“ROTATION IN OFFICE”
AND THE
TERRITORIAL SUPREME COURT

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2010

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A. Introduction

Minnesota became a territory on March 3, 1849, and it became a state on May 24, 1858. During the territory's nine years and three months of existence, ten men served on its supreme court. It is only a slight exaggeration to say that service on the territorial bench resembled life in Hobbes's state of nature—it was "solitary, poor, nasty, brutish, and short." Living conditions in the new territory were primitive, winters harsh, courthouses makeshift, many members of the bar more interested in land speculation than the finer points of the law, news from Washington and East Coast cities was slow and travel arduous. Turnover on the court was high. Between March 1849, and April 1853, the court had four chief justices. Three justices were removed by a president and only one was reappointed to a second term.

Four presidents served during Minnesota's territorial period—Zachary Taylor, Millard Fillmore, Franklin Pierce and James Buchanan—and each implemented a system of executive appointments known as "rotation in office." Under rotation, many officeholders were replaced by appointees of the newly elected president regardless of how well they had performed their duties. To understand the territorial court, it is necessary to understand rotation.

B. The Theory of Rotation

Variations of rotation were practiced in New England colonies as early as the seventeenth century. [1] It was supposed that by permitting officials to hold

[1] As Carl Russell Fish explained in *The Civil Service and the Patronage* 80 (New York: Longmans, Green, & Co., 1905):

> Rotation in office is said to have been an old Dutch custom, brought over to New Amsterdam and continued in New York. It is to be found also in colonial New England; but perhaps the most significant instance of its early use in America was its incorporation by William Penn in the Pennsylvania "Frame of government" of 1682, which provided that no councillor should hold his office for more than three years continuously, being then obligated to retire for one year, "that all may be fitted for government and have experience of the care and burden of it." This, then, was what the colonists ordinarily meant by rotation: it was to be applied to the lawmakers, and its objects were to educate the people and equalize the burdens of office-holding. With the quickening of political life, office ceased to be a burden; but the notion that it was a means of education persisted, and was welcomed by the democratic sentiment of the Revolution.

office for a few years, then to be replaced, the burdens of public service would be shared by more citizens who, through that experience, would become knowledgeable about how their government worked. Over time, the duration of the terms of some offices was fixed, usually at four years.[2] The significance of this was explained by Professor Carl Russell Fish: "The simple fixation of a term of office, however, even when reappointment was not forbidden, was caused by the same democratic feeling that led to rotation, and ultimately produced the same results; this introduction of the fixed term for general administrative offices should, therefore, be regarded as a stage in the evolution of the idea of rotation."[3]

Since the beginning of the republic, presidents have rewarded supporters by appointing them to fill vacant positions in federal departments. Because most public servants held office at the pleasure of the president, each president after Washington faced the dilemma of whether he should let incumbents remain in place or replace them with his supporters. John Adams retained incumbents and those that followed him—Jefferson, Madison, Monroe and John Quincy Adams—were reluctant removers, who were selective in whom they dismissed.[4]

While rotation has a long and varied history, it always will be associated with Andrew Jackson, the seventh president who served from 1829 to 1837. Jackson viewed rotation as a means of reconstituting democracy. He advanced the rationale for the policy in his first annual address to Congress on December 8, 1829:

> There are, perhaps, few men who can for any great length of time enjoy office and power without being more or less under the influence of feelings unfavorable to the faithful discharge of their public duties. Their integrity may be proof against

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[2] The Tenure of Office Act, 3 Stat. Ch. 102 (May 15, 1820), provided that a class of officials, including district attorneys, customs collectors, naval officers and agents, and land registers, among others "shall be appointed for the term of four years, but shall be removable from office at pleasure." It is discussed by Leonard D. White, *The Jeffersonians: A Study in Administrative History, 1801-1829* 387-90 (New York: Macmillan Co., 1959).

[3] Fish, supra note 1, at 83-4.

[4] Jefferson removed many of Adams' midnight appointees, attorneys and custom collectors; Madison removed revenue collectors, among others; Monroe removed a few foreign service consuls and revenue agents; and John Quincy Adams removed only twelve during his single term. White, supra note 2, at 379-80 (citing statistics compiled by Fish).

improper considerations immediately addressed to themselves, but they are apt to acquire a habit of looking with indifference upon the public interests and of tolerating conduct from which an unpracticed man would revolt. Office is considered as a species of property, and government rather as a means of promoting individual interests than as an instrument created solely for the service of the people. Corruption in some and in others a perversion of correct feelings and principles divert government from its legitimate ends and make it an engine for the support of the few at the expense of the many. The duties of all public officers are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance; and I can not but believe that more is lost by the long continuance of men in office than is generally to be gained by their experience. I submit, therefore, to your consideration whether the efficiency of the Government would not be promoted and official industry and integrity better secured by a general extension of the law which limits appointments to four years.

In a country where offices are created solely for the benefit of the people no one man has any more intrinsic right to official station than another. Offices were not established to give support to particular men at the public expense. No individual wrong is, therefore, done by removal, since neither appointment to nor continuance in office is matter of right. The incumbent became an officer with a view to public benefits, and when these require his removal they are not to be sacrificed to private interests. It is the people, and they alone, who have a right to complain when a bad officer is substituted for a good one. He who is removed has the same means of obtaining a living that are enjoyed by the millions who never held office. The proposed limitation would destroy the idea of property now so generally connected with official station, and although individual distress may be sometimes produced, it would, by promoting that rotation which constitutes a leading principle in the republican creed, give healthful action to the system. [5]

[5] Andrew Jackson, "First Annual Address," December 8, 1829, in James D. Richardson, ed., II *A Compilation of the Messages and Papers of the Presidents, 1789-1908* 442, 448-9 (Bureau of National Literature and Art, 1909).

Andrew Jackson

Jackson aimed to prevent the creation of a class of elite, entrenched office-holders, who viewed their job as a form of property; if officials were removed and replaced every four years, they were less likely to become "corrupt"; ordinary men, he felt, could perform most government jobs if given the chance.[6]

Jackson's rhetorical question of "whether the efficiency of the Government would not be promoted and official industry and integrity better secured by a general extension of the law which limits appointments to four years," refers to The Tenure of Office Act, supra note 2.

[6] Jackson's biographer, Robert V. Remini, summarized his aims:

In the Jacksonian era, public service, once considered a burden to be shared or distributed among the populace, became a highly desirable plum, sought by many. The arrival of Andrew Jackson's supporters at his first inauguration in March 1829, was described by Carl Russell Fish as "the Jacksonian invasion, the first appearance of a species of four-year locusts that has never since failed to devastate our capital city." [7] Many "locusts" were job-seekers.

Although Jackson removed few incumbents, his successors did so in increasing numbers. The acceleration in removal rates was due in part because the federal government grew larger which meant there were more presidential appointees, and in large part because of the political instability of the period. There were eight presidencies from Martin Van Buren to James Buchanan, with each new president more willing than his predecessor to remove or not reappoint an incumbent.[8] By the time Minnesota Territory was formed in March 1849, rotation, once envisioned as a reform policy, had become the much maligned "spoils system." According to Carl Russell Fish, the spoils system reached its nadir in the two decades that encompassed Minnesota's territorial period:

> The argument Jackson advanced for rotation was the argument of democracy. Offices exist for the benefit of the people. No one has an intrinsic right to them; they are open to all. Removal, therefore, does not in itself constitute a wrong. The only wrong that may result is when good men are replaced by bad. What Jackson advanced was the contention that a popular government had been established with his election and any notion of elitism in the operation of government was inimical to the doctrines of republicanism.

Robert V. Remini, II *Andrew Jackson and the Course of American Freedom, 1822-1832* 190-91 (New York: Harper & Row, 1981).

[7] Fish, supra note 1, at 109.

[8] The post-Jackson presidents, their parties, and terms were:

> Martin Van Buren (Democrat): 1837-1841.
> William Henry Harrison (Whig): 1841.
> John Tyler (Whig/Independent): 1841-1845.
> James Polk (Democrat): 1845-1849.
> Zachary Taylor (Whig): 1849-1850.
> Millard Fillmore (Whig): 1850-1853.
> Franklin Pierce (Democrat): 1853-1857.
> James Buchanan (Democrat): 1857-1861.

> The period from 1845 to 1865 marks the apogee of the spoils system in the United States: the old traditions of respectability had passed away, and the later spirit of reform had not arisen; the victors divided the spoils and were unashamed. The general interest was turned almost completely from attempts to limit the patronage of the executive and to improve the service, to the rival fortunes of the office beggars. . . . The presidential election became a quadrennial "event," with the civil service as the prize. Every 4th of March great mobs filled the capital, and the streets and saloons were crowded with men betting heavy expense and vast loss of time on the chance of getting something out of the hurly-burly.[9]

Territorial judgeships were not exempt from rotation. Professor Fish tabulated the number of "Judges of Territories" in all the territories who were either

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[9] Fish, supra note 1, at 158. Leonard D. White concurred in Fish's assessment that political instability in the prewar years encouraged rotation:

> The years immediately succeeding the departure of Andrew Jackson from Washington were, therefore, crucial. A long period of political stability might have reproduced the Jeffersonian tradition. This happy circumstance was not to occur. The Whigs carried the 1840 election; the Democrats returned in 1844 only to be thrown out again in the election of 1848. The Whigs lost in 1852 and it was not until then that the Democrats were able to remain in office for two consecutive terms. They were defeated in 1860 by a new national party that had never held the presidency. No sequence of events could have been more conducive to coerce party leaders to apply the doctrine of rotation.

Leonard D. White, *The Jacksonians: A Study in Administrative History, 1829-1861* 315 (New York: Macmillan & Co., 1956)(citing sources).

Fish's reference to the passing of the "old traditions of respectability" was echoed by William E. Nelson in his study of the growth of the federal bureaucracy: "[The Jacksonians] thus glimpsed the fact that the traditional social order inherited from the eighteenth century had disintegrated and that effective government could no longer rest on it. They may well have sensed as they tried to discharge the duties of office that they could no longer take advantage of old links with old centers of social power to insure uncoerced obedience, for those centers had become as weak as they themselves were." William E. Nelson, *The Roots of American Bureaucracy 1830-1900* 23-4 (Washington, D.C.: Beard Books, 2006 (first published in 1982)(citing sources).

removed or were not reappointed or re-nominated by Presidents Taylor, Fillmore, Pierce and Buchanan.[10]

President	Removals	Failure to Reappoint
Taylor (1849-50)	0	0
Fillmore (1850-53)	2	2
Pierce (1853-57)	12	0
Buchanan (1857-61)	4	3

On the Minnesota territorial court, three judges were removed and three denied re-nomination. President Fillmore removed Chief Justice Goodrich. President Pierce removed Chief Justice Hayner and Associate Justice Meeker and did not re-nominate Associate Justice Cooper. President Buchanan extended Chief Justice Welch's term via a recess appointment but did not re-appoint Associate Justices Chatfield and Sherburne. The pace of judicial rotation quickened during the administrations of Pierce and Buchanan.

In the antebellum period, as today, there were two lengths of a judicial term: judges held office during either good behavior or for a set period. Under Article III, §1, of the Constitution and Section 4 of the Northwest Ordinance, federal judges held office "during good behavior." [11] Alternatively, a judge's

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[10] Carl Russell Fish, "Removal of Officials by the Presidents of the United States," I *Annual Report of the American Historical Association for the Year 1899* 65, 78, 79, 80, 81 (Washington, D. C.: Govt. Printing Office, 1900). Fish erred in President Pierce's non-reappointments or, more accurately, non-re-nominations. There was at least one: he did not re-nominate David Cooper, whose term expired on March 18, 1853. See "Documents Regarding the Terms of the Justices of the Supreme Court of Minnesota Territory, 1849-1858: Part Two-A, at 12-5." (MLHP: 2009-2010) (The three parts of this article are cited hereafter as "Documents: Part One, at __"; "Documents: Part Two-A, B, etc., at __"; and "Documents: Part Three, at __.").

[11].Article III, §1:

> Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 4 of the Northwest Ordinance:

term was fixed at four years, which was the period set by the Organic Act for justices on the Supreme Court of Minnesota Territory:

> Sec. 9. . . . The supreme court shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum, and who shall hold a term at the seat of government of said territory annually, and they shall hold their offices during the period of four years.

As noted by Professor Fish, a fixed term is a form of rotation: after the passage of four years, a judge's term expires automatically, the office becomes vacant, and a president fills it with a new nominee or, rarely, reappoints the incumbent.

The reasons for the high turnover on Minnesota's territorial court now become clear: first, the willingness Presidents Fillmore and Pierce to exercise their power to remove a judge in mid-term; and, second, the refusal of all presidents to re-nominate or reappoint judges whose terms had ended, preferring to replace them with lawyers who supported the president and his party. The theory of rotation gave legitimacy to these presidential practices.

C. Presidential Power of Removal

Not everyone accepted the excesses of rotation or even the policy itself. Several senators, a few cabinet members and many good government reformers opposed the policy.[12] Those in opposition preferred a policy of

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> Sec. 4 …There shall also be appointed a court, to consist of three judges, any two of whom to form a court, who shall have a common-law jurisdictions and reside in the district, and have each therein a freehold estate, in five hundred acres of land, while in the exercise of their office; and their commissions shall continue in force during good behavior.

It is posted separately on the MLHP.

[12] Richard R. John, "The Executive Departments, the Election of 1832, and the Making of the Democratic Party," in Meg Jacobs, William J. Novak & Julian E. Zelizer, eds., *The Democratic Experiment: New Directions in American Political History* 50, 64 (Princeton: Princeton Univ. Press, 2003)("Opposition to rotation was by no means confined to administration critics. It sparked sharp dissent from within Jackson's cabinet and among some of Jackson's most loyal supporters. Rotation was also unpopular among the influential Washington society matrons who in previous administrations had worked diligently behind the scenes to match promising young men with suitable government berths. Few doubted that the new doctrine was anything more than a thinly veiled

retaining office holders who were competent and honest—what eventually became the civil service system.[13] Some editorial writers in Minnesota Territory railed against rotation, others supported it, usually for partisan reasons.

In the antebellum period, a president had two ways of removing incumbent office holders: by direct discharge or, alternatively, by nominating or making a recess appointment of someone else.[14] The second means was preferred because it permitted hundreds of holdovers from the previous administration to be replaced quickly and easily. It was ideally suited to implement the policy of rotation on a massive, national scale, but it would work only if the president had the power of removal. Without that power, a president's ability to apply rotation to the territorial judiciary would be limited.

Aaron Goodrich denied that President Fillmore possessed the power to remove territorial judges and challenged his dismissal in court. His removal was countenanced by Attorney General John J. Crittenden in an official opinion on presidential removal power. It is instructive to view these events and their aftermath from three vantage points—the presidency, the Senate, and the judiciary.

After taking office following the death of Zachary Taylor in July 1850, President Fillmore began receiving pleas from residents of Minnesota Territory to replace Goodrich because of his lack of judicial temperament.[15] In reply to an inquiry from the President on whether he possessed power to remove Goodrich, Attorney General John J. Crittenden issued a confidential opinion on January 23, 1851. Though not deeply researched, and citing only one case, he concluded that Goodrich served at the pleasure of the chief executive:

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rationalization for the bestowal of lucrative offices upon campaign workers. In the political vocabulary of the day, this was not reform but corruption—the same charge that the Jacksonians had leveled against the Adamsites during the preceding campaign."); see also Fish, supra note 1, at 140-3; White, supra note 9, at 314-5, 320-4.

[13] See Leonard D. White, *The Republican Era: 1861-1901, A Study in Administrative History* 278-364 (New York: Macmillan Co., 1958).

[14] The two ways of removal are discussed in "Documents: Part One. At 21-28."

[15] See generally, Henry L. Moss, "Last Days of Wisconsin and Early Days of Minnesota Territory," 8 *Minnesota Historical Society Collections* 67, 85 (St. Paul: Minn. Hist. Soc., 1898); Robert C. Voight, "Aaron Goodrich: Stormy Petrel of the Territorial Bench," 39 *Minnesota History* 141, 145-51 (1964).

> Application having been made to you to remove from office the chief justice of the Territory of Minnesota, erected by the act of 3d March, 1849, for establishing that territorial government, for very serious charges of incapacity, unfitness, and want of moral character, you have been pleased to refer to me the question whether you have the rightful power to do so.
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> . . . .
>
> When it is proposed that this power of removal shall be exerted upon a judge appointed for the administration of justice to the people of a territorial government, it must be admitted that caution and circumspection should be used. But the power of removal is vested by the constitution in the President of the United States to promote the public welfare, to enable him to take care that the laws be faithfully executed, to make him responsible if he suffers those to remain in office who are manifestly unfit and unworthy of public confidence.
>
> To answer your inquiry specifically, I have only, in conclusion, to add that, in my opinion, you, as President of the United States, have the power to remove from office the chief justice of the Territory of Minnesota, for any cause that may, in your judgment, require it. [16]

On October 21st, Fillmore removed Goodrich by making a recess appointment of Jerome Fuller to be chief justice.[17] Two months later, he nominated Fuller to a full four year term. Wanting assurance that Goodrich's dismissal was lawful before it considered Fuller's nomination, the Senate demanded to see Crittenden's opinion. The President turned it over, and on February 12, 1852, the Senate passed a motion "that the said opinion of the Attorney General be printed in confidence for the use of the Senate." [18] On

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[16] John J. Crittenden, "Executive Authority to Remove the Chief Justice of Minnesota," 5 Op. Att'y Gen. 288, 289-290 (1851)(citing *Canter v. American Insurance Co.*, 28 U. S. (3 Pet.) 307 (1828); posted in Documents: Part Three, at 26-9.

[17] Fuller's presidential commission, dated October 21, 1851, is reproduced in Documents: Part Two-C, at 4-5.

[18] The Senate's *Executive Journal* reported the proceedings as follows:

> Mr. Butler, from the Committee on the Judiciary, to whom was referred, the 20th December last, the nomination of Jerome Fuller, reported.

August 30, 1852, the Senate voted against confirming Fuller, who faced stiff political opposition. Fillmore immediately nominated Henry Z. Hayner and the next day, August 31st, the Senate confirmed him to be the new chief justice. General Crittenden's opinion, it would seem, persuaded the Senate that a president had the power to remove territorial judges.

