

JUSTICE DAVID S. TERRY AND FEDERALISM

A Life and a Doctrine in Three Acts

RICHARD H. RAHM*

EDITOR'S NOTE:

Richard H. Rahm, current president of the California Supreme Court Historical Society and also a scholar of legal history, prepared the script for a CLE program on Justice David S. Terry that was presented four times by the Society from 2012 to 2014. The “starring” roles were played by present-day justices and judges from the state and federal courts in California. The script appears on the following pages, together with some of the many illustrations seen by the audience.

The “performers” who played historical roles (in period costume) in one or more of the programs were California Chief Justice Tani Cantil-Sakauye; California Supreme Court



CALIFORNIA CHIEF
JUSTICE TANI CANTIL-
SAKAUYE (RIGHT) AND
ASSOCIATE JUSTICE
MARVIN R. BAXTER

SAN DIEGO, SEPT. 12, 2014.
PHOTO BY S. TODD ROGERS.

* Richard H. Rahm received his J.D. and Ph.D. from UC Berkeley, his M.Litt. from Oxford University, and his B.A. from UCLA. He is a Shareholder at Littler Mendelson, P.C., residing in its San Francisco office.



(ABOVE, L.-R.) U.S. DISTRICT COURT JUDGE WILLIAM ALSUP AND CALIFORNIA SUPREME COURT ASSOCIATE JUSTICES MARVIN R. BAXTER AND KATHRYN MICKLE WERDEGAR

SAN FRANCISCO, OCTOBER 15, 2012. PHOTO BY WILLIAM PORTER.

Associate Justices Marvin R. Baxter, Ming W. Chin, Carol A. Corrigan, Goodwin Liu, and Kathryn Mickle Werdegare; California Court of Appeal Justices Brad R. Hill, Charles S. Poochigian, and Laurie D. Zelon, Senior U.S. District Judge Thelton Henderson, U.S. District Court Judges William Alsup, Larry A. Burns, Andrew J. Guilford, Terry J. Hatter, Jr., Anthony W. Ishii, Ronald S. W. Lew, Lawrence J. O'Neill, and Yvonne Gonzalez Rogers; and Superior Court Judge Barry P. Goode.

Serving as narrators were U.S. District Judge James Ware, CSCHS President Dan Grunfeld, CSCHS Vice President John Caragozian, California State Bar CEO Joseph L. Dunn, and Richard H. Rahm.

The four events were:

■ October 15, 2012 — Milton Marks Auditorium, Ronald M. George State Office Complex, San Francisco — cosponsored by the U.S. District Court for the Northern District of California Historical Society.¹

■ June 25, 2013 — Ronald Reagan State Building Auditorium, Los Angeles — cosponsored by the Ninth Judicial Circuit Historical Society, the U.S. District Court for the Northern District of California Historical Society, and the California Historical Society.

¹ For feature story and photos, see *CSCHS Newsletter* (Fall/Winter 2012): 1–7, available at: <https://www.cschs.org/wp-content/uploads/2014/07/David-Terry-2012-Newsletter-Article.pdf>.



(ABOVE, L.-R.) U.S. DISTRICT COURT JUDGE JAMES WARE, SUPERIOR COURT JUDGE BARRY P. GOODE, U.S. DISTRICT COURT JUDGE YVONNE GONZALEZ ROGERS, AND SENIOR U.S. DISTRICT JUDGE THELTON HENDERSON

SAN FRANCISCO, OCTOBER 15, 2012. PHOTO BY WILLIAM PORTER.

■ January 30, 2014 — Robert E. Coyle Federal Courthouse, Fresno — cosponsored by the Fresno County Bar Association, Federal Bar Association — San Joaquin Valley Chapter, the Association of Business Trial Lawyers — San Joaquin Valley Chapter, and the U.S. District Court for the Northern District of California Historical Society,

■ September 12, 2014 — California State Bar Annual Meeting, San Diego.²

Historical documents used in the script for the characters' speeches were condensed or modernized in various places. Actual citations should be quoted from the original sources.

This program is published in the 2020 volume of *California Legal History* as the first of a group of four Society programs given their first publication in this volume. The two-fold purpose of publication is to preserve these informative programs in tangible form and to make them available to a wider audience.

—SELMA MOIDEL SMITH

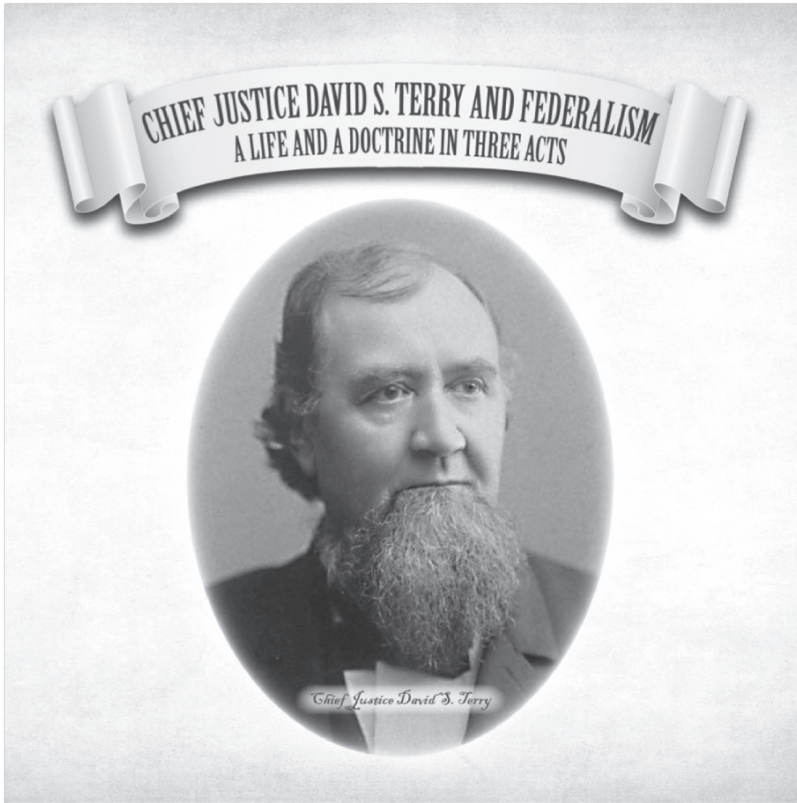


(L.-R.) CALIFORNIA SUPREME COURT ASSOCIATE JUSTICES MING W. CHIN, CAROL A. CORRIGAN, AND GOODWIN LIU.

SAN DIEGO, SEPT. 12, 2014.
PHOTOS BY S. TODD ROGERS.

² For photos, see "Disorder in the Court," *California State Bar Journal* (October 2014), available at: <https://www.calbarjournal.com/October2014/TopHeadlines/TH4.aspx>.

**A Joint Presentation of
The United States District Court for the
Northern District of California Historical Society and
The California Supreme Court Historical Society**



**Monday, October 15th, 2012 ★ 5:30pm to 7:00pm
Milton Marks Auditorium
455 Golden Gate Avenue, San Francisco**

INTRODUCTION

NARRATOR 1: The relationship between the national government and the individual states has been a matter of dispute since the birth of the Republic. Dissatisfaction with the balance which the Articles of Confederation struck between the powers of the states and the central government led to enactment of our present Constitution. Issues left unsettled in that Constitution led to the Civil War, which confirmed federal supremacy — at the cost of over 750,000 lives. One need look no further than the recent, sharply divided U.S. Supreme Court decisions on health care and immigration to see that federalism is not an abstract concept. The tensions inherent in a federal system remain tenacious, and how they are resolved has real-life consequences for individuals.

Tonight, we will look at three periods in the life of one of California's most colorful, and controversial, Supreme Court justices: David S. Terry. Terry served on the California Supreme Court from 1855 to 1859, two of those years as chief justice. Although Terry never had occasion to address the concept of federalism while on the court, it was a theme running through his life. More broadly, both the Navy and Army refused to intervene against the Vigilance Committee's armed takeover of San Francisco.

NARRATOR 2: In our first Act, in the mid-1850s, we will see how a narrow view of federal power restrained the U.S. Navy from rescuing Terry from imprisonment and possible execution by the San Francisco "Committee of Vigilance" — the Vigilantes.

Act II takes place some thirty years later, in the 1880s. Terry, again a practicing lawyer, represents Sarah Althea Hill in two of the most notorious trials in San Francisco. In both trials, one in San Francisco Superior Court and the other in federal court, Sarah claimed that she was secretly married to U.S. Senator William Sharon, one of the wealthiest individuals in the United States. The state and federal courts came to opposite conclusions, leaving matters unsettled for seven years, until the issue of jurisdictional priority was finally decided in favor of the federal courts.

Finally, Act III involves (as many a good drama does) a killing. We present the legal aftermath of Terry's being shot dead in 1889 by a U.S. deputy marshal after he assaulted a U.S. Supreme Court justice. The issue

in dispute: whether the U.S. marshal could be tried for murder in California courts if he was acting in the course and scope of his federal duties?

Our presentation this evening aims to make these events come alive. So we will be mixing explanation, original source materials, and historic images to give you a flavor of these events and the people caught up in them. David Terry was a formidable man — and the ripples he sent out into the world have had a lasting legal effect.

And now to our drama.

ACT I: TERRY'S "ARREST" BY THE VIGILANCE COMMITTEE (1856)

TERRY'S BACKGROUND

NARRATOR 2: Who was David Terry? Let him tell us.

JUSTICE DAVID S. TERRY: I was born in Kentucky in 1823. My father left us when I was eleven and my mother took my brothers and me to live on our grandmother's plantation in Texas. At thirteen, I fought in the Texas War of Independence from Mexico, which is where I learned to use a Bowie knife. Thereafter, it was my custom to keep this knife in my breast pocket, and for very good reason as you will see. In 1846 I served as a lieutenant in the Texas Rangers during the war between the U.S. and Mexico. I trained as a lawyer in my uncle's law office, and I later ran for district attorney of Galveston, but lost the election. In 1849, during the Gold Rush, I moved to California.

REPORTER: What did you do in California?

