The Advocate
Official Publication of the Idaho State Bar
Volume 50, No. 11 November 2007

Attorney's Oath or Affirmation

"I do Solemnly Swear That: (I do solemnly affirm that:)

I will support the Constitution of the United States and the Constitution of the state of Idaho.

I will abide by the rules of professional conduct adopted by the Idaho Supreme Court.

I will respect courts and judicial officers in keeping with my role as an officer of the court.

I will represent my clients with vigor and zeal and will preserve inviolate their confidences and secrets.

I will never seek to mislead a court or opposing party by false statement or fact or law and will scrupulously honor promises and commitments made.

I will attempt to resolve matters expeditiously and without unnecessary expense.

I will contribute time and resources to public service, and will never reject, for any consideration personal to myself, the cause of the defenseless or oppressed.

I will conduct myself personally and professionally in conformity with the high standards of my profession.

SO HELP ME GOD. (I hereby affirm.)"

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NEWS AND NOTICES

ON THE COVER

Photo is of 2007 ceremony for new admittees as they take the attorney oath.

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President's Message

andrew E. Hawes

Judges Picked by Voters Are Better?

Contrary to conventional wisdom, elected judges may perhaps be better than appointed judges. This angle to judicial choice grabbed my attention too. Three law professors suggest just this. In August 2007, Stephen J. Coi, New York University School of Law; G. Mitu Gulati, Duke University School of Law; and Eric A. Posner, University of Chicago Law School, published a study testing the assumption that appointed judges are far superior to elected judges. This study is in the form of working paper number 357, second series, in the University of Chicago's John M. Olin Program in Law & Economics. Although more research is needed, the data suggests that elected judges are better qualified than appointed judges.[1]

In their study the professors quantified "judicial quality" using three forms of measurement and analyzing four different ways to become a judge.

Measurements

1. Productivity (total number of opinions issued)
2. Citations (how often a judge's opinion is cited in other states)
3. Independence (how often a judge writes a dissenting opinion)
4. Whether the opinion is in conflict with other judges from the same political party on the same court

Ways to become a judge

1. Partisan Election (judges run for election under a political party)
2. Non-Partisan Election (judges run for election with no political affiliation)
3. Merit Selected (judges appointed by Governor from a list of candidates selected by a non-partisan committee)
4. Governor or Legislature Appointment (judges appointed directly by the governor, the state legislature, or Direct Appointment)

The "Results"

Productivity

Score one for the *partisan-elected judge.* Utilizing the authors' standards, the paper reported that judges elected in partisan elections wrote more opinions than judges from the other categories. Specifically, partisan-elected judges wrote a mean total of 31.3 opinions per year versus 27.5 mean total for non-partisan elected judges, 23.6 mean total for merit-selected judges and 20.9 for direct-appointment judges.

Citations

However, according to the paper, *direct-appointment judges* excel the rest under this category. The data shows mean citation rates for direct-appointment judges—.872, followed by merit-selected judges—.774, non-partisan-elected judges—.712 and judges elected under partisan election—.572.

Independence

The study determined political affiliations by reviewing news articles, campaign contributions, and the party of the governor who appointed the judge. Based on this data the professors were able to determine party affiliations of 352 of the 408 state judges surveyed. Other factors the study considered were: salaries for high court judges, length of tenure, and the rate of change on each bench. The authors then measured instances where a judge issued an opposing opinion against a fellow co-partisan judge on the same bench in order to determine level of "independence." The study concludes that judges subject to partisan-election have the highest independence and non-partisan judges have the lowest independence, and that independence levels of elected and appointed judges are not that different.

My summary is just a brief sketch of the paper they wrote about the study, and I urge you to read the entire publication before you form an opinion.[1]. But, anticipating this message would run in the November 2007 *Advocate* sponsored by the Idaho Legal History Society, I discussed this paper with *Idaho Senator William E. Borah*[2] (sometime referred to as the Lion of Idaho) to gauge his reaction to such a study. We met for coffee at the Starbucks a few blocks from the Capitol.

According to Senator Borah, the measures utilized by Professors Coi, Gulati and Posner to gauge 'Judicial Quality' make as much sense as the rationale behind the League of Nations Treaty, a similar kind of mindset that the Senator said he and his peers spent many hours debating. In fact, he scoffingly said, "Just because a judge decides a case or a motion lickity split, it doesn't necessarily mean it is a quality decision. In fact, Andy, if you want a modern day comparison let's look at my triple venti vanilla latte. If the barista gets behind and starts to rush orders and fails to take the necessary time to put the right amount of vanilla syrup or properly foam the drink, I'll get a bad product. Conversely, I have had bad lattes in cases where I was the only customer in the store and the barista had all the time in the world."

On the topic of the paper's use of analyzing frequency of citation to determine whether one was better than other, Senator Borah had this to say, "Frequency of citation to measure 'judicial quality' doesn't make sense either. I submit that the frequency a case is cited is likely a result of that decision having a typical issue of law concerning a common set of facts. Lawyers often cite cases not necessarily because they are best reasoned, but because they are on point and in support of an argument they are presenting in front of the court."

Finally, Senator Borah and I had a chance to discuss his thoughts on the paper's definition of "independence." I

want to share with you his much more expansive definition of "independence." According to the Senator, " … 'independence' means more than disagreeing with other judges on the same bench who share the same political views. It means you can make the right decision regardless of political pressure or public opinion. After all, there may be cases where a judge frequently dissents not because it is well-grounded in law, but because the decision is more in line with popular opinion, the governor's desires, or based on his or her personal views or agenda. For instance, Judge Freemont Wood could have crafted a way to not include the following instruction to the jury in the Haywood Trial. He instructed the jury that a person cannot be convicted of a crime upon the testimony of an accomplice unless such accomplice is corroborated by other evidence. That one instruction tended to connect Haywood to the assassination of Governor Steunenberg. We lost the case because of that instruction. It is worthy to note, Judge Wood then failed to win re-election."

After my discussion with the Lion of Idaho, I concluded it is indeed difficult to mathematically measure "judicial quality." Perhaps this has something to do with the fact that the practice of law is an art, not a science. In fact, the Senator's words piqued my interest in the reaction of the voting public to the Haywood Trial. I decided I should track down Judge Freemont Wood to discuss his failed re-election campaign and to hear his views on the elected versus appointed judge study. Despite numerous voicemail exchanges, I was not able to connect with Judge Wood prior to writing this message. I will keep you posted.

Endnotes

[1] "Professionals or Politicians: Uncertain Empirical Case for an Elected Rather than Appointed Judiciary" at: http://www.law.uchicago.edu/Lawecon/index/html

[2] In the spirit of Mark Twain, anyone attempting to analyze whether Senator Borah would in fact criticize the paper based on the late Senator's background, record or psychological profile etc., shall be shot. These comments are used for the purpose of examining debate on the subject. I can tell you though I really do believe that Senator Borah would in fact have enjoyed a vanilla latte.

Andrew E. Hawes, *is an in-house attorney for Western Pacific Timber, LLC and Yellowstone Club World, LLC. He is serving a six-month term as President of the Idaho State Bar Board of Commissioners. He was elected as Commissioner to represent the Fourth Judicial District in 2005. He grew up in Boise, and is a graduate of Boise High School and the University of Denver. He obtained his law degree from the University of Idaho College of Law. He and his wife Gretchen live in Boise and have two daughters, Audrey and Greta.*

Check your current MCLE attendance records on the Idaho State Bar website at www.idaho.gov/isb. The website also includes a list of MCLE approved live courses, online courses and video/audio disks and tapes. Contact the Membership Department at (208) 334-4500 or jhunt@isb.idaho.gov if you have any questions about MCLE compliance.

NEWSBRIEFS

Chief Justice Daniel Eismann—Justice Daniel Eismann became the new Chief Justice when Chief Justice Gerald Schroeder retired this summer. The new Chief Justice plans to build on past success and continue to improve the quality and efficiency of the Idaho Judiciary. In addition to the drug courts he has long championed, Justice Eismann would like to add more family drug courts and child abuse courts. He also sees a need for expansion of mental health, felony and DUI courts. The Chief Justice says his new role will require an effort to balance administrative and additional meeting time with keeping current on his own court workload. He would like to travel to the counties to visit with local leaders, court personnel and judges to hear their concerns. Chief Justice Eismann realizes Idaho's population has grown tremendously, but judicial resources haven't kept pace. He would like to see the addition of updated software for the state's appellate courts as part of the state's ISTARS computer system.

Idaho Supreme Court Justice—Justice Warren E. Jones was sworn in as the 55th Justice on the Idaho Supreme Court by Governor C. L. "Butch" Otter. He fills the seat vacated by Chief Justice Gerald Schroeder who retired this summer. Justice Jones is not a newcomer to the Court having clerked for Chief Justice Joseph McFadden from 1968-1970. He is an Idaho native who was born in Montpelier, Idaho. He attended high school in Arco, graduating as valedictorian, attended the College of Idaho in Caldwell, receiving his B.A. in political science, magna cum laude. He received his J.D. from the University of Chicago Law School in 1968. After his second year of law school he received a Ford Foundation Fellowship for advanced study in criminal law and procedure at Northwestern University School of Law in Chicago. After clerking for Chief Justice McFadden he joined the law firm of Eberle, Berlin, Kading, Turnbow, McKlveen & Jones. At the time of his appointment he was the senior litigator specializing in all types of litigation. During his 37 years with the firm he tried over 122 jury cases to a verdict in 38 of Idaho's 44 counties. Justice Jones and his wife Karen, live in Boise.

Idaho Supreme Court Justice—Justice Joel Horton was appointed to fill the seat vacated by former Justice Linda Copple Trout who retired at the end of the summer. He is an Idaho native who was born in Nampa. He graduated from Borah High School in Boise. He attended the University of Washington and received a B.A. in political science before attending the University of Idaho College of Law and receiving his J.D. in 1985. He practiced law in Lewiston for one year before moving to Twin Falls where he was deputy prosecuting attorney from 1986-1988. He worked as a criminal deputy in the Ada County Prosecutor's office for three years, then worked for a couple of years as a Deputy Attorney General before returning to the Ada County Prosecutor's office as a deputy criminal prosecutor. In 1994, he was appointed as an Ada County Magistrate, serving as a family law judge until his appointment to the district court in 1996 by Governor Phil Batt. He served as a district judge until Governor C.L. "Butch" Otter appointed him to succeed Justice Trout. Justice Horton and his wife, the Hon. Carolyn Minder, Magistrate Judge Ada County, live in Boise.

Hon. Michael McLaughlin Receives Judicial Professionalism Award—Judge Michael McLaughlin was honored by the Idaho Judiciary for his judicial professionalism. A District Judge for the Fourth District, Judge McLaughlin is this year's recipient of the Granata Award, presented each year to an Idaho judge in recognition of his or her professionalism. The recipient of the prestigious award is selected by virtue of their significant contributions over a substantial period to the Idaho judicial system, the impact of their professionalism, and their status as a role model. The award is named for the late Judge George G. Granata Jr. who exemplified judicial professionalism during his more than 20 years on the Idaho bench.

Fourth District Judges Darla Williamson and Ronald Wilper nominated Judge McLaughlin for his leadership on a variety of issues including organizing bench/bar meetings in the local Fourth District, building and organizing the Ada County Mental Health Court, serving as a featured speaker at new judge's orientations and before other groups and for his leadership in enhancing the image of the judiciary and serving as an effective role model for fellow judges.

Judge McLaughlin graduated from the University of Idaho in 1973 and received his J.D. from the University of Idaho College of Law in 1976. He opened his own practice in 1976. From 1981 to 1984 Judge McLaughlin served as Elmore County Prosecuting Attorney and then returned to private practice. In 1991 he served as Magistrate Judge Fourth Judicial District until 1997 when he was appointed by Governor Phil Batt as District Judge for the Fourth Judicial District. Judge McLaughlin is an active member of his community and has been a member of numerous associations and organizations including the American Arbitration Association, CARES Advisory Board and the Idaho Supreme Court Media Committee.

Judicial Council Appointment—Dr. Ronald Nate, a professor of economics at BYU-Idaho was appointed by Governor C.L. "Butch" Otter to replace Helen McKinney on the Idaho Judicial Council. The appointment is for six years and will expire June 30, 2013.

Dear Colleagues,

As many of you are aware, William J. Brauner passed away January, 2005. Pursuant to the request of the family, I have obtained the files of his law practice, including all of the original wills that he did over his forty-eight years of practice. Any inquiries about his files and/or wills are available at (208) 466-0050.

Respectfully,
Alan J. Coffel

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Charitable Giving – The Idaho Law Foundation, Inc.

At this time of year, you have the opportunity to support charitable organizations through payroll deductions or direct contributions of time or money. We hope you will take the time to review the many worthy organizations and choose to support one or more of those in our Idaho communities. Lawyers are generous of their time, and I believe, also their money. Our experience is that lawyers support organizations in their communities; we hope you will continue that tradition.

Two of our Idaho Law Foundation programs provide services and education to Idaho families and students: the Idaho Volunteer Lawyers Program (IVLP) and Law Related Education Program (LRE). We encourage you to support these programs by contributing to the Idaho Law Foundation and/or IVLP or LRE.

About the Idaho Law Foundation

The Idaho Law Foundation has been in existence for 32 years. During that time, it has provided programs and activities to improve the public's access to and understanding of the legal system and to enhance the competency of practicing lawyers and judges through the Foundation's system of ongoing education. Charitable and educational goals are accomplished through the financial support and efforts of volunteers. All members of the Idaho State Bar are members of the Idaho Law Foundation.

The Idaho Law Foundation embodies the public service mission of the legal profession through programs that provide education and access to justice. Every day lawyers in our state serve the public and the profession through Law Foundation programs, including Idaho Volunteer Lawyers Program, Law Related Education and Continuing Legal Education.

Idaho Volunteer Lawyers Program

Poverty locks many people out of the legal system; the majority of whom are working families living in the shadow of prosperity. These families most often need help to preserve basic necessities such as shelter, child support, and protection from violence.

Idaho Volunteer Lawyers Program organizes private attorneys across Idaho to expand the legal resources available to low-income families. Through IVLP, the Idaho Law Foundation helps narrow the gap between legal needs and available resources.

Your investment in the IVLP will help the program provide the lawyers of Idaho with an effective vehicle for fulfilling their ethical obligation to ensure that citizens have access to competent legal representation. For information on how to help in our IVLP program please call (208) 334-4500 and ask for IVLP Director Carol Craighill, ccraighill@isb.idaho.gov or IVLP Legal Director Mary Hobson, mhobson@isb.idaho.gov

Law Related Education

Idaho's young people are its most valuable resource, offering their strength, energy, and unlimited potential. Law Related Education taps into the power of active learning to bring together lawyers, educators, and students to build on the vitality of our young people.

Students exposed to Law Related Education programs learn constructive ways to resolve conflict and increase critical, analytical, and problem-solving skills. These students have been shown to be better leaders, less likely to engage in violent and delinquent behavior, and have higher self-esteem.

Your support of LRE is an investment in young people who understand the privileges of a democratic society and contribute positively to Idaho now and into the future. For information on how to help please call (208) 334-4500 and ask for LRE Director Carey Shoufler, cshoufler@isb.idaho.gov

2008 Licensing – An Opportunity to Donate

Later this month you will receive your 2008 License Fee Notice. As part of the notice, the Idaho Law Foundation includes information about contributing to the Foundation. Please consider making a donation to the Idaho Law Foundation in addition to your licensing fee. Our goal is for every lawyer to give to the Foundation through licensing. Your tax deductible gift will help your profession better serve the public.

The Foundation relies upon the continued generosity of individual attorneys. The active contributors represent the true strength behind the Foundation's work. We are grateful for the continuing contributions of our established donors and welcome the support of new donors. Please join your colleagues who already support the work of the Foundation by sending in your contribution with your licensing forms.

Again, we encourage you to support all charitable organizations in your community. Lawyers are generally among the more fortunate – through your contributions of time and money you can help those Idahoans that are less fortunate.

District Bar Association Resolution meeting Calendar

1st District, Coeur d'Alene
Noon, Ameritel Inn
Wednesday, November 7

2nd District, Lewiston
7:00 p.m. Red Lion Hotel
Tuesday, November 6

3rd District, Nampa
6:00 p.m., Masonic Event Center
Thursday, November 1

4th District, Boise
Noon, Grove Hotel
Thursday, November 1

5th District, Twin Falls
Noon, The Ballroom
Friday, November 2

6th District, Pocatello
Noon, Juniper Hills Country Club
Thursday, November 15

7th District, Idaho Falls
Noon, Garcia's Restaurant
Friday, November 16

OATHS—PUTTING PRINCIPLES TO THE TEST

Hon. Gaylen L. Box
Magistrate Judge, Sixth Judicial District

> *"It is because we do not place confidence in the veracity of men, in general, when they profess to tell the truth; it is because we cannot rely on their good faith, when they make a bare promise, that we are driven to seek for something more satisfactory to ourselves by imposing upon them a more binding responsibility than that of their mere word."*
>
> Jes Endel Tyler[1]

We seek a solemn, formal declaration or promise to fulfill a pledge, often calling on something sacred as a witness, and subject to legal and sometimes moral penalty if broken; to command alliance to principals, to assure us of the lack of bad motives, and to give us trust. We ask, often demand, that people take an oath. Throughout history and even today oaths are reverently administered in public forums, sworn to and observed as a test of truth, allegiance and fidelity.

Courts routinely require oaths to invoke moral compulsion, along with legal sanctions, to assure truthful testimony. Oaths have also been used in a broader sense to divine one's true intentions and to assure loyalty to certain principles. They have, in some instances, been employed as tools of political, religious and social oppression. It is this latter type of oath that serves as the theme for this issue of *The Advocate* sponsored by the Idaho Legal History Society. When the power of government clashes with individual conscience there are sure to be some interesting stories told, and there is nothing like a "good mouth filling oath"[2] to turn the pages of history.

In the heat of the Civil War in 1862, Congress passed the "Iron Clad Oath" requiring that all attorneys and federal officials denounce the confederacy as a domestic enemy.[3] Idaho's governor and treasurer were Republican appointees; the Territorial Legislature was composed of a number of Confederate Democrats whose salary was paid, in part, from the federal treasury. No federal money was to be paid to public officials who did not take the oath. In this issue, Owen Wister's short story, *The Second Missouri Compromise,* is an interesting and amusing account of the chaos created by the Iron Clad Oath when payday rolled around at the conclusion of the fourth session of the Idaho Territorial Legislature.

Oaths were not limited to public officials and attorneys. Concern over Mormon influence on civil government caused the 1885 Idaho Territorial Legislature to pass a law stating that no member of the Church of Jesus Christ of Latter Day Saints could vote, hold public office or sit on a jury in Idaho. The "Mormon Test Oath" was imposed.[4] By the time of the Constitutional Convention in 1889, the "Mormon question" was still unresolved. In his article, Professor Dennis Colson, noted author of *The Idaho Constitution, the Tie That Binds*, (University of Idaho Press 1991), explains the discussion of the Mormon Test Oath at the Idaho Constitutional Convention.

One might think that the requirement of an oath, being a mere formality, would not stop those intent upon evading the law from simply taking the oath and continuing with their involvement in the prohibited activity. But oaths were not mere "fossils of piety"[5]. They carried severe penalties in the form of prosecutions for perjury when violated. Judge David Evans recounts the pursuit of his great grandfather, D.L. Evans, by the famous anti-Mormon Fred T. Dubois and, after taking the oath, his prosecution for perjury in 1888 by the equally anti-Mormon D.W. Stanrod.

World War II brought a revival of the oath requirement. On February 19, 1942, President Roosevelt signed Executive Order 9066. Under the terms of the Order, some 120,000 people of Japanese descent living in the United States were removed from their homes and placed in internment camps. Camp Minidoka, located near Hunt, Idaho, housed nearly 10,000 of these evacuees in tar-paper barracks that had no insulation, running water, or interior walls, and that were heated by coal-burning stoves. The camp was surrounded by barbed wire and guarded 24 hours a day by watch dogs and armed sentries.[6] To enjoy these "amenities" residents were required to answer "yes" to a two-part oath, agreeing to serve and defend the United States. Those who answered "no" were treated to harsher conditions. The article by Professor Bob Sims relates the quandary of conscience suffered by people of Japanese descent when they were required to take the oath.

The Cold War and the Red Scare following World War II led many states, including Idaho, to enact legislation requiring public officers and employees, including public school teachers and college professors, to sign oaths of allegiance to the United States and the State of Idaho. The Loyalty Oath enacted in 1963 required the public official to "… swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the government of the United States or of the state of Idaho by force or violence or other unlawful means." It further stated that "… within the five (5) years immediately preceding the taking of this oath (or affirmation) I have not been a member of any party or organization, political or otherwise, that advocates the overthrow of the government of the United States or of the state of Idaho by force or violence." The public official also had to swear that "during such time as I hold the office, I will not advocate nor become a member of any party or organization, political or otherwise, that advocates the overthrow of the government of the United States or of the state of Idaho by force or violence or other unlawful means".[7]

Of course there is "no constitutionally protected right to overthrow a government by force, violence, or illegal or unconstitutional means", and "no constitutional right is infringed by an oath to abide by the constitutional system in the future."[8] In most

instances where the oath is applied in a manner consistent with due process and does not amount to an *ex post facto* law, rendering prior conduct unlawful, or a *bill of attainder*, tainting a certain group of people and punishing them without trial, courts have upheld the legislature's power to require oaths. Yet there is a good deal of disfavor for oaths as expressed by Justice William O. Douglas in a dissenting opinion:

> "We have condemned loyalty oaths as 'manifestation(s) of a national network of laws aimed at coercing and controlling the minds of men. Test oaths are notorious tools of tyranny. When used to shackle the mind they are, or at least they should be, unspeakably odious to a free people.'"[9]

Many Idaho teachers and professors were of the same mind as Justice Douglas. Kathy Hodges, in her article, describes their outrage and explains how nearly 100 plaintiffs from schools and universities sued, resulting in the United States District Court decision in *Heckler v. Shepard*.[10]

In Idaho, oaths have been put to the test. The day after Democratic Confederate legislators submitted to the oath in exchange for their pay, the U.S. Supreme Court found the Iron Clad Oath unconstitutional as to attorneys and teachers.[11] In 1893, the Mormon Church agreed to abide by the anti-polygamy statutes. The Idaho Legislature rescinded the statutory Mormon Test Oath. Nearly a hundred years later in 1982, Idaho voters struck the Mormon Test Oath from the Constitution. The fate of D.L. Evans, a victim of the Oath, was placed in the hands of a jury. In 1988, Congress acknowledged the fundamental injustice of the evacuation, relocation, and internment of resident aliens of Japanese ancestry during World War II and apologized on behalf of the people of the United States.[12] In 1965, the United States District Court for Idaho found the Anti-Communist Loyalty Oath unconstitutional.

