

Documents Regarding the Nominations, Confirmations,
Recess Appointments, Commissions, Oaths of Office,
Removals, and Terms of the Ten Justices who
Served on the Supreme Court of
Minnesota Territory,
1849-1858

with

Legislation Withholding Salaries
of Justices who are Absent
from the Territory

and

Opinions of the Attorney General
Regarding the Authority of
the President to Remove
Territorial Justices

— IN THREE PARTS —

Compiled and with
an Introduction

by

Douglas A. Hedin
Editor, MLHP

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I. INTRODUCTION

Professor Stefan A. Riesenfeld, who wrote several articles on Minnesota's territorial legal history while on the faculty of the University of Minnesota Law School in the 1940s, once observed that it requires "much ingenuity and real patience" to locate the sources of territorial law.¹

Those who write about another person's life have a duty to be accurate. But writing accurately about the state's territorial period is not as easy as it seems, and those who become discouraged at the task may take heart that even Stefan Riesenfeld found the territorial waters murky and difficult to fathom.

This article reproduces and interprets documents of the terms of the ten men who served on the territorial supreme court.² Behind these "dry documents" are stories of presidential policies and politics, bureaucratic blunders, conscientious and ambitious judges, laws passed by a skeptical Congress, and numerous topics for future research.

A. Early Accounts of the Terms of the Territorial Justices

The Legislative Manual of the State of Minnesota was published first in 1867 and has appeared on a regular basis, usually biannually, ever since. The first three editions, in 1867, 1868, and 1869, contained the constitution, rules of

¹ Stefan A. Riesenfeld, "Law-Making and Legislative Precedent in American Legal History," 33 Minn. L. Rev. 103, 142 (1949) ("In some instances the first revision of a new [law] varied but little from the last revision of the old from which it was derived, in other instances radical departures occurred. In these latter cases the revisors frequently relied heavily upon the statutes of some other states, and it may sometimes require much ingenuity and real patience to ascertain the source from which the compilers borrowed.").

² This article originated while I was researching the effects of the Jacksonian practice of "rotation in office" on the territorial supreme court. I was struck by obvious inaccuracies in the dates of service of the justices in previous histories. I set aside that research and decided to determine the exact dates of the justices' terms, and this resulted, after almost a year, in the compilation of primary source documents that form this article.

But as sometimes happens in archival research, one thing leads to another. Cryptic comments in several books about Chief Justice Henry Z. Hayner lead me to examine his brief tenure, and while pursuing that, I stumbled on the advisory opinions he and other justices issued to the territorial legislative council. The result was my "Advisory Opinions of the Territorial Supreme Court, 1852-1854" (MLHP, 2009). My article "Rotation in Office' and the Territorial Supreme Court" was posted in 2010, and been slightly revised a few times since.

the two houses, and little else. In 1870, it was enlarged to include statistical tables and historical information such as the names of office holders, beginning in the territorial period. The names and terms of the justices on the territorial supreme court were listed vertically as follows:

CHIEF JUSTICE.

Territorial.

Aaron Goodrich,
June 1, 1849, to November 13, 1851.

Jerome Fuller,
November 13, 1851, to ———

Henry Z. Hayner,
Appointed, 1852. [Never presided at a Term.]

Wm. H. Welch,
April 7, 1853, to May 24, 1858.

...

ASSOCIATE JUSTICES.

Territorial.

David Cooper,
June 1, 1849, to April 7, 1853.

Bradley B. Meeker,
June 1, 1849, to April 7, 1853.

Andrew G. Chatfield,
April 7, 1853, to April 28, 1857.

Moses Sherburne,
April 7, 1853, to April 23, 1857.

R. R. Nelson,
April 23, 1857, to May 24, 1858.

Charles E. Flandrau,
April 23, 1857, to May 24, 1858³

³ *The Legislative Manual of the State of Minnesota* 92-3 (St. Paul: Office of the Press Printing Co., 1870). Early manual had soft covers; only later did were they bound in blue.

Of the dates in this tabulation, fourteen are wrong and only four correct: in 1852, Chief Justice Hayner was placed on the supreme court (though by nomination and confirmation not appointment), and the terms of Chief Justice Welch and Associate Justices Nelson and Flandrau ended on May 24, 1858. All others are wrong, although some are near misses: The four year terms of William Welch, Andrew Chatfield and Moses Sherburne began on April 6, 1853, when President Pierce signed their commissions, not April 7th; and Rensselaer R. Nelson's term began April 21st, not the 23rd.

This list appeared in subsequent *Legislative Manuals* until 1883 when specific dates of the terms of Chief Justices Fuller and Hayner were added: Fuller's term concluded on "December 16, 1852" and Hayner's ran from "December 16, 1852, to April 7, 1853 [Never presided at a term]." It also ended the term of Moses Sherburne on April 13, 1857, rather than the 23rd. These dates are also wrong. This expanded list of errors reappeared in every *Legislative Manual* from 1883 to 1955, when the last edition to carry territorial data was published. Moreover, these errors were not confined to the "Blue Book," as it is known, but escaped into popular histories, most written by lawyers, from 1881 to the present.

In 1881, Charles E. Flandrau, who served on the territorial court in 1857 and 1858 and on the supreme court after statehood from 1858 to 1864, contributed a chapter to a history of St. Paul on the "Bar and Courts" in which he itemized the territorial justices and their terms, data he lifted from the 1870 *Legislative Manual*:

The chief justices have been as follows during the territory: Aaron Goodrich, June 1st, 1849, to November 13th, 1851; Jerome Fuller, November 13th, 1851, to—; Henry Z. Hayner, 1852, never presided; Wm. H. Welsh, April 7th, 1853, to May 24th, 1858.

Associate justices during the territory: David Cooper, June 1st, 1849, to April 7th, 1853; Bradley B. Meeker, June 1st, 1849, to April 7th, 1853; Andrew G. Chatfield, April 7th, 1853, to April 23d, 1857; Moses Sherburne, April 7th, 1853, to April 13th, 1857; R. R. Nelson, April 23, 1857, to May 24th, 1858; Charles E. Flandrau, April 23d, 1857, to May 24th, 1858.⁴

⁴ Charles E. Flandrau, "The Bar and Courts of Ramsey County" in Rev. Edward D. Neill, *History of Ramsey County and the City of St. Paul, Including the Explorers and Pioneers*

Here Flandrau even listed the wrong date of the commencement of his own term—he received a recess appointment from President Buchanan on July 19, 1857, not April 23rd. He wrote that Moses Sherburne’s term ended on April 13, 1857, but this too was wrong — he was commissioned by President Pierce on April 6, 1853, and his term ended on April 5, 1857.

Nine years later, *History of St. Paul, Minn.*, edited by Christopher Columbus Andrews, a Civil War general and lawyer, was published. It included a chapter on “The Bench and Bar of St. Paul” by a local lawyer, Hiram F. Stevens, who acknowledged his debt to Flandrau in a footnote.⁵ When it came to the names and terms of the territorial judges, Stevens copied Flandrau’s list and one addition from the 1883 *Legislative Manual*—that Jerome Fuller’s term ended on December 16, 1852. For Stevens, Henry Hayner’s term was simply, “December 16, 1852, (never presided).”⁶ Both dates are wrong. In 1904, Stevens published a two volume *History of the Bench and Bar of Minnesota* in which he briefly discussed the territorial court. Not surprisingly, he repeated his earlier errors.⁷ By now, the pattern of mistakes is unmistakable.

In 1908, the four volume *Minnesota in Three Centuries, 1655-1908* was published. It was compiled by Return I. Holcombe and a board of editors who were more thorough in their research than General Andrews’s contributors. The editors of the second volume included short profiles of the territorial judges, and generally avoided giving specific dates of their terms; but when they did, the errors of Flandrau, Stevens, and the *Legislative Manuals* were repeated.⁸

of Minnesota, and J. Fletcher Williams, *Outlines of the History of Minnesota* 234, 247-8 (Minneapolis: North Star Pub. Co., 1881). This chapter is posted on the MLHP.

⁵ Hiram F. Stevens, “The Bench and Bar of St. Paul” in Christopher Columbus Andrews ed., *History of St. Paul, Minn.* 247 n.1 (Syracuse: D. Mason & Co., 1890).

⁶ Id. at 292.

⁷ Hiram F. Stevens, I *History of the Bench and Bar of Minnesota* 113 (Minneapolis & St. Paul: Legal Pub. and Eng. Co., 1904) (“Under the organic act of the territory the terms of the judges of the supreme court expired at the end of four years. But in January, 1852, Jerome Fuller, of New York, was appointed to succeed Judge Goodrich as chief justice. Mr. Fuller served only until December 16, 1853, and was succeeded by Henry L.(sic) Hayner, of New York.”).

⁸ Return I. Holcombe et al. eds., II *Minnesota in Three Centuries* 457 (New York: Pub. Soc. of Minn., 1908), asserting erroneously that Goodrich’s dismissal was effective November 13, 1851, and that Hayner was appointed on December 16, 1852.

