importance* of fishing to Indians, moreover, rather than the internal legal organization of the aboriginal fishery. This in effect created the illusion that the aboriginal fishery had been a commons all along.

The true picture was not suppressed, but merely disregarded or misunderstood. The court found, for example, that

Generally, individual Indians had primary use rights in the territories where they resided and permissive use

<sup>44</sup>Romanoff, "Fraser Lillooet Indian Fishing," supra note 11 at 129, 149.

<sup>45</sup>Michael R. Anderson, "Law and the Protection of Cultural Communities: the Case of Native American Fishing Rights," *Law & Policy* 9 (1987) 128 [hereafter cited as Anderson, "Law and the Protection of Cultural Communities"]; compare Russel L. Barsh, "Plains Indian Agrarianism and Class Conflict," *Great Plains Quarterly* 7 (1987) 83-90, concerning the transition from hunting to ranching.

<sup>46</sup>Russel L. Barsh, *The Washington Fishing Rights Controversy: An Economic Critique* (Seattle, rev. ed. 1979) [hereafter cited as Barsh, *Washington Fishery Rights Controversy*].

rights in the natal territory (if this was different) or in territories where they had consanguineal kin. Subject to such individual claims, however, most groups claimed autumn fishing rights in the waters near to their winter village. Spring and summer fishing areas were often more distantly located and often were shared with other groups from other villages.<sup>47</sup>

The court also recognized that "certain types [of fishing gear] required cooperative effort in their construction and/or handling. Weirs were classed as cooperative property but the component fishing stations on the weir were individually controlled."<sup>48</sup>

The court went on to equate these proprietary "groups" with tribes rather than families, however, and to think of fishing rights as pertaining to contiguous geographic areas rather than specific fishing sites: "Each of the Plaintiff tribes had usual and accustomed fishing places within the case area. Although there are extensive records and oral history from which many specific fishing locations can be pinpointed, it would be impossible to compile a complete inventory of any tribe's usual and accustomed grounds and stations."<sup>49</sup> And, "The only method providing a fair and comprehensive account of the usual and accustomed fishing places of the Plaintiff tribes is the designation of the freshwater systems and marine areas within which the treaty Indians fished at varying times."<sup>50</sup>

Imputing "tribal" rights to whole watersheds avoided the problem of obtaining testimony on the ownership of individual sites along the streams, which would necessarily have drawn on the histories and genealogies of individual families. Rejecting the relevance of such evidence effectively disposed of the entire aboriginal legal system. In defence of this approach, the court argued that "Indian fisheries existed at all feasible places along a given drainage system. . . . Indian fishermen shifted to those locales which seemed most productive at any given time depending upon such factors as changes in river flow, turbidity or water course."<sup>51</sup>

This implied that each *drainage* was managed as a tribal commons, notwithstanding the historical situation and much of the evidence before the court. In practical terms, moreover, it meant that a "tribe" could claim as its "usual and accustomed"

<sup>47</sup>384 F.Supp. 312 [W.D. Wash. 1974] 353, § 12.

<sup>48</sup>Ibid. at 352, § 10.

<sup>49</sup>Ibid. at 353, § 13.

<sup>50</sup>Ibid. at 402, § 26.

<sup>51</sup>Ibid. at 353, § 13.

area anywhere it could show that any of the ancestors of any of its members used to fish.<sup>52</sup> Indeed, a reservation with highly diversified ancestry could claim as "tribal"—that is, belonging to all of its members in common—all of Puget Sound. That is exactly what the Tulalip Tribes attempted to do in 1982.<sup>53</sup>

Naturally, other tribes will be able to show that some of *their* ancestors also fished there. As long as the illusion of historical tribal fishing territories is maintained, resolving such competing claims meaningfully is impossible. The only way one tribe can prevail is when its opponents lack the ethnographic data to contest the claim. In other words, gaps in the ethnographic record are the basis upon which competing territorial claims are determined. Since ethnography is subject to re-interpretation, moreover, there is always a possibility of overthrowing previous decisions.<sup>54</sup>

Within each "usual and accustomed area," tribal members fish in common. Tribal fishing areas are therefore miniatures of the state's non-Indian fishery and suffer the same problems, such as over-capitalization and the high cost of harvest regulation.

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#### REDISTRIBUTION OF FISHERIES INCOME

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According to one observer, "Rather than protecting traditional fishing methods and reinforcing cultural solidarity, the [Boldt] decision has in many ways had exactly the opposite effect."<sup>55</sup> Native American fishing has expanded in terms of numbers of fishermen and aggregate harvests, and has shifted from riparian to marine areas, from relatively inexpensive gear to large vessels, and from a predominantly subsistence level to large-scale commercial objectives.

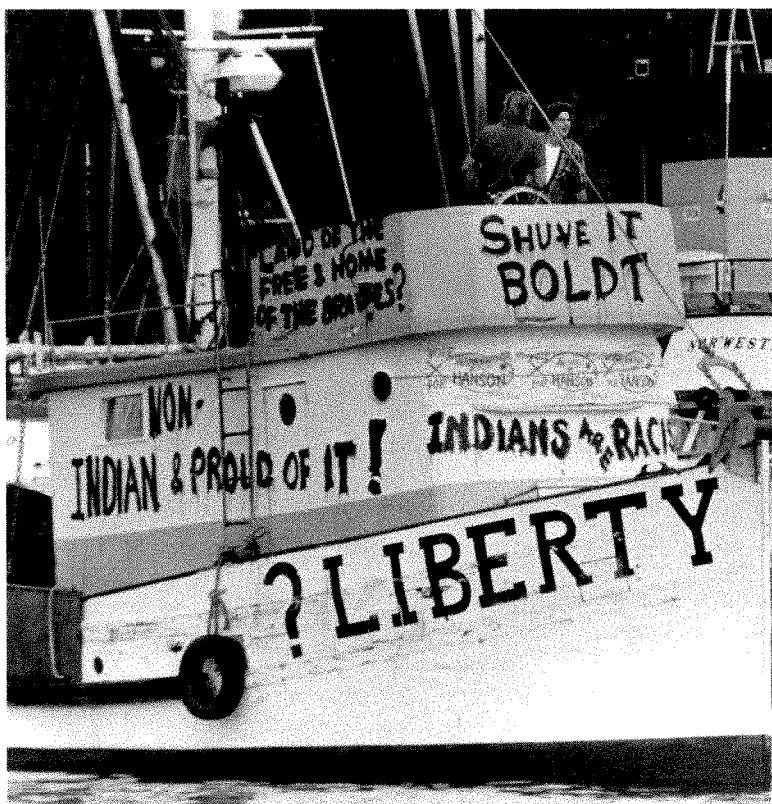
To enforce its division of the catch, the court restricted some non-Indian marine fisheries so that more salmon could reach

<sup>52</sup> The court defined "usual and accustomed ground or station" as "every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters." *Ibid.* at 332, § 8.

<sup>53</sup> "Amended Tulalip Request to Determine Usual and Accustomed Fishing Places," July 19, 1982, *United States v. Washington*, Civil No. 9213-Phase I, U.S. District Court for the Western District of Washington.

<sup>54</sup> The logical end to this process is, perhaps, that all "usual and accustomed" areas are nonexclusive and overlapping—or that all Indians fish in common everywhere.

<sup>55</sup> Anderson, "Law and the Protection of Cultural Communities," *supra* note 45 at 136.



Fishermen blockading Friday Harbor in the San Juan Islands, 1978. The Boldt decision triggered widespread protests among non-Indian fishers in Puget Sound. (*Seattle Times*)

areas fished by Indians, to whom it gave a comparative advantage by allocating them additional days of fishing in these areas. Increasing Indian harvests have attracted private capital, leading to a significant growth in the size of the fleet and its technological sophistication, and a shift from riparian and nearshore fishing to more expensive, deep-water gear. This has led to efforts by individuals and entire tribes to get in front of others along salmon migration paths.