When he accepted his commission in early September 1852, Hayner must have known that any president who was elected in November would begin rotating new officials into federal posts once he was inaugurated. And this is what happened. Even before his inauguration on March 4, 1853, Franklin Pierce was besieged with requests for jobs by his supporters. The names of Judges Hayner and Meeker were surely on his list of removeables.[19]

On April 4, 1853, one month after Pierce took office, the Senate passed a resolution in executive session that seems, in retrospect, intended to give him congressional support for certain removals he was about to make:

> Resolved, That, in the judgment of the Senate, the President of the United States has power under the Constitution and laws of the United States to remove a Territorial judge from office although appointed for a term of four years, and although there may be no power of removal reserved to the President by the law creating such office.[20]

The next day, April 5, 1853, Pierce sent the Senate three nominations to the Supreme Court of Minnesota Territory: William H. Welch to be Chief Justice "in place of Henry Z. Hayner, removed," Andrew G. Chatfield "in place of

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> Mr. Butler presented a copy of the opinion of the Attorney-General of the United States submitted to the President on the subject of the said nomination and in relation to the removal of Territorial judges appointed for four years.
>
> On motion by Mr. Chase,
>
> Ordered, That the said opinion of the Attorney-General be printed in confidence for the use of the Senate.

Journal of the Executive Proceedings of the Senate of the United States of America, 32nd Congress, 1st Sess., Thursday, February 12, 1852, at 367.

[19] See text below at 35-41.

[20] *Executive Journal*, 33rd Congress, Special Sess., Thursday, March 17, 1853, at 74 (resolution introduced), and Monday, April 4, 1853, at 143 (resolution passed by a vote of 25 to 9). This resolution was passed in camera.

David Cooper, whose commission has expired," and Moses Sherburne "in place of Bradley B. Meeker, removed."[21] Under prevailing practice, the President's nomination of Welch and Sherburne removed Hayner and Meeker from office.

The close proximity in time between these events suggests a causal connection. It is difficult to see the Senate's resolution, passed in camera, followed one day later by the removals of Hayner and Meeker as fortuitous events. For reasons which we may never learn, the Senate's resolution remained under seal for the next two years; finally, on March 3, 1855, "the injunction of secrecy" was removed, and it was made public.[22]

On a timeline, Crittenden's legal opinion on Aaron Goodrich in January 1851, appears to lead to the actions by the Senate in the next two years that recognized the power of the president to remove territorial judges. But the politics of the day should not be underestimated. While the president implemented rotation, his nominees or appointees were always from his party and usually were recommended by senators or other important political figures. A nominee like Jerome Fuller would not be confirmed because he faced fierce political opposition in the Senate. On a practical level, the Senate's resolution recognizing presidential power to remove territorial judges, which echoed Crittenden's conclusion, did not eliminate the participation of Senators and other politicians from the selection process.

Aaron Goodrich may not have known of the Senate's resolution but even if he had, he would have soldiered on, for that was his nature. After being removed, he submitted a claim for his unpaid salary to the Treasury Department which denied it.[23] He then filed a *mandamus* action against the Secretary of the Treasury in the Circuit Court in Washington, D.C., for his salary for the rest of his term. The court dismissed the suit, holding that it lacked jurisdiction. Goodrich appealed. In 1855, the Supreme Court ruled in *United States ex rel. Goodrich v. Guthrie* that federal courts lacked jurisdiction to issue a writ in a case where the decision to withhold the judge's

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[21] *Executive Journal,* 33rd Congress, Special Sess., Tuesday, April 5, 1853, at p. 147.

[22] *Executive Journal*, 33rd Congress, Second Sess., Saturday, March 3, 1855, at 444. Why it was kept confidential for so long is not known. Senators may have been aware of pending litigation such as Goodrich's appeal or, more likely, they simply forgot about it. Given the nature of Washington politics, it is certain that President Pierce learned of the Senate's confidential resolution immediately after it was passed.

[23] Documents: Part Two-A, at 9-11.

salary was political or discretionary, not a ministerial act.[24] Speaking for the majority, Justice Peter Daniel emphasized that the court was not addressing the underlying question of whether the president had the power to remove Goodrich. Justice John McLean dissented. He argued that Goodrich was an Article III judge who could be removed only by impeachment, and that *mandamus* was exactly the right remedy to challenge his dismissal.

Unnoticed by the outside world, Minnesota's Territorial Supreme Court reached—or barely touched—the merits of this politically-charged issue the previous year. Bradley B. Meeker shared Goodrich's belief that the president lacked the power of removal. One year, one month and one day after his removal by President Pierce, Meeker launched a public relations counteroffensive. In a 4,407 word manifesto published in the *St. Anthony Express* on May 6, 1854, he argued that his removal was illegal, unconstitutional and improper.[25] On August 15, he appeared before the territorial court and requested that it restore him to his former post; he relied upon a four year commission signed by President Fillmore on September 25, 1850.[26] The court declined, stating simply that the President's "appointment" of Moses Sherburne "superseded" Meeker's commission.[27]

The uncertainty about the president's authority to remove territorial judges who had four year commissions was finally resolved in 1891. Carl Brent Swisher described the conclusion:

> The question of the tenure of territorial judges went unsettled, however, for another third of a century. Then, in 1891, the Supreme Court decided a case brought up from the Court of Claims with respect to a district judge in the territory of Alaska. The Court held [in *McAllister v. United States,* 141 U. S. 174 (1891)], by a vote of six to three, that the President had the power under the Constitution and statutes to suspend the judge, that he was not entitled to receive his salary while suspended,

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[24] *United States ex rel. Goodrich v. Guthrie*, 58 U. S. (17 How.) 284 (1855).

[25] *St. Anthony Express*, May 6, 1853, at 1-2; the manifesto is posted in Documents: Part Three, at 38-47. An editorial of the *Express* accompanying the manifesto is quoted below at 46-8.

[26] Meeker's commission is posted in Documents: Part Two-B, at 12-13.

[27] The court's opinion is posted in Documents: Part Two-B, at 13. Meeker's three commissions and his court petition are discussed in Documents: Part One, at 16-7, 25-7.

and that the suspension became permanent on confirmation of his successor. [28]

D. Lobbying for Judgeships

Because the policy of rotation was well known by the 1850s, each newly elected president was besieged with pleas for appointments to federal posts. A judgeship, even in far-off Minnesota Territory that paid only $1,800 a year, was a prized office. [29] Michael Holt, in his history of the Whig party, provides the economic explanation for the demand for federal jobs when Zachary Taylor took office:

> One reason is that government jobs paid very well compared to other occupations available in the American economy, particularly an economy still in recession at the end of 1848. At a time when laborers made a dollar a day on the days they could find work and when most skilled artisans' annual income averaged less than $600, government salaries seemed generous indeed. The consulship Glasgow was said to be worth $7,000 to $8,000 yearly and that at Liverpool even more. Customs collectors in large ports could earn even more, and the naval officer in Philadelphia, New York, or Boston was paid $5,000 annually. Through the assessment of fees and fines, United States marshals could earn $10,000 to $15,000 a year. Government clerks in Washington earned $1,000 or $2,000 annually. Post-masterships in large cities

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[28] Carl Brent Swisher, *History of the United Supreme Court of the United States: The Taney Period, 1836-64* 171 (New York: Macmillan Pub. Co., 1974); see also William Wirt Blume & Elizabeth Gaspar Brown, "Territorial Courts and the Law," 61 *Mich. L. Rev.* 39, 78-83 (1962).

[29] For example, a plea by Alex S. Ramsey, a lawyer in Carrollton. Carroll Co., Ohio, to President Pierce covered all bases: he foresaw vacancies resulting from rotation; he was orphaned at a tender age but has worked hard to become a lawyer; he is a distant relative of the governor of Minnesota; he has the support from public officials in the county in Ohio where he lives; and he "zealously" fought for the election of the President. Alex S. Ramsey to President Franklin Pierce, December 20, 1852; Roll 7, Images 1579-80, National Archives Microfilm Publications, U. S. Territorial Papers, Territory of Minnesota Records, Justice Department, in the Ronald M. Hubbs Microfilm Room, Minnesota Historical Society. Other letters, petitions and recommendations supporting Minnesota territorial judges can be found on Roll 7. (hereafter "Roll 7, at __.").

Ramsey was supported by two letters and three separate petitions signed by 36, 22 and 25 citizens. Roll 7, at 1582-1591. Needless to say, he was not selected.

> paid $3,000, and even third- and fourth-class postmasters in small towns earned $1,000 a year. . . .The prospect of high pay, in sum, largely accounts for the rush of office seekers.[30]

To have a realistic chance of securing a presidential nomination or recess appointment to the territorial court, a candidate needed the support of prominent citizens and political leaders, especially a Senator, preferably from his state, who belonged to the president's party. The support of territorial delegates Henry Sibley in the Pierce Administration and Henry Rice in the Buchanan administration was important. In addition to personal lobbying in the capital, it was the custom of the day that each supplicant solicited letters from individuals or multi-page petitions signed by prominent citizens attesting to his integrity.[31] Many petitions had dozens of signatures. These were sent to the president or a cabinet member. On occasion, a "synopsis" was prepared within the administration which tallied, arranged or categorized the support. The primary consideration was politics, far less the legal ability of the candidate. That politics infused the selection process is simply a truism.

Numbers of petitions did not sway the president's advisors. Applicants for Minnesota's supreme court who filed numerous petitions with an incoming administration were not selected. And some who were appointed—William Welch and John Pettit, for example—submitted no petitions.

In general, there were three rounds of judicial selections: the initial Taylor-Fillmore terms when, from 1849 to 1852, the court was staffed and re-staffed; the Pierce term, beginning in 1853, when three new members were seated; and the Buchanan term, commencing in 1857, when three residents were chosen to serve until statehood. As statehood neared, political leaders in Minnesota Territory gained more influence over the process.

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[30] Michael F. Holt, *The Rise and Fall of the American Whig Party: Jacksonian Politics and the Onset of the Civil War* 416 (New York: Oxford Univ. Press, 1999).

[31] Professional office-brokers do not appear to have been hired by applicants for judicial posts in Minnesota Territory. Cf., Kenneth M. Stampp, *America in 1857: A Nation on the Brink* 73 (New York: Oxford Univ. Press, 1990)("Some applicants for federal appointments resorted to professional office-brokers to work on their behalf; but the most common tactic was a letter of solicitation, with supporting letters from friends, to the President, or a member of the Cabinet, or a Congressman.").

E. The Presidency of Zachary Taylor

Zachary Taylor won the election of 1848, because the Democrats, the main opposition party, were weakened by the defection of northern factions opposed to slavery. That year, after the Democrats nominated Lewis Cass, a Senator from Michigan,[32] Free Soilers bolted, held a convention, and nominated ex-President Martin Van Buren, resulting in victory for Taylor, the Whig candidate. [33]

Two days after Minnesota Territory came into being, Taylor was inaugurated. Like presidents before and after, he and his advisors, particularly Secretary of State John M. Clayton, tried to broaden the base of the party through patronage.[34] Although Taylor was involved in cabinet and diplomatic appointments, he necessarily delegated authority to cabinet members to fill hundreds of lower level jobs, which resulted in his being seen as a passive, detached, and indecisive.[35] He believed in rotation, and once advised Treasury Secretary William M. Meredith, "Rotation in office, provided good men are appointed, is sound republican doctrine."[36] His cabinet members acted cautiously and delayed filling posts for months, which fostered

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[32] Lewis Cass (1782-1866), a life-long Democrat, served as Governor of Michigan Territory, 1813-1831; Secretary of War under Andrew Jackson, 1831-1836; U. S. Senator from Michigan, 1845 to 1848, when he resigned to run for President; returned as Senator from Michigan, 1849-1857; and Secretary of State under James Buchanan, 1857 to 1860.

[33] The results of the election of 1848 were:

Zachary Taylor (Whig): 1,360,000 votes, and 163 electoral votes.
Lewis Cass (Democratic): 1,222,000, and 127 electoral votes.
Marin Van Buren (Free Soil): 291,000. No electoral votes.

Thus, Taylor received less than 50% of the popular vote. There are numerous accounts of this election. See, e.g., Joel H. Sibley: *The Rough and Ready Presidential Election of 1848* (Lawrence: Univ. Press of Ka., 2009); Jonathan H. Earle, *Jacksonian Antislavery & the Politics of Free Soil, 1824-1854* 163-180 (Chapel Hill: Univ. North Car. Press, 2004).

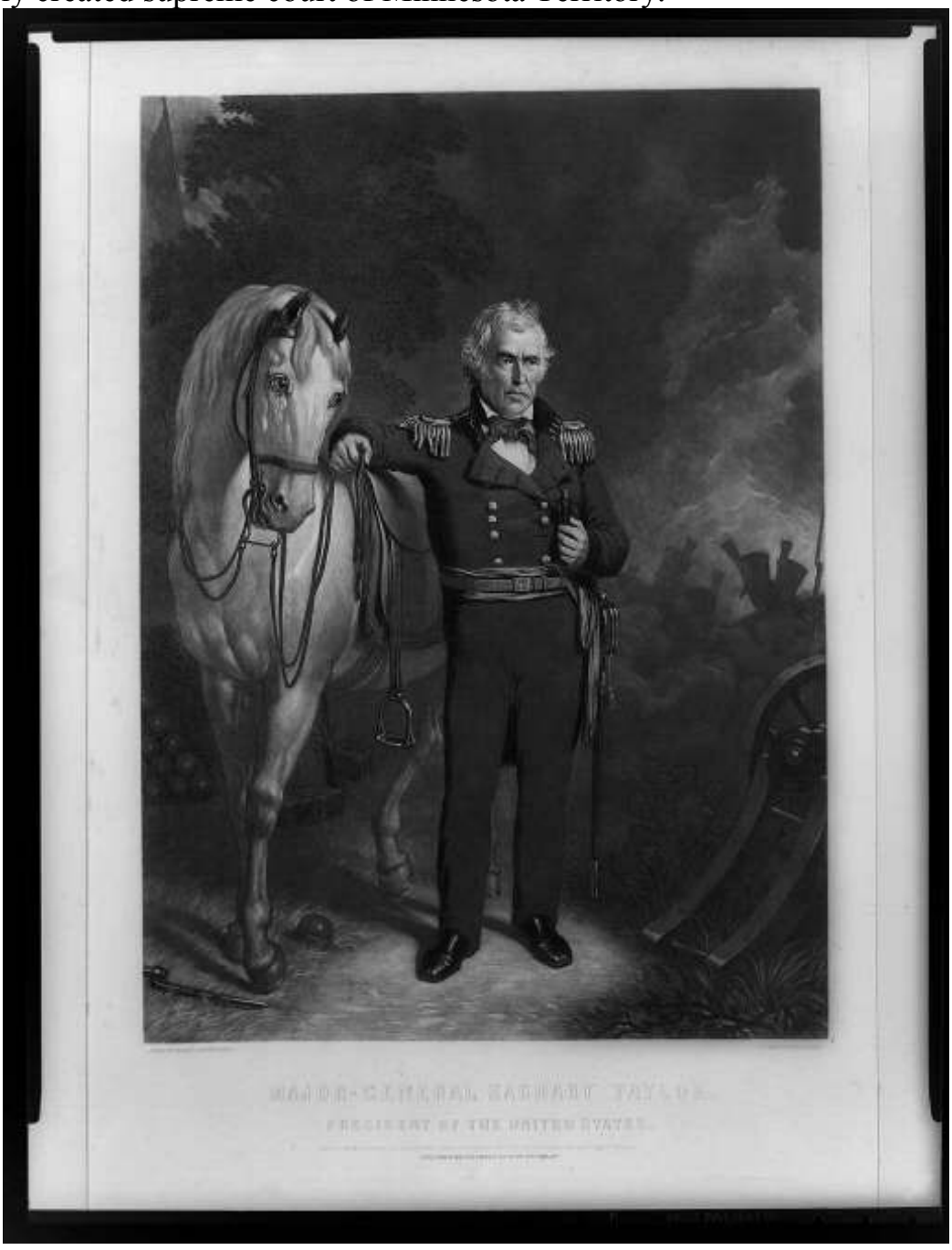
One indication of how far the prospect of being rewarded with a federal office had infected the system is the name "Hunkers" given one faction which broke with the Democratic ticket. It referred to their members' alleged "hankering or hunger for public office and spoils." David M. Potter, *The Impending Crisis, 1848-1861* 78 (New York: Harper & Row, Pub., 1976).

[34] Holt, supra note 30, at 414, 418, 422-4.

[35] Id. at 420-1.

[36] White, supra note 9, at 312 (quoting Thurlow Weed, the New York political boss).

discontent and intra-party squabbling.[37] But he acted speedily to fill the newly created supreme court of Minnesota Territory.



Zachary Taylor

On March 15th, Taylor sent the Senate nominations of Aaron Goodrich of Tennessee to be Chief Justice, and Bradley Meeker and David Cooper to be

[37] Holt, supra note 30, at 418-24.

Associate Justices. They were confirmed by the Senate on March 19, 1849, and that very day the President signed their four year commissions.[38]
Each had a patron in the Senate. Aaron Goodrich was a lawyer from Tennessee, who was active in the Whig party. He supported and had the support of John Bell, who was elected Senator in 1848. That year, Goodrich campaigned for Taylor, who carried Tennessee. When it came time to allocate the spoils, Tennessee Governor James C. Jones and John J. Crittenden, then Governor of Kentucky, promoted Goodrich, and Senator Bell and Merideth P. Gentry suggested him for the bench of Minnesota Territory in a joint letter to Secretary of State John M. Clayton. [39] The political powers behind the selections of Bradley Meeker and David Cooper are more obvious. Bradley Meeker of Kentucky was the nephew of Senator Truman Smith of Connecticut, [40] while David Cooper of Pennsylvania was the brother of James Cooper, the Senator from that state.[41] Professor Michael Holt refers to the latter appointments as "flagrant nepotism." [42]

Kermit Hall is scathing in his summary of how the President and Secretary of State Clayton fumbled these appointments:

> Taylor and Clayton in nominating associate justices for Minnesota squandered an opportunity to strengthen the administration and party cohesion. Party united the chief executive, Smith, and the nominees in the selection process, but traditional kinship connections took precedence over national party interests and the candidates' professional preparedness. Cooper and Meeker were legal mediocrities at best; the subsequent furor over their selection confirmed that Taylor and Clayton were politically and administratively inept. . . .