When principles are tested by the requirements of an oath courts are often called upon to determine if there is an infringement of individual rights. In the midst of this stands the lawyer. It is no small matter then to note that before embarking on a career in law the lawyer must take an oath (see box). The newly admitted lawyer must affirm that he or she will uphold the very system of laws that protects every individual from unconstitutional action by the government and to do so in accordance with rules of professional conduct.

This is the second issue of *The Advocate* sponsored by the Idaho Legal History Society. We hope you enjoy the thoughtful articles devoted to the appreciation of significant legal events in Idaho's history. Our thanks go out to the authors as well as Judy Austin, Rita Ryan and Duff McKee for working so hard on this issue. To become a member of ILHS an application form can be found at: www.id.uscourts.gov/comm/ilhs/oralhistory/htm

Endnotes

[1] *Oaths, Their Origin, Nature and History*, Jes Endel Tyler, London, John Parker, Wes Strand 1534, at http://books.google.com/books

[2] *William Shakespeare (1564–1616), British dramatist, poet. Hotspur, in Henry IV pt. 1, act 3, sc. 1, l. 249-50 (1598).*

[3] Leonard Arrington, *History of Idaho,* Vol. 1 page 288. University of Idaho Press 1994.

[4] Merle Wells, The Idaho Anti Mormon Test Oath 1884-1892. *The Pacific Historical Review*, Vol. 24, No. 3 (Aug., 1955), pp. 235-252

[5] George Santayana; (American philosopher) Interpretations of Poetry and Religion

[6] http://www.historyonthenet.com/WW2/japan_internment_camps.htm

[7] *Idaho Code* § 59-401, as amended by ch. 210, Idaho Session Laws (1963).)

[8] *Cole v. Richardson* 405 U.S. 676, 92 S.Ct. 1332 U.S.Mass. 1972.

[9] id

[10] 243 F.Supp. 841 (D.C.Idaho 1965)

[11] *Cummings v. Missouri,* 4 Wall. 277 (1867); *Ex parte Garland,* 4 Wall. 333 (1867).

[12] Civil Liberties Act 1988.

About the Author

Hon. Gaylen Box *is a Magistrate Judge in Pocatello, Idaho. He was admitted to practice law in Idaho in 1978, and before the Shoshone Bannock Tribal Court in 1983. He is Co-chair of the Tribal State Court Forum and Chairman of the Publications Committee of the Idaho Legal History Society. He is an avid outdoorsman, and greatly enjoys the study of history.*

Attorney's Oath or Affirmation

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I will respect courts and judicial officers in keeping with my role as an officer of the court.

I will represent my clients with vigor and zeal and will preserve inviolate their confidences and secrets.

I will never seek to mislead a court or opposing party by false statement or fact or law and will scrupulously honor promises and commitments made.

I will attempt to resolve matters expeditiously and without unnecessary expense.

I will contribute time and resources to public service, and will never reject, for any consideration personal to myself, the cause of the defenseless or oppressed.

I will conduct myself personally and professionally in conformity with the high standards of my profession.

SO HELP ME GOD. (I hereby affirm.)"

The oath taken by all attorneys who become members of the Idaho State Bar.

Idaho's Founders and Their Mormon Test Oath

Dennis C. Colson
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> *A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect.*
>
> *Sir Walter Scott*

The Mormon Test Oath

The Idaho Territorial Legislature in 1885 created the Test Oath Statute, or more precisely and frankly, the Mormon Test Oath Statute.[1] Congress had three years earlier made bigamy, polygamy and cohabitation a crime in the territories, and stipulated that any person convicted of these crimes "shall not be entitled to vote or be eligible for election or appointment" to public office. Congress also authorized a challenge for cause for any juror who "is or has been living in the practice of bigamy, polygamy or unlawful cohabitation" and for any juror who "believes it right for a man to have more than one living and undivorced wife at the same time."[2]

The Idaho Test Oath went far beyond the federal statute in several important respects. Congress declared that bigamists and polygamists were not entitled to vote or hold public office. The Idaho Act required voters[3] to take an oath before voting, swearing that they were not bigamists or polygamists. A false oath was a crime punishable by a fine of $500, or 250 days imprisonment. The Test Oath, as a legal device, could be far more widely and immediately implemented than the prohibitions enacted by Congress.

Hart's Exchange (Central Hotel) at the corner of 7th and Idaho, site of the legislature meetings in Boise, Idaho. Courtesy of Idaho State Historical Society (ISHS 2111.)

Just as importantly, while the Edmunds Act was a proscription on those practicing bigamy and polygamy, the Idaho oath required the voter to swear that he (1) did not practice bigamy or polygamy; (2) did not belong to any organization which "teaches, advises, counsels or encourages" its members to engage in such practices; (3) that he did "not either publicly or privately, or in any manner whatever, teach advise, counsel or encourage any person to commit the crime of bigamy or polygamy;" (4) and finally the he would "regard the constitution of the United States, and the laws thereof, and of this territory as interpreted by the courts, as the supreme law of the land."

Constitutional challenges to the Test Oath were soon raised. Innis[4] was willing to swear that he was not a bigamist or polygamist, but refuse to go further and was denied the right to vote. He filed suit alleging that the denial violated the freedom of religion guaranteed by the First Amendment to the United States Constitution and sought $1,000 in damages.

H.S. Wooley of Paris precinct was willing to take the entire oath, but still was denied the right to vote because Registrar C. N. Watkins knew Wooley to be a member of the Mormon Church. Wooley claimed because he was a member of the Idaho Mormon Church, the denial violated the First Amendment. Wooley sought a writ of mandamus, an order from the Court ordering that he be registered and allowed to vote.[5]

Idaho's Territorial Supreme Court denied the claims made by Innis and Wooley. Justice Broderick wrote the 1888 opinion for the Court in *Innis*. Relying upon the writings of Justices Story and Cooley, Justice Broderick concluded:

> Authorities might be multiplied, but the result of all is that the government must not interfere with opinion, but may with conduct. Laws are made for the government of actions, and when the conduct and actions are criminal it is no excuse to say that these things, though forbidden by the law, are done in the name of religion … . To permit this would make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.[6]

Justice Broderick examined the Test Oath. He concluded that while the "clause was undoubtedly open to criticism," it nevertheless withdrew the right of suffrage from "persons who encourage, aid and abet those who are endeavoring … against all law, to overthrow a sound public policy."[7] Besides, the Justice wrote, "The right of suffrage is not a natural right, nor an unqualified personal right. It was not included in the "rights of property," but rather "is a right conferred by law, and may be modified or withdrawn by the authority which conferred it."[8]

Chief Justice Weir wrote the 1889 opinion for the Court rejecting Wooley's claims under the First Amendment. Like Justice Broderick, Justice Weir opined that while Congress and the Territory were deprived of "all legislative power over mere

opinion, they are left free to reach actions which are of a criminal nature, and are in violation of social duties, and subversive of good order."[9] Regarding membership alone, Justice Weir wrote that "Orders, organizations, and associations, by whatever name they may be called, which teach, advise, counsel, or encourage the practice or commission of acts forbidden by law, are criminal organizations."[10]

Davis v. Beason,[11] a third case testing the constitutional validity of the Test Oath, was proceeding as the Idaho Constitution was being written and ratified by Congress. Just before the constitutional convention, Samuel D. Davis was indicted in April of 1889 in Oneida County and charged with giving a false oath. Just after the convention on September 12, 1889, Davis was convicted, and filed directly to the United States Supreme Court for a writ of habeas corpus. Congress waited for the decision of the Court in *Davis* before admitting Idaho into the Union on July 3, 1890.

The Mormon Test Oath led directly to Idaho statehood in 1890. From 1872 until 1885, the Territorial Legislature was controlled by a coalition of Democrats and Mormons. By the summer of 1889, no Mormon could vote and the Legislature came under control of the Republicans, supported by the Independent Anti-Mormon Party. Republicans swept the national elections in 1888, winning the White House and both Houses of Congress. In an attempt to perpetuate their control, Congressional Republicans invited six Republican Territories to join the Union, and to send Republican Congressmen and Senators to Washington. The six were Washington, Montana, North Dakota, South Dakota, Wyoming, and Idaho.

Free Exercise of Religious Faith and the Test Oath in the Constitution

Two committees of the Constitutional Convention recommended the Test Oath be written into the article it was reporting. The first was the Declaration of Rights Committee which proposed that the oath qualify the guarantee of religious liberty in Idaho. Article I, § 4 as proposed by the Committee forever guaranteed "the exercise and enjoyment of religious faith and worship," then added the critical qualifications: "but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, or excuse acts of licentiousness or justify polygamous or other pernicious practices, inconsistent with morality or the peace or safety of the state." The guarantee of religious freedom was further qualified by the Committee: "nor to permit any person, organization, or association to directly or indirectly aid or abet, counsel or advise any persons to commit the crime of bigamy or polygamy, or any other crime."[12]

It was the Republican leadership that controlled the convention and the committees that proposed to write the Test Oath into the new constitution. When the Declaration of Rights Report reached the floor of the convention, Democratic leadership quickly moved to prove they were as anti-Mormon as the Republicans. George Ainslie (D-Boise) proposed that another sentence be added to the qualifications on religious liberty: "Bigamy and polygamy are forever prohibited in the state, and the legislature shall provide by law for the punishment of such crimes." Ainslie wanted to know "if the Republicans are honest in their denunciations of bigamy and polygamy." He called upon the Democrats and Republicans to work together to "stamp out this twin relic of barbarism." His motion passed on a voice vote.[13]

Weldon B. Heyburn (R-Shoshone) wanted even stronger language than that proposed by the committee, and moved to require an oath be given before exercising the right of franchise or acquiring any portion of the public lands. Heyburn argued that his amendment was necessary "in order that it may never be said in argument in the court hereafter, or elsewhere, that the makers of this constitution did not intend to except" Mormons from the protections afforded by the Idaho Constitution.[14]

Heyburn's argument reflected the constitutional law of the day: the Bill of Rights was a limitation on Congress (and the territories), but had not been incorporated into the Fourteenth Amendment and therefore was not a limitation upon state legislation. During the debate on the right to jury trial at the convention, William H. Clagett (R-Shoshone) explained that it was as far beyond the power of the United States Supreme Court to interfere with the Idaho Constitution as "for the Shah of Persia to undertake to interfere with the Pope's decree."[15] State legislation was limited only by the state constitution, and Heyburn was anxious to write the First Amendment interpretations in *Innis* and *Wooley* into the Idaho Constitution.

In the end Heyburn's zealous amendment was defeated. Other delegates were more cautious and raised objections. The matter was within the jurisdiction of the Suffrage Committee. The United States Constitution limited Idaho's power on the public lands. Too many qualifications would make Congress think Idaho was wild, and cause them to reject the work of the convention. In the end, the proposed amendment might restrict rather than empower the Legislature in the future.

The Convention rejected Heyburn's amendment, but was willing to further limit the free exercise of religious faith in Idaho. Charles A. Clark (D-Ada) proposed to amend the section by adding, "No person shall be required to attend or support any ministry or place of worship, religious sect or denomination or pay tithes against his consent."[16] James M. Shoup (R-Custer) did not understand how one could be required to pay tithes by law. Clark quickly explained, "If the gentleman lived in a Mormon settlement and the water right was held by the church and he did not pay tithes and his water right was cut off, he would find a mighty strong compulsion to pay his tithes." The amendment quickly passed by a voice vote,[17] and soon the entire section passed.

Suffrage Theocracy

While the Declarations of Rights Committee sought to qualify the freedom of religious faith in Idaho with the Test Oath, the Suffrage Committee sought to define an Idahoan with the Test Oath. The proposed Article VI, § 3 expressly and thoroughly disfranchised all Mormons:

> No person is permitted to vote, serve as a juror, or hold any civil office who … is a bigamist or polygamist, or is living in what is known as patriarchal, plural or celestial marriage, or in violation of any law of this state, or of the United States, forbidding any such crime; or who, in any manner, teaches, advises, counsels, aids, or encourages any person to enter into bigamy, polygamy, or such patriarchal, plural or celestial marriage, or to live in vio-

> lation of any such law, or to commit any such crime; or who is a member of, or contributes to the support, aid or encouragement of, any order, organization, association, corporation, or society which teaches, advises, counsels, encourages, or aids any person to enter into bigamy, polygamy or such patriarchal or plural marriage, or which teaches or advises that the laws of this state prescribing rules of civil conduct, are not the supreme law of the state… .

When § 3 came to the floor of the Convention, George Ainslie (D-Boise) again assured the delegates that "there was no violent difference of opinion between the minority and majority as to the restrictions to be placed in the constitution upon these bigamists and polygamists, or Mormons, if we are going to use the word for all of them, as to disfranchising them thoroughly."[18] James Reid (D-Nez Perce), chairman of the Democratic caucus at the convention, echoed Ainslie's assurance that "the question we are all agreed upon should be the downing of the Mormons."[19]

While Republicans and Democrats were joined in downing the Mormons by adopting § 3, they were sharply divided over § 4 of the Suffrage Article. The Republican members of the Committee proposed that "The legislature may prescribe qualifications, limitations, and conditions for the right of suffrage, additional to those prescribed in this article, but shall never annul any of the provisions in this article contained." The Democratic members of the Suffrage Committee filed a minority report rejecting § 4 because they feared the legislative power might be used against "some of the secret societies, Masons and Odd Fellows, and some were of the opinion that it might reach as far as Catholics."[20]

By the time the section came to the floor for debate, the parties had reached a compromise. Language would be added to § 4 which would grant power "concerning the classes and persons referred to in the immediately preceding section.[21] James Beatty (R-Alturas), Chairman of the Suffrage Committee, introduced the compromise and was immediately joined by Democrats speaking in support. But, the life of the compromise was quickly cut short when William H. Clagett (R-Shoshone) took the floor to speak against it. Clagett was President of the Constitutional Convention; a gifted orator and one of the most influential delegates. His anti-Mormon credentials were also among the strongest.

Clagett did not base his opposition to Beatty's compromise upon licentiousness or polygamous and other pernicious practices, inconsistent with morality or the peace or safety of the state. Instead, he warned of a Mormon theocracy capturing the new state: "If you put this substitute in here your Mormons will be in power in this territory inside a year." [22] "Democratic friends" had entrapped Beatty into the compromise. It was a trap because under the compromise "inside of a year you would have the Mormon priesthood entrenched so strongly in the strong places in that state that nothing but an avalanche or a revolution would ever be able to dislodge them."[23]

Drew W. Strandrod (D-Oneida) had anti-Mormon credentials second only to Clagett at the convention and joined him in the argument. He was worried about a "despotic theocracy," and cautioned against placing too much emphasis on polygamy: "the least evil existing in that church today is this practice. It is a theocracy that is used for the purpose of securing political influence in the country where it exists."[24]

John Morgan (R-Bingham) gave the most damning descriptions of Mormons, and was adamant in his opposition to them: "George Cannon rules this church with a rod of iron. He has a despotism more tyrannical and more despotic than the despotism of the czar of Russia today. He tells one man to go, and he goeth; another to come, and he cometh." Morgan described the rod of iron: "The man who dares to raise his voice against this organization, either privately or publicly, if it is discovered, has the water cut off; his stacks are burned, his cattle are killed upon the range, his barn is burned, and perchance his house, and he is a ruined man. For this reason they dare not vote, they dare not talk, they dare not exercise any of the rights that an American citizen may exercise in this country."[25]

The convention delegates were convinced that Mormons sought to subvert the United States government. John Morgan stated that "The whole intent and purpose of this organization is to overthrow the government of the United States. When the North and South were engaged in a death struggle only a few years ago, Brigham Young and other prophets of that church, in their public meetings hailed the day when these brothers were warring, and said the time would come when this government would be destroyed and they would be the ruling power, and they prayed God that the day might be hastened, might come soon."[26]

The anti-Mormon sentiment of the delegates was encouraged by a Congressional delegation touring the West in the summer of 1889. The delegation was led by Congressman Burrows, who was expected to become the next Speaker of the House. Burrows warned the Idaho convention that his delegation had just been in Salt Lake City, and that he had learned privately that the Mormons were planning a large immigration, "to such an extent as to absolutely dominate . . . civil affairs."[27] Burrows explained that polygamy must be prohibited, but that it was not the real problem. He described a sermon he heard in the great cathedral where a church leader said, "We are loyal to the constitution of the United States, we are loyal to its flag, but I will be frank with you and state that when we receive a revelation from on high that is in conflict with either of those, we will follow the revelation to the death."[28] Burrows was outraged by this claim of divine revelation and drew applause when he declared, "No body of people in this country can dominate, either in the state or in the nation that acknowledges a higher power than the power of the government in civil affairs."[29]

The broad legislative power provided for in § 4 was necessary because those sponsoring it were skeptical about the claims of divine revelation made by Mormon leaders, and warned of the day that polygamy would be abandoned in order to advance the theocratic mission of the Church. John Morgan (R-Bingham) told the Convention that should the Mormons "by revelation renounce polygamy and bigamy and seem to abandon these practices that now exist in the church, then delegate to the legislature the power to provide against anything of that character."[30]

William H. Clagett (R-Shoshone) made the same argument, flashing the oratory for which he was so well-known: "The state is dealing with an adversary which does assume as many shapes as Proteus ever assumed of old, and can assume any shape it sees

fit; can profess anything, and by virtue of its pretense that it receives revelations from on high, may relieve its members from the obligations of civil conduct." His advice was to "leave the power of the state as broad as the capacity of this sect, to change the front and manner of its attack and its defense."[31]

Because They Voted the Democratic Ticket

There were, of course, no Mormons on the convention floor to offer a rebuttal. But there were Democrats, and from their point of view, the Test Oath was all about partisan politics. Aaron Parker (D-Idaho) argued, "the sole object of that test oath legislation in our legislatures has been for no other purpose than to disfranchise these people in southeastern Idaho, not because they were polygamists, not because they were Mormons, but because they voted the democratic ticket."[32] Peter J. Pefley (D-Ada) objected to "the granting of unheard of powers to the legislature in order to regulate the right of suffrage to suit the Republican party and keep it in power forever."[33]

Other Democrats argued rejection of the Beatty Compromise was a breach of the bi-partisan nature of the Convention. James Reid (D-Nez Perce) argued that, "The minority have some rights here, and I propose at this time to show where the minority has been treated with injustice." Orlando Batten (D-Alturas) joined Reid, the Democrats were "being treated in that rank bare-faced spirit of partisanship." He complained, "We were invited here as to an unpartisan feast, but we discovered, I am sorry to say it - I hate to use such a harsh term - that we have been entrapped and decoyed into a regular partisan camp … . We have been flouted and outreached in this matter without having in any manner violated our faith. I do charge it upon the opposition that they have broken faith . . ."[34]

William Clagett (R-Shoshone) was quick to rebut these claims of party politics. The majority report was not calculated for political advantage; instead, "[I]t is not because we would in any way expect to ever obtain any party advantage out of this matter, but it is because the republicans have been freely, each one for himself, acting upon this question."[35] Furthermore, according to Claggett, non-partisan does not mean equal: "Does a non-partisan convention require that both political parties shall be equally represented? Certainly not … a non-partisan convention consists of a convention in which all parties shall be represented according to their voting strength, and so are represented on the floor of this house."[36]

While Clagett denied that partisan politics were involved, other delegates made political advantage the premise of their argument. John Morgan (R-Bingham) argued that "within the last ten months the democratic party met in convention in the city of Boise and had in its organization, in its councils nominating candidates for office in this territory, a full-fledged Mormon."[37] Morgan warned his Republican colleagues, "I say we may well fear that possibly somebody in the Democratic Party may hereafter desire to get these Mormons into their organization in order to vote for their candidates."[38]

Weldon Heyburn (R-Shoshone) cynically responded to the Democrats. "All this talk, this nice palaver about constitutional conventions or any other political body—because this is a political body, convened here for political purposes, for the purpose of forming a government—when you talk to me in this nice palaver about this body being non-political, non-partisan, I smile or let it pass by as a rule, because there is no such thing."[39] Heyburn proudly subscribed to the partisan's creed. "I have never at any period since my majority disclaimed or disguised the fealty I owe the party to which I belong. Whenever political principles are being discuss or supported, I am always found on the side of my political party, not because it is my party, but because I believe it is the right side … ."[40]

One of the Most Liberal, Tolerant and Enlightened in the American Union

Only Peter J. Pefley (D-Ada) rose to protest writing the Mormon Test Oath into the Idaho Constitution. Pefley began by saying that he often wished to be a great orator, but never more than at that moment because "the very essence of the privilege of American citizens is endangered in this territory."[41] Pefley began, "American citizenship is the highest work than can exist . . . With it a man can travel the wide world over and all the time be protected by the hues of the stars and stripes." "Yet," continued Pefley, "if he landed the next day . . . in Idaho, and was a Mormon, and some of these statesmen should see him put a two-bit piece into a Mormon contribution box, he would be disfranchised and barred from holding public office."[42]

Pefley recalled the history of religious persecution in the United States. "Political and religious persecution are supposed to have died at the termination of the revolution; but it appears that Idaho is again an exception, and that the bloody history of two hundred years ago is about to repeat itself, in sentiment at least, with all its hideousness in this state, which should be one of the most liberal, tolerant and enlightened in the American Union."[43] Pefley concluded his oration by asking, "I have a request to make of a certain kind of people on this floor, and that is, when you shall reach that beautiful shore and look over the jasper rampart into that dark abyss, will you bear witness in heaven that Pefley did not vote on this occasion to punish the innocent with the guilty, and that I shall have credit at least for one righteous act on the great book."[44]

This was the second time Peter Pefley excited the convention by being the only voice to dissent from an otherwise unanimous passion. Earlier in the proceedings, Pefly proposed to delete the phrase "grateful to Almighty God" from the Preface[45] of the Constitution. For this he was labeled an "infidel;" other delegates sought to expunge his comments from the convention record. At the close of the convention, Pefley refused to sign the Constitution. He explained: "I always think consistency is a jewel highly prized, and inasmuch as there are sections in there that I could not endorse when they passed as sections or articles, I cannot conscientiously sign the constitution and therefore ask to be excused." Frank P. Cavanah (D-Elmore) immediately moved to deny Pefley his pay if he refused to sign. Clagett ruled Cavanah out of order, but Pefley had the last word, "I do not ask any pay, and I would not have it, and the gentleman can save his motion."[46]

The Woodruff Revelation

The United States Supreme Court denied the writ of habeas corpus sought by Samuel Davis on February 3, 1890. Justice Field, writing for the Court, condemned bigamy and polygamy:

> Bigamy and polygamy are crimes by the laws of all civilized and Christian countries … . They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment.[47]

Furthermore, Justice Field agreed with the reading given the First Amendment by the Idaho Court in *Innis* and *Wooley*: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[48]

Senator Orville H. Platt (R-Conn.) introduced an Idaho Admission Bill on December 8, 1889; Fred T. Dubois, Idaho's Territorial delegate, introduced a similar bill in the House ten days later. A number of Committee hearings considered the proposal in the months that followed. J.W. Wilson, who defended Samuel Davis before the United States Supreme Court also defended the Mormons before the committees, accompanied by William Budge, a prominent Mormon Bishop. The Democrats in Congress, like the Mormons, opposed Idaho's statehood. Four Republican territories had already been made into Republican states. But, Republicans had the votes and Idaho was invited into the Union. President Harrison signed the Admission Act on July 3, 1889.[49]

The revelation foreseen by William Clagett and other delegates was announced by Mormon President Wilford Woodruff on September 20, 1890, one week before Idaho's first state elections. President Woodruff referred to the federal anti-polygamy statutes and the cases upholding them, and announced that it was his intention "to submit to those laws and to use my influence with the members of the church over which I preside to have them do likewise." President Benjamin Harrison accepted the declaration, and agreed to amnesty for any polygamous relations established prior to the revelation.[50] Idaho politicians soon fell in line, and on February 3, 1893, the legislature repealed the Test Oath and Mormons were once again franchised.[51]

Endnotes

[1] 1885 Sess. Laws 110.

