



THE HISTORICAL SOCIETY OF THE TENTH JUDICIAL CIRCUIT

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Chair's Note • *By Alleen VanBebber*

We continued 2014 with an active second half. I'd like to highlight three of those activities here. First, we were thrilled to see the October launch of our new website, which emerged from the hard work of our Board Member and Webmaster, Lori Chatman, who is the Contents Management Librarian at the Circuit Library. Go to www.10thcircuithistoricalsociety.org and take a look. Or go through the Circuit's website tab for "Historical Society." We are most grateful to the Court for allowing that tab on its site. Visit our website often to watch it grow in size and usefulness, and don't be shy about calling or emailing the Webmaster to make comments or ask questions.

Second, we were glad to be of assistance to the American Society for Legal History in November, when it held its national meeting in Denver. Tenth Circuit judges and staff members, along with our Board Officer, Greg Kerwin, welcomed the Society's members with an opening event and a reception at the Byron White Courthouse.

Third, you can at last choose to join, pay dues, and make contributions online with a credit card. Contributions can be made for yourself, made anonymously, or made to honor or memorialize others. We have contracted with ColoradoGives.org, which is a giving website sponsored by the Community First Foundation and utilized by some 1,500 nonprofit organizations. The third-party vendor processing fees are two percent of an online donation, among the lowest of such fees in this country. I tested the site with my annual contribution. It was unusually easy, even for a cyber-dinosaur like me. Log in at <https://www.ColoradoGives.org> and see what you think.

Finally, we owe both an apology and a thanks to Richard Hatch, of Rodey, Dickason, Sloan, Akin & Robb, P.A., in Albuquerque. We apologize for failing to name him as the author of his article on the late John D. Robb, which appeared in the Spring/Summer issue. And we thank him for his excellent work on the article.

I wish you all a happy holiday season and look forward to seeing many of you at our annual events and special events in the six states. May 2015 be a year of remembering history, recording history, making history, and having an excellent adventure as it all happens.

NOTABLE CIRCUIT HISTORY

The Teapot Dome Scandal – Part II • *By Steven K. Balman*

This article is a continuation of the story beginning in the Spring/Summer 2014 Newsletter. That story left off with President Coolidge's appointment of two special prosecutors to investigate the Teapot Dome scandal, Atlee Pomerene and Owen Roberts.

Pomerene and Roberts followed a plan. Part I of the plan was to sue in equity to invalidate the leases that had been granted by Fall and to enjoin their enforcement. Pomerene and Roberts filed two cases—one in Wyoming and one in California.

The federal district court in Wyoming declined to invalidate the leases. *See United States v. Mammoth Oil Co.*, 5 F.2d 330 (D. Wyo. 1925) (per Kennedy, J.). In contrast, the federal court in California invalidated the leases but ruled that the lessee—Pan-American Petroleum Co. — should receive credit for its work in building fuel oil storage facilities at the naval base at Pearl Harbor, Hawaii. *United States v. Pan-American Petroleum Co. v. United States*, 6 F.2d 43 (S.D. Cal. 1925).

The United States Courts of Appeals for the Ninth Circuit affirmed the cancellation of the lease but reversed the "credit" for the construction at Pearl Harbor. *See Pan-American Petroleum Co. v. United States*, 9 F.2d 761 (9th Cir. 1926).

Pomerene and Roberts appealed the Wyoming district Court decision to the United States Court of Appeals for the Eighth Circuit. Their appeal was successful. The Eighth Circuit reversed the decision of the Wyoming court, and held that the lease granted to Sinclair should be cancelled. *United States v. Mammoth Oil Co.*, 14 F.2d 705 (8th Cir. 1926).



Roberts (top) and Pomerene (bottom)
Photos courtesy of Library of Congress

Article continues on next page ...

The Teapot Dome Scandal – Part II • *Continued ...*



Albert Fall (Photo courtesy of Library of Congress)

The Tenth Circuit was not formed until 1929. Before 1929, the District of Wyoming was part of the Eighth Circuit. The author of the Eighth Circuit opinion in *Mammoth Oil* was William S. Kenyon of Iowa. Appointed to the Eighth Circuit by Harding in 1922, Kenyon had previously served in the United States Senate with Harding, Fall, and Pomerene. A progressive Republican, Kenyon had co-sponsored the Clayton Antitrust Act, the Federal Trade Commission Act and the Child Labor Act during his time in the Senate.