In 1912, Henry A. Castle, a lawyer by training, published the three volume *History of St. Paul and Vicinity*, which included a chapter on “The Bench and Bar.” Castle borrowed shamelessly and without attribution from Flandrau. He copied Flandrau’s list of the names and terms of the territorial judges, and included Hiram Stevens’s limitation of Hayner’s term to “December 16, 1853.”⁹ Three years later, a wholly fictional story about Bradley B. Meeker appeared in the *Compendium of History and Biography of Minneapolis and Hennepin County, Minnesota*, edited by Return I. Holcombe and William Bingham:

It is not generally known that Judge Meeker’s appointment as U. S. Territorial Judge was confirmed only after a long delay and against much opposition. He was then a Whig—or at least declared he was—and a Kentuckian; but certain Kentucky Whigs of the variety known as “Old Hunkers” disliked him, and it was they who succeeded in holding up his confirmation from March, 1849, until in September, 1850.¹⁰

In truth, President Zachary Taylor nominated Meeker on March 15, 1849, and he was confirmed by the Senate exactly four days later. In 1923, this tale reappeared in the first volume of *History of Minneapolis: Gateway to the Northwest*, edited by Rev. Marion Daniel Shutter.¹¹ The following year, Joseph A. A. Burnquist, a former governor and future attorney general, published the four volume *Minnesota and Its People*. In a section on “The First Judges,” he repeated the common error that “on November 13, 1851, Fillmore removed Judge Goodrich and appointed Jerome Fuller in his place,” and, worse, he republished the myth about Justice Meeker.¹² Burnquist went on to list the territorial justices and the starting dates of their terms:

⁹ Henry A. Castle, 1 *History of St. Paul and Vicinity* 316, 321-22 (Chicago & N.Y.: Lewis Pub. Co., 1912). This chapter is posted separately on the MLHP.

¹⁰ Return I. Holcombe & William H. Bingham, *Compendium of History and Biography of Minneapolis and Hennepin County, Minnesota* 85 (Chicago: Henry Taylor & Co., 1915).

¹¹ Marion Daniel Shutter ed., I *History of Minneapolis: Gateway to the Northwest* 470 (Chicago & Minneapolis: S. J. Clarke Pub. Co., 1923).

¹² Joseph A. A. Burnquist, II *Minnesota And Its People* 90 (Chicago: S. J. Clarke Pub. Co., 1924).

TERRITORIAL ROSTER

Following is a list of the principal territorial officials, with the date each entered upon the duties of his office. As each one served until his successor was appointed and qualified, the date when one begins marks the end of the preceding term. All territorial officers went out when the state government was inaugurated on May 24, 1858.

.....

Chief Justices—Aaron Goodrich, June 1, 1849; Jerome Fuller, November 13, 1851; Henry Z. Hayner, December 16, 1852; William L. Welch, April 7, 1853.

Associate Justices—David Cooper and Bradley B. Meeker, June 1, 1849; Andrew G. Chatfield and Moses G. Sherburne, April 7, 1853; Rensselaer R. Nelson and Charles E. Flandrau, April 23, 1857.¹³

This is a text-book example of a writer who believed that the way government operated in his time was the way it functioned seventy years earlier, in the antebellum era. Burnquist listed only the starting dates of the justices's terms because "as each one served until his successor was appointed and qualified, the date when one begins marks the end of the preceding term." This describes how, after statehood, an elected judge's term ended on the same day a newly elected or reelected judge was sworn, but it is wildly inaccurate about transitions on the territorial bench. In the 1850s, there was a delay of days or weeks between the date a justice's four year term expired or he was removed, and the day the President commissioned a successor. There were even short periods when there were no justices on the territorial court at all. The only time the beginning of a justice's term "mark[ed] the end of the preceding term," as Burnquist envisioned, occurred when a president removed a justice in mid-term by making a recess appointment of his replacement.

Theodore Christianson, a former governor, published a five volume history of the state in 1935. In the second volume, he listed a "Roster of Officers of Minnesota as a Territory," which included the names and terms of the

¹³ Id. at 592-93. Predictably, every date on this "roster" is wrong.

territorial judiciary.¹⁴ Christianson duplicated and thus perpetuated the erroneous lists in the 1870 and 1883 *Legislative Manuals*.

In or about 1937, Russell O. Gunderson seems to have completed writing his *History of the Minnesota Supreme Court*.¹⁵ Gunderson was elected clerk of the state supreme court in 1934, and served from 1935 to 1939. He sought reelection but was defeated in the 1938 primary. He did not merely respect the court he served—he was fascinated by it, especially the territorial court to which he devotes about one quarter of his manuscript. In his chapters on individual territorial justices, he paraphrased, condensed or simply copied anecdotes or information about them from memoirs, addresses and papers published decades earlier, many by the Minnesota Historical Society. He chose not to cite these sources and his manuscript has no footnotes, a style shared by all earlier accounts of the court. Because his manuscript has been the only “history of the supreme court” available, and because it takes time, effort and luck to identify his authorities, subsequent writers assumed he was accurate, and they have repeated his chronologies without independent verification in the same manner that he relied upon and borrowed from earlier histories.

Like his predecessors, Gunderson’s errors are multifold. For instance, he wrote, “The actual length of Goodrich’s service on the bench was from January 14, 1850 to November 13, 1851.” In fact, Goodrich was commissioned on March 19, 1849, took the oath of office in Minnesota on May 22, 1849, and was dismissed on October 21, 1851, although he claimed he did not learn of it until November 30th.¹⁶ Gunderson wrote that Justice

¹⁴ Theodore Christianson, II *Minnesota: A History of the State and Its People* 527 (Chicago & N. Y.: American Historical Society Inc., 1935).

¹⁵ Russell O. Gunderson, *History of the Minnesota Supreme Court* (np, 1937). From a handwritten notation on the manuscript, it is clear that he hoped that someday it would be published. In the left hand corner at the top of the first page of his manuscript, Gunderson (presumably) wrote in cramped script, “To be printed later.”

The Law Library of the Minnesota Supreme Court has posted it on the internet, thereby making it available to the public and fulfilling Gunderson’s wishes as well: <http://www.lawlibrary.state.mn.us/gunderson.html>.

Paper copies of Gunderson’s manuscript are deposited in the Law Library of the Minnesota Supreme Court, the Riesenfeld Rare Book Collection at the University of Minnesota Law Library, and the Minnesota Historical Society.

¹⁶ It seems that the only early chronicler to get Goodrich’s starting date right was J. Fletcher Williams in *A History of the City of Saint Paul, and of the County of Ramsey*,

Meeker “served on the supreme court bench from July, 1851, to July, 1853.” In fact, Meeker took the oath in the new territory on May 9, 1849, which permitted him to perform judicial duties, and served until April 5, 1853, when he was “removed” by President Pierce. Though unlikely, Gunderson may have corrected some of these errors if his manuscript had reached the publication stage during his lifetime.

The errors of these writers, particularly Gunderson, reappear in recent chronicles. In 1990, for example, West Publishing Company published a 49 page booklet entitled *Biographical Sketches of Justices of the Minnesota Supreme Court and Judges of the Minnesota Court of Appeals from Territorial Days to 1990*.¹⁷ West’s sketches of the territorial justices are riddled with the errors of previous writers, as evident from this entry on Jerome Fuller:

JEROME FULLER (Chief Justice) (1851-1852). Little is known of his early life. Came to Minnesota from Brockport, New York. Appointed to the Minnesota Territorial Supreme Court by President Fillmore on November 13, 1851. The United States Senate rejected his appointment, but word of the rejection did not reach St. Paul until Fuller had arrived here and begun his duties. Fuller sat on the July 1852 term of court and continued to serve until December 15 of that year. Subsequently he returned to Brockport, New York, where he was elected County Judge.¹⁸

Minnesota 219 (St. Paul: Minn. Hist. Soc., 1983)(first published in 1876)(“On March 19, 1849, he was appointed, by President Taylor, Chief Justice of Minnesota.”).

¹⁷ *Biographical Sketches of Justices of the Minnesota Supreme Court and Judges of the Minnesota Court of Appeals from Territorial Days to 1990* (St. Paul: West Pub. Co., 1990).

¹⁸ *Id.* at 14. The author of this profile obviously relied upon Gunderson’s misstatement of events:

After arriving in St. Paul [Fuller] sat on the high court bench for the first time at the July term in 1852, and continued to serve for the balance of the year. . . . In the meantime word came to St. Paul, via steamboat, that the United States senate had rejected President Fillmore's appointment of Fuller to the territorial chief justiceship. This was months later, long after the rejection had been known in the east.

Gunderson, *supra* note 15, at §5.

Like other writers, the author of this profile did not differentiate between a presidential recess appointment and a presidential nomination subject to confirmation by the Senate. The Senate did not reject Fuller's "appointment" because there is no constitutional requirement that it confirm a recess appointment. The profile conflates Fuller's appointment with events at the end of his term.¹⁹ President Fillmore made a recess appointment of Fuller on October 21, 1851 (not November 13); he took the oath in St. Paul on November 24th, and began work; on December 19th, the President formally nominated him to a four year term but the Senate delayed action; finally, on August 30, 1852, its next-to-last day in session, the Senate voted against confirmation and his recess appointment expired the next day.²⁰ The Senate's rejection was reported in a local newspaper on September 10, 1852, exactly eleven days after the vote and over nine months after Fuller "had begun his duties."²¹

It is apparent, in retrospect, that the terms of the territorial judges published in the 1870 and 1883 *Legislative Manuals* and which Flandrau and his followers copied were doomed to be wrong because these writers never freed themselves from what Sidney Hook called "the hypnosis of the printed

The errors of many writers about the terms of Chief Justices Fuller and Hayner fall within the "glaring" category. For example, West listed both justices as serving during "1851-1852" as did the editors of *For the Record: 150 Years of Law & Lawyers in Minnesota* 153 (St. Paul: Minnesota State Bar Association, 1999), and the authors of the entries on these justices in *Testimony: Remembering Minnesota's Supreme Court Justices* 8-10 (St. Paul: Minnesota Supreme Court Historical Society, 2008). There may have been some laxity in judicial conduct in territorial days, but Fuller and Hayner never served simultaneously on the court.

¹⁹ Like other writers, former Supreme Court Justice Loren Warren Collins was puzzled by Fuller. In "An Incomplete History of the Establishment of Courts in Minnesota," (np 1913), he wrote: "[O]n November, 13, 1851, James (sic) Fuller of New York was appointed Chief Justice. The Senate refused to confirm the selection and on December 16th, Henry T. (sic) Hayner, also of New York, was appointed to the place." Collins's article is posted on the MLHP.

