

Western Legal History



The Ninth Judicial Circuit Historical Society

Volume 29, Number 1



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and Diverse Legal History*
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Introduction

On behalf of the United States District Court for the Eastern District of California Historical Society, it is my pleasure to introduce this special edition of Western Legal History, published by the Ninth Judicial Circuit Historical Society. This issue is a special collaboration between the judges of the United States District Court for the Eastern District of California, the Eastern District Historical Society, lawyers, a scholar and a journalist to honor the creation of the Eastern District and to commemorate 50 years of jurisprudence. In addition, we are honored to be able to include the transcript of the panel discussion between Associate Justice Anthony M. Kennedy and Senior District Judge William B. Shubb, moderated by Breann M. Moebius, to celebrate the first half century of the District.

The Eastern District holds a special place in history, as you will see from the accompanying articles, and has been the venue of many significant events, and the legal and spiritual home of many influential and fascinating people. We honor those people and events in the articles in this edition.

We wish to extend our gratitude to all of those who made this edition possible including Senior District Judge William B. Shubb who started the Eastern District Historical Society, Judge Mueller for her article on the first female Magistrate Judge, Esther Mix, Magistrate Judge Boone for his article on the history of the District, Associate Dean and Professor Clark Kelso for his article on three Supreme Court Justices who hailed from or had roots in the Eastern District, Denny Walsh and The Sacramento Bee for allowing us to reprint the article, "The Federal Court in Sacramento: A Court Shaped by the Character of its Judges" and Gary P. Lindsey, Jr., for his article about his grandfather Nathaniel S. Colley, Sr., the first African American lawyer admitted to the District.

On behalf of the contributors and the Eastern District Historical Society, I hope you enjoy this collection of articles and I invite you to visit the our website at: <http://courthistory.tripod.com> for more information.

Michael E. Vinding
President, United States District Court
for the Eastern District of California
Historical Society



By Hon. Stanley A. Boone

The History of the Eastern District of California: Over Fifty Years of a Rich and Diverse Legal History

On March 18, 1966, Congress enacted legislation establishing the Eastern District of California as a judicial district, as well as three other existing districts in California. In order to give the court sufficient time to reorganize under the new legislation, the act did not become effective for six months, and the district was officially created on September 18, 1966. In 1966, Lyndon Baines Johnson was president; Harold Wilson was the United Kingdom's prime minister; England defeated Germany in the World Cup; Leonid Brezhnev was secretary general of the USSR; China, under Mao Zedong, launched its Cultural Revolution; an actor and businessman named Ronald Reagan was running for governor of California and by year's end would defeat incumbent governor Edmund G. "Pat" Brown; the United States had over 350,000 troops in Vietnam; the Mamas and the Papas, the Beatles,¹ the Monkees, the Beach Boys, and Simon and Garfunkel were the most popular musicians; *The Sound of Music* beat out *Doctor Zhivago* for Best Picture; *Batman* and *Star Trek* premiered on television; "The Ballad of the Green Berets" by Staff Sergeant Barry Sadler was number one on the *Billboard* charts;² Halle Berry, Salma Hayek, Adam Sandler and Darius Rucker were born, and Lucy Burns, Buster Keaton, Montgomery Clift, William Frawley, Admiral Chester Nimitz, C. S. Forester and Walt Disney died. It was at this culturally diverse time that the Eastern District of California was created, and in 2016 celebrated its fiftieth year.

1. Additionally in 1966, the Beatles would perform their last live concert to a paying audience at Candlestick Park in San Francisco, CA.

2. <http://www.billboard.com/archive/charts/1966/hot-100> (March 19).

Before 1966

The history of the Eastern District does not, however, begin only in 1966. In fact, the federal court had an almost 116-year existence before the creation of the district. To understand and appreciate the history of our district, we must go back to the time when the federal court first came to California: 1850.

1. The Lay of the Land in 1850

When California was admitted to the Union on September 9, 1850, Congress was quick to enact, and President Millard Fillmore to sign, legislation establishing federal courts in the state. On September 28, 1850, an act "extending the Laws and the Judicial System of the United States to the State of California" by providing for two judicial districts in the state became federal law.³ At the time, and never again since, the area that now encompasses the Eastern District had a population greater than that of San Francisco and Los Angeles combined, due primarily to the California Gold Rush, which began in 1848.⁴ This large population resulted in the creation of two judicial districts in California when most states admitted to the Union started out with only one. The population of the area would eventually dwindle as the lure of gold subsided and miners moved away from the area to the more metropolitan areas of San Francisco and Los Angeles or returned to the places from where they had come.⁵

In 1850, federal judges included the nine members of the Supreme Court. Justice Roger B. Taney of Maryland was Chief Justice. In addition to discharging their Supreme Court duties, justices also presided as judges on the U.S. circuit courts. Other than for a brief respite of one year under the

3. 31 CONG. CH. 86, SEPTEMBER 28, 1850, 9 STAT. 521.

4. Gold was discovered at Sutter's Mill on January 24, 1848, when California was still a territory of the United States. Albert Hurtado, *John Sutter, A Life on the American Frontier* 215-216 (University of Oklahoma Press 2008). By the time of its announcement and the influx of miners from the East Coast, Midwest, and elsewhere began, it was 1849, and hence the gold miners were called "forty-niners." The discovery location is now included in the Eastern District of California, at Coloma, California, in Placer County.

5. The population of San Francisco was as follows: April 1848, pop. 850; July 1849, pop. 5,000; December 1849, pop. 25,000; 1850, pop. 21,000; 1852, pop. 36,151; 1860, pop. 56,802; and 1870, pop. 149,473. See *California Star* (March 18, 1848); *Daily Alta California* (April 18, 1851); *The Annals of San Francisco* (D. Appleton 1854); 1860 and 1870 U.S. censuses. <http://www.sfgenealogy.com/sf/history/hgpop.htm>. The population for Los Angeles was as follows: 1850, pop. 1,610; 1860, pop. 4,385; and 1870, pop. 5,728. See 1850, 1860, and 1870 U.S. censuses.

Judiciary Act of 1801, from the time the federal courts were established by the Judiciary Act of 1789 until 1891, when the practice became optional, the justices were required to ride circuit with a district judge for the district in which the circuit court was held.⁶ By 1850, the country was divided into nine judicial circuits, with each justice, including the Chief Justice, assigned to a circuit.⁷ The U.S. circuit courts then were not the same as the circuit courts of

6. Congress established the frequency and the locations where the federal circuit courts were required to have matters heard within that circuit. Over time, if a justice was unable to participate, circuit sessions did not leave the court without jurisdiction. Despite the absence of a Supreme Court justice, the matter would be handled by the district judge in the district, and after 1869 by either or both a district judge and the circuit judge for that circuit. In 1869, Congress created a judgeship for each of the nine circuits then in place. The new circuit judge, the designated justice, and the district judge, or some combination of two of them, could preside over the circuit courts. The circuit judges had the same authority as the Supreme Court justice assigned to the circuit. The circuit judge was an Article III judge nominated by the president and confirmed by the Senate. Separate circuit judges also existed as a result of the Judiciary Act of 1801, but their tenure was short, as the positions were abolished as part of the Judiciary Act of 1802.

Riding the circuit was often looked at as a form of punishment for justices of the court due to the length of circuit duty, travel costs, and the physical toll it took on the judges. While in reality such may have been the case, its origins and intent were quite different, as riding the circuit was intended to be a means for becoming engaged with the community and for creating uniformity in the law. Its origins derived from England, where the king's court rode the circuit, administering the king's justice, which was often looked upon more favorably than local justice. See Arthur Hogue, *Origins of the Common Law* 154-158 (Liberty Fund Inc. 1986); Theodore F. T. Plucknett, *A Concise History of the Common Law* 144-145 (Little, Brown 1956), and Frederick Maitland, *A Sketch of English Legal History* 36-37 (G. P. Putnam's Sons 1915). Additionally, Congress believed it was important for the justices of the Supreme Court to be in touch with the local legal community and issues rather than deciding matters from the confines of the Court in the City of Washington after 1800 and before that in New York and Philadelphia. Charles Hoffer et al. *The Federal Courts—An Essential History* 172 (Oxford University Press 2016).

7. In 1837, Congress increased the circuits from seven to nine, and in 1855, the circuits were increased to ten. 5 Stat. 176. In the Judiciary Act of 1789, Congress established a system of circuit courts to serve as the trial courts for most federal criminal cases, for suits between citizens of different states, and for civil suits initiated by the United States. The circuit courts also exercised appellate jurisdiction over all but the smallest admiralty cases and other civil suits that originated in the U.S. district courts. Rather than create

today. From 1801 to 1802 and again from 1869 to 1911, the U.S. circuit courts included separate circuit judges, who were trial judges handling a wide variety of federal court matters, including criminal cases, diversity suits, and suits against the United States for amounts not authorized to district judges.⁸ From 1802 to 1869, there existed no circuit judges and such trial court jurisdiction was authorized by either a Supreme Court justice or a district judge. Since the federal courts of appeals system would not exist until 1891, the next level of appeal from the U.S. circuit courts was the United States Supreme Court, which often heard cases on direct appeal.⁹ As will be discussed, when California was admitted in 1850, its proximity to the rest of the country changed the requirement of Supreme Court justices exercising circuit court authority in California. The U.S. circuit courts would eventually be abolished in 1911. By then, district judges had subsumed both their original responsibilities and that of the circuit judges in terms of trial court jurisdiction, as exists today.

As for district judges, in the 1850s their jurisdiction was much more limited than it is today. When sitting as a judge for their district court, and not the circuit court, district judges were authorized to hear only cases involving admiralty, petty crimes, and suits by the United States within set

separate judgeships, Congress stipulated that each circuit court panel would consist of two justices of the Supreme Court and the local U.S. district court judge. Eventually, one Supreme Court justice would ride circuit. As the Union of states grew, Congress expanded the number of circuits and increased the size of the court to provide a justice for assignment to each circuit. With the Evarts Act in 1891, the appellate jurisdiction of the circuit courts ended with the creation of the U.S. Circuit Courts of Appeals. The U.S. circuit courts continued to serve as trial courts until January 1, 1912, when they were abolished according to the terms of the Judicial Code of 1911.

8. They also exercised appellate jurisdiction over all but the smallest admiralty cases and other civil suits that originated in the U.S. district courts. Generally, circuit judges handled the trial matters of today's district judges, which included similar appellate jurisdiction.

9. The Supreme Court's ability to limit the cases it heard on appeal, through the writ of certiorari, would not come into play until the enactment of legislation creating the U.S. Circuit Court of Appeals through the Evarts Act of 1891, 26 Stat. 826 (March 3, 1891). Ultimately, it would not be until 1925, when the Judges' Bill of 1925 would fundamentally change the Supreme Court's docket, 43 Stat. 936 (February 13, 1925). The act repealed much of the mandatory jurisdiction of the court, except in limited circumstances, and allowed for discretionary review through the writ of certiorari process. *Id.* This shifted the focus of the Supreme Court to decide more important constitutional and "split in the circuit" issues, leaving the vast majority of the everyday appeals to the circuit courts of appeal.

amounts.¹⁰ As noted above, any matters that involved other federal trial jurisdiction were covered by the U.S. circuit courts in which district judges did participate. So when these judges wore their U.S. circuit court hats, their jurisdiction was greatly expanded over their jurisdiction when they sat as a district judge in district court. As will be seen, California's admission changed some of the jurisdictional limitation when it came to district judges, in part because of its location to the rest of the country. Also at that time, district judges had a unique, but not uncommon, role when it came to adjudicating bankruptcy matters. There would be no separate judicial officers to address bankruptcies until bankruptcy referees were created in the Bankruptcy Act of 1898, so the district judges exercised bankruptcy jurisdiction under the Bankruptcy Act of 1841.¹¹

Also in existence in 1850, and essential to the structure and performance of the federal courts, were the U.S. commissioners, the

10. Charles Hoffer et al., *The Federal Courts—An Essential History* 35 (Oxford University Press 2016). See also Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 91 (district courts had limited jurisdiction of criminal offenses involving no more than "whipping involving 30 stripes," 6 month imprisonment, and \$100 fine, and civil matters involving admiralty and maritime cases, where the United States sues for no more than \$100, and all suits against consuls and vice-consuls and other types of cases.)

11. Congress did not pass its first bankruptcy law until 1800, after a decade of periodic financial crises and commercial failures. Designed under the English system, the Bankruptcy Act was established only for merchants, bankers, and brokers, and only on the petition of a creditor. District judges appointed commissioners to administer each case, and the bankrupt estate was placed under the control of an assignee chosen by creditors. Congress repealed the act in 1803, even though it was set to expire in 1805. In 1841, Congress enacted the Bankruptcy Act of 1841, which allowed insolvent debtors, both merchants and non-merchants, to voluntarily commence bankruptcy proceedings. Under this act, the district courts had jurisdiction over "all cases and controversies in bankruptcy arising between the bankrupt and any creditor" and "all acts, matters, and things to be done under and in virtue of the bankruptcy." In 1867, Congress passed a new bankruptcy statute that granted the district and circuit courts expansive jurisdiction over ordinary suits in law and equity related to a bankrupt estate. In 1898, the bankruptcy system was drastically overhauled in the Bankruptcy Act of 1898. In the act, Congress designated the district courts as courts of bankruptcy, with jurisdiction to hear summary bankruptcy proceedings, which were handled by a bankruptcy referee appointed by the court.

precursors to U.S. magistrate judges.¹² In existence since 1793,¹³ and referred to in 1850 simply as commissioners,¹⁴ they assisted federal judges, specifically the judges who were acting in the U.S. circuit courts, by providing the court with local officers to support the enforcement of specific laws, such as matters involving the setting of bail, the taking of civil affidavits, and the authorization of arrests and imprisonment. At first, commissioners were required to be learned in the law, but that requirement was abandoned in 1812.¹⁵ In 1850, commissioners were appointed by the judges exercising jurisdiction under the U.S. circuit courts.¹⁶

12. Congress would not create the official title "U.S. commissioners" until 1896.

13. Act of March 2, 1793, ch. 22, § 4, 1 Stat. 334. For the four years preceding this Act, federal judges, and certain state judges ("any judge of the supreme or superior court of law of such state"), were given authority to order arrests, detention and release of federal offenders. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 91.

14. The term "commissioner" would not be used at all until an 1817 congressional act. Prior to that and beginning in 1793, Congress authorized judges of the U.S. circuit courts to appoint "discreet persons learned in the law" to take bail in federal criminal proceedings. That 1793 statute allowed officers of the federal courts to assume responsibilities that the Judiciary Act of 1789 had vested in local magistrates and justices of the peace. In 1940, judges of the district courts were authorized to delegate to commissioners the authority to try and to sentence individuals charged with petty offenses on federal reservations. Defendants had the right to request a trial in the district court and could appeal a commissioner's decision. The U.S. commissioner system would be abolished in 1968 and replaced by the United States magistrate system, and later (1990) by U.S. magistrate judges. For further reading on U.S. commissioners, see Charles A. Lindquist, *The Origin and Development of the United States Commissioner System*, *American Journal of Legal History* 14 (January 1970).

15. Act of February 20, 1812, ch. 25, § 25, 2 Stat. 679. This learned in the law requirement would never be reinstated during the lifetime of the commissioner system. The commissioner system was replaced in 1968 by U.S. magistrates under the Federal Magistrates Act.

16. The 1896 congressional act that changed the official title to that of "U.S. commissioners" also transferred the power to appoint commissioners from the circuit to the district courts, with four-year terms but subject to removal at any time by the district court.

2. Federal Courts in California

In 1850, when Congress created the two judicial districts in California as the Northern and Southern Districts, it placed their boundary at the 37th parallel.¹⁷ The act authorized one judgeship in each district. Because of California's physical location in relation to the rest of the Union and the lack of sufficient transportation between the western states and the City of Washington,¹⁸ California was not assigned to a judicial circuit, and hence, a circuit judge. Instead, the district judges were granted the same civil jurisdiction as U.S. circuit courts, except in appeals and writs of error, which were the jurisdiction of the Supreme Court. Additionally, no Supreme Court justice was assigned to this circuit. Under the 1850 act, the Northern District court was required to have sessions in San Francisco, Sacramento, Stockton, and San Jose.¹⁹ Due to their less than demanding workload, sessions in

17. The division between the two districts ran roughly from Santa Cruz, California, eastward, and south of present-day Stanislaus County to the border of Nevada, then called the Utah Territory (created under the Organic Act of 1850 on the same date California was admitted to the Union). Nevada would not be admitted to the Union until October 1864, toward the end of the Civil War.

18. The next closest admitted state to California in 1850 was Texas, admitted in January 1845. Travel from the East Coast to California at the time was by ship either around the horn of South America or via Panama or overland from the Midwest on the various trails west. Travel to California via Panama was most common, but it was especially treacherous. Travelers would disembark at Chagres, Panama, which was then part of Colombia, and travel via steamboat or canoe and then by foot or mule to Panama City. There travelers would travel north by steamship, or northwest, then east and south, if by sailing ship. Diseases and illness would accompany the trip. A railroad would not be built across the Isthmus of Panama until 1855. Richard Cahan et al., *The Court That Tamed the West: From the Gold Rush to the Tech Boom* 14 15 (Heyday Books 2013).

19. In 1850, Fresno was not yet a town, and Sacramento was just developing as a city, or the closest jumping-off point for the gold fields. Just a few years earlier, the area consisted only of Sutter's Fort, located near the area of 28th and J Streets in Sacramento, with a small wharf near the Sacramento River a few miles to the west. The gold rush moved activity away from Sutter's Fort to the small wharf area that is now known as Old Sacramento. The town was laid out by Johann Augustus (John) Sutter, who contracted with then on-leave U.S. Army officer Captain William Warner to survey the town west of the fort and east of the wharf in order to sell in lot sizes. Albert Hurtado, *John Sutter: A Life on the American Frontier* 242 245 (University of Oklahoma Press 2008). Eventually, Sutter's Fort would be

Sacramento, Stockton, and San Jose were abolished by Congress in 1854. The Southern District was required to have sessions in Los Angeles and, until 1866, Monterey. Because the workload for the Northern District of California was considered greater than the workload for the Southern District, Congress authorized the annual judicial salary for the district judge in the Northern District to be \$3,500, while the district judge's salary in the Southern District was \$2,800.²⁰

In December of 1850, President Millard Fillmore nominated and the Senate confirmed James McHall Jones as U.S. district judge for the Southern District of California. Judge Jones served briefly in that position until his death in December 1851. President Fillmore's ultimate selection for the Northern District was not his first or second choice,²¹ but it was in the end an excellent choice. That choice was forty-one-year-old Ogden Hoffman Jr., who would hold that position for more than forty years, from his appointment in February 1851 until his death in 1891, making him one of the longest-serving federal

abandoned by John Sutter, after he transferred the property to his son John Augustus Sutter Jr., who then sold the fort piecemeal for roughly \$40,000. *Id.* The proceeds from the fort and the city lots were used to pay off his father's vast debts. *Id.* Eventually, the Native Sons of the Golden West would influence its restoration, beginning in 1891 and completing it in 1893. Sutter's fort was then donated to the state. See http://www.parks.ca.gov/?page_id=21507. Sutter's Fort stands as the oldest restored fort in the United States. The fort was rebuilt and became a state park in 1897, making it one of California's oldest state parks. *Id.* After 1862, Sacramento received increased attention from the rest of the country and recognition of its importance and population due to its establishment as the western endpoint of the transcontinental railroad. 12 Statutes at Large, 489 (July 1, 1862) and 13 Statutes at Large, 504 (March 3, 1865).

20. Richard Cahan et al., *The Court That Tamed the West: From the Gold Rush to the Tech Boom* 6 (Heyday Books 2013).

21. President Fillmore's first pick was Judah P. Benjamin, who was confirmed by the Senate on September 28, 1850 (the same day the act was enacted). Benjamin would reject the appointment because of the low salary. He would go on to serve as a U.S. senator from Louisiana and hold positions as secretary of state, secretary of war, and attorney general for the Confederate States of America. He was also the first U.S. senator and cabinet official in America to be of the Jewish faith. President Fillmore's second pick was John Currey, who was rejected by the Senate in January 1850. President Fillmore would renominate John Currey in the next Congress to the vacated spot in the Southern District of California, but that nomination would result in a no vote by the Senate and ultimately that judgeship would not be occupied until President Pierce's nominee, Isaac Ogier, filled the position after Senate confirmation in January 1854.

judges in history.²² Upon Judge Jones's death, Congress authorized Judge Hoffman to sit as the sole district judge for both the Northern and Southern Districts of California, and he maintained that role until 1854, when Congress reauthorized a judgeship for the Southern District.²³ In 1854, President Franklin Pierce nominated and the Senate confirmed Isaac Ogier to that reauthorized judgeship. Judge Ogier was the former U.S. attorney for the Southern District of California and the former Los Angeles County district attorney. Upon Judge Ogier's death in 1861, President Lincoln appointed San Francisco lawyer Fletcher Mathews Haight, who presided over the Southern District from August 1861 until his death in February 1866. Upon Judge Haight's death, Congress consolidated the district courts in California into one judicial district, the District of California, and authorized Judge Hoffman as the sole district judge for the consolidated district of California.²⁴ In 1886, Congress would divide California back into two judicial districts, creating again the Northern and Southern Districts of California, with sessions in San Francisco and Los Angeles respectively. While authorized session locations would be added by Congress over the years, the established districts would be the judicial boundaries for California for the next eighty years, until the state was divided into the present-day four judicial districts in 1966.²⁵

22. During his long tenure, Judge Hoffman was the sole district judge in the court, which at times included coverage of all of California (1852-1854 [upon the death of the district judge appointed to the Southern District of California] and 1866-1886 [when California was one judicial district]). 10 Stat. 76 and 14 Stat. 300.

23. 10 Stat. 76, 84 and 10 Stat. 265.

24. 14 Stat. 300 (July 27, 1866). As noted, the 1866 act transferred this judgeship from the Northern District of California. The relationship between the Congress and President Andrew Johnson during the post-Civil War and Reconstruction era was less than cordial. This explains why, in part, California was consolidated and the president was given one fewer judicial appointment after the death of Judge Haight. The number of judicial appointments would not increase until President Johnson left office in March 1869 and President Ulysses S. Grant became president. It was also at this time that Congress created separate judgeships for the U.S. circuit courts through the Judiciary Act of 1869, 16 Stat. 44 (April 10, 1869). This same act also increased the number of justices of the Supreme Court from seven (decreased from ten in 1866 in an effort to avoid President Johnson appointing members to the Court) to nine justices, where it stands today. *Id.* and 14 Stat. 209 (July 23, 1866).

25. 24 Stat. 308 (August 5, 1886). This act transferred this judgeship to the Northern District of California and created a new judgeship for the Southern District of California.

As noted, because of California's location far from the rest of the country, in the original 1850 act, Congress did not assign a judicial circuit to California. Instead, Congress assigned the same civil jurisdiction exercised by U.S. circuit courts to the California district courts, except in appeals and writs of error, which were the jurisdiction of the Supreme Court. Also unlike other circuit courts, the California courts were not given criminal jurisdiction.²⁶ That changed on February 26, 1853, when Congress added criminal authority to the district court when exercising circuit jurisdiction.²⁷ Congress allowed for the California federal courts to exercise criminal jurisdiction. In 1855, Congress established the U.S. Circuit Court for the Districts of California and repealed the authority of the California district courts to exercise the trial jurisdiction of a U.S. circuit court, although the district judges continued to exercise appellate jurisdiction in certain cases involving land claims.²⁸ Congress authorized one judgeship for the circuit court, and President Franklin Pierce nominated Matthew H. McAllister, and the Senate confirmed him on March 3, 1855.²⁹ In 1856, Congress provided that the circuit judge would preside with the district judge for the district within which the circuit court was held, and that either the circuit judge or the district judge would constitute a quorum.³⁰ But when Congress abolished the California Circuit in 1863, it established a Tenth Circuit, consisting of the judicial districts of California and Oregon, and eliminated the remaining appellate jurisdiction of the district courts of

26. In 1850, federal criminal laws were very limited and dealt primarily with crimes occurring on federal property, against or by federal officials, actions occurring on the high seas and import and revenue laws. Most federal offenses at the time involved misdemeanor and petty offense crimes which were enacted as part of larger Congressional Acts addressing import, revenue and commercial laws and the means by which those larger laws were enforced. Omnibus federal criminal legislation was few and far between with the first crime "omnibus" crime bill being the Crimes Act of 1790. 1 Stat. 112 (April 30, 1790). That Act established 23 separate federal crimes, with penalties ranging from death to the payment of fines and lashings. The next major act was the Crimes Act of 1825 which codified additional federal crimes, primarily in the area of counterfeiting and crimes occurring on federal enclaves and expanding those crimes under the 1790 act. 4 Stat. 115 (March 3, 1825). After that, major federal criminal law legislation did not occur until after the Civil War and thereafter.

27. 10 Stat. 161, 169 (February 26, 1853).

28. 10 Stat. 631 (March 2, 1865).

29. Judge McAllister would resign in January 1863, and his position would be eliminated, when Congress abolished the California circuit.

30. 11 Stat. 6 (April 30, 1856).

California.³¹ Finally, in 1866, Congress passed one final circuit act for California, which abolished the 1863 act and reorganized the entire federal judiciary into nine circuits and assigned California to the Ninth Circuit.³²

3. Federal Courts in Sacramento and Fresno

While Sacramento was initially authorized as a meeting location for the federal court in the 1850 act, that designation was removed in the 1854 act and would not be reinstated until 1910.³³ As for the Southern District, the closest court to the Fresno area in 1850 was Monterey, and then, after 1866, when Monterey was removed as a court location, Los Angeles.³⁴ Fresno's designation as a session location for the court preceded that of

31. 12 Stat. 794 (March 3, 1863).

32. 14 Stat. 209 (July 23, 1866). As noted above, the circuit courts in 1866 were not the same as they are today. However, our Ninth Circuit Court of Appeals uses 1866 as its establishment date, the year Congress created the U.S. Circuit Court for the Ninth Circuit. (See the Ninth Circuit's seal.) While Congress had a Ninth Circuit already in existence since 1837, when it created that judicial circuit along with the Eighth Circuit, its area did not cover the territory now encompassed by the Ninth Circuit. 5 Stat. 176 (March 3, 1837). Instead, in 1837, the Ninth Circuit covered Alabama, Arkansas, Louisiana, and Mississippi. *Id.* In 1842, the Circuit covered only Arkansas and Mississippi, and, in 1862, it covered Iowa, Kansas, Minnesota, and Missouri. 5 Stat. 507 (12 Stat. 576 (July 15, 1862)). It was in 1866 that the Ninth Circuit covered portions of its current territory. In 1866, the U.S. Circuit Courts for the Ninth Circuit included California, Oregon, and Nevada. 14 Stat. 209 (July 23, 1866). After the creation of the United States Circuit Court of Appeals system in 1891, and until January 1, 1912, in California the U.S. Court of Appeals for the Ninth Circuit and the U.S. Circuit Court for the Ninth Circuit operated simultaneously but with different jurisdictions.

33. In 1910, the federal judges split their time between Sacramento and San Francisco. A permanent district judge did not sit in Sacramento until 1938, when Judge Welsh was appointed to this position by President Franklin D. Roosevelt.

