



WESTERN LEGAL HISTORY

A Publication of Ninth Judicial Circuit Historical Society

Volume 32, Number 1



IDAHO



The Ninth Judicial Circuit Historical Society

WESTERN LEGAL HISTORY

THE JOURNAL OF THE
NINTH JUDICIAL CIRCUIT HISTORICAL SOCIETY

IDAHO

VOLUME 32, NUMBER 1
2021



WESTERN LEGAL HISTORY

A Publication of Ninth Judicial Circuit Historical Society

Western Legal History is published semiannually by the Ninth Judicial Circuit Historical Society, 95 7th Street, San Francisco, CA 94103. (415) 757-0286. The journal explores, analyzes, and presents the history of law, the legal profession, and the courts, particularly the federal courts, in Alaska, Arizona, California, Hawai'i, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands.

Western Legal History is sent to members of the NJCHS as well as members of affiliated legal historical societies in the Ninth Circuit. Membership is open to all. For information regarding membership, back issues of Western Legal History, and other society publications and programs, please see our website, www.NJCHS.org or contact us via email at ExecutiveDirector@NJCHS.org.

Western Legal History disclaims responsibility for statements made by authors and for accuracy of endnotes. Copyright ©2021, Ninth Judicial Circuit Historical Society ISSN 0896-2189. The Editorial Board welcomes unsolicited manuscripts, books for review, and recommendations for the journal. Manuscripts should be sent to WLHsubmissions@gmail.com, with a copy to ExecutiveDirector@NJCHS.org. Communication with the editor is encouraged before submission of any manuscript. At that time, other guidelines for the preparation and publication of an article may be discussed. Consultation about punctuation, grammar, style, and the like is made with the author, although the editor and the Editorial Board are the final arbiters of the article's acceptance and appearance. Articles published in this journal are abstracted and indexed in America: History and Life; Historical Abstracts; the Index to Legal Periodicals; and the Legal Resources Index, and are available to the public off the NJCHS website and through HeinOnline.

Whether because of prejudice or custom, writers in earlier times often used language considered strange or offensive today. Because Western Legal History publishes articles that present the historical record as accurately as possible, it occasionally publishes quotations containing such language. The publications of such is not to be construed as representing the attitudes of either the authors or Western Legal History.

BOARD OF DIRECTORS

DEBORA KRISTENSEN GRASHAM, ESQ.

Chair

SONIA MARTIN, ESQ.

Vice Chair

JEFF R. PORTNOY, ESQ.

Treasurer

COREY WEBER, ESQ.

Secretary

RITA M. HAEUSLER, ESQ.

Immediate Past Chair

Seth Aronson, Esq.

Hon. Stanley A. Bastian

Hon. Marsha S. Berzon

Ryan W. Bounds, Esq.

George Brewster, Esq.

John Carson, Esq.

Hon. David O. Carter

David S. Casey, Jr., Esq.

Hon. Richard R. Clifton

Dale A. Danneman, Esq.

Gareth T. Evans, Esq.

Robert H. Fairbank, Esq.

Jeffrey M. Fisher, Esq.

Margaret G. Foley, Esq.

Paul Friedman, Esq.

Kiry K. Gray

Hon. Michael Daly Hawkins

Cynthia Jones, Esq.

Rachel Lee, Esq.

Ron Maroko, Esq.

Hon. M. Margaret McKeown

Hon. Mary H. Murguia

Hon. William H. Orrick III

Kathleen M. O'Sullivan, Esq.

Rob Pfister, Esq.

Hon. Virginia A. Phillips

Heather L. Richardson, Esq.

Hon. Mary M. Schroeder

Marc M. Seltzer, Esq.

Hon. Milan D. Smith, Jr.

Hon. Christina A. Snyder

David S. Steuer, Esq.

Hon. Sidney R. Thomas

Gail Migdal Title, Esq.

Lilian Tsai, Esq.

Dean A. Ziehl, Esq.

ADVISORY COUNCIL

J. Bruce Alverson, Esq.

Professor Katherine Ball

Hon. Stanley Boone

Magdalena Bordeaux, Esq.

Cathy Catterson, Esq.

Hon. Morgan Christen

A. Marisa Chun, Esq.

Matthew Close, Esq.

Hon. Steve Cochran

Barbara Dawson, Esq.

Caroline Djang, Esq.

Ben Feuer, Esq.

Hon. Haywood Gilliam

Hon. Philip Gutierrez

Peter F. Habein, Esq.

Ernest A. Hoidal

Robert A. James

Hon. Robert J. Johnston

Hon. Robert Lasnik

Courtney Linn, Esq.

Robert D. Lowry, Esq.

Sean McAvoy

Hon. Eric D. Miller

Tracy Morris, Esq.

Hon. Kimberly J. Mueller

Dan J. Nichols, Esq.

Andrew Ong, Esq.

Jonathan Patchen, Esq.

Nora Puckett, Esq.

Fred A. Rowley Jr., Esq.

Anna Russell, J.D.

Kelli Sager, Esq.

Hon. Richard G. Seeborg

Joy Shoemaker, MLS, JD

James Sigel, Esq.

Claire Wong Black, Esq.

Douglas R. Young, Esq.

Kelly A. Zusman, Esq.

BOARD EMERITUS

Jerome L. Braun, Esq.

Hon. Christine W. Byrd

Kenneth N. Klee, Esq.

Hon. D. O'Scannlain



WESTERN LEGAL HISTORY

A Publication of Ninth Judicial Circuit Historical Society

Editor-in-Chief

HON. MICHAEL DALY HAWKINS
Ninth Circuit Court of Appeals

Editorial Board

ARIELA GROSS
USC Gould School of Law

ARTHUR D. HELLMAN
University of Pittsburgh School of Law

S. DEBORAH KANG
University of Virginia
Corcoran Department of History

SARA MAYEUX
Vanderbilt Law School

PETER L. REICH
UCLA School of Law

JONATHAN ROSE
Arizona State University
Sandra Day O'Connor
College of the Law

HARRY N. SCHEIBER
Berkeley Law

REUEL E. SCHILLER
University of California
Hastings College of the Law

HON. G. MURRAY SNOW
United States District Court
for the District of Arizona

Book Review Editor

CHARLES MCCLAIN, JR.
University of California Berkeley Law

Administrative Assistant
LAURA FERGUSON

Ninth Circuit Archivist
ROLLINS EMERSON

Research Assistant
JENNA SMITH

Copy Editor
PAMELA MARSHALL

Production

ROBYN LIPSKY
KATIA KISTON



WESTERN LEGAL HISTORY

A Publication of Ninth Judicial Circuit Historical Society

VOLUME 32

CONTENTS

INTRODUCTION

Michael Daly Hawkins 1

APPLYING HISTORY: A HISTORIAN'S EXPERIENCES IN THE COEUR D'ALENE WATER CASES

Thomas R. Cox 3

FRIENDSHIP BETRAYED: GRANVILLE STUART, SAMUEL T. HAUSER, AND THE SEVEN DEVILS MINING CASE

Clyde A. Milner II 17

IDAHO SCRAPBOOK

Christian Winn 36

TUMULT TO ORDER: THE FEDERAL COURTS IN NORTH IDAHO

Richard C. Tallman and Morgan D. Goodin 39

IDAHO JUDGES ON THE NINTH CIRCUIT COURT OF APPEALS

Ryan D. Nelson 55

THE FIRST WOMEN OF IDAHO'S BENCH AND BAR

Debora Kristensen Grasham 81

IDAHO'S COURTHOUSES: PAST AND PRESENT

Robyn Lipsky and Katia Kiston 127

A TRUE "WESTERN LAWYER": THE EXTRAORDINARY LEGAL CAREER OF MILTON J.

HELMICK— LAST JUDGE OF THE U.S. COURT FOR CHINA

Tom Westphal 145

IN MEMORIAM: STEPHEN L. WASBY 177

IN MEMORIAM: THOMAS J. McDERMOTT 183

BOOK REVIEWS 185

MEMBERSHIPS, CONTRIBUTIONS AND GRANTS

Introduction

This issue is the culmination of a years' long effort in partnership with our friends at the Idaho Legal History Society. It features writings on the great state of Idaho and includes pieces on its history with an emphasis on the legal and the judicial landscape. Thomas Cox recounts his efforts over the years to bring history to bear on the lifeblood of the arid West in the adjudication of water disputes. Clyde Milner delves into the friendship of two of Idaho's most prominent citizens, a relationship that devolved into betrayal in a dispute over mining interests. Judge Richard Tallman and Morgan Goodwin bring us the evolution of courts in the north of Idaho, and the article is replete with the intriguing machinations of public officials struggling over political power, including the lengths one official used to avoid service of process. Judge Ryan Nelson chronicles the history of Idahoans appointed to the Ninth Circuit. The NJCHS Board Chair Debora Grasham contributes a piece recounting the history of Idaho women serving justice as court clerks, on the bench, and at the bar.

With this issue, we offer what we hope will be a regular feature in our journal, a judicial profile in which Tom Westphal recounts the life of Milton Helmick, an FDR appointee to far flung courts of remarkable jurisdiction, stretching from China to the high seas of Morocco. We also include a poem, a tradition begun with our last issue, by Idaho's own Christian Winn.

We remember two longtime contributors, to these pages and to the Ninth Judicial Circuit Historical Society (NJCHS), Professor Stephen Wasby and Tom McDermott. Professor Wasby served on our Editorial Board and, as his friend Professor Arthur Hellman and others detail, contributed extensively on the Ninth Circuit. Tom McDermott, the very soul of decency, was an active and contributing member of the NJCHS for many years.

This issue also marks our last with our friend Charles J. McClain as our book review editor. Chuck's efforts in seeking out, finding books of interest and talented people to review them will be sorely missed.



Thomas R. Cox*

APPLYING HISTORY: A HISTORIAN'S EXPERIENCES IN THE COEUR D'ALENE WATER CASES¹

Edmund Morgan, that eminent authority on early American history, used to address each year's entering class at Yale University. His talk was entitled "What Every Yale Freshman Should Know."² Americans, Morgan noted, do not place much value on curiosity; indeed, they tend to be suspicious of it. They speak of "idle curiosity" and warn that "curiosity killed the cat." But historians march to a different drummer. We frequently justify our craft by invoking George Santanya's warning that those who cannot remember the past are doomed to repeat it, and by talking of the "lessons of history." However, Professor Morgan confessed, that is not why most of us "do" history. More often than not, we are motivated by simple curiosity. Something happened back there, and we want to know what. Morgan urged his listeners to be equally curious, to push their professors for answers to what and why.

Still, although most of us pursue history out of curiosity, it can be utilitarian. Work that I did on Idaho's Heyburn State Park and on Coeur d'Alene tribal leadership and land-use patterns resulted in my being involved as an expert witness in two important lawsuits involving the federal government and the State of Idaho. That had not been my intent. As Professor Morgan might have guessed, my research initially stemmed from curiosity.

While studying the history of state parks in Oregon, I wondered if similar patterns applied in Washington and Idaho. In searching for an answer, I turned to Idaho's first major park, Heyburn, located near the southern end of Lake Coeur d'Alene—valued for its scenic, recreational, and geological features. The site had originally been part of the Coeur d'Alene Indian Reservation. In 1911, it was sold to Idaho for use as a park. In the 1970s, while

* Thomas R. Cox is the professor emeritus from San Diego State University and author of numerous publications on environmental history including *The Park Builders: A History of State Parks in the Pacific Northwest*.

1. This article was originally presented in a slightly different form as the luncheon address at the biennial meeting of the Idaho History Conference held in Pocatello in March 2006.

2. Mimeographed copy in author's possession.

I was engaged in my research, the tribe began pushing the federal government to bring suit to have the tract revert to the tribe, arguing that the state's policy of leasing summer home sites within the park to private individuals was a violation of the requirement in the state's deed that the land be "held, used, and maintained as a public park, and for no use inconsistent therewith."³ Officials in the United States Interior Department were receptive.⁴ Concerned, the State Land Board had Dr. Roy Truby investigate. He reported: "We have tremendous environmental problems in that area. . . . We'd be better off just to remove some of those cabins completely. It's a hell of a mess." Idaho's attorney general Wayne L. Kidwell promptly decamped for Washington, D.C., to confer with officials in the Interior Department. He returned to report that the Interior Department might declare that Idaho had violated the terms of its deed, "but could eliminate the problem by canceling the 192 leases." He urged that the state do so, but Governor Cecil D. Andrus objected.⁵ Impatient for action, the Office of the Solicitor of the Department of Justice responded by ordering Idaho to end the leasing program or "all the lands included in the 1911 deed are subject to forfeiture."⁶

3. Deed. Heyburn State Park, Patent No. 213295, June 29, 1911 [Bureau of Land Management Archives, Boise, ID]. A copy of the deed is also in the attorney general's files [Departmental files—Land, 1970, State Archives, Idaho State Historical Society, Boise, ID]. See also Cong. Rec., 62nd Cong., 2nd Sess., pp. 8037–39; *Evening Capital News* (Boise, ID), June 13, 1912.

4. Idaho's Senator Weldon Heyburn, after whom the park was named, had originally wanted the site made a national park; upon reversion, the tribe hoped to make it an "Indian National Park." Cong. Rec., 60th Cong., 1st Sess., p. 3378; Coeur d'Alene Tribal Council, Resolution CDA 279 (May 20, 1971), 71 [North Idaho Agency, Bureau of Indian Affairs, Lapwai, Idaho, Tribal Resolution files]; Letter from Robert Dellwo, Tribal Attorney, to Thomas St. Clair, Superintendent, North Idaho Agency, Feb. 7, 1972; Bureau of Indian Affairs, "Report on Heyburn State Park" (Dec. 27, 1972); Memorandum from Loren A. Dillon to Area Director, Bureau of Indian Affairs (Jan. 11, 1977) (quote) [*Heyburn State Park v. CDA Tribe*, Real Property Management file, North Idaho Agency, BIA, folder 308]; *Idaho Statesman* (Boise, ID), May 29, 1975.

5. *Idaho Statesman*, Sept. 7, 1975. By the time the case went before district court judge Marion J. Callister, Andrus had become secretary of the Interior; he was thus named as defendant in the state's case, but he took no active part. "My position as governor of Idaho is well known to everyone," but as Interior secretary he had trust responsibilities to the tribe, creating an apparent conflict of interest; he therefore believed he had to let the case take its course without his intervention. *Idaho Statesman*, Aug. 19, 1977.

6. Office of the Attorney General of Idaho to Office of the Solicitor General, "Memorandum in Support of the State of Idaho in Heyburn State Park" (Sept. 3, 1975); Coeur d'Alene Tribe, "Preliminary Study of Heyburn State

Kidwell grumbled about the “cavalier attitude” of federal authorities. As he put it, “I am not willing, at this point, to abide by some lawyer in the Interior Department telling us his opinion of what he thinks the law ought to be.” He declared, “Frankly I think the solicitor has gone too far. Idaho has acted in good faith and there’s no reason they are asking for this harsh remedy.” He vowed the state “will resist all the way, even to the U.S. Supreme Court if necessary.” State auditor Joe Williams, a member of Idaho’s State Land Board, echoed the sentiment; the case, he said, “will be taken to the highest courts. We’ll fight this to the bitter end.”⁷

The state sued first, seeking a declaratory judgment recognizing its clear title and establishing that leasing was not incompatible with parks use. The Justice Department, urged on by solicitor Leo Krulitz of the Interior Department, responded with its threatened suit seeking forfeiture.⁸ Three days later, in a move to protect itself should a court decision go against it, Idaho officials announced that as leaseholds expired, they would not be renewed, and that the state would not accept rents due on leases. Kidwell explained that the action was necessary to show that the state was making a good-faith effort to solve pollution problems in the park: “I do not want to take the position we have to cancel or phase out the cottage lease sites, but I’m afraid we have no choice.”⁹ Judith Austin of the Idaho State Historical Society knew of my research and called it to the attention of the Idaho Attorney General’s Office. I was soon hired by the State of Idaho to serve as an expert witness on state parks in general and Heyburn State Park in particular. But the story does not end there.

After the Heyburn case had run its course, I continued to ponder questions to which my research had led me. In the process of piecing together

Park” (Sept. 15, 1975); Memorandum from Robert Dellwo to Solicitor General, “Rights of Coeur d’Alene and United States in behalf of Heyburn Park” [*Heyburn Park v. Tribe*, Real Property Mgmt. files, NIA, folder 308]; Letter from H. Gregory Austin to Wayne L. Kidwell, Mar. 3, 1976; Idaho State Board of Land Commissioners, “Minutes of Regular Meeting” (Mar. 9, 1976), 40 [Idaho State Archives]; *Idaho Statesman*, June 3, 1976, Nov. 26, 1976, Aug. 12, 1977.

7. Letter from W. M. Beckert to R. Robson, May 18, 1970 [State of Idaho, Department of Parks Records, Boise (copy also in author’s possession)]; *Idaho Statesman*, Mar. 6, 1975 (1st and 2nd quotes), May 29, 1975 (4th quote); July 9, 1976, Aug. 9, 1976, Oct. 3, 1976, Nov. 24, 1976, Dec. 24, 31, 1976 (3rd quote); *Lewiston Morning Tribune*, Apr. 3, 1976 (5th quote).

8. Considering the issues involved in the two suits to be essentially the same, federal district judge Marion J. Callister had them consolidated.

9. Letter from Leo Krulitz to James W. Moorman, Aug. 1, 1977; *James W. Moorman et al.*, “Complaint in Quiet Title and for Declaratory Judgment” (copies in author’s possession); *Idaho Statesman*, Mar. 1976, Oct. 3, 1976 (quote), Nov. 24, 1976, Jan. 6, 1977.

the Heyburn story, I ran across Coeur d'Alene chief Peter Moctelme, whose allotment became a part of the park.¹⁰ To understand the importance of Chief Moctelme, of the Indian allotment act against which he struggled so mightily, and of Heyburn itself, it seemed necessary to understand the traditional relationship between the Coeur d'Alene people and their land—natural enough questions for someone who had spent much of his academic career laboring in the field of environmental history. Though the questions to which I sought answers had been shaped by my other work, once more, as Professor Morgan might have guessed, I was driven largely by curiosity; some interesting things happened back there, and I wanted to know the story. In due course, I presented my findings at a biennial conference of the American Society for Environmental History.¹¹

But again, that was not the end of it. In 1994, the federal government brought suit on behalf of the Coeur d'Alene Tribe against the State of Idaho, seeking to establish tribal title to the southern third of Lake Coeur d'Alene, the portion adjacent to and just north of Heyburn, and to the lower portions of the St. Joe River, both within the boundaries of the Coeur d'Alene reservation but managed by the state. Hearing of my work, including that done subsequent to the Heyburn case, and seeing ways that it might be relevant, officials in the Justice Department approached me about serving as an expert witness. Once more, my curiosity-driven investigations were to have utilitarian value.

I learned a great deal working on those two cases for the state and federal governments—a lot about the American legal system, of course, but a good bit about history as well. Let me share some, if not all, of those lessons.

First, I gradually came to the realization that not only do a large number of otherwise well-educated Americans not know much history—hardly news to those of us who labor in the field—but they also do not have much idea of what historians actually do. When I began work on the Heyburn case, attorneys for the State of Idaho kept asking me to provide facts that would support their contentions. I had great difficulty persuading them I could not do that. I felt certain that their arguments had merit, but I knew that documents that proved it in so many words did not exist—and probably never

10. Thomas R. Cox, "Tribal Leadership in Transition: Chief Peter Moctelme of the Coeur d'Alene," *Idaho Yesterdays: Quarterly Journal of the Idaho State Historical Society* 23 (spring 1979): 2–9, 25–31; "Weldon Heyburn, Lake Chatcolet, and the Evolving Concept of Public Parks," *Idaho Yesterdays: Quarterly Journal of the Idaho State Historical Society* 24 (summer 1980): 2–15; *The Park Builders: A History of State Parks in the Pacific Northwest* (Seattle: University of Washington Press, 1988), 14–23.

11. Thomas R. Cox, "Changing Patterns of Land Use Among the Coeur d'Alene: An Environmental History," paper presented at biennial conference, American Society for Environmental History, Las Vegas, NV, Mar. 1995.

had. My difficulty in persuading them stemmed largely from their apparent assumption that historians deal primarily with certainties—with facts. But others who labor in the field know as well as I do that much of what we do—and much of the best of it—is a weighing of possibilities, probabilities, and inference. Ours is an interpretive discipline—and it is in the process of determining and weighing the various possible interpretations of available evidence that we do our best work and make our greatest contributions.

I am not sure why this view of history was so foreign to the thinking of the attorneys with whom I worked—after all, their discipline readily accepts a very similar view of scientists, physicians, and the like—but I suspect it stems in large part from the abysmal teaching of history in many of our schools, public and private. There, all too often, history becomes an exercise in the memorization of names and dates. He who accumulates the most facts wins—or at least gets an A.

Somehow, we finally got over that hump, and when we did, the attorneys stopped asking me to provide facts—or fact-filled documents—and began to ask, “What do you think, and why do you think it?” Only then did I begin to be of real value to their case.

Problems remained. The attorneys knew how to establish the expertise of physicians and scientists, for there was ample precedent for that. But they were a bit at sea as to how to present my qualifications so the court would give my opinions the weight they desired them to have—especially since they anticipated that federal attorneys would have expert witnesses of their own against whose testimony my statements would be weighed. Degrees and academic affiliations helped, of course, but years of research and writing on the history of parks—including the specific park at issue—were more important, since the products of those efforts underwent peer review both before and after publication.

Ironically, it was probably the lead attorney for the United States who did the most to establish my credentials as an expert on the subject at hand. While I was being deposed, I expressed my interpretation of a matter central to the case.¹²

“And what,” he asked, “do you base that opinion on?” He emphasized the word “opinion.”

“The records,” I answered simply, “especially correspondence among the principals.”

“And how many records—letters—have you consulted?” he asked, hoping, I assume, that I would report a modest number, thus giving him an opportunity to suggest that my interpretation rested on a flimsy foundation.

12. The following exchange is based on my memory and post-deposition notes. A copy of the deposition itself is not available to me; the exchange as recorded in the deposition might vary a bit from that given here but would be essentially the same.

"I have no idea," I replied and paused for some moments before continuing. "Historians—and the archivists with whom we work—don't normally count the number of pages. There are often far too many for that. We talk about the number of feet in a collection. One of the key collections I went through was the Papers of Robert W. Sawyer located in the University of Oregon library. That collection has twenty-six feet of boxes full of records." I went on to list a number of other records collections, scattered in a variety of locations, through which I had plowed. "Altogether," I concluded, "in the ten years during which, off and on, I have been doing research relevant to this case, I would estimate that I have gone through over one hundred and sixty feet of records." He immediately let the matter drop.

In all probability, the federal attorney had obligingly opened the door for me to establish my credentials because he had little idea of how we do our work. A number of years ago, a leading practitioner in the field was asked what it took to do good history. "The power to take infinite pains," he replied. Indeed! The willingness to labor, year after year, on a question of little interest to anyone save the historian himself. The willingness to go through over 160 feet of records on parks in the Pacific Northwest or spend thirty years on a history of the lumberman's frontier, as I have done. Non-historians find it difficult to think in these terms.

The City of San Diego provides a case in point. Some years ago, it adopted new policies for the management of its records. They were open to researchers, those in charge insisted, but proper procedures had to be followed. On a written form, researchers had to specify what document or documents they wanted to consult. When time permitted, perhaps after a few days' wait, the clerk in charge would retrieve the requested material from the archives, and the researcher then had to pay, as I recall, \$1.25 a page (plus any copying charges) for the materials obtained. The policy may have been well intended, but it made historical research in the city's archives virtually impossible. Attorneys and the like might still call up specific contracts or policy statements that they were interested in, but the sort of semi-blind groping for evidence, the plowing through of file after file that is a good part of what historians do, was no longer a possibility.

But back to matters at hand. Having established my expertise, attorneys for the state proceeded. Central to their case was the argument that leasing a small portion of Heyburn to private individuals for summer home sites did not constitute a violation of the requirement that the land be used for public parks purposes. Federal attorneys—and the associated attorney working for the Coeur d'Alene Tribe—argued the opposite, pointing out that the summer homes were the source of water pollution that was undermining the value of nonleased portions of the park and insisting that all of the park should therefore revert to the tribe.¹³

13. Leaseholds constituted roughly one-third of 1 percent of the

My brother—himself an experienced attorney—thought the federal suit “a slam dunk.” But the questions at issue were not as simple as he assumed. What had been the intent of Congress when it passed the legislation transferring roughly 6,800 acres to the state for a park? And what did the term “public park” mean in 1911, when the transfer was made? These were central questions, and ones that as a historian I was called upon to address.

To make a long story short: Under the doctrine of contemporary construction, a contract should continue to mean what it meant to the principals at the time it was entered into. And in the period around 1911, when Congress voted to transfer the Heyburn tract to the state, it also created Glacier and Lassen national parks. In doing so, it made it clear that it saw no essential inconsistency in allowing summer home leaseholds within parks, for it specifically authorized them in the enabling legislation for both Glacier and Lassen. In subsequent years, the National Park Service and the U.S. Forest Service took similar positions, allowing private leaseholds within recreational lands under their jurisdiction, further undermining federal assertions that such use at Heyburn was inappropriate. So, too, did evidence that in 1928 at least six states allowed leaseholds in their parks.¹⁴

Furthermore, the term “public park” was a nebulous, unrefined term. As Frederick Law Olmsted—a key figure in the creation of New York’s Central Park and one of the nation’s leading authorities on parks—wrote in 1880: “I have lately known the word ‘park’ applied to the protecting belt of a reservoir, to a fish-pond, a sea beach and a jail yard; to scores of things which have the least possible interest in common.” The situation had changed but little by the time of Heyburn’s creation. A natural site, a small percentage of which was leased to private parties for summer homes, would surely have fallen within the broad definition of public parks that Olmsted reported.¹⁵

park’s acreage but allegedly tied up much of the best waterfront land. Float homes, allowed by permit from the state, were also a source of pollution—and criticism—but as they represented much smaller investments than the summer homes on leased land, they were an easier problem to deal with.

14. 36 Stat., 354–55; House Report 2100, 60th Cong. (2nd Sess. 1909), I: 5384; Senate Report 580, 60th Cong. (1st Sess. 1908), II: 5219; United States Attorney, “Answer of the United States of America to State of Idaho’s First Interrogatories,” *State of Idaho v. Cecil Andrus and Leo Krulitz, United States of America v. State of Idaho et al.*, and *David H. LeRoy et al.*; “Motion of Idaho and Plaintiff-Intervenor for Summary Judgment...,” *ibid.*, 11–23 (copies in author’s possession).

15. Frederick Law Olmsted, “The Justifying Value of a Public Park,” *Journal of Social Science* 12 (1880): 150–51. See also Harlean James, *Land Planning in the United States for City, State and Nation* (New York: Macmillan, 1926), 196. For a discussion, see my article Thomas R. Cox, “From Hot Springs to Gateway: The Evolving Concept of Public Parks, 1832–1976,” *Environmental Review* 5

In view of the evidence presented, on November 8, 1979, federal district court judge Marion J. Callister deemed a trial unnecessary and issued a declaratory judgment in favor of Idaho. Central to Judge Callister's decision was his finding that "the leasing of cottage sites and granting of float home permits was a proper public park use at the time Heyburn State Park was established and, therefore, cannot be the cause of forfeiture under the terms of the patent." For Judge Callister, my testimony had clearly been central, although he was surely influenced as well by the fact that the law tends to abhor forfeiture, seeing it as a last resort to which in this case it was not yet necessary to turn. Still, the wording of his decision made it clear that Idaho ought to improve its management practices, or the court might rule differently if the issue came before it again.¹⁶ As noted above, the state had already gotten that message, having begun phasing out summer home leaseholds within the park in December 1976—over the protests of leaseholders, of course. Three years later, after Callister's ruling, Idaho resumed renewing and collecting rents on them.¹⁷ But the matter was not over. The tribe and federal government appealed (although the Justice Department subsequently withdrew its appeal). A panel from the Ninth Circuit Court of Appeals remanded the case to the district court on procedural grounds but did not specifically address the questions surrounding Idaho's leasing practices. On remand, the district court let stand its position that while those practices *did* violate present-day ideas of proper park management, they did not violate the original legislative intent or terms of the deed and thus did not make the park subject to forfeiture.¹⁸

Some fifteen years later—when Idaho, the tribe, and the federal government clashed over water rights in the area of Lake Coeur d'Alene—I was called upon once more. This time, I was to play a different role. The area involved was larger, the stakes higher. From the beginning, it was understood that whoever lost at the lower court levels would appeal; the case seemed destined to go all the way to the United States Supreme Court; and as Hank

(summer 1980): 14–26.

16. *Idaho v. Cecil B. Andrus et al.*, No. 77-2058 (D. Idaho Nov. 8, 1979) (copy in author's possession).

17. *Idaho Statesman*, Oct. 3, 1976, Nov. 24, 1976, Dec. 31, 1976, Jan. 6, 1977, Aug. 19, 1977, Nov. 9, 1979; *Gazette Record* (St. Maries, ID), Dec. 6, 1979.

18. See *State of Idaho v. Andrus*, 566 F. Supp. 15 (D. Idaho 1982). A panel of the Ninth Circuit remanded the case once more, but Judge Justin L. Quackenbush entered a dissent in opposition to remand, noting that the Ninth Circuit had not addressed the issue of Idaho's practices and that, in light of its decision, there were no procedural questions left on which the lower court needed to decide. Be that as it may, with the case remanded, Judge Callister's interpretation of allowable uses of park land stood. *State of Idaho v. Andrus*, 720 F. 1461, 1471–72 (9th Cir. 1983).

Meshorer, special attorney for the Justice Department, predicted, there the decision was apt to go either way.¹⁹ In view of the importance of the case, I was to be but one of several expert witnesses. And this time, I was to labor on behalf of the United States and the tribe rather than the State of Idaho—which, understandably, made some tribal members suspicious. To them I seemed to demonstrate once again that white men speak with forked tongues!

E. Richard Hart, an ethnohistorian who had done considerable work on earlier Indian water rights cases, was the chief expert for the United States on behalf of the tribe; I worked as a subcontractor under him. The Coeur d'Alene intervened as an interested party, had their own attorney, and hired their own expert witnesses, including socioeconomic historian John Fahey; University of Idaho anthropologist Roderick Sprague, an authority on the culture of interior Northwest's tribes; and Thomas Michael Powers, an economist from the University of Montana.²⁰

In assessing Indian land claims, the courts have set a high standard of proof. The land must not only have been used by the group in question from time immemorial (whatever that means) but also been vital for its survival. To help meet that burden of proof regarding the latter, I drew upon my expertise in environmental history to prepare a fifty-five-page "Report on the History of Land and Water Resource Use Among the Coeur d'Alene." The report reinforced the assessments of Hart, Sprague, Powers, and Fahey, who came at the issue from angles different from my own but reached essentially the same conclusions.²¹

19. Hank Meshorer, comment to the author, Seattle, WA, Jan. 30, 1997.

20. E. Richard Hart, "A History of the Coeur d'Alene Tribe's Claim to Lake Coeur d'Alene" (3 vols.) and "Supplemental Expert Testimony"; and Marilyn P. Watkins, "Washington Water Power Company and the Post Falls Dam: Report and Source Materials" (all prepared for United States Department of Justice, re. Civil No. 92-35703) (copies in author's possession); Roderick Sprague, "An Anthropological Summary of the Coeur d'Alene Tribe's Occupation of the Coeur d'Alene Lake Area" and "Further Conclusions to an Anthropological Summary of the Coeur d'Alene Tribe's Occupation of the Coeur d'Alene Lake Area"; John Fahey, "A History of the Coeur d'Alene Indian Reservation and Aboriginal Title," and accompanying "Expert Opinion"; Gerald A. Willett, "Report of Land Survey Documentation Review for Coeur d'Alene Indian Reservation"; and Thomas Michael Powers, "The Economic Reliance of the Coeur d'Alene Indians on Agriculture and Traditional Subsistence Activities, 1873–1923" (all prepared for Coeur d'Alene Tribe re. Civil No. 92-35703) (copies in author's possession).

21. This point is established in detail in a twelve-page analysis of the Willett, Sprague, and Fahey reports in letters from Cox to Hart on Oct. 10, 1996 (personal correspondence with author).

In the end, my greatest contribution probably came not from my report but from work of a different sort. Historians not only “do” history; they also review history. Peer review is essential to our discipline, helping to guard against slipshod or faulty scholarship and polemical tracts disguised as dispassionate assessments. With an interdisciplinary background that includes anthropology, ethnohistory, and economics, I took on the role of reviewer of the contributions of the other experts with whom I was working, pointing out inconsistencies and errors in their arguments and helping to reconcile differences so that we might present a more uniform front in support of the contentions of the federal government and the tribe.

In addition, I reviewed the work of Kent D. Richards, the key expert hired by the State of Idaho, providing attorney Meshorer with weaknesses in Richards’s arguments that might be exploited.²² Indeed, when the time came for me to testify, I did so as a rebuttal witness. Meshorer passed quickly over my environmental study to my work as a referee. He asked about the role of anonymous peer review and had me list the many university presses and scholarly journals for which I had evaluated manuscripts.²³

“And once you have reviewed a manuscript,” he asked, “what do you do?”

“You make a recommendation to the press or journal that sent it to you.”

“What sort of recommendation?”

“Whether to accept the manuscript for publication, return it to the author with suggestions for revision that would make it publishable, or reject it as unsalvageable.”

“You have read the report of the state’s expert witness. If you were asked to review it for scholarly publication, what sort of recommendation would you make?”

“I would strongly recommend its rejection. It is too badly flawed in too many ways to be redeemed.” I gave a few examples, and when the time came for Idaho’s expert to give his own testimony, the weaknesses in his assessment that I had suggested soon became abundantly clear—most notably when a “deceased Jesuit historian” whom he cited in support of his position was called to the stand the next day and turned out to be old but very much alive, to have never been a Jesuit, and to disagree with the position that had been attributed to him!²⁴

22. Kent D. Richards, “United States Indian Policy and the Coeur d’Alene Tribe” (prepared for State of Idaho, Civil No. 92-35703) (copy in author’s possession).

23. A transcript of trial testimony is not available at this writing. The following exchanges are based on my memory and post-testimony notes. Wording in the trial transcript would no doubt vary slightly. Local newspapers provide a day-by-day account. See *Coeur d’Alene Press*, Dec. 2, 3, 4, 9, 11, 12, 13, 1997; *Spokesman-Review* (Spokane, WA), Nov. 30, 1997, Dec. 5, 9, 13, 1997.

24. For an account of this incident, see *Coeur d’Alene Press*, Dec. 12, 1997.

During my cross-examination, Steven W. Strack, deputy attorney general for the state, tried to shift attention away from my work as a reviewer to what I had said in my report on Coeur d'Alene land use. I had discussed the diversity of resources available to the tribe through hunting, fishing, gathering, and trade. Some of these statements were now taken out of context in an attempt to demonstrate that the Coeur d'Alene had such a multitude of resources available that the waters of Lake Coeur d'Alene and the lower St. Joe were not essential for their survival—and thus, that the tribe could not meet the standards of necessity set forth by the courts for such cases. I protested with some heat that he was taking what I said in my report out of context and distorting what I had written, but he plowed ahead. At one point I had commented that the Coeur d'Alene had far fewer guns than neighboring tribes, and this severely limited their ability as hunters. “How do you know this?” he asked, apparently suspecting that it was a mere supposition on my part. But it was not. Employees at the Hudson’s Bay Company’s Fort Colville, to which the Coeur d'Alene and other interior tribes resorted frequently to trade, had kept careful records of the weaponry of tribesmen visiting the post—both out of a desire to determine their capacity for violence and as a means of estimating potential markets for guns. The Coeur d'Alene, the company’s records showed, were far less well armed than other visitors; indeed, long after other tribes in the area had become well armed, the Coeur d'Alene had so few guns that they were sometimes referred to as “the people of the bow.”²⁵

Idaho’s attorney tried again, apparently still seeking to undermine my credibility by demonstrating that I tended to go off half-cocked. In addition to their relative shortage of guns, I had written about the tribe’s use of fire in driving deer into the lake, where they could be dispatched from canoes using clubs, spears, and bows and arrows. Triumphantly Idaho’s attorney produced a large blowup of a painting done in the early 1840s by Father Nicholas Point, one of the first Jesuit missionaries to the tribe. In the picture, Coeur d'Alene were shown with blazing torches—and a number with firearms—seemingly “driving” deer into the lake. “And how then do you explain this?” he crowed.²⁶

25. David H. Chance, “Influence of the Hudson’s Bay Company on the Native Cultures of the Colville District,” *Northwest Anthropological Research Notes* 7 (1973): 42–43. See also Elliott Coues, ed., *The Manuscript Journals of Alexander Henry and of David Thompson, 1799–1814* (3 vols.; New York: Francis P. Harper, 1897), 2: 526, 643–44, 712–14, 726; *Coeur d'Alene Teepee* 2 (Dec. 1939): 2; James A. Teit, “Salishan Tribes of the Western Plateaus,” *Annual Report of the Bureau of American Ethnology* 45 (1927–28): 97–98, 101, 144–45.

26. For this and Father Point’s other paintings, see *Wilderness Kingdom: Indian Life in the Rocky Mountains in 1845–1847*, trans. by Joseph P. Donnelly (New York: Holt, Rinehart & Winston, 1974).

I knew the series from which the painting came—and that Idaho's attorney was now on the turf of the environmental historian. "I have no idea why Father Point chose to show some of the Indians with guns," I replied, "but the records of the Hudson's Bay Company make it clear that in spite of what might be shown in an artistic rendering such as this, the Coeur d'Alene had few firearms." I paused. "However, if you will look at the painting closely, you will see that this is not a deer drive at all. Deer follow well-established migration routes between their summer and winter ranges. To this day, big game managers carry out annual censuses by staking out these trails and counting the deer as they pass by. This is akin to what is shown in this painting. Deer passing down a clearly visible trail are being ambushed by Indians lying in wait—some, to be sure, with guns." The trap the attorney had laid for me, together with my testimony on certain botanical questions, allowed me to demonstrate that as an environmental historian, I had to know a good bit about the out-of-doors as well as about archives, books, and, in this case, ethnohistory.

Meshorer provided the clincher in cross-examination. "Were the waters of the lake and river essential for the tribe's survival?" he asked.

"Absolutely," I answered, echoing the position taken by Hart earlier. "While individuals might have managed to find ways to remain alive, without the waters that were central to their existence, Coeur d'Alene society as such would have ceased to exist."²⁷

The Aripa brothers, two tribal elders who sat in the back row, listening intently to my testimony (and who in time would testify themselves), were taken with all I said. Their initial suspicions having melted away, they stopped me as I left the courthouse at the end of the day's session, congratulated me on the understanding I had shown of their culture, and extended the ultimate compliment. "You must come to our spring powwow," Lawrence Aripa said.²⁸ "I would be honored," I replied. "When will it be?" He paused for a long time, troubled by white society's system of dating—nothing peculiar to him, for in the history of the tribe compiled by Joseph Seltice, he had even misstated the date on which he had become chief of the tribe (it was 1934, but he said 1932).²⁹ Finally Aripa said, "I'm not sure. It's in meadowlark season." Try as I

27. On Hart's testimony, see *Coeur d'Alene Press*, Dec. 3, 4, 1997.

28. On Aripa, see Jeanne Givens, "Coeur d'Alene Tribe Mourns Loss of Leader," *Idaho Statesman*, Oct. 1998.

29. Joseph Seltice, *Saga of the Coeur d'Alene Indians: An Account of Chief Joseph Seltice*, ed. by Edward J. Kowrath and Thomas E. Connelly (Fairfield, WA: Ye Galleon Press, 1990), 13. Cf. *Spokesman-Review*, Sept. 3, 1934; Diary of de Smet Mission, Aug. 31, 1934, Sept. 3, 1934 [House Diaries, Section I Sacred Heart Mission Papers, Oregon Province Archives, Society of Jesus, Gonzaga University, Spokane, WA].

might, I never was able to find out when the powwow would be held, and to my regret I missed it.

After the State of Idaho was unable to undermine my testimony or that of the other federal and tribal witnesses, and with its own expert thoroughly discredited, some observers thought Idaho's case had been holed beneath the waterline and was slowly sinking. But the situation was not so cut-and-dried. This was no slam dunk. There were strong points to Idaho's case, not the least of which was the equal-footing doctrine, according to which each state upon coming into the Union is clothed with the same rights that the original thirteen possessed. The original states had jurisdiction over waters within their boundaries, and thus, regardless of where the executive order establishing the Coeur d'Alene reservation might have drawn its boundaries, Idaho had a right to control all of Lake Coeur d'Alene and the St. Joe. This meant, Idaho's attorneys argued, that even the section of the state's constitution adopted as a part of the admission process in 1890, which disclaimed authority over land and water within the boundaries of the state's Indian reservations, could not negate the basic right of Idaho to control its waters.

With strong arguments on both sides, this time there was no declaratory judgment. On July 28, 1998, Judge Edward J. Lodge handed down his decision. The claims of the United States and the tribe were upheld.³⁰ But, as Meshorer had predicted, that was not the end of it. Idaho appealed to the Ninth Circuit Court and, after losing on a split vote there,³¹ to the United States Supreme Court, which in December 2000 announced it would consider the case. It did so the following year in its decision on June 18, 2001.³²

Again, the Justice Department and tribe prevailed, this time on a 5–4 vote with Justices Rehnquist, Scalia, Thomas, and Kennedy in the minority.³³ I cannot say I was surprised at Chief Justice Rehnquist's vote. The need to strengthen state authority vis-à-vis that of the federal government was a central and well-known element in his thought. But I was amazed—and appalled—at the arguments he put forth in the minority decision he prepared. Rehnquist not only reiterated the high standard of necessity for Indian land claims but went on to spell out what he considered adequate. What he called for revealed a total lack of understanding of the past. To make a claim valid, he argued, tribes would have to come forth with hard, explicit documentary evidence. Yet evidence of the sort he would require seldom if ever existed in white, let alone Indian, situations until very recently. His standard, in other words, was presentist, totally ahistorical.

30. United States v. Idaho, 95 F. Supp. 2d 1094 (D. Idaho 1998).

31. United States v. Idaho, 210 F.3d 1067 (9th Cir. 2000).

32. Idaho v. United States, 533 U.S. 262 (2001).

33. Ibid.

Whether he realized it or not, Chief Justice Rehnquist set up a difficult standard to meet, potentially ruling out future Indian land claims that threaten the status quo. But his decision may be chalked up to a misunderstanding of the historical past, which raises questions for those of us who labor as historians.³⁴ What have we done wrong? What could we do better to ensure that presentist demands—the requirement that the past conform to the standards of the today—do not dominate decision-making in the years ahead? To those questions, I fear, I have no answers.

Finally, one cannot help but wonder how the case might be judged now that membership on the court has changed significantly. There is no doubt that today's majority is profoundly conservative, but how the newer members would vote on a case like this is less clear. Such things are often hard to predict, as Justice Kennedy's vote in the Coeur d'Alene case demonstrates. So far, Chief Justice Roberts has not shown his predecessor's commitment to advancing state power; indeed, some of his first votes seem to lean more toward increased federal authority.

Unlike in the case of *Roe v. Wade*, it appears unlikely that the present court will revisit the Coeur d'Alene case, but there will surely be other Indian land claims cases in the years ahead, and it will be interesting to see how they turn out. One can only hope that they, like the Coeur d'Alene case, will be settled in ways that do justice to people who have seldom received it in the past, and that the federal government will continue to exercise its trustee obligations to Native Americans as honorably as it did in the cases on which I worked.

34. See Armand Derfner, "Why Do We Let Judges Say Anything About History When We Know They'll Get It Wrong?," *The Public Historian* 27 (winter 2005): 9–18. Derfner explores the precarious nature of judges drawing on their "impressions or misimpressions of history" to support legal decisions, giving examples of both good (interpreting history of discrimination in the South to prevent vote dilution and gerrymandering) and bad (interpreting Reconstruction Era laws) uses. *Ibid.*, 11–12, 16–18.



FRIENDSHIP BETRAYED: GRANVILLE STUART, SAMUEL T. HAUSER, AND THE SEVEN DEVILS MINING CASE¹



Granville Stuart, 1883. 981-260. Courtesy of the Montana Historical Society (MHS).

Granville Stuart, an early investor in mining properties in neighboring Idaho, considered himself a founding pioneer in Montana. By the early twentieth century, some called him the “pioneer of pioneers,” and others regarded him as “Mr. Montana.” In his final years before he died in 1918, Granville took great pride in this recognition. The cordial old gentleman of those days did not seem like the man who years earlier had advocated the annihilation of American Indian raiders and taken murderous action toward predominately mixed-race horse thieves. The niceties of treaty

agreements and law enforcement did not impress Granville if his own livestock or that of his neighbors seemed threatened. He, like many of his fellow Montanans, wanted a chance at wealth, and he protected his interests

* Clyde A. Milner II lives in Tulsa, Oklahoma and is Emeritus Professor of History at Arkansas State University. He has authored or edited numerous works, including *The Oxford History of the American West*, coedited with Carol A. O'Connor and Martha A. Sandweiss. His most recent book, coedited with Brian Q. Cannon, is *Reconstruction and Mormon America*.

1. Substantial parts of this article are drawn directly from the biography of Granville Stuart jointly written with Carol A. O'Connor. See Clyde A. Milner II and Carol A. O'Connor, *As Big as the West: The Pioneer Life of Granville Stuart* (New York: Oxford University Press, 2009). My thanks to Oxford University Press for permission to republish parts of that book.

with deadly force if needed. Granville energetically engaged in mining ventures, mercantile efforts, and cattle raising, keeping meticulous records of these often ill-fated enterprises. Although he may have seemed a man destined to pursue litigation to protect his own affairs, he spent no significant time in court until the twentieth century. Granville counted on his friends, many of whom he considered fellow pioneers, to help him prosper. When he reached his mid-sixties, he sensed betrayal from one of his oldest and closest associates, and he launched his first major legal case. He had discovered that money troubles can destroy a friendship.

Samuel T. Hauser, like Granville, was considered a prominent Montana pioneer. Investments in mining and cattle had entwined the two men's finances since the mid-1860s. They had relied on each other in a string of business opportunities that often involved some connection to Hauser's banking enterprises. Most notably, their names provided two of the three letters for the DHS brand of the Davis, Hauser, Stuart ranch. By the mid-1880s, this operation owned perhaps the largest open-range herd in central



Samuel Thomas Hauser

Montana, some twenty thousand beeves on the hoof. Additionally, gold mining, then silver and copper, had lured enough people and enough capital to allow Montana to become first a federal territory and then, in 1889, a state.² Hauser, with strong connections in business and politics, had served as Montana's territorial governor in 1885–87. He had helped his fellow Democrat, Granville, be appointed the U.S. minister to Paraguay and Uruguay during the second Grover Cleveland administration.

Hauser and Granville invested separately and together in various mining properties, some in the area west of Montana that became the state of Idaho. One of these ventures, in the Seven Devils region, northwest of Boise, produced enough copper to become the source of their dramatic litigation. This legal action eventually resulted in a ruling by the Idaho Supreme Court, followed by a failed attempt to be heard before the U.S. Supreme Court. At stake in 1900, by the reckoning of Granville and others, was \$800,000, a sum that when adjusted for inflation would equal more than \$24 million in today's

2. In his old age, Granville would insist more and more that he deserved recognition as the man who made the first discovery of gold in Montana. In earlier years, he had acknowledged that other pioneers had a better claim to this primacy.

dollars.³ The *Idaho Statesman*, based in Boise, had become the state's major newspaper. A headline on September 2, 1900, announced in capital letters, "BIG MINING SUIT," and explained that "all the parties are prominent in Montana." The dispute centered on ownership of "seven-sixteenths of the Peacock, Helena and White Monument mines in the Seven Devils," worth \$800,000, and considered "some of the most valuable property" in the area. The remaining nine-sixteenths of the holding was under bond for \$1 million and was not part of what the paper considered "one of the most important mining suits ever begun in the state." Hyperbole about the Seven Devils case grew with the newspaper's accounts. On November 7, 1901, the day the trial

GREAT MINE CASE

**Trial to Begin at Weiser today
Before Judge Stewart.**

PEACOCK GROUP INCLUDED

**Suit Brought by Granville Stuart to
Recover an Interest in the Famous
Property— Effect of an Old Deed to
Be Determined.**

"Great Mine Case Trial to Begin at Weiser Today," *Idaho Statesman*, Nov. 7, 1901. Idaho State Archives.

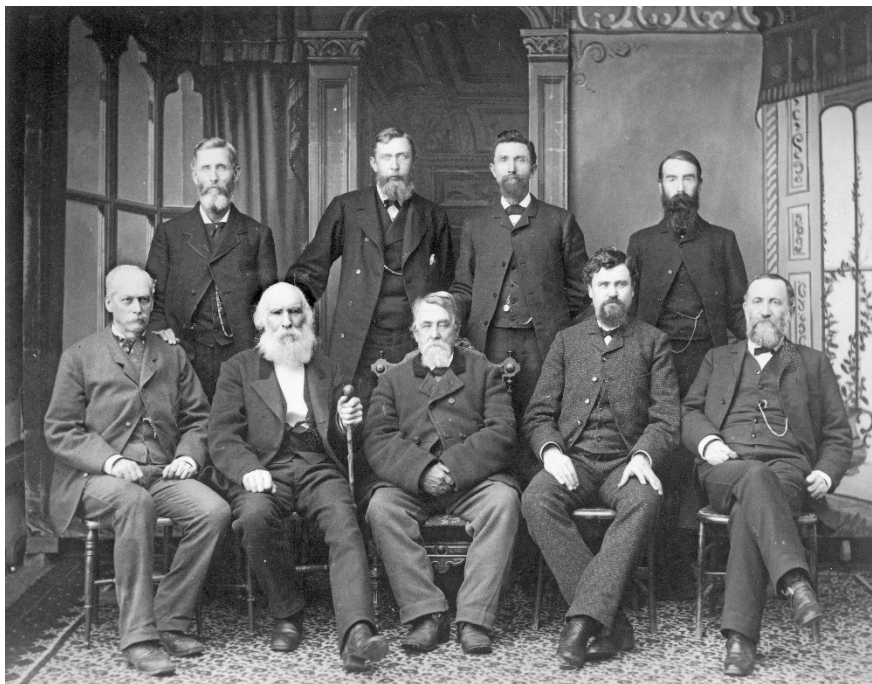
began in Weiser, Idaho, before the Third Judicial District Court, the headline read "GREAT MINE CASE" and added "Suit Brought by Granville Stuart to Recover an Interest in the Famous Property— Effect of an Old Deed to be Determined." By late January of 1902, in the closing days of argument, the suit itself, and not just the property, had become "famous" as Granville contested the claims of former governor Hauser. By the time Judge George H. Steward rendered his decision in late March, "famous" remained the adjective regularly affixed to the case.⁴ Judge Steward did not grant Granville what he desired. With so much money at stake, the old Montana pioneer moved forward with an appeal to the

3. \$800,000 in 1900 equals \$24,453,238.10 in 2019 using data for these calculations from the Bureau of Labor Statistics' Consumer Price Index (CPI), established in 1913. Inflation data from 1665 to 1912 is sourced from a historical study conducted by political science professor Robert Sahr at Oregon State University ("Inflation Conversion Factors for Dollars 1774 to Estimated 2019," by Robert Sahr, <http://oregonstate.edu/cla/polisci/faculty-research/sahr/cv2009.pdf>). The full calculation used Inflation Calculator, <https://www.officaldata.org/us/inflation> (accessed Nov. 5, 2019).

