

FROM CIVIL WAR MIDSHIPMAN TO
INDOMITABLE VETERAN: AN ESSAY ON THE LIFE
AND TIMES OF JEFFERSON FRANKLIN MOSER, HIS
TWENTY-YEAR NAVAL PENSION BATTLE, AND
JUSTICE SUTHERLAND’S OPINION IN *MOSER V.*
UNITED STATES, 266 U.S. 236 (1924)

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<https://www.alumni.albany.edu/s/1642/bp19/interior.aspx?sid=1642&gid=2&pgid=1783>

The American flag that the Veterans Administration provided for his funeral in 2012 is displayed in the author’s office as a constant reminder of both his lifelong patriotism as well as the good to which he put his college benefits from the Servicemen’s Readjustment Act of 1944 (commonly known as the G.I. Bill), Pub. L. 78-346, 58 Stat. 284 (June 22, 1944) (“An Act to provide Federal Government aid for the readjustment in civilian life of returning World War II veterans”).

I. INTRODUCTION

What if I were to tell you that a boy from a Pennsylvania inland town (notable as the hiding place of the Liberty Bell during the American Revolution) would attend the U.S. Naval Academy as a cadet (Midshipman) when it had to be moved during the American Civil War from the questionable loyalties of Maryland to a Revolutionary War-era ship anchored off the coast of Rhode Island; and that the boy would become a man who then would spend 40 years as a career Naval Officer,

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culminating in explorations of Alaska, which had been purchased through the diplomacy of President Lincoln's Secretary of State shortly after the Civil War? What if I were to add that the boy from Pennsylvania who came to age in the great steel Navy of the United States¹ would spend the last twenty years of his nautical career in command of the largest fleet of wooden commercial sailing ships in the world, plying the waters off Alaska? And what if I added to the mix that at the same time, this Pennsylvanian would carry on a pitched legal battle in Washington, D.C. courtrooms for nearly half a million dollars of pension enhancements and the rank of Rear Admiral denied him because his government switched policies after his 1904 retirement from the Navy when it no longer credited his service as a Midshipman during the American Civil War?

To further elaborate the story, what if I were to add that the judge who would ultimately rule in his favor was born in England in 1862, during the midst of the American Civil War and two years before Moser entered the Naval Academy, and moved with his family to Utah a year later, where he was educated by the Mormons although not himself a Mormon, sent off to work at 12, but paid his way through high school, college, and law school, was elected a U.S. Senator from Utah, and then appointed to the U.S. Supreme Court (one of only six Justices over 236 years to be born outside of the U.S. territory) a mere two years before writing the decision that would restore full rank and pension to the Pennsylvanian?

In the words of W.S. Gilbert, you might be forgiven for suspecting me of spinning "*so adventurous a tale, which may rank with most romances.*"²

Yet, it is all true. *Every* word of it.

A century ago, Captain Jefferson Franklin Moser caused his subordinates, i.e., his legal counsel, to lay down their arms – legal argument – having in three decades fought *the* government – the United States of America, which he had defended at the risk of his life serving in another war that had ended nearly 60 years before near a town called Appomattox Court House.³ Legal arms were laid down, however, not

¹ See generally ADMIRALS OF THE NEW STEEL NAVY: MAKERS OF THE AMERICAN NAVAL TRADITION 1880-1930 (1990)(James C. Bradford, ed.)(describing the transition of the U.S. Navy after the American Civil War from steam-and-sail to turbine propulsion and all-steel hulls).

² W.S. Gilbert, Libretto for *The Mikado—Or The Town of Titipu*, in THE SAVOY OPERAS: THE COMPLETE GILBERT AND SULLIVAN, at 362, 372-373 (2006)(Ed Glinert, Ed.) (Ko-Ko's Song).

³ See generally CHRIS CALKINS, ET AL., NO ONE WANTS TO BE THE LAST TO

because of surrender. Rather, swords became ploughshares because Moser had won a sweeping victory by virtue of the arcane (to non-lawyers) doctrine of collateral estoppel.

Indeed, it is through collateral estoppel that the author first met Moser in a Civil Procedure casebook. The case of *United States v. Moser*⁴ – his case – was one of those that I taught after I left law practice and took up law teaching in 1999. That case was featured in the Seventh Edition of Professors Cound, Friedenthal, Miller, and Sexton’s celebrated Civil Procedure casebook.⁵ The authors used the *Moser* case in exploring the technical elements of the collateral estoppel doctrine, in particular, the element of “defining and characterizing the issue.”⁶ Having always viewed law from an historical perspective, the opening lines of the authors’ summary of the facts immediately caught my eye:

Moser was a captain when he retired from the Navy. In his first action, he won a ruling that service as a Naval Academy cadet during the Civil War constituted service during the way that entitled him to be retired with the rank and three-fourths of the sea pay of the next higher grade.

I was struck that the Taft Court decided this case in 1924 – almost 60 years after the worst conflict in American history came to a close at Appomattox. A Civil War veteran still litigating with the United States Government after 60 years? *Amazing!* But this wasn’t just one legal action – or even two. This was a battle of attrition that had gone on during *three decades* and *four* separate legal actions that Moser had to hire lawyers to litigate again and again – because the government kept digging in its heels even after losing repeatedly:

Although the Court of Claims changed its mind about the interpretation of the pension statutes, he won his *next two* actions for later installments of his pay on the basis of *res judicata*. In his *fourth* action for still later installments, the Court of Claims ruled both that its initial interpretation of the statute had been correct and that in any event he was entitled to rely on *res judicata*.⁷

DIE: THE BATTLES OF APPOMATTOX, APRIL 8-9, 1865 (2023)

⁴ 266 U.S. 236 (1924).

⁵ JOHN J. COUND, JACK H. FRIEDENTHAL, ARTHUR R. MILLER, & JOHN E. SEXTON, CIVIL PROCEDURE: CASES AND MATERIALS 1216-17 (West Am. Casebook Series 7th ed. 1997) (hereinafter, JOHN J. COUND, ET AL.)

⁶ Id.

⁷ Id. at 1216 (emphases added)

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Here was a remarkably resilient and indomitable veteran. His story, I resolved, is one that I would tell in more detail one day. That day has arrived, in the form of this Essay, on the occasion of the centennial of the last battle Moser fought as part of a war that had been ended nearly 60 years before – a last battle of the Civil War, in a sense, but this time decided not by a meeting of Grant and Lee in the Appomattox Courthouse, but rather, in the in the Old Chambers of the Supreme Court in December 1924.

I aim to illuminate not only the legal story of the Moser case, but the vital context of the man and his times that gives the case the immediacy of context and a lasting significance beyond the niceties of legal doctrine. In Section II, we trace the life, times, and naval and civilian careers of Jefferson Franklin Moser. Section III tackles the complex, but vital, subject of military pensions following the American Civil War, which were a transformative phenomenon in the relationship between the federal government and the ways in which both politicians and constituencies saw the role of the federal government. Moser's own naval pension drama is examined in detail in Section IV, which also brings on stage the British-born U.S. Supreme Court Justice who ruled decisively in Moser's favor after twenty years of litigation with the federal government.



