No. 20180108-SC

THE SUPREME COURT OF UTAH

SCOTT PATTERSON,

Petitioner–Appellant

v.

STATE OF UTAH,

Respondent–Appellee.

A direct appeal from the dismissal of postconviction claims entered in the Second District Court, Case No. 160701113 (Farmington), the Honorable Thomas L. Kay presiding.

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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APPELLANT'S OPENING BRIEF

I. INTRODUCTION

In prior briefing, Scott Patterson argued that his postconviction claims should be considered despite the State's arguments they were untimely. First, he presented several arguments why the court should reach the merits of his claims, even under the statute of limitations in the Postconviction Remedies Act (PCRA). But if the claims really were untimely under the PCRA, he argued they should be heard under the Utah courts' extraordinary writ power.

This Court has ordered supplemental briefing on the constitutional argument. The briefing order directs the parties to address a variety of questions, but the core issues are these: what is the breadth of the Utah courts' writ power, and what power does the Legislature have to regulate it?

Mr. Patterson shows below that the courts' writ power includes the power to grant postconviction relief. That power was granted at Utah's founding and was reaffirmed in the 1984 amendments to the Judicial Article.

Mr. Patterson also shows below that the Legislature's power to regulate the writ power is minimal. At Utah's founding, the Legislature exercised the power to create rules of procedure, which allowed it some control in how the courts used the extraordinary writs. Over the years, the power to create rules was gradually shifted to this Court. In 1984, that shift was constitutionalized, and now this Court has the power to promulgate rules of procedure, subject to the Legislature's power to amend by supermajority. Because the PCRA cannot

be considered an exercise of the Legislature's rulemaking authority, it does not limit the courts' ability to grant postconviction relief via their writ powers.

II. ARGUMENT

A. The 1984 revisions to the Judicial Article provide Utah courts with the power to grant postconviction relief.

It response to Mr. Patterson's argument that Utah courts have the power to grant postconviction relief through their writ power, the supplemental briefing order asks a series of questions that seek to elucidate that position. While all facets of those questions are important, one key question guides the resolution of the rest: whether this Court should focus its analysis on the understanding of the courts' writ power in 1984 or 1896.[1]

The answer is simple. The focus must be on the 1984 understanding. While undoubtedly relevant, the 1896 writ provisions are no longer in effect. The 1984 amendments are now the governing law.

That leads to the next question: what was the impact of the 1984 amendments? The historical record answers that when the people of Utah ratified the 1984 amendments on the courts' writ power, they understood them to ratify the status quo. And, further answering this Court's questions, Mr.

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[1] Although the supplemental briefing order focuses on *this* Court's writ power, Mr. Patterson's analysis extends to the power held by the district courts and the other, statutory courts, as all have been granted the same writ power. *Compare* Utah Const. art. VIII, sec. 3 & 5 *with* Utah Code §78A-4-103(1) (granting extraordinary writ powers to Court of Appeals); Utah Code §78A-7-105(4) (same to justice courts); *see also* Utah Code §78A-6-102(3) (declaring juvenile courts as equal in status with district courts).

Patterson can demonstrate that by 1984, Utah courts had long been granting postconviction relief under the authority of their writ power. Moreover, such use of the writ power was consistent with the original grant of writ power in 1896 constitution.

1. The 1984 Judicial Article amendments aimed to preserve the courts' writ powers.

Prior to 1984, the Judicial Article saw little change, other than a little tinkering in the 1940s and the 1960s. But a confluence of factors in 1970s and early 1980s led to a push for a complete overhaul of the Judicial Article.

One factor that led to the amendment push was the "alarming growth in the Supreme Court caseload." Cheryll L. May, *Utah Judicial Counsel History* at 15 (Mar. 1998). Efforts to create an intermediary appellate court were confounded by the constitution's guarantee that "[f]rom all final judgments of the District Courts, there shall be a right of appeal to the Supreme Court." Utah Const. art. VIII, sec. 9 (1896). Another factor was the fragmented nature of the courts that prevented system-wide administration. Rather than one person or body having authority over the whole court system, there was instead a "hydra-headed system" of leadership. *See Utah Judicial Counsel History* at 15. Another push came from fights between the executive and legislative branches on how judges should be selected. *See Matheson v. Ferry*, 641 P.2d 674 (Utah 1982); *Matheson v. Ferry*, 657 P.2d 240 (Utah 1982) (per curiam).

Because of these and other issues, the Constitutional Revision Commission (CRC) undertook a comprehensive review of the Judicial Article so that these problems could be addressed. 1984 CRC Report at 15–17. In

proposing changes, one of the CRC's primary objectives was "to articulate the role of the judiciary as a co-equal branch of government within the historical framework of the system of checks and balances." CRC Report at 15.

Ultimately the CRC recommended a completely new Judicial Article. Some sections were tossed out as unnecessary, others looked little they did before, and new provisions were created from scratch. *See* Addendum B, CRC Report at 19–41 (providing a comparative and section-by-section analysis).

But for the provisions delineating the courts' writ power, the only change was terminology. Decades before 1984, court rules had simplified the use of the extraordinary writs, abolishing the need for special pleadings. Instead, a petitioner needed only to ask for relief by extraordinary writ. "[N]evertheless the remedy remains the same as when names were important." *See State v. Ruggeri*, 429 P.2d 969, 970 (Utah 1967) (discussing former URCP 65B). With the 1984 amendments, this "simplification of the writ process" was constitutionalized. *See State v. Barrett*, 2005 UT 88, ¶ 10, 127 P.3d 682. The CRC report explained the change this way: "The original jurisdiction to issue extraordinary writs has been retained, but is written in more general language than that found in the present [1896] provision." CRC Report at 26. A similar change was recommended for the article covering district courts. *Id.* at 28.

These changes were not controversial. The Legislature did not alter the CRC's recommendations in the joint resolution that sent the proposed amendments to the people of Utah for ratification. *See* Judicial Article Revision, 1984 Utah Laws 2d spec. sess. 268, 269 ("S.J.R. 1, passed March 27, 1984). There was similar quiet on the issue in the voter information pamphlet.

The subject of writs, extraordinary or otherwise, was not mentioned in the impartial analysis section, nor in the arguments for or against the revision. *See 1984 Utah Voter Information Pamphlet* at 14–20.

Consistent with the CRC's description of the change, and consistent with prior practice under court rules, this Court has repeatedly explained that the 1984 amendments did not affect its power to issue "the specific writs mentioned in the original version of Article VIII." *Petersen v. Utah Bd. of Pardons*, 907 P.2d 1148, 1152 (Utah 1995); *accord Barrett*, 2005 UT 88, ¶¶10–11; *Renn v. Utah State Bd. of Pardons*, 904 P.2d 677, 682 (Utah 1995); *Hurst v. Cook*, 777 P.2d 1029, 1033 (Utah 1989); *Heninger v. Ninth Cir. Ct., State of Utah, Washington County*, 739 P.2d 1108, 1110 (Utah 1987).

2. The 1896 Constitution provided courts with the power to grant postconviction relief from convictions and sentences.

Because the 1984 amendments did not alter the courts' writ powers, those powers must be at least as extensive as they were under the original provisions in the 1896 Constitution. The original provisions serve as a baseline.

While the text of the 1896 Constitution explicitly gave the courts habeas power, it did not define the breadth of that power. So, to resolve the issue, it is necessary to look at the "original meaning" of that grant of power. *See Neese v. Utah Bd. of Pardons and Parole*, 2017 UT 89, ¶67, 416 P.3d 663. And to determine original meaning, it is necessary to ask "what principles a fluent speaker of the framers' English would have understood a particular constitutional provision to embody." *Id.* at ¶96.

To determine the original meaning of the Utah Constitution, we must determine how the Utahns would have understood its provisions when they were asked to vote for its ratification. As in 1984, the grant of habeas power and writ power generally was not controversial or even remarkable. Consequently, there are no debates or such that reveal what the public understanding was at the time. Instead, we must look to how the habeas power was used prior to 1896 to see how its use informed the public understanding. *Cf. Waite v. Utah Labor Commission*, 2017 UT 86, ¶¶64–85, 416 P.3d 635 (Lee, J., concurring) (surveying how the Open Courts Clause was used in other state constitutions to determine original meaning). That view shows that the original meaning of the habeas power included the power to grant postconviction relief.

a. Pre-ratification evidence of original meaning

As an initial matter, many Utahns who settled the territory would have arrived with broad conception of the habeas power. Before Mormons came to Utah, the Church of Jesus Christ of Latter-day Saints was headquartered in Nauvoo, Illinois. John S. Dinger, "Joseph Smith and the Development of Habeas Corpus in Nauvoo, 1841–44," 36 Journal of Mormon History 136–38 (2010). When the Illinois legislature charted the city in 1840, it included a then-unusual provision: it gave the municipal court the power to issue writs of habeas corpus. *Id.* at 138–41. Based on that grant of power, the city council of Nauvoo passed habeas corpus ordinances that allowed the city's municipal court "to review not only the legality of the arresting writ but the underlying crime for which the arrest was made regardless of the state in which it

happened." *Id.*at 136. This meant the municipal court could use its habeas power not only to ensure that an arrest warrant was procedurally proper, but it could also try the crime itself before allowing the warrant to be executed. *Id.* at 146–47. This power to review the legality of an accusation before the case was even tried was unprecedented for the time, and its existence in Nauvoo supports the view that early Utahns would have understood habeas authority as asking more than just whether a court had jurisdiction.

At Utah's founding, the public understanding of the habeas power also was informed by how habeas was used in other states. In some states, Utahns saw the habeas power successfully used in the postconviction setting. For example, in one Nevada case, a petitioner was granted relief from his conviction because the tax law he violated was invalid. The Supreme Court of Nevada ruled in his favor despite objections that it was improper to consider the petitioner's claim under habeas. *See Ex parte Rosenblatt*, 14 P. 298, 298–99 (Nev. 1887). Similarly, the Supreme Court of California granted habeas relief to a petitioner who had been convicted of violating a city ordinance. It concluded that habeas relief was appropriate because, in its interpretation of the ordinance, "the petitioner was tried and sentenced to be punished for the commission of an act which is and under the existing laws can be no crime." *See Ex parte Kearny*, 55 Cal. 212, 225–29 (1880).

As described in Mr. Patterson's prior briefing, the greatest indicator of how early Utahns would have understood the habeas power comes through the way it was used to vindicate the constitutional rights of Lorenzo Snow, a prominent leader (and later President) of the Church of Jesus Christ of Latter-

day Saints. To appreciate the significance of his case, it is first necessary to review Utah's territorial history.

After Utah was made a territory, Congress made ever-increasing efforts to eradicate polygamy. The first push came with the Morrill Act, which made it an offense punishable by up to five years' imprisonment to "marry any other person, whether married or single, in a Territory of the United States." Morrill Act, ch. 126, 12 Stat. 501 (1862); Edwin Firmage and Richard Mangrum, *Zion in the Courts*, 131 (Univ. Ill. Press 2001) [hereinafter "*Zion in the Courts*"]. But the law was difficult to enforce. For one thing, the Utah territory, like the territories around it, did not keep marriage records. *Zion in the Courts*, 149. More significantly, "Mormon weddings were often performed in temples or the Endowment House, which were open only to faithful Mormons," so willing witnesses were hard to find. *Id.* Altogether these conditions made it difficult to prosecute polygamist marriages. *Id.* at 160.

In response to these troubles, Congress passed the Edmunds Act, which created the new offense of "unlawful cohabitation." *Id.* at 161; Edmunds Act, ch. 47, 22 Stat. 31, §3 (1882). This created a new misdemeanor, punishable by up to six months in prison, that prohibited "cohabit[ing] with more than one woman." *Id.* This statute eliminated the need to prove that sexual intercourse had occurred or even that some marriage ceremony had occurred. It was enough that a man had been "living and dwelling with more than one woman as if they were married." *United State v. Cannon*, 7 P. 369, 374-75 (Utah 1885).

While the new offense was easier to prosecute, the six-month penalty did not have much bite. But that did not stop creative prosecutors. To increase a

defendant's punishment, prosecutors would bring a separate charge of cohabitation for discrete time periods, e.g., charging a defendant separately for each year, month, or even each day in violation. *Zion in the Courts*, 178-79.

The first test case for this charging practice came in the prosecution of Lorenzo Snow. In December 1885, he was charged in three separate indictments with unlawful cohabitation with the same women—one charge for the year 1883, another for 1884, and one for 1885. He was first tried on the 1885 charge and convicted. At his second trial, for the charge covering 1884, he argued that his prior conviction barred further prosecution. The district court rejected his defense in that trial and again at his third trial for the charge covering 1883. *Zion in the Courts*, 179.

Mr. Snow appealed all three convictions. *See United States v. Snow*, 9 P. 501 (Utah 1886); 9 P. 686 (Utah 1886); 9 P. 697 (Utah 1886). Only the second appeal discusses his prior-conviction defense. This Court's territorial predecessor recognized the issue as "probably the most important in the case" but believed there was not "an abundance of authority either for or against" Mr. Snow's contention that he was improperly charged. *Snow*, 9 P. at 693. Ultimately, though, it was persuaded that the separate charges were permissible and upheld the convictions. *Id.* at 696.

Mr. Snow appealed to the U.S. Supreme Court, but his request was denied. Under the statutes then in effect, Congress had not granted the Supreme Court jurisdiction to review criminal proceedings by appeal or writ of error. And for that reason, Mr. Snow's writs of error were dismissed. *Snow v. United States*, 118 U.S. 346, 347-54 (1886). In the course of the decision,

though, the Court twice mentioned that it could consider an appeal of decision denying habeas relief. *Id.* at 348-49.

Taking the hint, Mr. Snow's next move was to seek relief via habeas. On October 22, 1886, his attorney, Franklin S. Richards,[2] filed his petition in the territorial court. It alleged that Mr. Snow was "being punished twice for one and same offense," and asked to be released on that ground. "Petition of Habeas Corpus," *Deseret Evening News* (Oct. 22, 1886). The territorial district denied the petition. "Writ Denied," *Deseret News* (Oct. 27, 1886).

Mr. Snow appealed the denial to the U.S. Supreme Court. *Ex parte Snow*, 120 U.S. 274, 280 (1887). On appeal, the government argued that Mr. Snow was not entitled to relief in habeas proceedings because he was not raising jurisdictional issues but issues of statutory interpretation. *Id.* at 281.

The Supreme Court rejected this argument. Jumping to the heart of the matter, it determined the territorial supreme court had incorrectly interpreted the cohabitation statute: it defined a continuing offense, not one that could be divided up arbitrarily. *Id.* at 281-85. Based on this interpretation of the statute, the Supreme Court concluded the district court in the criminal proceeding had "no jurisdiction to inflict a punishment" for duplicitous charges. *Id.* at 285. The conviction and sentence were "illegal," and it was proper to give Mr. Snow habeas relief. *Id.* at 285-87. Though framed as a ruling of jurisdiction, the *Snow*

[2] More details about Mr. Richard's background and his participation in Mr. Snow's case is available in this article: Ken Driggs, "'Lawyers of Their Own to Defend Them': The Legal Career of Franklin Snyder Richards," 21 *Journal of Mormon History* 84 (1995).

decision is readily seen as a ruling based on the constitutional prohibition against double jeopardy.

This broad view of habeas was confirmed in another Utah case that came to the U.S. Supreme Court two years later. That case, *Ex parte Nielson*, again involved the propriety of multiple charges. After the *Snow* decision, prosecutors could charge cohabitation only once, so instead they charged the defendant Hans Nielson with cohabitation and adultery. *Ex parte Nielson*, 131 U.S. 176, 176–77 (1889). He was tried on the cohabitation charge first, and pleaded guilty. When he was arraigned on the adultery charge, he entered a plea of former conviction, arguing that the cohabitation and adultery charges were "one and the same offense and not divisible." *Id.* at 177–78. The prosecutor demurred to the plea, which the district court sustained. Mr. Nielson was subsequently convicted and sentenced to additional imprisonment. *Id.* at 178.

Mr. Nielson did not appeal at all. Instead, within days of sentencing, he filed a habeas petition arguing that "he was being punished twice for one and the same offense," so "the court had no jurisdiction to pass judgment against him upon more than one of the indictments." *Id.* When the district court denied his petition, he appealed to the U.S. Supreme Court. *Id.*

The Supreme Court again rejected the government's argument that it was improper to grant habeas relief based on Mr. Nielson's arguments. While the Court acknowledged that habeas could not serve the role of an appeal, that did not mean that all claims were barred. By then, the Court had already held that a statute's constitutionality could be challenged on collateral review

because if a statute was unconstitutional, it would deprive a court of jurisdiction to hear a charge under the statute. *Id.* at 182–83 (citing *Ex parte Coy*, 127 U. S. 731 (1888)). From this, the Supreme Court reasoned:

> It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights than an unconstitutional conviction and punishment under a valid law. In the first case, it is true, the court has *no authority* to take cognizance of the case; but in the other it has *no authority* to render judgment against the defendant.

Id. at 183-84 (emphasis added). In light of its later conclusion that the two crimes were one and the same offense, the Supreme Court held that Mr. Nielson's sentence on the adultery conviction "was beyond the jurisdiction of the court, because it was against an express provision of the constitution which bounds and limits all jurisdiction." *Id.* at 185.

As with *Snow*, *Nielson* was nominally decided as a matter of jurisdiction. But to the general public, the understanding was the same: habeas corpus allowed courts to grant postconviction relief based on constitutional defects. Consistent with that understanding, a respected treatise on jurisdiction from this period declared:

> [I]f the defendant being placed on trial was denied the right of counsel guarantied him by the constitution there is no rightful conviction for he has had no trial and the conviction only follows a trial. So if a defendant was refused a subpoena for witnesses in his favor or refused the right of having the indictment read to him or any constitutional immunity the sentence is void. Such immunities are part of the mode of trial and their refusal *goes to the power of the court* as much as if sentenced without being indicted at all.

BROWN ON JURISDICTION, §103 ("When judgment is void and when voidable") (pp. 280-81) (1891) (emphasis added).[3]

In cannot be doubted that these two cases left an impression on the people of Utah. As the case made its way to the U.S. Supreme Court, article after article followed. The Deseret News criticized the district court for failing to issue the writ at all, even if just to deny it. It worried that this might frustrate review by the Supreme Court. "Another Judicial Straw," *Deseret News* (Nov. 3, 1886).[4] A later editorial in the Deseret Evening News advised readers that they must exercise "a little more patience" as they waited for the Supreme Court to hear the appeal. "The Snow Habeas Corpus Case," *Deseret Evening News* (Nov. 26, 1886). When Mr. Snow's attorney, F. S. Richards, left Utah to argue the case, it was reported. "A Very Important Case," *Deseret Evening News*, (Dec. 27, 1886). And after the case was argued, the Deseret Evening News provided a lengthy discussion of the argument itself. "Law and Logic: Arguments in the Case of Lorenzo Snow," *Deseret Evening News* (January 29, 1887).

Once the case was decided, news of it made it into every newspaper. A short discussion of the result was announced on the day the decision it was

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[3] A scan of the treatise is available at https://books.google.com/books?id=E5gEAAAAYAAJ. The second edition of this treatise was issued in 1901. It gives the same view on habeas and jurisdiction. *See* BROWN ON JURISDICTION, §103 (pp. 378-79) (1901), *available at* https://books.google.com/books?id=nKYzAQAAMAAJ. This Court frequently relied on this treatise. *See, e.g., State v. Morgan,* 140 P. 218, 220 (Utah 1914); *Snyder v. Pike*, 83 P. 692, 694 (Utah 1905).

[4] The historical articles are in Addendum A in chronological order.

issued. "Reversed!," *Deseret Evening News* (Feb. 7, 1887); "The Decision," *Ogden Herald*, (Feb. 7, 1887). The next day just about every paper discussed it. *See* "The Great Topic," *Ogden Herald* (Feb. 8, 1887); "A Paralyzer," *Salt Lake Herald-Republican* (Feb. 8, 1887); "The Snow Case," *Salt Lake Democrat* (Feb. 8, 1887); "The Snow Decision," *Salt Lake Tribune* (Feb. 8, 1887). Further discussion of the decision and its consequences followed in the weeks after. *See, e.g.*, "Releasing the Cohabs," *Salt Lake Tribune* (Feb. 10, 1887);[5] "The Last Assault on Mr. Dickson," *Salt Lake Tribune* (Feb. 12, 1887); "In the Snow Case," *Salt Lake Herald-Republican* (Feb. 13, 1887); "The Scope of the Decision," *Deseret News* (Feb. 16, 1887). Eventually, papers printed the Supreme Court's decision in full. *See, e.g.*, "The Snow Case," *Salt Lake Herald-Republican* (Feb. 18, 1887).

The subsequent habeas proceedings for Mr. Nielson made smaller waves, but they were still well-covered. Like Mr. Snow, Mr. Nielson was represented by Franklin S. Richards. His departure to D.C. to argue the case was announced. "Gone to Washington," *Utah Enquirer* (Mar. 29, 1889). The briefing in Mr. Nielson's Supreme Court case was described for the public. *See, e.g.*, "The Nielson Case: Before the U.S. Supreme Court," *Utah Enquirer* (Apr. 30, 1889). The public also received a description of the oral argument. "The Neilsen [sic] Case," *Deseret Weekly* (May 18, 1889). And once the Supreme Court was announced, its decision was widely discussed. *See* "Only One

[5] The Tribune's coverage in this article and elsewhere is particularly notable in light of the paper's generally hostile stance towards Mr. Snow and the Mormon church in this era. While it was critical of many things, it never suggested the Supreme Court misused the habeas power.

Punishment," Ogden Semi-Weekly Standard (May 14, 1889); "The Nielsen Case," *Utah Enquirer* (May 17, 1889); "An Erroneous Impression," *Utah Enquirer* (May 20, 1889).

The *Snow* and *Nielson* cases where both items of general interest in the community. When Utahns were asked to ratify the state constitution, these cases would have informed their understanding of the grants of habeas power in that constitution. And based on these cases, Utahns would have understood the habeas power to include the power to grant postconviction relief.

b. Post-ratification evidence of original meaning

After ratification, there were a number of decisions from this Court confirming that the habeas corpus provisions were originally understood to include the power to grant postconviction relief.

One of the earliest postconviction cases in state history was *In re McKee*. McKee challenged his conviction by an eight-person jury, an "innovative" feature of state's nascent criminal justice system. He claimed that the use of the eight-person jury denied him due process. *In re McKee*, 57 P. 23, 23–24 (Utah 1899). This Court denied habeas relief, but not because the writ could not reach such claims. Instead, it ruled on the merits, finding no conflict with the Fourteenth Amendment. *Id.* at 24–28. Similarly, in an appeal from a habeas denial, the petitioner argued that his conviction was invalid because the statute under which he was prosecuted was unconstitutional. *Bruce v. Sharp*, 127 P. 343, 344 (Utah 1912). The petitioner lost his appeal, but again the decision was based on the merits, not because this use of the writ was improper. *Id.*

Perhaps the earliest postconviction habeas success recorded in the *appellate* reports was *Saville v. Corless*.[6] The petitioners argued that the statute under which they were convicted was invalid because "the subject of the act is not clearly expressed in the title, and that the act contravenes the fourteenth amendment to the Constitution of the United States, and the state Constitution, forbidding special legislation where a general law can be made applicable." 151 P. 51, 51 (Utah 1915). This Court granted relief and accepted all three petitioners' arguments. *Id.* at 51–53.

There is no reason to believe that the justices who decided these cases misunderstood the habeas power they wielded. These cases were all decided in the shadow of ratification. Moreover, these justices were not strangers to Utah. For example, of the justices who decided *In re McKee*, two (Justice Miner and Justice Bartch) served as territorial federal judges before the state was incorporated. *See, e.g.*, Clifford L. Ashton, The Federal Judiciary in Utah 49–51 (Utah Bar Foundation 1988). The third (Justice Baskin) was a long-time lawyer and former mayor of Salt Lake City. *See, e.g.*, Eileen Hallet Stone, "Living History: Robert Newton Baskin fought Utah's fusion of church and state," S.L. Tribune (May 23, 2014). And while they were not delegates to the state's constitutional convention, all three were mentioned during the general

[6] In 1908 that this Court first made clear that the State could appeal a decision granting habeas relief. *See Winnovich*, 93 P. at 991–92. This may explain why postconviction successes do not appear in earlier state decisions.

proceedings. 1 & 2 Official Report of Proceedings and Debates of the Convention 672, 1400, 1747, 1768.

When Utahns ratified the constitution, they understood it to include a grant of habeas power to the state courts that allowed for postconviction relief. This Court then used that power in early cases.

3. The 1984 amendments enshrined the courts' existing authority to issue extraordinary writs, which included postconviction relief.

As discussed above, all available evidence shows that when the Utah Constitution was amended in 1984, the people of Utah sought to preserve for the courts the same power to issue the writs that the courts had been exercising under the original provisions. And by the time of the 1984 amendments, it was well understood that the courts' writ power extended to postconviction challenges. This is reflected in how habeas was used over the years.

In early Utah habeas cases, the focus was nominally on jurisdiction. The writ would not issue if a person was detained under the order of a court exercising proper jurisdiction. *See, e.g.*, *See Winnovich v. Emery*, 93 P. 988, 993-94 (Utah 1908). But this did not mean that habeas courts would not reach constitutional claims. As discussed above, courts granted relief based on the theory that the constitutional violation deprived the courts of jurisdiction to enter a judgment against the petitioner. *See Ex parte Snow*, 120 U.S. at 285–87; *Ex parte Nielson*, 131 U.S. at 183–84; *Saville,* 151 P. at 51–53.

By the 1940s, this Court tossed out this formulistic scheme. Instead, it recognized that habeas corpus could be used for "the correction of jurisdictional errors and [for] errors so gross as to in effect deprive the

defendant of his constitutional substantive or procedural rights. . . . And this of course is true whether the constitutional right is granted by the State Constitution or by the Federal Constitution through absorption in the Fourteenth Amendment." *Thompson v. Harris*, 152 P.2d 91, 92 (Utah 1944). From then on, this Court was explicit in its position that habeas corpus was not concerned only with jurisdiction, but could reach any error of sufficient magnitude. Relying on nothing but its constitutional powers, this Court granted habeas relief for decades until the 1984 amendments.

This subsequent history must be considered in understanding the original meaning of the 1984 amendments. The alternative is untenable. By the time of the amendments, Utah courts had been considering postconviction claims and granting postconviction relief for decades. For years, this Court had been regulating the postconviction process by rule. *See, e.g.*, URCP 65B(i) (1969). Given that background, it would make no sense to say that both the Utah Legislature and the people of Utah were dissatisfied with how this Court had interpreted the grant of writ powers, but nevertheless went ahead with an overhaul of the Judicial Article without restricting this Court's use of that power. Nor is there any reason to believe the people of Utah understood the writ power to be something other than what this Court said it was. So, to determine the public meaning of the 1984 provisions granting Utah courts the power to issue extraordinary writs, it is necessary to examine how the writ power was used since the founding in 1896, and especially on the eve of when the amendments were made.

This conclusion is consistent with how the U.S. Supreme Court has handled similar constitutional issues. In *McDonald v. Chicago*, for example, the question presented was whether the rights protected by the Second Amendment were incorporated against the states by the Fourteenth Amendment. 561 U.S. 742, 749–50, 752–53 (2010). In deciding that question, the Supreme Court considered not only the original meaning of the Second Amendment, but also its public meaning at the time the Fourteenth Amendment was ratified. *See id.* at 767–78 ("In sum, it is clear that the Framers *and* ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.") (emphasis added). The Supreme Court took the same approach in *Timbs v. Indiana*. In that case, the Supreme Court had to decide whether the Excessive Fines Clause was incorporated against the states. 139 S.Ct. 682, 686–87 (2019). Again, the Court considered the meaning of that clause at the time of the Fourteenth Amendment's ratification. *Id.* at 688–89.

Sure, the mechanics here are little different, but they are more direct. Rather than incorporating existing constitutional provisions, as then understood, against different sovereigns, the amendments to the Judicial Article incorporated existing constitutional provisions, as then understood, against the same sovereign. So, to understand what Utahns accomplished when they ratified the Judicial Article, we must determine the public meaning of the "extraordinary writs" as it existed in 1984.

a. By 1984, Utah courts wielded broad writ power.

As already mentioned above, in 1944, this Court held that under its habeas authority, it could correct not only jurisdictional errors, but also constitutional errors. *See Thompson*, 152 P.2d at 92. Until the 1984 amendment, this Court never retreated from the position it staked in *Thompson*. Instead, this Court only further declared that habeas and other writ powers.