4. "Big Mining Suit," *Idaho Statesman*, Sept. 2, 1900; "Great Mine Case Trial to Begin at Weiser Today," *Idaho Statesman*, Nov. 7, 1901; "Mining Case Argued," *Idaho Statesman*, Jan. 25, 1902; and "Seven Devils Case Decided," *Idaho Statesman*, Mar. 28, 1902.

three-member Idaho Supreme Court. At that higher level, Granville had a more sympathetic hearing for his contention that a well-established pattern of mutual trust had been abandoned by Hauser. Although the legal issues of the case were not complex, the interwoven personal histories of the two primary figures—Granville and Hauser—produced a fascinating drama with an emotional undertone that would seem familiar in a divorce court. Just as someone might become aware of his own failed marriage after many years, Granville had come to recognize his failed friendship with Hauser. He had placed his faith, as well as much of his financial future, in Hauser's hands, and his confidence had been betrayed.

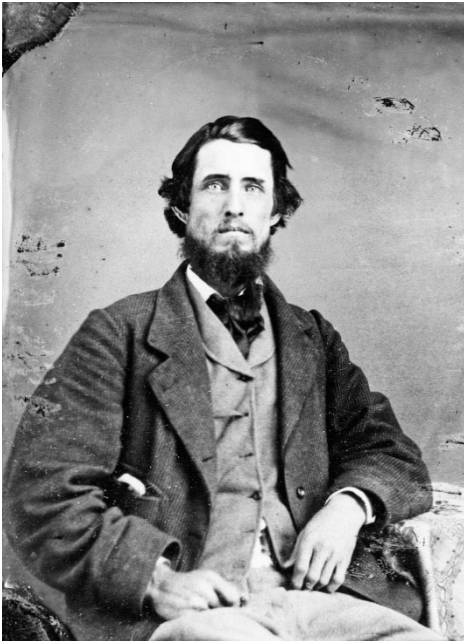
Hauser first came to the gold-mining camps of Montana in 1862, and there he soon met Granville and his older brother, James Stuart. Hauser had arrived in Montana via steamboat from St. Louis and was not a typical gold seeker. Originally from Kentucky, with well-placed relatives in Missouri, he had advanced training in civil engineering and experience in railroad planning and construction. His promising career stalled, however, when the outbreak of the Civil War halted railroad construction in the border states and created divisions between the paternal and maternal branches of his family. Perhaps the twenty-nine-year-old Hauser also wished to avoid military service.



"Montana Pioneers of 1857-1862" including Granville Stuart (back row, far left) and Samuel Hauser (front row, far right), taken in Helena, January 1884. PAC 74-100. Courtesy of the MHS.

During his first months in Montana, Hauser felt drawn to James, who introduced him and his companions to the diggings at Gold Creek, near

present-day Garrison Ranch in the Deer Lodge Valley, and “took great pleasure in showing us the country generally.” After spending some time with a pick and shovel near Bannack, a mining town, Hauser joined James’s expedition into Crow country in the spring of 1863. That fall, he often stayed with the Stuarts in the town of Virginia City as he made plans to travel to St. Louis, New York, and Washington, D.C. He was heading east partly to support the cause of territorial status for Montana and partly to raise capital to develop gold and silver deposits. The Stuart brothers invested early and heavily in this enterprise. As Granville noted on November 13, “Sam Hauser Started to the States.... We let him have a Thousand Dollars.” Apparently the Stuart brothers had managed to squirrel away some capital. In entrusting it to their friend, they assumed it to be in good hands and that this investment would lead to greater financial rewards.⁵ From their boyhood years together on the family farm in Iowa, the Stuart brothers had forged a remarkably close



Portrait of Granville Stuart, copied from original tintype. 945-202. Courtesy of the MHS.



Verso reads, 'James Stuart of Deer Lodge, M. T., Dec. 1st 1864.' 945-199. Courtesy of the MHS.

5. John William Hakola, “Samuel T. Hauser and the Economic Development of Montana: A Case Study in Nineteenth-Century Capitalism” (PhD diss., Indiana University, 1961), 1–7, 10–27; Letter from S. T. Hauser to his sister, Aug. 26, 1862 (quoted by Hakola, “Samuel T. Hauser,” 11); Nov. 13, 1863 entry, James and Granville Stuart, Joint Diary, 1861–1866 [Western American Collection 449, Beinecke Rare Book and Manuscript Library, Yale University, New Haven, CT]; Milner and O’Connor, *As Big as the West*, 85.

attachment. Together in 1852 they took the overland route to the gold fields of California as Granville was approaching his eighteenth birthday, with James only two years his senior. Over the course of the next five years, they tried their luck on numerous claims in placer and hydraulic mining. But the Stuart brothers arrived in California too late to hit pay dirt. In 1857, they resolved to return to Iowa. Granville fell ill along the way, and the brothers learned of the so-called Utah War. U.S. troops were on the march to Salt Lake City to subdue the supposedly rebellious Mormon settlers. Wishing to avoid this conflict, the brothers headed north once Granville recovered his health. They spent most of the next few years first in the Beaverhead and then in the Deer Lodge valleys, in what eventually became Montana.



Mural featured in Deer Lodge, MT post office entitled "James and Granville Stuart Prospecting in Deer Lodge Valley, 1858" by artist Verona Burkhard. Photograph by Clyde Milner.

The Stuarts found gold at the aptly named Gold Creek in April 1858. Eventually, this discovery helped set off a stampede of miners into the area and made the brothers famous, but it never made them rich. The surge in population set off by the mining rush led to the creation of Montana Territory on May 26, 1864. During the mid-1860s, the brothers' roles as leaders of the new territory seemed secure. James led two early expeditions along the Yellowstone River. He served as Missoula County's first sheriff, presided over Montana's first legal execution, and won a seat in the territory's first legislature. Meanwhile, Granville wrote the first book about the territory, *Montana As It Is* (1865). Hauser found a publisher for this volume in one of his trips back east to New York City.⁶ After leaving Virginia City in November 1863

6. A more detailed account of the lives of Granville and James Stuart as well as the brothers' extensive dealings with Samuel T. Hauser may be found in Milner and O'Connor, *As Big as the West*. An effective assessment of Hauser's business career is provided by William G. Robbins in "The Deconstruction of a Capitalist Patriarch: The Life and Times of Samuel T.

with \$1,000 of the Stuarts' hard-earned money, Hauser returned briefly to Montana in the winter of 1864–65. In the middle of 1866, he came back again, this time to establish the First National Bank of Helena and take up residence in that city. His thirty months of effort in the East and Midwest had led to the formation of the St. Louis and Montana Mining Company, capitalized at \$600,000. This company aimed to do for Rattlesnake Creek near Bannack, Montana, what the Comstock Lode did for Nevada. Heading the firm was Hauser's first cousin Luther Kennett. A former mayor of St. Louis, member of Congress, and vice president of the Pacific Railroad Company, Kennett used his many contacts to attract investors to the mining enterprise. James plunged deeply into this business. He wrote Hauser that he had "a severe attack of quartz on the brain," and promised to advance "any amount of money."⁷ At the time, James possessed substantial assets. He and his partner, Walter P. Dance, had sold their profitable Virginia City store, and with Hauser, James had already purchased six mining claims along Rattlesnake Creek. He now invested heavily in constructing the first smelter for silver ore in Montana. A flurry of positive publicity followed the opening of this plant at Argenta in October 1866. But the ore at Rattlesnake Creek did not contain enough silver, and it had a high percentage of lead—a by-product too heavy to ship from the remote location at a profit. Although the company had invested \$150,000 at Argenta, the plant produced only \$17,800 in bullion. In August 1867, Hauser closed the works. By October 1868, James recognized that the St. Louis and Montana Mining Company might soon collapse.



Saint Louis & Montana Mining Co. Courtesy of L. Tom Perry Special Collections, Harold B. Lee Library, Brigham Young University, Provo, Utah.

Hauser," *Montana The Magazine of Western History* (autumn 1992): 20–32.

7. Letter from James Stuart to S. T. Hauser, Sept. 14, 1866 [Samuel T. Hauser Papers, Manuscript Collection 37, Box 1, Folder 34, Montana Historical Society, Helena, MT (hereafter MHS)].

James's supposition proved correct. The company's directors in St. Louis had little sympathy for his situation or Hauser's. An officer of the company confided to Hauser, "When men lose money quarrels ensue, and they seek to throw the blame on others....Hence the Directory have sought to blame the Montana partners and to exculpate themselves." A large investor put the matter succinctly: "I write you wishing I had never heard of Montana." With such views in circulation, James received no favors either in 1869, when the stockholders voted to reorganize the company's debt, or in 1872, when they dissolved St. Louis and Montana Mining. Earlier on, James had been highly frustrated by Hauser's inadequate correspondence. He repeatedly complained, "Sam never writes to me." This reticence led James to conclude, "It is reasonable to suppose that [Hauser] has made a nice mess of our mining company accounts."⁸

James never recovered from these financial losses. Desperate to find a new source of income, he became a government Indian trader in Montana—first at Fort Browning and then at Fort Peck, where he died of a liver ailment on September 30, 1873. Granville brought his brother's body back to Deer Lodge, where mourners from around the territory, including Hauser, attended the funeral. Although grief-stricken by the loss of his brother, Granville did not distance himself from financial involvements with Hauser. In fact, starting in 1877, he began serving on the board of directors for Hauser's First National Bank of Helena. He also worked as the bookkeeper at that institution, and he purchased sixty-three shares of the bank's stock at \$100 a share. Granville had joined Hauser's banking crew, but he should have known the proclivities of the captain. Hauser did not run a tight ship, and he let it sail where his best interests could be served. However, Granville committed both labor and money to Hauser and also joined him in investing in a promising set of mines in the Flint Creek district near Philipsburg, Montana. Soon the two men set their sights on another venture, raising cattle.

This opportunity began with great promise. Granville scouted the range, purchased the beeves, coordinated the cattle drive, and moved his family to the ranch on Ford's Creek, east of Lewistown. Hauser and Granville needed lots of money to buy a large herd and then locate it on the best grazing lands. Hauser had no trouble raising money from investors. In fact, prospects seemed so positive that he created a limited ranching partnership. Two brothers, Judge Andrew J. Davis of Butte, Montana, and Erwin Davis, who lived in New York City, contributed \$50,000 each, or two-thirds of the \$150,000 original capital. Hauser and Granville split the remaining \$50,000. Hauser

8. Hakola, "Samuel T. Hauser," 55–60. (The statements were written to Hauser by Derrick A. January and John How and appear in Hakola at pages 57 and 51.); Letter from James Stuart to Ferdinand Kennett, Mar. 19, 1869; Letter from James Stuart to F. L. Worden, Apr. 21, 1869 [Box 1, Folder 3, Granville Stuart Papers MHS].

borrowed \$30,000 from Erwin, whereas Granville borrowed \$20,000 from the First National Bank of Helena. Hauser served as president of that bank, and Judge Davis, who had made a substantial fortune in mining, owned stock in the bank. Granville also held stock in the bank, worked there as a bookkeeper, and served on the board of directors. In the cattle venture, Hauser risked \$20,000 of the bank's money on Granville. Erwin risked \$30,000 in his loan to Hauser, which, combined with his original commitment of \$50,000, made him the key investor for the venture. The partnership bore the name of Davis, Hauser, and Company. The ranch and its brand became the "DHS." That final letter recognized Granville Stuart as the superintendent, who received a salary of \$125 a month to live nearby and care for the main assets of the business.

In 1880, as the new enterprise got well under way, it became evident that Granville played the most important and active role. His partners had invested significant funds, but Granville attended to the daily operation of the company. He invested his time much more than anyone else. But he had the time to invest, and he was willing to relocate his family out on the cattle range. Granville had performed his duties thoroughly and carefully when he worked for Hauser's bank in Helena. He also demonstrated a meticulous honesty when in 1878 the National Comptroller of the Currency appointed him receiver for the failed People's National Bank of Helena. Hauser knew he could trust Granville, but how much could Granville trust Hauser? Hauser made the First National Bank of Helena his own personal business, with family members and friends as the primary investors and with his brother-in-law, Edward W. Knight, employed in the key position of cashier. Hauser used the bank as a source for questionable loans to enterprises in which he and his associates held an interest. In 1877, Hauser had opened another bank in Butte, with Judge Davis as his partner, and by the end of 1879, Judge Davis had in turn become owner of 35 percent of Hauser's Helena bank, although Hauser did retain a majority of all shares. Overdrafts and bad loans nearly closed the First National Bank in 1884, 1888, and 1890, and then it temporarily shut down in 1893. In his wheeling and dealing, Hauser needed to take care of his own interests first. He may have been happy to see the conscientious Granville leave Helena and his bank's board and no longer be a close observer of how it operated.

For his part, Granville seemed delighted by Hauser's support for their opportunity with cattle. Clearly, both men thought they had found a highway to wealth. Yet, as had been the case with the St. Louis and Montana Mining Company, the great profits did not come. Granville borrowed more and more money from Judge Davis to maintain his partnership in the cattle company, while Hauser reduced his financial commitment to the business. For Granville's immediate family, the years at the DHS ranch represented the "best" and "worst" of times. Financially the ranch struggled. Too many other entrepreneurs had the same idea. Their stock overgrazed the range; the weather proved a disaster. Eventually Granville's partners deserted him. Still, Granville became a prominent figure among Montana's cattlemen. He led the

way in reorganizing the Montana Stockgrowers Association. When the territorial legislature established a Board of Stock Commissioners in 1885, he became the first president appointed by the territorial governor, Hauser. A year earlier, in the summer of 1884, he had organized and led a set of vigilantes who killed at least eighteen supposed horse thieves. This group became known as "Stuart's Stranglers." Although these violent extralegal actions were well known, they did not prevent Granville from becoming the first state land agent in 1891 after he left the cattle business. In fact, some prominent eastern newspapers seemed delighted in 1894 when Granville, the notable Western pioneer and notorious vigilante, became the U.S. minister to Paraguay and Uruguay.

While living in Uruguay's capital city, Montevideo, Granville learned of the final closing in late August 1896 of Hauser's First National Bank of Helena. He wrote sympathetically to his old friend, encouraging Hauser to join him in some possible South American mining or cattle investments. Granville gallantly declared, "I wish I had a half million to help you pull through." He expressed relief that he had nearly completed repaying his own debt from the cattle company in Montana. Trying to lift Hauser's spirits, he insisted,

"Come down and join me and we will soon own 500 square leagues and 200,000 cattle and peons (natives who practically go with the land and work for the owner for from \$2.00 to \$5.00 a month) enough to run it and then such hunting, tiger, tapirs, deer, water hogs, alligators, partridges, turkeys, grouse, etc. etc. and never an icicle hanging to your nose or toes, not half the insect nuisance that are in the north, a very healthy country and a chance to rise. Come."⁹

The appointed receiver for Hauser's bank, J. Sam Brown, was not so kind. He described Hauser in his report to the Comptroller of Currency as "a very careless man so far as looking after the details of his business is concerned, and has a very good memory as to what conditions are where it is to his interest, but where it is against his interest his memory is a little faulty at times."¹⁰ Granville did not experience the same financial reversal as Hauser. Living in a beautiful city, he enjoyed the prestige of his position as U.S. minister and the substantial salary attached to the post. If he had found a way to prosper financially in South America, he might never have returned to

9. Letter from Granville Stuart to S. T. Hauser, Oct. 26, 1896 [Letterpress volume IV, unpaginated copy following p. 433, MC 1534, Granville Stuart Collection, L. Tom Perry Special Collections, Harold B. Lee Library, Brigham Young University, Provo, UT].

10. Letter from Sam Brown to James H. Eckels, Mar. 18, 1897 [Box 41, First National Bank of Helena Records, 1865–1903, MC 116, MHS (quoted in Robbins, "Deconstruction of a Capitalist Patriarch," 30)].

Montana, because the days in Montevideo with his much younger second wife, Belle, seemed a most happy interlude for the aging Westerner. A change in presidential administrations brought an end to Granville's diplomatic appointment. He returned to Montana with no obvious means for his livelihood. Soon he and Belle moved to the industrial mining city of Butte, where he tried to get by leasing buildings that operated as rooming houses.

Hauser's financial situation had improved enough for Granville to start requesting loans from his old business partner. In June 1899, Granville urgently asked for \$600 to make payments on the furniture in his rooming house. In September, he needed another \$500 from Hauser to maintain the same property that he said stayed "full from garret to cellar." That year the *Butte City Directory* listed Granville as renting furnished rooms at 107 West Quartz.¹¹ As he scrambled to make ends meet with his rental properties, Granville began to look through the copies of personal letters and business documents that he had retained since the late 1860s. A close examination of these papers led him in the spring of 1900 to launch a major legal case against his old friend. If his financial affairs with Hauser could be set aright, Granville believed he was due more than \$800,000. From his extensive personal records, Granville noticed that various sales and other agreements with Hauser had not resulted in a correct financial settlement. For example, money from two transactions in 1879 and 1881 involving stock in the Hope and Parrot Mining Companies in Montana had never been paid to Granville by Hauser or applied against his debt at Hauser's First National Bank of Helena. Nearly twenty years of interest at the rate Granville had to pay the bank came to \$29,604.60. He pleaded, "Sam, had you placed these amounts to my credit at the time you received them I would not now be deeply in debt to the bank, and again Sam, you should remember the many, many times I risked my life while making large sums of money for you and the Davises without any benefit to myself and should pay me what you justly owe me."¹² Hauser never paid this sum, but Granville found an even larger financial discrepancy concerning his ownership of seven-sixteenths of the White Monument, Helena, and Peacock quartz lodes in the Seven Devils Mining District located in Washington County, Idaho. This dispute became the basis for an extended lawsuit. Hauser had wanted to develop copper mines along the Snake River. Beginning in the mid-1870s, Granville had joined Hauser in these Idaho endeavors, often as an equal partner. Then in 1890, Hauser asked Granville for the deed on his Seven Devils mining claims. Granville assumed that the deed would be treated as a

11. Letter from Granville Stuart to S. T. Hauser, June 23, 1899; Letter from Granville Stuart to S. T. Hauser, Sept. 30, 1899 [Letterpress volume V, 209, 273, MC 1534, Granville Stuart Collection, Lee Library, BYU]; *Butte City Directory* 1899 (Butte, MT: R. L. Polk & Co., 1899), 433.

12. Letter from Granville Stuart to S. T. Hauser, Nov. 18, 1900 [Folder 59, Box 26, Hauser Collection, MC 37, MHS].

mortgage, since Hauser needed it to secure Granville's ongoing debt to the First National Bank of Helena. That obligation came from Granville's investment in the Pioneer Cattle Company, the business that owned the DHS ranch.

Hauser never provided a written mortgage agreement. Granville had trusted him too readily, later asserting that the two men had an understanding. Granville's deed helped Hauser in the aftermath of a bank audit. A comptroller from the federal government noticed Granville's large unsecured loan, which stood at \$37,033 in 1890. Hauser wanted the deed in hand as collateral to satisfy the comptroller's insistence that Granville's debt be bolstered. A mortgage could have worked, but that is not how Hauser played the game. He restructured Granville's financial arrangements, dividing the debt into four parts—two notes to the bank of \$12,500 and \$12,533, secured by a mortgage on Granville's Montana properties, and two drafts from Hauser's personal account of \$6,000 each, for which he received the deed to seven-sixteenth of the Seven Devils mines in Idaho. Hauser seemed to have shuffled some papers to his own benefit with no financial reward for Stuart. Among other actions, Hauser financed a \$40,000 bond supported by what had been Granville's Idaho mining stock. When he later learned of this transaction, Granville believed he should have any income generated by the bond because he had not sold his interest in the Seven Devils mining claims.¹³ If Hauser had treated the deed as a mortgage and not a sale, then Granville would have had a just complaint. But obviously Hauser considered himself the owner of the deed without restriction.

After the 1895 sale of his Pioneer Cattle Company stock by the estate of Judge Davis, Granville retained an obligation of \$3,378.49 to the First National Bank of Helena. If Granville had relinquished his ownership of the Idaho properties as Hauser claimed, then at least \$12,000 from the sale of his deed should have been applied in 1890 from Hauser's personal accounts against the total debt. By 1895, Granville should have owed nothing to the bank. Hauser did not do this in 1890, perhaps because he did not have the money to cover his own personal notes at the time. When his bank failed for good in 1896, the settlement with the receiver had the notes given to Hauser and

13. Letter from Granville Stuart to Milton G. Cage, May 14, 1900 [Letterpress volume V, 378–87, MC 1534, Granville Stuart Collection, Lee Library, BYU]; Letter from S. T. Hauser to Granville Stuart, July 27, 1895, F 5, B 5; *Idaho Daily Statesman*, Mar. 28, 1902, clipping, F 2, B 5 [MC 171 William Wallace, Jr. Papers, MHS]. Wallace served as the lawyer in Montana for *Hauser et al.* in the Seven Devils case. The 1895 letter from Hauser to Stuart gives exact figures for Granville's debt after the sale of the Pioneer Cattle Company stock. The written opinions by two judges of the Idaho Supreme Court in 1903 provide extensive details about the financial aspects of this case. See *Stuart v. Hauser et al.*, 9 Idaho 53, 72 Pac. 719 (1903).

marked as paid by him. As a result, Granville never received \$12,000 and no longer had clear title to his Idaho investments. Even worse, if Hauser had valid ownership, then Granville had lost a potential fortune. He had learned that nearly a decade after Hauser's financial paper shuffling, the White Monument, Helena, and Peacock quartz lodes were worth at least \$1 million.

A prominent investor from Helena named Albert Kleinschmidt had given Granville this million-dollar figure, having acquired his own separate seven-sixteenths ownership in the same Idaho mining claims. In May 1900, Kleinschmidt began to aid Granville in his case against Hauser by retaining Milton G. Cage, a lawyer in Boise, Idaho. By December of that year, Granville told Cage that Kleinschmidt had set up a secret deal with another man to pay Granville \$777,777 for his seven-sixteenths ownership if he won the lawsuit. Kleinschmidt expected to receive the same amount for his equal holdings.¹⁴ The suit Cage filed named not only Hauser but also other investors working with him in the development of the Seven Devils property. Hoping for a financial bonanza, Granville and Belle moved to Boise, Idaho, perhaps as early as the spring of 1901. The formal filing occurred on March 5 in Weiser, Idaho, in the Third Judicial District Court. The trial began on November 7. The court had to examine a massive amount of documentation and hear extensive testimony. The local press reported regularly on developments in the trial, at one stage indicating, "there are about a quarter of a ton of bank account books which have still to come forward."

Granville testified for two days and was followed by Kleinschmidt as a witness for the plaintiff. Granville said that what he believed would be a mortgage for the Seven Devils holdings was not mentioned to him in conversation with Hauser as being a deed. As reported in the *Idaho Statesman*, Granville was surprised that the document sent to him for his signature was "in the form of a deed, but he had absolute confidence in Mr. Hauser and supposed the latter would protect his interests in the Seven Devils property. His understanding was that Hauser held the property in trust for him." Kleinschmidt then testified that Hauser told him that Granville still had an interest in the Seven Devils mines, which should mean that Granville would be paid if a sale occurred.

After the November sessions, the lawyers agreed to postpone final arguments until late January to permit the court stenographer time to

14. Letter from Granville Stuart to Milton G. Cage, Dec. 9, 1900 [Letterpress volume VIII, 15, MC 1534, Granville Stuart Collection, Lee Library, BYU]. This letter tells Cage about the secret offer of \$777,777 for Granville's seven-sixteenths ownership. It appears out of sequence at the first of this letterpress volume with several other letters from 1900. Letter from Granville Stuart to Milton G. Cage, May 14, 1900 [Letterpress volume V, 378–87, MC 1534, Granville Stuart Collection, Lee Library, BYU]. This letter states that Kleinschmidt has written to Stuart about retaining Cage for the lawsuit.

transcribe what amounted to over five hundred pages of testimony.¹⁵ After hearing concluding statements from counsel on January 25, 1902, Judge Steward indicated that his decision might take up to sixty days. Two months later, he ruled in what the *Idaho Daily Statesman* called “the famous Seven Devils mining case.” The full text of his decision appeared in the newspaper. The judge noted that for nine years, Granville had made no claim that the deed held by Hauser was instead a mortgage. Hauser meanwhile paid all taxes, all bills, and all financial obligations connected to the Seven Devils property. Nothing was charged against Granville’s account at the First National Bank. Granville explained that he had been silent because of his trust and confidence in Hauser. “This degree of confidence is unparalleled, and casts suspicion on the plaintiff’s contention that the instrument in question was intended as a mortgage.”¹⁶ In other words, Judge Steward did not believe Granville, and he decided in favor of Hauser. Listed among the victorious defendants were Hauser’s frequent mining partner, Anton Holter, and Charles W. Whitcomb, the very person who had the secret agreement to buy the holdings of Granville and Kleinschmidt for a total of more than \$1.5 million.

A Massachusetts lawyer who served as that state’s fire marshal, Charles Whitcomb lived extravagantly in Boston and also had a country home in New Hampshire, where he employed three servants and a coachman. An active investor in the Boston and Seven Devils Copper Company, Whitcomb sometimes corresponded with Hauser and Holter using the letterhead of that business. He wanted to control the Seven Devils district in coordination with Lewis A. Hall, president of the Pacific and Idaho Northern Railroad, who had founded the Boston and Seven Devils Copper Company. An eastern capitalist with a multimillionaire father, Hall even more than Whitcomb may have financially backed the offers to buy out Kleinschmidt and Stuart.

Why did Hall and Whitcomb not make a similar offer to Hauser if he obtained an unclouded title? Another legal entanglement explained what unfolded. Hauser and Anton Holter had filed a suit a few months earlier to partition the Seven Devils property. They wanted to operate their mining interests separately from those of Kleinschmidt. This action upset Whitcomb and Hall, who wanted to make improvements at the Idaho property as a unified business and have Hall’s railroad link to the site as well. In the public announcement of the partition case, Granville did not see his name listed among the owners. At that time, as he explained in his later lawsuit against Hauser and others, he wondered where his deed stood. Granville discovered that Hauser now claimed ownership of his investment.

15. “Seven Devils Case,” *Idaho Statesman*, Nov. 9, 1901; “Big Mine Contest,” *Idaho Statesman*, Nov. 10, 1901; “Mining Case Argued,” *Idaho Statesman*, Jan. 25, 1902.

16. “Seven Devils Case Decided,” *Idaho Statesman*, Mar. 28, 1902.

Whitcomb and Hall wanted to purchase Kleinschmidt's holdings. Holter supported this effort because, as he informed Hall, he would never work with Kleinschmidt as a partner. That explained the partition suit: get rid of Kleinschmidt, and the mining operations could be unified again. Holter even offered to set up a partnership involving Hauser, Hall, and Whitcomb to purchase Kleinschmidt's interests. If Hall did not want such a partnership, Holter offered to sell his and Hauser's interests in the Seven Devils property "at a reasonable price." The two easterners could then control the entire property. Yet to make this purchase, Holter insisted that Whitcomb cancel his agreement with Stuart. Obviously, this arrangement no longer remained a secret.¹⁷ Neither Whitcomb nor Hall had any reason to cut off Granville until the courts decided whether he held clear title or not. These eastern capitalists knew that Granville would sell his Idaho holdings. He needed the money and had no resources to operate a mine. Hauser, on the other hand, by 1901 had emerged from the dark days after the closing of his Helena bank. He may have seen the Seven Devils lode as a way to rebuild his wealth. But if he did agree to the sale, despite his partner Holter's assurances, Hauser always drove a hard bargain. For these reasons, the interests of Kleinschmidt, Granville, Hall, and Whitcomb became entwined. While Granville lived in Boise and worked with his legal team, the three other men may have provided hidden financial support, believing that orchestrating a sale with Granville would be much easier than dealing with the wily Hauser.

The potentially high rewards from Granville's lawsuit made an appeal to the Idaho Supreme Court worthwhile. Another lawyer, Alfred A. Fraser, joined Milton G. Cage in this second presentation of *Stuart v. Hauser et al.* William E. Borah, later a U.S. senator from Idaho, once more provided lead counsel for the defendants. Many months passed before the three judges of the court produced their decision on April 9, 1903. Two upheld the district court's

17. Letter from Charles W. Whitcomb to S. T. Hauser, June 1, 1900 [Folder 26, Box 2, MC 37, Hauser Papers]; Letter from A. M. Holter to Lewis A. Hall, Oct. 14, 1901 [Folder 5, Box 143, MC 80, A. M. Holter Papers, MHS]; Hakola, "Samuel T. Hauser," 308–9; "Site Report—Seven Devils," *Idaho State Historical Society Reference Series*, no. 116, rev. Dec. 1981, <http://www.idahohistory.net/Reference%20Series/0116.pdf> (accessed Apr. 15, 2007). The site report contains information about the role of Hall, Kleinschmidt, Holter, and Hauser in the development of the Seven Devils mining district. The 1900 census enumerated Whitcomb and his family twice, once at their Boston hotel residence, where they employed three Irish servants, and again at the house in Stratham, N.H., with the same three servants plus a coachman. In 1900, Whitcomb was listed as "Lawyer and State Fire Marshall." In 1910, still at his Stratham residence, the census showed his occupation as coal and iron mine owner. (Email message of Apr. 2, 2007, from Jeff Malcomson, Government Records Archivist, MHS).

ruling, whereas one judge dissented. That dissent showed that Granville had a legal argument worthy of thoughtful consideration. In the majority opinion, Chief Justice Isaac N. Sullivan regarded the document as an “absolute deed” and not a mortgage. The legal evidence seemed abundantly clear.

But in his dissent, Justice James F. Ailshie, who later served four separate terms as chief justice, saw that Hauser had abused a long-standing relationship based on friendship and trust. Twice Granville had given Hauser power of attorney in terms of significant financial arrangements. On May 20, 1882, Granville and his first wife, Awbonnie, had authorized Hauser “to sell, bond, or in any manner dispose [of]” their mining claims in the territory of Idaho. Later, on April 2, 1894, before departing to South America, Granville and Belle had given Hauser effective control of their property and interests in Montana.

Even before the disputed deed appeared, Hauser used the first power of attorney to sell another part of Granville’s Idaho mining properties to Kleinschmidt for \$10,600. Justice Ailshie pointed out that Hauser received a portion of this money “in October, 1886, and the remainder in January, 1887, during the severe winter in which Granville lost so many cattle and was having his hardest struggles to maintain his business.” In some of Granville’s darkest days, when Hauser went along with the replacement of Granville as superintendent of the DHS ranch, he also had money that belonged to Granville. Justice Ailshie said that Hauser kept the entire sum until October 1890 but left unclear what happened next. He did conclude that even after Hauser acquired the deed on Granville’s portion of the Seven Devils lode, Granville continued with the same obligation to the bank and to Hauser. The transaction therefore functioned as a mortgage and not a sale to liquidate a debt. He also recognized that Granville waited more than a decade to bring suit because he confidently assumed that he had retained ownership. Ailshie believed Granville more than Hauser, but his two colleagues on the bench did not concur.¹⁸ Encouraged by Ailshie’s opinion, Granville’s lawyers asked for a rehearing. The court acted swiftly, and on June 15, 1903, it denied the request by the same vote. Ailshie had not changed his views, but neither had the other two justices. Granville could have asked the United States Supreme Court to hear his case, but his lawyers advised him not to do so. Nonetheless, Granville stayed on in Boise for more than a year. Then, shortly after he returned to Butte, in October 1904, a lawyer from New York City, George B. Colby, said he wanted to reopen the lawsuit against Hauser. This time, Reinhold Kleinschmidt, Albert’s brother, had contacted the lawyer for Granville. Colby

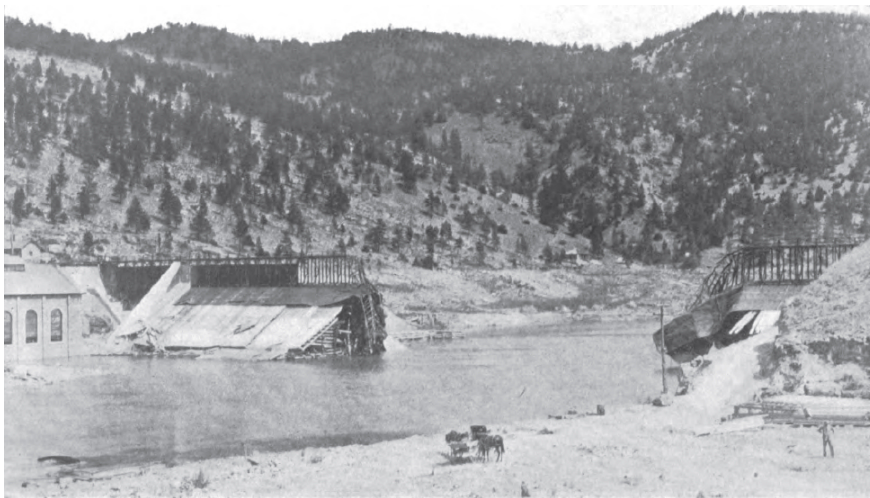
18. *Stuart v. Hauser et al.*, 9 Idaho 53, 72 Pac. 719 (1903); “James Franklin Ailshie (1868–1947),” The American Bar Association in Idaho, <http://politicalgraveyard.com/geo/ID/aba.html> (accessed Sept. 30, 2021). In 1945–46, Ailshie served his fourth and final term as chief justice of the Idaho Supreme Court.

wanted half of any property or monies received if the case proved successful. This new lawyer would assume all expenses for the legal action, and Granville would pay nothing. Requesting a relinquishment from each member of his old legal team, Granville explained that he “had no faith in accomplishing anything” but hoped that “some miracle” might occur.

It did not happen. More than two years later, on December 3, 1906, with George B. Colby as counsel for the plaintiff, the United States Supreme Court dismissed the case for want of jurisdiction. That same year, the State Mine Inspector for Idaho, R. M. Bell, concluded that the Seven Devils district “has been badly handicapped since its discovery by title litigation and some of the rankest kind of mining mismanagement. A large amount of capital has been expended on several different properties...without definite results in the way of intelligent development.”¹⁹ Bell’s observation may have captured the reason that Hauser deemphasized his mining investments in the aftermath of his legal victory. Instead, he focused his efforts on developing hydroelectric power in Montana. At first, he formed a financial alliance with Henry H. Rodgers of Standard Oil, who looked favorably on developing various sites along the Missouri River. However, Hauser’s ambitions did not succeed in these endeavors. In April 1908, the ill-fated Hauser Dam on the Missouri River collapsed due to abnormally high waters. Downstream damage was severe, and Hauser stood on the brink of financial failure. He held on for two more years, but the cancellation of a vital power contract by the massive Amalgamated Copper Company sealed his fate. The executive board of his

19. *Stuart v. Hauser et al.* on rehearing, 9 Idaho 82, 72 Pac. 729 (1903); *Granville Stuart, Plaintiff in Error v. Samuel T. Hauser et al.*, 203 U.S. 585 (1906); Letter from Granville Stuart to R. H. Kleinschmidt, Oct. 17, 1904, Letterpress volume VI, 444; Letter from Granville Stuart to George B. Colby, Oct. 17, 1904, Letterpress volume VI, 443; Letter from Granville Stuart to Milton G. Cage, Oct. 18, 1904, Letterpress volume VI, 446; Letter from Granville Stuart to A. A. Fraser, Oct. 19, 1904, Letterpress volume VI, 447; Letter from Granville Stuart to George B. Colby, Dec. 12, 1904, Letterpress volume VI, 480 [MC 1534, Granville Stuart Collection, Lee Library, BYU]; R. M. Bell quoted in “Site Report—Seven Devils,” 6.

own company removed Hauser from effective control of the business. He settled into a quiet life and passed away on November 10, 1914, in Helena at age eighty-one.²⁰ Granville survived longer than Hauser but did not fare any better. Beginning in 1905, he found suitable long-term employment in Butte as the director of the city's public library. Granville held this position until the second term of the Socialist mayor, Lewis Duncan, who engineered the removal of the old pioneer and Democrat on May 4, 1914. Granville then focused his energies in his final years on compiling his personal recollections and composing a pioneer history of Montana. He finished neither book before his death on October 2, 1918, at age eighty-four in Missoula. Belle saw to the posthumous editing and publication of Granville's memoirs, which appeared in 1925 in two volumes with the title *Forty Years on the Frontier as Seen in the Journals and Reminiscences of Granville Stuart, Gold-Miner, Trader, Merchant, Rancher and Politician*. It remains in print to this day and is considered a classic account of life in the far West.²¹



Looking upstream at Hauser Dam in Lewis & Clark County, Montana, United States, in 1908 after the steel dam's catastrophic collapse on April 14, 1908.

Granville spent more than forty years in Montana, but his published reminiscences conclude in 1890 at the end of his days as a cattleman, before his marriage to Belle and well before his legal case against Hauser. Granville

20. Robbins, "Deconstruction of a Capitalist Patriarch," 32.

21. Granville Stuart, *Forty Years on the Frontier as Seen in the Journals and Reminiscences of Granville Stuart, Gold-Miner, Trader, Merchant, Rancher and Politician*, ed. Paul C. Phillips (Cleveland: Arthur H. Clark Co., 1925; Lincoln: University of Nebraska Press, Bison Books, 1977). The most recent Bison Books paperback edition republished in one volume in 2004 retained the pagination and full text of the original two-volume edition.

no doubt felt betrayed by his old friend, but he should have known Hauser well enough through all their elaborate dealings not to sign a deed when he expected to be signing a mortgage. He obviously wanted Hauser to follow a code of honor that supposedly had existed since their early days as pioneers. Of course capitalism could always trump camaraderie. Both Hauser and Granville wanted friends, but they also wanted money. Ideally, they wanted friends with money who could help them make more money. Hauser did better than Granville in this realm by exploiting others and showing no conscience about the consequences. His notion of friendship did not match Granville's idealized version. A court of law could not resolve these different points of view. It could determine ownership of mining property but not reverse feelings of betrayal and exploitation.



*Christian Winn**

IDAHO SCRAPBOOK

There's this narrow grey-black
twine-held scrapbook
all photographs of our family
in Idaho
1920's
that my Uncle Joe handed me,
gifted me,
one years-gone summer down 8th Street
in Boise, caddy corner
from the dead and gone
Hollywood Market that
(well, you know)
is a yoga studio now.

We're in the hushed white bungalow
where my great grandmother Agnes
lived with pride
until her 97th year,
and Joe hands me this scrapbook
filled with unsteady, yellowing stills
of old boys
and no girls
all in their wood-pole canvas tents,
Model A's parked close,
all in their crooked smiles,
mostly happy and confused and
waiting for their country
to make sense of itself
finally and for sure,
and yes
they were smelling of rye
and chaw
and bring it on,
and yes,
they caught all the fish
in all the rivers
as for instance
in this scrapbook here
there are dead-fish strings
of fifty Dolly's
several Rainbows
maybe a Brownie or two
and whatever bottom fish
they might want to occasionally snag.

all opalescent in the bright mountain morning,
shimmering and plated
wishful and suddenly dead,
lined up and picture ready.

And these are photographs,
static and made
anachronistic in the two-dimension
of pre-Depression Idaho, while
so many years have passed,
all this remains familiar and close,
coursing our notebooks,
hanging from our bookshelves,
posing atop
our coffee tables,
our desktops, precious
just like all the trips
we will make into those
same torn-up mountains,
or down 8th St. and up 12th,
amid all the flags, all the unknowing,
all the surety remaining
akin to the near distance
of these ancient photographs
where there are also birch trees
pocked up with late summer chatter,
there remains the grey river bend,
the pack mules,
the stone white greed of dredge ponds,
the arrogant fire scar impatiently waiting to be,
the why and what might we do
but sigh and smile and
set this scrapbook back
on the hutch our great grandmother gifted us, too,
the one done up
with filigree and Fleur de Lis
and cigarette scars,
then later what might we do
but set these images on the desk
and write otherwise thoughts
for some people like so many of you
who think all the boys
got it right those years ago.

* Christian Winn is a fiction writer, poet, teacher of writing, and producer of literary and storytelling events. He is the author of the short story collections, *NAKED ME* and *What's Wrong With You is What's Wrong With Me*. His work has appeared in *McSweeney's*, *Ploughshares*, *Glimmer Train Stories*, *The Chicago Tribune's Printers Row Journal* and elsewhere. He is the co-founder and Director of Storyfort, founder of the Couch Surfer Artist Series, *Bloom*, and *Campfire Stories*. He served as the Idaho Writer in Residence from 2016 - 2019. He lives and works in Boise, Idaho.



Richard C. Tallman and Morgan D. Goodin***

TUMULT TO ORDER:

The Federal Courts In North Idaho

The early years of the Idaho Territory featured power struggles between the different branches of government, uncertainty about the statutory code, and tensions between the burgeoning bar and the territorial bench. These conflicts were particularly acute in North Idaho, known to the locals as the Panhandle. But the early Idahoans persevered and laid a strong foundation on which the state has thrived, and, in a more literal sense, the grand federal courthouses of past and present represent the stability of government, the enduring authority of the judiciary, and the importance of the Rule of Law in settling the West.

Early Idaho Jurisprudence

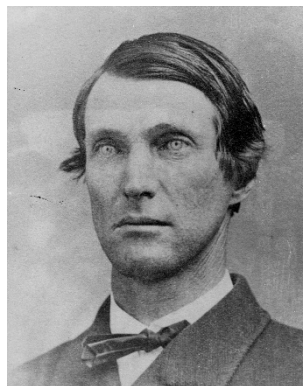
Soon after signing legislation making Idaho a territory in 1863, President Abraham Lincoln appointed the first three justices of the Idaho Territorial Supreme Court: Sidney Edgerton, Samuel Parks, and Alexander C. Smith.¹ The

*Judge Tallman is a United States Circuit Judge for the Ninth Circuit Court of Appeals with chambers in Coeur d'Alene, Idaho. He also served as a Judge on the Foreign Intelligence Surveillance Court of Review from January 2014 through January 2021. Judge Tallman thanks the judges of the District of Idaho for their gracious willingness to accommodate their new colleague in the U.S. Courthouse in North Idaho when he moved from Seattle in 2018.

**2020-2021 Term Law Clerk to Judge Tallman. The authors also thank law clerks Michelle Cornell-Davis and Riley Clifton; Emily Donnellan, the Boise Librarian for the United States Courts; and Stephen Shepperd of the Museum of North Idaho for their research assistance.

1. Hon. Merlin Young, "Territorial Days to Statehood: Pragmatic Beginnings," in *Justice for the Times: A Centennial History of the Idaho State Courts*, ed. Carl F. Bianchi (Boise: Idaho Law Foundation, 1990), 9; Bradley B. Williams, "Idaho's First Territorial Judges," Idaho Legal History Society, 2014, https://www.id.uscourts.gov/Content_Fetcher/index.cfm/Idahos_First_Territo

territory was divided into three judicial districts, and each justice sat as the trial court judge for a given district.² Sidney Edgerton, named the first chief justice, never presided over a term of court. As was typical of territorial appointments, he was an Eastern lawyer. He did not trek far enough west to even reach Idaho, stopping in the Montana Territory and becoming its first governor in May 1864.³ Justice Parks served only a brief stint before resigning his appointment in 1865. He swore in the Idaho Territorial Legislature in 1863 and convened the territory's first trial court in January 1864.⁴ Justice Smith, on the other hand, made his mark on early territorial legal history by playing a pivotal role in the heated dispute over the location of Idaho's capital.



Aleck C. Smith, P1963-51-30.
Courtesy of Idaho State Archives.

Where to Place the Capital

The congressional act organizing the territory empowered Governor William H. Wallace, the first territorial governor, to select a temporary location for the capital.⁵ Governor Wallace chose Lewiston—the nearest point to his home in Steilacoom, Washington.⁶ Lewiston's location at the confluence of the Snake and Clearwater Rivers had initially attracted miners, but the Clearwater's gold deposits had been largely depleted by 1863. Many miners moved to the Boise Basin to strike gold.⁷ The southern contingent in the legislature then set its gaze on moving the territorial capital south.

rial_Judges_1282.pdf?Content_ID=1282. Different sources refer to Judge Smith as Alexander, Aleck, and Alleck.

2. Organic Act of the Territory of Idaho, ch. 117, 12 Stat. 808 (1863).

3. James H. Hawley, *History of Idaho: The Gem of the Mountains* (Chicago: S. J. Clarke, 1920), 159, 587.

4. Williams, "Idaho's First Territorial Judges."

5. Organic Act of the Territory of Idaho, ch. 117, 12 Stat. 808 (1863); Eugene B. Chaffee, "The Political Clash Between North and South Idaho over the Capital," *Pacific Northwest Quarterly* 29, no. 3 (July 1938): 255.

6. Chaffee, "The Political Clash," 255; Merle W. Wells, "The Creation of the Territory of Idaho," *Pacific Northwest Quarterly* 40, no. 2 (Apr. 1949): 120.

7. Wells, "The Creation of the Territory of Idaho," 106; James Dawson, "How Did Idaho's Capital Move from Lewiston to Boise?," Boise State Public Radio, Jan. 2, 2018, <https://www.boisestatepublicradio.org/idaho-news/2018-01-02/how-did-idahos-capital-move-from-lewiston-to-boise>.

In December 1864, the Territorial Legislature moved the capital to Boise, and Governor Caleb Lyon approved the bill.⁸ After suffering defeat at the hands of the legislative and executive branches, the Lewiston contingent turned to the judiciary. A probate judge enjoined Governor Lyon from both leaving Lewiston and removing the territorial records.⁹ The injunction would be reviewed by the Supreme Court Justice designated to sit as the trial court judge for the district: Alexander C. Smith, a twenty-five-year-old whose father-in-law was close friends with President Lincoln.¹⁰

The outlook was good for Lewiston, as Justice Smith was a “rabid partisan of Lewiston.”¹¹ But the Lewiston contingent faced one hiccup. A successful prosecution of the “suit for the retention of the capital at Lewiston seemed to demand the arrest of the governor, but to arrest that dignitary meant, in the first place, to catch him.”¹² Getting wind of this plan, Governor Lyon engineered quite an escape. Under the pretext of a duck-hunting trip, armed with a shotgun, he embarked in a frail canoe, which “became unmanageable” in the current and carried him down the Snake River to White’s Ferry.¹³ From there, a carriage whisked him off to Walla Walla, Washington. That was the last time Governor Lyon was seen in Lewiston.¹⁴



Governor Caleb Lyon, portrait by Matthew Benjamin Brady. Courtesy of the Library of Congress.

Having made good his escape, Governor Lyon sent Major Sewall Truax, a retired U.S. Army officer, to Lewiston to remove the laws, seal, and archives to Boise.¹⁵ Because Governor Lyon sought sanctuary in Walla Walla, his absence from the Idaho Territory gave Acting Secretary Silas Cochran gubernatorial power.¹⁶ Cochran protected the public records in Lewiston.

8. Hawley, *History of Idaho*, 159; Chaffee, “The Political Clash,” 260.

9. Annie Laurie Bird, “A Footnote on the Capital Dispute in Idaho,” *Pacific Northwest Quarterly* 36, no. 4 (Oct. 1945): 344; Chaffee, “The Political Clash,” 260.

10. Williams, “Idaho’s First Territorial Judges.”

11. Chaffee, “The Political Clash,” 265.

12. Hawley, *History of Idaho*, 159.

13. *Ibid.*

14. *Ibid.*

15. Chaffee, “The Political Clash,” 262.

16. *Ibid.* The Act organizing the Idaho Territory established an executive branch consisting of a governor and a secretary. During the

Governor Lyon responded by sending Major Truax back with a document removing Cochran from his post.¹⁷ Cochran deemed the governor's order invalid because it was issued from outside the territory.¹⁸

The tug-of-war found its way to court, where Justice Alexander Smith denied Major Truax's application for a writ of mandamus to force Secretary Cochran to step down.¹⁹ Justice Smith ruled: "(1) that the governor had neither power to remove [n]or appoint a secretary, (2) that he had no authority over the seal or archives of the territory, [and] (3) that there was no office of custodian of laws either in the organic act that made Idaho a territory or in the laws passed by the sessions of the [territorial] legislature."²⁰

Meanwhile, President Lincoln appointed a new secretary, Clinton De Witt Smith, who arrived in Lewiston in March 1865.²¹ Despite the injunction to keep the seal and archives in Lewiston, Secretary Smith, accompanied by a ten-man armed escort from the U.S. Army, removed the seal and part of the archives in late March and arrived safely in Boise with these instruments of government on April 14, 1865.²² Because the Lewiston contingent still retained some of the archives, the capital dispute was far from settled.

Three days after Secretary Smith arrived in Boise, Justice Smith upheld the probate judge's injunction and declared, "The Capital of this Territory is at Lewiston."²³ Issuing a permanent injunction, Justice Smith found that all acts of the 1864 legislature were invalid because of procedural violations.²⁴ He ruled that when the legislature convened in late 1864, it began the legislative session on a day other than that fixed by law, thereby invalidating all enactments.²⁵ The federal government finally intervened and sent orders for the U.S. Marshal to remove the remainder of the territorial archives and

governor's vacancy or absence, the secretary took on the "powers and duties of the governor." Organic Act of the Territory of Idaho, ch. 117, 12 Stat. 808 (1863). The office of Lieutenant Governor was later established in 1890, when Idaho became a state. See Idaho Const. art. IV, § 12.

17. Chaffee, "The Political Clash," 262.

18. Ibid.

19. Bird, "A Footnote on the Capital Dispute," 344.

20. Chaffee, "The Political Clash," 262.

21. Merle W. Wells, "Clinton De Witt Smith," *Oregon Historical Quarterly* 52, no. 1 (Mar. 1951): 43.

22. Wells, "Clinton De Witt Smith," 45–46.

23. Chaffee, "The Political Clash," 265.

24. Ibid., iv.

25. Hawley, *History of Idaho*, 159, 587.

carry the records down to Boise.²⁶ The Marshal executed those orders in October 1865.²⁷

When the Territorial Supreme Court finally convened for its first session in 1866, it reversed Justice Smith and upheld the acts of the 1864 legislature in an oral decision.²⁸ Justice Smith stood by his earlier decision and dissented.²⁹ Due to miscommunication, the decision was never published. The local newspaper and the minute book of the Supreme Court retain the only records of this final chapter on the location of the capital.³⁰ The city of Boise has remained the capital of Idaho ever since.