²⁰ Chief Justice Fuller's term ended on August 31, 1852, the last day the Senate was in session. The Constitution, Article II, §2, provides that the term of a recess appointee expires on the last day the Senate is in session. For the Senate and for Fuller, that was August 31st. In an opinion dated April 16, 1830, on "Commissions Granted During Recess of Senate," Attorney General John MacPherson Berrien advised, "A commission by the President during a recess of the Senate continues until the end of the next session of Congress, unless sooner determined by the President, even though the individual commissioned shall have been meanwhile nominated to the Senate, and the nomination rejected." 2 Op. Att'y Gen. 336 (1830).

²¹ *St. Anthony Express*, September 10, 1852, at 2.

word”²² — that is, they had blind faith in the accuracy of previously published books and, unwittingly, perpetuated the errors in them. These writers were unaware of or did not use three primary sources: 1) the *Journal of the Executive Proceedings of the Senate of the United States of America*; 2) presidential commissions of the justices; and 3) the oaths of office of the justices. Had they studied these documents carefully, their lists would have been accurate, and they might have understood the anomaly that the period of a territorial justice’s *actual service* on the bench was shorter than his *term in office*.

It may be noted that three prominent historians did not repeat these errors in their histories of the state: William Watts Folwell, Theodore C. Blegen and William E. Lass.²³ Each was a professional trained historian, who taught history at the university level; each approached the study of the history of the state far differently, more skeptically and with greater diligence, than writers who simply duplicated lists of office holders found in other books. In fact, these historians rarely mention the judiciary at all.

B. Becoming a territorial justice

The process of becoming a justice on the territorial court had four steps: 1) be nominated by the president or receive a recess appointment by him; 2) if nominated, be confirmed by the U. S. Senate; 3) receive a commission from the president, and accept it; and 4) take the oath of office in Minnesota Territory. Steps 1 and 2 are well known; step 3 is rarely mentioned in the literature; and the importance of step 4 has been overlooked.

i. Commissions

Article II, §3, of the Constitution provides: “[The President] shall Commission all the Officers of the United States.” The presidential commission sets the beginning and the end of the term of a territorial justice. In most cases, it was filled out and signed by the President and the Secretary of State the day the nominee was confirmed by the Senate or the recess appointment made. Not all commissions were accepted. John Pettit of Indiana was issued

²² Sidney Hook, “Morris R. Cohen—Fifty Years Later” in Joseph Epstein ed., *Masters: Portraits of Great Teachers* 24, 27 (New York: Basic Books, Inc., 1981).

²³ William Watts Folwell, *A History of Minnesota* (St. Paul: Minn. Hist. Soc., 1956)(first published in 4 volumes in 1921); Theodore C. Blegen, *Minnesota: A History of the State* (Minneapolis: Univ. of Minn. Press, 1963); William E. Lass, *Minnesota: A History* (N.Y.: W. W. Norton & Co., 1977).

appears, these documents were commonly called “commissions” when they were transmitted to a new justice. The mechanics of completing the commission and issuing it to a newly appointed or confirmed justice appear simple. But mistakes were made. Take the case of Bradley B. Meeker.

On March 15, 1849, President Zachary Taylor nominated “Benjamin B. Meeker of Kentucky” to be “Associate Justice of the Supreme Court of the United States for the Territory of Minnesota.” On March 19, 1849, the Senate confirmed “Benjamin B. Meeker of Kentucky” and the President and Secretary of State John M. Clayton signed and issued a commission to “Benjamin B. Meeker of Kentucky” to serve “for the term of four years from the day of the date hereof.”²⁶

The mistake was caught—probably by Meeker—but another promptly made. On April 3, 1849, President Taylor issued a new commission to “Bradley B. Meeker of Kentucky” to serve as Associate Justice “until the end of the next session of the Senate of the United States and no longer.” This, however, is the wording of a Presidential recess appointment and it could not apply to Meeker because he already had been confirmed by the senate, albeit under a mistaken first name.

This blunder was discovered very quickly by Meeker.²⁷ On September 25, 1850, President Millard Fillmore issued a third commission to “Bradley B. Meeker of Kentucky to be an Associate Justice of the Supreme Court of the United States for the Territory of Minnesota...for the term of four years from the day of the date hereof.” By this time, Meeker had served on the court over sixteen months. Under a literal reading of this latest commission, his term ran until September 24, 1854; but §9 of the Organic Act limited him

²⁶ One of the few writers to get Meeker’s commission date correct is the author of the entry on him in *Testimony: Remembering Minnesota’s Supreme Court Justices* 6 (St. Paul: Minnesota Supreme Court Historical Society, 2008). Meeker’s three presidential commissions are posted in Pt. Two-B, at 5-11.

²⁷ Letter from Meeker to John M. Clayton, Secretary of State, April 12, 1849. Images 18-19, Roll 8 of the microfilm copies of U. S. Territorial Papers. Territory of Minnesota Records in the Ronald M. Hubbs Microfilm Room, Minnesota Historical Society. Clayton’s brief reply on April 18, 1849, concluded with some blunt advice: “The question as to the validity of that first commission having been decided by issuing of a second one to Bradley B. Meeker, you are advised to inform the Department as to the time when you will be prepared to enter upon the duties of your office which it is hoped will be at the earliest possible period.” Image 353, Roll 8.

to a four year term.²⁸ Apparently the staff of the President (or that of Secretary of State Daniel Webster, for the territories were under the jurisdiction of the State Department at this time) was unable to improvise a solution to the previous drafting errors, and so it simply filled the commission form with boilerplate language.²⁹ It was the intent of President Taylor when he signed Meeker's first commission on March 19, 1949, and probably the understanding of Meeker when he received it, that his four year term would expire on March 18, 1853; but he did not leave office on March 18th, a puzzle we will take up after discussing presidential recess appointments to the territorial bench.

²⁸ Section 9 of the Organic Act provided:

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.

²⁹ Faced with the identical problem, other presidents simply asked the Senate to correct the error by a second, routine confirmation vote. For example, on July 24, 1856, President Pierce requested the Senate to correct a misspelling in the name of an Army officer who had been confirmed previously:

I desire, also, the consent of the Senate to the correction of a clerical error in the name of Second Lieutenant Edward F. Bagley, Fourth Regiment of Artillery, who was improperly nominated and confirmed as Edward F. Bagby.

On August 9th, the Senate concurred:

Mr. Weller, from the Committee on Military Affairs, to whom was referred, the 28th July, the nominations of Alfred Cumming, Lawrence A. Williams, and Franck S. Armisted; also so much of the message of the President of the 28th July as relates to the correction of a clerical error in the name of Second Lieutenant Edward F. Bagley, who had been improperly nominated and confirmed as Edward F. Bagby, reported.

Whereupon

Resolved, That the Senate advise and consent to the appointment of the said persons, and of Edward F. Bagley, agreeably to their nominations respectively.

Journal of the Executive Proceedings of the Senate of the United States of America, 34th Congress, 1st Sess., Monday, July 28, 1856, at 129, and Saturday, August 9, 1856, at 138.

ii. Recess appointments

The third clause of Article II, §2, of the Constitution grants the President power to appoint persons to fill vacant positions, which would otherwise require the advice and consent of the Senate, when that body is not in session: “The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”³⁰ The prerequisites of a recess appointment seem clear and straightforward: 1) there must be a vacancy and 2) the Senate must not be in session.³¹

Presidents made four recess appointments to Minnesota’s territorial supreme court (excluding Justice Meeker’s second commission). Shortly after his inauguration, James Buchanan made three recess appointments. On April 21,

³⁰ During Minnesota’s territorial period, the 31st, 32nd, 33rd, 34th and 35th Congresses were held. Here are the dates of each session, as recorded in the *Executive Journal*:

31st Congress—December 3, 1849, to March 3, 1851:

Special Session: March 5, 1849 to March 23, 1849.

First Session: December 3, 1849 to September 30, 1850 (302 days).

Second Session: December 2, 1850 to March 3, 1851 (92 days).

32nd Congress—December 1, 1851, to March 3, 1853:

Special Session: March 4, 1851 to March 13, 1851.

First Session: December 1, 1851 to August 31, 1852 (275 days).

Second Session: December 6, 1852 to March 3, 1853 (88 days).

33rd Congress—December 5, 1853, to March 3, 1855:

Special Session: March 4, 1853 to April 11, 1853.

First Session: December 5, 1853 to August 7, 1854 (246 days).

Second Session: December 4, 1854 to March 3, 1855 (90 days).

34th Congress—December 3, 1855, to March 3, 1857:

First Session: December 3, 1855 to August 18, 1856 (260 days).

Second Session: August 21, 1856 to August 30, 1856 (10 days).

Third Session: December 1, 1856 to March 3, 1857 (93 days).

35th Congress—December 7, 1857, to March 3, 1859:

First Special Session: March 4, 1857 to March 14, 1857.

First Session: December 7, 1857 to June 14, 1858 (189 days).

Second Special Session: June 15, 1858 to June 16, 1858.

Second Session: December 6, 1858 to March 3, 1859 (88 days).

³¹ The recess clause is more ambiguous than it appears at first glance, and this has resulted to a growing literature. See citations under “recess appointments” on SSRN.

1857, he issued recess commissions to William H. Welch to remain as chief justice, and to “Renssalaer” R. Nelson to replace Moses Sherburne whose term had expired. On both, he added a condition that the appointee serve “during the pleasure of the President of the United States for the time being, and until the end of the next session of the Senate of the United States, and no longer.”³² On July 19, 1857, Buchanan commissioned Charles E. Flandrau in place of John Pettit, who had declined his appointment, and placed the same conditions on him that he had on Welch and Nelson.³³

On May 6, 1858, Buchanan sent the Senate formal nominations of William Welch, “Renssalaer” Nelson and Charles Flandrau, but the Senate tabled them on May 15, 1858 (and misspelling “Rennsaleer” R. Nelson’s first name in the process).³⁴ The recess terms of Welch, Nelson and Flandrau expired on May 24, 1858, when Minnesota Territory ceased to exist.