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[38] Documents: Parts Two-A & B.
[39] Voight, supra note 15, at 143-4.
[40] Holman Hamilton, "Zachary Taylor and Minnesota," 30 *Minnesota History* 97, 109 (1949)("Meeker owed his appointment to the influence of his uncle, Senator Truman Smith of Connecticut. Correspondence in the Library of Congress shows that the leading Whigs in Kentucky regarded his selection with disfavor; they had candidates of their own, and resented Smith's interference where Bluegrass patronage was involved."); accord Kermit L. Hall, *The Politics of Justice: Lower Federal Judicial Selection and the Second Party System, 1829-61* 84 (Lincoln: University of Nebraska Press, 1979)(citing sources).
[41] Hall, supra note 40, at 84, 184; accord, Voight, supra note 15, at 144 ("[David Cooper's] nomination was a clear consequence of the party work of his brother, Senator James Cooper.").
[42] Holt, supra note 30, at 420.

> By allowing Whig senators to dictate the Minnesota selections, the president relinquished control over the quality and political impact of the nominations. Unlike Polk, the Mexican War hero Taylor lacked the political savvy and toughness to shape the actions of members of the upper house to his own purposes. Sen. John Bell of Tennessee, in designating the chief justice for the territory, acted with greater restraint and political acumen than had Smith or Cooper.[43]

But Professor Holt, a more perceptive historian of antebellum politics than Hall, saw more than "traditional kinship connections" in many of these appointments. He saw the very psyche of the antebellum politician on display:

> [M]ost elected Whig officeholders sought federal jobs for their relatives and political friends, not for themselves. They valued patronage for the edge it gave them over intraparty rivals, not for the high salaries. Success in winning positions for friends could enhance leaders' prestige among local party activists and wean the allegiance of job seekers away from factional foes. Failure to land jobs for supporters could drive them into the arms of a rival.
> . . .
>
> To politicians who held or aspired to elective office, "*active* friendship" meant help in securing or retaining it. Patronage was the currency politicians dealt in, and the more one amassed, the better one's chances of controlling the party's organizational apparatus that nominated candidates for elective offices. Men

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[43] Hall, supra note 40, at 85. William P. Murray, a lawyer who practiced in this period, would have concurred with these views. In a speech to the Executive Council of Historical Society on November 14, 1904, he recalled the first judges:

> "Old Rough and Ready" was not as fortunate in his appointments of Territorial judges as in that for governor [Alexander Ramsey]. They were not great lawyers, nor did they become eminent as jurists, but they had a pull, as the politicians would say. B. B. Meeker was a nephew of Senator Trueman (sic) Smith, of Connecticut; David Cooper was a brother of Senator James Cooper, of Pennsylvania; Aaron Goodrich, a protégé of William H. Seward, of New York.

William P. Murray, "Recollections of Early Territorial Days and Legislation," 12 *Minnesota Historical Society Collections* 103, 107 (St. Paul: Minn. Hist. Soc., 1908).

> who owed government jobs and contracts to a particular patron were expected to repay him with undeviating loyalty, friendly newspaper editorials, campaign contributions, and especially faithful support at local, district, and state conventions. . . . The more hired hands a politician had in his pocket, the easier it was to pack conventions. [44]

During the short life of Minnesota Territory, influence over how to spend the "currency of patronage" passed from the Senate to local party leaders and the territorial delegate, who zealously promoted their favorite candidates.

The four year terms of the first justices, if completed, would expire on March 18, 1853, two weeks after the inauguration of the next president. The timing of their confirmations is important because, thereafter, the four year terms of most territorial judges expired shortly after a new president entered office, and as a consequence, he found vacant judgeships to fill and avoided removing a popular incumbent.[45]

F. The Presidency of Millard Fillmore

1. Removal of Aaron Goodrich

Millard Fillmore became president after Zachary Taylor's death on July 9, 1850. On October 21, 1851, responding to popular discontent, he made a recess appointment of Jerome Fuller to be territorial chief justice thereby sacking Aaron Goodrich. When news of this reached the territory, the *Minnesota Democrat* shrugged:

> ANOTHER REMOVAL.—We see it announced in the Galena Advertiser, that the President has dispensed with the further services of Chief Justice Goodrich, and appointed F. C. Fuller of Albany to supply his place.

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[44] Holt, supra note 30, at 416-7 (emphasis in original).

[45] William C. Gondy, who aspired to be placed on the Minnesota territorial court by President Pierce, emphasized that appointment to a vacant post was easier than removal in a letter soliciting the support of Illinois Senator James Shields: "These Judgeships in Minnesota all expire by limitation next March & it will not be necessary to make any removal." Gondy to Shields, January 31, 1853; Roll 7, at 1081-3 (underlining in original).

> Justice has at length been done, but, "speak not lightly of the dead, nor rail over the d—d." [46]

The headline indicates how ingrained rotation had become in the politics of the day—the removal of the Chief Justice of the Supreme Court warranted only a squib in one of the territory's leading newspapers. In contrast to the *Democrat*, the *St. Anthony Express* reacted with a strident two column editorial:

> **The Late Removals.**
>
> ———
>
> The recent removals from office in this Territory, by the President, have given rise to certain important questions which demand the serious consideration of every citizen.
>
> One of the most formidable dangers to be apprehended by a free government, especially by a Federal republic, is the centralization of power in the Executive.—This evil is one of the most difficult to provide against. . . .
>
> A power has recently been claimed and exercised by President Fillmore, somewhat novel in its character, which at least, so far as we are aware, has never been exercised by any previous incumbent of the Presidential office,—that of removing a Territorial judge from the bench, before the expiration of the time for which he was appointed. No instance of the kind is on record in the history of our national jurisprudence. . . .
>
> If the right of removal in such case does actually exist, it should only be exercised with the greatest care, and from the most stringent necessity. The public good as well as private rights imperatively demand this. No ordinary cause can furnish ground for so virtually important an act. No venial offence, in the incumbent of so important an office, can be sufficient excuse for his removal. His offence should be flagrant, notor-

[46] *Minnesota Democrat*, November 4, 1851, at 4. See also *New York Times*, October 25, 1851, at 3 ("Jerome Fuller, of New York, has been appointed Chief Justice of the Supreme Court of the territory of Minnesota, vice Aaron Goodrich, removed.").

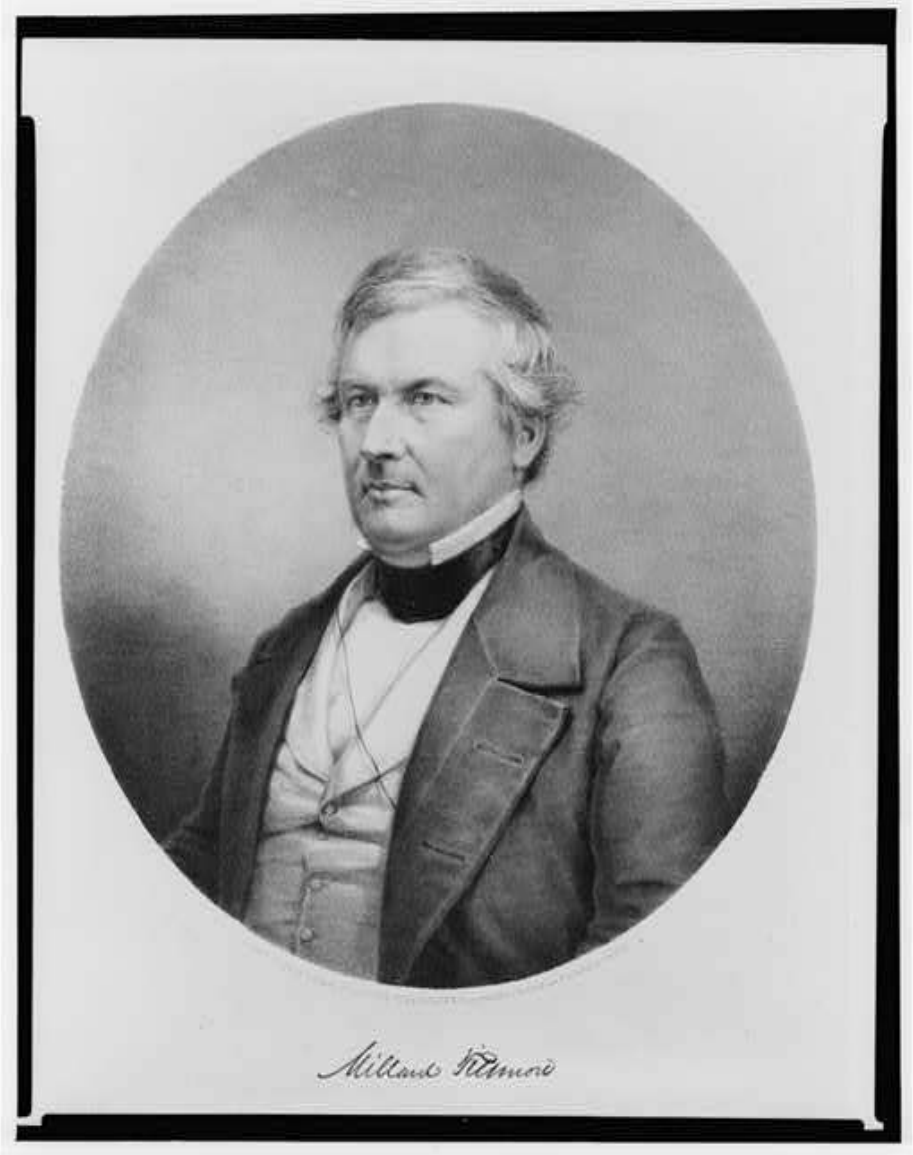
> ious, and clearly proved, to justify such a step. He should have full opportunity afforded him, after due notice of the charges alleged against him to vindicate his character….The independence and honor of this branch of the national judiciary demand it. The necessity of securing able and competent men, to discharge the duties of the responsible station of Territorial Judge, demand it….In the case of some, if not all the recent removals, no notice whatever was given until the blow was struck. . . .
>
> If the President have the power to remove a Judge of the Supreme Court, in the Territories, at any time that may suit his fancy; if it be right to remove any officer whom he has appointed, without a moment's warning, without informing him of the charges alleged, or affording an opportunity to refute them, at the instance of any sneaking, meddling, selfish political demagogue or private enemy, without the slightest regard to the interests or wishes of the people which the officers were appointed to serve—if this be right, let us know it.—No man with a particle of self-respect, or who values his own character, would accept an office held on so frail a tenure. None but the veriest political hacks and demagogues would consent to sell themselves to be used as Executive tools, or accept a position in which they might be used as footballs by their enemies. . . .[47]

The editorial commences with a warning about the dangers of the concentration of power in the presidency, and then advances two strains of thought about the territorial judiciary. One: it argued that a territorial judge may be removed only for good cause, and that he should be given both notice of the charges against him and an opportunity to defend himself before being ousted. [48] But the mechanics of this process is not fleshed out — the editorial

[47] *St. Anthony Express*, November 22, 1851, at 2.

[48] This was not a novel position. In fact President Taylor held it, as Kermit Hall explained:

> [Taylor] did not, however, extend his otherwise broad use of the removal power to the territorial judiciary. When Taylor assumed office there were two territories: Oregon and Minnesota. Polk had appointed Democratic judges to the former, but, since the latter was organized on the next-to-last day of his administration, he believed Taylor properly deserved to fill the posts. Taylor had only to remove the Oregon judges; however, he concluded that to do so would violate the privileged constitutional position of the



Millard Fillmore

does not identify the court which will hold the pre-termination hearing (his colleagues on the territorial bench or a court in Washington, D. C.) or where

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> judiciary. Reverting back to the precedent of Jackson's administration, the Whig president believed that territorial judges were susceptible to removal only on proof of malfeasance or incompetence in office, and only when their commissions specified that they served at the pleasure of the president. This position complemented Taylor's public profession of support for preservation of the judiciary as an independent branch of government free from party strife.

Hall, supra note 40, at 80.

it will be held (St. Paul or Washington). Nevertheless, it highlights the rank unfairness of rotation — the lawyer who had shut his law practice to serve, was forced to rebuild it quickly after being displaced without warning. Because of removal power, there was an ironic insecurity in incumbency.

Two: the editorial paints a stereotype of territorial judges they have never escaped: they were "hacks." [49] The partisanship that drove rotation made it easy to picture them as political opportunists, lacking juristic talent. The judges themselves may have been aware of this stereotype and several of them — Henry Hayner and Moses Sherburne in particular — tried to counter it by arranging to have flattering testimonials from their former county bars published in territorial newspapers soon after they arrived.

A finding of research of stereotypes is that the more information a person has about an individual member of a stigmatized social group, the more moderate that person's stereotypes will be, and with less information, the more extreme they will be. With more familiarity, we see each member as a complex

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[49] Lawrence M. Friedman points to Washington politics and the hardships of life in the territories for producing "political hacks, ill-paid, ill-prepared for their jobs, almost invariably nonresidents, whose sole claim to office was a claim on patronage at Washington." Lawrence M. Friedman, *A History of American Law* 282 (3rd ed., New York: Simon & Schuster, 2005).

Kermit Hall took issue with Friedman. After reviewing the social and educational backgrounds of territorial jurists, who served both before and after the Civil War, and recent biographies of some of these men, Hall concluded that "the collective backgrounds of the judges reveal that they were seldom the hacks and derelicts described by Friedman and that the political and legal cultures associated with the frontier environment of the territories produced a rich and complex judicial process." Kermit L. Hall, "Hacks and Derelicts Revisited: American Territorial Judiciary, 1789-1959," 12 *The Western Historical Quarterly* 273, 289 (1981).

Hall has not overlooked the sorry record of President Fillmore's judicial selections:

> In his dual capacity of administrator and party leader, Fillmore was frustrated in his selection of territorial judges. Of the chief executive's eighteen nominees, almost two-fifths never served: five appointees declined to accept office once confirmed, and the Democratic Senate claimed two more; it rejected one nominee and forced the withdrawal of another. . . . . He also encountered difficulties with judges who had accepted commissions; he broke with precedent by summarily removing two judges enmeshed in political controversy and administrative scandal.

Hall, supra note 40, at 101.

individual, not a caricature. And this is what happened to the editor of the *St. Anthony Express* after he came to know Goodrich's replacement. "No man ever sat upon the bench of any court with more general acceptableness," he wrote when Fuller left the court in the autumn of 1852.

2. The Senate Rejects Jerome Fuller

At the time of his recess appointment to replace Aaron Goodrich, Jerome Fuller was the editor of the Albany *State Register*, which supported President Fillmore editorially. The newspaper also attacked the President's opponents, who included Hamilton Fish and William Seward.[50] Tensions reached a boiling point in January 1851, when Fuller rebuked supporters of Fish, who was seeking election as Senator from New York. But Fish was elected in March with the aid of Fillmore who was trying to mend fences with Fish's faction of the Whig party.

On December 9, 1851, Fillmore nominated Fuller for a four year term on the territorial court, a matter requiring Senate confirmation. But the Senate delayed voting on Fuller's nomination, permitting opposition to grow. Finally, on August 30, 1852, Fuller's nomination came to the Senate floor. It failed. Kermit Hall has described the jubilation of Senator Fish:

> The Senate, on August 30, 1852, administered Fillmore a bitter defeat by rejecting his old friend Jerome Fuller as chief justice of Minnesota. While Fuller had fulfilled his judicial duties under a recess commission, his nomination had languished in the Senate. New York Whig Senators Hamilton Fish and William H. Seward denounced the nomination as an act of political cronyism. They failed, with the same argument, to secure the rejection of Fillmore's friend Nathan K. Hall to be judge of the Northern District of New York, but they gained support of the Senate Democratic majority to table indefinitely Fuller's nomination. "Within five minutes," a triumphant

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[50] Holt, supra note 30, at 649-50.

Hamilton Fish (1808-1893) served as governor of N. Y., 1849-1850; U. S. Senator (Whig/Republican), 1851-1857; and Secretary of State under President Grant, 1869-1877.

William Henry Seward (1801-1872) served as governor of N. Y., 1839-1842; U. S. Senator (Whig/Republican), 1849-1861; and Secretary of State under Presidents Lincoln and Johnson, 1861-1869.

> Hamilton Fish gloated, "the business was concluded and Jerome was a 'dead cock in the pit.' [51]

On September 10, 1852, the weekly *St. Anthony Express* criticized the Senate's action and extolled the virtues of the rejected nominee. After ten months on the bench, Jerome Fuller was no longer the faceless "political hack and demagogue" who usurped Goodrich's job, but was now an individual who had performed his duties exceptionally well:

> **Rejection of Judge Fuller.**
>
> ———
>
> The appointment of Jerome Fuller for the office of Chief Justice of this Territory, has been rejected by the U. S. Senate. This act of a democratic Senate is a striking illustration of the extent to which party spirit is carried in our country. No man ever sat upon the bench of any court with more general acceptableness. His thorough knowledge of the law, his sound and ready judgment, his stern justice, and unyielding impartiality, on the bench, and his bland and urbane demeanor in social life, have won for him, during his brief career among us, the esteem and admiration of all parties, and made him universally popular.
>
> When will party feeling cease to be carried to infatuation, and no longer rob community of their best and ablest officials?
>
> Mr. Hogan, of Troy, N. Y., has been nominated to fill the vacancy. It seems strange to us, that at this late day, when we have such an abundance of excellent talent in our Territory, our officers cannot be chosen from our midst.[52]

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[51] Hall, supra note 40, at 110. The *Minnesota Democrat's* account of Fuller's rejection is based on the *New York Times's*. *Minnesota Democrat*, September 15, 1852, at 2.