Establishing the Code of Idaho

The Territory's statutory code experienced its own tumultuous start. Over the years, Congress had carved new territories out of previously existing territories as the country expanded westward.³¹ To bridge the gap in time before the citizens of a new territory could establish and elect representatives to a territorial legislature to enact local laws, Congress usually provided for the continuation of the earlier territory's laws. Idaho's boundaries encompassed land from various existing territories, including the Washington and Dakota Territories, each with its own laws, and Congress "neglected to make specific provision for which earlier territory's laws should [remain] in effect before the Idaho [T]erritorial [L]egislature could convene."³² Then the first Territorial Supreme Court ruled that no law was in force during those first few months of the Idaho Territory's existence.³³ As a result, an accused murderer was set free and several convicts were released.³⁴

26. Ibid., 160.

27. Ibid.

28. Bird, "A Footnote on the Capital Dispute," 344.

29. Ibid.

30. Ibid.

31. Monique C. Lillard, "The Federal Court in Idaho, 1889–1907: The Appointment and Tenure of James H. Beatty, Idaho's First Federal District Court Judge," *Western Legal History* 2, no. 1 (1989): 35.

32. Ibid., 38–39.

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

34. Dennis C. Colson, "Lawless Idaho: *The People v. John Williams*," *Advocate* (Idaho State Bar), 56, no. 9 (Sept. 2013): 50–51. Idaho did not have a prison until the Idaho Territorial Penitentiary opened in Boise in 1872. It originally housed up to forty inmates in a three-tiered cell house. The presidentially appointed U.S. Marshal served as its warden until statehood in 1890. Jerry Clapp, *The Warden's Son* (McCall: Hidden Shelf Publishing House, 2021), 5.

But the troubles didn't end even after the Idaho Territorial Legislature met and promptly adopted some statutory law based on the Code of California.³⁵ The first Territorial Legislature printed these codes. However, the second Territorial Legislature repealed them and enacted new codes in 1864. The Territorial Secretary, H .C. Gilson, responsible for printing the new codes absconded to Hong Kong with the entire treasury in early 1866, and the codes remained unpublished for some time, perpetuating the confusion.³⁶

Tumult in the Territorial Courts

To further aggravate the situation, the bar and the early territorial judges did not always see eye to eye on jurisprudential practices. The legal term known as a "demurrer" is the legal equivalent of the defendant saying, "So what?" in response to the filing of a civil suit. Today we know this as a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a cognizable claim. James H. Hawley, an early Idaho lawyer, tells of one of the first court sessions held in Idaho after long delays in getting the court established:

[The] learned judge...so the legend goes, without explanation, comment or reasons given, proceeded to decide the legal questions involved in the various cases by overruling the demurrer in the first case argued and sustaining it in the second;... and, with absolute impartiality, alternately so continued until all were disposed of. To the consternation of the members of the bar, the court provided no explanation for resolving the legal questions involved by each decision rendered. Attorney E. D. Holbrook, who afterwards represented the territory in Congress for two terms, and who was then one of the most prominent members of the bar, rose to address the court on behalf of all the lawyers present, respectfully asking the court for the reason behind its rulings upon the several demurrers so that the attorneys could have the benefit of the court's reasoning in preparing their amended pleadings and in the future conduct of their cases. The learned judge immediately responded, "Mr. Holbrook, if you think a man can be appointed from one of the eastern states, come out here and serve as a judge in Idaho on a salary of \$3,000 a year, payable in greenbacks worth forty cents on the dollar, and give reasons for everything he does, you are mightily [*sic*] mistaken."³⁷

35. Lillard, "The Federal Court in Idaho," 39; Young, "Territorial Days to Statehood," 7.

36. Wells, "Clinton De Witt Smith," 52–53.

37. James H. Hawley, "The Judiciary and the Bar," in Hiram T. French, *History of Idaho, A Narrative Account of Its Historical Progress, Its People and Its Principal*

The territorial bar often saw these presidential appointees, Easterners benefiting from the spoils system, as unqualified and unfamiliar with the challenges of life on the frontier.³⁸ So the bar took matters into its own hands. J. W. Hart, a Clerk of the Idaho Supreme Court, recounts that a young attorney did what every disgruntled lawyer yearned but lacked the courage to do: He “secretly wrote out Judge X’s resignation, signed his honor’s name, and forwarded it to [the nation’s capital]. The first notice Judge X had of the proceedings was when his successor appeared on the ground with the President’s commission in his pocket.”³⁹

But the internecine disputes between the branches of government were not the only source of turmoil contributing to the growing pains of the territory. Historical records of correspondence maintained by the Department of Justice document the territorial judiciary denouncing salaries as inadequate to cover the costs of riding circuit;⁴⁰ complaining of a lack of funds to pay jurors, witnesses, and other court costs;⁴¹ inquiring whether the judges’ meager federal salaries could be supplemented by territorial or other local sources;⁴² and disputing whether the territorial judges could be removed from office by presidentially appointed successors on change of political administration.⁴³ Indeed, justice was difficult and costly to administer in Idaho’s early days; as the Clerk of the Supreme Court of the Territory wrote to the Attorney General, at times cases were left in want of adjudication for extended periods, “[w]hich has been detrimental to the proper administration of law and equity in regard to the public interest—and that of individual

Interest (Chicago: Lewis Publishing Company, 1914), 1: 510–11.

38. Young, “Territorial Days to Statehood,” 9–10.

39. Clark Bell and J. W. Hart, “Judicial History of Idaho,” *Southern Bench and Bar Review* 1, no. 6 (1913): 405. The identity of Judge X has been lost to unrecorded history.

40. Clerk of the Supreme Court of Idaho Territory A. S. Downer to the Attorney General, Nov. 13, 1865, in *Letters to the Attorney General, 1809–1870: Western Law and Order*, ed. Frederick S. Calhoun (Bethesda: University Publications of America, 1996). (“There is no doubt that the pay of the Judges is too small for their services and the hearing expenses they are subject to in this Territory.” [Copy on file with authors.]).

41. U.S. District Attorney for Idaho Territory James Huston to the Attorney General, Apr. 18, 1870, in *Letters to the Attorney General, 1809–1870: Western Law and Order*, ed. Frederick S. Calhoun (Bethesda: University Publications of America, 1996. [Copy on file with authors.]).

42. Chief Justice of Idaho Territory David Noggle to the Attorney General, July 18, 1869, in *Letters to the Attorney General, 1809–1870: Western Law and Order*, ed. Frederick S. Calhoun (Bethesda: University Publications of America, 1996. [Copy on file with authors.]).

43. *Ibid.*

suitors, and is discreditable to the administration of the Federal Government, to whom only can the citizens of the Territory look for the administration of justice in the higher courts.”⁴⁴

Still, one cannot help admiring these early territorial judges. As the late James E. Babb of Lewiston observed: “When we reconstruct the conditions under which they discharged their duties, their small salaries, discomforts of life and travel, bareness of court-house accommodations, lack of library, the unorganized social and political condition...we cannot but feel the deepest sympathy for them in the...hardships they endured.”⁴⁵

Despite these early challenges, Idaho continued to grow and was admitted to the Union as a full-fledged state in 1890.⁴⁶

The Federal Presence in North Idaho

Western settlement of North Idaho in the Coeur d’Alene area began when Jesuit priests arrived in the region in the 1840s and founded the Mission of the Sacred Heart.⁴⁷ The mission church at Cataldo in Kootenai County remains to this day. The county seat at Coeur d’Alene got its start in the 1880s as Fort Sherman, a military post established for preserving the peace among farmers, miners, and the local Native American tribes. General William Tecumseh Sherman identified the advantages of the location on a tour of inspection in 1877, and the army post was fully garrisoned by 1879.⁴⁸ Originally named Fort Coeur d’Alene, the post was renamed after the General’s death in 1891.⁴⁹

Coeur d’Alene was very isolated until the construction of railroads to the area, spurred by the discovery of gold, silver, and other valuable metals in the region.⁵⁰ This led to rapid population growth and an expanding economy based largely on mining, the timber industry, and irrigated agriculture.⁵¹

44. Clerk of the Supreme Court of Idaho Territory A. S. Downer to the Attorney General, Nov. 13, 1865, *Letters to the Attorney General*.

45. Henry Z. Johnson, *A Pioneer Judiciary* (unpublished manuscript; excerpt on file with author).

46. Hawley, *History of Idaho*, 201.

47. Ibid., 99; William S. Shiach, John M. Henderson, and Harry B. Averill, *An Illustrated History of North Idaho: Embracing Nez Perce, Idaho, Latah, Kootenai and Shoshone Counties, State of Idaho* (Western Historical, 1903), 756.

48. Shiach, Henderson, and Averill, *An Illustrated History of North Idaho*, 765.

49. Ibid.

50. Hawley, *History of Idaho*, 245.

51. These industries contributed to early growth but created over 75 million tons of toxic mine waste. Cleanup of that waste on the lake bed of Lake Coeur d’Alene continues to generate disputes even to this day between

Mining in particular boosted the economy, but the mine owners and their employees regularly disagreed, sometimes violently, over wages, bringing the federal court to Coeur d'Alene for the first time.

Trouble in the Mines

In the summer of 1892, trouble escalated between the miners' union and the mining companies to the point where armed miners took possession of one of the processing mills near Kellogg.⁵² Martial law was declared, and both the state militia and federal troops were deployed.⁵³ James H. Beatty, the first federal district judge for the District of Idaho, convened a special term of court in Coeur d'Alene in September 1892 to try the cases.⁵⁴ However, Moscow, eighty-five miles to the south in Idaho's Panhandle, was the designated court location in North Idaho,⁵⁵ and this change of venue angered attorneys and the local newspapers, who were used to court being held in Moscow.

During the special term of court in Coeur d'Alene, more than twenty of the leading unionized miners of the district were indicted. The ensuing trial lasted several weeks. Only four men were convicted, but the U.S. Supreme Court reversed based on insufficiency of the indictment,⁵⁶ thus ending the last federal court session north of Moscow for many years.⁵⁷

In 1899, conflict between the miners and the mine owners again erupted, culminating in almost one thousand miners commandeering a train and dynamiting the Bunker Hill and Sullivan Mine, the only nonunion mine

the EPA, the State of Idaho, and the Coeur d'Alene Tribe. Emily Benson, "A Dangerous Cocktail Threatens the Gem of North Idaho," *HighCountryNews*, June 24, 2019, <https://www.hcn.org/issues/51.11/pollution-a-dangerous-cocktail-threatens-the-gem-of-north-idaho>; Scott W. Reed, "Turn of the Century: A Time of Trial, Troubles, Travail and Triumphs," in *Justice for the Times: A Centennial History of the Idaho State Courts*, ed. Carl F. Bianchi (Boise: Idaho Law Foundation, 1990), 72.

52. Hawley, *History of Idaho*, 246.

53. *Ibid.*

54. *Ibid.*, 248–49; Claudia Druss, "Idaho's Federal Courts 1863–2010," Idaho Legal History Society, 2014, https://www.id.uscourts.gov/Content_Fetcher/index.cfm/Idaho_Federal_Courts_18632010_1978.pdf?Content_ID=1978; see Lillard, "The Federal Court in Idaho," 68–69.

55. "Organization, Jurisdiction, and Practice of United States Courts," in *Congress and the Courts: A Legislative History, 1787–1977*, comps. Bernard D. Reams, Jr., and Charles R. Haworth I (1901), 384.

56. Hawley, *History of Idaho*, 248–49; see *Pettibone v. United States*, 148 U.S. 197 (1893).

57. Druss, "Idaho's Federal Courts," 1–2.

in the Coeur d'Alene mining district, known locally as the Silver Valley.⁵⁸ Governor Frank Steunenberg responded by telegraphing President William McKinley and requesting federal troops be sent into the Silver Valley.⁵⁹ Governor Steunenberg subsequently declared martial law in the Coeur d'Alene district.⁶⁰ More than six hundred federal troops arrived and made more than a thousand arrests within a week.⁶¹ This aggravated the already-contentious relations between Coeur d'Alene mine owners and the Western Federation of Miners.

The grievances lingered. Six years later, on December 30, 1905, former Governor Steunenberg was blown up by a bomb wired to the gate of his Caldwell home—the “first successful use of dynamite in the assassination of an American.”⁶² After union miner Harry Orchard confessed to the murder and claimed that he was hired by the Western Federation of Miners to assassinate Steunenberg, Pinkerton detectives investigated which union officials hired Orchard to do the job. Western Federation of Miners Secretary Treasurer Bill Haywood and union officers George Pettibone and Charles Moyer were accused of conspiracy in the murder of the former Governor, but they were later acquitted after a lengthy trial in Boise.⁶³ Idaho’s “Trial of the Century” was prosecuted by U.S. Senator Bill Borah, James Hawley—“dean of the sagebrush lawyers and future Governor of Idaho”—and others.⁶⁴ The defense, including the famous Chicago attorney Clarence Darrow, prevailed in the case presided over by Judge Fremont Wood.⁶⁵

58. Hawley, *History of Idaho*, 252; John F. Greenfield, “Idaho Comes of Age in High-Profile 1907 Murder Trial,” *Advocate* (Idaho State Bar) 49, no. 11 (Dec. 2006): 23.

59. Hawley, *History of Idaho*, 252.

60. *Ibid.*

61. *Ibid.*, 253.

62. J. Anthony Lukas, *Big Trouble* (New York: Simon & Schuster, 1997), 64.

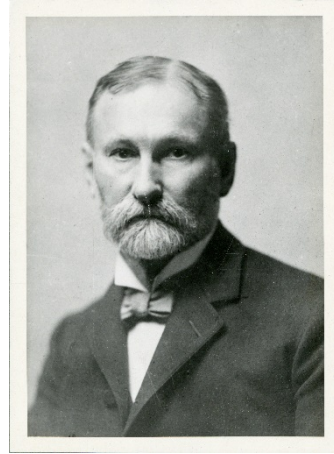
63. In 1900, Bill Haywood served as president of the Silver City Miners’ Union. Greenfield, “Idaho Comes of Age,” 20. He eventually took the number two spot, Secretary-Treasurer, of the Western Federation of Miners. In 1905, he helped found the Industrial Workers of the World, also known as the Wobblies. Although he was acquitted in the Steunenberg trial, he was later convicted of sedition in a Chicago trial. He jumped bail and defected to the Soviet Union. Jeffery R. Boyle, “Crime of the Century,” *Advocate* (Idaho State Bar) 49, no. 11 (Dec. 2006): 28, n. 4.

64. David H. Grover, *Debaters and Dynamiters: The Story of the Haywood Trial* (Corvallis: Oregon State University Press, 1964), 93, 169.

65. *Ibid.*, 207, 255, 283.

The Coeur d'Alene Courthouse

Except for the special session held in Coeur d'Alene in 1892, Judge James H. Beatty spent the early years of Idaho's statehood holding court sessions at Boise City, Pocatello, and Moscow, as well as handling judicial duties in California.⁶⁶ The first federal courthouse in the state was built in 1905 in Boise and did double duty as the city's U.S. post office.⁶⁷ Moscow's first federal building, also serving as the courthouse and U.S. Post Office, was completed in 1911.⁶⁸ James Knox Taylor, a prominent architect, oversaw the three-year project.⁶⁹



Judge James H. Beatty. P482.
Courtesy of Idaho State Archives.

Despite Judge Beatty's unwelcomed start in Coeur d'Alene, sentiment changed as the area rapidly expanded. By 1910, the members of the bar for the Northern Division of Idaho petitioned Congress to pass legislation for holding court in Coeur d'Alene, as "90 per cent of the litigation in the [N]orthern [D]ivision" originated from Shoshone, Kootenai,

66. Judge Beatty previously served as a Chief Justice of the Idaho Territorial Supreme Court following his appointment by President Benjamin Harrison in 1889. Bell and Hart, "Judicial History of Idaho," 405.

67. Druss, "Idaho's Federal Courts," 1.

68. Zachary Wnek, "The Federal Building of Moscow, Idaho," Latah County Historical Society, <https://artsandculture.google.com/exhibit/the-federal-building-of-moscow-idaho-latah-county-historical-society/LwKC5k7OYekCKA?hl=en>. Although that building has not served as a federal courthouse since 1973, the city of Moscow later purchased it and now uses it as its city hall. A second federal courthouse served Moscow from 1973 through 2017. Claudia Druss, "Moscow's Federal Courthouses," Idaho Legal History Society, 2014, https://www.id.uscourts.gov/Content_Fetcher/index.cfm/Moscows_Federal_Courthouses_1976.pdf?Content_ID=1976. Since September 1, 2017, the District Court conducts hearings on all North Idaho cases in Coeur d'Alene. "Notice: Moscow, Idaho Court Hearings to be Discontinued," District of Idaho, 2017, https://www.id.uscourts.gov/Content_Fetcher/index.cfm/Moscow_Court_Hearings_to_be_Discontinued_9/1_2764.pdf?Content_ID=2764#:~:text=Bankruptcy%20Court%3A%20Effective%20September%201,U.S.%20Courthouse%20in%20Moscow%2C%20Idaho.

69. "Happy 100th Birthday Moscow City Hall," *Preservation Moscow*, May 2011, 1, <https://www.ci.moscow.id.us/Archive/ViewFile/Item/276>.

and Bonner Counties.⁷⁰ In 1911, Congress responded and passed a bill creating a new division within Idaho's federal judicial district to serve Idaho's three northern panhandle counties—Shoshone, Bonner, and Kootenai Counties (Boundary County would not be carved out of Bonner County until 1915).⁷¹ Congress designated Coeur d'Alene as the place for holding court, and the local bar association held a large banquet to honor Judge Frank S. Dietrich, appointed by President Teddy Roosevelt to the seat vacated by Judge Beatty, and to celebrate the opening of the North Idaho federal courthouse in May 1911.⁷² Federal proceedings were originally held in the state district courtroom inside City Hall. Planning began in the early 1900s for building a dedicated U.S. courthouse near Lake Coeur d'Alene.⁷³

A site in the heart of downtown was purchased on 4th Street at Lakeside Avenue in 1912 for about \$13,000. By January 1914, the citizens of Coeur d'Alene—frustrated that a contract was already let for a new federal building in Pocatello to house the post office and federal court there—felt that “[no] other city in the state [was] more in need of a government building,” as the federal court building in Coeur d'Alene “[was] a necessity and not a chunk from the congressional pork barrel.”⁷⁴ A sum of \$10,000 was made immediately available by June 1914 to plan construction of the post office and federal court building, and actual construction was “expected to be underway before the end of the summer.”⁷⁵ However, due to intervening local and national events—including the death of Idaho's powerful Senator W. B. Heyburn and the intercession of World War I, when all public building construction was suspended—it would be more than fifteen years before money was appropriated and the courthouse could be built.⁷⁶

70. *United States Courts, Idaho and Wyoming: Hearing on S. 3315 Before the H. Comm. on the Judiciary*, 61st Cong. 3 (1911) (statement of Members of the Bar of the District of Idaho, Northern Division).

71. John A. Mallory, comp., *Compiled Statutes of the United States: Supplement 1911* (1912); “A United States Court for Coeur d'Alene,” *Coeur d'Alene Evening Press*, Feb. 7, 1911, 1.

72. “Will Celebrate Opening of Federal Court,” *Coeur d'Alene Evening Press*, May 15, 1911, 2.

73. “First Federal Court Held Here,” *Coeur d'Alene Evening Press*, May 22, 1911.

74. *Coeur d'Alene Evening Press*, Jan. 21, 1914, 2.

75. “\$10,000 Available for P.O. Building,” *Coeur d'Alene Evening Press*, June 8, 1914, 1.

76. Statement of Significance, National Register of Historic Places Inventory—Nomination Form for Coeur d'Alene Federal Building (May 26, 1977).

The first Coeur d'Alene U.S. Courthouse, 1928. Courtesy of the Federal Judicial Center (FJC).



Upon its completion in 1928, the new building housed a variety of U.S. government agencies. In addition to serving as Coeur d'Alene's main post office and the place for holding federal court, the original building also included the federal land office, the Bureau of Entomology, and the U.S. Forest Service. Long before the Forest Service moved into its space in the federal building, fires in the West had revealed the necessity of managing forests and preventing fires. In August 1910, a lightning strike sparked the largest wildfire in Western U.S. history, outside the railroad town of Avery, in Shoshone County. Despite the Forest Service's valiant efforts to fight the fire, it burned more than three million acres in North Idaho, Eastern Washington, and Western Montana.⁷⁷ The fire occurred shortly after President Teddy Roosevelt convinced Congress to establish the U.S. Forest Service under its first Chief Forester, Gifford Pinchot.

That old location on 4th Street served as the federal courthouse in Coeur d'Alene for about eighty years. The building was the subject of more recent history in September 1986, when a bomb planted by members of the Aryan Nations was detonated in a window well outside the courthouse.⁷⁸ While the bomb shattered windows as far as three blocks away, the explosion did little damage to the courthouse.⁷⁹ It did, however, underscore its poor security, and planning began to replace the structure with a more modern facility.

77. Timothy Egan, *The Big Burn: Teddy Roosevelt and the Fire That Saved America* (Boston: Houghton Mifflin Harcourt, 2009).

78. "Police Hunt for Bombs on Rooftops After 3 Explode at Coeur d'Alene," *The Times-News* (Twin Falls, ID), Sept. 30, 1986; see also "Bond Set in Bombings Case," *The Times-News* (Twin Falls, ID), Sept. 17, 1987.

79. "Police Hunt for Bombs."



United States Courthouse, Coeur d'Alene, Idaho (2009)
Photo courtesy of Shawn Toner, Explosive Illusions Photography, Spokane, WA.

In 2009, the federal courthouse on North Mineral Drive off Hanley Avenue opened. It currently houses Idaho's U.S. District and Bankruptcy Courts, Probation and Pretrial Services, U.S. Attorney's Office, U.S. Marshals Service, the U.S. Trustee, and Judge Tallman's chambers. It is unusual in that the building is owned by a private entity and leased to the General Services Administration, but it was built as a courthouse in anticipation of the construction and leaseback to the federal government.

Current Judges Serving Idaho

The United States District Court for the District of Idaho is currently authorized only two active federal judgeships. Chief U.S. District Judge David C. Nye and Senior District Judge B. Lynn Winmill cover the entire state from Boise and Pocatello.⁸⁰ Senior U.S. District Judge Ed Lodge retired in 2019 after serving as a state trial court, federal bankruptcy, and U.S. district judge in Idaho for more than fifty years. Two U.S. magistrate judges, Chief Magistrate Judge Candy W. Dale⁸¹ and Magistrate Judge Raymond E. Patricco, and two

80. Judge Winmill assumed senior status on Aug. 16, 2021. He has not reduced his caseload. As of November 19, 2021, the President has not yet nominated anyone to fill the now-open district judge position.

81. Chief Judge Dale will assume senior status on Mar. 31, 2022, and the District of Idaho has initiated the process to select her replacement. Chief Judge Dale is the first female federal judge to serve in the District of Idaho. She will also continue to assist on a recall basis.

U.S. bankruptcy judges, Chief Bankruptcy Judge Joseph M. Meier and Bankruptcy Judge Noah G. Hillen, also currently serve the Court and ride circuit throughout Idaho. Recalled retired Magistrate Judge Michael Williams and retired Bankruptcy Judge James Pappas also continue to assist on a part-time basis.

Beginning with Frank S. Dietrich in 1926, there have been eight Idahoans appointed to the U.S. Court of Appeals for the Ninth Circuit, and three Ninth Circuit judges currently sit in Idaho. Senior Circuit Judge Randy Smith has chambers in Pocatello, Circuit Judge Ryan Nelson recently joined the Court and has established his new chambers in Idaho Falls, and Judge Tallman moved over to Coeur d'Alene in the fall of 2018 after serving the Ninth Circuit from his chambers in Seattle since coming on the Court in 2000. Senior Circuit Judge Steve Trott recently retired from continuing service but had chambers in Boise for over thirty years.

Conclusion

Despite the Idaho Territory's less than auspicious beginnings, Idaho has thrived. As of the 2020 census, Idaho, now with a population of 1.8 million, is the second-fastest-growing state in the nation.⁸² Legislators have once again asked Congress to create a third district judgeship to address the burgeoning caseload.⁸³ As the state continues to expand, the federal judiciary serving North Idaho looks forward to continuing to develop the jurisprudence rooted in the State's rich historical tradition.

82. Brynn Epstein and Daphne Lofquist, "U.S. Census Bureau Today Delivers State Population Totals for Congressional Apportionment," U.S. Census Bureau, Apr. 26, 2021, <https://www.census.gov/content/dam/Census/library/stories/2021/04/apportionment-table-2-population-change.jpg>.

83. Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2021, H.R. 320, 117th Cong. (2021). This most recent proposal was introduced by Idaho Representatives Mike Simpson and Russ Fulcher, who were joined by Senators Jim Risch and Mike Crapo. Betsy Russell, "Idaho Delegation Introduces Legislation to Split 9th Circuit, Grant Idaho an Additional Federal Judgeship," *Idaho Press*, Jan. 26, 2021, https://www.idahopress.com/eyeonboise/idaho-delegation-introduces-legislation-to-split-9th-circuit-grant-idaho-an-additional-federal-judgeship/article_a1bc6fdd-3b15-56e0-80d9-ce0798aa5e58.html.



Ryan D. Nelson*

IDAHO JUDGES ON THE NINTH CIRCUIT COURT OF APPEALS¹

The U.S. Court of Appeals for the Ninth Circuit hears appeals from federal jurisdictions in nine states: Alaska, Arizona, California, Hawaii, Montana, Nevada, Oregon, Washington, and Idaho.² As is well known, it is the largest of the thirteen U.S. Courts of Appeals, currently with a full panoply of twenty-nine active judges and eighteen senior judges. Idaho is one of four states (including Hawaii, Montana, and Alaska) with just one active judge on the court.³ Three current circuit judges have their judicial chambers in Idaho.

Since the Circuit's creation in 1891, nine of its 112 judges have either been chosen from Idaho or have chambered in the cities of Boise, Pocatello, Coeur d'Alene, or Idaho Falls. It took thirty-five years for the first Idaho nominee to be appointed to the court (Judge Dietrich in 1926). And since 1937, Idaho has had at least one judge on the Circuit.⁴

The nine judges have served terms ranging from just three years to thirty-three years. Six of those judges have held Seat 3 on the court, including Judge Dietrich and then each Idaho judge since Judge Koelsch was confirmed in 1959. Judge Healy held Seat 7, a new seat established in 1937. Judge Trott held Seat 5, and Judge Tallman held Seat 14, a Washington seat. During these ninety-five years, they have published over ten thousand opinions.⁵

* Judge Nelson is a United States Circuit Judge for the Ninth Circuit Court of Appeals. See *infra* at 77.

1. I want to acknowledge and thank two of my law clerks, Jessica Joyce and Miranda Cherkas Sherrill; my extern, Caroline Sprague; Emily Donnellan; Rollins Emerson; Judge N.R. Smith; his law clerk, Carole Wesenberg; and several former law clerks of Idaho Ninth Circuit judges for their generous help with this article.

2. From 2004 to 2007, there was no active circuit judge in Idaho largely because of a political dispute in confirming a nominee from Idaho to succeed Judge Stephen Trott.

3. See 28 U.S.C. § 44(c).

4. There was one gap in time when the position was not filled. See 28 U.S.C. § 44(c).

5. Appeal and opinion totals are as reported by Westlaw and are

Three of these nine judges were born in Idaho. Seven practiced law in Idaho before being appointed to the bench. They have held various legal positions, including three presidents of the Idaho State Bar (Judges Healy, Anderson, and T.G. Nelson), high-level posts at the Department of Justice, in Idaho law firms, and as in-house counsel, state legislator, and state and local prosecutors. Four of the judges previously served on the bench—two in Idaho state courts (Judge Smith on the Sixth Judicial District and Judge Koelsch on the Third Judicial District) and two as federal district court judges for the District of Idaho (Judges Dietrich and Anderson).

In 1991, Judge T. G. Nelson wrote an article highlighting the first six judges on the Ninth Circuit who claimed Idaho as home.⁶ This article updates and provides additional background about Idaho's federal circuit judges. Whether on the bench, in the neighborhood, or on the road, each judge has made meaningful and lasting contributions to his community, state, and country.

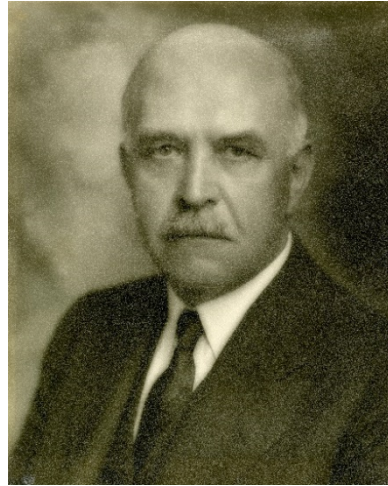
current as of the date of publication of this article.

6. Thomas G. Nelson, *Idahoans on the Ninth Circuit of Appeals*, 34 ADVOCATE 6 (1991).

Ninth Circuit Judges in Idaho

Frank Sigel Dietrich (1927–1930)

Judge Frank Sigel Dietrich, named after Civil War Union General Franz Sigel, was born in a frontier cabin near Princeton, Kansas, in 1863.⁷ His parents, originally from Frankfurt, Germany, immigrated to Chicago in 1855 and moved to Franklin County, Kansas, in 1857. His father, a farmer, died of pneumonia only months after Judge Dietrich was born. To support Dietrich and his two siblings, his widowed mother walked six miles to Ohio City to collect laundry from city officials. After her sons left for school, they taught her to read so that she could read the letters they sent home.



Courtesy of the Ninth Circuit U.S. Court of Appeals Archives

Judge Dietrich first attended Ottawa University in Kansas, where a professor took an interest in him and persuaded him to complete his education at Brown University in Providence, Rhode Island. There, he received his Bachelor of Arts in 1887 and his Master of Arts in 1890; he then returned to Ottawa University to teach Latin, history, and political science. While teaching, he also studied law and was admitted to the bar in 1891. During that time, he met and married Martha Behle of Blackfoot, Idaho. A professor and

7. Biographical information on Judge Dietrich was collected from Larry Winn, *National Register of Historic Places Inventory—Nomination*, NAT'L PARKS SERV. (1972), https://npgallery.nps.gov/NRHP/GetAsset/NRHP/72000500_text; *Biography of Frank Sigel Dietrich*, ACCESS GENEALOGY, <https://accessgenealogy.com/idaho/biography-of-frank-sigel-dietrich.htm> (last visited Oct. 8, 2020); *Who Were the Dietrichs?* FRANKLIN CNTY. HIST. SOC'Y, <https://www.olddepotmuseum.org/historical-sites/dietrich-cabin/who-were-the-dietrichs/> (last visited Nov. 3, 2021); *Dietrich, Frank Sigel*, FED. JUD. CTR., <https://www.fjc.gov/node/1380046> (last visited Nov. 3, 2021); Nelson, *Idahoans on the Ninth Circuit Court of Appeals*, *supra* note 5; *In Memoriam: Hon. Frank Sigel Dietrich*, 42 F.2d xxvii (9th Cir. 1930); *Judge Dietrich Dies Suddenly*, LEWISTON MORNING (Oct. 3, 1930), <https://news.google.com/newspapers?id=MINfAAAAIBAJ&sjid=nzAMAAAAIBAJ&pg=1797%2C2383499>; *History of the Cabin*, FRANKLIN CNTY. HIST. SOC'Y (2020), <https://www.olddepotmuseum.org/historical-sites/dietrich-cabin/>. Built in 1859, the cabin is one of the few remaining from that period in Kansas.

friend persuaded Judge Dietrich to join him in Blackfoot, and upon his arrival, they started the law firm of Dietrich, Chalmers & Stevens. Judge Dietrich was later involved in two other law firms, and in 1899 he became an attorney for Union Pacific Railroad, where he remained until he was appointed to the bench in 1907.

Judge and Mrs. Dietrich had two daughters and a son. Judge Dietrich was a member of the Delta Upsilon and Phi Beta Kappa societies and was an Oddfellow and a Mason. He also served as president of the Children's Home Finding and Aid Society of Idaho for fifteen years. Judge Dietrich was known for being a "hardworking, exact and able lawyer."⁸ He had "a sense of duty to the courts, manifested by the fair way he presented his cases, as well as by the courtesy he showed toward opposing counsel."⁹

On March 19, 1907, Judge Dietrich received a recess appointment to the U.S. District Court for the District of Idaho from President Theodore Roosevelt. After being nominated to the position and confirmed by the Senate, he received his commission on December 17, 1907. As a district judge, Judge Dietrich presided over the Bear River water rights adjudication; this water decree on the Bear River is commonly referred to as the "Dietrich decree." Perhaps the judge's best-known judicial decisions were those regarding the 1894 Carey Land Act and congressional and state legislation concerning it.¹⁰ He wrote many decisions delineating the relationship between federal jurisdiction under the Eleventh Amendment and the power of the federal government to interfere with the acts of the Idaho State Land Board.¹¹ Judge Dietrich also urged lawyers to take care "lest we forget that before we became attorneys in the case we were responsible officers of the court and lest our proper loyalty to the truth give place to an immoderate and unrestrained zeal for the success of our client's cause, whether it be just or not."¹² He was considered a judge "of quiet and firm dignity with a gentle kindness."¹³

On December 22, 1926, President Calvin Coolidge nominated Judge Dietrich to fill Seat 3 on the Ninth Circuit (succeeding Judge Wallace McCamant, who sat in Oregon). Judge Dietrich was unanimously confirmed by the Senate on January 3, 1927. It is said that because Judge Dietrich had a reputation as one of the nation's best lawyers, Chief Justice William Howard

8. *In Memoriam Hon. Frank Sigel Dietrich*, 42 F.2d at xxviii.

9. *Id.*

10. *See, e.g.*, *Caldwell v. Twin Falls Salmon River Land & Water Co.*, 225 F. 584 (D. Idaho 1915); *Noon v. Gem Irr. Dist.*, 205 F. 402 (D. Idaho 1913).

11. *See, e.g.*, *Twin Falls Salmon River Land & Water Co. v. Alexander*, 260 F. 270 (D. Idaho 1919).

12. *Judge Frank S. Dietrich, The Lawyer and His Moral Duty*, 10 Okla. L.J. 449, 450 (1912).

13. *In Memoriam Hon. Frank Sigel Dietrich*, 42 F.3d at xxx.

Taft told him that he would eventually be appointed to the United States Supreme Court. He was also reportedly offered (but declined) the position of Attorney General under President Warren Harding.

Judge Dietrich served on the court until he died on October 2, 1930, after suffering a heart attack while driving to San Francisco.¹⁴ In his three years on the court, he heard 842 appeals. Senator William E. Borah described Judge Dietrich as follows:

In temperament, in learning and in keen sense of fairness and justness he was rarely equipped for the work [to] which he devoted the better part of his life. Neither passion nor prejudice nor ulterior aims ever affected his judgment or colored his opinions. Idaho will mourn the loss of a friend and citizen, but the nation will join us in mourning his loss as a public servant and as a judge such as the country can ill afford to lose.¹⁵

14. After Judge Dietrich's death, neither Idaho nor Nevada had a judge on the Court of Appeals until Judge Healy took the bench in 1937.

15. *Judge Dietrich Dies Suddenly*, LEWISTON MORNING TRIB. (Oct. 3, 1930), <https://news.google.com/newspapers?id=MINfAAAAIBAJ&sjid=nzAMAAAAIBAJ&pg=1797%2C2383499>.

William Healy (1937–1962)

Judge William Healy was born to Jeremiah and Mary Ann Healy in Windham, Iowa, in 1881.¹⁶ At an early age, Judge Healy was determined to have a career in law. After graduating high school, he entered the University of Iowa, where he received his Bachelor of Arts in 1906 and his law degree in 1908. After law school, he and two law school classmates headed west and set up the firm of Smead, Elliot, & Healy in Boise. Judge Healy went to the developing town of Silver City, Idaho, to establish a branch office, where he helped develop fledgling Idaho case law by resolving contract,



Courtesy of the Ninth Circuit
U.S. Court of Appeals Archives

mining, wage, probate, livestock, and grazing statute disputes. In 1910, he was elected as Democratic Central Committee Chairman and then, the next year, as Deputy Prosecuting Attorney (a part-time job) in Owyhee County. In 1913, Judge Healy became an Idaho state representative and, after some years, went back to his Boise firm, where he practiced for twenty years. Judge Healy married Mary Hicks while living in Silver City in 1914. They had two daughters.

Judge Healy also served on the Idaho State Board of Education, on the University of Idaho Board of Regents, and as President of the Idaho State Bar Association. As President of the Bar during the Great Depression, he urged its members to be champions of civility and to “approach the consideration of [new social ideas with which one might disagree], not on a plane of cold legalism, but on a plane of realities.”¹⁷

In 1933, he participated in the Idaho Constitutional Convention to ratify the Twenty-First Amendment to the U.S. Constitution, repealing prohibition. In 1934, he was appointed as general counsel to the U.S. Farm Credit Administration in Spokane, Washington, and served until 1937.

On June 8, 1937, President Franklin D. Roosevelt nominated Judge Healy to a new seat (Seat 7) on the Ninth Circuit. He was confirmed without

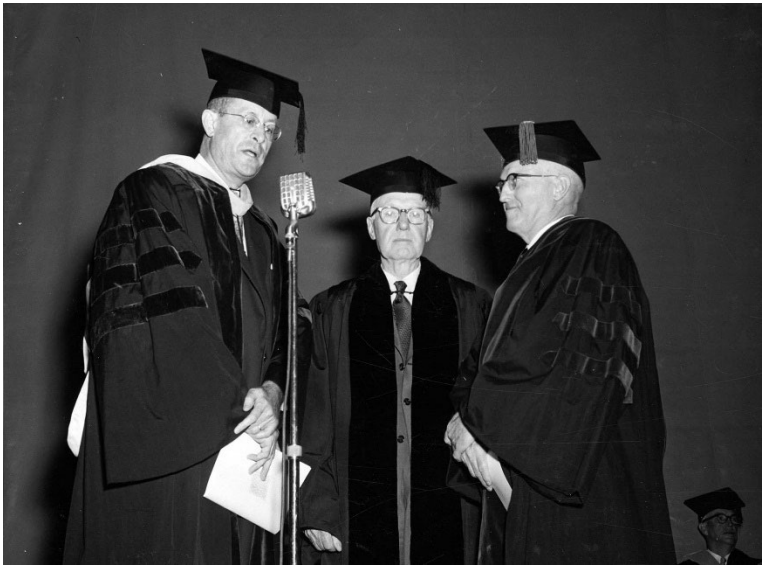
16. Biographical information on Judge Healy was collected from various sources: John J. Hasko, *William Healy and Early Idaho Law Practice*, 15 W. LEGAL HIST. 189, 189–95 (2002); Healy, William, FED. JUD. CTR., <https://www.fjc.gov/node/1382006> (last visited Nov. 3, 2021); *Judge William Healy at Commencement*, UNIV. OF ID. STUDENT ORGS. COLLECTION, <https://www.lib.uidaho.edu/digital/pg2/items/pg2732.html> (last visited Oct. 8, 2021); *In Memoriam Hon. William Healy*, 308 F.2d 3, 3–15 (9th Cir. 1962).

17. William Healy, *The President’s Address*, 3 ID. L.J. 316, 318 (1933).

objection and received his commission shortly thereafter. During his twenty-five years on the court, he heard 2,574 appeals. Judge Healy authored many influential decisions that are still cited today. Most notably, in *Spector v. El Rancho, Inc.*, Judge Healy held that a finding of privity between two parties (hotel and hotel employee) was analogous to an agency-principal relationship, and rendered a judgment against one a judgment against the other.¹⁸ And in *Humphreys v. United States*, Judge Healy held that “a suit dismissed without prejudice . . . leaves the situation the same as if the suit had never been brought in the first place.”¹⁹

Those who knew Judge Healy remembered him for his high and delightful sense of humor and for his talents as a storyteller. Former Ninth Circuit Chief Judge Richard Chambers described his opinions as clear and brief, “without a wasted word.”²⁰

In 1957, Judge Healy received an honorary Doctorate of Law from the University of Idaho. He assumed senior status on November 30, 1958, and served on the Ninth Circuit until his death on March 15, 1962. Upon his death, the Idaho State Bar Commissioners described him as would many of his friends: “He was a kindly, quiet man.”²¹



Dean Stimson and Idaho President Donald R. Theophilus stand by as Judge William Healy receives an honorary Doctorate of Law degree.
University of Idaho Student Organizations Collection,
Digital Initiatives, University of Idaho Library

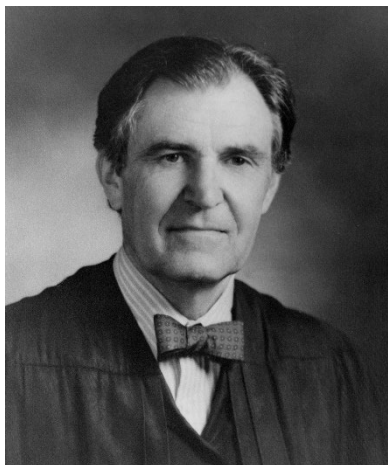
18. 263 F.2d 143 (9th Cir. 1959).

19. 272 F.2d 411, 412 (9th Cir. 1959).

20. *In Memoriam Hon. William Healy*, 308 F.2d at 12.

21. *In Memoriam Hon. William Healy*, 308 F.2d at 15.

M. Oliver Koelsch (1959–1992)



Courtesy of the Ninth Circuit
U.S. Court of Appeals Archives

In 1912, Judge Montgomery Oliver Koelsch was born to Idaho pioneers Charles and Katherine Koelsch in Boise; he became the first Idaho native to be appointed to the Ninth Circuit.²² Judge Koelsch's father was a well-known and respected lawyer and judge in Boise. Following in his father's footsteps, he went to Seattle to receive his Bachelor of Arts and Bachelor of Laws degrees from the University of Washington in 1932 and 1935, respectively. He was admitted to the bar in both Washington and Idaho in 1936. While in Washington, he married Virginia Daley in 1937. They had three children.

Following graduation, Judge Koelsch started private practice in Seattle. But he soon moved back to Idaho to serve as an assistant prosecutor for Ada County from 1939 to 1945. He later left the prosecutor's office to form the law firm of O'Leary & Koelsch in Boise.

In 1951, Judge Koelsch was elected to the District Court for the Third Idaho Judicial District—the same seat his father had held. On September 12, 1959, President Dwight D. Eisenhower nominated Judge Koelsch to Seat 3 on the Ninth Circuit (succeeding Judge James Fee, who sat in Oregon). Upon receiving the news that he was being considered for the post, he returned to the office to spend the rest of his afternoon at work and said, "Should the Senate view my appointment favorably, I will strive to the utmost of my ability to serve the cause of justice."²³ Unlike the confirmation process of today, he was confirmed just two days later. After taking the bench, he declared that he

22. Biographical information on Judge Koelsch was collected from various sources: *Koelsch, Montgomery Oliver*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/koelsch-montgomery-oliver> (last visited Nov. 3, 2021); *M. Oliver Koelsch, Federal Appeals Judge*, SEATTLE TIMES (Sept. 5, 1992), <https://archive.seattletimes.com/archive/?date=19920905&slug=1511213>; *M. Oliver Koelsch; Federal Appeals Judge Since 1959*, L.A. TIMES (Sept. 6, 1992), <https://www.latimes.com/archives/la-xpm-1992-09-06-mn-216-story.html>.

23. *Koelsch Appointed to Federal Court Post by President*, ID. SUN, Sept. 13, 1959.

would “continue to strive to do my best to faithfully and impartially apply the law to fulfill the responsibilities placed upon me.”²⁴

During his thirty-three years on the court, Judge Koelsch heard 1,813 appeals. Three of his notable decisions were *Stiltner v. Rhay*,²⁵ holding that a prisoner’s allegations that he is not receiving the “the kind and quality of medical treatment he believes is indicated” does not demonstrate deliberate indifference; *Collins v. United Airlines*,²⁶ holding that a failure to rehire after an alleged discriminatory firing does not constitute “a new and separate discriminatory act or somehow render[] the initial violation, if any, a continuing one. In this context, a request for reinstatement is wholly different from a new application for employment [in that] it seeks to redress the original termination”; and *Upper Snake River Chapter of Trout Unlimited v. Hodel*,²⁷ holding that the National Environmental Policy Act did not require an environmental impact statement “where a proposed federal action would not change the status quo.”

Judge Koelsch assumed senior status for disability in 1976. As a senior judge, he lived in Boise, San Francisco, and Seattle. He died of cancer while still on the bench in Seattle in 1992.

24. *Impressive Ceremonies Elevate M. Oliver Koelsch to Federal Appeals Court*, ID. SUN, Sept. 25, 1959.

25. 371 F.2d 420, 421 n.3 (9th Cir. 1967).

26. 514 F.2d 594, 596 (9th Cir. 1975).

27. 921 F.2d 232, 235 (9th Cir. 1990).

J. Blaine Anderson (1976–1988)



Courtesy of the Ninth Circuit
U.S. Court of Appeals Archives

Judge J. Blaine Anderson was born in Trenton, Utah, in 1922.²⁸ His father had put himself through school as a railroad telegrapher, rising through the ranks to become general counsel at Union Pacific—often arguing cases before the court on which his son would later sit.

Judge Anderson was raised in Pocatello and remained there to attend college at the University of Idaho, Southern Branch (now Idaho State University). In his first year of college, he enlisted in the Coast Guard when the United States entered World War II. Following the war, he did not return to Pocatello but instead transferred to the University of Idaho for pre-law studies. He

continued at the University of Idaho for law school and graduated in 1949.

Judge Anderson began his legal career in solo private practice in Blackfoot but later started the firm of Anderson & Beebe. His practice was varied and included both civil and criminal work. During his career, Judge Anderson was also chairman and a member of the State of Idaho Air Pollution Control Commission, served on Idaho State Bar disciplinary panels and the Idaho Board of Commissioners, and was President of the Idaho State Bar from 1961 to 1962. After being President of the Bar, he served in the American Bar Association's House of Delegates and Board of Governors. He was the Idaho State Director of the American Judicature Society and a Fellow of both the American College of Probate Counsel and the American College of Trial Lawyers. He was the first recipient of the Idaho College of Law's Award of Legal Merit for Service to the Profession and was selected for Idaho's Alumni Hall of Fame and as an Idaho State Distinguished Alumnus.

In 1971, President Richard Nixon nominated Judge Anderson, and he was confirmed as a judge on the U.S. District Court for the District of Idaho. In 1976, President Gerald Ford nominated him to succeed Judge Koelsch on

28. Biographical information on Judge Anderson was collected from various sources: *Anderson, J. Blaine*, FED. JUD. CTR., <https://www.fjc.gov/node/1377201> (last visited Nov. 3, 2021); *Judge J. Blaine Anderson*, 7 GOLDEN GATE U. L. REV. 5, 5 (1976); James Bevis, *Judge J. Blaine Anderson*, ADVOCATE (July 1988), https://isb.idaho.gov/wp-content/uploads/judge_j_blaire_anderson.pdf; Email from J. David Gratton, former judicial intern to Judge Anderson, to Judge R. Nelson's law clerk (Nov. 1, 2021) (on file with author).

the Ninth Circuit. Judge Anderson heard 1,332 appeals and authored many influential decisions during his twelve years as a circuit judge. His opinions included a determination that the National Football League violated antitrust laws by disallowing the Oakland Raiders to move to Los Angeles,²⁹ a ruling against warrantless searches of businesses,³⁰ and a decision that immigration officials could not conduct factory sweeps to question alleged illegal immigrants.³¹ He valued oral argument in helping him affirm or change his tentative conclusions, and believed that “[e]vils do not vanish with the waive of a court decree.’ Social problems can only be solved by an educated and informed citizenry and by wise legislation by the state and national legislatures, each acting within its proper sphere.”³² He was often quoted for his signature saying: “You just have to swallow hard and follow the law.”³³

A proud Idahoan, Judge Anderson was well known for his humility, kindness, and dedication to friendships, family, and work. Of him it was said, “for a man so deserving of praise, the Judge was always embarrassed by it and quick to redirect the conversation back to his interest in you. Friendships were special to Judge Anderson, and if you had the pleasure of knowing him, you knew that your bond with him was individual and unique.”³⁴ He was also known for his interest in clouds (which he could identify and describe by type) and his love for routines and habit: he drank a special coffee blend daily until four p.m., stayed in the same hotels, and adhered to a daily schedule.



Courtesy of the Ninth Circuit
U.S. Court of Appeals Archives

Judge Anderson and his wife, Grace, had four children. In 1988, Judge Anderson died in Boise while still an active judge, on the day before he was to administer the oath of office to newly appointed circuit judge Stephen S. Trott.

29. L.A. Mem'l Coliseum Com'n v. NFL, 726 F.2d 1381 (9th Cir. 1984).

30. See *Kopczynski v. The Jacqueline*, 742 F.2d 555 (9th Cir. 1984).

31. See *Int'l Ladies Garment Workers' Union, AFL-CIO v. Sureck*, 681 F.2d 624 (9th Cir. 1982), *rev'd by* *INS v. Delgado*, 466 U.S. 210 (1984).

32. Anderson, J. Blaine, *Some Thoughts on Appellate Advocacy*, 27 *ADVOCATE* 8, 15 (1984).

33. *Obituaries: J. Blaine Anderson; U.S. Court of Appeals Judge*, L.A. *TIMES* (1988), <https://www.latimes.com/archives/la-xpm-1988-04-21-mn-2381-story.html>.

34. James, Bevis, *Judge J. Blaine Anderson*, 31 *ADVOCATE* 9, 9–10 (1988).

Stephen S. Trott (1988–present)



Courtesy of the Ninth Circuit
U.S. Court of Appeals Archives

Judge Stephen S. Trott was born in Glen Ridge, New Jersey, in 1939.³⁵ His family traveled for his father's work, and as a child he spent several years in Mexico. He received his Bachelor of Arts from Wesleyan University in 1962 and his Bachelor of Laws from Harvard Law School in 1965.