TERRY: I tried my hand at mining but after a few months I opened a law office in Stockton, with another lawyer from Texas. I believe I earned quite a reputation for being a good lawyer there.



DAVID S. TERRY,
CHIEF JUSTICE OF
CALIFORNIA

REPORTER: But wasn't it in Stockton where you also earned a reputation for violence. For example, didn't you stab a man with your Bowie knife in a Stockton courthouse?

TERRY: If you lived in California as early as 1851 you would know that Stockton was not the most quiet or orderly place; and that a Justice's Court, in those days, was not a place of any great sanctity. On this occasion I was armed because I thought that arms were necessary for my defense, in a community almost all of whom were armed; and because I had frequently in the course of my practice been compelled to speak plainly of desperate characters and I was liable to be called to account by them at any moment. And I always thought that the best way of preventing an attack was to be prepared to repel it. The assault was committed in the justice's office because the provocation was given there. If the character of the place did not shield me from insult, I saw no reason why it should shield the aggressor from punishment.

REPORTER: You speak of "insults." Did your sensitivity to insults, real or perceived, account for your involvement with duels?

TERRY: I will promptly resent a personal affront. One of the first lessons I learned was to avoid giving insults and to allow none to be given to me. I believe no man has the right to outrage the feelings of another, or attempt to blast his good name, without being held responsible for his actions.

REPORTER: What do you mean, "responsible for his actions"?

TERRY: If a gentleman should wound the feelings of anyone, he should at once make suitable reparation, either by an ample apology or, if he feels that circumstances prevent this (that is, if he made charges which he still thinks true), he should afford the person who is the subject of his remarks the satisfaction that person desires.

REPORTER: And, of course, by "satisfaction" you mean by participating in a duel?

TERRY: Yes. I know that a great many men differ with me, and look with a degree of horror on any one entertaining such sentiments. My own experience has taught me that, when the doctrine of personal responsibility obtains, men are seldom insulted without good cause and private character

is safer from attack; and that much quarreling and bad blood and revengeful feeling can be avoided.

NARRATOR 1: In the early 1850s, there was really only one party in California, the Democratic Party, which was deeply divided over the issue of slavery. The pro-slavery “Chivalry Democrats” came primarily from the Southern states and were led by U.S. Senator William Gwin. The anti-slavery Democrats came primarily from the Northern states and were led by David Broderick, who became a U.S. senator in 1857. Terry’s natural affinity was with the pro-slavery Chivalry faction.

But the 1850s also saw the rise of the Know-Nothing party in American politics, which was nativist, anti-Catholic and anti-Irish. The Know Nothing moniker came from the fact that it was originally a secret society; in answer to any question about the organization, the response would be “I



NEELY JOHNSON,
GOVERNOR OF
CALIFORNIA

know nothing.” In 1855 the Know Nothing party dropped its secrecy, held a national convention, and presented slates of candidates throughout the country. In California, many of the Chivalry Democrats, including David Terry, defected to the Know Nothing Party and, in the 1855 election, the Know Nothing slate of candidates won several statewide offices in California. Neely Johnson was elected governor and David Terry won his bid to become an associate justice of the three-member California Supreme Court.

THE SAN FRANCISCO COMMITTEE OF VIGILANCE

NARRATOR 1: Shortly after taking his seat on the court, Terry became embroiled with the San Francisco Committee of Vigilance of 1856. A Committee of Vigilance first arose in San Francisco in 1851, in reaction to mostly Australian criminal gangs setting fire to buildings in order to loot them. The 1851 Committee, comprising primarily businessmen, hanged four men and banished thirty others. After about a month, believing their job was done, the Committee adjourned, but did not disband.

Four years later, tensions once again ran high in San Francisco. It was a dangerous place, with over 200 murders committed each year. There was

a sense among the general public that city government (now largely in the hands of Senator Broderick's Tammany Hall-style political machine) was corrupt, that the police and courts were incompetent at best, and that many criminals went unpunished. Two murder cases were seen by many as glaring examples of the problem.

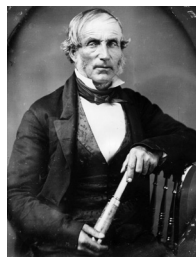
The first case involved Charles Cora, a gambler who lived openly with the beautiful proprietress of one of the city's most luxurious brothels. In late 1855, Cora shot and killed William Richardson, a federal marshal who, although a hero of the Mexican-American War, was also a violent drunk. Cora went on trial for murder but the jury deadlocked. While awaiting a new trial, Cora remained in jail for several months, visited daily by his mistress with a basket of culinary comforts. Local newspapers called for formation of a new Vigilance Committee to redress Marshal Richardson's murder.

The second murder was of reformist newspaper editor James King of William. As corruption and violent crime continued, King wrote an editorial on May 14, 1856 that attacked San Francisco County Supervisor James Casey. Later that same day, Supervisor Casey shot King as he was leaving his newspaper office. Casey was jailed and was awaiting trial, but the veterans of the 1851 Vigilance Committee reorganized, grew quickly, and marched on the jail. It demanded and received Cora and Casey. The Committee then immediately tried the two men.

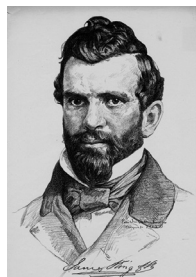
William Tecumseh Sherman, who would later obtain fame as a general in the Civil War, in 1856 was a banker in San Francisco, having remained in California after serving as a military officer in the Mexican-American War. Even though his "day job" was as a banker, Governor Johnson appointed Sherman to the position



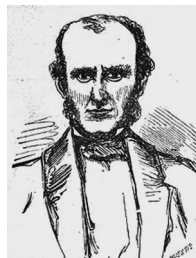
CHARLES CORA



U.S. MARSHAL
WILLIAM
RICHARDSON



JAMES KING
OF WILLIAM



SUPERVISOR
JAMES CASEY

of major general of the State Militia during the period of the Vigilance Committee events.

MAJOR GENERAL WILLIAM TECUMSEH SHERMAN: People here assert, with some show of truth, that any man with money can, through the sheriff, so pack a jury that they cannot agree. All these elements were rife when James King of William was shot by James Casey, a member of the Board of Supervisors, and an ally of Senator Broderick.



MAJOR GENERAL
WILLIAM TECUMSEH
SHERMAN

James King was the editor of the *San Francisco Bulletin*, a paper critical of corrupt city officials, Broderick's growing political power, and an ineffective judiciary. He published an article attacking Casey, revealing that, before coming to San Francisco, he had served time in Sing Sing prison in New York. Although the story

was true, Casey demanded a retraction, which King refused. Casey then shot King from across the street at the corner of Washington and Montgomery streets. King died a few days later.

The legal government of San Francisco was paralyzed, and the mayor in his helplessness telegraphed the governor, who came but was as powerless as anybody else. The Committee of Vigilance was quickly reorganized, declaring their intention to purge the city of rowdies and criminals, and its numbers quickly grew to over 5,000, headed by William T. Coleman, a successful local businessman.

REPORTER: What was Fort Vigilance?

SHERMAN: It was the headquarters of the Vigilance Committee, more commonly known as Fort Gunnybags because of the wall of sand-filled gunnysacks that was built up to protect it. They had a perfect citadel, with cannon above and below, a perfect arsenal of muskets within, and detention cells with steel bars. On the roof they installed a firehouse bell so they could summon their members.

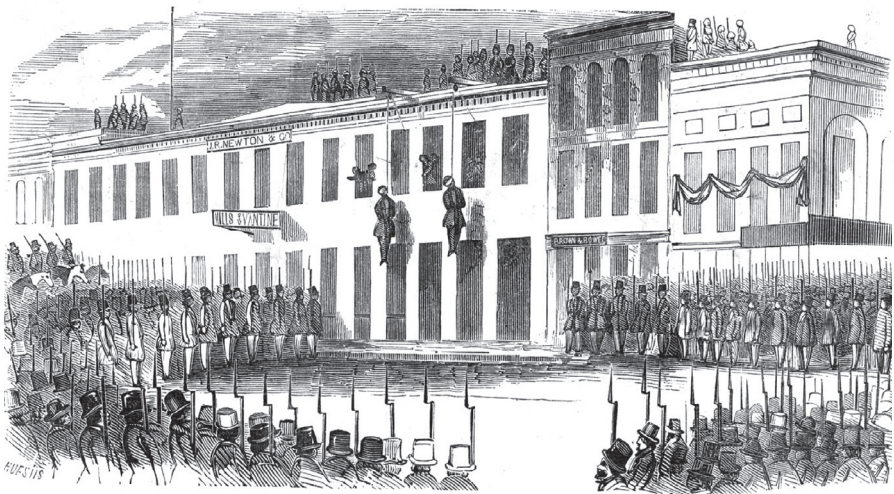
NARRATOR 1: Fort Gunnybags was located on Sacramento Street more or less across the street from what is now Embarcadero Two.

REPORTER: What did the Vigilance Committee do first?

SHERMAN: On Sunday May 18, 1855, I went to see the governor, who had just arrived in San Francisco and was staying at the International Hotel on Jackson Street between Montgomery and Kearny. When I got there, Governor Johnson was on the roof of the hotel, along with many others, pointing toward the jail, located at Broadway near Columbus; all the houses commanding a view were covered with people. Telegraph Hill was black with them, and the streets were a complete jam — there must have been at least ten thousand people within a rifle-shot of the jail.

A man then rode by on a white horse, followed by a carriage which stopped at the jail door; soon a shout announced success, and the procession began to move from the jail, down Kearny to Pacific, Pacific to Montgomery, Montgomery toward Sacramento, to Fort Gunnybags. It was headed by two platoons of about sixty or eighty men, with bright muskets, followed by the carriage with Casey and Cora with two files of armed men on each side, followed by a promiscuous crowd.