In 1856, when Fillmore was being touted for a second term, Fish dissented: "He [Fillmore] is a very bad judge of men; he has strong personal preferences, and still stronger antipathies, of which designing men with selfish and sinister purposes can and so easily avail themselves." Allan Nevins, *Hamilton Fish: The Inner History of the Grant Administration* 60 (New York: Dodd, Mead & Co., 1936). One wonders whether when making this assessment, Fish had Fillmore's support of Jerome Fuller in mind.

[52] *St. Anthony Express*, September 10, 1852, at 2.

In the next week's issue, the *Express* corrected the name of Fuller's replacement,[53] and in an editorial identified Senators Fish and Seward as being responsible for Fuller's rejection:

Rejection of Fuller.

———

> From reliable information recently received, we find we were under a mistake in our last number, in regard to the cause of Judge Fuller's rejection. As an act of simple justice to our political opponents, we take pleasure in correcting the mistake, although mortified and pained to state the true reason as we now understand it. We are informed from an authentic source, that Judge Fuller was rejected solely on account of the opposition of Senator Fish, of New York. Judge Fuller was in the New York Senate, some years since, and was opposed to some project which Fish had in view hence the present opposition of the Hon. Senator. We have always regarded Fish as a man of quite ordinary ability, but were not prepared to believe him capable of condescending to such illiberality and littleness. We look upon it as an exceedingly fishy, or rather "scaly" affair. We still have doubts whether Fish is at the bottom of the opposition. In this matter may be discerned some footprints of the New York "higher law" demagogue, of whom Fuller was no great admirer.[54]

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[53] *St. Anthony Express*, September 17, 1852, at 2:

> The name of the gentleman who succeeds Judge Fuller, is Hayner, of Troy, N. Y., not Hogan, as was stated. He is represented by those who know him to be a good lawyer, and most estimable man in private. If he makes good the place of his predecessor in all the relations of life, the Territory will be well satisfied.

[54] Id. The reference in the last sentence of the editorial to the "New York 'higher law' demagogue" provides a glimpse of how territorial appointments became entangled in fierce state political battles, strong personalities, and the institution of slavery.

The "New York 'higher law' demagogue" was New York Senator William H. Seward, who on March 11, 1850, gave a famous address to the Senate opposed slavery, and invoked the "higher law" background of the constitution. Appendix to the *Congressional Globe*, 31st Cong., 1st Sess., March 11, 1850, at 265.

Jerome Fuller exemplifies of the divide between the theory and practice of rotation. Because, in theory, it reduced the risk of corruption of long-serving officeholders, it justified or excused presidential patronage — what had become the spoils system. Fuller was doomed to be replaced even though, by local accounts, he performed his judicial duties well during his brief tenure.

Fillmore then nominated Henry Z. Hayner, who was confirmed by the Senate on August 31, 1852. After winding up his affairs in New York, Hayner traveled to Minnesota Territory and took the oath of office in St. Paul on October 6, 1852.[55] On October 22, 1852, the *St. Anthony Express* reprinted a column-length tribute to Hayner that had first appeared in the *Budget*, a newspaper in Troy, New York. The article consisted of an exchange of flattering letters between Hayner and members of the Troy bar (the names of 57 members of the bar appear under a congratulatory letter to Hayner on his appointment to the territorial court). The editor of the *Express* prefaced the article with the following: "The proffer of a public dinner by his legal friends, those who know him best, affords a flattering index to the Judge's social as well as professional character, and we have no doubt he will acquire as enviable a reputation among our citizens for urbanity and ability as his predecessor." [56] It is reasonable to suppose that Hayner himself carried this article to Minnesota and suggested that the *Express* reprint it. He probably believed that the publication of such a warm tribute from his former colleagues would hasten his acceptance by the local bar, that it would confirm that he was a lawyer of integrity and ability, that he was not a hack. Or, perhaps, he acted with an eye toward creating support for his retention by the new administration the following year. Whatever his motives, Hayner served only five months before his term ended April 6, 1853, when newly elected Franklin Pierce removed him by nominating William E. Welch.[57]

Thus, in its first four years, Minnesota Territory had three chief justices. In fact, in its first four years, one month and one day, it had four chief justices.

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[55] Documents: Part Two-C, at 13.

[56] *St. Anthony Express*, October 22, 1852, at 2.

[57] Tributes to local lawyers who received presidential appointments requiring them to relocate may have been the custom of the bar in that day. The *Minnesota Democrat* reprinted equally flattering exchanges between Moses Sherburne and his colleagues in the Franklin, Maine, bar that appeared first in the Farmington, Maine, *Chronicle*. *Minnesota Democrat*, June 1, 1853, at 2, quoted below at 44-5 n.83.

G. The Presidency of Franklin Pierce

1. Unifying Minnesota Democrats

By the time Franklin Pierce, a Democrat, assumed office on March 4, 1853, the first month or more of each new administration was devoted to dividing the spoils.[58] Pierce's approach to this task can be traced, in part, to the election of 1848, when his party was weakened by the defection of Free Soilers. As President, Pierce aimed to use patronage to unite his fractious party, not by rewarding centrists who stood by the Compromise of 1850, but by favoring "former Free-Soilers from the North and disunionist Southern States Democrats with the juiciest plums." [59] On a national level, the tactic was "an unmitigated disaster." [60]

In Minnesota Territory, however, Pierce succeeded in unifying Democrats, though more by inadvertence than design. In 1853, Minnesota Democrats were badly split, not by ideology, but by personalities. Henry Hastings Sibley, the territorial congressional delegate and a prominent Democrat, wanted the governorship, an ambition shared by Daniel A. Robertson, the editor of the *Minnesota Democrat*, who published lengthy charges of fraud against Alexander Ramsey and Sibley after the election. [61]

These charges and the intra-party feud forced the President to look outside the territory for supporters to reward with an appointment. That there were openings in the territorial government to fill was expected. On April 6, 1853,

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[58] The results of the 1852 election were:
Franklin Pierce (Democrat): 1,607,000 votes, and 254 electoral votes.
Winfield Scott (Whig): 1,387,000, and 42 electoral votes.

[59] Michael H. Holt, *Franklin Pierce* 66 (New York: Times Books, 2010).
The Compromise of 1850 gave the South a tough Fugitive Slave Law in exchange for the admission of California as a free state, abolition of the slave trade in the District of Columbia, formation of the Utah and New Mexico territories without restrictions on slavery, and matters peculiar to Texas.

[60] Id. at 67 ("In hindsight, it is clear that Pierce's attempts to distribute the loaves and fishes among all elements of the party proved an unmitigated disaster. Politicians who considered themselves worthy of selection fumed when members of rival factions instead got the jobs.").

[61] On December 15, 1852, Robertson published charges of fraud against Sibley and Alexander Ramsey that resulted in a congressional investigation that began in July 1853, and concluded in early 1854, with a report clearing Ramsey. George S. Hage, *Newspapers on the Minnesota Frontier, 1849-1860* 40-5 (St. Paul: Minn. Hist. Soc., 1967); Rhoda R. Gilman, *Henry Hastings Sibley* 128, 133-4 (St. Paul: Minn. Hist. Soc. Press, 2004).

Robertson repeated the familiar elimination-of-corruption rationale for the prompt removal of all Whig incumbents:

Removals from Office.

> The new administration is quietly, though effectively ridding the country of the valuable services of the whig dynasty. Some of the opposition journals, submit without murmur to this long established precedent of both parties, while others are inclined to think that President Pierce is an officious meddler with the *prescriptive* rights of the Galphins. This is a matter about which we have no doubt, the President is entirely willing that the whigs should entertain their own opinions, but that he will swerve from the straight line of duty in that performance of the task of removing every one of them, cannot be presumed for a moment. It were better for the whole crew to retire with a graceful bow, than to find fault with their inevitable expulsion from the theatre which they have so signally disgraced, by every species of corruption. It is true there have been honorable exceptions, but in the main, it must be conceded, that Mr. Fillmore's administration of the government has had no parallel in the universal peculation upon the public treasury which has attended it. From the national capitol to the furthest frontier, almost every office holder held a carte blanch, which he filled up for his private benefit, in the shape of "extras" "contingencies" &c., &c., which in the aggregate have amounted to millions. No doubt it is hard for these men to let go their hold, but prudence and the welfare of the country demands it. *It was their certain doom*, and so determined by the fiat of the people.
>
> The administrations of Generals Harrison and Taylor, were proscriptive to the last degree, although they came into power with the idle cant upon their lips, that they had no friends to reward or enemies to punish. No sooner had they taken the reins however, than every democrat's head went to the block. There was reason *then* to complain of broken promise and violations of pledges; but not *so now*. Gen. Pierce, on being sworn into office, said plainly, in words that exhibit the sincerity of the man, that he could not "retain persons known to be under the influence of political hostility or prejudice, in positions which will require no

> only severe labor, but cordial cooperation." This pledge he is sure to keep, and relieve from further duty, every whig incumbent. [62]

Because news traveled slowly, Robertson was unaware that the previous day, April 5th, President Pierce had nominated Willis A. Gorman of Indiana to be governor, and dismembered the territorial supreme court by removing two sitting jurists, and nominating three new members: William H. Welch to be Chief Justice, and Moses Sherburne and Andrew G. Chatfield to be associate justices.[63]

John Phillips Owens, a newspaper publisher, later recalled the result of these appointments:

> These appointments were made in disappointment of most of the Territorial Democratic politicians, who were applicants for the places. But they went to Washington with a factious quarrel on their hands; and there being plenty of office-seekers who had rendered service to the party in the states, who were willing and anxious to take the places, the administration no doubt thought the disagreements between these Minnesota applicants a good excuse to "kill two birds with one stone"—satisfy some of their friends outside, and compel the Minnesotans to discontinue their feuds before their claims for office could be considered. At all events, reconciliation soon followed between the Rice and Sibley wings of the Minnesota Democracy…[64]

With Governor Gorman's encouragement, the factions reconciled and elected Henry M. Rice as the territorial delegate to Congress, succeeding Sibley.[65]

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[62] *Minnesota Democrat*, April 6, 1853, at 2. According to Professor Fish, "Pierce had made 883 removals, thus practically exorcising all non-Democratic elements from the civil service." Fish, supra note 1, at 166.

[63] *Journal of the Executive Proceedings of the Senate of the United States of America,* 33rd Congress, Special Sess., Tuesday, April 5, 1853, at p. 147.

[64] John Phillips Owens, *Political History of Minnesota From 1847 to 1862* 197-8 (Owens papers, Box 1, Minnesota Historical Society). Owens probably wrote his unpublished *History* in the 1870s.

[65] Hage, supra note 61, at 44; accord, Warren L. Wallace, *Political History of Minnesota Territory, 1849-1853* 55-6 (n.p., 1918)(on file at Minnesota Historical Society).

Harmony did not last long. In early 1855, Rice and Senator Stephen A. Douglas tried unsuccessfully to persuade Pierce to remove Gorman who opposed legislation that would have increased the value of their investment in a townsite claim on Lake Superior. Robert W. Johannsen, *Stephen A. Douglas* 486 (New York: Oxford Univ. Press, 1973).

Franklin Pierce

2. Removal of Henry Z. Hayner

Under Franklin Pierce, rotation was extended to the territorial judiciary. He did not consider retaining Henry Hayner and Bradley Meeker or re-

nominating David Cooper. [66] Nevertheless, Meeker attempted to retain his job by gathering petitions of support. In an antebellum example of what has come to be known as a form letter, four identically-worded petitions, each two pages and written by the same hand, were signed by a dozen or more residents. Besides praising Meeker, the petitioners asked "his Excellency" to disregard rotation in language and tone strikingly similar to that used by Meeker in his manifesto the following year:

> The undersigned would therefore petition the President that if contrary to all wholesome precedent the Judgeships of Minnesota are to be regarded as merely political stations, Judge Meeker who has held himself aloof from the strifes and broils of partisans

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[66] Hall, supra note 40, at 113 ("Pierce nominated the largest number of judges of any antebellum president. Of the more than fifteen hundred nominations he submitted, fifty-three were to the lower federal courts. This surge in the judicial patronage resulted from several developments. The president created ten vacancies by extending the concept of rotation-in-office to the territorial judiciary.").

In his lengthy dissent in *United States ex rel. Goodrich v. Guthrie*, decided in 1855, Justice McLean noted the recent extension of rotation to "judicial office":

> But this power of removal from office by the President, was neither exercised nor supposed to apply until recently, to the judicial office.

17 U. S. at 308. This development also strayed from Jackson's original intent which confined rotation to the executive branch:

> Stasis bred corruption in the executive, he thought, just as it bred the odious belief that ordinary men lacked the experience necessary to master the mysteries of government service. He wanted, instead, to ventilate and democratize the executive branch by making official duties 'so plain and simple that men of intelligence may readily qualify themselves for their performance.'. . . . Jackson's rotation idea would have required a regular turnover of executive employees. Its chief aim was to prevent the formation of a permanent government in the executive branch…

Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* 315 (New York: W. W. Norton & Co., 2005). President Taylor, on coming into office, refused to remove Democratic judges President Polk had placed on the Oregon Territory supreme court because he believed they could be dismissed only for cause, a belief shared by Andrew Jackson himself. Hall, supra note 40, at 80.

> while acting as a Judicial officer, may be made an exception and retained in his place.[67]

It was the custom that most such petitions were sent first to the territorial delegate, at that time Henry Sibley, who forwarded them to the administration. This Sibley did in a letter to Secretary of State Marcy, but with an addendum that sabotaged Meeker's slight chances:

> I have the honor to enclose the Petitions of Sundry citizens of Minnesota Territory, asking the retention in office of Judge B. B. Meeker one of the Justices of the Supreme Court in said Territory, appointed by Gen. Taylor.
>
> While it is my duty to present these memorials, I beg leave to state that I do not concur in the views contained therein.[68]

While there was no public protest over Meeker's displacement, the "manner" and timing of Hayner's removal infuriated the editor of the *St. Anthony Express*, who issued a blistering editorial on April 29, 1853, criticizing rotation on several grounds, including the disruption it caused in the administration of the local court system.[69] Inspired perhaps by one of Defoe's

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[67] Petition signed by 38 residents to President Pierce, January 20, 1853; Roll 7, at 1413-4. The three other petitions were dated "January 1853," and signed by varying numbers of supporters. See Roll 7, at 1413-4, 1417-8, and 1421-2.

[68] Sibley to Marcy, March 9, 1853; Roll 7, at 1403 (underlining in original). Sibley did not always editorialize about the aspirants. For example, five days after he sent Meeker's petitions to Marcy, he forwarded without comment a petition signed by 108 residents in favor of William L. Larned to be U. S. Marshall. Sibley to Marcy, March 14, 1853; Roll 7, at 1329-34.

[69] The *Minnesota Democrat* reported that Hayner cancelled an upcoming court session after learning of his successor's nomination:

> The District Court of Ramsey County, which was to have commenced its session on Monday last, was yesterday adjourned by the clerk, and the jury dismissed, because of the non-appearance of a Judge to hold the term. Judge Hayner having received what he considers sufficient notice of his removal, was unwilling to preside; and Judge Welch, his successor, not having official notice of his appointment, is of course unable as yet to assume the duties of the office. The probability is that Judge Welch will remedy the difficulty by appointing a special term as provided by statute.

Minnesota Democrat, April 20, 1853, at 2.

satires or more likely by Swift's "A Modest Proposal," he concluded with a satiric proposal to reform the "removal system" by beheading all incumbents on inauguration day:

System in Removals from Office.

———

A great Reform is imperatively demanded in the present system of removal from office, under the general government—The extent to which removals from office is now carried, makes this subject a branch of political science, and as such, it deserves profound consideration of statesmen and philosophers. The question is not whether a change of administration should produce a complete change of public officers. In the primitive ages of the republic down to the time of Madison and Monroe, the negative of this proposition was universally admitted. But ever since the 'Sage of Lindenwald,' fathered the doctrine that 'to the victors belong the spoils of the vanquished,' the reverse of this proposition has been acted upon as the settled policy, at least of the democratic party. The only question therefore at present to be considered is how and when these spoils should be divided.

It must be obvious to the most casual observer that the present method or rather manner (for there is a total absence of method) of dividing the spoils, or in other words, removing incumbents from office, is managed in the most bungling unscientific way possible. Nay worse, it is done at a tremendous sacrifice to the public interest.—Take for example the course pursued in regard to incumbents in this Territory. The (official) head of Justice Hayner, was severed from his body, the first part of April. The District Court of Ramsey County, was appointed for the 18th inst. His Honor learned that he was a dead man, two or three days previous. His successor had not been appointed, at least had not received his commission. Consequently, no Court could be held. All business connected therewith, must lie over till next November, or else a special Term be held, which would subject the County to great and unnecessary expense. Honest men in the mean time, must be deprived of the use of their

money. Villains go ‘unwhipt of justice.’ The whole public business is retarded and deranged. This is but a single stance.

The same thing is true, more or less, in regard to every State and Territory in the Union. Let this inconvenience then be multiplied ten thousand times, and it will be found to amount to a most formidable objection to the represent system of removal from office.

There is also another most serious objection. This suspense—this protracting the “long agony,” both to incumbents and expectants, is an intolerable bore, and wholly uncalled for. It is a refinement of cruelty unworthy of this enlightened age. Savages and barbarians only, prolong the lives of their victims for purposes of torture.—To keep nearly a million of poor helpless devils on the hatchel of suspense for weeks or months, is an unchristian act, unworthy [of] the chief magistrate of a great nation.