After law school, Judge Trott served in the District Attorney's Office for Los Angeles County until 1981. While there, he was involved in several high-profile cases, including the Charles Manson and Patty Hearst cases. He became the U.S. Attorney for the Central District of California in 1981, then served as Assistant Attorney General for the Criminal Division of the Department of

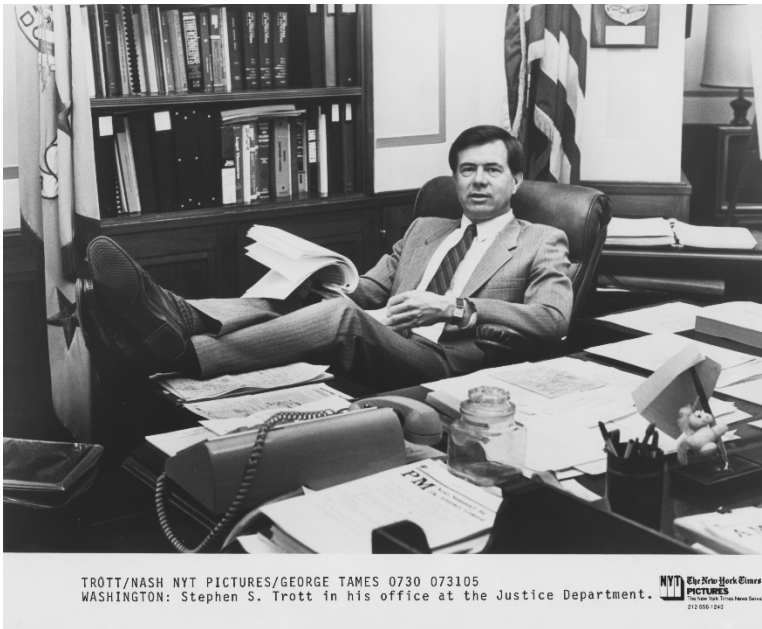
Justice from 1983 to 1986 and as Associate Attorney General, the third-ranking official for the Department of Justice, from 1986 to 1988.

After reportedly turning down the role of FBI Director, Judge Trott was nominated to Seat 5 on the Ninth Circuit (succeeding Judge Joseph Sneed III from California) by President Ronald Reagan on August 7, 1987. He was confirmed by the Senate on March 24, 1988. He received his commission the next day and established his chambers in Boise.

While in Boise, Judge Trott served as president of the Children's Home Society of Idaho and the Boise Philharmonic Association. He is a skilled magician and trainer of carrier pigeons and is an accomplished banjo, mandolin, and guitar player. In college, Judge Trott became a member of the Highwaymen, a folk music band whose *Billboard* #1 and Top 20 hits included "Michael, Row the Boat Ashore," and he continued as a member of the group while on the bench; he used vacation time to tour, played guitar at local Boise clubs, and was known to kill time at the airport playing his mandolin. On one occasion, an audience member recommended that he not quit his day job—and then asked if he had one. Judge Trott responded that he was a federal judge for the Ninth Circuit (not believing him, the audience had a good laugh). Judge Trott is devoted to his wife, Carol, and two daughters.

35. Biographical information about Judge Trott was collected from various sources: Trott, Stephen S., FED. JUD. CTR., <https://www.fjc.gov/history/judges/trott-stephen-s> (last visited Oct. 8, 2021); Interview Brent Whiting, former law clerk to Judge Trott (Oct. 12, 2021).

Judge Trott's commonsense view of the law inspired several words of wisdom that he often shared with his clerks, including "A deal is a deal is a deal" and "It's their own dumb fault." From his chambers in the federal courthouse in Boise, Judge Trott sought to uphold the independent and apolitical role of the judiciary. When dissenting, he referred to the judges in the majority as friends. One of Judge Trott's more widely recognized opinions held that the "political offense" exception to an extradition treaty did not apply to the murder of a civilian.³⁶ He also authored notable dissenting opinions in cases involving delayed *Miranda* warnings³⁷ and a home search pursuant to a parole condition,³⁸ as well as in an immigration case that was later reversed by the U.S. Supreme Court.³⁹



Stephen Trott in his office at the Department of Justice, 1985.
Original source: New York Times. Courtesy of Ninth Circuit U.S. Court of Appeals Archives.

36. *Barapind v. Enomoto*, 360 F.3d 1061 (9th Cir. 2004), *reh'g en banc granted by Barapind v. Enomoto*, 381 F.3d 867 (9th Cir. 2004).

37. *United States v. Orso*, 275 F.3d 1190, 1192 (9th Cir. 2001) (Trott, J., dissenting).

38. *United States v. Crawford*, 372 F.3d 1048, 1062 (9th Cir. 2004) (Trott, J., dissenting).

39. *Dai v. Sessions*, 884 F.3d 858, 875 (9th Cir. 2018) (Trott, J., dissenting); *see also Dai v. Barr*, 940 F.3d 1142, 1144 (9th Cir. 2018) (Trott, J., respecting the denial of rehearing en banc); *Garland v. Dai*, 141 S. Ct. 1669, 1677 (2021).

On the importance of applying the law rather than a jurist's own presuppositions, he once wrote that "[t]he bench is not a soapbox from which to force one's social views upon the nation,"⁴⁰ and although "judging does have its own authoritative geometry, working with its rules and within its limitations is creative, challenging, and stimulating."⁴¹

Judge Trott was blunt and direct on the bench. He was pragmatic and had an independent streak. He was smart and analytical. While polite on the bench, he asked sharp questions and gave counsel the opportunity to make their case. He is reputed to have said, "If the police don't play by the rules, they should be blasted. We cannot let the government tie the people in knots. The government is to be worried about."⁴² He often lectured and wrote about the questionability of the government's use of paid informants.⁴³

Judge Trott assumed senior status on December 31, 2004. He took inactive senior status in December 2020 and moved to Pasadena in 2021 to be closer to his family.

40. Stephen S. Trott, *No Way to Choose a Judge*, 34 *ADVOCATE* 6, 8 (1991)

41. *Id.* at 9.

42. 2 WOLTERS KLUWER, *ALMANAC OF THE FEDERAL JUDICIARY* 102 (Aspen Publishers, 2011).

43. See, e.g., Judge Stephen Trott, Lecture Supplement for the American Civil Liberties Union, *The Use of a Criminal as a Witness: A Special Problem* (Oct. 2007).

Thomas G. Nelson (1990–2011)



Courtesy of the Ninth Circuit
U.S. Court of Appeals Archives

Judge Thomas G. Nelson was born in 1936 to Donald and Margaret Nelson and raised in Idaho Falls.⁴⁴ His father owned a construction company and built roads in Idaho. After graduating from Idaho Falls High School in 1955, Judge T. G. Nelson worked with his father to put himself through college. He received his Bachelor of Laws from the University of Idaho in 1962.

Judge T.G. Nelson served three years of duty with the Idaho Air National Guard and another three years with the Judge Advocate General Corps of the United States Army. He also worked as Assistant Attorney General and Chief Deputy Attorney General in the Criminal Division of the Idaho Attorney General's Office. He then entered private law practice in Twin Falls and worked in several law firms there. While in private practice, he represented Idaho Power Company in the Hells Canyon Dam arbitration, the squabble over the Pioneer Plant in the 1970s (Idaho Power's venture into coal-fired power generation), the Swan Falls water dispute, and the re-adjudication of the Snake River watershed. He also represented the state of Nevada in its water litigation with the state of California.⁴⁵

Judge T.G. Nelson was devoted to public service, serving as a director of a local branch of the United Way, chairman of a citizens committee providing services to disabled children, and on the Twin Falls City Council. He also served on the Board of Commissioners for and as President of the Idaho State Bar, as well as in the American Bar Association House of Delegates and in the

44. Biographical information about Judge T.G. Nelson was collected from various sources: *Nelson, Thomas G.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/nelson-thomas-g> (last visited Nov. 3, 2021); David Madden, *Ninth Circuit Court of Appeals Mourns Passing of Judge Thomas G. Nelson*, PUB. INFO. OFF. (May 6, 2011), https://media.spokesman.com/documents/2011/05/Judge_Nelson_obit-1.pdf; *Obituary, Thomas G. Nelson*, IDAHO STATESMAN, (May 10, 2011), <https://www.legacy.com/us/obituaries/idaho-statesman/name/thomas-nelson-obituary?id=13153264>; Interview with Jan Bennetts, former law clerk to J. T.G. Nelson (Oct. 8, 2021).

45. See also Thomas G. Nelson, *Benefits of the Snake River Adjudication*, 31 ADVOCATE 9 (1988); Thomas G. Nelson, *Between Rock Creek and a Hard Place: Who Will Control Idaho's Water*, 32 ADVOCATE 12 (1989).

American College of Trial Lawyers. He enjoyed photography, white-water rafting, and spending time at his cabin in the Sawtooth Mountains of central Idaho.

On July 18, 1990, President George H.W. Bush nominated Judge T.G. Nelson to succeed Judge Anderson in Seat 3 on the Ninth Circuit. He was unanimously confirmed by the Senate on October 12, 1990, and received his commission on October 17.

During his twenty-one years on the circuit, Judge T.G. Nelson heard 6,797 appeals. He took an interest in water law⁴⁶ and authored opinions in several significant cases, including a bankruptcy case involving a large Ponzi scheme,⁴⁷ a challenge to Arizona's use of lethal gas for executions,⁴⁸ and a suit by a basketball star against General Motors for use of his name without his consent.⁴⁹

Judge T.G. Nelson had a reputation for being courteous to all the lawyers and even-tempered on the bench. Lawyers found him to have excellent legal ability, to actively ask pointed questions, and to write succinct, well-researched, scholarly opinions. His clerks remember him as a good man who could speed-read and absorb large amounts of information. He was known for being approachable and for having a quick wit and easygoing sense of humor. For example, in an article he authored explaining the Ninth Circuit's heavy caseload, he included in the general disclaimer that he "also disclaims any wish to be understood as complaining about his job."⁵⁰

Judge T.G. Nelson assumed senior status in November 2003. He died while still serving on the court in 2011, and is survived by his wife, Sharon, and two sons, a stepson, and a stepdaughter.

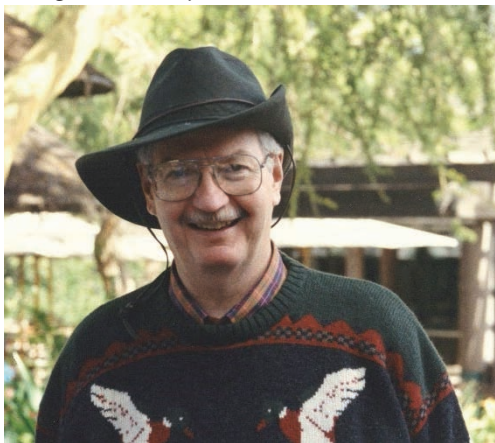


Photo by Judge Cynthia Holcomb Hall.
Courtesy of the Ninth Circuit
U.S. Court of Appeals Archives

46. See Nelson, Thomas G. Nelson, *Benefits of the Snake River Adjudication*, 31 ADVOCATE 9 (1988); Thomas G. Nelson, *Between Rock Creek and a Hard Place: Who Will Control Idaho's Water*, 32 ADVOCATE 12 (1989).

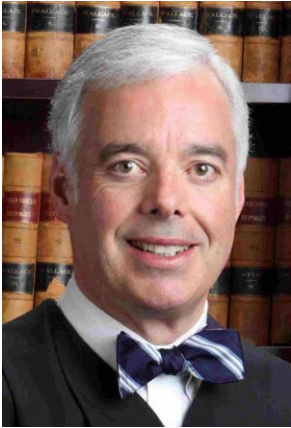
47. In re Slatkin, 525 F.3d 805 (9th Cir. 2008).

48. LaGrand v. Stewart, 173 F.3d 1144 (9th Cir. 1999).

49. Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407 (9th Cir. 1996).

50. Thomas G. Nelson, *The Future of the Federal Courts—The Case for a Mission Statement*, 37 ADVOCATE 12, 12 (1994).

Richard C. Tallman (2000–present)



Courtesy of the Ninth Circuit
U.S. Court of Appeals Archives

Judge Richard C. Tallman was born in Oakland, California, in 1953 and raised in a timber family in Fort Bragg.⁵¹ He received his Bachelor of Science in business administration from the University of Santa Clara in 1975 and his Juris Doctor in 1978 from Northwestern University School of Law, where he was executive editor of the *Northwestern Law Review*.

After law school, Judge Tallman served as a law clerk to Judge Morrell E. Sharp in the U.S. District Court for the Western District of Washington. He then joined the Criminal Division of the U.S. Department of Justice as a trial attorney and thereafter became an Assistant U.S. Attorney for the Western District of Washington (and later served as a special deputy prosecutor for the King County Prosecuting Attorney's Office, the Seattle City Attorney's Office, and the Washington State Attorney General's Office in special cases).

Judge Tallman entered private practice in Seattle in 1983, where he handled complex commercial litigation involving business issues collateral to white-collar criminal matters for the next seventeen years. During that time, he worked as an associate and then partner at Schweppe, Krug, Tausend & Beezer, P.S.; chaired the White Collar Criminal Defense Practice Group at Bogle & Gates, P.L.L.C.; and formed Tallman & Severin LLP. He represented the Seattle Mariners in litigation with the Seahawks over scheduling rights when both teams played in the Kingdome.

Judge Tallman raises national champion retrievers with his wife, Cynthia (a retired detective sergeant who served the Seattle Police Department for over twenty-eight years). Throughout his career in private practice and on the bench, Judge Tallman has been active in community service. He has been a Law Board member for the Northwestern University School of Law and co-moderated a weeklong "Justice and Society" seminar at the Aspen Institute.

51. Biographical information about Judge Tallman was collected from various sources: *The Honorable Richard C. Tallman*, FED. BAR ASS'N, W.D. WASH. (Fall 2019), <http://www.fba-wdwash.org/newsletters/FBAFall19.pdf>; Pub. Info. Off., *Ninth Circuit Judge Richard C. Tallman Announces Intention to Take Senior Status*, 9TH CIR. (Aug. 15, 2017), http://cdn.ca9.uscourts.gov/datastore/ce9/2017/08/16/FINAL_Tallman_Senior_Status_WEB.pdf; Michael Doyle, *Seattle Judge Richard Tallman Joins FISC Panel*, THE SPOKESMAN-REVIEW (Feb. 8, 2014), <https://www.spokesman.com/stories/2014/feb/08/seattle-judge-richard-tallman-joins-fisc-panel/>.

He has also served on the executive board of the Chief Seattle Council of the Boy Scouts of America; as general counsel to Seattle–King County Crime Stoppers; and as chairman of the Edmonds Community College Foundation Board.

President Bill Clinton nominated Judge Tallman to the Ninth Circuit on October 20, 1999, to Seat 14 (a Washington seat).⁵² He was confirmed and received his commission in May 2000. Judge Tallman's civil and criminal litigation background has been a valuable asset to him on the circuit. He is regarded as open-minded and fair. His opinions are direct and to the point. He has also written several precedential opinions in criminal law. For instance, in a dissent, he wrote that there is no constitutional right to "pre-plea" discovery in order to obtain a "fast track" sentencing reduction, and the Supreme Court agreed with him.⁵³ In *Oregon v. Ashcroft*,⁵⁴ the Supreme Court agreed with him in invalidating an Attorney General's directive declaring that physician-assisted suicide prescriptions (pursuant to Oregon's Death with Dignity Act) violated the Controlled Substance Act because it exceeded the statutory authority of the Attorney General.



Judge Tallman welcomes visiting students to the James R. Browning U.S. Courthouse.
Feb 2015. Courtesy of the Ninth Circuit U.S. Court of Appeals Archives

52. His appointment came from an unusual circumstance. President Clinton nominated Judge Tallman (a Republican) after he had nominated Washington Supreme Court Chief Justice Barbara Durham, who withdrew her name during Senate confirmation proceedings due to a medical diagnosis, in exchange for (1) Judge Betty Fletcher taking senior status and (2) Republicans agreeing to confirm Judge William Fletcher (her son) to the Ninth Circuit.

53. *United States v. Ruiz*, 536 U.S. 622 (2002).

54. 368 F.3d 1118 (9th Cir. 2004).

Judge Tallman was appointed by the Chief Justice of the United States to serve on the Foreign Intelligence Surveillance Court of Review from 2014 to 2021 and the U.S. Judicial Conference's Advisory Committee on Criminal Rules, which he chaired from 2007 to 2011. He resided in Seattle until taking senior status and then moved his chambers to the federal courthouse in Coeur d'Alene, Idaho, in 2018. Since moving to Idaho, Judge Tallman has been actively engaged with the state bar and has sat regularly by designation on the federal district court, assisting the trial court in handling its caseload.

N. Randy Smith (2007–present)

In 1949, Judge Norman Randy Smith was born in Logan, Utah, to Norman and Patricia Smith, who were attending school at Utah State University.⁵⁵ Thereafter, they moved to a farm in Thatcher, Idaho, where Judge Smith's father taught school and coached sports in Grace, Idaho. After graduating from high school in Grace, Judge Smith attended Utah State University. He then transferred to Brigham Young University, graduating in 1974 with a degree in accounting and receiving his Juris Doctor from BYU Law School in 1977. While in law school, he taught accounting at BYU.

After law school, Judge Smith was an associate and assistant general counsel at J.R. Simplot Company in Boise until 1981. He also taught as an adjunct accounting professor at Boise State University during that time. In 1982, he began private law practice at Merrill & Merrill in Pocatello. He generally practiced insurance defense law in state and federal courts. He continued to teach accounting and business law as an adjunct professor at Idaho State University. During this time, Judge Smith also served as chairman of the Idaho Republican Party. He left private practice when nominated as a state judge for Idaho's Sixth District in 1995.

Judge Smith has received several awards, including Idaho State University's "Statesman of the Year" Award, the George G. Granada, Jr. Award



Courtesy of the Ninth Circuit
U.S. Court of Appeals Archives

55. Biographical information about Judge Smith was collected from various sources: Smith, N. Randy, FED. JUD. CTR., <https://www.fjc.gov/node/1392521> (last visited Nov. 3, 2021); Judge N. Randy Smith, WHITE HOUSE, <https://georgewbush-whitehouse.archives.gov/infocus/judicialnominees/n-smith.html> (last visited Nov. 3, 2021); Randy Smith Is Elected to Succeed Phil Batt, LEWISTON MORNING TRIB. (Apr. 25, 1993), <https://news.google.com/newspapers?id=D39fAAAAIBAJs&sjid=FjAMAAAAIBAJs&pg=5112,3048944>; Smith, N. Randy, *Why I Do Not Let Jurors Ask Questions in Trials*, 40 IDAHO L. REV. 553 (2003–2004); N. Randy Smith, *Jurors Asking Questions*, 100 JUDICATURE 68 (2016); Dan Black, 2018 Idaho State Bar Distinguished Jurist, 61 ADVOCATE 52, 52–53 (Aug. 2018); Interview with Robert Couch, former law clerk to J. Smith (Nov. 5, 2021).

for Professionalism, Idaho State Bar's Jurist of the Year Award, and Outstanding Teacher by the Idaho State University College of Business.

As a state judge, Judge Smith presided over more than 6,000 cases. He was especially known for his skills as a mediator and in small lawsuit resolution; he spent many months mediating hundreds of cases to resolution all over Idaho; he also explained in one law review article why judges should not let jurors ask questions during trials. One of the highlights of Judge Smith's time in the state district court was the establishment of drug courts in Idaho in 2002, which helped rehabilitate low-level drug offenders. Although some may have railed against the proposal as soft on crime, the program has expanded, has enjoyed many successes, and continues to this day.

President George W. Bush nominated Judge Smith to the Ninth Circuit in 2005, 2006, and again on January 16, 2007 (originally to fill the seat vacated by Judge Trott but ultimately to Idaho's Seat 3).⁵⁶ Judge Smith was unanimously confirmed by the Senate on February 15, 2007, and received his commission on March 19, 2007. He established his chambers in Pocatello.



Judge Smith at his first sitting on the Ninth Circuit in June of 2007. Joined by fellow Judges Milan D. Smith, Jr. (left) and Jay Bybee (right). Photo by David J. Madden, former Assistant Circuit Executive for Public Information.

To date, Judge Smith has heard 5,674 appeals. He has written several influential decisions in bankruptcy and immigration law; his writings emphasize faithful adherence to the standard of review. Additional notable opinions were his dissent in *Geertson Seed Farms v. Johanns*,⁵⁷ which was later

56. Judge Smith was nominated twice to succeed Judge Trott when he took senior status, but California's senators argued that the seat was to be filled by a Californian and fought Judge Smith's confirmation. He was thereafter appointed to succeed Judge T.G. Nelson.

57. See 570 F.3d 1130 (9th Cir. 2009) (Smith, J., dissenting).

reversed by the Supreme Court; and his dissent in part in *Perry v. Brown*, detailing how California's Proposition 8 was constitutional because it was rationally related to a legitimate government interest.⁵⁸ He assumed senior status on August 11, 2018.

Judge Smith married La Dean Egbert in 1984. He has served as the president of the Idaho State Civic Symphony, Gate City Rotary Club, and Sixth District Bar Association. Judge Smith has been described as "down-home country folk, but underneath all that, sharp as a tack" and conservative but not biased. Lawyers remark on Judge Smith's courtroom demeanor being friendly, noting that he comes out before oral argument to introduce himself to counsel.

58. See 671 F.3d 1052 (9th Cir. 2012) (Smith, J., concurring in part).

Ryan D. Nelson (2018–present)

Judge Ryan D. Nelson is a “son of the West.”⁵⁹ Born in Idaho Falls in 1973 to Doug and Billie Nelson, Judge R. Nelson is a sixth-generation Idahoan, his family having settled in Idaho when it was still a territory.⁶⁰ His father has practiced law for fifty years at Nelson Hall Parry Tucker. And his great-grandfather started Farr’s Candy, a family-run business for over one hundred years in Idaho Falls, where Judge R. Nelson worked through high school. He is the oldest sibling and only brother to five sisters. As a young man, he served a two-year mission in the Belgium and Netherlands missions for the Church of Jesus Christ of Latter-day Saints and speaks Flemish and Dutch. Judge R. Nelson graduated from Brigham Young University in 1996. Three years later, he graduated with honors from BYU Law School, where he was lead articles editor of the *BYU Law Review* and a member of the Order of the Coif.



Courtesy of the Ninth Circuit
U.S. Court of Appeals Archives

After law school, Judge R. Nelson served as a law clerk to the Honorable Karen LeCraft Henderson on the U.S. Court of Appeals for the D.C. Circuit. He was then a law clerk to the Honorable Charles N. Brower and Richard M. Mosk at the Iran–United States Claims Tribunal in the Hague, Netherlands.

59. *Zinke Applauds Nomination of Idaho's Ryan Nelson to Serve as Interior Solicitor*, U.S. DEP'T OF INTERIOR (Aug. 1, 2017), <https://www.doi.gov/pressreleases/zinke-applauds-nomination-idahos-ryan-nelson-serve-interior-solicitor> [hereinafter *Zinke*]; *Trump Selects Local Attorney as Solicitor for Department of Interior*, E. ID, NEWS (Aug. 1, 2017), <https://www.eastidahonews.com/2017/08/trump-selects-local-attorney-as-solicitor-general-for-department-of-interior/>.

60. Biographical information about Judge R. Nelson was collected from various sources: *Nelson, Ryan Douglas*, FED. JUD. CTR., <https://www.fjc.gov/node/5373051> (last visited Nov. 3, 2021); Carrie Campbell Severino, *Who Is Ryan Nelson?*, NAT'L REV. (May 10, 2018); Senate Committee on the Judiciary, *Questionnaire for Judicial Nominees*, U.S. SENATE, <https://www.judiciary.senate.gov/imo/media/doc/Nelson%20SJQ.pdf> (last visited Nov. 3, 2021); Linda D. Jellum, *ABA AdLaw Section Member Spotlight Series: Ninth Circuit Judge Ryan Nelson*, NOTICE & COMMENT, YALE J. OF REG. (Apr. 23, 2020), <https://www.yalejreg.com/nc/aba-adlaw-section-member-spotlight-series-ninth-circuit-judge-ryan-nelson-by-linda-d-jellum/>.

Beginning in 2001, Judge R. Nelson practiced at Sidley Austin in Washington, D.C., handling Supreme Court and appellate matters. He served as Deputy Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice. While there, he argued thirteen cases in most of the federal courts of appeals (including three in the Ninth Circuit), was division counsel for fifty briefs filed in the Supreme Court,⁶¹ and oversaw more than 500 cases.⁶² In 2008, he became Deputy General Counsel for the Office of Management and Budget at the White House, where he managed the final clearance of major agency rulemakings. He then became Special Counsel to the Senate Committee on the Judiciary, assisting with the vetting of Supreme Court Justice Sonia Sotomayor.

In 2009, Judge R. Nelson returned to his hometown of Idaho Falls as general counsel to Melaleuca, Inc. He argued several cases in Idaho federal and state courts, including the Idaho Supreme Court. Judge R. Nelson was later nominated as the Solicitor for the Department of the Interior. Though his nomination was twice unanimously voted out of committee, it was held on the Senate floor. Before he was confirmed, he was nominated to the Ninth Circuit, and his Solicitor nomination was withdrawn.

On May 15, 2018, Judge R. Nelson was nominated by President Donald J. Trump to succeed Judge Smith in Seat 3. Upon his nomination, Senator Risch stated that Judge R. Nelson would “bring a valuable perspective to the Court—upholding our way of life, respecting the rule of law, and rejecting judicial activism.”⁶³ He was confirmed on October 11 and received his commission on October 18. Judge R. Nelson established his chambers in his hometown of Idaho Falls. During his three years on the court so far, he has heard 829 total appeals and participated in 111 reported opinions. Judge R. Nelson has taught a class on the Federalist and Anti-Federalist Papers at BYU Law School and will teach at Berkeley Law School in 2022. Judge R. Nelson dissented from the denial of rehearing en banc in two cases involving the ministerial exception, which were later reversed by the Supreme Court.⁶⁴

61. Press Release, White House, President Donald J. Trump Announces Fourteenth Wave of Judicial Nominees (May 10, 2018) (accessible at <https://trumpwhitehouse.archives.gov/presidential-actions/president-donald-j-trump-announces-fifteenth-wave-judicial-nominees-fourteenth-wave-united-states-attorney-nominees-ninth-wave-united-states-marshal-nominees/>).

62. Zinke, *supra* note 58.

63. Betsy Z. Russell, *Trump Nominates Melaleuca Attorney Ryan Nelson to the 9th Circuit U.S. Court of Appeals*, IDAHO PRESS (May 10, 2018), https://www.idahopress.com/eyeonboise/trump-nominates-melaleuca-attorney-ryan-nelson-to-the-9th-circuit-u-s-court-of-appeals/article_8714dd09-e518-50bc-b938-41a31eef898a.html.

64. See *Biel v. St. James Sch.*, 926 F.3d 1238 (9th Cir. 2019) (R.

“Ultimately,” he wrote separately in *Ford v. Peery*,⁶⁵ “the art of good judging is tethering so closely to the rule of law and the Constitution that personal beliefs do not dictate the outcome of any issue or case,” and “this ideal reflects the noblest role of an Article III judge.” And in *Ahlman v. Barnes*, he dissented from a Ninth Circuit opinion preserving a preliminary injunction that required a jail to comply with safety requirements that exceeded CDC guidelines.⁶⁶ Shortly thereafter, the Supreme Court stepped in and stayed the preliminary injunction.⁶⁷

Judge R. Nelson is involved in several organizations, including the Federalist Society, Federal Bar Association, Boy Scouts of America, and the Church of Jesus Christ of Latter-day Saints. He previously served as a council member and co-chair of the General Counsel Committee and currently serves as judicial liaison for the American Bar Association Administrative Law and Regulatory Practice Section. In his spare time, he enjoys following BYU football and has been an active triathlete. Judge R. Nelson and his wife, Barbara, have seven children.



Judge Ryan D. Nelson taking the Oath of Office administered by then-D.C. Circuit Judge Thomas B. Griffith. 2019. Photo by Alex Clausen.

Nelson, J., dissenting from the denial of rehearing en banc); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

65. 999 F.3d 1214, 1227 (9th Cir. 2021) (R. Nelson, J., dissenting in part and concurring in the judgment).

66. 2020 WL 3547960, at *5–13 (9th Cir. June 17, 2020) (R. Nelson, J., concurring in part and dissenting in part).

67. *Barnes v. Ahlman*, 140 S. Ct. 2620 (2020).



*Debora Kristensen Grasham*¹

THE FIRST WOMEN OF IDAHO'S BENCH AND BAR

Five years after Idaho was admitted to the Union in 1890, Helen Young was admitted to the Idaho State Bar even though she was not eligible to vote.² Eleven years later, Ola Johnesse was appointed as Clerk of the Idaho Supreme Court.³ Both were the first women to so serve. Despite these early achievements, it took decades before women would meaningfully enter the legal profession in Idaho and make their marks within the bench and bar.⁴ The stories of the first women in Idaho law have been largely unrecognized and, unfortunately, lost with the passage of time.

Opening the Bar Door

Helen Young—First Woman Admitted to Idaho Bar

Born in Lansing, Michigan, Helen Young moved with her family, following her father's death and her mother's remarriage, to the north Idaho mining town of Osburn. Her stepfather, Daniel Waldron, was a lawyer who had come to Osburn to practice in its booming mining economy. It was in Waldron's office that Young first began reading and studying the law as early as 1885.⁵ Two years later, she married Orville R.



1. Debora Kristensen Grasham is a partner in the Boise law firm of Givens Pursley. Deb currently serves as Chair of the NJCHS, and is former President of the Idaho Legal History Society. She is the author of a number of articles chronicling the lives of Idaho's first woman lawyers and a book entitled *The First 50 Women in Idaho Law* (2005) .

2. Debora K. Kristensen "1885–1975: The First 50 Women in Idaho Law" 1–4 (2005) (cited herein as "First 50").

3. Biography of Ola Johnesse on display at Idaho Supreme Court (on file with author).

4. It would take another eighty years—until 1975—before a total of fifty women had been admitted to Idaho's bar. First 50, *supra* note 1.

5. First 50, *supra* note 1 at 1.

Young, “a prominent mining man and owner of the Nellie mine.”⁶ After her marriage, Young began teaching in the public schools of Shoshone County.⁷

Young’s first contact with the law, and with many prominent north Idaho attorneys, came in a collection action brought against her husband. After the bank prevailed against Orville, it sought to collect its judgment by attaching and selling Helen Young’s separate property, consisting of two lode-mining claims in Shoshone County. She hired Weldon Brinton Heyburn to represent her in a quiet title action challenging the sale. This was likely done with the assistance of her stepfather, Waldron. Heyburn was a well-known and widely admired lawyer in north Idaho who had served as chair of the standing committee on the judiciary at Idaho’s 1899 Constitutional Convention and later became a United States senator (1903–1912). Heyburn argued that the claims had been deeded as a gift to Helen Young and were, therefore, her separate property “free from the control of her husband.”⁸ Two and a half years after the sale, in February 1895, she prevailed in her action before the Idaho Supreme Court.⁹

Young’s work with Heyburn over the course of her two-and-a-half-year legal battle likely had a large impact on them both. Just eight months after her win at the Idaho Supreme Court, Heyburn and W. W. Woods¹⁰—also a delegate to the Idaho Constitutional Convention, and later one of Idaho’s first district court judges—sponsored Young in her application for admission to practice before the Idaho Supreme Court, attesting:

[T]he applicant has been engaged in the study of law for a period of more than two years at Osburn...under the general direction of Daniel E. Waldron, Father of the applicant and an Attorney At Law of good standing.

Young submitted her handwritten application to the Idaho Supreme Court on October 14, 1895:

6. *Woman Attorney: Helen S. Young Admitted to Practice in This State*, THE IDAHO DAILY STATESMAN, Nov. 2, 1895, at 3. *See also* First 50, *supra* note 1 at 1.

7. First 50, *supra* note 1 at 1.

8. First 50, *supra* note 1 at 1.

9. *See* Young v. First Nat’l Bank of Hailey, 4 Idaho 323 (1895).

10. Woods knew Young through his wife, Melvina “Mell” Woods, an active suffragist and early officer in Idaho’s statewide woman’s suffrage movement. For more on Young’s role in securing the right to vote in Idaho, *see* Debora Kristensen Grasham, *Early Women Lawyers Who Helped Secure the Right to Vote in Idaho*, THE ADVOCATE, Nov./Dec. 2020, at 16–20.

Osburn, Idaho.

Oct. 14, 1895.

Mr. Sd Hasbrouck

Clerk of the Supreme Court:
Boise, Idaho.

Dear Sir:—

I hand you herewith my
application for examination at the Livinston
term on October 26th. Please file the same
and oblige

Yours respectfully,

Helen L. Young.

At the time of Young's application, Idaho statutes limited the admission of attorneys in Idaho to "white males." Nonetheless, on October 26, 1895, the Idaho Supreme Court granted Young's application, and she became the first woman admitted to the Idaho bar.¹¹

11. First 50, *supra* note 1 at 2. In an interview after Young's admission, Chief Justice Morgan discussed his thoughts about why Section 3900 of the Idaho Statutes did not bar Young's admission. Section 3900, titled "who may be admitted as attorneys" provided "Any white male citizen is entitled to admission as attorney and counsel in all the courts of the territory." The Chief Justice pointed to section 13, article 5 of the Idaho Constitution, which provides that "the legislature has no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the government" and his conclusion that "the admission and control of attorneys were within the purview of this section." Then, candidly, "[w]hen asked if the same interpretation of the statute which had been given in favor of women would apply as to the admission of negroes, the chief justice replied that he thought it would." The newspaper aptly noted: "If all the women that are admitted to the bar of this state are as bright and apt as Helen Young the old practitioners may well be alarmed and look to their laurels." *Woman Attorney: Helen S. Young Admitted to Practice in This State*, THE IDAHO DAILY STATESMAN, Nov. 2, 1895, at 3.

Young's admission to the Idaho bar was remarkable for many reasons, not the least of which was the fact that Idaho women did not have the right to vote at the time. But Young was working to change that. She had long been an active member of the woman's suffrage movement in Idaho prior to her admission to the bar, and such efforts continued in full force after her admission. In fact, given her prominence as a "lady lawyer," Young was recruited by some of the national woman's suffrage leaders to "take charge of north Idaho."¹²

Eventually Idaho voters passed the Woman's Suffrage Amendment to the Idaho Constitution, in November 1896, making Idaho only the fourth state to grant women the right to vote. The vote was challenged but ultimately upheld by a unanimous Idaho Supreme Court—composed of the same three justices who had admitted Young the year before.

Young's joy at securing the right to vote, and Idaho Senator William Borah's role in successfully defending the amendment at the Idaho Supreme Court, is revealed in her letter to Borah dated December 21, 1896 (her stationery identifies her as "Attorney and Counselor at Law"):

MRS. HELEN L. YOUNG,
ATTORNEY AND COUNSELOR AT LAW.

BOISE, IDAHO, Dec. 21, 1896.

Mr. W. E. Borah
Boise Idaho.

Dear Mr. Borah,

The Equal Suffrage Clubs of
Shoshone County in general, and the Wallace
Club in particular, wish me to thank
you most cordially for your able
and successful defense of our Amendment
before the Supreme Court. Wishing
you and yours all the joys of
the season, and with hearty con-
gratulations, I am,

Yours most sincerely,
Helen L. Young.
Pres. Wallace E. A.
Organizer for Shoshone Co.

12. First 50, *supra* note 1 at 2.

After admission to the bar, Young continued to work as a public school teacher and eventually entered politics, successfully running for county superintendent of public instruction for Shoshone County in 1900. Thereafter Young was introduced to, and began studying, Christian Science and eventually moved to New York City to join her brother and continue her studying—leaving Orville behind. Young died in New York City in April 1951.

Eloisa “Ola” Johnesse—First Woman Clerk of the Idaho Supreme Court

Women have participated in Idaho’s state courts almost from the beginning. But it has taken many generations to have meaningful representation of women on the state court bench.

Bessie Elosia (“Ola”) Johnesse was born on January 3, 1873, in Montrose, Iowa—a small town along the banks of the Mississippi. She was the sixth of eight children born to William M. Johnesse and Adaline D. Johnson. Her father was a ship carpenter and contractor who built Mississippi River steamboats, and her mother was a native of West Virginia whose parents had come to Iowa in the early 1840s.



Johnesse’s mother died in childbirth in 1879, leaving Ola the youngest of the surviving Johnesse children. She grew up and went to public school in Iowa. Johnesse’s brother Frank E. Johnesse was a mining engineer who began working in the mines of Idaho in 1893—from the Wood River valley to Silver City and Elk City in northern Idaho—and quickly made a name for himself. Frank settled in Boise in 1902 as field engineer and general manager of the Metal & General Development Company and was widely respected in the community.¹³

Johnesse and her sister Grace followed their brother west and were living together in Idaho City in 1900. At the time, Johnesse worked as a secretary and recorder. Like her brother Frank, Johnesse was involved in community and political organizations, including the Woman’s Republican League Club of Idaho, which reportedly “did much for the success of the Republican Party in the last campaign [in 1900].”¹⁴

13. 2 JAMES H. HAWLEY, HISTORY OF IDAHO 946 (1920).

14. Letter from Mrs. Herbert W. Dunton to Judges of Idaho Supreme Court (Jan. 12, 1902), found at University of Idaho Library, Special Collections and archives, James Franklin Ailshie papers, 1902–1931 <http://archiveswest.orbiscascade.org/ark:/80444/xv97816> at 3.

By 1902 Johnesse was working as a stenographer for John L. Day & Co., a wholesale fruit-and-produce company at 812 W. State Street in Boise, Idaho.¹⁵ While in Boise, and with the help and influence of her brother Frank, Johnesse became known to some of the leading attorneys of the day, including William Borah and James Ailshie. Apparently her stenographic skills impressed many of these leaders of the bar, because they endorsed Johnesse's January 8, 1902, application for the position of stenographer with the Idaho Supreme Court.¹⁶

Boise, Idaho. Jan. 8th, 1902.
Boise, Idaho. Jan. 8th, 1903.

Honorable Judges of the Supreme Court,
Gentlemen:-
Boise, Idaho.

Gentlemen:-

Please consider me an applicant for the position of stenographer for the Supreme Court. In addition to the enclosed indorsement, I refer you to the following named gentlemen of Boise for whom I have worked: M. B. Gwinn, N. M. Ruick, G. R. Hitt, Wm. McKinley, John L. Day, C. R. Shaw and E. W. Jones.

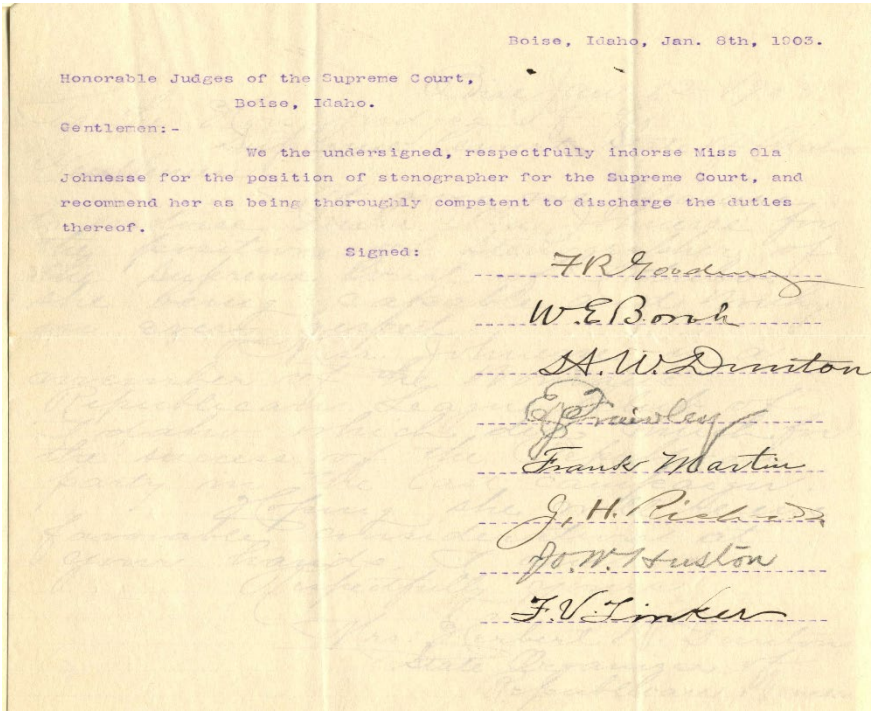
Trusting my application will be favorably considered, I am,
Very respectfully,

(Miss) Ola Johnesse.

Frank Martin
J. H. [unclear]
J. W. [unclear]
F. V. [unclear]

15. See Biography of Ola Johnesse, *supra* note 2.

16. See Ailshie papers, *supra* note 13 at 2 ("We the undersigned, respectfully indorse Miss Ola Johnesse for the position of stenographer for



Johnesse became a stenographer with the Idaho Supreme Court in 1902, working under the direction of Clerk of the Court Solomon Hasbrouck (the first Clerk of the Idaho Supreme Court after statehood). Her position clearly made her a bit of a celebrity, and her comings and goings were the subject of frequent reports in the Society pages.¹⁷

In the early 1900s, with only one woman, the aforementioned Helen Young, admitted to practice law in Idaho, it was rare for any woman to appear before the Idaho Supreme Court. But in May 1904, the prominent Montana lawyer Ella Knowles Haskell, Montana's first female lawyer, was to appear before the Idaho Supreme Court as counsel in *Monida & Yellowstone Stage Company v. Sherman*. Her impending arrival sent the Supreme Court and its staff into a flurry of concern about the proper etiquette for such an occasion.

the Supreme Court, and recommend her as being thoroughly competent to discharge the duties thereof. Signed: F. R. Gooding [Governor of Idaho and U.S. Senator from Idaho], W. E. Borah [U.S. Senator from Idaho], H. W. Dunton [Boise lawyer], E.J. Frawley [Boise lawyer], Frank Martin [Idaho Attorney General], J. H. Richards [district judge and state legislator], J. W. Huston [Boise mayor], and F. V. Tinker [Boise lawyer]").

17. See e.g., *Society*, THE IDAHO DAILY STATESMAN, July 4, 1906, at 3 ("Miss Ola Johnesse, stenographer in the Idaho Supreme Court, has gone to Idaho City to celebrate the Fourth with friends and relatives").

Clerk of Court Hasbrouck was tasked with receiving Haskell. According to the *Idaho Daily Statesman*, “Miss Johnesse, the vivacious court stenographer, insists that Mr. Hasbrouck owes it to his associates and the state of Idaho to make the appearance of the lady from Butte a memorable occurrence in the history of the tribunal.”¹⁸ Hasbrouck escorted Haskell from her hotel to the court and presented her to the justices, who, at the urging of Justice James F. Ailshie, had suggested adding flowers to the courtroom in her honor and urged the other members of the court to “spruce up” for the occasion.¹⁹ It is presumed that all went well, since there are no further reports of the proceedings. It would be twenty-five years before an Idaho woman lawyer, Adelyne Changers, would argue and win a case before the Idaho Supreme Court in 1929.²⁰

Two years after Montana’s Ella Haskell broke the glass ceiling at the Idaho Supreme Court, Ola Johnesse was elevated to become Clerk of the Idaho Supreme Court following the death of Solomon Hasbrouck. However, she was handed the position on a temporary basis only, as the justices announced that they would undertake a search for a permanent clerk.²¹

18. *Problems Face Supreme Court*, THE IDAHO DAILY STATESMAN, May 25, 1904, at 4.

19. *Montana Lawyer First Female Before Idaho Supreme Court*, IDAHO LEGAL HISTORY SOCIETY NEWSLETTER, Winter 2013, at 1.

20. *Estate of Fisher*, 47 Idaho 668 (1929). Ms. Changers was the ninth woman admitted to the bar in Idaho on Apr. 11, 1927, and she practiced in Pocatello, Idaho. First 50, *supra* note 1 at 16.

21. Biography of Ola Johnesse, *supra* note 2.

BOISE IDAHO, SEPTEMBER 10th 1906.

Supreme Court 3rd SPECIAL SESSION.
State of Idaho 3

Court met pursuant to an
order of the justices:

Present:
Hon James F. Aleslie Justice.
Hon Isaac W. Sullivan Justice.

And the officers of the Court when the following
proceedings were had, to wit:

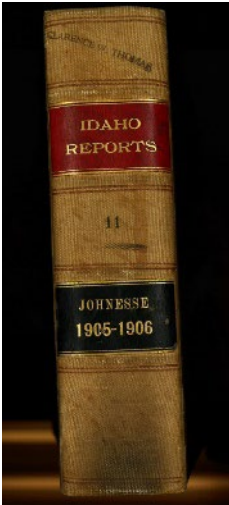
The office of Clerk of the Supreme Court having
become vacant by reason of the death of
Hon Sam Hasbrouck, it is ordered that Miss
Ola Johnesse, be and she is hereby appointed
Clerk of the Supreme Court, to hold said office
until the further order of said Court.

Ordered, that said special term do now
adjourn sine die
Chas O. Stockslager
Chief Justice

September 10, 1906, handwritten Order of Idaho Supreme Court appointing Ola Johnesse as Clerk of the Court "to hold said office until the further order of said court" signed by Charles O. Stockslager, Chief Justice. Original order is in a bound docket book at the Idaho Supreme Court. Copy provided by current Clerk of the Idaho Supreme Court, Melanie Gagnepain.

One of the important duties of the Clerk of Court at the time was to compile all of the cases heard by the justices within the last term and submit them to Bancroft-Whitney in San Francisco for publication as the official report of decisions from the court. While Clerk Hasbrouck's name appears on volumes 1-10 of the Idaho Reports, Johnesse's name appears on volume 11—"One of the few law books to bear the name of lady."²²

22. Idaho Law Reports Bear Lady's Name, THE IDAHO DAILY STATESMAN, Feb. 24, 1907, at 5.



The justices ultimately completed their search for a permanent clerk and settled on Boise attorney Irvin W. Hart.²³ Johnesse resigned her position, and on April 15, 1907, Hart was sworn in.²⁴ Johnesse returned to being a stenographer with the court and an active member of her community through participating in various women's clubs.

Below: Supreme Court in session circa 1908. The clerk is Irvin W. Hart. On the bench are Justice Isaak N. Sullivan, Chief Justice James F. Ailshie, and Justice George H. Stewart. The women are Misses Millsap, Ola Johnesse, and Carpenter. At the right is Bailiff Kimery. Idaho State Historical Society, Image ID # 1972-2-26



23. Biography of Ola Johnesse, *supra* note 2.

24. I PROCEEDINGS OF THE IDAHO STATE BAR 150–151 (1925). In 1927, another woman would temporarily serve as Clerk of the Idaho Supreme Court when the previous Clerk passed away. Edith J. Hearne served as Clerk of the Supreme Court from 1927 to 1928. She, like Ola, worked at the court as a stenographer before being asked to temporarily serve as Clerk.

In 1909, Johnesse married attorney Fred V. Tinker. At the time, Tinker was working as the receiver of the Boise land office, having been appointed by President Theodore Roosevelt.²⁵ The wedding took place at the home of Johnesse's brother Frank and garnered substantial attention in the *Society* page:

A wedding of interest to many friends throughout the state was the marriage of Miss Ola E. Johnesse and Mr. Fred V. Tinker, both of whom enjoy a large acquaintance through their connection with the public life of Idaho.

...

Miss Johnesse, who retires from public life to assume domestic relations, has been chief stenographer in the state supreme court for six years and the presence of the judges and their wives and the entire office force at the wedding attested the esteem of those with whom she has been most intimately associated.²⁶

After the wedding, "Mr. and Mrs. Tinker went to housekeeping at once in their new home on Fourth and Resseguie [in Boise]."²⁷

Johnesse and Tinker had two children: a daughter, Elinor V. Tinker, born in 1910, and a son, Frederick Johnesse Tinker, born in 1911. The family continued to live in Boise for many years, and Johnesse remained active in both community clubs and organizations and in politics.²⁸

Johnesse died in 1952 at the age of 78 in Seattle, Washington.

25. District land offices with registers and receivers were created to take applications and review land entries for the Department of Interior under the Homestead Act.

26. *Society*, THE IDAHO DAILY STATESMAN, June 20, 1909, at 8.

27. *Id.* at 5.

28. See e.g., *Society*, THE IDAHO DAILY STATESMAN, May 4, 1919, at 12; *A Few Sherman Supporters*, THE IDAHO DAILY STATESMAN, Apr. 1, 1921, at 9.

The Groundbreaking Tradition Continues

Mary Schmitt—First Woman to Serve as Law Clerk for the Idaho Supreme Court

In 1941, the Idaho Supreme Court was composed of five men—Chief Justice Budge and Justices Ailshie, Givens, Holden, and Morgan. It would take another fifty-one years before a woman would sit on the Court. Nonetheless, in 1941 an Idaho woman started tapping on the glass ceiling of the Court when Mary Elizabeth Schmitt was hired to serve as Justice Raymond Givens's law clerk.

Born in 1914 in Madison, Nebraska, Mary Schmitt moved when she was a child to Gooding, Idaho. After graduating from Gooding High School in 1931, Schmitt attended Gooding College and worked for several years as a stenographer in the Gooding law firm of Bissell & Bird. It was during this time that Schmitt became interested in the practice of law and "decided it was the thing for her."²⁹

To pursue her goal of becoming a lawyer, Schmitt transferred to the University of Idaho. After graduating with a degree in 1938, she was immediately admitted to the University of Idaho College of Law. Schmitt recalled that she "had a hard time convincing the dean of the school that she was in earnest about becoming an attorney."³⁰ After spending the summer of 1939 at the University of Colorado, Schmitt graduated in 1940 with a bachelor of laws degree, only the second woman to do so.³¹ On July 27, 1940, she was admitted to the Idaho bar, making her the thirteenth woman admitted in Idaho.³²

Schmitt began her forty-three-year legal career in Rexburg, Idaho, but after eight months moved to Boise to accept the position of law clerk for Idaho Supreme Court Justice Raymond L. Givens.³³ In so doing, Schmitt became the



29. First 50, *supra* note 1 at 24.

30. *Gooding Is Home of First Woman Lawyer in Idaho*, THE TWIN FALLS NEWS, Sept. 14, 1940, at 6.

31. Mary Shelton was the first woman to graduate from the University of Idaho College of Law, in 1923, but she was never admitted to the Idaho bar. See First 50, *supra* note 1 at 27; *Obituaries: Mary Schmitt*, THE TIMES NEWS, Mar. 12, 1984, at B2.

32. First 50, *supra* note 1 at 24.

33. First 50, *supra* note 1 at 24. See also *Woman Lawyer Named as Clerk*, THE TWIN FALLS NEWS, Aug. 31, 1941, at 8; *Mary Schmitt Takes Law Clerk Position*, THE IDAHO DAILY STATESMAN, Sept. 16, 1941, at 2.

first woman to clerk at the Idaho Supreme Court. Her tenure at the court seems to have gone well; the only news that we have of her time at the court is a report from August 1942 stating that “Miss Mary Schmitt and her brother, Jim Schmitt, are spending two weeks with relatives and friends in Los Angeles. Miss Schmitt has a month’s vacation from the office of Judge Raymond Givens.”³⁴

When her clerkship was complete, Schmitt moved to Canyon County and worked as an associate in the firm of Dunlap & Dunlap³⁵ before opening her own law office in Nampa. Schmitt practiced law for eleven years in Nampa and Caldwell, serving as Canyon County deputy prosecutor for five and a half years. She also was active in many community organizations, served as secretary of the Canyon County Republican Central Committee, and was President of the Seventh Judicial District Bar Association while being the only woman member.³⁶

In 1956, Schmitt returned to Gooding and worked as a court reporter for Judge D. H. Sutphen and Judge Charles Scoggin for a total of eighteen years. She then opened a law office with Scoggin in Gooding, where she worked until just prior to her death in 1984.

