

A Lucky Kansas Lawyer

*Stephen R. McAllister**

INTRODUCTION

The Editor-in-Chief of this volume of the Kansas Law Review asked me if I would consider writing about my experiences in public service in Kansas. Initially, I was not sure what I could say that might be worthy of publication or the possible attention of readers. But as I considered the request it dawned on me that I might have at least one contribution worth putting into the Kansas legal historical record—my service as the first and only State Solicitor for Kansas, a position which evolved into the position of Solicitor General. I have had two successors as Solicitor General and perhaps the position will become an institution that will remain a permanent part of the Attorney General’s office and Kansas government.

By mere happenstance, my colleague, friend, mentor, and dedicated Kansas legal historian, Distinguished Professor Michael H. Hoeflich separately had inquired about writing something on the first three U.S. Attorneys in Kansas, all of whom served while Kansas was a territory. Given my recent service as the U.S. Attorney for Kansas and my love of history, this generated a second idea which was to compare the experiences of those three pioneering Kansas public servants with my modern experience.

I. THE STORY OF A KANSAS STATE SOLICITOR AND SOLICITOR GENERAL

A. Attorney General Carla Stovall (01/09/1995 – 01/13/2003)

This story begins in 1996 when I was a relatively new assistant professor at KU. The Kansas Supreme Court struck down a state law commonly referred to as the “sex predator” statute, an enactment that permitted the involuntary civil commitment of certain sex offenders at the end of their prison terms for care and treatment if they were determined to be suffering from a “mental abnormality” that would make them a

continuing danger to the community.¹ The State of Washington was the first to enact such a law and Kansas followed suit shortly thereafter. But the Kansas Supreme Court was the first court to declare these laws unconstitutional as a matter of federal law.

My dean at the time, Mike Hoeflich, was at an event or dinner with a member of the Kansas House of Representatives and KU Law alumnus Mike O'Neal. Apparently, Representative O'Neal told the Dean that the Kansas Supreme Court recently had struck down the law as unconstitutional and the Dean volunteered a young faculty member who might be able to assist the legislature in revising the statute to make it constitutional. Next thing I knew I was invited to Topeka for a meeting at the Capitol with legislative leadership and the Attorney General of Kansas, Carla Stovall, and her Chief Deputy, John Campbell, to discuss how the statute might be amended to make it constitutional.

We sat around a big table and discussed ways to amend the statute, but I informed the group that there might be a better option than amending the statute: seek review of the Kansas Supreme Court decision in the U.S. Supreme Court. As a law clerk I had worked on a case that had some similarities to the issues in the Kansas case and there were several Justices—including my former boss, Justice Thomas—who might see the issues differently than the Kansas Supreme Court did. I encouraged legislative leadership and the Attorney General to consider litigation before legislation as their possible next step.

I was in my office at the law school later that afternoon when I got a phone call from Chief Deputy Campbell (a delightful fellow with a great sense of humor, unfortunately no longer with us), who immediately said, “well, professor, how would you like to write a cert petition?” That was the beginning of a years-long relationship with the Attorney General’s office of Carla Stovall and eventually the creation of the State Solicitor position. I wrote a cert petition in the case that became *Kansas v. Hendricks*,² as well as a motion to stay the Kansas Supreme Court’s judgment and mandate. The U.S. Supreme Court granted the motion and the petition, as well as the other side’s conditional cross-petition raising additional constitutional issues, and we were in for a ride—an entire

* Professor of Law, University of Kansas School of Law and proud Jayhawk. I want to thank especially KU law student Cassidy Bee, who was an outstanding research assistant and without whom the section about the three territorial era U.S. Attorneys would not have been possible. Any errors of course fall on me.

1. See generally KAN. STAT. ANN. § 59-29a01 (1994); *In re Hendricks*, 912 P.2d 129 (Kan. 1996).

2. 521 U.S. 346 (1997).

summer and early fall of merits briefing.

For several months, I was the primary Kansas brief-writer, signing as a “Special Assistant Attorney General.” The issues included whether the statute violated the substantive due process rights of individuals subject to such involuntary commitment because “mental abnormality” arguably was not “mental illness,” whether the statute violated equal protection principles, and whether the statute should be deemed criminal rather than civil in nature.

When it came time to prepare for oral arguments, the Attorney General decided she would argue the case, always a tricky point when one works for a state Attorney General. Attorneys General never write the briefs, but they do sometimes want to argue the cases. And, after all, they are the elected officials who take the blame or the credit for the outcomes. Because Attorney General Stovall was the elected official, I was a good soldier and threw myself into helping her prepare in the most thorough and professional ways possible, running her through the paces just like any seasoned Supreme Court advocate would prepare. To her credit, Attorney General Stovall prepared thoroughly and did very well at oral argument.³

When the Court decided *Kansas v. Hendricks* by a 5-4 vote in late June 1997, it was a big victory for the Attorney General and Kansas, and vindication of my advice the previous year to litigate rather than legislate. Further vindicating my original inclinations, Justice Thomas wrote the majority opinion. Justice Kennedy wrote a concurrence and Justice Breyer wrote for the dissenters. The *Hendricks* experience with an innovative sex offender law and the constitutional issues it raised coincided with contemporaneous interest in constitutional issues surrounding sex offender registration and community notification laws (commonly referred to as Megan’s Laws). This resulted in a series of academic articles motivated by my real-world litigation experience,⁴ a synergy that has

3. Notably, the day of the *Hendricks* oral argument (December 10, 1996) also was the day the Court announced its decision in the first case I ever argued at the Court, *O’Gilvie v. United States*, 519 U.S. 79 (1996) (argued October 9, 1996). I represented two children from Wichita whose mother had died from toxic shock syndrome and they (along with their father) had shared in a substantial punitive damages award against the defendant. A dispute then arose with the Internal Revenue Service over the taxability of punitive damages. My clients argued punitive damages were awarded “on account of personal injuries” and thus exempt from taxation but ultimately the IRS disagreed after changing its mind. The morning of the *Hendricks* oral argument the Supreme Court, in a 6-3 decision, sided with the IRS, but at least three Justices correctly read the statute. In any event, as I prepared to watch and assist Attorney General Stovall in the *Hendricks* oral argument, I was handed a defeat to digest and could not even look at the *O’Gilvie* opinions until later.

4. See, e.g., Stephen R. McAllister, *Sex Offenders and Mental Illness: A Lesson in Federalism and the Separation of Powers*, 4 PSYCH., PUB. POL’Y, & L. 268 (1998); Stephen R. McAllister, *Some*

continued throughout my advocacy and academic career.

One immediate post-*Hendricks* story was that the Attorney General was somewhere outside Kansas when the decision was announced (the Court does not tell anyone when any case will be decided). Looking for instant comments on the case, the media could not find the Attorney General and quickly descended on me at the law school in Green Hall. I effectively held my first and only press conference in the Rice Room on the fifth floor, an event I do not believe pleased the Attorney General, who was limited to taking phone calls from reporters who eventually located her. But thankfully she did not “fire” me for enjoying the spotlight briefly.

Following *Hendricks*, several states enacted such laws, but these civil commitment programs by no means became universal. They are expensive to operate and have not necessarily proven effective from a treatment perspective. Eventually, the federal government also adopted a similar program which gave me and Kansas an opportunity to write an amicus brief in the U.S. Supreme Court in a case that is an important Necessary and Proper Clause precedent.⁵ That said, as the years have passed, populations in these state programs have risen with few, if any, individuals ever released. Even among those few who have been released, some have reoffended and ended up in prison for the rest of their lives. For these and other reasons, I personally have come to doubt the wisdom and fairness of the programs—even if they remain constitutional.

Hendricks would not be the last of the sex offender civil commitment cases that would take us to the U.S. Supreme Court, nor sex offender program cases more generally for that matter. We filed perhaps the first amicus brief Kansas had ever filed in the U.S. Supreme Court in *Seling v. Young*,⁶ a case involving the Washington State sex offender civil commitment statute. This also began an era that continues to this day of Kansas taking the lead in filing multi-state amicus briefs in the U.S. Supreme Court, an effort that helped lead to the development of the State Solicitor and eventually Solicitor General positions.

A few years after *Hendricks*, the Kansas Supreme Court struck down a part of the Kansas sex offender civil commitment statute in *Kansas v. Crane*⁷ on federal constitutional grounds. By this point, however, I was

Reflections on the Constitutionality of Sex Offender Civil Commitment Laws, 50 U. KAN. L. REV. 1011 (2002); Stephen R. McAllister, “Neighbors Beware”: *The Constitutionality of Sex Offender Registration and Community Notification Laws*, 29 TEX. TECH. L. REV. 97 (1998).

5. *United States v. Comstock*, 560 U.S. 126 (2010). The case was decided during my time serving Attorney General Steve Six.

6. 531 U.S. 250 (2001).

7. 534 U.S. 407 (2002).

no longer filing Kansas briefs as a “Special Assistant Attorney General” because of a development between *Hendricks* and about the year 2000. There is a national group titled the National Association of Attorneys General, commonly referred to as NAAG, and jokingly retitled the National Association of Aspiring Governors. Attorney General Stovall became Vice-President of NAAG in 2000 or 2001, putting her in line for a year as the President. But when her predecessor resigned early, she ended up with a presidential term of approximately eighteen months.

NAAG has a big annual meeting of all the Attorneys General at the end of June that has for many years included a tag-along meeting of state Solicitors General and appellate chiefs. One focus of NAAG for many years through the tireless efforts of the incomparable Dan Schweitzer is improving the caliber of U.S. Supreme Court advocacy by the states. NAAG has numerous ways of accomplishing this goal, but one is to reward and recognize excellent advocacy by presenting “Best Brief” awards at the annual meeting for the best state briefs filed in the U.S. Supreme Court during the past year. When my good friend and clerk colleague, Jeff Sutton (then State Solicitor of Ohio⁸) kept winning best brief awards for Ohio, Attorney General Stovall decided that Kansas needed to be on the stage too.

I got a promotion from “Special Assistant Attorney General” to “State Solicitor” with an order to write and file cert petitions and amicus briefs in the U.S. Supreme Court to win best brief awards. But Chief Deputy Campbell wryly told me that I would not be “Solicitor General” because there was only one “General” in the office. In any event, over the next couple of years Kansas won two NAAG Best Brief awards, one for a cert petition and one for a merits brief.

While I served as Attorney General Stovall’s State Solicitor she and I did have a minor tussle at one point over oral arguments. In the fall of 2001, Kansas had two cases that had been granted on the merits and were set to be argued at the U.S. Supreme Court. One, *Kansas v. Crane*,⁹ was a follow up to *Kansas v. Hendricks* and presented a constitutional issue regarding the sex offender civil commitment statute. That case was scheduled for late October. The other case, *McKune v. Lile*,¹⁰ involved a Kansas prison program that sex offenders could participate in and earn

8. He is now Chief Judge of the United States Court of Appeals for the Sixth Circuit, with chambers in Columbus, Ohio.

9. 534 U.S. 407 (2002).