No, there is a more excellent, way.—Nearly four months intervene between the election of President and his induction into office. Let that time be improved by the President elect, in preparing his nominations. Let each aspirant for any office send in his name, qualifications and recommendations for the post he claims. Let Congress vote a million of dollars to employ five hundred clerks, more or less, to assist the President in his investigations. Let the assent of the Senate be obtained to the nominations. Let everything be fully arranged and completed by 12 o’clock, M., on the 4th of March. Then, at the moment that the cannon at the Capitol thunders out the advent of the new administration, let the fatal axe drink the blood of the luckless victims in every State and Territory in the Union. There need be no interregnum. And it would be a sublime spectacle! Five hundred thousand heads severed at the same instant—one terrible shriek of agony rending the heavens, a torrent of blood spouting from the mangled trunks, and all for opinion sake! But then, as Jefferson remarked, “the tree liberty must be nourished by the blood of martyrs.” At all events, the thing would soon be over—even the corpses of the defunct officers might be buried the same day.—There would be few

> mourners. The host of new officers might be inducted the same day, and by the morrow things have resumed their accustomed routine. We insist that nothing short of this will satisfy the demands of this "fast" age. "Manifest Destiny" points to it—"Young America" advocates it—the innumerable host of office seekers clamor for it—and even we poor conservative Whigs, would infinitely prefer it to the present bungling, barbarian, expensive system of slaughtering political offenders. Give us a change! [70]

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[70] *St. Anthony Express*, April 29, 1853, at 2. A 21st century reader may miss several references in this editorial. And so:

The "Sage of Lindenwald" was the nickname of Martin Van Buren, who served as President from 1837 to 1841. But, contrary to the implication of the *Express's* editorial, it was Senator William Learned Marcy of New York, not Van Buren, who argued, "to the victors belong the spoils of the enemy." Marcy uttered this famous epigram in a speech to the Senate on January 24, 1832, defending rotation: "It may be sir, that the politicians of the United States are not so fastidious as some gentlemen are, as to disclosing the principles on which they act. They boldly preach what they practice. When they are contending for victory, they avow their intention of enjoy the fruits of it. If they are defeated, they expect to retire from office. If they are successful, they claim, as a matter of right, the advantages of success. They see nothing wrong in the rule, that to the victor belong the spoils of the enemy." *Register of Debates* (Executive Proceedings), 22nd Congress,1st Session, January 24, 1832, at 1325.

Like other writers in the nineteenth century, the editor of the *Express* had a penchant for Shakespeare. The phrase "unwhipt of justice" is from King Lear, Act III, Scene 2.

The claim in the last paragraph that "Young America" advocated change of rotation referred to a reform movement within the Democratic party. "Young America" advocated internal improvements built by private enterprise and emphasized nationalism and geographic expansion rather than financial issues. Professor Yonatan Eyal describes a tenet of this ambitious agenda:

> Young Americans who came of age during the 1840s had to face the politically influenced distribution of patronage, and they rarely admired what they found. They called for reform of office holding, presaging the civil service activists who mobilized in the 1870s. Making the distribution of patronage more efficient and less corrupt fit into their larger campaign for honesty and fair dealing in both public policy and private enterprise.

Yonatan Eyal, *The Young America Movement and the Transformation of the Democratic Party, 1828-1861* 174 (New York: Cambridge Univ. Press, 2007); but see Mark W. Summers, *The Plundering Generation: Corruption and the Crisis of the Union, 1849-1861* 179-80 (New York: Oxford Univ. Press, 1987)(contending that Young America's endorsement of territorial expansion "added to the spoils system and the growing role of the central government.").

The imagery of this editorial was so powerful that two decades later, John Fletcher Williams, a journalist and local historian, borrowed it when describing how rotation was implemented during the Pierce administration:

> The Pierce Administration came into power on March 4, and consequently, all the Federal officers in the Territory were sent to the guillotine.[71]

3. Pierce selects William Welch, Andrew Chatfield and Moses Sherburne.

While Pierce's evictions of incumbents raised the ire of his opponents, his appointments did not. They elicited only brief comment in the territorial press. On April 21, 1853, the *Minnesota Pioneer* reported:

> The Chief Justice of the Territory, Hon. Wm. H. Welch, is a resident of the Territory, and is well known to our citizens. He is the only Judicial appointment from the Territory.
>
> The Associate Justices, A. G. Chatfield, and M. Sherburne, Esqs., have been appointed from the *States*. They are said to be sound lawyers. [72]

Each appointment poses the problem of identifying who or what influenced the President. There is circumstantial evidence in the form of letters in the National Archives that Henry Sibley retained significant influence with the administration even though it did not reward him with the governorship: the men he endorsed were selected, and the man he opposed, Bradley Meeker, was not. But the only fact we know with certainty is that Welch, Chatfield and Sherburne were beneficiaries of rotation.

There was serious competition for the judgeships. Jefferson P. Kidder of Vermont mounted the most extensive write-in campaign in the territory's brief

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[71] J. Fletcher Williams, *A History of the City of Saint Paul to 1875* 338 (St. Paul: Minnesota Historical Society,1983) (published first in 1876 under the title, *A History of the City of Saint Paul, and the County of Ramsey, Minnesota*). It can be found online.

[72] *Minnesota Pioneer*, April 28, 1853, at 2 (emphasis in original). These accounts confirm Professor Fish's observation that "Pierce's appointments excited comparatively little comment; the press was apathetic." Fish, supra note 1, at 165.

history.[73] Most of the petitions touted him for associate justice or chief justice; others for district attorney; while a few suggested that he "would satisfactorily discharge the duties of any office which might be assigned to him."[74] In 1865, he satisfied his ambition of a judgeship when President Lincoln appointed him to the supreme court of Dakota Territory.[75] Another candidate was Kirby Benedict, a lawyer in Illinois, who was supported by sixteen petitions.[76] While he did not make the Minnesota court, President Pierce appointed him associate justice of the supreme court of New Mexico Territory in 1853, and President Buchanan promoted him to be chief justice of that court in 1858.[77]

Henry Sibley compiled his own slate of candidates, and on March 19, 1853, he wrote Secretary of State Marcy of his recommendations:

> I have the honor to present the name of Hon. J. P. Kidder of Vermont as an applicant for the office of Chief Justice of the Supreme Court of Minnesota Territory. Mr. K. comes to me highly recommended by the prominent Democrats from his own state, and his appointment as Chief Justice or one of the Associate Justices of an (sic) Territory, would no doubt be cordially received by the people more immediately interested.
>
> As the Delegate from the Territory, representing the interests here, I have the honor respectfully to urge the appointment in lieu of the present Whig incumbents of the following persons, to wit:

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[73] At least 56 letters and petitions in support of Kidder have been preserved in the territorial archives. See Roll 7, at 1156-1310. So numerous were these letters of support that a "synopsis" of them was prepared. Id. at 1308-10.

[74] E.g., E. M. Brown to Pierce, March 1853; Roll 7, at 1233.

[75] Jefferson Parish Kidder (1816-1883) was appointed to the supreme court of Dakota Territory by President Lincoln and reappointed by President Grant in 1869 and 1873. For a biographical sketch, see the online *Biographical Directory of the United States Congress*. For an account of his work for the Dakota Land Company, which attempted to establish a government in Dakota Territory in the late 1850s, see William E. Lass, "The First Attempt to Organize Dakota Territory," in William L. Lang, ed., *Centennial West: Essays on the Northern Tier States* 148, 161-3 (Seattle: Univ. of Wash. Press, 1991); this article is posted separately on the MLHP.

[76] Roll 7, at 923-60.

[77] Kirby Benedict (1811-1874) is one of the few territorial judges who is the subject of a full-length biography. See Aurora Hunt, *Kirby Benedict: Frontier Federal Judge* (Glendale, Ca.: Arthur H. Clark Co., 1961).

Petitions were also submitted on behalf of Alexander W. Foster of Pittsburgh, S. S. N. Fuller, and Joseph N. Furber (Roll 7, at 1035-73).

> William H. Welch of Minnesota.
> Andrew G. Chatfield of Wisconsin, and
> J. P. Kidder of Vermont or
> Moss Sherburne of Maine as proper persons
> to fill the judicial Stations in the Territory, Judge Chatfield to occupy the position of Chief Justice thereof.[78]

On March 30th, Sibley wrote directly to the President repeating these recommendations. He began with a swipe at the Whigs:

> I am deeply interested in the prosperity of Minnesota Territory, and equally so for the success of your Administration. We have heretofore been afflicted by having placed over us, some Whig Judges and other officials, who were a disgrace to the Territory, as well as to those who appointed them. I have recommended Andrew G. Chatfield of Wisconsin, Wm. H. Welch of Minnesota, and J. P. Kidder of Vermont or Moses Sherburne of Maine, as proper men to receive the appointment of Judges. They are gentlemen of character, integrity & legal attainments.[79]

Six days later, the President nominated Welch, Chatfield and Sherburne. He knew Moses Sherburne, and that explains his name on the list; but it is not known whether he knew Welch or Chatfield, other than by reputation.

To Kermit Hall, one of the few scholars of the territorial judiciary, Welch was a "political ally" of Sibley.[80] Besides his party affiliation, and Sibley's

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[78] Sibley to Marcy, March 19, 1853; Roll 7, at 1231.
[79] Sibley to Pierce, March 30, 1853 (underlining in original); Roll 7, at 1076.
[80] Hall, supra note 40, at 118 (describing Welch as a "political ally of Sibley's").

John Phillips Owens, a territorial journalist, noted another political connection of Welch but it likely did not affect the President:

> As to the new members of the bench [in April 1853], Chief Justice Welch, who had resided here at the time of his appointment some three or four years, was a lawyer of fair ability, a native of Ohio and an old resident of Michigan, being a contemporary of [Lewis] Cass, though a younger man, in the days when that distinguished statesman was Territorial Governor and chief Indian officer of the whole Northwest.

Owens, supra note 64, at 199. After his defeat in the 1848 election, Lewis Cass had returned to the Senate. In 1852, he stumped for Pierce, and Michigan went Democratic; but when filling posts in his administration, Pierce did not consult him. According to Cass's

support, the mundane fact of Welch's residency was in his favor. That lawyers from North East states had been preferred for judicial posts had not gone unnoticed in the territory. When, in late August 1852, Jerome Fuller was succeeded by Henry Z. Hayner, another New Yorker, the *St. Anthony Express* lamented, "It seems strange to us, that at this late day, when we have such an abundance of excellent talent in our Territory, our officers cannot be chosen from our midst." [81] Eight months later, William Welch became the first resident of the territory to be nominated to the court.

The unexpected elevation of Andrew Chatfield, a native of New York before relocating to Wisconsin, is an illustration of the Rule of Chance that has changed the lives of many lawyers. As told by John Fletcher Williams:

> Being in attendance on the Supreme Court of the United States, in Washington, D. C. he formed the acquaintance of Hon. Henry H. Sibley, then delegate from Minnesota; he became much interested in the advantages and prospects of Minnesota, which were so much praised by Mr. Sibley, and expressed a wish to remove hither. As the federal offices in this territory were just at this time being distributed, this led the way to the appointment by President Pierce, of Judge Chatfield, as associate Judge of the Supreme Court, on the recommendation of Mr. Sibley.[82]

On May 4, 1853, a month before Moses Sherburne even arrived in the territory, the *Minnesota Democrat* republished a long editorial from the Farmington, Maine, *Chronicle* lauding his "strong common sense, and rare

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biographer, "There were not enough patronage positions available to satisfy everyone, and it nettled Cass to notify his many supplicants that he enjoyed little personal influence on the distribution of federal offices." Willard Carl Klunder, *Lewis Cass and the Politics of Moderation* 263 (Kent, Ohio: Kent State Univ. Press, 1996).

[81] *St. Anthony Express*, September 10, 1852, at 2.

[82] John Fletcher Williams, "Memoir of Judge Andrew G. Chatfield" (np, 1870s), posted separately on the MLHP.

The *Minnesota Democrat* noted Chatfield's reputation when reporting his arrival:

> JUDGE CHATFIELD.—This gentlemen arrived with his family, by the Franklin yesterday. He is one of the new associate Judges, and was appointed from the neighboring State of Wisconsin, where he has taken a prominent part in politics, and is widely known as a lawyer of experience and ability.

Minnesota Democrat, June 1, 1853, at 2.

business abilities…[and] thorough knowledge of Law and familiar acquaintance, from long and extensive practice, with judicial proceedings." [83] The *Chronicle* had mentioned his energetic campaign as a Democrat, for Congress:

> During the time he held [the office of Probate Judge], he was unanimously nominated as the Democratic candidate for Representative to Congress from the strongly whig district, composed of the counties of Kennebec and Franklin, represented in the last Congress by Hon. R. Goodenow, and formerly by Messrs. Severance, Belcher and Otis, all whigs. As an evidence of his standing, we have only to say, that everywhere in his district he received the full party vote, and in his own town and county ran far ahead of his ticket.[84]

Sherburne's strengths as a campaigner had come to the attention of the future President, as recounted years later by Simeon Mills Hayes, a St. Paul lawyer:

> About this time [1850] Judge Sherburne was nominated for Congress by the Democratic party of his [Maine] Congressional district; but, although running ahead of his associates on the Democratic ticket, he was defeated, the district being strongly Whig.
>
> The eloquent and able speeches of Judge Sherburne during the political canvass following his nomination for Congress had widely extended his reputation, and had brought him to the notice of Franklin Pierce. The acquaintance thus formed ripened into a friendship, and when Mr. Pierce became President of the United States, he appointed Moses Sherburne Associate Justice of the

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[83] *Minnesota Democrat*, May 4, 1853, at 2. It also republished a one paragraph note from the *Maine Democrat Advocate* stating that "Judge S. is a good lawyer and will win a host of friends in his new locality. We know of no man better qualified to do honor to his office."

The following month, the *Minnesota Democrat* republished an exchange of flattering correspondence between Sherburne and his "fellow members of the Franklin Bar" that had appeared in the *Chronicle*. *Minnesota Democrat*, June 1, 1853, at 2.

It is likely that either Sherburne's relatives in Minnesota arranged or encouraged republication of these testimonials to assure residents in general and the bar in particular that he was qualified to serve on the bench. See below at 45-6 n. 85.

[84] *Minnesota Democrat*, May 4, 1853, at 2.

> Supreme Court of the newly formed Territory of Minnesota. In speaking of this appointment, the Eastern Argus of Portland, Maine, of April 18, 1853, said, "The President could hardly have selected a man better suited to this honorable and responsible position." [85]

It is reasonable to conclude that the President nominated Sherburne because of their friendship, not because of Henry Sibley's recommendation.

4. Meeker's challenge to Sherburne

One year after he assumed office, Moses Sherburne found himself under siege from the man he displaced, Bradley Meeker. The *St. Anthony Express's* publication on May 6, 1854, of Meeker's manifesto, expounding why his removal was illegal, provided that newspaper another opportunity to launch a fusillade against presidential removal power, a critical component of rotation:

> **Executive Encroachments.**
>
> ———
>
> We this day present to our readers a paper from the Hon. B. B. Meeker, defining his position in regard to the late Executive encroachments upon his judicial prerogative. We commend the article to the attention and perusal of our readers as, altho'

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[85] Simeon Mills Hayes. "Moses Sherburne," 10 *Minnesota Historical Society Collections* (Pt. II) 863, 864 (St. Paul: Minn. Hist. Soc., 1905); the paper was delivered first to the Society's Executive Council on May 12, 1902.

If friendship and politics explain Sherburne's selection, family relations may explain why at the age of 45 and with an established law practice in Maine, he accepted a commission of a judgeship on the frontier. As reported in the *Minnesota Democrat*:

> Several of his friends now reside in Minnesota—among them our worthy friend, his son-in-law, Geo. W. Prescott., Att'y at Law, at St. Anthony Falls—and to them, no doubt, his appointment is very gratifying.

Minnesota Democrat, May 4, 1853, at 2. George Washington Prescott was an influential "Att'y at Law." He was appointed Superintendent of Public Instruction by Governor Willis A. Gorman (another Pierce appointee); and he later served as clerk of the territorial Supreme Court from 1854 to 1857. Warren Upham & Rose Barteau Dunlap, *Minnesota Biographies, 1655-1912* 615 (St. Paul: Minn. Hist. Soc., 1912); see also Thomas McLean Newson, *Pen Pictures of St. Paul, Minnesota* 394 (St. Paul, 1886). Almost certainly, Moses Sherburne and his family received glowing reports about Minnesota Territory from the Prescott's.

somewhat lengthy, it clearly and satisfactorily shows, that no authority is vested in the President to remove Territorial Judges, at last, not during good behavior. . . . .

The question at issue, concerns every citizen of the Territories, now in existence.—If there is any one principle more sacred and important to us as citizens of a Territory, than another, it is the entire independence of the judiciary. Without this it is impossible to maintain an equal impartial and consistent system of judicial procedure. And without such a system, the administration of justice would be a farce. Let it be understood, that the tenure by which Judges hold their offices is the mere whim or caprice of the Executive, that they are subject to removal at any moment, without notice or a hearing, and they become at once the mere tools of arbitrary power. Judges are but mortal, and it is impossible but that they should be influenced by such considerations. If they accept the office, it is because they wish to retain it, and if they wish to retain it, it must be at the price of a due subservience in opinion and conduct, to the superior who holds their destiny in his hand. . . .

Let it be understood that a territorial judge holds his office only at the will of his superior, and who will accept this most arduous and responsible position? What man of high legal attainments would abandon a lucrative practice, and sacrifice brilliant prospects, for onerous duties, salary barley sufficient for a comfortable subsistence, & all the inconveniences and disadvantages attending a distant territorial residence. The very idea of such a step is absurd. No man of spirit, of a decent self respect, would accept an office, however honorable or lucrative, held on such a tenure. . . .

These remarks are without any reflections upon any of the present incumbents of the Supreme bench of the Territory. The question s not one involving merely individual rights, but public interests. . . .The removal of Judges for political opinions we believe to be one of those unauthorized arbitrary high handed Executive acts, which have for the past few years been too rapidly increasing, and which demand more than popular rebuke. The centralization of power in the Executive has already reached such an extent, as most alarmingly to threaten the stability of our

> free institutions. Executive encroachments upon popular rights have been too long quietly submitted to; and if there is a conservative element in our Government, there is need that its influence be exerted. If there be a barrier between arbitrary power and popular rights, let it be interposed. By Constitutional provisions, of which there an be no question, the Executive is already vested with far too extensive authority—let him not seek to usurp others not expressly granted, especially such as involve interests as important to the people as those in the matter under consideration.[86]

Here, the editorialist repeated a recurrent warning in American politics—the dangers of "centralization of power in the Executive"—during, ironically, a prolonged period of notoriously weak presidencies. He demeaned the man who stooped to accept a judgeship under these conditions—"No man of spirit, of a decent self respect, would accept an office, however honorable or lucrative, held on such a tenure"—while adding a lame disclaimer: "These remarks are without any reflections upon any of the present incumbents of the Supreme bench of the Territory." Regardless, Moses Sherburne, the "present incumbent," did not fit the stereotype; indeed, he may have been the ablest of the ten territorial judges.