Over these forty years, this Court and lower courts used the habeas powers to reach a variety of issues. Under that authority, courts decided child custody issues. *See Sanchez v. L.D.S. Soc. Services*, 680 P.2d 753, 754 (Utah 1984); *Walton v. Coffman*, 169 P.2d 97, 100 (Utah 1946). They decided whether people could be extradited. *Buchanan v. Hayward*, 663 P.2d 70, 71 (Utah 1983); *Little v. Beckstead*, 358 P.2d 93, 94 (Utah 1961); *McCoy v. Harris*, 160 P.2d 721, 722 (Utah 1945). They decided whether prisoners held by other jurisdictions were properly under a detainer issued by Utah, and vice versa. *Hearn v. State*, Utah, 621 P.2d 707 (1980); *Gibson v. Morris*, 646 P.2d 733, 734 n.1 (Utah 1982). Utah courts decided whether probationers had been accorded due process. *Baine v. Beckstead*, 347 P.2d 554, 556 (Utah 1959); *Williams v. Harris*, 149 P.2d 640, 641 (Utah 1944). They even decided whether conditions of confinement were unlawful. *Duran v. Morris*, 635 P.2d 43, 44 (Utah 1981); *Wickham v. Fisher*, 629 P.2d 896, 900 (Utah 1981); *Ex parte S.H.*, 264 P.2d 850, 851 (Utah 1953). And, of course, courts decided "core" habeas claims, like whether a defendant was properly restrained prior to a trial. *McNair v. Hayward*, 666 P.2d 321, 325 (Utah 1983); *Spain v. Stewart*, 639 P.2d 166, 168 (Utah 1981).

Beyond these other sorts of issues, though, the habeas power was regularly used to decide postconviction claims. *See, e.g.*, *Brady v. Shulsen*, 689 P.2d 1340, 1341 (Utah 1984); *Horne v. Turner*, 506 P.2d 1268, 1268 (Utah 1973); *Dodge v. State*, 432 P.2d 640, 640 (Utah 1967); *Forrest v. Graham*, 261 P.2d 169, 169 (Utah 1953). And this Court was not ambiguous in asserting the reach of the writ power, repeating that relief could be granted even on issues that could have been raised earlier. *Martinez v. Smith*, 602 P.2d 700, 702 (Utah 1979); *Brown v. Turner*, 440 P.2d 968, 969 (Utah 1968).

Throughout this history, this Court never seemed to doubt the reach of its writ powers. The closest it seems to have come was the occasional criticism of the claims being presented. *See, e.g.*, *State v. Dodge*, 425 P.2d 781, 782 (Utah 1967) ("He appeals pro se and assigns four grounds of error. We unduly dignify them by discussing them at all."). But even these comments reflect an analysis of the merits (where there clearly was no merit), not a suggestion that the Court lacked authority to reach the merits of important constitutional claims.

Rather than diminish the reach the reach of the habeas power, this Court indicated that it could be combined with other writs with synergetic effect. For example, it held that the habeas power could be combined with the certiorari power, and together "they could be used for the same purpose as a writ of error to review the proceedings of a court over which the issuing court had appellate jurisdiction." *Boggess v. Morris*, 635 P.2d 39, 43 (Utah 1981).

When this history of the writ powers is considered in full, it reveals the original meaning of the 1984 amendments. When Utahns ratified the new

Judicial Article, they would not have understood the writ power narrowly, reaching only specific issues such as postconviction claims, objections to extradition, custody matters, or any other limited list of claims. Instead, Utahns would have had a broad view of the power of the extraordinary writs; the original public meaning would have been that the courts' extraordinary writ power allows them to decide and correct all issues relating to the restraint of any person. *See, e.g.*, Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 Loy. L. Rev. 611, 644 (1999) ("[D]etermining original meanings entails determining the level of generality with which a particular term was used."); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 Fordham L. Rev. 1269, 1280 (1997) ("A genuine commitment to the semantic intentions of the Framers requires the interpreter to seek the level of generality at which the particular language was understood by its Framers.").

Functionally, this is how the writs were used on the eve of the 1984 amendments. No longer did it matter what writ was invoked when petitioning. *Cf., e.g.*, *Pratt v. Bd. of Police and Fire Com'rs*, 49 P. 747, 750 (Utah 1897) (delineating when quo warranto or mandamus must be used in dispute over an office depending on circumstances). Instead, the various writs were invoked with little distinction. *Cf. Boggess*, 635 P.2d 39, 43 (Utah 1981) (using writs of habeas and certiorari to allow out-of-time appeal); *State v. Johnson*, 635 P.2d 36, 38 (Utah 1981) (writ of error coram nobis to allow out-of-time appeal); *see also Manning v. State,* 2005 UT 61, ¶¶26–27, 31, 122 P.3d 628 (creating an extraordinary remedy when no remedy existed under PCRA).

In sum, while the courts had the power to grant postconviction relief via the grant of habeas power in the original constitution, by 1984, that power had been become more firmly established. Indeed, rather than simply being a distinct "habeas" power, the power to grant relief from confinement drew on multiple writs. Thus, when Utah enshrined courts' power as a separate branch of government to "issue all extraordinary writs," Utah Const., art. VIII sec. 3, the people must have understood this authority to include postconviction challenges to constitutional defects in a criminal case.

B. The Court's rule-making authority gives it primary control over regulation of the extraordinary writs.

The extraordinary writ power in the Utah Constitution provides the courts with the power to grant postconviction relief. The question remaining is what the Legislature can do, if anything, to regulate the writ power.

At first glance, this appears to be a complicated question. On the one hand, this Court has been very consistent in its holdings that the Legislature cannot expand or diminish the courts' writ powers. *Brown v. Cox*, 2017 UT 3, ¶14, 387 P.3d 1040 (citing *State v. Durand*, 104 P. 760, 762 (Utah 1908)). On the other hand, it is possible to find a number of old decisions in which this Court has ruled that the writ powers were unavailable based on restrictions imposed by the Legislature. *See, e.g.*, *Utah Fuel Co. v. Indus. Comm'n*, 73 Utah 199, 273 P. 306, 311 (1928) (per curiam). On their face, these holdings seem irreconcilable.

But this conundrum is resolved once these cases are considered in light of another historical fact: originally this Court recognized the Legislature as having near-exclusive authority to make rules governing procedure in the

courts. "[A]lthough the supreme court possessed some power over procedural rulemaking and the practice of law during this period, the legislature retained ultimate control over establishing procedural rules for Utah courts." Kent R. Hart, *Court Rulemaking in Utah Following the 1985 Revision of the Utah Constitution*, 1992 Utah L. Rev. 153, 155–56 (1992); *Brown*, 2017 UT 3, ¶17 n.8.

Because of this dynamic, early decisions often defined the writ as one thing and the writ *as regulated by statute* as something else. *See Salt Lake City Water & Elec. Power Co. v. City of Salt Lake City*, 67 P. 791, 791–92 (Utah 1902) (interpreting certiorari power broadly based on "settled law in England as well as in this country" and prior decision in *Gilbert v. Board of P. & F. Com'rs*, 40 P. 264 (1895)); *Pincock v. Kimball*, 228 P. 221, 223 (Utah 1924) (interpreting certiorari power narrowly and disavowing *Gilbert* and *Salt Lake City Water* as inconsistent with statute); *Boggess*, 635 P.2d at 42 (with the rule power shifted back to this Court, relying on *Gilbert* to define breadth of certiorari power); *accord State v. Elliott*, 44 P. 248, 250 (Utah 1896) ("Except when changed by statute, the rule of procedure [for quo warranto] is practically the same in this country as in England."); *State v. Ryan*, 125 P. 666, 668 (Utah 1912) ("The proceeding in the nature of quo warranto is regulated by statute in this state."). Through its former rule-making power, the Legislature was able to limit how the extraordinary writs were used despite their proclaimed immutability.

Since those early decisions, however, this Court has clarified that the judiciary has authority to regulate procedure. Beyond the amendments to the writ power, the 1984 revision of the Judicial Article made an important change: it "solidified [this Court's] constitutional authority to adopt rules of

evidence and procedure." *Brown*, 2017 UT 3, ¶17 n.8. (citing Utah Const. art. VIII, sec. 4).

In light of the 1984 amendments, the question of regulation is simplified, and it is answered by a review of a few basic principles. Normally, that the Legislature defines rights and remedies, while it is left to this Court to promulgate the rules of procedure that govern their adjudication. *See, e.g.*, *State v. Drej*, 2010 UT 35, ¶¶26–27, 233 P.3d 476. But by directly granting courts the power to issue extraordinary writs, the Utah Constitution takes that power out of the Legislature's hands and gives the judiciary authority to define those substantive rights—as discussed above, one of the remedies secured in the Utah Constitution is the power for the court to grant postconviction relief.

With respect to procedure—how will claims be processed?—the Legislature's power is well defined, but limited. It can amend this Court's rules by a supermajority vote. *Brown*, 2017 UT 3, ¶17 n.8. By that route, the Legislature may regulate the process for considering claims by amending the rules of procedure relevant to the courts' habeas authority.

There may eventually be some question on what limits can be imposed by rule. Rules of procedure cannot alter substantive rights. *See State v. Alexander*, 2012 UT 27, ¶40, 279 P.3d 371; *AAA Fencing Co. v. Raintree Dev. and Energy Co.*, 714 P.2d 289, 291 n.2 (Utah 1986). And "[t]he distinction between substantive and procedural law . . . is not always clear." *DeLisle v. Crane Co.*, 258 So. 3d 1219, 1225 (Fla. 2018). Yet, in this case before the Court, there can be no question. Mr. Patterson sought postconviction review, and the only dispute before this court is the timeliness of his petition. "You can't get much more

procedural than a filing deadline." *State v. Rettig*, 2017 UT 83, ¶58, 416 P.3d 520; *accord Lee v. Gaufin*, 867 P.2d 572, 575 (Utah 1993). Because the proper time to petition the court to exercise its habeas authority is a procedural question, this Court retains full authority to say what claims are timely.

As it now stands, there is no time limit for filing extraordinary writs. *See Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Lindberg*, 2010 UT 51, ¶24, 238 P.3d 1054. And to the extent that the PCRA attempts to impose limits on the courts' writ power, those limits are invalid as inconsistent with the Court's primary rulemaking authority. Nor could the provisions of the PCRA be considered "amendments" to this Court's rules. *See Brown*, 2017 UT 3, ¶¶18–23. And Rule 65C cannot be considered as a rule adopted to regulate the writ because it applies by its own terms only to "proceedings in all petitions for post-conviction relief file under the [PCRA]." URCP 65C(a). Instead, what is left is this Court's prior statements on what few limits may be placed on meritorious claims. *See Julian v. State*, 966 P.2d 249, 254 (Utah 1998) ("[P]roper consideration of meritorious claims raised in a habeas corpus petition will *always* be in the interests of justice."); *Frausto v. State*, 966 P.2d 849, 851 (Utah 1998) ("[A] petitioner's failure to comply with a statute of limitations may never be a proper ground upon which to dismiss a habeas corpus petition.").

Having such control over the use of the writ power, including its habeas component, does not make this Court unique. Other courts possess both the power to grant habeas relief and the power to define rules of procedure. They, too, have resisted legislative efforts to impose limits on habeas relief. *See, e.g.*, *Allen v. Butterworth*, 756 So. 2d 52, 64 (Fla. 2000) ("For all of these reasons, we

conclude that the establishment of time limitations for the writ of habeas corpus is a matter of practice and procedure and, therefore, the judiciary is the only branch of government authorized by the Florida Constitution to set such deadlines."); *State v. Fowler*, 752 P.2d 497, 502 (Ariz. App. 1st Div. 1987) (ruling that a legislatively imposed time limit on the right to postconviction relief was invalid because "[t]he right to post-conviction relief is substantive but the time limits are purely procedural").

And in the bigger picture, recognizing this Court's power to control and grant postconviction relief is not as big of a change as it seems. Under the rule-making authority, this Court has adopted a number of procedural rules that allow individuals convicted of a crime the opportunity to seek postconviction relief, just on narrower grounds.

For example, Rule 24 allows defendants to request a new trial, *see* URCrP 24(a) & (c), and this rule seems to accommodate any constitutional claim. *See, e.g.*, *State v. Bisner*, 2001 UT 99, ¶ 31, 37 P.3d 1073 (reviewing a *Brady* claim raised by a new trial motion under URCrP 24); *State v. Hales*, 2007 UT 14, ¶ 68, 152 P.3d 321 (reviewing an ineffective assistance claim under the same rule). Its major limitation is its short time limit of 14 days (though that time may be prospectively extended). *See* URCrP 24(c). But this Court has power to increase that time under its rulemaking authority.

Similarly, a defendant can raise a constitutional claim of ineffective assistance on his direct appeal that would otherwise have to wait until later. URCrP 23B; *cf.* Utah Code §78b-9-104(1)(d). Rule 22 permits defendants to raise certain constitutional claims against their sentences, even after a direct

appeal. *See* URCrP 22(e)(1)(C) & (e)(2). And the ever-adaptable URCP 60(b) has been blessed as a stop-gap that obviates the need to resort to extraordinary writs where the PCRA by its terms does not apply. *See, e.g.*, *State v. Boyden*, 2019 UT 11, ¶¶ 25–42, 441 P.3d 737 (authorizing use of rule so the *State* could attack a judgment); *Meza v. State*, 2015 UT 70, ¶ 18, 359 P.3d 592 (authorizing use of rule to challenge pleas-in-abeyance). There is no apparent reason why these rules could not be expanded to cover more claims, too.

Notably, this Court has used its rule-making power to avoid resorting to its writ powers. Under Rule of Appellate Procedure 4(f), a court can reinstate a defendant's right to an appeal. Before this rule was adopted, courts used their writ power for the same purpose. *See Boggess*, 635 P.2d 39, 43 (Utah 1981); *State v. Johnson*, 635 P.2d 36, 38 (Utah 1981); *Manning*, 2005 UT 61, ¶¶ 26–27.

So, while there is presently no applicable rule that Mr. Patterson could use to avoid the need to call on the extraordinary writ, there is no reason why there could not be. This Court can, if it chooses, adopt procedural rules that avoid the need to resort to its extraordinary writ power in cases where the PCRA prohibits relief, but relief should otherwise be available.

Moreover, this discussion of the rule power shows that this Court is institutionally competent to decide when and on what terms postconviction relief should be available when a conviction is marred by constitutional violations. The rules currently provide for postconviction relief on certain narrow issues. And prior to PCRA, former Rule 65B governed all postconviction proceedings (other than those governed by some the niche rules mentioned above). Unless every grant of postconviction relief made under one

of these rules is *ultra vires*, there can be no legitimate objection to this Court occupying the field again.

III. CONCLUSION

Under the 1984 amendments, this Court and the lower courts have the authority to grant postconviction relief under their extraordinary writ power. Because that power is granted by the Utah Constitution to this Court and the district courts, the Legislature cannot regulate it except under the shared rulemaking power.

The preceding arguments answer the questions this Court asked, demonstrating that Utah courts have the power to provide postconviction relief via extraordinary writs.

1. The people of Utah in both 1896 and 1984 would have understood the courts' writ power to include postconviction relief from constitutional errors in a criminal conviction. The public understanding at both points is relevant to Mr. Patterson's claims, but it is ultimately the public understanding in 1984 that controls because that amendment is in force today.

2. The 1984 amendment enshrined the courts' writ authority as it was being exercised in 1984 without modification or restriction. By 1984 it was well understood that this authority included a comprehensive power to grant postconviction relief and other relief from confinement.

3. While the Legislature generally defines substantive rights, the Utah Constitution provides a substantive habeas right and gives it to the judiciary. The breadth of that power cannot be diminished.

4. This Court's rulemaking power gives it the primary authority to dictate how the writ power is exercised, subject only to the Legislature's limited power to amend.

Mr. Patterson has asked this Court to interpret the PCRA in a way that allows his claims to be heard on the merits. But if the Court decides the PCRA's statute of limitations does not permit that, the Court should allow his claims to be heard under the Utah courts' constitutional authority to issue extraordinary writs.

Consistent with the arguments in his original briefing, Mr. Patterson's case should be remanded to the district court so his claims can be considered on their merits, either under the PCRA or under the extraordinary writ power.

DATED: July 19, 2018.

/s/ Benjamin C. McMurray
Counsel for Scott Patterson

IV. ADDENDUM

ADDENDUM INDEX

Appendix, Part A

This portion of the appendix contains all of the historic newspaper articles cited in the brief except for one. It excludes "The Snow Case," *Salt Lake Herald-Republican* (Feb. 18, 1887), because that is essentially a verbatim reprint of the Supreme Court's decision in *Ex parte Snow*, 120 U.S. 274, 280 (1887). Nevertheless, it is available for review at https://newspapers.lib.utah.edu/ark:/87278/s6xd27cm/10813468.

The articles are presented in chronological order, oldest to newest.

"Petition of Habeas Corpus," *Deseret Evening News* (October 22, 1886).

PETITION FOR HABEAS CORPUS.

IMPORTANT ACTION LOOKING TO A TEST OF SEGREGATION.

In the Third District Court to-day F. S. Richards, Esq., filed a petition in *habeas corpus*, in behalf of Apostle Lorenzo Snow, now undergoing imprisonment in the Utah Penitentiary on a conviction of unlawful cohabitation, the offense having been segregated into three counts in the indictment.

On seeing the document Judge Zane asked what the object of the proceeding was, and was answered to the effect that the design was to test the legality of segregating indictments. Judge Zane stated that as Mr. Varian was not present the court would take no action in the matter until to-morrow morning at ten o'clock, when it will come up. The proceedings then will depend upon Mr. Varian's attitude, or upon his line of opposition, should he oppose the granting of the application. Following is the text of the petition:

In the District Court of the Third Judicial District, Territory of Utah, Salt Lake County.

In the matter of the application of Lorenzo Snow for a writ of *Habeas Corpus*.

The petition of Lorenzo Snow respectfully shows: That he is now a prisoner confined in custody of Frank H. Dyer, United States Marshal in and for the Territory of Utah, in the penitentiary of said Territory at the county of Salt Lake in said Territory, for a supposed criminal offense against the United States, to-wit: Unlawful cohabitation.

Your petitioner also shows that such confinement is by virtue of the judgment, warrant, and proceedings of record, including three indictments against your petitioner, his arraignments thereon, and pleas thereto respectively, as well as demurrers to such pleas, decisions thereof, and verdicts of the jury, being the record of said matters in the District Court of the First Judicial District of the Territory of Utah, copies of all of which are hereto annexed and marked respectively, exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, N, O and P. And your petitioner further shows that under said judgment, a copy of which is marked exhibit "P" and in execution thereof he has been imprisoned in the penitentiary for more than six months to-wit: continuously since the 12th day of March, A. D., 1886, and has paid $300 in satisfaction of the fine adjudged against him and all the costs awarded and assessed against him on said prosecution.

And your petitioner further states that he is advised and verily believes that his imprisonment is illegal and that such illegality consists in this: the court had no jurisdiction to pass judgment against your petitioner upon more than one of the indictments or records referred to in its said judgment, for the reason that the offense therein set out is the same as that contained and set out in each of the other said indictments and records, and the maximum punishment which the Court has authority to impose was six months' imprisonment and a fine of $300.

That by his said imprisonment your petitioner is being punished twice for one and the same offense.

Wherefore your petitioner prays a writ of *habeas corpus*, to the end that he may be discharged from custody.

LORENZO SNOW.

TERRITORY OF UTAH, } ss.
Salt Lake County. }

Lorenzo Snow, the petitioner above named, being duly sworn, says that he has heard read the foregoing petition, and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

LORENZO SNOW.

Subscribed and sworn to before me this 21st day of October, A. D. 1886.

JAMES JACK,
Notary Public.

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A1

"Writ Denied," *Deseret News* (October 27, 1886).

WRIT DENIED.

Judge Zane Refuses to Grant a Writ of Habeas Corpus in the Case of Apostle Lorenzo Snow.

The Case Will be Taken Before the United States Supreme Court.

The application of Apostle Lorenzo Snow for a writ of *habeas corpus*, as set forth in yesterday's EVENING NEWS, was called for hearing in the Third District Court to-day.

Mr. Sheeks stated that the court was not compelled by the statute to grant the writ, but as it was the desire of counsel for the petitioner to appeal to a higher court, they wanted no technicality to stand in the way of a review of the case, and asked that the court issue the writ, without passing on the question. They did not ask that the petitioner be released from imprisonment now, but that the question at issue—segregation—might go to the United States Supreme Court.

The Court said that with that understanding the writ would be issued.

Mr. Varian interposed an objection, however, claiming that the Third District Court had no jurisdiction to issue a writ of *habeas corpus* in this case. The defendant had been convicted in a co-ordinate court, the First District, and the Third District Court had no right to review the case, and no jurisdiction to render a judgment. For this reason he opposed the granting of the writ. He also argued that where the petition did not show sufficient cause for the discharge of the prisoner, the writ should be denied.

Mr. Richards said the position of Mr. Varian was not well taken. In reference to the alleged insufficiency of the facts shown in the petition, he cited authorities that Mr. Varian's claim had only reference to the court of last resort, and not to one from which an appeal could be taken. Counsel for petitioner had made this request that all possible doubt as to the right of appeal might be removed. It was very far from consistent for the representative of the government to object to having the highest court in the land pass on the construction of the law. This representative had claimed that he had the right to segregate the offense of unlawful cohabitation as often as he chose, and men were imprisoned in consequence. Now he came forward and objected to the Supreme Court passing on the question. If he was right, none should be more willing than government officers to have the question decided in his favor. If he was wrong, those prosecuted under that method were being illegally imprisoned, and it was only an act of justice to them to have the matter set right. For this purpose the writ should be granted. The Court should not try to oust the appellate jurisdiction of the United States Supreme Court by refusing the application of the petitioner.

Mr. Sheeks stated that the only object of the request was to get the question of segregation before the United States Supreme Court.

The Court said that the question was whether on the showing made, the petitioner could be discharged on the hearing. As this could not be done under the ruling of the Territorial Supreme Court, he would not issue the writ.

Mr. Richards said the reason the case had been brought before Judge Zane was that the statute required application to the most convenient court. The petitioner did not ask a review of the case, in this court, or the United States Supreme Court. The only question was whether the Court exceeded its jurisdiction in passing additional judgments after the petitioner had been sentenced once for the offense.

Judge Zane, however, refused to issue the writ, and an exception to the ruling was taken by counsel for the petitioner.

The case will be taken to the United States Supreme Court.

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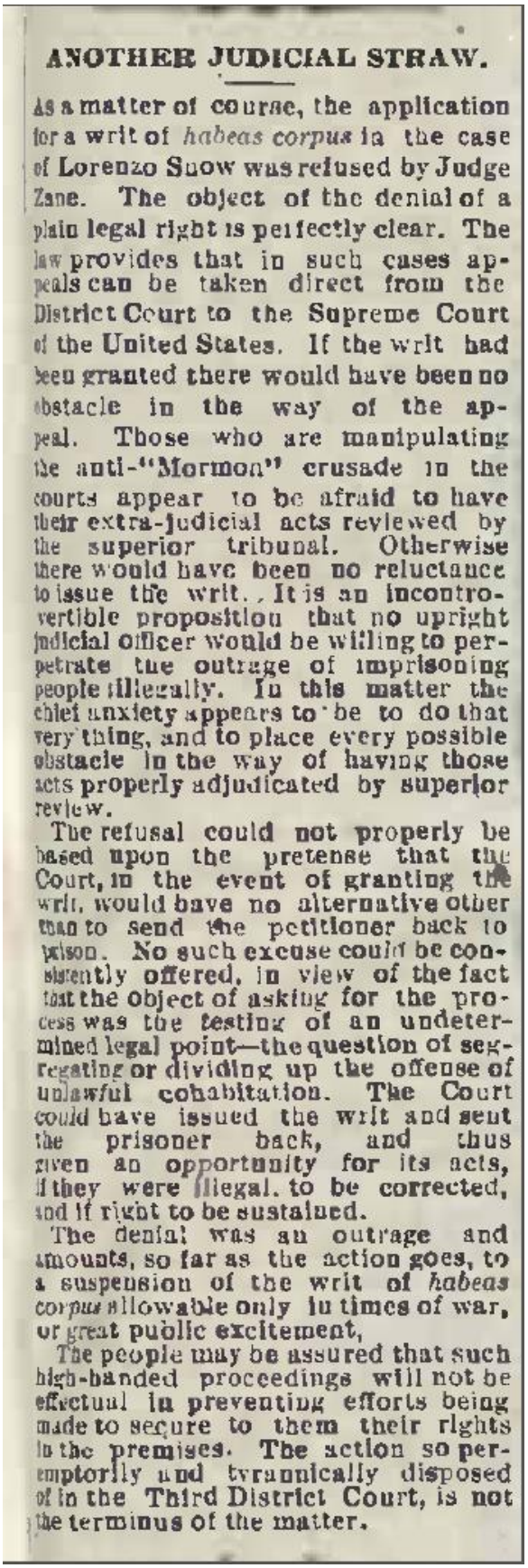
A2

"Another Judicial Straw," *Deseret News* (Nov. 3, 1886).



ANOTHER JUDICIAL STRAW.

As a matter of course, the application for a writ of *habeas corpus* in the case of Lorenzo Snow was refused by Judge Zane. The object of the denial of a plain legal right is perfectly clear. The law provides that in such cases appeals can be taken direct from the District Court to the Supreme Court of the United States. If the writ had been granted there would have been no obstacle in the way of the appeal. Those who are manipulating the anti-"Mormon" crusade in the courts appear to be afraid to have their extra-judicial acts reviewed by the superior tribunal. Otherwise there would have been no reluctance to issue the writ. It is an incontrovertible proposition that no upright judicial officer would be willing to perpetrate the outrage of imprisoning people illegally. In this matter the chief anxiety appears to be to do that very thing, and to place every possible obstacle in the way of having those acts properly adjudicated by superior review.

The refusal could not properly be based upon the pretense that the Court, in the event of granting the writ, would have no alternative other than to send the petitioner back to prison. No such excuse could be consistently offered, in view of the fact that the object of asking for the process was the testing of an undetermined legal point—the question of segregating or dividing up the offense of unlawful cohabitation. The Court could have issued the writ and sent the prisoner back, and thus given an opportunity for its acts, if they were illegal, to be corrected, and if right to be sustained.

The denial was an outrage and amounts, so far as the action goes, to a suspension of the writ of *habeas corpus* allowable only in times of war, or great public excitement.

The people may be assured that such high-handed proceedings will not be effectual in preventing efforts being made to secure to them their rights in the premises. The action so peremptorily and tyrannically disposed of in the Third District Court, is not the terminus of the matter.

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A3

"The Snow Habeas Corpus Case," *Deseret Evening News* (Nov. 26, 1886)

THE SNOW HABEAS CORPUS CASE.

MANY of our citizens, impatient at the law's delays, have wondered why the *habeas corpus* case of Apostle Lorenzo Snow has not yet been brought up before the Supreme Court of the United States, to which it has been appealed from the Third Judicial District of this Territory. They must exercise a little more patience, but may rest assured that it will be heard soon, and will no doubt be fully argued on its merits. We are pleased to inform our readers that the case has been advanced on the calendar and has been set for January 17th, 1887. Brother Snow has exhibited great fortitude and serenity of spirit in his unjust incarceration and has now a prospect of getting some measure of justice.

The point to be decided is the question of "segregation." It is to be determined whether the offense of unlawful cohabitation under the Edmunds act is or is not continuous and therefore one offense only, or may be construed into many offenses until indictment. This is of vital importance. It is to settle the powers of a grand jury to exercise authority never before reposed in such a body. Under the rulings of the Utah courts a grand jury (and here that really means the Prosecuting Attorney who manipulates it) can, at will, put a defendant in jeopardy of six months' imprisonment and a fine of three hundred dollars, or of double, or treble, or as many times multiplied those penalties as it chooses, keeping him a prisoner for life and depriving him of a fortune, for exactly the same offense as that for which the law prescribes the smaller punishment. If this could not be lawfully done in Mr. Snow's case, it can not be done in any other case. Hence the importance of the cause before the Supreme Court, apart from its personal effect on the venerable gentleman who is unjustly deprived of his liberty.

On a fair, rational and strictly legal construction of the third section of the Edmunds act, Brother Snow could not have been imprisoned or fined at all. But that point is not before the court of last resort. Only the segregation question is at issue. We believe it will be fully presented and ably argued. Mr. Snow's counsel will will be Messrs. George Ticknor Curtis and F. S. Richards. The last named gentleman will leave here about Christmas time for Washington, and we hope to hear of a favorable decision, upon one of the most important questions affecting the administration of justice in Utah that has ever been judicially argued or become a matter of general public interest.

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A4

"A Very Important Case," *Deseret Evening News*, (Dec. 27, 1886).