Since 1974, Indian riparian fishing has fallen sharply.<sup>56</sup> Today the industry is dominated by a small number of purse seiners from the Lummi and Tulalip reservations who were favorably situated to obtain financial assistance in the 1970s, principally

<sup>56</sup> Ibid. at 138; Barsh, *Washington Fishing Rights Controversy*, supra note 46 at 96-97.

through privileged positions in tribal governments.<sup>57</sup> The source of power in Coast Salish fishing has thus shifted from control of the fish to control of financial capital, representing a shift from traditional rights based on family heritage and prestige to privileges acquired through a relationship with the Bureau of Indian Affairs.<sup>58</sup>

These changes help explain why case-area tribes failed to use their internal regulatory powers to renew the proprietary structure of their "usual and accustomed" areas. The proprietary system would have secured the economic independence of fishing families, reducing their dependence on tribal councils for economic aid and employment. Managing each tribal fishery as a commons gives tribal councils power, through licensing and harvest regulations, to reallocate harvests and income among families. This further consolidates the importance of political privilege in intratribal fishing competition.

Since the Native American share is computed on a case-area basis, rather than by individual drainages, tribes, or fishing areas, competition for the most profit is also intertribal. Tribes on the seacoast, in the Strait of Juan de Fuca, or in the San Juan Islands are positioned to intercept salmon bound for the inner Sound. Inland groups such as the Nooksack, Chehalis, and Upper Skagit are also vulnerable to downstream interception by saltwater tribes.

The court encouraged tribal councils to work these conflicts out among themselves, and annual negotiations on harvest allocation account for much of the work of the Northwest Indian Fisheries Commission. The voting structure of the commission is geographically balanced,<sup>59</sup> but has not eliminated recurrent threats of hogging by the more favorably placed fleets. Nor has it dissuaded the members from periodically petitioning the federal court for the redefinition of their "usual and accustomed" areas.

<sup>57</sup> Although private lending increased in response to the Boldt decision, federal financial aid to Native American fishermen increased as well, generally on less burdensome terms. As a result, fishermen with political access to federal aid had an advantage over those who had to rely on private banks.

<sup>58</sup> As suggested by Gary C. Anders, "Theories of Underdevelopment and the American Indian," *Journal of Economic Issues* 14 (1980) 681-701. The remaining Indian subsistence fishermen may be analogous to peasants in relation to high-lining Indian seiners. See James Faris, "Primitive Accumulation in Small-Scale Fishing Communities," in M. Estelle Smith, ed., *Those Who Live from the Sea: A Study in Maritime Anthropology* (St. Paul, 1977) 235-49.

<sup>59</sup> Eight seats are currently divided as follows: Puyallup, Squaxin Island and Nisqually; Jamestown, Lower Elwha, Port Gamble and Skokomish; Muckleshoot and Suquamish; Tulalip and Stillaguamish; Swinomish, Upper Skagit and Sauk-Suiattle; Nooksack and Lummi; Makah; Quinault, Quileute, and Hoh. This gives the big seine fleets two votes, and potential interception fisheries in the strait and the islands three votes.

Since the tribes no longer have complex trade and sharing relationships with one another, some of the traditional incentives to settlement have been lost.

Significantly, the court itself felt obliged to explain that "Indian commercial fishermen share the same economic motivation as non-Indian commercial fishermen to maximize their harvest and fishing opportunities," and to "acquire most items of American material culture."<sup>60</sup> The principal thrust of this finding was to justify ruling that "treaty tribes may utilize improvements in traditional fishing techniques."<sup>61</sup> At the same time, it implied that traditional management aims such as food security and an equitable distribution of income were no longer culturally applicable. Whether the court's characterization of Coast Salish culture was correct in 1974, it has become more valid over the years—due, in some part, to the court itself.

<sup>60</sup> Anderson, "Law and the Protection of Cultural Communities," *supra* note 45 at 136.

<sup>61</sup> See Pamela Amoss, "The Fish God Gave Us: The First Salmon Ceremony Revived," *Arctic Anthropology* 24 (1987) 55-66.

# JOHN A. CARVER: A REMINISCENCE

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BY JOHN A. CARVER, JR.

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THE death of an Idaho Fifth Judicial District judge at Pocatello on December 23, 1962, was untimely. John A. Carver was sixty-six, and was leading a full and busy life. He was a member of the Idaho bar for forty-four years, during twenty of which he had been U.S. attorney for the District of Idaho. He had been a country lawyer and a city lawyer, a county prosecutor and a municipal court judge. A lifelong Democrat, he had been an unsuccessful primary candidate for U.S. senator, and had been a serious but disappointed aspirant for presidential appointments as both federal district and Ninth Circuit Court of Appeals judge.

Judge Carver lost his eyesight when he was five years old. He was my father.

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## EARLY YEARS

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The state of Idaho was only six years old when John Carver was born, on March 14, 1896, at Preston, where his parents had moved from neighboring Utah in about 1890. His father, Parley Pratt Carver, was from one of the three plural families of an English-born Mormon convert who had migrated to Utah. His mother, Elizabeth Pritchett Carver, was from Ogden Valley, Utah, the daughter of Mormon converts from rural Virginia. Parley and Lizzie had five children, John being the third.

In an accident when children were throwing rocks at a bottle, a glass fragment penetrated John's eye. A prolonged crisis in the young farm family ensued. By the time it became apparent that he would have no sight in the remaining eye, it was time for him to go to school. At the age of seven, Jack (as he was called by his family and close friends throughout his life) was therefore "adopted" by his father's oldest sister, Mary Ann Carver Geddes of Plain City, and was enrolled in the Utah School for the Deaf

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John A. Carver, Jr., is Professor Emeritus at the University of Denver College of Law.

and Blind at Ogden.<sup>1</sup> Later, he was encouraged to attend high school with sighted students, and went to the Oneida Academy at Preston, only a few miles from his father's farm.

While in high school, Carver worked as a stenographer in a law office. The 1917 *Utah Eagle* summarized his first exposure to his future career:

From all his activities, it would seem that John had no spare time, but he managed to find the leisure to spend a few hours a week in a law office of Preston, doing the firm's typewriting and acquainting himself with the barrister business. When he took his diploma in 1915, he entered the office permanently and took charge of the collecting phase of the law work.<sup>2</sup>

The law office referred to was that of A.D. Erickson, a scholarly lawyer who gave the young blind boy the chance to demonstrate that he could succeed in a sighted world. Carver took dictation directly on the typewriter, with enough speed and accuracy to satisfy the needs of the Erickson law practice. (Years later, when he had stenographers and secretaries of his own, he would sometimes still type his letters.) It was a short step from typing complaints and garnishment affidavits to "reading" law. Though it may not have been customary in 1916, it was an acceptable way to enter the profession.

A patient and gifted teacher, Erickson not only guided Carver's program, but also tolerated a precocious leap into politics. The *Utah Eagle* recounts how, in the 1916 general election, John Carver was his party's candidate for the office of probate judge, winning the majority of votes. Only then did it emerge that he would not be twenty-one (the statutory age for voting and for the office) until March the next year. The defeated incumbent refused to waive the defect, and was sworn in to succeed himself.<sup>3</sup>

In 1917 Carver met and courted LaVerne Olson, a young woman of Scandinavian descent from Oxford, Idaho, who was working in a household in Preston.<sup>4</sup> Agreeing to marry Jack

<sup>1</sup> An account of Mary Ann Carver Geddes's life by her granddaughter, Selma Geddes Summers, dated June 15, 1953, is in the John A. Carver files.

<sup>2</sup> *Utah Eagle*, Utah School for the Deaf and the Blind, Ogden, April 1917 [hereafter cited as *Utah Eagle*].

<sup>3</sup> Ibid. I have amplified the *Utah Eagle's* account, based on the story as it was told me by my father.

<sup>4</sup> An unsigned 1959 manuscript in the files of John A. Carver, entitled "Oxford, A Once Important City," states that Oxford was first settled in 1864. It was the site of one of only three U.S. Land Offices in Idaho from 1879 until 1886, covering southeastern Idaho.

must have been daunting to the young woman, whose father was bitterly opposed to her throwing her life away on a "helpless" blind man, and refused to attend their wedding. However, he was soon reconciled, and he and his family became staunch supporters of the young couple.<sup>5</sup>

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### FROM LAW STUDENT TO LAWYER

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The self-confident bridegroom now had a partner who could read to him. This multiplied the material he could go through in his law studies under his mentor, A.D. Erickson. Rushing the process as much as he could, in 1918 he deemed himself ready for the bar examination in Pocatello. He passed, and took the oath and signed the register of attorneys in July 1918, at the age of twenty-two.