10. 536 U.S. 24 (2002).

privileges. But to participate they had to accept responsibility for their offenses. Lile refused, claiming he was innocent, and he did not receive certain prison privileges as a result. He argued that conditioning the privileges on essentially admitting to a crime he claimed he did not commit was coercing him to confess in violation of the Fifth Amendment.¹¹ *McKune v. Lile* was scheduled for oral argument in late November 2001.

In early October, both cases had been scheduled, but there remained a merits reply brief to be drafted and filed in *McKune v. Lile*. Chief Deputy Campbell called me, and with reluctance, informed me that the Attorney General was thinking that she could do both oral arguments since they would be about a month apart. I asked Chief Deputy Campbell to inform the Attorney General that if she chose to do both arguments it was likely that I would not have the time to draft a reply brief in the *Lile* case. He said he would convey the message. The next day he called me back and said, “the Attorney General would be *pleased* if you would argue the *Lile* case.”

McKune v. Lile turned out to be one of my proudest victories—one I have described as winning by a vote of four-and-five-eighths to four-and-three-eighths. There were four solid votes for Kansas, and four solid votes for Lile, with Justice O’Connor as the swing vote who grudgingly gave the nod to Kansas with caveats and cautions. It did not help my cause that at oral argument a young Assistant to the U.S. Solicitor General, Greg Garre (who later would become Solicitor General near the end of the George W. Bush administration and remains a good friend to this day), although supporting Kansas in the case, kept conceding that the Federal Bureau of Prisons did not run its sex offender treatment program the way Kansas did.¹² Be careful of your friends.

B. Attorney General Phill Kline (1/6/2003 – 1/8/2007)

My first potential opportunity to be the “Solicitor General” foundered for political reasons. When Phill Kline was elected Attorney General after

11. The Tenth Circuit agreed. See generally *Lile v. McKune*, 224 F.3d 1175 (10th Cir. 2000). Notably, Appellant Lile was represented by one of my former stand-out moot court students, Matt Wiltanger. I was at the Tenth Circuit for another case the day Matt argued *Lile* and watched the argument but had not been involved in the case up to that point. After the Tenth Circuit ruled in Lile’s favor, I drafted the cert petition and the Supreme Court granted cert, so Matt and I got to face off, former coach versus former student, in one of the most fun experiences of my professional career.

12. “The Federal Government doesn’t apply the same incentive schemes that the State of Kansas does for participation.” Transcript of Oral Argument at 16, *McKune v. Lile*, 534 U.S. 407 (2002) (No. 00-1187). “There’s no—the Federal system currently doesn’t employ the same earnable privilege scheme that the Kansas prison does.” *Id.* at 18.

Carla Stovall declined to run again, Attorney General Kline asked me to serve as his Solicitor General. At that time, I was the Dean of the KU Law School (I started in 2000). The challenge with Attorney General Kline was that he was very mission-focused, and his primary mission was anti-abortion laws and litigation. This was quite different from Attorney General Stovall. Attorney General Kline quickly became a magnet for controversy and he fairly quickly became at odds with the Kansas Supreme Court.

I found it difficult to reconcile working for the Attorney General and serving my law school, alumni, and students as their Dean. As Dean, I represented constituents across the political spectrum, and my efforts to work with the Attorney General's office were perceived as partisan—even though I never approached them that way nor intended to work in that fashion. For the good of the law school, I reluctantly concluded that I could not continue in any capacity under Attorney General Kline while Dean. This decision cost me a U.S. Supreme Court oral argument, in another case for Kansas.

The Kansas Supreme Court had struck down the Kansas death penalty statute in a case called *State v. Marsh*,¹³ holding the law violated the U.S. Constitution. The Kansas law allowed the death penalty to be imposed if the aggravating factors supporting a death sentence were equal to the mitigating circumstances weighing against a death sentence (i.e., equipoise or a “tie” goes to the state).¹⁴ Attorney General Kline decided to argue the *Marsh* appeal in the U.S. Supreme Court, but he wanted someone to help him prepare and asked me. The trade was that if I did so, he would have me argue a Kansas case involving state taxation on Indian lands that the Court also had granted. But I could not do it.

Attorney General Kline ended up arguing *Kansas v. Marsh* twice because the first time the Court only had eight Justices and split 4-4 on the outcome. The Court ordered re-argument after Justice Alito was seated on the Court. The second time the Court reversed the Kansas Supreme Court.¹⁵ In the meantime, one of my mentors, Ted Olson, former U.S. Solicitor General under George W. Bush, and a partner at my first law firm, Gibson Dunn & Crutcher (in its Washington D.C. office), argued and won the state taxation case, *Wagnon v. Prairie Band Potawatomi Nation*.¹⁶ I strongly suspect Ted got paid a lot more than I would have to argue that

13. 102 P.3d 445 (Kan. 2004).

14. KAN. STAT. ANN. § 21-4625 (repealed by 2010 Kan. Sess. Laws ch. 136, § 307).

15. *Kansas v. Marsh*, 548 U.S. 163 (2006).

16. 546 U.S. 95 (2005).

case.

I did, however, end up arguing one case ostensibly for Attorney General Kline. I finished my stint as Dean of KU Law in August 2005 and was again free to become a legal advocate in the courtroom. In early 2006, I was hired as Legislative Counsel for the Kansas Legislature, largely because of pending school finance litigation. I worked with the Legislative Coordinating Council to file an amicus curiae brief on behalf of the legislature, and we sought argument time at the Court. But as an amicus curiae, the Court would not grant us oral argument time, so the only real option was to be designated a Special Assistant Attorney General by Attorney General Kline and to split “the State’s” oral argument time with other counsel for the State. Attorney General Kline agreed to take those steps, and once again, I was a Special Assistant Attorney General for one case and one oral argument.



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In *Montoy*, I had the privilege of arguing for Kansas with Alok Ahuja (now on the Missouri Court of Appeals, Western District and who was a law clerk colleague of mine on the U.S. Court of Appeals for the Seventh

17. Scott Rothchild, *Sides spar over school finance litigation*, LAWRENCE J.-WORLD (June 23, 2006), https://www2.ljworld.com/news/2006/jun/23/sides_spar_over_school_finance/.

Circuit in Chicago in 1988–1989) and Dan Biles (now on the Kansas Supreme Court), who was arguing for the State Board of Education in what proved to be the final round of that litigation.¹⁸ For better or worse, I was introduced to school finance litigation, a topic with which I would become all too familiar over the next decade. My tenure as Legislative Counsel, however, was short—lasting about a year. Trying to represent a body of 165 members, or even the leadership of that body, is a daunting task. It quickly became clear to me that serving as Legislative Counsel resulted in more headaches than rewards, and the next election brought a new opportunity.

C. Attorney General Paul Morrison (1/8/2007 – 1/31/2008)

In the November 2006 election, Johnson County District Attorney Paul Morrison defeated Attorney General Kline and became the Attorney General-Elect of Kansas. In early 2007, one of his assistant AGs, a great friend, and frequent collaborator of mine (later to work with me in the U.S. Attorney’s office), Jared Maag, reached out to me and inquired whether I might be interested in returning to a role with the Attorney General’s office.

At its core, my work with that office had allowed me to be a public servant to Kansas and its citizens. I never desired nor sought to be partisan or political. I am a student of the law and was willing to defend laws I believed had reasonable bases in constitutional doctrine as expressing the will of the people. But I never wanted to serve a political agenda or the personal goals of individual politicians or elected officials. The rule of law matters.

When I met with Attorney General Morrison—whom I had never met before—he asked me if I would serve as his Solicitor General. I asked if he was sure about that title, pointing out that one of his predecessors had insisted there was “only one General” in the office. He laughed and said, “No, I’m sure.” I accepted, and in 2007 became the first Solicitor General of Kansas.

Attorney General Morrison’s tenure was short. But during that tenure, we began building the foundation of a Kansas Solicitor General’s office that I hope and believe will last. Among other things, we formalized the “SG Unit” within the office, turning the operation into a true group effort. We began designating attorneys as part of the “SG” team as we started ramping up our efforts to have Kansas lead multi-state amicus brief filings

18. *Montoy v. State*, 138 P.3d 755 (Kan. 2006).

in the U.S. Supreme Court and watching for cases in which we might file our own cert petitions to further Kansas cases in the U.S. Supreme Court.

A notable example of our early amicus briefing efforts was the brief Kansas filed in *Danforth v. Minnesota*¹⁹ which, unusually, supported neither party, but made an argument no party or other amicus offered on an important question: whether the retroactivity rules the U.S. Supreme Court had announced for applying its decisions in *federal* habeas proceedings were binding on state courts in *state* post-conviction proceedings. The Kansas brief argued that state post-conviction remedies are a matter of grace—not federal right—and therefore states alone determine the rules in such proceedings, not the U.S. Constitution.²⁰ It was an effort to bring a distinct perspective to the mix on behalf of some States.

D. Attorney General Steve Six (1/31/2008 – 1/10/2011)

Paul Morrison’s successor, Attorney General Steve Six, was appointed by Governor Sebelius, and he asked me to continue in the Solicitor General role. Attorney General Six and I were friends and had worked together on a U.S. Supreme Court case early in my KU Law career and as part of his private practice. We had a comfortable relationship from the start. During Attorney General Six’s tenure, the SG Unit had a chance to shine by participating in two Supreme Court merits cases and filing several multi-state amicus briefs, including two that landed almost all fifty states on board.

In *Van de Kamp v. Goldstein*,²¹ trial lawyers failed to disclose to a murder defendant evidence that a key witness against him had received favorable treatment from the government in exchange for testimony against the defendant—a “*Giglio*” violation.²² The defendant eventually sued under 42 U.S.C. § 1983,²³ but he did not sue the prosecutors who withheld the impeachment evidence at trial because under well-settled precedent they had absolute immunity for trial decisions and could not be

19. 552 U.S. 264, 266 (2008).

20. Brief of Kansas as Amici Curiae in Support of Neither Party, *Danforth v. Minnesota*, 552 U.S. 264 (2008) (No. 06-8273).

21. 555 U.S. 335 (2009).

22. *Id.* at 339. See *Giglio v. United States*, 405 U.S. 150 (1972) (holding that it violates due process for the government to withhold from the defense material impeachment evidence of witnesses who testify on the government’s behalf).

23. This Reconstruction era statute creates a cause of action for individuals whose federal rights have been violated by persons acting under color of state law.

held civilly liable.²⁴ Instead, he sued their supervisors, arguing they had failed to adopt policies that would prevent *Giglio* violations, had failed to train the trial prosecutors properly, and in general had failed in their supervision of the trial prosecutors. The Ninth Circuit held the supervisory prosecutors could only assert qualified immunity, not absolute immunity, because such functions were “administrative” and not “prosecutorial” in nature.