The other two members of the Eighth Circuit panel in *Mammoth Oil* were Arba Seymour Van Valkenburg and a district judge, William Alexander Cant. Judge Van Valkenburg was appointed United States District Judge for the Western District of Missouri by President William Howard Taft in 1910. As a district judge, Van Valkenburg presided over several high profile political cases during World War I—including at least two Espionage Act cases. He was appointed to the Eighth Circuit by Coolidge in 1925. Judge Cant was a judge of the United States District Court for the District of Minnesota. After more than a quarter century as Minnesota district court judge (1896-1923), Cant received a recess appointment to the federal bench from Harding on May 21, 1923. Coolidge nominated Cant for the same position on December 15, 1923. He was confirmed a month later. Cant died in office on January 12, 1933. He was 59 years old at the time of his death.

The decisions of the Eighth and Ninth Circuit were affirmed by the United States Supreme Court. See *Pan American Petroleum Transport Co. v. United States*, 273 U.S. 456 (1927); *Mammoth Oil Co. v. United States*, 275 U.S. 13 (1927). Pomerene and Roberts were again successful. The leases that Fall had granted to Sinclair and Doheny were invalidated.

Part II of the Pomerene-Roberts plan was to prosecute Fall, Sinclair and Doheny and others for corruption and bribery. Pomerene and Roberts brought a total of six criminal cases. As explained above, Part II of the plan did not work out quite as well as Part I.

Owen Roberts was successful enough as a special prosecutor to build a positive national reputation. In 1930, President Herbert Hoover appointed Roberts to the United States Supreme Court. Roberts took the seat vacated by Edward Terry Sanford.³ Justice Roberts served on the Supreme Court for 15 years. He is known primarily for four things.

First, Justice Roberts' vote in *West Coast Hotel v. Parish*, 300 U.S. 379 (1937), is called the "switch in time that saved nine." Justice Roberts is given the credit (or the blame) for saving the Supreme Court from President Franklin D. Roosevelt's "court-packing" plan. Under the "court-packing" plan, the President would have appointed a new Justice for each Justice over the age of 70 years, six months. A "packed" Court of thirteen members might well consist of eight New Deal Democrats and five strict constructionist Republicans. In such a court, there would be no judicial check on the President's program, no impediment to the New Deal.⁴

Parish ended the *Lochner* Era, a period in which the Court struck down statutes that interfered with freedom of contract on substantive Due Process grounds. Before *Parish*, Roberts had tended to vote with the "Four Horsemen"—the four conservative justices who opposed the New Deal. They were Justices Pierce Butler, James McReynolds, George Sutherland and Willis Van Devanter. Roberts has been accused of changing his vote for political reasons as opposed to legal reasons or principled reasons. This criticism is unfair. Roberts was not one of the "Four Horsemen." Roberts had previously voted in favor of a New Deal measure in *Nebbia v. New York*, 291 U.S. 502 (1934). He decided how he would vote in the *Parish* case before Roosevelt announced his "court-packing" plan. See Kermit L. Hall (Ed.), *The Oxford Companion To The Supreme Court Of The United States*, 738 and 924 (1992) ("Oxford Companion").

Second, Roberts was appointed by President Franklin Roosevelt to head a commission to investigate the bombing of Pearl Harbor. The "Roberts Commission" found the commanders of U.S. forces at Pearl Harbor at the time of the attack—Admiral Husband E. Kimmel and General Walter C. Short—did not take early war warnings seriously and did not prepare for an air attack on Pearl Harbor and Hickam Field. Although the "Roberts Commission" was not a military tribunal, it determined that Kimmel and Short were guilty of "dereliction of duty." The Commission also exonerated the Roosevelt Administration. See Oxford Companion at 738. The "Roberts Commission" helped satisfy the American public's immediate need for an explanation of the Pearl Harbor attack and for accountability.⁵ It would be interesting to know what Justice Roberts thought about the long-term significance of the attack. Would Roberts agree with Paul Johnson's assessment?