Cora and Casey were each given a quick trial, found guilty, and hanged as Mr. King's funeral cortege passed by in front of Fort Gunnybags. Over



EXECUTION OF JAMES P. CASEY & CHARLES CORA,

.... BY THE

Vigilance Committee of San Francisco, on Thursday, May 22nd, 1856, from the windows of their Rooms, in
SACRAMENTO STREET, BETWEEN FRONT AND DAVIS.

the next few weeks the Vigilance Committee sentenced several dozen men to deportation from California and hanged two more murderers.

REPORTER: What was Judge Terry's reaction to all this?

SHERMAN: Judge Terry of the Supreme Court was a most violent opposer of the Vigilance Committee, and he honestly opposed the progress of the Committee by all the influence he possessed. Both he and I were outraged about the events, and he was one of the leaders of the so-called "Law and Order Party." This was a loosely organized group that included the new governor, other state officials, as well as some prominent judges and lawyers in the City.

REPORTER: What steps did you take to stop the Vigilance Committee?

SHERMAN: The Committee was the largest and best-armed organized military force in California, and the State Militia had almost no arms. So the governor turned to the federal government for help. He asked the commanding officer of the federal military garrison at Benicia, General John Wool, to release 3,000 rifles, other arms and ammunition from the federal armory to me. Wool refused, saying that he needed permission from the president.

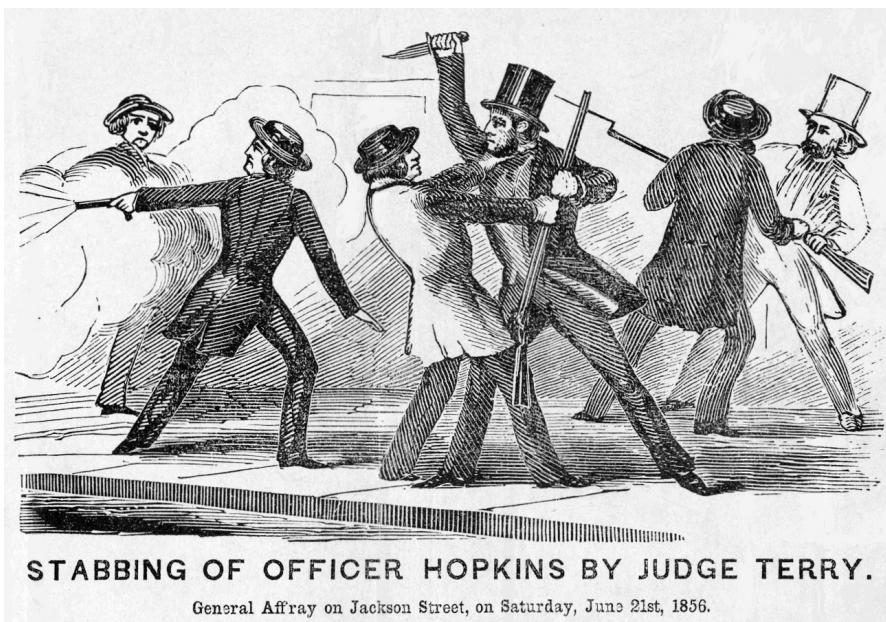
NARRATOR 1: General Wool did agree to provide the governor with a much smaller number of rifles, which Terry had convinced him the State Militia was legally entitled to as its annual quota. Three members of the militia set sail from Benicia in the schooner *Julia* to bring the rifles to the state armory in San Francisco. But the Vigilance Committee had been tipped off and dispatched its own boat to intercept the *Julia*. The vigilantes boarded the *Julia* in the early morning as it lay at anchor at Point San Pablo in San Pablo Bay. The 100 rifles were confiscated and taken to Fort Gunnybags, as were the three militiamen, who were questioned and then released.

REPORTER: General Sherman, what happened next?

SHERMAN: One of the militia members on the *Julia* that the Committee released, Reuben Maloney, began making threats of violence against Committee members, and the Committee ordered its sergeant at arms, Sterling Hopkins, to locate Maloney and re-arrest him. Hopkins located Maloney at the office of Richard Ashe near Portsmouth Square, whose office was also serving as a temporary headquarters of the Law and Order Party.

Judge Terry was there, along with several Law and Order Party adherents, and they refused to turn over Maloney to Hopkins. Hopkins returned to Fort Vigilance where he was given reinforcements.

Meanwhile, Ashe, Terry, Maloney and their supporters, armed with pistols and shotguns, left the building and headed toward one of the armories used by one of the State Volunteer Companies, on Jackson Street, between Kearny and Grant. They were followed by Hopkins and others, who endeavored to seize Maloney, but Ashe and Terry interposed. They had nearly reached the armory, when Hopkins seized the gun from Terry's hands, a scuffle ensued, a pistol went off, and Terry, a strong fine-looking man, excited, announced himself a judge of the Supreme Court, commanded the peace, and endeavored to escape from Hopkins, who held his gun with his left hand, and with his right grasped Terry by the hair or neck-cloth. Then Terry drew his knife, showed it to Hopkins, and stabbed him in the left side of his neck. One witness recalled Terry shouting, "Damn you, if it's a kill — take that!" Hopkins by this time had Terry's gun, with which he ran down the street, crying he was stabbed. Maloney, Terry, Ashe, and the rest of their party reached the armory, which is in the third story of a fire-engine house. Then arose such a tumult as I never witnessed. The



Vigilance bell pealed forth its wildest clamor, and men ran, calling, “Hang him! Hang him!” (referring to Judge Terry). Crowds of people with muskets, and swords, and pistols poured by up Jackson Street, and a dense mass of men filled the street from Montgomery to Stockton. Soon approximately 1,500 men, with two cannons, surrounded the armory, demanding its immediate surrender. Ashe offered to surrender if the Committee would promise to protect them from the mob that had assembled outside. The Committee agreed; the men came out and were taken in coaches to Fort Gunnybags.

NARRATOR 2: While Hopkins underwent emergency surgery to repair the severed artery in his neck, the Vigilance Committee put Terry on trial the following week. Terry addressed the Committee in his opening statement:

TERRY: You doubtless feel that you are engaged in a praiseworthy undertaking. This question I will not attempt to discuss; for, whilst I cannot reconcile your acts with my ideas of right and wrong, candor forces me to confess that the evils you arose to repress were glaring and palpable, and the end you seek is a noble one. The question on which we differ is, as to whether the end justifies the means by which you have sought its accomplishment; and, as this is a question on which men equally pure, upright and honest might differ, a discussion would result in nothing profitable.

The difference between my position and yours is that, being a judicial officer, it is my sworn duty to uphold the law in all its parts. You, on the contrary, not occupying the same position or charged with the performance of the same duty, feel that you are authorized, in order to accomplish a praiseworthy end, to violate and set at naught certain provisions of law. Although you may feel assured that you are right, you must see that I could not, with any regard to principle or my oath of office, side with you.

NARRATOR 2: As the Vigilance Committee’s trial of Terry began, Governor Johnson wrote to Commander C. B. Boutwell, the captain of a Navy “Sloop of War,” the *U.S.S. John Adams*, which lay just off Pier 1, with a plea for him to rescue Terry. This was followed the next day by a letter from Justice Terry himself, making the same request:

TERRY: Sir: I desire to inform you that I am a native-born citizen of the United States, and one of the justices of the Supreme Court of the State of

California, and that, on the 21st day of June I was seized with force and violence by an armed body of men styling themselves the Vigilance Committee, and was conveyed by them to a fort which they have erected and formidably entrenched with cannon in the heart of the city of San Francisco, and that since that time I have been held a prisoner in close custody and guarded day and night by large bodies of armed men. I desire further to inform you that the said committee is a powerful organization of men, acting in open and armed rebellion against the lawful authorities of this State.

In this emergency I invoke the protection of the flag of my country. I call on your prompt interference, with all the powers at your disposal, to protect my life from impending peril. From your high character I flatter myself that this appeal will receive your early and favorable consideration.

NARRATOR 2: Commander Boutwell dispatched a letter the next day to the Vigilance Committee, which requested the Committee to consider Judge Terry a prisoner of war and place him on board the *U.S.S John Adams* or, “from a desire to avoid the shedding of American blood, by American citizens, on American soil,” surrender him to the lawful state authorities. The letter closed with the following plea:

COMMANDER C. B. BOUTWELL: Gentlemen of the Committee, pause and reflect before you condemn to death, in secret, an American citizen who is entitled to a public and impartial trial by a judge and jury recognized by the laws of his country.

NARRATOR 2: The possibility that Boutwell would use force was not out of the question. The *U.S.S. John Adams* was a steam-powered sloop with twenty-six cannon and could have destroyed the Vigilance Committee’s headquarters at Fort Gunnybags. Accordingly, the Vigilance Committee decided to go over Boutwell’s head, forwarding his letter to his superior officer, Commander David Farragut, the commanding officer at Mare Island. The Committee explained that, “Owing to the extraordinary logic and menacing tone” of Boutwell’s letter, they thought it advisable to “submit it to his superior’s notice, for whom we entertain the highest regard and esteem.”

Commander Farragut’s reply to the Committee reveals his considerable tact and an astonishing degree of familiarity with constitutional law. It reads in part:

COMMANDER DAVID G. FARRAGUT: I have perused with great attention the correspondence between the Committee and Commander Boutwell, and although I concur with the Commander in many important facts of the case, still I conceive it to be my duty to avert, as far as possible, the evils now hanging over this highly excited community. And although I believe Commander Boutwell to be actuated by the same motive, he has perhaps taken a different mode of attaining this end. I perfectly agree with him that the release or trial of Judge Terry, in accordance with the Constitution of the United States, would be the readiest mode of attaining the great object we all have in view.



COMMANDER DAVID
G. FARRAGUT,
UNITED STATES
NAVY

NARRATOR 1: Farragut then discusses the Fifth and Sixth Amendments regarding due process and public trials and refers to Section 4 of Article IV which requires the federal government to, in specific circumstances, protect each state against domestic violence. Nevertheless, Farragut assured the committee that he would always be ready “to pour oil on the troubled waters, rather than to do aught to fan the flame of human passions, or add to the chances of the horrors of civil war.”