A VERY IMPORTANT CASE.

HON. F. S. RICHARDS left Ogden this morning for the East. He is on his way to Washington to prepare for the case of Lorenzo Snow, which is to come up on a writ of *habeas corpus* before the Supreme Court of the United States on the 17th of January. He will be associated with the celebrated George Ticknor Curtis in arguing this important case, and it will therefore be conducted with that care and skill which the friends of Elder Snow and of the cause of justice desire.

The main issue before the court is the much disputed question of "segregation." Brother Snow has served out the term of six months imprisonment, which with a fine of three hundred dollars is the maximum penalty for the offence of unlawful cohabitation, with which he was charged but of which he was not proven guilty. He is now serving out additional time for which the law makes no provision, but which was imposed upon him by the absurd and arbitrary ruling of the Utah courts.

We say he was not proven guilty of any offense. That is exactly correct He was accused of cohabiting with more than one woman, and it was proven by the witnesses for the prosecution that he had only cohabited with one since the passage of the Edmunds Act. Yet he was convicted because of the peculiar rulings of Orlando W. Powers, then on the bench but now going down to the oblivion that he merits.

The injustice of this conviction, however, is not before the court of review, but the right of grand juries to segregate that which the law has made one offense into many offences at will is the question before the court. This will be argued on both sides with vigor, and we hope will be decided with that impartiality that should rule in a court of the exalted character of the highest tribunal in the land.

We have strong hopes that justice will prevail, and that Brother Snow and others who are affected by the same ridiculous and oppressive rulings of the Utah courts, will receive that relief which a favorable decision will bring to them. The case is in able hands, and we hope that when Brother Richards returns it will be with joyful tidings. We wish him every success in his onerous task at Washington.

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A5

"Law and Logic: Arguments in the Case of Lorenzo Snow,"
Deseret Evening News (January 29, 1887)

LAW AND LOGIC.

Arguments in the Case of Lorenzo Snow

BEFORE THE UNITED STATES SUPREME COURT.

Lucid Statement of the Issues Involved by F. S. Richards.

MAURY FAIRLY CRUSHED BETWEEN THE UPPER AND NETHER MILL-STONES.

Pointed and Conclusive Remarks by Geo. Tickner Curtis.

IT LOOKS AS IF THE COURT WERE CONVERTED.

[News' Special Correspondence.]

The arguments in the Snow *habeas corpus* case began before the Supreme Court of the United States, on Thursday, January 20th. It lacked but half an hour of 4 p. m., the time at which the court closes each day, when F. S. Richards, who made the opening arguments, began his remarks. After stating the case as disclosed by the record, he called the attention of the court to the fact that the case involved two distinct propositions, on either or both of which they relied for a favorable decision from the court.

THE FIRST,

and the least important, was that the judgment was void because of its uncertainty. On this point Mr. Richards occupied the time until the court adjourned. His contention was that a judicial sentence must always impose a definite punishment, and in view of the existence of a legislative statute which allowed prisoners a remission of the number of days' confinement when their behavior entitled them to it, and as the judge in the sentences made no allowance for such a contingency, but had ordered that the prisoner be held until all three sentences had been satisfied to the full extent allowed by the law, independent of the statutory provision, or if allowance could be made for good behavior, no provision was made for it in the sentence, therefore it was uncertain, and being uncertain it was void. In answer to a question Mr. Richards stated that they would be safe in relying on either point alone, but did not choose to rest upon both.

THE SECOND POINT

was that three sentences were sought to be imposed upon the prisoner for a single offense. The record and the indictments taken as presented by the grand jury showed that the offense of unlawful cohabitation had been maintained continuously and uninterruptedly from the 1st day of January 1883, until the 1st day of December, 1885. The indictments, while they separated this period in the first place into two distinct years and in the second to eleven months, nevertheless covered the whole period within the years and months named without omitting a single day. The point sought to be established by Mr. Richards was that there could be but one offense for the period named. He cited a number of English and American cases and had still others on his brief, which time did not allow him to bring orally before the court, all of which bore with singular analogy on the case under consideration. In one case it was held that the taking of coal from day to day for a period covering four years from a coal mine in which some 40 persons were interested was

BUT ONE OFFENSE,

for the reason that there had been no cessation, and the taking, while felonious, was in all respects continuous. In another case a man had attached a fraudulent pipe to a gas main from which, for a protracted period, gas had been drawn during the day and turned off at night, and which had been consumed without passing through a gas meter, yet it was held to be only one offense. In the case of drawing wine from a vat at different periods by a fraudulent tube, the act was held to be continuous, as also in the case of killing a number of horses in one day and of selling different loaves of bread, all were held to be continuous, and being continuous were therefore but one offense. The judge in one case rea-

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"Law and Logic: Arguments in the Case of Lorenzo Snow,"
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prisonment and $300 fine; yet the court had sought to impose 18 months' imprisonment and $900 fine for an offense which the law explicitly provided could not bring upon the prisoner more than one-third either of the measure of imprisonment or the amount of the fine.

Mr. Richards called the court's attention to the statement of the Supreme Court of Utah in the Snow decision, that they have only found one case sustaining the segregation theory. He then reviewed that case, which was decided by the Supreme Court of Massachusetts, and clearly showed that it was wholly inapplicable to the case at bar and that, when tested by the rules of law applicable to such cases in Massachusetts, it did not sustain the prosecution's theory.

Mr. Richards was continually interrupted by interrogations from the court—an evidence always of interest in a case on the part of the bench—and among others were

THE FOLLOWING:

Chief Justice—Suppose that in these three sentences included in one, there had been a separate sentence in form, upon each one of these indictments, would you then claim you could take advantage of this question?

Mr. Richards—Yes. Because even then three penalties would be imposed for one single offense.

Justice Gray—What would you say if the man is indicted for this offense and at the date of the indictment is not arrested or imprisoned, and at the next term of the court, a month later, he is indicted again?

Mr. R.—We say that would be entirely competent. Our contention is that so long as the act of the parties remains unbroken, so long as it remains without any interruption or prosecution on the part of the Government, so long it is but one continuous offense.

Justice Harlan—Was not that question raised on the trial of the second or third case?

Mr. R.—Yes, by the plea of former conviction.

The Chief Justice—Was not that the question you sought to review here on writ of error the last time?

Mr. R.—That was one question. We sought on that writ of error, to review all the errors that the court had committed. But the main purpose, if your honor will remember, the real point we were seeking on the last writ of error, was to get a definition of that

WONDERFUL WORD

that we cannot find out the meaning of. We wanted to know something more about what "cohabit" meant. This was the real purpose of the last case.

Justice Blatchford—There is a further question whether that can be reviewed, not having been called up in the trial.

Mr. R.—We are not here asking a review of the decision of the lower court on the plea of former conviction. We are here claiming before this court, that, after having passed one judgment, the court exhausted its jurisdiction. We are not asking for any review upon the plea of former conviction.

Justice Miller—You do no go upon the ground of its being error alone, but upon the ground that the second and third judgments were void?

Mr. R.—Absolutely void.

The Chief Justice.—Suppose there had been separate judgments in each case, and in the second case tried you had plead a former conviction, would you ask this court to release him on a writ of *habeas corpus*, or must you not have it determined on writ of error, whether that would be proper?

Mr. R.—I can only answer in this way: I am not sure that I fully understand you. I understand this court to have said in the Lange case and in other cases of this class, that no man can be twice punished for the

SAME OFFENSE.

It can make no difference whether two judgments are rendered in the same case for the same offense, or whether they be imposed in two different cases for the same offense. Whenever it appears to this court that two or more penalties have been imposed for the same offense, then the case comes within the jurisdiction of this court on *habeas corpus*, as is distinctly shown by the following language of the court delivered in the Lange case:

"If there is anything settled in the jurisprudence of England and America, it is that no man can twice receive punishment for the same offense."

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"Law and Logic: Arguments in the Case of Lorenzo Snow,"
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At the conclusion of Mr. Richards' argument, Assistant United States Attorney General

WILLIAM A. MAURY

began speaking. He held that the case presented two questions. First, whether it was on a footing with the Lange case, referred to by Mr. Richards—in other words whether the judgment was void; and second, whether the second and third sentences in the case were void because of uncertainty. He expressed himself as amazed at the claim of the counsel for Mr. Snow that there was but one judgment. The contention that there was but one judgment, as the record would demonstrate, had no warrant whatever. In the case of Lange there was one verdict and two judgments; in this case, however, there were three distinct verdicts. Now it is claimed, because he was sentenced and judgment pronounced upon these verdicts *seriatim*, that it was but one act and that there is no separation or division, and that the whole thing must be taken as one act. Now I say the case of Bigelow puts an end to this plea. Bigelow was convicted by the Supreme Court of the District of Columbia for embezzlement. He was arraigned and put upon his trial on fourteen separate and distinct indictments, each one for embezzlement. After the trial had begun and evidence had been introduced, the court determined that there could not be a consolidation of these indictments and trial upon

ALL OF THEM.

Thereupon the case was withdrawn from the jury in the face of the objections made and he was put upon his trial on one indictment.

Justice Miller—That is not strictly correct, I think, Mr. Maury. The case was not withdrawn from the jury, but thirteen indictments were, and the trial continued on the other.

Mr. Maury—He then came to this court on the ground that there had been an infraction of a constitutional right which protected him from being twice placed in jeopardy for the same offense. This court said it might be so. This court said that it would not undertake to determine that question, because that was the very point that was raised in the court below and determined.

Justice Matthews—I would like to ask you a question on that point: Suppose that in this case, instead of the three indictments laying the offense as of three successive years, each indictment had laid it during the same period, that is, all three indictments had been for an offense named as committed from such a day in 1883 to a certain other day in 1883 or any other year, so that, in the face of the three indictments, the period during which the cohabitation was alleged to have

UNLAWFULLY EXISTED

was identical in point of time, and that the prisonor, having been found guilty on all three, had been separately sentenced for three successive terms, would you contend, in that case, that it differed from or was similar to this, so that he could not be delivered from the second term of imprisonment by the expiration of the first?

Mr. Maury—I contend that the same principle applies. The deliverances of the court in a number of cases are to this effect, and I give the words: "Where the court has jurisdiction it has a right to decide every question that arises in the case, and whether the decision be correct or not, its judgment, until reversed, is regarded as binding in every other court." In other words, there can be no judicial inspection behind the judgment save by an appellate court.

Justice Miller—This is the case of a judgment pronounced by the court at one time in regard to the three verdicts of guilty. The court in assuming to make this one judgment, had before it all the records of these three cases, and if they are here we are to be placed in the position of that court. Now, whatever the court might have done in regard to these pleadings, the one being a part of the other, whether that would be jurisdictional or not, is not exactly the question that is before us now. The question before us is, the court having before it these indictments, verdicts and pleadings which show that there was no actual separation of the offense of cohabitation (*which this court against my judgment in the Cannon case held not to mean actual connection, but a living together, as if they were man and wife*), now the court having all these cases before it, was it in its power, was it in its constitutional and legal power to impose more than

ONE PUNISHMENT

for what had occurred during those two or three years? All outside of that I do not think important. That is the question.

Mr. Maury—That very issue was very pointedly raised in the second and third cases by the plea of former conviction.

Mr. Justice Miller—Very well, I understand that. That court might have erred and possibly finding that since then, at another term, sentenced him to imprisonment again. It might have been mere error. But the court is brought face to face with the point that here I am pronouncing one judgment, and the question is, is it one offense or is it three offenses. The question is, does that go to the jurisdiction?

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"Law and Logic: Arguments in the Case of Lorenzo Snow,"
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Mr. Maury—I do not understand that the court pronounced one judgment? I understand that it pronounced three judgments.

Justice Miller—It may go for what it is worth. It looks to me like one judgment.

Justice Bradley—You would not contend that if two indictments should be found against a man for stealing the same horse at the same time, that two judgments could be given against him successively? Supposing the court should, on the plea of former acquittal on one of those indictments, on the trial of the second indictment, overrule the plea, (and commit an error undoubtedly), would it not be an error but

A VOID ACT

as well? A thing may be void as well as erroneous.

Mr. Maury—Certainly it may.

Justice Bradley—You would not contend that the same thief could be susceptible of two indictments and two judgments? The one judgment would be void would it not—the second judgment?

Mr. Maury—No, sir, I do not think so.

Justice Bradley—That is the point.

Mr. Maury then stated that he understood the rule to be that there could be no judicial inspection behind a judgment where the court that renders the judgment had jurisdiction. A number of questions were then asked, and among them the following:

Chief Justice—It seems to me that the question is not one of former conviction, and I want to present to you the view which I take of this sentence. The sentence shows there were three indictments found on one day for the different periods for the crime of cohabitation. These indictments show upon their face that they were for a cohabitation which was continuous from the 1st of January, 1883, until the time of filing the indictment. There were three indictments and there were three verdicts, and the prisoner was called up for sentence upon those three verdicts, and they gave what you say are three sentences, punishing this man by imprisonment for 18 months for unlawful cohabitation between January 1, 1883, and December 1, 1885. This is all embraced in one sentence and in one record. Nor, can we ignore the fact that this is a sentence of 18 months for unlawful cohabitation when the law says that for one offense there shall be a punishment of

ONLY SIX MONTHS?

Justice Gray—Let me put the case to you in a little different aspect. Assuming that these are to be treated as three sentences, the record that is before the court shows that the three indictments were for successive periods of one successive cohabitation. Assuming, for the purpose of this argument, that it is illegal so to treat them, that is is illegal to divide the continuous cohabitation, when the court had before it the evidence of the conviction on three successive years, or parts of them, of successive cohabitation, and has rendered judgment for the cohabitation, has it not exhausted its jurisdiction and sentenced the prisoner in the same sense as in the Lange case? And after having passed one sentence for the same purpose, had it not exhausted its jurisdiction and passed another sentence for the same offense?

Justice Bradley (to Maury)—The difficulty in my mind is outside of your argument entirely. It may be that you can throw some light on the question that troubles me, and I will state it: Is cohabitation from January 1st, 1883, to December 1st, 1885, one crime or three? If it is only one crime, then I have one view of it. If it can be made three crimes, then your position is sustained. But there is the thing behind the form, behind the indictments, behind the verdict, and that is the question of whether the matter is capable of being divided?

To this question Mr. Maury replied: I say as the civilians here often said that *res adjudicata* can

MAKE BLACK WHITE

and white black. I say, if that is done here, that it is no concern of yours. That is my answer to that question. *Res Adjudicata* may make black white. I am here in defense of these principles. I say when a court has jurisdiction, that when once the power is committed to it, you cannot take its judgment by a side wind, I do not care what the injustice. I may agree with your honor that this was one continuous act, that it is one sentence, but I say your honors cannot go behind that judgment.

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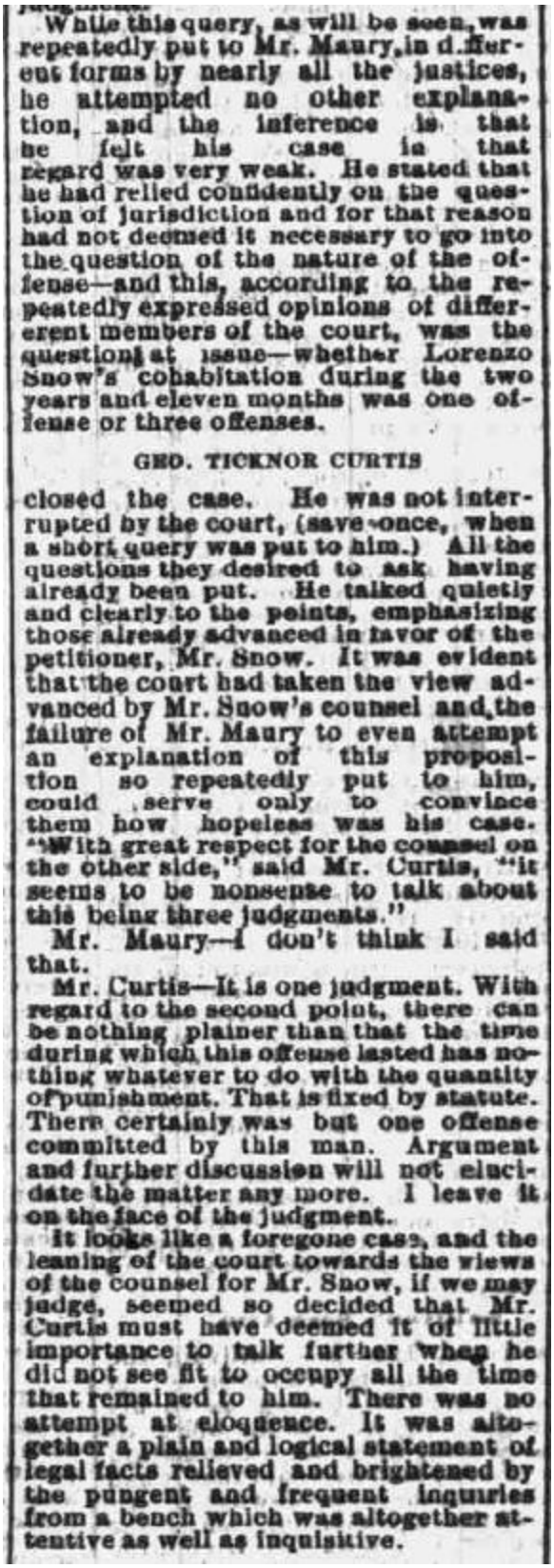
"Law and Logic: Arguments in the Case of Lorenzo Snow,"
Deseret Evening News (January 29, 1887)



While this query, as will be seen, was repeatedly put to Mr. Maury, in different forms by nearly all the justices, he attempted no other explanation, and the inference is that he felt his case in that regard was very weak. He stated that he had relied confidently on the question of jurisdiction and for that reason had not deemed it necessary to go into the question of the nature of the offense—and this, according to the repeatedly expressed opinions of different members of the court, was the question at issue—whether Lorenzo Snow's cohabitation during the two years and eleven months was one offense or three offenses.

GEO. TICKNOR CURTIS

closed the case. He was not interrupted by the court, (save once, when a short query was put to him.) All the questions they desired to ask having already been put. He talked quietly and clearly to the points, emphasizing those already advanced in favor of the petitioner, Mr. Snow. It was evident that the court had taken the view advanced by Mr. Snow's counsel and the failure of Mr. Maury to even attempt an explanation of this proposition so repeatedly put to him, could serve only to convince them how hopeless was his case. "With great respect for the counsel on the other side," said Mr. Curtis, "it seems to be nonsense to talk about this being three judgments."

Mr. Maury—I don't think I said that.

Mr. Curtis—It is one judgment. With regard to the second point, there can be nothing plainer than that the time during which this offense lasted has nothing whatever to do with the quantity of punishment. That is fixed by statute. There certainly was but one offense committed by this man. Argument and further discussion will not elucidate the matter any more. I leave it on the face of the judgment.

It looks like a foregone case, and the leaning of the court towards the views of the counsel for Mr. Snow, if we may judge, seemed so decided that Mr. Curtis must have deemed it of little importance to talk further when he did not see fit to occupy all the time that remained to him. There was no attempt at eloquence. It was altogether a plain and logical statement of legal facts relieved and brightened by the pungent and frequent inquiries from a bench which was altogether attentive as well as inquisitive.

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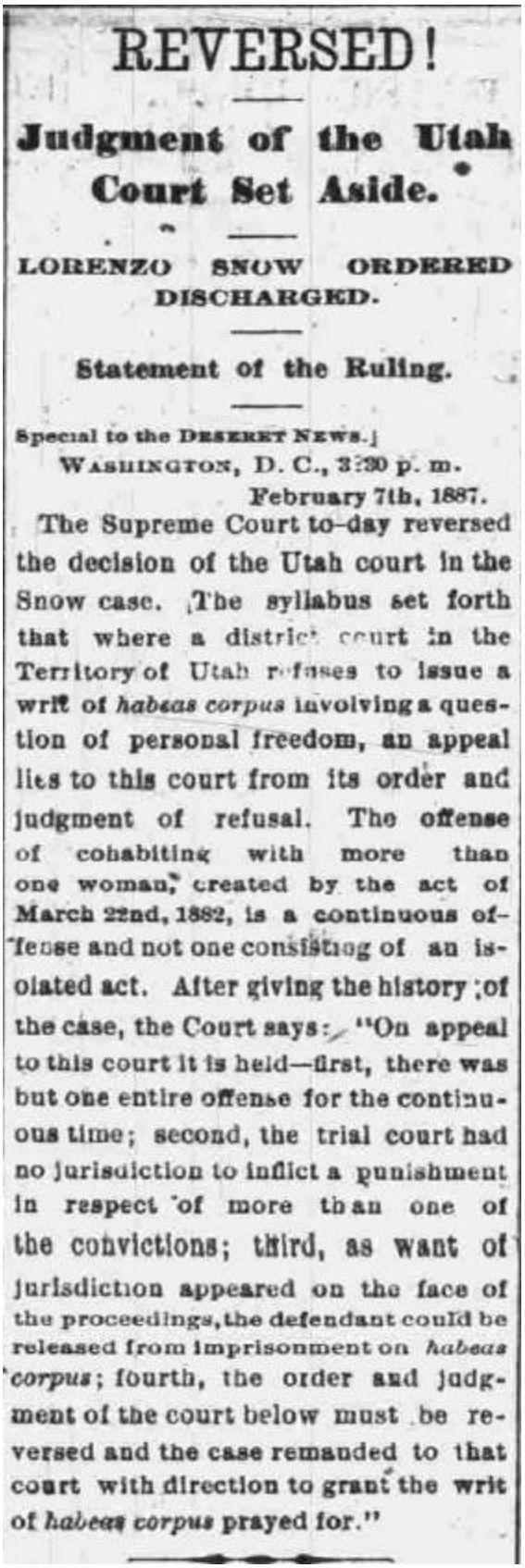
"Reversed!," *Deseret Evening News* (Feb. 7, 1887)



REVERSED!

Judgment of the Utah Court Set Aside.

LORENZO SNOW ORDERED DISCHARGED.

Statement of the Ruling.

Special to the DESERET NEWS.]
WASHINGTON, D. C., 3:30 p. m.
February 7th, 1887.

The Supreme Court to-day reversed the decision of the Utah court in the Snow case. The syllabus set forth that where a district court in the Territory of Utah refuses to issue a writ of *habeas corpus* involving a question of personal freedom, an appeal lies to this court from its order and judgment of refusal. The offense of cohabiting with more than one woman, created by the act of March 22nd, 1882, is a continuous offense and not one consisting of an isolated act. After giving the history of the case, the Court says: "On appeal to this court it is held—first, there was but one entire offense for the continuous time; second, the trial court had no jurisdiction to inflict a punishment in respect of more than one of the convictions; third, as want of jurisdiction appeared on the face of the proceedings, the defendant could be released from imprisonment on *habeas corpus*; fourth, the order and judgment of the court below must be reversed and the case remanded to that court with direction to grant the writ of *habeas corpus* prayed for."

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"The Decision," *Ogden Herald*, (Feb. 7, 1887)

THE DECISION

Of the Supreme Court in the Snow Case.

ACCEPTABLE INFORMATION.

Continuous Cohabitation Is One Offense—No Segregation Allowable.

For several days past the public has been expecting to hear a decision from the Supreme Court of the United States in the Snow *habeas corpus* case which was so ably argued by Hon. F. S. Richards before that court a week or two ago. The questions involved were lucidly explained and at the time of the arguments it was thought the court was favorably impressed. The main point was whether or not continuous cohabitation was one offense or whether any number of counts might be incorporated in an indictment against one person.

This afternoon the HERALD received information that the Court had rendered a decision in favor of Mr. Snow and laying down the rule that continuous "unlawful cohabitation" can not be segregated. This is what the people of Utah have always claimed in face of the decisions of the Courts of the Territory. The decision is all that the Mormons could expect.

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"The Great Topic," *Ogden Herald* (Feb. 8, 1887)

THE GREAT TOPIC.

The Supreme Court Decision in the Snow Case

ENTHUSIASTICALLY ARGUED.

Further Information on the Subject—What Is Being Done.

When the OGDEN HERALD reached its numerous readers last night the people generally were gratified at one piece of intelligence it contained, namely, that the Supreme Court of the United States had reversed the decision of the court below in the Snow case. The Mormons were elated while Gentiles were found who were willing to bet the report was untrue. The information was received from private sources, but, last night the following dispatch came over the wires.

WASHINGTON, February 7.—A decision was rendered by the United States Supreme Court to-day in the polygamy case of Lorenzo Snow, petitioner, which comes up on an appeal from the decision of the Third District Court of Utah, denying the prisoner's application for a writ of *habeas corpus*. Snow was tried and found guilty of unlawful cohabitation upon three indictments which were all alike, except that they covered diffent periods of time.

The court sentenced him to a fine of $300 and six month' imprisonment, the several terms of imprisonment to follow one another. The prisoner, after serving out the first term, petitioned for a writ of *habeas corpus* and discharge from prison on the ground that he could not be legally sentenced to three terms of imprisonment for one continuous offense. The court denied his application, and he thereupon appealed. This court holds that the offense of cohabitation in the sense of the statute is an inherent continuous offense consisting of one isolated act. There was therefore, only a single offense committed prior to the time the indictments found. This court is, therefore, unanimously of the opinion that the order and judgment of the district court for the third judicial district of Utah, must be remanded to that court with directions to grant the writ of *habeas corpus* prayed for, and to take such proceedings therein as may be in conformity with the law and not inconsistent with the opinion of this court. The opinion was by Justice Blatchford.

The Deseret News of last evening contained the following special:

WASHINGTON, D. C., 3:30 p.m.
February 7th, 1887.

The Supreme Court to-day reversed the decision of the Utah Court in the Snow case. The syllabus set forth that where a district court in the Territory of Utah refuses to issue a writ of *habeas corpus* involving a question of personal freedom, an appeal lies to this court from its order and judgment of refusal. The offense of cohabiting with more than one woman, created by the act of March 22nd, 1882, is a continuous offense

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and not one of an isolated act. After giving the history of the case, the Court says: "On appeal to this Court it is held—first, there was but one entire offense for the continuous time; second, the trial court had no jurisdiction to inflict a punishment in respect of more than one of the convictions; third, as want of jurisdiction appeared on the face of the proceedings, the defendant could be released from imprisonment on *habeas corpus*; fourth, the order and judgment of the Court below must be reversed and the case remanded to that Court with direction to grant the writ of *habeas corpus* prayed for."

According to the Salt Lake Herald, a very few minutes after the news had been received in Salt Lake City F. S. Richards hunted up Ben Sheeks, and these two repaired to Dickson's office to break the news to him, and to inquire whether he would consent to an immediate discharge of Apostle Snow and the others affected by the decision, or whether he intended to require special *habeas corpus* proceedings in each case * * * The gentleman was found pacing the floor, buried in the contemplation of a law volume. He was conducted into a private room, and there, with as much feeling as they were capable of, Richards and Sheeks gently intimated to him the disaster that had befallen, and asked what his intentions were with regards to the liberation of the prisoners.

Mr. Dickson answered that he thought it would require a *habeas corpus* proceeding in each case. After some reflection, however, he said he would probably advise a discharge of the prisoners at once, but he wanted some justification for the officers. Mr. Sheeks dryily answered that he would think a sufficient justification might be found in the fact that the judgments upon which the men were held were entirely void. The interview then ended, with no positive assurance to that effect, but with the understanding that all Mormons who are undergoing sentence on other terms than the first, should be liberated to day.

F. S. Richards rode out to the Penitentiary soon after his interview with Mr. Dickson, and was allowed to see Apostle Snow privately. He maintained his usual calmness of manner, and Mr. Richards says, was apparently no more affected by the news than he had been some months before, when he was informed that the Supreme Court had thrown his case out on the grounds of lack of jurisdiction. Mr. Richards informed him that he was not prepared to take him out last evening, but if it all went well, he would be discharged to-day. Mr. Snow replied that he did not know whether he could get ready to leave for a few days—a statement, it may be believed, which brought a smile to the face of the attorney. He was finally persuaded that he must vacate

"The Great Topic," *Ogden Herald* (Feb. 8, 1887)

his quarters to day, and nothing occurring to the contrary, he will leave the adobe walls behind him at 3 o'clock. He was undergoing sentence for three terms of six months each, and $900 fine; of this amount $600 will, of course, be remitted. The extra illegal imprisonment he has suffered, however, he will, of course, have no recompense for.

The OGDEN HERALD learns from Salt Lake City that this morning Prosecuting Attorney Dickson wired the Attorney General at Washington what course he should take, whether to give the marshal permission to liberate the prisoners whom the decision affects at once, or whether it would be necessary for each one to be brought before the court in Salt Lake City under a writ of *habeas corpus*. An answer was anxiously awaited this morning. However, it is certain a great hegira from the penitentiary will take place to morrow if it has not already occurred this afternoon.