[2] Ibid.

3. 22 Stat. 30-32.

[4] Not every voter was required to take the oath, but any person offering to vote could be orally challenged by any elector entitled to vote at the election. Election judges were required to challenge anyone "he knows or suspects not to be qualified."

[5] *Innis v. Bolton*, 2 Idaho 442, 17 Pac 264 (1888).

[6] *Wooley v. Watkins*, 2 Idaho 590, 22 Pac. 102 (1889).

[7] 2 Idaho 442, 449, 17 P. 264, 267-68.

[8] Ibid. at 450, at 268.

[9] Ibid. at 442, at 268.

[10] 2 Idaho 590, 601, 22 P. 102, 105.

[11] Ibid. at 601, at 106.

[12] 133 U.S. 333 (1890).

[13] Hart, I. W., ed., *Proceedings and Debates of the Constitutional Convention of Idaho*, 2 vols. Caldwell: Caxton Printers, Ltd. (1912) 129. [Hereinafter cited to as *Proceedings and Debates*.]

[14] Ibid. at 133-135.

[15] Ibid. at 135-142.

[16] Ibid. at 248.

[17] Ibid. at 145.

[18] Ibid. at 145-46.

[19] Ibid. at 931.

[20] Ibid. at 933-935.

[21] Ibid. at 931.

[22] Ibid. at 943.

[23] Ibid. at 931-933.

[24] Ibid. at 983.

[25] Ibid. at 953-55.

[26] Ibid. at 1045.

[27] Ibid. at 1040.

[28] Ibid. at 719.

[29] Ibid. at 720.

[30] Ibid.

[31] Ibid. at 953-55.

[32] Ibid. at 931-933.

[33] Ibid. at 1035.

[34] Ibid. at 1016.

[35] Ibid. at 974-76.

[36] Ibid. at 983.

[37] Ibid. at 977.

[38] Ibid. at 1038.

[39] Ibid. at 1039.

[40] Ibid. at 998-99.

[41] Ibid. at 998.

[42] Ibid. at 1014.

[43] Ibid. at 1015-16.

[44] Ibid. at 1017.

[45]. Ibid. at 1018.

[46] The Preface states: "We, the people of the state of Idaho, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare do establish this Constitution."

[47] *Proceedings and Debates* 2043.

[48] Ibid. at 341.

[49] Ibid. at 344.

[50] Dennis C. Colson, *Idaho's Constitution: The Tie That Binds* (University of Idaho Press 1991) 220-223.

[51] Proclamation of Amnesty and Pardon, Vol. IX, Messages and Papers of the Presidents, 368.

About the Author

Dennis C. Colson *recently retired as a professor at the University of Idaho College of Law, where he taught state constitutional law, Indian law, contracts, and other subjects. He is a widely recognized authority and consultant on the Nez Perce treaties as well as on state constitutional history. His treatise, Idaho's Constitution: The Tie That Binds, is a landmark work of scholarship. He is also well known for his monographs on William H. Clagett, who presided over the Idaho state constitutional convention. The Class of '07, with support from the College of Law, has established a student scholarship in Professor Colson's name.*

Titans Tug of War

Hon. David L. Evans
Magistrate Judge, Sixth Judicial District

The decade leading up to the admission of the Idaho Territory as a state was characterized by considerable political turmoil and ostracism from political participation of one group of the early pioneer settlers, the members of The Church of Jesus Christ of Latter-day Saints, or "Mormons" as they were and are commonly called. This article attempts to capture some of the background and flavor of the times during that dramatic period leading up to statehood, especially as it relates in part, to some of the political leaders of that time and the consequences of the Idaho Test Oath to David Lloyd Evans, great-grandfather of the author, and other Mormon politicians of the day.

Polygamy and Politics

On August 29, 1852, Orson Pratt publicly announced the revelation that Joseph Smith received, over ten years earlier, that "the true marriage relationship: as God is polygamous, so then are men to be."[1] This doctrine was founded upon the Bible's example of the patriarchs of ancient Israel, Abraham, David, and Solomon. One historian commented, "Many Mormons accepted and defended polygamy, but few actually entered plural marriages. The majority of those who did were leaders in the church; presumably proven loyalty was an important consideration."[2] During the nearly 40 years that polygamy was an accepted practice of the Mormon church, less than 5 percent of all the Mormon men had plural wives. In Idaho, no more than 3 percent practiced plural marriage.[3]

Fred T. Dubois, 1890. Courtesy Idaho State Historical Society (ISHS 1148-5)

Why then, were the "Saints" of Idaho persecuted for this culturally unorthodox doctrine, far beyond the measure of their brethren to the south in Utah? It was because the Mormons in Idaho were in the minority and they had become the swing votes for political control of the territory. This fact soon became quite apparent to a young, soon to be politician, who arrived in the territory in 1880. Fred T. Dubois landed at Blackfoot by rail from his native state of Illinois at the age of 31. He used the polygamy issue to cleverly catapult himself into a position of prominence in Idaho's local politics, and eventually became Idaho's United States Senator.

Dubois arrived in Blackfoot with his brother, Jesse Dubois, Jr., a new doctor, and both recent graduates from the esteemed Yale University. Jesse had just landed a job as physician at the Fort Hall Reservation. Dubois did not have a job lined up and went along with his brother for the adventure. The boys were American bluebloods with political connections from their father and grandfather, and were tried and true Lincoln Republicans. The boys' grandfather served under President William Henry Harrison in the battle of Tippecanoe and their father lived across the street from Abraham Lincoln and served with him in the Illinois State Legislature.

When Dubois was a young boy, he and his friends tied a string between two trees where Mr. Lincoln customarily walked to his law office. The string was situated at hat level. When Lincoln walked by wearing his famous stove pipe hat, the string knocked the future president's hat to the ground, giving the boys a well earned laugh. The hat was full of Lincoln's law papers, which added to the rascals' delight to watch the tall man scramble about retrieving his papers.[4]

Fred Dubois was the perfect politician for frontier Idaho, which during the decade of the 1880s, was becoming more and more inhabited by miners, loggers, cowboys and gamblers. He soon acquired the perfect job for such a politician. Despite Dubois' refined eastern upbringing, he was known to have earnestly cultured his reputation as a frontiersman, and many recite that he often enjoyed the wild and bawdy customs of the Idaho frontier.

When Dubois arrived in Blackfoot with $34 in his pocket, dressed like a Yaley in eastern attire, the first place he ventured was a local saloon. He soon became acquainted with a stockman, who offered him a job as a cowboy on a cattle drive to Cheyenne, Wyoming. Being a dude from the East he received quite an education from the seasoned cowboys, who gained respect for his grit and determination. Dubois later recalled that three months later he "drew my pay in a bunch, about $120, bought a ticket to Blackfoot and stuck away $10 for eating on the way. Then I proceeded to light up Cheyenne, with the help of hundreds of cowboys, who were there to let loose after the long season."[5] Although he was seeking adventure when he came west, he soon realized that being a cowboy was not his ticket to fame and fortune in frontier Idaho.

His next job took him to the Indian Agency at Fort Hall to look after the reservation livestock and brought him closer to his brother. In the fall of 1881, he came to know E.S. Chase, who was then the U.S. Marshal for Idaho. After spending some time with the marshal and learning about his duties, Dubois began to covet the marshal's job. When Marshal Chase left his position, Dubois told his brother, "I think I will take the marshal's place."[6] Sure enough the politically connected Dubois, with the assistance of Robert T. Lincoln, then Secretary of War, and Judge David Davis, a former Illinois Supreme Court Justice and then influential U.S. Senator, secured the appointment to the post of

U.S. Marshall for the Territory of Idaho from President Chester A. Arthur.

Although he was fresh from the East, the new U. S. Marshal fit in well with most of the cultural factions that inhabited the Idaho frontier. Dubois was at home campaigning and spreading his propaganda in the saloons and hurdy-gurdies of Idaho. However, there were two factions that he didn't get along with, the politicians from Boise and the Mormons from the eastern section. In Boise, Territorial Secretary David Porter Baker Pride became his political nemesis. Pride was the leader of the "Boise Ring" and was a thorn in Dubois' side, constantly challenging him for political leverage in the Republican Party. In Dubois' eye, the Mormons were quite simply criminals. Upon taking office, Dubois said:

> The Territory was infested with bandits, who frequently held-up stages and committed other crimes of this class. Their ranks had been added to by many lawless men who had been brought in through the building of the Oregon Short Line. But still more important than this was the fact that, through legislation by the congress of the United States, in March 1880, every member of the Mormon Church was guilty of crime, either as a principal or as an accessory.[7]

The Mormons in eastern Idaho were members of the Democratic Party and had been so since 1856 when the Republicans, with their famous campaign slogan, assailed polygamy, along with slavery, as the "twin relics of barbarism."[8] The Mormons had a tendency to vote as one block and carried considerable weight in Oneida County where they fit in quite well with B. F. White's Independent party. Dubois recognized their considerable influence in statewide elections, but in 1882 as U.S. Marshal, he felt he was in the driver's seat.

His first task as the new marshal was to enforce the Edmunds Act—the new federal law that made polygamy a crime. He recruited the most ardent anti-Mormons that he could find in the territory for his deputies. Prosecuting Mormons under the Edmunds Act was not the easiest process. The Act disenfranchised polygamists and increased the opportunity for criminal conviction, but the apprehension and prosecution of polygamists was difficult. The ambitious deputies not only had to catch the polygamist in the act of cohabitating with more than one wife, but then had to convince a jury of the culprit's guilt. The Mormons became skillful at hiding the few members of their religion with plural wives, and obtaining convictions with jurors drawn from the heavily Mormon areas was not an easy task.

However, after the United States Supreme Court ruled in *Rudger Clawson v. United States*, 124 U.S. 477 that the open venire system of jury selection was constitutional, Dubois' men were able to draw the jury pool from the mining camps around Hailey, Ketchum and Silver City and import them for trials in Malad.[9] The juries selected from this pool were much more inclined to convict. Dubois' men also became stealthier by conducting nighttime raids to achieve arrests. Gradually the territorial prison began to fill with polygamists. Eventually the prison became so full that a number of them were hauled to Detroit, Michigan to serve out their terms.

When he became U.S. Marshal, Dubois received a "light top wagon with two seats and a magnificent span of dapple grays, Andy and Jeff," which he used to travel throughout Idaho. As he journeyed about the state, Dubois took every opportunity to spread his anti-Mormon propaganda and found many willing ears eager to hear the accounts of the depraved Mormons. Dubois was a likeable politician and enjoyed getting to know the Idahoans of the day. He personally summoned the jurymen and made sure they received extra compensation for their travel, by computing it from the "longest way around, paying no attention to shortcuts which they might have used."[10]

D.L. Evans Entry into Politics

In 1882, when the author's great-grandfather D. L. Evans was elected to the territorial legislature, he was 28 years old and three years junior to Fred Dubois. He was the son of twice-widowed, Winnefred Lloyd Roberts Evans, a Welsh immigrant, who walked the plains with her three small children in the company of one of the many wagon trains that brought Mormon converts to the Salt Lake Valley in 1852. The prospect of obtaining more land under the Homestead Act brought Winnefred and her sons to the Malad Valley. D.L. Evans was the oldest child and was educated at the University of Deseret (now Utah) and became a teacher at Franklin. Later in life he attributed the sacrifice his mother made to finance his education as the single most important factor attributable to his success. Over his lifetime he became a successful merchant, banker, politician and prominent citizen of Malad City and the state of Idaho.

As were most members of the Mormon Church, Evans was a member of the Democratic Party and he, along with three other Democrats, was elected to the territorial House of Representatives from Oneida County. The Mormons knew that their influence in the territory rested on the success of the Democratic Party. As one historian noted, "in 1882 the anti-Mormons swept the territory, but lost the vital local election in Oneida County and did not capture the legislature."[11] The election of the four Democrats from Oneida County prevented the anti-Mormons from gaining control of the territorial legislature.

Dubois saw his chance in 1884 and declared it to be the most important election in Idaho History. The Democrats again nominated a similar strong ticket, including D.L. Evans, at their convention at Oxford. Marshal Dubois attended as an observer. As in 1882, the Mormons controlled the proceedings. Dubois then recruited the losing "gentile" faction. As Dubois recalled, "I used my position as United States marshal to summon to Malad, as witnesses and jurors, the leading Democrats and Republicans of the county, who were not of the Mormon faith….We had called upon the gentiles in the various precincts throughout the county to send delegates to the convention, these being on the list of jurors, which enabled them to make the trip without personal expense."[12]

Voter Fraud on Both Sides

The election of 1884 in Oneida County was characterized by allegations of voter fraud on both sides. Both the anti-Mormon and Democratic candidates received certification and trudged on

to Boise to assume the seats to which they claimed to have been elected. Despite the protests of D. L. Evans and George C. Pratt to the territorial council, the anti-Mormon candidates were given the seats.

The political climate for Mormons began to change dramatically. As a noted historian wrote, "Cheerfully ignoring demands for an investigation of 'great frauds' responsible for their election to the council, Harvey Walker Smith and George N. Crawford (whose votes transformed the legislature into a radical anti-Mormon assembly) presented a proposal designed to make similar election irregularities unnecessary in the future."[13]

In 1882, under the federal Edmunds Act, all polygamists had lost their franchise. Now, in 1884, with the anti-Mormons in complete control of the territorial legislature, the plan was to disenfranchise all Mormons. According to Dubois memoirs, H.W. "Kentucky" Smith, a young lawyer and now newly elected member of the territorial council, drafted the famed Mormon Test Oath. Under the Test Oath, not only were polygamists banned from voting, but any member of any organization that recognized the teaching of the doctrine of plural marriage or polygamy were banned from voting and all were required to subscribe such test oath as a condition of voting. The act passed the legislature.

D.P.B. Pride orchestrated a plan where he would receive the support of the Mormons for the approval of construction bonds to build the capitol building in Boise and the insane asylum at Blackfoot in exchange for a governor's veto of the Mormon Test Oath. The construction bonds passed, but when "Kentucky" Smith got wind of the impending veto, he encouraged Governor Bunn to sign the Test Oath legislation with the help of a Colt revolver.[14] The net result was no member of the Mormon Church held office for a period of ten years.

Seceders

Dubois resigned his position as U.S. Marshal in 1884 and ran for the Territorial Representative to Congress. He was elected in 1886 and 1888, and was influential in the admission of Idaho as a State in 1890. He was rewarded by being elected as the first full term United States Senator in 1890.

In 1888, a group of Mormons, including D.L. Evans, attempted to regain their political influence in eastern Idaho by resigning their membership in the Mormon Church just prior to the election, making them eligible to vote. They planned to rejoin their church the next day. All of this had the approval of church leadership. The Mormon Independent Party met on October 23 at Paris and endorsed James Hawley against Dubois for territorial representative. Soon thereafter resignations commenced. By October 24, resignations were also taking place at Rexburg and three days later D. L. Evans and a substantial group of Mormons from Malad resigned. Emotions were running high and the open violence seemed imminent "during the eight-day tempest preceding the elections." Both sides refrained from armed confrontation as the "Mormons registered in droves."[15]

The anti-Mormons were prepared for that and the Oneida County prosecutor, Drew W. Standrod, ordered the arrest of twenty "seceders" on November 3. Dubois' defenses held intact. Stanrod's instructions to the Oneida registrars prevented the Mormon's from registering. The failure of the Mormon seceders to vote in 1888 contributed to Dubois' successful re-election as representative to Congress.

Stanrod's case against the Malad seceders was timed to commence just prior to the ratification election of the new Idaho Constitution. The constitution was adopted to include the Mormon Test Oath to insure a continuation of their disenfranchisement. The Mormon seceders had been indicted for perjury by a grand jury that contained no Mormons. Attorney Standrod hoped to discourage Mormons from their experiment of 1888 by demonstrating what would happen to Mormons if they attempted to vote again. "Drew W. Stanrod's case against David Lloyd Evans, most prominent of the Malad Group, encountered a strong defense. Evans convinced five of the twelve jurors on September 7, that his withdrawal was permanent and part of no church conspiracy to nullify the test oath by subterfuge."[16]

The case against D.L.'s friend, Samuel D. Davis, resulted in a conviction and eventually made it to the U.S. Supreme Court. Davis appealed his conviction on the grounds that his conviction for conspiracy violated his free exercise of religion. In *Davis v. Beeson*, the Court upheld his conviction saying that because the matter arose as a habeas corpus proceeding, the Court ruled only on the issue of whether the district court at Malad had jurisdiction and avoided completely the free exercise of religion issue.

In 1890, Idaho was admitted into the union, sadly without the political participation of 25,000 Mormons that lived within its boundaries at that time. 1890 was also the year that church president Wilford Woodruff announced his famous "Manifesto" abandoning polygamy in the United States. With the "Manifesto" there no longer was a basis or need to utilize the Mormon Test Oath. The issue disappeared for a time and D. L. Evans was elected to the state legislature in 1898 to serve as the Speaker of the House of Representatives. He remained active in Democratic politics throughout his life.

Ironically, Dubois became a Democrat and was elected to the U.S. Senate in 1900. Eventually the enemies that he accumulated in both parties proved to be his demise. Dubois was ousted from the leadership of the Democratic Party by a decision of the Idaho Supreme Court in favor of the faction led by John Nugent.[17] D.L. Evans was among that faction. The famous "Lion of Idaho", William E. Borah, was elected to the U.S. Senate in his place.

In another irony, Drew W. Standrod became a business partner and confidant of D. L. Evans. Together, with some other partners they organized the D. W. Standrod & Co. Bankers of Blackfoot in 1898. Along with many others, the bank failed during the great depression.

The Mormon Test Oath remained in the Idaho Constitution until 1982 when it was officially repealed by the state legislature and ratified by the citizens of the state. The repealing legislation was signed into law by Governor John V. Evans, a grandson of D. L. Evans and the author's father.

Endnotes

[1] A.J. Simmonds, *Idaho's Last Colony*: *Northern Cache Valley Under The Test Oath* pp. 4. *Idaho Yesterday* 1984 28(1): 24-30 Bennett, Dana, Mormon Polygamy in Early Southern Idaho. At 25, also Walace Turner, *The Mormon Establishment* (Boston:

Hougton Mifflin Co. 1966, 180.
[2] *The Making Of A State* (Rexburg, Idaho: Eastern Idaho Publishing Co., 1971, Dubois' hand typed memoirs located in the special collection section of the Idaho State Historical Society. Hand typed memoirs at pp 5.
[3] Ibid, at pp12.
[4] Ibid, at pp14.
[5] Merle W. Wells, *Anti-Mormonism in Idaho*, 1872-92. Provo, Utah, Brigham Young University Press, 1978, xii.
[6] Ibid
[7] Dubois Memoirs, p 32
[8] Wells, p 66
[9] Dubois, p 66
[10] Wells, p 58
[11] Ibid, p 61
[12] Ibid, p 120
[13] Ibid, p 121
[14] Ibid, p 138
[15] Leo W. Graff, *Fred T. Dubois, Biographical Sketch*. Pocatello, Idaho State University, p 8.
[16] Ibid
[17] Ibid

About the Author

Hon. David L. Evans *is a magistrate judge in Oneida County for the Sixth Judicial District. He was born and raised in Idaho and is the great-grandson of D.L. Evans. He received his J.D. from the University of Idaho College of Law.*

The Life and Death of Idaho's 1963 Loyalty Oath for State Employees

Kathleen Rubinow Hodges
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In 1963, Idaho passed a law requiring public officers and employees to sign a loyalty oath. Each employee had to promise to support and defend the state and national constitutions, and had to swear or affirm that he or she was not a member of any organization that advocated the violent overthrow of the government, had not belonged to any such organization for the past five years, and would not join one while employed by the state. The measure was controversial, and a group of university and college professors filed a complaint. The case, Heckler v. Shepard, was decided in 1965, when a judgment permanently enjoined the defendants from enforcing the law.