The same day Farragut addressed a stiff letter to Commander Boutwell:

FARRAGUT: Yesterday I received a communication from the Vigilance Committee, inclosing a correspondence between yourself and the Committee, in relation to the release of Judge D. S. Terry, and requesting my interposition. In regard to the constitutional points, I cannot agree that you have any right to interfere in the matter.

In all cases within my knowledge, the Government of the United States has been very careful not to interfere with the domestic troubles of the States, when they were strictly domestic, and no collision was made with the laws of the United States, and has always been studious of avoiding as much as possible, collision with State rights principles.

So long as you are within the waters of my command, it becomes my duty to restrain you from doing anything to augment the very great

excitement in this distracted community, until we receive instructions from the Government.

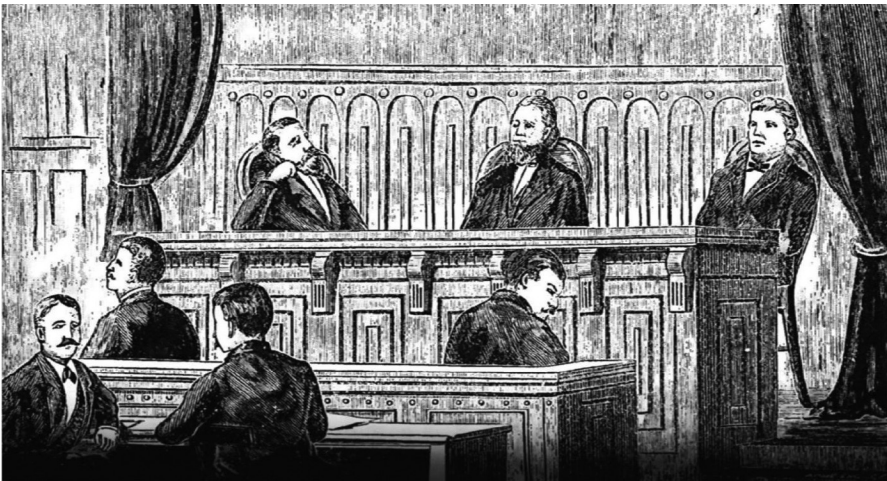
NARRATOR 1: Days later, Governor Johnson wrote directly to President Franklin Pierce to request assistance. (In 1856 — before the Pony Express or transcontinental telegraph — it took three weeks for a letter to go from California to the East Coast, and another three weeks for a return letter to arrive in California.) Even though the U.S. Senate adopted a resolution requesting President Pierce to inform the Senate if he received any application from the governor of California for military aid against the Vigilance Committee, being close to the presidential election of 1856, President Pierce nevertheless decided to move cautiously and referred the matter to his attorney general, Caleb Cushing.

Attorney General Cushing concluded that the president could not provide the requested assistance for two reasons. First, Article IV, section 4 of the Constitution provides that the federal government may interfere within a state “against domestic violence” if called upon by the legislature of the state or, if the legislature was not available, by the governor. Yet, Governor Johnson had offered no explanation why the request was not made by the California Legislature. Second, the 1795 statute implementing the constitutional protection against “insurrection” authorizes the president to summon the militias from other states to assist in quelling the violence, but not to provide weapons and ammunition, as the governor also requested. Although Cushing admitted that an emergency could arise when the president *might* furnish arms alone, the circumstances in California “did not afford sufficient legal justification for acceding to the actual requests of the governor of the State of California.”

On July 19, 1856, with Cushing’s legal analysis in hand, Secretary of State William L. Marcy wrote to Governor Johnson, informing him that the president believed there were “insuperable obstacles” to providing the help requested. Other cabinet officers followed suit. Secretary of War Jefferson Davis instructed General Wool that the Army was not to interfere with California’s domestic affairs except when necessary to protect federal government property. And the secretary of the Navy directed the commandant of the Pacific fleet to exercise “the most extraordinary circumspection and wise discretion to prevent collision between federal forces and the people of California.”

At the same time, because another California Supreme Court justice was out of state, Terry's imprisonment for two months by the Vigilance Committee had prevented the California Supreme Court from deciding major cases, including some involving the financial interests of foreigners and citizens of other states. A French citizen applied to Circuit Judge Matthew Hall McAllister for a writ of habeas corpus to get Terry back on the bench. Owing to the distances involved, it is unlikely that Judge McAllister was aware of the president's directives for the military not to interfere with California internal affairs. Although Judge McAllister, after receiving assurances of support from the Navy, issued the writ of habeas corpus, it was never served, because Terry had been released the day before it was to have been served.

In the end, the most significant fact in saving Terry from the Vigilance Committee was Hopkins' recovery from his near-fatal wound. Terry's trial concluded on July 22 and was followed by two weeks of deliberation on the verdict and sentence. On a close vote, the Executive Committee persuaded the larger, more broadly-based Board of Delegates to accept a verdict of assault without intent to kill and to release Terry with only the recommendation he resign from the court. On August 7, the verdict was read and Terry was taken aboard the *John Adams*. He left for Sacramento and within a few days resumed his seat on the court.



CHIEF JUSTICE DAVID TERRY (CENTER) AT THE CALIFORNIA
SUPREME COURT

INTERMEZZO: AN INCIDENT AT LAKE MERCED

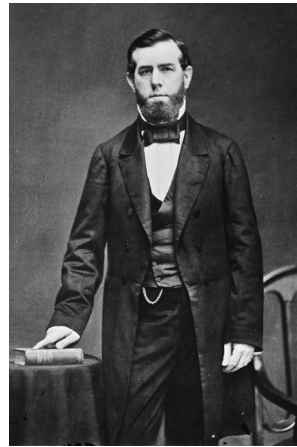
NARRATOR 1: Before moving to the next Act, we pause to consider the one action for which Terry is best remembered — the killing of Senator David Broderick in a duel.

NARRATOR 2: As we have seen, Terry did not resign from the court as he had been urged to do by the Vigilance Committee. He remained on the court and thus, with the death of the Chief Justice Murray, became chief justice in 1857. Terry's party, the Know Nothing Party, collapsed, and the two factions of the Democratic Party — the pro-slavery Chivalry Democrats led by Senator Gwin and the anti-slavery wing led by Senator Broderick — fought for political control of California. By 1859 the struggle was intense and bitter as the nation drifted toward civil war.

One morning in June 1859, Broderick was having breakfast in the dining room of the International Hotel. While reading the paper he came upon an account of a speech that Terry had recently given at a convention of the Gwin faction of the Party, in which Terry denounced Broderick in vitriolic language. Enraged, Broderick loudly proclaimed:

SENATOR DAVID BRODERICK: I paid three newspapers to defend him during the Vigilante Committee days and this is all the gratitude I get from the miserable wretch. I have hitherto spoken of him as an honest man — the only honest man on a corrupt Supreme Court, but now I find I was mistaken; I take it all back. He is just as bad as the others.

NARRATOR 2: The remark was reported to Terry who demanded a retraction. An exchange of letters ensued; Terry's final note concluded with the duelist's traditional formula: "This course on your part leaves me no other alternative but to demand the satisfaction usual among gentlemen, which I accordingly do."



U.S. SENATOR DAVID
BRODERICK



THE DUEL AT LAKE MERCED —
DAVID BRODERICK (LEFT) AND
DAVID TERRY (CENTER)

Terry resigned from the court in advance of the duel, which was held near Lake Merced. Both men had been in duels before, and Broderick believed that he was a quicker and more accurate shot than Terry. Broderick thus insisted that the count be “Fire, 1, 2,” instead of “Fire, 1, 2, 3” — the more customary count — which should have given him the advantage. Terry

won the toss for the guns, which were French dueling pistols, with barrels about one foot in length. (The dueling pistols are now in a case in the basement museum of the Union Bank on the corner of California and Sansome Streets.) Broderick shot at “1,” but his shot landed about ten feet before Terry; Terry shot before “2,” and his shot hit the right side of Broderick’s chest. While at first the wound was not thought to be life threatening, Broderick died two days later. A eulogy attended by thousands was given for Broderick in Portsmouth Square, with a two-mile funeral entourage to the burial site.

Ostracized, Terry moved to Nevada, and then left that state in 1863 to become a colonel in the Confederate Army. Returning to California in 1870, he began a long climb to respectability and financial security. He rebuilt his law practice, with offices in Fresno, Stockton and San Francisco. He resumed an active role in the Democratic Party, avoided duels, and was sufficiently restored in reputation to be selected as a delegate to the second Constitutional Convention in 1878, at which he was anti-corporate, anti-railroad and anti-Chinese.

ACT II: THE SHARON–HILL TRIALS

THE STATE TRIAL

NARRATOR 1: We now move to our second Act, when, in 1884, Terry becomes first the lawyer, and then the husband, of Sarah Althea Hill, a young woman suing United States Senator William Sharon for divorce. The two

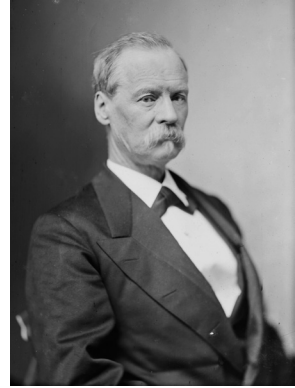
cases, and its violent aftermath, generated ten California Supreme Court decisions, nine Federal Circuit Court decisions, and two U.S. Supreme Court decisions. We will assess the key rulings from these courts. But first we should introduce the principals. Who was William Sharon?

SHARON: I was born in Ohio in 1820. I studied law but didn't much care for the practice. In 1849, I moved to California and began investing in property. I did well, through hard work and a bit of good luck. In 1864 I became the manager of the Bank of California in Virginia City, capitalizing on the silver Comstock Lode. By 1875 I owned the bank, as well as a railroad, a newspaper, and some hotels. And in that year I was elected by the Nevada Legislature to the United States Senate from Nevada.