LATER. — At four o'clock a special from Salt Lake City to the OGDEN HERALD stated that nothing had been heard from the Attorney General up to that time, and, therefore, matters were at a standstill. News was expected every minute, however.

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"A Paralyzer," *Salt Lake Herald-Republican* (Feb. 8, 1887)

A PARALYZER.

A Terrific Setback for Dickson and Zane.

THE SNOW CASE REVERSED.

The Supreme Bench and the Haughty Prosecutor in Mourning for the Downfall of a Long Cherished Pet Scheme.

The city was thrown into a fever of comment about 4.30 o'clock last evening, scarcely less violent than that which raged on the passage of the Edmunds-Tucker bill by the House, by the appearance of HERALD extras reading as follows:

HERALD EXTRA.

The decision of the Supreme Court of Utah, in the case of LORENZO SNOW, has been reversed by the United States Supreme Court.

This was all the intelligence that at first arrived. Half an hour later, when the evening papers came out, the *News* pablished the following special:

WASHINGTON, D.C., 3.30 p.m., February 7th, 1887.

The Supreme Court to-day reversed the decision of the Utah court in the Snow case. The syllabus set forth that where a district court of the Territory of Utah refuses to issue a writ of *habeas corpus* involving a question of personal freedom an appeal lies to this court from its order and judgment of refusal. The offense of cohabiting with more than one woman, created by the act of March 22d, 1881, is a continuous offense and not one consisting of an isolated act. After giving the history of the case, the Court says: "On appeal to this Court it is held—first, there was but one entire offense for the continuous time; second, the trial court had no jurisdiction to inflict a punishment in respect of more than one of the convictions; third, as want of jurisdiction appeared on the face of the proceedings, the defendant could be released from imprisonment on *habeas corpus;* fourth, the order and judgment of the court below must be reversed and the case remanded to that court, with direction to grant the *habeas corpus* prayed for."

The welcome intelligence was discussed on every hand with glowing countenances or blue countenances, according as the sympathies of the discussers ran. On all hands it was conceded to be a terrific rebuke to the man who first conceived the iniquitous scheme—Dickson, and to the Judge who assisted at its birth, and set it on its feet with his official endorsement—Zane. It was a terrible blow to the Supreme Court; to Boreman, who had echoed Zane and Dickson; to Varian and McKay, who have each sat with Dickson and bulldozed Grand Jurors into multiplying counts upon the powerless Mormons. It would be a terrible blow to Powers—but he has neither the capacity to understand it nor the sensibility to feel it.

HOW THEY TOOK THEIR SHOCKS.

A very few minutes after the news had been received in this city, F. S. Richards hunted up Ben Sheeks, and these two repaired to Dickson's office to break the news to him, and to inquire whether he would consent to an immediate discharge of Apostle Snow and the others affected by the decision, or whether he intended to require special *habeas corpus* proceedings in each case. A reporter of THE HERALD, who started out with the intention of being the first to inform the prosecutor of his set back encountered Richards and Sheeks at the foot of the stairs leading to Mr. Dickson's office, and accompanied them to his room.

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"A Paralyzer," *Salt Lake Herald-Republican* (Feb. 8, 1887)

The gentleman was found pacing the floor buried in the contemplation of a law volume. He was conducted into a private room, and there, with as much feeling as they were capable of, Richards and Sheeks gently intimated to him the disaster that had befallen, and asked what his intentions were with regard to the liberation of the prisoners.

When he had recovered from a brief apoplectic fit, Mr. Dickson answered that he thought it would require a *habeas corpus* proceeding in each case. After some reflection, however, he said he would probably advise a discharge of the prisoners at once, but he wanted some justification for the officers. Mr. Sheeks dryly answered that he would think a sufficient justification might be found in the fact that the judgments upon which the men were held were entirely void. The interview then ended, with no positive assurance to that effect, but with the understanding that all Mormons who are undergoing sentence on other terms than the first, should be liberated to-day.

THE HERALD reporter hurried off to Judge Zane and met him just as some one was informing him of the intelligence:

REPORTER—Judge, have you heard the news?

JUDGE ZANE—Regarding the Snow case? Yes, I just heard that it was decided in his favor. Anything regarding the Hopt case?

REPORTER—No, the Snow was the only decision wired.

JUDGE ZANE—The Hopt case was submitted at the same time, I think.

And the judge passed nonchalantly on. His assumption at coolness was admirable. But there was that evident about him which told that the blow had been a severe one and had gone home.

Judge Boreman was nowhere to be seen. Judge Henderson, who had not committed himself on the segregation doctrine, was informed by Mr. C. C. Richards of the decision. He merely adjusted his favorite quid, and remarked, "I suspected as much."

At the Marshal's office, the little gathering there looked as cheerful as an assemblage of cocks on a drizzly morn. Some comfort was attempted to be extracted from the claim that the only thing decided was that the putting of two or more counts into the same indictment was not allowable, but that the right to find more than one indictment yet remained. This absurd view was quickly demolished when the gathering was assured that it was segregation in any form that had been declared against, and that Apostle Snow's case itself was one in which the periods had been covered by separate indictments.

HOW APOSTLE SNOW TOOK IT.

F. S. Richards rode out to the Penitentiary soon after his interview with Mr. Dickson, and was allowed to see Apostle Snow privately. He maintained his usual calmness of manner, and Mr. Richards says, was apparently no more affected by the news than he had been some months before, when he was informed that the Supreme Court had thrown his case out on the ground of lack of jurisdiction. Mr. Richards informed him that he was not prepared to take him out this evening, but if all went well, he would be discharged to-day. Mr. Snow replied that he did not know whether he could get ready to leave for a few days—a statement, it may be believed, which brought a smile to the face of the attorney. He was finally persuaded that he must vacate his quarters to-day, and nothing occurring to the contrary, he will leave the adobe walls behind him at 3 o'clock. He was undergoing sentence for three terms of six months each, and $900 fine; of this amount $600 will, of course, be remitted. The extra illegal imprisonment he has suffered, however, he will, of course, have no recompense for.

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"A Paralyzer," *Salt Lake Herald-Republican* (Feb. 8, 1887)

OTHERS WHO WILL BE AFFECTED.

In and out of the Penitentiary, it is safe to say, there were many thankful hearts last evening. Among those who have served their first term and are now imprisoned on their second, are N. H. Groesbeck, of Springville, and Bishop Bromley, of American Fork. These and some ten or twelve others should be freed with Apostle Snow. The others who are at present serving on their first terms, and whose prison bars will be broken by this decision as soon as they have served those terms out, are the following:

Royal B. Young, three counts; John Bergen, four counts; O. P. Arnold, three counts; Willard L. Snow, three counts; William Jeffs, four counts; Carl Jensen: James Dunn, three counts; James Higgins, five counts; Jonas Lingberg, three counts; Andrew Hansen, three counts; Isaac Pierce, three counts; Amos H. Neff, three counts.

These are only from this district; there are others from the First and Second. Those in this district against whom cases are still pending on more than one count or more than one indictment, are as follows. Many of them have already served one term, and all such are now freed from any further fear of having to re-visit the old haunts. Those who have had from two to five counts before them, will now be able to think of one with some degree of cheerfulness. H. S. Gowans, two cases; John Penman, one case; H. J. Foulger, two cases; Thomas Jones; John Y. Smith, two cases; James Moyle, two cases; George H. Taylor, two cases; Charles Livingston, three cases; James C. Paulson, two cases; Henry Goff, two cases; William J. Jenkins; one case; Robert McKendrick, one case; Ishmael Phillips, three cases; Jonathan Chatterton, two cases; H. W. Naisbitt, two cases; Stanley Taylor, three cases; William H. Haigh, three cases.

Following is a list of those recently indicted, in whose case the Prosecutor will have the cheerful task of moving either to quash all but the one count, quash the whole indictment and resubmit the case to the grand jury, or elect upon which of the counts he chooses to proceed:

John Tate, four counts; Bedson Eardley, four counts; William H. Watson, four counts; Ezra T. Clark, three counts; B. H. Schettler, four counts; Peter Barkdell, five counts; Lewis H. Mousely, three counts; Herrman Grether, five counts; George B. Wallace, two counts; John P. Mortensen, three counts; John Adams, four counts; Apollo Driggs, five counts; Joseph Hogan, four counts; James Butler, five counts; Edward Schoenfeld, two counts; Andrew W. Winberg, five counts; William H. Tovey, two counts.

THE ELDREDGE-ARMSTRONG BOND.

It is thought that the decision will have considerable importance in influencing the Supreme Court's decision in the case of the Eldredge-Armstrong bonds, as one of the grounds on which those gentleman are making their fight is that the two bonds ($10,000 each) were exacted on different indictments for the same offense, that segregation was illegal, and hence the bonds were illegal.

BUT THEY WON'T DO IT.

Several gentlemen were heard to say on the street last night that if Dickson and Zane were men of the calibre they were accounted to be—they would hand in their resignations forthwith—no man who deserved the name of lawyer would bow his neck and humbly receive so crushing a rebuke. The best answer to this, however, is that these gentlemen are Republicans, and that they belong to that great army of office holders who seldom die and never resign.

CONGRATULATIONS.

F. S. Richards was the recipient of a host of congratulations on every hand last evening on the issue of the fight he had conducted at Washington. He accepted all expressions without disguising the gratification he felt over the victory, but added that he had had the strongest possible aid on his side—the law and the right.

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"The Snow Case," *Salt Lake Democrat* (Feb. 8, 1887)

THE SNOW CASE.

Unlawful Cohabitation Not a Continuous Offense.

WASHINGTON, Feb. 8.—A decision was rendered by the United States Supreme Court yesterday in the polygamy case of Lorenzo Snow, petitioner, which comes up on appeal from the Third District Court of Utah, denying the petitioner's application for a writ of habeas corpus. Snow was tried and found guilty of unlawful cohabitation upon three indictments, which were all alike, except that they covered different periods of time. The Court sentenced him to a fine of $300 and six months' imprisonment, the several terms of imprisonment to follow one another. The prisoner, after serving out the first term, filed a petition for a writ of habeas corpus and a discharge from prison, on the ground that he could not be legally sentenced to three terms of imprisonment for one continuous offense. The Court denied his application, and he thereupon appealed. This Court holds that

THE OFFENSE OF COHABITATION

In the sense of the statute is inherently a continuous offense having duration, and not an offense consisting of an isolated act. There was, therefore, only a single offense committed prior to the time the indictments were found. This court is, therefore, unanimously of the opinion that the order and judgment of the Third Judicial District of Utah must be remanded to that court with direction to grant the writ of habeas corpus prayed for, and to take such proceedings thereon as may be in conformity with the law and not inconsistent with the opinion of this court.

Opinion by Justice Blatchford.

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"The Snow Decision," *Salt Lake Tribune* (Feb. 8, 1887)

The Snow Decision.

The Supreme Court's decision in the Snow case wreathed the faces of the priesthood with smiles yesterday. The old man was notified by telephone, when he and the rest of the cohab convicts held a praise meeting, and Elder F. S. Richards got a good-for-any-time permit from the Marshal's office so that he and Brother Moyle could go down and mingle their tears of joy with his. The church plan now is to bring up on Habeas *corpus* all the cohabs who have served six months or over, and turn them loose. Just how many will participate in the jail delivery, Warden Brown could not state yesterday, as the books must be carefully looked over to figure the thing up. The priesthood will make a handle of this in proclaiming to the people that the Lord is at last showing His hand in favor of His Saints.

Colonel Merritt says Judge Rosborough and a number of other prominent local lawyers have claimed all along that the segregation of indictments would not stand before the Supreme Court.

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"Releasing the Cohabs," *Salt Lake Tribune* (Feb. 10, 1887).

RELEASING THE COHABS.

Scope of the Late U. S. Supreme Court Decision.

APPLICATIONS FOR RELEASE UNDER IT.

Attorney Richards Gets a Set-Back on His Arrogant Demand for Fanciful Rights—Tough Swearing by Bromley.

Mr. Dickson received word yesterday morning from Attorney-General Garland as to the scope of the United States Supreme Court's decision, so that the cohab convicts affected thereby will be released now as fast as their first six months expire.

COHABS RELEASED YESTERDAY.

Cohabs Wm. M. Bromley of American Fork, Isaac Pierce of this city and Wm. H. Pidcock and Ambrose Greenwell of Ogden were brought down from the Pen yesterday to be acquitted under the recent ruling of the Supreme Court of the United States in the Snow case.

Greenwell paid his fine of $300, there being no costs taxed against him, received his suit of clothes and went away rejoicing.

No costs or fine were taxed against Pidcock in his sentence, and he was accordingly discharged.

Bishop Bromley and Isaac Pierce went before the Commissioner to take the pauper oath, but were gloriously slipped up on their scheme.

BISHOP BROMLEY.

The cohab and child beater, on going into the Pen had a long beard, which has been shaved off. He has now but a scrubby moustache and wears a decidedly tough appearance. He was sworn and testified that he was a kind of farmer by occupation. The only real property that he could call his own was fifty-two acres of grust land situated near American Fork, worth about $15 an acre. He had given $10 per acre for it, but would be willing to sell it for $15. This was covered by a $600 mortgage which was given three years ago, but only the interest had yet been paid. He had no home, the two he had having been deeded to his wives before he was sent to the Pen. He had a team of horses and wagon and a cult, and some farming implements and about 100 head of sheep, which were loaded by some one on shares. The sheep were worth $1.75 per head. These were his entire resources.

Mr. Dickson said there was no use to go further into the examination, as the overplus in the real estate exempt from execution was enough to pay the fine.

Bromley said in reply to Brother Moyle's questions that he had had fourteen children, but two of these would, he thought, be considered illegitimate. The property spoken of was all that he had notwithstanding his long residence in the country, and his office of bishop of American Fork; and therefore did not know whether the sheep were living yet or not. Mr. Dickson asked the Bishop if he had ever heard anything to the contrary, or if he had any reason to think that the sheep were dead, to which the Bishop replied that he could not say. It was possible that they had all died during the winter. He had also two bills that he had to pay pretty soon. He was informed that this cut no figure in the case. Mr. Moyle thought that the land was exempt from execution, as by a ruling of Judge Zane such property was considered a part of a homestead. Mr. Dickson said if this rule held good, as the Court was inclined to be here, that the sheep were not exempt. The written form of the oath was handed to Bromley by Mr. Dickson, and he was asked if he could swear that he was not worth the sum of $30 over and above the amount exempt from execution, and the

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"Releasing the Cohabs," *Salt Lake Tribune* (Feb. 10, 1887).

Zane such property was considered a part of a homestead. Mr. Dickson said if this rule held good, as the Court was inclined to believe, that the sheep were not exempt. The written form of the oath was handed to Bromley by Mr. Dickson, and he was asked if he could swear that he was not worth the sum of $30 over and above the amount exempt from execution, and the Bishop, after reading it, said that if there was any probability of his getting into a perjury scrape, by taking the oath required, he would not do so. He was not much of a lawyer, and with a greenness that was quite refreshing said that he did not understand the thing at all. After being pinned down to the question as to whether he could take the oath or not, he wilted and slid out of the chair and went to the Marshal's office, where his sons gave the money required for the payment of his fine and costs, amounting to $407 80, the bishop, singularly enough, taking the change from the Clerk and stuffing it into his wallet and then into his trousers pocket, as if it was his own and not borrowed from his sons with no show in the world to pay it back. The bishop will return to the bosom of his concubines, as he indicated his intention of doing, as soon as he was released, when the sentence was passed upon him by Judge Powers last spring.

ISAAC PIERCE GETS AWAY.

The next victim was Isaac Pierce, who has since his winter residence in the Pen changed so much that he would *hardly* be recognized by his cronies if they should have had the pleasure of *seeing* him. His fiery beard has been all shaved off and his hair cut in regular convict style. He perched upon the anxious seat, cocked his leg over the arm of the chair, and looked for all the world like a *Police Gazette* photograph of a train robber. He said his business was that of a farmer and general rustler; he has a little home in the Tenth Ward where his legal wife and three children are at present living, the house of the second being in the Sugar House Ward. His property was a couple of colts. He was once the owner of a horse, wagon and harness, but he understood his wife had sold them. He could form no estimate of what they were worth, but after being brought down to the point by Mr. Dickson said that about $150 would cover their value.

His answers were given in the shortest manner possible, and with a very apparent lack of candor, and were squeezed out of him at intervals *like milk from a cow*. He, too, did not know whether he could take the oath or not. Brother Doyle thought that he would not commit any perjury by taking the requisite oath. A long and tedious examination followed, in which the defendant made the most non-committal answers that could possibly be given in answer to the questions of the Prosecuting Attorney, which was at last wound up by no oath being taken by him.

Judge McKay said that he could not discharge the defendant upon this showing, and the case went, if he did not pay his fine, be taken on a writ of *habeas corpus* before Judge Zane. Pierce was remanded into the custody of the United States Marshal and into last evening furnished the amount required to pay his fine and costs, $116.65.

RICHARDS MAKES A SCENE.

F. S. Richards, Attorney-General for the Church of J. C. of L. D. S., is becoming much too large for his pantles. He stalked into the Marshal's office yesterday morning followed by a motley horde of Mormon vassals, hangers-on and filthy men, and demanded a pass to the Penitentiary for one of the church hirelings. The fellow was to be really a church missionary to the "saints in prison." He was to go in among them, tell each one what to do, and when it would be time to strike each for his "rights." In short, he was to set at defiance prison discipline, and give the Gentile minions of a hellish law to understand that "Israel is above all law." Brother Richards, with the detonating mouth, to show off before his backers, inflated his thoracic pouch, shook his Numidian mane and roared in stentorian tones that the Latter-day Saints had some rights left in this Territory, and that they demanded those rights! [Chorus of henchmen—"Hear! Hear!"] The Mormon chanticleer again flapped his wings with another mighty cock-a-doodle-do, stating he did not ask as a favor, but as a *right*, when Deputy Pratt walked in, and, finding what was being demanded, directed the clerk to

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"Releasing the Cohabs," *Salt Lake Tribune* (Feb. 10, 1887).

GIVE NO PASSES

Whatever. He also gave the Attorney General for the Church of J. C. of L. D. S. to understand that the Marshal's office likewise had rights, that the prison had discipline to be preserved, and that if he couldn't come into that office and act like a gentleman he would be accommodated with no favors. [Cries from the benchmen of "Shame! Shame!"] Pratt then went into the other room and called on Captain Greenman, who was in charge of the office, not to allow Grand Mogul Richards any pass or favors whatever, at the same time making a few cursory and casual remarks, as it were, about the perplexities and nervousness of Mormon parentage, obviously intended as a balm of Gilead for the tender cohab heart of My Lord-high-muck-a-muck and-son-of-an-apostle Franklin Smith Richards. Franklin S. stood dumb as an oyster for a moment, apparently afraid that Pratt would act as he felt, take him by the nape of the neck and waltz him down stairs to a peculiar kind of Newport Glide not practiced much in the ward meeting-house hoe-down. When Pratt went out, the Mormon Mikado and Grand Llama Franklin S. plucked up his spirit, which had been cowed into a metaphorical woodchuck's hole by Pratt's flashing across his field of vision, and asked of Mr. Miller: "Come, are you not going to give us our rights?"

"You act like a d—d fool," retorted the clerk, as he refused to give the pass asked for. [Cries of "Oh! oh!" from the aspen.]

Then Pasha Richards and his attendant badi-bazouks, seeing that they had bit off more than they could chew, withdrew to rue their gall and chew the cud that had been given them.

That the brethren profited by the castigation, was evident when Brother Moyle come in toward noon relative to getting Child-Beater Brouley, Abramus Isaac, Jacobus Pierce and Guilielmus Decapolous Pilcock out of the bastile. He was very affable and, while while pressing his request, was exceedingly deferent to Marshals Greenman and Pratt. He was no more like High-cock-a-lorum Franklin S. that the moon is green cheese. Captain Greenman told Brother Moyle that Mr. Miller has no authority to grant passes to the Pen., which the cohabs will do well to bear in mind. But as Moyle conducted himself with propriety, he was accommodated as quickly as the law would allow.

THE MORNING'S EPISODE

Caused a general remark in the Marshal's office that Dib was but a very faint indication of the fearful high hand with which the Saints would run things if Statehood were granted them; the earth could not contain them, and blood and murder would unhesitatingly be resorted to in driving the Gentiles from the new State; for is it not written in the code of Mormon, "Israel is above all human law." Their overmuch previous airiness was also instanced at the Pen Tuesday afternoon when the crowd of wingless cherubim drove out to bring in Apostle Badly Muddled Snow. The whole gang drove in as though they owned the place, and the warden and turnkey had to fairly stand them off or they would have demanded the gates be raised and the entire cavalcade of seraphs be allowed to ride in and carry off every cohab carried in the place. They wanted their "rights," so they said, and no doubt a number of them expected any moment to see the Lord appear from Heaven surrounded by Smith, Brigham and the few deceased apostles who never apostatized, and releasing all the cohabs at a word, smite the whole Gentile hostile into the earth, warden and all. The guards say they are tired to death with the arrogant cheek of the Chosen Seed of Israel, and the way they have been driving out to the Pen since the Marshal went away, demanding their "rights," as though the Penitentiary management was at the beck and call of the Mormon Church. In fact, the United States Supreme Court decision, which really bulks on the Edmunds-Tucker bill, has so exalted the horn of the pseudo Children of Israel that they think now the Lord is about to show Himself on high, defeat the bill, give Utah Statehood, and wipe the Gentiles from the face of the earth.

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"The Last Assault on Mr. Dickson," *Salt Lake Tribune* (Feb. 12, 1887)

THE LAST ASSAULT ON MR. DICKSON.

The *Deseret News* has committed almost every species of crime and outrage in the course of its sinister career. It has tried to incite murder; it has justified murder and defended every species of crime; it has thrown the blanket of its concealment around a thousand scoundrels; it has assisted in condoning every species of malfeasance and ruffianism; it has knowingly held up people guilty of incest, robbery and murder, as saints and martyrs; it has helped to betray weak women into the clutches of brutal men; it has watched and kept still while it knew that wholesale robberies were being perpetrated upon poor slaves; it has tried with all the venom of a nature the active principles of which are falsehood and malice to assassinate characters; it has, while defending the gratification of lust as a divine sacrament, upheld perjury as a divine grace; it has taught treason to the Government and loaded faithful officers with all the slimy abuse which a base-born and base-bred soul could invent, and if it has ever failed in being more depraved than words can express, it has been through a want of capacity, and not through a want of any brutal earnestness of desire. But in all its history nothing was ever more false, more cruel and more completely saturated in meanness, than its attack upon District Attorney DICKSON last evening. Of course it is using all its efforts to have Mr. DICKSON removed. It has stopped at no falsehood for months to accomplish that result, but last evening it went further. It pictured Mr. DICKSON as destitute of every manly attribute, and of being guilty of seeking to oppose the natural process of the law, and to gratify personal spite, to obstruct, out of pure cruelty, a mandate of the Supreme Court of the United States. To show how utterly causeless, and how unspeakably false and mean it can be, a plain statement of facts is all that is necessary.

On Monday last the Mormons received a dispatch stating that there had been a decision of the Supreme Court in the Snow case reversing the judgment of the Supreme Court of this Territory. The information was carried to Mr. DICKSON by Messrs. RICHARDS and SHEETS, and he was asked by them whether he would compel them under that decision to bring up every prisoner by habeas corpus, and generally pursue an obstructive course. He replied that he had no disposition to do any such thing, but called their attention to the fact that he could not act on a private, unofficial dispatch. He offered, however, to telegraph to the Attorney General asking for instructions. It was thought best to wait until Tuesday morning, thinking

"The Last Assault on Mr. Dickson," *Salt Lake Tribune* (Feb. 12, 1887)

perhaps instructions would come. On Tuesday morning Mr. DICKSON wrote the following dispatch to the Attorney General:

Does the decision of the Supreme Court in *ex parte* Snow hold that the offense defined in the third section of the Edmunds bill is continuous, so that I will be authorized to advise the release of all persons convicted under that section, who have served six months and paid fine?

This dispatch Mr. RICHARDS took from Mr. DICKSON'S hand and forwarded. On Wednesday morning an answer was received from the Attorney General which read as follows:

Will send you full text of opinion as soon as printed.

This shows plainly that the idea of the Attorney-General was that there should no one be released under the decision until the full decision should be received here by mail. However, inasmuch as the dispatches to THE TRIBUNE in the main confirmed those received by the Mormons, Mr. DICKSON determined to act at once. Accordingly he went to the Marshal's office and found that four prisoners, besides Mr. SNOW, were, under his understanding of the decision, entitled to release, and he thereupon advised the Marshal to release them. This the Marshal refused to do without an order from Judge ZANE. So Mr. DICKSON went into the court-room and moved that an order be issued by the Court for the release of those men upon payment of their fines, and the order being made, they were released.

The next day Attorney MOYLE presented himself to Mr. DICKSON and asked that the same order might be asked for in the case of ROYAL B. YOUNG. This Mr. DICKSON declined, because as he explained, he thought Mr. YOUNG was not entitled to a release, as he was not convicted on two counts of one indictment, but under two indictments, the last of which was for an offense committed after the first indictment had been found. MOYLE then slipped out and went directly to the Third District Court, and in the midst of the business then in progress, asked Judge ZANE for an order in the ROYAL B. YOUNG case similar to the one issued for the others. The Judge not thinking that everything was not entirely regular, granted the order. It was a mistake, and was due to the fact that the attorney carried to him the idea that the case was precisely like those already disposed of. It was upon this that the *News* founded its cowardly and shameful assault last evening. It is a lasting pity that the *News* could not be published at some point three or four hundred miles West of here for a single week. To show that Mr. DICKSON has been too hasty in

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"The Last Assault on Mr. Dickson," *Salt Lake Tribune* (Feb. 12, 1887)

his generosity, we copy below a dispatch received yesterday by him from the Attorney-General. It is as follows:

WASHINGTON, D. C., Feb. 11.—*U. S. Attorney Dickson, Salt Lake*:—Take no action in Snow case until copy of opinion mailed you last, which will show you what to do, reaches you.

(Signed) A. H. GARLAND,
Attorney-General.

What will the infamous character

assassin have to say to that? There needs no stronger evidence to be given that the power of the Mormon Church should be utterly broken, than that it accepts the *Deseret News* as its official organ.

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"In the Snow Case," *Salt Lake Herald-Republican* (Feb. 13, 1887)

IN THE SNOW CASE.

The Points Decided in the Recent Decision.

Ex parte. In re Snow. No. 1282.

POINTS DECIDED.

Where a District Court in the Territory of Utah refuses to issue a writ of *habeas corpus*, involving the question of personal freedom, an appeal lies to this court from its order and judgment of refusal.

The offence of cohabiting with more than one woman, created by Section 3 of the Act of Congress of March 22d, 1882, chap. 47, (22 Stat., 31,) is a continuous offence; and not one consisting of an isolated act.

Snow was convicted separately, in a District Court of the Territory of Utah, on three indictments under that section, covering together a continuous period of time, each covering a different part, but the three parts being continuous, the indictments being found at the same time, by the same Grand Jury, on one oath, and one examination of the same witnesses, covering the whole continuous time. One judgment was entered on the three convictions. It first imposed a term of imprisonment and a fine. It next imposed two further successive terms of imprisonment, each to begin at the expiration of the last preceding sentence and judgment with two further fines. It set forth the time embraced by each indictment, and specified each of the three punishments as being imposed in respect of a specified one of the indictments. On a petition to a District Court of the Territory by the defendant, for a writ of *habeas corpus*, setting forth that he had been imprisoned under the judgment for more than the term first imposed, and paid the fine first imposed, and that the other two punishments were in excess of the authority of the trial court, the writ was refused. An appeal to this court: held,

1.—There was but one entire offence for the continuous time.

2.—The trial court had no jurisdiction to inflict a punishment in respect of more than one of the convictions.

3.—As the want of jurisdiction appeared on the face of the proceedings, the defendant could be released from imprisonment on a *habeas corpus*.

4.—The order and judgment of the court below must be reversed, and the case remanded to that court, with a direction to grant the writ of *habeas corpus* prayed for.