The Idaho Political Environment in the 1960s

In early 1963, Idaho's newspapers painted a picture of a dangerous world. News about Castro's Cuba, insurgents in Laos, and civil rights demonstrations in the American South dominated front pages. Headlines made it clear that most of these troubles were due to the "reds," or communists. At the same time, Idaho's budget was in shambles, and school funding was a persistent problem. It was in this climate that Idaho's loyalty oath bill, SB7, was introduced on January 15, 1963 by the Senate Judiciary and Rules Committee (headed by Sen. James McClure) and passed on January 25, 1963.

According to Perry Swisher, who was then in the state senate, the loyalty oath and other conservative legislation of the era represented both procrastination on some very real fiscal problems, and a fear of events outside Idaho. As Swisher tells it, the legislation would have passed with one dissenting vote—his—but the Republican leadership purposely waited until he had to leave the room for a conference on another piece of legislation. When he returned, SB7 had been read and passed unanimously.[1]

State Loyalty Oaths

Loyalty oaths were then a common feature of state codes throughout the country, the bulk of them having been enacted in the mid-1950s. Idaho's law was written during a period of time when many states still had such laws on their books. The laws tended to stay in place because it was political suicide for legislators to vote them out, though there was never much indication that they actually helped to identify communists or eliminate them from the public payrolls. Some states required public officials to sign oaths; others only required educators to sign them. The oaths, in addition to being a simple pledge of loyalty to the national or local government, contained a provision disavowing membership in subversive organizations. Idaho's oath law was enacted a bit later than most, but was still squarely in the mainstream.[2]

Many state loyalty oath laws were supported by veterans' groups, and this was apparently the case in Idaho, though the record is not entirely clear. When the bill was being debated in the House, Rep. Alvin Benson (D-Owyhee) demanded to know where it had originated. Republican Larry Mills of Ada County answered that the bill had originally been proposed by the American Legion. According to the newspaper column "It Seems to Me" by Idaho State College librarian Eli Oboler, the Idaho American Legion convention had passed a resolution the previous July, proposing that membership in the Communist Party be declared a felony punishable by a fine and a prison sentence. In October, the national American Legion convention had approved a resolution calling for a loyalty oath for all public employees. The Pocatello chapter of the Legion, however, claimed that the Legion had neither sponsored nor worked for passage of the controversial legislation.[3]

Eli Oboler, Idaho State University librarian (l.) with a library patron. (Courtesy Idaho State University Library.)

The Idaho Oath Bill and Its Debate

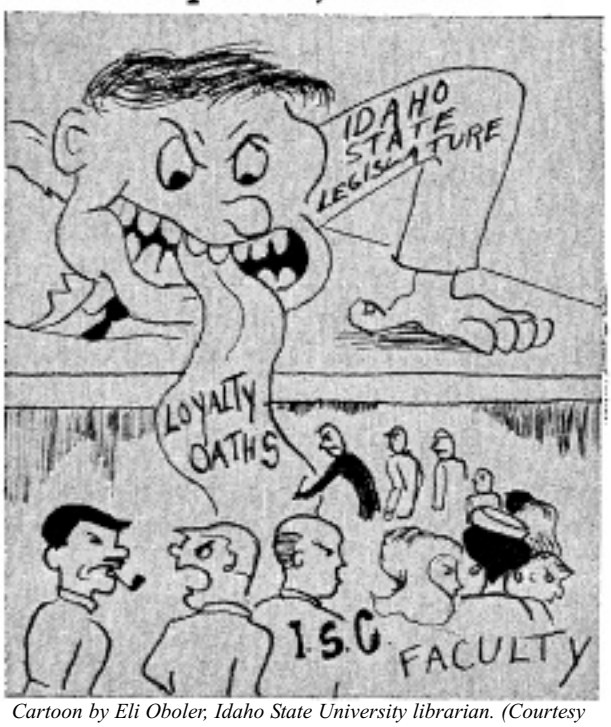
Idaho's oath was a three paragraph affair. The oath taking state employee promised to support the constitutions of the nation and the state, promised (again) to support and defend the aforementioned constitutions, and swore (or affirmed) that he or she was not a member of any organization that advocated the violent overthrow of the state or national government, had not been a member of any such organization within the past five years, and would not join such an organization while remaining on the job. The last paragraph, which opponents referred to as the "disclaimer," deeply offended members of the academic communities at both the University of Idaho and Idaho State College (later Idaho State University). After the bill passed the Idaho Senate, both the Moscow and Pocatello chapters of the American Association of University Professors (AAUP) tried to "knife it silently" through a letter writing campaign to legislators. By the time the House took up the issue, it had become controversial.[4]

On March 12, 1963, the Idaho House of Representatives spent its morning session hotly debating SB7. A vote to indefinitely postpone action, which might have killed the bill, narrowly failed on a 30-30 vote. Darrell Manning, D-Representative from Bannock County, pointed out that "In its present form there is no one here who is listed as being responsible for determining what organizations are subversive, what organizations are not subversive, what organizations are borderline." He proposed an amendment to require a list of specific subversive organizations, but the amendment was defeated. The other representative from Bannock County, Herman McDevitt, also opposed the bill, saying "Idaho has had a sad history of requiring extra tests of certain groups within our population."[5]

Opponents of the bill also argued that truly disloyal persons wouldn't hesitate to sign the oath. Proponents of the measure countered by saying that perjury charges against false oath signers had been an effective weapon against communism. The bill finally passed on a vote of 49-11, and was sent on to Governor Smylie, who signed it on March 26, 1963. The law would take effect on July 1, 1963.[6]

In the ensuing public debate, opposition to the loyalty oath came from the University of Idaho and Idaho State College. Walter A. Bunge, an instructor in journalism at Moscow, said "I would not be willing to sign the oath as it now stands…. I believe that the Idaho oath, a very complicated and long oath, infringes on certain civil rights and is morally wrong." Dr. Postweiler, president of the Moscow chapter of the AAUP, said that "most will sign it, but that doesn't mean they are for it….In general, university faculties are opposed to these loyalty oaths because they harass freedom of speech." ISC librarian Oboler pointed out in a newspaper column that the U.S. Supreme Court had overturned a similar Oklahoma statute in 1952. "It is not the oath of allegiance which any American is proud to take but the appended disclaimer certificate to which those who believe in freedom…object." The court had held that it was a violation of due process for a state to exclude certain persons from employment solely on the basis of organizational membership, since "membership may be innocent. A state servant may have joined a proscribed organization unaware of its activities and purposes," or an organization might change over time, becoming more or less subversive. Oboler added, "This law has already seriously affected the morale of the faculties of the state supported Idaho institutions of higher education." Oboler's next column took up the topic of red baiting: "I have heard and so, probably, have you that there are a number of card carrying Communists teaching in Idaho public educational institutions.... How can academic freedom flourish when supposedly responsible citizens call 'Communist' those teachers with whose opinions they differ?"[7]

Other Idahoans favored an oath and were critical of what they perceived as the leftist leanings of Idaho's teachers. Long letters to the *Idaho Statesman*, printed in a wordy Sunday editorial section, upheld the legislators. On March 31, 1963, a letter proclaimed, "All persons who are employed as teachers in our schools, and who object to such an oath as a condition to their continued employment, should be summarily discharged. They are not the type of people who should be permitted to teach the youth of America." The following week another writer referred



Cartoon by Eli Oboler, Idaho State University librarian. (Courtesy Idaho State University Library.)

to the American Association of University Professors itself as a "front organization." On April 16, 1963, Letcher Neil of the National Constitution Party in Portland, Oregon claimed that "the big foundations, whose purpose it is to undermine loyalty in the nation, have been working on the educators in an effective way...." Lines were being drawn. On April 14, 1963, a letter writer from Payette declared that "It would seem rather common sense, that a person is either for the American and Idaho governments and all they represent or he is against them. In this day and age there is not and can't be any middle loyalty." Many veterans groups were outspoken. The Boise chapter of the Veterans of World War I passed the following resolution: "Whereas, the most recent session of our State Legislature in an effort to prevent teachers with Communistic leanings to be employed as school teachers…and further to prevent the employment of people who advocate the overthrow of this government from becoming public employees, enacted into law a bill…[and] whereas, certain teachers or professors…namely at Pocatello and at Moscow are opposing the signing of this Loyalty oath, therefore, Be It Resolved, that our organization deplores the action of these professors and teachers…."[8]

Academic Opposition to the Oath

Students defended their professors in print. Brent Bennett, a Boise Junior College (now Boise State University) student, wrote to the *Statesman*: "Be assured that the instructors of ISC are not secretly plotting to overthrow the American government… . The faculty of Idaho State College objects to the type of repressive measures that were used to justify the persecutions of Christians, the existence of the Inquisition, the Salem witch trials, and, in more recent times, the Stalin purges and the McCarthy hearings." An editorial in the University of Idaho stu-

dent paper asserted that "[Professor] Bunge and numerous other instructors have criticized the oath because it insultingly questions their loyalty, because it's clogged with ambiguities and vagueness, because it won't expose any actual Communists since none would be foolish enough to hesitate to sign it, and because most foreign instructors here couldn't or wouldn't sign it." A letter to the editor spoofed anti-communism: "These greeting card companies are actually communist front organizations. Sinister sentiments are forced upon our children gradually, beginning with 'Happy Birthday' and working through 'Merry Christmas' to such openly communist dogma as 'Peace on Earth' and 'Good will to all men.'"[9]

Professors at Pocatello and Moscow geared up for a battle. The AAUP chapter at the University of Idaho organized a panel discussion which was attended by an audience of over 100. Professors at Idaho State College retained an attorney and considered legal action. According to Swisher, "the ACLU didn't amount to much at that time, so the AAUP was the place you looked to for due process issues, that kind of fight." The oath was on the agenda at the State Board of Education meeting on April 19, 1963. U of I professors asked the board to declare the faculty exempt from provisions of the loyalty oath, but board chairman Ezra Hawkes said the law was clear, and the board had to abide by the law. U of I President Dr. D. R. Theophilus testified that there would probably be at least two faculty resignations because of the oath. Theophilus requested a policy statement from the board, so that he could send the statement to faculty members, asking them to indicate whether they intended to sign or resign. Theophilus and Dr. Donald Walker, Idaho State College President, both pointed out that the wording of the oath created a problem for visiting professors from other countries.[10]

Three days later, James R. Crockett, radio television instructor, and Jay G. Butler, assistant professor of sociology, both from the University of Idaho, announced their resignations. Journalism instructor Bunge said he might follow their lead. In a letter to the *Idaho Argonaut* Butler wrote, "An inadequate salary is one indignity I find irritating but when the indignity of the loyalty oath is added, the two indignities make me sick of my stomach. I have reached the point where I think I would rather be a tramp than an American college professor." In response to a reporter's question, Crockett said, "I think it is unfair for a government to legislate beliefs. I think people should reserve the right to refuse any oath." Bunge said, "I will not sign the Idaho disclaimer oath… . At present it means that I cannot work at the University of Idaho next year; I have not officially resigned."[11]

Meanwhile, in Pocatello, a meeting of the ISC chapter of the American Association of University Professors (AAUP) voted unanimously on April 29, 1963 to fight the new loyalty oath law. The 50 professors present at the meeting decided to seek an injunction in federal court, and pledged $3000 to start a "war chest." Dr. George Heckler, chairman of the ISC chemistry department and president of the AAUP chapter, called the oath "thought control." The AAUP attorney, Louis F. Racine Jr., saw two major weak points in the law: There was no mechanism for hearings for employees dismissed for refusing to sign; and there was no method for deciding which organizations were subversive. A day later, the University of Idaho AAUP voted to join the ISC chapter, and 50 more professors agreed to become plaintiffs. Students at ISC organized a group to back the faculty, distributed posters, and raised money.[12]

A motion for an injunction was filed in federal court, on May 29, 1963. The complaint carried the names of 31 employees of Idaho State College, 52 employees of the University of Idaho, 12 employees of the Pocatello Public School District, one employee of Idaho State Hospital South and three state legislators. Defendants were the Attorney General, the Secretary of State, Regents of the University of Idaho, the presidents of the University of Idaho and Idaho State College, and the superintendent of the Pocatello Schools. The case, known as *Heckler v. Shepard*, took two years to reach its final conclusion. On June 13, 1963, the court issued a temporary stay, preventing application of the law to the approximately 100 plaintiffs, and sending the suit on to a court panel for final judgment. On June 19, 1965, the panel of judges filed a decision, holding that the law violated the due process clause of the constitution because no provision was made for pre-discharge hearings for employees who refused to take the oath. On July 12, 1965, a judgment permanently enjoined the defendants from enforcing the law. The professors and their allies had been vindicated. By that time Idaho politicians had turned their attention from red hunting towards more practical problems, and were addressing issues such as the sales tax and reapportionment.[13]

Endnotes

1. Perry Swisher, conversation with the author, August 26, 2003; *ISC Bengal*, May 10, 1963.

2. M. J. Heale, *McCarthy's Americans: Red Scare Politics in State and Nation, 1935-1965* (Athens: University of Georgia Press, 1998).

3. *Idaho State Journal* (Pocatello), March 13 and April 28, 1963.

4. 1963 Idaho Session Laws; *Idaho Argonaut* (University of Idaho), April 19, 1963.

5. Idaho has had other brushes with loyalty issues. During the 1860s, southern sympathizers in the Idaho legislature refused to sign oaths (Merle W. Wells, "S. R. Howlett's War with the Idaho legislature, 1866-1867," *Idaho Yesterdays* [1976], 20/1: 20-27) , and in the 1880s an Anti-Mormon test oath disenfranchised LDS voters (Merle W. Wells, "The Idaho Anti-Mormon Test Oath," *Pacific Historical Review* [1955], 24/3: 235-252). A third controversy erupted as the United States entered World War I and resentment flared against Idahoans of German descent. A "war census," taken in Owyhee county, tabulated patriotism by tracking individuals' liberty bond purchases, Red Cross contributions, and "special patriotic service rendered." See Hugh Lovin, "World War Vigilantes in Idaho, 1917-1918," *Idaho Yesterdays* (1974), 18/3: 2-11. An excerpt from the same article appears in *Mountain Light* 42(3): 21-24, with an illustration of the war census card.

6. *Idaho State Journal*, March 13, 1963; *Idaho Argonaut* , March 29, 1963.

7. *Idaho Argonaut*, March 29, 1963; *Idaho State Journal*, March 31 and April 7, 1963.

8. *Idaho Daily Statesman* (Boise), March 31, April 7, 14, 1963; *Idaho Argonaut*, April 16, 1963.

[9]. *Idaho Daily Statesman*, April 7, 1963; *Idaho Argonaut*, April 16, 19, 1963.
[10]. *Idaho State Journal*, April 3, 1973; *Idaho Argonaut*, April 16, 19, 1963; *Idaho Daily Statesman*, April 20, 1963; conversation with Perry Swisher.
[11]. *Idaho State Journal*, April 23 1963.
[12]. *Idaho State Journal* , April 30, 1963; *ISC Bengal*, May 10, 1963; *Idaho Argonaut*, May 7, 1963.
[13]. *Idaho Daily Statesman*, June 1, 1963; *Daily Idahonian* (Moscow), June 13, 1963; *Idaho Daily Statesman*, June 20, 1965; eastern division civil docket, U.S. District Court, Boise; conversation with Perry Swisher.

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Loyalty Questionnaires and Japanese Americans in World War II

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Japanese Internment Camp. Photo courtesy of Idaho State Historical Society, 76-29.1q.

Assessing the "Loyalty" of Japanese Americans by a Questionnaire

During World War II, Japanese nationals and Japanese Americans imprisoned in camps in the Western United States were subjected to "tests" of their loyalty. This might seem improbable, since they were placed in these camps initially because of a presumed disloyalty. In his final report on the removal of Japanese Americans from the West Coast, General John L. DeWitt, wrote that, "the Japanese race is an enemy race," and "there is no ground for assuming that any Japanese … , though born in the United States, will not turn against this nation when the final test of loyalty comes." Closer to home, we also have the account of Idaho's Governor Chase Clark, in a meeting of Western State officials in Salt Lake City in April 1942, saying: "I don't trust any of them [Japanese Americans]. I don't know which ones to trust and so therefore I don't trust any of them."

By early 1943 certain developments had occurred that brought about the administration of loyalty oaths to those in the camps. By that date, interest had grown in an all-Japanese American unit in the U.S. Military and the army sought some means to identify those who could be shown to be "loyal" to the United States. At about the same time, the War Relocation Authority (WRA), the civilian agency operating the large camps housing Japanese Americans wished to respond to a growing interest in releasing people from the camps to meet labor needs around the country and to allow young, college-age Nisei (American born Japanese Americans) to continue their education in colleges away from the West Coast. The result was a two questionnaire system, one for the army and one for the WRA to be administered to all inmates seventeen years of age and older. The army questionnaire was given to Nisei males and the WRA version to Nisei females and Issei (immigrant generation) of both sexes.

Problems with the "Oath"

While most questions were innocuous, Numbers 27 and 28 on both forms became the center of attention. Question 27 on the army form was "Are you willing to serve in the armed forces of the United States on combat duty, wherever ordered?" The corresponding question on the WRA form was: "If the opportunity presents itself and you are found qualified, would you be willing to volunteer for the Army Nurse Corps or the WASC (Women's Army Auxiliary Corps)?" Keep in mind that the WRA form was intended for all Issei, male and female, so this was puzzling to many. How were elderly Issei women to respond? What did the question mean to Issei men? Question 28 presented even greater problems. The army version read: "Will you swear unqualified allegiance to the United States of America and faithfully defend the United States from any or all attack by foreign or domestic forces, and forswear any form of allegiance or obedience to the Japanese emperor, or any other foreign government, power or organization?" For young Nisei men, this was a troubling question, particularly since none felt they had any allegiance to the Japanese emperor in the first place. The three-part construction on the question led to further confusion. Many Nisei men were troubled by the third part of the question, forswearing allegiance to the emperor. Would answering yes imply that they had been or still were loyal to a foreign government?

It was also a problem for many that, soon after Pearl Harbor, many Nisei sought to enlist in the army but found that all Japanese American were reclassified as 4-C, the same classification as that of enemy aliens. This was an affront not easily over-

come and many continued to harbor irritation over it and thus were not eager to volunteer at that point.

The WRA version of question 28 presented further problems. It read the same as the army version but did not ask for respondents to affirm that they would "faithfully defend the United States from any and all attack by foreign or domestic forces." Even with that deletion, the question posed serious issues for the Issei. By 1922 court decisions in the United States found that Issei could not become naturalized citizens. Although they had made their lives here without citizenship, they had obviously cast their lot with this country. What would happen at war's end? Might they be sent back to Japan and, if so, what would the Japanese government do with the information that they had "forsworn" allegiance to that country? Since they were not allowed to be United States citizens, would answering this question in the affirmative mean that they were "stateless persons?"

Because of these issues, question 28 of the WRA version was later modified to read: "Will you swear to abide by the laws of the United States and take no action which would in any way interfere with the war effort of the Untied States?" Although clearly making it easier for Issei to answer affirmatively, much harm had already been done.

The entire process of the administration of the questionnaires had a number of important implications. As one of the early historians of the effort, Allen Bosworth, has written: "In retrospect, the entire registration program appears to have been a sophomoric and half-baked idea, if not, indeed, a stupid and costly blunder. In the long run, nothing could have been more certain or more simple that this: If there had been any actual Japanese agents or spies in the Relocation Centers, in February 1943, they would have been the very first to profess their loyalty on paper, so that they could carry on their work."

The "Oath" Results in Segregation of the "Loyal" from the "Disloyal"

The two questions, in whatever form, became known as the Loyalty Questions, and the overall response to the questionnaires led to several important outcomes. One of these was the development of a segregation program for the inmates of the WRA prisons. The Tule Lake camp, in northern California, was named as the site to house those presumed to be loyal to Japan. Negative answers to questions 27 and 28 were part of the information used to assign individuals to this segregation center. Even those "yes" responses, if the respondent qualified their answers in any way, were regarded as "no." By September 1943, the administration of the "oath" was complete. Overall, 87 percent of the respondents answered affirmatively on both questions. About 5,300 (about 7%) answered no on at least one of the questions and approximately 4,600 (6%) did not respond at all or qualified their answers. Not all who responded negatively were assigned to Tule Lake.

Trials for Draft Evasion

One other important result of the loyalty questionnaire had to do with military service. When the army initiated its program in February 1943, it sought to determine who would be accepted as volunteers. One year later that changed when the Nisei were made eligible for the draft. By that time a label had been given to those who replied negatively. They were called "no-no boys", and even they were eligible for the draft. In early February 1944 young men in the camps began receiving their draft notices and were ordered to appear for their pre-induction physical examination. The decision as to how to respond to this situation was one of the most wrenching and painful for the young Nisei to make. Should they resist the draft and refuse to yield to the government's demands while their parents were kept in the camp? Why should one capitulate to this demand when that same government had initially classified them as the equivalent of aliens?

Most masked whatever resentment they felt and responded to the draft call as yet another test of their patriotism. Others chose not to comply and resisted the draft. In all ten camps, about 300 chose the latter path. For most of them, their defense was straightforward—If they were loyal enough to serve in the United States military, why were they imprisoned in barbed wire camps?

Throughout the spring and summer of 1944, federal marshals went through the camps and arrested those who insisted on draft evasion. In late summer and fall of 1944 their trials were held in federal courts in western states. If the "resisters" placed any hope in the federal courts, they were soon disappointed. The judges who heard their cases dismissed their arguments on the legality of drafting internees whose only crime was being of Japanese ancestry and conducted what one scholar has termed "shoddy trials." There was an exception, Judge Louis E. Goodman of the Northern District of California, who dismissed the government's charges against 26 Nisei and called the decision to prosecute them "shocking to [his] conscience" and a violation of due process. But he was the lone exception. More typical was Federal Judge Chase Clark, appointed to the federal bench after he was defeated for re-election as governor of Idaho in 1942.