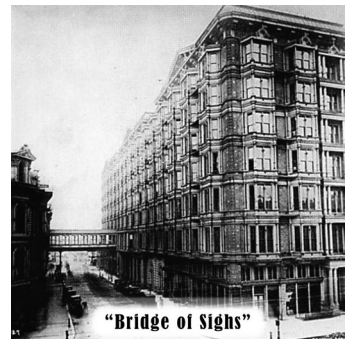
NARRATOR 1: Among the hotels that Senator Sharon owned was the Palace Hotel in San Francisco, one of the largest and most luxurious hotels in the world and the center of the city's social life. He also owned the Grand Hotel, directly across the street. The two hotels were connected by a covered bridge crossing over New Montgomery Street, commonly referred to as the "Bridge of Sighs." The reference was not to the famous bridge of that name in Venice. Rather, it was an allusion to the fact that a number of residents of the Palace Hotel kept their mistresses at the Grand Hotel, from which they could visit their clients via the enclosed bridge.

REPORTER: In 1880 did you not have a young woman friend living at the Grand Hotel, who would visit your suite at the Palace Hotel?

SHARON: Yes, I did. Her name was Sarah Althea Hill. In addition to providing her a room at the Grand Hotel, I paid her \$500 a month.



U.S. SENATOR
WILLIAM SHARON



GRAND HOTEL AND
PALACE HOTEL (L.-R.)
WITH "BRIDGE OF SIGHs"

REPORTER: Who was Sarah Althea Hill?

SARAH: I was born in Missouri. The year is none of your business. My father was an attorney; my grandfather was a well-to-do merchant. Both my parents died when I was very young and I was raised by my grandmother. After I finished at the convent school, I left for San Francisco in 1870.

REPORTER: Did you work in San Francisco?

SARAH: No, I had a small but adequate inheritance from my parents.

REPORTER: After you met Senator Sharon in 1880, did he make a romantic proposition to you?

SARAH: Well, I wouldn't call it romantic.

He said that if I would let him love me, he would give me \$1,000 a month. I was offended and told him he had made a mistake — that I was an honest girl and that he could not make love to me in that style for \$30 million. I insisted that we be married.

REPORTER: Did he agree to marry you?

SARAH: Yes, but he said that we would have to keep the marriage secret for two years. I didn't like that but he explained that it would still be legal. And he said that he had a young woman friend who had a baby and whom he had moved to Philadelphia. If she found out that he had gotten married, she would create a scandal in Nevada and that could ruin his chances for re-election. So I agreed and after we had signed the marriage contract I moved into the Grand Hotel in the summer of 1880.

REPORTER: Did things change between you and Senator Sharon?

SARAH: They certainly did. Eighteen months later, Senator Sharon asked me to give him back the marriage contract. I refused, of course, because that would mean surrendering my honor. He then told me to move out of the Grand Hotel and to stop visiting him. When I refused to move, he had



SARAH ALTHEA HILL

the door taken off my room and all the carpets pulled up. So I wrote him a letter. It was very sweet:

Oh Senator, dear Senator, don't treat me so! Whilst everyone else is so happy for Christmas, don't try to make mine so miserable. Let me come in after your servant has gone and be to me the same senator again. Or may I see you if only for a few minutes? You know you are all I have in the world, and a year ago you asked me to come to the Grand. Don't do things now that will make me talk.

REPORTER: Did you get any answer?

SARAH: No. So I wrote another letter later:

My Dear Mr. Sharon: I have written you, and received no reply. I heard you said you were told that I said I could and would give you trouble. Be too much of a man to listen to such talk, or allow it to give you one moment's thought. I have never said such a thing, nor have I had such a thought. No, Mr. Sharon, you have been kind to me. I have said I hoped my God would forsake me when I ceased to show my gratitude. I repeat it. I would not harm one hair of your dear old head, or have you turn one restless night upon your pillow through any act of mine.

REPORTER: Any reply?

SARAH: No. Some months later, after I had moved out of the Grand Hotel, I heard that he was ill. So I wrote again:

Senator: I hear you are quite ill. I should like it if you would let me come and read to you, or sit with you of evenings. Perhaps I may prove entertaining enough to help drive away both your cares and pains. You surely have not forgotten what a nice little nurse I proved myself in your last illness and you cannot but remember how willing I was to be with you. And I assure you, you will find me as willing and agreeable now. I should like to see you today anyway; it being the first of the month and I would like to get some money.

I never heard from him.

REPORTER: Senator Sharon, do you recall what happened on September 8, 1883?

SHARON: I do indeed. I was arrested for criminal adultery. Sarah was behind it. She claimed that we had been secretly married. That story is a pure fabrication. I offered her \$250 a month to be my mistress. She rejected it and I then offered her \$500 a month and she crawled into my bed.

NARRATOR 1: In response, Sharon sued Hill the next month in federal Circuit Court in San Francisco, alleging diversity jurisdiction and praying for a declaration that the alleged marriage contract was a fraud. (At that time, federal circuit courts were primarily trial courts, with district courts primarily hearing admiralty cases.) Sarah then dropped the criminal case (with its higher burden of proof) and sued Sharon for divorce in San Francisco Superior Court, alleging adultery and desertion.

NARRATOR 2: The trial in the state court action began first, extended over six months and involved scores of witnesses. As the trial was about to begin, Sarah retained David Terry to assist her other lawyers. It became fashionable to attend the trial. When Sarah was cross-examined the spectators included a count, a marquis, a former mayor, a county supervisor, the police commissioner, and the president of the board of education in addition to the usual lawyers and City Hall employees. The City Hall steps and sidewalk were crowded each morning with reporters and celebrity seekers vying for a glimpse of the main players. Closing arguments took five weeks. Terry's final argument lasted five days with each day's installment published in full in the San Francisco Examiner. Terry called Sharon "the burro of the Palace Hotel" and a "miserable, lecherous, selfish old scoundrel." His closing line put the stakes for his client in stark terms:

TERRY: She goes from this courtroom either vindicated as an honest and virtuous wife or branded as an adventuress, a blackmailer, a perjurer and a harlot.

NARRATOR 2: San Francisco County Superior Court Judge J. F. Sullivan, a relatively young and inexperienced Superior Court judge, took the matter under submission for three months. The day before Christmas 1884, a crowd gathered in his courtroom to hear him deliver his judgment. It took two and a half hours to read. The judge first announced that the case was "disgusting beyond description . . . mess of perjury," by which he included much of Sarah's testimony. This, however, was offset because Sharon was a malevolent libertine, a man of

uncounted wealth, possessed of strong animal passions that, from excessive indulgence had become unaccustomed to restraint. His passion may have been stronger than his judgment. He may have regarded as a trifle, light as air, the miserable bit of paper behind which a weak woman could shelter her virginity and her standing in the community.

NARRATOR 2: Although Judge Sullivan concluded that Sarah had perjured herself, he also concluded the marriage contract was genuine. He ruled that its having been entered into in secrecy did not prevent it from being enforceable under California law. Judge Sullivan accordingly granted Sarah her divorce, awarded alimony and attorneys' fees, ordering a referee to handle the division of community property. Sarah went shopping that Christmas Eve. Senator Sharon was defiant, pledging to:

SHARON: Fight it to the bitter end. Fight it in all the courts and fight it on all sides. I'll never give in to the last.

THE FEDERAL TRIAL

NARRATOR 1: The trial in the federal Circuit Court began about a month after Judge Sullivan's decision in Superior Court. The two judges assigned to decide the matter appointed an "Examiner in Chancery" to hear the evidence and compile a transcript for later review. The proceedings before the examiner consumed six months. While most of the witnesses were the same as those who testified in the state trial, Sharon's lawyers did present one new key witness: a handwriting expert who testified that the Senator's signature on the marriage contract was a forgery and that it had been forged by none other than the man who then served as Sarah's own handwriting expert in the state trial!

NARRATOR 2: During a hearing before the examiner, Sarah became incensed at testimony offered by an adverse witness. She began threatening one of Senator Sharon's lawyers, saying she would "cowhide" or shoot him and that "no jury will convict me for shooting him." She bragged about her skill with guns: "I can hit a four-bit piece nine times out of ten." When admonished by the examiner she then took a pistol out of her purse and pointed it at the offending lawyer. The examiner demanded she give him

the gun (which she did) and then reported the incident to the judges. Sarah was thereafter searched before each future session began.

NARRATOR 1: The examiner submitted a transcript of over 1,700 pages to Judges Matthew Deady and Lorenzo Sawyer. There followed a month of selective readings from the transcript and legal argument, at the close of which the judges took the matter under submission for three months.

It took Judge Deady and Judge Sawyer nearly four hours to read their lengthy opinions in December 1885. (Judge Sawyer had been an associate justice and chief justice of the California Supreme Court in the 1860s and, as both a state and federal judge, contributed greatly to the development of California law.) They each came to decisions exactly the opposite of Judge Sullivan's. They found that Sarah was the senator's hired mistress, not his wife; that her claims were rooted in perjury; and that her documentary evidence (the contract itself and some letters from the senator to her) was crudely fabricated and forged. Judge Deady bolstered his conclusions about Sarah's credibility by the following reflections about the relative credibility of women versus men and rich people versus poor people:

JUDGE DEADY: Whatever deductions may be made from his credibility, on account of his participation in this transaction and interest in the result, must also be made from hers, and even more; for, in the very nature of things, this is a game in which the woman has more at stake than the man. And, however unfavorably the plaintiff's general character for chastity may be affected by the evidence in this case, it must not be forgotten that, as the world goes and is, the sin of incontinence in a man is compatible with the virtue of veracity, while in the case of a woman, common opinion is otherwise. Nor is it intended by this suggestion to palliate the conduct of the plaintiff or excuse the want of chastity in the one sex more than the other, but only, in estimating the relative value of the oath of these parties, to give the proper weight to the fact founded on common experience, that incontinence in a man does not usually imply the moral degradation and insensibility that it does in a woman.

And it must also be remembered that the plaintiff is a person of long standing and commanding position in this community, of large fortune and manifold business and social relations, and is therefore specially bound to speak the truth. On the other hand, the defendant is a comparatively

obscure and unimportant person, without property or position in the world. While a poor and obscure person may be naturally and at heart as truthful as a rich and prominent one, and even more so, nevertheless, other things being equal, property and position are in themselves some certain guaranty of truth in their possessor.