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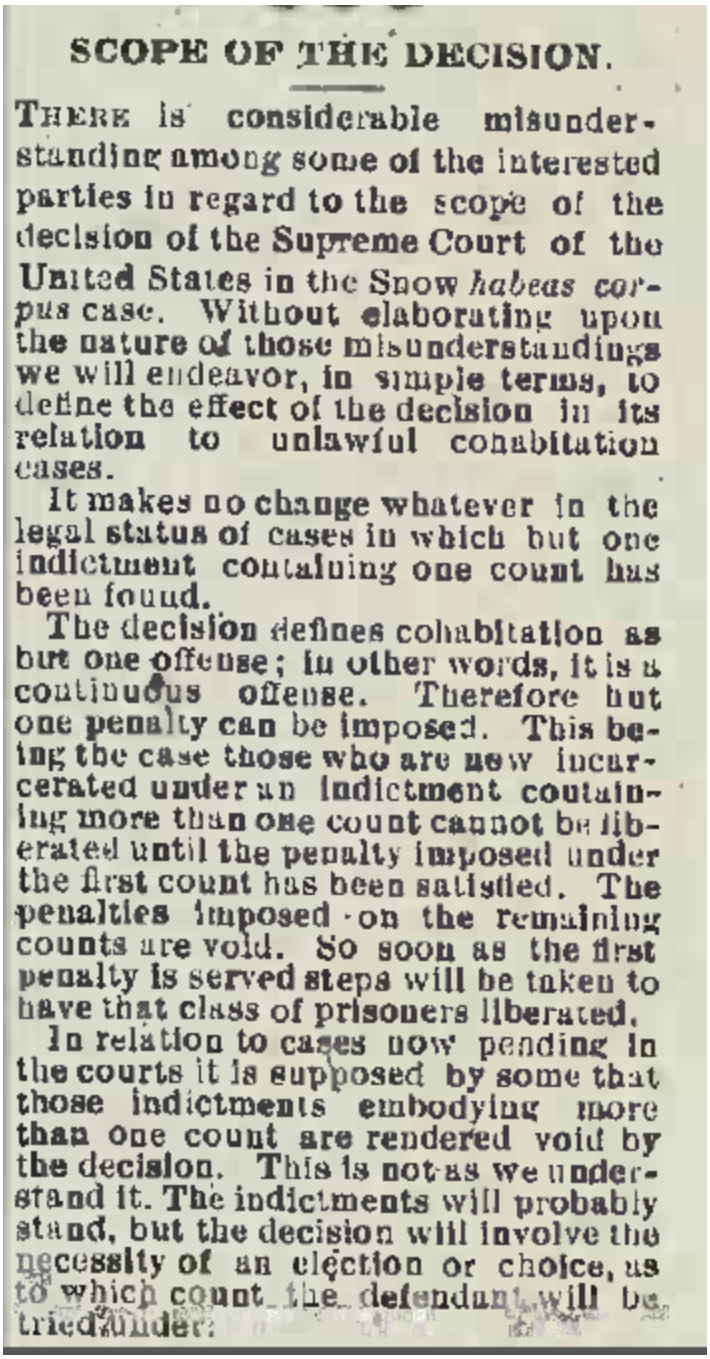
"The Scope of the Decision," *Deseret News* (Feb. 16, 1887)



SCOPE OF THE DECISION.

THERE is considerable misunderstanding among some of the interested parties in regard to the scope of the decision of the Supreme Court of the United States in the Snow *habeas corpus* case. Without elaborating upon the nature of those misunderstandings we will endeavor, in simple terms, to define the effect of the decision in its relation to unlawful cohabitation cases.

It makes no change whatever in the legal status of cases in which but one indictment containing one count has been found.

The decision defines cohabitation as but one offense; in other words, it is a continuous offense. Therefore but one penalty can be imposed. This being the case those who are now incarcerated under an indictment containing more than one count cannot be liberated until the penalty imposed under the first count has been satisfied. The penalties imposed on the remaining counts are void. So soon as the first penalty is served steps will be taken to have that class of prisoners liberated.

In relation to cases now pending in the courts it is supposed by some that those indictments embodying more than one count are rendered void by the decision. This is not as we understand it. The indictments will probably stand, but the decision will involve the necessity of an election or choice, as to which count the defendant will be tried under.

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"Gone to Washington," *Utah Enquirer* (Mar. 29, 1889)

GONE TO WASHINGTON.

To Present the Nielsen Adultery Case Before the Supreme Court.

On Wednesday morning, Hon. F. S. Richards, of Ogden, associate counsel in the adultery case of the U. S. vs. Hans Nielsen, tried before Judge Judd last month, and in which the defense applied for *habeas corpus*, started for Washington to present the case to the Supreme Court. This is another feature of the segregation business. Nielson was convicted of the offence of unlawful cohabitation with two or more women, imprisoned for the offence, and, at the expiration of the term he was indicted and convicted of the crime of adultery, alleged to have been committed with one of the women during a period of time covered by the former indictment for unlawful cohabitation. At the trial, the defendant entered a plea of former conviction and punishment for the same offence. The question presented is this: Can the Government indict a man for unlawful cohabitation, which is supposed to cover all the acts essential or incident to cohabitation with more than one woman as a wife, punish a man for it, and then indict him for one of those many acts, and punish him a second time for that? As the defendant is in custody, Mr. Richards will endeavor to get the case advanced, and will no doubt succeed in getting it decided, probably within the next month.

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"The Nielson Case: Before the U.S. Supreme Court," *Utah Enquirer* (Apr. 30, 1889)

THE NIELSON CASE

Before the U. S. Supreme Court.

POINTS OF LAW MADE BY THE DEFENSE.

A Logical Brief Presented to the Court.

We have received a copy of the brief of Jeremiah M. Wilson, Franklin S. Richards and Samuel Shellabarger, counsel for the appellant, in the case of Hans Nielsen before the Supreme Court of the United States. It covers forty-five pages of a law pamphlet and is therefore too voluminous for reproduction in this paper. We will therefore epitomize its contents as briefly as consistent with perspicuity. But we will first give a short history of the case:

Hans Nielsen was, on the 19th of November, 1888, in the First District Court, convicted of unlawful cohabitation and sentenced to imprisonment for three months and a fine of one hundred dollars and costs. He served his term and was subsequently placed on trial for adultery, the indictments for both offenses having been found on the same evidence before the same grand jury on the 27th of September, 1888. The offense in each case was alleged to have been committed with the same person. The indictment for unlawful cohabitation named the time as from the 15th of October, 1885, to the 13th of May, 1888; and that for adultery, the 14th of May, 1888. But the indictment averred that the defendant had continued to cohabit with his plural wife without intermission till the 27th of September, 1888; this is, the date of the two indictments. The latter offense was therefore included in the time of the former.

The defendant on the second trial pleaded a former conviction and claimed that the two offences were one and indivisible and that having been convicted for unlawful cohabitation, he could not now be convicted of adultery with the same person, during the continuance of the cohabitation for which he had been already punished. The prosecution demurred to the plea and the court sustained the demurrer. The defendant was convicted of the second offence and on the 12th of March, 1889, sentenced to one hundred and twenty-five days' imprisonment. A petition for a writ of *habeas corpus* was presented to the First District Court of Provo, which refused to issue the writ. An appeal was therefore taken to the Supreme Court of the United States under section nine of the Organic Act.

The brief assigns, as errors of the court below:

1st—The court erred in refusing to issue the writ and in holding that upon the facts stated in the petition the petitioner was not entitled to be discharged.

2d—The court erred in holding that the adultery charge was not embraced in the offence of unlawful cohabitation for which the petitioner had been convicted.

"The Nielson Case: Before the U.S. Supreme Court," *Utah Enquirer* (Apr. 30, 1889)

The chief question involved is this: "Is the charge of adultery, as appears in this record, for which the appellant is now imprisoned, such that it is in law a part of the same offense as the unlawful cohabitation for which he was previously convicted and punished? If so the second sentence is void because the prisoner is being punished twice for the same offence.

The argument claims first that

"When the two indictments are for matters arising out of the same transaction, there can be but one conviction."

In support of this a mass of authorities is presented. Chief Justice Cockburn says it is "A fundamental rule of law that out of the same facts a series of charges shall not be preferred." In the case of State vs. Cooper (New Jersey Law 361) the Supreme Court ruled that a "defendant cannot be convicted and punished for two distinct felonies growing out of the same identical act." In Jackson vs. State and Lampher vs. State (14 Indiana 327) the Court held That the State can not split up one crime and prosecute it in parts. The prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime." In State vs. Graffenreid (9 Baxter 280) Chief Justice Waite is quoted as laying down the principle that "Where a criminal act has been committed every part of which may be alleged in a single count of the indictment and proved under it, *the act cannot be split into several distinct crimes* and a separate indictment sustained on each; whenever there has been a conviction on one part, it will operate as *a bar to any subsequent proceedings* as to the residue." In State vs. Commissioners (2 Murphy 371) the Supreme Court said: "The notion of rendering crimes, like matter, infinitely divisible, is repugnant to the spirit and policy of the law, and ought not to be countenanced."

The second claim of the argument is:

"It is not necessary that the offense in each indictment should be the same in name, if the transaction is the same."

The Federal Constitution and all the State Constitutions provide that no one shall be twice put in jeopardy of life and limb for the same offense, and a number of authorities are cited to show that the phrase "the same offense" signifies the same act or omission and not the same offense in name only. In the case of Hall vs. State (38 Georgia 187), in which the appellant had been indicted for an assault with intent to commit murder and was discharged and afterwards was indicted for aggrevated riot, and pleaded former-acquittal, the appellate courts said: "Can the State put a party on trial the second time for the same criminal act, after he had been acquitted by changing the name of the accusation? If it can, then the constitutional protection does not amount to much. The effort here is to avoid the provision of the Constitution by changing the name of the offense." Other decisions show that "It is a universally admitted rule at common law that a conviction of manslaughter would bar an indictment for murder, based upon the same act of homicide." Blackburn says: "The fact prosecuted is the same in both though the offense differs in coloring."

The third point is:

"If the conviction is for the whole transaction, there can be no further conviction for any part of it."

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"The Nielson Case: Before the U.S. Supreme Court," *Utah Enquirer* (Apr. 30, 1889)

Among the authorities cited on this point are these: In Denver vs. Commonwealth, the Supreme Court ruled that "a party indicted for seduction and acquitted may plead such acquittal in bar of a subsequent indictment for fornication founded on the same act, and the record will be *a complete defense.*" In Sanders vs. State the Court held that a "former conviction for mal-treatment, by chaining the appellant to a plow, was a bar to conviction for assault and battery, because *both charges* grew out *of the same conviction.*"

The fourth claim of the argument is:

"If the conviction is for a part of the transaction, there can be no further conviction, either for the whole or for any part of the transaction."

In the case of the People vs. McGowan, (17 Wendell 386) the Supreme Court held that "an acquittal for robbery was a bar to indictment for larceny, where the property alleged to have been taken was the same." In State vs. Colgate, (21 Kansas, 511) the court ruled that "the commission of a single wrongful act can furnish the subject matter or foundation of only one criminal prosecution." In Georgia it has been held that "one prosecution will bar another whenever the proof shows the second case to be the same transaction with the first."

The fifth claim is this:

If the adultery occurred during the unlawful cohabitation which is covered by the conviction, it was part of and involved in such cohabitation, and a conviction for the latter bars a prosecution for adultery.

It is shown that the authorities establish conclusively that the statute against unlawful cohabitation applies alone to cases where the relation of husband and wife exists, either actually or ostensibly, and that it is a transaction which is "a group of facts," one of which facts is sexual intercourse, and that if involved in or incident to the transaction of which a defendant has been guilty of an act which if committed separately from the transaction would be indictable, that act is embraced in the transaction, he cannot be made again the subject of prosecution. The decisions of the Court in the Cannon and Snow cases are cited in support of this and of the proposition that the whole policy of the law is against dividing or segregating what happened under one transaction into separate prosecutions.

The record is then reviewed to show that the principles of cases cited apply to this case and that although the time named for the commission of adultery was placed one day after the last date named as the time of the unlawful cohabitation, yet the latter offense was claimed in the indictment to have continued up to the date of the indictment and thus included the date of the alleged adultery. To punish for the two offences then would be another kind of segregation. One offense being included in the other, the conviction of one bars the conviction of the other.

Cases that seem to convey a contrary doctrine are here investigated and shown to be of a different character to the one at issue. Also the difference is pointed out between former acquittal and former conviction, which have a different effect An acquittal for the lesser offense might admit of an indictment for the greater, but a conviction bars it because a necessary part of what the conviction covered.

The jurisdiction of the Court is then argued and established and the counsel say in conclusion:

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In concluding this brief, we repeat that the theory of this prosecution is contrary to the policy of the law. This is a criminal statute to which no rule of construction or principle of enforcement can be applied that is not applied to other criminal statutes. We would not be understood as suggesting a possibility, that it will be dealt with in any different manner from other criminal statutes. Multiplication of punishments is not the policy of the law, and we cannot believe that it was the intention of Congress to punish a man by fine and imprisonment for living with a woman three years, as his wife, and then to add to that punishment, or make it possible to add to it, hundreds of convictions for sexual intercourse occurring during the period of, and being a part of the cohabitation, the punishment for which would be an aggregate of penal servitude that would require centuries of time to discharge.

Judge Wilson argued the case before the Supreme Court of the United States on Friday last and was followed by Solicitor General Jenks, who denied the jurisdiction of the court. F. S. Richards, Esq., closed the argument, and it is hoped that an early decision will be rendered, as it is of great importance to the people and the courts of Utah.

It is a matter of congratulation that the case is in thoroughly competent hands. If the court is not swayed by the desire which prompted the special legislation against Utah, but will be governed by its own decisions and the precedents of centuries, this new attempt to punish men several times for the same offense will fall into the same pit where lies the dead and gone infamy known as "segregation."

"Only One Punishment," Ogden Semi-Weekly Standard (May 14, 1889)

ONLY ONE PUNISHMENT.

The United States Supreme Court Differs With Judge Judd.

By private information last evening it was learned that Hon. F. S. Richards had received word from Washington, D. C. yesterday, that the Supreme Court of the United States had, rendered as expected, a decision in the case of Hans Nielson appeared from Judge Judd's court at Provo. The decision is favorable to the defendant and appellant, as every reader who perused in THE STANDARD of Sunday's the able argument by Hon F. S. Richards could not fail to expect. Strange to say this morning's dispatches have nothing to say of this important matter.

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"The Nielsen Case," *Utah Enquirer* (May 17, 1889)

THE NIELSEN CASE

Ruling of the Supreme Court.

REVERSING JUDGE JUDD'S DECISION.

The Effect that the Verdict Will Have.

WASHINGTON, May 13.—[Special telegram to the *Herald.*]—Among the decisions rendered by the supreme court to-day, was one in the case of Nielson, brought here by habeas corpus from Utah. Nielsen was committed and sentenced in the district court at Provo, for unlawful cohabitation and for adultery, the latter offence being committed with his polygamous wife, for living with whom he was held to be guilty of the former offense. The supreme court reversed the Utah court, holding that two separate crimes were not comitted by his living with an unlawful wife. The court sent down an order for the discharge of the prisoner, who is in the Utah penitentiary serving a sentence for adultery, having completed his term for unlawful cohabitation.

The *Deseret News*, in reviewing the case and the decision says:

The decision of the Supreme Court of the United States in the Nielsen case, appealed from the First District Court of Utah, as was expected, reverses the decision of the lower court and releases the defendant from the penitentiary. He will be set at liberty as soon as official advices can be obtained.

The history of the case has been detailed in these columns, the brief of counsel for the appellant has been summarized, and the able argument of Hon. F. S. Richards on his behalf has been given to our readers in full. The court of last resort agree with the defendant's counsel, and decide that a man cannot be convicted of two different offenses which are covered by the same transaction. A man can not be punished for the offense of adultery who has been convicted of unlawful cohabitation, when the former offense is alleged to have been committed during the time of the cohabitation.

"Of course not," will be the response of most people who know anything of constitutional law or common justice. A man cannot be legally punished or placed in jeopardy twice for the same offense. But, strange to say, this very thing has been attempted in Utah in different ways, in a prevented effort to make the people of Utah have extra respect for the law and its administrators.

The famous, or rather infamous "seggregation" scheme was of this character. It was spoiled by the Supreme Court of the United States. The latest plan to inflict double punishment has been defeated by the same judicial authority. In both cases our native Utah attorney has been the active counsel and the chief mover and adviser in the legal controversy. His success is gratifying,

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as his labors have been unwearying and performed in the face of much opposition and many difficulties, which are not generally known or appreciated. Brother Richards is in every way worthy of his laurels.

It is to be greatly regretted that either attorneys or judges will allow anti-Mormon prejudice to affect them in the discharge of their important duties. The cry was raised many years ago that "the laws should be enforced in Utah as in other parts of the United States." To that there will be little objection. But who that is acquainted with the facts and the situation here, can say candidly, that this has been the rule since the special raid upon a certain class of this community was inaugurated? The Chief Justice on the bench at the time announced his opinion that the penalties of the law of Congress were not sufficent and that he wished they could be made more severe. Then came the shameful, cruel and lawless "seggregation" plot, by which defendants were made to suffer more than the full measure of lawful punishment. It was done vindictively, maliciously and cunningly, with the understanding that it was not sound in law, but with the belief that it could not be appealed from, and that the unfortunate victims of the scheme were at the mercy of their shameless and inhuman persecutors.

This later scheme was devised in a similar spirit. It has met with a similar fate. That is eminently proper. The two cases should be a lesson to those who are charged with the administration of the laws in Utah. The Mormons are an unpopular people. There are many things in their faith which are obnoxious to other folks. Some of them are in a position which makes them appear hostile to one of the laws of their country. In all other respects they are conceded to be good citizens, useful members of the community and now not openly or harmfully at discord with the law in question. Why should there be such a bitter and vengeful spirit in proceeding against them?

If the object is to induce people who have been in a condition forbidden by special enactment to conform to its provisions, why should not a course be taken likely to lead to that result? Stretching the law, violating the well-known provisions of common and constitutional law is not, surely, the best way to command respect for the law. It would seem, from experience and common knowledge of human nature, that the desired result is much more likely to be brought about by justice tempered with mercy, and when the law must be enforced, that it shall be done as in other parts of the United States and in the spirit of legal and judicial fairness, devoid of temper and of special rigor.

The text of the decision has not yet been received. So far as it has been made known it is of great value, and will release from improper prosecution a large number of persons who have been marked for double punishment. We hope it will be found to contain some rulings of the court on the main questions involved that will be a guide to the courts, and to the people of Utah in the settlement of

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the important issues between them and the majority of their fellow citizens in this great nation.

The decision reverses the action of Judge Judd, and will liberate Mr. Nielsen and a number of other "Mormons" who have been held under a similar unjust rendering of the law.

Marshal Dyer has not received any word as yet, but has asked the Attorney General for instructions in the matter.

There are now in the penitentiary four persons under sentence of unlawful cohabitation and adultery. These are Joseph Clark, Chas. S. Hall, Albert Jones and Bishop Wm. H. Maughan. Mr. Nielsen himself is serving a term on a charge of adultery, having completed his sentence for unlawful cohabitation. We understand that there are a number of others in the same situation.

"The Neilsen [sic] Case," *Deseret Weekly* (May 18, 1889)

THE NEILSEN CASE.

Following is the argument of Hon. F. S. Richards in the Neilsen *habeas corpus* case:

Before the Supreme Court of the United States April 22, 1889.

May it please the court: On the 27th day of September, 1888, the grand jury of the First Judicial District of the Territory of Utah investigated the charge of unlawful cohabitation against the petitioner, Hans Nielsen; four witnesses were examined on one oath and one examination as to the alleged offense and the conduct of the accused, during the period from October 15, 1885, to September 27, 1888. It appeared that the petitioner had, during the entire time, continuously, and "without intermission," cohabited with Anna Livina Nielsen and Caroline Nielsen, the women named in the indictment, as his wives, and that during the continuance of said cohabitation, to wit, on the 14th day of May, 1888, he had sexual intercourse with Caroline. Instead of indicting the petitioner for a continuous cohabitation from the 15th day of October, 1885, till the 27th day of September 1888, the jury presented an indictment for unlawful cohabitation during the time prior to the 14th day of May, 1888, and, at the same time, presented an indictment for adultery, alleged to have been committed with Caroline on the said 14th day of May, 1888.

Under the decision of this court in the Snow case, there could be but one indictment found for the offense of unlawful cohabitation committed prior to the finding of the indictment. Knowing this, the prosecutor and the grand jury sought to avoid the effect of the decision of this court, based upon the constitutional provision that a person shall not be twice put in jeopardy for the same offense, by indicting him for one of the acts embraced in the cohabitation and calling the supposed offense by another name, to wit, adultery. The reason the grand jury could not find more than one indictment for unlawful cohabitation was because the offense was a continuous one, and all the acts of which it was composed were embraced or involved in the transaction, and together constituted the one offense.

It was in the discretion of the prosecutor and grand jury to charge the cohabitation as having continued during the whole period from October, 1885, till September, 1888, or, in the language of the authorities, "to carve as large an offense" out of the transaction as they could, but having once carved they "could not cut again." This being the law, could the grand jury, by charging the cohabitation as extending only to the 13th day of May, take an act which occurred on the day following but formed a part of that cohabitation and make it the subject of another prosecution? In other words: When it was impossible for the grand jury to make a second offense out of all the acts of the defendant which constituted the cohabitation after the 13th of May, 1888, because it had already carved an offense out of the transaction, could it select one of those acts, and, by calling the offense adultery instead of unlawful cohabitation, find another valid indictment? This is the exact question involved in the case. We have a manifest attempt, by changing the name of the alleged offense, to do what this court has said cannot be done—make more than one offense out of a continuous cohabitation. Such procedure is repugnant to the fundamental principles of law and justice.

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"The Neilsen [sic] Case," *Deseret Weekly* (May 18, 1889)

The authorities are uniform upon the point that the same transaction may present two or more indictable aspects or phases, under different names. For instance, by the same continuous act a man may commit robbery and burglary, or arson and murder, or swindling and uttering a forged instrument, or an assault with intent to murder and aggravated riot, or riot and disturbing a religious meeting, or fornication and seduction, or running a horse and betting on a horse race. But, in the language of the Supreme Court of Alabama, in the case of Moore v. State, "If the state elects, through its authorized officers, to prosecute a crime in one of its phases or aspects, it cannot afterwards prosecute the same criminal act under another name."

I repeat that, after hearing the evidence, it was in the discretion of the grand jury to either indict the petitioner for cohabitation during the entire time from October 15th, 1885, to September 27th, 1888, or for any part of that time, or to indict him for adultery; but when an indictment was found for either of these offenses, no matter what period of time it covered, nor the name given to the offense in the indictment, a conviction on that charge became a bar to any other prosecution, under any name, for any act or series of acts growing out of that transaction. This doctrine is abundantly sustained by the great weight of authority and, as was said by the Supreme Court of Georgia, in the case of Holt v. State, if it were not so, the provision of the Constitution which declares that no person shall be twice put in jeopardy, would be "a mere shadow and delusion."

The following cases referred to in our brief, illustrate the principle we invoke, and clearly establish the proposition that only one conviction can be had and one penalty imposed for a single transaction; which has been defined by Mr. Stevens, in his work on evidence, to be "a group of facts so connected together as to be referred to by a single legal name." In this case unlawful cohabitation is the name of the transaction. A conviction for arson bars a prosecution for murder of the person burned. State v. Cooper, 13 N. J. Law, 361.

A conviction for burglary bars a prosecution for robbery, when the same transaction. Roberts v. State, 14 Ga. 8.

A conviction for stealing a horse bars a prosecution for stealing a saddle and bridle, because "the prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime." Jackson v. State, 14 Ind. 327.

A conviction for disturbing the peace by assaulting Martin Hill bars a prosecution for an assault on Herman Hill, because a part of the same transaction. State v. Locklin, 59 Vt. 654.

A conviction for burglary with intent to commit larceny bars a prosecution for larceny, it being one transaction, which cannot be split into several distinct crimes. State v. Graeffenried, 9 Baxter 289.

A conviction for setting up a gaming table bars prosecution of the same person for keeping such a table and inducing a person to bet upon it, because they are co-operating acts and one transaction. Hinkle v. Commonwealth, 4 Dana. 518.

A conviction for keeping a disorderly house bars any other prosecution for keeping a disorderly house at any time prior to the finding of the indictment. U. S. v. Burch, 1 Cranch C. C.

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A conviction for being a common seller bars prosecution for any single sale within the period named in the charge of being a common seller, but not so with an acquittal. Commonwealth v. Hudson, 14, Gray 1.

A conviction for uttering and publishing one forged check bars any other prosecution as to other checks forged or uttered at the same time. State v. Egglisht, 41 Iowa, 574.

A conviction for keeping a gaming house bars any other prosecution for keeping the same house before the informations were filed. State v. Lindley, 14 Ind., 430.

A conviction for being a "common seller" merges all acts of sale up to the filing of the complaint. State v. Nutt, 28 Vt., 568.

A conviction for swindling, on an indictment setting forth all the elements constituting the offense of uttering a forged instrument, bars a prosecution for uttering a forged instrument, because the same transaction though not the same offense *eo nomine*. Hirshfield v. State, 11 Tex. App., 207.

An acquittal for an assault with intent to murder bars a prosecution for the offense of aggravated riot, because, in the language of the court, "the State cannot put a party on trial a second time for the same criminal act, if he has been acquitted, by changing the name of the offense." Holt v. State, 38 Ga., 187.

A conviction for an assault and battery bars a prosecution for an assault with intent to commit murder, because it was one transaction and the "prosecutor could cut only once." Wilcox v. State, 6 Lea (Tenn.), 571.

A conviction for stealing Houston's cattle bars a prosecution for stealing Floyd's cattle, if they were taken at one time and the transaction was a single one. Wright v. State, 17 Tex. App., 152.

A conviction for riot bars a prosecution for disturbing a religious meeting. State v. Townsends, 2 Harrington, 543.

An acquittal of seduction bars a prosecution for fornication and bastardy. Dinkey v. Commonwealth, 17 Penn. State, 126.

A conviction for breach of the peace bars a prosecution for assault and battery growing out of the same transaction. Commonwealth v. Hawkins, 11 Bush., 603.

A conviction for assault and battery bars a prosecution for riot, because involved in the same transaction. Wininger v. State, 13 Ind., 540.

A conviction for running a horse along a public road bars a prosecution for betting on the horse race, because a part of the same transaction. Fiddler v. State, 7 Humph., 508.

A conviction for larceny bars prosecution for robbery when a part of the same transaction. State v. Lewis, 2 Hawks., 98.

The recovery of one penalty would be a bar to all prosecutions for acts of keeping a faro table committed previous to the issuing of the warrant. Dixon v. Corporation of Washington, 4 Cranch C. C., 114.

A conviction for assault with intent to commit rape bars a prosecution for rape. State v. Shepard, 7 Conn., 54.

A conviction for robbery bars a prosecution for larceny when the property alleged to have been taken is the same. People v. McGowan, 17 Wend., 386.

A conviction for arson in burning a mill bars a prosecution for burning books of account which were in the mill at the time it was burned. State v. Colgate, 31 Kansas, 511.

"A single wrongful act can furnish the subject matter or foundation to only one prosecution," and "one prosecution will bar another whenever the proof shows the second case to be the same transaction with the first." Roberts v. State, 14 Ga., 8.

"It is a fundamental rule of law that out of the same facts a series of charges shall not be preferred." Chief Justice Cockburn in Regina v. Elrington, 9 Cox C. C., 86.

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"The Neilsen [sic] Case," *Deseret Weekly* (May 18, 1889)

The foregoing cases are cited to illustrate the principle upon which this case rests, but in some respects the case is *sui generis*, and it must be determined by a construction of the Acts of Congress under which these prosecutions were instituted. In construing this legislation, in cases that have been before this court, your honors have taken into consideration the peculiar conditions existing in Utah which led to the enactment of these laws and have said, in substance, that the cohabitation prohibited by this law was in the "marital relation, actual or ostensible." This being so, the purpose of Congress in passing these two statutes is obvious. The act of 1882, against unlawful cohabitation, prohibited the "living or dwelling together as husband and wife," whether attended with sexual intercourse or not, while the act of 1887, against adultery, if it has any application at all to the intercourse of men with their plural wives, prohibited acts of sexual intercourse between the parties, whether attended with living or dwelling together or not. The first act was construed by this court as intended to break up the polygamous household; the other, if it applies to these people at all, must be construed as intended to prevent sexual intercourse between the parties after they have ceased to live and cohabit together. There is no evidence of any intention on the part of Congress to punish, as separate offenses, acts of sexual intercourse occurring during the continuance of the unlawful cohabitation. The act creating the offense of adultery was passed after this court had held that sexual intercourse was not a necessary element of cohabitation, and the legislative purpose evidently was, after breaking up the polygamous households by the one act, to prevent a continuance of sexual relations between the parties by the other. This is the only construction that will give full force and effect to both statutes, and at the same time, avoid the inhuman policy of creating and punishing a multitude of separate offenses growing out of the same transaction or out of one continuous offense. This construction leaves unimpaired the constitutional securities for the personal rights of the individual.