We now return to President Fillmore’s recess appointment of Jerome Fuller on October 21, 1851. It is examined at length because it illuminates the President’s power to both appoint and remove territorial judges and other executive branch officers in the antebellum period.

As a result of numerous complaints from residents in the new territory about Chief Justice Aaron Goodrich,³⁵ President Fillmore sought advice from Attorney General John J. Crittenden on whether he had the legal authority to dismiss Goodrich.³⁶ On January 23, 1851, Crittenden issued a confidential

³² Welch’s recess commission is posted in Pt. Two-D, at 7-8, and Rensselaer Nelson’s recess commission is posted in Pt. Two-E, at 7-8.

³³ Flandrau’s recess commission is posted in Pt. Two-C, at 9-10.

³⁴ The misspelling of an appointee’s name was not uncommon at this time. Bradley Meeker was confirmed under an erroneous first name. The misspelling of Rensselaer R. Nelson’s first name is so easy that, to be on the safe side, he was sometimes called “R. R. Nelson” by early writers. More famously, President John Adams nominated William “Marberry” to be justice-of-the-peace in the District of Columbia in March 1801. Cliff Sloan & David McKean, *The Great Decision: Jefferson, Adams, Marshall, and the Battle for the Supreme Court* 62 (New York: PublicAffairs, 2009); Lawrence Goldstone, *The Activist: John Marshall, Marbury v. Madison, and the Myth of Judicial Review* 163 (New York: Walker & Co., 2008).

³⁵ Henry L. Moss, “Last Days of Wisconsin Territory 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).

³⁶ John J. Crittenden (1786-1863) was Attorney General from 1850 to 1853.

opinion that the President held “the power to remove from office the chief justice of the Territory of Minnesota, for any cause that may, in your judgment, require it.”³⁷ But Fillmore did not act immediately. He waited nine months. Finally, on Tuesday, October 21, 1851, when the Senate was not in session, he appointed Jerome Fuller to be chief justice of the territorial supreme court. Fuller’s commission was signed by the President and Crittenden, and sealed that day.³⁸

While *Marbury v. Madison* is famous for announcing the doctrine of judicial review, it is less known for its lengthy discussion of the process of issuing Article II commissions. We turn to *Marbury* to understand the commission issued to Fuller. There the Chief Justice declared:

It is therefore decidedly the opinion of the Court that, when a commission has been signed by the President, the appointment is made, and the commission is complete when the seal of the United States has been fixed to it by the Secretary of State.³⁹

Fuller’s commission was, therefore, “complete” on the 21st. The next day, Wednesday, October 22, 1851, Crittenden, who was then Acting Secretary of State, wrote Goodrich of the President’s action.⁴⁰ His letter consisted of one long, convoluted, compound sentence that would appall many grammarians:

The President of the United States having thought proper to confer the appointment of Chief Justice of the Supreme Court of the United States, for Minnesota, which you now hold, upon Jerome Fuller, this letter is written to apprise you of the circumstances, and to inform you, that your successor’s

³⁷ 5 Op. Att’y Gen. 288, 291 (1851), posted in Pt. Three, at 12-15. Kermit Hall notes that Fillmore also received advice from Secretary of State Daniel Webster. See *The Politics of Justice: Lower Federal Judicial Selection and the Second Party System, 1829-61* 107 (Lincoln: University of Nebraska Press, 1979)(citing sources).

³⁸ Fuller’s commission is posted in Pt. Two-C, at 4-5.

³⁹ *Marbury v. Madison*, 5 U. S. (1 Cranch) 137, 162 (1803).

⁴⁰ Crittenden became Acting Secretary of State by Presidential appointment when Webster was briefly absent for some reason. This practice was authorized as early as 1792, when Congress enacted a statute authorizing the President to designate any person to act for an officer of the State Department who was unable to perform his duties. 1 Stat. Ch. 37, §8 (May 8, 1792).

Commission has been this day transmitted to him by this Department.⁴¹

Crittenden sent Fuller a copy of this letter with a note on the bottom asking him to acknowledge receipt of his commission which was enclosed. Fuller, therefore, did not receive physical delivery of his commission until after Goodrich had been sacked. This, however, was not important. In *Marbury*, the Chief Justice dismissed the notion that a commission becomes valid only when it is received by the commissioned appointee:

But in all cases of letters patent, certain solemnities are required by law, which solemnities are the evidences of the validity of the instrument. A formal delivery to the person is not among them. In cases of commissions, the sign manual of the President and the seal of the United States are solemnities. This objection therefore does not touch the case.

.....

The transmission of the commission is a practice directed by a convenience, but not by law. It cannot therefore be necessary to constitute the appointment, which must precede it and which is the mere act of the President. If the Executive required that every person appointed to an office should himself take means to procure his commission, the appointment would not be the less valid on that account. The appointment is the sole act of the President; the transmission of the commission is the sole act of the officer to whom that duty is assigned, and may be accelerated or retarded by circumstances which can have no influence on the appointment. A commission is transmitted to a person already appointed, not to a person to be appointed or not, as the letter enclosing the commission should happen to get into the post office and reach him in safety, or to miscarry.⁴²

Although Fuller's recess commission was "complete" on October 21st, it appears there was only an anticipated vacancy, not an actual vacancy, in the office he was appointed to fill that day. And this raises the following question: If there was no vacancy in the office of territorial chief justice on

⁴¹ Crittenden's letter is posted in Pt. Two-A, at 8.

⁴² *Marbury*, 5 U. S. at 159-60.

October 21st, was Fuller’s recess appointment premature and unconstitutional as well?

To address this constitutional conundrum, we turn to the subtle law of executive removal that had developed in the antebellum period—that is, we must reverse course and now view this chronology less as the recess appointment of Jerome Fuller and more as the removal of Aaron Goodrich.

iii. Removals

As required by Article II, §3, of the Constitution, every territorial justice received a presidential commission regardless of whether he was a recess appointee or had been nominated and confirmed by the senate. The commission sets both the starting date of his term and its conclusion, whether at the end of the next senate session or in four years. In the language of officialdom, a justice’s term was said to have “expired” if he completed it. But Aaron Goodrich, Bradley Meeker and Henry Hayner did not make it to the end.⁴³

There were two ways a President removed territorial officials. The first method, which seems to have been employed rarely, was by direct order of the President. Fillmore had ample justification to directly dismiss Goodrich. In his confidential opinion to the President in January 1851, General Crittenden described the complaints about Goodrich as “very serious charges of incapacity, unfitness, and want of moral character” and the syllabus to this opinion, when it was eventually published, affirmed, “The President of the United States is not only invested with authority to remove the Chief Justice of the Territory of Minnesota from office, but it is his duty to do so if it appears that he is incompetent and unfit for the place.”⁴⁴

Fillmore, however, chose an alternative method by which an office holder is removed when the President nominates or makes a recess appointment of his

⁴³ Memoirs of lawyers and judges of this period frequently describe a justice as “retiring” regardless of the circumstances of his departure. For example, in an article published in December 1887, Isaac Atwater could not bring himself to write that Aaron Goodrich had been cashiered by President Fillmore: “The duties of the office, however, were not entirely congenial to one of his active temperament, and he retired in 1851, after something less than three years’ service.” Isaac Atwater, “Territorial Bench of Minnesota: Part I,” 7 *Magazine of Western History* 207, 209 (1887).

⁴⁴ 5 Op. Att’y. Gen. 288, 289 (1851), posted in Pt. Three, at 12-15.

replacement. This indirect method was described and endorsed in an official opinion of Attorney General Caleb Cushing on June 30, 1855:

It is perfectly well settled in our constitutional law, that “in the case of appointments and removals by the President, when the removal is not by direct discharge or an express vacating of the office by way of independent fact, but merely by the operation of a new commission or appointment, then the virtue of the old commission ceases only when notice of the new commission is given to the outgoing officer, either by the President or by the new officer exhibiting his commission to the old one, or by other sufficient notice.” (*Bowerbank v. Morris*, Wallace’s Rep. 118-133.)⁴⁵

In his letter of October 22, 1851, Crittenden notified Goodrich that the President had appointed Fuller to be the new chief justice. He did not lay out a litany of accusations against Goodrich because there was no need to do so. When Fillmore commissioned Fuller, he removed Goodrich and, by a legal fiction of sorts, satisfied the vacancy requirement of Article II, §2, as well. A recent study of the president’s power to fill anticipated or contingent judicial vacancies under Article II describes executive branch practices and customs that Fillmore followed when he replaced Goodrich with Fuller:

The forms of contingent vacancies with the longest historical pedigree are those conditioned upon the removal or elevation of an incumbent officeholder. Where the President has the power to remove the incumbent officeholder, contingent vacancies also satisfy the vacancy prerequisite of their own force. Where the President has the power to remove an executive branch official, he has long been permitted to do so through the act of appointing a successor. . . . In such a case, it is functionally the same if the removable official resigns contingent upon the confirmation and appointment of a successor. Where the President has the power to remove an officer and then nominate a successor, historical practice has permitted the President to

⁴⁵ 7 Op. Att’y Gen. 303, 310 (1855), posted in Pt. Three, at 15-23. The complete cite is *Bowerbank v. Morris*, 1 Wall. C.C. 118, 3 F.Cas.1062 (1801)(Case No. 1726); however, the passage that General Cushing quotes does not appear in the case; it may have been taken from a published digest of court holdings.

make the nomination first and to remove the incumbent by the act of appointment. Nomination upon a contingent vacancy becomes more troublesome, however, where the President is without the power of removal.⁴⁶

Fillmore's recess appointment of Fuller on October 21, 1851, therefore, did not violate the vacancy requirement of Article II, §2. Nevertheless, Goodrich did not believe that Fillmore acted constitutionally. Maintaining that the President lacked the power of removal, he brought suit to recover the balance of his salary for the remainder of his term. His challenge was rebuffed in 1854 by the United States Supreme Court in *United States ex rel Goodrich v. Guthrie*, albeit on narrow procedural grounds.⁴⁷

President Pierce used the second method to remove Bradley Meeker and Henry Z. Hayner. On April 5, 1853, he sent the senate formal nominations of three men to serve on the territorial court and, as recorded in the *Executive Journal* of the U. S. Senate, noted explicitly that two incumbents had been "removed":

I nominate William H. Welch to be chief justice of the United States for the Territory of Minnesota, in place of Henry Z. Hayner, removed.