Officers

From left to right, standing—
Assistant Paymaster Fred W. Holt, P. A. Surgeon Samuel S. Rodman, Assistant Surgeon Frederick G. Abekin, First Lieutenant John W. McClaskey (U. S. M. C.), Paymaster Frederick K. Perkins, Assistant Paymaster H. B. Worden.
Sitting—
Lieutenant Arthur J. Heplurn, Lieutenant-Commander Guy W. Brown, Captain Jefferson F. Moser, Chaplain John B. Frazier, Surgeon Henry B. Fitts, Lieutenant Percy N. Olmsted.

Illustration 1—Yerba Buena U.S. Naval Training Station, San Francisco, California: Moser's last command in 1904.⁸

II. CIVIL WAR MARYLAND AND THE LAUNCH OF THE NAVAL CAREER OF JEFFERSON FRANKLIN MOSER

A. Maryland on the Eve of the American Civil War

The Naval Academy that young Jefferson Franklin Moser would enter as a Midshipman had been just three years before his arrival a place fraught with fear, panic, uncertainty, mistrust, and an impending sense

⁸ Downloaded by the author in 2017 from <http://www.navsource.org/archives/09/46/094691016.jpg>. Original from U.S. NAVAL TRAINING STATION ESTABLISHED 1899: YERBA BUENA ISLAND, SAN FRANCISCO, CALIFORNIA (1904).

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of doom. “Like the United States as a whole, Maryland was a society divided against itself.”⁹ Matters were volatile in Maryland. In fact, they were so volatile that Allen Pinkerton (of later detective agency fame) learned of a credible plot to assassinate the newly-elected President Abraham Lincoln as he passed through Baltimore on his journey from Illinois to Washington, D.C. Pinkerton advised that Lincoln pass through Baltimore (a) in the dead of night by train and (b) wearing a disguise.¹⁰ Critics of Lincoln later lampooned this precaution in widely circulated 1863 etching¹¹:

⁹BARBARA JEANNE FIELDS, *SLAVERY AND FREEDOM ON THE MIDDLE GROUND: MARYLAND DURING THE NINETEENTH CENTURY*, at 6 (1987). Professor Fields elaborated that—

[t]here were, in effect, two Marylands by 1850: one founded upon slavery and the other upon free labor. Northern Maryland, embracing Allegany, Baltimore, Carroll, Frederick, Harford, and Washington counties, was an overwhelmingly white and free labor society, the only region of the state in which industrial activity had grown to significant proportions. Black people contributed only 16 percent of its population, and slaves less than 5 percent. Southern Maryland (Anne Arundel, Calvert, Charles, Prince George’s, Montgomery, and St. Mary’s counties) was a backward agricultural region devoted primarily to tobacco, though wheat production made inroads during the 1850s, particularly in areas of large and concentrated landholdings. The population of the southern counties was 54 percent black and 44 percent slave.

Id. Annapolis, where the U.S. Naval Academy was opened in 1848, is located in Anne Arundel County, part of Southern Maryland. See JANE WILSON MCWILLIAMS, *ANNAPOLIS—CITY ON THE SEVERN: A HISTORY*, at 14, 82, 151, 167, 193, 250 (2011)

¹⁰ *Straddling Secession: Thomas Holliday Hicks and the Beginning of the Civil War in Maryland—A Plot Against Lincoln?*, MARYLAND STATE ARCHIVES, at <https://msa.maryland.gov/msa/educ/exhibits/hicks/html/case5.html>. For a full account, see ALLEN PINKERTON, *THE SPY OF THE REBELLION* (1883).

¹¹https://msa.maryland.gov/msa/educ/exhibits/hicks/images/case5/1_lincoln_v_passage.jpg (“Passage Through Baltimore,” Adalbert J. Volck, 1863, National Portrait Gallery, Smithsonian Institution). More information on this remarkable political cartoon is available at *Passage Through Baltimore*, MARYLAND CENTER FOR HISTORY AND CULTURE, at <https://www.mdhistory.org/resources/passage-through-baltimore/>.



Illustration 2: Volck, “Passage Through Baltimore”

B. The U.S. Naval Academy

1. An Academy Whose Need Was Debated

Unlike the enthusiasm for training Army officers at West Point¹², the notion of an Academy to train naval officers was much

¹²SEE JAMES L. MORRISON, JR., “THE BEST SCHOOL IN THE WORLD”: WEST POINT, THE PREV-CIVIL WAR YEARS, 1833-1866, at ix (“[F]ounded during the administration of Thomas Jefferson,” West Point “represents the oldest continuing experiment in federally sponsored higher education in the United States.”). In a March 5, 1823 letter to his nephew Andrew Jackson Donelson, West Point Class of 1820, Jackson declared that West Point was “the best school in the world.” *Id.* at 27, 203 & n. 13 to Ch. 2 (quoting letter reprinted in 3 JOHN SPENCER BASSETT, 3 CORRESPONDENCE OF ANDREW JACKSON, at 190-191 & n.1 (Carnegie Inst. 1928)). Jackson’s comment was made about his nephew’s brother, Daniel, whose family he had been advising about Daniel’s desire to quit the Military Academy for Yale College. Jackson wrote to his nephew to say,

I wish you to write to him, to write me freely of his wishes[;] if he is still dissatisfied at the m. academy, tell him from me, that he shall be supported at Yale College, and from the military school to go direct there, where I will remit him the means to remain there. [S]till, I would be gratified if he could remain contentedly at the M. academy. I believe it the best school in the world

Id. The greatest naval strategist of the 19th and early 20th centuries, Alfred Thayer Mahan, was the son of a civilian professor at West Point, who very much opposed

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muted and quite grudging. The view was that of the British – officers were made and trained at sea, not in school. It took until 1845 for the view that supported an equivalent education for Naval officers took fruition in what we now know as the United States Naval Academy at Annapolis, Maryland.¹³

2. A Youth From Pennsylvania Heads To The Naval Academy

Not unlike his older contemporary Commodore George Dewey, who was born in landlocked Vermont¹⁴, Moser was born in Allentown, Pennsylvania, which even today is a two-hour drive by automobile from the sea in Ocean City, New Jersey. One of Allentown's claims to fame is that Patriots chose it as the place to conceal the Liberty Bell from the danger of British capture in Philadelphia during the Revolutionary War.¹⁵

Alfred Mahan's decision to seek an appointment to the Naval Academy in the 1850s. See SUZANNE GEISLER, *GOD AND SEA POWER: THE INFLUENCE OF RELIGION ON ALFRED THAYER MAHAN*, at 24-26 (2015); see also JAMES L. MORRISON, JR., *supra*, at 25, 45 (describing Dennis Hart Mahan as "professor of civil and military engineering and the art of war for forty-one years" at West Point).

¹³ JAMES RUSSELL SOLEY, *HISTORICAL SKETCH OF THE UNITED STATES NAVAL ACADEMY* (1876). The beginnings were not inspiring:

Before the Navy Department was established by the act of 1798 , the Navy could hardly be said to have any independent existence . The acts of Congress had provided for a small armament, and a body of officers proportioned to the number of ships . The officers were selected from the merchant service , the upper grades being filled by those who had served with distinction during the Revolution .