But it is contended by the government, because this court held that sexual intercourse was not an indispensable element of unlawful cohabitation, that such intercourse is not a part of the offense of cohabitation, and that a conviction for the latter would not bar a prosecution for the former.

As this court has held that the offense of unlawful cohabitation applies alone to cases where the plural marriage relation exists, either "actually or ostensibly," and where the parties live together as husband and wife, sexual intercourse must be presumed from a continuous living together in such a relation. In such a case, there is an obvious purpose or intent to commit the act, and, while it may not actually occur, if it does occur it becomes an inherent part of the cohabitation—one of the group of facts entering into that transaction. This case differs very materially from the illustration suggested by opposing counsel, of a drunken man committing murder, and when prosecuted pleading in bar a former conviction for drunkenness, claiming that the murder was a necessary incident to the drunkenness. The difference between the cases is obvious. There is no presumption, either of law or fact, that a drunken man will commit murder, but it will not be denied that there is a strong presumption, both of law and fact, that a man while cohabiting with two women as his wives, will have sexual intercourse with them.

This court said in Cannon's case,

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116 U. S., and in Snow's case, 120 U. S., that sexual intercourse was not an indispensable element of unlawful cohabitation; but it did not say, nor has any court said that when sexual intercourse takes place between the parties, during the continuance of an unlawful cohabitation, such intercourse does not form part of the cohabitation. On the contrary, while proof that it did not occur during the cohabitation is no defense to the charge, yet proof that it did occur is one of the highest evidences of the unlawful cohabitation and is admitted as such against the accused. This is the invariable rule in the Utah courts.

This court has said that "the offense of cohabiting with more than one woman * * * may be committed by the man by living in the same house with two women whom he had theretofore acknowledged as his wives, and eating at their respective tables, and holding them out to the world by his language or conduct, or both, as his wives, though he may not occupy the same bed or sleep in the same room with them, or either of them, or have sexual intercourse with either of them. The offense of cohabitation, in the sense of this statute, is committed if there is a living or dwelling together as husband and wife. This is inherently, a continuous offense, having duration; and not an offense consisting of an isolated act."

While this court has said that the foregoing state of facts constitutes unlawful cohabitation, it has not said that such cohabitation might not exist on some other state of facts, nor has it said that any of the acts enumerated are indispensibly necessary to constitute the offense of unlawful cohabitation. Residence in the same household is not a necessary element; nor is the introduction of the plural wife by the defendant, nor eating at the same table, nor the multitude of other evidences of the relation, necessary elements, but they are all acts going to prove the unlawful relationship and conduct, and forming a part of it. No one nor any number, nor any particular kind of acts are necessary elements In the sense of being of the essence of the crime; it is only necessary to show a sufficient number of a certain character of acts to make out the offense. It is one of the peculiarities of a continuing offense of this character that no matter how few, nor how many, nor how long continued the distinguishing acts of the offense, they form but a single indivisible offense. To live in the same house with the plural wife outwardly occupying the relation of husband and wife, is sufficient to constitute the offense. If the parties occupy the same bed, this but adds another fact to the proof. It does not make another crime.

In the language of this court, the offense of unlawful cohabitation is committed if there is "a living or dwelling together as husband and wife." Every act or fact that goes to make up such living or dwelling together, whether it be living in the same house, or eating at the same table, or holding the women out as wives, or occupying the same beds with them, or any other act that goes to make up the cohabitation, constitutes a part of the transaction. If a state of facts exists which constitutes this offense, the gravity of the offense is not increased by any other additional fact included in it. If the parties have lived and dwelt together as husband and wife without sexual intercourse, an offense has been committed; if they have had sexual intercourse during such living or dwelling together, it was by virtue of this relationship or claim of marriage, and it becomes a

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"The Neilsen [sic] Case," *Deseret Weekly* (May 18, 1889)

part of the transaction of cohabitation. It does not change the character of the offense, because it was as much unlawful cohabitation without as with the element of sexual intercourse, but if that fact exists, it becomes a part of, and so involved in the cohabitation that the government is barred from prosecuting for the cohabitation and afterwards maintaining a separate prosecution for that element. And this view is in harmony with the authorities.

The keeping of a disorderly house during the entire period of time prior to the finding of the indictment, as in the case of unlawful cohabitation, is a single, continuous offense, incapable of division into separate crimes—made up it may be of many acts extending over many days, but connected by the thread of continued and unbroken action into a single and undivided whole. A conviction as a common seller of liquor is a conclusive bar to all complaints for sales prior to commencing the action on which the conviction was had.

The same principle applies to this case. The defendant has been convicted—not for a single act, nor for a series of acts—his offense consists not of a single act nor of a series of acts—but of a general and systematic course of conduct, a mode of life, a habit, if you please; and he having been convicted of such mode of life or habit, has been convicted of every act which goes to make up or form a part of that mode of life or habit, and he cannot again be punished for one of those acts, without an arbitrary disregard of the rule that no man shall be twice punished for the same offense.

Inasmuch as it was incompetent for the grand jury to divide up the continuous transaction and present more than one indictment for unlawful cohabitation, it was also incompetent and illegal for them to present one indictment for unlawful cohabitation, covering a portion of the transaction, and then select an isolated act comprising another part of the transaction, and indict for it under the name of adultery. It is another attempt to do what this court said in the Snow case could not be done, punish a person more than once, for a continuous and indivisible offense.

Counsel insists that these charges must be separate and distinct offenses, because "there is no period of time that is common in the two indictments," and, because, under the Massachusetts rule, no evidence is admissable tending to show that a continuous offense was committed "at any other time than upon the day named." This is not the rule in Utah. The evidence is not confined to the time laid in the indictment, but if it were the contention would not be sound. In considering this case the court must take the whole record, and construe the indictments with reference to the plea of former conviction, interposed on the second trial. When this is done, it appears, as has already been shown, that the act of sexual intercourse, which constitutes the alleged adultery, was committed during the continuance of the cohabitation and formed a part of it. This being so, and but one continuous offense having been committed prior to the finding of the indictment, it was not within the power of the prosecution, by arbitrarily fixing the dates in each indictment, upon which the acts complained of were committed, to thereby multiply the offenses.

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This is very clearly illustrated by the case of State v. Egglisht (41 Iowa, 574) where several indictments were found by the same grand jury against the appellant for uttering and publishing forged checks, and others for forgery. After conviction upon one of these indictments the appellant was put on trial for another. He pleaded the former conviction, which was overruled by the trial court. The Supreme Court sustained the plea, and said:

"Whether certain criminal acts constitute one crime or more, must depend upon the nature and circumstances of the acts themselves. When the defendant uttered, at the Davenport National Bank, four forged checks, the character of his act became fixed. He either committed one crime or he committed four. It is not competent for the State, at its election, by the form of the indictment, to give to the defendant's act the quality of one crime or of four, at pleasure. The act partakes wholly of the one character or wholly of the other. * * *

"It is urged by the appellee that if the State had failed to prove the forgery of the check described in the first indictment tried there would have been an acquittal, and that it is a dangerous rule to allow such acquittal to be plended in bar to a subsequent prosecution for uttering another check, since it would thereby be placed in the power of the defendant to secure a trial upon the indictment under which he knows no conviction could be had, and then plead the judgment of acquittal as a bar to the other indictments. But the State can and should prevent the happening of any such contingency, by charging the uttering of all the checks offered at the same time, in one indictment and as but one offense. When this is done, the proof that any one of the checks was known to be forgery will support the indictment."

So we say in this case that the prosecution should have charged a continuous cohabitation from October 15th, 1885, to September 27th, 1888, but having carved out an offense embracing a less extended period and prosecuted for it, in the language of the Supreme Court of Indiana, (Jackson v. State), such prosecution "bars any further prosecution based upon the whole or a part of the same crime."

The Texas court of appeals said in the case of Wright vs. State: "The accused cannot be convicted on separate indictments charging different parts of one transaction as in each a distinct offense. A conviction on one of the indictments bars prosecution on the other."

Mr. Chief Justice Waite said:

"I take it to be a sound rule of law, founded upon the plainest principles of natural justice, that where a criminal act has been committed, every part of which may be alleged in a single count of the indictment and proved under it, the act cannot be split into several distinct crimes, and a separate indictment sustained on each; and whenever there has been a conviction on one part, it will operate as a bar on any subsequent proceedings as to the residue."

And the numerous other authorities cited in our brief all go to this point and conclusively establish, as we maintain, that when two indictments are for matters arising out of the same transaction, there can be but one conviction, and a prosecution for the whole or any part of the transaction bars a conviction for any other part of the same transaction.

In support of his position that the petitioner has not been placed twice in jeopardy, the learned counsel for the government cited the case of Moore v. The People, 14 Howard 20, where it was held that a citizen of the United States being also a citizen of a State or Territory and

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owing "allegiance to two sovereigns, may be liable to punishment for an infraction of the laws of either," and "could not plead the punishment of one in bar to a conviction of the other." Conceding, for the purpose of this argument, what the court says in that case to be the law, it has no application to this case. Here there was but one sovereign. Both prosecutions were instituted in the name of the United States, and the principles of the Moore case can have no possible application.

But the case of Morey v. The Commonwealth, 108 Mass. 433, and other Massachusetts cases are also cited by the government on this point. The rule laid down in the Morey case is invoked, that "a conviction or acquittal upon one indictment is no bar to a subsequent conviction upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other."

Before attempting to distinguish the case at bar from the Morey case, I desire your honors' consideration for a moment of the rule there laid down. Mr. Bishop in his Criminal Law, Section 1052, gives substantially the same test, but in the following section he limits the test in these words: "Probably the test under consideration is always applicable when its effect is to bar proceedings, while still the proceedings may be barred by other principles when this one fails."

From this section it would seem that whenever the evidence required to support two indictments is the same, that fact, being in favor of the accused, is conclusive, and only one conviction can be had. But if the evidence required was not the same, that fact would not necessarily defeat the plea of former conviction because the prosecution might still be barred by other principles.

The whole doctrine, so far as it can have any application to this case, is summed up by Mr. Bishop in Section 1060, where he says: "There may be gleaned from the books passages which seem to indicate that one act may constitute any number of crimes, for each of which the doer may be prosecuted and a conviction of one will not bar a prosecution for another. And perhaps, in our complicated system of government, one act may be an offense against both the United States and a particular State, and both may punish it. But in principle, and according to the better authority, while one act may constitute as many distinct offenses as the legislature may choose to direct, for any one of which there may be a conviction without regard to the other, it is, in the language of Cockburn, C. J., 'a fundamental rule of law that out of the same facts a series of charges shall not be preferred.' To give our constitutional provisions the force evidently meant, and to render it effectual, 'the same offense' must be interpreted as equivalent to the same criminal act."

That the distinguished author understood the rule to cover just such a case as the one at the bar, is shown beyond doubt by his note to section 1061, where he says:

"Some courts maintain that, in the words of Gray, J., 'A single act may be an offense against two statutes; and, if each statute requires proof of an additional fact, which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. (Morey vs. Commonwealth, 108 Mass., 433, 434. And see Commonwealth vs. Bakeman, 105 Mass., 53; Commonwealth vs. Shea, 14 Gray, 386; Commonwealth vs. McConnell, 11 Gray, 204.) But this question has been in effect, already considered in the text. (Ante, 1054 *et seq.*) By all the authorities, this would not be so if the conviction was for the larger crime. (Ante, 1054.) And on the better reason and

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better authorities it would not be so if the conviction was for the smaller. (Ante, 1057.) But the State could choose under which statute the one prosecution should be."

It is evident from the foregoing that if the rule laid down in the Morey case is correct, it is subject to many exceptions, modifications and limitations that would cover this case. Otherwise the Morey case belongs to that class which Mr. Bishop says "are founded on principles which, if adopted throughout, would render practically void the Constitutional inhibition," for certainly it is at variance with the current of authorities on this subject. It cannot be reconciled with many of the cases cited in our brief, particularly the arson case, for arson and murder are separate offenses; yet, when the party was convicted of arson, which was an act as well as a crime, it was held that he could not be convicted of a different offense, because he had been convicted of another offense committed by the same act which caused the offense of murder. The authorities cited in Morey's case, having relation to different degrees of homicide, support our contention, because in such cases the different degrees of homicide are involved; and the cases do not support the proposition stated by the court. For example, murder is the killing with malice aforethought, an element that must be proved in order to convict. In manslaughter, this element is not required, and is not necessary to be proved; therefore the proof in the one case is different from that required in the other. In murder, that fact must be proved; in manslaughter it is not necessary to prove it. The evidence to procure a conviction of manslaughter would not be sufficient to procure a conviction of murder; but the conviction for manslaughter is a bar to a conviction of murder, and, therefore, these cases do not support the proposition that "a conviction upon one indictment is no bar to a subsequent indictment unless the evidence required to support the one would have been sufficient to warrant a conviction upon the other." If that proposition were sound, then a party convicted of manslaughter might be subsequently convicted of murder, for the proof necessary to convict of the former would not be sufficient to convict of the latter. It is because the one offense is involved in the other that the conviction of the one bars the conviction of the other; and this supports the views we are urging in this case.

But we say there is a material difference between this case and the Morey case, in that, here we have the element of marriage entering into both prosecutions, while in that case it was no element of either charge. As has already been shown, the offense of unlawful cohabitation applies alone to cases where the plural marriage relation exists, "either actually or ostensibly" and where the parties live together as husband and wife. In prosecutions for this offense both the legal and the plural marriages are proven at the trial. The existence of the marriages constitutes a part of the case for the government, and evidence to establish them is always admissible.

This being so, and the fact of marriage being absolutely essential to sustain the charge of adultery, why is that element not common to both charges? Of course, it would not be so in an ordinary case of lascivious cohabitation, like the Morey case, where the law did not require nor presume marriage, and the indictment expressly negatived its existence, but in this case it was

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an essential element of the offense which was proved on both trials. And so we say that this case is distinguishable from the Morey case and the latter is no authority for what has been done here.

This court has settled the question of jurisdiction in such a case as this, by its decisions in the Snow case, 120 U. S. and in the Lange case, 18 Wall. Every objection urged here was brought forward in those cases and fully answered by the court. In the Snow case, which is identical in principle with this, at page 281, the court says:

"It is contended for the United States that, as the court which tried the indictments had jurisdiction over the offenses charged in them, it had jurisdiction to determine the questions raised by the demurrers to the oral pleas in bar in the cases secondly and thirdly tried; that it tried those questions; that those questions are the same which are raised in the present proceeding; that they cannot be reviewed on *habeas corpus*, by any court; and that they could only be re-examined here on a writ of error, if one were authorized. For these propositions the case of Ex parte Bigelow, 113 U. S. 328, is cited. But * * * we are of opinion that the decision in that case does not apply to the present one. * * * Other considerations bring it within the principles of such cases as Ex parte Milligan, 4 Wall. 131; Ex parte Lange 18 Wall. 163; Ex parte Wilson 114 U. S. 417."

Much of the argument of counsel on this point was based upon the assumption of a case where the issue on a plea of former conviction had been submitted to a jury and passed upon by them. I submit that the rule in such a case could not apply here, because in that case the evidence would have gone to the jury and, the record failing to disclose it here, the verdict that the offenses were not the same would be conclusive upon this court, but that is not our case. Here the record (plea of former conviction) discloses all the facts which go to determine whether the transaction constituted one offense or more. The question decided by the trial judge was a question of law and not one of fact, because the facts were all admitted by the demurrer, and the court only had to determine whether the facts stated were sufficient in law to show that there was but one offense. Here the record discloses the fact that, there being but one offense, the trial court had exhausted its jurisdiction before the second judgment was rendered, while the record in such a case as counsel supposes, would not show that fact. Herein lies the distinction, which your honors have drawn between the province of the writ of error and the writ of *habeas corpus*. The record in this case establishes the jurisdiction of this court beyond question.

The Pitzner case, 44 Tex. App., 578, cited by opposing counsel, is not in point because in that case there had been no conviction on the second trial and no punishment imposed. The case was still pending in the trial court and, of course, the proper remedy, as the Supreme Court said, was by special plea of *autrefois acquit* to be interposed in the trial court, and not *habeas corpus* from the court of appeals.

The whole policy of the law is against the multiplication of offenses and the infliction of cumulative punishment. In the language of the Supreme Court of North Carolina, "this notion of rendering crimes, like matter infinitely divisible, is repugnant to the spirit and policy of the law, and ought not to be countenanced." This court has forcibly condemned that mode of procedure in Snow's case (120 U. S., page 282), where an attempt was made to divide a continuous cohabitation and prosecute different parts of it as separate and distinct offenses. This court said:

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"The division of the two years and eleven months is wholly arbitrary. On the same principle there might have been an indictment covering each of the thirty-five months, with imprisonment for seventeen years and a half and fines amounting to $10,500, or even an indictment covering every week, with imprisonment for seventy-five years and fines amounting to $44,400, and so on, *ad infinitum*, for smaller periods of time. It is to prevent such an application of penal laws, that the rule has obtained that a continuing offense of the character of the one in this case can be committed but once for the purposes of indictment or prosecution, prior to the time the prosecution is instituted."

Sometimes the result of a rule is the best test as to whether or not it is a sound rule. Applying the same illustrations to this case that your honors applied to the Snow case, and, if the rule is not as we claim, a vast number of prosecutions might be instituted and maintained upon proof of facts and presumptions arising therefrom. for intercourse occurring during one continuous cohabitation of three years, the penalties for which would aggregate hundreds of years of imprisonment.

This must be so, because if a separate indictment can be sustained for one act of sexual intercourse occurring during such a continuous cohabition, a hundred, prosecutions could be sustained, if there were that many acts of intercourse occurring during the cohabitation. Certainly the court of last resort, in a free country, will hesitate to so construe a highly penal statute, as to render possible such appalling consequences.

But there are some matters which are so much a part of the history of affairs in Utah, that I hope I may without impropriety allude to them here. The present condition of affairs there warrants the assumption that, unless some system of multiplying offenses prevails, such as is here attempted, prosecutions for this class of offenses will soon cease and the vexed question be settled.

The jury law in force in Utah, practically excludes all Mormons from serving as grand or trial jurors in this class of cases, and, as a rule, jurors are selected by the United States Marshal on open venire. How far, under such circumstances, this statute will be made an instrument of oppression if you sanction what has been done in this case, I will not pretend to say. Nor will I say that it was to delay or prevent this settlement that the mode of procedure was adopted which we are opposing in this case, but I do say that such must necessarily be its effect. Everything that tends to magnify the importance of these offenses and the extent of these practices, and every means that are employed in their suppression, which bear upon their face any semblance of disregard for the personal rights of the accused, only tend to delay, instead of hasten, the consummation so devoutly to be wished.

The experience of ages has demonstrated that fair, impartial and humane methods are always more effectual, in producing obedience to the law, than arbitrary, oppressive and cruel means. While the one course induces respect for the law and consequent obedience to it, the other engenders an opposite feeling and is apt to result in every possible evasion of the law.

My excuse for having ventured these observations upon a most delicate point lies in the fact that this case is but one of many like cases that are now pending in the courts of Utah. If your honors hold that what has been done here has the warrant of legal authority, the strong temptation and stimulating effect of liberal fees, and other con-

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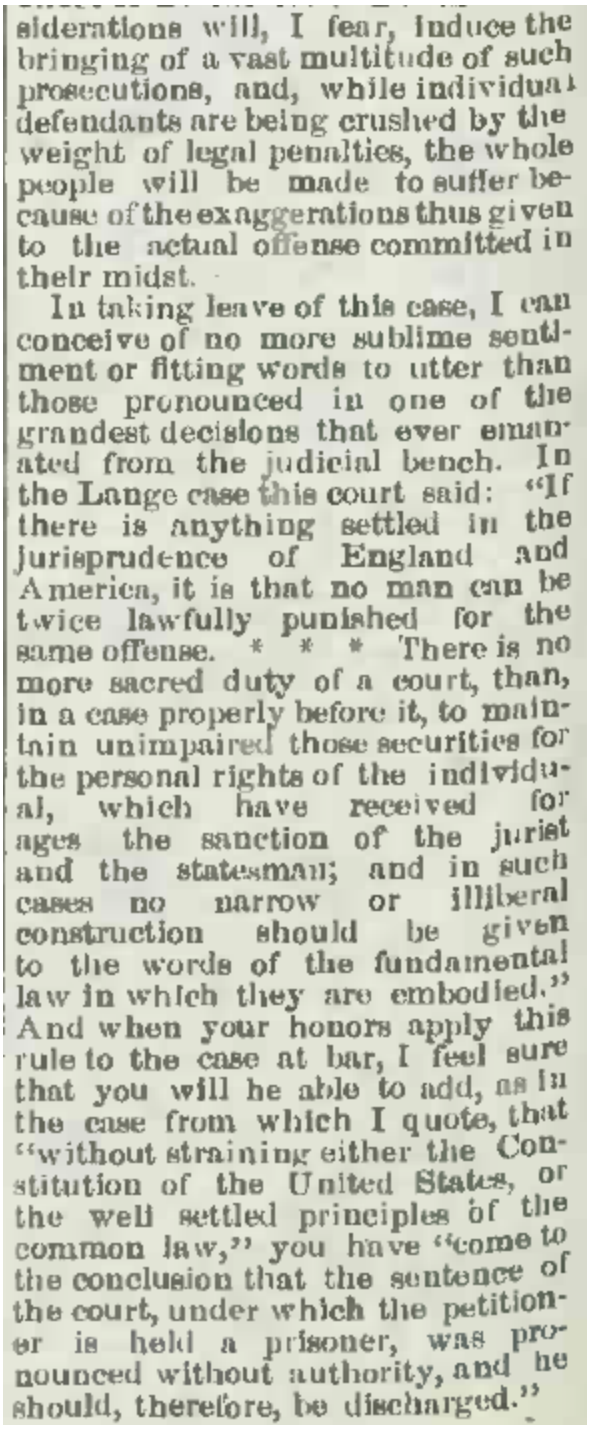

siderations will, I fear, induce the bringing of a vast multitude of such prosecutions, and, while individual defendants are being crushed by the weight of legal penalties, the whole people will be made to suffer because of the exaggerations thus given to the actual offense committed in their midst.

In taking leave of this case, I can conceive of no more sublime sentiment or fitting words to utter than those pronounced in one of the grandest decisions that ever emanated from the judicial bench. In the Lange case this court said: "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. * * * There is no more sacred duty of a court, than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual, which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied." And when your honors apply this rule to the case at bar, I feel sure that you will be able to add, as in the case from which I quote, that "without straining either the Constitution of the United States, or the well settled principles of the common law," you have "come to the conclusion that the sentence of the court, under which the petitioner is held a prisoner, was pronounced without authority, and he should, therefore, be discharged."

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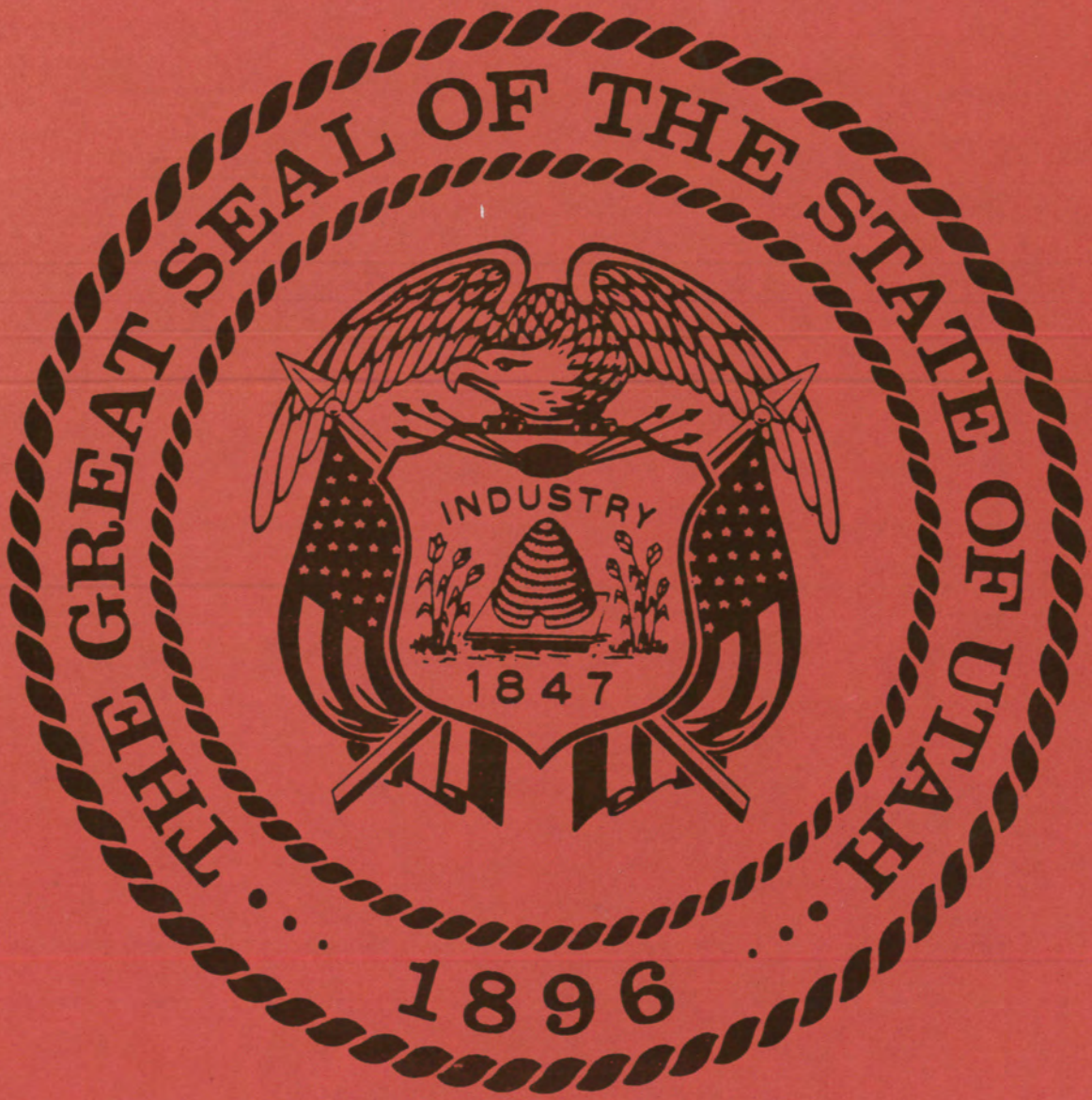
Appendix, Part B

This portion of the appendix contains the Report of the Utah Constitutional Revision Commission that was submitted to the Utah Legislature in 1984. The parts of the report that do not address the Judicial Article have been omitted. The complete report is available at: http://digitallibrary.utah.gov/awweb/guest.jsp?smd=1&cl=all_lib&lb_document_id=78702.

Report of the
CONSTITUTIONAL REVISION COMMISSION
Submitted to the Governor and the 45th Legislature of the State of Utah for the years 1982 and 1983



January 1984
Second Printing

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REPORT OF THE

UTAH CONSTITUTIONAL REVISION COMMISSION

SUBMITTED TO THE GOVERNOR AND THE

45TH LEGISLATURE OF THE STATE OF UTAH

OFFICE OF LEGISLATIVE RESEARCH
AND GENERAL COUNSEL
436 STATE CAPITOL
SALT LAKE CITY, UTAH 84114

JANUARY 1984
SECOND PRINTING

B2

Utah Constitutional Revision Commission

436 State Capitol • Salt Lake City, Utah 84114 • (801) 533-5481

Honorable Scott M. Matheson
Governor of the State of Utah

Honorable Members of the 45th Legislature
of the State of Utah

The Utah Constitutional Revision Commission is pleased to submit this report of its work during the 1982 and 1983 legislative interims. The work of the commission during this period has included further study of the Judicial and the Education Articles as well as a review of the Legislative Article.

The commission has devoted a great deal of time and attention in preparing the recommendations included in this report. In addition to its own detailed study, the commission has received input from a broad cross section of interested parties, including public officials, interested organizations and citizen groups, as well as the public at large. Their participation was a valuable contribution in preparing the commission recommendations.

This report will discuss in depth the commission's proposals for major revisions of the Judicial Article (Article VIII) and the Education Article (Article X). The commission has also proposed an important amendment to the Legislative Article (Article VI). The report also includes an overview of previous commission recommendations and a summary of the 1982 election, reviewing the four constitutional amendments that were on the ballot.