The Pearl Harbor assault achieved complete tactical surprise. All but twenty-nine [Japanese] planes returned to their carriers and the [Japanese] fleet got away safely. But the results, though they seemed spectacular at the time, were meagre. Some eighteen [American] warships were sunk or badly damaged, but mostly in shallow water. They were raised and repaired and nearly all returned to active service in time to take part in major operations; losses in trained men were comparatively small. As luck would have it the American carriers were out at sea at the time of the attack, and the Japanese force commander, Admiral Nagumo, had too little fuel to search and sink them, so they escaped completely. [Nagumo's] bombers failed to destroy either the *naval oil storage tanks* or the submarine-pens, so both [American] submarines and carriers – now the key arms in naval war – were able to refuel and operate immediately.

Modern Times at 394 (emphasis added). The "naval oil storage tanks," Roberts would have known, had been built by the lessees in the Teapot Dome Scandal.

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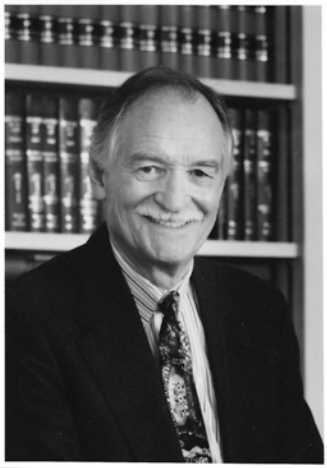
³ Learned Hand had hoped President Hoover would appoint him to the United States Supreme Court in 1930. The appointments that year went to Charles Evans Hughes and Owen Roberts. See Gerald Gunther, *Learned Hand: The Man and the Judge*, 357-365 (2d Ed. 2011) ("Gunther").

⁴ Columnist Walter Lippmann was critical of the "court-packing" plan. He said Roosevelt was "drunk with power" and plotting a "bloodless coup d'état." Gunther at 391.

⁵ In that, the "Roberts Commission" resembles the "Warren Commission"—the commission to investigate the assassination of President John F. Kennedy that was headed by Chief Justice Earl Warren. See Oxford Companion at 915.

IN MEMORIAM

Judge Jim R. Carrigan • *By Jessica Brown*



Judge Jim R. Carrigan, former United States District Court Judge and Colorado Supreme Court Justice, passed away on August 15, 2014, at the age of 84. Judge Carrigan served on the Colorado Supreme Court from 1976 to 1979 and on the federal district court for the District of Colorado from 1979 until 1995. He was a proud Irish Catholic, a self-described Democrat "with a capital D" (and President Carter federal-court appointee), and a loving and devoted husband, father, and mentor. He had a wonderful sense of humor and cheerful disposition, even after suffering a stroke at the age of 82. He lived an extraordinary life and, as a judge, he positively impacted the lives of countless litigants, jurors, law clerks and, through his heartfelt administration of the Oath of Allegiance, new American citizens.

Judge Carrigan was born on August 24, 1929, to Michael and Mildred Carrigan, in Mobridge, South Dakota. Judge Carrigan and his four siblings grew up in Hallock, Minnesota, where their father ran a bakery. The Judge often said that his father was the hardest working man he ever knew. Judge Carrigan never forgot his humble beginnings, and was a champion for the disadvantaged throughout his career, but it was quickly apparent that he was destined for greatness. He attended the University of North Dakota, where he served as student body president and from which he graduated Phi Beta Kappa with a Bachelor of Arts in philosophy. He stayed at the University of North Dakota for law school and was Editor-in-Chief of the law review, graduating Order of the Coif and first in his law school class.

After a brief stint practicing law in Williston, North Dakota, Judge Carrigan attended New York University, where he obtained an L.L.M. in tax law in 1956. By age 25, the Judge was an assistant law professor at NYU. He would go on to become a law professor at the University of Denver, the University of Washington, and the University of Colorado at Boulder, which became like a second alma mater for the Judge. He was elected a Regent of the University of Colorado in 1974. He also received an Honorary Doctor of Law degree from the University of Colorado, among other institutions. A teaching courtroom at CU was named in Judge Carrigan's honor, as was the prestigious "Carrigan Cup" mock trial competition.

Before taking the bench, Judge Carrigan also became one of the most distinguished plaintiffs' personal injury lawyers in Colorado. And he served as administrator for the State of Colorado Judicial Department, where he was influential in developing the State's judicial merit selection system.

