

Circuit Riding Judge Rides on Home—Into the Sunrise

By Mark Thompson

Roughly between July of 1884 and November of 1885, the 3rd Judicial District of New Mexico had four different resident judges, not to mention the canceled sessions of court while the citizens awaited the arrival of a new appointee. On Sept. 12, 1885, *The Rio Grande Republican*, quoting another newspaper, offered some advice to the President: “The next appointee to the judgeship of that district ought to be a man with a constitution of iron, the morality of a Joseph, the learning of a Blackstone, and the adaptability of a country editor.” Although some judges were probably better than others, it is doubtful that the President was able to follow that advice during the 62 years of the New Mexico Territory.

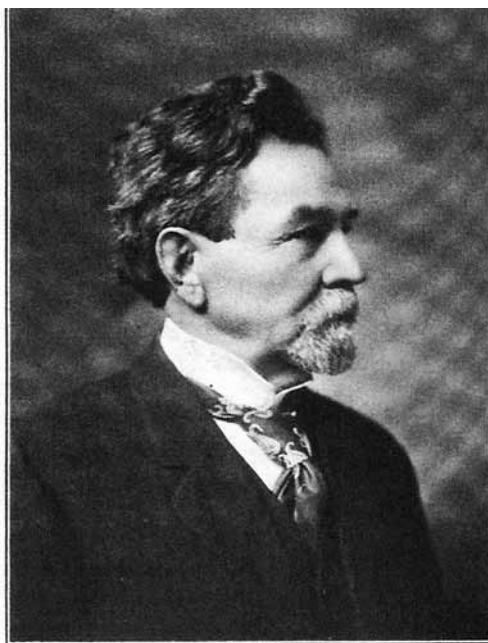
On paper, the territorial judgeship looked like a pretty interesting job. Appointed by the U.S. President, with the advice and consent of the Senate, the judges exercised both federal and “general jurisdiction,” the latter being what we would call “state law” today. In addition, they were both district (trial level) judges and sat on panels of three as appellate judges; i.e., as the New Mexico Territorial Supreme Court. Appeals from the N.M. Supreme Court for both federal and general law cases were to the U.S. Supreme Court. On the other hand, until New Mexico lawyers began to be appointed to the court in the 1890s, the appointees had to move to New Mexico, what the *N.Y. Times* in 1876 had called a “miserable Territory.”¹

Part of the misery was exemplified by the political and physical geography of the 3rd District, which by late 1884 consisted of Grant, Sierra, Doña Ana and Lincoln counties. Sounds simple, but those counties along the southern border stretched from Texas to Arizona. The goal was to hold two terms of court per year in each county plus one or more terms as the appellate court in Santa Fé. With headquarters in Las Cruces, the judges also held district court in Lincoln on the east and Silver City and Hillsboro on the west. The physical requirements of the job were what prompted the newspaper suggestion that this district judge had to have “a constitution of iron.”

Given these conditions, it is not surprising that some of the appointees were what prominent New Mexico historians have declared to be “political hacks,” by which I believe they mean that the appointee had some meaningless political experience at the time of appointment. But one could also argue that a New Mexico judgeship itself was somewhat “hackish.” For example, when he retired as Speaker of the House of Representatives, Thomas B. Reed of Maine turned down the job when it was offered by President Benjamin Harrison.² The other side of that coin is that political appointees are the subject of political infighting. President Grant had reappointed Judge Warren Bristol two months before Bristol’s first term was to end in 1876 but in 1880 President Rutherford B. Hayes decided Bristol had been judge long enough. Hayes first appointed William Ware Peck, a former Wyoming territorial court judge, who received an adverse report from the Senate Judiciary Committee. Hayes then nominated S. Newton Pettis who was rejected by the Senate. Hayes followed with the nomination of Charles Pelham, who likewise was

not confirmed. Hayes then gave up and re-nominated Bristol who was confirmed for a third term in December of 1880.³

Judge Bristol, not a favorite of historians, deserves his own story but he starts this story as the first of the four judges in 1884. Bristol did not wait until his term expired in December but instead “suddenly and unexpectedly,” according to *The Rio Grande Republican* (Sat. Aug., 2, 1884, p. 3), resigned effective July 26, 1884. Republican President Chester A. Arthur secured the confirmation of his appointee, Stephen Fowler Wilson, on Oct. 16, 1884, and Judge Wilson was on the job in time for the term of court in Hillsboro in November. Wilson had served in the Pennsylvania Legislature and as a U.S. Congressman for two terms. He had also served as a judge of the Pennsylvania Court of Common Pleas for 10 years. Perhaps his experience lifted him above the status of “hack,” but then the Democrat Grover Cleveland was inaugurated as President of the U.S. in March of 1885 and things got interesting.