Franklin County, Idaho, is in the northern end of the Cache Valley, a famed and beautiful rendezvous area for mountain men and trappers. Early settlement forays by Brigham Young's lieutenants made Franklin, just across the Utah border into Idaho, the state's oldest town.<sup>6</sup> The county was carved out of Oneida County in 1913, with Preston as its seat.<sup>7</sup>

When John Carver began his practice, the Franklin County Bar consisted mainly of Erickson and two dominating old-timers, Arthur W. Hart and P.M. (Phil) Condie. The Fifth Judicial District comprised the extreme-southeastern Idaho counties of Bear Lake, Caribou, Franklin, Oneida, and Bannock. Pocatello, the county seat of Bannock County, was the second most populous city in Idaho, an important division point of the Oregon Short Line Railroad. The district's two judges both had their chambers there. Preston and the other county seats were visited by the judges, who took turns riding circuit.

Soon after passing the bar, Carver became Democratic county chairman. In his law practice, however, he was not doing as well as he thought he should, and blamed this on his lack of a formal legal education. With characteristic directness, he set out to remedy the problem. He enlisted the help of friends from the Utah School for the Blind, particularly Murray B. Allen, by then the head of the Utah Society for the Blind.<sup>8</sup> A loan or grant was

<sup>5</sup>In 1918, for example, the Olson Oldsmobile transported Jack and LaVerne Carver and their nursing infant to the bar examination in Pocatello and back.

<sup>6</sup>Franklin dates from June 15, 1860, which in my youth was celebrated as "Idaho Day," a Fourth-of-July sort of holiday.

<sup>7</sup>1913 Idaho Sess. Laws, ch. 5, p. 22, Act of June 30, 1913.

<sup>8</sup>See *Utah Eagle*, supra note 2 at 24. Allen was a man of enormous influence on Carver, one of whose children was christened after him.

arranged, which Carver thought would see him through law school. At the age of twenty-five, married and with three children, he enrolled in the College of Law of the University of Idaho.

Theoretically, two years of college were necessary for admission to law school, but Carver got permission to take examinations for some of the required courses, and waivers for others because he was already a practitioner.<sup>9</sup> In class he took notes on a folding Braille slate, and at home LaVerne—and, less often, other students—read his law books to him. He obtained his LL.B. degree with the class of 1922, becoming the college-trained lawyer he thought he needed to be to succeed.<sup>10</sup>

He returned to Preston, in debt but not regretful of the experience, and plunged back into law practice and politics with equal zeal. He announced his candidacy for prosecuting attorney, and was elected.

Late in 1927, Carver and his family moved seventy-five miles from Preston to Pocatello, a step fraught with economic peril. Perhaps influenced by the possibility of being named a municipal-court judge (or "police judge," as it was called), he had decided to practice law in the bigger city.

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#### U.S. ATTORNEY

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The depression years before the 1932 election were tough, politically and economically. Unemployment was high, and there was considerable hardship for wage earners and professional people. John Carver's salary as police judge was sometimes paid in warrants that could be negotiated only at a discount. His fees were often in kind, and one client's turkeys brightened several holidays for his family.

Franklin D. Roosevelt was elected president in November 1932. Gov. C. Ben Ross was reelected in Idaho, where the attorney general was also a Democrat. For politicians like Carver, the long dry spell was about to end. There were patronage jobs to be had.

For the blind Bannock County chairman from Pocatello, however, an excruciating problem existed. The position of assistant state attorney general was there for the taking. The job paid \$2,400 a year, a munificent sum. But he hoped to do better. He thought he could get the approval of the newly elected

<sup>9</sup> According to LaVerne Carver, she was delegated the task of outlining and summarizing the coursebooks for a couple of the required undergraduate courses, for which her husband took the examination with only her notes to go on.

<sup>10</sup> According to the Alumni Office of the College of Law, there are no surviving members of the 1922 class, which included J.T. (Josh) Evans, Laurence E. Huff, Francis C. Keane, and Michael Thometz.

Democratic senator, James P. Pope, for a presidential appointment as U.S. attorney, a job that paid \$5,600—\$600 a year more than the governor's salary. It was undoubtedly the prime legal political job available. The problem for Carver was one of timing. The statehouse job would have to be taken in January, while the federal job would not even open until March or April at the earliest, since inauguration of the president in those days was on March 4. He gambled on the larger post.

It was a painful wait. The fight was as rough as the stakes were high. The new senator was bombarded about the appointment even before he was sworn in. The open charges against Carver were that he was too young and that he lacked experience. However, although he was only thirty-six, his premature baldness and self-assured manner made him seem much older. The real misgivings were related to his blindness—how could he try cases, handle grand juries, get around the state? But influential friends backed him, and he may have been better off for not hailing from Boise, the senator's fiefdom.

In February Carver was told of his appointment, although confirmation by the Senate was delayed for a few months. The family moved to Boise in July 1933.

The position of U.S. attorney was one of great prestige. In those days before the Hatch Act,<sup>11</sup> it was one of three much coveted patronage posts controlled by the state's senior U.S. senator from the party of the administration. The other plums were those of U.S. marshal and district collector of internal revenue. All three offices were in the Boise Federal Building, across from the Capitol.<sup>12</sup>

One other important tenant of the Federal Building was the U.S. district judge for the District of Idaho. Judge Charles C. Cavanah, appointed under the patronage of Sen. William E. Borah, was not disturbed in his life tenure by the election of Roosevelt. Cavanah was not pleased with the new U.S. attorney, and the relationship of the two men remained prickly, even hostile, for the rest of Cavanah's life. This was a burden for Carver, who liked to get along with people, and to be liked.

The District of Idaho was divided into four divisions, and the entire federal court—judge, U.S. attorney and one or two assistant U.S. attorneys, the district court clerk, and files and secretarial staff—moved twice each year from Boise to the three outlying divisions. The eastern division, at Pocatello, covered all of eastern Idaho, and its docket was the heaviest, aside from Boise's. The

<sup>11</sup> Enacted in 1939, 53 Stat. 1148, 18 U.S.C. (1946) sec. 61.

<sup>12</sup> George A. Meffan of Nampa became U.S. marshal, and John R. Viley of Twin Falls internal revenue collector.

Coeur d'Alene division had been established to serve the northern Idaho mining-district cases, but these were no longer numerous. The Moscow division, only ninety miles south of Coeur d'Alene, had somewhat more business because a mail-order evangelist was headquartered there.<sup>13</sup>

In Moscow, the only place to stay was at the Moscow Hotel. In the local federal courtroom, however, many of the prosecutions were for the interstate transportation of women for immoral purposes. And so it was that the madams, the pimps, the FBI agents, the informants, the judge, the marshals, the panel of both grand and petit jurors, and the lawyers, prosecution and defense, would all be in or around the hotel's lobby, the dining-room, the barber shop—a kind of big happy family.

In almost twenty years as U.S. attorney, Carver saw many changes in the work of his office. The burgeoning of New Deal programs and the approach of war involved special activities apart from the prosecution of violators of federal criminal laws. On the civil side was the defense of the government in litigation of claims under the War Risk Insurance policies issued to soldiers in World War I.<sup>14</sup> When wage-and-hour legislation was enacted, the federal courts were used to enforce the new standards, creating a volume of specialized cases.<sup>15</sup> In the buildup of the military establishment beginning in 1940, the government needed land for arsenals, test ranges, and (although the purpose was not generally known at the time) for atomic-bomb development sites.

U.S. attorneys were jealous of their prerogatives as the chief federal law officers in their states or districts. There was friction between these politically potent U.S. district attorneys and the "civil-service" lawyers detailed from Washington. A federal judge, too, could insist that only the local assistant U.S. attorney knew how to practice in his court, or was really admitted to do so.