Id. at 7. "[I]n general," midshipmen placed onboard Naval vessels "had to pick up the necessary knowledge by noticing what went on about them and by asking questions . They became the pupils of the older officers , when the latter were willing to teach them ; but whatever education they got was fragmentary and technical , and depended chiefly upon their own efforts ." Id. at 7-8.

¹⁴ JAMES C. BRADFORD, *ADMIRALS OF THE NEW STEEL NAVY : MAKERS OF THE AMERICAN NAVAL TRADITION, 1880-1930*, at 222 (1990).

¹⁵ See GARY B. NASH, *THE LIBERTY BELL*, at 18-19 (2010)(noting the Bell's removal to Allentown in September 1777 for safekeeping because the advancing British could have made "thirty thousand rounds of ammunition from it")

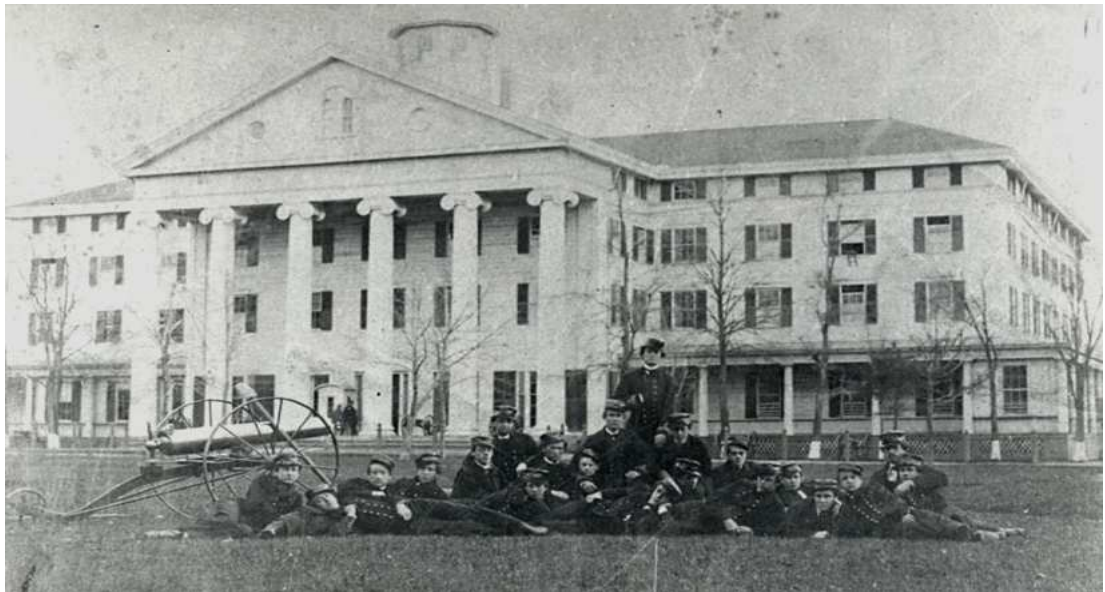


Illustration 3: Midshipmen At The U.S. Naval Academy During Its Relocation To Newport, Rhode Island—The Atlantic Hotel¹⁶



Illustration 4: The U.S.S. Constitution (“Old Ironsides”) at anchor in Newport, by which the cadets of the Naval Academy decamped from Annapolis to Newport in 1861, and which became a combination classroom and quarters during the Academy’s exile.¹⁷

¹⁶ Downloaded by the author from *Newport Home To Naval Academy During Civil War* (August 13, 2013), at <https://zilianblog.com/2013/04/16/newport-home-to-naval-academy-during-civil-war/>

¹⁷ John Pentagello, *Annapolis Comes To Newport*, THE CIVIL WAR NAVY SESQUICENTENNIAL (May 6, 2011), at <http://civilwarnavy150.blogspot.com/2011/05/annapolis-comes-to-newport.html>.



Illustration 5: *Cramped quarters: Civil-War U.S. Naval Cadets taking classes aboard “Old Ironsides”*¹⁸

Life at the Naval Academy was no picnic during the Civil War years, as author John Pentagello recounts:

On 8 May 1861, the famous frigate known as “Old Ironsides,” sailed into Newport Harbor carrying the members of the classes of 1861 to 1864. Initially, Constitution housed the plebes (first years) and their classes took place below decks.

After it became clear that the war would not be over quickly, the Navy ordered Blake to prepare for a longer stay and lease one of the city’s hotels. They leased the Atlantic House, a hotel at the corner of Bellevue Avenue and Pelham Street opposite Touro Park, as the main location of the Naval Academy while in Newport. The building provided a mess facility, administrative offices, classrooms, and quarters for upperclassmen. Underclassmen referred to the Atlantic as “Paradise,” and called their classrooms and berths aboard USS Constitution and other school ships, “Purgatory.”¹⁹

¹⁸ Id.

¹⁹ Id.

Park Benjamin, Jr., graduated from the Academy one year ahead (Class of 1867) of Moser (Class of 1868). Benjamin remembered vividly the educational conditions the Civil War midshipmen had endured:

Nothing could be more desolate than the outlook to the ‘plebe’ whose first experience brought him to these school-ships. During the day he sat and studied at one of the desks, long rows of which extended up and down the gun-deck, and occasionally marched ashore to the windy recitation rooms, where he contracted bad colds along with knowledge of arithmetic. The commissary department was always more or less out of gear, and the meals eaten in the blackness of the berth-deck by the light of a few ill-smelling oil lamps were wretched.²⁰

Whether Moser himself recorded any recollections of this period at the Naval Academy is unclear. His papers appear to have been auctioned into private collections recently.²¹ What is clear, however, is that cadets

²⁰ Id. Park Benjamin, Jr., an alumnus both of Union College and Albany Law School as well as the Naval Academy, published two works on the Academy. PARK BENJAMIN, JR., SHAKINGS. ETCHINGS FROM THE NAVAL ACADEMY (1867); PARK BENJAMIN, JR., THE UNITED STATES NAVAL ACADEMY (1900). Both works are in the public domain and available on Google Books. *Shakings* is illustrated by Benjamin with clever poems about his time as a Midshipman, and may be viewed its full glory in an original edition at <https://archive.org/details/shakingsetchingsoobenjr/ch>. Benjamin’s naval career lasted only two years, but he achieved fame as a science writer, the Editor of *Scientific American*, and a patent lawyer. See <http://www.bartleby.com/library/bios/600.html>; see also LLOYD J. MATTHEWS, GENERAL HENRY LOCKWOOD OF DELAWARE: SHIPMATE OF MELVILLE, CO-BUILDER OF THE NAVAL ACADEMY, CIVIL WAR COMMANDER 171, 360 (2014). Unfortunately, his last public acts were the revelation of the disinheritance of his children in his will, one of whom was the wife of the celebrated Italian opera tenor, Enrico Caruso. PARK BENJAMIN’S CHILDREN, CUT OFF, TO FIGHT HIS WILL; Lawyer’s Testament Gives Each of Five One Dollar. ADOPTED GIRL IS HEIRESS She Will Get Reversionary Estate as Well as a Cash Bequest of \$60,000.\$500,000 FOR LIFE TO WIDOW Heirlooms, Pictures and Furnishings Given to Miss Anna Bolchi Benjamin, N.Y. TIMES, 30 August 1922 (“A bitter legal battle to upset the will of Park Benjamin, noted patent lawyer and father-in-law of the late Enrico Caruso, is to be waged by the five children cut off with a dollar each by their father, according to an authorized spokesman for the family, who made a statement last night several hours after the will had been filed for probate in the Surrogate’s Court.”).