34. In 1850, proximity to Fresno, California, was irrelevant, as Fresno County would not be incorporated until 1856, and the City of Fresno until 1885. Edwin Eaton, *Vintage Fresno* ix (Huntington Press 1965). Fresno would not become a city until the Central Pacific railroad created a station on its new Valley branch in 1872. Two years later, the citizens voted to move the county seat from Millerton, a former fort, to Fresno. *Id.*

Sacramento, having been designated as an official sitting place in 1900.³⁵ While no permanent federal court would preside in the Fresno or Sacramento area until May 1938,³⁶ a federal court presence was not absent during those forty years.

Prior to the New Deal era, the federal government's footprint was limited, and the federal presence in a town or area was often restricted to a military installation or post office or was simply nonexistent, sometimes for miles. The federal courts at that time were no exception, especially when their jurisdiction was limited. In many places, the federal courts were located within the only federal building in town, the United States Post Office. Fresno's federal courthouse was located inside the post office building until 1966, when the new federal courthouse building was built at 1130 O Street.³⁷

35. As with Sacramento in 1910, in 1900 the federal judges split their time between Fresno, Los Angeles, and San Diego. A permanent district judge did not sit in Fresno until 1930, when Judge Cosgrave was appointed to this position by President Herbert Hoover. While the history in this area is not definitive as to why the Fresno federal court was created prior to the reestablishment of a Sacramento court, the reason may have had less to do with the city's importance, workload, and population than it did with its distance to the next closest federal court and the time it took to reach that court. The closest federal court to Fresno was Los Angeles, which required litigants to have to travel either by train through the Tehachapi Pass or by stagecoach or horse to the coast and then by the coastal train south. The next closest federal court to Sacramento was San Francisco, and that travel could be accomplished in a day or less by train or boat.

36. 52 Stat. 584-585.

37. From 1908 to 1940, the federal court held its sessions at the newly constructed Post Office Building at Van Ness and Tulare Streets. Prior to that time, the Fresno post office occupied rented spaces at Tulare and Fulton Streets, and prior to that at Fulton Street (located where the old Guarantee Savings Bank Building now stands [at the corner of Fulton and Fresno Streets]). Edwin Eaton, *Vintage Fresno* 55 (Huntington Press 1965). The federal court vacated the Van Ness and Tulare Street premises in 1940 and moved to the new Post Office Building constructed one block east on the northeast corner of Tulare and M Streets. When the federal courts moved into federal courthouse buildings, these buildings were not exclusively dedicated to the federal courts, as is still the case today. The buildings, while primarily occupied by the federal courts, have space dedicated to court partners such as the U.S. Attorney's Office, Probation, congressional offices, and other federal agencies.

Sacramento's federal court occupied the post office until 1962, when a new federal courthouse was built at 650 Capitol Mall.³⁸

While both Fresno and Sacramento were designated to hear cases, federal district judges did not usually permanently reside in those areas.³⁹ Their residences were in cities such as San Francisco for the Northern District, and Los Angeles or San Diego for the Southern District. One of the first judges to reside in our area was U.S. district judge George Cosgrave of the Southern District. Judge Cosgrave was born in Calaveras County, California. He read for the law and in 1895 began his private practice in Fresno, where he remained until his appointment to the federal bench in April 1930 by President Herbert Hoover. He served in that role until his death in 1945 at the age of seventy-five, having taken senior status in 1940. There would not be a judicial officer residing in the Sacramento area until 1939, after Congress established permanent locations for both Sacramento and Fresno. In May 1938, legislation was enacted authorizing one additional judgeship in the Southern District of California, with a permanent residence in Fresno, and one judgeship for the Northern District of California, with a permanent residence in Sacramento.⁴⁰ By this time, Congress had created divisions within each district. The area including Sacramento was incorporated into the Northern Division of the Northern District of California, and the Fresno area was incorporated into the Northern Division of the Southern District of California.

38. Beginning in 1911, the Sacramento federal court sessions were held in the old Sacramento County courthouse and in the senate chamber of the state capitol. Later, a courtroom was set up in the former Post Office Building at Seventh and K Streets, until the new Post Office Building was constructed in 1933 at 8th and I Streets, when a courtroom was established on the fourth floor. Today, the Federal Defender's main office resides in that same building.

39. While a district judge may not have permanently resided in the area, other judicial officers such as U.S. commissioners may have, as well as other court staff such as clerks and, after 1925, probation officers, whose position was created under the Probation Act of 1925. Again, because most court records centered on Article III judges, there are few records on the others. However, it would often have been difficult and expensive to have all court staff travel with a judge, as they sat in different locations that were not permanently staffed by a district judge.

40. 52 Stat. 584-585. The bill was introduced by U.S. representative Frank Buck, Democrat from Sacramento, who had an impact on another important piece of legislation, the Social Security Act of 1935. In January 1935, President Roosevelt sent to Congress his Economic Security Bill. The bill was introduced to the appropriate Senate and House committees. During a March 1935 meeting of the House Ways and Means Committee, Rep. Buck made an oral motion to change the name of the bill to the Social Security Act of 1935. The motion was carried.

To those newly authorized district judge positions, President Franklin Roosevelt appointed Martin I. Welsh for Sacramento, and Campbell E. Beaumont for Fresno. Fresno then had more district judges, (Judges Cosgrave and Beaumont) than Sacramento (Judge Welsh) residing in their respective courts, but the Fresno majority of district judges would end in 1945 upon the death of Judge Cosgrave. Fresno would not see an additional judgeship for its area until October 1978, twelve years after the creation of the Eastern District of California, an authorized number that exists today.

Judge Welsh of Sacramento read for the law in 1912, and in 1914 he was appointed by Governor Hiram Johnson to finish out an unexpired term on the Sacramento Superior Court. After completing that term, he returned to private practice from 1914 to 1930. During this time, he served in several different capacities: as U.S. commissioner for the Northern District of California from 1914 to 1919; as a Sacramento city council member from 1928 to 1929; and as mayor of Sacramento in 1929. In 1930, he ran unsuccessfully for lieutenant governor on the Democratic ticket. In 1932, he was appointed a judge of the Superior Court for the County of Sacramento, and he held that position until his appointment by President Franklin Roosevelt in 1939. He served as a U.S. district judge until 1947, when he took senior status due to disability.

To this vacated position, President Harry Truman appointed Dal M. Lemmon in 1947. Judge Lemmon served in that position until 1954, when President Dwight Eisenhower appointed him to the Ninth Circuit Court of Appeals. Judge Lemmon's seat would be filled by Stanislaus County superior court judge Sherrill Halbert. Prior to his appointment, Judge Halbert had a notable career: as a lawyer in private practice in Porterville, San Francisco, and Modesto; as chief deputy district attorney for Tulare County; as deputy attorney general for California; as chief deputy district attorney and then district attorney of Stanislaus County; and finally as judge of the superior court for Stanislaus County. He was nominated by President Eisenhower on August 19, 1954, and confirmed by the Senate the next day. He would serve the court for thirty-seven years, until his death in 1991.⁴¹

To the new judicial seat in Fresno, President Franklin Roosevelt appointed Campbell Eben Beaumont. Judge Beaumont was a native of Kentucky, and he graduated from Cumberland School of Law in 1910. He worked in private practice and, from 1914 to 1917, was a deputy district

41. Judge Halbert has left a lasting and invaluable legacy with the court through his Abraham Lincoln collection. Judge Halbert was an avid Lincoln historian and student of all things Lincoln. He donated his large Lincoln library, over a thousand books about Abraham Lincoln, to the Pacific McGeorge School of Law. Today, portions of Judge Halbert's Lincoln collection can be viewed at the Justice Anthony M. Kennedy Learning Center located on the first floor of the Robert T. Matsui Federal Courthouse in Sacramento.

attorney and assistant district attorney in Fresno County. From 1918 to 1921, he was district attorney of Fresno County, until he was appointed as a superior court judge for the county. He held that judicial position until Roosevelt appointed him to the federal bench on July 27, 1939, and the Senate confirmed him on August 1, 1939. He maintained that position until his death in 1954 at the age of seventy-one.

To this vacated position, President Eisenhower appointed Fresno attorney Gilbert H. Jertberg in 1955. He served in that position until 1958, when Eisenhower appointed him to a position on the Ninth Circuit Court of Appeals to replace Dal Lemmon, who had died that year. (Judge Jertberg would serve on the Ninth Circuit until his death in Fresno in 1973.) To replace Judge Jertberg, President Eisenhower appointed Madera County superior court judge Myron D. Crocker. Judge Crocker possessed extensive experience prior to his appointment to the federal bench, including as a special agent for six years with the FBI starting in 1940; as a lawyer in private practice; as assistant district attorney of Madera County, California; as a justice court judge; and as a superior court judge, until his federal appointment in 1959. Judge Crocker would serve the Fresno legal community until his retirement from the bench in 2002.⁴²

In 1961, Congress added additional judgeships to the California courts. One of those positions was designated for the Northern District of California, with a slot to be permanently assigned to the Northern Division sitting in Sacramento.⁴³ For that position Thomas J. MacBride was appointed by President John F. Kennedy.⁴⁴ Born and raised in Sacramento, Judge MacBride had extensive private practice experience and was elected to two terms in the California State Assembly in the late 1950s.

And so, in 1966, when the Eastern District was created, residing in the area were three district judges—Judges Halbert, Crocker, and MacBride—plus commissioners and bankruptcy referees and members of the clerk's staff for both Northern and Southern Districts of California.

42. Judge Crocker's tenure would be one of the longest in this district, forty-three years. Judge Crocker took senior status on January 1, 1981, and continued serving the court for another twenty years. Judge Robert E. Coyle would be nominated and confirmed to his position in 1982.

43. This act, 75 Stat. 80, enacted May 19, 1961, added new judgeships nationwide, including two new judgeships in both the Northern and Southern Districts of California.

44. Judge MacBride was nominated by the president on September 14, 1961, and confirmed by the Senate on September 21, 1961.

who had served in the Northern Division of the Southern District.⁵⁰ For the chief probation officer, the court selected Richard C. Nicholson,⁵¹ who had been the senior probation officer in the Sacramento courthouse prior to his selection. At that time, he supervised six full-time employees, and he served in that capacity until 1971. For U.S. attorney, President Johnson appointed John C. Hyland, a Visalia, California, attorney and deputy district attorney for Tulare County.⁵² His assistant U.S. attorneys were made up of assistant U.S. attorneys who had served previously in the Sacramento office for the U.S. attorney for the Northern District of California. Each was designated as an assistant U.S. attorney for the Eastern District of California. During his tenure, Hyland would appoint a full-time assistant U.S. attorney for the Fresno office. Because there was the occasional crossover case in which one assistant had prosecuted or represented the United States civilly out of the San Francisco office in Sacramento and San Francisco out of the Sacramento office before 1966, those assistants were designated special assistant U.S. attorneys for the district so that they could still remain on the case, despite their change of districts.

Crimes that had been committed prior to September 18, 1966, presented an interesting jurisdictional dilemma in the newly created district. Under the Sixth Amendment to the United States Constitution, a defendant in a criminal case has a constitutional right to a speedy and public trial by an impartial jury "of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." Therefore, any crime that was committed in the Northern or Southern Districts of California before September 18, 1966, would have to be prosecuted in those respective districts, since the Eastern District of California did not yet exist then and hence was "not ascertained by law." As a result, even after the creation of the Eastern District, all indictments for crimes that were committed within the territorial boundaries of the new district prior to the date it was created were still captioned in the Northern District of California, Northern Division, or for Fresno, in the Southern District of California, Northern Division. Just as with assistants working cases in the newly created Eastern District of California, assistant U.S. attorneys under the U.S. Attorney's Office for the Eastern District of California were cross-designated to handle cases as special assistant U.S. attorneys for the Northern and Southern Districts of California.

50. See General Order 3, filed September 19, 1966.

51. See General Order 7, filed September 19, 1966.

52. The court, pursuant to its authority under 28 U.S.C. § 506, appointed John C. Hyland as U.S. attorney. Mr. Hyland had been nominated by President Johnson but not yet confirmed, and the court needed to have a chief prosecutor appointed in its district to carry out the functions of the U.S. attorney. Mr. Hyland would be confirmed by the U.S. Senate on October 20, 1966.

For crimes committed after September 18, 1966, the district judges sat as judges for the Eastern District of California. As for civil cases, by order, the court transferred to the Eastern District all pending cases from the Northern Division of the Southern District and from the Northern Division of the Northern District, except for those counties in the Northern District that remained with the Northern Division as of September 18, 1966.

At the time of the creation of the Eastern District, individuals accused of crimes were entitled to court-appointed counsel through the Criminal Justice Act (CJA), passed by Congress in 1964.⁵³ While the act allowed for the representation and payment of an attorney and the establishment of a panel of CJA attorneys, their administration was handled directly by the court through the clerk's office, since the federal defender's organization was not created until 1970, through an amendment to the CJA. The court established a CJA panel for this district and the procedures by which attorneys would be appointed, but in reality, attorneys were selected based on who happened to be in the courthouse or by calling a number in the telephone book.⁵⁴

As for the U.S. marshal, President Johnson nominated John C. Begovitch, who was a former California state senator from Amador County, California.⁵⁵ Before Begovitch's confirmation, the court appointed Allan Lindley as interim U.S. marshal.⁵⁶ Marshal Begovitch was a real character and a vision straight out of the Old West, with his large cowboy hat and a six-shooter at his side. He would continue as U.S. marshal until March 13, 1970.⁵⁷

53. The CJA was enacted to establish a comprehensive system for appointing and compensating lawyers to represent defendants who were financially unable to retain counsel in federal criminal proceedings. The CJA authorized the reimbursement of reasonable out-of-pocket expenses and the payment of expert and investigative services necessary for an adequate defense. While it provided for some compensation for appointed counsel (CJA panel attorneys), it did so at rates substantially lower than what they would have received from their privately retained clients.

54. See General Order No. 20, dated September 19, 1966.

55. Marshal Begovitch would not be nominated until June 5, 1967, and he was confirmed by the Senate on June 29, 1967. 109 J. Exec. Proc. S. U.S. 567, 658 (1967) and 113 Cong. Rec. 17978, 18063 (1967).

56. See General Order 8, dated September 19, 1966.

57. State Route 49 from the Jackson, California, city limits to State Route 88 is named the John C. Begovitch Memorial Highway. Caltrans, 2015 *Named Freeways, Highways, Structures and Other Appurtenances in California* 33. In 1942, Marshal Begovitch enlisted as a private in the Army and served in combat with the Third Infantry Division in Tunisia, North Africa, Sicily, Salerno, Anzio, Saint-Tropez, the Rhône Valley, and in the Rhineland. He was severely wounded three times and was awarded a battlefield commission to second

His deputies were appointed by the court from deputies who had served in the Northern Division of both the Northern and Southern Districts of California.⁵⁸

When it came to other judicial officers, the Court maintained the full complement of U.S. commissioners who had served within the boundaries of the newly established Eastern District.⁵⁹ One U.S. commissioner, Gary V. Schaber, a non-lawyer and the brother of the long-serving dean of Pacific McGeorge School of Law Gordon Schaber, served in Sacramento, reviewing search- and arrest warrants, setting bail in criminal cases, and handling petty offense matters. At this time, however, Congress was embarking on an extensive fact-finding mission in an effort to overhaul the U.S. commissioner system. It was looking to standardize the appointment process across the different districts with regard to legal qualifications and other matters. The system was eventually overhauled with the enactment of the Federal Magistrates Act of 1968.⁶⁰ United States commissioners continued to serve an essential role until August 1971, when the act took effect in this district.

In the bankruptcy arena, just as the court kept U.S. commissioners who had been serving already in the area, the court maintained for the Eastern District all those bankruptcy referees except one who were appointed under the Bankruptcy Reform Act of 1897 and who had served as bankruptcy referees for both of the Northern Divisions of the Northern and Southern Districts. This retention also included the clerks and staff who had supported the referees.⁶¹ Two notable bankruptcy referees for the area were Robert Woodward for Sacramento and Donald R. Franson Sr. for Fresno. Bankruptcy cases that were heard in certain counties from the former Northern Divisions and from counties covered under the Northern Division of the Southern District were transferred and heard by the bankruptcy referees in the Eastern District.⁶²

After 1966

The logistics of creating a new district would be worked out within a couple of years. After 1967, under the leadership of chief judge Thomas MacBride, the Eastern District grew in the number of judges, responsibilities, and new partners to the federal court.

lieutenant. He received thirteen decorations, including the Silver Star, the Bronze Star, the French Croix de Guerre, and three Purple Hearts.

58. See General Order No. 9, dated September 19, 1966.

59. Because court history is often Article III centric it is difficult to determine with certainty the names of all of the U.S. commissioners who held positions within the newly created Eastern District of California.

60. 82 Stat. 1107.

61. See General Order No. 12, dated September 19, 1966.

62. See General Order No 17, dated September 19, 1966.

1. New Partners Are Added

The first real change for the Eastern District came when Congress enacted the Federal Magistrates Act of 1968, which eventually replaced the commissioners with U.S. magistrates.⁶³ Since the 1968 act began as a pilot program in only five judicial districts, U.S. commissioners in the interim continued to carry out their duties until the act went nationwide in 1971. On April 30, 1971, for an effective date of May 1, the court appointed one full-time magistrate judge in Sacramento and fifteen part-time magistrate judges at various salaries to be located in Lassen, Modesto, Redding, Susanville, Stockton, South Lake Tahoe, Merced, Fresno, Three Rivers, Yosemite National Park, Bishop, Bakersfield, Yreka, Alturas, and Lancaster.⁶⁴ The reason for the numerous magistrate judges and locations was that the district was huge, extending from the coastal range east to Nevada, and from the Oregon border south to the Tehachapi Range. This area encompassed vast federal lands with several federal agencies, including the National Park Service, the Forest Service, the Bureau of Land Management, and the Corp of Engineers, plus the military installations that administered those lands and enforced any offenses that occurred on them.

The first full-time judge chosen for the Eastern District was Esther Mix, who was not only a prominent Sacramento attorney but also the first full-time female magistrate judge appointed in the United States. She proudly served the district from May 1, 1971, until her retirement in February 1991, when she was succeeded by magistrate judge Peter A. Nowinski. The next full-time magistrate judge for the district was appointed on June 6, 1975,⁶⁵ when Gene

63. Under the 1968 act, Congress created the title "United State magistrate," and that title would not be changed to "United States magistrate judge" until 1990, through the Judicial Improvements Act of 1990. 104 Stat. 5089 (December 1, 1990). However, to maintain continuity, the author will use the term "United State magistrate judge" throughout this article, even though that specific title may not have been the official title at the time being referenced.

64. See General Order No. 35, dated April 30, 1971. It should be noted that while Lancaster was not located within the boundaries of the Eastern District of California, the magistrate judge who covered that area performed duties occurring out of Edwards Air Force Base, which had property located within both the Eastern and Central District of California. Therefore, that particular magistrate judge was designated as a magistrate judge for both the Eastern and Central Districts of California and heard cases in Lancaster and eventually at Edwards AFB. See General Order No. 60 dated April 1, 1975.

65. While the general order covering the full-time appointment was signed June 6, 1975, it stated that it was *nunc pro tunc* as of July 1, 1972. See General Order No. 62, dated June 6, 1975.

J. Ottonello was appointed as a magistrate judge for Yosemite National Park.⁶⁶ There was no full-time magistrate judge in Fresno until January 3, 1977, when Alan Dale Christensen was appointed for the Fresno court.⁶⁷ For a number of years after his appointment, part-time magistrate judges continued to outnumber full-time. More and more full-time magistrate judges were gradually added, until eventually no part-time magistrate judges were used by the district. The last part-time magistrate judge to serve was magistrate judge Craig Kellison, who ended his part-time service when he was appointed full-time on September 2, 2004. At that time, as now, Judge Kellison served the Redding and Susanville areas, which serve the counties of Butte, Lassen, Modoc, Plumas, Shasta, Siskiyou, Tehama, and Trinity.

In the early 1970s, Congress amended the Criminal Justice Act to authorize districts to establish federal defender organizations as counterparts to federal prosecutors in U.S. Attorneys Offices and as an institutional resource for providing defense counsel in those districts where at least two hundred persons annually require the appointment of counsel.⁶⁸ The Eastern District court responded by creating a Federal Defender's Office, headquartered in Sacramento, in January 1971.⁶⁹ On July 1, 1971, the first federal defender for the district, E. Richard Walker, was appointed by the Ninth Circuit Court of Appeals. Mr. Walker had been a court crier for the federal court in San Francisco and a law clerk to district judge Oliver J. Carter of the Northern District, who sat temporarily in Sacramento prior to 1966, when the area was covered by the Northern District. Mr. Walker had served as an assistant U.S. attorney in Sacramento, as well as being the district attorney/county counsel of Trinity County, having a private practice, and serving as an assistant public defender in Yolo County. Under the amendment to the CJA, the responsibility for the CJA panel also moved from the court to the Federal Defender's Office through the adoption of the final federal defender plan on April 27, 1972.⁷⁰ Mr. Walker served as chief federal defender for the district until 1987 and is the longest-serving federal defender to date.

In November 1978, Congress amended the eighty-year-old Bankruptcy Act of 1898 with the Bankruptcy Reform Act of 1978, which drastically changed

66. See General Order 62, dated June 6, 1975. Judge Ottonello would serve only until November 30, 1975, when he retired. In his place, the court appointed Donald W. Pitts to the full-time position, effective December 1. He would serve Yosemite National Park until September 30, 1994.

67. See General Order No. 70, dated November 4, 1976.

68. The act was amended on October 14, 1970, 84 Stat. 916.

69. The adoption of the Federal Defender's Office for the Eastern District of California was approved by the Ninth Circuit Judicial Council on February 24, 1971.

70. See General Order 42, dated April 19, 1972.

the structure and makeup of the federal bankruptcy court.⁷¹ Bankruptcy referees were referred to no longer by that title but rather as bankruptcy judges. The bankruptcy referees who became bankruptcy judges under the 1978 act were Robert E. Woodward for Sacramento, who had been appointed as a bankruptcy referee in 1964 for the Northern District of California, and

71. 92 Stat. 2549. As part of the act, bankruptcy courts were established in each judicial district, with bankruptcy judges appointed by the president and confirmed by the Senate for terms of fourteen years. The act relieved the bankruptcy judges of the administrative duties of the referee system and established a pilot program for U.S. trustees who would assume these responsibilities. The act also set a transition period during which those appointed under the referee system would continue in office until March 31, 1984, or until a successor took office. Much of the 1978 act came unraveled with the Supreme Court's 1982 decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50. In *Marathon*, the Court held that it was unconstitutional for Congress to grant bankruptcy jurisdiction to independent courts composed of judges who did not have the protections of Article III. The Court postponed the application of its judgment so that Congress could enact legislation to restructure the bankruptcy courts. The Bankruptcy Amendments and Federal Judgeship Act of 1984, 98 Stat. 333, made the courts of appeals responsible for the appointment of bankruptcy judges and declared that the bankruptcy judges "shall serve as judicial officers of the United States district court established under Article III of the Constitution." In this period between *Marathon* in 1982 until Congress's act in 1984, there was a great deal of confusion and trepidation as to how bankruptcy matters would be handled. The Eastern District was no different than any other district, and things did not calm down in the district until the 1984 act's judges were appointed and serving. During this time, Judges Thompson, Eckhart, Dahl, and Hedrick were referred bankruptcy matters by the district court and were also designated consultants and, later in July 1984, special masters. See General Orders 114, dated September 29, 1982 (effective October 4, 1982, but stayed until December 24, 1982, via General Order 115, dated October 4, 1982); General Order 117, dated December 22, 1982, and continued through General Orders 153 dated April 2, 1984, and 155, dated April 30, 1984. After Congress passed the new legislation to address *Marathon* but before the then present bankruptcy judges could be appointed under the new process, Judges Thompson, Eckhart, Dahl, and Hedrick were appointed by the district court as "Bankruptcy Estate Administration Consultants," at a daily rate of pay not to exceed the equivalent of an annual rate of \$66,100. See General Order 160, dated July 2, 1984. Subsequently, on July 13, 1984, then Chief Judge Lawrence K. Karlton appointed them all as special masters to handle bankruptcy matters. General Order 612, dated July 13, 1984. They were to be paid as consultants but not for their special master work. *Id.*

Eckhart Thompson for Fresno, who had been appointed as a referee in 1972. Two other bankruptcy referees who existed at the time of the 1978 act retired before their appointment as bankruptcy judges would happen, and this necessitated the appointment of additional bankruptcy judges: Loren S. Dahl in Sacramento in 1980, and Joseph W. Hedrick Jr. in Modesto.⁷²RN

2. New Judges Double the Size of the District

As the 1970s came to a close, the Eastern District of California received welcome legislation from Congress: the doubling of the number of district judges from three to six. Much of the credit for the increase belongs to Chief Judge MacBride, who actively campaigned for additional judges in Sacramento, pointing out to the Administrative Office and the Judicial Council that for three consecutive years, the judges in this district had the highest-weighted caseload of all the judges in the United States. Congressman Bernie Sisk of Fresno joined the effort and sought approval for another judge to sit in Fresno as well.⁷³ This combined effort led to the authorization by Congress on October 20, 1978, of three new judicial slots for the Eastern District: two in Sacramento and one in Fresno.⁷⁴ In 1990, Congress authorized a temporary district judgeship for Sacramento to which Garland E. Burrell, Jr. was appointed, giving Sacramento five district judge positions. However, under the statute, that temporary position was lost when district judge William B. Shubb took senior status on November 1, 2004. Since 1978, no new permanent positions have been authorized for the Eastern District of California, which now stands at four district judgeships for the Sacramento Division and two for the Fresno Division.⁷⁵

3. Into the 1980s and the Present

The 1980s saw the last members of the current court family join the Eastern District. In 1982, through the Pretrial Services Act of 1982, Congress, after a pilot program initiated in 1974 in ten judicial districts,⁷⁶ established

72. Those two referees who retired were Bryte M. Peterson and Frederick W. Reyland, both appointed in 1967.

73. The federal courthouse in Fresno from 1967 to 2005 is named the Bernie F. Sisk Federal Building.

74. 92 Stat. 1629 (October 20, 1978).

75. To put this in perspective, currently the Central District of California is authorized for twenty-eight district judgeships. Since the establishment of the Eastern District in 1966, the district has appointed only twenty-two district judges.

76. The pilot program was established as a result of the Speedy Trial Act of 1974. The pilots were established by Congress in an effort to see if an

the nationwide Pretrial Services Agency, whose function was to address pretrial matters involving the detention and supervising of those who were released pretrial. The act provided for an eighteen-month evaluation period whereby courts could decide whether to establish a separate Pretrial Services Office or provide a pretrial services component through the probation office. The Eastern District chose to create a separate Pretrial Services Agency with a separate pretrial services chief.⁷⁷ On October 10, 1984, the court appointed Glenn Thomas, a former probation officer, as the first chief of the Pretrial Services Agency in the district.