NARRATOR 1: Judge Deady concluded the decision with the following observation:

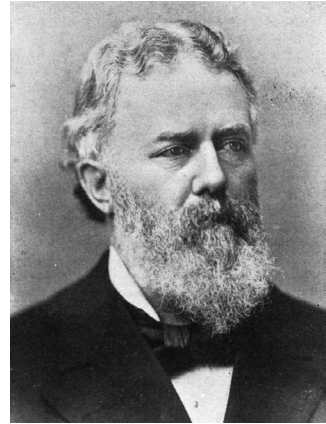
DEADY: I cannot refrain from saying, in conclusion, that a community which allows the origin and integrity of the family, the cornerstone of society, to rest on no surer or better foundation than a union of the sexes, evidenced only by a secret writing, and unaccompanied by any public recognition of each other as husband and wife, or the assumption of marital rights, duties, and obligations except furtive intercourse, more befitting a brothel than otherwise, ought to remove the cross from its banner and symbols, and replace it with the crescent.

NARRATOR 1: The Circuit Court gave judgment to Sharon, declaring the marriage contract to be “false and fraudulent” and enjoining Sarah from ever alleging its genuineness or validity or using it to support any rights claimed under it.

NARRATOR 2: Two events occurred within weeks of the federal court decision. A month before the decision, William Sharon died. A few weeks after the decision, Sarah Althea Hill married David Terry, whose wife had died shortly before the state court decision. Now that Terry was married to Sarah, it was not just his client’s honor that Terry would be defending, but his wife’s.

THE FIRST STATE APPEAL

NARRATOR 1: Sharon filed appeals from three of Judge Sullivan’s decisions. (Because California had no intermediary appellate courts, all appeals



JUDGE MATTHEW DEADY,
U.S. DISTRICT COURT

were to the Supreme Court.) The first appeal was from the judgment in the underlying divorce action. The only question before the court was whether, as a matter of law, a marriage contract that contained a provision making the marriage itself secret, was valid under California law. In a 4-to-3 ruling, the court ruled that “the law does not make it indispensable to the validity of the marriage that the relation between the parties shall be made public.” The court thus affirmed the divorce decree.

THE SECOND STATE APPEAL

NARRATOR 1: The second appeal was from Sullivan’s denial of Sharon’s motion for a new trial, which the Supreme Court decided in July 1889. By this time, the federal Circuit Court had (as we will soon see) recently granted the Sharon Estate’s motion to “revive” its earlier ruling in favor of the senator. The lawyers for the estate now argued that the federal decision finding that the marriage contract was a forgery and prohibiting Sarah from making any use of it required the California Supreme Court to give effect to that decree. The court took notice, for the first time, of the proverbial elephant in the room. As California Supreme Court Justice John D. Works opined:

JUSTICE WORKS: Here are two courts of concurrent jurisdiction over



ASSOCIATE JUSTICE JOHN
D. WORKS, CALIFORNIA
SUPREME COURT

the same subject-matter and the same parties. The federal court has first taken jurisdiction but this fact is not called to the attention of the state court in any legal way. And it proceeds to final judgment. Subsequently, the federal court renders a judgment contrary to and in direct conflict with that of the state court. Does this prove that the judgment of the state court is either void or erroneous? Not so. But as a matter of public policy, one or the other of these conflicting judgments must be held to prevail over the other, whether right or wrong; which one is not for us to say. Both of the judgments may be valid,

and as they may have been rendered upon different evidence, it may be that neither of them is erroneous. It is purely and solely a question, therefore, as to which one shall prevail over the other, and this is a question that cannot be determined on this appeal.

NARRATOR 1: So even though the elephant had been observed, it remained in the courtroom. But the composition of the California Supreme Court itself had changed dramatically from the court which ruled on the first appeal. Of the four justices who had ruled in Sarah's favor the previous year, three were gone. But all three of the dissenters from that earlier decision remained in place. Thus, the previous decision was now being scrutinized by three men who had disagreed with it and three others who had taken no part in it. And this newly constituted court found that it was unnecessary to resolve the federalism issue because a new trial was required simply as a matter of state law. Even assuming that the marriage contract was genuine, and not forged, the controlling question was whether Sharon and Sarah had assumed the marital rights and duties mentioned in the code. After reviewing the evidence, six members of the court were convinced "that this evidence shows conclusively that these parties did not live and cohabit together 'in the way usual with married people.' They did not live or cohabit together at all. They had their separate habitations in different hotels. Her visits to his room and his visits to hers were occasional, and apparently as visitors. They had no common home or dwelling place." In short, "Their acts and conduct were almost entirely consistent with the meretricious relation of man and mistress, and almost entirely inconsistent with the relation of husband and wife." Judge Sullivan's decision was reversed and remanded for a new trial in Superior Court. On retrial, Sarah would be permitted to produce any evidence she might have to show an open and public assumption of marital responsibilities.

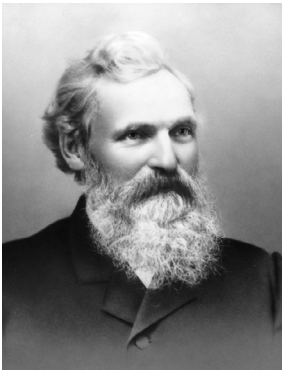
THE THIRD STATE APPEAL

NARRATOR 1: Before that new trial could begin, however, the California Supreme Court decided Sharon's third appeal and, in so doing, both settled the jurisdictional stand-off and delivered the death blow to Sarah's fading hopes. This third appeal was from Judge Sullivan's post-trial order

that Sharon pay Sarah the alimony awarded at trial, as subsequently reduced by the California Supreme Court on the first appeal (Sharon had obstinately refused to pay Sarah anything).

In June 1890, California Supreme Court Justice Charles N. Fox acceded to the priority of the federal court's 1885 judgment not because it was correct, nor on constitutional supremacy grounds, but simply because it was filed first.

JUSTICE FOX: The record shows that the Circuit Court of the United States (the court in which such action was brought) acquired jurisdiction



ASSOCIATE JUSTICE
CHARLES N. FOX,
U.S. SUPREME COURT

of the persons and subject-matter before the commencement of this action. Consequently, no matter when its judgment was rendered, whether before or after the date of the judgment of any other tribunal subsequently acquiring jurisdiction over the same persons and subject-matter, the final judgment in that case became binding and conclusive as to that subject-matter upon all persons, and upon all other courts and tribunals whatsoever.

The judgment of the court below for alimony and costs was essentially based upon this identical contract or instrument; for the court expressly finds that it was the only contract or agreement of marriage between the parties. There could be no marriage without a contract or agreement of the parties. Without marriage there could be no divorce, and without this judgment for divorce, there would have been no judgment for alimony or costs. This judgment in the Circuit Court was and is the only final judgment on the question of the validity of the contract, upon which this alleged marriage depends.

Thus, we began the trial with the state court ignoring federal jurisdiction. Both state and federal trials continued on their course. After ducking the question several times, the California Supreme Court finally acceded to the jurisdiction of the federal court over the subject of the "marriage contract."

ACT III: TERRY'S DEATH AND THE *IN RE NEAGLE* EVENTS (1889–90)

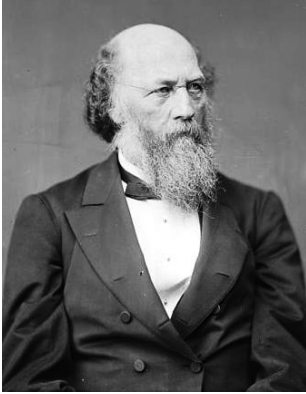
TERRY SENTENCED TO SIX MONTHS BY JUSTICE FIELD FOR CONTEMPT

NARRATOR 1: The third, and final, Act of our drama actually begins shortly before the California Supreme Court issued the two decisions in favor of Sharon that we just reviewed. And it plays out entirely in the federal courts.

You may recall that in 1885 the federal Circuit Court ruled that the “marriage contract” was a forgery, ordered Sarah to hand it over for cancellation, and enjoined her from ever asserting its validity or claiming any rights based on it. However, since Senator Sharon died just prior to the decision, the decree abated. In 1888, Sharon’s son-in-law sought to revive the decision for the benefit of Sharon’s estate. Terry argued against the “revivor” petition before a panel composed of United States Supreme Court Justice Stephen Field (sitting as circuit justice for the Ninth Circuit), Circuit Judge Lorenzo Sawyer (who was a protégé of Justice Field), and a District Court judge from Nevada.

NARRATOR 2: Terry could not have found a judge less likely to be favorably inclined to him, or his client, than Stephen Field. To begin with, they were polar opposites in background and training. Unlike Terry, who was raised in Texas and had no formal education after age thirteen, Field was born in Connecticut, spent two and one-half years touring Greece and Turkey before being admitted to prestigious Williams College in Massachusetts in 1832, where he graduated with the highest honors in the class. While Terry became a lawyer by apprenticing at his uncle’s law office in Houston, Field apprenticed with his brother, David Dudley Field, a prominent New York City attorney. During his apprenticeship, Stephen Field helped his brother draft the famous “Field Codes” for New York that were adopted in California.

Field came to California during the Gold Rush in 1849, and was elected “alcalde,” or justice of the peace, of Marysville. Field was subsequently elected to the State Assembly and then to the California Supreme Court. He served on the court with Terry for two years and succeeded him as chief



ASSOCIATE JUSTICE
STEPHEN J. FIELD,
U.S. SUPREME COURT

justice when Terry resigned to fight his duel with Broderick. President Lincoln appointed Field to the U.S. Supreme Court in 1863.

Terry had a low opinion of Field, saying:

TERRY: Field is an intellectual phenomenon. He can give the most plausible reasons for a wrong decision of any person I ever knew. He was never known to decide a case against a corporation. He has always been a corporation lawyer and a corporation judge, and as such no man can be honest.

NARRATOR 2: Terry had other reasons to doubt Field's impartiality. Field had been a political ally of Senator Broderick and a good friend of Senator Sharon. In fact, when Field came to California for Ninth Circuit business, he stayed at a luxury suite at Sharon's Palace Hotel. And Francis Newlands, Sharon's son-in-law who was the lawyer representing the Sharon estate, had been one of Field's close advisors during his unsuccessful campaign to win the Democratic Party's nomination for president in 1884.