⁴⁶ Matthew Madden, "Anticipated Judicial Vacancies and the Power to Nominate," 93 *Va. L. Rev.* 1135, 1153-54 (2007); it is also posted on SSRN. As Madden notes, the Supreme Court recognized the propriety of this custom in *McElrath v. United States*, 102 U. S. 426, 437 (1880), and *Blake v. United States*, 103 U. S. 227, 237 (1880). See also, Charles E. Morganstan, *The Appointing and Removal Power of the President of the United States* 55 (Washington, D.C.: Government Printing Office, 1929)(quoting Daniel Webster as declaring, "In all the removals which have been made [since 1789], they have generally been effected simply by making other appointments.").

⁴⁷ *United States ex rel Goodrich v. Guthrie*, 58 U. S. (17 How.) 284 (1854). According to the syllabus, on October 21st the President "thought" it proper to remove Goodrich, and dated his official notification of dismissal the following day:

On 21st of October, 1851, the President of the United States thought proper to remove Mr. Goodrich, and to appoint Jerome Fuller to the office; of which removal Mr. Goodrich was informed by an official letter from the department of state, dated 22nd October, 1851, and received by him on 30th November, 1851, as stated by him.

(Goodrich likely learned of his dismissal as early as November 1st. See note 63, below).

I nominate Andrew G. Chatfield to be associate justice of the United States for the Territory of Minnesota, in place of David Cooper, whose commission has expired.

I nominate Moses Sherburne to be an associate justice of the United States for the Territory of Minnesota, in place of Bradley B. Meeker, removed.⁴⁸

It took about ten days for this news to reach Minnesota Territory. To his credit, once Hayner learned that his successor had been nominated, he cancelled an upcoming court session; he did not wait for William Welch to “exhibit” his new commission to him.⁴⁹

We now return to the curious case of Bradley B. Meeker and his three commissions. To recapitulate: on March 15, 1849, President Taylor nominated Aaron Goodrich, David Cooper and “Benjamin B. Meeker” to the territorial court; and on March 19, 1849, they were confirmed and issued four year commissions. If completed, their terms would “expire” on March 18, 1853, and for David Cooper that is what happened. However, on April 5, 1853, President Pierce nominated Moses Sherburne “in place of Bradley B. Meeker, removed.” Why would the President “remove” Meeker if his term had already expired? We may surmise that he learned that Meeker did not believe his commission had “expired” and, more important, did not

⁴⁸ *Journal of the Executive Proceedings of the Senate of the United States of America*, 33rd Con., 1st Sess., Tuesday, April 5, 1853, at 147.

⁴⁹ The *Minnesota Democrat* reported the cancellation:

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. Welch was commissioned on April 6, 1853, and sworn in on April 25, 1853, in St. Paul. His commission is posted in Pt. Two-D, at 4-5, and his oath is posted in Pt. Two-D, at 6.

In striking contrast, Meeker held court in Hennepin County on April 4, 1853, over two weeks after the end of his four-year term on March 18, 1853. See account in *St. Anthony Express*, April 8, 1853, at 2. It is reprinted in “The First Court Session in Hennepin County (1853)” (MLHP, 2012).

recognize a presidential power of removal and so, in an abundance of caution, the President (or Secretary of State William S. Marcy) labeled the judge's displacement a "removal." One year later, Meeker counterattacked.

In an extraordinary 4,407-word open letter to the residents of the territory published in the *St. Anthony Express* on May 6, 1854, Meeker argued that his removal was illegal.⁵⁰ It was a *tour de force*. It was also disingenuous. He based his claim on the four year term written in his third and final commission dated September 25, 1850, which, as we have seen, was designed to correct a series of clerical errors:

To this office [Judge of the Supreme Court of this Territory] I was appointed by President Fillmore, and commissioned by him for the term of four years, after serving under a temporary commission from President Taylor about eighteen months. My present commission will expire the 24th of September next, till which time I am empowered to receive the emoluments and have sworn to discharge the duties of the office.⁵¹

Three months after the publication of this incomplete account of his commissions, Meeker petitioned the territorial supreme court to be restored to his former post. On August 15, 1854, he "presented his commission" to Chief Justice Welch and Associate Justice Chatfield, and "requested that he be admitted to a seat on the bench as one of the judges thereof." Minutes in the court's docket book record its ruling:

And his said Commission having been examined by the Court, and it appearing also that said Commission had been superseded by the appointment by the President of the

⁵⁰ *St. Anthony Express*, May 6, 1854, at 1-2; posted in its entirety in Pt. Three, at 24-33; (hereafter "Meeker, 'Letter to the Public,' Pt. Three, at _"). It received favorable editorial receptions in the *Express* on May 6th, and the *Minnesota Democrat*, May 17, 1854, at 2.

⁵¹ Meeker, "Letter to the Public," Pt. Three, at 24. Meeker suggests that he had an ongoing debate with the State Department about his status. After the passage quoted above, he wrote, "I shall neither surrender the former, *which is regularly demanded from the Department*, nor refuse to perform the latter..." (emphasis added).

Toward the end of his manifesto, Meeker suggests that he had filed or was about to file his application with the court: "Whether the Chief Justice and the other Associate Judge who are regularly commissioned will recognize my claims to the place in question, will of course depend upon what their opinion of the law may be." *Id.* at 33.

Honorable Moses Sherburne as said Associate Justice in the place of the said B. B. Meeker:

It was ordered by the Court, that the said application be refused. Mr. Justice Sherburne being interested, took no part in the Decision.⁵²

Meeker decided against an appeal to the United States Supreme Court but for years remained bitter about his removal.⁵³

Meeker's "application" for reinstatement raised a profound constitutional question about presidential power before a court that did not hear appeals with such political magnitude. It was, in other words, utterly unique. The great issues of the day such as slavery, negotiating treaties with native tribes, and westward expansion, to name a few, did not come before the territorial supreme court. Its docket consisted of civil and criminal cases that were

⁵² Territorial Archives, Supreme Court, Docket A. 1851-1858, at 52-3. Minnesota Historical Society. A photo of the docket entry is posted in Pt Two-B, at 13. The court did not issue a written opinion, although the *St. Anthony Express*, in its report of the court's ruling, pleaded for one. *St. Anthony Express*, August 19, 1854, at 2 ("A decision of this importance involving no less than the efficiency, usefulness and independence of Courts of Justice in this Territory, at least until the Supreme court of the nation shall have passed upon it, we have no doubt will in due time be given to the public."). It appears from the wording of the docket entry that Meeker withheld his first two commissions from the court.

The docket does not note the appearance of United States Attorney John E. Warren, who was confirmed two weeks earlier, suggesting either that Meeker did not notify him of his petition or that Warren had not yet received his commission. President Pierce nominated Warren on August 1, 1854, following the death of Daniel H. Dustin, and he was confirmed by the Senate the next day. *Journal of the Executive Proceedings of the Senate of the United States of America*, 33rd Cong., 1st Sess., Tuesday, August 1, 1854, at 372, and Wednesday, August 2, 1854, at 379.

⁵³ In an article on the territorial court published in 1888, Isaac Atwater recalled Meeker grouching about being replaced:

He was averse to engaging in the practice of his profession, and after his retirement from the bench, which occurred in the year 1853, in consequence of the advent of a Democratic administration, under President Pierce, he never resumed the practice of law. He firmly believed that the new administration had no power to remove territorial judges, and proposed to carry the question to the United States supreme court, but finally abandoned the idea.

Atwater, *supra* note 43, at 208-9.

important to the litigants and sometimes to the territory, but did not include constitutional cases with national implications.⁵⁴ Given this background, it is not surprising that a quorum of the court sustained the power of the President to remove Meeker by nominating Moses Sherburne, in the same manner and at the same time that he eliminated Henry Hayner.

The second method of removal—displacement by nominating or appointing a successor—was less confrontational and less personal than the first.⁵⁵ It was the quickest way to remove large numbers of office holders. It was implemented every four years when, shortly after his inauguration, the new President began sending the Senate the names of hundreds of nominees to various federal posts, most of whom were confirmed and commissioned. This practice, known as “rotation in office,” resulted in a high turnover on the territorial court because each newly inaugurated President in the 1840s and 1850s removed incumbent office holders such as Hayner and Meeker—or did not re-nominate them if their terms had expired, as in the cases of Cooper, Chatfield and Sherburne—and replaced them with political supporters.

This discussion of the law of removal leaves one more question: On what date did the term of a territorial justice who has been removed end? Was it the date his successor was nominated or appointed, or was it the date he received actual notice of the new commission? As usual, we begin with the saga of Aaron Goodrich.

Sometime in early January 1852, Goodrich sent Elisha Whittlesey, the First Comptroller of the Treasury Department, a claim for his salary through the

⁵⁴ Occasionally, constitutional arguments were made, and the court even held an act of Congress rescinding a land grant to the territory was unconstitutional in *United States v. Minnesota and Northwestern Railroad Co.*, 1 Minn. (1 Gil. 103) 127 (1854), *appeal withdrawn*, 59 U. S. (18 How.) 241 (1856), an important case whose long history is discussed in Hiram F. Stevens, I *History of the Bench and Bar of Minnesota* 44-49 (Minneapolis & St. Paul: Legal Publishing and Engraving Co., 1904).