After Pearl Harbor, the U.S. attorney for Idaho suddenly had to deal with the relocation of Americans (as well as resident aliens) of Japanese ancestry from the West Coast states to inland camps. One of the larger of these internment camps was in Minidoka County. Carver was deeply troubled about this program, and was

<sup>13</sup> Frank Bruce Robinson called his religion Psychiana. His activities ensured that the small town of Moscow had a first-class post office.

<sup>14</sup> The statute giving district courts jurisdiction over denials of claims was passed in 1924, 43 Stat. 612. President Roosevelt signed Executive Order No. 6166, on June 10, 1933, giving the Justice Department responsibility for handling these cases, and Congress passed an act to the same effect, 48 Stat. 301, 38 U.S.C. (1946) sec. 445a-b.

<sup>15</sup> Wage and Hour Division cases could be appealed to the circuit courts of appeals, but the volume was so large that Washington detailed lawyers to the various states to handle the appeals. These lawyers worked with the local U.S. attorneys, not always happily.



John Carver

quoted by a Salt Lake paper as saying that "the stirring up of racial prejudice, hatred, or strife in any form against enemy aliens in this country" was "unpatriotic."<sup>16</sup>

Despite the increasing workload, Carver made a point of encouraging others. Harold S. Forbush, a young student at the University of Idaho's southern branch in the forties, recalls the district attorney's telephone calls to him whenever he was in the area, counseling him and exchanging news. Forbush, who, like Carver, was blind, says that the older man became a role model for him, and had a profound influence on his life.<sup>17</sup>

Idaho was under the supervision of the field office of the Federal Bureau of Investigation in Butte, Montana. Butte had the

<sup>16</sup> *Salt Lake Tribune*, March 15, 1942.

<sup>17</sup> Forbush to author, personal reminiscence, January 1991.

reputation of being the Siberia of the bureau, but perhaps because of that Carver established close friendships with individual FBI agents. However, the relationship of the U.S. attorney with the bureau and its young director, J. Edgar Hoover, was competitive and sometimes contentious. Carver could be outspoken, and he was not afraid of expressing himself candidly when he thought cases referred to him should not be prosecuted.

I was with my father when the FBI director spoke to a conference of U.S. attorneys in 1936, in the new Justice Department Building. I remember vividly the "show" Hoover put on for the prosecutors, who were, by and large, jealous of their prerogatives. After keeping them waiting, he made a grand entrance, surrounded by his agents. The skill of his omnipresent stenotypist fascinated me, because he lectured the group at not less than three hundred words a minute. At the last word of his speech, he turned without farewell or good wishes and marched out, leaving the audience to ponder his words on their own. I was impressed; my father was not.

Among the attorneys general under whom he served, Carver's clear favorites were Robert H. Jackson and Tom C. Clark, both of whom had been U.S. attorneys. He regarded them as dear friends, his friendship with Clark being particularly close. In his view, however, the patrician Francis Biddle lacked warmth.<sup>18</sup> A young Montanan who, as assistant attorney general in charge of the Civil Division, made a particularly favorable impression on the by-then senior U.S. attorney was James R. Browning, now Ninth Circuit Chief Judge Emeritus.

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### DISAPPOINTMENTS AND SETBACKS

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In 1936 Carver ran unsuccessfully against C. Ben Ross, Idaho's three-term governor, for the Democratic nomination to the U.S. Senate. He was again frustrated the next year, when he hoped to be appointed to a Ninth Circuit seat newly authorized by Congress, Idaho having no member on the court at the time. The post went to William Healy.<sup>19</sup> He had also wanted to succeed Charles Cavanah on the federal district bench in Idaho, but the post—not surprisingly—went to former Idaho Gov. Chase Clark, an uncle of Idaho Sen. D. Worth Clark.

<sup>18</sup> The attorneys general during my father's service as U.S. attorney were Homer S. Cummings, 1933-1939; Frank Murphy, 1939-1940; Robert H. Jackson, 1940-1941; Francis Biddle, 1941-1945; Tom C. Clark, 1945-1949; J. Howard McGrath, 1949-1953.

<sup>19</sup> The Act of April 14, 1937, ch. 80, 50 Stat. 64, authorized the new circuit judgeships. Judge Healy, of Boise, began his service on June 21, 1937.

The Hatch Act had taken John Carver out of politics, but he was reappointed by President Roosevelt in 1941, and by President Truman in 1945 and 1949. He served as vice-president of the United States Attorneys Association, an honor he prized highly.

The close-knit district attorney's office of prewar times was not the same during wartime. New problems, with spy scares and war-fraud cases, arose. Carver had a succession of assistants, each crop younger and less experienced than the last. A second federal judge, Fred M. Taylor, joined Chase Clark on the Boise federal bench.<sup>20</sup>

In 1947, when I was a fledgling lawyer, my father agreed to take part in private practice with me, though he was still a U.S. attorney. At the time it was fairly common for U.S. attorneys to engage in private practice so long as the work was unrelated to federal responsibilities. However, the arrangement didn't work out: he was not entirely comfortable with it, and business was poor for returning veterans, as I was, in the immediate postwar years.

Dwight D. Eisenhower was elected president in 1952. Carver's fifth four-year term was not due to end until July 1953, but Eisenhower's Justice Department suggested that he resign immediately after the inauguration on January 20. Although Carver held out for completion of his term, the department prevailed, and afterward he claimed to be "F.B.I."—fired by Ike.

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#### LAST YEARS—TRIAL JUDGE

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Boise held no charms for the former U.S. attorney. He felt that Pocatello was still his home, and he and LaVerne returned there in the summer of 1953.

Although he opened a law office, his taste for public service remained, possibly coupled with a reluctance to break into private practice alone. Soon he successfully ran for justice of the peace in Bannock County. One of the state district judges died shortly afterward, and he decided to run against the interim appointee for the office.

He wasn't given the ghost of a chance by the Pocatello segment (some 90 percent) of the Fifth District bar, and went to bed on election night in November 1954, assuming he had suffered another disappointment. The Pocatello returns were solidly

<sup>20</sup>Judge Clark resisted relinquishing his chief judgeship when he became seventy and eligible for senior status. He was successful through the efforts of his son-in-law, Sen. Frank Church, who was responsible for the Act of Aug. 6, 1958, P.L. 85-593, sec. 3, which in effect "grandfathered" Clark as chief judge so long as he remained on the Idaho federal Bench and it contained only two judges.

against him, but country precincts can change things. LaVerne recalls being woken at 5 the next morning, when he heard on the radio that he had narrowly won. "Wake up, wake up!" he said, "You're sleeping with a district judge."

Once again, he had to convince others that he could do the job. How, they asked, could a blind man keep track of what was going on in a trial court?

Unless order was maintained in his courtroom, he realized, it would be impossible for him to know what was going on. With his phenomenal ability to recognize voices (often many years later), he never mistook them, but he could not tolerate two at once. He therefore made rules for his courtroom, and he enforced them. The older lawyers had been accustomed to looser ways, but it was they, not he, who had to adjust. He won the respect of members of the practicing bar, in a role they regarded as much more demanding than that of U.S. attorney.

Henry F. McQuade, the senior district judge on the bench with Carver for two years, recalls that one of the problems they inherited was a backlog of civil cases. Those ending with even numbers, he says, were assigned to one judge and all cases ending with odd numbers to the other. According to McQuade, Carver was "very cheerful in assuming the extra caseload" and "diligent in the disposition of cases," and the changes he introduced increased the courtroom's efficiency.<sup>21</sup>

John Carver loved his life as judge. With the family grown and gone, LaVerne acted as chauffeur as well as unpaid secretary. As she had for so many years, she read case files and briefs to him in the evening in motels in Soda Springs, or Preston, or Malad, as he rode his turn on the circuit of the district. He was prompt with his decisions, figuring, correctly, that a prompt decision could temper the blow for the loser, who could thus get to his or her appeal immediately. As he was wont to say, "I may sometimes be in error, but I'm never in doubt."

<sup>21</sup> McQuade to author, personal reminiscence, January 1991.