William Boyer Fleming

The New Mexico Territorial Act of 1850 provided for four-year terms for the judges and, as I have argued elsewhere, in the absence of other legislation, a New Mexico territorial judge did not just serve at the pleasure of the President but had a specific four-year term.⁴ President Cleveland, the first Democrat elected to the office since 1856, made liberal use of that “other legislation,” the so-called Tenure of Office Act. In July of 1885, Cleveland “suspended” a territorial judge in Alaska, specifically using the Tenure of Office Act. His action was eventually upheld by the U.S. Supreme Court.⁵ As reported by *The Rio Grande Republican* (Sat. June 27, 1885, p. 1), Wilson was “guillotined” by Cleveland even before the Alaska judge. Probably an astute politician, Wilson went back home quietly and in 1887 was again elected to a judicial position in Pennsylvania. Stephen F. Wilson died in Wellsboro, Pennsylvania, on March 30, 1897.⁶

The Senate confirmed President Cleveland’s appointee, William Boyer Fleming of Louisville, Kentucky, on June 19, 1885. Fleming probably falls into the “hack” category based upon his political experience—one term in the Kentucky Legislature and a delegate to the Democratic National Convention which nominated Cleveland in 1884. In a sense, President Cleveland also supported a conclusion that a New Mexico judgeship was not a political plum. Cleveland wrote a letter praising Fleming for the latter’s willingness to take the New Mexico job as a consolation prize; Fleming’s first choice was appointment as U.S. Attorney for Kentucky.⁷ On the other hand, Fleming probably had more formal education than most lawyers in the United States. He had attended Yale and then received his A.B. from the University of Toronto. He did post-graduate work at two German universities and studied law at the University of Kentucky before being admitted to the Kentucky Bar in 1870. His biographical sketch says that he “found his chief recreation in reading and study”

Fleming had arrived in Santa Fé in mid-July, 1885, and opened a term in Silver City on Monday, July 27, with a lengthy docket of

criminal and civil cases.⁸ The Grant County opening was apparently also the closing for Judge Fleming. On Sept. 12 the clerk was opening sessions in Las Cruces in hopes that Judge Brinker would come down from Albuquerque. It was reported that Judge Fleming was nursing an illness in Colorado and a week later it was reported that he was in Louisville and his doctor had advised him not to travel to Las Cruces for a special term. The newspaper account of Sept. 26, 1885, was more optimistic; Fleming had wired the clerk that he would return shortly and would conduct a term of court in Lincoln. But then, on Saturday, Oct. 3, 1885, *The Rio Grande Republican* reported that Judge Fleming had resigned. (His official termination date was Sept. 24.)

The “party line” is that Judge Fleming resigned because the New Mexico climate did not agree with him, but in statements to the press he was more specific. He indicated that “the places for holding the territorial courts are at great distances apart, that the country is new and travel difficult, and he was not pleased on any account with his surroundings.” (RGR, Oct. 3) And even more telling, a statement before leaving New Mexico to the effect that “if he had known the amount of work to be performed he would not have accepted the appointment as the salary was insufficient.” (RGR, Sept. 9) Whatever his reason for resigning, the New Mexico Supreme Court clerk notes him in the 1890 list of judges as “designated” in 1885, but then eliminates Fleming altogether in the final compilation of territorial judges published in volume 16 of the *New Mexico Reports* in 1912. Apparently, the clerk had concluded that Judge Fleming had ridden right out of New Mexico judicial history.

William F. Henderson of Arkansas was then appointed by President Cleveland as the fourth judge of our story and was on the job in November of 1885. No doubt to the relief of the litigants in the 3rd District, Judge Henderson stayed until the conclusion of his term in 1889. William Fleming returned to the practice of

law in Louisville and served as a lawyer in the Treasury Department in Washington during Cleveland’s second term in the 1890s. He then returned again to D.C. to work in the State Department after the election of Woodrow Wilson. Judge Fleming’s “illness” in New Mexico apparently did not slow him down. He died in Washington D.C. on Sept. 24, 1918.

Endnotes

¹“The New Mexico Job,” *The New York Times* (Wed. May 24, 1876), p. 4.

²Albert T. Volwiler, *The Correspondence Between Benjamin Harrison and James G. Blaine, 1882-1893* (Philadelphia: The American Philosophical Society, 1940), p. 127.

³James K. Logan, ed., *The Federal Courts of the Tenth Circuit: A History* (Denver: U.S. G.P.O, 1992), p. 238 (chapter by Henry Weihofen).

⁴Mark Thompson, “President Benjamin Harrison, Judge A.A. Freeman and the Shalam Colony: A Legal and Political History,” *So. N.M. Hist. Rev.* (Jan. 2009), p. 9.

⁵*McAllister v. United States*, 141 U.S. 174 (1891).

⁶On Sept. 12, 1885, *The Rio Grande Republican* (p. 2) quoted another newspaper which claimed that it was Judge Wilson’s “grossly immoral conduct” which “brought about his early removal.” Obviously his conduct off the bench could have been a factor, but I found no specific evidence of immorality. I believe that, in any event, he had no political chance of survival under Cleveland.

⁷Letter of Oct. 2, 1885, from President Cleveland, *The Rio Grande Republican* (Las Cruces; Sat. Oct. 10, 1885), p.2.

⁸“District Court,” *The Silver City Enterprise* (Friday, July 31, 1885), p. 3.

About the Author

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