5. Increase in local influence

When competing factions emerged within the territory, Pierce avoided both, and awarded political allies living elsewhere. Such an inclination may have been abetted by the territory's lack of electoral votes. There would be little immediate political benefit to a president to fill a judgeship with a supporter who resided in a territory without electoral influence. However, Pierce's selections of Welch and Chatfield to fill vacancies indicate a subtle shift in political power. The five justices selected by Presidents Taylor and Fillmore had either the backing of powerful Middle West or New York Senators or the direct support of the President himself. In the second round of selections, only Moses Sherburne owed his judgeship to his personal relations with the President, while Welch and Chatfield seem to owe their fortunes in large part to Sibley.[87] In the last round, local influence became even more pronounced.

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[86] *St. Anthony Express*, May 6, 1854, at 2.

[87] According to Kermit Hall, "Sibley was pleased that the backgrounds of the nominees complimented the New England and New York origins of the territorial populations." Hall, supra note 40, at 118.

H. The Presidency of James Buchanan

1. Buchanan struggles with rotation

The pattern of alternating party control over the executive branch beginning with Martin Van Buren ended in 1856 with the election of James Buchanan, a Democrat like his predecessor. Buchanan thus faced the problem of whether incumbent Democrats, appointed by Franklin Pierce, should be rotated out of office. As Buchanan knew, and as most elected official come to know, the exercise of patronage power rewards one political supporter with a job but may also alienate others who favored a rival, who wanted that position for themselves or, in the case of Pierce-appointees, who want to remain in office. He chose removal. In his history of the administrative practices of antebellum presidents, Leonard D. White described Buchanan as "perfecting" rotation:

> Both Whig and Democratic administrations followed the practice of Jackson. The full application of the theory of rotation came with Buchanan. The Pierce officeholders had worked for Pierce's renomination—but they were Democrats and presumeably had supported Buchanan in his successful contest against the Republican candidate, Frémont. Were they now to be spared, as Democrats, or decapitated, as Pierce men? Buchanan stood squarely on the doctrine of rotation and announced that no one would receive reappointment after his commission expired, unless under exceptional circumstances. To his friend, John Y. Mason, he wrote after his election was assured, "They say, and that, too, with considerable force, that if the officers under a preceding Democratic administration shall be continued by a succeeding administration of the same political character, this must necessarily destroy the party. This, perhaps, ought not to be so, but we cannot change human nature." [William L.] Marcy wrote on March 27, 1857, "Strange things have been enacted here during the last three weeks. Pierce men are hunted down like wild beasts." The theory of rotation had finally been perfected. The triumph of the new system was complete in civilian circles. No one thought to remember the days of the old Republicans nor the care with which they had preserved the character of the public service above faction and party.[88]

[88] White, supra note 9, at 313.

Buchanan's observation to John Y. Mason that "we cannot change human nature," may have reflected his belief in a rationale for rotation — that careerists were corruptible. According to Buchanan's biographer, Philip Shriver Klein:

> Buchanan never believed in giving important posts in the public service to persons who depended on politics for their living. To favor and encourage them would make them utterly dependent upon the vagaries of political fortune and sooner or later, in these days before Civil Service protection, place them in a position of such insecurity that they would always be for sale to the highest bidder. A sound party demanded men who could stand on their own feet, come success or failure at the polls.[89]

Whether Henry Rice, the territorial delegate to congress from 1853 to 1858, understood this cynical aspect of Buchanan's political thought, he certainly played to it when, with stealth and cunning, he eliminated Andrew Chatfield and Moses Sherburne, incumbent rivals to his slate of candidates.

Professor Klein, viewing Buchanan through the narrow prism of his exercise of his patronage power, saw a committed rotationist but also a leader who had lost touch with the political currents of the day, whose political instincts had withered over time:

> Buchanan had expected a wild scramble for patronage, but the reality exceeded even what he had steeled himself to endure. Not only were there more applicants than ever before but also fewer

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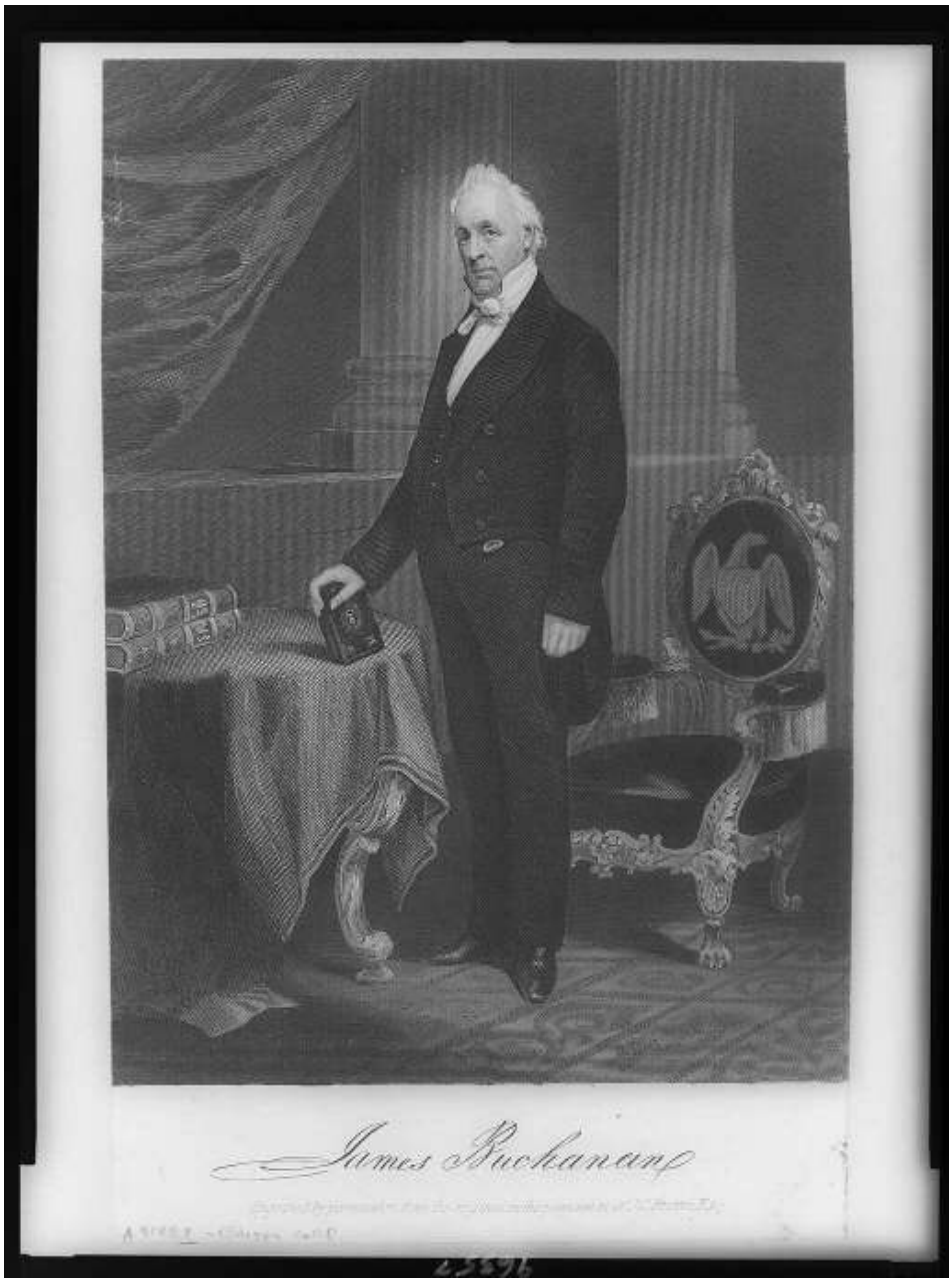
William L. Marcy (1786-1857) served as U. S. Senator (Democrat), 1831-1833; Governor of N. Y., 1833-1838; Secretary of War under President Polk, 1845-1849; and Secretary of State under President Pierce, 1853 to 1857.

Kenneth Stampp has described the criteria for Buchanan's appointments: "Hardly an appointment, high or low, was made on merit alone. Federal clerkships, post offices, customhouses, navy yards, land offices, and Indian agencies were filled with persons of varying degrees of ability and integrity but of unswerving party loyalty. So were federal judgeships and district attorney's offices." Stampp, supra note 31, at 73.

[89] Philip S. Klein, *President James Buchanan* 281 (University Park: Pa. State College Press, 1962).

John Y. Mason (1799-1859) served as Secretary of the Navy under President Tyler, 1844-1845; as Attorney General, 1845-46, and Secretary of the Navy, 1846-1849, under President Polk; and as Minister to France under Presidents Pierce and Buchanan from 1853 to 1859, when he died in office.



James Buchanan

jobs. Not since inauguration of Van Buren, twenty years before, had one Democratic Administration succeeded another. Now the offices were filled with Pierce men who could not be swept out without disrupting the party. Furthermore Buchanan for a generation had been accepting political aid but never achieved any office that gave him power to pay off party debts. In the Secretaryship of State [from 1845 to 1849 under President Polk]

his influence on appointments had been slight. Now, he found himself for the first time in an administrative position with control over patronage, his obligations had grown larger and the expectations greater than he had realized. All his old-time friends came for jobs, and they all brought long lists of *their* friends who had been promised their rewards. Even if these requests had not created an impossible situation, Buchanan's ancient policy of amalgamation and the reconciliation of contesting groups would have done so. He had long advocated a division of the spoils between Democratic factions, and in the recent elections he had promised to let the Whigs come in for a share. Thus, he probably doubled the number of those who felt justly entitled to patronage. In addition to all these pressures there was still another: the ambition of presidential aspirants for 1860, whose appetites had been whetted by Buchanan's inaugural pronouncement that he would retire after a single term. Douglas, Hunter, Walker, Davis, Cobb, and others all demanded special consideration and were ready to fight for it. It required no wizard to foresee the result. Whatever patronage policy should be developed, there would be unprecedented disappointment and discontent throughout the Democratic ranks, and no "administration party" at all. . . .

Buchanan adopted the general rule that Pierce appointees who were good men and held commissions for a specified time should retain their offices until their terms expired. . . . .Buchanan hoped to spread the availability of many choice jobs throughout his term. Pierce had installed a good many of his friends in the last two years of his Administration when he hoped to promote his own renomination. By leaving these men in office, Buchanan could hold their jobs as prospects and have some important gifts to offer in the latter stages of his term, without need to remove his own appointees to create vacancies.

The Cabinet, meeting for four or five hours nearly every day, considered little but the patronage for the first several months. … Even had these men had been endowed with peculiar genius, they would have faced several grave disadvantages in making appropriate selections from this mountain of requests. In the whole Cabinet group there was not one "big city" politician; there was no son of the new West; there was no "Young

> American;" there was no representative of industry; there was no spokesman for the free-soil Democrats. Buchanan could not have had a unified Cabinet with these elements included, but by surrounding himself with rural politicians and lawyers who frankly accepted the America of Andrew Jackson as their ideal he got only a partial and antiquated view of the forces astir in the land. Buchanan's supreme confidence in himself might have been his greatest asset had he become president in 1844 or 1848 for he then was in touch with the national scene. But for a decade he had been either out of office or out of the country, and lightning changes had been in progress. The friends he trusted and the enemies he understood had died or passed from view. . . . He did not know the new generation, and it did not know him except by reputation. The president had become very nearly a political stranger in his own country. But he had the confidence of rectitude and past success and hoped to proceed serenely. Otherwise he would not have remarked to a friend who warned that he would be hounded to death by job-hunters, "I'll be damned if I will."[90]

2. Henry Rice forestalls retention

A week before Buchanan's inauguration, Congress passed the Enabling Act, which authorized Minnesotans to form a constitution and government "preparatory to their admission in the Union." [91] It was, therefore, clear that Minnesota would gain statehood in the near future and that the men he placed on the territorial court would serve only a year or so. When he came into office, he announced that unless there were exceptional circumstances, no civil servant would be reappointed after his commission expired.[92] Nevertheless, to many residents, the current occupants of the bench, all of whom were now residents, deserved retention. Not only was there a push for retention but there was opposition to appointing lawyers from outside the territory — what Henry Rice called "importation."[93] Maintaining the status quo, therefore, would have been the easiest and safest course of action.

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[90] Id. at 278-80 (citing sources; emphasis in original).
[91] 11 U. S. Statutes at Large, 166-67 (February 26, 1857). It is posted on the MLHP.
[92] Klein, supra note 89, at 279 (cited above at 53); Fish, supra note 1, at 166.
[93] Rice to Attorney General Black, May 13, 1857; Roll 7 at 1030.

To aide the Buchanan administration evaluate "applicants" for Minnesota judgeships, a three page outline listing the candidates and their supporters and detractors was prepared.[94] Although the identity of the compiler is not known, his goal seemed to be accuracy and even handedness. He duly noted, for example, the recommendation for "reappointment of the present Judges of the Territory" by former governor Willis Gorman, M. W. Irwin, U. S. Marshall, and George Prescott, the clerk of the supreme court. [95]

But Henry M. Rice, a politician with a remarkably devious side, had his own slate of candidates, and only one incumbent — the chief justice — was on it.[96] Rice acted quickly to forestall the groundswell for retention. He dispatched Andrew Chatfield, the protegé of his old rival Henry Sibley, on March 20, 1857, by a memorandum, shorter than but as lethal as a stiletto, accusing him of charging exorbitant fees for signing deeds to township sites:

> I am informed (by good men) that his fees …have amounted to nearly ten thousand dollars since he has been in office—I am also informed that the other Judges have never made any charges for performing the same service. The citizens of the towns are entirely at the mercy of the Judges & when one asks 500$ for his

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[94] Three page outline captioned "Minnesota T."; Roll 7, at 900-2. (hereafter "Synopsis of candidates").The author is not listed; it was written in early April 1857.

[95] Synopsis of candidates, Roll 7, at 902, referring to letter from Gorman et al, to Buchanan, March 18, 1857; Roll 7, at 984 ("Sir, There is not to our knowledge or belief any desire or anticipation on the part of the Bar or People of Minnesota of any changes in the Judiciary of the Territory during the time while it shall continue under its present Territorial organization; and in our judgment, both the business & political interests of the Territory would be best served and the wishes and expectation of the Bar and People most strictly consulted by the reappointment of the present Judges of the Territory.").

[96] The following entry on Henry Rice appears in Warren Upham & Rose Barteau, supra note 85, at 638:

> RICE, HENRY MOWER, U. S. senator, b. in Waitsfteld, Vt., Nov. 29, 1816; d. in San Antonio, Texas, Jan. 15, 1894. He came to Fort Snelling in 1839; was agent of the Chouteau Fur Company, and assisted in making several treaties with the Indians by which lands were ceded; settled in St. Paul in 1849, and was elected a delegate from Minnesota territory to Congress in 1853; was re-elected in 1855; procured the passage of an act enabling the territory to become a state, and was author of the law extending the right of pre-emption over the unsurveyed lands of the territory. He was elected to the U. S. senate, and served from 1858 to 1863. He donated Rice park to the city of St. Paul, and many lots to churches and public institutions. Rice county is named in his honor.

> signature it must be paid or he cannot get title to his property — the foregoing is substantially true and I hold myself responsible for the same.[97]

The next day, Rice wrote Attorney General Jeremiah Black recommending "Charles E. Flandrau for associate justice for the Territory of Minnesota in place of A. G. Chatfield, whose term is about to expire." He described Flandrau, then U. S. Indian agent, as "a gentleman of great legal attainments and whose character is above reproach."[98]

By the time Rice's charge against Chatfield made its way into the synopsis of candidates, it had metastasized to "extortion."[99] Chatfield was unaware of the libel until he traveled to Washington, probably to plead has case for reappointment, a month later.[100] On Saturday evening, April 18, 1857, he learned of the charges. Surprised but composed, he wrote General Black:

> I have this evening, for the first time, learned that charges of malfeasance in the discharge of my duties as Associate Justice of Minnesota, have been made against me.
>
> Fairness if not right entitles me to know what the charges are and who are my accusers. I therefore respectfully, ask to be furnished with a copy of the charges and at least that I may see and copy them myself. That being accorded to me I will with all possible promptitude make a full and time answer to every allegation against me either orally or in writing as you may prefer, and as a matter of strict justice, I must ask that all further action on the question to which the charges relate may be suspended until my answer shall have been given.[101]

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[97] Rice memorandum dated "20th March 1857"; Roll 7, at 976. There is no addressee on the memorandum, but it likely was directed to Attorney General Black.

[98] Rice to Black, March 21, 1857; Roll 7 at 1028.

[99] Synopsis of candidates, Roll 7, at 902.

[100] There were six petitions in support of Chatfield's retention. Roll 7, at 981-997.

[101] Chatfield to Black, dated "Saturday evening Apl. 18th 1857"; Roll 7, at 978-9. He concluded the two page letter by stating that that he would call upon Black's office on Monday morning at nine o'clock to the end that I may see and have a copy of the charges…" It is not known whether he ever met personally with Black or saw Rice's charges.

It was too late. Three days later, the President bypassed Chatfield when he filled the court.

3. The appointment of Rensselaer Nelson against the background of the *Dred Scott* case.

Henry Rice preferred Rensselaer R. Nelson for the slot occupied by Moses Sherburne, who was favored by a petition signed by 30 members of the bar.[102] On March, 20, 1857, the same day he knifed Andrew Chatfield, Rice relayed hearsay to General Black that Sherburne suffered from a "bad case" of inebriation:

> Confidential
> Sir, Washington 20th March 1857
>
> I make the following extract from a letter dated St. Paul January 5th 1857.
>
> "Judge Sherburne has also been sick for nearly a month. His case is a bad one; and Doct Willey said yesterday that he thought his mind was gone past restoration, that in other respects he might get well. It is probable therefore that he will never take his seat on the bench again."
>
> I am informed by reliable persons that the illness of Judge Sherburne was occasioned by intemperance. I have no doubt of this fact.
>
> Of late his health has improved and I believe he is able to attend his duties. As a judge and a citizen I have never heard any complaint—as a gentlemen he stands high—but his misfortune I think renders his reappointment a matter of doubtful policy. I would not ask for his removal—but do believe that at the expiration of his term that another should be appointed. And should the President concurs in this, I would respectfully by leave to submit the name of Rensalear R. Nelson, who has long been a resident of Minnesota, and whose legal attainments peculiarly qualify him for the position. He is a gentlemen of high standing in the Territory, possed of a large fortune he has earned from his profession.