Judge Sawyer, another member of the panel, had been one of the two federal judges who had issued the 1885 decision in favor of Sharon that was sought to be revived. And, to make matters worse, in the interval between the argument and the decision on the revivor petition, Terry and Sarah happened to be on the same train as Judge Sawyer. Sarah insulted the judge and, when he ignored her, she grabbed him by the hair and shook his head from side to side, while Terry laughed encouragingly.

On September 3, 1888, the Circuit Court decided whether Sarah would have any claim against the Sharon estate. Both Terry and Sarah were sitting at counsel table, normally reserved only for lawyers. Because of the hair-grabbing incident on the train between Sarah and Judge Sawyer, additional deputy marshals and San Francisco police officers were in the courtroom.

William Herrin, special counsel to the U.S. attorney, questioned U.S. Marshal J. C. Franks, about what happened at the September 3rd hearing:

SPECIAL COUNSEL WILLIAM HERRIN: Now; go on and state what occurred in the courtroom on that day, in your own language, commencing at the beginning and going to the end.

U.S. MARSHALL J. C. FRANKS: After Justice Field had been reading about ten minutes, Mrs. Terry rose up from her seat and addressed the court, saying that “everybody knows you have been bought; that this is a paid decision.” The judge asked Mrs. Terry to be seated. She paid no attention to the order. She kept addressing her remarks to Justice Field, saying, “How much did you get; how much did Newlands pay you?” About that time Justice Field looked towards me and said, “Mr. Marshal, remove this woman from the court-room.” Before I started, however, Mrs. Terry said: “I will not be removed from the court-room; you dare not remove me from the court-room.”

HERRIN: That was immediately after the order was given?

FRANKS: Yes sir. Judge Terry said: “Don’t touch my wife,” or words to that effect. I immediately stepped up to Mrs. Terry. She turned facing me to strike me with both open hands, and said: “You dirty hireling,” or “scrub, don’t you lay your hands on me.” As I attempted to take her by the arm to lead her out of the courtroom, Judge Terry threw himself immediately in front of me. I motioned to him again — perhaps touched his arm — or told him to stand by. As I did that, he struck me with his right hand a heavy blow.

HERRIN: Where did he strike you?

FRANKS: Right in the mouth, bringing out one of my front teeth. I immediately closed in on him and pushed him, and he attempted to draw a weapon. I pushed him with both my hands on his breast, and he fell back over a chair, the deputies and the citizens having hold of him pulling him down. She at the same time was striking me on the back. I think she had a parasol that she was hitting me with over the head. She resisted, kicked, whenever she got an opportunity, with her feet, and was scratching and resisting all that it was in her power to do. She struck me in the face a number of times. She scratched the skin off my face in a number of places.

HERRIN: Was she saying anything during all this time?

FRANKS: She was abusing the judges, Justice Field and Judge Sawyer, very bitterly. She called them “corrupt scoundrels,” and that she would kill them both; that this was a paid decision, and that I was a hireling paid by the Sharons to do their dirty work.

I placed Mrs. Terry in the inner office of the marshal’s office and returned to the courtroom to arrest Judge Terry. As I passed through the door to get there, I saw Deputy Taggart with a pistol, and heard him say, “If you come in here with that knife or if you attempt to use that knife I will blow your brains out.” After the knife was taken from his hand, Judge Terry was placed in my inner office with his wife. He was very abusive, calling Judge Sawyer “a corrupt son of a bitch,” and told me to “tell that old bald-headed son of a bitch, Field, that I want to get out of here and I want to go to lunch.”

NARRATOR 2: Regardless of all of the commotion, Justice Field continued to read the decision, making it clear that the jurisdiction of a federal court, once legally obtained, cannot be evaded by commencing another suit in state court.

CIRCUIT JUSTICE FIELD: We proceed to consider how far the judgment therein is affected, or should have been affected, if at all, by the judgment in the state court. William Sharon, being a citizen of Nevada, had a constitutional right to ask the decision of the federal court upon the case presented by him, and it would be a strange result if the defendant, who was summoned there, could, by any subsequent proceedings elsewhere, oust that court of its jurisdiction and rightful authority to decide the case.

The jurisdiction of the federal court having attached, the right of the plaintiff to prosecute his suit to a final determination there cannot be arrested, defeated, or impaired by any proceeding in a court of another jurisdiction. Any subsequent proceedings there are null and void, and will be so treated by the federal courts. This doctrine we hold to be incontrovertible. It is essential to any orderly and decent administration of justice, and to prevent an unseemly conflict of authority, which could ultimately be determined only by superiority of physical force on one side or the other.

NARRATOR 2: Justice Field reconvened the court in the afternoon to deal with the Terrys’ contempts. Field sentenced Sarah to thirty days in Alameda County jail, and sentenced Terry to six months in the same jail.

FRANKS: After the order was made committing him to six months for contempt, Judge Terry said, “Field thinks that when I get out he will be away; but I will meet him when he comes back next year, and it will not be a very pleasant meeting for him.”

THE SHOOTING OF TERRY AND WRIT OF HABEAS CORPUS TRIAL

NARRATOR 1: Because word reached Justice Field that Terry had made threats against him, a deputy U.S. marshal, David Neagle, was appointed to accompany Field, then age seventy-three, on his trips to California to sit on the Circuit Court. Neagle was born on Telegraph Hill in San Francisco and, although he was only 5 feet 4 inches — almost a foot shorter than Terry — he was previously the chief of police in Tombstone, Arizona, during the time that Wyatt Earp and Doc Holiday won the gunfight at the OK Corral. He was also the man who had pulled Terry’s Bowie knife from his hand in the Circuit Court following Sarah’s removal from the courtroom. In early August 1889, Field held Circuit Court in Los Angeles, after which he and Neagle boarded the train to San Francisco, to hold Circuit Court there.

In his subsequent habeas corpus trial, Marshal Neagle testified as to what happened when the train stopped for breakfast in the town of Lathrop (near Stockton), as elicited by U.S. Attorney Special Counsel William Herrin:

SPECIAL COUNSEL HERRIN: Go on and state the events of that journey home from Los Angeles.

DEPUTY U.S. MARSHAL NEAGLE: After leaving Los Angeles, I watched the stations pretty closely that night. We arrived at Fresno. I got off the train and went out on the platform. I saw Judge Terry and his wife coming along about the hind end of all the passengers. I immediately returned to the sleeper, and told Justice Field they had got on the train. He asked me who I meant by “they.” I told him “Judge Terry and his wife.” He said he hoped they would sleep well. I did not go to sleep no more.



U.S. MARSHAL
DAVID NEAGLE

HERRIN: What did you do at Lathrop?

NEAGLE: As soon as the train arrived, we were one of the first that got off the train — Justice Field and myself. I assisted him off and proceeded into the dining-room.

HERRIN: You say you assisted Judge Field off the train?

NEAGLE: Yes, sir. He is lame, and getting down the steps I took hold of his arm naturally to help him.

HERRIN: What size man was Judge Terry?

NEAGLE: I guess he must have been a man 6-foot-3 or -4, and weighed 240 or 250 pounds.

HERRIN: What size man is Justice Field?

NEAGLE: I would not judge him to be over 150 or 155 or 160 pounds. He is a man about 5-foot-8 or -9.

HERRIN: Did you go to the dining-room?

NEAGLE: Yes, sir; I proceeded into the dining-room and went to take our seats. We sat down for maybe a minute or so, when Judge Terry and his wife came in. Mrs. Terry looked around and as she saw Justice Field she turned right around and started out of that door very fast.

HERRIN: Did you notice any expression on her face?

NEAGLE: Yes; she had a very vindictive and mad look on her face.

HERRIN: What did Judge Terry do?

NEAGLE: Judge Terry proceeded on and took a seat. He sat there for as much as three or four minutes, when he rose and came down this way.

HERRIN: He came down the aisle between yourself and Mr. Justice Field?

NEAGLE: Yes, sir.

HERRIN: About how far from Justice Field?

NEAGLE: He must have been within two or three feet of his back. When he got to about this point he halted. Justice Field continued eating his breakfast. Judge Terry kind of gave him a side look.

HERRIN: Was Justice Field's attention drawn to Mr. Terry at all?

NEAGLE: No; he was eating at the time.

HERRIN: Judge Terry turned?

NEAGLE: Yes, sir; and looked around.

HERRIN: Towards whom?

NEAGLE: To Justice Field, and hauled off with his right hand that way and that way [Neagle illustrates how Terry hit Field] and hit him. The two blows came almost together.

HERRIN: With his right hand and left hand?

NEAGLE: Yes, sir; both blows striking him about the same time.

HERRIN: Where did they strike him?

NEAGLE: The first blow must have struck him here [Neagle points to side of face], and the other one hit him at the back of his head. I told him to stop that. Judge Terry turned around. His hand was turned 'round in this position.

HERRIN: That is, he had his fist clinched?

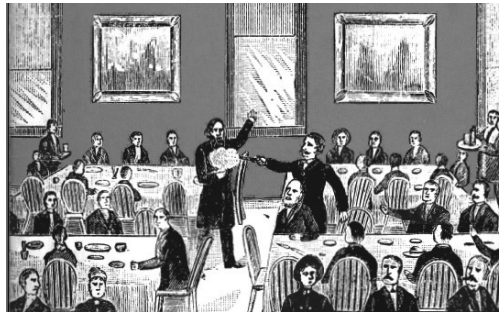
NEAGLE: Yes, sir.

HERRIN: Drawn back?

NEAGLE: Yes. I hollered "Stop that! Stop that!" and jumped between him and Justice Field. I said, "I am an officer." He seemed to recognize me at that point. He looked at me. His hand came right to his breast. It went a good deal quicker than I can explain it. He continued looking at me in a desperate manner, and his hand got there.

HERRIN: Where?

NEAGLE: To his left breast with his right hand. His hand got there and I raised my six-shooter like that, held it to him, and shot twice in rapid succession. He fell. I stood there for a second or two.