Thirty-three draft resisters from the Minidoka camp in south central Idaho stood before Judge Clark in September 1944 without counsel. To deal with the problem the judge ordered available attorneys to appear in his court and they were each appointed to represent one or more of the defendants which they did, apparently without enthusiasm. One week after the arraignments, the first of the trials opened. Early efforts by the defendants to present motions regarding the legality of the proceedings were dismissed by Clark and the thirty three trials were conducted over the following eleven days, with the only issues being whether the individual charged was classified 1-A for the draft and whether he failed to appear for the required physical. The typical defense involved each defendant attempting to express their reasons for resisting the draft. One young man from Seattle later recalled the reaction by Judge Clark to his attempt at explanation, and that was to inform the jury to disregard any statements concerning their treatment at the hands of the government. They were all convicted and late in September and early October they were sentenced by Judge Clark. Those who had pled guilty received sentences of eighteen months and most of the rest received terms of three years and three months in prison.

From "No-No Boys" to "Resisters of Conscience"

The heroic sacrifices of those Nisei who served in the military in World War II, for example, in the 442nd Regimental Combat Team in Europe and in Military Intelligence Service in

the Pacific, brought about a grudging acceptance of their loyalty to America. Conversely, those who refused to cooperate with the U.S. Government by acquiescing to the draft were usually seen as pariahs and treated badly, even within the Japanese American community. This continued for some time in spite of the fact that, in 1947, President Harry S. Truman granted full pardons to the Japanese Americans convicted under the Selective Service Act and this action restored their citizenship rights. By the 1980s people began to take a more measured look at that experience. Those who resisted came to be called "resisters of conscience" and increasingly they were recognized for taking principled stands in demanding more justice under the Constitution. For them, fidelity and loyalty to the principles of the Constitution demanded such a stand.

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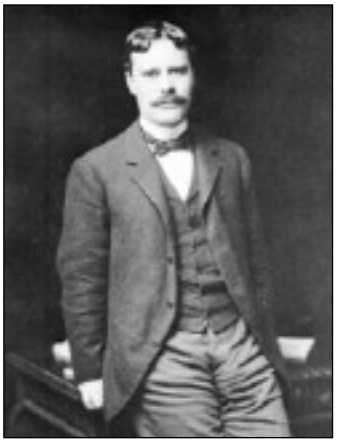
The Second Missouri Compromise

Owen Wister

When Owen Wister came to Boise in the early 1890s, he gathered information from residents that he might use in his writing. One result was the following short story, published in Harper's Monthly *in March of 1895 and illustrated by Wister's Harvard classmate Frederic Remington. Wister, best known for his novel* The Virginian*, seems an unlikely author for a piece on oaths; but the events he describes in "The Second Missouri Compromise" were triggered by the post-Civil War requirement that all federal officials swear their loyalty to the Union.*

Wister took a few liberties, whether because his informants had faulty memories or because they might make for a better story. The 1867 legislative session was the fourth, not the first, in the young territory; and the matter described here was resolved in January rather than May. But the tensions between Confederate and Union men were real and affected views of the legislature's work. Wister also left out the real reason that troops were called from nearby Fort Boise (Boise Barracks): at one point in the conflict, furniture went flying in the legislative chamber.



Owen Wister, American author of western novels of the mid-1800s.

The Legislature had sat up all night, much absorbed, having taken off its coat because of the stove. This was the fortieth and final day of its first session under an order of things not new only, but novel. It sat with the retrospect of forty days' duty done, and the prospect of forty days' consequent pay to come. Sleepy it was not, but wide and wider awake over a progressing crisis. Hungry it had been until after a breakfast fetched to it from the Overland[1] at seven, three hours ago. It had taken no intermission to wash its face, nor was there just now any apparatus for this, as the tin pitcher commonly used stood not in the basin in the corner, but on the floor by the Governor's chair; so the eyes of the Legislature, though earnest, were dilapidated. Last night the pressure of public business had seemed over, and no turning back the hands of the clock likely to be necessary. Besides Governor Ballard, Secretary (and Treasurer) Hewley[2] was sitting up too, small, iron-gray, in feature and bearing every inch the capable, dignified official, but his necktie had slipped off during the night. The bearded Councillors had the best of it, seeming after their vigil less stale in the face than the member from Silver City, for instance, whose day-old black growth blurred his dingy chin, or the member from Big Camas, whose scantier red crop bristled on his cheeks in sparse wandering arrangements, like spikes on the barrel of a musical box. For comfort, most of the pistols were on the table with the Revised Statutes of the United States. Secretary and Treasurer Hewley's lay on his strongbox immediately behind him. The Governor's was a light one, and always hung in the armhole of his waistcoat. The graveyard of Boise City this year had twenty-seven tenants, two brought there by meningitis, and twenty-five by difference of opinion. Many denizens of the Territory were miners, and the unsettling element of gold-dust hung in the air, breeding argument. Against the windows distant from the stove the early thin bright morning steadily mellowed, melting the panes clear until they ran, steamed faintly, and dried this fresh May day after the night;s untimely cold; while still the Legislature sat in its shirt sleeves, and several statesmen had removed their boots. Even had appearances counted, the session was invisible from the street. Unlike a good number of houses in the town, the State-House[3] (as they called it from old habit) was not all on the ground-floor for outsiders to stare into, but up a flight of wood steps to a wood gallery, from which, to be sure, the interior could be watched from several windows on both sides; but the journey up the steps was precisely enough to disincline the idle, and this was counted a sensible thing by the lawmakers. They took the ground that shaping any government for a raw wilderness community needed seclusion, and they set a high value upon unworried privacy.

The sun had set upon a concentrated Council, but it rose upon faces that looked momentous. Only the Governor's and Treasurer's were impassive, and they concealed something even graver than the matter in hand.

"I'll take a hun'red mo', Gove'nuh," said the member from Silver City, softly, his eyes on space. His name was Powhattan Wingo.

The Governor counted out the blue, white, and red chips to Wingo, pencilled some figures on a thickly ciphered and cancelled paper that bore in print the words "Territory of Idaho, Council Chamber," and then filled up his glass from the tin pitcher, adding a little sugar.

"And I'll trouble you fo' the toddy," Wingo added, always, softly, and his eyes always on space. "Raise you ten, suh." This was to the Treasurer. Only the two were playing at present. The governor was kindly acting as bank; the others were looking on.

"And ten," said the Treasurer.

"And ten," said Wingo.

"And twenty," said the Treasurer.

"And fifty," said Wingo, gently bestowing his chips in the middle of the table.

The Treasurer called.

The member from Solver City showed down five high hearts, and a light rustle went over the Legislature when the Treasurer displayed three twos and a pair of threes, and gathered in his harvest. He had drawn two cards, Wingo one; and losing to the lowest hand that could have beaten you is under such circumstances truly hard luck. Moreover, it was almost the only sort of luck that had attended Wingo since about half after three that morning. Seven hours of cards just a little lower than your neighbor's is searching to the nerves.

"Gove'nuh, I'll take a hun'red mo'," said Wingo; and once again the Legislature rustled lightly; and the new deal began.

Treasurer Hewley's winnings flanked his right, a pillared fortress on the table, built chiefly of Wingo's misfortunes. Hewley had not counted them, and his architecture was for neatness and not ostentation; yet the Legislature watched him arrange his gains with sullen eyes. It would have pleased him now to lose; it would have more than pleased him to be able to go to bed quite a long time ago. But winners cannot easily go to bed. The thoughtful Treasurer bet his money and deplored this luck that seemed likely to trap himself and the Governor in a predicament they had not foreseen, else they had never begun the game. All had taken a hand at first, and played so for several hours, until Fortune's wheel ran into a rut deeper than usual. Wingo slowly because the loser to several, then Hewley had forged ahead, winner from everybody. One by one they had dropped out, each meaning to go home, and all lingering to see the luck turn. It was an extraordinary run, a rare specimen, a breaker of records, something to refer to in the future as a standard of measure and an embellishment of reminiscence; quite enough to leek the Idaho Legislature up all night. And then, it was their friend who was losing. The only speaking in the room was the brief card talk of the two players.

"Five better," said Hewley, winner again four times in the last five.

"Ten," said Wingo.

"And twenty," said the Secretary and Treasurer.

"Call you."

"Three kings."

"They are good, suh. Gove'nuh, I'll take a hun'red mo'."

Upon this the wealthy and weary Treasurer made a try for liberty and bed. How would it do, he suggested, to have a round of jack-pots, say ten—or twenty, if the member from Silver City preferred—and then stop? It would do excellently, the member said, so softly that the Governor looked at him. But Wingo's large countenance remained inexpressive, his black eyes still impersonally fixed on space. He sat thus till his chips were counted to him, and then the eyes moved to watch the cards call. The Governor hoped he might win now, under the jack-pot system. At noon he should have to disclose to Wingo and the Legislature something that would need the most cheerful and contented feelings to receive with any sort of calm. Wingo was behind the game to the tune of—the Governor gave up adding as he ran his eye over the figures of the bank's erased and tormented record, and he shook his head to himself. This was inadvertent.

"May I inquah who yo're shakin' you head at, suh?" said Wingo, wheeling upon the surprised Governor.

"Certainly," answered that official. "You." He was never surprised for very long. In 1867 it did not do to remain surprised in Idaho.

"And have I done anything which meets yoh disapprobation?" pursued the member from Silver City, enunciating with care.

"You have met my disapprobation."

Wingo's eye was on the Governor, and how his friends drew a little together, and as a unit sent a glance of suspicion at the lone bank.

"You will gratify me by being explicit, suh," said Wingo to the bank.

"Ha-ha, Gove'nuh! I rose, suh, to yoh little fly. We'll awduh some mo'."

"Time enough when he comes for the breakfast things," said Governor Ballard, easily."

"As you say, suh. I'll open for five dolluhs." Wingo turned back to his game. He was winning, and as his luck continued, his voice ceased to be soft and became a shade truculent. The Governor's ears caught this change, and he also noted the lurking triumph in the faces of Wingo's fellow-statesmen. Cheerfulness and content were scarcely reigning yet in the Council Chamber of Idaho, as Ballard sat watching the friendly game. He was beginning to fear that he must leave the Treasurer alone and take some precautions outside. But he would have to be separated for some time from his ally, cut off from giving him any hints. Once the Treasurer looked at him, and he immediately winked reassuringly, but the Treasurer failed to respond. Hewley might be able to wink after everything was over, but he could not find it in his serious heart to do so now. He was wondering what would happen if this game should last till noon with the company in its present mood. Noon was the time fixed for paying the Legislative Assembly the compensation due for its services during this session; and the Governor and the Treasurer had put their heds together and arranged a surprise for the Legislative Assembly. They were not going to pay them.

A knock sounded at the door, and on seeing the waiter from the Overland enter, the Governor was seized with an idea. Perhaps precaution could be taken from the inside. "Take this pitcher," said he, "and have it refilled with the same. Joseph knows my mixture." But Joseph was night bar-tender, and now long in his happy bed, with a day successor in the saloon, and this one and this one did not know the mixture. Ballard had foreseen this when he spoke, and that his writing a note of directions would seem quite natural.

"The receipt is as long as the drink," said a legislator, watching the Governor's pencil fly.

"He doesn't know where my private stock is located," explained Ballard. The waiter departed with the breakfast things and the note, and while the jack-pots continued, the Governor's mind went carefully over the situation.

Until lately, the Western citizen has known one every-day experience that no dweller in our thirteen original colonies has had for two hundred years. In Massachusetts they have not seen it since 1641; in Virginia not since 1628. It is that of belonging to a community of which every adult was born somewhere else. When you come to think of this a little, it is dislocating to many of your conventions. Let a citizen of Salem, for instance, or a well-established Philadelphia Quaker, try to imagine his Chief Justice fresh from Louisiana, his Mayor from Arkansas, his tax-collector from South Carolina, and himself recently arrived in a wagon from a thousand-mile drive. Such was the community that Ballard from one quarter of the horizon had travelled to in a wagon to govern, Wingo arriving on a mule from another quarter. People reached Boisé in three ways: by rail to a little west of the Missouri, after which it was wagon, saddle, or walk for the remaining fifteen hundred miles;[4] from California it was shorter; and from Portland, Oregon, only about five hundred miles, and some of these more agreeable, by water up the Columbia. Thus it happened that salt often sold for its weight in gold-dust. A miner in the Bannock [Boise] Basin would meet a freight teamster coming in with the staples of life, having journeyed perhaps sixty consecutive days through the desert, and valuing his salt highly. The two accordingly bartered in scales, white powder against yellow, and both parties content. Some in Boisé to-day can remember these bargains. After all, they were struck but thirty years ago. Governor Ballard and Treasurer Hewley did not come from the same place, but they constituted a minority of two in Territorial politics because they hailed from north of Mason and Dixon's line. Powhattan Wingo and the rest of the Council were from Pike County, Missouri. They had been Secessionists, some of them Knights of the Golden Circle;[5] they had belonged to Price's Left Wing, and they flocked together. They were seven—two lying unwell at the Overland, five now present in the State-House with the Governor and Treasurer. Wingo, Cascon Claiborne, Gratiot des Pères, Pete Cawthon, and F. Jackson Gilet were their names.[6] Besides this Council of seven were thirteen members of the Idaho House of Representatives, mostly of the same political feather with the Council, and they too would be present at noon to receive their pay. How Ballard and Hewley came to be a minority of two is a simply matter. Only twenty-five months had gone since Appomattox Courthouse. That surrender was presently followed by Johnston's to Sherman, at Durhams Station, and following this the various Confederate armies in Alabama, or across the Mississippi, or wherever they happened to be, had successively surrendered—but not Price's Left Wing. There was the wide open West under its nose, and no Grant or Sherman infesting that void. Why surrender? Wingos, Claibornes, and all, they melted away. Price's Left Wing sailed into the prairie and passed below the horizon. To know what it did next, you must, lilke Ballard or Hewley, pass below the horizon yourself, clean out of sight of the dome at Washington, and find in remote, snug Idaho (besides wild red men in quantities) a white colony of the ripest Southwestern persuasion, and a Legislature to fit. And if, like Ballard or Hewley, you were a Union man, and the President of the United States had appointed you Governor or Secretary of such a place, your days would be full of awkwardness, though your difference in creed might not hinder you from playing draw-poker with the unreconstructed. These Missourians were whole-souled, ample-natured males in many ways, but born with a habit of hasty shooting. The Governor, on setting foot in Idaho, had begun to study pistolship, but acquired thus in middle life it could never be with him that spontaneous art which it was with Price's Left Wing. Not that the weapons now lying loose about the State-House were brought for use there. Everybody always went armed in Boisé, as the gravestones impliedly testified. Still, in the thought of what it might come to at noon, a bad quarter of an hour, did cross Ballard's mind, raising the image of a column in the morrow's paper: "An unfortunate occurrence has ended relations between esteemed gentlemen hitherto the warmest personal friends…. They will be laid to rest at 3 P.M.…As a last token of respect for our lamented Governor, the troops from Boisé Barracks…." The Governor trusted that if his friends at the post were to do him any service it would not be a funeral one.

The new pitcher of toddy came from the Overland, the jack-pots continued, were nearing a finish, and Ballard began to wonder if anything had befallen a part of his note to the bar-tender, an enclosure addressed to another person.

"Ha, suh!" said Wingo to Hewley. "My pot again, I declah." The chips

had been crossing the table his way, and he was now loser but six hundred dollars.

"Ye ain't goin' to whip Mizzooruh all night an' all day, ez a rule," observed Pete Cawthon, Councillor from Lost Leg.

"'Tis a long road that has no turnin', Gove'nuh," said F. Jackson Gilet, more urbanely. He had been in public life in Missouri, and was now President of the Council in Idaho.[7] He, too, had arrived on a mule, but could at will summon a rhetoric dating from Cicero, and preserved by many luxuriant orators until after the middle of the present century.

"True," said the Governor, politely. "But here sits the long-suffering bank, whichever way the road turns. I'm sleepy."

"You sacrifice yo'self in the good cause," replied Gilet, pointing to the poker game. "Oneasy lies the head tha wahs an office, suh." And Gilet bowed over his compliment.

The Governor thought so indeed. He looked at the Treasurer's strong-box, where lay the appropriation lately made by Congress to pay the Idaho Legislature for its services; and he looked at the Treasurer, in whose pocket lay the key of the strong-box. He was accountable to the Treasury at Washington for all money disbursed for Territorial expenses.

They dealt and played the hand, and the Governor strolled to the window.

"Three aces," Wingo announced, winning again handsomely. "I struck my luck too late," he commented to the onlookers. While losing he had been able to sustain a smooth reticence; now he gave his thoughts freely to the company, and continually moved and fingered his increasing chips. The Governor was still looking out of the window, where he could see far up the street, when Wingo won the last hand, which was small. "That ends it, suh, I suppose?" he said to Hewley, letting the pack of cards linger in his grasp.

"I wouldn't let him off yet," said Ballard to Wingo from the window, with sudden joviality, and he came back to the players. "I'd make him throw five cold hands with me."

"Ah, Gove'nuh, that's yoh spo'tin' blood! Will you do it, Mustuh Hewley—a hun'red a hand?"

Mr. Hewley did it; and winning the first, he lost the second, third, and fourth in the space of an eager minute, while the Councillors drew their chairs close.

"Let me see," said Wingo, calculating, "if I lose this—why still—" He lost. "But I'll not have to ask you to accept my papuh, suh. Wingo liquidates. Fo'ty days at six dolluhs a day makes six times fo' is twenty-fo'—two hun'red and fo'ty dolluhs spot cash in hand at noon, without computation of mileage to and from Silver City at fo' dolluhs every twenty miles, estimated according to the nearest usually travelled route." He was reciting part of the statute providing mileage for Idaho legislators. He had never served the public before, and he knew all the laws concerning compensation by heart. "You'll not have to wait fo' yoh money, suh," he concluded.

"Well, Mr. Wingo," said Governor Ballard, "it depends on yourself whether your pay comes to you or not." He spoke cheerily. "If you don't see things my way, our Treasurer will have to wait for his money." He had not expected to break the news just so, but it made as easy a beginning as any.

"See things yoh way, suh?"

"Yes. As it stands at present I cannot take the responsibility of paying you."

"The United States pays me, suh. My compensation is provided by act of Congress."

"I confess I am unable to discern your responsibility, Gove'nuh," said F. Jackson Gilet. "Mr. Wingo has faithfully attended the session, and is, like every gentleman present, legally entitled to his emoluments."

"You can all readily become entitled—"

"All? Am I—are my friends—included in this new depa'tyuh?"

"The difficulty applies generally, Mr. Gilet."

"Do I understand the Gove'nuh to insinuate—nay, gentlemen, do not rise! Be seated, I beg." For the Councillors had leaped to their feet.

"Whar's our money?" said Pete Cawthon. "Our money was put in thet yere box."

Ballard flushed angrily, but a knock at the door stopped him, and he merely said, "Come in."

A trooper, a corporal, stood at the entrance, and the disordered Council endeavored to look usual in a stranger's presence. They resumed their seats, but it was not easy to look usual on such short notice.

"Captain Paisley's compliments," said the soldier, mechanically, "and will Governor Ballard take supper with him this evening?

"Thank Captain Paisley," said the Governor (his tone was quite usual), "and say that official business connected with the end of the session makes it imperative for me to be at the State-House. Imperative."

The Legislature, always in its shirt sleeves, the cards on the table, and the toddy on the floor, sat calm a moment cooled by this brief pause from the first heat of its surprise, while the clatter of Corporal Jones's galloping shrank quickly into silence.

Captain Paisley walked slowly from the adjutant's office at Boisé Barracks to his quarters, and his orderly walked behind him. The captain carried a letter in his hand, and the orderly, though distant a respectful ten paces, could hear him swearing plain as day. When he reached his front door, Mrs. Paisley met him.

"Jim," cried she, "two more chickens froze in the night." And the delighted orderly heard the captain so plainly that he had to blow his nose or burst.

The lady, merely remarking "My goodness, Jim," retired immediately to the kitchen, where she ha a soldier cook baking, and feared he was not quite sober enough to do it alone. The captain had paid eighty dollars for forty hens this year at Boisé, and twenty-nine had now passed away, victims to the climate. His wise wife perceived his extreme language not to have been all on account of hens, however; but he never allowed her to share in his professional worries, so she staid safe with the baking, and he sat in the front room with a cigar in his mouth.

Boisé was a two-company post without a major, and Paisley being senior captain was in command, an office to which he did not object. But his duties so far this month of May had not pleased him in the least. Theoretically, you can have at a two-company post the following responsible people: one major, two captains, four lieutenants, a doctor, and a chaplain. The major has been spoken of; it is almost needless to say that the chaplain was on leave, and had never been seen at Boisé by any of the present garrison; two of the lieutenants were also on leave, and two on surveying details—they had influence at Washington; the other captain was on a scout with General Crook somewhere near the Malheur Agency,[8] and the doctor had only arrived this week. There had resulted a period when Captain Paisley was his own adjutant, quartermaster, and post surgeon, with not even an efficient sergeant to rely upon; and during this period his wife had staid a good deal in the kitchen. Happily the doctor's coming had given relief to the hospital steward and several patients, and to the captain not only an equal, but an old friend, with whom to pour out his disgust; and together every evening they freely expressed their opinion of the War Department and its treatment of the Western army.

There were steps at the door, and Paisley hurried out. "Only you!" he exclaimed, with such frank vexation that the doctor laughed loudly. "Come in, man, come in," Paisley continued, leading him strongly by the arm, sitting him down, and giving him a cigar. "Here's a pretty how de do!"

"More Indians?" inquired Dr. Tuck.

"Bother! They're nothing. It's Senators—Councillors—whatever the Territorial devols call themselves."

"Gone on the war-path?" the doctor said, quite ignorant how nearly he had touched the Council.

"Precisely, man. War-path. Here's the Governor writing me, saying they'll be scalping him in the State-House at twelve o'clock. It's past 11:30. They'll be whetting knives about now." And the captain roared.

"I know you haven't gone crazy," said the doctor, "but who has?"

"The lot of them. Ballard's a good man, and—what's his name?—the lit-

tle Secretary. The balance are just mad dogs—mad dogs. Look here: 'Dear captain'—that's Ballard to me. I just got it—'I find myself unexpectedly hampered this morning. The South shows signs of being too solid. Unless I am supported, my plan for bringing our Legislature to terms will have to be postponed. Hewley and I are more likely to be brought to terms ourselves—a bad precedent to establish in Idaho. Noon is the hour for drawing salaries. Ask me to supper as quick as you can, and act on my reply.' I've asked him," continued Paisley, "but I haven't told Mrs. Paisley to cook anything extra yet." The captain paused to roar again, shaking Tuck's shoulder for sympathy. Then he explained the situation in Idaho to the justly bewildered doctor. Ballard had confided many of his difficulties lately to Paisley.