One of the last central partners to join the federal court was the U.S. trustee program, which was added to the Eastern District in 1988. Through the Bankruptcy Reform Act of 1978, Congress established the Office of the United States Trustee in eighteen judicial districts. The U.S. Trustee Office was similar to structure of the U.S. Attorney's Office but designed to address problems specific to the bankruptcy system and the appointment of private trustees and their compensation. After a successful pilot program, Congress, through the Bankruptcy Judges, U.S. Trustees and Family Farmer Bankruptcy Act of 1986, created a nationwide (except in Alabama and North Carolina) application of the United States trustee program as a component of the U.S. Department of Justice.⁷⁸ In the case of the trustee program—unlike the U.S. attorney system, in which one U.S. attorney was appointed for each judicial district—Congress chose to create one U.S. trustee for a particular region, with each region covering many judicial districts.⁷⁹ The first U.S. trustee appointed for the Eastern District of California area was Anthony Sousa, who had offices in both Sacramento and Fresno and a main office in San Francisco.⁸⁰

In its first fifty years, the footprint of the court has expanded not only in size but also in appearance and location, outgrowing its shared spaces with U.S. post offices first in Sacramento by its move in 1962 and then in Fresno.

established Pretrial Services Office could reduce crime by persons released to the community pending trial and to reduce unnecessary pretrial detentions.

77. That separation still exists today, and while many districts, as a cost-cutting measure, have consolidated their pretrial and probation offices, the Eastern District still maintains a separate and extremely effective Pretrial Services Agency serviced by officers whose sole training, experience, and function is directed toward pretrial issues.

78. 100 Stat. 3088 (October 27, 1986).

79. The Eastern District of California is covered by Region 17 of the United States trustee program, which covers not only the Eastern District of California but also the Northern District of California and the District of Nevada.

80. The author was appointed by Mr. Sousa as a paralegal specialist for the year-old program in November 1989.

Eventually the judiciary and its partners outgrew those new spaces, too, despite the fact that a number of federal agencies vacated the premises. It was through the hard work and dedication of chief judge Robert E. Coyle, appointed by President Ronald Reagan in 1982, that three federal courthouses were constructed for the district: the sixteen-floor federal courthouse at 501 I Street in Sacramento in 1999; the nine-floor federal courthouse at 2500 Tulare Street in Fresno in 2005; and the federal courthouse in Bakersfield in 2012.⁸¹ Judge Coyle's work and the tireless efforts of the other judicial officers and the clerk's office through Clerk of Court Jack Wagner⁸² attest to the dedication and work ethic of this district in adding to our rich history.

This has been merely an overview of the first fifty years of our rich and diverse Eastern District of California and the women and men who made it great. There is much more to say about its richness and especially about its people, not only the judges but also those who make our federal legal system operate through its limited resources, from clerks to law clerks, assistants, attorneys, the parties, and the community. Many of the themes that were present in our early years still exist in the Eastern District of California today: a positive can-do approach despite overwhelming caseloads; a collegiality among its colleagues; and, as with all courts, the ability to administer justice and to proudly serve as a separate and equal branch of our democracy. Who knows what the next fifty years will look like, but if it is anything like the first fifty and before that, things are looking good.

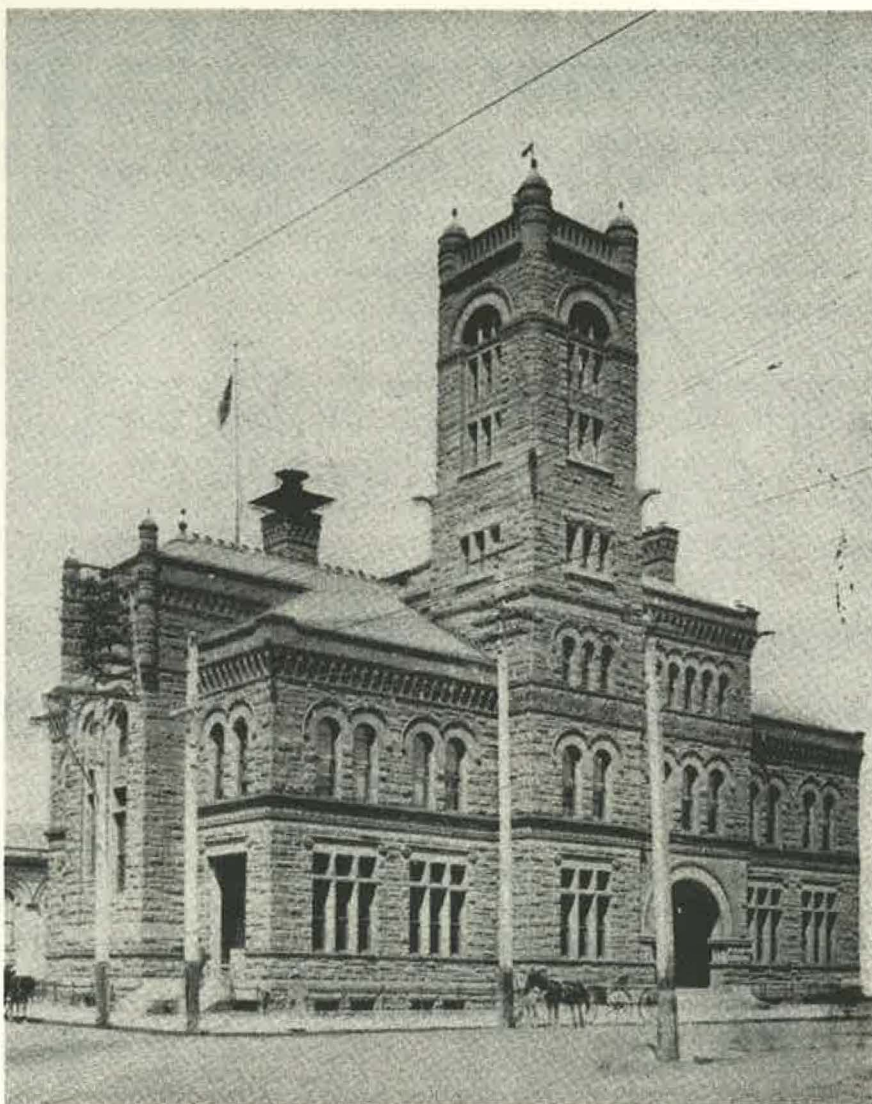
Stanley A. Boone is a U.S. magistrate judge for the Eastern District of California in Fresno. Judge Boone was appointed to the bench on December 31, 2012. Prior to his appointment, he served for almost twenty-five years in Fresno and Sacramento, California, and in Washington, D.C., for the U.S. Department of Justice as an assistant U.S. attorney, chief of the White Collar Unit, White Collar Crime coordinator, and as a paralegal specialist. He is a graduate of the University of California, Berkeley and Pacific McGeorge School of Law. Judge Boone was elected Class Clown of his high school graduating class at Nevada Union High School in Grass Valley, California (date undisclosed), and can name all the U.S. presidents and kings and queens of England, from Edward the Confessor to the present.

81. The Fresno federal courthouse was dedicated as the Robert E. Coyle Federal Courthouse on October 18, 2007.

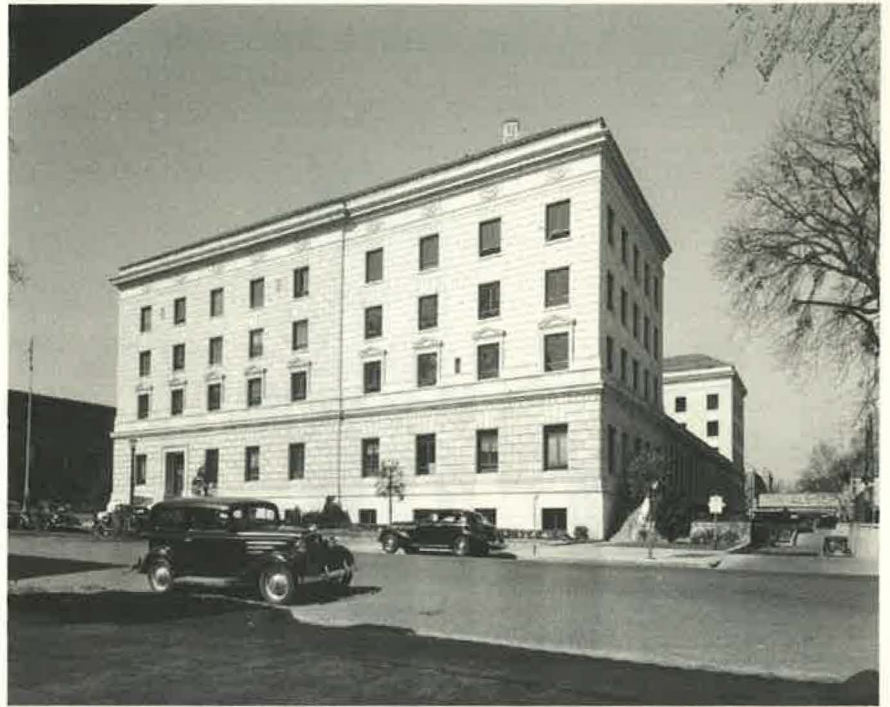
82. To date, Jack Wagner is the longest-serving clerk of court for the Eastern District of California, having served almost sixteen years (fifteen years, eleven months, and twenty-one days), from July 9, 1990, to June 30, 2006, but not counting the three weeks in June and July 1990 prior to his official appointment, when he was acting clerk of court. The next-longest-serving clerk was James Grindstaff, who served from September 16, 1974, to June 22, 1990, for a total term of fifteen years, nine months, and four days.

The author wishes to thank the Federal Judicial Center's website, which provided an overview of many of the judicial biographies on the Article III judges, and the Eastern District of California Historical Society's website, which allowed the author to fill in a few of the missing gaps in this article. In fact, much of the work associated with the Historical Society's webpage can be attributed to the efforts and dedication of senior U.S. district judge William B. Shubb, a true historian and archivist. For more in-depth information about many of the judges, the author directs you to the Eastern District of California Historical Society's website at <http://courthistory.tripod.com>. The author also wishes to thank Greg Santee, human resources manager; Marianne Matherly, clerk of the court; and Daniella Lee-Garcia, librarian for the 9th Circuit in Fresno for their assistance in researching this article. The author also thanks Chief Judge Lawrence J. O'Neill and Mia Giacomazzi, chair of the 2016 Eastern District Conference, both of whom asked the author to do a history presentation at the 2016 Eastern District Conference on its 50th, and federal defender Heather Williams, who suggested that the presentation be placed in an article format. Lastly, the author wishes to thank all those who offered advice and editorial assistance, especially Marjorie Webb and his wonderful wife, Karen Boone. It was truly a collective effort.

**Eastern District Courthouses:
Yesterday and Today**



Sacramento Courthouse 1894



Sacramento Courthouse 1933



Matsui Courthouse, Sacramento, exterior



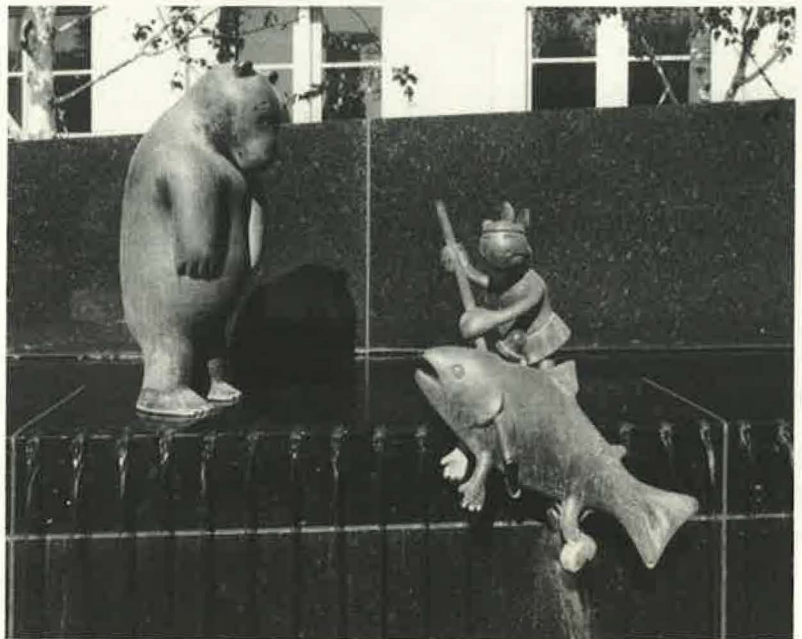
Robert T. Matsui Courthouse Atrium, Sacramento



Robert T. Matsui Courthouse Atrium detail, Sacramento



Matsui Courthouse, Sacramento, FOUNTAIN DETAIL WITH ART



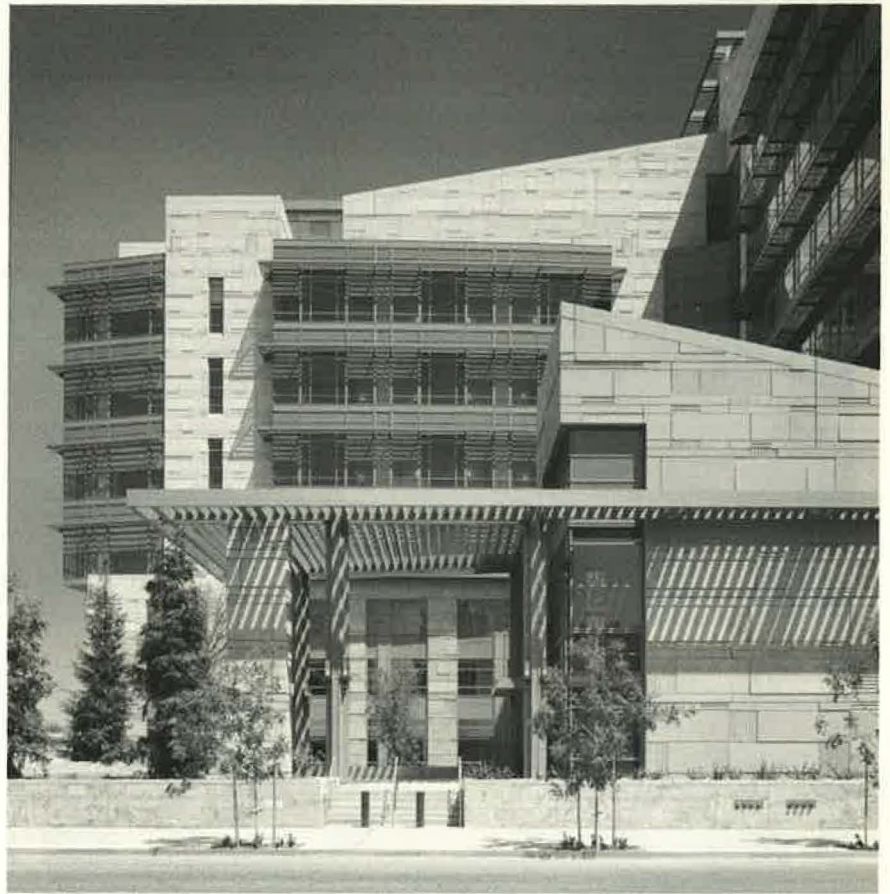
Matsui Courthouse, Sacramento, DETAIL OF FOUNTAIN ART



Fresno Courthouse 1908



Fresno Courthouse 1940



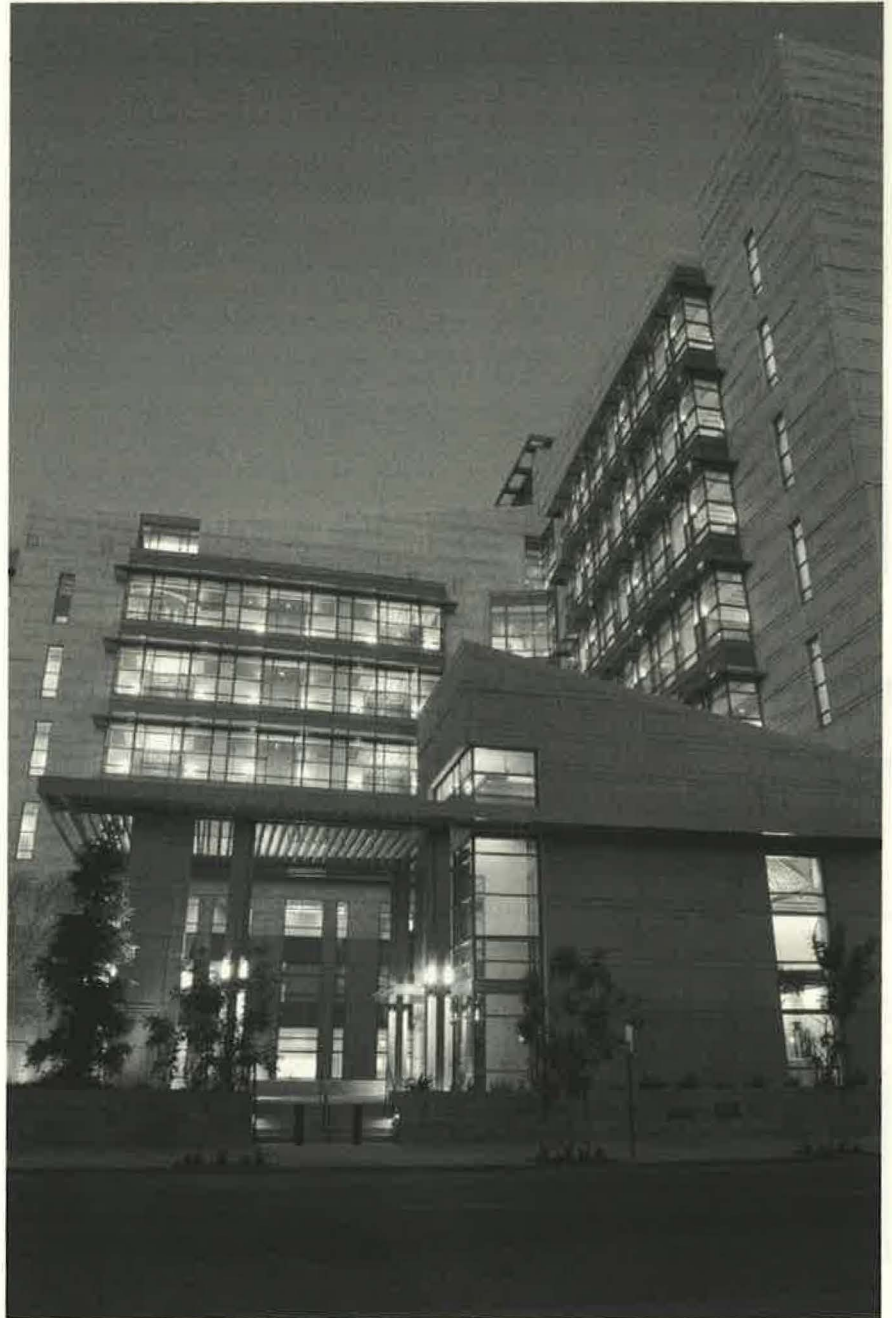
Robert E. Coyle US Courthouse, Fresno 2005



Fresno Courthouse Hallway



Fresno Courthouse Interior



Fresno Courthouse Exterior



Fresno Courthouse Atrium courtroom



Fresno Courthouse Atrium detail



Bakersfield Courthouse 2012 dusk



Bakersfield Courthouse 2012 sunrise

Transcript of the Proceedings Commemorating the 50th Anniversary of the Eastern District of California



On Friday, September 16, 2016, the Historical Society of the United States District Court for the Eastern District of California, along with the Sacramento Chapter of the Federal Bar Association, sponsored a panel discussion and reception to celebrate the first half century of the District. Associate Justice Anthony Kennedy participated with Senior District Judge William B. Shubb in the hour-long panel discussion moderated by Breann M. Moebius. The following is a transcript of that discussion.

Mr. Vinding: Hi, my name is Michael Vinding, and I welcome you all on behalf of the Eastern District Historical Society and the Sacramento Chapter of the Federal Bar Association to our panel discussion on the 50th Anniversary of the United States District Court for Eastern District of California. As tomorrow is Constitution Day, this event is perfectly timed. I ask that you all refrain from taking pictures during the event.

It is an honor today to introduce Congresswoman Doris Matsui. Congresswoman Matsui has represented Sacramento and its surrounding areas for more than a decade. She serves on the House Energy and Commerce Committee, on the Subcommittee on Health; and on the Subcommittee on Communications and Technology. She is a long-time friend of the Sacramento legal community,

and this very courthouse bears her husband's name. She flew out to Sacramento from Washington, D.C. early in order to be here today, so I ask you to please welcome Congresswoman Doris Matsui.

Congresswoman
Matsui:

Thank you so much. It's wonderful to see all of you here this afternoon, and thank you Mike for that kind introduction. And thank you all, the Eastern District Historical Society and the Sacramento Chapter of the Federal Bar Association, for hosting today's event, and for inviting me to join in the celebration of this important milestone. It is hard to believe that 1966, the year the Eastern District was created by Congress, was actually a half-century ago. You know it is quite sobering to me, because 1966 was the year that Bob Matsui graduated from law school, got married and brought his young bride back to Sacramento, his hometown, to start his law practice. And I think you know who that bride was, and is. Anyway, the town and the legal profession were quite a little bit different then, and so was this Court. Most of the federal offices, including the judges', were on 650 Capitol Mall, which is now known as the John Moss Federal Building. This place is maybe a little bit nicer than that one, but still, you know, really wonderful things happened over there too. But I could never have imagined that I would be standing here today celebrating the 50th Anniversary in the Robert T. Matsui Federal Courthouse.

It is a privilege for all of us to have Justice Tony Kennedy here to mark this anniversary. Justice Kennedy represents the best in the traditions of our community and of public service. And he and Mary have been dear friends to my family and me for a very long time. I remember how proud Bob was to introduce him at his Senate confirmation for the Supreme Court of the United States. My son Brian had the honor to clerk for him in the Supreme Court, after first proving himself as a clerk here in the Eastern District, clerking for Judge David Levi. I always have a wonderful time when I get together with the Justice and Mary in Washington, D.C. and here at home. He is still in Sacramento, and you?

I want to thank Judge Shubb, District Senior Judge, for his leadership and participation here today. There are many distinguished guests here amongst us and it would take far too long for me to introduce them all. Sacramento's legal community is well represented here

including, those from the U.S. Attorney's Office, the State Court Judges, Public Defenders, and those in the private practice of the law. Thank you all for coming here today.

And I do want to, though, recognize the sitting Federal Judges here who work tirelessly on behalf of justice for the people of California: Judge Callahan from the Ninth Circuit, Judge Burrell, Judge Drozd, Judge England, Judge Ishii, Judge Mendez, and Judge Nunley. Thank you all for your dedicated service. In addition, this District really does depend on the magistrate judges, and the bankruptcy judges, to keep up the heavy docket and I want to thank them very much for their service and the judicial officers here today.

Before we hear from Justice Kennedy and Judge Shubb, I have a short presentation to make here. So, may I ask Judge Morris England, my good friend and Chief Judge Emeritus of this Court, to accept a few items here. Where are you? [Laughter.] Judge England, I have here a Congressional Record Statement celebrating today's or tomorrow's 50th Anniversary of the Eastern District. And I also have a flag here flown over the—and I didn't fly it myself personally, but I had it flown, over the United States Capitol in honor of the 50th Anniversary. So, if you please accept these items. [Applause.]

Judge England: Absolutely. Thank you so very much.

Congresswoman

Matsui: Thank you very much, I appreciate it. Thank you so much.

Judge England: Very generous of you, Congresswoman Matsui, thank you so very much. I have another flag that was also flown over the Capitol and this was from Congressman Kevin McCarthy and he was not able to make it here, but he did send some words he would like to be read here, as I accept this flag. And that is: "The flag was flown over the U.S. Capitol to honor the 50th Anniversary of the Eastern District of California." And given that Congressman McCarthy's District includes portions of Kern, Tulare and Los Angeles Counties and largely falls within the Eastern District of California, the Congressman presents this flag in honor of the hard work and dedication of those who help to ensure the Eastern District of California in a fair, independent and dedicated way for the advancement of justice." And again, I accept that from Congressman McCarthy, and also Congresswoman Matsui.

I am here today on behalf of the current Chief Judge O'Neill, who was not able to make it. He and I spoke about

this and the decision was made that because of the close ties the Matsui family has to, not only this community and courthouse, this flag and display will be kept in Sacramento, and the one from Congressman McCarthy will go to Fresno. So, we'll have both courthouses fully represented congressionally. So again, thank you so very much for doing this. Thank you. [Applause.]

Mr. Vinding:

Thank you both. I would now like to introduce today's moderator, Breann Moebius. Bre has served as a Senior Law Clerk for Judge Shubb since 2007. She has also taught Civil Rights at the University of Pacific McGeorge and U.C. Davis Law School. She is the past President of the Sacramento Chapter of the Federal Bar Association in 2004, and with her help and guidance, I promise that today's event would be memorable. Bre?

Ms. Moebius:

Thank you Mike. From 1850 through 1966, the State of California was organized into two Federal Judicial Districts, the Northern District and the Southern District. That changed on March 18, 1966, when Congress enacted Public Law 89372, to create the Eastern District of California. Six months later, on September 18, 1966, the Eastern District opened its doors for the first time at 650 Capitol Mall. On that day, the Eastern District had three District Judges, three Assistant United States Attorneys, and no Federal Defender. Today, the Eastern District has 9 District Judges, 15 Magistrate Judges, 92 Assistant United States Attorneys and 32 Assistant Federal Defenders.

Of course, though, the growth and history of our District cannot be captured in mere numbers. We are fortunate to have two esteemed jurists with us today who were practicing in Sacramento when the District was created. They are here to share their more personal memories and recollections about the history of our District and the judges.

Supreme Court Justice Anthony M. Kennedy has strong ties to Sacramento and our District. He was born in Sacramento and he grew up in Land Park. In 1963, he took over his father's law practice here and continued in private practice for twelve years. After he was appointed to the Ninth Circuit in 1975, he maintained his Chambers here for 13 years across the street from the Federal Courthouse at that time. He also taught Constitutional Law at the University of the Pacific, McGeorge School of Law, and has maintained his affiliation with McGeorge to this day.

Senior District Judge William B. Shubb was born in Oakland, and after graduating from law school in 1963, moved here to serve as a law clerk for District Judge Sherrill Halbert. After his clerkship, Judge Shubb served as an Assistant United States Attorney from 1965 to 1974, then he went into private practice. He returned to the United States Attorney's Office to serve as the United States Attorney from 1980 to 1981 and then again went to private practice. In 1990, he was appointed to the United States District Court for the Eastern District of California. He served as our court's Chief Judge from 1996 to 2003. Judge Shubb has appeared before, or been a colleague with, every Judge and Magistrate Judge who has served in the history of our District.

When Sacramento was still a part of the Northern District, Judge Martin I. Welsh was the first judge appointed to reside and sit in Sacramento. Eight years later in 1947, Judge Dal M. Lemmon was appointed to succeed him. Justice Kennedy, you knew both of those judges. What was your recollection at the time about the circumstances that gave rise to the creation of the Eastern District? [Applause.]