NEAGLE SHOOTING TERRY

HERRIN: What expression was there on the face of Judge Terry when you looked at him?

NEAGLE: The most desperate expression that ever I saw on a man's face, and I have seen a good many men in my time. It meant life or death to me or him.

HERRIN: From the motion you have described that Judge Terry made what did you believe?

NEAGLE: I believed if I waited another two seconds I should have been cut to pieces. I was within four feet of him.

HERRIN: Did you doubt the fact that he was then armed?

NEAGLE: No; I always knew — I was always satisfied that the man was armed. That has been his reputation ever since I can recollect of him.

HERRIN: What did the motion that Judge Terry made with his right hand indicate to you?

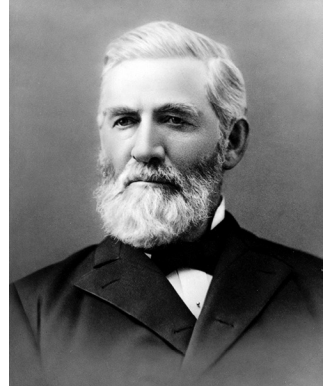
NEAGLE: That he would have had that knife out there within another second and a half and trying to cut my head off.

NARRATOR 2: Neagle surrendered to a local police officer in Lathrop and was taken to jail in Stockton, where he was charged with murder. Field proceeded to San Francisco where a *Chronicle* reporter found him in his room at the Palace Hotel “as calm as though the killing of a man at breakfast were an everyday occurrence.”

Field was by no means indifferent and most likely played a role in the preparation of a petition for a writ of habeas corpus directing the San Joaquin County sheriff to deliver Neagle to the jurisdiction of the federal court in San Francisco. The writ was issued by Circuit Judge Sawyer. A special train had been chartered by Neagle's protectors to take him to San Francisco. In the dead of night, at 3:30 a.m., the train pulled out of the deserted Stockton station.

The habeas trial proceedings, conducted by Judge Sawyer and a District Court judge, began on August 22, 1889 and lasted two weeks. Several witnesses testified, including Justice Field, who regularly attended the trial, sitting in the unoccupied jury box and frequently joining Judge Sawyer in chambers during recesses. On September 16, 1889, Judge Sawyer rendered his decision, in which he framed the issue thus:

CIRCUIT JUDGE SAWYER: The homicide in question, if an offense at all, is, it must be conceded, an offense under the laws of the state of California, and the state, only, can deal with it, as such, or in that aspect. It is not claimed to be an offense under the laws of the United States. But if the killing of Terry by Neagle, was an “act done . . . in pursuance of a law of the United States,” within the powers of the national government, then it is not, and it cannot be, an offense against the laws of the state of California, no matter what the statute of the state may be, the laws of the United States being the supreme law of the land. A state law, which contravenes a valid law of the United States, is, in the nature of things, necessarily void — a nullity.



U.S. CIRCUIT JUDGE
LORENZO SAWYER

NARRATOR 1: In determining whether Neagle acted “in pursuance of a law of the United States” when he killed Terry, Judge Sawyer asked two questions. First, was Neagle acting under a federal law and, second, if he was, was the killing of Terry in pursuance of that law. But there was no federal law that specifically authorized a U.S. marshal to protect a judge outside of the courtroom and, so the Sheriff of San Joaquin argued, because Terry was not killed in a courthouse, the State of California had jurisdiction over the matter. Judge Sawyer rejected this “geographical” notion of jurisdiction and, instead found that the federal law in question is one that can be implied in the power of the sovereign:

SAWYER: The power to keep the peace is a police power, and the United States have the power to keep the peace in matters affecting their sovereignty. There can be no doubt, then, that the jurisdiction of the United States is not affected, by reason of the place — the locality — where the homicide occurred.

The Constitution of the United States provides for a Supreme Court, with jurisdiction more extensive, in some particulars, than that conferred on any other national judicial tribunal. If the executive department of the government cannot protect one of these judges, while in the discharge of

his duty, from assassination, by dissatisfied suitors, on account of his judicial action, then it cannot protect any of them, and all the members of the court may be killed, and the court, itself, exterminated, and the laws of the nation by reason thereof, remain unadministered, and unexecuted.

NARRATOR 1: The second inquiry was whether the “the killing was necessary” for Neagle to discharge his duty of protecting Justice Field. After recounting the events leading to Terry’s death, Judge Sawyer had no trouble in finding that the homicide was justifiable. Nevertheless, Judge Sawyer addressed an “eastern law journal” that came to a different conclusion:

SAWYER: It is not for scholarly gentlemen of humane and peaceful instincts — gentlemen, who, in all probability, never in their lives, saw a desperate man of stalwart frame and great strength in murderous action — it is not for them sitting securely in their libraries, 3,000 miles away, looking backward over the scene, to determine the exact point of time, when a man in Neagle’s situation should fire at his assailant, in order to be justified by the law. It is not for them to say that the proper time had not yet come. To such, the proper time would never come. The homicide was, in our opinion, clearly justifiable in law, and in the forum of sound, practical common sense — commendable. This being so, and the act having been “done . . . in pursuance of a law of the United States,” as we have already seen, it cannot be an offense against, and the petitioner is not amenable to, the laws of the state. Let him be discharged.

NARRATOR 2: When Judge Sawyer concluded the reading of his opinion from the bench, Justice Field sprang to his feet to shake hands with Neagle and presented him with a gold watch engraved with the inscription:

Stephen J. Field to David Neagle, as a token of appreciation of his courage and fidelity to duty under circumstances of great peril at Lathrop, Cal. on the fourteenth day of August, 1889.

NARRATOR 1: The San Joaquin County sheriff, supported by the California attorney general, appealed to the U.S. Supreme Court, challenging Judge Sawyer’s decision that the State of California had no power to prosecute federal employees committing state crimes while acting within the scope of their federal duties. The Supreme Court deemed the matter significantly weighty to allow two days of oral argument. Zachariah Montgomery argued for the State of California.

ZACHARIAH MONTGOMERY: If the President has any such power . . . where does he get it? If the President has power, within the jurisdiction of the several states, to keep a bodyguard for every instrument of the federal government, he has power to place a marshal in the house of every American citizen in order to shield him from harm at the hands of his fellow citizens. And if it has come to this, what use have we for state government?"

NARRATOR 1: The U.S. Supreme Court issued its decision on April 14, 1890, with Field abstaining. The 6–2 majority led by Associate Justice Samuel Miller, turned around the question posed by the San Joaquin sheriff, quoting from a Supreme Court decision in an earlier case involving the reach of federal authority:

JUSTICE MILLER: Why do we have marshals at all, if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform, if they cannot use force? In executing the processes of the courts, must they call on the nearest constable for protection? Must they rely on him to use the requisite compulsion, and to keep the peace, while they are soliciting and entreating the parties and bystanders to allow the law to take its course? If we indulge in such impracticable views as these, we shall drive the national government out of the United States and relegate it to the District of Columbia. We shall bring it back to a condition of greater helplessness than that of the old confederation. It must execute its powers or it is no government."

NARRATOR 1: The majority agreed with this pragmatic approach:

MILLER: It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably. We do not believe that the government of the United States is thus inefficient, or that its Constitution and laws have left the high officers of the government so defenseless and unprotected.

NARRATOR 1: On this basis, the Court concluded that Article II, Section 3 of the Constitution, directing that the president "shall take care that the laws be faithfully executed," gave him ample implied power to authorize

federal marshals to protect federal judges. Justice Miller's opinion is considered to be one of the broadest statements of the power of the federal government to immunize its officers in the performance of their duties:

MILLER: The result at which we have arrived upon this examination is, that in the protection of the person and life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that without prompt action on his part the assault of Terry upon the judge would have ended in the death of the latter; that . . . he was justified in taking the life of Terry, as the only means of preventing the death of [Justice Field]; that in taking the life of Terry . . . he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California.

NARRATOR 1: The dissent was written by Associate Justice Lucius Quintus Cincinnatus Lamar, joined by Chief Justice Fuller. Justice Lamar had represented Mississippi in Congress but, upon the outbreak of the Civil War, he gave up his seat and joined the Confederate Army, later serving as Jefferson Davis' special emissary to Russia. After the war, he was elected a U.S. senator from Mississippi and served as secretary of the interior under Grover Cleveland who appointed him to the court. Given that background, he might be expected to be sensitive to the jurisdictional claims of individual states. Underlying the dissent is a concern about the effect of the decision "upon the autonomy of the States, in divesting them of what was once regarded as their exclusive jurisdiction over crimes committed within their own territory, against their own laws." The dissenters rejected the majority's expedient of implied constitutional powers. "The gravamen of this case is in the assertion that Neagle slew Terry in pursuance of a law of the United States. He who claims to have committed a homicide by authority must show the authority. The right claimed must be traced to legislation of Congress; else it cannot exist."

Nor were they impressed by the majority's reliance on that part of the United States Code that gives federal marshals and their deputies the same powers, in executing the laws of the United States, as sheriffs and their deputies have in executing state laws. The dissent pointed out that this statute only gave marshals powers to enforce *federal* laws and then asked:

JUSTICE LAMAR: If the act of Terry had resulted in the death of Mr. Justice Field, would the murder of him have been a crime against the United States? Would the government of the United States, with all the supreme powers of which we have heard so much in this discussion, have been competent to prosecute in its own tribunals the murder of its own Supreme Court justice? There can be but one answer. Murder is not an offence against the United States. The United States government being thus powerless to try and punish a man charged with murder, we are not prepared to affirm that it is omnipotent to discharge from trial and give immunity where he is accused of murder, unless an express statute of Congress is produced permitting such discharge.

NARRATOR 1: The dissent concluded that Marshal Neagle should be remanded to the custody of the sheriff of San Joaquin County, remarking that “we are the less reluctant to express this conclusion, because we cannot permit ourselves to doubt that the authorities of the State of California are competent and willing to do justice; and that even if [he] had been indicted, and had gone to trial upon this record, God and his country would have given him a good deliverance.”

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