The Utah Constitutional Revision Commission has been charged to conduct a comprehensive examination of the Utah Constitution and to recommend those changes necessary to provide Utah with the tools to address present and future needs. We appreciate the opportunity we have had to serve in this capacity, and hope that our efforts will receive serious consideration and ultimately prove to be of benefit to the people of Utah.

UTAH CONSTITUTIONAL REVISION
COMMISSION

Karl N. Snow, Jr.
Chairman

William G. Fowler
Vice Chairman

TABLE OF CONTENTS

INTRODUCTION

THE UTAH CONSTITUTIONAL REVISION COMMISSION ANNUAL REPORT, 1982 AND 1983

This report contains a review of the studies and recommendations of the Constitutional Revision Commission for the years 1982 and 1983. The report contains the following information:

- Legislative action taken on commission recommendations made to the Budget Session of the 44th Legislature - January, 1982 (See Report of the Constitutional Revision Commission - January 1982.)

- The commission's involvement with, and the results of, the 1982 General Election;

- A review of the commission's recommendations to the General Session of the 45th Legislature; and

- The commission's recommendations to the Budget Session of the 45th Legislature, or if necessary, a special session of the 45th Legislature. The commission has prepared proposals for significant change to three articles of the Utah Constitution: (a) the Judicial Article, (b) the Education Article, and (c) the Legislative Article. For each recommendation discussed, an introduction and overview will be offered, followed by a detailed section-by-section analysis which will include old and new language, explanations, and a rationale.

CHAPTER I

BACKGROUND

THE CONSTITUTIONAL REVISION COMMISSION

The Constitutional Revision Commission was originally organized in 1969 to study and recommend needed revisions of the Utah Constitution. Concerns had been expressed for many years that the Utah Constitution needed serious overhaul. However, a proposal to call a constitutional convention to completely rewrite the constitution had been rejected by the voters in 1966.

At the same time the commission was organized, the Utah Legislature proposed the Gateway Amendment. This amendment allowed for the revision of entire constitutional articles which could then be presented to the public as a single ballot issue. The Gateway Amendment was approved by the electorate at the 1970 General Election.

Commission Activities - Prior to 1977

The Constitutional Revision Commission existed on an ad hoc basis until 1977. During this period, the commission proposed the following amendments:

--Legislative Article (partial revision)
presented to the 39th Legislature, January 1971 (approved)
approved by voters, November 1972

--Executive Article
presented to the 40th Legislature, January 1973 (approved)
rejected by voters, November 1974

--Elections and Right of Suffrage Article
presented to 41st Legislature, January 1976 (approved)
approved by voters, November 1976

--Congressional and Legislative Appointment Article
presented to 41st Legislature, January 1976 (not approved)

Establishment of the Commission as a Permanent Body

The Utah Constitutional Revision Commission was established as a permanent commission by the 42nd Legislature in 1977. The commission is empowered to, "make a comprehensive examination of the Constitution of the State of Utah, and of the amendments thereto, and thereafter to make recommendations to the

governor and the legislature as to specific proposed constitutional amendments designed to carry out the commission's recommendations for changes therein." (See Appendix A for a copy of the statute.)

In reviewing and revising the Utah Constitution, the commission has sought to develop a document that protects essential rights and basic institutions while at the same time allowing for flexibility to address future needs. The commission has, therefore, recommended deleting references to policies or practices that could be better established by statute. In addition, the commission has tried to eliminate certain ambiguities between long-standing practice and actual constitutional language. In many cases, constitutional requirements and prohibitions have been ignored for years. The commission has recommended removing these long-neglected provisions as well as other outdated sections from the constitution.

The commission consists of 16 members. The president of the senate appoints three state senators, the speaker of the house appoints three state representatives, and the governor appoints three members. Six members are then chosen by these nine appointees. The director of the Office of Legislative Research and General Counsel serves as an ex officio member. (Exhibit 1 contains a complete list of the Constitutional Revision Commission's members and staff.)

Commission Activities - Since 1977

Since 1977, the commission has been active in reviewing and revising the constitution. It has recommended revisions of the following:

--Revenue and Taxation Article
presented to the 43rd Legislature, January 1980 (approved)
rejected by voters, November 1980
presented to the 44th Legislature, January 1982 (approved)
approved by voters, November 1982

--Labor Article
presented to the 43rd Legislature, January 1979 (approved)
approved by voters, November 1980

--Executive Article
presented to the 43rd Legislature, January 1979 (approved)
approved by voters, November 1980

--Judicial Article
presented to the 44th Legislature, January 1982 (not approved)

In addition to these formal study proposals, the commission has assisted in developing other constitutional amendments which have been submitted to the legislature independently. The commission has been instrumental in obtaining legislative and public approval for these changes. Specifically, these proposals include:

--Legislative Compensation Commission
presented to the 44th Legislature, January 1982 (approved)
approved by voters, November 1982

--Corporate Officers Amendment
presented to the 44th Legislature, January 1982 (approved)
approved by voters, November 1982

As a bipartisan body, composed of both legislators and and citizen members, the Constitutional Revision Commission has demonstrated a unique capacity to develop meaningful proposals for improving the Utah Constitution.

EXHIBIT 1
MEMBERS OF THE UTAH CONSTITUTIONAL REVISION COMMISSION

Karl N. Snow, Jr., Chairman (term expired 1983 reappointed until 1989)	Senate Appointee State Senator Provo
William G. Fowler, Vice Chairman (term expired 1983, reappointed until 1989)	Governor Appointee Citizen Member Salt Lake City
James E. Faust (term expired 1981, reappointed until 1987)	CRC Appointee Citizen Member Salt Lake City
Norman H. Bangerter (appointed 1981, term expires 1987)	House Appointee State Representative, Speaker of the House West Valley City
Martin B. Hickman (term expired 1979 reappointed until 1985)	CRC Appointee Citizen Member Provo
Raymond L. Hixson (term expired 1983, reappointed until 1989)	CRC Appointee Citizen Member Salt Lake City
Richard C. Howe (term expires 1985)	CRC Appointee Citizen Member Murray
Dixie Leavitt (term expired 1981, reappointed until 1987)	CRC Appointee Citizen Member Cedar City
Clifford S. LeFevre (term expires 1985)	House Appointee State Representative Clearfield
Eddie P. Mayne (term expired 1979, reappointed until 1985)	CRC Appointee Citizen Member West Valley City
Jon M. Memmott (ex officio)	Director, Office of Legislative Research and General Counsel Layton
Jefferson B. Fordham (appointed 1981, term expires 1987)	Governor Appointee Citizen Member Salt Lake City

Darrell G. Renstrom (term expired 1983)	Senate Appointee State Senator Ogden
Wilford R. Black (appointed 1983, term expires 1989)	Senate Appointee State Senator Salt Lake City
G. LaMont Richards (term expired 1979, reappointed until 1985)	House Appointee State Representative Salt Lake City
Phyllis C. Southwick (term expired 1983, reappointed until 1989)	Governor Appointee Citizen Member Bountiful
Glade M. Sowards (term expired 1981, reappointed until 1987)	Senate Appointee State Senator Vernal

The following were constituted commission subcommittees during the period covered by this report.

Education Article Subcommittee	Judicial Article Subcommittee
Mr. Clifford S. LeFevre, Chairman	Dr. Martin B. Hickman, Chairman
Rep. G. LaMont Richards	Mr. William G. Fowler
Sen. Karl N. Snow, Jr.	Elder James E. Faust
Mr. Dixie Leavitt	Dr. Jefferson Fordham
Speaker Norman H. Bangerter	Justice Richard C. Howe
Mr. Eddie P. Mayne	Mr. Darrell G. Renstrom
Mr. Raymond L. Hixson	Dr. Phyllis C. Southwick
Sen. Wilford R. Black	Sen. Glade M. Sowards
Mr. Jon M. Memmott	Mr. Jon M. Memmott

Staff

Roger O. Tew	Executive Director, 1981 - Present
Robin Riggs	Research Assistant, 1980 - 1982
Ivan Legler	Research Assistant, 1981
Kevin Howard	Research Assistant, 1982 - 1983
Brian McKell	Research Assistant, 1983
Shelly Cordon	Research Assistant, 1983 - Present
Jan Poulson	Secretary, 1981 - Present

REPORT OF THE 1982 BUDGET SESSION

The Constitutional Revision Commission presented two major proposals to the Budget Session of the 44th Legislature: a revision of the Revenue and Taxation Article, and a revision of the Judicial Article. (See Report of the Constitutional Revision Commission - January 1982.) In addition, the legislature considered three other constitutional amendments, two of which the commission was instrumental in developing.

Revenue and Taxation Article Revision

The Revenue and Taxation Article Revision (introduced as SJR 3) proposed a series of changes to the present constitution dealing with tax policy. Collectively, the proposal provided the legislature with the authority to implement various tax exemptions and policies.

The legislature approved the Revenue and Taxation Article Revision as presented by the commission with the following amendments (see Appendix B for a copy of the resolution as amended by the legislature):

1. The proposed tax exemption for tangible personal property was deleted.

2. The residential property tax exemption ceiling was lowered. The commission had proposed that the residential property tax exemption be limited at 50 percent of the property's assessed valuation. The legislature lowered the ceiling to 45 percent.

3. The vertical revenue sharing proposed by the commission was deleted. This provision would have authorized revenue sharing between the state and its political subdivisions.

The most controversial provision of the amendment was the residential property tax exemption. During the 1982 Budget Session, the legislature passed legislation to implement the exemption at a level of 25 percent (HB 142 - 1982). Enactment of the measure was tied to the passage of the Tax Article by the electorate.

Judicial Article Revision

The commission introduced a comprehensive revision of the Judicial Article to the 1982 Budget Session of the legislature. The proposal (HJR 10) was considered and approved by the house of representatives. The senate, however, deferred action on the proposal. Chapter II discusses the issues raised by the legislature, and subsequent efforts to develop an acceptable Judicial Article revision.

Other Constitutional Amendments

Legislative Compensation Commission

The Budget Session of the 44th Legislature also considered and approved a measure calling for the establishment of a legislative salary commission. This

proposal, while not formally introduced as a commission recommendation, was actually the product of previous commission study efforts. The amendment, introduced as SJR 5, provided for the creation of an independent legislative salary commission to recommend salary levels for legislators. The governor would appoint the members of the salary commission. The legislature would be required to approve, reject or lower the recommendations. (See Appendix B for a copy of the resolution.)

SJR 5 provided needed flexibility in establishing legislative compensation. It removed the specific dollar figures from the constitution and allowed the legislature to create by legislative rule a mechanism for reimbursing expenses. The measure was endorsed by the commission.

Legislative Residency Amendment

A final constitutional amendment considered and approved by the 1982 Budget Session was HJR 1. This proposal required legislators to live in their districts throughout their term of office. If a legislator moves from the district, the office would be vacated and filled according to existing statutory procedures. The measure originated independently of the commission, but did receive an endorsement from the commission prior to the 1982 General Election. (See Appendix B for a copy of the resolution.)

Corporate Officers Amendment

This measure (introduced as HJR 27) proposed to remove a seldom-enforced prohibition on corporate officers holding public office in municipalities which grant a business license to the corporation. The commission did not formally introduce the proposal to the legislature, but the issue was originally raised by commission studies. After approval by the legislature, the measure received commission endorsement. (See Appendix B for a copy of the resolution.)

REPORT OF THE 1982 GENERAL ELECTION

The 1982 General Election ballot included four constitutional amendments.

1. Proposition 1--Revenue and Taxation Article Revision
2. Proposition 2--Legislative Compensation Commission Amendment
3. Proposition 3--Legislative Residency Amendment
4. Proposition 4--Corporate Officers Amendment

The previous section detailing the actions of the 1982 Budget Session briefly outlined the four proposals and the Constitutional Revision Commission's involvement with each proposed amendment. This section describes the commission's efforts to achieve voter approval in the 1982 General Election. These efforts were ultimately successful, with all four proposed amendments being approved by the electorate.

The Constitutional Revision Commission took an active role in providing educational information about the proposed amendments. In addition, the commission provided information to the lieutenant governor for the official voter information pamphlet which was distributed to all voters of the state.

The commission carefully avoided expending any public funds for advertising or any direct promotional efforts for the amendments. Its efforts were confined to providing general educational information on the Utah Constitution and issues surrounding the 1982 ballot proposals. The commission was instrumental in developing a wide-ranging informational program which included a speaker's bureau and informational mailings to public officials and civic groups. Commission members also appeared on various media programs to discuss the amendments.

An independent promotional organization was created by interested citizens to solicit funds and to directly promote the passage of the amendments--particularly Proposition 1. This organization, known as Citizens for Constitutional Improvement, actively raised money and campaigned for the amendments.

In the final analysis, however, it was the direct involvement by the governor, the legislature, both major political parties, the education community, and other key public leaders, which convinced the electorate of the need to approve the proposed amendments. Their efforts focused primarily on the passage of Proposition 1. All of the amendments, however, received broad support and endorsement. (Exhibit 2 summarizes the actual election results.)

EXHIBIT 2
1982 CONSTITUTIONAL AMENDMENTS
GENERAL ELECTION SUMMARY

Final Vote Summary

Proposition 1 - Tax Article Revision

For	341,263	64.7%
Against	185,924	35.3%

Proposition 2 - Citizen Salary Commission

For	352,195	67.1%
Against	172,380	32.9%

Proposition 3 - Residency Requirement

For	403,694	82.7%
Against	84,229	17.3%

Proposition 4 - Corporate Officers

For	293,289	62.5%
Against	176,270	37.5%

REPORT OF THE 1983 GENERAL SESSION

The Constitutional Revision Commission did not recommend any proposals to the 1983 General Session of the 45th Legislature. Commission studies had not been completed for consideration for the legislature at its general session. The commission, therefore, voted to introduce any proposed amendments to either the 1984 Budget Session or to a subsequent special session. It should be noted that the commission unanimously endorsed the concept of a special session to review constitutional amendments.

CHAPTER II

JUDICIAL ARTICLE

BACKGROUND

The following information summarizes the Constitutional Revision Commission's Judicial Article study. The material includes a brief review of the commission's action from 1980 to 1982, as well as a more extensive review of the commission's Judicial Article study since the 1982 Budget Session.

Judicial Article Study 1980 to 1982
(See Report of the Constitutional Revision Commission - January 1982)

The Constitutional Revision Commission actually first examined the Judicial Article (Article VIII) in 1975. At the direction of the Utah Legislature (SJR 3 - 1973), the commission reviewed the positions of a special task force on court organization and the Utah State Bar which had recommended changes in the Judicial Article. (See Utah Courts Tomorrow - Report and Recommendations of the Unified Court Advisory Committee, September 1972, and the recommendation of the Utah State Bar, April 1972). The commission, after a preliminary examination of the proposals, declined to recommend any changes in Article VIII to the legislature.

The Constitutional Revision Commission began its most recent review of the Judicial Article in 1980 by supporting a simple amendment to eliminate automatic appeals to the supreme court (HJR 20 - 1980). The measure was ultimately rejected by the legislature. However, even though the commission supported the proposal, there was concern that the entire Judicial Article merited extensive review. As such, a total review of the article was included on the commission's 1981 study agenda.

During the 1981 study year, a Judicial Article Subcommittee was formed to more clearly focus the commission's resources on the Judicial Article study. The commission staff did extensive background work on the problems associated with the present Judicial Article. Several hearings were conducted with representatives of the judiciary to discover areas of concern. The commission's work indicated that, in addition to the appeals problems, other substantive issues warranted review. Specifically, changes in the administration of the judiciary and clarification of the judicial selection process were needed.

The Constitutional Revision Commission defined three major objectives that the revised Judicial Article should address. They were:

1. to articulate the role of the judiciary as a co-equal branch of government within the historical framework of the system of checks and balances;

2. to provide the means to develop a more efficient and effective judicial system; and

3. to attract and maintain quality judges. The proposal, introduced to the 1982 Budget Session of the legislature as HJR 10, was developed to accomplish these objectives.

The 1982 Budget Session

HJR 10 was reviewed closely by the legislature. After significant amendments, the proposal was adopted by the house of representatives. These amendments concerned incorporating a specific reference to justice of the peace courts and restoring the general authority of the legislature to establish the judicial selection process. However, the measure was not acted upon by the senate.

It was in fact the controversy over the selection of judges which ultimately precluded action by the senate. Just prior to the beginning of the legislative session, the Utah Supreme Court ruled on a controversial case challenging the authority of the senate to review judicial appointments. Matheson v. Ferry, 641 P.2d 674 (1982). In this case, the Court struck down the statutory provision requiring senate confirmation of judicial appointments. The political atmosphere surrounding the case made adoption of the Judicial Article revision impossible. As a result, no action was taken and the commission was asked to further study the revision.

The 1982-1983 Judicial Article Study

Following the actions of the 1982 Budget Session, the Constitutional Revision Commission again undertook a review of the Judicial Article. The Judicial Article subcommittee was reconstituted and began to work on the article.

Further study was slowed, however, by a second court case. Again, the governor challenged a statute providing for senate confirmation of judicial appointments. The action was resolved by the Utah Supreme Court shortly before the beginning of the 1983 General Session. Matheson v. Ferry, 657 P.2d 240 (1982). As a result, the commission did not introduce a proposal to the 1983 General Session.

Following this second litigation on judicial selection, the Judicial Article subcommittee began its work in earnest. It was decided by the subcommittee to support most of the previous positions taken in developing HJR 10. However, the subcommittee did reexamine those issues raised by the legislature in 1982.

On the justices of the peace issue, the subcommittee again supported deleting specific reference to them from the constitution. As before, this action was taken to provide legislative flexibility and to avoid unnecessary specificity. The commission, however, did not intend that this recommendation reflect on the value of the justice of the peace system. Rather, the commission position simply states that no court of limited jurisdiction should be mentioned in the constitution.

In examining the selection process for judges, primary concern centered on balancing the interests of the legislature, the governor, the courts, and the public. The subcommittee's study indicated that aspects of the current selection process, specifically the election procedures, contained significant potential for abuse. In some instances, incumbent judges stand for a retention election only based on their

record as a judge. If opposed, however, an incumbent judge must participate in a contested election. In the view of the subcommittee, this "hybrid" approach provided neither meaningful review of judges' records nor protection against undue politicizing of judicial elections. As a result, the subcommittee again recommended retention elections only for incumbent judges.

The commission had previously not included senate confirmation as part of the judicial selection process. It felt that the original commission proposal provided adequate legislative involvement at the nominating level. However, the subcommittee now recommended that a senate rejection provision be included, coupled with a strict prohibition on legislative involvement at the nominating level. This approach satisfied concerns over any one governmental branch exercising undue control over judicial appointments.

The full Constitutional Revision Commission considered and adopted the subcommittee recommendations with minor amendments. The full commission restored a provision regarding public prosecutors. Current language provides for elected county attorneys. The subcommittee supported deletion of the provision, arguing for legislative flexibility. The full commission adopted a provision establishing a system of public prosecutors to be selected as provided by statute.

The Recommendations to the 1984 Budget Session

As with other commission recommendations, changes made in the Judicial Article by the commission are comprehensive and do not follow closely the order of the present article. Although the commission's proposal is different in organization from that found in the present constitution, much of the substance of the present article is retained.

The following material presents a comparative outline showing the relationship between the current constitution and the commission proposal, and a section-by-section analysis of the commission's proposal. The discussion will present the current constitutional language as it relates to issues raised by the new proposal. A short statement outlining the commission's rationale is also included. (Appendix C contains a copy of the complete commission proposal as well as a copy of the present Judicial Article.)

COMPARATIVE OVERVIEW

The following information is a summary comparing the Constitutional Revision Commission's proposed Judicial Article revision and the present Judicial Article. The information is organized by subject matter and shows how each document addresses specific issues.

CRC PROPOSED JUDICIAL ARTICLE REVISION	PRESENT JUDICIAL ARTICLE
1. Court Structure (Section 1) •Specifically mentions supreme court and district court. •Allows other courts by statute (juvenile, circuit, j.p.'s).	1. Court Structure (Section 1) •Specifically mentions supreme court, district court, and j.p.'s. •Allows other courts by statute (juvenile, circuit).
2. Supreme Court Organization (Sec. 2) •Five justices plus additional. •Chief justice to be selected as provided by law. •Court may hear cases in panels.	2. Supreme Court Organization (Sec. 2) •Five justices plus additional. •Chief justice automatically justice with least remaining time on term. •All cases must be heard by a majority.
3. Supreme Court Jurisdiction (Sec. 3) •Original jurisdiction over extra-ordinary writs and "certified" state law questions. •General appellate jurisdiction to be exercised as provided by statute.	3. Supreme Court Jurisdiction (Sec. 4) •Original jurisdiction over certain specified writs. •Appellate jurisdiction which requires all cases filed originally in district court to be heard. Specified how appeals to be processed from j.p. courts.
4. Supreme Court Rulemaking Authority (Sec. 4) •Empowers supreme court to adopt court rules. •Empowers supreme court to govern practice of law.	4. Supreme Court Rulemaking Authority (Sec. 4) •No stated authority for rulemaking or governance of the practice of law •Powers derived from inherent judicial authority powers.

- Authorizes use of retired judges and pro tempore. (See Sec. 2)
- Supreme court by rule manages the appellate process.

- Sec. 2 authorizes use of a district court judge to sit on supreme court. No specific mention for use of other retired judges.
- Sec. 5 authorized use of judges pro tempore

5. District Court and Trial Court Organization and Jurisdiction (Sec. 5)
   - Original jurisdiction except as limited by statute.
   - Appellate jurisdiction as provided by statute.
   - Guarantees right of appeal.
   - Eliminates reference to specific writs.

5. District Court Organization and Jurisdiction (Secs. 5, 7, 8, 9)
   - Original jurisdiction except as as limited by law.
   - Appellate jurisdiction from specific trial courts.
   - Lists specific writs.

6. Number of Judges/Judicial Districts (Sec. 6)
   - Allows legislature to establish judicial districts (eliminates reference to specific districts).

6. Number of Judges/Judicial Districts (Secs. 5, 6, 8, 16)
   - Specifies seven districts, the organizati of the seven may be changed.

7. Qualifications for Judges (Sec. 7)
   - Supreme court - 30 years/five-year resident, admitted to practice.
   - Other courts of record - 25 years/ Three year resident, admitted to practice.
   - If district established, residency in district.
   - Courts not of record - as provided by law.

7. Qualifications for Judges (Secs. 2, 5)
   - Supreme court - 30 years/five-year resident, admitted to practice.
   - District Court - 25 years/three-year resident, admitted to practice.
   - Resident of judicial district.
   - No mention of other courts.

8. Judicial Selection (Secs. 8, 9)
   - Judicial Nominating Commissions (no legislative involvement).
   - Governor appointment.
   - Senate review.
   - Unopposed retention election after Three years/then at end of each term.
   - Prohibition on partisan involvement.

8. Judicial Selection (Sec. 3)
   - Method to be established by statute.
   - Prohibition on partisan involvement.

     Statutory Method
     - -Nominating Commissions
     - -Governor appointment
     - -Stand for election at first general election following term-retention if unopposed. (Juvenile court does not stand for election - subject to senate review.)

9. Judicial Prohibitions (Sec. 10) •Private practice of law. •Holding elective nonjudicial offices. •Offices in political party.	9. Judicial Prohibitions •No similar prohibitions exist in article.
10. Judicial Administration (Sec. 11) •Establishes a judicial council. •Representatives from each court. •Chief justice head of council	10. Judicial Administration (Sec. 7) •No similar provision exists. -Present judicial council exists by statute. •District court has supervisory authority over "inferior" courts.
11. Discipline and Removal of Judges (Sec. 12) •Establishes a judicial conduct commission. •Standards for discipline. •Impeachment still retained.	11. Discipline and Removal of Judges (Secs. 11, 27, 28) •General legislative authority to develop standards for removal of judges. •Removal-by-address (2/3 vote of each house). •Forfeiture by absence.
12. Judicial Salaries (Sec. 13) •Legislature to provide for compensation.	12. Judicial Salaries (Sec. 20) •$3,000 until changed by law.
13. Retirement of Judges (Sec. 14) •Legislature to establish standards (deletes "uniform" requirement.)	13. Retirement of Judges (Sec. 28) •Legislature to establish uniform standards for retirement.
14. Public Prosecutors (Sec. 15) •Legislature to provide for system of public prosecutors. •Selected as provided by statute. •Admitted to practice law.	14. Public Prosecutors (Sec. 10) •Each county to have attorney. •Elected to four-year term. •No qualifications.

NOTE -- The proposed CRC revision deleted the following sections:

Sec. 8 - Justice of the Peace Jurisdiction
Sec. 11 - Removal by Address
Sec. 13 - Disqualification of Judges
Sec. 14 - Supreme Court Clerk
Sec. 15 - Appointment of Relatives to Office
Sec. 18 - Style of Process
Sec. 19 - Form of Civil Action

Sec. 14 - Supreme Court Clerk
Sec. 15 - Appointment of Relatives to Office
Sec. 18 - Style of Process
Sec. 19 - Form of Civil Action
Sec. 21 - Judges to be Conservators of Peace
Sec. 22 - Reporting Defects in Law
Sec. 23 - Publication of Decision
Sec. 24 - Extending Judges Terms
Sec. 25 - Decisions to be in Writing
Sec. 26 - Syllabus of Cases
Sec. 27 - Forfeiture of Office Due to Absence

SECTION-BY-SECTION ANALYSIS

Section 1 - Vesting of Judicial Powers

Present Language

> Section 1. The Judicial power of the State shall be vested in the Senate sitting as a court of impeachment, in a supreme court, in district courts, in justice of the peace, and such other courts inferior to the Supreme Court as may be established by law.
>
> Sec. 17. The Supreme and District Courts shall be courts of record, and each shall have a seal.

Proposed Language

> Section 1. The judicial power of the state shall be vested in a supreme court, in a trial court of general jurisdiction known as the district court, and in such other courts as the legislature by statute may establish. The supreme court, the district court, and such other courts designated by statute shall be courts or record. Courts not of record may also be established by statute.

Explanation

This section vests the judicial power of the state in the Utah Supreme Court, establishes a trial court of general jurisdiction known as the district court, and deletes specific reference to justice of the peace courts. Other courts of limited jurisdiction, such as the juvenile court and the circuit court, are also not mentioned specifically. Courts other than the supreme court and district court would be established by the legislature. The proposed article specifically allows for the creation of courts not of record such as justice of the peace courts. Courts not of record are those courts which do not develop appealable records. The proposal also deletes the reference to the senate sitting as a court of impeachment.

Rationale

This provision establishes the supreme court and the general jurisdiction trial court (district court) as the constitutional foundation of the court system. The legislature is empowered to establish additional courts as needed. Most constitutional scholars feel that specific delineation of courts is unnecessary.

The provision does contain a reference to the trial court of general jurisdiction, however, since that court is fundamental to a judicial system. The reference to the senate sitting as a court of impeachment is removed because impeachment is actually a legislative function. The Legislative Article (Article VI, Sec. 18) contains a similar provision regarding the role of the senate in impeachment cases. As such, the removal of this provision from the Judicial Article will have no impact on the impeachment process.

Sec. 2 - The Supreme Court

Present Language

> Sec. 2. The Supreme Court shall consist of five judges, which number may be increased or decreased by the legislature, but no alternation or increase shall have the effect of removing a judge from office. A majority of the judges constituting the court shall be necessary to form a quorum or render a decision. If a justice of the Supreme Court shall be disqualified from sitting in a cause before said court, the remaining judges shall call a district judge to sit with them on the hearing of such cause. Every judge of the Supreme Court shall be at least thirty years of age, an active member of the bar, in good standing, learned in the law, and a resident of the state of Utah for the five years next preceding his selection. The judge having the shortest term to serve, not holding his office by selection to fill a vacancy before expiration of a regular term, shall be the chief justice, and shall preside at all terms of the Supreme Court, and in case of his absence, the judge, having in like manner, the next shortest term, shall preside in his stead.

Proposed Language

> Sec. 2. The supreme court shall be the highest court and shall consist of at least five justices. The number of justices may be changed by statute, but no change shall have the effect of removing a justice from office. A chief justice shall be selected from among the justices of the supreme court as provided by statute. The chief justice may resign as chief justice without resigning from the supreme court. The supreme court by rule may sit and render final judgment either en banc or in divisions. The court shall not declare any law unconstitutional under this constitution or the Constitution of the United States, except on the concurrence of a majority of all justices of the supreme court. If a justice of the supreme court is disqualified or otherwise unable to participate in a cause before the court, the chief justice, or in the event the chief justice is disqualified or unable to participate, the remaining justices, shall call an active judge from an appellate court or the district court to participate in the cause.