First Women to Serve as Judges in Idaho State Court

The distinction of being the first woman to serve as a state court judge in Idaho goes to Margaret Geisler, a non-lawyer who served as a probate judge for Camas County in 1938. Geisler ran in a contested election in 1938 as a Republican against the incumbent Louis Walton, a Democrat.³⁷

34. *Gooding*, THE TIMES-NEWS, Aug. 11, 1942, at 3.

35. An article announcing Schmitt’s decision to join the Caldwell firm Dunlap & Dunlap reads: “Women truck drivers, janitors and railroad yard workers have become so common these days as to pass almost unnoticed, but a lady lawyer still can be the object of a startled glance, especially if she combines the graciousness of a well-paid receptionist with the intelligence of a learned attorney and fills the bare spots with a wonderful sense of humor. Miss Mary Schmitt, new associate in the law offices of Dunlap and Dunlap here, is just such a person.” *Lady Lawyer Enters Caldwell Firm*, THE IDAHO DAILY STATESMAN, Feb. 25, 1945, at 28.

36. *Nampa Attorney Heads Altrusans: Mary Schmitt Tells About Law Career*, THE IDAHO DAILY STATESMAN, Mar. 20, 1955, at 6. The article describes Schmitt: “Mary, who is about as big as a minute, and who has much of the same shy charm as the African violets decorating her office when you meet her casually, is in reality a pint-sized dynamo. The fact that she was the 13th woman admitted to the Idaho bar has brought no bad luck to this miniature whirling dervish.” *Id.*

37. *Camas Entries for Primaries*, THE TWIN FALLS NEWS, July 20, 1938, at 8.

The first Idaho woman attorney to serve as a judge was Mary Smith Oldham, who was justice of the peace for Madison County in 1945.

Oldham was the tenth woman admitted to practice law in Idaho, on July 25, 1935, at the age of twenty-one. Her admission was announced in a newspaper story with the headline “Pretty Mary Smith Becomes a Member of the Idaho State Bar”:

Mary Smith, the winsome lass from Rexburg, Thursday took the oath as a member of the state bar, before Justice Raymond L. Givens....The members and attaches of the court...kept their minds on the details of the ceremony with a certain degree of difficulty. But in spite of the extremely attractive appearance of the new member all the forms were complied with.³⁸



After being admitted, Oldham returned to Rexburg, Idaho, and worked with many lawyers until she joined the practice of W. Lloyd Adams. Initially, Oldham did legal work and all of the secretarial work for both of them. Oldham said she did not mind and later reminisced that working with Adams was a pleasure and a challenge and said that she learned much.³⁹ A young woman working in Rexburg in the 1930s and 1940s attracted a lot of attention, and Oldham found that some of her first clients came to her “mainly out of curiosity.”⁴⁰ But she soon won over many and took significant responsibility for cases, including trial work.

In 1939, Oldham was admitted to practice before the United States Supreme Court—thereby becoming the second Idaho woman to gain such admission (M. Pearl McCall was the first, in 1924).⁴¹ Over the course of her sixty-plus-year career, Oldham served as Rexburg City Attorney for forty years, as Sugar City Attorney for thirty-six years, and as legal counsel for the Fremont-Madison Irrigation District. Her work for the Irrigation District caused her to become involved in lobbying in Washington, D.C., for the Teton Dam and, after it was built, to be very active in dealing with the many issues that arose when the dam failed in 1976.

In 1945, Oldham was elected to serve as justice of the peace for Madison County, after running on both the Republican and Democratic ticket.⁴² As justice of the peace, Oldham was asked to administer the oath of office to

38. First 50, *supra* note 1 at 18.

39. First 50, *supra* note 1 at 18.

40. First 50, *supra* note 1 at 19.

41. First 50, *supra* note 1 at 12.

42. First 50, *supra* note 1 at 20.

Idaho Governor Arnold Williams in 1945. Oldham was also very involved in the Idaho State Bar⁴³ and other organizations. Because of these accomplishments, two different governors wanted to appoint her to the Idaho Supreme Court, but she declined both times.⁴⁴

Marriage and family came into Oldham's life after she was well established in her law practice. She married Volney Oldham in 1949 and immediately became the mother of two preteen children. The couple also had two daughters. Oldham carried on her legal practice after the birth of her children under her maiden name of Smith, setting up a bassinet in her office.⁴⁵

Oldham received numerous awards during her lifetime, including the Idaho State Bar's Professionalism Award in 1996, and was inducted into the Idaho Water Users Association Hall of Fame in 1990. Oldham died on January 26, 2002, and thereafter achieved another first for Idaho women; in 2003, the Idaho State Bar posthumously awarded Oldham its highest honor, the Distinguished Lawyer Award, recognizing attorneys "who have distinguished the profession through exemplary conduct and many years of dedicated service to the profession and to Idaho citizens."⁴⁶

Linda Cook—First Woman to Serve as State Magistrate Judge

Born in Idaho Falls, Idaho, Linda Cook grew up in a farming family in Ririe, Idaho. After graduating from high school, she attended Ricks College and obtained both a bachelor of science in sociology and a master's of science in social psychology from Brigham Young University. Cook then began teaching in Walla Walla, Washington, where some of her classes were in the maximum-security men's prison (as the first woman employee "inside the wall" of the prison in its hundred years of operation).⁴⁷



After two years at the prison, Cook moved to Mexico to teach English before deciding on a career change. She applied to and was accepted at the University of Idaho College of Law beginning in 1970. At the time, she was

43. In 1935, Oldham became the first woman to address the Idaho State Bar at its annual meeting, speaking on the need for penal reform. First 50, *supra* note 1 at 19–20.

44. First 50, *supra* note 1 at 20.

45. First 50, *supra* note 1 at 19.

46. First 50, *supra* note 1 at 20.

47. First 50, *supra* note 1 at 79.

one of only five women in the class of 1973, and women law students were so rare that there was no restroom for them at the law school.⁴⁸

After graduation, Cook was admitted on November 1, 1973, as Idaho's forty-second woman attorney, and she returned to Idaho Falls to work as a prosecutor and in a general law practice. Less than three years later, in January 1976, Cook was appointed magistrate judge for Bonneville County.⁴⁹ She was the first woman to hold this position, and she was reelected to it every year until she took senior status in 2010.

Cook remains one of the longest-tenured judges on Idaho's state court bench.

Deborah Bail—First Woman District Court Judge

Deborah Ann Bail was born in 1949 in Wichita, Kansas. Although her family moved a few times when she was a child, Bail grew up mostly in Wichita. Just as she was about to graduate from high school, her father got a job in Hawaii, and the family relocated there. Bail attended the University of Hawaii from 1967 to 1969 and then Lewis and Clark College in Portland, Oregon, from which she graduated in 1971.⁵⁰ Immediately thereafter, she enrolled in Northwestern School of Law in Portland. After graduating in 1974, she took the Oregon bar, thinking she would live and practice in Oregon, but she soon found herself in Boise, having received a fellowship that encouraged attorneys to work there in legal services offices to aid the poor.⁵¹ She had missed the summer bar exam in Idaho, but she took the spring exam the following year and was admitted as Idaho's forty-ninth woman lawyer on April 11, 1975.⁵²



During her fellowship in Boise, Bail represented disadvantaged clients in all areas and gained both trial and appellate experience. During this time, she worked to help establish Emergency Housing Services, the first shelter in Idaho for homeless and battered women and their children. Given these accomplishments, Bail was awarded a rare third year of fellowship by the Reginald Heber Smith Community Lawyer Fellowship. When her fellowship

48. First 50, *supra* note 1 at 79.

49. First 50, *supra* note 1 at 79. See also *Judges Selected*, SOUTH IDAHO PRESS, Dec. 10, 1985, at 5.

50. First 50, *supra* note 1 at 94.

51. First 50, *supra* note 1 at 94.

52. First 50, *supra* note 1 at 94.

ended, Bail turned to developing legal services for the elderly in Idaho, working on projects with the Office of Aging and Idaho Legal Aid Services.⁵³

In 1978, Bail began work at the United States Attorney's Office for the District of Idaho, prosecuting federal crimes and representing the United States on civil matters.⁵⁴ In so doing, she gained a tremendous amount of trial experience and respect from her colleagues.

In the early 1980s, Bail became interested in becoming a judge and applied for an open position through the Judicial Council. Although she did not get that position, her name was on the short list that was sent to the Governor. Two years later, when the next judicial position became open, Bail was better known by the Judicial Council and familiar with the process, and she applied again. On February 23, 1983, Governor John V. Evans called Bail to inform her that he had selected her to be Idaho's first woman district court judge. Two months later, on April 18, 1983, Bail took the oath of office as district judge for the Fourth Judicial District of Idaho.⁵⁵ She served in this position continuously from 1983 through her recent retirement in May 2021. Bail recognized her place in Idaho history, humorously remarking, "I did not mind being a pioneer....At the time I just wished the other wagon would hurry up and get here." It would take another seven years before the other wagon showed up.⁵⁶

Throughout the course of her long judicial career, Bail continued to be involved in a number of community and bar-related organizations, many of which focused on the rights of the disadvantaged. In July 2021, Bail received the Idaho State Bar's Distinguished Jurist Award.

In June 2021, Bail moved from active to senior judge status.

53. First 50, *supra* note 1 at 94–95.

54. First 50, *supra* note 1 at 95.

55. First 50, *supra* note 1 at 95.

56. *Sitting Judge Profile, Deborah Bail*, Idaho Supreme Court, Oct. 24, 2011, at 1, available at <https://isc.idaho.gov/links/Bail-Deborah-Story.pdf> In 1990, Linda Copple Trout was elected district court judge for the Second Judicial District.

Cathy Silak—First Female Idaho Appellate Court Judge



Cathy R. Silak has held many prestigious roles in Idaho, from trial attorney with the U.S. Attorney's Office, to counsel for a major international company, to partner in a large Boise law firm, to dean of a law school. In addition, she has been significantly involved in community affairs. Even so, Silak is perhaps best known for being the first woman to serve on Idaho's appellate bench.

Silak was born and raised in New York. She attended New York University and graduated with a degree in sociology and French literature in 1971. She went on to Harvard and obtained her master's in city planning in 1973 and then, deciding to pursue a career in law, headed west to the University of California, Berkeley School of Law. Silak graduated from law school in 1976 and began work as an assistant United States Attorney in New York before moving to Idaho in 1983 and working as a Special Assistant U.S. Attorney.⁵⁷ In 1984, Silak joined the Boise law firm of Hawley Troxell and became a partner there in 1988. From 1989 to 1990, she was Associate General Counsel of Morrison Knudsen.

By the late 1980s, despite all the progress women had made in Idaho law, no woman had ever served on Idaho's appellate bench. In 1989, Idaho Governor Cecil Andrus made it publicly known that he was interested in appointing a qualified woman to Idaho's appellate bench. The Governor got that opportunity in 1990 with the retirement of Idaho Court of Appeals Judge Donald Burnett—who left the court to become dean of the law school at the University of Louisville.⁵⁸ The Idaho Judicial Council, the entity that collects, interviews, and provides a slate of judicial nominees to the Governor for consideration, reportedly conducted their deliberations to fill that vacancy “amid mounting pressure for a woman to finally be named to the appellate bench.”⁵⁹ Silak, at the age of forty, applied for the open seat on the Court of Appeals and, after making it through the Judicial Council, was quickly selected by the Governor.

On August 2, 1990, Silak was sworn in as judge of the Idaho Court of Appeals, and became the first woman to serve on Idaho's appellate bench.

57. *Silak Sworn in as 2nd Woman In Idaho Supreme Court History*, THE LEWISTON TRIBUNE, Mar. 16, 1993.

58. *Panel Nominates 1st Woman to High Court*, THE TIMES-NEWS, Aug. 2, 1990, at 13.

59. *Id.*

Governor Andrus was in attendance and declared it a “historic moment for Idaho” and noted that “we must provide more opportunities for women in the judicial branch of government.”⁶⁰ During her swearing-in ceremony, Silak remarked, “I’ve always viewed the courts as a place of great hope in our society” and “I would hope that not just women but all people who feel they have been excluded from institutions would take courage....I hope it is a beacon of light to all people.”⁶¹

Silak served on the three-member Court of Appeals until 1993, when Governor Andrus again selected her to fill an open seat on the Idaho Supreme Court. Speakers at her swearing-in ceremony said “it was important that gender was not a factor in her appointment, and yet it was a good signal women were taking a greater role in the judiciary.”⁶² Silak’s appointment to the state’s highest court made her the second woman to fill that seat (the first was Linda Copple Trout the year before).⁶³ Gail Bray, a member of the Idaho Judicial Council at the time, commented on Silak’s appointment to the Court: “It is remarkable....But it will be even more remarkable when it no longer is remarkable.”⁶⁴

In 1997, Silak became the Court’s Vice-Chief Justice.⁶⁵ She continued to serve on the Court until 2000, and in 2001 she resumed her partnership with Hawley Troxell.⁶⁶ Silak continued to remain very active in the community and served as the founding dean of Concordia University School of Law, Idaho from 2008 to 2016. She then transitioned to become Concordia University’s vice president of Community Engagement, before returning in 2017 to Hawley Troxell as of counsel.⁶⁷

Silak has been recognized for her achievements by many organizations; she received the Distinguished Lawyer Award from the Idaho State Bar, the Kate Feltham Award from Idaho Women Lawyers, the Icon Award from the Idaho Business Review, and many more.⁶⁸

60. *Woman Fills Vacant Seat on Gem Appeals Court*, THE TIMES-NEWS, Aug. 3, 1990, at 1.

61. *Id.*

62. *Silak Sworn in as 2nd Woman in Idaho Supreme Court History*, THE LEWISTON TRIBUNE, Mar. 16, 1993.

63. *Id.*

64. *Id.*

65. *Cathy R. Silak Biography*, Hawley Troxell, available at <https://hawleytroxell.com/people/cathy-r-silak/>.

66. *Id.*

67. *Id.*

68. *Id.* at *Memberships and Accolades*.

Linda Copple Trout—First Female Justice and Chief Justice of Idaho Supreme Court

Governor Andrus's work at creating a more diverse bench in Idaho did not stop with the appointment of Cathy Silak to the Idaho Court of Appeals in 1990. In 1992, Idaho Supreme Court Justice Larry Boyle resigned his position and became a U.S. Magistrate Judge for the District of Idaho.⁶⁹ Justice Boyle's resignation left Governor Andrus with the opportunity to appoint a new Supreme Court justice. Once again, Governor Andrus publicly announced that he wanted to appoint a woman to fill the vacancy, in part because there are some things "men don't have the genes to judge."⁷⁰ Enter Linda Copple Trout of Lewiston.



©Idaho Business Review

Born in Tokyo in 1951, Trout was adopted by Dr. B. I. "Bing" Copple, a doctor at Tokyo Army Hospital.⁷¹ When her father's military service was up, the family moved to Boise, and Dr. Copple became a pediatrician. Trout grew up in Boise and graduated from Boise High in 1969. Thereafter, she attended the University of Idaho, graduating with a degree in English with a minor in French in 1973.

Trout originally thought she would pursue a career in journalism, but she ended up going to law school after talking to family members who were attorneys.⁷² Trout graduated from the University of Idaho College of Law in 1977 and went to work with the Lewiston law firm of Blake, Feeney and Clark.⁷³ During her six years at the firm, she had the opportunity to be "in court quite a bit," and she became interested in becoming a judge. "There were two elements about judging that especially appealed to Trout: research and people."⁷⁴ Thus, when a magistrate position in Lewiston opened up in 1983,

69. *Trout Takes Oath as Gem High Court Justice*, THE TIMES NEWS, Sept. 19, 1992, at 3.

70. *Id.*

71. Jeanne Huff, 2016 *Lifetime Achievement Award: Linda Copple Trout, Justice, Idaho Supreme Court in Boise*, IDAHO BUSINESS REVIEW, Nov. 17, 2016, at 16–17, available at <https://idahobusinessreview.com/2016/11/17/2016-lifetime-achievement-award-linda-copple-trout-justice-idaho-supreme-court-in-boise/>.

72. *Id.*

73. *Id.*

74. *Id.*

Trout applied, and she was chosen.⁷⁵ During her tenure as a magistrate judge, Trout also taught family law at the University of Idaho and served as a trial court administrator.⁷⁶

In 1990, Trout ran for and won a seat as a Second District Court judge in Lewiston.⁷⁷ She was the first woman to hold such a position in the Second District, and only the second woman in Idaho to ever be a district court judge.⁷⁸ It was during her tenure as district court judge that Justice Boyle resigned his position on the Idaho Supreme Court.

Trout recalls: "Gov. Andrus said he'd really like to appoint a woman....How many opportunities are you going to have to be considered for the Supreme Court? I finally thought, 'I have nothing to lose.'"⁷⁹ And so, Trout applied for the position, and in August 1992 she was appointed by Governor Andrus to be the first woman justice on the Idaho Supreme Court.⁸⁰ She was just forty years old.⁸¹ Always one to offer a humorous remark, shortly after her appointment to the Court, Trout quipped to an audience of law students that she "must hold some sort of record for the most number of jobs held after leaving Moscow [law school]" but that her appointment to the Court should "wind up this period of job hopping."⁸²

In 1993, Justice Silak joined Justice Trout on the Idaho Supreme Court—the first time that two women served together on the five-member Idaho Supreme Court.

75. *Id.* Trout was only the second woman to serve as a magistrate judge in Idaho—the first was Linda Cook, beginning in 1976.

76. Kara Garten, *Justice Trout Gives Tips to Law Students*, MOSCOW-PULLMAN DAILY NEWS, Oct. 8, 1992, at 3A.

77. *Id.*

78. *Trout Wins Race for Second District Judge*, MOSCOW-PULLMAN DAILY NEWS, May 23, 1990, at 10A. At the time, the only other woman to serve as district court judge in Idaho was Deborah Bail, in the Fourth Judicial District. *See* First 50, *supra* note 1 at 95.

79. 2016 *Lifetime Achievement*, *supra* note 70.

80. *Id.*

81. *Trout Takes Oath as Gem High Court Justice*, THE TIMES NEWS, Sept. 19, 1992, at 3.

82. *Tips to Law Students*, *supra* note 75 at 3A.



Idaho Supreme Court 1993 (left to right): Justice Cathy Silak, Justice Steven Bistline, Chief Justice Charles McDevitt, Justice Byron Johnson, and Justice Linda Copple Trout. Photo courtesy of Idaho Supreme Court

Trout's notable firsts continued when, in December 1996, Chief Justice Charles McDevitt announced his retirement from the Court and "[i]n a historic move, the court unanimously selected Linda Copple Trout to serve as its first woman chief justice when McDevitt's term in that capacity expires in February [1997]."⁸³ Trout served two consecutive terms as Chief Justice.

Trout retired from the Idaho Supreme Court in 2007 and has since served as a senior judge for the court as a pro tem and settlement judge as well as handling administrative matters on assignment from the administrative director of the Idaho courts.⁸⁴

In 2021, Idaho's appellate courts have greater gender diversity than ever before. The five-person Idaho Supreme Court has two female justices (Justices Robyn Brody and Colleen Zahn) and the four-person Idaho Court of Appeals

83. *Chief Justice to Retire in September*, MOSCOW-PULLMAN DAILY NEWS, Dec. 13, 1996, at 4A.

84. 2016 *Lifetime Achievement*, supra note 70. See also Dean A. Ferguson, *Idaho High Court's First Woman Retires*, THE LEWISTON TRIBUNE, Sept. 1, 2007 (updated Apr. 12, 2011), available at https://lmtribune.com/northwest/idaho-high-courts-first-woman-retires/article_9ec5ca0f-32eb-55ea-a4b8-e52fffb564b.html.

has three women judges (Chief Judge Molly Huskey and Judges Jessica Lorello and Amanda Brailsford).⁸⁵



Justice Robyn Brody and Justice Colleen Zahn. Courtesy of Idaho Supreme Court.

85. See Idaho Supreme Court's website at <https://isc.idaho.gov/main/historyandprocedures> (last visited Nov. 1, 2021).

The First Women on the Federal Bench in Idaho

Idaho's federal district court was established shortly after statehood in 1890, creating the District of Idaho and one district court judge to cover the entire district. In 1954, Congress added a second district court judgeship for the District of Idaho. Since the establishment of the district court in Idaho more than 130 years ago, twelve men have served as district court judges. No women have served on the district court bench, and no women have represented Idaho on the Ninth Circuit Court of Appeals. Nonetheless, women have made their mark on Idaho's federal bench in other ways.

Ina Mae Wheeler Hanford—First Idaho Woman to Serve as Law Clerk for the U.S. District Court in Idaho

Ina Mae Wheeler Hanford was born in a farmhouse in a rural area of north Idaho, north of Bonners Ferry, in 1928. The family led a simple life on the farm and did not have electricity until "REA came through in about 1937."⁸⁶ Hanford went to Bonners Ferry High School and graduated as valedictorian in 1946. She had always thought that she would become a teacher, but in the spring of her senior year, Hanford worked as a secretary for a local attorney. While working in that office, the bright young woman was encouraged to pursue the study of law.⁸⁷



Although Hanford did not have the money to attend college after high school, she was able to save enough to attend Idaho State College in the fall of 1947. At the time, students could earn a bachelor of laws degree with two years of pre-law study and three years of law school. Hanford took this path and, after completing her two years at Idaho State College, transferred to the University of Idaho College of Law.⁸⁸ Hanford recalled that there were three women in her law school class and all were "well accepted by the men in the law school."⁸⁹

Hanford graduated from law school in 1952 and returned to her parents' home in Bonners Ferry to help out on the farm and study for the bar exam, scheduled for August 1952. In mid-July, however, she got an unexpected call from Glenn Bandelin, an attorney in Sandpoint, who asked her if she would be interested in clerking for U.S. District Court Judge Chase A. Clark, noting

86. First 50, *supra* note 1 at 49.

87. First 50, *supra* note 1 at 49.

88. First 50, *supra* note 1 at 49.

89. First 50, *supra* note 1 at 49.

that Dean Stimson of the University of Idaho College of Law had recommended Hanford for the position.⁹⁰ Hanford jumped at the chance and, after an interview with Bandelin in Sandpoint, was hired by Judge Clark—making her the first woman to clerk for the U.S. District Court in Idaho.⁹¹

Hanford moved to Boise and began working for Judge Clark on July 26, 1952. Shortly thereafter, she sat for the Idaho bar exam and was admitted on September 13, 1952, as the twenty-fifth woman attorney in Idaho.⁹² At the time, Judge Clark was the only Federal District Court Judge in Idaho, and twice a year he and his clerk traveled to Pocatello, Moscow, and Coeur d'Alene for court sessions. Hanford described her time clerking with Judge Clark as exciting and challenging, exposing her to some of the “outstanding legal minds” of Idaho.⁹³

In 1955, U.S. District Court Judge Fred Taylor was appointed to fill the second judgeship created in 1954. This split the work in Idaho, so with time available, both judges were assigned to help out in other jurisdictions. Over the years, in addition to traveling throughout Idaho, Hanford joined Judge Clark in court in Portland, San Francisco, Los Angeles, Phoenix, Las Vegas, and cities in South Carolina and Virginia. After Hawaii and Alaska were admitted to the union, Hanford particularly enjoyed traveling to those states to assist in the transition from territorial courts to federal courts.⁹⁴

While the usual tenure of law clerk was one or two years, Judge Clark told Hanford that as long as she wanted to stay in her position, he was not interested in training a new law clerk. Hanford enjoyed the work and travel, was still single, felt accepted by her peers, and made a good living—while many of her female peers “had difficulty making a good living.”⁹⁵ Hanford decided to stay with Judge Clark and did so for twelve years.

When Judge Clark assumed senior status in April 1964, Hanford went to work for his successor, U.S. District Court Judge Raymond McNichols.⁹⁶ Shortly thereafter, Hanford married William Hanford, and by the end of September 1964, the newlyweds decided to move to Portland, Oregon, and Hanford left the court and the practice of law. She turned her attention to raising her children and, after returning to Boise in 1974, declined offers of employment and instead supported her husband's business and volunteered in her community.⁹⁷

90. First 50, *supra* note 1 at 49.

91. First 50, *supra* note 1 at 50.

92. First 50, *supra* note 1 at 50.

93. First 50, *supra* note 1 at 50.

94. First 50, *supra* note 1 at 50.

95. First 50, *supra* note 1 at 50.

96. First 50, *supra* note 1 at 50.

97. First 50, *supra* note 1 at 51.

Ladora Butler—First Woman Clerk of the Court, District of Idaho

Ladora L. Butler served as Clerk of the Bankruptcy Court for the District of Idaho from October 1, 1979, to July 7, 1985, during a time of great change and tumult. Prior to that, she had long worked in the clerk's office and, after 1985, continued to work as a deputy clerk for the court for many years. She is the first woman to have served as Clerk of Court in the District of Idaho.



Butler was born in 1935 in Burns, Oregon, and grew up on a farm in Nyssa, Oregon, and in Nampa, Idaho.⁹⁸ She did not attend college; instead, after marrying in high school, she concentrated on raising her family for a number of years.⁹⁹ In 1960, Butler joined the Clerk's Office of Ada County, Idaho, and eventually became courtroom deputy for district court judge Merlin S. Young.¹⁰⁰ Judge Young was appointed United States Bankruptcy Judge for the District of Idaho in December 1969. Butler left Ada County shortly thereafter, in 1970, and joined Judge Young at the federal court in Idaho.¹⁰¹

In 1978, Congress passed comprehensive legislation—commonly referred to as the Bankruptcy Code—that drastically overhauled the bankruptcy system effective October 1, 1979.¹⁰² In particular, the legislation granted new bankruptcy jurisdiction to be exercised primarily by bankruptcy judges as an Article I judge appointed for a set term. Judge Merlin Young became the first bankruptcy judge in Idaho under these provisions. Butler was named Clerk of the newly constituted Bankruptcy Court of the District of Idaho,¹⁰³ while the district courts operated as a separate unit, with their own Clerk of Court, Jerry Clapp.

Unfortunately, shortly after this, the United States Supreme Court held that the Bankruptcy Code's delegation of jurisdiction to bankruptcy judges was an unconstitutional delegation of Article III powers to non-Article III

98. Interview of Ladora Butler by Glenda Longstreet, deputy clerk, United States District Court, in Boise, Idaho (Mar. 28 and 29, 2001) at 1.

99. Butler Interview, *supra* note 97 at 4–6, 9.

100. Butler Interview, *supra* note 97 at 13–14.

101. Butler Interview, *supra* note 97 at 15.

102. Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549 (Nov. 6, 1978) (creating new 11 U.S.C. § 1 *et seq.*).

103. Butler Interview, *supra* note 97 at 22.

judges.¹⁰⁴ This obviously caused serious disruption and concern for the bankruptcy courts. Butler recalled how Clerk Clapp informed Judge Young of the *Northern Pipeline Co. v. Marathon Pipe Line Co.* decision:

When the day came and the case says you are no longer a judge, [Clerk of the District Court] Jerry Clapp came over to the bankruptcy court, Judge Young was still in court, and he says, until they tell me I'm off the bench, I'm going to preside, so it was the next day, I think it was, or maybe it was two, within days after this decision, and then Jerry Clapp, much to his reluctance, had to come over and tell the bankruptcy judge that he would have to come off the bench. The courtroom was full of people, proceedings were going on, and he came off the bench and that ended court that day.¹⁰⁵

Butler describes this time as "very demeaning...some judges just left and didn't see it through. Judge Young hung around, he came to the office for a couple of days and then he quit coming to the office. There wasn't anything for him to do."¹⁰⁶

A number of continuing resolutions continued court operations for some time, until, in 1984, Congress enacted legislation to resolve the concerns raised by *Marathon* and continue hearing cases. But by then Judge Young had decided to retire. Butler recalls this series of events as one of the worst times of her career with the courts:

The worst times were those years in transition when the Supreme Court case upset bankruptcy by the judge not being a judge, not having jurisdiction until the dust settled and they worked their way through it and there was just a lot of, I mean that was not a local thing, that was nationwide. Good men, good bankruptcy judges left the bench because of that incident and never came back. A loss, a real loss.¹⁰⁷

In 1985, the District of Idaho consolidated its bankruptcy and district courts, naming Jerry Clapp as Clerk of the consolidated courts and Butler was named chief deputy clerk.¹⁰⁸ Butler retired in 2001, after serving the District of Idaho for thirty-one years.¹⁰⁹

104. See *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

105. Butler Interview, *supra* note 97 at 19.

106. Butler Interview, *supra* note 97 at 19.

107. Butler Interview, *supra* note 97 at 36.

108. Butler Interview, *supra* note 97 at 20.

109. *Boisean Finds Renewed Energy*, THE IDAHO STATESMAN, Oct. 4, 2001, at Life 3.

Betty Richardson—First Woman U.S. Attorney for the District of Idaho



The United States Attorney's Office for the District of Idaho was created in 1863, when Idaho became a territory. President Abraham Lincoln appointed Richard Williams to be the District's first U.S. Attorney.¹¹⁰ Since the Office's founding, there have been thirty-one presidentially appointed U.S. Attorneys—all men until 1993.

Betty Hansen Richardson was born and raised in Lewiston, Idaho, in a blue-collar, pro-union family of Democrats. From a young age, she was exposed to and became involved with the Democratic Party in Idaho. At Lewiston High School, Richardson was a student body officer, debater, band member, basketball player, and delegate to Syringa Girls State and to the YMCA Youth Legislature.¹¹¹ In her senior year, Richardson worked as a page in the Idaho House of Representatives and, at the age of eighteen, she was Idaho's youngest delegate to the 1972 National Democratic Convention.¹¹²

As a young adult, Richardson "worked in blue-collar, pink-collar, and white-collar jobs to put herself through college at the University of Idaho."¹¹³ She graduated magna cum laude with a degree in political science from the University of Idaho in 1976. After college, she worked on the staff of Senator Frank Church in his Washington, D.C., and Moscow offices and as the executive secretary of the Idaho Democratic Party.¹¹⁴

When it came time to choose a career, Richardson chose the law. She attended the University of California Hastings College of Law. After graduating in 1982, Richardson clerked for the Criminal Division of the San Francisco Superior Court, but she soon returned to Idaho to clerk at the Idaho Supreme Court with Justice Robert Huntley.¹¹⁵ Richardson was admitted to the Idaho bar in 1984.

When her clerkship ended, Richardson practiced civil and criminal law in Boise. Throughout this time, she remained active in Democratic Party

110. The history of the U.S. Attorney's Office for the District of Idaho is detailed at the U.S. Department of Justice's website, *available* at <https://www.justice.gov/usao-id> in "About the District."

111. *About Betty Hansen Richardson* to author (Oct. 2021) (on file with author).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

activities, including serving as chair of the Ada County Democratic Central Committee as the party made strides in the Idaho legislature in the 1988 and 1990 elections.¹¹⁶ These activities caused party leaders—including newly elected Idaho Governor Cecil Andrus—to take notice of the smart lawyer in Boise.

In 1991, Governor Andrus appointed Richardson as the first woman commissioner of the Idaho Industrial Commission. The Industrial Commission is the state agency in Idaho that is responsible for managing the state's workers' compensation system, with both judicial and regulatory functions. At the time, the Industrial Commission employed about 120 people and had a budget of \$8 million.¹¹⁷ In 1993, she was elected Commission chair.

Betty Richardson's nomination as the first woman in Idaho to hold the position of U.S. Attorney for the District of Idaho followed the November 1992 election and a change in administration, which gave the party in power the opportunity to make a variety of new appointments. Idaho Representative Larry LaRocco—the ranking Democrat in Idaho's congressional delegation—supported Richardson's nomination with the White House.¹¹⁸ LaRocco commented, "As the first woman to be nominated as U.S. Attorney for Idaho, Betty Richardson represents change and a step forward."¹¹⁹

On September 30, 1993, Richardson's nomination was unanimously confirmed by the U.S. Senate, making her the first woman to serve as U.S. Attorney for the District of Idaho.¹²⁰ She was just thirty-nine years old at the time.¹²¹ Richardson held that office for seven years, until 2000, when she resigned her position following the next change in administration. Richardson returned to private practice in Boise, serving as of counsel in the firm of Richardson and O'Leary.

116. *Id.*

117. *President Nominates Boise Attorney to Federal Post*, THE TIMES-NEWS, Sept. 8, 1993, at 6.

118. *Senators Will Support Attorney Pick*, THE TIMES-NEWS, Sept. 18, 1993, at 7.

119. *President Nominates Boise Attorney to Federal Post*, THE TIMES-NEWS, Sept. 8, 1993, at 6.

120. *Idaho Gets 1st-Ever Female U.S. Attorney*, THE TIMES-NEWS, Oct. 1, 1993, at 10.

121. *Id.*



Five Clinton-era U.S. Attorneys (left to right): Kate Pflaumer (Western District of Washington), Sherry Matteucci (D. Montana), Betty Richardson (D. Idaho), Kathryn Landreth (D. Nevada); and Karen Schreier (D. South Dakota). They affectionately refer to themselves as “The Wild Women of the West” and have been gathering for more than twenty-five years.

Richardson remained active in Idaho Democratic Party politics after leaving office, including an unsuccessful run for the U.S. House of Representative, District 1, in 2002.

Candy Dale—First Woman to Serve on Idaho's Federal Bench



It is impossible to discuss the impact of women on Idaho's federal bench without talking about Candy Wagahoff Dale. Dale is the first—and so far the only—woman to have served in any judicial capacity for the District of Idaho. She broke that barrier in 2008 when she was selected to serve as a United States Magistrate Judge for the District of Idaho.

Dale grew up in Boise and, after graduating from Borah High School, enrolled at the College of Idaho to study math and English. After spending a semester in Oxford, England, on an American exchange program, she returned to the College of Idaho and enrolled in a political science class. She enjoyed the class so much that she asked her professor and adviser from the math department whether she should attend law school. Dale said that "they virtually signed me up for the LSAT and encouraged me to pursue law."¹²² Her math adviser further counseled her that the "logic of mathematics was a perfect foundation for law."¹²³

After graduating cum laude and as a Gipson Scholar from the College of Idaho in 1979, Dale attended the University of Idaho College of Law. There, too, she excelled academically. Dale served as editor in chief of the *Law Review*, received the Idaho Law Foundation scholarship for 1981–1982, and graduated cum laude in the top ten of her class of 1982.¹²⁴ She was one of fewer than twenty women in her graduating class. After graduation, Dale joined the Boise law firm Moffatt Thomas Barrett & Blanton, eventually being elected shareholder of the firm. In 1988, she and some of her colleagues left the firm to create their own firm: Hall, Farley, Oberrecht & Blanton. She practiced business litigation and employment law with the firm for many years and earned a reputation as one of Idaho's premier employment lawyers.¹²⁵

A vacancy created by the retirement of two U.S. Magistrate Judges (Judges Mikel Williams and Larry Boyle) prompted Chief District Court Judge B. Lynn Winmill to appoint a merit selection panel to find qualified candidates for these positions.¹²⁶ Dale decided to apply. In addition to having

122. Deb Kristensen, 118 *Years in the Making: A Woman Takes the Federal Bench in Idaho*, 51 *THE ADVOCATE*, Feb. 2008, at 13.

123. *Id.*

124. *Id.*

125. *Id.*

126. See U.S. District Court for the District of Idaho, General Order 220 entitled "In re: Appointment of Merit Selection Panel for United States Magistrate Judges," dated Sept. 19, 2007.

a reputation as a gifted trial lawyer, she was well known to the members of the federal bench in Idaho from her years of service to the district as a lawyer representative to the Ninth Circuit Judicial Conference, a member of the Ninth Circuit's Advisory Board and as a member of the Gender Fairness and Long Range Planning committees for the District.¹²⁷ In December 2007, Chief Judge Winmill announced Dale would become Idaho's first female federal judge.¹²⁸

On March 30, 2008, Dale began her tenure as U.S. Magistrate Judge for the District of Idaho, succeeding U.S. Magistrate Judge Williams.¹²⁹ Shortly thereafter, on October 1, 2008, she served as the first Chief Magistrate Judge for the District of Idaho, a position she held until September 30, 2015. Dale was reappointed as the court's Chief Magistrate Judge on June 10, 2021.

In addition to handling some of the most complex and high-profile cases to come through the District of Idaho,¹³⁰ Dale has taken on a number of administrative responsibilities, including chairing the Local Civil Rules Advisory Committee and planning the court's annual Teachers Institute. Dale was appointed by Chief Justice John Roberts to serve a two-year term as the magistrate judge observer to the Judicial Conference of the United States, and she served in that capacity from October 2017 through September 2019. She was also a member of the Fairness Committee for the Ninth Circuit and the Jury Trial Improvement Committee and was past chair of the Magistrate Judges Executive Board for the Ninth Circuit.¹³¹

Judge Dale is scheduled to retire from her position on March 31, 2022, but will continue on recall status to serve on the Court.

127. *Id.*

128. *Id.* See also Dale, *Bush Named Federal Magistrate Judges for Idaho*, THE TIMES-NEWS, Dec. 3, 2007, at 27.

129. 118 *Years in the Making*, *supra* note 121 at 13.

130. See, e.g., Latta v. Otter, 19 F. Supp. 3d 1054 (D. Idaho 2014) (Judge Dale's decision overturning Idaho's ban on same-sex marriages), *aff'd* 771 F.3d 456 (9th Cir. 2014).

131. See U.S. District Court for the District of Idaho's website, "Chief U.S. Magistrate Judge Candy W. Dale," *available* at https://id.uscourts.gov/district/judges/dale/General_Information.cfm (last accessed on Nov. 1, 2021).

The First Women of Color to Join the Idaho Bar

Idaho has never been a racially diverse state. According to the U. S. Census Bureau, as of July 2019, Idaho's population was 81.6 percent white, 12 percent Hispanic or Latino, 1.7 percent Native American, 1.6 percent Asian, and 0.9 percent African American.¹³² As of October 2021, there were a total of 5,429 active attorneys in the state,¹³³ with women making up about 27 percent of them.¹³⁴ With such relatively small numbers, it is even more remarkable and inspiring to learn about each of the first women of color who joined the bar in Idaho. Their struggles make their triumphs even more noteworthy.

Rei Osaki—First Japanese American Woman to Graduate from University of Idaho College of Law and Be Admitted to Bar in Idaho



Rei Kihara Osaki was born on December 16, 1918, in Wapeta, Washington.¹³⁵ The daughter of parents who emigrated from Japan, Osaki grew up on her family's farm in Harrah, Washington, on the Yakima Indian Reservation with parents who placed great importance on education for their children.

When Osaki entered first grade, she knew only one word in English—"elephant"—but she quickly learned, speaking English at school and Japanese at home.¹³⁶ Osaki knew at an early age that she "wanted to do good, to change things" and initially considered becoming a doctor. Her plans changed to law, however, after her mother, who had worked as a nurse in Japan, advised that medical care was hard work.¹³⁷

In 1936, Osaki began college at Washington State University and studied political science in preparation for law school. She graduated in 1940 and, after one of her professors suggested that, given how quiet she was, she might be interested in a small law school, decided to attend the University of Idaho College of Law.¹³⁸ Going to school in Moscow, Idaho, changed her life in more ways than one.

132. See United States Census Bureau, Quick Facts, Idaho, *available at* <https://www.census.gov/quickfacts/fact/table/ID/RHI825219#RHI825219>.

133. See Idaho State Bar, Membership Count as of 10/5/21, *available at* <https://isb.idaho.gov/licensing-mcle/membership-count-statuses/>.

134. See Jessica R. Gunder, *Women in Law: A Statistical Review of the Status of Women Attorneys in Idaho*, 62 THE ADVOCATE, Feb. 2019, at 23.

135. First 50, *supra* note 1 at 32.

136. First 50, *supra* note 1 at 32.

137. First 50, *supra* note 1 at 32.

138. First 50, *supra* note 1 at 32.

On February 19, 1942, shortly after the bombing of Pearl Harbor, President Franklin D. Roosevelt signed Executive Order 9066, which forcibly removed Americans of Japanese ancestry—even U.S. citizens—from their homes within certain military zones along the Pacific Coast and incarcerated them in isolated internment camps throughout the west. Osaki escaped incarceration because she was outside the internment area, but her family did not. While she was spared the “real fear, the anguish” that her family experienced in being forcibly relocated from their farm in Washington to Wyoming’s Heart Mountain Relocation Camp, she felt guilty and offered to leave school.¹³⁹ Her father refused her offer, saying, “You’re the only free person in the family. Take all my savings and finish law school.”¹⁴⁰ Osaki did that and, in 1943, became the fourth woman to graduate from the University of Idaho College of Law and its first Japanese American graduate.¹⁴¹

Osaki passed the Idaho bar and was admitted on September 15, 1943, as Idaho’s sixteenth female attorney and the first Japanese American woman admitted to the Idaho bar.¹⁴²

After graduation, Osaki “had no home to return to,” so she headed east and accepted a position with a real-estate office in Elkhorn, Wisconsin. She was in Wisconsin when her father and brother were released from Heart Mountain. Tragically, her family had lost more than their freedom during their internment; the family farm was gone too.¹⁴³ Osaki worked with her father to start over, not only returning what remained of his savings but also buying him a tractor.¹⁴⁴

In the following years, Osaki moved to Chicago and worked as a lawyer for the Office of Price Administration. But after marrying, she and her husband settled in Pasadena, California, and she was no longer interested in pursuing law as a career.¹⁴⁵ Instead, she set her “roots down by getting involved in various community activities, especially partisan politics.”¹⁴⁶ She also devoted herself to her family and was the mother of three sons and numerous grandchildren.

Osaki died at her home in Pasadena on November 15, 2006.¹⁴⁷

139. First 50, *supra* note 1 at 32.

140. First 50, *supra* note 1 at 32.

141. First 50, *supra* note 1 at 32.

142. First 50, *supra* note 1 at 32.

143. First 50, *supra* note 1 at 32–33.

144. First 50, *supra* note 1 at 33.

145. First 50, *supra* note 1 at 33.

146. First 50, *supra* note 1 at 33.

147. First 50, *supra* note 1 at 33.

Cassandra Lee Furr Dunn—First Native American Woman Admitted to Idaho Bar



Born in Pinehurst, North Carolina, to a Cherokee mother and a Shoshone Dutch father, Cassandra Lee Furr Dunn described herself as “three-quarters” Native American.¹⁴⁸ Neither of her parents could read or write, and she was the only person in her family who “got past the 7th grade.”¹⁴⁹ Dunn recalls that “we lived in a shack on the side of a mountain when I was growing up. I remembered what it was like to be dirt poor.”¹⁵⁰ Her life story is one of determination and triumph over tragedy.

Her childhood was not a happy one. In 1947, when she was fifteen, she hitchhiked her way to Washington, D.C., to leave the “strange people” she called her family.¹⁵¹ Along the way, Dunn met a truck driver whom she later married. Dunn worked during the day and took classes at night to complete her high school education. On January 1, 1951, she gave birth to her daughter, and on the same day, her husband abandoned her.¹⁵² Determined to make a better life for herself and her daughter, Dunn sought education wherever she could, including “sneaking” into college classes at George Washington University, because she did not have the money to pay for them.¹⁵³

In 1952, Dunn left Washington, D.C., with her young daughter for Los Angeles. Having no money, they hitchhiked their way across country, eventually ending up in Fresno. In 1954, she met and married her second husband, and they had a son. He contracted polio and was left severely handicapped. Soon after, she discovered that her husband was a child molester. She left him immediately and raised her two young children alone. She took in sewing at night to meet the medical bills.¹⁵⁴

Although she was busy raising her children and working three jobs, Dunn’s desire “to do something” had not waned. She wanted to become a lawyer but knew that she first needed a college education. Fortunately, California was one of the few states at the time that offered a college

148. First 50, *supra* note 1 at 86.

149. First 50, *supra* note 1 at 86.

150. First 50, *supra* note 1 at 86.

151. First 50, *supra* note 1 at 86.

152. First 50, *supra* note 1 at 86.

153. First 50, *supra* note 1 at 86.

154. First 50, *supra* note 1 at 86.

equivalency test to fulfill this requirement for graduate students.¹⁵⁵ Dunn took and passed the test and, with her high score, was accepted at Humphreys College of Law in Fresno, California, in 1959.¹⁵⁶ For the next four years, Dunn worked numerous jobs during the day, attended law school at night, and raised her children as a single parent. She graduated from law school in 1963 and was admitted to the California bar on January 6, 1964.¹⁵⁷

After law school, unable to find a job in a law office, she opened her own, a one-room office next to the Fresno County Courthouse. She would sit in courtrooms, waiting to be assigned cases as a public defender for \$25 per case. Given her success in the courtroom, the Fresno County district attorney offered her a job. Dunn accepted the offer¹⁵⁸ but was wary of doing so because the men in the office had never treated her well. Her wariness proved well founded, as she experienced significant harassment from the lawyers in the office and the judges she appeared before.¹⁵⁹ In 1966, Dunn left the District Attorney's Office to resume her own practice.



Dunn speaking with Pit River Indian tribal chief in 1970. *Indian Land Claim Rights Hold Focus in Shasta Testimony*, The Sacramento Bee, Oct. 9, 1970, at 13

In 1968, her life took a new, happier direction when Dunn met and married Don Kendall, a real-estate developer. They were married for twenty-five years, until his death. During this time, Dunn also started working with Native American groups to represent them in various high-profile demonstration matters throughout the state, including the Pit River Indians American occupation of the Pacific Gas and Electric facility in Shasta County in 1970.¹⁶⁰

This work catapulted Dunn into the spotlight as a leading Native American attorney in California and attracted national attention. In 1971, the White House called and offered her

155. First 50, *supra* note 1 at 86.

156. First 50, *supra* note 1 at 87.

157. First 50, *supra* note 1 at 87.

158. *Mother of Two New Deputy D.A.*, VENTURA COUNTY STAR-FREE PRESS, July 30, 1964, at 16 ("Mrs. Cassandra Dunn, a Fresno mother of two, is the first woman ever appointed deputy district attorney in Fresno County").

159. First 50, *supra* note 1 at 87.

160. First 50, *supra* note 1 at 87.

a job at the Environmental Protection Agency.¹⁶¹

In 1971, Dunn went to work as chief legal counsel for the U.S. Environmental Protection Agency Region IV (the first woman to hold that position) under President Nixon.¹⁶² In this role, she was responsible for setting up hearing procedures throughout the west, including in Idaho. After a trip to Idaho, Dunn decided to move to Boise and rented a house there, while her husband stayed in Fresno.¹⁶³ On October 11, 1974, Dunn was admitted to the Idaho bar as the forty-sixth woman and the first Native American woman.¹⁶⁴

Dunn's self-described "nomad" ways continued when she moved to New Mexico in 1975 and then, a year later, returned to California.¹⁶⁵ Once back in California, she left the EPA and started a private practice in Fresno. Dunn remained in private practice until her retirement, and along the way she also became a real-estate broker and investor. Having come a long way from the days of sneaking into college classes, Dunn lectured at universities in the west and in Hawaii and taught American Indian Law at California State University in Fresno. She was also involved in numerous professional organizations and served as a judge in juvenile court in Fresno County and on California State Attorney General task forces.¹⁶⁶

Joanne Rodriguez—First Hispanic Woman Admitted to Idaho Bar

No records of specific categories of "first" admittees are maintained by the Idaho State Bar. Thus, determining who was the first to be admitted in any particular category is an exercise in patience and persistence. With that disclaimer in place, it is believed that Joanne P. Rodriguez was the first Hispanic woman to be admitted to the Idaho State Bar, on May 11, 1983.

Rodriguez has been an Assistant U.S. Attorney for the District of Idaho since May 1983. She is an experienced litigator with extensive criminal and civil experience and has served as a mentor for less experienced AUSAs for years. In July 2018, Rodriguez was named senior litigation counsel for the U.S. Attorney's Office and continues to litigate civil cases and serve on the management team.¹⁶⁷

161. First 50, *supra* note 1 at 87.

162. First 50, *supra* note 1 at 87.

163. First 50, *supra* note 1 at 87.

164. First 50, *supra* note 1 at 87.

165. First 50, *supra* note 1 at 88.

166. First 50, *supra* note 1 at 88.

167. Press Release, United States Attorney for the District of Idaho, "U.S. Attorney David Announces New Leadership Roles Within Office," July 12, 2018.

Ida Leggett—First African American Woman Admitted to Idaho Bar and to Serve on an Idaho Bench



Ida Rudolph Leggett was born and raised in a small town in Alabama at a time when racial tensions were high.¹⁶⁸ Her father was a sawmill worker and her mother was a schoolteacher. Separate water fountains existed for whites and people of color, along with separate entrances to the courthouse. When Leggett was young, she was not permitted in the whites-only city library.¹⁶⁹ An avid reader, she read anything and everything she could get her hands on. When she was seven, one of the magazines she found was an issue of *Ebony* with an article about Thurgood Marshall arguing *Brown v. Board of Education*. When Leggett asked her mother about it, she explained Marshall's role as chief counsel for the NAACP Legal Defense and Education Fund and said that he was "going to change the schools because he could argue in court."¹⁷⁰ That is when Leggett decided to become a lawyer and help bring about change herself.

Leggett graduated from her segregated high school in 1965 and attended Tuskegee Institute, in Alabama.¹⁷¹ After just a year and half, however, she got married and dropped out of school. She became a mother, and then a single mother, to three children, before she returned to college.¹⁷² When she applied for financial aid, she was denied based on the argument that she had chosen her career as a mother over other options. Leggett persevered without the financial aid and returned to college later. She graduated from the University of South Florida in Tampa in 1979, the first integrated school she had attended.¹⁷³

After college, Leggett was not sure what to do with her life, even though she had aspirations of becoming a lawyer. Her finances were tight and she had three children and very little support. But she decided, "I can do this

168. Richard D. Eadie, *Judge Ida Leggett: A Pioneer Jurist in Idaho*, Washington State Courts, EQUAL JUSTICE NEWSLETTER, Mar. 2000, available at https://www.courts.wa.gov/programs_orgs/pos_mjc/newsletter/032000/equaljustice.cfm?article=leggett.htm.

169. *Id.*

170. *Id.* See also *Ida Leggett: First African-American Woman Admitted to the Idaho Bar*, IDAHO LEGAL HISTORY SOCIETY NEWSLETTER, Spring 2017, at 3.