Justice Kennedy: Well, thank you and good afternoon. Relax; no one knows what's going to happen here. So, it's ok. [Laughter.] It might be stretching a point too much to say, for me to assert a *personal* recollection of Judge Welsh. But, I know my parents both knew him. He was Mayor of Sacramento and he'd been a Superior Court Judge. Rolph had appointed him, and my father came to Sacramento as Governor Rolph's Appointment Secretary. So, they knew him and they spoke very highly of him. Dal Lemmon, our family did know, and it was my honor to know the judge.

Even today, I think attorneys may be somewhat reluctant to have judicial officers over to their home for social occasions, there's that independence and that separation we have. In an earlier time – we might talk about what Sacramento was like in an earlier time – this was a rigid rule. My parents knew the Lemmons very well, and Mary Alice Lemmon was just a delightful, beautiful lady. They would see them at other events, and so forth and they, the Lemmons, would come often to see our neighbors right across the street, and we would chat with them. But, my father was very, very careful in not having a social relationship. Judge Lemmon sat in the Federal District Courthouse, which is what I call the Post Office

Building at Eighth and Hyde. I drove by today and it said "Space for Lease." [Laughter.] I don't quite understand that. But it was a simply beautiful courthouse, and in my high school days, when my father was practicing, and he was a solo practitioner, it was lonely so I was following him around. I was in Judge Lemmon's courtroom, just as a spectator, as a visitor, many different times. It was an absolutely beautiful courtroom.

He was a distinguished, very learned judge. He later went to the Ninth Circuit and would be the first Sacramento judge that would have gone to the Ninth Circuit. He was just a very, very scholarly man. I think he came here as the State Law Librarian. He graduated from Stanford and couldn't get a job, but was recognized as a premier judge and a distinguished man and had this beautiful courtroom. Do they still use it?

Judge Shubb: It's now, I think, part of the Federal Defender's Office.

Justice Kennedy: Well, they say, "Space for Lease" if anybody wants it. [Laughter.] I knew Lemmon very, very well (as well as a young boy can know a distinguished elder person in that sense).

Ms. Moebius: Judge Shubb, they were sitting in the Northern District, and didn't have their own courthouse in Sacramento. What was happening to lead to the Eastern District being created?

Judge Shubb: Well, over the years I have heard credit given to a lot of different individuals for the creation of the Eastern and Southern Districts out of what used to be the old Southern District, the Northern District of California. And I think, probably, the fact of the matter is, that it was something that had to happen. You know, California started in San Francisco. The Southern District was almost an afterthought, and then it *grew*. And when you think about it, in 1966, the Southern District of California included what's now the entire Central District of California, what is now the *new* Southern District of California, San Diego, and part of what is now the Eastern District of California, Fresno. And I just imagine that it became so cumbersome to manage as a unit that something had to happen.

Justice Kennedy: It was way too big even then, and you have to remember, district courts, as we know them, were not established until 1911. Judge Walsh was probably appointed here in the late '30s. So, the district courts, as we know them, were less than forty years old when Welsh was appointed, and the needs of the District Court were not understood. But, California, my heaven, this District today – what are you,

thirty-four counties? The population of this District makes it the eighth biggest District in the country. If the Eastern District of California were a state, it would be the twelfth largest state in the United States, both by size and roughly by population. I mean, that's big – people see the big federal courthouses in Fresno and in Sacramento.

You have to realize how vast the region is you represent, and how many cases you get, so that this was just something people were slow to understand. Have you heard that there was some resistance? You know, federal officials do not like their jurisdiction reduced. [Laughter.] So, when people would talk about this in the Northern District, I'm not sure the Northern District Judges were particularly happy with this. On the other hand, they must have realized that they didn't have the time to go. I just never heard much about whether there was some resistance on the part of the Northern District Judges who lived in San Francisco – I just don't know that.

Judge Shubb: There may have been some resistance in San Francisco. In Sacramento, it was the other side of the coin.

Justice Kennedy: Of course.

Judge Shubb: You couldn't divide the Southern part of the State without taking the Northern part into account. And so, if you're going to take the Fresno part of the Southern District away from it, you had to put it somewhere, and they created the Eastern District of California, out of what used to be the Northern Division of the Northern District, and the Northern Division of the Southern District. And I imagine some of the judges in San Francisco felt they were losing something that they didn't need to lose.

But the judges in Sacramento, from the time I came to work for Judge Halbert in 1963, were constantly making little snide remarks. "We're second class citizens here." The U.S. Attorney, there was only one Assistant U.S. Attorney in Sacramento, he worked for the United States Attorney in San Francisco. He'd say, "I have to get permission from San Francisco," and the judges here would say, "We're second class citizens." And so, the move was underway from the time I came in 1963. Ultimately, it happened in 1966.

I was in the U.S. Attorney's Office at that time, and we heard that there was going to be a new Eastern District of California. We started to wonder whether we were going to have jobs. We were working for the Northern District of California; we were in Sacramento. There was going to be a new U.S. Attorney appointed for the Eastern District of

California. Would he hire his own Assistants? It was very soon that we learned that the bill also said that all Assistant United States Attorneys presently in Sacramento would become Assistant United States Attorneys for the Eastern District of California. So, we took some comfort in that, and from March of '66 until September '66 when it was to take effect, it was an exciting period of time.

One of our Assistants, Roth Mason, wanted to be the United States Attorney for the Eastern District of California. He went around to lobby the Congressmen in the District. And he went down to Bakersfield and he said, "Congressman, I'd like to be the United States Attorney for the new Eastern District of California," and the Congressman said, "What is that, United States Attorney?" So, he explained it to him, and the Congressman said, "You know, I think that would be a good job for my friend, John Hyland." [Laughter.] And sure enough, John Hyland became the first United States Attorney.

Justice Kennedy: Was Roth Mason a clerk for Sherrill Halbert?

Judge Shubb: No, he was not.

Justice Kennedy: He was a brilliant, brilliant attorney.

Judge Shubb: He was. He later on became a Superior Court Judge, and he was one of the three Assistants that we had in the office, when the District was created. Same thing with the Marshals Service. The Marshals would say, "Well, we need some more help up here, we've got to apply to San Francisco, where the U.S. Marshal is," and the judges would say, "Yes, we're just second class citizens." So we got a new Marshal here, and his name was John Begovich. He was a State Senator from Amador County, Jackson. He was a war hero, and I remember wondering, you know, what effect this was going to have on our District.

Justice Kennedy: But he should have been appointed in the time of Stephen Field. He wore a huge cowboy hat and visible pistols – matching visible pistols. [Laughter.]

Judge Shubb: Yeah.

Justice Kennedy: Matching visible pistols. [Laughter.] And he lived in Jackson, and would commute, and one time, someone phoned him and they said, "We have a State Senator here, he's being taken ... being tested for drunk driving," and they said, "Where should we take him?" and he said, "Take him home." [Laughter.] And I would always like to have seen the interaction between Halbert and Begovich.

But, Sherrill Halbert – I had not realized until I was talking to Bill a couple of days ago, that Bill was his clerk –

was a good friend of our family. He and my mother worked together on the Pony Express Project, and people used to say, "Are you representing your mother on the Pony Express Project?" I said, "No, Halbert's doing that." He loved the civic activity. He had a prosecutor's background, very severe, very severe sentencing. Some of the few appearances I had in the District Court were to move for a reduction of sentence, and I would wait till around Christmas time, you know, those, days they could revise it after six months – after six months, you could change the sentencing.

Judge Shubb: There was a provision to do it.

Justice Kennedy: But Halbert was a very fine District Judge and I knew him. I did not go often to District Court. I went mostly in the first part of my practice to what was then the Northern District in San Francisco. I was in San Francisco. I did admiralty work, and I had a case, it was a small enough case they could give it to me, where it was being tried before Judge Al Wallenberg, a distinguished, dignified, very quiet, scholarly man. And he had this presence on the bench, he just had the jurors and the audience in awe.

I was representing a barge owner, and barges have what's called a "capstan." It looks like a chess pawn in its shape, and it has slots in it, so that you can take a crowbar and go around and pull up an anchor, chain, or a rope. I represented the barge owner, and on this capstan, the gear had broken, the rope came around and it hit the seaman, and there was an injury, he had a fracture in his jaw. We thought we had settled the case, and I phoned Judge Wallenberg. I said, "Judge we've settled this case, we don't have to try it on Friday." And then the settlement documents came, and the plaintiff's admiralty attorney had moved the decimal one place to the right. [Laughter.] So, I told Judge Wallenberg, I phoned him and I said, "I'm sorry your Honor, but this case has not settled." He said, "I was going to pick a jury in another case. I'm going to pick juries in two cases, you come here with both counsel, and you bring your Pretrial Statement, what the case is about." And the audience was full. There were two juries to be pulled, lots of attorneys for law and motion, and he picks up this paper and this quiet, dignified man, starts roaring with laughter, tears are coming out and he's reading my Pretrial Statement. [Laughter.] And you know this capstan, is like a winch, and I looked at it, and it said, "This case began when a *wench* that a seaman was working on [laughter]

unwound and struck him in the jaw." [Laughter.] And which was my first, and very public lesson in proofreading, you have to do your own. [Laughter.] But the judges in San Francisco were very close, Sam Conti and some of the other great judges there; and they would see me and say, "Got any of those *wench* cases for us again?" And years later Phil Wilkins, who had a great sense of humor and heard that story, he had to start the story all over again, ten years later. [Laughter.]

Ms. Moebius: Well, I don't have a great follow-up for that story [laughter], but we go back to the first day, when the doors opened, and we had three judges: Judge Halbert, who Justice Kennedy talked about, we also had Judge Thomas J. MacBride, and Judge Myron D. Crocker. And Judge Halbert had told MacBride before he was a judge that being a District Judge in Sacramento was the best judicial job possible. Judge MacBride later reflected that after he joined the bench, he agreed. Judge Crocker had said that becoming a judge added ten years to his life "because instead of getting ulcers, he was now giving ulcers." [Laughter.] Justice Kennedy, you told us a little bit about Judge Halbert – what would you like to share about Judge MacBride and Judge Crocker?

Justice Kennedy: Judge MacBride and his wife Martha were very good friends of our parents, and simply wonderful people. And MacBride had this tremendous sense of humor. When I came to the Court of Appeals – you're correct, the best job in the world is a District Judge, you know, there's nothing you can do with those judges, they have their own realm, their own kingdom, and it's a wonder, you get to see *real* people; you have juries. And so, I thought, I want to be District Judge and that couldn't happen, so I went on to the Court of Appeals. But I thought, well, I'll get my assignment, and I'll go down and I'll show everybody that I'm this very, very talented District Judge.

Well, Warren Burger would not allow us to go – to be assigned to the District Court – because we had a four thousand case backlog. We were only twelve Circuit Judges, twenty-two percent of the nation. We had visiting judges coming to us all the time. And so, he would not allow us to be assigned to the District Court.

The one time I sat in the District Court was for my swearing-in as a Circuit Judge. We had Judge MacBride, who was presiding, and Judge Wilkins, a wonderful man, we will talk about him later, also a great family friend; and Judge

Halbert; and myself. So four of us were on the bench. And it was in the afternoon – there was going to be a big reception afterwards – and my family, of course, was there. Some of the lawyers who had helped me spoke as well, and then Judge Halbert administered the oath. Then, it is the custom for the new judge, having taking the oath, to thank everybody, and to thank the President of the United States for the appointment, and to assure the bench and bar that he or she will be devoted and assiduous in his or her judicial work. MacBride then thanked everybody, I've been sworn in, "And now," he said, "We will recess for our reception." And I said, "Judge MacBride, I have to speak." MacBride had a wonderful sense of humor and was a very charismatic presiding officer, and he said, "Holy moley, I forgot the Judge!" And I said, "You know, I've been sworn in for ninety seconds and I've reversed you already." [Laughter.] MacBride said, "That was the one time." I said, "Well, we can talk about that, you know, what a Circuit Judge has to do." But MacBride was a dynamic, wonderful person and presided over a lively courtroom, where there was humor and very good argument, but he ran a very good court and had great respect as a Presiding Judge.

Ms. Moebius: Judge Shubb, you clerked for Judge Halbert about for two years, and I can attest that law clerks get to see a unique side of judges. [Laughter.] What would you like to share about him?

Judge Shubb: We see the good side of judges. Judge Halbert was my mentor. Think about it, he was born in 1901, on a sheep farm in Tulare County on his family homestead since 1880. His father remembered Abraham Lincoln. He'd tell him stories about Lincoln. That accounts in part for how Judge Halbert became a Lincoln scholar later on. He used to have all these books on Lincoln in his chambers, and I thought that was the entire collection and I was impressed even with that. Later, after he retired, he gave his entire Lincoln collection to McGeorge, and we worked out an arrangement with McGeorge to have it housed here, and they brought it over here. It's now down in the Anthony M. Kennedy Learning Center where we're going afterwards, and you can see the collection. It was one of the most complete collections of its time on the West Coast.

He was a Lincoln scholar, but he still had the *country* in him. He was a Californian, but he was a *rural Californian*. He had these folksy statements, and I see Dick Nichols grinning there a little bit. When he wanted to keep the

lawyers going, he'd say, "You got to keep him up to the snubbing post." When he wanted to get them to do something he'd say, "They've got to fish or cut bait!" Later on he changed it to "*fish, cut bait, or go ashore.*" He had all these sayings. "Anything with more moving parts than a crowbar is bound to break down." [Laughter.] I love that one – I use it all the time in trials. He was my mentor.

Judge MacBride, Justice Kennedy is right he had a lot of class, but he was frugal. I do have one story to tell about him and that was one time we were in chambers, and we had a juvenile proceeding, and it ended up that he had to sign a certain order. I was representing the government, somebody else was representing the juvenile, and he said, "I'll sign the order. Mr. Shubb, would you present the order to me." And I did and he looked at it, signed it, excused everybody, said, "Mr. Shubb, would you please remain?" I said "Yes." So, I stayed in there and he said, "Bill," (everybody's gone) he said, "Bill, I signed that order, but that's a terrible form." I said, "Well judge," I said, "That's the same form we use in every other case, that's a form order." And he said, "Well you can *bet* me I never signed that form" and I said, "How much?" [Laughter.] You should never say that to the judge. [Laughter.] It just came out. [Laughter.] Now MacBride thinks a minute and he says "A dollar." So I said, "Just a minute." In those days we didn't have anything electronic. I had run down to my office, which was down at the end of the hall. I went into the filing cabinet, I found some orders, I open it, and sure enough, there was one *exactly* the same as I had just presented to him with "Thomas J. MacBride" signature at the bottom. So I run back and I present it to him. He says "Alright." So, he's walking over to his little coat rack over there, where he had his robe and his coat hanging. He pulls his wallet out of his pocket opens it up; unfolded, he pulls out a *crisp new* one dollar bill. He must have just gotten it from the bank. He gives it to me and he goes like this, and he says "Spend it wisely son, you're *not* going to get another one like that again." [Laughter]

Justice Kennedy: When Judge MacBride was appointed, Halbert was in the old office building, the *old* courthouse, and so they had to have a second courtroom. They manufactured one and Nat Colley, a marvelous litigator, came to visit Judge MacBride and to congratulate him. He looked at the courtroom. He said, "This will never do" and MacBride said, "Well, don't worry about it." And he said, "I'm worried about it." He

said, "When you go to federal court you have a big courtroom, you can charge your clients a lot more." He said, "I can't do that in this dinky courtroom." [Laughter.] And so, that maybe—might bring you to the new courthouse on 650 Capital Mall.

Ms. Moebius: Did you want to add before we —

Judge Shubb: Judge Wilkins?

Ms. Moebius: That's where I was going to go. So, in 1970, Judge Wilkins joined the court, and Justice Kennedy, you mentioned you have something you would like to share about him.

Justice Kennedy: Phil Wilkins was a very good friend of our family and of mine again, with an age difference, and we used to see each other a lot at the Capitol, when the U.S. Senate was in session. We both had the same style. We didn't wait around to see legislators much, we lawyers gave lobbying the kind of lawyer's approach, where we made appointments and so forth.

But Phil had a wonderful sense of humor. He loved baseball and would go every year to the World Series with Earl Warren. He was a very, very close friend of Earl Warren and his wife Sue, an elegant, lovely lady. And I don't think I appeared before Judge Wilkins as a lawyer. One of the cases I had in the new Eastern District was the *Donner Bridge Fire* case but they had John Kilkenny come to try that from Portland, or I guess that was when that was still the old Northern District. I don't think I ever appeared in front of Judge Wilkins. We would sometimes have a Judge Callahan, a visiting District Judge, come to sit on the Court of Appeals, but MacBride and Wilkins never sat with me, and I'd always hoped that they would. Dean Price and Crocker sat with me. But Wilkins had a marvelous sense of humor, and was one of the most well-respected attorneys in Sacramento; he had a very fine reputation, and deservedly so as, as an attorney.

Judge Shubb: He did go to the World Series. One year when the A's were going to go to the World Series, I wanted to go, and so I had approached Judge Wilkins and I said "Judge, I understand you are going to the World Series." He said "Oh, yes," and I said, "I'd like to go too." I said, "Could you make sure we don't set any cases during that week, that period when the World Series is going to be in Oakland." He said, "Oh yeah." So, he told his clerk. Well, one day a few weeks later I was in his court, and I had a case and the defendant entered a plea of not guilty. "Do you wish to have this matter set for a jury trial? Yes. Very well Mr. Clerk, I set it down for trial."

The Clerk says "October the 10th," and I looked up at the judge, and just looking like this [shocked expression]. Wilkins looked over his glasses like this, and I said, "Your honor?" "Yes?" I said, "That's the week of ah – the week we're going to be in the Bay Area?" [Laughter.] He says, "Oh, *the conference, the conference.*" From then on whenever I was going to a ball game in the Bay Area, I said I was going to a conference, [laughter] and he did have a great sense of humor.

But, the first day that he sat on the bench, I was in the U.S. Attorney's Office and he had a calendar, he had a routine criminal calendar. And he called me into his chambers and he said, "What's going to happen this morning?" And I said, "Well this is number one: he's going to ask to have a continuance. This is number two: he's going to plead not guilty, and your clerk will set it for jury trial. And there were maybe a couple other things on there." And we went over them in detail. So, we went into court and sure enough, it just went as planned. One at a time those cases were resolved, and the lawyers, after they finished their case, would walk out of the courtroom until there was nobody left in the courtroom but me, the judge and his clerk and he said, "Bill?" And I approached the bench and he said, "We did it!" [Laughter.] It was so great.

Just one other story about his sense of humor. Dick Walker was a Federal Defender – I hope we're going to talk about him here in a few minutes – he had a motion on, a Motion to Suppress, and had his investigator, Dave Craft, testifying on the motion. And he was trying to draw a diagram over here on an easel, and he had a little piece of chalk, and he was trying to draw and the chalk kept breaking. And Judge Wilkins finally looks down to Dick Walker. He says, "Can't you give him a bigger piece of chalk?" and Walker says, "I'm sorry your Honor," he says, "We don't let him have anything sharp in the office." [Laughter.] Wilkins immediately says, "I didn't know you had *anything sharp* in your office." [Laughter.] Dick Walker and Phil Wilkins were very good friends.

Justice Kennedy: I guess the new courthouse was opened around 1960-61?

Ms. Moebius: Or '62 I think.

Justice Kennedy: '61 or '62.

Judge Shubb: '62.

Justice Kennedy: Judge Halbert went over to look at it, and the country had gone along with courthouses dating from the pre-forty's and the 1930's for years, because of World War II, and

because Sacramento and Northern California had these beautiful Victorian courthouses, simply splendid. And so, I don't think the judge paid much attention to the plans for this courthouse, and the GSA wasn't really expert in building them. This building, the Moss Building, you can see the identical counterpart in Florida. And they each originally had a big snow roof. Well, you don't need a snow roof in Florida or Sacramento, but that's what they had, and so they took that off to save the money, but it gave it a very flat look. But in any event, Bill would remember, that if the door was open, you would see the prisoner on the commode, and the judge had to put on his robe and walk into the public hallway before he got to the judges' entrance to the bench. Courtrooms are hard. You have to have an entrance for the judge, and for the spectators, and for the jury, and for the prisoner in custody, which is simple if you have one courtroom. But try it with ten or twenty, it's tough. And they had just not made the right accommodations. Did Halbert refuse to move into the courtroom?

Judge Shubb: Yes, Dick Nichols is here, he was his law clerk at the time. Yes, he wouldn't move in until they fixed it so you couldn't see the commode, and they put another door on the side so he could come in – but he still couldn't come in from his chambers. But he didn't have to walk in through that door back there.

Justice Kennedy: And that may have got me interested in courthouse design later, because I've got an interest in courthouse design and work with the GSA. Oh well, the next question?

Judge Shubb: So, ask the next question. [Laughter.]

Ms. Moebius: Before, could we just include the judges who aren't with us today anymore. In 1978, Congress doubled the number of district judges on our District, and shortly after that, President Jimmy Carter appointed Judge Lawrence K. Karlton, Judge Milton L. Schwartz, Judge Edward D. Price, and Judge Raul A. Ramirez. Would you like to share some memories about those judges?

Justice Kennedy: Well, Milt Schwartz's mother owned Levinson's Bookstore. And he was a very scholarly man, my parents knew him very well. And he was with McDonough, Allen, Wahrhaftig & Schwartz and they were there were very fine, very careful lawyers. When I was on the Court of Appeals, I would sometimes take the Greyhound bus at six in the morning to go to San Francisco, and occasionally I would see Milt there and he would be working at six in the morning on his briefs.

He was a very diligent and meticulous lawyer, and the McDonough firm was known for that. They turned out very good work product and he was very careful, I'm sure, as a District Judge. I'm trying to think, you see I appeared mostly when I was in practice in the Superior Court and, of course, he came to the bench after that. I was a Circuit Judge when he was appointed a District Judge. But we thought it was a great tribute to him, and to the bar, that he would come to the federal bench.

Judge Shubb: I think the addition of those new judges to the Court, more than anything to do with their individual personalities or attributes, was that it actually doubled the number of judges both in Sacramento and in Fresno. And it really, I think, changed the dynamics from that small court with two active judges up here, and just one all by himself down in Fresno, to something more traditional and from then on, it hasn't been exactly the same but, we haven't gotten any more judges since then, I'll tell you that! [Laughter.]

Justice Kennedy: I know, I don't want to interrupt the systematic point, about the relationship with the judges in Fresno that you've had, but one more thing about Milt Schwartz. You know, the Congress was slow and the Senate for the confirmation, so, he was in private practice, he had cases and then he's nominated and nothing's happening, and they would say "You have a tentative date, you have a tentative date." And so, they phoned and they said, "You have a tentative date," and he said, "No I don't." They said, "What do you mean?" He said, "Either you give me a date or you can take my name off the list," and they were so shocked in Washington that they gave him a hearing and confirmed him. [Laughter.]

Ms. Moebius: And Justice Kennedy, Judge Schwartz credits you with him applying or putting his name in to be a judge. He said that you were in the elevator one day, and you mentioned it to him, and before that, he didn't know what a district judge did or know that there was an opening. Do you remember that day?

Justice Kennedy: Well, I think he knew what a district judge did; Milt Schwartz was quite a litigator. But people have told me that story and apparently, I do remember telling Milt that he ought to go to the federal bench, because I thought he was such a fine lawyer and I think maybe that's how he found out about the vacancy.

Ms. Moebius: With the exception of Judge Robert E. Coyle, all of the other judges appointed to this District are with us today, so we've

made the judicious decision not to discuss them in their presence today. [Laughter.] With Magistrate Judges, our court today has fifteen Magistrate Judges, but Judge Shubb, how has the role of the Magistrate Judge in this District changed over time?

Judge Shubb: Well, historically, and up to the time that I came to work for the Court for Judge Halbert, we had what they called U.S. Commissioners. They weren't lawyers, they didn't have to be lawyers, and they would be stationed at various points in the District: at Yosemite, the National Parks, the Metropolitan areas, the outlying areas, so that they could arraign people in criminal cases and handle those types of non-dispositive issues. But it wasn't until after I came to work for Judge Halbert — and actually after I was in the U.S. Attorney's Office — that the role of the Commissioners changed, and we had the Magistrates Act in 1968 that changed all that. Then you had to be a lawyer and the title was changed from Commissioner to Magistrate. So, before we had the Magistrates Act, our Commissioner in Sacramento was Gary Shaber, he was Gordon Shaber, the Dean at McGeorge and Judge's brother.

Justice Kennedy: And not a lawyer.

Judge Shubb: Not a lawyer, he was the business manager of McGeorge, and he was our U.S. Commissioner. So, after the Magistrates Act 1968, the whole thing changed, he had to leave, and we had to have a lawyer appointed. So, the first *Magistrate* that we had in Sacramento—

Justice Kennedy: Was Esther Mix?

Judge Shubb: Was Esther Mix.

Justice Kennedy: Esther? Oh, she was wonderful.

Judge Shubb: Esther Mix, and she was Judge Wilkinson's partner in his law practice before he was appointed to the court.

Justice Kennedy: Wilkins & Mix.

Judge Shubb: Yes, Wilkins & Mix—Wilkins, Little & Mix.

Justice Kennedy: Wilkins, Little & Mix. And although my practice didn't take me very much to federal court, a few cases, we would go to the magistrates often, because during hunting season, people would phone you know, that they've allegedly shot too many ducks [laughter] and we would go to the federal magistrate. And John Moulds, I grew up with down the street, he was a very fine federal magistrate, and these are the kind of things that Circuit Judges and Appellate Judges don't know much about, is how difficult it is to manage district courts today. You have to be good business managers. You know, on the Court of Appeals, you have

the blue brief, the red brief, the yellow brief, big deal. But, you know the district judges, they're so much busier, and there's a magistrate you mention in Yosemite. Yosemite with over a million visitors a year, its magistrate is like a very, busy Municipal Court Judge in a small city. And one time, when I was on the Court of Appeals here in Sacramento, I received a call late at night from the Deputy Attorney General of the United States and the Deputy Secretary of State of the United States in Washington. And they said, "Judge Kennedy, we have a problem in Yosemite," and I said, "Oh," and they said, "There's a magistrate there," I said, "Magistrate Pitts?" He said "Yes," he said, "He's committed the French Ambassador to jail." [Laughter.] And so I started to wake up [laughter] and it turned out that the French Ambassador to the United States had been at the Ahwahnee Hotel, and he was thrilled to be there, but he had to leave. And they have young college kids working at Yosemite. And someone had sent up from the bell desk a young lady to carry his bag. And when carrying the bag down, he said, "I've had such a wonderful time here my dear," and he kissed her on the cheek, and she filed charges against him, and Pitts put him in jail. [Laughter.] I told Magistrate Pitts, I said, "Are you in your pajamas?" And he said, "Yes," I said, "Don't take them off, go down and get him out of jail." [Laughter.]

Ms. Moebius: [to Judge Shubb] Do you want to add to that?

Judge Shubb: No, no, no. [Laughter.]

Ms. Moebius: In addition to the Magistrate Judges, our court has Bankruptcy Judges, but our District was formed before the Bankruptcy Reform Act of 1978 providing for those judges. Judge Shubb, how was bankruptcy handled then?