## BOOK REVIEWS

*The Treaty of Guadalupe Hidalgo: A Legacy of Conflict*, by Richard Griswold del Castillo. Norman: University of Oklahoma Press, 1990, 251 pp., \$22.95, cloth.

This book presents the history of a document, and as such is of great interest because it represents an unusual organization. Ultimately, however, it is flawed as a study because it is unbalanced.

The initial chapters describe the background of the treaty signed by the United States and Mexico in 1848, the fascinating interplay of military activities and diplomatic negotiations, and the ensuing final product. The Treaty of Guadalupe Hidalgo was the result of intricate diplomatic maneuvering, in which many of the negotiations were conducted without the authority of either government and some were in defiance of orders. It is an interesting story, and the author presents it well.

The middle portion of the book concerns the American interpretations of the treaty, primarily in the courts. This is followed by an interesting section on historiographical views of the treaty throughout the years, among both American and Mexican historians. The next chapter relates the use of the treaty, as an organizing tool, by Mexican Americans, from the Alianza movement in New Mexico to various urban groups. The final chapter discusses the treaty's role in subsequent negotiations and arbitrations between the two countries concerned.

Richard Griswold del Castillo's perspective is skewed sharply in favor of Mexican Americans, and though at times he is critical of the official Mexican actions, he is also defensive in regard to the Mexican government. He writes:

Today the Treaty of Guadalupe Hidalgo gives Mexican Americans a special relationship to the majority society. As a conquered people, Mexicans within the United States have been given special considerations under an international treaty. Although these considerations proved to be illusory when the U.S. government undermined the intention of the original document, Mexican Americans continue to have a historical claim on the collective conscience of America. (173)

This is a slippery concept. Most Mexican Americans are not descended from people in the Southwest in 1848, but from later immigrants. Moreover, nothing in the treaty suggests that it confers rights upon an ethnic group per se, apparently in perpetuity. Specific residents of the ceded lands were to be protected in their civil rights, as were their heirs and assigns and non-resident

Mexicans, in the case of property. Those rights may well have been violated, although that is not as clear an issue as the author would have the reader believe. But it is a leap into the mists from that proposition to the view of the Mexican-American movement, apparently endorsed by the author, that the Southwest today "is really 'occupied Mexico,' and Mexican Americans and Indians are a 'colonized people' whose rights have been violated despite the guarantees of the treaty." (153)

The author's bias leads to some strange statements. For example, following a long series of arbitrations and disputes over the Pious Fund, in 1902 Mexico was ordered by the Hague Tribunal to pay approximately \$43,000 annually, in perpetuity, to the United States for the benefit of the Catholic church in California. Mexico reneged on its payments in 1914 and paid nothing until 1967, when it paid \$719,546 to terminate the obligation forever. After presenting the rather spotted background, Griswold del Castillo concludes that in this episode "the Mexican government took the decisions of the international tribunals and arbitration commissions as serious obligations and worked to abide by these decisions even when they were against Mexico." (158)

In another example, Joseph Yves Limantour, who had claimed a land grant for half of San Francisco, is presented as the victim of rapacious Americans. The substantial evidence of the alleged grant's fraudulent nature is not mentioned, and Limantour's criminal indictment for fraud is simply brushed aside as the result of "the political pressure of the squatters, many of them wealthy and influential San Franciscans." (75)

The discussion of the judicial opinions interpreting the treaty is weak. A contrast between periods of liberal and conservative interpretation is problematic enough; worse is that the author presents snippets of judicial interpretation (frequently miscalled holdings) without providing the specific facts of a case or the often critical procedural context in which it arose. An example is the important case of *Botiller v. Dominguez* (130 U.S. 238), in which the owner of a Mexican land grant held a fully perfected title as of 1848. It was not presented to the land commissioners for confirmation pursuant to the Land Law of 1851. The claimant contended before the U.S. Supreme Court that she was in a different position from holders of inchoate titles, because her fully perfected title was protected by the treaty itself. The author states that this opinion "held that the sovereign laws of the United States took precedence over international treaties. . . . In this case the protection of private property ostensibly guaranteed by the Treaty of Guadalupe Hidalgo was essentially invalidated." (76-77)

However, the Supreme Court held no such thing. It indulged in a discussion, *arguendo*, that if there were a conflict between treaty and statute, the Court would have to follow the statute, as

it had no power to enforce a treaty the U.S. government chose to ignore. That may be bad law, but it was *dicta* only. The Court went on to hold (the actual holding) that the Land Law's provision that lands for which claims were not presented by a specified date be considered a part of the public domain covered titles already perfected under Mexican law as well as inchoate titles. The Court further opined that there was no violation of the treaty for the United States to use the means of requiring claims by a specified date in order to separate the public lands from those privately owned (130 U.S. at 247, 250).

Griswold del Castillo's discussion would have been much informed by a consideration of the basic legal distinction between substantive rights and procedural remedies, and the corollary proposition that procedure may be modified without a violation of a vested right. The Court in *Botiller* suggested that the government could have sued everyone in possession of California land to quiet title, thus forcing Mexican claimants to defend their titles, and that the statute simply accomplished the same result more efficiently.

There may be flaws in the Court's reasoning. After all, the United States would have had the burden of proof in such quiet-title actions, whereas the claimants had to prove their titles to the land commissioners. It was doubtless extremely unfair—even immoral—for the American government to require persons in possession to prove their title affirmatively. The resulting costs led to the mortgages and lawyers' tricks whereby Mexican claimants lost much of their land. It was not the first time, and certainly not the last, that the federal government had acted immorally. But those considerations are very different from the more simplistic conclusion that this case simply permitted the statute to abrogate the treaty.

Although the legal chapters are weak and the book as a whole is unbalanced in perspective, the author's discussion of the negotiations behind the treaty is excellent, as is the chapter on the treaty's historiography.

David J. Langum  
Cumberland School of Law

*Gibson, Dunn & Crutcher, Lawyers. An Early History*, by Jane Wilson. Privately published, 1990, 550 pp.

Looking backward in 1946 from what he termed "this era of puny lawyers," Richard Rovere wrote a profile of New York's William Howe and Abe Hummel, law partners who became legends representing criminal defendants, theatrical performers, and divorcing spouses between 1869 and 1907. Subtitled "Their

True and Scandalous History," Rovere's wry and sardonic portrait of the two reveals much about their peccadilloes—their penchant for diamonds, practical jokes, and legal tender—and their roguish, if not outright criminal, clientele. But his history reveals somewhat less about the practice of law at the time and the intersection between that practice and the larger legal, political, and economic issues of the day.

The writing of law-firm history has changed much since Rovere's piece appeared. The early, plodding histories too often focused on a blow-by-blow account of a firm's Great Cases and the Great Men who handled them, while many of the recent accounts are little more than kiss-and-tell narratives of megafirms—relentless litanies of rainmaking, greed, and insider backstabbing, to the virtual exclusion of all else.

Jane Wilson's grand monograph, *Gibson, Dunn & Crutcher, Lawyers. An Early History*, is a refreshing exception, and one of the fullest realizations of the genre. Writing when neither the self-image nor the annual income of many lawyers can remotely be termed puny, Wilson demonstrates the extent to which the early men of Los Angeles' Gibson, Dunn and Crutcher (and they *were* all men) were involved in most facets of Southern California's economic development, from the time John Bicknell set up shop in 1873 on a retainer of \$50 per month through the death of Albert Crutcher in 1931. Commissioned by the firm as part of its centennial celebration, the book is a fine academic history in the best sense of the term.

With over 700 lawyers and offices in seventeen cities worldwide, Gibson, Dunn and Crutcher is now the largest firm in California and one of the largest in the United States. Its story began in May 1872. When Howe and Hummel were already representing the leading lights of New York City's underworld, thirty-four-year-old, red-bearded John Dustin Bicknell "alighted from a stage coach at the Plaza of Los Angeles . . . covered with dust after a nineteen day and night journey from Lamar, Missouri." He came west in search of gold (which he didn't find) and of Southern California's curative climate, seeking relief from his asthma. "What greeted him was an ugly little pueblo with dusty unpaved streets, with no industry, and scant business of any kind other than that related to its uncertain agriculture." Wilson traces an unbroken line from Bicknell through the firm's founding partners—Walter Trask, James Gibson, William Dunn, and Albert Crutcher—to its present leadership.