²¹ See <http://mbamericana.com/jefferson-franklin-moser-papers> and <https://www.cowanauctions.com/lot/admiral-j-f-moser-united-states-navy-manuscript-archive-110768>. A 2019 update in a military history forum noted that Moser’s papers have been disbursed to private collectors, and are thus not currently available to scholars. See Posting by Epsom Green, U.S. MILITARY FORUM, March 5, 2025, at <https://www.usmilitariaforum.com/forums/index.php?/topic/257505-rear-admiral-jefferson-f-moser-civil-war-s-a-war-ww-1/>

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from military and naval academies could very well be called into combat duty, sometimes at a day's notice. Maj. Gen. John C. Breckinridge's requisition "at once" of 257 cadets from the Virginia Military Institute for the battle of New Market in 1864 is the American Civil War's most well documented example.²² "With no other reserves available, Breckinridge reluctantly ordered the VMI cadets into line, saying, 'Put the boys in, and may God forgive me for the order.'"²³ Out of 800 Union and 500 Confederate casualties at the Battle of New Market, ten VMI cadets were killed and fifty were wounded²⁴—60 casualties from a contingent of 257 cadets²⁵, a rate of 23 per cent. Sixteen was the average age of these cadets.²⁶ But Union naval and military cadets were also called up during the Civil War, as the Comptroller General described in a 1946 opinion that widely ranged over the ways in which time as a cadet had been treated for purposes of various kinds of military privileges and benefits. Indeed, during litigation by another Civil War-era Midshipman, Robert T. Jasper, contemporaneous with Moser's legal odyssey, the Court of Claims acknowledged "that midshipmen at the Naval Academy were liable to be and were actually called into the service during the [C]ivil [W]ar."²⁷

Thus, contrary to the picture painted by various government

²² See, e.g., "Put the Boys In": The VMI Cadets at New Market, Shenandoah Battlefields National Historic District, at <https://www.shenandoahatwar.org/put-the-boys-in-article>

²³ Id.

²⁴ Id.

²⁵ *VMI Cadet Cenotaphs—Died on the Field of Honor: Gravestones of the New Market VMI Cadets*, VA. MUSEUM OF THE CIVIL WAR, at <https://www.vmi.edu/museums-and-archives/virginia-museum-of-the-civil-war/museums-and-grounds/vmi-cadet-cenotaphs/>

²⁶ See "Put the Boys In," *supra* n.21. VMI cadets were again called up and manned the trenches around Richmond, Virginia in October 1864. See *The Battle*, VA. MUSEUM OF THE CIVIL WAR, at <https://www.vmi.edu/museums-and-archives/virginia-museum-of-the-civil-war/the-battle/#:~:text=In%20October%20of%201864%20the%20Corps%20was%20dispatched%20to%20Richmond%20for%20fatigue%20duty%20in%20the%20trenches>

²⁷ *Moser v. United States*, 42 Ct. Cl. 86, 93 (1907); *Jasper v. United States*, 40 Ct. Cl. 76, 77 (1904) (in granting a new trial, the Court of Claims acknowledged that "the court overlooked the fact that cadet midshipmen at the Naval Academy were liable to be called into service during the civil war and were actually called into service; and among them, it is now understood, classmates of the claimant were so called"). Jasper fought the government he once served with as much vigor as Moser, but in the end, did not succeed. See

officials some forty years later²⁸, the experience of Moser and other Naval Academy Midshipmen during 1861-1865 was in no way the boyhood experiences of *Tom Brown's School Days*²⁹—even if one adds the sadistic cruelty of the occasional Flashman.³⁰

Illustration 6—Midshipman Jefferson Franklin Moser (Class of 1868)³¹



²⁸ See nn. ___, *infra*.

²⁹ See generally THOMAS HUGHES, *TOM BROWN'S SCHOOL DAYS* (1857).

³⁰ See, e.g. Katharine Kittredge, "Perversity Shews Itself So Early": *Changing Perceptions Of Bullying From Late Eighteenth Century To Victorian Children's Literature*, 43 *THE LION AND THE UNICORN* 34 (2019)

³¹ Downloaded from <https://www.usmilitariaforum.com/forums/index.php?/topic/257505-rear-admiral-jefferson-f-moser-civil-war-s-a-war-ww-1/>



Illustration 7—Moser's Commission³²

³² Downloaded by the author from:
<http://www.usmilitariaforum.com/forums/index.php?/topic/257505-rear-admiral->

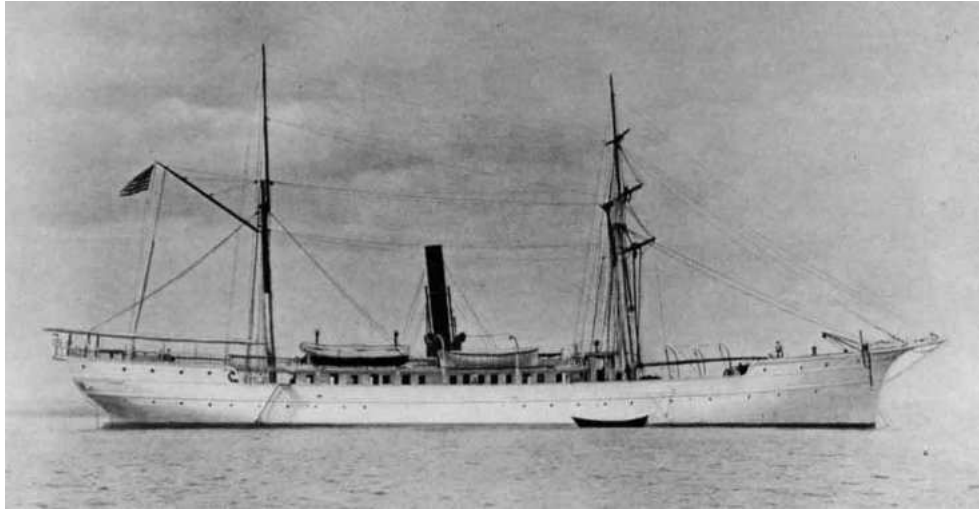
C. After The Civil War

Although forged in the flames of a national conflagration, Moser's naval career later turned to the scientific survey of the Alaska Territory. He commanded a research vessel that limned the wild natural resources and topography of Alaska.³³ During these cruises, those under his command on the *U.S.S. Albatross* gathered critical data about the lands and waters, flora and fauna, valleys and peaks³⁴, which had once been dismissively dubbed "Seward's Icebox."