Judge Shubb: Well, before the Bankruptcy Reform Act, we had what we called Referees in bankruptcy. They were appointed by the District Court, and so Judge MacBride and Judge Halbert had an agreement between the two of them, that they would alternate appointments. One would be United States Commissioner for appointment; the next one of them that had the appointment would make that appointment. And then if the next one was a Bankruptcy Referee, the other Judge would make that appointment. So, it fell upon Judge Halbert to appoint a Bankruptcy Referee, and he appointed Bob Woodward. Bob Woodward, when I came to work for Judge Halbert, was the only Assistant United States Attorney in Sacramento, and

he was in court almost every day, he was almost in trial every day and he wore the same black suit . . .

Justice Kennedy: Right.

Judge Shubb: . . . during his arguments and he had this tattered copy of Title 18 in his hand. We called him, Brian Flynn, the crier, and I, and the law clerk, called Bob Woodward, "The Preacher." [Laughter.] Sometimes we called him "The Hangman" because he *always* got convictions. And he worked very well in Judge Halbert's court. Judge Halbert respected Bob, and so when that appointment came up, he appointed Bob Woodward as the Referee in Bankruptcy. I personally thought that was kind of strange, because Bob Woodward seemed to be a criminal law practitioner. His experience seemed to be in criminal law, but it just fit. He had always had an interest in Bankruptcy and he took that job on. He became a very good Bankruptcy Referee, and when the Bankruptcy Reform Act was passed, he was grandfathered in and became one of the first Bankruptcy Judges in our District. And then from then on, we've had more.

Justice Kennedy: But when the Act was originally passed, the judges were appointed by the Justice Department with the input of United States Senators, and the judges were upset that this appointment function had been taken away. The Act was soon amended so that now, the Circuit Conference appoints judges, and when that changed and they added Bankruptcy Judges, suddenly the Circuit Conference was faced with having to make and appoint within a year or so, twenty Bankruptcy Judges. We had committees around the Circuit and I served on this committee for the Eastern District with Phil Wilkins and we had a bankruptcy law professor to help us. We found out that the quality of the people that would apply to the appointment when it was being made by the Judicial Conference and by the court were really very fine attorneys. They might not have wanted to go through the political process where you go through the Senate and all that stuff. But we had wonderful, wonderful bankruptcy judges as a result. Bankruptcy judges have to know so much law. They have to know all state, commercial and property law and banking law; they have to know all the federal law; they have to know all the Bankruptcy Code; and they're very, very hardworking, and we're just extremely fortunate that we have such talented members of the Bankruptcy bench.

- Judge Shubb: Something else that the Bankruptcy Reform Act did was to create a Bankruptcy Court as a unit of the District Court. Before that, there wasn't a Bankruptcy Court *per se*, and before that the bankruptcy filings were just made in the District Court Clerk's Office. There was one deputy clerk and he was in charge of all the bankruptcy filings. There was a little paper sign off to the side of the counter that said "Bankruptcy," that's all it was. And it was Ted Adams, and somebody come in say, "I want to file something in bankruptcy," "Oh Ted come over here." And Ted Adams would file it. That's the way it was before the Reform Act.
- Justice Kennedy: I had one bankruptcy case in which a Sacramento client here was having difficulty. The allegation was at least, that there had been failure to withhold; that's the way some businessmen get in trouble, try to get additional cash, from failure to pay the I.R.S. the money that's due for withholding. And creditors from around the country were converging here to put my client in bankruptcy and my client said, "All I need is forty-eight hours." And the Revenue Service was about ready to close down the bank accounts. So, I went into the District Court here with a Proposed Order to Enjoin the Internal Revenue Service from Collecting a Tax; which is a little difficult, because there is a statute which says a "Federal court cannot enjoin Revenue Service." [Laughter.] But I thought well, I might have an argument when preserving the jurisdiction of the Bankruptcy Court, and the Clerk of this Court said, "No you have to go to Los Angeles, because that's where the bank is." So, I go to Los Angeles, and we had a District Judge there by the name of Charlie Carr. I don't know if any of you remember him, and he had his own style. He wore cowboy boots on the bench, and if he was bored, he'd lean back and put his feet up on the bench and you'd see his cowboy boots. He was very hard on the attorneys, and I thought he is going to hold me in *contempt* for even asking that he do this; it is just such a strange argument. But I made it very clear what the statute was, and I said, "Your Honor," I said, "we understand that this is a very unusual motion, but we do think that this is an exceptional case and wish you would consider it, and I'm pleased to rest on my written submission." And he said, "Ok, do you have anything to say?" And he looked at the Assistant United States Attorney, and he said, "Nothing your Honor, except you *can't* do that." And the Judge said, "What?" Then he said, "I want this on the record" to the Court Reporter, "What am I

holding in my hand?" [Court Reporter] He said, "It appears to be a pen." [Judge Carr] He said, "What am I holding here?" [Court Reporter] "It appears to be Mr. Kennedy's Proposed Order." [Judge Carr] "What am I doing right now?" [Laughter.] So, so I, I think, I think it took the Ninth Circuit a full seventy-two hours to set the thing aside, but in the meantime, we had the injunction. [Laughter.]

Ms. Moebius: We talked a little bit about the prior courthouse at 650 Capitol Mall, and I understand there are some interesting doors there in the United States Attorney's Office. What can you tell us about those?

Justice Kennedy: One of the things that attracted my interest on the Ninth Circuit was courthouse design and many hours, months were spent on the design of the Federal Courthouse in Pasadena. I don't know if any of you have seen it, the United States Court of Appeals building in Pasadena. And I was interested in this new San Jose Courthouse and so I had been working with the GSA. And I got a call from the United States Attorney and he said, "Judge Kennedy," he said, "I hear you work a lot with the GSA and know the GSA people. I have this problem here in the U.S. Attorney's Office. We have these glass doors and the Public Defender can see who's coming in to see us all the time. And we've asked for different doors." And I said, "That's not a problem at all." So I phone the Regional Administrator, maybe Washington, I don't know. And two days later, the United States Attorney said, "Wow," he said, "Do you have clout with the GSA?" He said, "It must have been just hours after my call." He said, "They came in and took down the doors, the only thing is, they're not going to replace them." [Laughter.] "So, now, not only can they see who's there, they can hear what's there." [Laughter.] So, that was my clout with the GSA.

Judge Shubb: Until Justice Kennedy just told me that story yesterday, I didn't realize that I was a party to the second half of that story. I was appointed U.S. Attorney in 1980, and when I walked into the office on my first day on the job, there were some workers there and I said, "Oh, what are these workers doing?" "Oh, there were glass doors here and we're replacing the glass doors with some wooden doors," same story. So, I say, "Well, ok, where's the wooden doors?" [GSA] "Well, they're not here yet." All right. They put up some, like painter's cloths up there [laughter] and you had had to walk in through these painter's cloths. I was in the United States Attorney's Office for nineteen months, they

never, never were replaced until, this is true, *the last day* I was leaving, [laughter] they were up there putting in the doors. And one of the Assistants, we had a party that day for my going away and she presented me with this little plaque, and it said, "The Bill Shubb Memorial Doors." And as a joke, they put the plaque on the inside over the doors. *The Bill Shubb Memorial Doors*, because I'd spent the whole time in the office, walking through this tarp. [Laughter.]

Justice Kennedy: You're welcome, you're welcome, Bill. [Laughter.]

Judge Shubb: The aftermath—

Judge Kennedy: But when I was appointed, there was no Circuit Judge chambers here and so the GSA showed me the space they had, and it was at that building, but there were no windows. And I said, you know, I said, "Part of my oath is that I had to spend time looking out the window." And so nothing much was happening, so George McCune was a former client of mine, he was a builder here, and he was moving out of a very beautiful office at 550 Capitol Mall, almost right across the street from the court, not quite across the street from the courthouse on the Capitol Mall. So, the GSA took those offices, and they were simply beautiful offices with very special bookcases. It looked on the whole side down the Capitol Mall, and I could see the Capitol Building on one side, Tower Bridge on the other. It was simply a superb office, and I would go over to the District Judges' dining room to see the District Judges, where I was always welcome. But I had quite a beautiful office, and I still miss it. The Capitol — one time, you know it can be very—

Judge Shubb: You do have a nice office now, you know. [Laughter.]

Justice Kennedy: But, oh, the GSA . . . I spent the first three months in San Francisco, it was summer time, so we rented a house in Tiburon for the kids, and so that I could meet my new colleagues and see the headquarters of the Ninth Circuit. So finally, I told GSA I said, "Is the office ready?" And they said, "It's all ready," and we had picked out furniture or so forth, and I went in there and they had thirteen wastebaskets and a flag, and that might sum up the job, I don't know? [Laughter.]

Ms. Moebius: Our court moved, our Sacramento Court actually in 1999 moved to the Robert T. Matsui Courthouse where we sit today, and in 2005, Fresno moved to its new courthouse named after Judge Coyle. Judge Coyle was instrumental in developing and designing both of those buildings, and he was known for saying "We shape our buildings, and then

our buildings shape us." Judge Shubb, you were the Chief Judge when the Court moved to this Courthouse. How did we end up here on 501 I Street?

Judge Shubb: Well first, I was the Chief Judge, but Bob Coyle gets all the credit.

Justice Kennedy: Right.

Judge Shubb: For this building. When David Levi and I were informed that we were going to be appointed, Judge Karlton took us out to lunch one day, and he said "We have a problem." He said, "We've run out of space in our building at 650 Capitol Mall. And what they're going to do is add on to the building, and we will be in the courthouse while they're doing this construction. The new wing of this courthouse is going to be what's now the parking lot, and we'll be in there for several years while they do this construction and then when it's completed, it's really going to be, kind of thrown together as the old courthouse and the new courthouse together. What do you think about this idea?" He said, "For just a little bit more, we could have a whole new courthouse. Would you be in favor of that?" I think Judge Levi and I thought that was a no-brainer and we said "We would certainly favor a new courthouse."

So, Judge Coyle entered into negotiations with the City to find a location for a courthouse. He had some tentative plans, and he went to the City and he said, "We'd really like to put it downtown, but we really can't afford the kind of money you're talking about for this real estate. We have an option to go out in the county somewhere." And I don't know that he even knew what he was talking about, because I don't think there was any other option. [Laughter.] But the City really wanted the courthouse downtown. So, they had some discussions, and they sold him this lot for this courthouse for one dollar. And that's how we got here.

Justice Kennedy: Judge Coyle talked with me, and we talked about what would be the comparative cost to add on the building, plus the inconvenience of having it going on. He was able to show, and he took a lot of time on that, that there would be very little cost differential. To his credit, they really needed a courthouse in Fresno even worse, but he wanted this one first. He did a terrific job.

Ms. Moebius: Judge Coyle has reflected, Justice Kennedy, that when you were part of the opening ceremonies at the Fresno Courthouse it was one of the best highlights of his career. Do you remember that day?

Justice Kennedy: Well I remember, of course, the judge, and remember going to Fresno and seeing that magnificent courthouse. And remember, courthouses are designed to show that there must be respect for the law, and that the law lasts, and that the law has dignity, and that the law endures. And this courthouse and the courthouse in Fresno reflect that, as it reflects the temperament and character of not only Judge Coyle, but all of the judges of this splendid District that you have.

Ms. Moebius: Moving away from the courthouses, the Federal Defender's Office did not exist when this District was formed. But in 1963, the Supreme Court decided *Gideon v. Wainwright*, guaranteeing legal defense counsel to indigent defendants. There was no office though. How do you evaluate how that has progressed, Justice Kennedy, from the *Gideon* decision to providing counsel for indigent defendants?

Justice Kennedy: Well, of course, *Gideon* was one of the seminal cases, and again it makes us realize the tremendous power that the law has over an individual who's accused of crime. And *Gideon* is one of the great cases in the history of our Court. Not many people realize that the federal budget – for some reason my task is to present the budget to the Congress. I've been doing it for twenty years. It's just our Court, and Julia Gibbons does the budget for the rest of the courts, but I assist her and I testify as well. The budget for the federal courts is .01 percent of the budget of the United States, .01 percent, and not many people realize that this includes the cost of Public Defenders and Probation Officers. And the cost of the Public Defenders is a very substantial part of the budget, but necessary under the Constitution.

Ms. Moebius: Judge Shubb, what did the District do before it had a Federal Defender's Office in 1971 to enforce that right?

Judge Shubb: Think about this: in my time, before *Gideon*, if you couldn't afford counsel, you didn't get one. *Gideon* came around and this Court had to deal with it, they had to decide how to get somebody an attorney that couldn't afford counsel. And we all know what a high percentage of those persons charged with crimes cannot afford counsel. So, they didn't really have a lot of guidance as to how to do this, and they didn't have the money to pay these lawyers. So, Judge Halbert and Judge MacBride would get a hold of the phone book, and they'd open up to the 'attorney section' in the Yellow Pages, and they'd just go down the list of attorneys. Somebody would say they didn't have an attorney. "Would you like the Court to appoint one for you?" "Yes." Next

attorney, it may be a bankruptcy lawyer, it may be a probate lawyer, you didn't know. And so we would, in the U.S. Attorney's Office, get to see a cross-section of the bar coming in. And is Doris still here? One of them was Bob Matsui. Remember she said he just started practicing in 1966? He was a brand-new lawyer and he came in, and I had the privilege at that time of showing him around the federal courthouse. Well, after a while, certain lawyers kept coming back because they felt more comfortable in the court, and others would respectfully decline saying they really didn't think they can handle it. So, we got to see a more select group of lawyers. But it was a privilege to get to work with all those different lawyers in the community. That's how I got to meet the lawyers. And, I don't know, maybe you even came in on one of those?

Justice Kennedy: Well, if you had a law and motion, they'd say "Your motion, the motion is granted, Mr. Kennedy and please remain to the ten o'clock session," and you got your assignment for the criminal.

Judge Shubb: That could happen then. So, eventually, we got a Federal Defender. And it was Dick Walker. Dick came around to us in the U.S. Attorney's Office, and he said, "I'm the lawyer - I'm going to be the loyal opposition." He said, "I have my job, you have your job. I have my clients to represent and I'm going to represent my clients as vigorously as I can. But you can trust me, I'm not going to tell you anything that isn't true. I'm not going to mislead you in any way. I want to have this working relationship with the U.S. Attorney's Office." We were reluctant at the beginning you know, this was somebody that was coming in messing up the apple cart a little bit. We had a good thing going here with these new lawyers coming in here, and educating them [laughter] on the law. And here was somebody that knew what he was talking about and it took us a while to develop that trust with the Federal Defender's Office but we did, we did. And then others came to work for him. Cliff Tedman, and a number of others, and they had that same relationship with the U.S. Attorney's Office. I credit Dick Walker with having set that example, that I think probably persists to this day, so that the relationship between the Federal Defender's Office and United States Attorney's Office shows his input into it.

Justice Kennedy: And they would send very good lawyers to the Court of Appeals, and do a very good job in the Court of Appeals.

Ms. Moebius: As we begin to close, are there any final thoughts or memories that either of you would like to share?

Justice Kennedy: When I was hearing from my family about Judge Welsh and knew Judge Lemmon and Judge Halbert, and the other judges we mentioned, Judge MacBride and Judge Wilkins, I had such respect for the dignity and the commitment and the integrity, and the stature of the Federal bench. When you're young, you don't know who your role models are, but then you look back and say "Oh, that was a role model, that was a role model." And as, as judges, we have the opportunity, we have the obligation to inspire young attorneys, and I thank all of my colleagues on the bench for carrying on that tradition. Thank you very much.

Judge Shubb: I don't know – two things come to mind when I think about how the District has changed in the last fifty years. One of them is technology. When you look at the caseload that our judges had back then, I think Judge Halbert probably had one hundred or less cases. We now have a thousand per judge. And the technology has in many ways enabled us to deal with that. And you just look back at the way we, we didn't know what the Internet was, we didn't have email. If we wanted to communicate with Fresno, we had to pick up the phone. If we wanted to send them any documents, it had to be by the U.S. Mail. You think about all the changes gradually having been made; things that we didn't even think were going to happen or could happen, have happened. That's probably the biggest change that I perceived in this Court over the last fifty years.

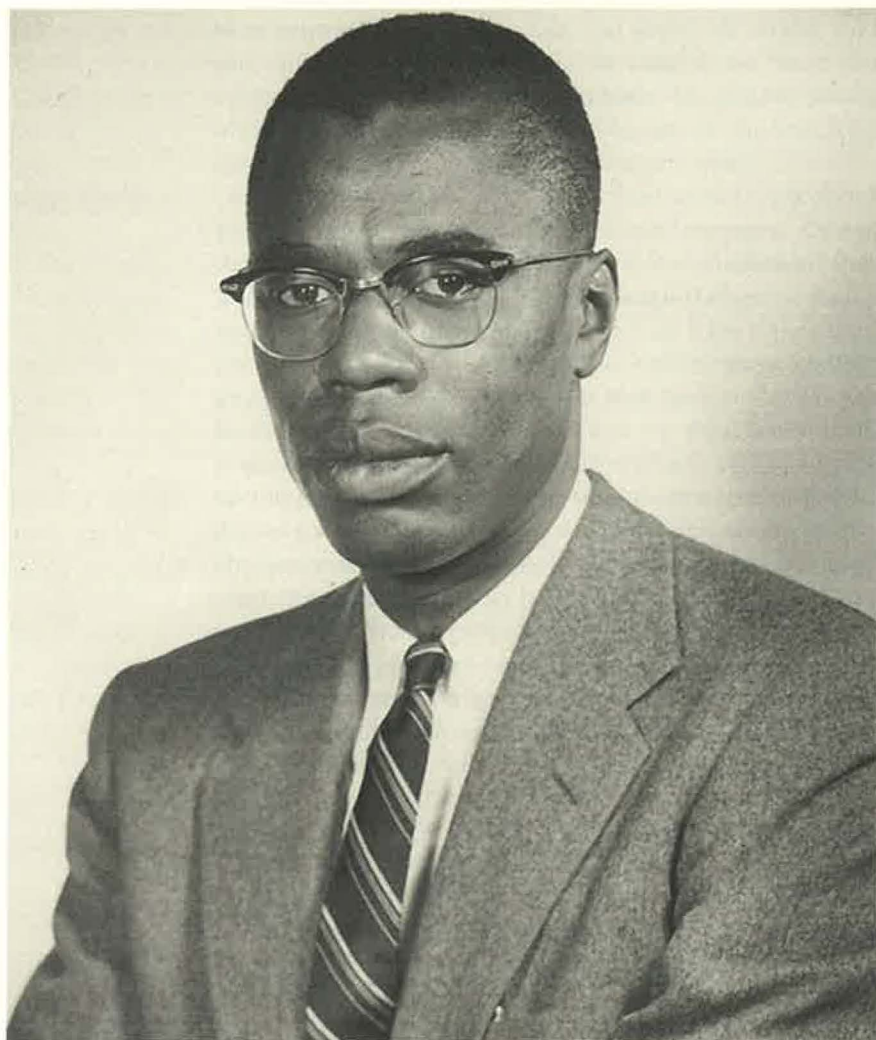
The other thing that comes to mind is that we talk about the judges. Every judge that we mention, when we talk about them, I don't think about – when I hear "Bob Matsui" – I don't think the Courthouse, I think about Bob Matsui. And when we talk about Judge MacBride, Judge Halbert, Judge Wilkins, I think of the men. And each one of these judges, each one of the people that have worked with, or for, this Court have influenced it in some way, and we've shaped it and that's what's given the Eastern District of California its character today.

Ms. Moebius: It is our hope that these conversations and sharing stories and memories can continue downstairs in the reception. On behalf of Eastern District Historical Society and the Sacramento Chapter of the Federal Bar Association and all the guests and judges here today, Justice Kennedy and Judge Shubb, thank you for coming. Please join us downstairs in the Anthony M. Kennedy Library and

Learning Center on the first floor, and we look forward to seeing you there. Thank you. [Applause.]

Justice Kennedy: Thank you very much.

Judge Shubb: Thank you. [Applause.]



Nat Colley



Gary P. Lindsey, Jr.

Nathaniel S. Colley, Sr.: A Country Lawyer

A "country lawyer" is how Nathaniel S. Colley, Sr., the first African American lawyer admitted to the United States District Court for the Eastern District of California, would often describe himself to the public. But the tall, erudite Alabama native and member of the National Bar Association's Hall of Fame became known as much more to his professional and political contemporaries of the 20th Century in California and Washington, D.C.

Nathaniel Colley's friends, including President John F. Kennedy and Associate Justice Anthony M. Kennedy of the United States Supreme Court, affectionately referred to him as "Nat." He would eventually receive the unofficial title of "Mr. Civil Rights of California" from former Lieutenant Governor Mervyn Dymally for a lifetime of social activism through practice of the law, which contributed to establishing legal precepts taken for granted in our modern pluralistic society.

Colley's life began in rural, segregated Alabama on November 21, 1918, at the end of World War I and only two decades after the end of Southern Reconstruction and the imposition of racially discriminatory Jim Crow laws targeting African Americans. Born into poverty in Carlowsville and raised in the town of Snow Hill, Colley displayed an affinity for academics at an early age. He would later graduate from Snow Hill Institute with high honors before entering Tuskegee Institute in 1936 on a five-year work plan and majoring in chemistry under the tutelage of famed African American inventor George Washington Carver. Colley paid for his tuition by working as a garbage collector.

While attending Tuskegee Institute, Colley met the love of his life—Jerlean Jackson of Sacramento, California. Colley graduated from Tuskegee first in his class in 1941 with a Bachelor of Science. Jerlean graduated with a degree in elementary education, and the sweethearts married in 1942.

A year later, Colley would be inducted into the United States Army at the age of 24. Colley, then a thin young man of 6 feet 3 inches and approximately 165 pounds, could have avoided military service in World War II for failure to meet the weight requirement for his height, but he successfully pleaded to the doctor conducting the physical to find him fit for service. Colley entered the Army as a private.

Once in the Army, Colley earned a commission as a lieutenant in less than a year. Colley later ascended to the rank of captain in charge of a racially segregated chemical warfare unit in the Pacific Theater, including Guam, New Guinea and the Solomon Islands. While serving as one of the few black commissioned officers, Colley faced racial discrimination while serving his country. One day in the Philippines, someone concealed a razorblade in his bar of soap. When Captain Colley went to wash his hands, the razorblade sliced open the entire length of his palm, fortunately stopping before reaching his wrist. Colley would live with the scar for the remainder of his life, and he informed his white superior officers that he had more to fear from his fellow white officers than the Japanese. In later life, Colley would publicly cite his discomfort with experiencing segregation in the Army as the impetus for turning to the practice of law as a means of addressing society's ills.

After his honorable discharge from the Army in 1946, Colley set upon his goal of becoming a lawyer. He applied to the University of Alabama in his home state. The University of Alabama informed Colley that he would not be allowed to attend law school at the University of Alabama, due to his race despite his impeccable educational history. This was the era of "separate but equal" following the United States Supreme Court's decision in *Plessy v. Ferguson* 163 US 537 (1896), so the University of Alabama paid for Colley to attend a different law school—Yale University.

In New Haven, Connecticut, Colley was the only African American in his law school class. But he excelled, while being a father to two young daughters. He received the C. LaRue Munson Prize as the student who most contributed to the New Haven Connecticut Legal Aid Society, and the Benjamin Sharp Prize for the best original essay by a third-year law student.

In 1948, Colley graduated from Yale with a Masters of Law. He and Jerlean faced the decision of where to raise their growing family. Determined not to return to the dim prospects of the South, Nat and Jerlean set their sights westward and became part of the Second Great Migration, the post-World War II exodus of African Americans from the South to the North and West in search of a better life away from Jim Crow.

But the Sacramento of the late 1940s was far removed from the tolerance and diversity for which Sacramento is known today. Colley once recounted to historian Clarence Caesar that "there were no blacks that I could see working in any of the business establishments or banks . . . [and] many business establishments in Sacramento . . . would not serve blacks."

The racially discriminatory atmosphere of the time affected Colley personally. Despite his litany of academic achievements, Colley remained a black man with a Yale law degree.

No Sacramento law firm seemed willing to hire him, and he received similar treatment in the public sector. While awaiting interview for a position with the California Department of Justice, the receptionist informed Colley that he must be in the wrong place because the position required a law degree. Never one to let a racial affront pass without comment, Colley informed his interviewer of the receptionist's rude presumptuousness and stated: "I have a law degree from Yale. It's is Latin. I can read it. Can she?" Colley never worked for the California Department of Justice.

Undeterred by his cold reception in the Sacramento legal community, Colley decided to pursue private practice in 1949 as a sole practitioner in civil litigation, including civil rights cases, and criminal defense with wife Jerlean, then a mother of three, often serving as his office manager at his first law office at 5th and L Streets (the present location of the Golden 1 Center, home to the Sacramento Kings). U.C. Hastings graduate Mamoru Sakuma would come to Sacramento in 1950 as the second Asian American lawyer to practice in the city. Sakuma and Colley soon became partners. They practiced together from the L Street office until Governor Edmund G. "Pat" Brown, Sr. appointed Sakuma to the Sacramento County Superior Court in 1963.

1950 marked the beginning of Colley's national notoriety as a skilled litigator. Colley represented James Monroe, an African American teenager and California Youth Authority inmate charged with murder. Colley successfully represented young Monroe through four trials.

Colley also earned his reputation litigating cases, which challenged ingrained racist policies. With the law as his sword, Colley successfully fought to integrate restaurants, swimming pools, and housing in California.

In 1953, Colley teamed with his friend and Los Angeles-based civil rights attorney, Loren Miller, to represent Mattie Banks and her fellow respondents in *Banks v. Housing Authority of San Francisco* before the California Court of Appeal. Ruling in favor of respondents, the justices invalidated nearly two decades of racial segregation in public housing in California.

As his reputation as an excellent litigator grew in the 1950s, Colley's relationship to the Sacramento legal community would change for the better. Two prominent white Republican lawyers—Archibald M. Mull and Anthony J. Kennedy, father of Justice Anthony M. Kennedy—took note of Colley and supported his membership before the Sacramento County Bar Association as its first African American member at a time when the Los Angeles County Bar Association had no African American members. Mull and the elder Kennedy would also encourage Colley's membership in the American Bar Association.

In *Ming v. Horgan* (1957), Colley represented plaintiff Oliver Ming in the Sacramento County Superior Court against white developers for racially

discriminating against non-white prospective homebuyers while accepting federal funds from the Federal Housing Administration and the Veterans Administration. Finding for plaintiff Ming, Judge James H. Oakley ruled for the first time in any court in the country that a recipient of federal funds is subject to the federal constitutional provisions against discrimination applicable to the government itself. Quoting Colley, Judge Oakley stated that "[w]hoever dips his hand into the federal treasury may not be heard to complain if a little democracy clings to it." In time, the concept would become the law throughout the country.

Colley also challenged housing discrimination personally. He and Jerlean integrated the Sacramento neighborhood of South Land Park by moving their growing family of five to a two-story home on Pleasant Drive in 1955. But the first non-white family's reception was anything but pleasant. The Colley family was subjected to racial epithets and fires set on their lawn. The family persevered. The following year, a Japanese family moved into a home across the street from the Colleys and the unstoppable tide of racial integration had begun.

As California and the country transitioned through the 1950s, the self-described country lawyer's prominence in state and national politics expanded. After an unsuccessful California Senate campaign in 1956, Governor Pat Brown appointed Colley to several positions within his administration. Colley co-chaired the California Committee for Fair Employment Practices and supported the successful passage of the Fair Employment Practices Act of 1959. Colley subsequently reshaped California education when Governor Pat Brown appointed him to the California State Board of Education in 1960. Colley persuaded his fellow board members to incorporate the historical accomplishments of African Americans in the curricula of California's public schools.