Kansas took the lead on a multi-state amicus brief supporting the supervisory prosecutors and arguing for absolute immunity. Now, think about it, who are the ultimate “supervisory” prosecutors in almost every state? Attorneys General. And would they prefer absolute over qualified immunity if they are sued for the alleged misconduct of their line prosecutors? Not a difficult question to answer. With a powerful amicus brief arguing that the Ninth Circuit decision was fundamentally wrong in several respects, the Kansas brief attracted a total of forty-nine states and the District of Columbia. Only one state declined to join. It was a compelling demonstration to the Supreme Court of how important the issue was to the Attorneys General and other supervisory prosecutors, and the closest we got to having all fifty states on an amicus brief.

I had two merits case experiences with Attorney General Six. The first was in *Kansas v. Colorado*,²⁵ a decade-plus long dispute with Colorado over the Arkansas River and its water. Because it was an original jurisdiction case, meaning it was filed directly in the Supreme Court and not as an appeal, we dealt with special rules and procedures. By the time Attorney General Six took office, the case was wrapping up. Kansas had in many respects prevailed and won a determination that Colorado had violated the Compact that governed the sharing of Arkansas River water. As a result, Kansas was entitled to recover “costs,” but a dispute arose as to whether costs included the millions of dollars in expert witness fees Kansas had incurred during years of litigation.²⁶ Kansas argued yes and Colorado opposed.

By the time Attorney General Six inherited the case, Kansas had filed an opening brief, and Colorado had responded several months previously. And the filing of only two briefs was the tradition in original cases at that time, even though in any appellate case the party seeking review (here, Kansas challenging the Special Master’s recommendation that expert

24. *Van de Kamp*, 555 U.S. at 340. *See also* *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (“We hold only that in initiating a prosecution and in presenting the State’s case, the prosecutor is immune from a civil suit for damages under § 1983.”).

25. 556 U.S. 98 (2009).

26. *Id.* at 100–01.

witness fees are not included as costs) would as a matter of course be permitted to file a reply brief. Attorney General Six decided he would argue the case for Kansas and, as he began to look at it, he asked me if Kansas could file a reply which resulted in our first adventure.

Because this was an original jurisdiction case, there are virtually no written Supreme Court rules about procedure. I consulted the Clerk's Office (always an excellent place to go with questions about the Court's procedures) and got some advice, including that a reply was "not prohibited" but would require a motion for permission to file that should be accompanied by the complete, printed brief. Plus, there were no guarantees, not least because there were no rules and we would be asking to file well outside the time allowed for a reply brief in an appellate case.²⁷ So what to do? The Attorney General said file so I began drafting.

We drafted a brief arguing, most notably, that Congress lacked the authority under the explicit text of Article III to regulate the Court's procedures in original jurisdiction cases. Article III pointedly acknowledges that the Court's appellate jurisdiction is subject to regulation by Congress²⁸ but has no similar provision with respect to original jurisdiction. Thus, although Colorado argued a federal statute defined "costs" to exclude expert witness fees, Kansas argued the statute could not control in original jurisdiction cases.²⁹ We filed our motion and forty copies of the printed reply brief. The Court denied the motion for permission to file but kept the briefs.

Oral argument was scheduled for right after Thanksgiving in 2008. Attorney General Six and I traveled to Washington on the Saturday after Thanksgiving, missing one of the all-time great KU football games, when Kerry Meier caught the last-second touchdown pass from Todd Reesing in the snow at Arrowhead Stadium to defeat Mizzou. But sacrifices had to be made. Attorney General Six argued the case against his counterpart from Colorado, so it was Attorney General versus Attorney General.

27. See Stephen R. McAllister, *Ask The State Solicitor General: Can The State File A "Reply" Brief When It Takes An Exception In An Original Jurisdiction Case In The Supreme Court Of The United States?*, 29 REV. LITIG. 538 (2010).

28. U.S. CONST. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have *original* Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have *appellate* Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make.*") (emphasis added). The textual argument is that the sentence granting original jurisdiction is silent as to any power of Congress to regulate such jurisdiction, while the sentence granting appellate jurisdiction explicitly provides for the power of Congress to regulate the latter type of jurisdiction, thus making a distinction between the two.

29. 556 U.S. at 101–02.

The Court later ruled against Kansas, holding—without deciding whether it was required to—that it would apply the federal statute that excluded expert witness fees from “costs” as a guideline.³⁰ Notably, however, the Chief Justice wrote (and Justice Souter joined) a concurring opinion in which he embraced the Kansas argument that Article III does not give Congress the power to regulate the Court’s original jurisdiction procedures.³¹ A Pyrrhic victory perhaps, but one that resulted in three articles for me. First, I wrote an article on that question: whether Article III precludes Congress from regulating the Court’s original jurisdiction.³² That article caused the authors of “The Bible” of Supreme Court practice to engage me on the topic and express doubt about the correctness of the Chief Justice’s and my answer.³³ I then offered a rebuttal of sorts.³⁴ And, in researching the first article I discovered a fascinating case decided by Chief Justice Taney on the eve of the Civil War that resulted in an unrelated article, a story I thought worth telling.³⁵

My service with the Attorney General’s office, as State Solicitor and as Solicitor General, has complemented and been synergistic with my work as an academic and professor at the law school. Likely well more than half my articles find their idea in cases and issues I encountered in the real world of constitutional litigation. The casebook of which I am a co-author, now in its third edition, is possible only because of my years learning, exploring, and litigating state constitutional law.³⁶

My other merits case experience under Attorney General Six was memorable in different ways. In *Kansas v. Ventris*,³⁷ a defendant being held pretrial had conversations with a jailhouse informant the government had placed in the jail precisely to talk to the defendant. Doing that, however, after the defendant had been charged and had counsel violated

30. *Id.* at 103.

31. *Id.* at 110 (Roberts, C.J., concurring).

32. See Stephen R. McAllister, *Can Congress Create Procedures For The Supreme Court’s Original Jurisdiction Cases?*, 12 GREEN BAG 2D 281 (2009).

33. STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, SUPREME COURT PRACTICE 620 n.5 (10th ed. 2013) (“Although Chief Justice Roberts’ view has been endorsed by Professor McAllister . . . there is substantial reason to doubt it.”) (citations omitted) (proceeding to articulate arguments).

34. See Stephen R. McAllister, *Congress and Procedures for the Supreme Court’s Original Jurisdiction Cases—Revisiting the Question*, 18 GREEN BAG 2D 49 (2014).

35. See Stephen R. McAllister, *A Marbury v. Madison Moment on the Eve of the Civil War: Chief Judge Roger Taney and the Kentucky v. Dennison Case*, 14 GREEN BAG 2D 405 (2011).

36. JEFFREY S. SUTTON, RANDY J. HOLLAND, STEPHEN R. McALLISTER & JEFFREY M. SHAMAN, STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE (3d ed. 2020).

37. 556 U.S. 586 (2009).

the Sixth Amendment right to counsel. The issue in *Ventris* was the scope of the exclusionary rule.³⁸ The informant's testimony could not be used in the state's case-in-chief, but when Ventris testified in his defense, could the state use the informant's testimony to impeach Ventris? A majority of the Kansas Supreme Court said no and that question went to the U.S. Supreme Court, with Kansas arguing the informant could be used for impeachment.³⁹

The case was scheduled for argument the day after President Obama's First Inauguration, a historic event and time in Washington. I arrived in Washington on inauguration morning with three family members in tow, a bitterly cold day. Our hotel was in Arlington near the Key Bridge. But because of the inauguration access to the District was cut off and restricted. We ended up being dropped off by our taxi on Highway 66 at the bottom of a ramp and walking from there to the hotel dragging our luggage along the road.

The oral argument the next day was I believe the quietest one I have experienced at the Court. I was up first and got some questions, but not a barrage and nothing too difficult. The United States was supporting Kansas as an amicus and the Assistant Solicitor General had ten minutes. She made her opening remarks and ended without a single question or interruption. She then almost glared at the Justices as if demanding questions. Finally, someone moved and started speaking. I have always wondered if there was inauguration-hangover that morning. In any event, we won *Ventris*.

The final case under Attorney General Six I will mention involves the Phelps family from Topeka. At the time, they were at the height of their funeral protest activities. Many states and the federal government had enacted laws to try and limit their intrusion on and disruption of funerals.⁴⁰ One deceased Marine's father sued them in Maryland after they protested his son's funeral. The case went to trial and a jury awarded the father millions of dollars in damages for intentional infliction of emotional distress. The Phelpses took the case to the Supreme Court, arguing their activities were protected by the First Amendment and could not subject them to civil liability.⁴¹

Kansas took the lead on a multi-state amicus brief, supporting the

38. *Id.* at 593.

39. *Id.* at 589.

40. See Stephen R. McAllister, *Funeral Picketing Laws And Free Speech*, 55 U. KAN. L. REV. 575 (2007); Stephen R. McAllister, *Would Other Countries Protect the Phelps' Funeral Picketing?*, 2010 CARDOZO L. REV. DE NOVO 408 (2010).

41. *Snyder v. Phelps*, 562 U.S. 443, 450–51 (2011).

Marine's father. Frankly, it was an uphill fight because the First Amendment principles are strong and the Phelps followed the rules in the sense that they stayed on public sidewalks and public spaces when they protested. They were unpleasant and their messages horrific, but they were never violent, they tended to obey law enforcement directives, and they avoided trespassing on private property. This time the Kansas amicus brief attracted forty-eight states plus the District of Columbia. But the Court ruled eight-to-one in favor of the Phelps, holding that the First Amendment shielded them from liability because they were on public property and their signs expressed opinions on matters of public concern, however misguided and hateful those opinions might be.⁴² Only Justice Alito would not have protected their actions.⁴³

E. Attorney General Derek Schmidt (1/10/2011 – 1/25/2018)

The 2010 election would result in me working with my fifth Attorney General. In that election, State Senator Derek Schmidt defeated Attorney General Six. But during the period between the election and new officers taking over, I was tapped for one of the greatest honors and most entertaining cases of my career. Occasionally, the Supreme Court finds itself with a case in which it has granted certiorari but for some reason the respondent who won below no longer wants to defend the lower court's judgment. Sometimes a "confession of error" will cause the Court to vacate and remand in that situation. But increasingly the Court has appointed an amicus curia to defend the judgment below, resulting in an odd three-way argument, with both petitioner and respondent attacking the lower court judgment while an independent amicus curia—with no real client except arguably the lower court—does their best to defend the judgment. It is rarely a fair fight but maintains an adversarial process.

I got that call in the fall of 2010 from Justice Alito. The Court had a case, *Bond v. United States*,⁴⁴ in which a woman had been convicted of using a "chemical weapon" to assault another person when she put chemical powder on a romantic rival's car door, mailbox, and front door-knob. The defendant was sentenced to several years in prison but argued the statute exceeded Congress's power because it was based on an international treaty banning chemical weapons and intruded on the states'

42. *Id.* at 443.

43. *Id.* at 463 (Alito, J., dissenting).