jefferson-f-moser-civil-war-s-a-war-ww-1/

³³ Moser also commanded a lengthy expedition of the *Albatross* that took the celebrated scientist, Alexander Agassiz, to the South Pacific. See REPORTS ON THE SCIENTIFIC RESULTS OF THE EXPEDITION TO THE TROPICAL PACIFIC, IN CHARGE OF ALEXANDER AGASSIZ, BY THE U.S. FISH COMMISSION STEAMER ALBATROSS, FROM AUGUST, 1899, TO MARCH, 1900, COMMANDER JEFFERSON F. MOSER, U.S.N., COMMANDING (1901), in XXXV MEMORIES OF THE MUSEUM OF COMPARATIVE ZOOLOGY AT HARVARD COLLEGE, No. 2 (1907), available at <https://archive.org/details/biostor-65243>. For a modern account of the significance of Agassiz's work, see DAVID DOBBS, REEF MADNESS: CHARLES DARWIN, ALEXANDER AGASSIZ, AND THE MEANING OF CORAL, at 3, 212-213, 231-32, 234-37 (2009) ("In the last half of the nineteenth Century, Alexander Agassiz, the smart, quiet son of the brilliant, famously talkative Louis Agassiz, entangled himself in an argument over the genesis of coral reefs that grew into one of the most heated and vital debates in science.")

³⁴ *U.S.S. Albatross* entered service in 1882 as "a deep sea oceanographic research steamer thoroughly equipped for the purposes of the U.S. Commission of Fish and Fisheries," and "produced the means for U.S. marine science and fisheries studies ranging from coastal shallows to the abyssal depths." Patricia Roppell, *The Steamer Albatross and Early Pacific Salmon, Oncorhynchus spp., Research in Alaska*, 66 MAINE FISHERIES REV. 21 (2004). The steamer was first "used on the Atlantic coast," and in 1888 transferred to the Pacific coast. *Id.* The *Albatross* made annual trips to Alaska for nearly 20 years," six of them under Moser's command. *Id.* at 21, 26-28 & n. 15. For a modern proposal to retrace Moser's surveys on *U.S.S. Albatross* that shows the areas of his work in detail, see RICHARD CARSTENSEN, *ALBATROSS RETRACED: A STUBBORN IDEA* (Discovery Southeast 2019), at <http://juneanature.discoverysoutheast.org/wp-content/uploads/2021/09/albatross-reduced.pdf>

Illustration 8—U.S.S. *Albatross*³⁵

Commander Moser was the titular author of publications that presented the details of these explorations,³⁶ but his knowledge of their contents was detailed.³⁷ The reports were prodigious – they examined every observable aspect of Alaskan shores, rivers, and fisheries.³⁸ The scope of the examination was prodigious, as even flipping through the leaves of one of his 500-page reports reveals.³⁹ Nor was Moser a remote observer of this exploration work – he figuratively and literally waded right into the midst of it with his crew:

³⁵ Downloaded by the author from <http://www.usmilitariaforum.com/forums/index.php?/topic/257505-rear-admiral-jefferson-f-moser-civil-war-s-a-war-ww-1/>

³⁶ See, e.g., JEFFERSON F. MOSER, *THE SALMON AND SALMON FISHERIES OF ALASKA. REPORT OF THE OPERATIONS OF THE UNITED STATES FISH COMMISSION STEAMER ALBATROSS FOR THE YEAR ENDING JUNE 30, 1898*; JEFFERSON F. MOSER, *ALASKA, HYDROGRAPHIC NOTES, SAILING DIRECTIONS, AND CHARTS OF SURVEYS RELATING TO THE VICINITY OF PRINCE WILLIAM SOUND, COOK INLET, KODIAK ISLAND, AND ROUTE FROM UNALASKA TO CHIGNIK, THROUGH UNIMAK PASS AND INSIDE THE ISLANDS, 1897*; JEFFERSON F. MOSER, *THE SALMON AND SALMON FISHERIES OF ALASKA: REPORT OF THE ALASKAN SALMON INVESTIGATIONS OF THE UNITED STATES FISH COMMISSION STEAMER ALBATROSS IN 1900 AND 1901*.

³⁷ As evidenced by his Congressional testimony. See the discussion of his 1912 Senate testimony, *infra* n. 55.

³⁸ See the sources cited in note 24, *infra*.

³⁹ *Id.*



Illustration 9— “Jefferson Moser and his Bureau of Fisheries crew removing a beaver dam on Kuiu Island in 1897.”⁴⁰

Commander Moser’s scientific work was interrupted by the war that the United States declared against the decaying remnants of the Spanish Empire.⁴¹ One of his preserved dispatches to the Secretary of the Navy reveals a seasoned professional who investigated a potential threat and got to the heart of the matter quickly and efficiently:

⁴⁰ Steve J. Langdon & Robert Sanderson, Customary and Traditional knowledge of sockeye salmon systems of the K’iis Xaadas (Hydaburg Haida)

⁴¹ See generally, IVAN MUSICANT, *EMPIRE BY DEFAULT: THE SPANISH-AMERICAN WAR AND THE DAWN OF THE AMERICAN CENTURY* (2008). Moser’s reports and discoveries during these scientific missions continue to be cited in the 21st century. See, e.g., Letter from Qagan Tayagungin Tribe to Alaska Board of Fishers, at 146, Sept. 17, 2017, at https://www.adfg.alaska.gov/static/regulations/regprocess/fisheriesboard/pdfs/2017-2018/ws/pes_101-139.pdf (attachment “oppos[ing] United Cook Inlet Drift Association’s Agenda Change Request 11 to adopt a new management plan capping weekly and seasonal commercial sockeye salmon harvest in portions of the Kodiak Management Area”, citing Moser: “In 1889 [sic] Captain Jefferson Moser reported to congress in his Report of the Operations of the US Fish Commission Steamer Albatross for the Year ending June 30, 1898 that Cook Inlet sockeye were being caught off of Karluk during the 1898 season.”).

Lieutenant Commander Jefferson F. Moser to
Secretary of the Navy John D. Long

TELEGRAM

Seattle, Washington,
July 21, 1898.

I have investigated reports concerning the Spanish privateer. Personal inquiry of agents of the principal Alaskan steamship lines and influential bankers, lawyers, merchants at Port Townsend and Seattle and have reports from commissioned officers sent incognito to British Columbia or Alaskan discredited. Believed to be a hoax, and it is suggested detain "*Bennington*" until further orders in this vicinity.