With the election of President of John F. Kennedy in 1960, Colley's involvement in government and politics would lead him to the White House. Colley publicly supported President Kennedy during the 1960 campaign, and Colley and wife Jerlean attended the 1961 Inaugural Ball.

In 1962, President Kennedy appointed Colley to the Presidential Committee on Equal Opportunity in the Armed Forces to investigate off-base discrimination against minority members of the military and provide recommendations to address discrimination. President Kennedy later offered Colley an appointment as U.S. ambassador to Nigeria, but Colley declined the offer because moving to Lagos would require Colley to wind down his law practice and disrupt the lives of his five children: Jerlean Evelyn, Ola Marie, Natalie, Sondra, and Nathaniel, Jr.

The two WWII veterans became friends as President Kennedy routinely called upon the country lawyer as an advisor on racial matters during the country's most racially turbulent period since Reconstruction. Following

President Kennedy's assassination in 1963, Colley referred to his late friend as "Our Lincoln" who "realiz[ed] that freedom is indivisible and cannot be reserved for, or allocated to, white people exclusively" and "used his popularity to forge a new climate of public opinion in this country in race relations."

Colley continued to improve the racial climate in the United States in his own way after the passing of his friend. In 1964, Colley challenged de facto racial segregation in the schools of his adopted hometown in *Keller v. Sacramento City Unified School District*. Upon Sacramento County Superior Court Judge Irving H. Perluss finding in favor of Colley's client, Cyrus Keller, Jr., the school district complied with a desegregation plan drafted by Colley.

The same year would bring Proposition 13, the greatest challenge to Colley's 15-year legacy of defeating discrimination in California. William Rumford, the first African American from Northern California to serve in the California State Legislature, penned the Rumford Fair Housing Act, which passed in 1963. The act prohibited property owners from discriminating based on ethnicity, religion, sex, marital status, familial status, and physical disability in the renting of their real property. The near immediate backlash to the Rumford Fair Housing Act came in the form of Proposition 13, a statewide ballot measure to amend the California Constitution to legalize discrimination in all forms in the sale and rental of real property. *Time* magazine characterized the "Rumford" issue as "overshadow[ing]" the 1964 presidential election in California.

Colley publicly proclaimed Proposition 13 unconstitutional well before election day, but he would have to wait three years to prove himself right. With the endorsement of the *Los Angeles Times*, the John Birch Society, the California Republican Assembly, and actor and soon-to-be California Governor Ronald Reagan, Proposition 13 passed in a landslide. But the seeds of Proposition 13's destruction were sown by alleged housing discrimination against two California married couples well before and soon after the ballot measure's passage.

The Mulkeys, an African American couple, attempted to rent an apartment in 1963. They sued the landlords, the Reitmans, for refusing to rent to the Mulkeys because of their race.

Before the passage of Proposition 13, Carola Eva Prendergast—the Caucasian wife of Wilfred Prendergast, an African American man—rented an apartment in Los Angeles on a month-to-month tenancy while her husband worked in San Francisco. Shortly before Proposition 13's passage, Wilfred moved back to Los Angeles and into his wife's residence. Upon the passage of Proposition 13 in November 1964, the landlord attempted to evict the couple the very same month.

The Mulkeys and the Prendergasts sued the respective landlords in the California courts in direct challenge of Proposition 13. In 1966, the Supreme

Court of California respectively held in *Mulkey v. Reitman* 64 Cal.2d 529 (1966) and *Prendergast v. Snyder* 64 Cal.2d 877 (1966) that Proposition 14 violated the Equal Protection Clause of the United States Constitution. The landlords petitioned for certiorari before the Supreme Court of the United States in what would become Proposition 14's last stand.

Colley and the four lawyers, who had represented the Mulkeys and the Prendergasts in state court, collectively represented both married couples before the Supreme Court of the United States in the consolidated case of *Reitman v. Mulkey* 387 U.S. 396 (1967). In a 5-4 decision, the high court ruled in favor of both couples, holding Proposition 14 to be a violation of the Equal Protection Clause.

By 1968, United States Supreme Chief Justice Court Earl Warren called Colley "a fine lawyer, a dedicated civic leader and a splendid champion of may civil rights causes." Fewer than 20 years since he arrived from Yale to a cold reception in his wife's hometown of Sacramento, Colley changed his city, state, and country for the betterment for all.

Colley continued his law practice and political activism for two more decades. From his law firm's final location at 1810 S Street, Colley operated a thriving civil and criminal practice, including representing the interests of his fellow veterans and defending federal criminal defendants before the United States District Court for the Eastern District of California. And Colley's consciously developed a legal practice, which reflected the very diversity that he pursued through the courtroom. Colley's practice included white, African American, Mexican American, and Asian American people as support staff; and provided trilingual legal services (English, Spanish, and Japanese) to clients since the 1970s.

In 1971, Colley began his first semester as an adjunct professor of jurisprudence at McGeorge School of Law. He would become good friends with a constitutional law professor and soon to be United States Court of Appeals Judge Anthony M. Kennedy. The two men remained colleagues at McGeorge for 17 years.

Colley did not slow his efforts to create the diverse and more enlightened society of today. Colley continued his quest to desegregate California schools in *Tinsley v. Palo Alto Unified School District* (1979) 91 Cal.App.3d 871, and travelled the United States making speeches on the state of race relations, civil rights, and his lifelong opposition to the death penalty while continuing to serve on both the Board of Directors of the NAACP and the Board of Trustees of Tuskegee University (formerly Tuskegee Institute) since the 1960s.

He remained active in the Democratic Party politics. Colley even hosted a fundraiser at his South Land Park home for former and current California Governor Edmund G. "Jerry" Brown, Jr.'s 1978 reelection campaign.

Colley cherished time with family and friends, despite his busy schedule. On a given summer weekend, Colley could be found donning a chef's apron and proudly grilling and sharing a laugh with friends and family as the host of one of his many barbeques at his South Land Park home.

Colley was a fan of professional football and basketball. He would routinely invite friends and family to his home to watch his favorite teams, the San Francisco 49ers and the Los Angeles Lakers.

But his deepest sporting passion was horse racing. Colley would host dozens of family members and friends for Kentucky Derby parties at Priscilla Bell Farm, the Colleys' ranch in Elk Grove where he bred racehorses. Colley served as chairman of the California Horse Racing Board from 1976 to 1983, and he delighted in treating his grandchildren with visits to the Winner's Circle to meet victorious owners, jockeys, and horses.

After three full decades of practicing law, Colley continued to advocate for forward-thinking change. Though known for his accomplishments in championing racial progress, he was never hesitant to speak out when he perceived injustice in other forms. Colley, the father of four daughters and one son, was one of several critics of exclusion through the 1980s of women from the Sutter Club, a Sacramento-based private club founded in 1889 with a membership comprised of a who's who of California.

At the start of the 1990s, Colley was diagnosed with brain cancer. He would not live to see what would become of what he called "the struggle of ethnic minorities to achieve full participation in every aspect of American life." When Colley finally succumbed to the disease on May 20, 1992, at the age of 73, the nation was reeling from the aftermath of the Los Angeles riots.

In the years following Colley's passing, Time magazine to the San Francisco Chronicle would hail Sacramento as the most diverse and integrated city in the United States. Sixteen years after his death, the 2008 elections begot the era of Sacramento Mayor Kevin Johnson and U.S. President Barack Obama, the first African Americans to serve in their respective offices. Our society has changed from the cold Sacramento reception that a bright African American Yale Law School graduate received in Sacramento almost 70 years ago. Due, in part, to Nathaniel Colley's more than 40 years of legal mastery and political activism his adopted home and his country began "the painful [incomplete] process of reconciling its practices with its high sounding theories."

[About the Author: Gary P. Lindsey, Jr., is a practicing lawyer in Sacramento and the elder son of Nathaniel S. Colley, Sr.'s former law partner and daughter, retired Sacramento County Superior Court Referee Natalie Lindsey.]





By U.S. District Judge Kimberly J. Mueller

Magistrate Esther Mix—One of the Eastern District's “Hidden Figures”¹

When I became a magistrate judge in 2003, I suffered no illusion that I was the first full-time woman to fill the position in Sacramento. That distinction belonged to the Honorable Esther Mix, who served our court with distinction for nearly twenty years, from 1971 to 1991. And I was not even the only woman magistrate judge in our district at the time. I was welcomed with a warm “yay-hoo” by Fresno-based magistrate judge Sandra Snyder, who had been serving with aplomb since 1993. Judge Snyder was a wonderfully warm and supportive colleague, but she was a three-hour drive south! I was so fortunate that Judge Mix was still living at the time and that she welcomed occasional e-mails, visits, and discussions about the work.

Not that Judge Mix herself—Esther, she insisted—ever suggested she was a source of wisdom or advice. Esther was one of the most humble judges I have ever met, naturally understated and with a quiet demeanor. But she was not without backbone or conviction. Born Esther Markham in 1920 and raised on a farm in Oklahoma, she made her way to San Francisco as a young adult, around the time of the 1939 World's Fair in San Francisco, also known as the Golden Gate International Exposition. Esther came of age professionally at a time when one of the primary lessons she learned from the world around her was that women should avoid drawing attention to themselves. She served as an airplane mechanic during World War II, following which she took work as a legal secretary.

1. “Hidden Figures” is a 2016 American biographical drama film directed by Theodore Melfi and written by Melfi and Allison Schroeder, based on the non-fiction book of the same name by Margot Lee Shetterly about black female mathematicians who worked at the National Aeronautics and Space Administration (NASA) during the Space Race.

The job that laid the foundation for her becoming a magistrate, as the position was first called, was as secretary to Phil Wilkins, who became a successful litigator in Sacramento after returning home from the war. Esther once told me that Mr. Wilkins first realized she was very smart when she was typing up a complaint for him and she pointed out that the numbers did not add up. Still, she did not let him know that she had started night law classes at McGeorge School of Law. Another woman, who was working for a neighboring law firm and attending law school, got no end of grief for her efforts, Esther had observed. That woman ultimately dropped out, claiming that reading all those cases hurt her eyes too much. Esther quietly persisted in her efforts, figuring that if no one knew she was studying law, no one could give her a hard time about it. She progressed after her first year by reading the law, with Frank Richardson, who was teaching at McGeorge. (Richardson later was appointed presiding justice of the California Third District Court of Appeal and then associate justice of the California Supreme Court.) Phil Wilkins first found out about Esther's after-hours pursuits when he saw her name in the published list of those who had passed the first year law student's exam known as the "baby bar"

Esther completed her legal studies by reading the law—a feat she shares with California's first woman lawyer, Clara Shortridge Foltz. State bar records show Esther was admitted to practice in January 1951. As a new lawyer, she soon shared something else with Foltz: Foltz was known as the "Portia of the Pacific," after the name Shakespeare gave to his woman lawyer in *The Merchant of Venice*. Esther remembered male attorneys calling her Portia, too, when she joined the bar, perhaps because, as senior district judge William B. Shubb offered, Esther's male colleagues were followers of a radio soap opera (briefly televised in the early 1950s) featuring a woman lawyer protagonist, called *Portia Faces Life*.

License in hand, Esther began practicing with Phil Wilkins, an association she said she felt very lucky to enjoy for nearly twenty years, the last ten as law partners in the firm of Wilkins, Little and Mix. Her favorite part of the job was the investigation stage—interviewing people and obtaining signed statements, usually prior to deposition. The other tasks, she and Wilkins divided according to their personal strengths. Esther continued to assume responsibility for the numbers, examining and cross-examining accountants, for example. After her retirement, Esther still marveled that her ability had seemed extraordinary, wondering how it could be that quite a few attorneys weren't able to grasp the numbers so critical to their cases.

As a practicing lawyer, Esther was noticed by the federal bench. Late in life she recounted with amusement that whenever she entered the courtroom of district judge Sherrill Halbert, known for his stern demeanor, he would interrupt proceedings to acknowledge her politely and even introduce her to others in the room. Judge Halbert called on her professionally as well. In the days before federal defenders and defender panels, he would sometimes phone Esther to tell her he had appointed her to defend in a criminal case,

just like that. At times she received appointments in state court cases as well. She recalled one grim and difficult case in which a woman was charged with killing her daughter to spare her the humiliation of being mocked by other schoolchildren. Ultimately the woman was referred to a psychiatric hospital. Bill Lally, who later ascended to the Sacramento Superior Court bench, was appointed Esther's co-counsel. After sharing that unique and "searing" experience, as Esther described it, she and Judge Lally—William Hall Lally—stayed in touch throughout their tenures on the bench.

When Phil Wilkins was appointed to the Eastern District's federal bench at the end of 1969, Esther lost her longtime compatriot in the practice of law. But when the federal court needed a habeas clerk because the incumbent had recently died, Esther was appointed on a stipend to work down the habeas backlog, which existed then as now. The timing of this employment turned out to be fortuitous: the Federal Magistrates Act had recently been passed, and the relatively new Eastern District, carved out from the Northern District, was in the process of considering who would be its first full-time magistrate. Gary Schaber, who had served in the predecessor position as commissioner, was not eligible because he was not a lawyer, unlike his formidable brother, Gordon, then presiding judge of the Sacramento Superior Court. Esther hoped to be appointed as magistrate, but for about a year the appointment was up in the air. She assumed that district judges MacBride and Wilkins were in deep discussion over their choice. If she had not been appointed, Esther would have continued practicing law, probably with Kneeland "Kay" Lobner, a former Sacramento City councilmember and, as she put it, a real "rainmaker." But as it turned out, she did not need to find a new law partner. Ultimately Esther secured the coveted full-time position and was appointed on May 1, 1971, the fifth woman in the nation to be named a federal magistrate. She appears in the court's General Order No. 35 at the bottom of a list of fifteen others who were appointed at the same time, all part-time and all men.

Before starting the job in earnest, Esther took a celebratory trip to Europe with her son and an exchange student whom they were hosting. They drove all over in a VW van, including to Paris, where they stayed for two weeks. Esther would continue to travel abroad as much as she could, and she developed a strong interest in other cultures and their foods. Her court staff remember that she would use all of her vacation time for trips abroad and then come straight back to work without letting jet lag slow her down. Esther's close and devoted friend Ann Schwing, who clerked for Judge Thomas MacBride before embarking on a distinguished career as a civil lawyer, enjoyed travel as well, and she often accompanied Esther to Ninth Circuit conferences, adding trips on before or after. They also traveled farther afield, to Canada, Hong Kong, China, and Macao, while both were working at the court, and to London, Paris, Mexico, and the Canadian Rockies afterward. Longtime litigator Andrea Miller, a former clerk to Judge Wilkins and a current court staff attorney, remembers Esther as "the primary source of information

for those of us going abroad for the first time: 'Take the red eye and don't go to bed when you get there but walk around a lot, then hit the sack about five thirty or six p.m. and get up bright-eyed and bushy-tailed the next morning.' Boy, does that work!"

When she was magistrate, Esther's duties ran the gamut from criminal duty matters, including arraignments, reviewing search warrants, and handling misdemeanor cases, to preparing findings and recommendations in civil prisoner matters and Social Security cases. It was Esther who arraigned Lynette "Squeaky" Fromme after Fromme was charged with the attempted assassination of President Gerald Ford in 1975. And she was no pushover when it came to reviewing warrants. Ann Schwing recalls that during her clerkship for Judge MacBride, she received a call from a new assistant U.S. attorney from the Northern District who was "just furious" that Esther would not sign his search warrant. He said no magistrate had ever refused to sign his warrants before and added, "Who does she think she is?" According to Ann, that young attorney should have been grateful for the chance to correct his flawed documents.

Esther's resolve is demonstrated by another good story: Once when she was hearing a motion to compel production involving an associate of a civil fraud defendant, she was presented with irrefutable evidence that the man was surreptitiously recording conversations, including the voices of, among others, a young woman attorney on the plaintiff's side of the case. The district judge on the case adopted Esther's recommendation that the associate be jailed until he produced the material with which he had used the recorded conversations. The judge later commented that he was somewhat overwhelmed by the quiet vehemence he heard on the recording of Esther's hearing, at the end of which she recommended contempt. The judge had known Esther was tough, but he had never heard such a quietly aggressive voice: "It almost scared me," he said. "I couldn't imagine what the consequences might be if I rejected her recommendation!"

In addition to handling matters at the John Moss Courthouse in Sacramento, Esther rode the circuit with her courtroom deputy—for many years Templee Mobley—holding court at the many federal installations in the Sacramento division and presiding over the lengthy petty offense calendars generated by traffic tickets and other minor offenses on federal land. On her regular criminal calendar, she remembered seeing illegal aliens "by the dozens" charged solely with illegal entry. At another point, she recalled, defense attorneys objected to the attendance of members of Mothers Against Drunk Driving (MADD) during certain driving-under-the-influence proceedings.

One of Esther's law clerks, Jessica Kohn McGuire, worked on a case referred to Esther for trial by Judge Karlton. The plaintiff was in pro per and had sued the local housing authority for violation of the right of free association through a ban on the operation of a bingo game. When the plaintiff invoked "cosmic law" during opening statement and contrasted it

with "mundane law," Judge Mix's composure and dignified treatment of the litigant taught Jessica an important lesson about the discipline and demeanor required of a fair judge. On another occasion, former clerk Rich Archibald, later a Sacramento City attorney, was present when a pro se party was unable to read his own notes. Esther had her deputy hand down the judge's own glasses to assist with magnification. In another matter, a default judgment proceeding, a corporate party, which by law required representation by counsel, tried instead to proceed in pro per. After Judge MacBride gave the corporation sixty days, then another sixty days, to get counsel, Esther held the default judgment hearing. The corporation's president and its entire small board of directors marched to the podium and demanded to speak. Esther said firmly, "You may not." And so they did not. Her judicious handling of cases notwithstanding, Esther was named in quite a few suits filed against her by plaintiffs in pro per, an experience every magistrate judge inevitably shares.

While Esther at one point reflected on her isolation on the job in the 1970s, she clearly valued spending quality time with court staff, both law clerks and support staff. Jessica McGuire recalls how tolerant and helpful Esther was in teaching her the principles of how to write as a lawyer when McGuire was fresh out of law school. And she was generous with her time; Esther and Jessica regularly had lunch at Taki, a Japanese restaurant once located on J Street next to the railroad tracks, one of many Japanese restaurants that Esther enjoyed.

Jessica also remembers going to a Women Lawyers lunch with Esther, who was introduced, as one might expect. Esther wondered aloud afterward, "Why do we get all this credit—the way we got this job was to keep our mouth shut and do our jobs!" Not that she had a problem with assertive women. During her time in practice, Esther knew of another woman attorney who was considered quite forward for shaking hands with everyone whenever she entered a room. Esther herself saw no problem with the practice.

Longtime court employee Robbin Maloney first joined the Sacramento federal court when she began working for Esther in February 1987, and she stayed with her until she retired from the bench in February 1991. "Despite her soft-spoken and gentle demeanor, she was an incredible and strong woman of her generation....[She] was not only my employer, but she became my trusted friend and frequent lunch companion," Robbin said.

Esther was a role model for everyone—not just for women—in the profession. Current chief magistrate judge Edmund F. Brennan met "Magistrate Mix" through Jessica McGuire. Esther was "the inspiration for me seeking a career change that ultimately led to where I am today," he said. "Had she not suggested to me that I apply for a judicial clerkship, it never would have occurred to me to apply to be Judge Garcia's law clerk." Esther's good advice and encouragement stays with Judge Brennan today: "I think of Magistrate Mix often as I enter the courthouse, and I feel that to some extent I owe my start in the federal court family to her." From these stories and others

like them, it is clear that Esther treated the many people with whom she interacted well and was rewarded with great respect and affection in return.

Esther remained "well and chipper," as Ann Schwing would report, for virtually all of her fifteen years of retirement. She drove to Sacramento regularly and ran errands and met friends for lunch at her favorite restaurants, and by her own account she was "navigating well." She lived in her own apartment in Davis next door to good friends and read good books and enjoyed interesting, fresh, often international foods.

Esther died on September 17, 2008, at the age of eighty-seven. After learning the sad news from Ann Schwing, Chief Judge Anthony W. Ishii ordered the courthouse flag flown at half-mast for two days in her honor, on the Friday and Monday following her death. True to form, Esther did not want a memorial service. But she deserves to be remembered as the woman in our court who, without fanfare, paved the way for others to follow. Her quiet competence and steady work ethic spoke for themselves and are a testament to her unquestionable ability to do the job and to do it well.

Robbin Maloney speaks for all of us when she says this about Esther: "Forever she will be remembered by me as an inspiration to women, hard-working and fair, a firm believer in equal rights, and steadfastly loyal and kind."

The author thanks Chief Magistrate Judge Edmund F. Brennan, Robbin Maloney, Jessica McGuire, Andrea Miller, Richard Mix, Ann Taylor Schwing, and senior U.S. district judge William B. Shubb for their contributions and comments, while she retains full responsibility for the contents of this article as presented here.



By J. Clark Kelso*

Three Sacramento Justices — Champions of Liberty

Introduction

Sacramento can lay claim to three leading justices who sat on the Supreme Court of the United States for a combined seventy-nine years, stretching from 1863 to the present. Those justices are Stephen J. Field (1863-1897), Earl Warren (1953-1969), and Anthony M. Kennedy (1988-present). Although these three justices would, by most accounts, be identified with three different points on the traditional ideological spectrum that are now used to describe members of the Court (Field as conservative, Kennedy as swing, and Warren as liberal), there is at least one broad constitutional topic — individual rights and liberties — that links them together. On this topic our three justices shared an intellectual flexibility, a willingness to let legal concepts develop as society itself advances, that ensures the continued relevance of those provisions of the Constitution that are designed to protect fundamental individual rights.

Brief Backgrounds of the Sacramento Justices

A brief summary of the backgrounds of our three justices establishes their Sacramentan credentials.

The earliest of the three Sacramento justices, Stephen Field, was born on the East Coast in Haddam, Connecticut, in 1816, long before California or

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Sacramento was even part of the United States.¹ Field's undergraduate education was at Williams College, in Williamstown, Massachusetts. He read for the law first in Albany with a well-known lawyer, Harmanus Bleecker, and then in New York City with his older brother, the equally prominent attorney David Dudley Field (who also had read with Harmanus Bleecker). In 1848, at the age of thirty-two, the younger Field traveled to California to seek his fortunes in the Gold Rush.

Field spent the next fifteen years of his life in Northern California, much of it in the Sacramento area. Almost immediately after his arrival in Marysville, California, Field was elected "alcade," the mayor and justice of the peace of the city. Two years later, in 1850, he was sent by voters to the California State Assembly to represent the county of Yuba. After losing a campaign for a California State Senate seat, Field successfully ran for a seat on the California Supreme Court, where he served from 1857 to 1863, when President Lincoln appointed him to the Supreme Court of the United States. Field served on the United States Supreme Court for thirty-four years and left the bench in 1897. He died two years later at the age of eighty-two.

Both Earl Warren and Anthony Kennedy were born and raised in California. Warren was born in Los Angeles in 1891 and was raised in Bakersfield. Both his undergraduate education and his legal training were at the University of California, Berkeley. He received his J.D. in 1914, worked briefly for an oil company, and then joined a law firm in San Francisco. After serving in the army from 1917 to 1918, Warren worked for a year as a clerk to the Judicial Committee of the State Assembly and then, in 1920, became a deputy city attorney in Oakland for five years. In 1925, Warren was appointed as district attorney for Alameda County and then won three four-year terms.

Warren ran for state attorney general in 1938 and won fairly easily. As attorney general, he was the driving force behind the internment of Japanese-Americans in concentration camps. Elected governor in 1942, Warren served for three consecutive terms. On October 1, 1953, he received a recess appointment from President Eisenhower to replace Chief Justice Fred Vinson, who had died suddenly the month before. The Senate confirmed his appointment in March of 1954.

Our third justice, Anthony Kennedy, was born in 1936 and raised in Sacramento. His father was a prominent attorney who was well known in both legal and political circles. As a boy, Kennedy was a page in the California State

1. Sutter's Fort was established by John Sutter in 1839, and Sutter championed the establishment of Sacramento. The Mexican-American War ended in 1848, at which time California was ceded to the United States. The Gold Rush began on January 24, 1848, when James W. Marshall discovered gold at Sutter's Mill in Coloma, California, just a few miles northeast of Sacramento. California was admitted as a state in 1850, the same year that Sacramento was formally incorporated.

Senate, where he had the opportunity to see California's leading politicians, including Governor Earl Warren, in action. Kennedy graduated at the top of his class at McClatchy High School in 1954. The valedictory speech he gave there demonstrates his understanding already at a young age of the value of diversity and the power of the individual in advancing society, themes that he would take up years later as a judge and justice. In his speech entitled "A Century of Education in Sacramento," Kennedy extolled the benefits of Sacramento's schools:

Sacramento's educational system while progressing remarkably in facilities has advanced in methods as well. Today our schools stress independence of thought and action. Consequently, in addition to teaching us the facts about the intriguing world we live in, our schools also prepare us to use these facts for building a better world.

Yet even more significant than subject matter or methods is the training for citizenship which our schools offer. By giving equality of opportunity to all, without discrimination of individuals or status of life, our schools show us democracy in action. By giving us a greater understanding of our rights and privileges, Sacramento's schools make us aware of the high honor and responsibility we have in being citizens of the United States.²

Kennedy received his B.A. from Stanford in 1958, after spending his final year at the London School of Economics, and his law degree from Harvard in 1961. He started his legal practice in San Francisco but, upon his father's untimely death in 1963, moved to Sacramento to take over his father's law practice. Beginning in 1965, Kennedy started teaching constitutional law at the McGeorge School of Law while continuing to maintain his law practice.³ In 1975, he was appointed to the Ninth Circuit Court of Appeals. Twelve years later, in 1987, he was nominated by President Reagan to the Supreme Court, and he began his service on the Court on February 18, 1988.

2. Valedictory speech, June 1954, C. K. McClatchy High School. The speech is on display at the Justice Anthony M. Kennedy Library and Learning Center, located in the Robert T. Matsui United States Courthouse in Sacramento, California.

3. Justice Kennedy has frequently told the story of how he asked the dean of the law school, Gordon D. Schaber, if he could teach his preferred subject, contracts. Since the contracts class had already been offered to another lawyer in town, Claude Rohwer, Dean Schaber told Kennedy that he would have to teach constitutional law instead. Whether this early classroom assignment had any impact upon Kennedy's subsequent career path is of course open to debate, but being a professor of constitutional law certainly didn't hurt his chances for federal appellate appointments.

The Sacramentans on the Topic of Individual Liberty

The most distinctive substantive contribution of the Sacramentans to constitutional jurisprudence is reflected in the role each of these justices carved out for the Court in recognizing and protecting human dignity and individuality from governmental encroachment.