44. 564 U.S. 211 (2011).

reserved powers under the Tenth Amendment. The Third Circuit held the defendant lacked “standing” to bring a Tenth Amendment challenge to the federal statute because she was not a state, a state entity, or a state official.⁴⁵

Mrs. Bond’s Supreme Court lawyer, former U.S. Solicitor General Paul Clement filed a compelling cert petition pointing out the problems with the Third Circuit’s reasoning. At that point the U.S. Solicitor General’s office declined to defend the Third Circuit’s reasoning as well, declaring it erroneous, but arguing that there are certain constitutional claims that only states or state officials can bring. Rather than vacate the case, the Court tasked Justice Alito as the Circuit Justice for the Third Circuit with finding an amicus to defend the judgment. I got the call and gladly accepted the unremunerated honor of taking on two heavyweights and friends – Paul Clement for Mrs. Bond and Deputy Solicitor General Michael Dreeben for the United States.

With the assistance of two friends who generously volunteered their time and effort, I filed a brief working with what we had to defend the Third Circuit’s ruling. The Court then had to decide how the case would be argued, with three lawyers but the United States not defending its own victory. The decision was that each of us would receive a third of the time, or twenty minutes each, with Clement going first, me (McAllister) second, and Dreeben last. I will never forget that oral argument, both because of the fun of being there with great colleagues and good friends (Paul Clement has joined me to see the Jayhawks beat Mizzou in Allen Fieldhouse) and because the Justices pulled no punches with me. At one point Justice Sotomayor was pummeling me and asked me something like, “Mr. McAllister, how can you argue . . . ?” To which I wanted to respond, but did not, “because you [the Court] ordered me to do so.”

The most lasting rewards of *Bond v. United States* are the great story it makes and a sentence in the majority opinion written by Justice Kennedy (reversing the Third Circuit, 9-0): “Stephen McAllister, a member of the bar of this Court, filed an *amicus* brief and presented an oral argument that have been of considerable assistance to the Court.”⁴⁶ The result in *Bond* always makes me think of an anecdote Chief Justice Roberts sometimes shares about his days as a Supreme Court advocate. Once, after learning he lost a case 9-0 at the Court, he informed the client who asked, “but how can we lose 9-0?” To which the Chief responded, “because there are only nine Justices.”

45. *Id.* at 215.

46. *Id.* at 216.

One interesting aspect of working for Attorney General Schmidt was that he brought my old friend, John Campbell, back to the office (John had departed when Attorney General Stovall departed). I do not believe John was a fan of the “SG Unit” concept and initially there was some hostility to the idea, and questions were raised whether we needed multiple people or a designated group. Fortunately, Attorney General Schmidt did not make any hasty decisions and I trust that he soon saw the value of the SG work. We continued to file important multi-state amicus briefs,⁴⁷ and soon the Court granted cert in a Kansas death penalty case that the Attorney General himself would argue and Kansas would win.⁴⁸

I am confident that seeing the professionalism of those involved in the process of preparing for a Supreme Court oral argument, including the folks at NAAG, and the dedication and talent of SGs across the country won over the Attorney General. Soon he was a fan and supporter of the SG Unit. Over his time in office, he in fact has built it both in size and depth, recruiting even from outside Kansas and seeking former federal judicial law clerks, a typical model in many state SG offices.

I argued at the U.S. Supreme Court three times as Solicitor General under Attorney General Schmidt. The first time was in *Kansas v. Nebraska & Colorado*,⁴⁹ another long-running interstate water dispute, this one about the Republican River. There were several issues in play for this argument and the argument required a fair amount of scientific knowledge about water, especially below ground. What I knew and held for the sixty minutes of the argument was substantial, but it was gone like a burst dam as soon as the argument ended.

The argument itself had a delightful moment when two Justices started arguing over a hypothetical while I watched from the podium. Nebraska argued the parties misunderstood part of the deal in the Compact and that it should be reformed because of that “mutual mistake.” Kansas opposed that request, arguing the parties intended to adopt the provision in the Compact, mistake or not. The question boiled down to the nature of the

47. For example, Kansas took the lead in *Filarsky v. Delia*, 566 U.S. 377 (2012), which raised the question whether a private lawyer retained by a city to investigate a city firefighter could claim qualified immunity when later sued under 42 U.S.C. §1983 by the firefighter. The Ninth Circuit held that because the lawyer was a private actor and not a city employee, he could not claim immunity. The Kansas amicus argued that result was wrong and pointed out that Attorneys General regularly hire and rely upon private counsel to provide a variety of legal services. Denying them immunity when performing state functions would undermine all that positive activity. The Supreme Court reversed the Ninth Circuit.

48. *Kansas v. Cheever*, 571 U.S. 87 (2013).

49. 574 U.S. 445 (2015).

mistake. Justice Breyer started asking me wasn't it like buying a barn with the mutual understanding that there were 17 cows inside when instead there were only horses.⁵⁰ As I argued our situation was different, Justice Scalia with a frown (and they sat right beside each other) jumped in and said, the parallel is "not buying horses in a barn, but buying whatever animals are in the barn. Although both parties believed it was a mix, it turns out that was wrong. But the deal was the deal, right?"⁵¹ As I began to agree with him, he said "They were rolling the dice."⁵² And I agreed that was "fundamentally the Kansas position."⁵³

That same year I finally accomplished something I had tried a handful of times without succeeding. When the states file an amicus brief in a Supreme Court case, they do have the option of requesting oral argument time as an amicus. As a rule, the Court is loathe to have more than three lawyers split the traditional one hour of oral argument time, and the United States presumptively argues as an amicus if it has filed a brief. So, if the United States and the states both file an amicus brief, the states will not get argument time. Rarely, if the states file on the opposite side of the United States the Court has permitted them argument time, but that means a four-lawyer split of the time—which the Court is reluctant to do.

In *OneOK, Inc. v. Learjet, Inc.*,⁵⁴ native Kansan and Stanford Supreme Court Clinic star Jeff Fisher was handling a state antitrust lawsuit in the Ninth Circuit for the plaintiffs with the defendants arguing that the federal Natural Gas Act preempted the plaintiffs' state antitrust law claims. The Ninth Circuit disagreed and allowed the claims to proceed. The United States as an amicus supported the defendants (represented by former Acting Solicitor General Neal Katyal), arguing federal law preempted the plaintiffs' claims. Jeff represented the plaintiffs and I took the lead on a multi-state amicus brief arguing that states long had played a role in enforcing their state antitrust laws without federal preemption, including in the energy sector. Jeff appreciated the support and encouraged me to seek oral argument time as an amicus, and this time the Court granted my request. We squared off against Katyal and the United States at oral argument and won the case.

My final argument at the Supreme Court for Kansas was in *Kansas v.*

50. Transcript of Oral Argument, *Kansas v. Nebraska*, 574 U.S. 445 (2015) (No. 126), 2014 WL 5398224, at *7–8.

51. *Id.* at *9.

52. *Id.*

53. *Id.* at *10.

54. 575 U.S. 373 (2015).

Carr,⁵⁵ involving the notorious Carr brothers from Wichita and their killing spree many years ago. They argued their capital sentencing proceeding should not have been conducted jointly and a majority of the Kansas Supreme Court agreed, holding that doing so violated the Eighth Amendment. The case was argued the same day as *Kansas v. Gleason*,⁵⁶ another Kansas death penalty case. I argued *Carr* and the Attorney General argued *Gleason*. Arguing *Carr* was not logically or legally the most difficult case, but from a victim standpoint it is the most difficult case I have ever handled. I simply cannot fathom what those families have endured. I cringed and lowered my head during oral argument when Justice Scalia read the facts of the crimes to the Carrs' counsel to make a point, because I knew there were victims' family members in the courtroom hearing that description read aloud. As it turned out, *Kansas v. Carr* was Justice Scalia's final majority opinion (reversing the Kansas Supreme Court) before he died.

The final cert petition I took the lead for Kansas on as Solicitor General was in three consolidated identity theft cases that became known as *Kansas v. Garcia*.⁵⁷ State prosecutions resulted in convictions for identity theft but a divided Kansas Supreme Court held that the prosecutions were preempted by the federal Immigration and Control Reform Act of 1986, either explicitly or implicitly, because information used to prosecute the state charges was included on the federal I-9 form utilized under ICRA procedures. The cert petition argued there was no preemption and that the Kansas Supreme Court's decision would severely hamper state identity theft prosecutions. The Supreme Court granted cert and reversed, but I had become U.S. Attorney by the time the Court granted cert, so I was only involved in drafting the petition.

That said, once the case was granted and being briefed on the merits, the United States decided to file an amicus brief supporting Kansas, agreeing that federal law did not preempt the state prosecutions. As U.S. Attorney for Kansas, I asked the U.S. Solicitor General whether he would consider permitting me to make the ten-minute oral argument for the United States given that I had drafted the cert petition, knew the cases well, and the cases after all were from Kansas. Not surprisingly, he rejected my request, stating that if he let me argue then "all the U.S. Attorneys" would want to argue a case. I believe I had a unique claim to argument in *Garcia* but was hardly shocked by the Solicitor General's response given the

55. 577 U.S. 108 (2016).

56. 575 U.S. 934 (2015).

57. 140 S. Ct. 791 (2020).

limited number of arguments available at the Court and the way that office zealously guards oral argument opportunities for its own small band of attorneys.

I would be remiss in focusing solely on the U.S. Supreme Court cases in my Solicitor General role, especially during my time serving under Attorney General Schmidt. I already have mentioned arguing in the *Montoy* school finance litigation in the final year of Attorney General Kline's tenure. The education cases effectively have become solely about state constitutional law. And they returned with a vengeance under Attorney General Schmidt, providing several opportunities for the most challenging and exhaustive oral arguments in which I have ever participated.

In a case styled *Gannon v. State*,⁵⁸ plaintiffs sued over the funding of public schools, alleging that the Legislature had backtracked on commitments made to end the *Montoy* litigation. That resulted in years of additional litigation and several trips to the Kansas Supreme Court. Without going into the specifics of the cases or the issues—about which one might easily write a book—it is worth discussing the oral arguments in those cases.

The Kansas Supreme Court developed the habit of scheduling those cases for forty-five minutes per side of oral argument, with Kansas always going first, after losing below before a three-judge panel that was part of a new procedure created after the *Montoy* litigation. Or, in subsequent rounds it was Kansas going first after the Legislature responded to an opinion of the Kansas Supreme Court for that Court to determine whether the Legislature had complied with the Court's directives. In any event, it was *always* Kansas going first and on the defensive.

These were the most grueling and challenging arguments for several reasons. First, the issues often were numerous, detailed, and complex. Sometimes they involved understanding formulas for providing revenue to school districts and other minutiae. Second, forty-five minutes for the state to argue was simply a suggestion and not a limit. Not one of these arguments stopped at forty-five minutes for the State. My time would blow past the clock running out and continue with questions coming rapid fire from the bench. At some point, well past an hour, Chief Justice Nuss would lean forward, look up and down the bench and ask, "any more questions?" At which point there often were more and I readied for another onslaught. In one such instance, there were none, but then the Chief himself said, essentially, "Well, then, Mr. McAllister, I have a

58. 319 P.3d 1196 (Kan. 2014); 368 P.3d 1024 (Kan. 2016); 390 P.3d 461 (Kan. 2017).

couple of questions for you.”