"He means you're to send troops?" Tuck inquired.

"What else should the poor man mean?"

"Are you sure it's constitutional?"

"Hang constitutional! What do I know about their legal quibbles at Washington?"

"But, Paisley—"

"They're unsurrendered rebels, I tell you. Never signed a parole."

"But the general amnesty—"

"Bother general amnesty! Ballard represents the Federal government in this Territory, and Uncle Sam's army is here to protect the Federal government. If Ballard calls on the army it's our business to obey, and if there's any mistake in judgment it's Ballard's, not mine." Which was sound soldier common-sense, and happened to be equally good law. This is not always the case.

"You haven't got any force to send," said Tuck.

This was true. General Crook had taken with him both Captain Sinclair's infantry and the troop (or company, as cavalry was also then called) of the First.

"A detail of five or six with a reliable non-commissioned officer will do to remind them it's the United States they're bucking against," said Paisley. "There's a deal in the moral of these things. Crook—" Paisley broke off and ran to the door. "Hold his horse!" he called out to the orderly; for he had heard the hoofs, and was out of the house before Corporal Jones had fairly arrived. So Jones sprang off and hurried up, saluting. He delivered his message.

"Um—umpra—what's that? Is it *imperative* you mean?" suggested Paisley.

"Yes, sir," said Jones, reforming his pronunciation of that unaccustomed word. "He said it twiced."

"What were they doing?"

"Blamed if I—beg the captain's pardon—they looked like they was waitin' for me to git out."

"Go on—on. How many were there?"

"Seven, sir. There was Governor Ballard and Mr. Hewley and —well, them's all the names I know. But," Jones hastened on with eagerness, "I've saw them fie other fellows before at a—at—" The corporal's voice failed, and he stood looking at the captain.

"Well? Where?"

"At a cock-fight, sir," murmured Jones, casting his eyes down.

A slight sound came from the room where Tuck was seated, listening, and Paisley's round gray eyes rolled once, then steadied themselves fiercely upon Jones.

"Did you notice anything further unusual, corporal?"

"No, sir, except they was excited in there. Looked like they might be goin' to hev considerable rough house—a fuss, I mean, sir. Two was in their socks. I counted four guns on a table."

"Take five men and go at once to the State-House. If the Governor needs assistance you will give it, but do nothing hasty. Stop trouble, and make none. You've got twenty minutes."

"Captain—if anybody needs arrestin'—"

"You must be the judge of that." Paisley went into the house. There was no time for particulars.

"Snakes!" remarked Jones. He jumped on his horse, and dashed down the slope to the men's quarters.

Crook may be there any day or hour," said Paisley, returning to the doctor. With two companies in the background, I think Price's Left Wing will subside this morning."

"Supposing they don't?"

"I'll go myself; and when it gets to Washington that the commanding officer at Boisé personally interfered with the Legislature of Idaho, it'll shock 'em to that extent that the government will have to pay for a special commission of investigation and two tons of red tape. I've got to trust to that corporal's good sense. I haven't another man at the post."

Corporal Jones had three-quarters of a mile to go, and it was ten minutes before noon, so he started his five men at a run. His plan was to walk and look quiet as soon as he reached the town, and thus excite no curiosity. The citizens were accustomed to the sight of passing soldiers. Jones had thought out several things, and he was not going to order bayonets fixed until the final necessary moment. "Stop trouble and make none" was firm in his mind. He had not long been a corporal. It was still his first enlistment. His habits were by no means exemplary; and his frontier personality, strongly developed by six years of vagabonding before he enlisted, was scarcely yet disciplined into the military machine of the regulation pattern that it should and must become before he could be counted a model soldier. His captain had promoted him to steady him, if that could be, and to give his better qualities a chance. Since then he had never been drunk at the wrong time. Two years ago it would not have entered his free-lance heart to be reticent with any man, high or low, about any pleasure in which he saw fit to indulge; to-day he had been shy over confessing to the commanding officer his leaning to cock-fights—a sign of his approach to the correct mental attitude of the enlisted man. Being corporal had wakened in him a new instinct, and this State-House affair was the first chance he had to show himself. He gave the order to proceed at a walk in such a tone that one of the troopers whispered to another, "Specimen ain't going to forget he's wearing a chevron."[9]

The brief silence among the Councillors that Jones and his invitation to supper had caused was first broken by F. Jackson Gilet.

"Gentlemen," he said, "as President of the Council I rejoice in an interruption that has given pause to our haste and saved us from ill-considered expressions of opinion. The Gove'nuh, I confess, surprised me. Befo' examining the legal aspect of our case I will ask the Gove'nuh if he is familiar with the sundry statutes applicable."

"I think so," Ballard replied, pleasantly.

"I had supposed," continued the President of the Council—"nay, I had congratulated myself that our weightiuh tasks of law-making and so fo'th were consummated yesterday, our thirty-ninth day, and that our friendly game of last night would be, as it were, the finis that crowned with pleashuh the work of a session memorable for its harmony."

This was not wholly accurate, but near enough. The Governor had vetoed several bills, but Price's Left Wing had had much more than the required two-thirds vote of both Houses to make these bills law over the Governor's head. This may be called harmony in a manner. Gilet now went on to say that any doubts which the Governor entertained concerning the legality of his paying any salaries could easily be settled without entering upon discussion. Discussion at such a juncture could not but tend towards informality. The President of the Council could well remember most unfortunate discussions in Missouri between the years 1856 and 1860, in some of which he had had the honor to take part—*minima pars*, gentlemen! Here he digressed elegantly upon civil dissensions, and Ballard, listening to him and marking the slow, sure progress of the hour, told himself that never before had Gilet's oratory seemed more welcome or less lengthy. A plan had come to him, the orator next announced, a way out of the present dilemma, simple and regular in every aspect. Let some gentleman present now kindly draft a bill setting forth in its preamble the acts of Congress providing for the Legislature's compensation, and let this bill in conclusion provide that all members immediately receive the full amount due for their services. At noon both Houses would convene; they would push back the clock, and pass this

bill.

"Then, Gove'nuh," said Gilet, "you can amply vindicate yo'self by a veto, which, together with our votes on reconsideration of yoh objections, will be reco'ded in the journal of our proceedings, and copies transmitted to Washington within thirty days as required by law. Thus, suh, will you become absolved from all responsibility."

The orator's face, while he explained this simple and regular way out of the dilemma, beamed with acumen and statesmanship. Here they would make a law, and the Governor must obey the law!

Nothing could have been more to Ballard's mind as he calculated the fleeting minutes than this peaceful pompous farce. "Draw your bill, gentlemen," he said. "I would not object if I could."

The Revised Statutes of the United States was procured from among the pistols and opened at the proper page. Gascon Claiborne, upon another sheet of paper headed "Territory of Idaho, Council Chamber," set about formulating some phrases which began "Whereas," and Gratiot des Pères read aloud to him from the statutes. Ballard conversed apart with Hewley; in fact, there was much conversing aside.

"Third March, 1863, c. 117, s. 8, v. 12, p. 811," dictated Des Pères.

"Skip the chaptuhs and sections," said Claiborne. "We only require the date."

"Third March 1863. The sessions of the Legislative Assemblies of the several Territories of the United States shall be limited to forty days' duration.'"

"Wise provision that," whispered Ballard. "No telling how long a poker game might last."

But Hewley could not take anything in this spirit. "Genuine business was not got through till yesterday," he said.

"The members of each branch of the Legislature," read Des Pères, "shall receive a compensation fo six dollars per day during the sessions herein provided for, and they shall receive such mileage as now provided by law; *Provided*, That the President of the Council and the Speaker of the House of Representatives shall each receive a compensation of ten dollars a day."[10]

At this the President of the Council waved a deprecatory hand to signify that it was principle, not profit, for which he battled. They had completed their *whereases*, incorporating the language of the several sections as to how the appropriation should be made, who disbursed such money, mileage, and, in short, all things pertinent to their bill, when Pete Cawthon made a suggestion.

"Ain't there anything 'bout how much the Gove'nuh gits?" he asked.

"And the Secretary?" added Wingo.

"Oh, you can leave us out," said Ballard.

"Pardon me, Gove'nuh," said Gilet. "You stated that yoh difficulty was not confined to Mr. Wingo or any individual gentleman, but was general. Does it now apply to yo'self, suh? DO you not need any bill?"

"Oh no," said Ballard, laughing. "I don't need any bill."

"And why not?" said Cawthon. "You've jist ez much earned yoh money ez us fellers."

"Quite as much," said Ballard. "But we're not alike—at present."

Gilet grew very stately. Except certain differences in political opinions, suh, I am not awah of how we differ in merit as public servants of this Territory."

"The difference is of your own making, Mr. Gilet, and no bill y ou could frame would cure it or destroy my responsibility. You cannot make any law contrary to a law of the United States."

"Contrary to a law of the united States? And what, suh, has the United States to say about my pay I have earned in Idaho?"

"Mr. Gilet, there has been but one government in this country since April, 1865, and as friends you and I have often agreed to differ as to how many there were before then. That government has a law compelling people like you and me to go through a formality, which I have done, and you and your friends have refused to do each time it has been suggested to you. I have raised no point until now, having my reasons, which were mainly that it would make less trouble now for the Territory of which I have been appointed Governor. I am held accountable to the Secretary of the Treasury semiannually for the manner in which the appropriation has been expended. If you will kindly hand me that book—"

Gilet, more and more stately, handed Ballard the Revised Statutes, which he had taken from Des Pères. The others were watching Ballard with gathering sullenness, as they had watched Hewley while he was sinning Wingo's money, only now the sullenness was of a more decided complexion.

Ballard turned the pages. "Second July 1862. Every person elected or appointed to any office of honor or profit, either in the civil, military, or naval service,…shall, before entering upon the duties of such office, and before being entitled to any salary or other emoluments thereof, take and subscribe the following oath: I—"

"What does this mean, suh?" said Gilet.

"It means that there is no difference in our positions as to what preliminaries the law requires of us, no matter how we may vary in convictions. I as Governor have taken the oath of allegiance to the United States, and you as Councillor must do the same before you can get your pay. Look at the book."

"I decline, suh. I repudiate yoh proposition. There is a wide difference in our positions."

"What do you understand it to be, Mr. Gilet?" Ballard's temper was rising.

"If you have chosen to take an oath that did not go against yoh convictions—"

"Oh, Mr. Gilet!" said Ballard, smiling. "Look at the book." He would not risk losing his temper through further discussion. He would stick to the law as it lay open before them.

But the Northern smile sent Missouri logic to the winds. "In what are you superior to me, suh, that I cannot choose? Who are you that I and these gentlemen must take oaths befo' you?"

"Not before me." Look at the book."

"I'll look at no book, suh. Do you mean to tell me you have seen me day aftuh day and meditated this treacherous attempt?"

"There is no attempt and no treachery, Mr. Gilet. You could have taken the oath long ago, like other officials. You can take it to-day—or take the consequences."

"What? You threaten me, suh? Do I understand you to threaten me? Gentlemen of the Council, it seems Idaho will be less free than Missouri unless we look to it." The President of the Council had risen in his indignant oratorical might, and his more and more restless friends glared admiration at him. "When was the time that Price's Left Wing surrendered?" asked the orator. "Nevuh! Others have, be it said to their shame. We have not toiled these thousand miles fo' that! Others have crooked the pliant hinges of the knee that thrift might follow fawning. As fo' myself, two grandfathers who fought fo' our libuhties rest in the soil of Virginia, ad two uncles who fought in the Revolution sleep in the land of the Dark and Bloody Ground. With such blood in my veins I will nevuh, nevuh, nevuh submit to Northern rule and dictation. I will risk all to be with the Southern people, and if defeated I can, with a patriot of old, exclaim,

'More true joy an exile feels

Than Caesuh with a Senate at his heels.'

Ay, gentlemen! And we will not be defeated! Our rights are here and are ours." He stretched his arms toward the Treasurer's strong-box and his enthusiastic audience rose at the rhetoric. "Contain yo'selves, gentlemen," said the orator. "Twelve o'clock and our bill!"

"I've said my say," said Ballard, remaining seated.

"An' what'll ye do?" inquired Pete Cawthon from the agitated group.

"I forbid you to touch that!" shouted Ballard. He saw Wingo moving towards the box.

"Gentlemen, do not resort—" began Gilet.

But small, iron-gray Hewley snatched his pistol from te box, and sat down astraddle of it, guarding his charge. At this hostile movement the others precipitated themselves towards the table where lay their weapons, and

Governor Ballard, whipping his own from his armhole, said, as he covered the table: "Go easy, gentlemen! Don't hurt our Treasurer!"

"Don't nobody hurt anybody," said Specimen Jones, opening the door.

This prudent corporal had been looking in at a window, and hearing plainly for the past two minutes, and he had his men posted. Each member of the Council stopped as he stood, his pistol not quite attained; Ballard restored his own to its armhole and sat in his chair; little Hewley sat on his box; and F. Jackson Gilet towered haughtily, gazing at the intruding blue uniform of the United States.

"I'll hev to take you to the commanding officer," said Jones briefly to Hewley. "You and yer box."

"Oh my stars and striped, but that's a keen move!" rejoiced Ballard to himself. He's arresting *us*!"

In Jones's judgment, after he had taken in the situation, this had seemed the only possible way to stop trouble without making any, and therefore, even now, bayonets were not fixed. Best not ruffle Price's Left Wing just now, if you could avoid it. For a new corporal it was well thought and done. But it was high noon, the clock not pushed back, and punctual Representatives strolling innocently towards their expected pay. There must be no time for a gathering and possible reaction. "I'll hev to clear this State-House out," Jones decided. "We're makin' an arrest," he said aloud, "and we want a little room." The outside by-standers stood back obediently, but the Councillors delayed. Their pistols were, with Ballard's and Hewley's, of course in custody. "Here," said Jones, restoring them. "Go home now. The commanding officer's waiting fer the prisoner. Put yer boots on, sir, and leave," he added to Pete Cawthon, who still stood in his stockings. "I don't want to hev to disperse anybody more'n what I've done."

Disconcerted Price's Left Wing now saw file out between armed soldiers the Treasurer and his strong-box; and thus guarded they were brought to Boisé Barracks, whence they did not reappear. The Governor also went to the post.

After delivering Hewley and his treasure to the commanding officer, Jones with his five troopers went to the sutler's store and took a drink at Jones's expense. Then one of them asked the corporal to have another. But Jones refused. "If a man drinks much of that," said he (and the whiskey certainly was of a livid, unlikely flavor), "he's liable to go home and steal his own pants." He walked away to his quarters, and as he went they heard him thoughtfully humming his most inveterate sing, "Ye shepherds tell me have you seen my Flora pass this way."

But poisonous whiskey was not the inner reason for his moderation. He felt very much like a responsible corporal to-day, and the troopers knew it. "Jones has done himself a good turn in this fuss," they said. "He'll be changing his chevron."

That afternoon the Legislature sat in the State-House and read to itself the Revised Statutes all about oaths. It is not believed that any of them sat up another night; sleeping on a problem is often much better. Next morning the commanding officer and Governor Ballard were called upon by F. Jackson Gilet and the Speaker of the House. Every one was civil and hearty as possible. Gilet pronounced the Captain's whiskey "equal to any at the Southern, Saint Louey," and conversed for some time about the cold season, General Crook's remarkable astuteness in dealing with Indians, and other topics of public interest. "And concernin' you difficulty yesterday, Gove'nuh," said he, "I've been consulting the laws, suh, and I perceive yoh construction is entahley correct."

And so the Legislature signed that form of oath prescribed for participants in the late Rebellion, and Hewley did not have to wait for his poker-money. He and Wingo played many subsequent games; for, as they all said, in referring to the matter, "A little thing like that should nevuh stand between friends."

Thus was accomplished by Ballard, Paisley—and Jones—the Second Missouri Compromise, at Boisé City, Idaho, 1867—an eccentric moment in the eccentric years of our development westward, and historic also. That it has gone unrecorded until now is because of Ballard's modesty, Paisley's preference for the sword, and Jones's hatred of the pen. He was never known to write except, later, in the pages of his company roster, and such unavoidable official places; for the troopers were prophetic. In not many months there was no longer a Corporal Jones, but a person widely known as Sergeant Jones of Company A; called also the "Singing Sergeant"; but still familiar to his intimate friends as "Specimen."

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1. The Overland Hotel was two blocks from Hart's Exchange (later the Central Hotel), where the territorial legislature was meeting. Not until 1886 was there a Territorial Capitol to house the elected and appointed officials of the state and legislative chambers.

2. The Treasurer's actual name was Solomon Howlett; the governor was indeed D. W. Ballard.

3. Hart's Exchange was something of a mid-19th-century convention center, with balconies all around the second floor where the legislature met. The setting made for considerable drama when furniture came flying out the windows of the chambers.

4. A stage line was available by this time, connecting to rail lines at Atcheson, Kansas. Otherwise, Wister's description of routes to Idaho is correct.

5. The Knights of the Golden Circle was a secret society of Democrats, primarily in the Middle West, whose goal was to end the Civil War and restore the Union as it was before the war. Confederate General Sterling Price, a Missourian, led unsuccessful efforts to "rescue" Missouri from the Union; at the end of the Civil War, rather than surrendering he took many of his troops to Mexico. The left wing of his army went instead to the Northwest mines. Many of Idaho's early settlers were from Missouri, but by no means were all members of the Council.

6. These are not the actual names of members of the Council. There were thirty-one legislators altogether: eleven in the Council, twenty in the House.

7. Gilet is patterned after George Ainslie, who came to Idaho when he was only 24 and thus had had no political career in his home state of Missouri. He went on to serve two terms in the U.S. Congress.

8. General George Crook was in charge of operations during the Snake War; Major James Sinclair was in fact at the post at this time, doing much of what Wister attributes to Paisley.

9. Corporal Specimen Jones appears in other of Wister's short stories as well.

10. Wister took some liberties here; leadership received eight dollars a day, other legislators four, and the territory paid expenses. And the quotation is revised from the Idaho Organic Act rather than a general statute applying to all territories. But he was correct about Ballard's volunteering to be left out of any territorial legislative plan for compensation.

About the Author

Owen Wister *was born July 14, 1860 and died July 21, 1938. He is best known for The Virginian: A Horseman of the Plains (1902), a novel often credited with being "the first Western." He produced over 60 short stories, all but a few of which were about the American West. His stories appeared in* Harper's New Monthly Magazine, *the* Saturday Evening Post, Collier's Weekly, *and* Cosmopolitan. *He graduated from Harvard Law School in 1888, but was more interested in writing than practicing law. He and his wife, Mary Channing had six children.*

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Oral History of Idaho's Legal Profession

Rita Ryan
Idaho Legal History Society Oral History Committee

During this year, the Oral History Committee of the Idaho Legal History Society has been working diligently to design a process and tools to help interviewers and narrators record and retain the important stories of our extraordinary, intelligent and legendary legal figures. These stories—and the knowledge and perspective that the lawyers and judges and others have about important legal issues and times—deserve to be gathered and saved for the future.

The output of this multifaceted committee, composed of judges, lawyers, court reporters, historians and others, is *The Oral History Guide for Interviewers and Transcribers*, now available on the Idaho Legal History Society's website: www.id.uscourts.gov/comm/ilhs/oral-history/htm.

From information on how to get started to tips on interviewing, from letters of inquiry through approved release forms, from the interview to the written and oral files, the handbook details each step and answers the questions for interviewers. In addition, the committee members have compiled a list of the "top-60" persons in Idaho that should be interviewed soon, and a list of court reporter-transcribers in each section of the state willing to help with the projects.

Further, the members of the committee have agreed to "mentor" or be "buddies" with first-time interviewers as each goes through the oral history process. Committee members will answer questions, pave the way when they can, suggest background information that interviewers should be aware of, and otherwise help the interviewers become comfortable with the process and the story narrators they choose to interview.

The oral history project is rewarding and worthwhile. The stories out there are priceless. Please volunteer to become an oral history interviewer, narrator, or transcriptionist soon by contacting any of the ILHS committee members.

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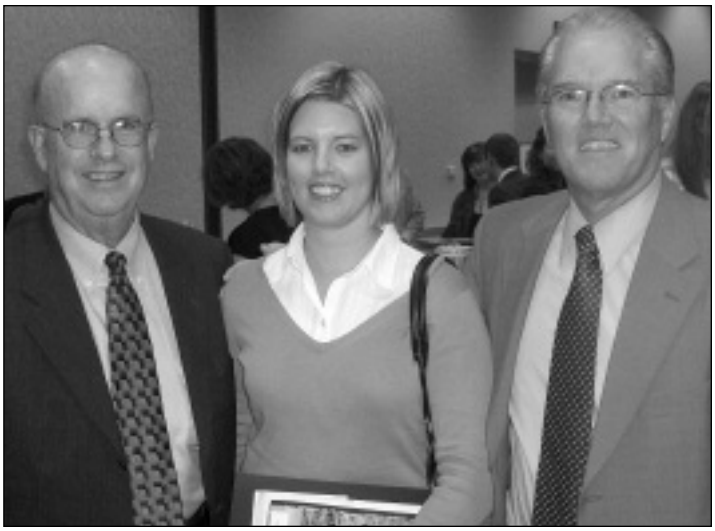
New Idaho State Bar attorneys being sworn in before the Idaho Supreme Court on September 27, 2007.



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Family Josh Decker's family wait for Josh to finish some paperwork. Susan Cannon, holding Josh's son Cannon Decker, Pat Decker, and T. Val Cannon.

Lance Stevenson with wife Bettie and baby Calista. Lance is working in the Bannock County Prosecutor's office in Pocatello.

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AVOID THE LAST MINUTE SCRAMBLE

If your MCLE reporting period ends on December 31, 2007, visit www.idaho.gov/isb for lists of upcoming live courses, approved online courses and audio/video rentals available for rent. Do not wait until December to get the credits you need. If you have questions about MCLE compliance, contact the Membership Department at (208) 334-4500 or jhunt@isb.idaho.gov.