The Constitution is, of course, not silent on the topic of human dignity and individuality. The Bill of Rights explicitly recognizes a small handful of human behaviors that are deserving of protection from unduly intrusive government regulation, including the following:

- Practice of religion
- Free speech
- Free press
- Petitioning government
- Bearing arms
- Protecting the privacy of one's person, home, papers, and effects
- Pursuing life, liberty, and property
- Defending against criminal accusations
- Litigating in civil cases

Each of these provisions breathes life into what it means to be a person in the United States. Taken together, the Bill of Rights sets forth a core set of individualistic values and principles that empower people and limit government. Throughout our 225-year history, the Bill of Rights, and its interpretation by the Supreme Court, has been a shining beacon that has drawn millions of immigrants from around the world to our shores — people seeking a new start in life, often to be free from the rule of despots and dictators.

The exact scope and interpretation of the provisions in the Bill of Rights — and, after the Civil War, the rights set forth in the Thirteenth, Fourteenth, and Fifteenth Amendments and related legislation — are topics that have frequently occupied the Supreme Court's attention, not only historically but also including cases that are pending right now before the Court or are expected to be before the Court in the near future. The Sacramentans have been particularly influential in steering the Court toward a more open and free interpretation of those provisions, an interpretation acknowledging that our understanding of what it means to be a person and to have human dignity develops over time as society learns and matures. This interpretive method stands in stark contrast to a more formal, rule-bound approach that would at

times limit the interpretation of those provisions to old and well-established interpretations — in the most extreme case to originalist interpretations.

The distinctive Sacramentan contribution to the protection of individual civil rights is vividly on display in the cases discussed below, each one of which is widely understood as representing some of the best work of each justice involving some of the Court's most important decisions.

Field on Individual Rights

We begin with Justice Field's dissent in the *Slaughter-House Cases*.⁴ The *Slaughter-House Cases* involved the constitutionality of legislation effectively creating a monopoly in livestock butcher houses in New Orleans. In the course of its analysis rejecting the constitutional challenge, the 5-4 majority decided that the privileges and immunities clause in Section 1 of the Fourteenth Amendment was narrowly focused on privileges held by a person only insofar as he or she was a "citizen of the United States,"⁵ and those privileges did not encompass the rights claimed by the plaintiffs in the case. Instead, the Fourteenth Amendment's privileges and immunities clause encompassed only the following sorts of "United States citizen" rights:

Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State.⁶

Modern scholars have frequently characterized the Court's holding in the *Slaughter-House Cases* as rendering the Fourteenth Amendment's privileges and immunities clause largely irrelevant to civil rights or constitutional litigation. As one scholar has explained, "[I]n the *Slaughter-House Cases*,...the Supreme Court said the phrase 'privileges and immunities' had nothing to do with applying the Bill of Rights to the states."⁷

4. In re *Slaughter-House Cases*, 83 U.S. 36, 21 L.Ed. 394 (1873).

5. *Id.*, 83 U.S. at 79.

6. *Id.*, 83 U.S. at 79-80.

7. Stephen J. Wermiel, *Rights in the Modern Era: Applying the Bill of Rights to the States*, 1 Wm. & Mary Bill Rts. J. 121, 124 (1992).

Justice Field penned a dissent for himself and three other members of the Court.⁸ The dissent concluded that the Civil War amendments, and particularly Section 1 of the Fourteenth Amendment, were intended to completely restructure the relationship between the federal government, the state government, and citizens. In that restructuring, "[a] citizen of a State is now only a citizen of the United States residing in that state. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State."⁹ Field recognized that his interpretation of the Fourteenth Amendment's privileges and immunities clause would have "a profound significance and consequence" because that clause would then serve as a new constitutional basis for protecting "the natural and inalienable rights which belong to all citizens."¹⁰

More generally, it is clear from Field's dissent that he had a fundamentally different, and much more expansive, perspective on the role of federal courts and federal law in protecting individuals against state legislation. At the end of his tenure on the Supreme Court, Field reflected on his time on the bench as follows:

As I look back over the more than a third of a century that I have sat on this bench, I am more and more impressed with the immeasurable importance of this court. Now and then we hear it spoken of as an aristocratic feature of a Republican government. But it is the most Democratic of all. Senators represent their states, and Representatives their constituents, but this court stands for the whole country, and as such it is truly "of the people, by the people, and for the people."¹¹

This expansive view of the Court's central role in protecting individual rights was half a century or more ahead of its time. Only months before Field retired, in 1897, the Supreme Court initiated the so-called *Lochner* era with its decision in *Allgeyer v. Louisiana*.¹² In *Allgeyer*, the Court struck down a state statute that made it illegal for a person to enter into a marine insurance contract with an out-of-state insurer that had not complied with the state's requirements for doing business in the state. The doctrinal basis for the decision in *Allgeyer* was the "liberty" clause in Section 1 of the Fourteenth

8. *Slaughter-House Cases*, 83 U.S. at 83 (Field, J., dissenting).

9. *Id.*, 83 U.S. at 95.

10. *Id.*, 83 U.S. at 96.

11. Charles W. McCurdy, "Stephen J. Field and the American Judicial Tradition," reprinted in *The Fields and the Law*, p. 5 (quoting Field's valedictory letter at the end of his Supreme Court tenure).

12. 165 U.S. 578 (1897).

Amendment.¹³ The unanimous decision in *Allgeyer* defined "'liberty'... to embrace the right of the citizens to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."¹⁴

In formulating this list of "liberty" interests, the Court relied upon Justice Bradley's dissent in the *Slaughter-House Cases*.¹⁵ Bradley concurred in Field's dissent, and his separate dissent mirrored in most material respects Justice Field's dissent. So although the Court did not adopt Justice Field's doctrinal conclusion that the source of these rights was the privileges and immunities clause, the Court did adopt Field's broad list of individual rights through the Fourteenth Amendment's "liberty" clause.

In short order, the reasoning in *Allgeyer* crystallized in the *Lochner*-era's focus on liberty of contract and private contract rights, and the Court embarked on a forty-year effort to preserve its views of economic freedom and capitalism against the increasing volume and weight of state and federal legislation designed to rein in some of the more extreme or abusive business practices of the times. It was not until the New Deal Era case of *West Coast Hotel Co. v. Parrish* that the Court backed away from its activist review of economic legislation.¹⁶

From *Parrish* forward, the Supreme Court has generally adopted a hands-off approach to economic legislation by employing a "rational basis" level of judicial review. As Chief Justice Hughes wrote in *Parrish*, "Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."¹⁷ By contrast, the Court reviews more aggressively and carefully — by employing so-called strict scrutiny or midlevel review — legislation and state action that burdens rights expressly set forth in the Constitution and those rights in the Bill of Rights that have been embraced by the Fourteenth Amendment and are fully applicable to the states; legislation and state action involving discrimination based on race,

13. "...nor shall any State deprive any person of life, liberty, or property, without due process of law;" United States Constitution, Amend. XIV, Section 1.

14. *Allgeyer*, 165 U.S. at 589.

15. *Slaughter-House Cases*, 83 U.S. at 108 (Bradley, J., dissenting).

16. 300 U.S. 379 (1937).

17. *Id.*, 300 U.S. at 391.

religion, or nationality; and legislation and state action evidencing prejudice against discrete and insular minorities.¹⁸

As a practical matter, by the 1950s, Justice Field's expansive view of the judiciary's role in protecting individual rights became the dominant position on the Court, not based on the privileges and immunities clause, as noted above, but based upon a set of doctrines triggering heightened judicial scrutiny of statutes and government actions that burden individual and fundamental rights.

Warren on Individual Rights

Our next Sacramentan justice, Chief Justice Earl Warren, is well known as a champion of individual rights. His most famous opinion, *Brown v. Board of Education*,¹⁹ authored during his first year on the Court, ended the legal segregation of public schools by overruling the "separate but equal" doctrine set forth in *Plessy v. Ferguson*.²⁰ So much has been written about *Brown* and about Warren's remarkable leadership in securing a unanimous decision on such a controversial subject that there is no need to add more words.²¹ The case is a testament to the power of the Court, under inspired leadership, to advance the law toward ever more just and equal ideals by shaking free from then-existing doctrinal rigidities.

Brown was an auspicious start for Warren, who served as the Chief for sixteen years, from 1953 to 1969. Under his leadership, the Court would significantly expand the rights of criminal defendants with decisions such as *Gideon v. Wainwright*,²² which established the right of indigent criminal defendants to receive publicly funded legal counsel, *Miranda v. Arizona*,²³ which established the requirement that persons in custody be advised of certain rights before being interrogated, and *Mapp v. Ohio*,²⁴ which established that

18. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-54 n.4 (1938).

19. 347 U.S. 483 (1954).

20. 163 U.S. 537 (1896). Although Justice Field set the groundwork for an expansive view of individual rights in his dissent in the *Slaughter-House Cases*, that attitude did not extend to his interpretation of the equality principle embodied in the equal protection clause. Field's votes in cases involving racial discrimination, particularly discrimination against African-Americans, were on the wrong side of history.

21. A search on Westlaw on June 7, 2017, produced 276 articles in law reviews that had "*Brown v. Board of Education*" in the title of the article. Over 10,000 articles cite the decision.

22. 372 U.S. 335 (1963).

23. 384 U.S. 436 (1966).

24. 367 U.S. 643 (1961).

the Fourth Amendment and its "exclusionary rule" applied to the states. On the topic of voting rights, in *Baker v. Carr*²⁵ and *Reynolds v. Sims*,²⁶ Warren's Court advanced the interests of each citizen to have his or her vote counted equally by adopting the "one man, one vote" principle and applying that principle to state legislative apportionment. Interpreting the First Amendment's religion clauses, the Court struck down mandatory school prayer in *Engle v. Vitale*,²⁷ protecting children from state-sponsored religious activities. And, of course, there is the landmark decision in *Griswold v. Connecticut*,²⁸ where the Court held that various provisions in the Bill of Rights support recognizing an implied right of privacy that, as applied to intimate sexual conduct between married adults, established a constitutional right to purchase and use contraceptives.

Kennedy on Individual Rights

Our last Sacramentan, Associate Justice Anthony M. Kennedy, was born and raised in Sacramento. Like Justice Field and Chief Justice Warren, Justice Kennedy is properly recognized as one of the Supreme Court's most important and productive members. The list of significant Kennedy opinions is long and covers a broad range of topics. In one of the Court's most important campaign finance decisions, *Citizens United v. FEC*,²⁹ Kennedy wrote for a 5-4 majority that the Free Speech Clause of the First Amendment protected the right of corporations, labor unions, and other associations to make independent political expenditures. In *Planned Parenthood v. Casey*,³⁰ Kennedy co-authored the *per curiam* opinion that reaffirmed the core holding of *Roe v. Wade* that the Constitution protected a woman's right to choose to have an abortion prior to viability of the fetus without undue interference from the government. The *per curiam* included a lengthy explanation of *stare decisis* and strong defense of the Court's central role in interpreting the Constitution.³¹ Kennedy co-authored the *per curiam* opinion in *Bush v. Gore*, which resolved the vote-counting dispute in Florida involving the 2000 presidential election.³²

Justice Kennedy's most important opinions extending constitutional protections to a new class of persons have involved gay rights. In *Romer v.*

25. 369 U.S. 186 (1962).

26. 377 U.S. 533 (1964).

27. 370 U.S. 421 (1962).

28. 381 U.S. 479 (1965).

29. 558 U.S. 310 (2010).

30. 505 U.S. 833 (1992).

31. *Id.*, 505 U.S. 854-66.

32. 531 U.S. 98 (2000).

Evans,³³ the Court struck down a Colorado initiative that would have prevented any town, city, or county from taking any action to recognize homosexuals as a protected class for civil rights purposes. The Court concluded that the initiative reflected an animus toward homosexuals that lacked a rational relation to any legitimate government purpose. In *Lawrence v. Texas*,³⁴ the Court struck down the sodomy law in Texas, overruling its earlier decision upholding such laws in *Bowers v. Hardwick*.³⁵ In *United States v. Windsor*,³⁶ the Court held that the Defense of Marriage Act was unconstitutional in attempting to deny recognition to same-sex marriages that had been approved by state law. As in *Romer*, the Court concluded that there was no reasonable basis for the legislation other than an attempt to disparage and injure those who had entered into same-sex unions under state law.

These three cases laid the foundation for the Court's gay marriage decision in *Obergefell v. Hodges*.³⁷ In *Obergefell*, we see Justice Kennedy at his best. His opinion makes a convincing case for moving the law forward on the basis of a mature, respectful, thoughtful consideration of the fundamental nature of what it means to be human.³⁸ That the traditional doctrines of constitutional law and the three tiers of judicial scrutiny would likely have led to a different decision is simply evidence that those doctrines are an imperfect tool to achieve justice and fairness.³⁹ What is important in Kennedy's decision

33. 517 U.S. 620 (1996).

34. 539 U.S. 558 (2003).

35. 478 U.S. 186 (1986).

36. 133 S.Ct. 2675 (2013).

37. 135 S.Ct. 2584 (2015).

38. "The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, 'has not been reduced to any formula.' [citation omitted] Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect." *Id.*, 135 S.Ct. at 2598.

39. The dissenting opinions contain the more traditional analysis based on existing precedent. *Id.*, 135 S.Ct. at 2611 (Roberts, C.J., dissenting); 135 S.Ct. at 2626 (Scalia, J., dissenting); 135 S.Ct. at 2631 (Thomas, J., dissenting); 135 S.Ct. at 2639 (Alito, J., dissenting). The attitude of the dissenting justices is nicely summed up in Chief Justice Roberts's opinion as follows: "Neither petitioners nor the majority cites a single case or other legal source providing any basis for...a constitutional right [to same-gender marriage]. None exists, and that is enough to foreclose their claim." 135 S.Ct. at 2619 (Roberts, C.J., dissenting). For the dissenters, apparently, the list of "fundamental rights" protected by the Fourteenth Amendment is frozen in place and not to be expanded.

is the undeniable importance to every human being of a loving, intimate relationship with another.⁴⁰ What is important is the right of every individual to fulfill his or her identity and spirit and not to have that identity or spirit squelched by the awesome power of government.

Here are the key passages from Kennedy's opinion, an opinion that I am confident both Warren and Field would be sympathetic to if they were living in today's world:

From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. 2 Li Chi: Book of Rites 266 (C. Chai & W. Chai eds., J. Legge transl. 1967). This wisdom was echoed centuries later and half a world away by Cicero, who wrote, "The first bond of society is marriage; next, children; and then the family." See *De Officiis* 57 (W. Miller transl. 1913). There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.

That history is the beginning of these cases.⁴¹...

Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.

40. *Id.*, 135 S.Ct. at 2593-94.

41. *Id.*

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced to any formula." Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.⁴²...

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.⁴³

Conclusion

Field, Warren, and Kennedy. Three very different justices on many subjects who have, nevertheless, shared a deep reverence for individual liberty as a juridical concept that changes over time as society itself matures

42. *Id.*, 135 S.Ct. at 2597-98 (citations omitted throughout).

43. *Id.*, 135 S.Ct. at 2602.

and develops. Sacramento, as one of the nation's most diverse cities,⁴⁴ can legitimately be proud of its connection to these three titans of the Court and to their commitment to individual liberty and empowerment.

44. Tony Sheppard, "Sacramento: The Most Integrated Major City in the US," January 24, 2015, <http://sacramentopress.com/2015/01/24/sacramento-the-most-integrated-major-city-in-the-us/>.



Denny Walsh

The Federal Court in Sacramento: A Court Shaped by the Character of its Judges

No segment of society has more impact on the quality of our lives than the federal courts. They are the guardians of the rights guaranteed us by the U.S. Constitution. Still, comparatively few individuals have direct contact with federal courts, and most people have only a vague awareness of their existence.

It was without fanfare, then, that the federal judicial authority based in Sacramento - the Eastern District of California - achieved a significant milestone this year: its 50th anniversary.

The district opened for business in Sacramento on September 18, 1966. Six months earlier, 34 mostly rural counties officially ceased to be backwaters of the Northern and Southern Districts when Congress designated them the Eastern District.

The district's sweeping expanse stretches from the Tehachapis on the south to the Oregon border on the north, and from the Coast Ranges on the west to the Nevada border on the east. If it were a state, it would be the 12th largest of the 50.

"We went from a small-town outpost of a larger court headquartered in San Francisco to a separate and independent judicial district," U.S. District Judge William B. Shubb said during a recent series of interviews.

"In many ways, the first day was routine, but all of us who were there at the time seemed to recognize that we were participating in an historical event," said the 78-year-old Shubb, now the longest-serving judge on the Eastern District bench and a walking encyclopedia of its history.

"For the most part, the changes were administrative," said Shubb, who was an assistant U. S. attorney in Sacramento at the time. He has appeared before or been a colleague of every district and magistrate judge who has served in Sacramento.

Until the district was legislated into existence, there had been only the Northern District based in San Francisco and the Southern District based in Los Angeles. Those two were created by Congress when California was

admitted to the Union in 1850. The dividing line extended across the state just south of Stanislaus County. Yosemite National Park was not split and was placed in the Northern District.

In a public discussion marking the golden anniversary on September 16 this year, U.S. Supreme Court Justice Anthony Kennedy, a native of Sacramento, and Shubb agreed that the district's history is best viewed by looking at the judges who served it.

"The growth of our court over the last 50 years, as I have observed it, has been shaped largely by the character of the judges who preceded me and the emergence of the various technological advances we have been able to employ," Shubb said.

In response to a growing public sentiment that the state's capital should have a greater federal judicial presence, Congress enacted a bill in 1938 authorizing the appointment of a judge "whose official residence shall be Sacramento."

Martin I. Welsh, a former Sacramento mayor and then a Superior Court judge, was appointed to the newly-created seat by President Franklin D. Roosevelt on July 14, 1939. Welsh left the bench in 1946 and was succeeded by a former Superior Court colleague, Dal Millington Lemmon. He, in turn, was succeeded by Sherrill Halbert, a stern, no-nonsense Superior Court judge from Stanislaus County.

Halbert sat as the only federal judge in Sacramento for seven years. By 1961, however, business had picked up to a point where it was more than a single judge could handle. A second judgeship was authorized and, on September 22, 1961, President John F. Kennedy appointed Thomas J. MacBride, a young assemblyman who had managed Kennedy's campaign in the Sacramento region.

The court was then located in the old post office building at 8th and I Streets, which had been designed for only one courtroom, leaving MacBride with substantially less and more modest space than Halbert.

Soon after he moved in, MacBride proudly showed his courtroom to a friend and prominent Sacramento attorney Nathaniel "Nat" Colley. "Oh, this will never do!" Colley exclaimed. "Why?" MacBride asked. "Well," Colley explained, "whenever I go to federal court I always charge more because my clients are convinced it is so much more important than state court. But now, when they see this courtroom, that's not going to work."

When it was completed in 1962, Halbert and MacBride moved into the court's new home at 650 Capitol Mall. But that building also presented some design problems.

For example, Halbert immediately discovered the bench was on the same level as the rest of his courtroom, and would hear no cases until the bench was elevated, enabling him to appropriately peer down on the lawyers before him. Shubb, a 1963 graduate of the UC Berkeley School of Law, went to work for Halbert as a law clerk. He remembers his mentor fondly.

"He was born in 1901 on a sheep ranch in Tulare County that his family homesteaded in 1881," Shubb related. "His father had distinct memories of Abraham Lincoln, and told his son stories about Lincoln. That accounts in part for Judge Halbert becoming a Lincoln scholar."

Halbert's collection of Lincoln literature and memorabilia is now housed in the Anthony M. Kennedy Learning Center and Library on the first floor of the federal courthouse in Sacramento.

"He was a Californian, but a rural Californian, and he was folksy in some ways," Shubb recalled. "My favorite Halbert saying is, 'Anything with more moving parts than a crowbar is bound to break down.' I use that all the time."

In the mid-1960s, a consensus began to develop that the judges in Sacramento were ready to assume independence. Chief Judge Richard H. Chambers of the Ninth U.S. Circuit Court of Appeals put his considerable influence behind the movement and, on March 18, 1966, Congress enacted Public Law 89-372, creating the Eastern District, effective six months later.

This brought into the fold a judge in Fresno, formerly in the Southern District but removed to the Eastern District. Myron D. Crocker was a salty, blunt ex-FBI agent. In the court's oral history, Crocker lamented a rising tide of litigation and told the interviewer a district judgeship "isn't the soft job that it used to be."

"It used to be kind of a retirement-type job," Crocker said. "In fact, we didn't used to have senior judges that amounted to anything. Because you usually didn't get appointed till you were 60 or 65, and by the time you were eligible to take senior status, you were dead most of the time."

Crocker said the best part of the job is that "instead of getting ulcers, you now give ulcers."

As a practicing attorney, Crocker recalled, on his way to a trial he worried whether the witnesses would show up and whether their testimony would match what they had told him earlier.

As a judge, "I turn on the radio and try to figure out who won the baseball games . . . and not caring whether the witnesses show or what's going to happen. I think that added 10 years to my life."

After a few months buried in the paperwork and extra duties that go with being chief judge, Crocker passed the baton to MacBride, whose tenure as chief lasted from June 1967 to January 1979. He served in the post longer than any other judge ever has or ever will, since the term has been limited to seven years.

MacBride had been elected president of his senior class at the law school in Berkeley with the campaign slogan "Slip and Slide with Tom MacBride." It was a hard-fought race against an opponent whose slogan was "Rock 'er and Sock'er with Don Crocker." After more than 25 years, MacBride was able to relieve his old adversary of the headaches that go with the chief's job.

Kennedy remembered MacBride's "wonderful sense of humor. He was a very charismatic presiding officer. He ran a lively courtroom with good humor

and great respect for those who appeared before him, which was reciprocated."

MacBride presided over two of the most famous Eastern District cases: the so-called "Roseville explosion" litigation and the prosecution of Lynette "Squeaky" Fromme for her attempt on the life of President Gerald Ford.

Early on the morning of April 28, 1973, residents of the Sacramento area were awakened by explosions. Bombs were being transported from Hawthorne, Nevada, to the Bay Area in boxcars of a Southern Pacific train. As the train passed through Roseville, the bombs ignited. The railroad and the government fought it out in court over the cause and responsibility for the devastation suffered by homeowners. The case ended with a \$15 million settlement. The non-jury trial lasted more than two years, the Eastern District's longest.

Fromme, a follower of imprisoned murderer Charles Manson, pointed a pistol at Ford as he walked through Capitol Park in Sacramento on September 5, 1975. She pulled the trigger, but the weapon did not fire.

Determined to act as her own attorney, Fromme did not seek an acquittal and, instead, sought to use the trial to bring public attention to her adopted environmental cause. The trial focused the nation's attention on the bizarre events unfolding in MacBride's courtroom over several weeks. She was convicted and sent to prison and later paroled.

Fromme engaged in so many raucous outbursts that MacBride finally ordered her removed from the courtroom. But not before she beamed the prosecutor with an apple meant for MacBride.

MacBride was succeeded as chief judge by Philip C. Wilkins, a former president of the Sacramento County Bar Association who had been appointed by President Richard Nixon in 1969.

Wilkins, an avid baseball fan, always attended the World Series. Shubb, an Oakland native and baseball addict, said that one year, when the A's were in the Series, he told Wilkins he would like to attend the games in Oakland.

"I asked him not to set any of my cases for court proceedings on those dates," Shubb said.

However, Wilkins set one of Shubb's cases for trial during the Series. "I said, 'Your Honor, that's the week we are going to be in the Bay Area,'" Shubb recalled. "He paused momentarily, then said, 'Oh! The conference, the conference,' and promptly vacated the trial date.

"From then on, whenever I was going to a ballgame in the Bay Area, I said I was going to the conference," Shubb said.

President Jimmy Carter's time in the White House - 1977 through 1980 - witnessed one of the district's most significant transitions. Congress authorized two new judicial slots in Sacramento and one in Fresno. In addition, MacBride took senior status, leaving yet a fourth seat to fill.

Among those chosen by Carter to fill those slots was Sacramento Municipal Court Judge Raul A. Ramirez, the first Hispanic on the district's bench. He later quit, saying the job didn't pay enough.

By 1991, the work of the district had become so heavy that Congress authorized an additional judgeship. President George H.W. Bush appointed Garland E. Burrell Jr., the first African American to sit in the Eastern District.

By random turn of the assignment wheel, it fell to Burrell to handle the district's most famous case: the prosecution of Theodore Kaczynski, the notorious Unabomber.

Kaczynski, a mathematics prodigy, taught at UC Berkeley before retreating to a survivalist lifestyle in the Montana woods. Between 1978 and 1995, he mailed and planted homemade bombs that killed three people - including two in Sacramento - and injured 23 others. After one of the longest manhunts in U.S. history, he was captured in 1996.

Although there was a guilty plea before trial, the case attracted worldwide media attention, with news reporters, their mobile homes and equipment trucks filling a city block across Capitol Mall from the courthouse, which became known as "Camp Kaczynski."

The wait for a conspicuously overdue woman on the district bench finally ended in 2010, when President Barack Obama bestowed on Magistrate Judge Kimberly J. Mueller the coveted lifetime appointment.

"The sooner we as a bench reflect our society as a whole, in all ways, the better we'll be able to maintain the public's trust. It is that trust on which we depend to play our essential role in the country's system of checks and balances," said Mueller, who is still waiting to be joined by another woman.

"We've come a long way," Shubb mused one day not long ago, looking out his 14th-floor window over the city and the years. "It's been quite a ride."

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Book Reviews

William Schwarzer, *A Life Well Lived: The Life of William Schwarzer, a Memoir*, privately printed, 2016.

A key aspiration of our federal courts is expressed in the very first paragraph of their rules of civil procedure—the “just, speedy, and inexpensive determination of every action.” Perhaps no judge devoted more of his intelligence, scholarship, and will to this principle than did the Honorable William W. Schwarzer, who died January 28, 2017 after an extended struggle with Parkinson’s disease. His short (132-page) final memoir (he had earlier given an account of his life in an oral history) surveys the highest peaks of his travels in practice, on the bench, and in service to the profession.

13-year-old Wolfgang Schwarzer arrived in 1938 with his German family in San Pedro, California, refugees in the aftermath of Kristallnacht. Renamed William (but leaving a floating letter “W” for a middle name), he entered an all-American youth: Eagle Scout, Los Angeles High School, World War II service interrogating German prisoners, USC, and Harvard Law School. He married a Radcliffe student, Anne, moved to San Francisco, and embarked on a career in regulatory and antitrust litigation at the general practice firm then named McCutchen, Thomas, Matthew, Griffiths & Greene. The young Turks including Morris Doyle and, later, Schwarzer transformed the partnership into McCutchen, Doyle, Brown & Enersen, a litigation powerhouse for the remainder of the century.

The book recounts his most notable cases as trial and appellate advocate. He relates his victories for Greyhound, Georgia Pacific, Chrysler and other corporations, appropriately declaring that “a memoir is not the place for modesty.” His due process objections to a Delaware statute facilitating jurisdiction over a defendant by virtue of owning stock of a Delaware corporation were initially rejected. But his position (argued by a partner after he became Judge Schwarzer) proved persuasive to the U.S. Supreme Court in *Shaffer v. Heitner* (1977).

Schwarzer chronicles his personal rites of passage, including raising two children (Jane and Andrew), heli-skiing, airplane piloting, and joining the Bohemian Club. His service in 1975 as a counsel to Nelson Rockefeller’s commission investigating domestic CIA abuses is noted. Nothing in his background, though, suggests the impact he was to have on the judicial

process in the United States following his nomination by President Gerald Ford in 1976 to the bench of the Northern District of California.