My point, however, is not to criticize but to praise our court for its approach to oral argument in these incredibly important cases. I have never understood why courts artificially limit the oral argument if the justices or judges have more questions to ask. Any good advocate would far rather get all the questions out on the table and have an opportunity to respond (even if it takes over an hour!) than speed through an argument and be left wondering what has gone unanswered.

Two important spinoff cases, if you will, of the fundamental educational funding litigation that I also argued were *Solomon v. State*⁵⁹ and *KNEA v. State*.⁶⁰ In *Solomon*, the Legislature attempted by statute to change the way chief judges in judicial districts in Kansas are selected. Historically they have been chosen and appointed by the Kansas Supreme Court which, under the Kansas Constitution, has administrative authority over the Kansas judicial system.⁶¹ The new law would have allowed the judges in each district to choose their chief judge. The Chief Judge of the Thirtieth Judicial District sued, arguing the statute violated the separation of powers because the Legislature was intruding on a prerogative of the judicial branch. This time, the Court concluded that the Legislature had overstepped its authority and struck down the law. And it was not lost on anyone that the Legislature was attempting to reduce the Supreme Court’s authority during a royal tug of war in the *Gannon* litigation over school finance.

In *KNEA*, while the *Gannon* litigation was ongoing, the Legislature packaged together legislation involving education funding and spending with statutory changes to teacher tenure procedures. The KNEA sued, arguing that combining spending provisions with substantive law provisions was a violation of the state constitutional “single subject rule”⁶² which requires that legislation involve a single topic and precludes “logrolling” which is permitted and common in Congress, for example. This precise issue had not arisen in Kansas before but had in other States. Kansas successfully persuaded the Kansas Supreme Court that there was

59. 364 P.3d 536 (Kan. 2015).

60. 387 P.3d 795 (Kan. 2017).

61. KAN. CONST. art. III, § 1 (“The judicial power of this state shall be vested exclusively in one court of justice, which shall be divided into one supreme court, district courts, and such other courts as are provided by law; and all courts of record shall have a seal. The supreme court shall have general administrative authority over all courts in this state.”).

62. KAN. CONST. art. II, § 16 (“No bill shall contain more than one subject, except appropriations bills and bills for revision or codification of statutes.”).

no violation of the single subject rule because all the provisions of the bill involved “education,” a single subject. This was my only victory in the post-*Montoy* school finance related litigation.

Perhaps the most fascinating state constitutional law case I was part of as Solicitor General was *Hodes & Nausser v. Schmidt*,⁶³ the case in which the Kansas Supreme Court recognized a right for women to obtain an abortion under the Kansas Constitution. This case began after the Legislature enacted a law restricting the methods of abortion that could be utilized after a certain point in pregnancy. Plaintiffs challenged the law in state district court solely on state constitutional grounds, leaving federal law out of the picture. The trial judge held the Kansas Constitution recognizes a right to abortion.

The Attorney General’s office was representing the State and both sides agreed the trial court’s decision could and should go straight to the Kansas Supreme Court, which inevitably was going to have to decide the question. The parties requested a transfer of the State’s appeal from the Kansas Court of Appeals to the Kansas Supreme Court, but the Kansas Supreme Court declined to accept the transfer and left the appeal in the Kansas Court of Appeals. The Kansas Court of Appeals then decided that it would not have a three-judge panel hear the appeal but instead would sit en banc for this case. So, I argued in front of the largest bench I have ever seen and probably ever will—fourteen judges.⁶⁴ That court split six-one-seven on the Kansas constitutional issue, with seven agreeing there is a right, and seven finding no right.⁶⁵ That equally divided ruling affirmed the trial court.

The appeal then proceeded to the Kansas Supreme Court. The oral argument was scheduled for March 16, 2017, a Thursday. That semester I was teaching federal constitutional law to first-year students and we had a class session scheduled the same time as the oral argument. Rather than schedule a make-up class I assigned the students to watch at least one hour of the *Hodes & Nausser* oral argument and send me an email afterwards with their impressions of the argument in lieu of our class meeting (I

63. 440 P.3d 461 (Kan. 2019).

64. As State Solicitor I had many years before argued an appeal to the en banc Tenth Circuit, with eleven judges sitting for that argument. *Beem v. McKune*, 317 F.3d 1175 (10th Cir. 2003) (en banc). The Tenth Circuit’s en banc courtroom in Denver is an unusual experience because the bench is quite literally a semi-circle that spans the area from the advocate’s left shoulder all the way around to the right shoulder, one hundred and eighty degrees. Of course, U.S. Supreme Court oral arguments involve nine Justices and Kansas Supreme Court arguments involve seven Justices. So, until *Hodes & Nausser*, my record was a bench of eleven judges.

65. *Hodes & Nausser v. Schmidt*, 368 P.3d 667 (Kan. Ct. App. 2016).

assigned them to listen to only an hour because I knew the argument would go much longer). The argument was much like those in the school finance cases in that we were exploring new ground, provisions of the Kansas Constitution the court had never interpreted in this context,⁶⁶ the questions and discussion were wide-ranging, and the time-limits were mere suggestions. The Kansas Supreme Court eventually held that the Kansas Constitution recognizes a right to abortion that is stronger than the right protected by the U.S. Constitution because regulations restricting abortion are subject to strict scrutiny rather than the federal undue burden standard.⁶⁷

The *Gannon* litigation, *KNEA*, *Solomon*, and *Hodes & Nauser* all demonstrate how important state constitutional law can be to our daily lives. Learning and taking a deep dive into state constitutional law has been one of the greatest benefits of my service as Solicitor General, but far too few lawyers appreciate its potential and value. I teach a course on state constitutional law occasionally at KU and wish more students would take it. As federal constitutional law becomes more stagnant and unlikely to recognize anything new (so many issues have been decided, the U.S. Constitution is very unlikely to be amended, and the current U.S. Supreme Court is likely to lean conservative for some time), the future is state constitutional law where people would be surprised what you can find.⁶⁸ State constitutions often provide creative lawyers with tools that receptive state courts may be willing to let them use.

66. Unlike the U.S. Constitution, the Kansas Constitution does not have a true “Due Process Clause,” and arguably only an oblique “Equal Protection Clause,” the latter of which did come up in the oral argument. See KAN. CONST. BILL OF RTS. § 2. The focus thus became Section 1 of the Kansas Constitution Bill of Rights, taken from the Declaration of Independence, which provides: “All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.” *Id.* § 1.

67. *Hodes & Nauser v. Schmidt*, 440 P.3d 461, 502–03 (Kan. 2019). The Legislature subsequently has proposed an amendment to the Kansas Constitution to overturn the decision and eliminate a right to abortion from the Kansas Constitution. That amendment will be on the ballot in the August 2022 election. See *Kansas No Right to Abortion in Constitution Amendment (August 2022)*, BALLOTPEdia, [https://ballotpedia.org/Kansas_No_Right_to_Abortion_in_Constitution_Amendment_\(August_2022\)](https://ballotpedia.org/Kansas_No_Right_to_Abortion_in_Constitution_Amendment_(August_2022)) (last visited Apr. 13, 2022).

68. See generally JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018); JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION (2022).

II. PIONEER UNITED STATES ATTORNEYS⁶⁹ AND A MODERN EXPERIENCE

Although I spent much longer as a State Solicitor and Solicitor General, I approached my time as U.S. Attorney for Kansas with both a more experienced perspective as a lawyer and a deeper sense of history. Rather than breaking ground or setting a precedent, I was heir to a long line of individuals who had served in the role before me. That was apparent the first day of my tenure when I showed up in each of the three offices to meet the troops and encountered prominent displays of the photographs/portraits of all my predecessors. Except, the first six were missing! No photos, only brief descriptions of their backgrounds and time as U.S. Attorney.

That absence of information immediately triggered the historian in me and I spent much of my spare time during the next two years searching for evidence of those six early U.S. Attorneys. I succeeded in locating photographs for two of the post-territorial U.S. Attorneys in the collection of the Kansas Historical Society. Those now hang in each of the three U.S. Attorney offices. But there are no photos or portraits for the first four U.S. Attorneys for Kansas. My own research, that of summer interns in the U.S. Attorney's Office, and a wonderful law student research assistant since my return to KU have brought us closer to knowing them. What follows are some insights into the three "territorial" U.S. Attorneys, the three who served prior to statehood. And we have a portrait of the first one now, located in a family property in Louisiana.⁷⁰

But I also want to discuss and compare the experiences of my earliest predecessors to my twenty-first century experience as a U.S. Attorney for Kansas. The mission may remain largely the same, but the scope of the enterprise is vastly different, both in terms of the size of the office and

69. Sometimes the U.S. Attorney appointed for a territory is referred to as a territorial "Attorney General," although I do not believe, strictly speaking, that designation is accurate. They are appointed by the President and confirmed by the Senate pursuant to the provisions of the Judiciary Act of 1789 and are U.S. Attorneys (though regularly called United States District Attorneys until well into the twentieth century). The Kansas State Historical Society and the Kansas Attorney General's office thus list Isacks, Weer, and Davis as the "first three" Attorneys General of Kansas. See *Kansas Attorneys General*, KAN. ATT'Y GEN. OFFICE, <https://www.ag.ks.gov/about-the-office/aghistorical/kansas-attorneys-general>. Again, I respectfully disagree. There was no "state" until January 29, 1861, so these men were federal officials, not state officers. To this day, there are U.S. Attorneys for territories, including Guam, American Samoa, the U.S. Virgin Islands, and Puerto Rico, not to mention the special case of the District of Columbia. They were my federal colleagues and they certainly were not "state" officials in any sense. Nor are they called Attorney General.

70. A portrait that is credited as A.J. Isacks is available on Ancestry.com as part of the Isacks family tree with the indication that it is located in an Isacks family home in Metairie, Louisiana.

personnel involved, and in terms of the reach and scope of investigations and litigation. While my territorial predecessors were able to maintain private law practices and treat their U.S. Attorney duties as very part-time, such an approach is unthinkable today, and except for a handful of crimes, I doubt they prosecuted virtually any of the myriad of offenses the Kansas U.S. Attorney's Office handles today, nor did they contend with the array and complexity of civil litigation the office handles on a daily basis.

A. The Three Pioneers

1. *AJ Isacks (June 1854 – March 1857)*

Andrew Jackson Isacks was appointed U.S. Attorney for the Kansas territory in June 1854, but did not arrive in the territory until Saturday, October 7, 1854, when he landed at Fort Leavenworth with the new territorial Governor, Andrew H. Reeder, after a trip across Missouri on the Polar Star steamboat.⁷¹ Isacks and Reeder both had been appointed by President Franklin Pierce.