171. Pioneer Jurist, *supra* note 168.

172. Pioneer Jurist, *supra* note 168.

173. Pioneer Jurist, *supra* note 168.

myself," and she began applying to law schools throughout the nation.¹⁷⁴ One day she received a telegram offering a fellowship to pursue her legal education at Gonzaga Law School in Spokane, Washington. Leggett described how she had to pull out a map to see where Washington State was, but she happily accepted the offer.¹⁷⁵ With her three kids in tow, she moved from Florida to Washington in 1979.

Leggett recalls studying for her law school classes at night while her children slept. She attended summer terms at Gonzaga and graduated cum laude after just two and one-half years.¹⁷⁶ During that period, Leggett participated in two moot court teams that won regional championships and one that placed third in the nation.¹⁷⁷ She also worked as an Assistant U.S. Attorney in Spokane. After graduation in 1981, she accepted a clerkship with Chief Justice William Williams of the Washington Supreme Court.¹⁷⁸ Leggett was admitted to the bar in Washington State one year later.

After her clerkship, Leggett accepted a position with the Lane Powell law firm and worked in civil litigation, including insurance defense and construction law.¹⁷⁹ A few years later, a law school classmate invited her to move to Coeur d'Alene, Idaho, to start their own firm. She accepted and practiced civil law for several years.

Leggett was admitted to practice law in Idaho on April 25, 1986, and thereby became the first African American woman admitted to the Idaho bar. Later that year, Leggett was interviewed by the Associated Press about the racism she had experienced in Coeur d'Alene.¹⁸⁰ Leggett described how her son had been taunted by high school classmates using racial epithets. Her secretary had been followed home by people who yelled the same words, and Leggett described the precautions she herself took each day to stay safe.¹⁸¹ A newspaper of the day reported:

In September, when bombs rocked the rugged, mountain ringed beauty of smalltown Coeur d'Alene, Ms. Leggett got serious about precautions.

She left markers on the hood of her car each day to warn her if someone tampered with the engine. She drove different routes to and from work.

174. Leggett in Idaho, *supra* note 170 at 3.

175. Pioneer Jurist, *supra* note 168; Leggett in Idaho, *supra* note 170 at 3.

176. Pioneer Jurist, *supra* note 168.

177. Pioneer Jurist, *supra* note 168.

178. Pioneer Jurist, *supra* note 168.

179. Pioneer Jurist, *supra* note 168.

180. *Lawyer Is Fearful of New Idaho Life*, SOUTH IDAHO PRESS, Dec. 31, 1986, at 3.

181. *Id.*

"No one should have to live this way," she said. "Probably the only reason we're here now is because I don't want him [her son] thinking he has to run for his life."¹⁸²

Nevertheless, she persisted.

Within a few years, Leggett came to the attention of the Idaho Governor Cecil Andrus, and in 1988 he appointed her to the State Commission on Pardons and Parole.¹⁸³ In this position, Leggett found herself in a new role as decision maker and having to find consensus with her fellow board members. She was the only woman and only person of color on the commission.

As previously mentioned, in 1992, Governor Andrus announced his intention of appointing a woman to the open seat on the Idaho Supreme Court. Leggett decided to throw her name into the mix, becoming the first black woman to apply for an Idaho Supreme Court position.¹⁸⁴ During her interview with the Judicial Council, Leggett told the members that the circumstances of her life had forced her to excel—something she would continue to do as a justice. She said she had been so successful in private practice that she would be taking a pay cut if she were named to the Supreme Court. The job paid \$74,701.

"I am qualified to do this job; I'm willing and I'm able," Leggett said. "And because of what my parents have given me, I don't have any choice but to do a good job."¹⁸⁵

Linda Copple Trout was chosen for the position, but that did not end Leggett's ambition to join the bench. In fact, Trout's elevation to the Idaho Supreme Court meant that her district court seat in Lewiston was now open. Leggett decided to apply for that seat; at the time, only one other woman served as a district court judge in Idaho, Deborah Bail in Ada County.

Leggett "received strong support from a number of groups" in her judicial application.¹⁸⁶ On November 16, 1992, Governor Andrus appointed Leggett to the district court bench in the Second Judicial District in Lewiston, noting, "I am particularly impressed that she intends to lead the effort to make the citizen more comfortable in what sometimes can feel like the insider's realm of the courtroom."¹⁸⁷ In so doing, Leggett became the first African American woman to hold a judicial position in Idaho.

182. *Id.*

183. *Pioneer Jurist*, *supra* note 168.

184. *Idaho Judicial Council Begins Screening Applicants for Vacancy*, THE TIMES NEWS, Aug. 16, 1992, at 12.

185. *Id.*

186. *Andrus Mulls Lewiston Court Seat*, THE TIMES NEWS, Nov. 13, 1992, at 10.

187. *Id.*

In Lewiston, Leggett was “highly visible as an African American woman, a woman professional, and an African American judge.”¹⁸⁸ The lack of privacy made her vulnerable to threats and, unfortunately, she received them. One particularly horrendous example occurred during her presiding over a high-profile murder trial. Leggett received racially motivated death threats and had a cross burned on her front lawn.¹⁸⁹ In 1998, Leggett decided that the “isolation and fishbowl nature of her life” was too much, resigned her position, and moved to Seattle to be closer to her family.¹⁹⁰

A colleague and friend of hers, Judge Richard D. Eadie of the King County Superior Court in Seattle, Washington, described Leggett as:

a quiet but determined woman who has endured poverty, racism—both overt and subtle—and the challenges of education and employment as a single parent and sole support of three children. She is an accomplished lawyer and jurist; a person with dignity and class. She has faced enormous challenges, but always found the inner strength to overcome.¹⁹¹

Other Notable Firsts By Idaho Women Lawyers

In addition to the many amazing “first ladies” of Idaho’s bench and bar described above, numerous other woman have achieved firsts worth mentioning.

Kate E. Feltham—First Woman Elected as Idaho Prosecutor

Kate E. Feltham was born in 1859 in Adams, New York. After high school, Feltham worked as a teacher in Iowa before moving to Nampa, Idaho, in 1893.¹⁹² Once in Idaho, she married Lot Feltham, the city attorney for Caldwell, on September 21, 1893, and began teaching again. Feltham immersed herself in the Caldwell community and soon became an active member of the woman’s suffrage campaign, serving as the president of the Caldwell branch of the Idaho Equal Suffrage Association.¹⁹³ In that capacity,



188. Pioneer Jurist, *supra* note 168.

189. Kathy Hedberg, *Standing in Judgment*, THE LEWISTON TRIBUNE, Oct. 26, 2018.

190. Pioneer Jurist, *supra* note 168.

191. Pioneer Jurist, *supra* note 168.

192. First 50, *supra* note 1 at 9.

193. First 50, *supra* note 1 at 9.

she attended statewide meetings and worked with Helen Young, Idaho's only woman attorney at the time, on the board of the Idaho chapter of the National American Women Suffrage Association.¹⁹⁴

Feltham's efforts at securing the right to vote in Idaho gained her attention, including receiving "about 9 [write-in] votes for city engineer" in 1898 while she was working as a clerk in a Caldwell election.¹⁹⁵ Feltham continued to be involved in her community, founding the first free public reading room in Caldwell and becoming the founding president of the Progress Club, a forerunner of the Future Club of Caldwell.¹⁹⁶

By 1910, Feltham and her husband were living in the Weiser, Idaho, area and were listed in the 1910 census as "fruit farmer[s]." But it is clear that Feltham was doing more than farming; she was preparing for a career in the law by studying in her husband's law office. At the time, law-office study or "reading for the law" was an alternative form of legal education allowed by the Idaho State Bar. Four years later, on September 22, 1914, Feltham applied for, and was admitted to, the Idaho State Bar and became its fifth woman attorney.¹⁹⁷

Feltham practiced law in Weiser for thirty years and shared an office with her husband, whom she later divorced. In 1926, she was elected to serve as prosecuting attorney for Washington County; she was the first woman to hold a prosecuting attorney position in Idaho.

Feltham died in Weiser on August 28, 1936. The local newspaper reflected on her life:

"Gifted with a mind of unusual power and with determined will and pioneer spirit she entered upon the study of law, and was admitted to the bar at time when this was considered exclusively a field for the activity of men."¹⁹⁸ Today, Idaho Women Lawyers, Inc., honors Feltham each year through its top award named in her honor. The Kate Feltham Award is given to individuals in recognition for their work in "promoting equal rights and opportunities for women and minorities in the legal profession."



194. First 50, *supra* note 1 at 9. See also *Early Women Lawyers*, *supra* note 9 at 18–19.

195. First 50, *supra* note 1 at 9.

196. First 50, *supra* note 1 at 9.

197. First 50, *supra* note 1 at 9. The other four were: (1) Helen Young in 1895; (2) Bertha Stull Green in 1904; (3) Della M. Gregory Thomas in 1907; and (4) Margaret Beall Connell in 1911. See First 50, *supra* note 1 at 1–8.

198. First 50, *supra* note 1 at 10.

Edith Miller Klein—First Woman Lawyer to Serve in Idaho Legislature



Edith Miller Klein was born in Wallace, Idaho, in 1915. When she was growing up, her parents had a house in Moscow, Idaho, and a meat shop in Kellogg, Idaho, and she divided her time between these two places.¹⁹⁹

Klein's parents were advocates of a university education, and she enrolled at the University of Idaho after high school. While there, Klein stayed very busy: while living at home with her parents in Moscow, she took twenty credits a semester, worked four part-time jobs, was a "Hell Diver" with the swimming team, and also played on the soccer and basketball teams.²⁰⁰ She graduated from college in just three years with a degree in business administration in 1935 at the age of nineteen.²⁰¹ After college, Klein attended nearby Washington State University on a teaching fellowship and completed a master's degree.²⁰² When her fellowship ended, she returned to Moscow and held several jobs before moving to Pocatello to work for the State Employment Service and later to Weiser to teach vocational school.²⁰³

In 1943, Klein decided to move to Washington, D.C., to work for the Labor Department and later the War Department. While in D.C., Klein worked during the day and began attending law school at George Washington University at night. At the time, GWU was one of the few law schools that accepted women—many other law schools, including Georgetown, did not—and as a result, GWU attracted women students in large numbers.²⁰⁴ Klein graduated in 1946 and took and passed the D.C. bar, reflecting that World War II had opened up many more opportunities for women than had existed prior to the war.²⁰⁵

Klein returned to Idaho after law school, took and passed the Idaho bar, and on January 7, 1947, became the seventeenth woman admitted to practice in Idaho.²⁰⁶ Klein applied for but did not receive a position with a prominent Boise firm. Undeterred, she approach two other attorneys for a job and was

199. First 50, *supra* note 1 at 34.

200. First 50, *supra* note 1 at 34.

201. First 50, *supra* note 1 at 34.

202. First 50, *supra* note 1 at 34.

203. First 50, *supra* note 1 at 34.

204. First 50, *supra* note 1 at 34.

205. First 50, *supra* note 1 at 35.

206. First 50, *supra* note 1 at 35.

hired—the stipulations being that she would receive the same salary as the office secretary, do her own stenographic work for all cases, and receive a finder's fee of one-third of the fee for the cases she brought to the office.²⁰⁷ That arrangement, Klein recalled, gave her a “foot in the door.” Klein soon developed a solid practice of her own, which included being appointed a part-time Boise city judge (a first in Boise).²⁰⁸

Klein was always interested in politics, so in 1948 she decided to run for the Idaho legislature.²⁰⁹ At the time, Idaho had had a few female legislators, but a female legislator—particularly a woman attorney—from Boise was a novelty.²¹⁰ Klein was the first woman attorney elected to the Idaho legislature.

During her first term in office, from 1949 to 1950, Klein met Sandor (“Sandy”) Klein, a journalist with United Press International, and they married soon thereafter.²¹¹ In 1953, the couple moved to Washington, D.C., and Klein earned her L.L.M. in tax from George Washington University in 1954. She worked for the Federal Communications Commission and then, after two years, moved to New York, where, after being admitted to the bar, she worked for the United States Housing Administration.²¹²

In 1957, Klein returned to Idaho and joined the firm of Langroise & Sullivan in Boise, and her husband became the managing and executive editor of the state's largest newspaper, *The Idaho Statesman*.²¹³ Klein once again pursued elected office but, after being defeated three times, took a job as attorney for the House of Representatives to draft legislation.²¹⁴

In 1964, Klein successfully ran for the House of Representatives and served there until 1968, when she was elected to the Idaho Senate. Klein served in the Senate until 1982, for a total of twenty years in the legislature, including fourteen years as the only woman in the Idaho Senate.²¹⁵

Klein was on a number of cultural and philanthropic boards in Boise and was honored by many organizations for her tireless work. She died in Boise on December 31, 1998, at the age of eighty-three.²¹⁶

207. First 50, *supra* note 1 at 35.

208. First 50, *supra* note 1 at 35.

209. First 50, *supra* note 1 at 35.

210. First 50, *supra* note 1 at 35.

211. First 50, *supra* note 1 at 35.

212. First 50, *supra* note 1 at 35.

213. First 50, *supra* note 1 at 35.

214. First 50, *supra* note 1 at 35.

215. First 50, *supra* note 1 at 35–36.

216. First 50, *supra* note 1 at 36.

Other notable firsts by women in Idaho include the following:²¹⁷

- Susan Flandro of Pocatello was the first woman to serve as deputy Idaho Attorney General in 1968.
- Mary Hobson of Boise was the first woman to serve as an Assistant United States Attorney for the District of Idaho, in 1978.
- Kaye O’Riordan of Boise was elected as the first woman to serve on Idaho State Bar’s Board of Commissioners (representing the Fourth Judicial District), in 1986.
- Merrily Munther of Boise was the first woman to serve as president of the Idaho Law Foundation, in 1986.
- Kaye O’Riordan was the first woman to serve as president of the Idaho State Bar, in 1988.
- Marsha Smith of Boise was the first woman appointed as commissioner of the Idaho Public Utilities Commission, in 1991.
- Susan Graham of Boise was the first woman elected to serve as president of the Idaho Trial Lawyers, in 1992.
- Linda Palmer Judd of Post Falls and Boise was first woman awarded the Idaho State Bar’s Professionalism Award, in 1993.
- Mary Oldham Smith of Rexburg was the first woman awarded (posthumously) the Idaho State Bar’s highest honor, the Distinguished Lawyer Award, in 2003.

Conclusion

Idaho has been blessed with a wealth of smart, gritty, and determined women who have made an impact on Idaho’s bench and bar. Their life and work should serve as an inspiration for both the men and women of Idaho for generations to come. There are still a few important positions that women have not held in Idaho, including United States District Court judge²¹⁸ and judge on the Ninth Circuit Court of Appeals. With time, and with the continued persistence of the smart women of Idaho’s bar, these positions will someday be held by women, and the ultimate glass ceiling of the bar will fall.

217. See First 50, *supra* note 1 at “Milestones for Women In Idaho Law.”

218. As of Nov. 1, 2021, Judge B. Lynn Winmill of the U.S. District Court, District of Idaho, had taken senior status, and his position remained open without a nomination from President Biden and Idaho’s senators.



Robyn Lipsky & Katia Kiston***

IDAHO'S COURTHOUSES: PAST AND PRESENT¹

With so much territory to cover in the Ninth Circuit, we suspect that not everyone will have the opportunity to visit the incredible federal courthouses throughout the Circuit. Fret not, as we welcome you to join us on our virtual visit of the District of Idaho courthouses (past and present)!² Use these pages to whet your appetite for an in-person visit one day!

With several historic and current courthouses in Boise, Moscow, Coeur d'Alene, and Pocatello, there is so much to see!³ We will start our tour of the historic Courthouses in Boise.

*Robyn Lipsky has had the privilege of being the Executive Director of the NJCHS since June 2016. She also served as a law clerk in the federal district court for the Northern District of California for 18 years, where for ten years she ran the NDCA's Historical Society and its Practice Program.

** Katia Kiston has been with the NJCHS for nearly a year as its Executive Assistant. She graduated from UCLA in 2020 with a bachelors in Communication Studies. She is working towards building a successful career in the legal field, with a focus in nonprofit and public interest.

1. Many people contributed their time and effort to this article and while we cannot acknowledge them all as we should, we would like to especially thank Erin Botswick of the Idaho State Archives; Elaina Pierson of the Latah County Historical Society, and Rollins Emerson, archivist for the Ninth Circuit Court of Appeals.

2. For virtual visits of other Districts' courthouses, see our website, NJCHS.org.

3. Additional resources about Idaho's Federal Courts available here: https://www.id.uscourts.gov/clerks/general/Federal_Court_History.cfm

Historic Federal Courthouses

BOISE

Reports that a federal building was planned for Boise appeared in the *Idaho Statesman* as early as 1891, and plans for the building were first established in 1899. Construction began in 1901, and four years later, under the designs of James Knox Taylor, the Federal Building and United States Courthouse at 750 West Bannock Street, Boise was completed.⁴ Taylor, a highly regarded classicist, spent fifteen years as supervising architect of the U.S. Treasury, overseeing the design and construction of more than 800 federal buildings.

The initial design was for a small, elaborate building, constructed with stone and topped with a hipped roof, with a Second Renaissance style. The building ended up being built in the Beaux Arts architectural style instead. Features of the Beaux Arts style are found in the raised first story with a grand entrance, arched windows and doorway, use of decorative wrought iron, and the inclusion of a parapet.



Boise, 1905. Courtesy of the Federal Judicial Center (FJC).



MR. JAMES KNOX TAYLOR.
First Supervising Architect of the United States appointed under Civil Service rules.

James Knox Taylor, Supervising
Architect for the U.S. Treasury

In order to save money, Taylor used bricks in addition to the more expensive sandstone. The sandstone that was used for the basement and first floor walls of the building came from the Table Rock quarry nearby. The construction also represented a technological innovation for Boise, as it was the first time in Boise that an electric stone saw was used

4. James A. Wetmore oversaw an extension to the rear of the building in 1930.

to shape the construction stones.

The front steps are made of granite. One of the eight blocks cut for the steps was a 10,000 pound block, the single largest block of stone quarried in the area. The inside features marble and terrazzo, and many of the original details are still present including the varnished oak wood paneling, the glue-chip glass at the wood entry vestibule, the bronze finishing at the doorway and the ornamental metal in the elevator.

The building was originally used as both the federal building and the courthouse. It served as the meeting place for the U.S. Circuit Court from 1906 until 1912, and the District of Idaho Court held hearings there from 1905 to 1967.⁵ It also was the location of the Bankruptcy Court through 1995. The state maintains some offices in this structure, and it is also home to a U.S. Post Office and some federal agency offices. The building is sometimes referred to as the Borah Building since it houses the Borah Station Post Office.



Old Federal Building in Boise. Photo by Taxoeconomico.

MOSCOW

Located one block off of Main Street, at 206 East Third Street, the Renaissance Revival style building that currently serves as the Moscow City Hall was originally the Moscow Post Office and Courthouse. The Moscow City Hall is a beautiful three-story building, one of only five buildings of three stories or more in downtown Moscow.

Design and construction of the building began in 1909 and was completed in 1911, also under the direction of James Knox Taylor as supervising architect of the U.S. Treasury Department. Built during the Progressive Era, when the federal government was expanding the civic infrastructure to meet the needs of a rapidly growing country, few other Idaho buildings in the early twentieth century cost as much to build.

With thanks to the Latah County Historical Society,⁶ we are able to share with you some contemporary images taken during the construction of the building:

5. The state of Idaho purchased the building from the federal government for \$1.00 and then had to fund a \$1 million contract for renovations.

6. See their Google Arts and Culture site for more. <https://artsandculture.google.com/exhibit/the-federal-building-of-moscow-idaho/LwKC5k7OYekCKA?hl=en>

By May of 1910, bricks and lumber arrived at the construction site, as well as a portable engine. In this photo, the foundation forms are being made and poured.



Workers standing in front of a brick pile.
May 1910. Courtesy of Latah County Historical Society.

With the foundation poured, first floor construction began.



Moscow Post Office and Courthouse first floor construction.
July 1910. Courtesy of Latah County Historical Society.

Detailed brickwork on the roof began in November of 1910.



Bricklayers forming the top decorations of Moscow Courthouse and Post Office.
November 1910. Courtesy of Latah County Historical Society.

The upper decorative cap was completed around the building.



Moscow Post Office and Courthouse.
April 1911. Courtesy of Latah County Historical Society.

Stone was not readily available in the Moscow area, so the building was built of brick. Howard Buchanan, a Scottish mason, was brought to Moscow to execute the brickwork. Buchanan's wage rate was so high, and he was so particular about brick selection and laying that he nearly bankrupted the building's contractor. Buchanan's meticulousness is evident however in the red brick trimmed in ivory terra-cotta.



Courtesy of Waymarking⁷

Additional architectural details of the building are set out in an article by the Society of Architectural Historians:

"Ground-floor windows are tall and round arched and the central panel of each is made up of double-hung, eight-over-eight sashes. These are flanked with four-pane sidelights and topped by graceful fan windows for a Palladian effect. . . . The interior of what remains Moscow's most handsome and sophisticated building has been fully restored. The old courtroom on the second floor, with its finely detailed oak paneling, was turned into chambers for the city council. The lobbies have been turned into a public gallery known as the Third Street Gallery. Only occasionally have historic buildings changed hands and [been used] in such satisfying ways."⁸

As of 1973, a new post office building was under construction. Meanwhile, the Post Office and Courthouse building was listed on the National Register of Historic Places for Latah County, and its fate became a source of local debate, with civic activists engaging with city officials and the Department of the Interior to identify alternative uses for the building. The City of Moscow eventually purchased the building and by 1981 it had been

7. https://www.waymarking.com/waymarks/wm2RCF_Moscow_City_Hall_Moscow_Idaho

8. D. Nels Reese, "Moscow City Hall", [Moscow, Idaho], SAH Archipedia, eds. Gabrielle Esperdy and Karen Kingsley, Charlottesville: UVaP, 2012—, <http://sah-archipedia.org/buildings/ID-01-057-0021>.

partially refurbished for use as the Moscow Community Center. During the next decade further discussions led to the complete renovation of the building and its conversion to the Moscow City Hall.⁹



Moscow Post Office & Courthouse. National Register of Historic Places Collection.

POCATELLO

The search for a dedicated federal courthouse building in Pocatello began in 1908. The following year, a lot at West Lewis and Arthur Streets was

9. For further information, see: Attebery, Jennifer. *Building Idaho, An Architectural History*. Moscow: University of Idaho Press, 1991; Gordon, Irene ed. *Building a National Image: Architectural Drawings for the American Democracy, 1789–1912*. Washington D.C.: National Building Museum, 1985; Hart, Arthur A., "Moscow Post Office and Courthouse," Latah County, Idaho. National Register of Historic Places Inventory – Nomination Form, 1973. National Park Service, U.S. Department of the Interior, Washington, DC; Neil, J. Meredith. *Saints and Oddfellows, A Bicentennial Sampler of Idaho Architecture*. Boise, ID: Boise Gallery of Art Association, 1976; Otness, Lillian W. *A Great Good Country, A Guide to Historic Moscow and Latah County, Idaho*. Moscow, ID: Latah County Historical Society, 198

purchased for the building. Four years later, Congress appropriated \$50,000 to begin the \$200,000 construction project.

Construction of the three-story, Classical-style building began in 1914 and took about two years. The project began under Supervising Architect James Knox Taylor, and was completed under the tenure of Supervising Architect Oscar Wenderoth. While Taylor was renowned for keeping strict control of the hundreds of federal buildings he supervised during his fifteen-year tenure at the Treasury, Wenderoth departed from Treasury Department tradition by hiring a local architect, Frank H. Paradise, for this project.

Paradise had trained as an architect in Chicago, but had relocated to Pocatello shortly before Wenderoth awarded him the commission. Paradise continued the theme of classicism set by the town's 1907 Carnegie Library by designing a reserved building of buff brick with terra-cotta trim.

The Pocatello Federal Building at 150 South Arthur Avenue was used as a federal building and courthouse starting in 1916. The first hearing was held on April 10, 1916, with U.S. District Court Judge Frank Dietrich convening court in the second floor courtroom. While local newspapers referred to the building as "the palace" and hoped that it would be used for 200 years, in fact it was only used until 1977. Though no longer housing federal offices, the building is still a local landmark.



Pocatello, 1916. Courtesy of the FJC.



Pocatello Federal Building. National Register of Historic Places Collection.

COEUR D'ALENE

The Federal Building located in Coeur d'Alene at 221 North 4th Street was in use as a courthouse from 1928 to 2009. In 1910, the United States Senate passed a bill creating a new federal judicial district in Idaho. Because of the city's geographic location in the Idaho "panhandle," Coeur d'Alene was selected in 1911 as the site for a new federal courthouse to serve this new judicial district. In 1911, \$100,000 was allocated for construction of the new courthouse, and the parcel where the Federal Building is located was acquired for \$13,200 on February 5, 1912.¹⁰

Building efforts were stymied possibly by the unexpected death in 1912 of Idaho's powerful Senator, W. B. Heyburn and certainly by the larger national concern —World War I— during which time the federal government suspended or postponed all building appropriations for the Coeur d'Alene Federal Building, as well as for all other federal construction projects. Construction of the Coeur d'Alene building did not resume until the late-

10. https://www.waymarking.com/waymarks/wm2C2E_Coeur_dAlene_Federal_Building_Coeur_dAlene_Idaho

1920s and took approximately fifteen months. Construction was completed by the end of 1928 at an approximate cost of \$266,000.¹¹

The 1977 application to become listed on the National Register of Historic Places describes the building as follows:

"The Coeur d'Alene Federal building is significant in being one of the finer federal buildings constructed in Idaho. The decorative motifs, the contrast of the red brick and cast stone, and the imposing stature of the edifice contribute to its being one of the landmarks of Coeur d'Alene. . . . Building interiors typically featured plaster walls and classically detailed plaster ceilings and trim. . . . The decorative motifs, the contrast of the red brick and cast stone, and the imposing stature of the edifice contribute to its being one of the landmarks of Coeur d'Alene."¹²



Coeur d'Alene, 1928. Courtesy of the FJC.

11. According to the architectural assessment of Jennifer Attebery in "Building Idaho," the U.S. Department of the Treasury began using standardized plans for post offices "in an effort to save architectural cost and to categorize the building needs by size of community. Partly as a result of this scheme and partly as a result of the depression, buildings constructed for the small communities in states like Idaho were plainer than their counterparts elsewhere." Attebery, Jennifer. *Building Idaho, An Architectural History*. Moscow: University of Idaho Press, 1991

12. https://npgallery.nps.gov/NRHP/GetAsset/NRHP/77000461_text

The identity of the architect is unknown.¹³ The National Register application lists L.L. Welch, as the architect but Welch was one of the contractors, not the architect.¹⁴ The building design is described as “Adamesque,” a reference to Robert Adam and Sir William Chambers, the mid to late eighteenth century British architects who espoused this style, which is described as a revival of late Georgian classicism. It was based on Palladian principles of proportion, and introduced a sense of grandeur to British (and later American) architecture. The building elements of the Coeur d’Alene Federal Building suggest a simple, commercial interpretation of the late Georgian style.

Upon completion, the building housed a variety of federal agencies. Original building tenants, in addition to Coeur d’Alene’s Main Post Office and the federal courts, included the U.S. Forestry Service and the Bureau of Entomology, and the federal land office. The building now serves as the location of the Kootenai County Juvenile Justice Center.



Federal Building in Coeur d’Alene, Idaho. Photo by Nancy Reilly Young.

13. In the first three decades of the 20th century, the Department of Treasury began to standardize public building plans with four classifications based on the character of the building. The Coeur d’Alene Federal Building was designed as a Class III. Class III are buildings with brick veneer and terra cotta or stone trim, fireproof floors, wood windows and doors, and limited use of marble or more expensive finishes. Ornament is intended to be simple and limited to public spaces.

14. W. D. Lovell of Minneapolis initially was declared the general contractor after submitting a bid of \$190,000 in 1927. However, according to contemporary newspaper accounts, the work began in August of 1927 with L. L. Welch of Welch and Fritz of San Diego as the general contractor. https://www.waymarking.com/waymarks/wm2C2E_Coeur_dAlene_Federal_Building_Coeur_dAlene_Idaho.

Current Courthouses

BOISE

James A. McClure Federal Building and United States Courthouse

Construction on the current Federal Building and Courthouse in Boise began in 1961 and was completed in 1968. The architectural style of the building is Modernist, and it was designed by the architect Charles F. Hummel, a leader in environmental design, modernism, and urban planning. In 2001, the building was renamed after James A. McClure, a Republican Senator from the State of Idaho. As of 2019, the building has been listed on the National Register of Historic Places.¹⁵



Interior of McClure Federal Building.
Courtesy of Hennebery Eddy Architects.

GSA officials have said the following about the building:

“The modernist style of architecture of the building is reminiscent of the basic tenets of the “Guiding Principles for Federal Architecture” as set forth by President John F. Kennedy in 1962. This encouraged architecture that would provide both efficient and economical facilities as well as provide a visual testimony to the dignity, enterprise, vigor, and stability of the American Government.”¹⁶

15. McClure Federal Building and Courthouse is one of only two Federal buildings in Idaho owned by the General Services Administration with this status. The import of this listing, in part, is that any proposed changes to the building are to be reviewed by the General Services Administration and the Idaho State Historic Preservation Office who will review the proposals with an eye to preserving the building’s distinctive modernist-style exterior architecture and character-defining historic interior features.

16. “McClure Federal Building Now Listed on Historic Register” October 15, 2019. <https://www.gsa.gov/about-us/regions/welcome-to-the-northwest-arctic-region-10/region-10-newsroom/r10-press-releases/mcclure->



James A. McClure Federal Building and United States Courthouse, 1968. Courtesy of the FIC.

The Hummel Architectural Dynasty



"Stacking the Stone," by Royce A. Willians. Charles F. Hummel Papers, Special Collections & Archives, Boise State University.

Charles F. Hummel was a third-generation architect, and the fourth in his family to make architecture his profession. He died in Boise on October 22, 2016, at the age of 91, but his stamp on Boise is indelible. In addition to having designed the U.S. Courthouse and James A. McClure Federal Building, he also designed the Student Union Building and Library at Boise State University. About his public commissions, Hummel said, "[p]ublic buildings reflect something about us. If they're in a city or town, they have to be part of the urban fabric. They can't work against it. They have to be in the context of their place. Our work has always respected that."

The Hummel architectural dynasty in Boise began with Hummel's grandfather, Charles Frederick Hummel. The senior

Hummel was born in Germany, where he trained in architecture, civil engineering, and drafting. The family lived in Chicago and then Seattle, but by 1893 the family was in poor financial circumstances, and so after seeing a promotional flyer about prosperity in the Boise Valley, they moved to Boise in 1895. Hummel went to work with the J.E. Tourtellotte Company, and not long after became a partner in the firm.

The firm became known as Tourtellotte and Hummel. The senior Hummel's sons, Fritz and Frank, later became partners in the firm and the firm came to be known as Hummel Architects. The firm's design legacy includes the Idaho Statehouse, St. John's Cathedral, Egyptian Theater, churches, multiple buildings on the campuses of all three state universities, and many other buildings and homes throughout the northwest.

Charles was born in Boise in 1925. Charles' career in architecture was not a sure thing. He said:

"I knew an awful lot about architecture as a kid," but "it wasn't until after the end of World War II¹⁷ that I really made up my mind that I was going to study architecture. My father never told me that I ought to be an architect. I didn't feel any pressure from my family... I didn't become a partner in the firm for 10 years after I went to work there, so it wasn't a drop kick."

Named a Fellow by the American Institute of Architects (AIA), Hummel and his firm received many regional AIA awards for their designs. He was instrumental in the creation of Boise's two initial historic districts. He was also a proponent of human/pedestrian-friendly city planning, and along with Jane Lloyd, he co-founded Idaho Smart Growth, a nonprofit organization working within the overlap of land use, transportation and community development to help Idaho communities of all sizes become great places.¹⁸

Hummel also served on boards supporting the arts, including the Boise Art Museum and the Boise Philharmonic. About his service he said, "Art and architecture are twins. . . There's a unity to all the arts: dance, art and architecture, saddle making, even cooking. I don't draw a distinction between the so-called higher and the practical arts. They're all pushed by the same impulse: the need to work and to make the thing right."¹⁹

17. Hummel served in France during World War II and then in the Korean conflict.

18. For more information about Hummel, see: Hummel, Charles and Woodward, Tim. *Quintessential Boise: An Architectural Journey* (Boise State University College of Social Sciences and Public Affairs, 2010); Williams, Royce A. "Stacking the Stone". "Capitol of Light." *A Brief History of Hummel Architects 1896-2008*, Charles Hummel.

19. https://info.aia.org/aiarchitect/thisweek06/1020/1020n_hummel.htm

POCATELLO

U.S. District and Bankruptcy Court



Photo courtesy of Brent E. Bunderson, Court Security Officer.

The current federal courthouse in Pocatello is a traditional-style two-story brick building with columns, and is home to the Court as well as offices of the U.S. Marshal, U.S. Attorney, Federal Defender, and General Services Administration (GSA).

When the new courthouse opened in March of 1999, it was considered one of the most user friendly, highly automated, and secure federal judicial facilities in the U.S.

It was also one of the first federal courthouse in the U.S. with a private donor art collection. The collection includes paintings by Idaho and nationally recognized artists.



Pocatello, 1999. Courtesy of FJC.



Artwork by Dayton Claudio, featured in the Pocatello courthouse. Dayton Claudio was born in California in 1955. He has a BA from the University of California, Santa Barbara, and MFA from San Jose State University. Much of his work has been through public art commissions. He describes his work as: “involv[ing] the fusion of surface texture and imagery. It delves into the relationship of 2-dimensional composition with 3-dimensional illusion.” He says that he is “fascinated by seemingly chaotic patterns in nature that have underlying systems. Hidden structures that influence what we see.”

Outside the Pocatello Courthouse there is an exact replica of the Philadelphia Liberty Bell, that, after a ten-year effort, was moved to the front of the federal building from Brady Park in 2011.



Federal Courthouse employees and others celebrating the installation of a Liberty Bell replica outside the Courthouse in Pocatello. Photo by Joe Kline. Courtesy of Idaho State Journal.

COEUR D'ALENE



United States Courthouse, Coeur d'Alene, Idaho (2009)
Photo courtesy of Shawn Toner, Explosive Illusions Photography, Spokane, WA.



George Morrison

This building was built in 2009 by the Architect firm ALSC. In addition to courtrooms, the building also provides office space to Probation and Pretrial Services.

A lovely feature of this courthouse is the artwork, Red Totem V by George Morrison. It was completed in 1980 and is made of sculpted and stained cedar. The work was commissioned by the General Services Administration.

The artist, George Morrison (b. 1919 d. 2000) was an Ojibwe landscape painter and sculptor from Minnesota. His Ojibwe name was Wah Wah Teh Go Nay Ga Bo (Standing In the Northern Lights). He was a member of the Grand Portage Band of the Chippewa Tribe in Minnesota. With his fluent command of the Ojibwe language, he worked as a court interpreter. He attended Minnesota School of Art, which later became the Minneapolis College of Art and Design. He lived in New York in the 1950s and became acquainted with prominent American artists like William de Kooning and Jackson Pollock. By 1970, he had taken a teaching position at the University of Minnesota instructing American Indian studies and art until he retired in 1983. George Morrison acknowledged a variety of influences for his work from cubism to abstract expressionism. For his

woodworking pieces, he gathered driftwood along beaches and then piece them together on a backing board. The totems that he created were inspired by the tribes beyond his own. Totem means “family mark” in the Anishinaabe or Ojibwe language and was seen as a mark of status and honor. Most of the totems that he made were monumental in scope.

We hope that you have been as intrigued and inspired by the stories of these courthouses as we were. This is the second of an ongoing series of virtual visits of courthouses around the Ninth Circuit. For more, please see our website, www.NICHHS.org, and sign up for our newsletter.



Tom Westphal*

A TRUE “WESTERN LAWYER”

The Extraordinary Legal Career of Milton J. Helmick— Last Judge of the U.S. Court for China

In December 1952, an extraordinary trial convened at the ancient Moorish palace housing the U.S. consulate in Tangier, Morocco. Sidney H. Paley, an American citizen, stood accused of helping “a fugitive New York adventurer” arrange a “high seas hijacking of \$100,000 worth of American cigarettes,” violating U.S. piracy laws.¹ Though the alleged offense took place in Moroccan territory, the United States had obtained extraterritorial legal rights in Morocco through treaty in 1836.² These rights granted the United States exclusive legal jurisdiction over U.S. citizens accused of crimes in Morocco and exempted U.S. citizens from Moroccan jurisdiction.³ U.S. consulates, run by State Department officials, held ad hoc courts to administer these legal rights.⁴

At first glance, such “consular courts” may have borne a superficial resemblance to the U.S. legal system. But, as the breathless newspaper accounts of Mr. Paley’s surreal trial attest, the scene was anything but typical of justice back home. Consular courts followed their own complex legal code of local regulations and federal statutes and were considered to operate almost entirely outside the U.S. Constitution.⁵ For example, consular regulations allowed for the complete suspension of procedural safeguards in

* Tom Westphal is a graduate of Washington State University (B.A.) and Stanford University (J.D., M.A.). He is a former U.S. Army Officer and currently works for the City of San José.

1. *Piracy Trial Due to End Today at Tangier*, BOSTON GLOBE, Dec. 20, 1952, at 5.

2. Peace and Friendship art. XX, United States–Morocco, Oct. 1, 1836, 8 Stat. 484, T. S. 244-2. Note that U.S. extraterritorial privileges in Morocco did not apply if a U.S. citizen committed murder. *See id.* at art. XXI.

3. *Id.* at art. XX.

4. Act of June 22, 1860, ch. 179, §§ 1, 21, 28–29, 12 Stat. 72, 72, 76, 78 (creating consular courts to administer U.S. extraterritorial rights in Thailand, Turkey, Iran, Tripoli, Tunis, Morocco, and Oman).

5. *In re Ross*, 140 U.S. 453, 464 (1891).

cases involving American seamen when “justice or public policy require[s] it.”⁶ Non-American witnesses could not be made to answer questions, because the court was powerless to punish them for contempt.⁷ The multinational proceedings likely required a bevy of translators, further complicating the proceedings.

In addition to the jurisdictional, practical, and procedural complexities, the sensational nature of the affair posed a threat to the somber atmosphere one expects in a judicial proceeding. Mr. Paley’s attorney based his defense partially on representing his client as “a business type with no stomach for strong drink [or] stirring action”⁸ who professed “violent seasickness in the calmest of seas”⁹—implying that Paley was temperamentally unsuited for professional piracy and therefore innocent of the charges at hand. A colorful cast of characters, including “a sleek, detached Arab ‘agent,’ a Spanish veteran of Generalissimo Francisco Franco’s Blue Division, another American cigarette ‘exporter’...with the horn[-]rimmed abstraction of a law school student, a brace of bearded Dutch seafaring hearties[,] and a sea captain with a righteous hatred of pirates [all] crossed the witness stand as the trial opened.”¹⁰ Maintaining any semblance of judicial decorum in such a setting was enough to test any judge’s expertise and temperament.

But presiding over this particular trial was Judge Milton J. Helmick, perhaps one of the most experienced and skilled



Milton J. Helmick, Judge of the U.S. Court for China
Court for China. *The China Review*
Weekly, Jul. 14, 1934, at 276.

6. MAXWELL BLAKE, AMERICAN CONSUL GENERAL, REGULATION OF THE CONSULAR COURTS OF THE UNITED STATES OF AMERICA IN THE EMPIRE OF MOROCCO, Ch. 1, § 6 (1911).

7. Milton J. Helmick, *The United States Court for China*, 27 A.B.A. J. 544, 546 (1941).

8. Robert C. Doty, *Tangier Court Finds “Proxy Pirate” Guilty*, N.Y. TIMES, Dec. 21, 1952, at 1, 9.

9. *Piracy Trial Due to End Today at Tangier*, BOSTON GLOBE, Dec. 20, 1952, at 5.

10. U.S. *Piracy Hearing Unfolds in Tangier*, N.Y. TIMES, Dec. 18, 1952, at 1, 20. One gets the sense that the newspaper reporters were really enjoying themselves at this trial, gushing that “[t]he setting—this ancient outpost of the Barbary Coast...was straight technicolor....The casting of the minor roles was uniformly excellent.” *Id.*

extraterritorial judicial officers in U.S. history. By the time of this trial, Helmick's extraordinary legal career had already taken him through a wide variety of unusual settings, from private practice in the dusty mining boomtowns of the American West to high elected office in New Mexico to overseas service as a colonial administrator. Having already seen service in World War I, capture by the Japanese Army in World War II, and private legal practice in free-wheeling postwar Shanghai, he was unlikely to have been fazed by the wild proceedings. There was perhaps no one better suited to guide the trial to a successful and just conclusion.

Though Helmick has sometimes been mentioned as a character in larger works about the various institutions he served in, no one has previously written a biography that spans his remarkable career. This article is divided into two parts. Part I examines Helmick's education and early career as a lawyer, politician, and judge in New Mexico. Part II explores Helmick's overseas service, including his tenure as the last judge of the U.S. Court for China, his capture and repatriation by the Japanese Army during World War II, his postwar career as a private lawyer in Shanghai, and his brief tenure as a consular court judge in Morocco. It also provides substantial background information on the U.S. Court for China, as many readers may be unfamiliar with this extraordinary and unusual extraterritorial court. Throughout, this article analyzes Judge Helmick's role in colonial practices advanced by extraterritorial justice, arguing that though he did not challenge these practices, he continually sought to introduce a measure of humanity and compassion for both Americans and non-Americans within its framework. It also shows how Helmick's upbringing in the American West shaped his approach to colonial jurisprudence. Ultimately, this article shows Judge Helmick to be an extraordinary character in Western American legal history—an "adventurer jurist," the likes of which only the early twentieth-century American West could have produced.

Before beginning, a brief word about sources. Though gaps exist, there are sufficient materials to sketch out the contours of most periods of Helmick's life, including materials available through the Stanford library's Special Collections Department, historical newspaper databases, and journal articles written by Helmick himself. It is worth noting that in addition to the normal obstacles one encounters when retrieving historical documents, there are several unique challenges to studying Helmick's jurisprudence while he served as the judge for the U.S. Court for China. Because the court was not a regular federal district court, its decisions were not published in a regularly published official recorder. The court's records—including Judge Helmick's official opinions—were lost or destroyed during either the Japanese occupation of Shanghai during World War II or the subsequent Chinese

Revolution of 1949.¹¹ This article therefore relies on other primary and secondary sources, including contemporaneous newspaper articles, writings by court officials, bar association materials, and personal correspondence to understand Helmick's experiences.

Part I. Only in the West: Helmick as a Western Lawyer

Early Life and Education

Milton J. Helmick was born November 27, 1885, in St. Louis, Missouri.¹² His family moved to Colorado sometime thereafter, and he was educated in the public schools of Denver.¹³ Helmick enrolled as an undergraduate at Stanford University in 1907, studying pre-law at the law school.¹⁴ At the time, this degree program required students to complete three years of "general courses" as well as all of the first-year law courses.¹⁵ The required first-year law courses bear a striking resemblance to those required at the law school today, including Contracts, Criminal Law, Torts, and Property.¹⁶ Less recognizable was the tuition bill—Helmick would have paid a "syllabus fee" of fifty cents per semester for each law course.¹⁷



Milton J. Helmick, Stanford University 1909 Yearbook.
Courtesy of Stanford Law Library.

11. See Alice I. Youmans et al., *Questions and Answers*, 82 LAW LIBR. J. 633, 635 (1990); *Records of the United States Court for China*, 1 AM. J. LEGAL HIST. 234, 235 (1957) [hereinafter *Records*] (detailing the interesting story of the court records' disappearance and last reported whereabouts). The exception to this rule are cases appealed to the United States Court of Appeals for the Ninth Circuit, which published its opinions in the Federal Reporters. See, e.g., *Smith v. American Asiatic Underwriters, Federal, Inc.*, 127 F.2d 754 (9th Cir. 1942).

12. *New York, New York Passenger and Crew Lists, 1909, 1925–1957*, National Archives & Record Administration (Oct. 2, 2015) [hereinafter *Passenger List*].

13. THE CARLSBAD CURRENT, Sept. 29, 1922, at 8.

14. ANNOUNCEMENT OF THE DEPARTMENT OF LAW, 1909–1909 at 25 (1908) (confirming Helmick's enrollment at Stanford Law School).

15. *Id.* at 17.

16. *Id.* at 9–10.

17. *Id.* at 18.

Helmick was quite active in student organizations, especially as a writer and illustrator for student publications.¹⁸ He was also active in the Stanford Press Club¹⁹ and the Phi Delta Phi legal fraternity.²⁰ Evidentially a gifted cartoonist, his contributions routinely appeared in campus publications.²¹ While cartooning was a perfectly ordinary hobby for a student newspaper contributor, in his later life as a prominent judge, this talent commanded considerable amusement. In one episode, a Shanghai newspaper employee drew a cartoon of Helmick.²² Helmick responded with a caricature of the newspaper cartoonist.²³ The paper gamely published both side by side, reportedly provoking general hilarity in the local community.



BY SAPAJOU

Judge Milton J. Helmick
The N. China Herald and
Supreme Court & Consular
Gazette, Jun. 29, 1939, at 543.

Helmick graduated from Stanford Law in 1909 with a bachelor of arts in pre-legal studies, having completed a four-year program in just two years.²⁴ He returned to Colorado and continued his legal studies at the University of Denver Law School.²⁵ The law school appears to have been particularly focused on subjects needed in the resource extraction and agrarian economy of the early twentieth-century American West, paying “[s]pecial attention” to “Mining Law, Irrigation Law, and Water Rights.”²⁶ The school also emphasized

18. Helmick’s involvement in student life was a constant feature in the *Stanford Daily* during his enrollment. See, e.g., *Bruning Makes Appointment*, STANFORD DAILY, Sept. 23, 1907, at 1; *“Chaparral” Out Friday*, STANFORD DAILY, Sept. 26, 1906, at 4 [hereinafter *Out Friday*]; *Chaparral Out Tomorrow*, STANFORD DAILY, Oct. 8, 1907, at 1 [hereinafter *Out Tomorrow*]; *May Secure Military Band*, STANFORD DAILY, Mar. 7, 1908, at 2.

19. *Press Club Initiates New Members*, STANFORD DAILY, Nov. 21, 1907, at 2.

20. *Phi Delta Phi Initiates: Prominent Law Majors Give an Amusing Entertainment at the Post-Office This Noon*, STANFORD DAILY, Jan. 17, 1908, at 3.

21. See, e.g., *Out Friday*, *supra* note 18; *Out Tomorrow*, *supra* note 18.

22. *Judge Cartoons Cartoonist*, CHRISTIAN SCIENCE MONITOR, Aug. 26, 1936, at 1.

23. *Id.*

24. 1 STANFORD ALUMNI 256 (1956), available at <https://exhibits.stanford.edu/stanford-pubs/catalog/xt336yr6280>.

25. THE CARLSBAD CURRENT, Sept. 29, 1922, at 8.

26. *School of Law of the University of Denver*, DENVER CLARION, Sept. 20, 1923, at 2, available at <https://specialcollections.du.edu/object/codu:64370>.

practical learning, providing “[s]pecial opportunit[ies] for observing actual practice in numerous courts.”²⁷ Helmick continued to be an active reporter, graduating from student publications to working the local news beat at the *Denver Times* and the *Denver Republican*.²⁸

Helmick graduated from the University of Denver Law School in 1910.²⁹ Little else is known about his legal education, but it appears that he rapidly developed into a successful legal practitioner.³⁰ He passed the bar in Colorado in 1911 and in New Mexico in 1912.³¹ Soon after, he opened a law office in the mining boomtown of Socorro, New Mexico, and developed a modest but successful practice.³²



Mrs. Helmick, *The China Press*, Judge and Mrs. Milton Helmick
Jul. 4, 1935, at B3.

While living in Socorro, Helmick married Mildred McLanahan,³³ originally from Clayton County, Iowa.³⁴ The couple evidently eloped across the state line to El Paso, where they were married on January 29, 1916.³⁵ When

27. *Id.*

28. *Judge Helmick Was Once a Newspaper Man*, *THE CHINA WEEKLY REVIEW*, Jul. 14, 1934, at 276 [hereinafter *Helmick a Newspaper Man*].

29. *THE SANTA FE NEW MEXICAN*, Sept. 26, 1922, at 2.

30. *THE CARLSBAD CURRENT*, Sept. 29, 1922, at 8 (noting Helmick was a “successful lawyer and a close student”).

31. *THE SANTA FE NEW MEXICAN*, Sept. 26, 1922, at 2.

32. *THE CARLSBAD CURRENT*, Sept. 29, 1922, at 8.

33. *Helmick a Newspaper Man*, *supra* note 28.

34. *Passenger List*, *supra* note 12. This entry also shows that Mildred was born on June 21, 1895. *Id.*

35. *Notes of Society*, *ALBUQUERQUE MORNING JOURNAL*, Feb. 6, 1916, at 2.

later asked in a newspaper interview why they chose to elope, Helmick explained that they “had no reason for it”—they simply “preferred to do it that way.”³⁶ This sentiment prompted the reporter to observe that such an answer was sure to cause local women to view Helmick as an unrepentant romantic.³⁷ Little information is available about Mildred, but she appears to have occasionally been active in Democratic politics³⁸ and various charity groups.³⁹ There’s no indication that their marriage was anything other than harmonious.

Helmick’s early life and education took him across the American West—from Missouri to Colorado to California—before arriving in New Mexico. Attending some of the best legal institutions that existed west of the Mississippi River at the time, he learned skills at Stanford Law and the University of Denver that would serve him well for the rest of his life. In some ways, his personal journey traced the classic Manifest Destiny route westward from Missouri to the Pacific Ocean.⁴⁰ For well-educated white men, the early twentieth-century American West afforded boundless prospects. Arriving in New Mexico, Helmick was well equipped to take advantage of these opportunities.

Public Service in New Mexico

Though he initially entered private practice—and, indeed, would return to private practice episodically over the course of his life—Helmick seems to have had inclinations to enter public life early in his professional career. He must have immediately become active in the local Democratic Party, as town newspapers were listing him as a Democrat as early as the fall of 1913.⁴¹ That October, the newly minted state district attorney for the Seventh Judicial District selected Helmick to be the assistant state attorney for the district.⁴² This must have been a heady appointment for a young lawyer—even if it was

36. *Helmick a Newspaper Man*, *supra* note 28.

37. *Id.*

38. *Democrats Pick Delegates for County Meeting*, ALBUQUERQUE MORNING JOURNAL, Sept. 30, 1922, at 5.

39. *Committee Meeting This Morn*, THE CHINA PRESS, Mar. 27, 1935, at 5.

40. Helmick did what many Americans before him had been urged to do—“go west, young man, and grow up with the country.” For the confusing origin of this phrase, see Stephen J. Taylor, “Go West, Young Man”: *The Mystery Behind the Famous Phrase* (July 9, 2015), <https://blog.newspapers.library.in.gov/go-west-young-man-the-mystery-behind-the-famous-phrase/>.