Beginning service with a very full docket, Judge Schwarzer streamlined the case flow in his own courtroom and those of others. He used and strenuously advocated for substantive status conferences, early neutral evaluations, mandatory production of evidence by counsel, magistrate judges, summary judgment, and the possibility of Rule 11 sanctions. Procedures reducing the delays and costs of litigation that seem unremarkable today are with us because of this district judge's efforts.

Judge Schwarzer's influential 1984 article was cited with approval in *Celotex Corp. v. Catrett*, one of the Supreme Court's 1986 trilogy of summary judgment cases. "He has been at the cutting edge of new developments in the simplification and improvement of the administration of justice for more than twenty years," Ninth Circuit Chief Judge James Browning wrote in 1998.

Not everyone was enthusiastic about the procedural innovations. Judge Jack Weinstein in a 2007 opinion warned that they slighted the jury and could lead to "a tilting of the scales of justice away from injured plaintiffs." However, Judge Schwarzer did not ignore or belittle the role of the jury in those cases where factual issues remained in claims having legal merit. He chaired a Ninth Circuit committee pioneering the drafting of readable instructions that jurors could take with them into deliberations.

Judge Schwarzer briefly describes the highlights of the cases over which he presided. Among them are *Alioto v. Cowles Communications* (*Look Magazine*) (1977), a libel bench trial in which the judge found the magazine engaged in actual malice but no damages beyond attorneys' fees were awarded; *Apple Computer v. Microsoft* (1990), a "look and feel" infringement claim that he regarded as defeated by the terms to which Apple had agreed in a Microsoft software license; and criminal cases in which the disparity in treatment under the U.S. Sentencing Guidelines between crack and powder cocaine led in his view to draconian, discriminatory, and unjust results.

In 1989, he became the director of the Federal Judicial Center, the training and research arm of the United States courts. He was immediately and continuously embroiled in turf disputes with the courts' Administrative Office, headed by a civil-service veteran. The judge took pride in the FJC's "baby judges" seminars, Manual for Complex Litigation, and work on scientific testimony and federalism. Leaving the center in 1995, he resumed sitting on cases throughout the country by designation, taught, and engaged in Rule of Law conversations with attorneys abroad.

An oral history skillfully conducted by Carole Hicke twenty years ago covers much the same ground as the memoir and runs to 378 pages, with sharper detail. It was recorded when Judge Schwarzer's memory and eloquence were on full display (*William W. Schwarzer: Litigator, Federal District Judge, Director of the Federal Judicial Center, and Professor, 1952-1997*, with an introduction by James R. Browning, Regional Oral History Office, University of

California, Berkeley, 1998). We are fortunate to have both memoirs, along with his opinions and scholarship as cited in the 1998 version.

His reflections are fitting tribute to a lawyer who transitioned from success in private practice to a profound influence on public justice.

Robert A. James
San Francisco, California

NINTH JUDICIAL CIRCUIT HISTORICAL SOCIETY WILLIAM A. NORRIS - A REMEMBRANCE

Hon. Raymond C. Fisher

During the more than 50 years I knew Bill Norris he was my mentor, law partner, almost-colleague on the Ninth Circuit, and my close friend.

I first heard of Bill Norris in the fall of 1965 when I was a third-year Stanford Law School student interviewing Los Angeles law firms for a job. In those days, law firm practices, structures and choices were much different from today: there were the established, large (80-100 lawyers) firms located in major financial, business centers such as New York, Chicago, San Francisco and Los Angeles – focusing on corporate and business litigation. Pillsbury, Madison & Sutro, O'Melveny & Myers and Gibson, Dunn & Crutcher were leaders on the West Coast. And there was Covington & Burling in Washington, D.C., dominant in administrative law and well connected with the federal government. There were also prominent, high quality mid-size firms in these cities that could compete with the larger firms. But the firms were not multi-city, national or international – they were localized and relied largely on clients who were part of their community or region. They were also partnerships, places where you expected to be accepted as an associate, make partner after five or more years if lucky, and stay there for the rest of your career. It was against this backdrop that I – considering myself “mature” at age 26, married with a 4-year old son – was attracted to a smaller, high quality firm that would give me major responsibility quickly, and – in the era of Vietnam War protests and civil rights activism in the South – would also accommodate my rather idealistic interest in politics and civil rights issues.

I was therefore surprised and intrigued that so many top lawyers would tell me, “You should talk to Bill Norris at Tuttle & Taylor,” a very small, primarily corporate-agribusiness firm of about 10 lawyers. As my colleague on the Ninth Circuit, Judge William C. Canby, captures in his accompanying review of Bill Norris's Memoir, *Liberal Opinions: My Life in the Stream of History*, Bill had already emerged as an “exceptional” lawyer in Los Angeles, with impressive academic credentials (Princeton, top of his class at Stanford Law School and Executive Editor of the *Stanford Law Review*, law clerk to the legendary Justice William O. Douglas) and active in Democratic politics. As I would soon learn, Bill was embarked on a visionary mission to build a top flight litigation group at tiny T&T that could compete with the best of the well established firms, starting with an unabashedly elitist approach to recruiting those he judged to be the best and brightest law graduates (top grades and law review were key). He envisioned a firm that would be known for its commitment to public service – especially through politics and civic engagement, a law firm commitment that was relatively unique then. Also

distinctive, the firm had a "life style" based on collegiality, socializing together, becoming a "family" of friends and families. Inspired by Bill's charming and persistent salesmanship over an almost three-year courtship (I had to defer my decision while clerking on the D.C. Circuit and then the Supreme Court) and moved by a strong endorsement of Bill and T&T by Warren Christopher, a mentor to Bill and to me, I ultimately accepted an offer from Tuttle & Taylor – which really should have been known as Tuttle, Taylor & Norris. Thus began 12 years of partnering with Bill the litigator and firm guru, and a lifetime of friendship. My privilege during those years and beyond was to experience first hand Bill's amazing talents as a litigation attorney, a political activist and a civic leader in Los Angeles, whose intellect, practical skills and charismatic leadership played a major role in many significant, even historic events – as Bill Canby recounts.

So why was Bill Norris, the man, so special?

- * He was fiercely competitive, but usually with a sense of humor and a winning smile.
- * He was above all a legal scholar who prized intellectual excellence and rigorous analysis. He was a "lawyers' lawyer," as well as a scrappy litigator. He was a master at creating and applying legal theories, a meticulous editor who insisted on clarity of argument and careful, accurate reading of cases and precedents. He could be very insightful and creative in articulating legal theories.
- * He was a great mentor who ignored distinctions between partners and associates and loved to delegate lots of responsibility, teaching and coaching through on-the-job experience. He and I tried several difficult and complex cases together, working at intense levels in courtrooms in Los Angeles and San Francisco – and Escondido. His favorite trick was to suddenly find a reason why I should substitute for him at a court appearance or deposition – "Ray, I'm not feeling well this morning, why don't you drive down to Escondido and cover this hearing?" (He even offered to let me drive his new Porsche there!)
- * He was a visionary, who thought long range and strategically. He looked for ways to make institutional or systemic changes. He was unafraid of controversy, of challenging the status quo or an injustice – including assuring equal treatment of women lawyers, who were beginning to turn to law as a career. (T&T was a leader in hiring and promoting women, and a pioneer in granting maternity leave.)
- * He was an eternal optimist. He didn't lose a case or cause: rather, Bill would always find a silver lining in a disappointing outcome, or look for ways to win the next round.

These qualities permeated his legal, political and civic career. But they are best illustrated by his scholarly, prescient 1988 opinion as a Ninth Circuit judge, *Watkins v. United States Army*, involving a career Army Sergeant

discharged after 18 years of patriotic, unimpeachable service simply because he was gay. Bill, careful to ground his opinion on the Constitution and Supreme Court jurisprudence, found a novel way to remedy this obvious unfairness by invoking the Equal Protection Clause. As reported in *The New York Times*:

Homosexuals may not be kept out of the Army; their claims for equal protection under the Constitution are as strong as those of blacks and stronger than those the Supreme Court has ever recognized for women. So concludes the U.S. Court of Appeals on the West Coast. A ruling of such sweep on such an incendiary subject cannot stand without full Supreme Court review but it is another welcome step in America's steady evolution toward tolerance. Gay people should not be denied the opportunity for military service solely on the basis of their sexual preference, as distinguished from their behavior.

As it turned out, however, Bill's equal protection theory would have to wait until 2013 to be vindicated by the Supreme Court in its landmark gay marriage decision. But that was Bill Norris: a brilliant, optimistic visionary not afraid to be ahead of his times.

Although Bill found his calling in litigation, political activism was his driving force for most of his life (with the 17-year hiatus as a Ninth Circuit judge when, as he was fond of saying, he had to "give up his First Amendment rights"). He was heavily involved in Democratic politics, when being active politically (or even being a politician) was seen as an honorable act of good citizenship. Of the various campaigns Bill Canby mentions, the one I especially remember was Bill's central role in 1970 in helping recruit and elect Wilson Riles as State Superintendent of Public Instruction, the first African-American elected to any California statewide office – whose upset win over a controversial incumbent was described as "one of the most stunning upsets in California's political history." Bill was driven to this cause by his experience as Governor Pat Brown's appointee to the California State Board of Education, where Bill fought for racial equality in schools in the aftermath of *Brown v. Board of Education*. His passionate fight to elect a largely unknown but highly qualified African-American to oversee California's public schools revealed Bill at his best: a superb talent spotter, strategic master, eternal optimist, indefatigable competitor. When Riles won, it was proof that grass roots political activism could indeed make a difference. And to those of us at T&T it proved Bill's thesis that full time lawyers could use their skills for something beyond the courtroom.¹

Bill returned to electoral politics with a major role in Jimmy Carter's 1976 presidential campaign. In 1980, in recognition of Bill's stellar reputation

1. One young Tuttle & Taylor associate Bill hired and inspired was Edmund G. Brown, Jr., although Jerry exceeded even Bill's expectations by being elected Governor of California in 1974 at age 36, well before Bill thought he could win!

as a lawyer and civic leader, President Carter appointed him to the Ninth Circuit U.S. Court of Appeals. To my disappointment, Bill left the Ninth Circuit shortly before I arrived in 1999. But even though we didn't sit together, his hundreds of opinions are still there, and I sometimes find them guiding – even dictating! – my decisions.

Finally, above law and politics, Bill had an endearing passion for his family – an enthusiastic pride in all they were doing. He was a cheerleader for his children and stepchildren; and especially for his two grandchildren. His wife, Jane Jelenko, was a perfect intellectual and spirited match for Bill; he was never happier than when he was with her or bragging about her latest success.

Bill had a wonderful life, and accomplished many amazing things – not the least of which was creating a law firm that would become a model for others that aspired to combine excellent lawyering with public service, with a culture of collegiality not driven by billable hours.² Fortunately, he was honored in his lifetime when the Legal Aid Foundation of Los Angeles gave him its prestigious Maynard Toll Award for Distinguished Public Service in 2013. As reflected in *Liberal Opinions*, he leaves an enduring legacy and will be missed.

2. Confirmation of Tuttle & Taylor's respect for excellent lawyering was its decision to retain William Edlund (remembered elsewhere in this Issue) to advise and successfully defend it in a meritless malpractice suit, the silver lining of which was my introduction to Bill and a long professional friendship.

***Liberal Opinions: My Life in the Stream of History*, by William A. Norris. New Orleans: Quid Pro Quo Books, 2016. 288 pp.; acknowledgments; appendix; \$ 26.99 paper.**

This autobiography by the late William A. Norris, a retired judge of the United States Court of Appeals for the Ninth Circuit, is a highly personal history of Norris's life (he will be called "Judge Norris" herein when he reaches the bench), but it is a personal story that intersects time and again with our nation's major historical events.

Norris's life is a true Horatio Alger story. It begins in Turtle Creek, Pennsylvania, where Norris was born and lived through high school. His parents were migrants from England and the family lived a modest life during the Depression. College was not on the horizon. Norris had his first liberal reaction to race discrimination when he saw how the girl who was the only black in his class was treated. He began an enduring interest in journalism by helping his father, who edited a local weekly. He wrote a sports column for another local newspaper.

In high school Norris was voted president of his class and graduated at its head. He joined the Navy and became a hospital corpsman; naturally enough, he wound up running the hospital newspaper. At the urging of a friend, he applied to Princeton University even though at first he did not know where it was. He was accepted and attended under the GI Bill.

He relates that he and other public high school graduates entered Princeton at a disadvantage compared to the more numerous prep school graduates. By the second year, though, "we public school guys had caught up." He explains that "we . . . had an expertise that was not taught in these elite schools. We knew *people*." Norris became involved with the Press Club and became a stringer for the New York Times and other papers. He even interviewed Albert Einstein! He graduated in 1951 as a member of Phi Beta Kappa.

Norris then entered Stanford Law School. He describes an exchange with a particularly distinguished but intimidating professor, whose question Norris answered by beginning: "I don't know why, but my gut tells me" He then finished his answer and the professor glared at him and turned away. Norris was concerned, but then heard the professor say: "You stick with that gut." The effect of those five words on Norris was profound: "Perhaps, I began to think, that meant that I was in the right place and had an intuitive talent for the law that could serve me well." Norris was awarded one of only two A+ grades that the professor had ever given, and he ultimately graduated first in his class.

The exchange with the professor illustrates a recurring theme in this book's narrative. It sets forth one of several instances when Norris discovers (and "discovers" is an apt term) that he has exceptional talents, both academic and practical. The discoveries seem to come as a sort of pleasant surprise. Norris is not shy about describing his abilities or accomplishments. But he is also exceptionally generous in giving credit to everyone who helps him along the way, and they are legion, from his fourth-grade teacher to those who formed and assisted him in his professional and political life. He describes the abilities and achievements of these many persons, with explanations of how much they contributed to his ultimate successes and otherwise interacted with him throughout his life. The list is so long that it would be daunting to the reader if several of those benefactors were not already well known and if the incidents where they helped were not so inherently significant. This is a book about important events, but even more about *people* connected with them and with Norris.

After a brief stint in practice, Norris became a law clerk to Supreme Court Justice William O. Douglas, and he maintained a friendly relationship with that notoriously difficult but very liberal Justice. After his clerkship, Norris chose to join the small firm of Tuttle & Taylor, which then numbered four lawyers! He stayed with the firm for the next 24 years, becoming its prime litigator. He represented one of the five appellants in *Miranda v. Arizona*. He was an incredibly successful recruiter for the firm, because of his exceptional ability to spot talent and then enlist it. At the same time, he became increasingly involved in politics. He was campaign manager for Democratic congressional candidate Rudd Brown.

Governor Pat Brown appointed Norris to the State Board of Education, where he enlisted expert help in evaluating textbooks that had, up to then, been woefully deficient in science and math, and Confederacy-oriented in American history. Norris supported black candidate Wilson Riles for Superintendent of Schools, who defeated the reactionary Max Rafferty in an upset election. Norris then became one of three campaign co-chairmen for Governor Pat Brown's successful 1962 gubernatorial campaign against Richard Nixon. In 1964 he became heavily involved in Bobby Kennedy's campaign, and was present at its tragic end at the Ambassador Hotel; he joined Kennedy's brother-in-law Steve Smith at the rostrum while Smith announced that Bobby Kennedy had been shot!

Subsequently, Norris was instrumental in the successful campaign of Tom Bradley, who became the first black mayor of Los Angeles and governed that city for the next 20 years. Bradley appointed Norris head of the Police Commission, where he worked to increase racial diversity and put a stop to politicized surveillance activities of a police unit.

In 1979, Norris embarked on an adventure unlike anything he had ever done: he led a major effort to fund and create a contemporary art museum in Los Angeles. The story illustrates Norris's startling capacity for building a network of support consisting of major players in a field that was entirely

foreign to him. The tale is well told, with snapshots of the many supporters who enlisted and contributed funds or effort. The result is the magnificent Los Angeles Museum of Contemporary Art.

Although Norris viewed an appellate judge's role as far too cloistered, he ultimately accepted a nomination to the Ninth Circuit. He was easily confirmed and joined the court.

Judge Norris discusses several of his principal cases. There is no doubt, however, that his most important issue, on which he was the national leader among judges, was that of gay rights. The featured case is *Watkins v. United States Army*, 847 F.2d 1329 (9th Cir. 1988). (Full disclosure: your reviewer joined Judge Norris in both of his *Watkins* opinions. There was no doubt, however, that Judge Norris was the prime mover on the issue.) *Watkins* was a soldier who had served 18 years with distinction, informing the Army at his enlistment and reenlistments that he was homosexual. After a change of regulations, he was denied another reenlistment on the ground that he was homosexual. The Supreme Court had held in *Bowers v. Hardwick* that it did not violate due process for a state to make homosexual activity a crime. Judge Norris wrote an opinion holding that discrimination against *Watkins* was a violation of the equal protection clause. Homosexual status was a "suspect class" and thus discrimination on that ground could only be sustained if it was essential to serve a compelling governmental interest; the Army's justification did not pass muster. It was important that the discrimination was against *Watkins* for *being* homosexual, not for committing homosexual acts, which the Supreme Court had held could be made crimes. Judge Norris's opinion was a path-breaker, and caused much national comment. En banc rehearing was granted, and the en banc court ruled for *Watkins* on the narrower ground that the government was estopped from denying *Watkins*' reenlistment, having previously reenlisted him after he said he was gay. Judge Norris concurred separately, arguing that the proper ground of decision was the equal protection clause.

Some years later, the Supreme Court overturned *Bowers v. Hardwick* in an opinion written by Justice Kennedy, *Lawrence v. Texas*. It held that prosecution of persons for engaging in consensual homosexual conduct violated the due process clause. That ruling enabled much further progress in gay and similar rights. But Judge Norris in *Watkins* had been the first to light the way.

Among Judge Norris's personal achievements while he was on the court was his marriage to Jane Jelenko, whom he describes as the love of his life. Judge Norris's next personal decision was to retire completely from the court three years after he became eligible, in order to return to the freedom of an active practice with new firms. He became Governor Gray Davis's special counsel for Indian affairs, and negotiated gaming agreements with many California tribes. He ultimately joined the firm of Akin Gump and became involved in additional major litigation. He continued his interest in politics, and ends his narrative on a characteristic high note:

To live and see the day when gay rights include the right to marry,

when the Affordable Care Act is law, when an African American man is the President, is to have the fundamental areas of injustice that have defined my personal and professional values move closer to resolution. During my privileged and engaged life, I never lost sight that with great rights come enormous responsibilities. That recognition is part of my DNA, and it all began in Turtle Creek.

Readers who decide to take this life's journey with Judge Norris will be well rewarded, and will appreciate his enormous contribution to the public weal.

William C. Canby, Jr. Phoenix, Arizona

***Constitutional Governance and Judicial Power*, Edited by Harry N. Scheiber. Berkeley: Berkeley Public Policy Press, 2016. 669 pp.; notes, index; \$50, cloth, \$35 paperback. Available only from California Supreme Court Historical Society.**

Coordinating the work of six authors into a cohesive and comprehensive history of the California Supreme Court is a challenging and monumental achievement, largely accomplished through the persistence and patience of Professor Harry N. Scheiber, the Riesenfeld Chair Professor of Law and History, Emeritus at the University of California, Berkeley, School of Law. Unfortunately, the book lacks biographical information about the individual authors, except for a brief identifying footnote. The work benefitted from a diverse group of talented authors with an interesting blend of backgrounds, and readers might have appreciated some insights into their familiarity with the work of the Court. Professor Scheiber, whose chapter on "The Liberal Court" of 1964-87 is the lengthiest, was joined by his Berkeley School of Law colleague Charles J. McClain, who authored two excellent chapters, "The Pioneers on the Bench" from 1849 to 1879, and "The Gibson Court," from 1940 to 1964, as well as two distinguished historians, the late Gordon Morris Bakken of California State University at Fullerton, who contributed the chapter on "The Court in an Era of Rising Industrialism," 1880-1910, and Professor Lucy E. Salyer of the University of New Hampshire, who covered "The Court in an Era of Reform," 1910-1940. For the most recent history, however, Scheiber turned to veteran journalists who covered the Court during the periods they were describing: Bob Egelko of the San Francisco Chronicle, who wrote on "The Lucas Years," 1987-1996, and Molly Selvin, a former correspondent for the Los Angeles Times now a Research Fellow at Stanford Law School, who wrote the final chapter on "The George Court," 1996-2010.

All the authors did a superb job of placing the cases decided by the Court into their historical context, but I thought the history professors were especially adept at providing richly detailed and compelling context. The era covered by Professor Salyer was a politically tumultuous one for California, and she displays intimate familiarity with the drama of cases like the Tom Mooney prosecution for the San Francisco Preparedness Day bombing, the shameful treatment of Japanese under California's Alien Land Law of 1920, and the war against the I.W.W. "wobblies" embodied by the California Criminal Syndicalism Act of 1919. I was disappointed, however, by her barely mentioning the bribery scandal involving Justice Frederick Henshaw, who was accused (with very credible evidence) of accepting a bribe to change his vote, and thus change the outcome of a challenge to the will of Constock Lode

millionaire James G. Fair, which was exposed only after Henshaw resigned from the Court.

I would like to have seen a deeper mining of the explosive social issues underlying cases like *Bakke v. Regents of the University of California* and *Robins v. Pruneyard Shopping Center* in Professor Scheiber's summary of these cases, but he had an awful lot of ground to cover, and over all, his coverage of the divisive Bird Court era was nicely balanced.

Professors Scheiber and McClain lace their chapters with informative biographical information about the individual Justices who served on the Court during the eras they analyze. I would like to have seen more of that in the chapters by Professors Bakken and Salyer. Most of the Justices were products of the times in which they lived, and couldn't see beyond that. The greatest were those who could imagine a California far beyond what they knew. What kind of backgrounds produced those imaginations? With recurring controversy over how we go about putting Justices on the Court, (and removing them), the book would have benefitted from an assessment of how good or bad of a job we've done with this over the years. I think a strong case could be made that, with the exceptions of Governor Culbert Olson and the reincarnation of Governor Jerry Brown, the almost universal practice of Governors looking to the California Courts of Appeal for their Supreme Court appointees deprived the Court of the diversity of outlooks that comes from a healthy mix of judicial experience, political experience and academic experience.

The final two chapters cannot render the final verdicts on the reigns of Malcolm Lucas and Ron George, but they represent a valiant effort to be "fair and balanced." I thought the journalistic experience of both authors shone brightly, enabling them to focus greatest attention on the most salient cases and controversies.

All in all, this book is a rare treasure for the State of California. Few states can boast of a single volume analyzing the history of their State Supreme Court from the beginning to the present. It will be a valuable resource for all those seeking to put the work of the California Supreme Court into a context beyond the daily headlines. This includes California judges, lawyers, law professors and law students as well as journalists who cover the Court. And it's a welcome reminder that most of the controversies the California Supreme Court struggles with today go back a long way, to the aspirations of the teeming rabble that flowed over our mountains and into our harbors to create the diversity that is our strength.

Reviewed by Gerald F. Uelman,
Professor of Law Emeritus,
Santa Clara University School of Law.



In Memorium

WILLIAM I. EDLUND

William I. Edlund (Bill) was born August 31, 1929. He graduated from Stanford and earned his law degree at Berkeley in 1953. His state bar number was 25,013. There are now more than 190,000 attorneys in California. Shortly after graduation, Bill joined the law firm then known as Pillsbury, Madison & Sutro (Pillsbury) in San Francisco, where he practiced law for 43 years, before joining Bartko, Zankel, Bunzel & Miller (Bartko Zankel) 17 years ago. He frequently mentioned that he liked to change firms about every 40 years. At Pillsbury, Bill rose to become one of the premier leaders of the firm's litigation groups, where he spearheaded significant antitrust, securities, and other high-stakes litigation and appeals. Up until his unexpected death on Christmas Eve 2016, Bill, while at Bartko Zankel, was one of the most active, prodigious members of the firm. Like Theodore Roosevelt, Bill believed that life has no greater reward than hard work worth doing. He was indefatigable and a skilled and gifted lawyer who left no stone unturned in the pursuit of his clients' cause and justice. His noteworthy contributions include:

1. *Timberlane Co. v. Bank of America* 549 F.2d 597 (9th Cir. 1976) [establishing a new basis for extraterritorial antitrust jurisdiction and application of the act of state doctrine];
2. *Gaillard v. Natomas Co.* 173 Cal.App.3d 410 (1985) [representing Natomas in the leading case on derivative claim standing for prior shareholders];
3. *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156 (9th Cir. 1992) [representing Chevron in the leading case on intent in Schedule 13D disclosures];
4. *Stilson v. Reader's Digest* 28 Cal.App.3d 270 (1972), cert. denied, 411 U.S. 952 (1973) [representing the publisher in the leading case on rejection of class actions for invasion of privacy]; and

5. *Martin, et al. v. Merrill Lynch, Pierce, Fenner & Smith*
(N.D. Cal. No. 10-CV-40200 2010-2012)
[representing plaintiff financial advisors in a class
action for trade restraint; settled for \$17.2 million].

While Bill had many interests outside the law, most notably the work he did on behalf of the Law Center to Prevent Gun Violence, he was most comfortable practicing his profession. He was a fellow of the American College of Trial Lawyers, a Director of the Bar Association of San Francisco, and a Trustee of The United States Supreme Court Historical Society. Bill was a friend and mentor to many of the judges serving on the Northern District, and was a long-serving Director of both the Northern District and Ninth Judicial Circuit Historical Societies. Bill participated in numerous Northern District committees, providing the perspective of statesman of the bar, including Chair of the Task Force on Alternative Dispute Resolution for the District's Civil Justice Reform Act Advisory Group. He also served as a member and as Chair of the California Judicial Nominees Evaluation Committee, known as the JNE Commission, and was personally involved in the vetting, review and recommendations to the Governor's office for many of our state court judges.

Bill demonstrated on a daily basis how the practice of law should be meaningful and enriching, always striving for excellence. Whether he was championing a defendant wrongly accused by the government or counseling the CEO of a large corporation in bet-the-company litigation, he was guided by rightness and principle. He did not yield to the easy way out nor the convenient settlement, and he sought the day of justice in each case. He relished the fight and approached every legal battle with integrity and preparation. Bill was an extremely skilled trial and appellate counsel.

Bill was also a mentor to scores of lawyers and persisted tirelessly and graciously in the pursuit of what he believed was right and just. He was formal yet wry and wily. He was courteous to a fault by contemporary standards, always concerned that the many people who assisted him received recognition and respect for their contributions. He was a loyal and trustworthy friend to a vast array of people he encountered throughout the years, each of whom was enriched by his contributions to their success.

Bill was an active member of the Family Club and supporter of Stanford football. He was a devoted husband and father. Bill is survived by his wife Iris Edlund and his daughter Campbell Edlund.

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U.S. District Court, District of Alaska
U.S. District Court, District of Arizona
U.S. District Court, District of Hawaii
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, Eastern District of California
U.S. District Court, Northern District of California
U.S. District Court, Southern District of California
U.S. District Court, Eastern District of Washington
U.S. District Court, Western District of Washington