Shortly after their arrival, U.S. Attorney Isacks participated in the very first official judicial proceedings in the Kansas territory, with Governor Reeder presiding as the judge. The hearing took place at Fort Leavenworth. The case involved two men charged with assault with intent to kill two other men. There was a dispute over property where one of the victims had erected a house and one of the defendants claimed an interest. There was a confrontation and one victim suffered a serious wound to his forehead while the other was stabbed twice. But the "evidence as to which struck the first blow was rather conflicting," and it appeared the stabbing victim was "not in a dangerous condition." Thus, after "a protracted and impartial examination," Governor Reeder set bail for the defendants and the newspaper was "happy to perceive that the case is not so serious and does not involve so much guilt as was at first reported."⁷²

There are not many newspaper reports of official prosecutions by

71. *Reception of Gov. Reeder*, LEAVENWORTH HERALD, Oct. 13, 1854, at 2. The Polar Star was a packet steamer that made weekly runs between St. Louis and St. Joseph, Missouri. It departed St. Louis on a Tuesday and St. Joseph on the following Monday, with two stops in "Kansas"—Fort Leavenworth and Parkville. See, e.g., *1855 Steam Arrangement POLAR STAR*, KAN. WEEKLY HERALD, Aug. 25, 1855, at 4; *Steamboat Cards: Season of 1856 POLAR STAR*, SQUATTER SOVEREIGN. (Atchison, Kan.), Mar. 4, 1856, at 3, <https://asset.library.wisc.edu/1711.dl/BY6Q53EYFGO NK8R/M/h1380-ea3ac.jpg>.

72. *First Judicial Proceedings in Kansas*, LEAVENWORTH HERALD, Oct. 13, 1854, at 3. The report indicates "A.J. Isaacs . . . for the prosecution." Isacks' name throughout his tenure is variously spelled Isacks, Isaacks, and Isaacs, but on his tombstone, it is Isacks, presumably the correct spelling.

Isacks during his tenure as U.S. Attorney,⁷³ but during his first year he made a strong, favorable impression on the pro-slavery Democrats in the territory. On June 29, 1855, the Leavenworth Herald published on its first page a call for Isacks to be the Democratic party's nominee to run for election to Congress from the Kansas Territory. The column opined that "Andrew J. Isacks could rally around him the divided legions of the Pro-slavery party" and then recounted his birth in Tennessee, his legal career in Louisiana, his service in the Mexican War, and his participation in the Louisiana Constitutional Convention. Stating that "Kansas is the home of his adoption," the paper declared "Col. Isacks is one of the soundest lawyers, and ablest men in the Territory." The column continues to praise Isacks effusively, noting his "gallant bearing and courtesy" and concluding that he "is the only man around whom we all would rally."⁷⁴ Isacks apparently was inclined to accept the invitation but another candidate emerged and Isacks stepped aside.⁷⁵

At least one other commentator of the time had high praise for Isacks:

Of Col. A.J. Isaacs, who lived here in Leavenworth until his death a number of years ago, it is but justice to his memory in this connection for me to say, that although Southern born and raised, during the entire time he occupied the responsible position of Attorney General of the Territory of Kansas, and during our entire troubles, Col. Isaacs never said or did aught to injure Free State men or attempted to deprive them of their full rights and privileges under the law. He was never guilty of prostituting his high office (as I regret to say some other Kansas officials of that day did) to the injury and disparagement of any person. While all knew his natural predilections were in favor of making Kansas a slave state, he always counseled moderation and liberality to all. * * * He occupied his official position with honor and credit to himself.⁷⁶

73. And there likely were not many. An account of one of the original territorial judges appointed by President Pierce and who arrived in the territory prior to Isacks, S.W. Johnstone, indicates that Judge Johnstone was assigned to the "extreme western district where there were but few settlers and little business to be done." H. MILES MOORE, EARLY HISTORY OF LEAVENWORTH CITY AND COUNTY 294 (1906). Thus, he "remained as Judge of that district for some three or four years but with little judicial business to do," he "resigned his judicial position and came to Leavenworth to reside, opened a law office and in due course of time became the head of the law firm of Johnstone, Stinson & Havens, one of the leading law firms in the city and territory." *Id.* at 294–95.

74. *Hon. Andrew J. Isack's*, LEAVENWORTH HERALD, June 29, 1855, at 2.

75. A General J. W. Whitfield instead was nominated. Isacks, however, was praised because he, "the principal opponent of Gen. Whitfield, acted most magnanimously, by withdrawing his name from the Convention." *Congressional Convention, SQUATTER SOVEREIGN* (Atchison, Kan.), Sept. 4, 1855, at 2. Isacks thus evinced "a liberal disposition and a noble heart" in taking a "manly course that has raised him high in the opinion of his late opponent, and his friends." *Id.*

76. MOORE, *supra* note 73, at 38–39.

Isacks and Reeder appear to have been friendly and in a sense co-conspirators, though Reeder would pay with his job after incurring the wrath of President Pierce, while Isacks remained in good favor. One incident demonstrates Isacks' willingness to serve and protect Reeder, and another shows their conspiracy to make money in the territory, a conspiracy that cost Reeder his position, but not Isacks.

Isacks participated in preventing Reeder from engaging in a close-quarters pistol battle with a well-known lawyer in the territory. According to an account provided in a letter years later, Benjamin F. Stringfellow, a former Attorney General of Missouri who had come to the Kansas territory and set up shop,⁷⁷ came to the office of Governor Reeder in a foul mood about comments and insults he believed Reeder had directed at him as a "Missourian" who had come to the Kansas territory. The report indicates that Stringfellow entered Reeder's office using insulting language, asking Reeder what he had said about Stringfellow, and with Stringfellow attempting to draw his pistol from his holster, but fumbling in the effort. In the meantime, Reeder drew a pistol from his desk drawer, advised Stringfellow he would defend himself and that Stringfellow needed to calm down if he wished to converse with the Governor. Stringfellow continued with his insulting language, but ceased attempting to draw his pistol, leaving himself vulnerable. Soon, Stringfellow "made a spring on the Gov and both fell on the floor." At that point, Reeder's secretary and U.S. Attorney Isacks "then came and stood between the parties or one or both would have been shot."⁷⁸

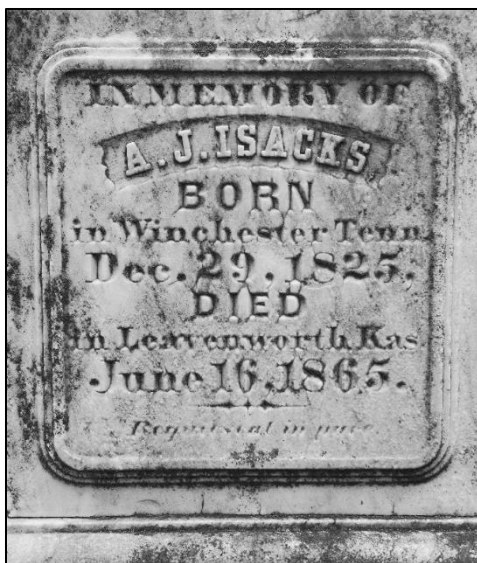
Isacks and Governor Reeder apparently both came to the territory determined to make their fortunes buying land from the Indian tribes; they were not pure-hearted public servants. Soon after arriving they began maneuvers to purchase large tracts of Indian land. There was a tract of 2,571 acres, located about two miles from the town of Leavenworth, owned by the Munsee (or Christian) Tribe which several groups were trying to purchase but had been denied approval by the Indian Commissioner George Manypenny. Instead of seeking official approval, Isacks sought to purchase the land directly from the Indians. In addition, he, Governor Reeder and two presidentially-appointed judges participated in other land schemes, including one to purchase illegally 2,300 acres along the north bank of the Kansas river. When President Pierce learned of these activities, he dismissed Reeder and the judges from their positions

77. MOORE, *supra* note 73, at 272-73.

78. Letter of Thomas Sherwoody to Friend Woodward (July 3, 1883), <https://digital.lib.ku.edu/ku-kansascollection/1056>.

(perhaps because Reeder was antislavery and this provided the President an excuse), but Isacks remained as U.S. Attorney. Isacks would continue to pursue the purchase of the Christian Tribe lands outside Leavenworth, eventually going to Washington, D.C. in March 1857, resigning his position as U.S. Attorney, and ultimately succeeding in obtaining congressional approval of his purchase. Isacks remained in the area after his resignation, practicing law, pursuing land development, directing the Leavenworth, Pawnee & Western Railroad Co., and organizing the Leavenworth Fire & Marine Insurance Co.⁷⁹ He also was part of a law firm that had a practice in Washington, D.C.⁸⁰ His post-U.S. Attorney life likely was far more lucrative than his \$1,000 annual government salary and \$25 expense allowance.⁸¹

But Isacks was not to live a long life. He died in Kansas in 1865 and is buried in the Mount Muncie Cemetery in Lansing, the same cemetery as Kansas and U.S. Supreme Court Justice David J. Brewer.⁸²



79. William E. Treadway, *The Gilded Age in Kansas*, 40 KAN. HIST. Q. 1, 6 (1974).

80. The firm was Hughes, Isacks & Denver, composed of James Hughes (of Indiana), our Isacks (of Kansas), and J.W. Denver (of California). They advertised that they would “practice in the Supreme Court of the United States, the Court of Claims, and the Courts of the District of Columbia.” *Hughes, Isacks & Denver*, DAILY NAT’L INTELLIGENCER, May 19, 1865, at 4. Further, “Claims and Department Business will receive Prompt Attention.” *Id.* Their office was at “Whitney’s, Corner Delaware avenue and North A street, opposite the Capitol.” *Id.*

81. Treadway, *supra* note 79, at 6.

82. Photograph of A.J. Isacks’s Grave (on file with author).

2. *William Weer (March 1857 – June 1858)*

Prior to his service as U.S. Attorney, William Weer resided on the Wyandot Reserve, an Indian community near Leavenworth, and served as legal counsel for the Reserve.⁸³ He was involved as legal counsel in a notable dispute over some of the Reserve's land, on the side ultimately led by James H. Lane, who eventually killed his rival claimant to the land, Gaius Jenkins. Lane, of course, went on to serve as a notable general for the Union Army in the Civil War, commanding Kansas troops and organizing the first African-American regiment to see action on the Union side, as well as becoming one of the first U.S. Senators from Kansas.⁸⁴ When appointed U.S. Attorney, Weer would have been well-known and well-respected in the legal community of the territory.

Finding material about Weer's service as U.S. Attorney has proven challenging. Any activities as U.S. Attorney do not show up in newspaper reports of the day. The job, however, does not appear to have been a full-time enterprise. For instance, Weer put a notice in the papers that he was leaving "shortly for Washington, on business before the Departments" and informing anyone who might have "pre-emption or other claims" that in his absence they should address his law partner at "Mitchell & Weer, Attorneys, Lecompton, Kansas."⁸⁵ Weer also does not appear to have been enamored with the job, given that he quit it after little more than a year.