JUSTICE LINDA COPPLE TROUT

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On August 31st of this year, the Honorable Linda Copple Trout stepped down from her position as an Idaho Supreme Court justice after 15 years of service to the citizens of Idaho. During her tenure with the Court, Justice Trout demonstrated to the public and to the lawyers who appeared in her courtroom, a high degree of professionalism, common sense, and great breadth and depth of legal insight. Behind the scenes, Justice Trout also showed skill and finesse as a consensus-builder in deliberations with the other justices with whom she worked.

On the national level, Justice Trout represented the State of Idaho as Chief Justice from 1997-2004. Additionally, she acted as the designated disposition justice at the Idaho Supreme Court from 1993 to 2007. In this role, Justice Trout was in charge of making recommendations on all petitions and motions brought before the Idaho Supreme Court. Justice Trout has also worked within the Idaho judiciary to create institutional changes including the necessary support for the creation of problem-solving courts, such as the mental health and drug courts and children and family services. Additionally, she volunteered time with the Citizens Law Academy and countless other state and national legal organizations.

Justice Trout is an extremely personable, yet private person. Few people know (or would guess) that Justice Trout enjoys gourmet cooking and baking. In order to bake the freshest bread, she buys her whole wheat in 25 pound bags and grinds the wheat flour herself. However, to demonstrate the breadth of her appreciation for fine food, she is seen at least once a week at the Taco Time drive-through window for her favorite chicken ranchero burrito. In addition to cooking, Justice Trout enjoys outdoor activities with her fiancé, John Comstock, such as fly-fishing or walking her dogs. When the weather is better-suited for indoor pursuits, she likes to knit and will miss the opportunity to show off her latest creations with the Idaho Supreme Court staff.

In 1992, upon her appointment to the Court, Justice Trout was interviewed by *The Advocate.* Before conducting our interview, Justice Trout and the authors reviewed this article and asked Justice Trout a number of questions to see whether her perspective had changed after serving 15 years on the Idaho Supreme Court.

Q: In the 1992 Advocate *article, you stated that you were drawn to the bench because you "always liked the idea of the judge as the person who ended disputes as opposed to an advocate who pursued the client's best interests." After 15 years on the Supreme Court, have your feelings changed about your role as a judge?*

A: No, my feelings haven't changed. I still think the thing I really enjoy about being a judge is the ability to resolve matters in a final way for the parties; however, as I mentioned in 1992, there are still those cases that simply don't lend themselves to a final conclusion, such as the Snake River Basin Adjudication. That case will ultimately be resolved, but it was going on before I was appointed to the Supreme Court and will go on for several years after my retirement.

Q: How have you changed as a decision maker since you were appointed to the Idaho Supreme Court in 1992?

A: Because I worked with four other justices, I had to become more accustomed to a collaborative process in decision-making. Idaho Supreme Court decisions require at least three people to agree before an opinion can issue; therefore, you have to engage in a dialogue with your fellow justices in order to come up with a decision and approach that is agreeable to a majority.

Q: What has kept you on the bench for 25 years?

A: It is the continuing challenge to interpret the law, apply it to the facts in cases that come before us and the incredible variety of cases that we're called upon to decide. This has remained consistent throughout my experience both as a trial judge and as an appellate judge. I have also enjoyed very much the opportunity to work with the dedicated judges, attorneys and court personnel who make our judicial system work so well.

Q: What have you enjoyed the most about serving on the court?

A: In addition to the ability to work with four other very intelligent and capable people, it would be the ability to interpret the laws in a way that affects everyone in the state of Idaho and not just the parties appearing before the Court. The appellate courts are unique in that their decisions impact everyone and that is both a challenging and rewarding part of the job. Further, the varied opportunity I had as the Chief Justice to be involved in court administration and to travel throughout the state, meeting with the public and elected officials has also been wonderful. In addition, the opportunity to promote new initiatives, like the drug and mental health courts and family

and children services and specialized courts, was really very rewarding.

Q: What has been your biggest challenge on the Idaho Supreme Court?

A: As I mentioned before, working collaboratively has been a benefit, and it is great fun to discuss legal issues with four highly intelligent and experienced people. At the same time, trying to get the other justices to agree with my analysis could sometimes be a challenge.

Q: In the 1992 Advocate article, you indicated that there was perhaps too much emphasis on your appointment as the first female justice. Upon your retirement, the media has, again, focused upon your role as the only female justice and the selection of a male to replace you. Have your feelings changed at all about the focus on your gender and your role as a woman on the Idaho Supreme Court.

A: It is hard to say that simply having a woman on the Court makes a difference, but to the extent that women feel that they are represented and that the judge has had some of the same life experiences that they have had, there may be greater confidence in the system. I still believe that, but I would like to think that over the last fifteen years, I have been accepted as a member of the Court and not just a woman member of the Court. While I do bring a different perspective and life experience to the Court, I think, as I did fifteen years ago, that I am there just like all of the other justices trying to decide cases on the facts and applicable law and that is of primary importance.

Q: Do you think a diverse bench is beneficial in general?

A: Yes, I do, because I feel the public has greater confidence when they believe the decision makers are reflective of all of society. That is meant in no way as a criticism of Justice Horton, who I think will do a wonderful job, but I still think that the judicial system is benefited when it reflects the citizens that come before it.

Q: You were appointed to the bench at an early age and are retiring at an early age. What has led you to retire now?

A: I am retiring now for a number of different reasons. The first is a desire to have new challenges. I have an opportunity while I am still young to do a number of different things in the law. I have been on the Court for 15 years and it seemed like a great time to explore some other opportunities. The fact that I would be up for election next spring was certainly another factor that I took into consideration.

Justice Linda Trout and fiance John Comstock hiking at Jackson Lake in Wyoming.

Q: In the 1992 Advocate *article, you stated that your election campaign to become a district judge was "a really positive experience." Did you have the same reaction after your re-election campaign on the Idaho Supreme Court?*

A: No, I didn't, only because I discovered there is a difference in running for a new position as opposed to running to retain a position that you already have, which would not have occurred to me before I went through the last campaign. It puts a whole new burden on you that I simply didn't feel when I was seeking a district court position. I still enjoyed meeting people and that aspect of the process, but the fear that I might lose my job added a whole different perspective to the process.

Q: You are currently applying for a position as a federal magistrate judge. Why are you interested in this position?

A: If I were fortunate enough to be selected, it would provide some really interesting new challenges for me. I would enjoy the opportunity to be back in the trial courts. In fact, as a senior judge in the state system, I hope to have that experience again, as I have volunteered to take cases in the fourth judicial district. The direct contact with attorneys, litigants, and jurors was a wonderful experience when I was a trial judge before, and I would really enjoy the opportunity again.

Q: In the 1992 article, you mentioned an improvement in your rodeo abilities; can you still rope a calf on horseback?

A: (laughing) I'm a little rusty now that I'm a town dweller and no longer living on the farm.

It is clear that the impact Justice Trout's time with the Court had on Idaho citizens will not be soon forgotten. She has broken down social barriers, honorably represented our state on the national level and released clear and thoughtful opinions that will continue to guide Idaho litigants for decades to come. On behalf of our fellow bar-members, we send our congratulations to Justice Trout on her retirement from the Court and thank her for her dedicated service.

About the Authors

Jennifer Reinhardt and **Kira Pfisterer** *both clerked for Justice Linda Copple Trout. Jennifer is now with Mueleman Mollerup, Boise and Kira is a clerk for Judge Boyle at the U.S. District Court.*

COURT INFORMATION

OFFICIAL NOTICE
SUPREME COURT OF IDAHO

Chief Justice
Daniel T. Eismann

Justices
Roger S. Burdick
Jim Jones
Warren E. Jones
Joel D. Horton

1st Amended – Regular Fall Terms for 2007

Coeur d'Alene . . . . . September 5 and 6
Boise . . . . . September 10, 11 and 12
Idaho Falls . . . . . October 3 and 4
Pocatello . . . . . October 5
Boise . . . . . October 10 and 12
Boise . . . . . November 2 and 5
Twin Falls . . . . . November 7, 8 and 9
Boise . . . . . December 3, 5, 7, 10 and 12

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of setting of the year 2007 Fall Terms of the Idaho Supreme Court, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

IDAHO SUPREME COURT
ORAL ARGUMENT DATES
As of October 15, 2007

Friday, November 2, 2007 – BOISE—Ada County Courthouse

8:50 a.m.	Lane Ranch Partnership v. City of Sun Valley	#33423
10:00 a.m.	Andrae v. ICRMP	#33250
11:10 a.m.	Crowley v. Critchfield	#33615

Monday, November 5, 2007 – BOISE—Ada County Courthouse

8:50 a.m.	Gem State Insurance v. Hutchison	#33141
10:00 a.m.	Cole v. Esquibel	#33502
11:00 a.m.	**Vacated**	

Wednesday, November 7, 2007 – TWIN FALLS

8:50 a.m.	**Vacated**	
10:00 a.m.	Giltner, Inc. v. Dept. of Commerce	#33611
11:10 a.m.	Mason v. State Farm Mutual Auto Insurance	#33358

Thursday, November 8, 2007 – TWIN FALLS

8:50 a.m.	Seiniger Law v. North Pacific Insurance	#33192
10:00 a.m.	Birdwood v. Bulotti Construction	#33391
11:10 a.m.	Cranney v. Mutual of Enumclaw Insurance Company	#33501

Friday, November 9, 2007 – TWIN FALLS

8:50 a.m.	**Vacated**	
10:00 a.m.	Hernandez v. Triple Ell Transport	#33592
11:10 a.m.	Trilogy Network v. Johnson	#33824

OFFICIAL NOTICE
COURT OF APPEALS OF IDAHO

Chief Judge
Darrel R. Perry

Judges
Karen L. Lansing
Sergio A. Gutierrez

3rd AMENDED – Regular Fall Terms for 2007

Boise . . . . . August 14
Lewiston (Northern Idaho term) . . September 11
Boise . . . . . October 11
Boise . . . . . October 25
Boise . . . . . November 6, 8, 13, and 15
Boise . . . . . December 11 and 13

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of setting of the year 2007 Fall Terms of the Court of Appeals, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

IDAHO COURT OF APPEALS
ORAL ARGUMENT DATES
As of October 15, 2007

Tuesday, November 6, 2007 – BOISE—Ada County Courthouse

9:00 a.m.	State v. Tietsort	#32166
10:30 a.m.	Bright v. Bright	#33825
1:30 p.m.	State v. Flegel	#32956

Thursday, November 8, 2007 – BOISE—Ada County Courthouse

9:00 a.m.	State v. Hill	#33317
10:30 a.m.	State v. Bishop	#32805
1:30 p.m.	State v. Allen	#33677

Tuesday, November 13, 2007 – BOISE—Ada County Courthouse

9:00 a.m	.State v. Gervasi	#31661
10:30 a.m.	State v. Buell	#33435
1:30 p.m.	Stuart v. State	#32445

Thursday, November 15, 2007 – BOISE—Ada County Courthouse

9:00 a.m.	State v. Saputski	#33383
10:30 a.m.	Derushe v. State	#33469
1:30 p.m.	Kendall v. Johnson	#33561

Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(*UPDATE 02/01/07*)

CIVIL APPEALS

SUMMARY JUDGMENT

1. Did the court err in granting summary judgment to the defendant and by holding the exculpatory clause did not violate public policy?

Jesse v. Lindsley
S.Ct. No. 34037
Supreme Court

2. Did the court err in granting summary judgment for the defendants and in finding Sheriff Stacey did not act with reckless disregard as a matter of law?

Athay v. Stacey
S.Ct. No. 33785
Supreme Court

POST-CONVICTION RELIEF

1. Did the court err in concluding Smith failed to prove he received ineffective assistance of appellate counsel?

Smith v. State
S.Ct. No. 33412
Court of Appeals

2. Did the court err in concluding Thomas failed to prove ineffective assistance of counsel because there was a reasonable probability the outcome of the trial would have been different if counsel had responded to Thomas' repeated attempts at communication and had done the investigation requested by Thomas?

Thomas v. State
S.Ct. No. 33356
Court of Appeals

3. Did the district court err in granting the State's motion for summary dismissal of Swearingen's post-conviction petition?

Swearingen v. State
S.Ct. No. 31776/32653
Court of Appeals

PROCEDURE

1. Did the district court err in finding the plaintiffs had failed to properly serve the Board within six months of filing the complaint as required by I.R.C.P. 4(a)(2)?

Harrison v. Board of Professional Discipline State Board of Medicine
S.Ct. No. 33862
Supreme Court

2. Did the court err in ruling that a restitution order entered pursuant to I.C. § 19-5304 must be renewed within five years from the date the order is filed with the court?

Huntley v. Vessey
S.Ct. No. 34013
Court of Appeals

PARTNERSHIP

1. Did the district court err in finding Borges could not dissociate from the partnership because it consisted of only two partners?

Costa v. Borges
S.Ct. No. 33752
Supreme Court

CONTEMPT

2. Was the court clearly erroneous in finding Morton was in contempt of the permanent injunction?

Huyck v. Morton
S.Ct. No. 31613
Court of Appeals

CRIMINAL APPEALS

SEARCH AND SEIZURE – SUPPRESSION OF EVIDENCE

1. Did the court err in denying Giambo's motion to suppress and in finding the officer's search of Giambo was not clearly beyond the permissible scope of a Terry search for weapons?

State v. Giambo
S.Ct. No. 32508
Court of Appeals

2. Did the court abuse its discretion by denying Hastie's motion to suppress due to its untimeliness, and by finding Hastie failed to establish good cause or excusable neglect for the untimely filing?

State v. Hastie
S.Ct. No. 32735
Court of Appeals

3. Did Mubita have a privacy interest in the documents North Central District Health Department turned over to law enforcement such that the court erred in denying Mubita's motion to suppress?

State v. Mubita
S.Ct. No. 33252
Supreme Court

4. Did the court err in denying Purdum's motion to suppress and in concluding that he had waived all his Fourth Amendment rights as a condition of his probation?

State v. Purdum
S.Ct. No. 33073
Court of Appeals

SUBSTANTIVE LAW

1. Whether the court misapplied I.C. § 18-8310 by failing to make its own independent "not at risk" determination, rather than deferring to the determination made by the evaluator in the psychosexual evaluation?

State v. Kimball
S.Ct. No. 33673
Supreme Court

EVIDENCE

1. Is there insufficient evidence to support the jury verdict finding Hickman guilty of grand theft because the state failed to prove that the victim had financial transaction cards as defined by statute?

State v. Hickman
S.Ct. No. 33750
Supreme Court

INSTRUCTIONS

1. Did the court err when it declined to give Maynard's proposed jury instruction regarding the definition of "value"?

State v. Maynard
S.Ct. No. 32981
Court of Appeals

RESTITUTION

1. Did the court abuse its discretion when it imposed $3,771 in restitution to reimburse the victims for their losses?

State v. Holmquist
S.Ct. No. 32962
Court of Appeals

CONTEMPT

1. Did the summary contempt proceedings in this case, where the alleged contempt did not occur in the presence of the court or disrupt the orderly business of the court, violate I.C.R. 42?

State v. Elliott
S.Ct. No. 32265
Supreme Court

BOND FORFEITURE

1. Did the court properly deny Ellefson's motion to set aside forfeiture where the court concluded Ellefson posted bond, that the bond was a valid contract and that Ellefson received notice of the bond's forfeiture?

State v. Ellefson
S.Ct. No. 33622
Court of Appeals

Summarized by:
Cathy Derden
Idaho Supreme Court Staff Attorney
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Federal Court Corner

Tom Murawski
U.S. District and Bankruptcy Courts

In Memory of Judge Merlin S. Young

The District and Bankruptcy Courts for the District of Idaho, their Judges, clerks and staff, mourn the passing of the Honorable Merlin S. Young, retired United States Bankruptcy Judge, who died on August 14, 2007.

Born in Eden, Idaho on December 5, 1918, Judge Young graduated from Boise High School and Whitman College. He completed two years at the University of Michigan Law School, before serving as a U.S. Naval Officer in the Pacific during World War II. He completed his legal education at the University of Southern California in 1946.

Judge Young was admitted to the Idaho Bar in 1946 and was in private practice with his cousin, Willis Moffatt, from 1946 to 1950. In 1952, he was elected Ada County Prosecuting Attorney, and in 1952, he was elected to the Idaho State Legislature as an Ada County representative. He served as Chairman of the House Judiciary Committee in the legislature. In the fall of 1954, Judge Young was elected District Judge in the Idaho state courts, where he served for 14 years.

In 1969, he was appointed by the District Court for the District of Idaho as Referee under the Bankruptcy Act. In 1979 he was appointed as the first United States Bankruptcy Judge for the District of Idaho. He retired with distinction from that position in 1984.

Annual District Conference/ Federal Practice Program

The U.S. Courts for the District of Idaho will present the 3rd in its series of Annual District Conference/Federal Practice Programs, to be held in Boise on November 2nd at the Grove Hotel. Previous presentations in Lewiston and Idaho Falls have proven to be very informative and educational. Chief Judge Mary Schroeder of the Ninth Circuit Court of Appeals will be the guest speaker.

There are several interesting presentations on the Agenda including: "Practical Pointers from Chambers," outlining effective practices when filing in the federal court; "In the Valley of Bankruptcy - Fear no Evil" presented by regional Bankruptcy experts; "The U.S. Supreme Court Term in Review" presented by University of Idaho Dean Don Burnett, Associate Dean Richard Seamon and U.S. 9th Circuit Court of Appeals Judge Thomas G. Nelson; "Controlling the Cost of E-Litigation" presented by Ken Withers of the Sedona Conference and Helen Bergman Moure from K&L Gates in Seattle; and a Judge's Panel Best Practices on "Advocacy from the Court's Perspective."

The cost of the Conference is $75 for attorneys; and $35 for law students, paralegals, or law clerks ($100 late registration at the door). A total of six and one quarter (6.25) CLEs will be awarded. Information, flyers and registration materials can be found on the Court's website under the "Scrolling Announcements."

Merit Selection Panel for U.S. Magistrate Judges

A Merit Selection Panel consisting of nine attorneys and two lay members has been appointed to assist the Court in reviewing applications, conducting interviews, making necessary inquiries and ultimately recommending 6 to 9 qualified candidates for consideration for the two full-time U.S. Magistrate Judge positions which will become available in 2008. See General Order 220.

Bankruptcy Means Testing Requirement update

The Census Bureau's median family income data has been updated and will apply to all cases filed on or after October 15, 2007. Below is a link to all of the Census Bureau, IRS Data and Administrative Multipliers necessary to complete the Bankruptcy Means Testing requirement for cases filed on or after October 15, 2007.
http://www.usdoj.gov/ust/eo/bapcpa/20071015/meanstesting.htm

Amendments to Federal Rules of Procedure

Barring any additional action by Congress, the following amendments are set to take effect on December 1, 2007. Federal Rules of Bankruptcy Procedure 1014, 3007, 4001, 6006, 7007.1, and new rules 6003, 9005.1, and 9037. Federal Rules of Civil Procedure 4, 9, 11, 14, 16, 26, 30, 31, 40, 71.1, 78 and new rule 5.2. Federal Rules of Criminal Procedure 11, 32, 35, 45 and new rule 49.1. Federal Rules of Appellate Procedure 25. A comprehensive summary of these amendments will be available on our website at www.id.uscourts.gov prior to their effective date. If you would like to track the progress of these and other proposed federal rules, go to the federal judiciary's website on rule making at:
http://www.uscourts.gov/rules/

Amended Official Bankruptcy Forms effective Dec. 1, 2007

At their September meeting, the Judicial Conference of the United States approved the proposed revisions to Bankruptcy Official Forms 1, 3A, 3B, 4, 5, 6, 7, 9A-I, 10, 16A, 18, 19, 21, 23, and 24, which will take effect on December 1, 2007. If you would like to preview these forms or read the Committee Notes detailing the exact changes, please go to:
http://www.uscourts.gov/bankform/index.html.

New Chief Deputy

The U.S. District & Bankruptcy Court for the District of Idaho recently selected **Shannon Fuller** to become its new Chief Deputy Clerk. Ms. Fuller brings a wealth of court management experience at both the state and federal level. She has a Masters Degree in Judicial Administration from the University of Denver Law School. Most recently, Shannon served as Chief Deputy Clerk for the U. S. Bankruptcy Court for the District of Colorado.

Tom Murawski *is an Administrative Analyst with the United States District and Bankruptcy Courts. He has a J.D. and Masters in Judicial Administration.*

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Richard H. Greener

30+ years as an experienced civil litigator; available for ADR

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•Certified by Institute for Conflict Management's Mediation training/seminar
•Completed 40 hours of basic civil mediation training at University of Idaho, including 40 hours of IMA core training

Professional Activities and Association

•Best Lawyers in America, 1999 – Present
•Fellow, American College of Trial Lawyers
•American Board of Trial Advocates
•Lawdragon, leading 500 Trial Lawyers in America
•Mountain States Super Lawyers, 2007
•Chambers USA American Leading Business Lawyers (Litigation) 2003 – Present

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—Recognition—

Jean Fisher, director of the Ada County Prosecutor's Child Abuse and Sexual Assault Unit, was named by Idaho Governor C. L. "Butch" Otter as the 2007 Children at Risk Task Force prosecutor of the year. She has been the director of the unit since 1996. She prosecutes cases where children are victims and supervises other lawyers handling those cases. She also regularly consults with prosecutors from other Idaho counties dealing with difficult cases involving children, teaches classes for new police officers at the state police training academy in Meridian;, and serves in a multi-disciplinary Ada County team to identify and implement best practices for investigating crimes against children and dealing with the young victims. Jean works to bring together law enforcement, medical professionals and social service workers on how to uniformly respond to crimes with child victims. For instance she helped create a uniform protocol at Boise's two hospitals—Saint Alphonsus and St. Luke's—for what to do if newborn babies are found to have narcotics in their system. If that happens, health workers immediately call both the appropriate law enforcement agency and Idaho Health and Welfare officials, who put the baby into protective custody while police and welfare workers begin an investigation that will determine when the child will be allowed to safely reunite with the parents. Fisher and other prosecutors work on the criminal aspect of those cases and try to figure out the best way to resolve them in the best interests of the children. She also helped write similar protocols on how local hospitals and police should handle sexual assault victims who go to emergency rooms. She facilitates monthly discussions between local law enforcement, Health and Welfare and hospital officials about new trends, investigative techniques and cases.