Explanation

This section retains the provision setting the number of supreme court justices at five, but allows the legislature the authority to add additional justices. The proposed language also allows the court to sit in divisions to render decisions not

involving constitutional issues. Otherwise, a full majority is still necessary to render a decision. Also, in case of a justice's disqualification only an active judge from a lower court may be called in to sit with the supreme court.

The proposed article also provides for the selection of a chief justice in a manner provided by statute. The current procedure provides for the selection of the chief justice according to length of service on the bench. The chief justice may also resign as chief justice without resigning from the supreme court.

Qualifications for supreme court justice have been moved to Sec. 7 of the proposed revision.

Rationale

By providing the legislature with the authority to expand the supreme court, the revision gives the legislature an additional option to deal with increasing caseloads. Likewise, allowing the court to sit in divisions is another tool for caseload management. The new selection process for the chief justice is recommended because the chief justice will have more administrative responsibilities under the new Judicial Article. A change in the process for selecting the chief justice will permit a justice with appropriate administrative skills to be selected for the position. The commission felt the legislature should be free to determine the method for selecting the chief justice.

Finally, the commission felt that only active judges should be used to fill temporary vacancies on the supreme court. The present constitution states that a district court judge may be used. Historically, however, retired supreme court justices have also been called to fill temporary vacancies. The proposed revision empowers the supreme court to establish rules for the use of retired judges for proceedings in lower courts (Sec. 4). However, the commission felt that only active judges should be so employed for the supreme court. The commission recommendation follows federal court procedures where retired judges are used for lower court proceedings, but not for the supreme court.

Sec. 3 - Jurisdiction of the Supreme Court

Present Language

> Sec. 4. The Supreme Court shall have original jurisdiction to issue writs of mandamus, certiorari, prohibition, quo warranto and habeas corpus. Each of the justices shall have power to issue writs of habeas corpus, to any part of the State, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the Supreme Court, or before any district court or judge thereof of in the State. In other cases the Supreme Court shall have appellate jurisdiction only, and power to issue writs necessary and proper for the exercise of that jurisdiction. The Supreme Court shall hold at least three terms every year and shall sit at the capital of the State.

Proposed Language

> Sec. 3. The supreme court shall have original jurisdiction to issue all extraordinary writs and to answer questions of state law certified by a court of the United States. The supreme court shall have appellate jurisdiction over all other matters to be exercised as provided by statute and power to issue all writs and orders necessary for the exercise of the supreme court's jurisdiction or the complete determination of any cause.

Explanation

The proposed article outlines the jurisdiction of the supreme court. The revision gives the court the original jurisdiction to issue all extraordinary writs and to answer questions of state law in federal courts. The supreme court is vested with appellate jurisdiction over all other matters. However, the legislature is empowered to determine how that jurisdiction will actually be exercised. The court is also given the necessary authority to issue writs and orders for the full exercise of its appellate jurisdiction. The provision deletes reference to the terms of the court as well as the requirement that the court sit at the capital of the state.

Rationale

This section, in outlining the appellate and original jurisdiction of the supreme court, grants broad authority to the court. The court's original jurisdiction has been expanded to include dealing with questions of state law when used in federal courts. The original jurisdiction to issue extraordinary writs has been retained, but is written in more general language than that found in the present provision. The court retains general appellate jurisdiction over all matters. However, the method of exercising that jurisdiction is left to statute. The commission felt that the court should not be compelled to actually hear all matters, but rather, options such as an intermediate appellate court should be available. Vesting the authority with the legislature established maximum flexibility to deal with caseload management. The commission deleted the reference to court terms and location of sittings on the basis that these items are better handled by court rule or statute.

Sec. 4 - Supreme Court Rulemaking

Present Language

There is no language in the present constitution providing the Supreme Court with rulemaking authority. Any present rulemaking authority exists pursuant to statute or by inference regarding the traditional role of the judiciary.

> Sec. 5. . . . Any cause in the district court may be tried by a judge pro tempore, who must be a member of the bar sworn to try the cause, and agreed upon by the parties, or their attorneys of record. . . .

Proposed Language

Sec. 4. The supreme court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. Except as otherwise provided by this constitution, the supreme court by rule may authorize retired justices and judges and judges pro tempore to perform any judicial duties. Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah. The supreme court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.

Explanation

This section gives the supreme court general authority to establish rules of procedure and evidence for the state's various courts. The court is also charged with responsibility for managing the appellate process in those courts. The rulemaking authority also includes a specific responsibility to govern the practice of law, including the admission to practice and the discipline of attorneys. Lastly, the section provides for rulemaking to govern the use of retired judges and judges pro tempore and sets basic qualifications for judges pro tempore.

Rationale

Members of the commission felt that the rulemaking authority of the supreme court should be specifically included in the constitution. This power is considered essential to the maintaining an independent judiciary. The revision also provides the supreme court with clear constitutional authority for the governance of the practice of law. The commission felt that the practice of law is an inherent function of the judiciary. Lastly, the commission decided that the supreme court should be charged with managing the appellate process of the courts since it historically has assumed that role. The provision regarding judges pro tempore is taken essentially from Sec. 5 of the present Judicial Article. The court is granted broad authority to employ retired judges, subject to the limitation outlined in Sec. 2.

Sec. 5 - Jurisdiction of the District Court and Other Courts

Present Language

Sec. 5. . . . All civil and criminal business arising in any county must be tried in such county, unless a change of venue be taken, in such areas as may be provided by law. . . .

Sec. 7. The District Court shall have original jurisdiction in all matters civil and criminal, not excepted in this Constitution, and not prohibited by law; appellate jurisdiction from all inferior courts and tribunals, and a supervisory control of the same. The District Court or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition and other writs necessary to carry into effect their orders, judgments and decrees, and to give them a general control over inferior courts and tribunals within their respective jurisdictions.

Sec. 8. . . . The jurisdiction of justices of the peace shall be as now provided by law, but the legislature may restrict the same.

Sec. 9. From all final judgments of the District Courts, there shall be a right of appeal to the Supreme Court. The appeal shall be upon the record made in the court below, and under such regulations as may be provided by law. In equity case the appeal may be on questions of both law and fact; in cases at law the appeal shall be on questions of law alone. Appeals shall also lie from the final orders and decrees of the Court in the administration of decedent estates, and in cases of guardianship, as shall be provided by law. Appeals shall also lie from the final judgments of justices of the peace in civil and criminal cases to the District Courts on the questions of law and fact, with such limitations and restrictions as shall be provided by law; and the decision of the District Courts on such appeals shall be final, except in cases involving the validity or constitutionality of a statute.

Proposed Language

Sec. 5. The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. The jurisdiction of all other courts, both original and appellate, shall be provided by statute. Except for matters filed originally with the supreme court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause.

Explanation

The proposed article deletes all reference to the jurisdiction of courts other than the district court. The district court is vested with general trial jurisdiction except as may be limited by statute or the constitution. It also gives the court power to issue all extraordinary writs, and permits appellate jurisdiction of the court to be established by statute. The jurisdiction of all other courts is established by statute. Finally, the proposal establishes a right of appeal to an appropriate appellate court.

Rationale

A trial court of general jurisdiction is considered essential to a judicial system. As such, the district court is vested with that authority. However, there are instances where limited authority for specialized matters may better be vested in specialized trial courts. This section provides for those options. The district court is also given the authority to issue all extraordinary writs. The jurisdiction of other courts is to be established by statute. The commission felt that the authority to establish the jurisdiction of most state courts properly lies with the legislature.

The proposed article also removes the provision mandating an appeal of all final judgments of the district courts to the supreme court. This proposal would instead provide for a right of appeal to any appropriate appellate court. The actual

determination of how this appeal would be discharged would be determined by statute or court rule. Again, this language was chosen to provide flexibility in determining how the appellate process should be established. It should be noted that the guaranteed right of appeal does not apply to matters raised originally with the supreme court. The court's original jurisdiction is very limited, however, and the commission felt that the court should not be mandated to hear appeals from its own original decisions.

In addition to removing the supreme court's mandated appeals language, the proposal also removes language requiring "de novo" appeals from the justice of the peace courts to the district court.

Sec. 6 - Judicial Districts and Number of Judges

Present Language

> Sec. 5. The state shall be divided into seven judicial districts, for each of which, at least one judge shall be selected as hereinbefore provided. Until otherwise provided by law, a district court at the county seat of each county shall be held at least four times a year. . . .
>
> Sec. 6. The Legislature may change the limits of any judicial district, or increase or decrease the number of districts, or the judges thereof. No alteration or increase shall have the effect of removing a judge from office. In every additional district established, a judge or judges shall be selected as provided in section 3 of this article.
>
> Sec. 8. The Legislature shall determine the number of justices of the peace to be elected, and shall fix by law their powers, duties and compensation. . . .
>
> Sec. 16. This section specifically outlines the present judicial districts for the district court. The most recent alignment of the seven judicial districts became effective July 1, 1982.

Proposed Language

> Sec. 6. The number of judges of the district court and of other courts of record established by the legislature shall be provided by statute. No change in the number of judges shall have the effect of removing a judge from office during a judge's term of office. Geographic divisions for all courts of record except the supreme court may be provided by statute. No change in divisions shall have the effect of removing a judge from office during a judge's term of office. The number of judges of courts not of record shall be provided by statute.

Explanation

This section removes the specific limitation of seven judicial districts for the district court from the constitution. Instead, the provision allows the legislature to

establish appropriate judicial districts. This section also empowers the legislature to determine the number of judges, but prevents political manipulation of judges by preventing any change in number from removing a judge from office during the judge's term. Otherwise, geographic determination of judicial districts and number of judges is to be established by statute.

Rationale

This section is basically unchanged from the present constitutional language. The recommended change does, however, remove the specific enumeration of judicial districts. In keeping with the policy of making constitutional language more general, the specific duties, powers, and qualifications of judges were removed from this section and included in broader language in Sections 7, 8, and 9 of the proposed article.

Sec. 7 - Judicial Qualifications

Present Language

> Sec. 2. . . . Every judge of the Supreme Court shall be at least thirty years of age, an active member of the bar, in good standing, learned in the law, and a resident of the state of Utah for the five years next preceding his selection. . .
>
> Sec. 5. . . . Each judge of a district court shall be at least twenty-five years of age, an active member of the bar in good standing, learned in the law, a resident of the state of Utah three years next preceding his selection, and shall reside in the district for which he shall be selected. . . .

Proposed Language

> Sec. 7. Supreme court justices shall be at least 30 years old, United States citizens, Utah residents for five years preceding selection and admitted to practice law in Utah. Judges of other courts of record shall be at least 25 years old, United States citizens, Utah residents for three years preceding selection, and admitted to practice law in Utah. If geographic divisions are provided for any court, judges of that court shall reside in the geographic division for which they are selected.

Explanation

The proposed article indicates that judges of all courts of record must be citizens of the United States, Utah residents (five years for the supreme court, three for other courts) and admitted to practice law in Utah. The present article sets specific age and residency requirements for certain courts, but they are scattered among several sections in the Judicial Article. In addition, the proposed language contains a more general residency requirement than that

found in the present article. Specifically, the provision states that if courts are divided into districts, judges must reside in the district for which they are selected.

Rationale

The commission agreed with those experts who indicated that specific requirements beyond those of professional competence, age, United States citizenship and basic residency should not be included in the constitution. By placing specific qualifications in the constitution, it is intended that the legislature be precluded from establishing additional requirements.

Sec. 8 - Judicial Selection

Present Language

Sec. 3. Judges of the supreme court and district courts shall be selected for such terms and in such manner as shall be provided by law, provided, however, that selection shall be based solely upon consideration of fitness for office without regard to any partisan political considerations and free from influence of any person whomsoever, and provided further that the method of electing such judges in effect when this amendment is adopted shall be followed until changed by law.

Proposed Language

Sec. 8. When a vacancy occurs in a court of record, the governor shall fill the vacancy by appointment from a list of at least three nominees certified to the governor by the judicial nominating commission having authority over the vacancy. The governor shall fill the vacancy within 30 days after receiving the list of nominees. If the governor fails to fill the vacancy within the time prescribed, the chief justice of the supreme court shall within 20 days make the appointment from the list of nominees. The legislature by statute shall provide for the nominating commissions' composition and procedures. No member of the legislature may serve as a member of, nor may the legislature appoint members to any judicial nominating commission. The senate shall consider and render a decision on each judicial appointment within 30 days of the date of appointment. If necessary, the senate shall convene itself in extraordinary session for the purpose of considering judicial appointments. The appointment shall be effective, unless rejected by a majority vote of all members of the senate. If the senate rejects the appointment, the office shall be considered vacant and a new nominating process shall commence. Selection of judges shall be based solely upon consideration of fitness for office without regard to any partisan political considerations.

Sec. 9. Each judicial appointee of a court of record shall be subject to an unopposed retention election at the first general election held more than three years after appointment. Following initial voter approval, each supreme court justice every tenth year, and each judge of other courts of

record every sixth year, shall be subject to an unopposed retention election at the corresponding general election. Judicial retention elections shall be held on a nonpartisan ballot in a manner provided by statute. If geographic divisions are provided for any court of record, judges of those courts shall stand for retention election only in the geographic divisions to which they are selected. Judges of courts not of record shall be selected in a manner, for a term, and with qualifications provided by statute.

Explanation

The proposed article specifically provides for the method of selecting judges for all courts of record. The procedure includes the following components:

1. Judicial Nominating Commissions - Legislative participation is strictly prohibited. The nominating commissions would recommend three names to the governor.

2. Gubernatorial appointment - The Governor would make an appointment from the nominating commission recommendations.

3. Review by the senate - A majority vote would be necessary to reject a nominee. In addition, the senate could call itself into session to review judicial appointments.

4. Uncontested retention elections - The initial retention election would be held at the first general election three years after appointment. Subsequent elections would be held at the conclusion of each term of office.

Under the proposal, the term of office for supreme court justices is ten years and the terms for judges of other courts of record judges is six years. These terms are the same as those found in the present constitution. Partisan considerations are prohibited as a basis of selection. Also included is a reference stating that if geographic divisions are created for a court, judges will stand for retention election only in their respective division. This position reaffirms existing practice.

The present constitution provides for the selection process to be set entirely by statute. However, direct partisan involvement is prohibited. The scope of legislative authority, however, has been limited through recent court decisions.

Rationale

One of the principal objectives of the Constitutional Revision Commission's study of the Judicial Article was to provide a mechanism to attract and retain quality individuals to serve in the judiciary. Due to the importance of this issue, the Constitutional Revision Commission departed from its usual policy of legislative flexibility and proposed a specific selection process to be included in the constitution.

The Constitutional Revision Commission carefully reviewed the experiences and constitutions of other states, as well as the United States Constitution. The selection process proposed by the Constitutional Revision Commission is based on the following conclusions:

- The judicial selection process must balance the interests of the legislature, the governor, the courts, and the public.

- Absent actionable behavior, selection to the bench contemplates a permanent position. As such, judicial terms are longer than terms for other political offices. (Note: The United States Constitution provides for the lifetime appointment of all federal judges.)

- Periodic public review is necessary to evaluate the performance of sitting judges. However, that review should focus on the record of the judge and not become a contest between personalities or parties.

- The selection process must balance the public's right to review with the protection for the judiciary to render unpopular but legally correct decisions.

The commission feels that its proposal grants a meaningful, but not excessive, role to both the legislature and the governor. Likewise, the public's right to periodically evaluate judges is preserved. Lastly, the necessary protections are maintained to preserve an independent judiciary.

Sec. 10 - Conflict of Interest

Present Language

There is no language in the present constitution establishing guidelines or restrictions in the area of conflict of interest. Such restrictions, if any, are provided by statute.

Proposed Language

Sec. 10. Supreme court justices, district court judges, and judges of all other courts of record while holding office may not practice law, hold any elective non-judicial public office or hold office in a political party.

Explanation

The private practice of law, holding elected public office, and the holding office in a political party are prohibited for judges by the proposed article.

Rationale

Most members of the judiciary expressed concern over the absence of such a provision in the present constitution. For this reason, the commission inserted this provision. It is similar to comparable language found in other state constitutions.

Sec. 11 - Court Administration

Present Language

There is no present language in the constitution dealing directly with administration of the judiciary. Sec. 7 does contain language authorizing the district court to exercise supervisory authority over other "inferior courts".

Sec. 7. . . . The District Courts or any judge thereof, shall have power to issue. . . writs necessary to carry into effect their orders, judgments and decrees, and to give them a general control over inferior courts and tribunals within their respective jurisdictions.

Sec. 14. The Supreme Court shall appoint a clerk, and a reporter of its decisions, who shall hold their offices during the pleasure of the Court. Until otherwise provided, Court Clerks shall be ex officio clerks of the District Courts in and for their respective counties, and shall perform such other duties as may be provided by law.

Proposed Language

Sec. 11. A Judicial Council is established, which shall adopt rules for the administration of the courts of the state. The Judicial Council shall consist of the chief justice of the supreme court, as presiding officer, and such other justices, judges and other persons as provided by statute. There shall be at least one representative on the Judicial Council from each court established by the constitution or by statute. The chief justice of the supreme court shall be the chief administrative officer for the courts and shall implement the rules adopted by the Judicial Council.

Explanation

The proposed article specifically establishes a Judicial Council to be composed of representatives from each level of the judiciary. The council would act as the administrative body for the court with the chief justice as presiding officer.

Rationale

This section addresses the issue of whether or not there should be a central administrative authority for the entire judicial branch of government. The commission determined that centralized authority would create a more efficient and effective judicial administration. The proposal, therefore, establishes a single judicial governing body, the Judicial Council, to represent all courts. The inclusion of a representative from every court level would insure the participation of all courts in the administrative process. In addition, placing the chief justice at the head of the council focuses administrative and presiding authority in the senior judicial officer of the state. The commission felt that the legislature should determine the composition of the council (with limited guidelines) to ensure maximum flexibility in developing an administrative body for the judiciary.

Some questions arose over the administrative authority of the judicial council and the rulemaking authority of the supreme court. The commission felt that the primary role of the council lies in developing basic administrative policies including consolidated budgeting procedures, personnel systems, relations with other governmental entities, and the management of judicial resources. The role of the supreme court is to establish the actual adjudication procedures used by the courts. In addition, the supreme court is specifically charged with the management of the appeals process.

Sec. 12 - Judicial Conduct

Present Language

> Sec. 11. Judges may be removed from office by the concurrent vote of both houses of the Legislature, each voting separately; but two-thirds of the members to which each house may be entitled must concur in such vote. The vote shall be determined by yeas and nays, and the names of the members voting for or against a judge, together with the cause or causes of removal, shall be entered on the journal of each house. The judge against whom the house may be about to proceed shall receive notice thereof, accompanied with a copy of the cause alleged for his removal, at least ten days before the day on which either house of the Legislature shall act thereon.
>
> Sec. 27. Any judicial officer who shall absent himself from the State of district for more than ninety consecutive days, shall be deemed to have forfeited his office: Provided, That in case of extreme necessity, the Governor may extend the leave of absence to such time as the necessity therefor shall exist.
>
> Sec. 28. The Legislature may provide uniform standards for mandatory retirement and for removal of judges from office. Legislation implementing this section shall be applicable only to conduct occurring subsequent to the effective date of such legislation. Any determination requiring the retirement or removal of a judge from office shall be subject to review, as to both law and facts, by the Supreme Court.

Proposed Language

> Sec. 12. A Judicial Conduct Commission is established, which shall investigate complaints against any justice or judge and conduct confidential hearings concerning the removal or involuntary retirement of a justice or judge. The legislature by statute shall provide for the composition and procedures of the Judicial Conduct Commission. On recommendation of the Judicial Conduct Commission, the supreme court, after a hearing, may censure, remove, or retire a justice or judge for action which constitutes willful misconduct in office, willful and persistent failure to perform judicial duties, disability that seriously interferes with the performance of judicial duties, or conduct prejudicial to the administration of justice which brings a judicial office into disrepute. The power of removal conferred by this section is alternative to the power of impeachment.

Explanation

Under this section, a Judicial Conduct Commission is established to review complaints against judges and to conduct confidential hearings. The revision provides the Judicial Conduct Commission with the authority to make recommendations to the supreme court concerning discipline or the removal of judges. The section also outlines the parameters of judicial misconduct and provides that the composition and procedures of the commission shall be established by the legislature. Other means of disciplining or removing judges have been deleted, including the "removal by address" power of the legislature (Sec. 11), forfeiture of office by absence (Sec. 27), and other statutory methods (Sec. 28). The provision further provides that the method of discipline and removal used by the commission is to be an alternative to the impeachment power which is provided in the Legislative Article.

Rationale

The commission initially felt that specific standards of judicial conduct would be best left to legislative determination. However, as alternative methods of judicial discipline were reviewed, the commission discovered that most of these methods were either vague regarding grounds for removal, or lacked a fundamental regard for due process.This was particularly true regarding the "removal by address" provision in Sec. 11.

The commission concluded that the establishment of the Judicial Conduct Commission was the best system and important enough to warrant constitutional inclusion. The role of the legislature is still preserved with the impeachment power.

Sec. 13 - Judicial Compensation

Present Language

> Sec. 12. The Judges of the Supreme and District Courts shall receive at stated times compensation for their services, which shall not be diminished during the terms for which they are selected.
>
> Sec. 20. Until otherwise provided by law, the salaries of supreme and district judges, shall be three thousand dollars per annum, and mileage, payable quarterly out of the State treasury.

Proposed Language

> Sec. 13. The legislature shall provide for the compensation for all justices and judges. The salaries of justices and judges shall not be diminished during their terms of office.

Explanation

The proposed article provides for judicial compensation by statute and prohibits diminution of judicial salaries during their terms of office.

Rationale

Specific dollar amounts in the constitution were deleted because they unduly restrict constitutional flexibility. In addition, the present language concerning diminution of judicial salaries was retained to prevent political manipulation or retribution on the part of the legislature and to help insure judicial independence.

Sec. 14 - Retirement and Removal From Office

Present Language

Sec. 28. The Legislature may provide uniform standards for mandatory retirement and for removal of judges from office. Legislation implementing this section shall be applicable only to conduct occurring subsequent to the effective date of such legislation. Any determination requiring the retirement or removal of a judge from office shall be subject to review, as to both law and facts, by the Supreme Court.

This section is additional to, and cumulative with, the methods of removal of justices and judges provided in Sections 11 and 27 of this article.

Proposed Language

Sec. 14. The legislature may provide standards for the mandatory retirement of justices and judges from office.

Explanation

The proposed article permits the legislature to provide standards for the mandatory retirement of judges. There is little change from the present language as it relates to judicial retirement. However, the term "uniform" has been deleted. The commission has substituted the Judicial Conduct Commission (Sec. 12) for the legislative authority regarding judicial removal standards. Supreme court review of removal actions is also included in Sec. 12.

Rationale

The commission saw no need to substantially change this section as it relates to mandatory judicial retirement standards. The commission deleted the term "uniform" because it felt that the legislature should be free to set different retirement standards for the judges of the various courts.

Sec. 15 - County Attorneys

Present Language

Sec. 10. A county attorney shall be elected by the qualified voters of each county who shall hold his office for a term of four years. The

powers and duties of county attorneys, and such other attorneys for the state as the legislature may provide, shall be prescribed by law. In all cases where the attorney for any county, or for the state, fails or refuses to attend and prosecute according to law, the court shall have power to appoint an attorney pro tempore.

Proposed Language

Sec. 15. The legislature shall provide for a system of public prosecutors who shall have primary responsibility for the prosecution of criminal actions brought in the name of the State of Utah and shall perform such other duties as may be provided by statute. Public prosecutors shall be selected in a manner provided by statute and shall be admitted to practice law in Utah. If a public prosecutor fails or refuses to prosecute, the supreme court shall have power to appoint a prosecutor pro tempore.

Explanation

The section deletes specific reference to county attorneys and establishes a system of public prosecutors. The prosecutors would be selected as provided by statute. A requirement that public prosecutors be qualified to practice law is also included. The section retains the authority to appoint prosecutors pro tempore, but clarifies that the supreme court is to be the appointing authority.

Rationale

The commission felt that requiring each county to elect a county attorney was unduly restrictive and precluded the establishment of other prosecutorial structures such as district attorneys. The proposal requires the legislature to establish a system of professionally competent public prosecutors. The prosecutors would be selected as provided by statute. The commission felt that since there are legitimate reasons for requiring elected as well as appointed prosecutors, the legislature should be free to set public policy in this area.

Miscellaneous Provisions

The following sections of Article VIII were considered by the commission to be unnecessary or outdated and were deleted from the proposal. In most cases, similar provisions could be established by either court rule or statute.

1. Disqualification of Judges, Nepotism

Sec. 13. Except by consent of all the parties, no judge of the supreme or inferior courts shall preside in the trial of any cause where either of the parties shall be connected with him by affinity or consanguinity within the degree of first cousin, or in which he may have been of counsel, or in the trial of which he may be presided in any inferior court.

Sec. 15. No person related to any judge of any court by affinity or consanguinity with the degree of first cousin, shall be appointed by such court or judge to, or employed by such court or judge in any office or duty in any court of which such judge may be a member.

Rationale

The essence of these provisions could be more appropriately retained by statute or court rule.

2. Style of Process--"The State of Utah"

Sec. 18. The style of all process shall be, "The State of Utah," and all prosecutions shall be conducted in the name and by the authority of the same.

Rationale

This provision is a procedural requirement better stated by court rule.

3. Forms of Civil Action

Sec. 19. There shall be but one form of civil action, and law and equity may be administered in the same action.

Rationale

Although there are historical distinctions surrounding this provision, its importance is largely symbolic and could be stated by court rule.

4. Judges to be Conservators of Peace

Sec. 21. Judges of the Supreme Court, District Courts, and justices of the peace, shall be conservators of the peace, and may hold preliminary examinations in cases of felony.

Rationale

The language of this section is outdated and inconsistent with the rest of the proposal.

5. Judges to Report Defects in Law

Sec. 22. District Judges may, at any time, report defects and omissions in the law to the Supreme Court, and the Supreme Court, on or before the

first day of December of each year, shall report in writing to the Governor any seeming defect or omission in the law.

Rationale

This provision is outdated and and could be stated by court rule.

6. Publication of Decision, Supreme Court Decisions to be in Writing

Sec. 23. The legislature may provide for the publication of decisions and opinions of the Supreme Court, but all decisions shall be free to publishers.

Rationale

This provision is outdated and not needed in the constitution. The requirements could be established by statute.

7. Effect of Extending Judges' Terms

Sec. 24. The terms of office of Supreme and District Judges may be extended by law, but such extension shall not affect the terms for which any judge was elected.

Rationale

This provision was considered unnecessary.

8. Decisions to be in Writing

Sec. 25. When a judgment or decree is reversed, modified or affirmed by the Supreme Court, the reasons therefor shall be stated concisely in writing, signed by the judges concurring, filed in the office of the clerk of the Supreme Court, and preserved with a record of the case. Any judge dissenting therefrom, may give the reasons of his dissent in writing over his signature.

Rationale

The commission is generally supportive of the concept of written court opinions. However, it felt that a rigid constitutional mandate was unnecessary. This same requirement could easily be imposed by statute or court rule. It should be noted that the present language applies only to the supreme court. As such, no similar constitutional requirement exists regarding decisions by other courts, even when functioning in an appellate capacity. Also, no similar provision is contained in the U.S. Constitution.

9. Court to Prepare Syllabus

Sec. 26. It shall be the duty of the court to prepare a syllabus of all the points adjudicated in each case, which shall be concurred in by a majority of the judges thereof, and it shall be prefixed to the published reports of the case.

Rationale

This requirement was considered unnecessary for inclusion in the constitution and could be stated by statute.

Section 2 - Transition Provision

Section 2. This amendment shall not shorten the term of office or abolish the office of any justice of the supreme court, any judge of the district court, or judge of any other court who is holding office of the effective date of this amendment. Justices and judges holding office on the effective date of this amendment shall hold their respective offices for the terms for which elected or appointed and at the completion of their current terms shall be considered incumbent officeholders. Existing statutes and rules on the effective date of this amendment, not inconsistent with it, shall continue in force and effect until repealed or changed by statute.

Rationale

This section is included as part of the amendment resolution, but is not part of the actual Judicial Article. The section is intended to ensure a smooth transition after the approval of the amendment and to protect sitting judges. Specifically, judges holding office on the effective date of the amendment are considered incumbent officeholders and therefore not subject to reappointment. At the completion of their term, they would stand for a retention election as provided in the Judicial Article.

CERTIFICATE OF COMPLIANCE

I certify that in compliance with the Court's supplemental briefing order, this brief is 30 pages long, excluding the table of contents, table of authorities, and the addenda. I further certify that this brief complies with URAP 21(g)'s restrictions on non-public records.

DATED: July 19, 2019.

/s/ Benjamin C. McMurray