⁵⁵ When this method was used, the president or a cabinet member usually did not send a letter to each replaced or removed officeholder. When the President sent a nomination to the Senate, his message was a matter of public record, recorded in the Senate’s *Executive Journal*, thereby providing notice to the removed office holder. Crittenden probably sent a personal letter on October 22, 1851, to Goodrich advising him of Fuller’s appointment (and Goodrich’s removal) because the Senate was not in session.

end of the previous year (territorial officers were paid quarterly).⁵⁶ Puzzled, Whittlesey wrote Secretary of State Daniel Webster for the exact date of Goodrich's removal.⁵⁷ On January 16, 1852, Webster replied:

In reply to your letter of the 15th instant, requesting to be informed from what day the removal of Aaron Goodrich, Esq: as Chief Justice of the Supreme Court for the Territory of Minnesota took effect, I have to inform you, that Mr Goodrich was notified on the 22d day of October, 1851, of his removal on which day Jerome Fuller was commissioned as Chief Justice of the Territory in his place.⁵⁸

To Webster, Goodrich was not entitled to receive his salary after the date Fuller was commissioned, notwithstanding Goodrich's claim that he did not receive notice of the President's action until November 30th.⁵⁹

Three years later, Attorney General Caleb Cushing reached a different conclusion. In his opinion of June 30, 1855, he quoted the circuit court holding in *Bowerbank v. Morris* for the proposition that "the virtue of the old commission ceases only when notice of the new commission is given to the outgoing officer, either by the President or by the new officer exhibiting his commission to the old one, or by other sufficient notice."⁶⁰ *Bowerbank* arose from disputes over the legality of sales of tracts of land, seized in execution, by a sheriff who did not know that his replacement had been commissioned a week earlier. The majority held that only sales that took place after the "old marshal" learned he had been removed would be set aside. In reaching this conclusion, the court considered two statutes, the first enacted in 1789 created the office of U. S. Marshall, the second, passed in

⁵⁶ Elisha Whittlesey (1783-1863) was First Comptroller of the Treasury from May 31, 1849, to March 26, 1857, when he was removed by President Buchanan.

⁵⁷ Letter dated January 15, 1853, from Elisha Whittlesey to Daniel Webster ("Be pleased to inform me, from what day his removal from the office of Chief Justice took effect. This information is necessary for me to decide when his salary ceased."). The letter is posted in Pt. Two-A, at 9-10.

⁵⁸ Letter dated January 16, 1853, from Webster to Elisha Whittlesey, posted in Pt. Two, at 11. This appears to be the only time anyone has placed this date on Fuller's commission. It is wrong. The correct date of Fuller's commission is October 21, 1851.

⁵⁹ There is evidence that Goodrich learned of his dismissal as early as November 1st. See note 63 below.

⁶⁰ 7 Op. Att'y Gen. 303, 310 (1855), quoting *Bowerbank v. Morris*, 1 Wall. C.C. 118, 3 F.Cas.1062 (1801)(Case No. 1726). Cushing's opinion is posted in Pt. Three, at 15-23.

1800, forbade the marshal from selling lands after his “removal.” Finding ambiguity in the word “removal” in the latter statute, and keenly aware that innocent purchasers would be harmed if they held that the sheriff’s authority terminated instantly upon the commissioning of his successor,⁶¹ the court held that the “old marshal” was not “removed” until he had actual notice of the appointment of his successor.

In his official opinion, Cushing noted that because of delays in communication, it was possible that a new justice would be commissioned before the incumbent learned that he had been removed; thus, for a short period, two judges might be paid a salary for “holding the same office.”⁶² This would seem to cover the situation of Aaron Goodrich, but for Webster’s opinion. And it would describe the situations of Chief Justices Hayner and Welch. Welch received his commission on April 6, 1853, but Hayner did not learn that he had been removed until about ten days later.

While there were public policy considerations at play in *Bowerbank*, the circuit court’s ruling rested, ultimately, on its interpretation of an ambiguity in the 1800 statute, something Cushing did not mention in his official opinion. In Minnesota Territory, there was also a statute that must be considered when determining when the term of a removed justice ended. Section 9 of the Organic Act provided:

Sec. 9. And be it further enacted, That the judicial power of said territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. 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.

⁶¹ *Bowerbank*, supra note 43, at 1064 (Tilghman, C. J.) (“The marshals in many districts of the United States, live so remote from the seat of government, that a considerable time must elapse before notice can be received: and it cannot be supposed that it was intended to injure bona fide purchasers, who may have paid their money at marshal’s sales before it was possible to know the marshal was removed.”). The court must have been aware of another problem: If a U. S. Marshall made arrests and jailed suspects before knowing of his removal, he would be vulnerable to civil suits for false arrest and imprisonment.

⁶² 7 Op. Att’y Gen. 303, 310 (1855), posted in Pt. Three, at 22.

There is no ambiguity here: the territorial supreme court has three members, one of whom is chief justice. The Organic Act precludes two justices from “hold[ing] the same office” in Minnesota Territory.⁶³ A court which, by law, has three members cannot have four.

On one hand, the purpose of this lengthy discussion is to determine the correct dates of the terms of the three justices who were removed, and on another, it is speculation about the probable thinking of officials in Washington, members of the territorial court, and the bar about when the terms of Goodrich, Meeker and Hayner ended or, to put it another way, about when they ceased to hold judicial power. In his manifesto in the *St. Anthony Express*, published over one year after his removal, Bradley Meeker raised that precise question:

[H]ow does a Judge know, in this distant Territory, or in the more remote ones of Washington and Oregon, Utah and New Mexico that he has not, or *has* been removed? If the latter, what a pretty posture the public business will be left in?—In any of these last named Territories the Judges would have time to hold all their Courts in their respective Judicial Districts,

⁶³ If Webster had adopted Cushing’s analysis and held that Goodrich’s term ended when he received notice of Fuller’s commission, there would have been a short period in November 1851, when there were two chief justices—an absurd situation. The syllabus to *United States ex rel Goodrich v. Guthrie*, 58 U. S. (17 How.) 284 (1854), quoted in note 45 above, stated that Goodrich received Crittenden’s letter dated October 22nd on November 30, 1851; however, by that time Fuller had reached Minnesota and taken the oath on November 24, 1851, after which he could perform judicial duties. If the syllabus is accurate Goodrich apparently avoided or missed meeting Fuller for six days. Fuller’s oath, his second, is posted in Pt. Two-C, at 6.

Goodrich, according to Robert C. Voight, who wrote his doctorate on the jurist, “received the news [of his dismissal] on November 1.” Voight, *supra* note 33, at 151. This date seems more accurate than the 30th inasmuch as the *Minnesota Democrat* carried the following story on November 4th:

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, N. Y. to supply his place.

Justice has at length been done, but “speak not lightly of the dead, nor rail over the d—d.”

Minnesota Democrat, November 4, 1851, at 2. 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.”).

sentencing murderers and other felons to be punished, and adjudicating upon the property and liberties of citizens before it could be possible for the to anticipate their removal. In my own case, full two thirds of the Hennepin District Court which I held last spring [of 1853], was held after the date of my removal, (if removed,) and it was some two or three weeks after its adjournment, that there was even a rumor of such an event. Thus murderers may be tried without authority, and properly adjudicated upon and passed without authority, unless *two* can hold one and the same office at one and the same time. I cannot for a moment suppose that Congress ever intended to confer on the Executive any such mischievous power, and if they *did* I am quite certain they have failed to use language in the Act at all adequate to express any such purpose.⁶⁴

It is noteworthy that Meeker did not allege that any litigants had attacked his orders or sentences as being void on the ground that he did not hold office when he presided over their trials during the spring term of 1853.

The Organic Act's establishment of a three-member supreme court, the law of executive removal in the antebellum period, Webster's reply to Whittlesey, and the public policy considerations in *Bowerbank*, lead to the following conclusion, albeit tentative: the term of a removed territorial justice ended on the day his successor was nominated by the President, as in the cases of Meeker and Hayner, or received a recess appointment, as in the case of Goodrich, regardless of when the removed justice learned of that event, but any official acts of that justice before he had actual knowledge of his removal were not void or voidable.

⁶⁴ Meeker, "Letter to the Public," Pt. Three, at 31-2. He might have admitted that a judge who is commissioned to a four year term can look at the calendar to see when his term ends. In any event, he held court in Hennepin County on April 4, 1853, seventeen days after his four-year term ended on March 18, 1853. See the account of that court session in *St. Anthony Express*, April 8, 1853, at 2. It is reprinted in "The First Court Session in Hennepin County (1858)" (MLHP, 2012).

iv. Taking the oath of office

A territorial justice's *term in office* did not coincide with the period of his *actual service* on the bench. The explanation for this anomaly lies in Congress' recognition of the frailties of human nature.

The receipt and acceptance of a Presidential commission was the third step in the process of becoming a territorial jurist. The fourth and final step required him to take the oath of office *in* Minnesota Territory. When it passed the Organic Act, Congress included a provision designed to ensure that newly commissioned office holders actually reported for work: it required that before they could act in their official capacities, they take an oath of office before someone in the territory qualified to administer that oath, which then was to be transmitted to the secretary of the territory for recording. Section 11 provided:

Sec. 11. And be it further enacted, That the governor, secretary, chief justice, and associate justices, attorney, and marshal, shall be nominated, and, by and with the advice and consent of the senate, appointed by the president of the United States. . . . and *the chief justice and associate justices, and all other civil officers in said territory, before they act as such, shall take a like oath or affirmation, before the said governor or secretary, or some judge or justice of the peace of the territory, who may be duly commissioned and qualified, which said oath or affirmation shall be certified and transmitted, by the person taking the same, to the secretary, to be by him recorded as aforesaid; and afterwards, the like oath or affirmation shall be taken, certified, and recorded in such manner and form as may be prescribed by law*⁶⁵

Thus, a territorial jurist could not perform judicial functions—that is, try cases, hold hearings, decide motions, issue writs and warrants, and carry out routine official duties — until he arrived in Minnesota Territory and took the oath or an affirmation.