Bicknell came to Los Angeles just in time to participate in the city's first boom. His practice quickly involved land transfers, the acquisition of water and oil rights, and the construction of a far-flung urban and intercity rail network. Between 1880 and 1902, some fifty-seven mutual water companies were incorporated in the foothills east of Los Angeles; Bicknell had his hand in twenty

of them as lawyer as well as irrigation consultant. He and his partners represented several of the local street-railway companies that sprang up as well as Collis P. Huntington's behemoth Southern Pacific. Bicknell's successors held steadfastly to these specialties throughout the late-nineteenth and early-twentieth centuries, becoming active participants in the growth and development of Los Angeles. They acquired land—lots of it—and held stock and sometimes offices in innumerable local business ventures. As property owners, businessmen, agents, and boosters, as well as in their more technical capacity as legal counsel, they were shapers of the region, and Wilson inextricably links their interests and those of their clients to the area's continued development.

In so doing, she also reveals much about how lawyers "law-tered" in the last third of the nineteenth century and the first part of this one. As the firm grew from Bicknell's sole practice and early, short-lived partnerships, through the 1903 merger between Bicknell, Gibson, Trask, Dunn, and Crutcher, to the outlines of the firm's current structure, the way it—and other firms—practiced law changed dramatically. For example, growth in size meant changes in the delegation of responsibility among lawyers and, by the early twentieth century, creation of the "library men"—law students and newly minted lawyers who undertook research for the firm. The firm's reliance on the work of these non-partners who would eventually be known as associates was unusual for the time. Changes in technology meant other changes in the firm's practice: extension of reliable telephone service throughout Southern California, for instance, eventually meant that the firm no longer used carrier pigeons, as it had in the 1890s, to communicate with clients, judges, and lawyers vacationing on Catalina Island.

Wilson's research is both meticulous and comprehensive. She has so seamlessly woven Gibson, Dunn's history with Southern California's that her book is, in effect, a history of the region's economic and political development. It is one of the best texts on the subject to date, and an extraordinary reference on such arcana as Los Angeles' first water system (a network of carriers who delivered buckets from canals to residents' doors) and problems with the early city pipes (leaks from hollowed pine trunks buried under the streets).

Perhaps because of Wilson's extraordinary detail, the book's absence of footnotes and bibliography is curious. And, no doubt because it is a specially commissioned history, distribution of *Gibson, Dunn & Crutcher* may be quite limited. That would be a shame.

Molly Selvin  
*The Los Angeles Times*

*The Magic Mirror*, by Kermit L. Hall. New York: Oxford University Press, 1989, 376 pp., \$16.00, paper.

This useful, often elegant synthesis of American legal development replaces Lawrence Friedman's *History of American Law* as the best brief account of the subject. At the same time, Kermit Hall's book (whose title is borrowed, appropriately enough, from an 1891 speech by Oliver Wendell Holmes) constitutes more than a jazzed-up retelling of a familiar tale. Unlike Friedman's study of the evolution of private law or any of the texts on constitutional history in print, *The Magic Mirror* merges the two fields. In doing so, it identifies possible relationships between changes, say, in the law of coverture or contract and parallel shifts in American constitutional practice.

For some time, Hall has been at the forefront of a two-part reformist campaign within the legal-historical profession. In several significant articles, he has urged the abolition (for purposes of history writing, if not in law schools) of the sometimes murky line traditionally drawn between "private" and "public" law. He has argued as well that the legal-historian's subject ought to be American legal *culture*. This is to re-assert (with the benefit of a century's fresh scholarship) what Justice Holmes said repeatedly—that, at any given moment, there exists a dialectical conversation between a received legal tradition and human imperatives, and that the historian's subject lies at the juncture of the two. Hall surmounts endless tedious talk about whether law is autonomous or whether it reflects social pressure (although from time to time he leans toward the latter position). "Without society," he writes, "we need no law; without law we would have no society." He refuses to choose between discussion of the internal life of the law and environmental pressure, emphasizing instead the "human choices" and what Holmes called "moral deposits" (in courts, in homes, in the streets) manifested in legal change.

*The Magic Mirror* proceeds chronologically, from earliest settlement of British North America to the present; within this framework, Hall creates topical divisions. He skillfully weaves the experience of women, African Americans, and other traditionally disfranchised groups into his tapestry, departing from a narrative style that all too commonly wedges marginalized experience self-consciously into the prose like an irksome afterthought. His chapter entitled "The Nineteenth-Century Law of Domestic Relations" is far and away the best overview of the subject in print; a subsequent chapter called "The Dangerous Classes and the Nineteenth-Century Criminal Justice System" persuasively contends that modern conceptions of criminal justice represent the fulfillment of ideas bubbling away since American independence. The concluding chapters attempt—

rather unusually, in a field that typically treats aspects of the present century as current events—to organize and assess developments since World War I in light of the past. Other historians have identified elements of a fundamental transformation in American legal culture during and after the Great War; in the book's finest moment ("Cultural Pluralism, Total War, and the Formation of Modern Legal Culture, 1917-1945"), Hall puts all the pieces together, while suggesting that this change in both mind and practice clearly followed an earlier metamorphosis of American professional culture.

The book is not flawless. Particularly in his pre-Jacksonian chapters, Hall's catholicity leads to fragmentation; nonspecialists will be hard pressed to make sense of the many subsections. The treatment of British and colonial foundations is uneven and skimpy. Arguably, the unstable legal and constitutional regimes prevailing in British North America offer a ripe opportunity for comparative legal and constitutional analysis; here, those complicated centuries are cast (despite some effort to the contrary) as a prelude to nationhood. Sometimes oversimplification verges on error: the *Corpus Juris Civilis*, to give one example, is not precisely a coherent "four-volume restatement" of Roman law, but, rather, a collection of four disparate works published during and after the emperor's reign.

Still, readers will be challenged and inspired by this accessible, rich book. In it, the concept of legal culture—once little more than an aesthetically pleasing abstraction borrowed from anthropology—takes on flesh and sinew. Holmes could not have written *The Magic Mirror*; in the 1890s, scholars had not done much of the basic research upon which historical synthesis depends. But he would have recognized and applauded the spirit behind the words in Hall's concluding chapter: "Habit and culture incline us," he writes, "to think of the legal system as stable, certain, orderly, and fair. Yet our legal history suggests that it has been more a river than a rock, more the product of social change than the mold of social development. . . . [T]hrough our legal history we discover that we are what we have been."

Sandra F. VanBurkleo  
Wayne State University

*"He Shall Not Pass This Way Again": The Legacy of William O. Douglas*, edited by Stephen L. Wasby. Pittsburgh: University of Pittsburgh Press, 1990, 338 pp., bibliography, \$19.95, paper.

An impoverished son of the West rides freight trains to law school. From there, through sheer energy and force of intellect, he drives himself to faculty appointments at the Columbia and Yale

law schools, to the chairmanship of the Securities and Exchange Commission, to a position as adviser and confidant of President Franklin D. Roosevelt, and to appointment as a youthful justice who then serves longer than anyone else. It's a story that stirs and fascinates us. But the question that pursues the reader of these commentaries on William O. Douglas's Supreme Court career is why such a man, serving for so long, did not make a greater contribution to constitutional jurisprudence. His failure to have more decisive influence is the more surprising because he could be a brilliant advocate, his output of opinions was prodigious, and he was perhaps the brightest of all the considerably talented justices with whom he served.

The fiftieth anniversary of Douglas's appointment to the bench is the occasion for this publication. The two dozen contributors, almost all law professors (including several of his former clerks), seem favorably disposed toward Douglas, if not in every case his partisans. They survey his relations with his colleagues, and his opinions, both on and off the Court, on civil liberties and environmental and international law, in all of which areas, because of his deeply felt concerns, he might have had a great impact.