[102] Petition to Rice, March 12, 1857; Roll 7, at 981-2.

I enclose two letters on the subject.

With great respect
Your obedient servant
Henry M. Rice[103]

Later, Rice's gossip was condensed into the synopsis of candidates: "the appointment of Judge Sherburne would be improper, inasmuch as he is incapacitated by intemperance."[104]

R. R. Nelson was one of the earliest lawyers in Minnesota Territory, arriving in May 1850.[105] A Democrat, he was a prominent figure in the territory. These facts—his party affiliation and his residency—were important at a time when resident lawyers were preferred. But he also had support of

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[103] Rice to Black, March 20, 1857; Roll, at 1682-3 (underlining and misspelling in original) The letter was addressed from "Washington." Rice also received a letter dated March 20, 1857, from Henry Hollinshead, a prominent lawyer in the territory, repeating gossip about Sherburne's health:

> I know that members of our Bar myself and partner included, being the principal part of the ___ of the District in which Judge Sherburne presided refused to sign the petition refused to for the reason that they believed him to be incompetent to the discharge of his official duties. I have heard both of his physicians Dr. Willey and Steward of this city, who attended him in his late illness (softening of the brain)) say that his mind was so affected that he ought to resign. Abundant evidence of such intellectual unfitness exists in the records of his Court.
>
> Personally I like Judge S. I have always been friendly with him, and am so now. But my duty to my clients requires me to say that, for the reason state, he ought not to be re-appointed.

Hollinshead to Rice, March 20, 1857; Roll 7, at 1679-80. William Hollinshead (1820-1860) arrived in the Territory in 1849 or 1850. His law partners were Edmund Rice, brother of Henry, and the George Becker. Their firm was known as Rice, Hollinshead & Becker. His second wife was the sister of Henry and Edmund Rice. Newson, supra note 85, at 153-7.

[104] Synopsis of candidates, Roll 7, at 902 ("Hon. H. M. Rice (delegate) states that the reappointment of Judge Sherburne would be improper, inasmuch as he is incapacitated by intemperance.").

[105] Nelson's arrival in St. Paul in May 1850, provided fodder for one of the many tall tales about the frontier bar—what may be called the "myth of the starving lawyers." It is recounted and exposed in "Lawyers and 'Booster Literature' in the Early Territorial Period," at 19 n. 53 (MLHP, 2008).

another kind. In the administration's three-page synopsis of candidates for the court, the following appears:

> R. R. Nelson is recommended for Justice by
> 1. Hon. R. C. Grier (U. S. Sup. Court)
> 2. Hon Samuel Nelson (U. S. Sup. Court)
>
> That Mr. Nelson is a good lawyer, has resided sometime in the Territory is fully competent for the place & would give satisfaction to the public & the Bar. He is also recommended in a letter written for another purpose. Harlan Hall. Rice (delegate).[106]

Samuel Nelson, a Democrat from New York, was nominated by President Tyler, confirmed, and took his seat on the Supreme Court on March 5, 1845. Robert C. Grier was nominated in 1846 by President Polk, in whose cabinet Buchanan served as Secretary of State. Buchanan and Grier were Democrats from Pennsylvania. They were of the same generation. In 1857, Buchanan was 66 years old, Nelson 65, and Grier 63. The correspondence between Grier and Buchanan, quoted by Carl Brent Swisher and Don Fehrenbacher, suggests a frank relationship, if not friendship, and Grier, according to Swisher, thought himself "close to the President-elect." [107] Importantly the three shared an opposition to abolitionism and defended southern constitutional rights. In his history of the *Dred Scott* case, Don Fenrenbacher describes Nelson and Grier's common beliefs:

> Judicial self-restraint on slavery questions probably appealed most strongly to Samuel Nelson of New York and Robert C. Grier of Pennsylvania, because as northern Democrats they were subject to the usual cross-pressures of party and section. In their general outlook, however, both men fitted the "doughface" pattern, and some unpleasant experiences on circuit duty resulting from abolitionist resistance to the Fugitive Slave Law no doubt reinforced the natural tendencies of both to be, if not proslavery, at least grimly anti-antislavery.[108]

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[106] Synopsis of candidates, Roll 7, at 901 (underlining in original). Harlan P. Hall (1838-1907), an early journalist, wrote *Observations* (St. Paul, 1904), a collection of political reminiscences.

[107] Swisher, supra note 28, at 617; Don E. Fehrenbacher, *The Dred Scott Case* 307 (New York: Oxford Univ. Press, 1978)(describing correspondence between Buchanan and his "old friend Catron."). See Scott v. Sanford, 60 U. S. (19 How.) 393 (1857).

[108] Fehrenbacher, supra note 107, at 234.

The Justces's recommendations are part of a curious sequence of events in the *Dred Scott* case which preceded the President's appointment of Justice Nelson's son to the territorial court by a few weeks.

It was argued first in February, 1856, and the court split over the question of jurisdiction. At Nelson's suggestion, the case was ordered reargued in the fall term, after the election. The most vociferous anti-slave member of the court was John McLean, appointed by President Jackson in 1830. In 1856, McLean sought the nomination of the newly-formed Republican party, but it preferred John C. Frémont, a candidate McLean felt was inadequate.[109] Carl Brent Swisher saw that the court's delay "deprived Justice McLean of the opportunity to deliver a ringing dissent, with a denunciation of the Kansas-Nebraska Act, and a means of getting the nomination." [110] In the election, Buchanan defeated Frémont, and Millard Fillmore the candidate of the American or Know-Nothing party. [111]

The case was reargued on December 15-18, 1856. While it was being considered, and the opinions drafted, Buchanan exchanged correspondence with Justices Catron and Grier about its status.[112] Grier even advised the President-elect about the likely outcome, which led Buchanan to write him urging that the court's ruling not rest on the narrow ground of the legal status of Dred Scott under Missouri law but resolve the broader issue of slavery, which would bring into question the constitutionality of the Missouri Compromise. Buchanan believed that a broad ruling would diffuse the slavery issue, bringing harmony to the country. Grier shared Buchanan's letter with the Chief Justice and Justice Wayne, who concurred that an expansive ruling was necessary. Grier later notified Buchanan when the decision would be issued,[113] leading him to refer to the imminence of the ruling in his inaugural

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[109] Francis P. Weisenburger, *The Life of John McLean: A Politician on the United States Supreme Court* 151-2 (Columbus: Ohio State Univ. Press, 1937).

[110] Swisher, supra note 28, at 608.

[111] Election histories list different totals of the popular vote but, rounded, they were:

James Buchanan (Democrat): 1,830,000, and 174 electoral votes.
John C. Frémont (Republican): 1,340,000, and 114 electoral votes.
Millard Fillmore (America/Know-Nothing): 870,000, and 8 electoral votes.

Thus, Buchanan received less than 50% of the popular votes.

[112] For this and subsequent discussion of the case in this paragraph, see Swisher, supra note 28, at 616-20, and Fehrenbacher, supra note 107, at 311-14.

[113] Swisher, supra note 28, at 618.

address on March 4th.[114] Professor Fehrenbacher concluded that Buchanan, whose "intervention" contributed to a change in the substance of the opinion, "was now assured of the judicial rescue that he so desperately desired."[115]

The opinions in *Dred Scott* were released over two days. On March 6th, the Chief Justice read his opinion, holding that slaves were property without rights, blacks were not citizens of the U. S., Dred Scott could not sue in court, and the remnant of the 1820 Missouri Compromise barring slavery in the territories was unconstitutional, after which Justices Nelson and Caltron read their concurrences.[116] That day, Justice Nelson wrote the President and asked him to appoint his son to the territorial court.[117] The next day, Justices McLean and Curtis read their dissents, while Grier, Wayne, Campbell and Daniel submitted theirs without reading them.[118] That day, Justice Grier sent a note to Buchanan recommending that he appoint "my friend Rensalaer (sic) R. Nelson" to be "Justice in the territory of Minnesota."[119]

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[114] Buchanan, "Inaugural Address," March 4, 1857, in James D. Richardson, ed., V *A Compilation of the Messages and Papers of the Presidents, 1849-1861* 430, 431 (Bureau of National Literature and Art, 1909)("A difference of opinion has arisen in regard to the point of time when the people of a territory shall decide this question [of slavery] themselves. This is, happily a matter of but little practical importance. Besides, it is a judicial question, which legitimately belongs to the Supreme Court of the United States, before whom it is now pending, and will, it is understood, be speedily and finally settled. To their decision, in common with all good citizens, I shall cheerfully submit, whatever this may be…"). This was a disingenuous promise since he already knew the result.

[115] Fehrenbacher, supra note 107, at 312.

[116] Swisher, supra note 28, at 622 ("On Friday, March 6 ….he read his opinion in Court, taking about two hours, and Nelson and Catron read their concurring opinions.").

Taney actually read a draft, which he did not file. He revised it in the following weeks to meet some of the objections in the dissents and criticism in the press, finally releasing it for publication in late May. Fehrenbacher, supra note 107, at 315-7.

On the Missouri Compromise, see Robert Pierce Forbes, *The Missouri Compromise and Its Aftermath* 69-120, 288-91 (Chapel Hill: Univ. N. C. Press, 2007).

[117] Two page letter from Nelson to Buchanan, March 6, 1857, Roll 7, at 1428-9. Re-formatted into one page, it is posted below at 61.

[118] Swisher, supra note 28, at 622 ("On the following day, Saturday, Justices McLean and Curtis read their dissenting opinions, taking some five hours. It was said that Justices Campbell and Daniel had withheld their concurring until after the dissenting opinions were read, 'with the view of rebutting their arguments,' but when McLean and Curtis had finished it was as if everybody had had enough of Dred Scott and his case, and Justices Wayne, Grier, Campell, and Daniel submitted their opinions without reading them in Court.")(citing sources). Grier joined the opinions of both Taney and Nelson.

[119] Grier to Buchanan, March 7, 1857, Roll 7, at 1423. Posted below at 62.

Justice Samuel Nelson's letter to Buchanan:

Washington March 6/57

To the President of
the United States

Dear Sir,

My son R. R
Nelson, who is one of the early settlers
of Minnesota Territory, is a candi-
date by his friends for the office
of ~~Chief~~ Justice of the Supreme
Court of the Territory. I understand
and believe that he is well quali-
fied for the place, and, that his
appointment would be entirely
acceptable to the profession.
If not inconsistent with your
sense of duty, and you should
give his application a favor-
able consideration, it would,
I assure, be very gratifying
to me; and lay me under
very great obligations.

I am truly & sincerely
Your Obl Sert
S. Nelson

Justice Robert Grier's note to the President:

To his Excellency
James Buchanan
Presdt

Sir
My friend Rensselaer R. Nelson Esqr has been recommended to you for the appointment of ~~[illegible]~~ Justice in the territory of Minnesota — I beg leave to join in that recommendation. Mr Nelson is a good lawyer, has practiced for some years in the territory — is well acquainted with the laws of the territory and I believe fully competent to fulfil the duties of the office with satisfaction to the public & honor to himself.

With much respect
Yours
R C Grier

March 7 – 1857

These letters are two more reasons why Professor Fehrenbacher called *Dred Scott* a "tale of intrigue" and "a labyrinthine case."[120] They raise the question of whether the President appointed Rensselaer Nelson to the territorial court because he felt an obligation to Justices Grier and Nelson for the way they voted in *Dred Scott*. Asked another way, was there a causal connection between the Justices's behavior and the President's appointment?

Initially, even if Justice Nelson's re-argument stratagem failed and John McLean had received the Republican nomination, Buchanan probably would have won the three-way race anyway. It is hard to think, in other words, that Buchanan felt any obligation to Nelson because of his suggestion that the case be set down for re-argument after the election, if he was aware of that at all.

The most plausible explanation of the recommendations and the appointment is this: for months after it was reargued, the case absorbed the justices as they debated and worked on their separate opinions, to the exclusion of most other activities. After he read his concurrence on March 6th, Justice Nelson turned his attention to the situation of his son. He thereupon wrote the President recommending his son for the judgeship (he may also have believed it was inappropriate to write the President before he was inaugurated or while the case was pending). Realizing that Grier was much closer to Buchanan, Nelson enlisted his colleague's support as well. The next day, after the remaining opinions had been submitted, Grier dashed off an endorsement to the President. When these recommendations reached Buchanan, he saw the authors as men whose advice he trusted, who shared his political values, less as voters on *Dred Scott*, and more as jurists who sat at the pinnacle of the judicial branch of government, who were Democrats, who were his age, and who were old acquaintances. Yet, he could not have forgotten Grier's cooperation, only a few weeks earlier, in fashioning the sweeping majority opinion in the case; and now when Grier asked a favor, how could he refuse?[121]

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[120] Fehrenbacher, supra note 107, at 314, 321.

[121] Another approach, admittedly unorthodox, is to ponder how Buchanan would have acted if there had been no *Dred Scott* case. Suppose, in March 1857, on the heels of his inauguration, he received pleas from two Associate Justices of the Supreme Court, whom he had known for years, that he appoint the son of one of them to a territorial judgeship that would last a year or so. And the son was not only a Democrat, but a resident of the territory with a reputation for being a fine lawyer. Under this hypothetical, Buchanan surely would have appointed Rensselaer Nelson to the bench.

Buchanan surely considered the behavior of Justices Grier and Nelson in the *Dred Scott* case before he appointed Rensselaer Nelson to the territorial court but he was influenced far more by other personal and political considerations. To simplify it: on April 21, 1857, President Buchanan appointed Rensselaer R. Nelson, a loyal Democrat and a resident of Minnesota Territory, to the territorial supreme court because he had been endorsed by Justice Robert C. Grier and Justice Samuel Nelson.

4. John Pettit declines his appointment.

On April 21, 1857, the President made recess appointments of William Welch to continue as chief justice, Rensselaer R. Nelson to replace Moses Sherburne, and John Pettit to replace Andrew G. Chatfield.[122] Because the President had announced that he did not favor reappointments, Welch's selection was unusual. Of the ten men who served on the territorial court, he was the only one reappointed to a second term. John Pettit's selection was even odder.[123] His name does not appear on the list of "applicants" prepared for the administration; he was not a resident of the territory; and he did not have the support of Henry Rice. But he was a former Indiana Senator who knew Buchanan and had supported him for the Democratic nomination in 1856.[124] This, it seems, explains the President's surprising decision.

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[122] Documents: Part Two-D, at 3-9 (Welch); E, at 7-14 (Nelson); and F, at 3-10 (Pettit).

[123] The *Biographical Directory of the United States Congress* has the following entry on John Pettit:

> PETTIT, John, a Representative and a Senator from Indiana; born in Sackets Harbor, N.Y., June 24, 1807; completed preparatory studies; admitted to the bar in 1831; moved to LaFayette, Tippecanoe County, Ind., where he commenced practice in 1838; member, State house of representatives 1838-1839; United States district attorney 1839-1843; elected as a Democrat to the Twenty-eighth, Twenty-ninth, and Thirtieth Congresses (March 4, 1843-March 3, 1849); unsuccessful candidate for renomination in 1848; delegate to the State constitutional convention in 1850; presidential elector on the Democratic ticket in 1852; elected as a Democrat to the United States Senate to fill the vacancy caused by the death of James Whitcomb and served from January 18, 1853, to March 3, 1855; unsuccessful candidate for reelection in 1854; chairman, Committee on Private Land Claims (Thirty-third Congress); chief justice of the United States courts in the Territory of Kansas 1859-1861; judge of the supreme court of Indiana 1870-1877; died in LaFayette, Ind., January 17, 1877; interment in Greenbush Cemetery.

[124] Pettit supported Buchanan over his rival Senator Douglas in the 1856 election. Johannsen, supra note 65, at 521 (quoting a letter from Pettit to Douglas: "My heart was

The announcement of the judicial appointments elicited only a short notice in the *Saint Paul Advertiser*:

> NEW APPOINTMENTS.—It is certain that R. R. Nelson, Esq, of this city, and Hon. Jno.(sic) Petit of Indiana, have been appointed Associates Justices of the District Court of this Territory, *vice* Judges Sherburne and Chatfield, whose terms of office had expired. Chief Justice Welch has been reappointed. We notice the return of Mr. Nelson, who has been absent several weeks. [125]

The *Daily Pioneer & Democrat*, the result of a merger of two papers in 1855, reported the appointments with more enthusiasm:

> **Minnesota Appointments.**
>
> ———
>
> We have reliable news of the appointment of R. R. NELSON, Esq., of this city, and HON. JOHN PETTIT, of Indiana, as Associate Justices of the District Court of this Territory, in the places of Judges SHERBURNE and CHATFIELD, whose terms of office had expired. Also of the re-appointment of Chief Justice WELCH.
>
> We believe these appointments will give general satisfaction to the profession and the public. Mr. NELSON, during a long residence here, has gained and maintained a high reputation as a lawyer, which, with his superior social qualities, will render him a popular as well as capable office. He will be fortunate, though,

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with Douglas, but my head was with Buchanan, or in other words I preferred you for President but him for a candidate.").

On April 3, 1857, Pettit wrote Buchanan requesting appointment to be Chief Justice of either the territory of Kansas or Minnesota:

> I congratulate you and the country upon the happy inauguration & auspicious opening of your administration. I think you have a cabinet in which the whole country ought to & will have the fullest confidence.
>
> I feel that I am treading upon very delicate grounds when I say that I would like to go to Kansas or Minnesota as Chief Justice should it be compatible with your sense of public duty to send me in that capacity.

Pettit to Buchanan, April 3, 1857; Roll 7, at 1562. See also discussion in Documents: Part Two-F, at 3-4.