MOSER.⁴²

Moser's own military proclivity for succinctness proved a good fit for the telegraphic medium. Public outcry over the potential for Spanish raids on or near the American coastline was persistent, even though the Secretary of Navy, Theodore Roosevelt, dismissed the danger out of hand in his correspondence with legendary naval strategist, Captain Alfred Thayer Mahan⁴³:

⁴² *Documentary Histories—Spanish-American War*, NAVAL HISTORY AND HERITAGE COMMAND, at <https://www.history.navy.mil/research/publications/documentary-histories/united-states-navy-s/coastal-defense/lieutenant-commander-o.html>

⁴³ JOHN KEEGAN. *THE AMERICAN CIVIL WAR: A MILITARY HISTORY*, at 272 (2009)(describing Mahan as "'the most important American strategist of the nineteenth century". As a professor and later President of the Naval War College, Mahan wrote influential books that emphasized the centrality of naval power in the growth of burgeoning empires. See *THE INFLUENCE OF SEA POWER UPON HISTORY*, 1660–1783 (1890); *THE INFLUENCE OF SEA POWER UPON THE FRENCH REVOLUTION AND EMPIRE*, 1793–1812 (1892); *THE LIFE OF NELSON: THE EMBODIMENT OF THE SEA POWER OF GREAT BRITAIN* (1897).; *SEA POWER IN RELATION TO THE WAR OF 1812* (1905). For an account of Mahan and his influence, see, e.g., Walter LaFeber, *A Note on the "Mercantilistic Imperialism" of Alfred Thayer Mahan*, 48 *MISS. VALLEY HIST. REV.* 674 (1962).

I further agree with you with all my heart about local coast defense. I shall urge, and have urged, the President and the Secretary to pay absolutely no heed to the outcries for protection from Spanish raids. Take the worst--a bombardment of New York. It would amount to absolutely nothing, as affecting the course of a war, or damaging permanently the prosperity of the country.⁴⁴

“Although the protection of American shores was not a strategic prerogative, the Navy could not ignore initial public outcry.”⁴⁵ In response to the hypothesized threats, plans were prepared and measures implemented to protect the coasts.⁴⁶ Among the measures adopted, “[a] plan for the defense of the Pacific coast was prepared by Lt. Cmdr. Jefferson F. Moser and implemented by RAdm. Joseph N. Miller, the Commander-in-Chief on the Pacific Station.”⁴⁷

⁴⁴ *Documentary Histories—Spanish-American War: Introductory Essay*, NAVAL HISTORY AND HERITAGE COMMAND, at *Documentary Histories—Spanish-American War*, NAVAL HISTORY AND HERITAGE COMMAND, at <https://www.history.navy.mil/content/history/nhhc/research/publications/documentary-histories/united-states-navy-s/coastal-defense.html> (Ltr from Navy Secretary Theodore Roosevelt to Capt. Alfred T. Mahan, 14 March 1898).

⁴⁵ *Documentary Histories—Spanish-American War: Introductory Essay*, NAVAL HISTORY AND HERITAGE COMMAND, at *Documentary Histories—Spanish-American War*, NAVAL HISTORY AND HERITAGE COMMAND, at <https://www.history.navy.mil/content/history/nhhc/research/publications/documentary-histories/united-states-navy-s/coastal-defense.html>

⁴⁶ Notably, however, the units organized and dispatched to implement these plans did not remain long in that mission. “Once the initial furor subsided, almost all of these units were shifted to operations in the offensive operations in the Caribbean.” *Id.*

⁴⁷ *Id.*

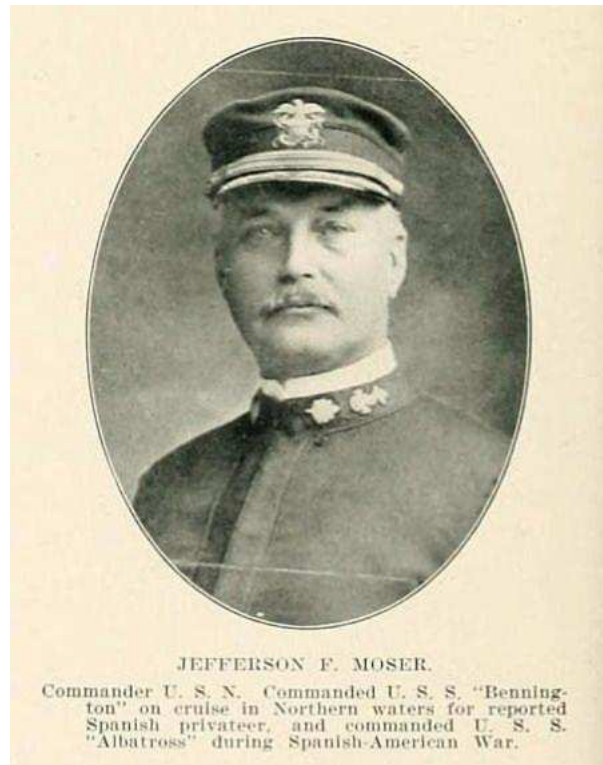


Illustration 10—Moser before 1904.⁴⁸

Returning to his scientific expeditions, we see how Moser presaged modern government officials who gain great expertise in their work – and upon retirement, go to work for the private sector enterprises with which they had worked. In Moser's case, it was the Alaska Packers' Association ("APA"). In his 1901 Alaska voyage report to the U.S. Fish Commission, Moser gratefully and candidly described his very close coloration with APA:

Before proceeding to the report of the investigations, I desire to express my appreciation of the work performed by the officers of the Albatross, and of the courtesies extended by those interested in the canneries. ... The Alaska Packers' Association furnished me with a letter to all their canneries, directing the superintendents to offer the *Albatross* every facility for conducting the inquiries and examinations.⁴⁹

⁴⁸ Image posted at *RADM Jefferson Franklin Moser*, FIND A GRAVE MEMORIAL, at <https://www.findagrave.com/memorial/92739094/jefferson-franklin-moser>

⁴⁹ JEFFERSON MOSER, *THE SALMON AND SALMON FISHERIES OF ALASKA: REPORT OF THE OPERATIONS OF THE UNITED STATES FISH COMMISSION STEAMER*

This was the beginning of a phenomenon that was only to grow throughout the 20th into the 21st Centuries. For Moser, it was vital to providing the liquidity he would need to fight the United States Government tooth and nail for his full service pension. Moser mentions the APA 68 times in the 1899 report. The APA was already a formidable canning sector dominator in 1898.⁵⁰



Illustration 11—Commander's Pennant of the Fish Commission Research Steamer, U.S.S. Albatross⁵¹

ALBATROSS FOR THE YEAR ENDING JUNE 30, 1898, at 3 (1899). Moser added, that “[a]ll the other canneries also extended every courtesy, and at no place were any obstacles placed in our way.” *Id.*

⁵⁰ For example, Moser observed that

The Alaska Packers' Association is the largest canning operator in Alaska. Of the 29 canneries operated in 1897, 17 belonged to this association, with an output of 669,494 cases, or nearly 74 per cent of the total pack, while the other 12 canneries packed 239,584 cases, or 26 per cent. In addition to the 17 operating canneries the association had as reserves 8 other establishments, besides several in a dismantled condition which have not, however, been abandoned

Id. at 21.

⁵¹ Downloaded by the author from <http://www.usmilitariaforum.com/forums/index.php?/topic/257505-rear-admiral-jefferson-f-moser-civil-war-s-a-war-ww-1/>

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D. Retirement After A Life At Sea Becomes Command Of The World's Largest Sail Navy

Moser retired in 1904 and took up a position with an increasingly powerful consortium of businesses known as the Alaska Packers Association (APA). This was neither coincidental nor accidental. And it certainly was not merely serendipitous.