Even Douglas's strongest supporters here disparage his opinions as models of draftsmanship, clear thought or useful legal theory. "*He Shall Not Pass This Way Again*" contains much speculation on the reasons for his haphazard approach to opinion writing. Perhaps he was too impatient to curry support; perhaps as a legal realist he thought citing precedent and employing the usual lawyerly devices of distinguishing cases and spinning fine webs of theory was not only disingenuous, but injurious to the realist cause; perhaps, as Lucas A. Powe, Jr., one of his former clerks, suggests (and this seems most persuasive), in the last analysis he wasn't temperamentally suited to being a judge, and should have continued to serve in posts in the executive branch, where he had enjoyed huge success. Instead, he "may have been a one-shot error of the appointing process."

As is widely known, Douglas disdained most precedent other than his own. "I would rather create precedent than follow it," he said. Yet, on the evidence of these authors, too often he failed at doing that; his result-oriented opinions habitually picked up little or no following from the other justices. Nor did he take advantage of collegiality to persuade his fellow justices to go along with him. A major surprise to one who has not followed the Court's work assiduously through the years is the paucity of "bellwether" opinions attributable to the judge who broke the record for longevity on our supreme bench. Naturally, the book includes some panegyrics, especially on Douglas's civil-liberties dissents. (Often the arguments for the durability of his contributions seem to go beyond the evidence.) In any event, one cannot read it without a rekindling of interest in the philosophy of jurispru-

dence. It contains thoughtful discussions of the uses of precedent, and elegant statements, as by Sanford Kadish, of the case for and against judicial activism.

Douglas characteristically chose his law clerks from schools in the Ninth Circuit area. A year ago, readers of *Western Legal History* (Winter/Spring 1990) were treated to Melvin Urofsky's "William O. Douglas and His Clerks," which is included in this book. While many of the other justices and clerks thought Douglas's clerks badly treated and forced to work too hard, Urofsky believes the nineteen former clerks he interviewed did not feel they had to work any harder than Douglas himself. Nevertheless, the relationship was difficult and lacked the informality other clerks enjoyed with their justices. Douglas appears to have been one of those idealists with an affection and concern for humanity at large they are unable to express in most of their personal relationships.

The justice traveled all over the world during his tenure on the Court. These experiences, and his views on public issues, were the subjects of dozens of books, articles, and speeches. His critics used them as fodder against him, believing it was not fitting for a judge to take public positions off the bench, or to spend time writing books he should be devoting to his job. (These critics may not have wished to recognize that he was one of the hardest workers on the Court.) Yet in the long run, his extracurricular activities may prove more memorable than his work on the Court. He accomplished much as an early environmentalist. Anyone who, like this reviewer, has carried a pack along the inlets and headlands of the Olympic seashore, or who has walked through the woods along the old Chesapeake and Ohio Canal near Washington, D.C., both of which Douglas was instrumental in preserving from invasion by highways, is beholden to his environmental activism. His concern as a citizen of the world for ordinary people, regardless of their country or form of government, will continue to inspire those who work for the rule of law in international relations.

And Douglas himself—tough, smart, cantankerous, courageous—who turned himself from a poor boy crippled by polio into an American legend, will continue to inspire all of us by his example of the possibilities open to individual achievement.

Grover R. Heyler  
Los Angeles, California

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#### BRIEFLY NOTED

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*Portraits of the American Law*, by Frederick S. Voss. Washington: National Portrait Gallery, 1989, 200 pp., illustrated, \$25.00, paper.

This oversized, sumptuously illustrated, and handsomely printed volume is, as its title suggests, about those Americans who have "used, challenged, and given life" to the law. It is, therefore, about legal history. *Portraits of the American Law* is a catalog from a 1989 National Portrait Gallery exhibition of paintings and drawings from the collections of Harvard Law School, among other institutions, and private individuals. The portraits in it are of forty-four of the nation's most notable lawyers and jurists, each briefly glimpsed in biographical essays by gallery Curator Frederick Voss describing their personalities and their impacts on American law. The men and the one woman depicted were, in the words of the gallery's director, Alan Fern, "often determined to find artists who would do justice to their personal attainments." They or their colleagues or admirers commissioned the leading artists of their times, bequeathing us portraits of remarkable vividness and clarity, through which shine their subjects' brilliance and character. Anyone interested in those who personify America's legal traditions will want a copy of this book.

*The Federal Courts: Yesterday, Today, And Tomorrow*, ed. Michael Griffith and Glenn MacFivra. San Francisco: U.S. District Court for the Northern District of California Historical Society, 1990, 86 pp., paper.

On November 3, 1989, the U.S. District Court for the Northern District of California and its historical society convened a symposium called *The Federal Courts: Yesterday, Today, And Tomorrow*. Four distinguished scholars presented papers, which are published in this book as essays: "The Judiciary Act of 1789: Politics and Principles," by Russell R. Wheeler, director of Special Educational Services at the Federal Judicial Center; "Civil Rights in the Federal Courts: A Racial Perspective," by Judge A. Leon Higginbotham, Jr., of the Third Circuit; "The Role of the Federal Judge: The Learned Hand Model," by Professor Gerald Gunther, of Stanford Law School; and "The Federal Courts and the Future: Meeting the Needs of a Litigious Society," by Leon Silverman, a member of the ABA's Standing Committee on the Federal Judiciary. Following the essays is a transcript of a panel discussion (in which four other scholars joined the speakers) responding to the four topics. Not intended to offer comprehensive interpretations of their subjects, the essays provide an excellent and interesting overview of federal court history and will appeal to many readers. The book should also be of value to the nation's several law-related education programs.

## ARTICLES OF RELATED INTEREST

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

Anderson, Terry L., and Hill, Peter J., "The Race for Property Rights," *Journal of Law and Economics* 33 (April 1990).

Bernstein, Barton J., "The Oppenheimer Loyalty-Security Case Reconsidered," *Stanford Law Review* (1990) 1383-1484.

Clinton, Robert N., "Tribal Courts and the Federal Union," *Willamette Law Review* 26:4 (1990).

Cole, Judith K., "A Wide Field for Usefulness: Women's Civil Status and the Evolution of Women's Suffrage on the Montana Frontier, 1864-1914," *The American Journal of Legal History* 34:3 (1990) 262-94.

Dunning, Harrison C., "Dam Fights and Water Policy in California: 1969-1989," *Journal of the West* 29:3 (1990) 14-27.

Fadeley, Nancie, "The Early Days: Origins of Two Oregon Law Schools," *Oregon State Bar Bulletin* 51:3 (1990) 5-9.

Freedman, Estelle B., "Historical Interpretation and Legal Advocacy: Rethinking the Webster Amicus Brief," *The Public Historian* 12:3 (1990) 27-32.

Friedman, Lawrence M., and Russell, Thomas D., "More Civil Wrongs: Personal Injury Litigation, 1901-1910," *The American Journal of Legal History* 36:3 (1990) 295-314.

Fritz, Christian, "More than 'Shreds and Patches': California's First Bill of Rights," *Hastings Constitutional Law Quarterly* 17:1 (1989) 13-34.

Garfield, Helen, "Twentieth Century Jeffersonian: Brandeis, Freedom of Speech, and the Republican Revival," *Oregon Law Review* 69:3 (1990) 471-526.

Getches, David H., "A Philosophy of Permanence: The Indians' Legacy for the West," *Journal of the West* 29:3 (1990) 54-68.

Goldsmith, Laura M., "History of the University of Washington Law Librarianship Program," *Law Library Journal* 82:2 (1990) 239-80.

Harmon, Sasha, "Writing History by Litigation: The Legacy and Limitations of Northwest Indian Rights Cases," *Columbia, The Magazine of Northwest History* (Winter 1990/91) 5-15.

Horn, J. Salisbury, "Early-Day Antecedents of McEwen, Gisvold, Rankin & Stewart," *Oregon Benchmarks* 6:4 (1990) 1-4.

Hurtado, Albert L., "Public History and the Native American: Issues in the American West," *Montana, The Magazine of Western History* (Spring 1990) 58-69.

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Johnson, Byron J., "Carpetbaggers to Computers: The Idaho Supreme Court from Territorial Days to the Present," *The Idaho State Bar Advocate* 34:2 (1991) 5.