[125] *Saint Paul Advertiser*, May 2, 1857, at 2.

> even with his acknowledged ability, if he fills the place of his predecessor.
>
> The HON. JOHN PETTIT has a long time occupied a prominent position in Indiana. He was, for a short term, Senator from that State to Congress.
>
> The present Chief Justice is too well known in this Territory to need any special notice or commendation. [126]

But the *St. Anthony Republican*, at the other end of the political spectrum, was contemptuous of Pettit:

> APPOINTMENTS.—President Buchanan has appointed W. H. Welch Chief Justice of Minnesota, with R. R. Nelson of St. Paul and John Pettit of Indiana, as the Associate Judges. Judge Nelson is son of Justice Nelson of the U. S. Federal Court, and is a good lawyer. Judge Pettit is that eminently eminent American who, on the floor of the U. S. Senate, pronounced the proposition that "all men are created free and equal" to be "*a self-evident lie*." He is the same John Pettit who was complimented by Senator Benton "as a dirty dog, sir, a dirty dog." His appointment by Mr. Buchanan, like that of Capt. Rynders, is appropriate as an illustration of what modern "Democracy" means.
>
> We must bear it all until a State Government gives us the election or appointment of our own Judiciary and then —possibly we shall do worse.[127]

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[126] *Daily Pioneer & Democrat*, April 30, 1857, at 2. The merger of the papers is discussed in Hage, supra note 61, at 59.

[127] *Minnesota Republican*, April 30, 1857, at 3 (emphasis in original). An account of Pettit's political background, selection, and withdrawal appears in Documents: Part Two-F, at 3-9.

The quotes from "Senator Benton" and the likeness of Pettit to "Capt. Rynders" show how territorial appointments had become entwined with the issue of slavery. Senator Thomas Hart Benton, aka "Old Bullion" Benton, was a Jacksonian Democrat who served as Senator from Missouri from to 1821 to 1851, and from 1853 to 1855. Isaiah Rynders was "a notorious politician, with an evil reputation of many years' standing, and his appointment" by Buchanan to be a federal marshal in New York in 1857 "was gleefully derided by the opposition press." Fish, supra note 1, at 168. Part of Rynders' notoriety steamed from in incident in 1851, when he led a mob that broke up an abolitionist meeting

After the President's recess appointments, rumors began to float that Pettit might decline the honor. Henry Rice, seeing there still was a chance that his candidate might be appointed, wrote Attorney General Black on May 13, 1857:

> St. Paul Minnesota
> May 13th 1857
>
> Dear Sir
>
> Messrs. Nelson & Welch have received their commissions, Should Mr. Pettit decline the appt—I sincerely trust that Mr Flandrau may be appointed (Charles E. Flandrau) I find a strong feeling here against importations and a universal feeling in favor of Mr. Flandrau's appt. The appointments of Nelson & Welch are popular beyond my expectations.
>
> Very Respectfully
> & truly your friend,
> Henry M. Rice[128]

Accepting the rumors as fact, on May 21st, the *Minnesota Republican* prematurely cheered Pettit's refusal:

> Good!—John Petit, Ex-Senator from Indiana, declined to accept a Judgeship in Minnesota from Mr. Buchanan. As we take it for granted, no worse appointment is hardly possible, and a better one is probable, this news is really gratifying.[129]

But Pettit waited another month before notifying the President of his decision:

> Lafayette, Ind.
> June 22, 1857.
>
> My Dear Sir:
>
> I duly received your commission dated 21st day of April last appointing me Associate Justice of the Supreme Court Minnesota Territory &, after mature deliberation assisted by various letters

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in New York. Allan Nevins, *Ordeal of the Union: A House Dividing, 1852-1857* 154 (New York: Charles Scribner's Sons, 1947).

[128] Rice to Black, May 13, 1857 (underlining in original); Roll 7 at 1030.

[129] *Minnesota Republican*, May 21, 1857, at 3.

> from this Territory, I have come to the conclusion that I cannot accept the appointment. I confess I do this with some reluctance, as I am desirous of a permanent judgeship or something that lead to one, & am I dislike to seem to reject anything you may have willing to offer me, but as I am satisfied it would not better my condition, I deem this course due to my self and my family.
>
> I tender you my thanks for the honor conferred, and I beg you to accept full assurance of my constant & sincere esteem & good wishes, personally & officially.
>
> John Pettit [130]

There are several reasons why Pettit declined the appointment. In his letter of refusal, he expressed a desire for "a permanent judgeship or something that lead to one," thereby acknowledging his awareness that the territorial court would remain in existence only until statehood, which was a year or so away. His reference to his "family" suggests that it would have been a hardship for them to relocate to Minnesota Territory for a brief period. Moreover, he was named an Associate Justice, not Chief Justice, which was the assignment he had requested in his letter of April 3rd.[131] He was a seasoned politician, who saw that Rensselaer Nelson's appointment to the territorial court meant that he was the frontrunner for the lifetime post of judge of U. S. District Court when Minnesota became a state.[132] And in his letter of refusal, Pettit stated that he was "assisted" in reaching his decision by "various letters from this Territory." It is likely that a few of those letters enclosed copies of the *St. Anthony Republican's* disparaging editorials—there was, he understood, strong opposition to him within the territory.[133] His withdrawal is more evidence of the increasingly influential role local conditions and local opinion played in the selection process.

On July 17, 1857, Buchanan made a recess appointment of Charles Flandrau to complete the court. Flandrau was a resident lawyer with an established

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[130] Pettit to Buchanan, June 22, 1857; Roll 7, at 1566-7.

[131] Pettit to Buchanan, April 3, 1857, Roll 7, at 1562; quoted above at footnote 124.

[132] A year later, when Minnesota became a state, the position of Judge for the U. S. District Court, District of Minnesota, needed to be filled. Again Rensselaer Nelson sought the job, as did Bradley B. Meeker, who mounted a fierce petition drive. This time, Justice Samuel Nelson wrote another letter of recommendation for his son. Buchanan selected the younger Nelson, who served from 1858 to 1896. For his commissions, see Documents: Part Two-E, at 10-14.

[133] *Minnesota Republican*, April 30, 1857, at 3, quoted above at 66-7.

reputation; he had served as "Indian Agent for the Sioux of the Mississippi"; and he was a Democrat. [134] But most important, he had the staunch backing of Henry Rice. Four months earlier, on March 21, 1857, Rice had written General Black recommending Flandrau as the replacement for Andrew Chatfield.[135] When rumors about Pettit began circulating, Rice reaffirmed to Black that Flandrau would make an excellent judge.[136] It was Rice's persistence that resulted in Flandrau's appointment to the court.

The President sent the nominations of Welch, Nelson and Flandrau to the Senate on May 6, 1858, but, seeing the imminence of statehood, the Senate never voted, tabling them five days later.[137]

5. Statehood

On October 13, 1857, the governor, lieutenant governor and members of the supreme court of the future State of Minnesota were elected. Minnesota was admitted to the union on May 11, 1858, and on May 24, the newly elected state officials, including Chief Justice LaFayette Emmett and Associate Justices Isaac Atwater and Charles Flandrau, took office. For the supreme court, the era of rotation in office—the era of quadrennial earthquakes—came to an end.

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[134] Kermit Hall contends that familial relations help explain Buchanan's choice of Flandrau. Hall, *supra* note 40, at 141, 144, 186-7; but Flandrau's distant relationship to Judge Wilson McCandless of Pittsburgh is not a convincing explanation for his selection. Instead, Flandrau's party affiliation, his prominence in territorial affairs, his residency, and most important, the support given him by Henry Rice, were determinative.

[135] Rice to Black, March 21, 1857; Roll 7 at 1028.

[136] Rice to Black, May 13, 1857; Roll 7 at 1030; quoted above at 67.

[137] *Journal of the Executive Proceedings of the Senate of the United States of America*, 35th Congress, First Session, Saturday, May 15, 1858, at p. 415.

I. Consequences of Rotation

1. Deleterious effects

Besides its effect on the organization of political parties, Leonard D. White identified three consequences of rotation: first, loss of efficiency and the deterioration in public service; second, the lowering of prestige of public office; and, last, the imposition of political obligations and duties upon government employees.[138]

As to the first, there were periods of several weeks when, after the expiration of terms of incumbents and the arrival of their replacements, there were no federal judges in Minnesota Territory.[139] When, for example, Henry Hayner learned that he had been removed, he stopped holding court, which disrupted the system.[140] His replacement, William Welch, a resident, took the oath about ten days later, but Justices Chatfield and Sherburne did not arrive in the territory for over a month.[141] The effects of these delays, however, should not be overestimated; to the residents, they may have been minor inconveniences.

There is more than a hint that rotation diminished the prestige of the territorial judiciary. When previous occupants were ousted, their replacements were disparaged by some newspaper editorialists as spineless hacks. Yet, over time, those incumbents came to be viewed as men of integrity and admirable character. Aside from commentary about Aaron Goodrich, who obviously lacked judicial temperament, and David Cooper, who was absent frequently from the territory, there seems to have been little public criticism of the behavior of the other justices.[142]

Whether the high turnover on the bench affected the bar is a subject for pure speculation. Trial lawyers learn the quirks, habits and prejudices of the judges they regularly appear before. This familiarity enables them to give sound, predictive advice to their clients, which must be reacquired when a new judge arrives. One wonders whether a judge's oral rulings in cases in his

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[138] White, supra note 9, at 325-46.
[139] Documents: Part One, at 33-5.
[140] See text above at 37 n. 70.
[141] Documents: Part One, at 35.
[142] Only further research will reveal whether Henry Rice's charges against Andrew Chatfield and Moses Sherburne were well founded. See text above at 55-7.

district were cited by lawyers in later sessions—a sort of district common law which was lost when a new judge arrived. This is another aspect of territorial practice that we will never understand.

2. Judicial elections.

While Carl Russell Fish recognized the deleterious effects of rotation, he also saw remarkable benefits flowing from it:

> The true cause for the introduction of the spoils system was the triumph of democracy. If the people as a whole are to exert any tangible influence on the conduct of government they must be organized. Unorganized they may effect a revolution, but they cannot thereby control administration. The division of the people into parties is not sufficient to secure this pervasive influence; it gives them an opportunity to vote on special questions and at stated intervals, but not to select the questions or to vote when the issue is fresh in the public mind. If the majority is to mould the policy of the party, if the *demos* is to be kept constantly awake and brought out to vote after the excitement of the hour has passed away, it is necessary that the party be organized. There must be drilling and training, hard work with the awkward squad, and occasional dress parade.
>
> This work requires the labor of many men: there must be captains of hundreds and the captains of tens, district chiefs and ward heelers. Now, some men labor for love and some for glory; but glory comes only to the leaders of ten thousands, to the very few — It cannot serve as a general inducement, and even those who love must live. It is an essential idea of democracy that these leaders shall be of the people; they must not be gentlemen of wealth and leisure, but they must—the mass of them at any rate —belong to the class that makes its own living. If, then, they are to devote their time to politics, politics must be made to pay. It is here that the function of the spoils system becomes evident; the civil service becomes the pay-roll of the party leader; offices are apportioned according to the rank and merits of his subordinates, and, if duties are too heavy or new positions are needed, new offices may be created. To apply these facts to America, the spoils system paid for the party organization which

> enabled the democracy of Pennsylvania to rule after 1800 and which established "a government of the people" in the United States in 1829. [143]

With these sentiments, Leonard D. White concurred in part and dissented in part:

> The consequences of rotation on the public service were unfortunate as a whole, but they were balanced in part by democratic gains, and because both Whigs and Democrats looked for character and competence among their partisans, and often found these qualities.
>
> Thus it was an advantage, in a democratic society, to have destroyed the concept of a personal property right in office, so far as it prevailed…
>
> Moreover, neither party welcomed scoundrels or irresponsibles in public office. Democrats and Whigs alike preferred men of integrity and skill and steadily sought for them among the ranks of their party friends…
>
> Conversely, bad habits were generally deemed a bar to consideration for office…
>
> The experience of officeholding under the Jacksonians was consequently various. The tone and character of this period were set by the rule of rotation, and this rule brought deterioration in its wake. The public service was seized upon by the party system and made to support it in large measure. The politically neutral quality of the service generally sustained from 1789 1829 was impaired and in some quarters destroyed. The appetite of the office-seeking class was augmented and became more obnoxious. The efficiency of the public service was diminished and its prestige damaged. These were losses that had to be set of against the wholesome objects sought by the friends of rotation.

[143] Fish, supra note 1, at 156-7.

> By the time of James Buchanan there could be little doubt that the losses were great.[144]

As statehood neared, many residents of Minnesota Territory saw only flaws in the rule of rotation. The cure was more democracy. When the constitutional convention convened in St. Paul in July, 1857, the *Minnesota Republican* endorsed an elected judiciary because elections enabled voters to act as checks on judges. In this expression of faith in "the common sense of the people," the editorial reflected the spirit of the Jacksonian era:

> Law soon gets tangled up in knotty points; and *the common sense of the people* is quite likely to "strengthen things" as is the perpetual appeal to the precedents recorded in the musty volumes of reports. We would not undervalue the wisdom of the past, nor the sagacity and subtle penetration evinced by the venerable men who in our country and in England have adorned the sense of justice; but we would be equally slow to distrust the people. Neither Judges not people are always right; and so let each be a check upon the other. Let the Judges be elected for a term of reasonable length—say four years. This will make people careful in their selection, and will measurably remove the office from the constant excitement of the annual elections.
>
> The less we have of executive patronage the better. Nothing has operated more disastrously to the purity of the national government than the leaving of so many offices at the practical control of the President. Executive officers should be confined to the discharge of their own proper duties. It is neither natural, democratic nor safe to render either the subordinate or co-ordinate departments of the government the mere emanations of their will.
>
> Let the people rule: let us *manage*, so far as possible, our own affairs. Let *all* offices be directly elective. Each office should be kept, so far as may be, independent of and separate from all

[144] White, supra note 9, at 343-6.

> the rest; and should be held answerable only to the earthly source of all civil authority—the people themselves.[145]

On October 13, 1857, voters in Minnesota Territory approved the new state's constitution, Article 6, §3, of which provided for the election of the supreme court:

> SEC. 3. The judges of the supreme court shall be elected by the electors of the state at large, and their terms of office shall be seven years and until their successors are elected and qualified.

This constitutional requirement is the consequence of many intellectual currents in antebellum America, including a faith in the people and a reaction against the policy of rotation in office.

J. Acknowledgments

This article has been in the works, off and on, for sixteen months. It meshes documents found in the territorial archives with contemporary newspaper reports and editorials and the writings of some of our finest historians. One of the great pleasures in writing this article is that it has permitted me to pull off my shelves and use books by Michael F. Holt, Robert C. Remini, Kenneth M. Stampp, Don Feherenbacher, Carl Brent Swisher, Philip S. Klein and Kermit Hall. But there are two historians to whom I owe a particular debt, for I relied upon them heavily: Carl Russell Fish and Leonard D. White. [146]

Photographs and paintings of the presidents have been taken from the online "Presidential Inaugurations" Section of the Library of Congress.

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[145] *Minnesota Republican*, July 9, 1857, at 2 (emphasis in original). The editorialist made an oblique reference to the *Dred Scott* case when he wrote that judges suffered from "the bias of partisan influences—of which we have a lamentable instance in the present degradation of the Supreme Court of the nation"

[146] A footnote on style. In this article, many letters and newspaper editorials are quoted at great length, as are several of the prominent historians of the period. In a law journal, this style would not be permitted; long quotes would fall prey to ellipses. But the MLHP is not a law review; it is something else. These excerpts have never before been read or interpreted within the narrow context of the legal history of the state, and that is why they have not been condensed. Readers today tend to skip long, indented quotes and jump to the next paragraph of the text. This is understandable, but much of the spirit of the Jacksonian era, its partisanship and rich rhetoric, preoccupations, and colorful characters are missed when that habit is indulged here.

As always, I am indebted to the staff at the research library of the Minnesota Historical Society for their assistance. They are, without exception, unfailingly courteous, knowledgeable and helpful.

K. Future Research

Regrettably authors of articles in law journals have not adopted the custom of those authors who suggest areas for future research in the conclusions of papers published in journals of the social sciences, medicine, and physical sciences. But this is an admirable custom. And so:

First, what influenced the delegates to the constitutional convention to adopt popular elections of the judiciary in Article 6, §3, of the 1858 constitution?[147] Why did the delegates and the voters reject executive appointment as the means of selecting judges, preferring elections, while setting a term of years for the office, which is a variation of rotation?

Related inquiries are: what happened during judicial elections in this state in the rest of the nineteenth century, and in the next? How partisan were they, how important were party nominations, how did judges campaign, how frequently did incumbents lose their seats, what has been the influence of the bar association on the process? And so on. Serious study of these questions is daunting but necessary to understand the state's legal past.

Territorial judges usually are recalled as serving on the supreme court, where they decided appeals, but their service on the district court, where they presided over trials, may have been more important to territorial residents. In his memoir of Andrew Chatfield, John Fletcher Williams wrote:

> Judge Chatfield's district was very large. He held the first court in nearly every county organized west of the Mississippi River, namely Winona, Scott, Carver, Sibley, LeSueur, Nicollet, Blue Earth, Rice and Steele. He made his first journey through the Minnesota Valley on horseback following an Indian Trail, part of the way.[148]

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[147] See, e.g., "Report of the Committee on Judicial Elections to the Minnesota State Bar Association, (1904)," posted separately on the MLHP.

[148] John Fletcher Williams, "Memoir of Judge Andrew G. Chatfield" (np, 1870s), posted separately on the MLHP.

Did he carry law books in his saddlebags on these trips? How did he prepare jury instructions? Did he use a form book? What sorts of cases did he and the other justices hear?

And, finally, the foregoing article may be read with two other articles posted on the MLHP: "Advisory Opinions of the Territorial Supreme Court, 1852-1854" (2009) and "Documents Regarding the Terms of the Justices of the Supreme Court of Minnesota Territory, 1849-1858: Part One" (2009-2010). Anyone who makes it through all three will see many areas of the territorial period that call for further research. ■

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Posted MLHP: June 1, 2010; revised August 3, 2010;
and November 10, 2011..