Jerome Fuller seems to have missed the subtleties of §11 of the Organic Act. Samuel Nelson, Associate Justice of the United States Supreme Court,

⁶⁵ Organic Act, §11 (1849)(emphasis added).

administered the oath to Fuller on October 25, 1851, in Albany County, New York, only four days after he received his recess commission. Realizing his mistake, Fuller retook the oath — actually a slightly different version than the first — on November 24, 1851, after he arrived in Minnesota Territory, before Henry A. Lambert, a Ramsey County Probate Judge.⁶⁶

Because it took weeks for a newly commissioned justice to travel to Minnesota Territory, there was a lag between the first day of the four year term set by his commission and the day he took the oath and began work as a judge. This is why a territorial justice's *term* was longer than the period of his *actual judicial service* or, to phrase the anomaly another way, why no territorial justice actually served four years continuously on the bench.⁶⁷ It took David Cooper of Pennsylvania two and a half months to move to Minnesota following his Senate confirmation, Henry Hayner of New York took five weeks, and Andrew Chatfield of Wisconsin seven weeks. Toward the end of the territorial period, three residents — William H. Welch, Rensselaer R. Nelson and Charles E. Flandrau — received presidential recess appointments, and so there were only a few days between the dates of their commissions and their oaths.

The length of time it took a newly commissioned justice to reach the new territory to take the oath had an unintended consequence — a brief period when there were no justices on the court. To illustrate: On March 18, 1853, Justice Cooper's term expired. On April 5, 1853, President Pierce notified the senate that he had "removed" the remaining two justices, Hayner and Meeker, by nominating their successors. Hayner (and presumably Meeker) learned of their removals on April 15 or 16; and Hayner cancelled the next term of the district court. This resulted in a blistering editorial in *The St. Anthony Express* on April 29, 1853:

⁶⁶ Fuller's two oaths are posted in Pt. Two-C, at 6. The travel expenses of a justice such as Fuller, who moved from New York to Minnesota Territory, were likely reimbursed by the government if he filed claim. Cf., "Extra Compensation to Salaried Officers," 4 Op. Att'y Gen. 372 (1845) (Opinion of Attorney General John Y. Mason dated May 7, 1845, that allowance for traveling expenses is not compensation to a salaried officer, but is an "expense incident to a public service.").

⁶⁷ After Chief Justice Welch's first term expired, there was a two week gap before he was received a recess appointment to a second term. Justice Meeker took the oath in Minnesota Territory on May 9, 1849, and was removed on April 5, 1853.

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.⁶⁸

By mid-April, the supreme court was empty of judges. It took two months before it reached full strength. Newly commissioned Chief Justice Welch took the oath in Minnesota Territory on April 25, 1853, followed by Justice Chatfield on May 31, 1853, and Justice Sherburne on June 6, 1853, thereby filling the third seat on the court.

The court had several vacant slots after President Buchanan came into office. On April 5, 1857, the terms of Chief Justice Welch and Justices Sherburne and Chatfield expired. For the next two weeks, the court was again empty. On April 21, the President made recess appointments of Welch to remain in office, and of Rensselaer R. Nelson as associate justice, replacing Sherburne. Welch had taken the oath in April 1853; Nelson did so on May 11, 1857, thereby making a quorum. Chatfield's replacement, Charles E. Flandrau, received a recess commission on July 17th, and took the oath on August 8, 1857, thereby completing the court. An appellate court with nine, seven or even five members could still operate with two vacancies, but a three member court could not.

The wording of the oaths taken by the justices is not uniform. While each recorded oath includes the affirmation that the office holder will "support the Constitution" and will "discharge his duties," the rest seems to depend on the predilection of the particular justice or the officer administering it. Only Jerome Fuller took the oath the Chief Justice quoted in *Marbury*.⁶⁹ A

⁶⁸ *St. Anthony Express*, April 29, 1853, at 2.

⁶⁹ This is the oath the Chief Justice quoted in *Marbury*:

The oath of office, too, imposed by the Legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words:

preprinted form was not used. The oaths were written on different sized paper, which was usually blue and lined; the pages of the oaths of Chief Justices Goodrich and Fuller were written on less than half a full page, the bottoms of which are jagged and obviously torn.⁷⁰ Sometimes the justice handwrote the oath, other times a notary or another judge. It is as if one or the other took whatever blank paper was handy, picked up a pen, handwrote an oath, signed it and handed it to the other for his signature.

“Taking the oath” was thought at the time to be necessary but not worthy of public notice. This view reflected the prevailing attitude toward public servants in the Jacksonian era. The Jacksonians wanted to open government to the people; they argued that most public offices could be filled by anyone with minimal qualifications; and they railed against special privileges and entrenched officeholders. It would have been contrary to the thinking and spirit of Jacksonian America for a territorial justice to hold a “swearing in ceremony.”

The judge who relocated to Minnesota Territory and took the oath, received a significant reward: he could get paid. The salary of a territorial judge began to accrue when he was commissioned, but was not payable until he reached the territory, was sworn and entered upon his official duties.⁷¹

“I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States.”

Marbury, 5 U. S. at 180. The Presidential oath is quoted in Article II, §1. Fuller’s first oath in New York tracked the language of *Marbury*. It is posted in Pt. Two-C, at 6.

⁷⁰ Today the oaths of all the territorial justices are filed in a manila folder marked “Territorial Secretary: Bonds and Oaths—Territorial Offices” in the box of “Territorial Records of the Territorial Secretary” in the archives of the Minnesota Historical Society. Copies are on file at the MLHP.

The only oath that appears on the letterhead of the “Secretary’s Office, Territory of Minnesota” was that of Henry L. Moss, U. S. Attorney, taken before Aaron Goodrich on November 14, 1849.

⁷¹ Two official Attorney General opinions regarding the timing of the payments of salaries to officers of Oregon Territory, the first issued on December 21, 1849, by General Reverdy Johnson, 5 Op. Att’y Gen. 219 (1849)(“in my opinion, its proper construction is, that the salaries date from their respective appointments, but that they are not payable until the officers reach the territory and there enter upon their official duties.”), the second on June 30, 1855, by General Caleb Cushing, 7 Op. Att’y Gen 303,

v. Legislation barring salary to absent jurist

Congress wanted the justices not only to move to the new territory and work, but stay there as well. To encourage this, it enacted legislation in 1852 and 1853 that barred payment of salaries of judges who were absent from the territory for more than sixty days.⁷²

Of the territorial justices, David Cooper appears to have been absent more than others. In January, 1851, James Goodhue, the editor of the *Minnesota Pioneer*, denounced A. M. Marshall, the U. S. Attorney, and Cooper in an editorial headlined “Absentee Office Holders”:

While we regret the continued absence of a U. S. Marshal, and a judge of the 2d district, from Minnesota, we would not be understood to lament the absence of A. M. Mitchell and David Cooper, the incumbents (oftener *recumbents*) of those two offices.—It would be a blessing if the absence of two such men were prolonged to eternity. In the present scarcity and high price of whiskey, their absence may be considered a blessing...

...

As for Judge Cooper, besides lacking a residence at Stillwater, at least ever since last May, he has neither there nor any where else, any attachable property, that the officers can find. He has land claims, to be sure, which he has some way got in possession, on one of which he has obtained the construction a cabin, for building which, he yet owes. . . . The law requires him to reside in his own judicial district; but he not only does not reside there, but in Minnesota, he dates, his correspondence at St. Paul, and affects to belong here — an unspeakable indignity our town.⁷³

309-10 (1855), held that a newly commissioned officer could not collect his salary until he began performing his official duties in the territory. This was the rule followed in Minnesota Territory. Cushing’s opinion is posted in Pt. Three, at 15-21.

⁷² The legislation is posted in Pt. Three-A, at 4-6. The problem of absentee territorial judges existed from the beginning of the republic. For an account of the problem under President Washington, see Leonard D. White, *The Federalists: A Study in Administrative History* 370-2 (New York: MacMillan Co., 1948).

⁷³ *Minnesota Pioneer*, January 16, 1851, at 2 (italics in original). Six years later, Attorney General Jeremiah S. Black held that a judge could live anywhere he wished in the territory: 9 Op. Att’y Gen. 23 (1857). It is posted in Pt. Three, at 9.

This smear outraged Joseph Cooper, the judge's brother, who challenged Goodhue in St. Paul on January 15. They fought to a bloody standstill.⁷⁴ Inadvertently proving the prosecution's case, Justice Cooper was in Washington at the time.⁷⁵

Two years later, the issue of Cooper's absences rose again, but this time it was resolved not with a bowie knife and a derringer but by an official opinion of Attorney General Caleb Cushing. In an opinion dated June 18, 1853, General Cushing held that Justice Cooper and other territorial judges, who were absent from the territory for a prolonged period, could obtain their salaries if the President certified that their absence was for good cause:

I have examined the case presented by the letter of the Hon. D. Cooper, of the 1st of May last, which you were pleased to refer to me, and find that Mr. Cooper, one of the judges of the Territory of Minnesota, having been absent from that territory for a period of three months, is unable to obtain his salary for that period without a certificate of the President that the absence was for good cause, such being the provision of the act of June 15th, 1852. . . .

Mr. Cooper states that he was absent on account of ill health, and without neglect of any official duty; and I therefore advise a certificate to the accounting officers, which may enable him to receive the balance of his salary.⁷⁶

It appears Cooper was absent from the territory from late 1852 through the end of his term on March 18, 1853. It is difficult to see how he performed or, in his words, did not "neglect" his official duties during this period.