Larson, Jane E., and Spillenger, Clyde, "'That's Not History': The Boundaries of Advocacy and Scholarship," *The Public Historian* 12:3 (1990) 33-44.

Law, Sylvia A., "Conversations Between Historians and the Law," *The Public Historian* 12:3 (1990) 11-18.

Leshy, John D., "The Prior Appropriation Doctrine of Water Law in the West: An Emperor with Few Clothes," *Journal of the West* 29:3 (1990) 5-13.

Lessley, W.W., "The Diary of a Colorful Judge," *The Montana Lawyer* 16:5 (1990) 3-13.

Lundquist, Weyman I., "Alaska Frontier Justice," *The Alaska Bar Rag* (July-August 1990) 16-17.

Madsen, Carol Cornwall, "'At Their Peril': Utah Law and the Case of Plural Wives, 1850-1900," *Western Historical Quarterly* 21:4 (1990) 425-44.

McConnell, Michael W., "The Origins and Historical Understanding of Free Exercise of Religion," *Harvard Law Review* 103:7 (1990) 1409-1518.

Melone, Albert P., "Revisiting the Freshman-Effect Hypothesis: The First Two Terms of Justice Anthony Kennedy," *Judicature* 74:1 (1990) 6-13.

Mohr, James C., "Historically Based Legal Briefs: Observations of a Participant in the Webster Process," *The Public Historian* 12:3 (1990) 19-26.

Novick, Sheldon M., review of "Honorable Justice: The Life of Oliver Wendell Holmes," by Mathias Reimann, *Michigan Law Review* 88:6 (1990) 1908-1924.

Peterson, Todd A., "World War I Patriotism and the District Court in Oregon," *Oregon Benchmarks* 6:3 (1990) 1, 3.

Quinn, William W., Jr., "Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept," *The American Journal of Legal History* 34:4 (1990) 331-64.

Riley, Glenda, "Sara Bard Field, Charles Erskine Scott Wood, and the Phenomenon of Migratory Divorce," *California History* 69:3 (1990) 250-59.

Scheiber, Harry N., "Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution," *Hastings Constitutional Law Quarterly* 17:1 (1989) 35-80.

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Stapilus, Randy, "Personalities Behind the Bench: Biographical Sketches of Idaho's Supreme Court Justices," *The Idaho State Bar Advocate* 34:2 (1991) 6-27.

Stevens, Jan S., "Stephen J. Field: A Gold Rush Lawyer Shapes the Nation," *Journal of the West* 29:3 (1990) 40-53.

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"Article III and the Judiciary Act of 1789: A Colloquy," *University of Pennsylvania Law Review* 138:6 (1990) 1499-1674.



## MARCUS MATTSON

Arter, Hadden, Lawler, Felix and Hall is proud to honor Marcus Mattson for his sixty years as a member of the firm and for his many contributions to the practice of law in southern California.

Marcus Mattson was born in 1904 in Ogden, Utah, the descendant of Swedish Mormon converts. In 1923, with his diploma from Ogden High School, and no doubt to satisfy his inherited urge to migrate, he went west. In 1930 he graduated in law from the University of California at Berkeley.

When he was twelve, Marc had announced his intention to become a lawyer as he was walking with his father past the county courthouse in Ogden. By chance, a lawyer friend of Marc's father was arguing a case there at that moment. The senior Mattson quickly ushered his son to a seat inside. After hearing the lawyer's argument delivered in an extremely loud voice, Marc asked his father if the judge liked all the noise. "Perhaps not," his father replied, "but the lawyer's client loved it." Marc had just acquired his first lesson in lawyerly conduct.

When he graduated from law school, the country was already in the grip of the Great Depression. Fortunately, an opening occurred in Oscar Lawler's firm (then Lawler and Degnan) in Los Angeles. Marc promptly joined the firm, which has been his professional home ever since.

Marc married the former Eleanor (Tondy) Hynding on December 30, 1933. After their early-morning wedding, the couple traveled in their Ford roadster to Santa Ana, where Marc attended a Saturday hearing in a pending litigation. Not until the newlyweds had driven the judge home did they leave on their honeymoon. They have one son, Peter. In their Hancock Park home, Marc and Tondy have entertained many friends over the decades, including lawyers and judges from across the nation and abroad.

In September 1990, Marc's friends and colleagues invited him to a luncheon in celebration of his sixty years of practice. Richard F. Outcault, Jr., Marc's partner, said these words to commemorate the occasion:

"I was thinking of some of the changes that have come over the profession in the sixty years in which Marc has been a lawyer. He began his practice in 1930, when Charles Evans Hughes had become chief justice of the U.S. Supreme Court. Many great judges have been associated with that Court, but I know that Marc must be convinced that the one with the greatest potential is David Souter. What else could Marc think about the appointment of a man whose habit, we are told, has been to give his subordinate attorneys copies of Strunk on style and English grammar.<sup>1</sup> How many of us at Lawler, Felix and Hall have received that book from Marc—with the suggestion that we *use* it! I am sure he feels that the Supreme Court is in better hands than ever.

"Although we are often nervous about today's economic conditions, they could hardly be disappointing to Marc when he reflects on conditions in 1930. He began his practice in the shadow of the 1929 stock-market crash. (That depression is often attributed to the Hawley-Smoot tariff, which bore the name of Marc's fellow Utahan, Senator [Reed] Smoot.) The following year the Dow Jones Average worked its way back up to the stratospheric height of 300. By the time Marc had helped the legal profession to oil the wheels of industry for two years, 1932 saw the Dow at 41—hard to believe in light of today's levels. The thirties did have their challenges.

"I couldn't begin to list all of Marc's activities in the firm over the years, but certainly his work in the electrical equipment manufacturers' antitrust cases of the early 1960s was

<sup>1</sup> William Strunk, Jr., and E.B. White, *The Elements of Style* (New York, 1959).

a milestone in his career. He represented one of the largest groups of damage claims, filing some ninety cases on one morning. That litigation, in thirty-three different U.S. district courts across the country, broke ground for later adoption of the multidistrict litigation statute and of the *Manual for Complex Litigation*.

"Among his many litigated matters, Marc defended a client in an antimerger action brought by the federal government, and successfully argued the case in the U.S. Supreme Court. He guided his client's merger through a gap that Congress had left in the scope of the Clayton Act—a gap Congress soon closed after his successful passage.

"Reference to Marc's career as an antitrust lawyer would not be complete without mentioning his service as chairman of the Antitrust Law Section of the American Bar Association, and as a member of the Federal Trade Commission Advisory Council on Rules of Practice and Procedure.

"For many years Marc, and his firm, represented Standard Oil Company of California (known as Chevron now), in all kinds of Southern California legal matters. Perhaps in keeping with the prespecialization times in which he began his practice, he was a counselor as well as a trial lawyer, and his practice embraced many areas of the law in addition to his antitrust law work. Among his notable representations were the Miller and Lux cases litigated up and down the state, the Huntington Beach 'crooked hole' drilling litigation, the Chevrolet discount-house cases, and the General Motors smog-device investigations.

"Marc's reputation as a trial lawyer was recognized by his election as a Fellow of the American College of Trial Lawyers, which he later headed as its president.

"As I say, I wouldn't attempt to catalog Marc's activities, but any list would record a generous measure of service to the State Bar of California, including a term on its Board of Governors and service on the Committee of Bar Examiners.

"Obviously, Marc's career has spanned many changes in the practice of law. During that time we went from predominantly rail travel to air travel; we went from volumes of typed carbons as our only copies to paper-storms of copies put out by Xerox and other machines; we progressed from mail and courier to the facsimile transmission of documents by telephone to most any point on the globe; we went from legal research done by 'beating the books' to the electronic legal research of today. And, of course, Marc saw his law firm grow from a few lawyers in Oscar Lawler's time to becoming a part of Arter and Hadden, a 350-lawyer, nationwide firm with a tradition similar to, but even older than, our own."

Richard L. Fruin, Jr.

For Arter, Hadden, Lawler, Felix and Hall

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