Illustration 12—APA Fleet Pennant⁵²

A group of savvy investors created APA in February 1893 as a “trust”⁵³ composed of twenty-seven of the thirty-three canneries in Alaska, “pool[ing] both resources and talent to create what the press often called the ‘salmon trust.’”⁵⁴ One of these investors, Henry

⁵² Photograph downloaded by the author from APA Museum, Semiahmoo Park, Washington. See <https://blainebythesea.com/apa-museum/>; APA Museum at Semiahmoo Facebook page (profile picture posted Oct. 13, 2024).

⁵³ See, e.g., Wayne D. Collins, *Trusts And The Origins Of Antitrust Legislation*, 81 FORDHAM L. REV. 2279, 2279, 2292 (April 2013) (observing that “In the early 1880s, however, some combinations, beginning with Standard Oil, adopted a new form of organization, the trust proper, which had the command and control attributes of a corporation without being subject to the restrictions of state corporation law.”). The object of these trusts was competitive advantage within the commercial and legal structures of the day. “The increasing competition among firms and the decline in nominal prices and the threat to producers’ profits, if not survival-so-called excessive competition-created strong incentives in many industries to coordinate and centralize operations in order to reduce capacity, control overproduction, and reduce competitive pricing pressure.” *Id.* at 2279.

⁵⁴ DONALD H. DYAL, *THE FLEET BOOK OF THE ALASKA PACKER’S ASS’N*, at 1 (2014). APA had a friendly rival, with a similarly colorful history, in another “salmon trust,” Pacific American Fisheries. See AUGUST C. RADKE, *PACIFIC AMERICAN*

Fortman, “resolutely held the reigns of the newly-formed [APA], serving as its president for and continuing as a board member and a director until his death in 1946 at age 90.”⁵⁵

Fortmann, son of German immigrants with a university education in 19th-century Germany, knew that the “salmon trust” needed a superb superintendent – someone with simultaneously broad and sophisticated understanding of (a) the territory – Alaska and her waters, as well as the waters and hazards between Alaska and the home port of San Francisco; (b) the fauna of the territory, focused on the wide variety of salmon and their interaction with their environment ; (c) the building, repair, operation, and navigation of ships in the territory; and (d) the business of catching and canning tune in Alaska.⁵⁶ But where would such a commercial and industrial polymath, with such a specific skill set, be found? Fortmann, in fact, had the man in his sights: Jefferson Moser.⁵⁷ As a chronicler of the Star Fleet observed,

[t]he [APA] had no appetite for the frequently reported events that occurred on other companies’ charted vessels such as seamen or cannery workers refusing to board ships they deemed unseaworthy. The last days of sail were often threaded with a motif of penny-pinching by owners to the detriment of those who sailed in the vessels. Those sorts of actions showed up in negative headlines that the Company did not want to see. Photographs of Alaska Packers-owned vessels about to depart for the north reveal freshly-painted black hulls with straw-colored spars and houses, tuned-up rigging and general ship-shape condition. Henry Fortmann saw to that. One of the early fleet managers was an ex-Navy officer, Jefferson Moser, who had experience not only with ships of all types, but also experience in Alaskan Waters. Fortman cultivated a long and close relationship with Moser even before offering him a position. The [APA] president hosted [Moser] in San Francisco along with other naval

FISHERIES, INC.: HISTORY OF A WASHINGTON STATE SALMON PACKING COMPANY, 1890-1966, at 1-2 (2002).

⁵⁵ Dyal, *supra* n. 31, . at 6. For a description of how Fortmann came to attain preeminence in the salmon industry, see *id.* at 5-7. See also *Biography of Henry F. Fortmann of San Francisco*, CALIFORNIA GENEALOGY, July 2, 2024, at <https://californiagenealogy.org/san-francisco/biography-of-henry-f-fortmann-of-san-francisco.htm>. Fortmann’s mansion became a San Francisco landmark and eventually was tapped by Alfred Hitchcock as a set for his 1958 film, *Vertigo*. See, e.g., <https://ancestors.familysearch.org/en/LVZY-MC3/henry-frederick-fortmann-1856-1946>

⁵⁶ *Id.* at 19-20, 95, 121.

⁵⁷ *Id.* at 19.

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officers between surveys for the United States Fish Commission. The vessels, valuable assets in the eyes of Formann and the other directors, were kept in top serviceable condition⁵⁸

Moser held the title of Vice President and General Superintendent, and in that role, he is credited with making things happen.⁵⁹ Among his attainments, Moser is credited with keeping the fishing portion of the operation under sail by superintending the construction of an all-wood, all-sail fleet of ships that were called “the Star Fleet.”⁶⁰ In addition, Moser supervised the construction of the shipyard that built and maintained the sailing ships of the Star Fleet.⁶¹ Under Moser, nineteen ships fished for Alaska salmon as “the Star Fleet, the ships that sailed for the APA in the early years of the 20th century. The APA, a sprawling business headquartered in San Francisco and dedicated to selling Alaskan salmon to the world, oversaw the last great commercial sailing fleet.”⁶²

⁵⁸ Id. at 19-20.

⁵⁹ See Moser, *Creator of “Star Fleet,” Dies*, BERKELEY DAILY GAZETTE (Berkeley, CA), Friday, October 12, 1934, page 12, column 7. The clipping is available at <https://www.findagrave.com/memorial/92739094/jefferson-franklin-moser#view-photo=155668363>.

⁶⁰ Id.

⁶¹ Id. See also Dennis Evanovsky, *Packing Companies Shaped Alameda’s North Shore*, ALAMEDA POST, Aug. 22, 2024, at <https://alamedapost.com/history/packing-companies-shaped-alamedas-north-shore/>. Nearly sixteen minutes of silent film photographed of Moser’s Star Fleet in action are available for viewing. See *The Great Star Fleet: APA Ships 1909 – 18*, ALASKA FISHERMEN’S MUSEUM, at <https://www.alaskafishermensmuseum.com/the-great-star-fleet-apa-ships-1909-18>. See also Star of Alaska (formerly Balclutha, later Pacific Queen and Balclutha), Texas Tech. U. Libraries, at <https://ttu-ir.tdl.org/items/9000aac7-7dc6-4fd8-96ba-d100e943ff3e>

⁶² The Alaska Packers Ass’n and the Great Star Fleet, Sea History Today, Nov. 30, 2023, at <https://myemail.constantcontact.com/Sea-History-Today---The-Alaska-Packers-Association-and-the-Great-Star-Fleet.html?soid=1138974103528&aid=cgrvyKsD59w>. In a Historical Note to its collection of records from APA, Archives West informs us that “[f]rom the 1890s through the 1960s” APA “comprised a dominant force in the fishing industry of the Pacific Northwest. With operations located in the Puget Sound and across Alaska, APA was closely involved in many of the major developments and conflicts relating to fishing activities and rights in the region during this period, including use of land, labor and conservation techniques.” *Historical Note, Alaska Packers Association Records, 1841-1989*, ARCHIVE WEST, at <https://archiveswest.orbiscascade.org/ark:/80444/xv77299>.