41. *Tittman Is Named as Dist. Att’y*, THE BELEN NEWS, Oct. 2, 1913, at 1.

42. *Id.*

somewhat tempered by the fact that there was only one other lawyer in the district eligible for the position.⁴³

Though he had been in New Mexico for only about a year, the position quickly established Helmick as a local fixture in politics. In 1914, Helmick prosecuted four men charged with torturing a local resident to extort money.⁴⁴ These kinds of sensational cases garnered press attention,⁴⁵ perhaps helping him gain additional name recognition and prominence in the local area. He also built a network of future allies and made contacts throughout the region by joining organizations such as the Freemasons.⁴⁶ Given his location in Socorro, a region controlled by powerful mining interests, it was highly likely he was able to cultivate ties to well-heeled businessmen—never a bad thing for an aspiring politician, particularly in New Mexico at the time. He continued to be active in Democratic politics, serving as a delegate to the Democratic Party's state convention in 1916⁴⁷ and running as the Democratic candidate for district attorney in the Seventh Judicial District.⁴⁸ Though he lost that race, his faithful service to the Democratic Party resulted in an even bigger prize: an appointment as an assistant attorney general for the state of New Mexico.⁴⁹ Helmick was sworn into that office on January 1, 1917.⁵⁰

Helmick's tenure as an assistant attorney general was almost immediately overshadowed by larger geopolitical events. In April 1917, the United States declared war on Germany and entered World War I.⁵¹ America began the war with a comparatively small military and enacted a program of raising a mass force through conscription.⁵² Integral to this task were boards of local citizens, appointed to process draftees and ensure that such a conscription was "attuned to local occupational needs, personal problems, and community attitudes."⁵³ In May 1917, Helmick was appointed to such a

43. *Id.*

44. *Los Lunas Notes*, THE BELEN NEWS, May 28, 1914, at 1.

45. *Id.*

46. *Southern New Mexico Masons Taking Degrees*, EL PASO HERALD, Oct. 9, 1915, at 8A.

47. *Socorro County Send 12 Delegates to Convention*, EL PASO HERALD, Aug. 30, 1916, at 14; *Fairbanks Says Democrats Repudiate Their Platforms*, EL PASO HERALD, Aug. 31, 1916, at 4.

48. *Election Proclamation*, THE BELEN NEWS, Oct. 31, 1916, at 1.

49. *Socorro Man to Take Oath as Assistant Attorney General*, EL PASO HERALD, Dec. 26, 1916, at 2.

50. *Id.*

51. ALLAN R. MILLETT & PETER MASLOWSKI, *FOR THE COMMON DEFENSE: A MILITARY HISTORY OF THE UNITED STATES OF AMERICA* 348 (1994).

52. *Id.* at 349.

53. *Id.* at 350.

board: the Selective Service District Board Number One, headquartered in Santa Fe.⁵⁴

Shortly thereafter, Helmick joined the U.S. Army Officer Reserve Corps, probably as an infantry officer.⁵⁵ His decision was almost certainly voluntary—as a prominent state official and an appointed member of a Selective Service board, he would have been extremely unlikely to be drafted. Additionally, at age thirty-two, Helmick was too old to be eligible for Selective Service.⁵⁶

Contemporary newspapers reported that Helmick traveled to the Presidio in San Francisco for training in the summer of 1917.⁵⁷ He evidently did not expect to be gone for long, leaving his wife with her sister “for the summer.”⁵⁸ After training, he was assigned to the Infantry Corps Officer Training School at Camp Pike, Arkansas.⁵⁹ It does not appear that he served elsewhere during the war, and he was honorably discharged in December 1918.⁶⁰

Helmick also became quite involved in supporting the war effort. He urged the New Mexico State Bar Association to adopt a resolution encouraging its members to “lend every assistance required to the clientele”

54. Draft Records for New Mexico District Board for Division Number One, Center for Southwest Research, University Libraries, University of New Mexico (accessed Jan. 14, 2019), <https://rmoa.unm.edu/docviewer.php?docid=nmu1mss82bc.xml>.

55. *Items of Interest from over the State by our Exchanges*, DEMING GRAPHIC, Aug. 3, 1917, at 6; *Judge Helmick's Departure for U.S on First Vacation*, THE CHINA WEEKLY REVIEW, Jun. 25, 1938, at 107 (noting Judge Helmick “served in the American infantry in 1918”).

56. MILLETT & MASLOWSKI, *supra* note 51, at 350 (noting that the “draftable age range” of American men during World War I was 21 to 30 years old).

57. *Socorro County*, Society Section, ALBUQUERQUE MORNING JOURNAL, May 20, 1917, at 6.

58. *Id.*

59. THE CARLSBAD CURRENT, Sept. 29, 1922, at 8 (noting Helmick was assigned to the “I.C.O.T.S.” at Camp Pike); *see also* Camp Pike-World War I Cantonment, G.G. ARCHIVES, <https://www.gjenvick.com/Military/ArmyArchives/TrainingCenters/CampPike/index.html> (accessed Feb. 1, 2019) (stating Camp Pike is located in Arkansas and served as an infantry replacement and training camp).

60. THE CARLSBAD CURRENT, Sept. 29, 1922, at 8.

of lawyers absent due to war service.⁶¹ He also donated to community organizations supporting Army servicemen.⁶²

After the war, Helmick returned to private practice, opening a law office in Albuquerque and representing powerful clients such as the New Mexico Central Railroad.⁶³ The practice thrived, and he commissioned an architect to construct a house in Albuquerque's Fourth Ward, considered to be the city's "best residential area" at the time.⁶⁴ One imagines that connections to railroad interests served Helmick's political aspirations well, as railroad companies effectively controlled development in much of the American West during this time period.⁶⁵

Helmick also remained politically active, serving as the New Mexico Democratic Party's chief legal officer during the 1920 election.⁶⁶ He busied himself collecting political favors by supporting the nominations of friends as candidates to powerful positions.⁶⁷ Such close ties and continued involvement in the Democratic Party earned him the party's uncontested nomination for New Mexico Attorney General in 1922,⁶⁸ highlighting his

61. *Annual Meeting of Attorneys to be Closed Today*, ALBUQUERQUE MORNING JOURNAL, Aug. 31, 1918, at 8.

62. *Santa Fe Goes Over Quota for the War Y.M.C.A.*, NEW MEXICO STATE RECORD, Nov. 16, 1917, at 1.

63. See Milton J. Helmick, *This Is Important*, ESTANCIA NEWS-HERALD, May 8, 1919, at 1 (listing Helmick as an employee of the New Mexico Central Railway [NMCR] as of May 3, 1919); Milton J. Helmick, *About the Park Deed*, ESTANCIA NEWS-HERALD, Mar. 17, 1921, at 2 (listing Helmick as an NMCR employee as of March 1, 1921); *Judge Milton J. Helmick*, THE N. CHINA HERALD AND SUPREME COURT & CONSULAR GAZETTE, Jun. 29, 1939, at 543; Historic Resources of the Downtown Neighborhoods Area of Albuquerque, New Mexico, National Register of Historic Places Inventory—Nomination Form, Heritage Conservation and Recreation Service, U.S. Department of the Interior at 26 (Oct. 20, 1980), accessed at <https://npgallery.nps.gov/GetAsset/25cc2e53-636d-41f7-84c9-cacf3af974e5> [hereinafter HISTORIC RESOURCES] (listing Helmick as an attorney for the New Mexico Central Railway in 1920).

64. HISTORIC RESOURCES, *supra* note 63, at 16.

65. COLIN WOODWARD, AMERICAN NATIONS: A HISTORY OF THE ELEVEN RIVAL REGIONAL CULTURES OF NORTH AMERICA 247 (2011).

66. *Organized for Work*, THE CLOVIS NEWS, Sept. 23, 1920, at 14.

67. See, e.g., *Treasurer Discovered*, NEW MEXICO STATE RECORD, Sept. 27, 1918, at 1 (describing Helmick as responsible for the nomination of T. W. Medley as the Democratic Party candidate for New Mexico State Treasurer).

68. *Election Proclamation*, GALLUP HERALD, Oct. 28, 1922.

popularity and influence.⁶⁹ In the general election, Helmick dispatched his opponent, going on to serve as attorney general of New Mexico from 1923 to 1924.⁷⁰

Helmick's rise from obscurity to prominence was meteoric. In just ten years, he went from opening a one-man private practice in a remote mining boomtown to holding one of the most powerful elected positions in New Mexico. Examining his career, we can clearly see his instincts and skill as a political operator. Oscillating between private practice and public service, Helmick cultivated a network of allies and collected political favors from local politicians. His ties to the enormously powerful railroad and mining industries from his time in private practice also likely paid dividends.⁷¹ He paid his dues to the Democratic Party, remaining a loyal and active member. When World War I began, he did his patriotic duty by enlisting in the Army and supporting the war effort.

His experience as a reporter with Stanford student publications and Denver newspapers may have also endeared him to the press—an invaluable situation for any politician. Newspaper articles covering his future life as a judge illustrate how this relationship may have played out. Members of the Shanghai press observed that even when Helmick's professional responsibilities kept him working long hours, he always made time for reporters, and "his courtesy to the press permitted no interruption."⁷² Helmick charmed reporters by letting them know he was on their side, confiding "I've been...a reporter myself."⁷³ Immediately after he reached Shanghai, the *China Weekly* ran an interview that triumphantly proclaimed "Judge Helmick was once a Newspaper Man."⁷⁴ Such interactions give insight into the personal charm and cozy relationships with the press that may have propelled his political career.

After completing a two-year term as attorney general, Helmick stepped aside, allowing himself to be replaced by fellow Democrat John W.

69. *Democrats Fill Ticket Without Hard Contests*, ALBUQUERQUE MORNING JOURNAL, Sept. 3, 1922, at 1.

70. NEW MEXICO SECRETARY OF STATE, 2015 NEW MEXICO BLUE BOOK at 191 (2015), accessed via the New Mexico State Library digital collection at nmdigital.cdmhost.com/cdm/compoundobject/collection/p267801coll5/id/32916/rec/1 [hereinafter NEW MEXICO].

71. WOODWARD, *supra* note 65, at 247, 250 (noting that the control of the railroad and mining interests "over Far Western politics and society was disturbingly thorough").

72. *New U.S. Judge in Office*, THE N. CHINA HERALD & SUPREME COURT & CONSULAR GAZETTE, Jun. 13, 1934, at 387.

73. *Id.*

74. *Helmick a Newspaper Man*, *supra* note 28.

Armstrong.⁷⁵ Leaving politics, he settled into a less prominent but comfortable role as a state judge, serving on the New Mexico Second Judicial District.⁷⁶ It is unclear why Helmick chose to leave elected office and not run for another term. Previous attorneys general in New Mexico had also chosen to only remain in office for one term, so perhaps he was following custom.⁷⁷ It is possible that Helmick ran afoul of the Democratic Party establishment by opposing the Democratic governor's attempt to award a lucrative highway contract without a competitive bidding process,⁷⁸ but the overall evidence for this theory is scant.

Helmick served as a state court judge in Albuquerque for nine years, adjudicating more than 6,500 civil and 1,500 criminal cases.⁷⁹ One imagines that Helmick could have happily stayed on the bench in New Mexico for the rest of his days, enjoying his status as a respected, prominent figure in the local community. But his already eventful career took an unexpected turn in February 1934 when the President Franklin D. Roosevelt nominated him to be the sole judge of the "the strangest federal tribunal ever constituted": the U.S. Court for China.⁸⁰

Part II. The Honorable Milton J. Helmick: Imperial Judge

Extraterritoriality and the U.S. Court for China

Prior to World War II, western powers regularly obtained extraterritorial legal rights through coercive treaties with nonwestern nations such as Turkey, Morocco, and China.⁸¹ These rights granted exclusive legal jurisdiction over expatriate citizens of western countries to their home nation, exempting them from the legal system of the country where they lived. This practice—a "profound violation of Westphalian territorial principles"⁸²—was deemed permissible because western nations refused to subject their citizens to

75. NEW MEXICO SECRETARY OF STATE, 2015 NEW MEXICO BLUE BOOK at 191 (2015), accessed via the New Mexico State Library digital collection at nmdigital.cdmhost.com/cdm/compoundobject/collection/p267801coll5/id/32916/rec/1.

76. *Helmick a Newspaper Man*, *supra* note 28.

77. NEW MEXICO, *supra* note 70.

78. *Hinkle Disagrees with Gen. Hemlick* [sic], GALLUP HERALD, Oct. 28, 1922.

79. *Helmick a Newspaper Man*, *supra* note 28.

80. David J. Bederman, *Extraterritorial Domicile and the Constitution*, 28 VA. J. INT'L L. 451, 452 (1988).

81. Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2511 (2005).

82. *Id.*

"uncivilized political and legal systems"⁸³ that were "barbaric, unpredictable, and strange."⁸⁴

Beyond the evident racist foundations of such thinking, extraterritoriality functioned as a cutting-edge legal technology for advancing a particular type of colonialism. This strain of imperialism focused not on territorial acquisition but on an empire of "functions, not territory...characterized not by the acquisition of new territory but by their penetration."⁸⁵ Obtaining extraterritorial rights allowed western nations to maintain an "informal empire,"⁸⁶ stripping nonwestern nations of their sovereign right to enforce their laws within their territorial boundaries.

Like many other nations,⁸⁷ the United States enjoyed extraterritorial rights in China, having extracted them as a concession in an 1844 treaty.⁸⁸ This treaty granted it exclusive legal jurisdiction over U.S. citizens in China and exempted U.S. citizens from Chinese jurisdiction.⁸⁹ Extracting extraterritorial rights in China was part of a larger project for the U.S. government, an integral part of building "America in China."⁹⁰ This project envisioned "a kind of U.S. colony, albeit one that did not formally infringe on

83. See David P. Fidler, *The Return of the Standard of Civilization*, 2 CHI. J. INT'L L. 137, 143 (2001).

84. Raustiala, *supra* note 81, at 2511. For more on why Chinese law was not considered to be "law" by western nations, see generally TEEMU RUSKOLA, *LEGAL ORIENTALISM: CHINA, THE UNITED STATES, AND MODERN LAW* (2013) [hereinafter *LEGAL ORIENTALISM*].

85. Samuel P. Huntington, *Transnational Organizations in World Politics*, 25 WORLD POL. 333, 343–44 (1973).

86. Raustiala, *supra* note 81, at 2510–11 (2005).

87. See WESTEL W. WILLOUGHBY, *FOREIGN RIGHTS AND INTERESTS IN CHINA* 27 (1920); see also Helmick, *supra* note 7, at 545 ("Some of the other nations enjoying extraterritorial rights are Great Britain, France, Italy, Japan, Belgium, Switzerland, Norway, Brazil, Denmark, and Sweden," and noting that "Germany, Austria, Hungary and Russia" had also enjoyed such rights prior to World War I.).

88. Treaty of Wanghia art. 21, United States–China, July 3, 1844, 8 Stat. 592, T.I.A.S. No. 109 ("Citizens of the United States, who may commit any crime in China, shall be subject to be tried and punished only by the consul, or other public functionary of the United States, thereto authorized according to the laws of the United States.").

89. *Id.*

90. NORWOOD F. ALLMAN, *SHANGHAI LAWYER* 83–97 (1943).

China's territorial sovereignty."⁹¹ Through extraterritoriality, the U.S. government also wanted to export U.S. legal ideas to the Chinese as "a classic *mission civilisatrice*."⁹² Such imperial sentiments stopped just short of describing the mission of extraterritorial justice as a "white lawyer's burden, in language...Rudyard Kipling would have approved."⁹³

From 1844 to 1906, U.S. consular officers stationed throughout China administered U.S. extraterritorial legal rights. These officials carried, in addition to the normal duties of consular officers, "the double responsibility of providing for [American] citizens in China a system of laws and of tribunals competent to administer them."⁹⁴ The irony here is that because the U.S. Constitution did not apply to extraterritorial judicial proceedings, the power of consular courts was functionally "as extreme and absolute as that of the potentates of the 'non-Christian' countries" where they operated.⁹⁵

In the early twentieth century, the U.S. government became increasingly concerned about reports of consular corruption and incompetence. U.S. consular officials in China, who often had little or no legal training, proved largely inept at administering the extraterritorial legal regime.⁹⁶ According to the State Department, consular courts provided "a certain rough-and-ready justice in a spirit of excellent common sense" but "there have been many complaints on this score...and in some cases, there can be no doubt that consuls have taken advantage of the situation to wield a despotic authority over American citizens in defiance of their rights."⁹⁷ In 1906, Congress

91. See Teemu Ruskola, *Colonialism Without Colonies: On the Extraterritorial Jurisprudence of the U.S. Court for China*, 71 LAW & CONTEMP. PROB. 217, 218 (2008) (emphasis added).

92. See LEGAL ORIENTALISM, *supra* note 84, at 162.

93. *Id.*

94. Note, *The United States Court for China*, 49 HARV. L. REV. 793, 793 (1936).

95. *Reid v. Covert*, 354 U.S. 1, 11 (1957).

96. SEC'Y OF STATE, DISTRICT COURT OF THE UNITED STATES FOR CHINA AND KOREA, S. DOC. NO. 95, at 6 (1905) (noting that "none of our consuls in China are trained lawyers," nor, due to the low pay, "trained lawyers of real ability would be willing to go to China and abandon the practice of their profession in the United States to take these positions"). It is worth noting that this failure to provide proper training or hire qualified officials was not due purely to bureaucratic incompetence on the part of the State Department: administering consular courts was often seen as a distraction from the "proper work" and "single object" of a consular official—the "expansion of American trade in foreign lands." See Richard Weightman, *Secretary Root's First Task Is to Reorganize Consular Service*, CHI. TRIB., Oct. 7, 1905, at 8.

97. S. DOC. NO. 95, *supra* note 96, at 6; see also EILEEN P. SCULLY, *BARGAINING WITH THE STATE FROM AFAR: AMERICAN CITIZENSHIP IN TREATY PORT*

addressed these complaints by establishing a “professionalized” version of a consular court: the U.S. Court for China.⁹⁸

The Court for China was deliberately created to be “in the image of a Federal District Court,” perhaps inspiring defendants to hope for more rigorous judicial proceedings than normally received in consular court.⁹⁹ In place of a consular officer, it was administered by a Senate-confirmed, qualified judge. Instead of ad hoc rules and minimal due process safeguards, the Court for China held the promise of proper procedure and the orderly administration of justice, approaching the standards of courts back in the United States.

The Court for China held concurrent jurisdiction, shared with consular courts, over minor civil and criminal cases, and exclusive jurisdiction over all other cases.¹⁰⁰ It also allowed the court to hear appeals of final consular court judgments and to exercise “supervisory control” over consular officials handling the estates of deceased U.S. citizens in China.¹⁰¹ The court’s decisions could be appealed, in turn, to the United States Court of Appeals for the Ninth Circuit headquartered in San Francisco.¹⁰²

Under the extraterritorial treaty terms, the United States had exclusive jurisdiction over U.S. citizen defendants.¹⁰³ This included corporations

CHINA, 1844–1942 at 98–99 (2001) (noting that “consular extraterritoriality was sorely compromised by the drinking, womanizing, and pilferous [*sic*] habits of State Department field officers”).

98. See An Act Creating a United States Court for China, Pub. L. No. 59-403, § 2, 34 Stat. 814, 815 (1906); 59 CONG. REC. S9,475 (1906); 59 CONG. REC. H9,576 (1906).

99. Milton J. Helmick, *United States Court for China*, 14 FAR E. SURV. 252, 254 (1945). Note that the Court for China may have been in the “image” of a U.S. Federal District court, but it was administered by the State Department and was *not* in fact an Article III Federal District Court. This distinction confused many people (including congressmen) at the time, and continues to confuse contemporary academics. See, e.g., Alan F. Williams, *The Case for Overseas Article III Courts: The Blackwater Effect and Criminal Accountability in the Age of Privatization*, 44 U. MICH. J.L. REFORM 45, 54 (2010) (inaccurately describing the U.S. Court for China as “a U.S. District Court judge sitting in mainland China”).

100. An Act Creating a United States Court for China, *supra* note 98, § 2.

101. *Id.* §§ 2–3.

102. Judge Helmick noted that “comparatively few [appeals] were taken owing to the expense and time involved in carrying them to San Francisco.” Helmick, *supra* note 99, at 254.

103. See Treaty of Wanghia, *supra* note 88.

incorporated within the United States.¹⁰⁴ The court's organic legislation did not specify which body of law was supposed to apply within its jurisdiction.¹⁰⁵ In practice, the court acted largely by ad hoc analogies, sometimes guided by reference to the statutes of the Alaskan territory, the District of Columbia, or various U.S. states.¹⁰⁶ The result: an unpredictable and bizarre jurisprudence, wherein "absurdities plagued the application of U.S. procedure and law."¹⁰⁷ Nonetheless, the Court for China was viewed as an improvement over the uncertain justice previously dispensed by consular courts.¹⁰⁸ By the time Helmick was appointed in 1934, the court had functioned as an important component of the U.S. government's imperial project in China for close to three decades.

Helmick in Shanghai

President Roosevelt nominated Helmick to be the sole judge of the U.S. Court for China in February 1934.¹⁰⁹ His nomination was uncontroversial, and

104. Helmick, *supra* note 99, at 255. Judge Helmick notes that State Department officials in China "fretted and fumed a lot" about non-American companies doing business in China that sought to incorporate in America to escape Chinese jurisdiction, and "in many instances refused to register them." *Id.* For an exhaustive look at how individuals and companies manipulated concepts of citizenship to obtain favorable outcomes from extraterritorial systems, see SCULLY, *supra* note 97.

105. Congress directed the Court for China to enforce "the laws of the United States," regulations promulgated by the minister to China, "the common law," and the "law as established by the decisions of the courts of the United States." *Id.* at § 4. This vague directive was too ambiguous to provide useful guidance, and the "burden of defining a body of authoritative materials of adequate scope and coherence" fell largely on the court's judges. See Note, *The United States Court for China*, 49 HARV. L. REV. 793, 793 (1936).

106. Helmick, *supra* note 99, at 253.

107. Tahirih V. Lee, *The United States Court for China: A Triumph of Local Law*, 52 BUFF. L. REV. 923, 1020–23, 1028. (2004).

108. See WILLOUGHBY, *supra* note 87, at 73 ("[Consular courts] are presided over by officials who are not, for the most part, trained in the law...the United States, by the establishment of the United States Court for China, have partially corrected this evil."); Shanghai Bar Association, U.S. Court for China: Decennial Anniversary Brochure 15 (1916) (statement of former Rep. Edwin Denby) ("I do not imagine that many Americans would care to go back to the slipshod consular system which was so difficult of proper administration and so liable to abuse.").

109. 78 CONG. REC. 2,878 (1934).

he passed quickly through the Senate confirmation process. The Senate judicial committee endorsed Helmick on April 23rd,¹¹⁰ and the full Senate unanimously confirmed him two days later.¹¹¹

At first glance, Helmick might be seen as a pretty odd choice for the post. There's no evidence that Helmick had ever left the United States before, much less journeyed to any part of Asia. He spoke not one word of Chinese, and it is not clear that he had any interest in China. Beyond his brief military service, he had never worked for the federal government. Though he had been active in politics, that experience would not have familiarized him with sensitive diplomatic concerns, brought him into contact with foreign powers, or caused him to interact with the State Department.

But upon closer examination, the justification for Helmick's nomination is a bit clearer. Though lacking overseas experience, Helmick had deep and varied professional experience with both criminal and corporate law. His service as a prosecutor and state attorney general and his work in the private sector had exposed him to legal practice from a wide array of perspectives. Additionally, Helmick's nine years as a state judge in the American West uniquely prepared him for service on the Court for China. Helmick himself maintained that his years on the New Mexico bench well accustomed him "to having different races and nationalities in court and to the use of interpreters," recalling cases requiring a "Spanish interpreter for the jury and [a] Navajo interpreter for the witness."¹¹² Such skills would come in handy on the Court for China, where Helmick would sometimes need to guide judicial proceedings involving witnesses and plaintiffs from "every nationality under the sun."¹¹³ As just one example, Helmick later described a case where a key witness was a Chinese medical doctor educated in Germany. The court interpreter translated the lawyers' questions from English into Chinese. The witness then had to "think in German, reply in Chinese, and let his answer reach the court in English through the interpreter."¹¹⁴ Helmick dryly noted that "[t]his did not make for snappy rapid-fire cross-examination,"¹¹⁵ but his previous experience in navigating these types of complicated language and cultural barriers was surely beneficial.

Finally, Helmick possessed something else that made him a suitable candidate: strong Democratic Party ties and a record of loyal service to the party. Though not explicitly mentioned during his confirmation process, this surely played a large role in his nomination. It was an open secret in the

110. 78 CONG. REC. 7,109 (1934).

111. 78 CONG. REC. 7,324, 7,327 (1934).

112. *Helmick a Newspaper Man*, *supra* note 28, at 276.

113. Helmick, *supra* note 99, at 255 (1945).

114. Milton J. Helmick, *Cases Before the Court*, 14 FAR E. SURV. 304, 304 (1945).

115. *Id.*

Shanghai press, which reliably described Helmick as a “consistent,”¹¹⁶ “strong supporter of the present administration in America,”¹¹⁷ and as a “leading figure in Democratic politics in New Mexico for many years.”¹¹⁸

Upon his confirmation, Helmick set out immediately for China. The term of the previous judge, the Honorable Milton D. Purdy, had lapsed in February,¹¹⁹ and upon arriving in Shanghai that summer, Helmick found a significant backlog of work.¹²⁰ Despite this, Helmick was instantly taken with Shanghai, describing the city as “[a]n astonishing example of human ingenuity and adaptability in meeting complicated conditions—a gorgeous fantasy which I still can scarcely believe is real.”¹²¹ He dedicated himself to his work, and was credited with causing the U.S. Court for China to “flourish[] [and] assume[] a dignity compatible with that of American federal courts elsewhere and the loftiest traditions of Anglo-American jurisprudence and the administration of justice.”¹²² During this time, he probably adjudicated hundreds of decisions, ranging from commercial disputes to capital criminal cases, and often traveled to hear cases at the consular courts in Canton and Tientsin.¹²³

Perhaps using skills honed in campaigns for elected office back home, Helmick quickly gained the approval of the local press and achieved widespread popularity. A Shanghai bar lawyer described Judge Helmick as “without a doubt the most popular” Court for China judge in recent memory, not just with Americans but also “with other nationals, especially the Chinese.”¹²⁴ Local reporters found Helmick to be “quiet spoken and dignified, boast[ing] a trace of the soft accent of New Mexico” and commented that “[h]is manner [was] friendly, yet reserved, and tempered always with genuine

116. *New Judge Sails for Post*, THE NORTH CHINA HERALD & SUPREME COURT & CONSULAR GAZETTE, May 9, 1934, at 186.

117. *Judge Purdy to Retire from Local Bench*, CHINA PRESS, Feb. 22, 1934, at 1.

118. *Milton J. Helmick's Appointment Confirmed*, THE CHINA WEEKLY REVIEW, May 5, 1934, at 392.

119. *See Records*, *supra* note 11, at 235.

120. *Helmick a Newspaper Man*, *supra* note 28, at 276.

121. *Id.*

122. *U.S. Court for China Completes 35 Years of Judicial Activity*, THE CHINA WEEKLY REVIEW, Jul. 5, 1941, at 154.

123. *Judge Milton J. Helmick*, THE N. CHINA HERALD & SUPREME COURT & CONSULAR GAZETTE, Jun. 29, 1939, at 543. Note that the exact number of cases Helmick tried is unknown, as the official records of almost all of Helmick's judicial decisions were subsequently lost. *See supra* note 11 and accompanying text.

124. ALLMAN, *supra* 90, at 107.

interest in his caller.”¹²⁵ Helmick developed a reputation as both a “sound” and “humane” judge, readily able to “combin[e] dignity and humour.”¹²⁶

Helmick’s humor and self-aware perspective of the “strange and amusing” role of the Court for China is evident from his writings.¹²⁷ In 1941, after several years of service on the bench, he humorously described his position on the Court for China as an impossible one, saying:

Somewhere on the rolls of duly licensed lawyers in the United States there may be...a man with sufficient qualifications to be judge of the United States Court for China but if he were to be discovered and brought to bay he would surely prove too sagacious to take the job...For ordinary everyday judging he should know all the substantive law there is on any subject, federal procedure and practice, state court methods and function, all about extraterritoriality, a little international law, a smattering of the law of other countries, something of Chinese law, a great deal about China in its bewildering mass, a lot about international politics, considerable about diplomatic usages, a bit of anthropology and a modicum about bomb-dodging. Curiously, he need not know that elusive thing called the Chinese language. Additional desirable qualifications of a less tangible nature may be summed up as a high and crafty ability for broken field running on behalf of the team representing substantial justice.¹²⁸

Helmick’s humility and gift for “flavor[ing] common sense with humor” endeared him to the Shanghai bar, and no doubt contributed to his popularity as a member of the Shanghai community.¹²⁹ Helmick served on the Court for China from the time he was appointed until the court was dissolved in 1943.¹³⁰

World War II: Capture, Internment, and Return

World War II significantly disrupted Judge Helmick’s tenure on the Court for China, precipitating some of the more colorful exploits of his fascinating career.

In the late 1930s, the Japanese military began a campaign against the Chinese government, eventually occupying large swathes of Chinese territory. This left foreign enclaves in China as “solitary islands” surrounded by

125. *New U.S. Judge in Office*, THE N. CHINA HERALD & SUPREME COURT & CONSULAR GAZETTE, Jun. 13, 1934, at 387.

126. *Common Law Heritage Stressed*, THE N. CHINA HERALD & SUPREME COURT & CONSULAR GAZETTE, Apr. 5, 1939, at 17.

127. Helmick, *supra* note 7, at 545.

128. *Id.* at 544.

129. ALLMAN, *supra* 90, at 107.

130. *See Records*, *supra* note 11, at 235.

Japanese territory.¹³¹ In 1937, the Japanese Army occupied the Chinese quarters of Shanghai, causing significant damage.¹³² Though it did not occupy the international sections of the city, the fighting caused Mrs. Helmick to temporarily flee to Manila.¹³³ But the situation stabilized, and Mrs. Helmick returned to Shanghai after a few months.¹³⁴ Thus, for several years preceding World War II, Shanghai residents learned to live with the uncertainty and threat of conflict. Helmick seems to have largely shrugged off the potential dangers, saying that “[a]ny resident of Shanghai has seen action—violent events—but the city remains serene and indifferent. It has weathered many a blow.”¹³⁵

This new political equilibrium impacted Judge Helmick’s duties considerably. During one criminal hearing, the proceedings were disrupted by the sound of Japanese bombers “dropping bombs on Chinese positions just out of the International Settlement.”¹³⁶ Though he ultimately convicted the defendant to a six-month imprisonment, Helmick was forced to suspend the sentence, concluding there was no safe jail in the city to hold the convict.¹³⁷ He also adjudicated criminal charges brought against the occasional miscreants among the increasing numbers of U.S. Marines assigned to protect the city.¹³⁸

In March 1940, Helmick accompanied the U.S. ambassador to China on an extraordinary 1,000-mile journey by automobile through southwestern China, partially to survey the impact of war on the countryside.¹³⁹ They apparently cut quite the figures; a local newspaper man remarked that the party “presented a striking appearance, with every member wearing a blue

131. 3 DOUGLAS CLARK, *GUNBOAT JUSTICE: BRITISH AND AMERICAN LAW COURTS IN CHINA AND JAPAN 1842–1943* at 131 (2015)

132. John Ahlers, *Shanghai at the War’s End*, 14 FAR E. SUV. 329, 329 (1945). The Chinese quarters were physically separate from the international settlement where the U.S. Court for China was located. See JACK SHERWOOD, *FOND MEMORIES OF A YOUNG MAN IN OLD CHINA* 16 (2009) (noting “[l]ike ancient Gaul...Shanghai had three parts: the International Settlement, the French Concession, and the Chinese city and outlying area”).

133. *Helmick Leaves Shanghai to Visit Wife in Manila*, ALBUQUERQUE JOURNAL, Nov. 11, 1937, at 1.

134. *U.S. Court Resumes*, SOUTH CHINA MORNING POST, Nov. 28, 1937, at 10.

135. *U.S. China Judge Lauds Americans*, L.A. TIMES, Aug. 16, 1941, at 3.

136. *New Mexican Is Law for U.S. in China*, CLOVIS NEW EVENING NEWS, Sept. 1, 1937, at 1.

137. 3 CLARK, *supra* note 131, at 134.

138. *Id.* at 163.

139. *U.S. Envoy Completes 3-Month Tour of China*, [D.C.] EVENING STAR, Mar. 1, 1940, at B14 [hereinafter *Tour*].

beret purchased in French Indochina and with chopsticks and knives dangling from [their] belts.”¹⁴⁰ As part of this journey, Helmick held court in Canton, “the first session of his court in Japanese-occupied territory.”¹⁴¹ Helmick described Canton as a “completely devastated city,” noting that “[w]hat few buildings remained standing were mere shells; four walls standing with the interiors blasted out...only one-third of the original population was now living there and most of these were of the poorer classes.”¹⁴² Nonetheless, the judge held court, handling a “few routine cases” such as “probates, adoptions, and estate cases.”¹⁴³

The day after Japan bombed the American naval base at Pearl Harbor, America declared war on Japan, entering World War II on the side of Great Britain and Russia.¹⁴⁴ Japanese military swiftly took control of Shanghai’s international quarter on December 8, 1941, closing the U.S. Court for China.¹⁴⁵ Judge Helmick, along with other American officials, was captured and held as prisoners of war. Though it would not be formally abolished until 1943, this functionally marked the end of the U.S. Court for China.

Captured American officials, including Helmick, were initially interned at Shanghai’s Metropole Hotel or placed under house arrest. The Metropole was highly regarded as a top hotel in the city at the time, and the ordeal likely wasn’t too arduous.¹⁴⁶ American internees later reported that the women among them “had been treated courteously” and the food provided had been adequate.¹⁴⁷ However, other internees were reportedly exposed “to great discomforts and dangers.”¹⁴⁸ Beyond these details, there is a disappointing dearth of information about Helmick’s tenure as a prisoner of war.¹⁴⁹ He did not mention the experience in his later writings.

140. U.S. *Diplomats Arrive in Chungking*, THE CHINA CRITIC, Mar. 7, 1940, at 157.

141. *Tour*, *supra* note 139, at B14.

142. Judge M. J. Helmick *Back in Shanghai*, THE NORTH CHINA HERALD & SUPREME COURT & CONSULAR GAZETTE, Mar. 20, 1940, at 452.

143. *Id.*

144. Jessica Kwong, *What is V-J Day?*, NEWSWEEK (Aug. 14, 2018), <https://www.newsweek.com/what-v-j-day-date-and-meaning-behind-victory-over-japan-celebrations-1071154>.

145. SCULLY, *supra* note 97, at 193.

146. 3 CLARK, *supra* note 131, at 178–79.

147. *Gripsholm Brings 1,500 from Orient*, N.Y. TIMES, Aug. 26, 1942, at 7.

148. *The Gripsholm*, N.Y. TIMES, Aug. 26, 1942, at 18.

149. Helmick’s Prisoner of War (POW) record is in the National Archives, but it contains little information beyond his demographics. *See* Records of World War II Prisoners of War, U.S. National Archives at College Park, Record Group No. 389, available at <https://aad.archives.gov/aad/record-detail.jsp>

After difficult negotiations, the U.S. and Japanese governments eventually agreed to the return of the internees.¹⁵⁰ Over 1,500 American diplomatic and consular staff from China and Japan were taken aboard a Japanese ship to Mozambique, then a Portuguese colony and therefore neutral territory.¹⁵¹ There they were transferred to a Swedish ship, the *Gripsholm*, which arrived in New York in late August 1942.¹⁵² Judge Helmick reportedly took charge of keeping morale up over the long journey, at one point organizing a party involving “baseball caps...all adorned with the Chinese characters for prisons that they had been interned in.”¹⁵³ Sadly, further details on these festivities are not available, and despite Helmick’s efforts, reporters noted that “probably no residents in foreign parts were ever so glad to get back.”¹⁵⁴

After his return to the United States, the State Department found a place for Helmick on the Board of Appeals on Visa Cases.¹⁵⁵ He was reportedly considered for U.S. ambassador to China, but an appointment never materialized.¹⁵⁶

The Japanese Army’s capture of Shanghai and closure of the U.S. Court for China had a particular impact on the court’s Chinese employees. Helmick threw himself into advocating for these employees to be paid back wages, writing persuasively of their “faithfulness, loyalty, and competency.”¹⁵⁷ He successfully persuaded the Judicial Conference of Senior Circuit Judges to pay part of these wages, which reached the Chinese employees via the Swiss consulate.¹⁵⁸ For the remaining wages, Helmick turned to Congress. Legislation funding their back wages was introduced in the House in January 1944,¹⁵⁹ and, partially thanks to Helmick’s advocacy and strong endorsement, it successfully passed both houses of Congress by the end of the year.¹⁶⁰

?dt=466&mtch=1&cat=all&tf=F&q=Milton+Helmick&bc=&rpp=10&pg=1&rid=854 (last accessed Feb. 16, 2019).

150. Randall Gould, *Tokyo Exchange of Americans Slow*, CHRISTIAN SCIENCE MONITOR, Jun. 26, 1942, at 7.

151. 3 CLARK, *supra* note 131, at 178–79.

152. *Gripsholm Brings 1,500 from Orient*, *supra* note 147, at 7.

153. 3 CLARK, *supra* note 131, 178–79.

154. *The Gripsholm*, N.Y. TIMES, Aug. 26, 1942, at 18.

155. OFFICIAL CONGRESSIONAL DIRECTORY 327 (1st ed., Dec. 21, 1943); OFFICIAL CONGRESSIONAL DIRECTORY 338 (2nd ed., Jun. 2, 1944).

156. *The Periscope*, NEWSWEEK, Oct. 29, 1945.

157. H.R. REP. NO. 78-1670, at 3.

158. *Id.*

159. H.R. 4080, 78th Cong. (1944).

160. 90 CONG. REC. S9,625 (1944).

After his experience as a prisoner of war, one might expect that Helmick would not have been eager to return to China during wartime. However, in November 1944, with the war against Japan still in full swing, Helmick accepted a State Department assignment to return to China.¹⁶¹

The relationship between the U.S. and Chinese governments had changed considerably between Helmick's capture and his return to China. Hoping to earn the goodwill of the Chinese government and strengthen their wartime alliance against the Japanese, the U.S. government signaled its willingness to relinquish its extraterritorial rights in China in September 1942.¹⁶² Negotiations moved quickly, and the United States and China signed a treaty to this effect in January 1943.¹⁶³ This precipitated considerable anxiety among some western observers, especially those with prewar commercial stakes in China.¹⁶⁴ American companies were particularly alarmed by Chinese proposals to exclude some foreign corporations from operating in China when the war was over.¹⁶⁵ Partially in response to such concerns, the State Department dispatched Helmick to undertake "a general survey of Chinese laws, regulations, and judicial administration, with particular reference to commercial laws affecting American firms having commercial interests in China."¹⁶⁶

Helmick arrived back in China on November 24, 1944.¹⁶⁷ His mission was officially welcomed by the Chinese government, which promised to make "due facilities" available for him "so as to make his visit of mutual benefit to the two countries."¹⁶⁸ He evidently made "an extensive survey of many local, provincial, and national courts," supervised the translation of existing Chinese judicial codes into English, and undertook a "comparative study"

161. *Judge Helmick to Make Judicial Survey in China*, [D.C.] EVENING STAR, Nov. 8, 1944, at A3.

162. 3 CLARK, *supra* note 131, at 185.

163. Treaty for Relinquishment of Extraterritorial Rights art. 1, United States-China, Jan. 11, 1943, 57 Stat. 767, T.S. 984.

164. Ahlers, *supra* note 132, at 330 n.1 (noting the popularly held view that "[m]any problems will undoubtedly arise when the prewar Shanghai business community attempts to function without the protection of extraterritoriality").

165. AMERICAN BAR ASSOCIATION, REPORT OF THE COMMITTEE ON FAR EASTERN LAW at 114 (Dec. 1945).

166. 11 DEPARTMENT OF STATE BULLETIN, PUB. NO. 2213, at 576 (Nov. 12, 1944); see also *Judge Helmick to Make Judicial Survey in China*, *supra* note 161, at A3.

167. *Helmick to Study Chinese Courts*, N.Y. HERALD TRIBUNE, Nov. 25, 1944, at 3.

168. *Id.*

between the written codes and “the actual practice of the Chinese juridical system.”¹⁶⁹

American firms operating in China found the end of extraterritoriality difficult to adjust to. They complained about the cumbersome nature of Chinese commercial regulations and hoped Judge Helmick’s visit would result in the “clarifi[cation]”¹⁷⁰ and “revision of certain laws.”¹⁷¹ Though it is unclear if his visit immediately or directly achieved the hoped-for objectives, Helmick later said he was confident that foreign businesses would be able to operate profitably in China “under the new Chinese company law,” which he deemed to be “a reasonable and modern piece of legislation.”¹⁷²

After his mission, Helmick briefly returned to the United States and his job at the Visa Cases Board of Appeals.¹⁷³ Alongside an eminent Chinese lawyer, Helmick founded a nonprofit association to provide scholarships for Chinese students to study American law in the United States.¹⁷⁴ The association also coordinated an effort to provide American law books to newly established Chinese law schools.¹⁷⁵ Helmick considered this cause to be “of the utmost importance to the future of both China and the United States.”¹⁷⁶ Leveraging his personal connections in government, he persuaded prominent politicians and legal scholars to join the board of his organization, including Supreme Court justice William O. Douglas, New Mexico senator Carl Hatch, and the dean of the University of Virginia Law School.¹⁷⁷

Japan formally surrendered in August 1945, effectively ending World War II.¹⁷⁸ The war had intimately affected Helmick’s life and legal career, impacting

169. U.S. CONSULATE GENERAL IN CHUNGKING, CHINESE PRESS REVIEW, *Chinese Existing Juridical Codes Translated into English* at 9 (Jan. 17, 1945).

170. U.S. Will Make Survey of Chinese Legal System: Milton J. Helmick Departs for Orient to Start Project, NEW YORK HERALD TRIBUNE, Nov. 8, 1944, at 17A.

171. H. DOC. NO. 303-6, Vol. 6, at 1006 (1967).

172. *Chiang Sees U.S. Admiral on China Navy*, CHRISTIAN SCIENCE MONITOR, Feb. 8, 1946, at 7.

173. OFFICIAL CONGRESSIONAL DIRECTORY 342 (2nd ed., Aug. 14, 1945).

174. AMERICAN BAR ASSOCIATION, *supra* note 165, at 114.

175. Letter from Milton J. Helmick to China Legal Education Committee Board of Trustees (undated, likely from 1945) (on file with the University of Virginia Law Library).

176. Letter from Milton J. Helmick to F. D. G. Ribble, Dean, University of Virginia Law School (Jun. 5, 1945) (on file with the University of Virginia Law Library).

177. *Committee Will Sponsor Law Scholarships*, Newspaper Fragment, The Papers of Frederick D. G. Ribble, Box No. 18 (on file with the University of Virginia Law Library).

178. Kwong, *supra* note 144.

his duties as U.S. Court for China judge and leading to his internment as a prisoner of war. Despite the dangerous circumstances, Helmick continued to carry out his responsibilities, holding court while bombers droned overhead and hearing cases in war-torn cities. Even after the U.S. Court for China was closed, Helmick found avenues for his legal skills, advocating for back pay for its employees and helping to develop the renewed Chinese legal system. The end of the war also signaled the end of extraterritoriality in China—a system on which Helmick left a distinctive and significant mark.

Helmick's Contributions to Extraterritorial Jurisprudence



Judge Helmick Once Worked on a Big Daily, The China Press, Jul. 4, 1934, at B13. Adolphe Goldberg.

The U.S. Court for China's jurisprudence is a puzzling and unique chapter in American imperial ambitions. Though the United States enjoyed similar extraterritorial rights in other countries,¹⁷⁹ it was "only in China that the United States decided to establish a 'real' court...everywhere else, it relied on consular courts."¹⁸⁰ This makes the Court for China a historical outlier "unprecedented in American diplomatic and legal history."¹⁸¹ As the court's sole judge and one of only five people ever to serve on its bench, Helmick made important contributions to the history and practice of American extraterritoriality. While nearly all of the official records of his tenure were subsequently lost or destroyed,¹⁸² by examining other sources, we can get a sense of how he approached the position and of his legacy as the last judge of the U.S. Court for China.

Helmick's views on colonialism, as well as extraterritoriality itself, seem to have been heavily informed by his upbringing in the American West. He appears to have had substantial awareness of the injustices and hypocrisy of American imperial attitudes. He described Americans as "interlopers" in New Mexico,

179. See, e.g., Treaty of Amity and Commerce art. VI, United States–Japan, Jul. 11, 1858, T.S. 185 (establishing American extraterritorial rights in Japan).

180. LEGAL ORIENTALISM, *supra* note 84, at 160.

181. *Id.*

182. See *supra* note 11 and accompanying text.

since “Spanish-Americans” had been there for several hundred years prior to American occupation of the territory.¹⁸³ However, like many of his contemporaries, he denied that extraterritorial concessions were a “disgraceful derogation of Chinese sovereignty, forced upon the Chinese by foreign imperialism.”¹⁸⁴ He instead viewed the U.S. role as the United States doing the Chinese a favor, relieving them from the “troublesome problem” of holding foreigners accountable under Chinese law.¹⁸⁵ He compared this view to the relationship between the U.S. government and Native American tribes in New Mexico, saying that the United States “allowed” Native American tribes to retain limited jurisdiction over their members to prevent them from “cluttering up our courts with their misdemeanor trials and internal disputes.”¹⁸⁶

Despite these beliefs, Helmick recognized the problems created by extraterritoriality and seems to have been committed to preventing Americans from exploiting extraterritorial privileges to “instigate civil strife or undermine the every existence of the [Chinese] Government.”¹⁸⁷ He emphasized that “American citizens in China are to engage in legitimate pursuits only” and that “[n]o one must be allowed to think China is a fair field for American adventurers.”¹⁸⁸ Helmick often showed kindness to Chinese and other non-American plaintiffs, recognizing the difficulties they faced in having to come to a “strange tribunal to enforce the rights they claimed.”¹⁸⁹ He exercised his judicial discretion to ease the financial burden on Chinese plaintiffs, often waiving court fees.¹⁹⁰ These actions underline Helmick’s view that “the duty of the court to protect Americans was no higher than its obligation to afford just remedies to four hundred million potential [Chinese] plaintiffs.”¹⁹¹

Helmick’s jurisprudence seems to have been guided by a functionalist approach to law, wherein the ultimate goal was to “do substantial justice and satisfy the essential requirements of elementary right.”¹⁹² In the service of this goal, he was willing to take liberties with black-letter law, explaining that “[e]ven beyond matters of procedure and practice, substantive law sometimes had to be warped or strained in order to do simple fairness and insure [sic]

183. *Helmick a Newspaper Man*, *supra* note 28.

184. Helmick, *supra* note 99, at 252.

185. *Id.*

186. *Id.* at 253.

187. *A Significant Ruling*, THE CHINA CRITIC, Feb. 20, 1936, at 172.

188. *Id.*

189. Helmick, *supra* 114, at 304.

190. *Id.* at 306.

191. Helmick, *supra* 99, at 255.

192. *Id.*

clearly sensible results.”¹⁹³ He referred to *stare decisis* as a “fetish,” rejecting “technical and artificial” “imperial rules based on past experience.”¹⁹⁴ Accordingly, Helmick called on courts to “weigh these ancient prejudices with misgiving.”¹⁹⁵

In lieu of strict adherence to judicial precedent, Helmick believed judges should consider “human relationships,”¹⁹⁶ examining the case “from the human angles.”¹⁹⁷ The search for equity would instead be aided by the judges’ “legal instinct and intuition,”¹⁹⁸ drawing on the “history, racial instincts, habits, customs, and hopes and fears of people.” Judicial decisions would therefore “no longer [lie] solely in Webster and John Marshall, but increasingly in Miles Standish, Hawthorne, Mark Twain, and Edison.”¹⁹⁹ Put another way, Helmick believed that the judicial system should serve individuals through a human-centric approach to resolving disputes. This appears to be an outgrowth of a larger view in which Helmick understood the state to be in service to the citizen, “not the citizen for the state.”²⁰⁰

This philosophy also seems to have contributed, in part, to Helmick’s rejection that Chinese law was innately inferior. He instead believed that, in some ways, western nations should adopt “some of the Chinese idea of emphasis on custom rather than on codes” in the search for equitable, human-centric, flexible justice.²⁰¹ He made “frequent concessions to local conditions and customs”²⁰² and even occasionally drew on and applied Chinese legal concepts in court,²⁰³ particularly in cases involving real-

193. *Id.*

194. *Judge Helmick Speaks on “Drifts in American Law,”* THE CHINA WEEKLY REVIEW, Feb. 2, 1935, at 343.

195. *Judge Helmick on U.S. Justice,* THE N. CHINA HERALD & SUPREME COURT & CONSULAR GAZETTE, Jan. 30, 1935, at 175.

196. *Id.*

197. ALLMAN, *supra* note 90, at 107.

198. Helmick, *supra* 114, at 304.

199. *Judge Helmick on U.S. Justice, supra* note 195.

200. *Common Law Heritage Stressed,* THE N. CHINA HERALD & SUPREME COURT & CONSULAR GAZETTE, Apr. 5, 1939, at 17. This sentiment was quite popular at the turn of the century, and may have played a role in Helmick’s university education. *See, e.g.,* H. G. WELLS, A MODERN UTOPIA 90–91 (New York, 1905) (“The State is for Individuals, the law is for freedoms, the world is for experiment, experience and change: these are the fundamental beliefs upon which a modern Utopia must go.”).

201. *Judge Helmick on U.S. Justice, supra* note 195.

202. Helmick, *supra* 114, at 304.

203. *Judge M. J. Helmick Applies Chinese Law of Succession,* THE CHINA WEEKLY REVIEW, Jul. 20, 1935, at 249.

property transactions.²⁰⁴ Note that this position is at odds with the origins of extraterritoriality as a “cure” for foreign laws that were “barbaric, unpredictable, and strange,”²⁰⁵ but it is compatible with Helmick’s view that extraterritoriality was a “favor” that relieved foreign nations of the trouble of administering their own justice.