⁷⁴ The story of the "deadly affray" has been told many times. See, e.g., Mary Wheelhouse Berthel, *Horns of Thunder: The life and Times of James M. Goodhue* 63-70 (St. Paul: Minn. Hist. Soc., 1948); J. Fletcher Williams, *A History of the City of Saint Paul to 1873* 285-86 (St. Paul: Minn. Hist. Soc., 1983)(first published by the Society in 1876 under the title *A History of the City of Saint Paul, and of the County of Ramsey, Minnesota*).

⁷⁵ Edward Duffield Neill, *The History of Minnesota: From the Earliest French Explorations to the Present Time* 547 (Philadelphia: J. B. Lippincott & Co., 1859)(reprinted in *The Michigan Historical Reprint Series*).

⁷⁶ 6 Op. Att'y Gen. 57 (1853), posted in Pt. Three, at 7-8.

In January 1853, three months after he arrived in Minnesota, Chief Justice Henry Hayner still had not received his salary because First Comptroller Whittlesey in Washington demanded a copy of his oath of office, which supposedly would prove that he resided in the territory and was performing his judicial duties. Hayner had been nominated, confirmed and issued a four year commission on August 31, 1852. He knew that any new president elected in November of that year would, after his inauguration, remove incumbents under the policy of rotation. Nevertheless he accepted the commission. It took him five weeks to wind up his affairs in New York and travel to Minnesota Territory. He was sworn on October 6, 1852, in St. Paul. But the Comptroller withheld his salary under the law barring payments of salaries to absentee jurists until he could produce his oath, something he could not satisfy from the distance of Minnesota Territory.

Hayner responded in the following letter, which displays not only frustration over his unpaid salary but also his sensitivity to the condescending attitude of Washington officials who were oblivious of the sacrifices he has made, something other territorial jurists may have experienced as well.⁷⁷

Saint Paul, Minnesota Territory
14th January 1853

Hon. Elisha Whittlesey
1st Comptroller U. S. Treasury

Sir

Allow me to express my surprise at the contents of your letter of the 24th instant. I received my commission on the 4th of Sept. dated the 31st of August last and waiting a day or two

⁷⁷ Image 341, Roll 9 of the microfilm copies of U. S. Territorial Papers. Territory of Minnesota Records: Secretary of the Interior, Appointments Division, in the Ronald M. Hubbs Microfilm Room of the Minnesota Historical Society.

Folwell erroneously cites Hayner's letter as "relative to [his] removal." *I A History of Minnesota* 378 n.32 (St. Paul: Minn. Hist. Soc., 1956)(published first in 1921). Folwell was misled by a handwritten note on the back of this letter: "H. Z. Hayner 1853 to Whittlesey about his removal from office."

thereafter accepted the office as can be seen in the State Department of the U. S. Government.

I ascertained that it was necessary to hold court in the Territory in early October last. Accordingly I broke away from the solace of my former residence (Troy, N.Y.) neglecting business of considerable importance both to myself and others to arrive in time to attend to my official duties. I left Troy about the 20th Sept, and arrived St. Paul, the 3rd October last, where I have remained ever since—On the 6th October last, I took Oath of Office (to which I suppose you refer in your letter) which I ascertain was filed on the 12th of the same month with the Secretary of the Territory to be recorded.

I know of no legal provision nor do I now that require the Oath of a copy to be transmitted to the Treasury Department or another Department at Washington, consequently it can not be a matter of surprise that I did not do it or that it was omitted to be done at all—The Organic Act requires the Oath to be taken and duly certified by a proper officer and filed with the Secretary of the Territory and by him to be recorded —This was done as before stated. But if the Oath or a copy thereof is to be transmitted to any of the United States departments at Washington let those see to it whose business it is. It is not within the range of my duties, and I cannot with any propriety be requested to perform it, and I do not comprehend why the payment of my salary should be delayed on that accord—If you have the right to withhold it either because you require an act to be done that no officer of the Territory is bound to perform—or compel me to do acts or comply with conditions that are not within the scope of my duties, you undoubtedly have the power of refusing to pay it altogether, which I presume you will not abrogate to yourself.

The significant manner in which you call my attention to the proviso in the appropriations bill of the 31st August last is still more a matter of surprise to me — I have examined the proviso you refer to and the statute to which it refers and amends—and all that I can make of it is this—that if an officer of the Territory absents himself from it more than 60 days his salary is not to be paid him until the President certifies that he may

so absent for good and sufficient cause—no one surely can have been guilty of the gratuitous mischief of interpreting obligations with your department so the payment of my salary on the ground of my absence, inasmuch as I have had constantly, and I will add most diligently attending to the duties of my office ever since my arrival in this Territory. By the provision of the act you refer to, the President is alone authorized to make certificates upon such absence. I cannot call on him as I have not been absent—still you require me to send a certificate. Whose? I ask—the President’s I cannot obtain as I do not come within the reach of the exigency of the Act, and I do not find that the act referred to, or any other requires any other certificates—nor can I divine whose, or what kind will be satisfactory to you—For if you have a right to require these without legal authority, you unquestionably may determine also the quality and degree of proof that will entitle an officer to draw his salary—In both these respects your letter leaves me in the profoundest ignorance. For you do not direct whether to testimony of any competent legal witness will suffice or whether the statement of the official dignitaries of the territory will alone answer—whether it must be made more the sanctity, or an oath, or taken under a simple parol of honor. In law the presumption is that I am, and have been engaged in the performance of my duty ever since I accepted the place unless the contrary appears as well in respect to my having taken the oath and my having remained in the territory as in respect to all the duties and requirements incident to the office. And you have as good a right to demand as a condition of the payment of my salary, proof that I have appointed a clerk—that I reside in the District to which I am assigned.—that I have held the required regular terms of the court—and that I have performed all and singular my duties as a judge in detail;—as to make the requirements contained in your letter, I cannot therefore believe that you might be guilty of the official impertinence to require certificates of my having performed my duties without complaint as to my absence. If such complaint has been made inform me as to the particulars and I will forthwith answer and furnish you with the requisite proof to show that I have not ever been absent. If not, I shall expect my salary transmitted as your earliest convenience; and from time to time as it becomes due—

Aside from the presumed delinquency your requirement implies, and the utter humiliation it demands—conditions that no right minded or honorable man can or will submit to, I do not desire to twice earn my salary before it shall be paid me once by the performance of labors legally attached to the office—And again by being illegally compelled to get up certificates and prepare documents unknown to the law to satisfy assuming and impertinent treasury officials that I have preformed my duty — or by begging for an indefinite period at the doors of the treasury for my legal dues before its every watchful guardians can be induced to account them to me.

I have enclosed a copy of this and of my former letter to the Secretary of the Treasury calling his attention to your letter and requesting an explanation.

Very truly your obedient servant,
H. Z. Hayner

Missing from most documents that demarcate a territorial justice's term is the man behind them — his personality and temperament, attitude toward his office, legal acumen, relations with his colleagues, the bar and the federal bureaucracy, and so on. But occasionally a document is found that reveals a sliver of the man. Hayner's letter is such a document.

Almost sixty years later, in June 1912, the Minnesota Historical Society published a collection of semi-official biographical sketches of important figures in the state's history. Here is the complete entry on Hayner:

HAYNER, HENRY Z., was chief justice of Minnesota, 1852-3, but never presided, and was probably never in the territory.⁷⁸

Given the tone of Hayner's letter to the First Comptroller, it is not difficult to imagine how he would have reacted to this profile, which is one more instance of the myths and misinformation about the territorial judiciary that have been propagated by writers from 1870 to the present time.

⁷⁸ Warren Upham & Rose Barteau Dunlap, *Minnesota Biographies: 1655-1912* (14 Collections of the Minnesota Historical Society) 313 (St. Paul: Minn. Hist. Soc., 1912). Surprisingly, Kermit Hall repeated this canard. Hall, *supra* note 37, at 117 (“Although Hayner never reached the territory...”).

C. Conclusion

With access to primary source materials on the terms and periods of service of each of the ten territorial justices, future historians will no longer repeat the errors of previous generations of writers.

But the documents that follow provide more than correct dates. They are documentary proof of the quadrennial earthquake that shook the territorial court when each newly inaugurated President in the 1850s replaced judges selected by his predecessor with his own supporters.

They also reveal of how distance, place, and geography influenced the administration of the territorial judicial system. Territorial justice was administered within the confines of a rugged physical environment. It took days for newspapers, mail and official orders to reach St. Paul from Washington or East Coast cities. It took judges even longer to travel from their homes in the East or Midwest to the new territory after being commissioned. Once here, they encountered large numbers of natives whose language and customs they did not understand. They suffered delays and difficulties in travel that disrupted court schedules. The system faltered if there was a vacancy on the court or a judge was absent from the territory. The justices on the territorial supreme court were not isolated from developments in the law in other jurisdictions, but they were geographically and temporally removed. One of the conclusions of those who endeavor to study the territorial judicial system with “much ingenuity and real patience” is the importance of distance, in its myriad of forms.

D. Acknowledgments

Those who have engaged in the activity quickly learn that archival research is its own reward. They also understand that success in locating primary materials is due frequently to others. And with that firmly in mind, I acknowledge the assistance of several individuals without whom compilation of documents on the terms of the territorial justices could not have been achieved.

I am indebted to Jennifer Locke Davitt, Head of Library Services at the Georgetown Law Library, Georgetown University Law School, in Washington, for locating and copying the commissions of the territorial justices in the *Book of Commission of Judges* in the National Archives

facility in College Park, Maryland. Her search was made easier by specific directions provided by several archivists at the National Archives, especially David A. Langbart of the Textual Archives Services Division.

Librarians at the Government Documents Section of Wilson Library at the University of Minnesota provided assistance and, as always, I have been aided by the women and men who track down books and files in the archives, those who copy documents and papers, and those who answer questions and give suggestions in the library of the Minnesota Historical Society. ■

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