Best Lawyers in America—the selection is based on peer-review surveys comprising more than two million confidential evaluations by top attorneys in the country. *Best Lawyers* is highly regarded as the definitive guide to excellence in the legal profession in the United States. It is based on an a peer review survey of leading attorneys throughout the country who vote on the legal abilities of other lawyers in their specialties, and because lawyers are not required to pay a fee to be listed, inclusion in Best Lawyers is considered a singular honor.

Greener Burke and Shoemaker P.A. has three attorneys who have been selected to be included in the 2008 edition of *The Best Lawyers in America*. **Carl P. Burke** was chosen in the specialties of Commercial Litigation and Corporate Law. **Richard H. Greener** and **Christopher C. Burke** were chosen for the specialty of Commercial Litigation. Carl has been listed in *Best Lawyers* for 25 years and Dick for more than ten.

Hall, Farley, Oberrecht & Blanton, P.A., has seven attorneys who have been selected as attorneys to be included in the 2008 edition of *The Best Lawyers in America.* They are **Richard E. Hall, Donald J. Farley, Phillip S. Oberrecht, Raymond D. Powers, Candy W. Dale, J. Kevin West,** and **Tamsen L. Leachman**.

Julian & Hull had five attorneys selected for inclusion in the 2008 edition of *Best Lawyers in America*. They are **Robert A. Anderson, Brian K. Julian, Alan K. Hull, Chris H. Hansen** and **Kenneth D. Nyman of Anderson**. Robert A. Anderson has been selected for his work in Personal Injury Litigation. Brian K. Julian has been selected for his work in Insurance Law and Personal Injury Litigation. Alan K. Hull has been selected for his work in Employee Benefits and Workers' Compensation Law. All three individuals are the founding partners of Anderson, Julian & Hull. Partner, Chris H. Hansen has been selected for his work in Personal Injury Litigation and partner Kenneth D. Nyman selected for his work in Mining Law.

Stoel Rives, LLP has three attorneys who have been selected to be included in the 2008 edition of *The Best Lawyers in America*. **Kevin J. Beaton**–Environmental Law, Water Law; **Paul M. Boyd**–Corporate Law, Mergers & Acquisitions Law; **James C. Dale**–Employee Benefits Law and Labor and Employment Law; **Mark S. Geston**–Commercial Litigation **Krista K. McIntyre**–Environmental Law **Kris J. Ormseth**–Corporate Law, Mergers & Acquisitions Law; and **J. Walter Sinclair**–Commercial Litigation

—On the Move—

Meuleman Mollerup LLP, Boise has three new associates in the areas of law for Construction, Real Estate, and Business Law Practice. They can be reached at (208) 342-6066, or on the web at www.lawidaho.com.

Anna E. Eberlin joins the firm's real estate law practice group. Her focus is on real property acquisition, development, finance and leasing. She received her J.D. cum laude from the University of Idaho College of Law in 2007 where she was honored with the James E. Rogers Scholarship and the 2006 Alumni Award for Excellence.

Weston B. Meyring joins the firm's commercial law group. His focus is on business matters including new business formation, commercial transactions, contract and real estate litigation, and employment issues. He served two years as law clerk to the Honorable Sergio A. Gutierrez, Idaho Court of Appeals. He received his J.D. magna cum laude from the Gonzaga University School of Law. During law school, he was selected to represent all law students in the United States as National Liaison to the ABA's Forum on Affordable Housing & Community Development Law.

Jennifer M. Reinhardt is an associate with the firm's construction law group. Her focus is on drafting and reviewing construction contracts on behalf of owners, general contractors, subcontractors and suppliers, and representing businesses and business owners in matters involving contract litigation. She received her J.D. from the University of Idaho College of Law where she was a member of the International Law Student Association. Prior to joining the firm, she served as a law clerk to the Honorable Linda Copple Trout, Idaho Supreme Court.

Trout Jones Gledhill Fuhrman, PA, Boise, would like to announce the addition of two new attorneys to its firm.

Burt R. Willie (associate) joined the firm on August 13, 2007. Burt earned his J.D. in 2007 from the University of Idaho College of Law where he served as Technical Editor for the Idaho Law Review. During law school, Burt worked as a judicial extern for United States Magistrate Judge Mikel Williams. He also participated in the College of Law Small Business Clinic providing free legal services to Idaho entrepreneurs and assisting them organize various legal entities. Burt practices in the areas of construction, insurance, and civil litigation. He can be reached at (208) 489-3007.

Daniel L. Glynn, of counsel, joined the firm in October 2007. Daniel graduated from Whitman College with a Bachelor of Science degree in Political Science in 1992. He obtained his J.D. cum laude from Gonzaga University in 1994. Daniel served as a law clerk for the Idaho Supreme Court from May 1995 through June 1996. He brings over ten years of experience with commercial litigation, general business dispute resolution and complex litigation to corporate and individual clients. He can be reached at (208) 489-3007.

Jathan Janove, has joined Ater Wynne LLP, Portland, Oregon, as a partner in the Employment and Litigation Groups. Prior to joining Ater Wynne, Jathan was a partner in the Portland office of Bullard Smith Jernstedt Wilson. He received his J.D. from the University of Chicago.

Adam Richins has joined Stoel Rives, LLP, Boise, as an associate in the firm's litigation group. He is a former civil engineer, who represents clients on construction, design, energy, technology and environmental matters. He has significant field experience in civil engineering and project management in both the public and private sectors. Adam served as a law clerk to the Honorable Stephen S. Trott, Ninth Circuit Court of Appeals in Boise. He received a J.D., with honors, from the University of Washington School of law; a B.S. magna cum laude in civil engineering from Columbia University; and a B.S. in mathematics from the University of Puget Sound.

If you're tired of singles bars or internet dating, this could be...

"The Easiest Way To Meet Successful Singles In Boise"

By: Elise Daniel

Finding the right people to date while balancing a busy career can be a real challenge.

For many singles, dating means hit-or-miss encounters in noisy bars, endless hours reading "profiles" online, or spending time and money on dates only to realize the two of you are as incompatible as oil and water.

But you're about to discover how hundreds of professionals in Boise are enjoying regular dates with other attractive, successful singles... without the risk and hassle of the "singles scene" or time-consuming internet dating.

Even the busiest, most successful people struggle to find quality dates

All the money or career achievements in the world can't change the feeling of coming home to an empty house after work, and yet it's challenging to meet other singles who are compatible and on your same level.

After a while, thoughts like "Maybe there's something wrong with me" may even start to creep in.

Fortunately, there's nothing wrong with YOU. The REAL problem is that the chances of bumping into your ideal romantic partner in a bar or among a circle of friends are incredibly small. In today's busy, impersonal society, the deck is stacked against you.

How to tilt the odds of dating success in your favor

"It's Just Lunch" is a dating service exclusively for single professionals, entrepreneurs and business executives. We arrange personalized, confidential dates between our members for lunch or drinks after work.

All our clients are single professionals with busy careers who want to date but don't have the time or inclination to hang out in bars or use internet dating. Because we have more than 450 members in the Boise area, our members always have dates lined up with singles who are the type of person they're looking for.

We make it EASY to have all the first dates you want

Our members are busy people, that's why we do ALL the leg work to arrange their dates, protecting them from the time and hassle of choosing the restaurant, coordinating schedules with someone they've never met, awkward introductions, etc.

"What I liked best was that they did all the arranging. They arranged the time, they made sure it was going to work for both parties. They arranged the location. They had even arranged for separate checks!"
Lisa, Boise

We take all the risk and hassle out of dating by personally matching you up with like-minded, attractive, successful people...**singles who are actively looking to meet you.**

For most of our members meeting people isn't the hard part.

Meeting the RIGHT person is the problem.

The people who join It's Just Lunch are all professionals like you. They understand the stresses and demands of a busy career, and how hard it can be to meet someone.

"I had tried some internet dating, and just did not meet the kind of quality person I was looking for. The most surprising thing about the experience with It's Just Lunch has been the consistently high-caliber of professional people that seem to be attracted to the service. They tend to be business owners, high level executives, doctors, attorneys."
Rob, Boise

Our clients are excited to discover what we do because **it's completely different from internet dating or the regular "singles scene".**

We hand select your dates and connect you with someone who has your most desired qualities. Then we put the two of you together in a relaxed setting, either for lunch or drinks after work where you can get to know each other without any pressure.

"Before our date they set everything up. And because I knew something about her, it took the awkwardness out of it. And from then on it was just 'be yourself', which makes sense because you're dealing with a person who, according to your profile, is what you're looking for."
Mike, Engineer, Boise

On your date there's no pressure, no loud music to try and talk over, no pick-up lines or fake credentials. Just casual conversation and a chance to discover if that special kind of spark exists between you.

Our members experience these ideal dating situations several times a month if they choose

To be fair, not every date leads to passion (this is real life, after all) but every date you go on *does* increase your chances of meeting "the one". More dates means a greater chance for happiness and the kind of intimacy that leads to happiness.

Not for everybody...

We're an exclusive service for successful and success-minded people. We personally screen and interview every member so you are guaranteed the most compatible, fun people to date.

Please, if your future happiness is important to you, if the idea of meeting new people without any extra effort appeals to you, or if you're just tired of spinning your wheels in the dating scene...

Call now to schedule your confidential, no-obligation interview: (208) 429-1399

We'll arrange a private, personal consultation with you to answer all your questions and learn if we have the type of person you're looking for.

There's no cost, risk or obligation for this interview. And if it turns out this is a good fit for you, we can have you on your first date the next day if that's what you want.

You'll also receive a FREE copy of my new book "The It's Just Lunch Guide to Dating In Boise" just for meeting with us.

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Our members feel good knowing they've always got high-quality dates lined up without any of the stress or inconvenience of traditional dating. **Call (208) 429-1399** to learn more.

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~ LEGAL ETHICS ~
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STAFF ATTORNEY
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Conducts defense functions in court proceedings on behalf of indigent citizens. Responsible for handling legal matters; preparation of motions and orders and appearances in court. Computer intensive environment requires proficiency in keyboarding and familiarity with Word and legal research software. Reqs: Juris doctorate degree. Must be licensed to practice law in the State of Idaho. Criminal background check and mandatory pre-employment drug test. Salary DOE with full benefits. For application, required materials, job descriptions and due dates, visit the HR website at www.kcgov.us or call (208) 446-1643 or obtain at the 2nd Floor Info. Desk, Admin. Bldg., 451 Gov't Way in Coeur d'Alene. All materials may be submitted to: Kootenai County Human Resources Dept., PO Box 9000, Coeur d'Alene ID 83816-9000. 24-hr Job Hotline (208) 446-1001. EOE.

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The Sweetwater County Attorney's Office in Southwest, Wyoming has an immediate opening for a Deputy County and Prosecuting Attorney. This position offers a challenging legal opportunity for professional growth and development. Located in Southwest Wyoming, Sweetwater County affords an abundance of outdoor activities to choose from. For additional information on the area visit the Rock Springs Chamber of Commerce website at www.rockspringswyoming.net. To apply for the position: Please contact the SWC Human Resources Dept. at 307-872-6475 or via e-mail at swchr@sweet.wy.us for application materials and additional information. EOE.

University of Idaho
College of Law

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November/December CLE Courses

November and December 2007

Monday, November 5, 2007
Think REAL Big: Ten Innovative Strategies for Building a Better Firm
8:30 - 10:00 a.m.
Law Center, Boise
1.5 CLE Credits

Wednesday, November 14, 2007
Maintaining an Ethical Law Practice
Sponsored by the Idaho Law Foundation
Law Center, Boise
1.0 Ethics Credits
RAC approved

Friday, November 16, 2007
Mental Health and The Law
Hampton Inn & Suites, Boise
6.25 CLE Credits of which .5 is Ethics Credit

Wednesday, December 5, 2007
Managing Technology within a Law Firm: An Interactive Ethics CLE
8:30 - 11:30 a.m.
Doubletree Riverside Hotel
3.0 Ethics Credits

SAVE THE DATE
Lunch and a Movie: Video Replay
Sponsored by the Idaho Law Foundation
November 20, 27 and December 4, 2007
Law Center, Boise
Noon
CLE Credits pending (program TBA)

Headline News Year in Review
Sponsored by the Idaho Law Foundation
November 30, 2007—Coeur d'Alene
December 7, 2007—Pocatello
December 14, 2007—Boise
(RAC Approved)

The Law Center

525 West Jefferson Street
Boise, Idaho 83702
Telephone: (208) 334-4500
Fax: 334-4515 or (208) 334-2764
Office Hours:
8:00 a.m. - 5:00 p.m. Mountain Time
Monday - Friday except for state holidays

COMING EVENTS
11/1/07 – 12/31/07

These dates include Bar and Foundation meetings, seminars, and other important dates. All meetings will be at the Law Center in Boise unless otherwise indicated. Dates might change or programs may be cancelled. The ISB website (www.idaho.gov/isb) contains current information on CLEs. If you don't have access to the Internet please call (208) 334-4500 for current information.

(DATES MAY CHANGE OR PROGRAMS MAY BE CANCELLED)

NOVEMBER

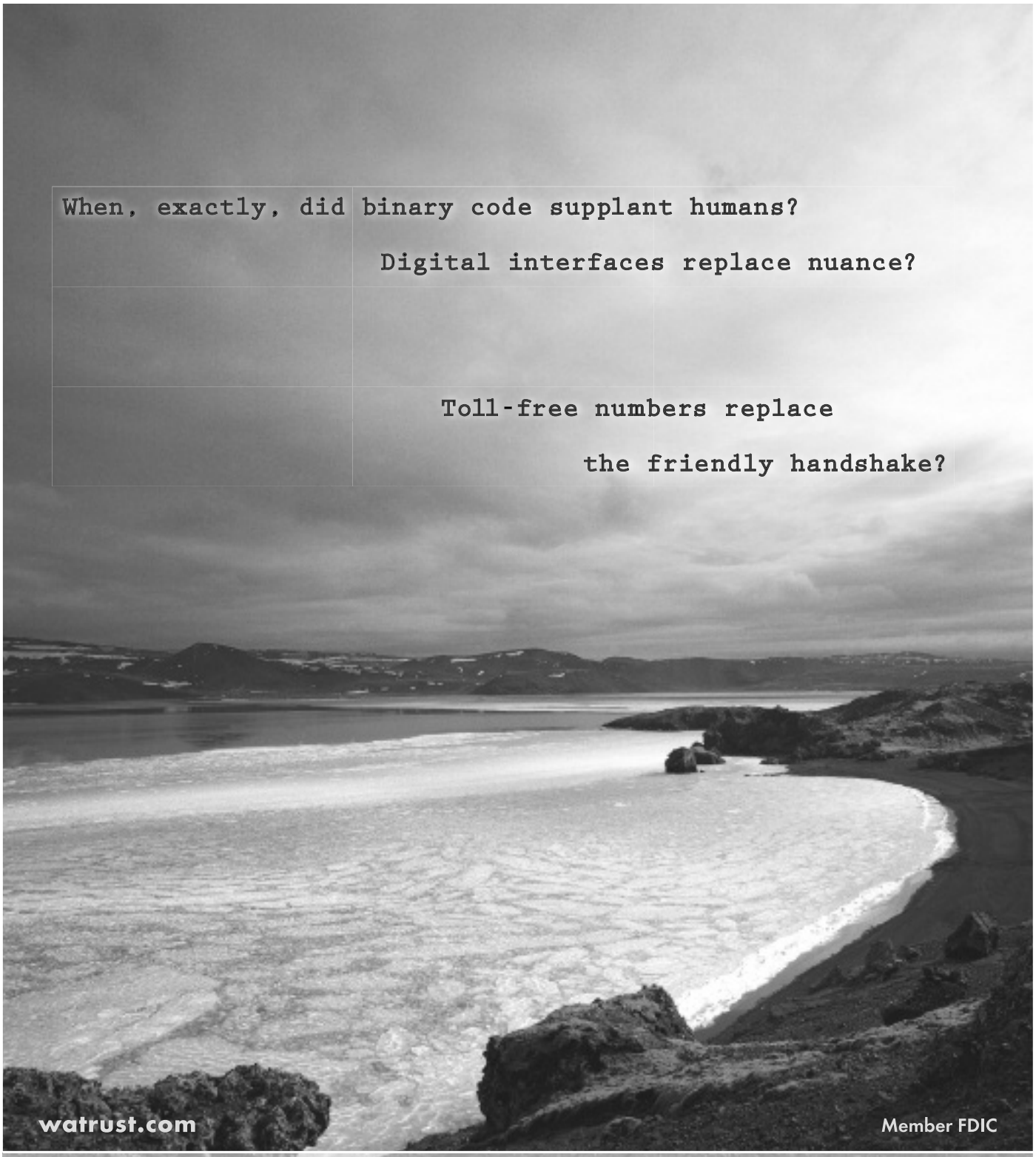
1 *The Advocate* Deadline
1 Resolution Meeting—4th District Bar
1 Resolution Meeting—3rd District Bar
2 Resolution Meeting—5th District Bar
6 Resolution Meeting—2nd District Bar
7 Resolution Meeting—1st District Bar
14 *The Advocate* Editorial Advisory Board Meeting
15 Resolution Meeting—6th District Bar
16 **Resolution Meeting—7th District Bar**
16 Idaho State Bar Board of Commissioners Meeting in Idaho Falls
22 Thanksgiving Day, Law Center Closed
23 Thanksgiving Day Holiday, Law Center Closed

DECEMBER

3 *The Advocate* Deadline
7 Idaho State Bar Board of Commissioners Meeting
19 *The Advocate* Editorial Advisory Board Meeting
24 Christmas Day Holiday, Law Center Closed
25 Christmas Day, Law Center Closed

The University of Idaho College of Law would like to congratulate our graduates admitted to the Idaho State Bar:

Jonathan Bradley Ahten
Sara Marie Bearce
A. Dean Bennett
Robert Arthur Berry
Kelsey Dionne Bolen
Christopher Aaron Booker
Brian Charles Call
Jennifer Elysia Canfield
Andrea Dawn Carroll
Nance Ceccarelli
Lisa Marie Chesebro
Christian Carl Christensen
Mark Paul Coonts
Mark Von Cornelison
Joshua Bingham Decker
Anna Elizabeth Eberlin
Faren Zane Eddins
Amber Champree Ellis
Lance Ludwig Fuisting
Mary Kate Garcia
Mary F. Gigray-Shanahan
Kara Marie Gleckler
Noah Grant Hillen
N. Aaron Johnson
Alan Fred Johnston
Lisa Maurine Johnstone
Brian Richard Langford
Chase Wesley Martin
Brian Christopher Marx
Brett R Millburn
Megan E. Mooney
Tyler Harrison Neill
Rebecca J. Ophus
Dylan Jack Orton
Nicole Owens
Keisha L. Oxendine
Daniel K. Sheckler
Jennifer Marie Simpson
Beth Liana Smethers
Matthew Sonnich Sonnichsen
Jared A. Steadman
Lewis Nishioka Stoddard
Zachary James Thompson
David Charles Whipple
Burt R. Willie
Brian Clayton Wonderlich
Craig Richard Yabui



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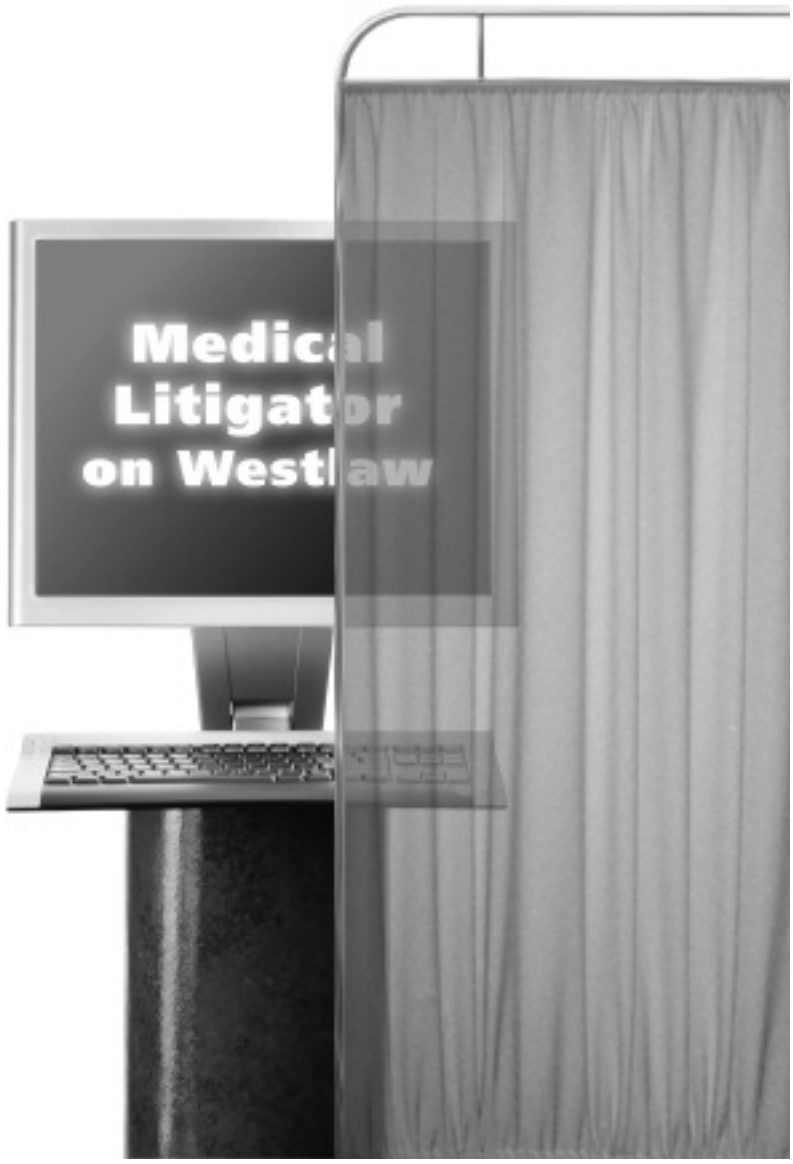

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