What is most interesting about Weer is his post-U.S. Attorney military career. William Weer jumped into the Civil War, originally as part of the Kansas Fourth Infantry Regiment, which later consolidated with the Third Regiment to form the Tenth Regiment. He had the rank of Colonel and served most of the war, but with mixed results. He is credited with several important early victories in the territories and for recruiting Native Americans to fight with Union forces in the Oklahoma territory. But he also is blamed for some battle losses and was arrested twice by military superiors. In 1862, he was arrested and relieved of his Indian expedition command because a superior officer concluded Weer was "either insane, premeditated treachery to his troops, or perhaps that his grossly intemperate habits long continued had produced idiocy or monomania." But Weer had virtues as well, with others describing him as "a bold, bluff,

83. ROGER D. HUNT, *COLONELS IN BLUE: MISSOURI AND THE WESTERN STATES AND TERRITORIES 194–95* (2019) (entry for William Weer, Jr.); Moore, *supra* note 73, at 259.

84. *James Henry Lane*, KAN. HIST. SOC'Y (Mar. 2013), <https://www.kshs.org/kansapedia/james-henry-lane/11735>. He also may have been or become mentally ill and certainly was violent. He killed himself in 1866, early in his second term as a U.S. Senator and is buried in Lawrence, Kansas. *Id.*

85. *Pre-emptors and Claimants!*, KAN. HERALD OF FREEDOM, Feb. 6, 1858, at 3.

brave man . . . with the endurance of a mule and the heart of a lion.” Weer was not convicted or discharged and continued active duty.⁸⁶

Eventually Weer’s flaws were determined to outweigh his virtues as a fighting commander. He and the Kansas Tenth were ordered to take charge of a prisoner-of-war camp in Alton, Illinois. Such duty likely chafed on Weer and permitted him even more opportunity to indulge his weaknesses. While the facility was under Weer’s command there were significant financial improprieties and one or more notable escapes of Confederate prisoners. Weer attempted to blame others, but his drunkenness and other failings caught up with him. In June 1864 he was tried before a military court in St. Louis, convicted of offenses, and dishonorably discharged. He appealed directly to President Lincoln, who did not overturn Weer’s convictions but did remove the portion of the sentence that precluded Weer from re-entering military service.⁸⁷ Weer was in fact later briefly called back into service.

Weer returned to Kansas after the war where he continued to practice law, served briefly in the Kansas Senate, and was named Adjutant General of the Kansas Militia. But he must have been a broken man by this time and things did not last. He soon was arrested and removed from the Adjutant General position on the orders of the Governor.⁸⁸ Weer died in Kansas in 1867, a colorful figure, more known for his military exploits and failings than anything ever achieved in the legal arena. Upon his death, one Kansas newspaper eulogized Weer simply but powerfully, stating “He was Colonel of the Kansas 10th through the war, and no braver man or truer soldier ever led a regiment to battle.”⁸⁹ According to his obituary, he was buried in Alton, Illinois, though there is no record of his gravesite.

3. *A.C. Davis (June 1858 – February 1861)*

A.C. Davis contrasts significantly with his predecessor, A.J. Isacks, in that rather than exploiting Native Americans and seeking to obtain and profit from their lands, he filed numerous actions seeking to protect them and their lands as U.S. Attorney.⁹⁰ But Davis was not progressive in other

86. HUNT, *supra* note 83, at 194–95 (entry for William Weer, Jr.).

87. *Id.*

88. LEAVENWORTH BULL., Apr. 1, 1866, at 1.

89. *Died*, WYANDOTTE COM. GAZETTE, Mar. 2, 1867, at 2.

90. United States Versus Henry Devillers *for Settling on Indian Lands*, KAN. HIST. SOC’Y, <https://www.kshs.org/archives/444960> (last visited Feb. 15, 2022) (describing Davis’s petition against Henry Devillers in November 1859 accusing him of surveying for settlement lands that belonged to the Miami Tribe in Linn County in violation of the federal Nonintercourse Act); United States Versus Jesse Donahue (Donahoo) *for Settling on Miami Land*, KAN. HIST. SOC’Y,

ways and was staunchly pro-slavery. Indeed, he authorized the arrest of ultra-Kansas radical John Ritchie, who advocated both for abolition of slavery and for the political rights of women. The following story was published upon the death of Davis in 1881:

In 1858 he was the U.S. District Attorney for Kansas, and was in the practice of law at Wyandotte. It was while he held that office that a warrant was issued, at his suggestion, for the arrest of Col John Ritchie, of Topeka. Mr. Armes, a brother-in-law of the Eldridges, at Lawrence, was the U.S. Marshal. Ritchie was charged with the commission of some offense during the early troubles. The Legislature had passed an amnesty act, covering all of the old charges for offences on both sides. Davis got out the warrant in spite of the amnesty act, and gave it to Armes, who, before he reached Ritchie's residence in Topeka, became intoxicated. He demanded Ritchie's surrender. Ritchie asked for his warrant, when Armes pointed a cocked pistol at him and said, "Here it is, d—n you." Ritchie backed into his bed room, got his pistol from under a pillow, and shot and killed the Marshal. Out of this grew up trials and interminable law suits that never were fully settled until about 1868 we think. * * * The notice of the death of Davis calls up these recollections. He was a Southerner, intensely pro-slavery, and used to carry things on with a high hand at Wyandotte.⁹¹

From this account, the U.S. Attorney position remained a part-time gig, as Davis—like Weer—continued a private law practice at the same time. But unlike Isacks, he was not intent on making his fortune in Kansas at the expense of Native Americans. And unlike Weer, he took the position seriously, being active and continuing in the role until just after Kansas attained statehood.

Although Davis initially joined the Union Army in late 1861 and raised a regiment that became known as the Kansas Ninth he served as its colonel for just over forty days before he resigned⁹² for reasons that were not reported. Nonetheless, the citizens of Kansas—Leavenworth and Wyandot in particular—seem to have been enamored of Davis. When Davis returned to Kansas in late November 1861 in his role as a colonel,

<https://www.kshs.org/index.php?url=km/items/view/444970> (last visited Feb. 15, 2022) (describing Davis's petition against Jesse Donahue (Donahoo) for settling on Miami Tribal land in Linn County on January 1, 1860); *United States Versus James L. Cox for Settling on Indian Lands*, KAN. HIST. SOC'Y, <https://www.kshs.org/km/items/view/444914> (last visited Feb. 18, 2022) (explaining that Davis twice filed suit against James L. Cox for settling on Miami Tribe land in Linn County, once in 1858 and again in 1859 after a jury found Cox not guilty in 1858); *United States Versus William Baldwin for Settling on Indian Lands*, KAN. HIST. SOC'Y, <https://www.kshs.org/km/items/view/444738> (last visited Feb. 18, 2022) (describing Davis's case against William Baldwin for settling on Miami Tribe lands in Linn County in 1860).

91. *Another Old Kansan Gone Over*, THE COMMONWEALTH (Topeka, Kan.), July 29, 1881.

92. HUNT, *supra* note 83, at 170 (entry for Alson Chapin Davis).

the citizens of Wyandot threw a most elaborate banquet in his honor. The “large dining hall of the Garno-House was arranged to accommodate the greatest possible number of guests” and “was beautifully decorated with a number of national flags,” while a “most sumptuous repast was spread.”⁹³

Notably, after the sumptuous repast, “cloth was removed, and the ‘feast of reason and flow of soul,’ copiously intermingled with the best of champagne commenced.”⁹⁴ The toasts began, of which twenty-one are reported in the newspaper account, but they surely do not include all. There are too many to report here, but several are worth highlighting just to give a sense of the nature of the occasion. For example, toasts were made to “the President,” “Action v. Red Tape,” “The Union,” “The Army and the Navy,” “The memory of Andrew Jackson,” and “The Union, the Constitution, and the Enforcement of the Laws.” Then things turned more local, with toasts to Kansans, including Wyandot County (the “pluckiest little county of plucky little Kansas”) and A.C. Davis himself.⁹⁵

Nonetheless, in two months Davis was out of the Union Army. He stayed in Kansas perhaps a year longer before he returned east and spent the remainder of his career in law practice in New York.⁹⁶ Thus, unlike Isacks and Weer, Kansas did not become the adopted home state of Davis and he did not die here, nor is he buried here, though he served the longest of the three territorial U.S. Attorneys.

B. My Experiences (Jan. 2018 – Feb. 2021)

I started as U.S. Attorney for Kansas almost 160 years after these territorial pioneers. In some respects, the mission remains the same but the nature of the job and the reach of the office are quite different. Each of them could maintain a private law practice because the U.S. Attorney position was a part-time role—a reality that is no longer true by any stretch of the imagination. And the pioneers wanted for work as the U.S. Attorney, even though they had no other lawyers or staff working with them. Again, not true today. The Kansas office now has about fifty Assistant U.S. Attorneys and over one hundred total personnel spread across three offices located in Kansas City, Topeka, and Wichita.

93. *A Military Reunion at Wyandott: The Twelfth Regiment*, LEAVENWORTH TIMES, Dec. 4, 1861.

94. *Id.*

95. *Id.*

96. LEANDER HALL, UNION COLLEGE: HALF-CENTURY HISTORY OF THE CLASS OF 1856 (2013) (entry for Alson C. Davis) (“His Western experience continued about five years, when he returned to the East. He made Brooklyn his place of residence, and established a law office in New York.”).



I can only imagine the extremely limited jurisdiction and crimes available for those territorial U.S. Attorneys to prosecute. Though firearms would have been present across the territory, I doubt there were any federal firearms crimes. Drug crimes would have been unheard of. Child pornography and human trafficking? Cybercrimes? Interstate scams? International and domestic terrorism? Money laundering? Tax, securities, and bankruptcy fraud? Hate crimes? Civil rights violations? Wire fraud? Not for them, but these issues are daily staples of today's U.S. Attorney's Offices.

What might we have had in common? I can think of a few things. For sure bank robberies. And theft of the mail. Perhaps kidnappings. And cattle-rustling if the cows moved across state lines. But there is not a lot of common ground when it comes to criminal prosecutions. And even less on the civil side. There was no such thing as tort claims against the federal

97. *Former United States Attorney Stephen R. McAllister*, U.S. DEP'T OF JUST., <https://www.justice.gov/archives/usao-ks/meet-us-attorney-mcallister> (last visited Apr. 25, 2022).

government in those territorial days. Nor *Bivens* claims against federal officials. Or employment discrimination claims by disgruntled Postal Service or other federal agency employees. Maybe there were some land claims against the federal government? Though even those may have gone to Washington, D.C. and the Court of Claims.

Their experiences and mine could not be more foreign. They were literally one-man shows. And part-time at that. They had no federal investigators supporting them—no Federal Bureau of Investigation, Drug Enforcement Administration, Bureau of Alcohol, Tobacco, Firearms and Explosives, the Secret Service, the Internal Revenue Service, Homeland Security, the Environmental Protection Agency, or many other federal agencies that today can investigate crimes and work with a U.S. Attorney's Office to charge and prosecute a wide array of crimes.