Congress’s vague statutory directives granted the U.S. Court for China enormous leeway in deciding what law to apply.²⁰⁶ In some ways, extraterritorial court was the perfect venue for a judge like Helmick, who had access to a wide range of legal materials to select from and analogize to as he saw fit.²⁰⁷ This flexibility certainly facilitated Helmick’s beliefs that judicial decision-making was a matter of assigning “law to justice and not justice to law”²⁰⁸ and that, driven by his “earnest hope” that despite the frequent absurdities of extraterritorial laws, his judicial decisions would “turn out to be American justice.”²⁰⁹

When we examine these concepts together, a picture emerges of a judge driven to provide equitable justice within the existing imperialist framework. Judge Helmick does not appear to have ever challenged the colonial structure of extraterritoriality itself, and he spent close to a decade of his life dutifully upholding American imperial interests. But it does appear that he was devoted to providing some semblance of evenhanded treatment to Chinese and non-American plaintiffs within this framework—a view that does him substantial credit.

Helmick’s Postwar Career: Shanghai Lawyer and Consular Judge

The end of the war brought a new order and a new optimism. For many nations and individuals, it was a period of profound transition and change. For Milton Helmick, the war had prematurely ended his tenure as the judge of the U.S. Court for China, and its conclusion brought new opportunities. He left government and returned to private practice, accepting a position as in-

204. Lee, *supra* note 107, at 934.

205. Raustiala, *supra* note 81, at 2511. For more on why Chinese law was not considered to be “law” by western nations, see generally *LEGAL ORIENTALISM*, *supra* note 84.

206. See generally Ruskola, *supra* note 91.

207. Helmick, *supra* 114, at 304 (“Nearly every day there was some case which called for some modification or relaxation of American law....[The court] steered mostly by legal instinct and intuition...and acted largely by analogy in the earnest hope that whatever it wrought would turn out to be American justice.”).

208. *Judge Helmick on U.S. Justice*, *supra* note 195.

209. Helmick, *supra* 114, at 304.

house legal counsel for the Standard-Vacuum Oil Company's Shanghai office.²¹⁰

The sudden transition back to the private sector—after nearly a quarter century of public service and almost twenty years on the bench—must have been a substantial adjustment and may seem unexpected. But in some ways, the move followed several well-established patterns. Helmick had done the same thing after World War I, leaving government for private practice to take advantage of postwar opportunities. Helmick's predecessor on the Court for China, Milton Purdy, had also remained in Shanghai after his tenure on the bench was complete, leveraging his professional connections and knowledge of the complicated legal landscape to become the president of a local finance company.²¹¹ From Standard Oil's standpoint, Helmick's appointment must have been a coup. By "virtue of his post before the war, [Helmick] is one of the most well-known and respected Americans in China today"—a potentially invaluable advocate for American companies.²¹² Helmick had also just finished his survey of the emerging post-extraterritorial Chinese commercial code, and was steeped in the expertise needed to navigate the uncertainties of postwar China. The appointment may also have occurred partially by happenstance—Helmick's office for the Board of Appeals on Visa Cases appears to have been in the same building as Standard Oil's Washington, D.C., office.²¹³

Upon his return to Shanghai in 1946, Helmick found an "undercurrent of tremendous optimism" coursing through the city.²¹⁴ Shanghai was largely spared the devastation suffered by other Chinese cities during World War II, and American companies had tremendous expectations of the commercial opportunities available in Chinese markets.²¹⁵

Helmick's return to Shanghai also appears to have been based in part on a genuine love for and personal interest in the city. Helmick reportedly proclaimed, with eerie prescience, that "Shanghai is destined to be one of the three leading cities of the world, coming after London and New York."²¹⁶ This ascendancy, Helmick said, would be based not on the actions of the victorious western powers, but on Shanghai's "key geographical position" and on the

210. *People in the News*, THE CHINA WEEKLY REVIEW, Dec. 22, 1945, at 65.

211. 3 CLARK, *supra* note 131, at 79.

212. *Shanghai's Place: Destined to Be World's Third City*, SOUTH CHINA MORNING POST, Mar. 1, 1946, at 4 [hereinafter *Shanghai to be World's Third City*].

213. Letter from F. D. G. Ribble, Dean, University of Virginia Law School 2 (May 26, 1945) (on file with the University of Virginia Law Library).

214. Ahlers, *supra* note 132, at 329.

215. *Id.*

216. *Shanghai to Be World's Third City*, *supra* note 212.

"wisdom of the Chinese people."²¹⁷ He said he was confident that China would emerge as a "strong" nation with "an industrious, resourceful, intelligent population."²¹⁸ These comments got enormous play in the Shanghai press, triumphantly reestablishing Helmick as one of the city's leading lights.

Although back in private practice, Helmick remained active in the public life of the city. He seems to have played an informal role in State Department efforts to resolve the claims of various entities and organizations affected by the war.²¹⁹ He also seems to have worked as a legal adviser to the mayor of Shanghai in sorting through the host of problems caused by Japanese expropriation of property during the war.²²⁰

A letter from Helmick dated October 1947 gives interesting insight into his position in China.²²¹ Finding life in China "interesting" and "a little too exciting" at times, Helmick confides considerable frustration in the state of the Chinese legal system, comparing it to "practicing law in a legal vacuum."²²² Helmick relates that the "[l]aw picture" in China is "not good" and diagnoses the problem as due to a "lack of a settled legal system and the impotency of [Chinese] courts."²²³ It is unclear if these frustrations played a role in Helmick's eventual departure from China.

Though nearing the end of his remarkable career, Helmick had one final adventure in front of him. Through a recess appointment, Helmick was appointed to be consular court judge for Casablanca and Tangier, in Morocco.²²⁴ In the early 1950s, America still exercised extraterritorial rights in Morocco similar to those it had historically held in China.²²⁵ In Morocco, U.S. extraterritorial justice had never been "professionalized" to the extent it was

217. *Id.*

218. *Chiang Sees U.S. Admiral on China Navy*, *supra* note 172.

219. H. Doc. No. 80-790, Vol. 7, at 1412 (1972).

220. *War on House Racketeers?*, *THE CHINA WEEKLY REVIEW*, Oct. 26, 1946, at 224.

221. Letter from Milton J. Helmick to D. R. F. Ribble, Dean, University of Virginia Law School (Oct. 16, 1947), (on file with the University of Virginia Law Library).

222. *Id.*

223. *Id.*

224. 99 CONG. REC. 9,451, 9,521 (1953); *Former U.S. Judge in China Dies*, *SOUTH CHINA MORNING POST*, Oct. 21, 1954, at 10. The Senate confirmed his appointment several months later. *See* 99 CONG. REC. 10,646 (1953).

225. Peter Nicolas, *American-Style Justice in No Man's Land*, 36 GA. L. REV. 895, 999–1000 (2002); Act of June 22, 1860, ch. 179, §§ 1, 21, 28–29, 12 Stat. 72, 72, 76, 78 (creating consular courts in Thailand, Turkey, Iran, Tripoli, Tunis, Morocco, and Oman). Extraterritorial jurisdiction in Morocco repealed in August 1956. *See* Pub. L. 84-857, 70 Stat. 774 (repealing 22 U.S.C. §§ 141–43) (1954).

in China, and even in the 1950s, there was no equivalent to the U.S. Court for China.²²⁶ Most diplomatic personnel in U.S. consular courts had no expertise and little experience in adjudicating criminal cases or courtroom procedures.²²⁷ Helmick's appointment, therefore, represented a great improvement. His deep experience as a public servant and his decades on the bench made him a uniquely qualified candidate for such a position.

Helmick arrived in Morocco just in time to preside over the sensational trial referenced at the beginning of this paper²²⁸—the piracy trial of Sidney H. Paley, described by one newspaper reporter as “a Barbary Coast nylon-panty manufacturer from Jersey City, N.J.”²²⁹ Helmick adjudicated the surreal proceedings with a practiced hand. As the trial drew to a close, the mild-mannered pirate, appearing in court in “an expensive camel's hair coat and an immaculate blue suit,”²³⁰ asked for relief on the basis that mercy was justified by the imminent Christmas holiday and the approach of “the season of peace and good-will.”²³¹ Despite this plea, Helmick convicted Paley on both alleged charges over the objections of other consular officials.²³² Mr. Paley appealed and made his \$10,000 bond by putting up cash and a “cream-colored Cadillac convertible.”²³³ On appeal, the embassy's chargé d'affaires affirmed Helmick's judgment.²³⁴ This colorful, sensational trial must have been a satisfying capstone for a judge at the high-water mark of his career.

Conclusion

By late 1953, Helmick's health seems to have been failing. He returned to Washington, D.C., and his position on the Board of Appeals on Visa

226. Bederman, *supra* note 80, at 451.

227. Maryellen Fullerton, *Hijacking Trials Overseas: The Need for an Article III Court*, 28 WM. & MARY L. REV. 1, 68 (1986).

228. See *supra* Introduction.

229. *Piracy Trial Due to End Today at Tangier*, BOSTON GLOBE, Dec. 20, 1952, at 5.

230. Robert C. Doty, *Tangier Court Finds “Proxy Pirate” Guilty*, N.Y. TIMES, Dec. 20, 1952, at 9.

231. *Id.*

232. *American Who Hates the Seas Convicted as Pirate in Tangier*, N.Y. HERALD TRIBUNE, Dec. 21, 1952, at 1.

233. *Id.*

234. AMERICAN MARITIME CASES 402 (1953).

Cases.²³⁵ He retired in January 1954²³⁶ and died shortly thereafter in Los Angeles, in October 1954.²³⁷

Throughout his extraordinary life, Judge Helmick served his community through many avenues of legal practice, including as a small-town private practice lawyer, state prosecutor, attorney general, respected member of the state bar, railroad company lawyer, state judge, federally appointed extraterritorial judge, international lawyer, and consular official. Helmick availed himself of the opportunities available in the early twentieth-century American West, becoming a sort of renaissance man and “adventurer-jurist” worthy of a pulp fiction novel. As a judge in New Mexico, Shanghai, and elsewhere, he sought to humanize the law through a more flexible brand of equitable justice. His varied and colorful legal career illustrates both the possibilities of service through a life in the law and the boundless opportunities of the early American West.

235. 99 CONG. REC. 1,993 (1953).

236. 3 CLARK, *supra* note 131, at 202.

237. *Former U.S. Judge in China Dies*, SOUTH CHINA MORNING POST, Oct. 21, 1954, at 10.

**In Memoriam:
Stephen L. Wasby
Chronicler of the Ninth Circuit
1937-2021**



The United States Supreme Court is the subject of a vast literature that examines every aspect of the Court's operations, its processes, and its personnel. By comparison, the federal courts of appeals – the final arbiters in all but a tiny fraction of federal cases – are little known and seldom studied. Fortunately, there is one Court of Appeals about which we have a trove of information, thanks to the labors and insights of the late Professor Stephen L. Wasby. Professor Wasby took it upon himself to study in depth and detail the inner workings of the what is now the largest of the federal appellate courts, the Ninth Circuit Court of Appeals. There is no comparable body of work about any of the federal courts of appeals, let alone one that is the product of a single author.

Stephen L. Wasby was born on March 6, 1937. He received his B.A. from Antioch College, Yellow Springs, Ohio, and his M.A. (1961) and Ph.D. (1962) in political science from the University of Oregon. For 20 years he taught in the political science department at the University of Albany – SUNY, where he took emeritus status in 1999. A prolific writer, Professor Wasby was author of

dozens of articles in professional journals and law reviews and was author, co-author, or editor of more than a dozen books, including *The Supreme Court in the Federal Judicial System* and *Race Relations: Litigation in an Age of Complexity*. In addition to his scholarship, he will be remembered for having advocated for civil liberties; for helping train police and teaching prospective Navy officers; and, particularly, for serving as a mentor to junior faculty and advanced graduate students. After taking emeritus status, he moved to Eastham, Massachusetts, where he continued as an active scholar of the courts, particularly the Ninth Circuit. He also served on, and chaired, the Zoning Board of Appeals in the Town of Eastham; served on the Charter Review Committee; and chaired a Task Force on Animal Regulations. Professor Wasby died on August 2, 2021.

In this issue of *Western Legal History*, we present tributes to Professor Wasby from four people who knew and worked with him: Judge Diarmuid F. O'Scannlain of the Ninth Circuit; journal editor Clare Cushman; Professor Arthur D. Hellman; and Professor Stefanie Lindquist. These are followed by a bibliography of Professor Wasby's writings about the Ninth Circuit. Additional tributes, and a more detailed biography, can be found at the Dignity Memorial website, <https://www.dignitymemorial.com/obituaries/orleans-ma/stephen-wasby-10293815>.

HON. DIARMUID F. O'SCANNLAIN
JUDGE, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I had the privilege of knowing Steve and collaborating with him on several of his projects. Steve's vast corpus is a testament to his keen skill as an observer of the inner workings of this country's largest and busiest appellate court—a court of nearly 50 judges spread among nine states. My home state of Oregon particularly captivated Steve. Indeed, Steve chose Oregon as the place from which to launch his scholarly career, obtaining an M.A. and a Ph.D from the University of Oregon and later lecturing at Oregon State University. His academic work would often reflect these Oregon roots. For example, his biography of my colleague and fellow Oregonian, Judge Alfred T. Goodwin, discusses the Oregon state and federal courts and the interplay between them. Steve even authored a law review article focusing entirely on the United States District Court for the District of Oregon and that court's record before the United States Supreme Court. Of course, Steve also loved the things everyone loves about Oregon; walking the state's magnificent beaches, for instance, was a favorite lifelong pastime. So while I will miss discussing our mutual admiration of the courts, I may miss even more sharing our mutual affection for this special place.

CLARE CUSHMAN
MANAGING EDITOR, JOURNAL OF SUPREME COURT HISTORY

Steve was a brilliant mind and a great editor. He served the *Journal of Supreme Court History* for many years, helping to edit articles both for content and for syntax and grammar. We asked him to help out after years of receiving gotcha letters after an issue was published—so he could point out flaws *before* we went to press. He was skilled at crafting sentences but was best at diagnosing problems in articles and seeing what was missing. Was he occasionally persnickety and ornery? Yes. But he gave generously of his time and really cared about helping authors get it right.

ARTHUR D. HELLMAN
PROFESSOR OF LAW EMERITUS,
UNIVERSITY OF PITTSBURGH SCHOOL OF LAW

No scholar has contributed more than Steve to our understanding of how federal appellate judges decide cases. Steve's published studies of the Ninth Circuit Court of Appeals – based, as they were, on extended interviews with judges and access to internal court memoranda – provide unique insight into the actual workings of an important appellate court. On a more personal note, Steve was a good friend and a collaborator on many projects. He could on occasion be difficult to work with, but there was no better person to critique a manuscript and suggest ways of improving it. The deeply felt tributes at the Dignity Memorial website testify to the many different ways in which he touched people's lives. I too will miss him.

STEFANIE LINDQUIST
FOUNDATION PROFESSOR OF LAW AND POLITICAL SCIENCE,
ARIZONA STATE UNIVERSITY

Professor Steve Wasby left an indelible mark through his scholarship and teaching at the intersection of political science, public law, and public administration. From 1970 to his death in 2021, Steve produced a remarkable body of work focusing on the discipline of political science, the U.S Supreme Court, policing, desegregation, court management, and the U.S. Courts of Appeals. Powered by his tireless intellectual curiosity, Steve was dedicated to advancing our understanding of the critical role of the judiciary in a dynamic democracy, to explaining how institutional dimensions shape the rule of law, and to evaluating the impact of judicial policy making on local institutions such as education and law enforcement. Author of numerous books and countless articles, Steve's contributions were multifaceted and

diverse. His interests were never solely esoteric, but instead were always driven by his interest in how law and policy shape outcomes in the real world.

Nor did he limit his energy to his scholarship alone. Instead, Steve appreciated and cultivated his role as mentor to students and to junior scholars in the profession. Never shy in offering constructive criticism, Steve invested his time to review and promote high quality work within the academy. His commentary was always invaluable, focused as it was on how research could advance institutional effectiveness, as well as on the quality of the writing and analysis. In that sense, Steve was a pragmatic political scientist. Until the day of his death, he remained an engaged intellectual who valued and nurtured his professional relationships. In his last email to me, with the reference line "How be you?", Steve contacted me to let me know he had read an article that might interest me, and that he was "still writing about the Ninth Circuit, now about the en banc process." Would that all of us would have such energy and focus at 84. Steve will be greatly missed.

Ninth Circuit Bibliography: Writings of Professor Stephen L. Wasby*

What follows is a bibliography of Professor Wasby's writings about the Ninth Circuit. As you can see, their range is extraordinarily wide. They cover judges, supporting personnel, relations with the bar, interaction with the Supreme Court, en banc processes, and many other topics. Some of the books and articles included in the list address broader subjects, but the data and examples are drawn primarily from the Ninth Circuit. Within the categories, works are listed in chronological order. We believe that this bibliography will be an essential starting-point for anyone doing research on the largest of the federal courts of appeals.

I. The Judges

"'Extra' Judges in a Federal Appellate Court: The Ninth Circuit," *Law and Society Review*, 15 (#2, 1980-1981), 369-384.

"Into the Soup? The Acclimation of Ninth Circuit Appellate Judges," *Judicature*, 73 (June-July 1989), 10-16.

"Alfred T. Goodwin: A Special Judicial Career," *Western Legal History*, 15 (Winter/Spring 2002), 9-43.

"The Work of a Circuit's Chief Judge," *Justice System Journal*, 24 (2003): 63-90.

"How Federal Appellate Judges Affect State Law: Judge Goodwin and Oregon," *Willamette Law Review*, 50 (Winter 2014), 195.

*Prepared by Arthur D. Hellman, Professor Emeritus, University of Pittsburgh School of Law.

A Life in Judging: Ted Goodwin of Oregon (Eastham, Mass., 2015).
Borrowed Judges: Visitors in the U.S. Courts of Appeals (2018).

II. Supporting Personnel

"A Judicial Secretary's Many Roles: Working with an Appellate Judge and Clerks," *Journal of Appellate Practice and Process*, 7 (Spring 2005): 151-166.
"Why Clerk? What Did I Get Out of It?" *Journal of Legal Education*, 56 (September 2006), 411.
"Clerking for an Appellate Judge: A Close Look," *Seton Hall Circuit Review*, 5 (Fall 2008), 19-97.
"The World of Law Clerks: Tasks, Utilization, Reliance, and Influence," *Marquette Law Review*, 98 (Fall 2014), 111.

III. Decisions and Opinions

"Inconsistency in the U.S. Court of Appeals: Dimensions and Mechanisms for Resolution," *Vanderbilt Law Review*, 32 (November 1979), 1343-1373.
"Of Judges, Hobgoblins, and Small Minds: Dimensions of Disagreement in the Ninth Circuit," *Judicial Conflict and Consensus*, eds. Sheldon Goldman and Charles Lamb (Lexington: University of Kentucky, 1985), pp. 154-177.
"Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish," *Journal of Appellate Practice & Process*, 3 (2001): 325-341.
"Unpublished Court of Appeals Decisions: A Hard Look at the Process," *Southern California Interdisciplinary Law Journal*, 14 (2004): 67-124.
"Publication (or not) of Appellate Rulings: An Evaluation of Guidelines," *Seton Hall Circuit Review*, 2 (Fall 2005), 41-117.
"Court of Appeals Dynamics in the Aftermath of a Supreme Court Ruling," *Golden Gate University Law Review*, 42 (December 2011), 5.

IV. En Banc Processes

"How Do Courts of Appeals En Banc Decisions Fare in the U.S. Supreme Court?" *Judicature*, 85 (January-February 2002), 182.
"The Supreme Court and Court of Appeals En Bancs," *McGeorge Law Review*, 33 (2002): 17-73.
"'A Watchdog for the Good of the Order': The Ninth Circuit's En Banc Coordinator," *Journal of Appellate Practice and Process*, 12 (Spring 2011), 91.
"Why Sit En Banc?," *Hastings Law Journal*, 63 (March 2012), 747.

V. Communication Among the Judges

"Communication Within the Ninth Circuit Court of Appeals: The View From the Bench," *Golden Gate Law Review*, 8 (1977), 1-25.
"Communication in the Ninth Circuit: A Concern for Collegiality," *University of Puget Sound Law Review*, 28 (Fall 1987), 73-138.

"Technology and Communication in a Federal Court: The Ninth Circuit," *Santa Clara Law Review*, 11 (Winter 1988), 1-28.

"Technology in Appellate Courts: Electronic Mail in the Ninth Circuit," *Judicature*, 73 (August-September 1989), 90-97.

VI. Judges and Lawyers

"Oral Argument in the Ninth Circuit: The View from Bench and Bar," *Golden Gate Law Review*, 11 (Spring, 1981), 21-79.

"The Functions and Importance of Appellate Oral Argument: Some Views of Lawyers and Federal Judges," *Judicature*, 65 (February 1982), 340-353.

"The Bar's Role in Governance of the Ninth Circuit," *Willamette Law Review*, 25 (Summer 1989), 471-569.

"The Bar's Role in Circuit Governance," *Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts*, ed. Arthur D. Hellman (Cornell University Press, 1990), pp. 281-318.

"As Seen From Behind the Bench: Judges' Commentary on Lawyers' Competence," *Journal of the Legal Profession*, 38 (Fall 2013), 47.

VII. Interaction with Other Courts

"Intercircuit Conflicts in the Courts of Appeals," *Montana Law Review*, 63 (Winter 2002): 119-196.

"The District of Oregon in the U.S. Supreme Court," *Willamette Law Review*, 39 (Summer 2003): 851-1030.

"How the Ninth Circuit Fares in the Supreme Court: The Intercircuit Conflict Cases," *Seton Hall Circuit Review*, 1 (Spring 2005): 119-145.

"Judging and Administration for Far-Off Places: Trial, Appellate, and Committee Work in the South Pacific," *Golden Gate University Law Review*, 45 (Summer 2015), 193.

VIII. Other

"Disruption, Dislocation, Discretion, and Dependence: The Ninth Circuit Court of Appeals and the Loma Prieta Earthquake," *Judges' Journal*, 37 (Fall 1998): 33-39.

"The Effect of Disasters on Courts: An Introduction," *Judges' Journal*, 37 (Fall 1998), 4.

"The Loma Prieta Earthquake and the Ninth Circuit Court of Appeals," *Western Legal History*, 11 (1999): 41-69.

"Ninth Circuit Conference: Introduction," *Arizona Law Review*, 48 (Summer 2006), 221 (with Arthur D. Hellman and Toni M. Massaro).

"State Dominance of a Circuit: An Exploration," *Southern Illinois Law Review*, 32 (2008), 545-568 (with Jolly A. Emrey).

In Memoriam:
Thomas J. McDermott
A Hero Among Lawyers and Judges
1931-2021



It is with a heavy heart that we share the passing of our esteemed Board member, Thomas McDermott. Tom was an accomplished lawyer, practicing for over fifty-two years across and beyond the state of California

Service was a lifelong endeavor for Tom, starting with a stint in the US Army during the Korean War. After the Army, he earned his J.D. from UCLA School of Law, where he was the Articles Editor of the Law Review and he received the prestigious Order of the Coif.

Tom spent much of his career at large firms in Los Angeles, New York, and Washington D.C. before establishing the Law Offices of Thomas J. McDermott in the Palm Springs area. His practice areas included business litigation, business development, and intellectual property (patents, copyrights and trademarks). With clients as diverse as the singing group The Platters, Pfizer, and Baskin Robbins, Tom wanted to be remembered “as someone who did the best for the people he represented,” and he especially

enjoyed about his practice that every day he was meeting new people and learning about new businesses.

He was recognized for his outstanding service to the legal field with many accolades. In 2009, he was the recipient of the Ninth Circuit's John Frank Award, given once a year by the Ninth Circuit to a lawyer for outstanding service to the federal courts. In 2013, Mr. McDermott was inducted into the State Bar of California Litigation Section's Trial Lawyer Hall of Fame, which he described as "the two highest awards [he] received during [his] career," and about which he modestly stated, "It's a great honor. It made me humble to join a great group of trial lawyers. I was number twenty-four. I was surrounded by great lawyers, and I don't know how I got in."

Tom helped found and was president of the Association of Business Trial Lawyers (ABTL), where he was the first editor of its Bulletin. He was President of the UCLA Law Alumni Association, chair of the Ninth Circuit Advisory Board, chair of the Ninth Circuit Judicial Conference, chair of the Lawyer Representatives Coordinating Committee of the Ninth Circuit Judicial Conference, and chair of the Litigation Section of the State Bar of California. He was a Fellow of the American College of Trial Lawyers and he wrote extensively for California Litigation, a publication of the State Bar of CA.

When he wasn't working, he enjoyed reading, and performing magic. He loved attending operas, as well as musical plays and comedies, and he served on the board of the Los Angeles Music Center Performing Arts Council. He was one of the founders of the Los Angeles Opera Company and represented it for several years.

The NJCHS Board valued Tom's support and advice. Tom was described by his fellow NJCHS Board member Robert Lowry as "always the quintessential professional, a true "Lawyer's Lawyer." Several Board members echoed Mr. Lowry's sentiment about "how freely Tom extended his friendship" and called out Tom's "wonderful smile and sparkle in his eyes." Judge Steve Cochran called Tom "a hero among lawyers and judges and a genuine personal friend to many."

Judge Mary Schroeder said, "There are few attorneys who contributed as much to the Courts and to our profession as Tom," and called him "a role model for lawyers and judges." Judge Milan D. Smith, Jr. summed up by saying that "The purpose of life is to be useful, to be responsible, to be compassionate. It is, above all, to matter, to count, to stand for something, to have made some difference. Tom clearly filled the measure of his creation, and he will be missed."

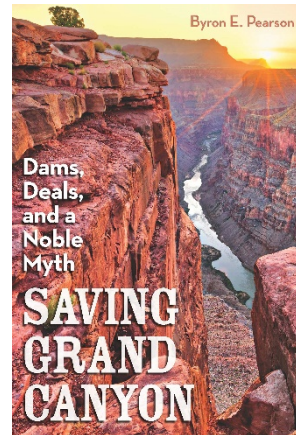
Saving Grand Canyon: Dams, Deals, and a Noble Myth, by Byron E. Pearson. RENO: UNIVERSITY OF NEVADA PRESS, 2019. 368 pp.; notes, bibliography, index; \$39.95, *hardcover*.

Byron Pearson's *Saving Grand Canyon* explores three failed attempts to dam the Colorado River in one of the west's most iconic locations. The book focuses primarily on the last of these attempts, which is also where Pearson makes his central contribution. Historians and popular media alike have remembered the Sierra Club as the hero of this defeat, citing the national publicity and subsequent public outcry it created as the reason that Grand Canyon remains today undammed. Pearson complicates this story. He shows that, contrary to the "noble myth" of the Sierra Club's activism, it was the deep inner workings of congressional politics that stopped proposed dams from materializing.

After the two initial unsuccessful attempts to dam Grand Canyon in the mid-1910s and early 1950s, newly appointed Arizona-born interior secretary Stewart Udall revived the idea in 1961. Udall envisioned a large-scale water project—what became the Pacific Southwest Water Plan (PSWP)—that would require forging agreement across the entire lower Colorado basin. This agreement, however, never fully came together. Getting the key states on board required importing water to supplement the basin's supply and guaranteeing each state's claims to the river. After California refused to export any of its own resources, Udall settled on the next best bet—bringing in water from the Columbia River. Washington State senator Henry Jackson fought the proposal tooth and nail, ultimately ensuring that it would never pass the Senate.

Throughout this time, there was also continual back-and-forth between dam supporters and preservationists. Dam supporters formed a powerful lobbying group and forged a strategic alliance with the Hualapai Nation, which was eager to potentially benefit financially from a dam. The alliance initially helped portray the Sierra Club as anti-Indigenous, but it ultimately amounted to a major political blunder. The Sierra Club made an alliance of its own with the much larger Navajo Nation. The coal deposits on Navajo land, it argued, could provide an alternative power source for the water project.

The club also shifted its advocacy strategy in the mid-1960s, moving away from providing legal argumentation and scientific expertise and toward harnessing the national media to generate publicity. The well-remembered full-page ads in the *New York Times* drawing attention to Grand Canyon's plight marked a turning point for the Sierra Club. Within twenty-four hours of the



first ad's appearance, on June 9, 1966, the IRS opened an investigation into whether the club's advocacy violated its tax-deductible status. The ad, coupled with the IRS reaction, created a public outrage, with thousands of letter writers worried that the government was silencing the Sierra Club's First Amendment rights.

While the ads and the IRS investigation caused a stir, Pearson's central argument is that they were not the crucial factor in the defeat of the proposed dams. The project finally signed into law in 1968 was a far cry from the comprehensive, basin-wide PSWP, and it relied on electricity from coal mined on Navajo land, not from hydroelectric power. This was due not to the Sierra Club's political deftness but rather to California's water attorney, Northcutt Ely, who stalled the last version of the bill to contain provisions for a dam so that it never reached the House floor for debate. Udall's dream of an Arizona-California agreement never quite materialized, and this fact coupled with Senator Jackson's adamance that Columbia water stay in the state of Washington, Pearson argues, sealed the fate of a free-flowing river in Grand Canyon.

Pearson's study is one of depth, not breadth, so the story he tells is only one part of the larger picture. A broader study, he himself admits, might examine the role of indigenous peoples, not only as pawns in a larger game of power-brokering but also as active agents who have played a role conservation law since the beginning of western U.S. settlement. Their complicated history with the conservation movement would add to the longer arc of the study. Pearson also leaves untouched a central paradox—that the coal mining eventually substituted for hydroelectricity destroyed sacred Navajo land and created “the worst polluting power plant in the western United States” (272)—until the last six pages of the book.

Nonetheless, the book is well worth reading for its rich historical detail, drawing on both archival sources and original interviews. Pearson reminds his reader that nothing in current law precludes the possibility of damming Grand Canyon in the future. He wants environmentalists and historians alike to eschew the kind of hubris that thinks the battle has been won and the specter of damming Grand Canyon will never rise again.

Cristina Violante
JD/PhD Student
University of California, Berkeley, School of Law

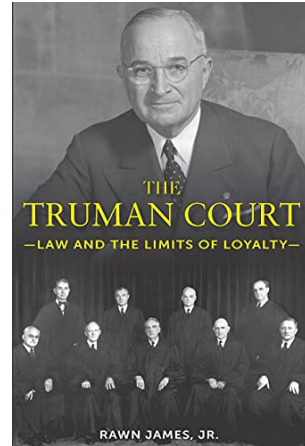
The Truman Court: Law and the Limits of Loyalty, by Rawn James, Jr. COLUMBIA: UNIVERSITY OF MISSOURI PRESS, 2021. 302 pp.; notes, index; \$36.95, *hardcover*.

Rawn James, Jr., has given us an impressively researched and readable book on the Truman Court, a Court defined by a distinct era in postwar American history. In this period of less than a decade, President Truman had four appointments—Justices Harold Burton, Thomas Clark, Sherman Minton, and the chief justice, Fred Vinson—an unusually large number measured by the presidents who came after him. It is a period largely neglected by leading legal historians, with appointments of no more than average justices and bookended by the highly consequential New Deal Court, populated by a group of judicial lions, and the Warren Court.

Why should we be especially interested, therefore, in a new account of this period, which one legal historian has labeled the “Vinson interlude”? And how does a deeper understanding of this so-called Truman Court enrich our understanding of the Court as a pivotal institution or of the jurisprudence of our times? Admittedly, the Steel Seizure case was decided by the Truman Court, as were a number of interesting—and problematic—free-expression cases, including *Dennis v. United States*. But there have been books and articles written on those cases, so the case for an exegesis on the Truman Court as such may be elusive.

Still and all, we learn much from this well-crafted monograph. James illuminates some of the key political circumstances in which these Truman justices found themselves, both inside and outside the Court. President Truman’s appointments reflected no discernible commitment to legal excellence (understanding that we can argue over exactly what that means) or to merit along other dimensions, such as long-standing judicial service or even to certain judicial philosophies. Instead, Truman was motivated by a mild desire to reward his allies and a much more tangible interest in ensuring that these appointments would be scrupulously loyal his objectives. The idea that the Supreme Court might have different, and rather higher, purposes and responsibilities seemed to elude Harry S. Truman. In this respect, although I won’t dwell on this point here, he might be compared to our forty-fifth president, whose resolute motivation, too, seemed to be to make sure that his appointed justices would be scrupulously loyal and would, if the occasion arose, join him in his political foxhole.

The air of what might have been a more nuanced analysis of judicial loyalty and President/Court relations gets let out of the balloon somewhat in



the book's last third, where, after focusing much attention on judicial biography and the internecine strife within the Court, the author turns to actual cases and shows that with respect to civil liberties and free expression, the Truman justices followed a rather pedestrian path toward statist results. If we can identify in their opinions any discernible method or approach, it seems downright antediluvian. The federal government and Truman as chief executive wanted what they wanted, and in the hotbed of postwar anti-Communism it seemed well warranted to rule unequivocally in favor of governmental restraint on expression. It would take the Warren Court, under the strategic skills of Justice William Brennan and other allies, to move civil liberties in a decidedly different direction.

Ultimately, this book gives too limited attention to matters of desegregation and the unsteady move toward the Court's major ruling in *Brown v. Board of Education* soon after the replacement of Vinson with Warren. The fascinating counterfactual, explored in other scholarship of this era, is this: What would have happened if Chief Justice Vinson had not been felled by a heart attack and had stayed on the Court into the 1950s? One view, which I heard from a distinguished alumnus of my law school who clerked for Vinson near the end of his service (and at the same time of William Rehnquist), is that the difference would not have been consequential. Chief Justice Vinson's commitment to bringing the justices a legal ruling that would undermine desegregation was, it is claimed, unwavering, and so the result was inevitable. And yet, could he have accomplished this act of judicial statesmanship? Here again, a question looms close to the surface: Would a collection of justices with much more prosaic attitudes and with loyalties to political figures rather than to principled jurisprudence (assuming here that this juxtaposition captures something truly meaningful) have accomplished what the early Warren Court did? This is an important historical question, and credit should be given to Mr. James for an exegesis into this neglected period of SCOTUS history that at the very least helps us reengage with this question.

Daniel B. Rodriguez

Harold Washington Professor of Law and Dean Emeritus

Northwestern University Pritzker School of Law

MEMBERSHIPS

PATRON

Akin, Gump, Strauss, Hauer & Feld
Browne George Ross LLP
Crowley Fleck PLLP
Farella, Braun & Martel LLP
Hughes, Hubbard & Reed
Keker Van Nest & Peters LLP
Klee, Tuchin, Bogdanoff & Stern LLP
Morrison & Foerster Foundation
Munger, Tolles & Olson
Orrick Herrington & Sutcliffe LLP
Susman Godfrey LLP
Wilson Sonsini Goodrich & Rosati
Foundation
Bruce Alverson, Esq.
Seth Aronson, Esq.
Jerome Braun, Esq.
John Briscoe, Esq.
Elizabeth J. Cabraser, Esq.
John Carson, Esq.
David S. Casey, Jr., Esq.
Hon. Steve Cochran
Dale A. Danneman, Esq.
Gareth T. Evans, Esq.
Robert H. Fairbank, Esq.
Jeff Fisher, Esq.
Margaret G. Foley, Esq.
Paul T. Friedman, Esq.
Donald Gaffney, Esq.
Debora Kristensen Grasham, Esq.
Peter Habein, Esq.
Rita Haeusler, Esq.
Hon. Robert J. Johnston
Ken Klee, Esq.
Rachel Lee, Esq.
Jan Little, Esq.
Charles McClain, Jr.
Sonia Martin, Esq.
Marshal A. Oldman, Esq.
Albert F. Pagni, Esq.

Robert J. Pfister, Esq.
Jeffrey Portnoy, Esq.
Nora M. Puckett, Esq.
Bruce M. Ramer, Esq.
Per A. Ramfjord, Esq.
Heather Richardson, Esq.
Jeremy D. Sacks, Esq.
Marc M. Seltzer, Esq.
Honorable Milan D. Smith, Jr.
David S. Steuer, Esq.
Gail M. Migdal Title, Esq.
Corey Weber, Esq.
Douglas R. Young, Esq.
Meryl Young, Esq.
Dean Ziehl, Esq.

STEWARD

Rex Heinke, Esq.
Jonathan Patchen, Esq.
Hon. Christina Ann Snyder

SPONSOR

James S. Azadian, Esq.
Hon. Christine Byrd
Hon. David Carter
Hon. Richard R. Clifton
Matthew Close, Esq.
Ernest Hoidal, Esq.
A. Marisa Chun, Esq.
Robert D. Lowry, Esq.
Ron Maroko, Esq.
Dan Nichols, Esq.
Hon. William H. Orrick, Jr.
Kathleen M. O'Sullivan, Esq.

GRANTOR

Wilke, Fleury, Hoffelt, Gould &
Birney
Mather Law Corporation
Cooley LLP
Sandra Alarcon
Hon. Redfield T. Baum, Sr.
Peter J. Benvenuti, Esq.
Hon. Marsha S. Berzon
Asim Bhansali, Esq.
Hon. Trish Brown
Timothy F. Cahill, Esq.
Hon. William C. Canby
Cynthia Cohen, Esq.
Mel Crawford, Esq.
Barbara Dawson, Esq.
Richard D. De Luce, Esq.
Keely Duke, Esq.
Hon. Ferdinand Fernandez
William Gould, Jr., Esq.
Edwin Harnden, Esq.
Brian Heady
Prof. Arthur Hellman
Robert A. James, Esq.
Cynthia Jones, Esq.
Ruth J. Lavine, Esq.
Eileen Leech
Samuel Lionel, Esq.
Ross Lipman, Esq.
Hon. M. Margaret McKeown
Tracy Morris, Esq.
Hon. Kimberly J. Mueller
Hon. Geraldine Mund
Hon. Mary H. Murguia
Hon. Randall J. Newsome
Tamar Pachter, Esq.
Elizabeth Pipkin, Esq.
Kelli Sager, Esq.
Hon. Janis Sammartino
Robert Sanger, Esq.
Hon. Mary Schroeder
James Sigel, Esq.
Hon. James K. Singleton, Jr.
Hon. N. Randy Smith
Eric Stahl, Esq.

Gregory Stone, Esq.
Hon. James A. Teilborg
Robert S. Warren, Esq.
Kelly A. Zusman, Esq.

SUSTAINING

Barry Abrams, Esq.
Hon. George T. Anagnost
Lawrence A. Anderson, Esq.
Edward Angel, Esq.
Charles Bakaly, Jr., Esq.
Hon. Stanley Bastian
Hon. Carlos T. Bea
Hon. Laurel Beeler
Norman Brand, Esq.
Charles Berwanger, Esq.
Hon. Camille Bibles
Anne K. Bingaman, Esq.
Ryan Bounds, Esq.
Hon. Anna J. Brown
Hon. Robert J. Bryan
Cathy Catterson
Nanci Clarence, Esq.
Ezekiel E. Cortez
Hon. Thomas Donovan
Roy Dwyer, Esq.
Jonathan Eisenman, Esq.
Hon. Robert J. Faris
Ben Feuer, Esq.
Hon. Dale S. Fischer
Hon. Michael W. Fitzgerald
Hon. Raymond C. Fisher
John M. Fredenburg, Esq.
Prof. Lawrence M. Friedman
Hon. Holly Fujie
Hon. Dolly M. Gee
Brian H. Getz, Esq.
Gerald George, Esq.
Hon. Lloyd D. George
Hon. Allison Goddard
Brian Goldman, Esq.
Hon. Barry P. Goode
John D. Gordan III, Esq.
Marshall Grossman, Esq.
Paul D. Gutierrez, Esq.

Mark E. Haddad, Esq.
Michael E. Haglund, Esq.
E. Richard Hart
Doreen Spears Hartwell, Esq.
M. Jonathan Hayes, Esq.
Susie and Paul Headlee
Hon. Marco Hernandez
Rachel Hilla
Hon. H. Russel Holland
Prof. James Huffman
James R. Homola, Esq.
Hon. Sandra Ikuta
Hon. Patrick Irvine
Hon. Anthony W. Ishii
L.M. Jacobs IV, Esq.
Daniel O. Jamison, Esq.
Hon. Edward R. Johnson
Bernard Jolles, Esq.
Kathleen E. Jolly, Esq.
Hon. Robert E. Jones
Hon. Harold E. Kahn
Jacquelyn Kasper
Steven Kazan, Esq.
Letitia Kim
Hon. James P. Kleinberg
Hon. Andrew J. Kleinfeld
Hilary C. Krase, Esq.
Hon. Robert Kwan
John A. Lapinski, Esq.
Ruth J. Lavine, Esq.
Hon. Peggy Leen
Hon. Ronald S.W. Lew
Courtney Linn, Esq.
John L. Littrell, Esq.
Renée Lorda
Thomas C. Mackey, Ph.D.
Nina Marino, Esq.
Hon. Bruce A. Markell
Hon. Malcolm F. Marsh
James C. Martin, Esq.
Thomas McDermott, Jr.
Hon. Howard D. McKibben
Mary McNamara, Esq.
Hon. Robert McQuaid, Jr.
Kurt W. Melchior, Esq.

Grover Merritt, Esq.
Hon. Jeffrey Miller
Hon. John F. Moulds
Hon. Dorothy W. Nelson
Shawn Nelson, Esq.
Leslie W. O'Leary, Esq.
Prof. David Oppenheimer
Andrea Ordin, Esq.
Hon. Carolyn Ostby
Hon. Karen A. Overstreet
Robert Parham, Esq.
Anna Park, Esq.
Hon. Virginia Phillips
Randy Sue Pollock, Esq.
Vanessa Soriano Power, Esq.
Hon. Dean D. Pregerson
Hon. Philip M. Pro
Richard Rahm, Esq.
Prof. R. Anthony Reese
Camille Rieber, Esq.
Hon. James Robart
Philip J. Roberts
Cara W. Robertson, Esq.
Prof. Jonathan Rose
Mark D. Rubin, Esq.
Hon. Richard Seeborg
Ann Semaan-Beisch
Harry Scheiber, Ph.D.
Jack Sheridan, Esq.
Peter W. Sherwood, Esq.
Hon. Michael Simon
Libby Smith
Dean Steward, Esq.
Hon. Lonny R. Suko
Ragesh Tangri, Esq.
Hon. Wallace Tashima
John D. Taylor, Esq.
Hon. Sidney R. Thomas
Michael Traynor, Esq.
Lilian Tsai, Esq.
Licia Vaughn, Esq.
Hon. Vaughn R. Walker
David M. Walsh, Esq.
Hon. Madeleine C. Wanslee
Hon. Kim McLane Wardlaw

Hon. John L. Weinberg
Claire Wong Black, Esq.
Edward J. Wynne, Jr., Esq.
Rosalyn Zakheim, Esq.
Hon. Frank R. Zapata

ADVOCATE

Michael Abraham, Esq.
Cheryl Alcorn
Jean-Claude Andre, Esq.
Sarah Andre, Esq.
Francisca N. Araiza-Kasama, Esq.
Timothy Armistead
Hon. Maria A. Audero
Hon. Martin Barash
Hon. Cathy Ann Bencivengo
Timothy Berg, Esq.
Sheryl Bregman, Esq.
Hon. Robert N. Block
Nina Boyajian, Esq.
Hon. Anna Brown
Cedric C. Chao, Esq.
Hon. Maxine M. Chesney
Richard R. Clements, Esq.
Hon. Dennis Cota
Robert L. Cowling, Esq.
John S. Cramer, Esq.
Ronald Dean, Esq.
Eileen M. Decker, Esq.
Charles J. Diegel
Gina Diaz, Esq.
Hon. David K. Duncan
Cynthia Ecube, Esq.
Scott Emblidge, Esq.
Bruce Ericson, Esq.
John Feeney, Esq.
Dennis A. Fischer, Esq.
Lawson Fite, Esq.
Hon. Richard Ford
Scott Gan, Esq.
Michael J. Garcia, Esq.
Prof. Andrea Geiger
Paul J. Georgeson, Esq.
Michael Griffith
Richard Grosboll, Esq.

Michael Haglund, Esq.
Ann Habermelde, Esq.
Jamey Harris
Hon. Terry J. Hatter, Jr.
John E. Havelock, Esq.
Brian Heady, Esq.
Hon. David Hercher
Lisa Hightower, Esq.
Robert Homlar, Esq.
Chinenye Iweze, Esq.
Kristen Jackson, Esq.
Hon. Sandra R. Klein
Karen Korematsu
Doug E. Kupel, Esq.
Vicki Lai, Esq.
Hon. Louise A. LaMothe
Prof. Ronald B. Lansing
Hon. Robert Lasnik
Hon. Edward Leavy
Douglas Littlefield Ph.D.
Jamie Lisagor, Esq.
Jordan Luttrell, Esq.
Sarah MacDonald, Esq.
Prof. Michael Magliari
Nir Maoz, Esq.
Prof. Robert Markman
Hon. A. Howard Matz
Gerald McIntyre, Esq.
Howard McPherson, Esq.
Eric G. Messinger, Esq.
Thomas C. Mitchell, Esq.
Jeffrey Morris
Eric Monek Anderson, Esq.
Hon. William Fremming Nielsen
Diane North
George Nowell, Esq.
Kurt Nutting, Esq.
Hon. Fernando M. Olguin
Hon. Sheila Oberto
Nancy Olson, Esq.
Chet Orloff
Kaye O'Riordan
Hon. Diarmuid F. O'Scannlain
Anne E. Padgett, Esq.
Pamela Parham
Robert Parham, Esq.

Michelle Pettit, Esq.
Elizabeth Pritzker, Esq.
Hon. Stephen Pogson
Hon. Justin Quackenbush
Stephen Raher, Esq.
Hon. Karsten Rasmussen
James Rigos, Esq.
Hon. Ernest Robles
John Rosholt, Esq.
Hon. John A. Rossmeissl
Mary Ann Rousso, Esq.
Jeremy Sacks, Esq.
Michael Sall, Esq.
Hon. James Selna
Vincent Seman
Matthew Shapiro, Esq.
Prof. John Cary Sims
Russell J. Speidel, Esq.
Melanie Sturgeon, Ph.D
Robyn Stein, Esq.
Hon. Mary Alice Theiler
James Tierney, Esq.
Chris Tweeten, Esq.
Anne Waddell, Esq.
Hon. Clifford Wallace
Brian Washington, Esq.
Carrye Washington, Esq.
Roy G. Weatherup, Esq.
Edgar L. Weber, Esq.
Hon. Brenda Weksler
Timothy L. Williams, Esq.
Mark Wilson, Esq.
Hon. Stephen V. Wilson
Dorothy Wolpert, Esq.
Laurence S. Zakson, Esq.

SUBSCRIBING

Daryll Audilett, Esq.
Brian Alan Baker, Esq.
Dean A. Bochner, Esq.
Daniel Borinsky, Esq.
Vickie Brewer, Esq.
George Brewster, Jr., Esq.
Hon. Charles R. Breyer

Janet Cabral, Esq.
Chinhayi Cadet, Esq.
Patricia D. Cafferata, Esq.
Kris Carlson, Esq.
Christopher Casey
Susan Cohen, Esq.
Debra Crawford, Esq.
Dorothy DeCoster
Patrick Del Duca, Esq.
Joe Derrig, Esq.
Hon. Mary Dimke
Robert M. Ebner, Esq.
Lisa Ells, Esq.
Marc Eshoo
W. Manning Evans, Esq.
Alfred G. Ferris, Esq.
Keith H. Fichtelman, Esq.
Randolph M. Fiedler, Esq.
Samuel Fortier, Esq.
Gale Group
Holly Gieszl, Esq.
Hon. Helen Gillmor
Stanley J. Grogan, Ed.D..
Peter J. Gurfein, Esq.
Joseph W. Guzzetta, Esq.
John Hansen
Mark I. Harrison, Esq.
Robert Henry, Esq.
James L. Hiller, Esq.
Maha Ibrahim, Esq.
Kristen Jackson, Esq.
Daniel Kaplan, Esq.
David Kelley
Thomas S. Kidde, Esq.
Hon. Christopher M. Klein
Dr. Louis Knafla
Warren P. Kujawa, Esq.
Hon. Louise A. LaMothe
Prof. David J. Langum
Kathryn A. Lee, Ph.D.
Stanley Lehman
Peter Levinson
Rob Leung
Kenneth Leyton-Brown, Ph.D.
Stephen Liacouras, Esq.

Douglas Littlefield, Ph.D.
Mitzi Loftus
Hon. Robert C. Longstreth
H. Clifford Looney, Esq.
Hon. Charles C. Lovell
Andrew Lundberg, Esq.
Brian Malloy
Joanna McCallum, Esq.
Hon. Salvador Mendoza, Jr.
James Mulholland, Esq.
Jenna Nalchajian, Esq.
Peter O'Driscoll
Michonne Omo
Rachel Osborn, Esq.
Anne Padgett
Pamela Parham
Kay Parker, Esq.
Hon. Michelle Peterson
Hon. Lawrence Piersol
Craig Platt, Esq.
Adam W. Pollock, Esq.
Paul C. Ray
Magdalena Reyes Bordeaux, Esq.
Monica Rieder, Esq.
Dick Rubin
Stacy Saetta, Esq.
Sina Safvati, Esq.
Sherwin Samuels, Esq.
Robert M. Sanger, Esq.
Edmund S. Schaffer, Esq.
Quinton Seamons, Esq.
James Patrick Shea, Esq.
Alan D. Smith, Esq.
Judith Stoyko
Mitsuo Tomita
Susan E. Torkelson
Roger M. Townsend, Esq.
Marketa Trimble

Hon. Neil V. Wake
Stan Watts, Esq.
W. Mark Wood, Esq.
Katie Zoglin, Esq.

FRIENDS

Roxanne Daneri, Esq.
Robert Fries, Esq.
Mike Hoge, Esq.
Kenyon Lee, Esq.
Jackie Maruhasi
David Mendel
Jane Yung

JUDGE PREGERSON TRIBUTE

Jeffrey Braun, Esq.
Paul Friedman, Esq.
Blair Levin and Patricia Friedman
Ben Hernandez-Stern, Esq.
Hon. Maria Stratton

JUDGE LOVELL TRIBUTE

Hon. Beth Baker
Will Brooke, Esq.

GERSHAM GOLDSTEIN MEMORIAL

Robert D. Lowry, Esq.
Hon. Mary Schroeder

10 PERCENT FOR HISTORY CAMPAIGN

U.S. Court of Appeals, Ninth Circuit
U.S. District Court, District of Alaska
U.S. District Court, District of Arizona
U.S. District Court, Central District of California
U.S. District Court, Eastern District of California
U.S. District Court, Southern District of California
U.S. District Court, Northern District of California
U.S. District Court, District of Hawai'i
U.S. District Court, District of Idaho
U.S. District Court, District of Montana
U.S. District Court, District of Nevada
U.S. District Court, District of Oregon
U.S. District Court, Eastern District of Washington
U.S. District Court, Western District of Washington

WESTERN LEGAL HISTORY
The Journal of the
Ninth Judicial Circuit Historical Society
95 7th Street
San Francisco, CA 94103

Non-Profit Org.
U.S. POSTAGE
PAID
PASADENA, CA
Permit No. 244