But first, before coming to Colorado, Judge Carrigan met his future wife and lifelong love, Beverly Jean Halpin. They met in New York City, where Beverly had received a master's degree in social work from Fordham University. Following their romantic courtship in New York, the Judge and Beverly were married in Los Angeles on June 2, 1956. They were together almost 60 years (married more than 58) and had six children together – Sheila, who very fittingly was born on St. Patrick's Day, as well as Maura, Patrick, Kathleen, Andrew, and Michael – and twelve grandchildren. The Carrigan family settled in Boulder in 1963. All six children were raised in their Boulder home, which was the site of many large gatherings of friends, family, and colleagues over the years.

One such gathering occurred in the early 1990s, while the Judge was sitting on the federal bench. The Carrigan home was filled with the most influential people of the day, when one of Judge Carrigan's law clerks, Brian Duffy, arrived to deliver the jury instructions the Judge needed for trial in the morning. Though the party was in full swing, the Judge was nowhere to be found. Not even Mrs. Carrigan knew where he was. Finally Brian wandered into the kitchen and found the Judge chatting with the catering staff. They were students at CU, and the Judge was asking them about their majors, their career plans and aspirations – and undoubtedly inspiring them. Judge Carrigan did this with all of his law clerks over the years as well; he inspired and mentored us, even towards the very end of his life. He always took a genuine interest in people who could learn from him and benefit from his wisdom.

Judge Carrigan also showed a keen interest in those who could benefit from his influence as a judge. He believed that the law could and should be the great equalizer – that, properly applied, the law could do tremendous justice for people who needed it and change their lives for the better. Another of Judge Carrigan's law clerks, Munir Meghjee, was wrapping up his clerkship when the Judge was asked to approve a consent decree between the government and a company that had polluted Commerce City. When the Judge took the bench, the courtroom was packed with people whom Judge Carrigan recognized probably lived in Commerce City, had taken time off from their jobs without pay to be there, and did not necessarily speak English. Judge Carrigan immediately called for an interpreter; then required counsel to turn the podium around and explain the agreement to the assembled crowd. During the hearing, the Judge called Munir into the courtroom and asked him to turn around: "What you see out there is the face of America," he said. "I don't want you to forget that face when you leave my chambers."

Judge Carrigan never forgot, including when he was serving as a mediator and arbitrator at the Judicial Arbitrator Group following his retirement from the bench. Or when he was doing volunteer work for the Samaritan House in Denver and the St. Thomas Aquinas Catholic Church food bank. Or when he was traveling the world with his beloved Beverly Jean, and conducting seminars in Taiwan, Zambia, Croatia, and Jamaica. Judge Carrigan was a true legend and one of Colorado's most distinguished judges.

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Third, Justice Roberts dissented in *Korematsu v. United States*, 323 U.S. 214 (1944), the Supreme Court decision upholding President Roosevelt's decision to imprison ("intern") 100,000 Japanese-Americans. Justices Murphy and Jackson also dissented.⁶

Fourth, Roberts headed a second "Roberts Commission" in 1943. The second Commission was an organized effort to help the United States Army protect "Monuments, Fine Arts and Archives" in war zones. The second Commission provided funds and support for the "Monuments Men"—the men who retrieved stolen art from Nazi Germany, the men celebrated in the 2014 George Clooney film *The Monuments Men*. (Justice Roberts is not portrayed in the film.)

Query: If Albert Fall had never accepted a bribe, would Owen Roberts have ever risen to national prominence? If Owen Roberts had never risen to national prominence, would the Monuments Men have saved the art treasures of Europe from Hitler?

Further Reading: Laton McCartney, *The Teapot Dome Scandal: How Big Oil Bought the Harding White House and Tried to Steal the Country* (2008); Leslie E. Bennett, *One Lesson From History: Appointment of Special Counsel and the Investigation of Teapot Dome Scandal*. <http://academic.brooklyn.cuny.edu/history/johnson/teapotlandome.htm>; Robert M. Edsel, *The Monuments Men: Allied Heroes, Nazi Thieves and the Greatest Treasure Hunt in History* (2010)

⁶ Justice Roberts wrote:

[This is a] case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. ... I need hardly labor the conclusion that Constitutional rights have been violated.

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