A U.S. Attorney today is not a part-time local who prosecutes the occasional criminal matter that arises but, in the best case, a leader of a complex, sophisticated office of extremely talented professionals who are pursuing all kinds of investigations and prosecutions for their District, as well as managing a wide variety of civil matters in the interests of the United States. The office consists of criminal and civil attorneys, paralegals, legal assistants, investigators, administrators, IT staff, security experts, law enforcement liaisons, victim-witness experts, and others. It is a comprehensive operation. And even in the District of Kansas, located in the heart of the continental United States, the office handles an amazingly diverse and complex array of cases.

For instance, during my tenure, the office prosecuted a man for committing murder on the high seas. How, one might well ask? The answer is that under federal law, if a murder takes place on the high seas, venue lies either where the vessel comes to port and the defendant is arrested, or where the defendant resides.⁹⁸ In our case, the defendant resided in Topeka, Kansas. He choked and pushed his girlfriend over a balcony on a cruise ship in international waters after leaving Miami, Florida and on the way to the Bahamas; but he was not arrested when the vessel returned to port in Florida. He returned to Topeka. After an investigation, a grand jury in Topeka indicted him for murder on the high seas. So, the District of Kansas had federal jurisdiction over the case.⁹⁹

Or take the case that I first personally involved myself in, with the capable support and guidance of a veteran prosecutor. In December 2017,

98. 18 U.S.C. § 3238.

99. The case referenced was *United States v. Newman*. See *Kansas Man Sentenced to Federal Prison for Second Degree Murder on Cruise Ship*, U.S. DEP'T OF JUST. (July 8, 2020), <https://www.justice.gov/usao-ks/pr/kansas-man-sentenced-federal-prison-second-degree-murder-cruise-ship>.

shortly before I took office, two online gamers, one near Cincinnati, Ohio and one in Wichita, Kansas had a dispute arising out of a game of Call of Duty. The young man near Cincinnati reached out to a notorious individual in the Los Angeles, California area known for his willingness to “swat”¹⁰⁰ people, and the Cincinnati young man gave the LA swatter an (incorrect) address for the player in Wichita.

The swatter accepted the invitation to target the player in Wichita and began following him online. When the Wichita young man noticed he was being followed by the swatter (who he recognized), he started taunting the swatter and confirming the incorrect address. The swatter soon went to work, calling emergency services in Wichita with a wild, false story that included giving them the address where he thought his victim was located, stating that the victim had shot his father, locked his mother and little brother in a closet, had poured gasoline all over the house, and was thinking about lighting it. Police surrounded the address. It was a winter evening. When a completely innocent and unsuspecting man who lived in the house noticed all the police lights and stepped onto the front porch in the dark, police began yelling from across the street. The man started to raise his hands, then lowered them, and one officer fired a rifle. The shot killed the man.

An investigation tracked down all three young men, the swatter was extradited to Wichita, and a multi-federal district prosecution followed.¹⁰¹ It turned out the swatter had committed crimes in Districts across the country, and he was charged with federal crimes in both the Central District of California (which includes Los Angeles) and the District of Columbia (including against the Federal Communications Commission and the Federal Bureau of Investigation). The District of Kansas had the most serious charges because of the death in Wichita. Eventually other districts agreed to have the prosecution of all charges proceed in Kansas. Through his counsel, the swatter helped identify over fifty incidents across the country in which he had engaged in other swatting incidents, or what he described as “evacuations,” i.e., calling in false bomb threats to empty buildings. We agreed to a global plea agreement that resolved the swatter’s culpability for all these incidents so that he would not be charged in other districts across the country. In exchange, he agreed to accept a

100. The term “swat” describes the practice of calling emergency services or the police, making up false claims about a dire situation, and trying to draw out a forceful, heavily armed (i.e., a SWAT team) response to a location where an unsuspecting victim will be surprised and scared out of their wits.

101. For reference, the case is *United States v. Barriss*. See *California Man Pleads Guilty in Deadly Wichita Swatting Cases*, U.S. DEP’T OF JUST. (Nov. 13, 2018), <https://www.justice.gov/usao-ks/pr/california-man-pleads-guilty-deadly-wichita-swatting-case>.

sentencing range of twenty to twenty-five years, with the judge to decide the precise sentence. My territorial friends could not have imagined something like the swatting case.

Nor would my territorial predecessors, at least one of whom had fought in the Mexican War, believe what comes from Mexico to the United States today. The range and volume of illegal substances is daunting, not to mention the deadliness of some forms. Overdose deaths have skyrocketed in recent years as the Mexican cartels continue to flood our country with the drugs too many Americans seem unable to resist.

Fentanyl has become a scourge of the drug world and a regular feature of the life of prosecutors. There are too many stories of the high school teen or person in pain who thought they were buying or trying a street pill that was just a “painkiller” and died from a fentanyl overdose. Fentanyl for those with no opiate or opioid tolerance is deadly in an amount that looks like three grains of salt, an amount easily pressed into one pill or an eight-ball of heroin bought on the street. It is a far too regular occurrence that unwitting victims die when they ingest fentanyl they did not know was present in a drug or pill. I have taken to preaching the dangers of fentanyl in my law school classes now.

Federal law provides a mandatory minimum twenty-year sentence for anyone who manufactures, distributes, or sells a drug to another resulting in death or serious bodily injury,¹⁰² a powerful weapon for the U.S. Attorney Offices, but it is no substitute for preventing that death in the first place. The stories federal prosecutors are familiar with are disheartening and terrifying. Saloon brawls or knife fights would be so much easier than this plague.

Further, as for the Mexican cartels, they are ruthless and efficient, not to be underestimated. They do not leave a profitable market to others. Fentanyl originally was produced by and came from Asian markets. But the Mexican cartels did not take long to start moving into that market and likely have taken it over or will soon. They will shut the Asian market out. That is what they did with methamphetamine years ago. There is no more *Breaking Bad* and cooking meth in an RV or a farmhouse in rural America. The meth coming into the United States for years now is of an ultra-high purity and mass-produced in Mexico. And it is transported to America in more ways than one can imagine.¹⁰³ The cartels are full-

102. 21 U.S.C. § 841.

103. I once had a reporter at a press conference in Kansas City ask me, “How do they get the drugs across the border?” My first reaction was, “Let me count the ways.” My second was, “Use your imagination.” My third was to try and give him a quick list: airplanes, boats, trucks, cars, trains (hidden in cargo, including in new cars from plants in Mexico, with crews who come to unload it in

service operations, also big heroin producers,¹⁰⁴ as well as the suppliers—thought not producers—of cocaine.¹⁰⁵

One of the most maddening aspects of the illegal drug trade is that as we fight to slow drugs moving north, little is done to stop guns and ammunition moving south, and guns empower the cartels. The cartels are incredibly well-armed. They obtain a lot of weapons from the United States, though for the most part, these weapons are not military-grade. They can obtain military firepower from other locations around the world. The cartels need to launder a huge amount of drug proceeds—one way to accomplish this is to trade dirty cash for guns that move south across the border. This southward flow of weapons goes largely unchecked both by U.S. Border Patrol and Customs, which generally does not inspect anything leaving the United States at the Mexican Border, and the Mexican Government which does even less to inspect anything entering the country from the north.

On a more upbeat note, on the criminal side, one thing I had the opportunity to do as U.S. Attorney was occasionally steer us to open an investigation into a case I believed important. One of those cases was that of Alonzo Brooks, a young African-American man who went to a farmhouse party of teens and young adults in April 2004 near LaCygne, Kansas and did not come home. His body was found in a nearby creek almost a month later. The case has never been solved.

After consulting with the FBI, I asked that the case be re-opened and took an active role in the investigation. Among other positive steps, we had an expert team of forensic pathologists at Dover Air Force Base in Delaware take another look at the body and autopsy findings (which originally found cause of death “undetermined”). The Dover team declared the death a “homicide,” and the investigation continues. I remain optimistic that there will be a solve in this case and that the Brooks family will one day receive the justice it deserves.

Among other things, Alonzo’s case sensitized me to the number of unsolved cold cases. Unfortunately, the number that exists is far too many.

places including Topeka, KS), in liquid form in gas tanks and elsewhere, pedestrians with backpacks, shipments of toys, shipments of candy, drones, tunnels under the border, and the mail system. There undoubtedly are other ways we have not detected or even thought of yet.

104. We did have one interesting case in which a local Kansas entrepreneur decided to grow his own Afghan poppies and was going to attempt to produce heroin. It appears he obtained real Afghan poppy seeds on Amazon and had poppies growing when caught, though very few had produced the buds necessary to get the opium. Plus, if you are ever curious, producing heroin is not a simple task; it takes many steps. It is easier to buy heroin, and an operation of any size might attract unwanted cartel attention.

105. The Colombians have tired of the United States and wholesale the cocaine to the Mexican cartels or Dominicans, taking less profit but buying less trouble.

One goal of my post-U.S. Attorney life is to bring more such cold cases to resolution. Much is made of actual innocence cases—and rightly so. But there are too many cases in which justice remains to be done. Someone has been murdered and no one has been brought to account. A family grieves and has no closure. And a killer remains on the loose. Those cases count too.

Lastly, a few words about the modern civil work of the U.S. Attorney's office, a significant component of what the office does. Unlike in the 1850s, today a U.S. Attorney has a significant role with respect to civil cases. The United States can be sued in tort, and individual officials can be sued in *Bivens* suits for money damages for certain constitutional violations. Plus, there are employment discrimination suits by those in various federal agencies and Administrative Procedures Act suits brought against agencies. Not to mention, a variety of other civil matters that arise. Every U.S. Attorney's Office today has a significant Civil Division that manages many matters of considerable complexity and size.

These matters range from tort suits against the U.S. Postal Service (slip and falls on Postal Service property or mail vehicles in accidents) or against the Veterans Administration hospitals (for medical malpractice claims). The United States also has lots of litigation involving financial claims both against it and for it, as the United States often is a creditor seeking to collect taxes, defaulted loans, and other financial obligations owed to the federal government, including fines and restitution in criminal cases. Thus, the United States is a regular litigant in bankruptcy court and state foreclosure proceedings. And occasionally the civil attorneys of a U.S. Attorney's Office litigate a question as unusual as who owns tiny particles of moon dust in an Apollo 11 mission bag sold at auction by the U.S. Marshal's Service (perhaps erroneously)—the United States as sovereign or the private purchaser of the bag?¹⁰⁶

CONCLUSION

Between my experiences as a State Solicitor/Solicitor General and a U.S. Attorney for Kansas, I consider myself one lucky Kansas lawyer indeed. There has been a lot of being in the right place at the right time, good breaks, working to have a good relationship with people across the political spectrum, striving to do principled, non-partisan legal work, and fundamentally, a desire to serve the people of Kansas. I will never run for

106. *Carlson v. United States*, No. 2:19CV02027, 2019 WL 8500968 (D. Kan. Jan. 18, 2019) (describing plaintiff's complaint regarding Apollo 11 mission bag she bought at auction conducted by U.S., and, the declaratory and other relief sought after NASA employee allegedly collected moon dust to which plaintiff claimed title from the bag post-auction).

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office, but I have been proud to stand up and say I represent the people of Kansas, both as a lawyer for the State and for the United States.