By consolidating and expanding the holdings of predecessor companies including the Chignik Bay Packing Company and the Central Alaska Company, the APA soon comprised one of the largest operations in the fishing industry. Through the early 1930s, the

Association was noted in particular for its "star fleet," of up to thirty large sailing ships, which transported men, supplies and goods between San Francisco and Alaska. APA controlled and established fishing and cannery stations and salteries at sites that included Nushagak, Kvichak, Ugashik, Naknek and Egegik in the Bristol Bay area. The association also maintained stations at Karluk, Alitak, Cook Inlet and Chignik in Central Alaska, and Fort Wrangell and Loring in southeastern Alaska. Puget Sound operations included a cannery at Point Roberts, Washington (acquired in 1894 and operational until the 1920s), and canneries, warehouses and a boat repair yard located on Semiahmoo Spit, in Blaine, Washington. APA operations were supervised and directed from central offices in San Francisco

Id. Moser provided specifics about the scope of the Star Fleet and related operations that he managed for APA during 1912 Congressional testimony during hearings on a fisheries bill:

Mr. MOSER . Our fleet consists of 24 large sailing vessels and about 60 steamers and launches . I think in connection with that I would like very much to show you what is necessary in the transportation way to carry on work of that kind . This [indicating] represents our sailing fleet of about 30 vessels . This [indicating] is our shipyard in Alameda , which we maintain exclusively for our fleet - Alameda , Cal . This represents our plant . We have our own machine shops ; our own woodworking shops ; we do all our own repairs ; build our lighters and boats and build our own machines and machinery .

The CHAIRMAN . How many men do you employ ?

Mr. MOSER . We employ during the winter from 275 to 300 .

The CHAIRMAN . Do they work on any other work excepting your own vessels ?

Mr. MOSER . None whatever . This [indicating] is our fleet . We have dredged this space here . That is the largest fleet of sailing vessels under one company in the world , I think .

The CHAIRMAN . How many sailing vessels have you ?

Mr. MOSER . We have them all here except 3 , and we have 21 in there . There are 7 steamers that come from Alaska . The other steamers are all hauled out in Alaska .

Mr. BOWER . This is at Alameda , Cal . ?

Mr. MOSER . Yes , sir ; Alameda , Cal .

Senator BOURNE . How many men do you employ in the summer- time ?

Mr. MOSER . In the neighborhood of 4,000

Alaska Fisheries: Hearings Before the Subcommittee of the Committee on Fisheries, United States Senate, Sixty-second Congress, Second Session, on S.5856, a Bill to Amend an Act for the Protection and Regulation of the Fisheries of Alaska, at 132-133. The APA was also formed to promote the national and international creation of demand for canned Alaskan salmon:

APA's origins reflect early commercial concerns within the Alaska fishing industry. As production of canned salmon rose dramatically during the 1880s and 1890s, Alaska-based fishing and packing companies began to suffer increasingly from competition and lack of consumer demand. In 1892 therefore, the majority of fisheries-related operations in Alaska joined forces to form the [APA], aiming to regulate their operations and pursue more successful marketing strategies. In February 1893, twenty-five of the thirty-three Alaska companies formed [the APA].

Historical Note, Alaska Packers Association Records, 1841-1989, supra. “Through the early 1930s, the Association was noted in particular for its ‘star fleet,’ of up to thirty large sailing ships, which transported men, supplies and goods between San Francisco and Alaska.” *Id.* The most exhaustive study of APA’s Star Fleet is found in DONALD H. DYAL, *THE FLEET BOOK OF THE ALASKA PACKER’S ASS’N* (2014), which synthesizes various superintendents’ logs of ships from 1893 until the period 1923-1945, when APA gradually ended its code to the age of sale. *Id.* at xi. One of the most significant reasons for that end was a lack of qualified sailor in the workforce. See *id.* at xv-xvi. Indeed, the scarcity of competent seaman is assigned as the principal cause of APA effectively “ditch[ing] its sailing fleet by 1927.” *Id.* at svi. This also drove up the cost, and drove down the availability, of insurance for the sailing fleet. *Id.* Thus, the APA “pulled the plug on wooden sailing ships by 1923,” and by 1930, APA “had ceased to employ the sailing fleet at all.” *Id.* Thus, Moser’s great accomplishment was undone within a generation, because of “the realities of keeping a complex and expensive transportation machine economically viable in the face of changing technology and business practices.” *Id.* at xv-xvi. Moser had so well honed the Star Fleet that his precision, success, and economic rigor allowed for a “cultural lag” that kept sailing ships at work years after they had disappeared from other activities. See *id.* at xvi. However, Moser was alert to the increasing obsolescence of sail and the inevitable need to transition the fleet to motor power; he said as much to the San Francisco Chronicle in 1916. See DYAL, *supra*, at 121, 199 n. 352 (citing San Francisco Chronicle, Oct. 14, 1916, at 6).



Illustration 13—Medals earned by Moser during his 40-year Naval career.⁶³

When Moser retired in 1904, the Alaska Packers Association hired him as Vice President and General Superintendent of its extensive Salmon cannery and fisheries operation, which included both manufacturing plants and a large flotilla of sailing vessels.⁶⁴

In the private sector, Moser continued to display the no-nonsense, informed, get-the-job-done kind of leadership he developed over his 40-year Naval Career. A good example comes from testimony he gave before the U.S. Senate in 1912 regarding Senate Bill 5862, “A Bill To Amend An Act For The Protection And Regulation Of The Fisheries Of Alaska.”⁶⁵ Moser interacts with witnesses throughout the hearing. His own statement, given over two days, begins on p. 132 of the Hearing Record. There, he explains his extensive background relevant to Alaska Packers specifically, and to the salmon industry generally:

I am here before this committee in the capacity of one engaged in

⁶³ Downloaded by the author from <http://www.usmilitariaforum.com/forums/index.php?/topic/257505-rear-admiral-jefferson-f-moser-civil-war-s-a-war-ww-1/>

⁶⁴ <http://www.usmilitariaforum.com/forums/index.php?/topic/257505-rear-admiral-jefferson-f-moser-civil-war-s-a-war-ww-1/>. Moser described his work for Alaska Packers Association in some detail in testimony he gave before the U.S. Senate in 1912. Alaska Fisheries: Hearings Before the Subcommittee of the Committee on Fisheries, United States Senate, Sixty-second Congress, Second Session, on S.5856, a Bill to Amend an Act for the Protection and Regulation of the Fisheries of Alaska, at 132-133. Moser displays a stunningly cogent and detailed knowledge of all aspects of the salmon habitats and salmon industry in his extensive testimony. See https://books.google.com/books?id=J_APAAAAIAAJ&lpg=PA132&ots=TQCWjOzPQs&dq=Alaska%20Packers%20Association%20Jefferson%20Moser&pg=PA166#v=onepage&q=Alaska%20Packers%20Association%20Jefferson%20Moser&f=false

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the salmon - canning business in Alaska . I am an officer of the Navy , retired in 1904 after 40 years ' service . Since that time I have been commercially engaged in the Alaska fisheries . During my service I made my regular sea cruises required of officers of the service , and between the cruises I was engaged largely on special work . In the early part of my career I spent four years on the Isthmus of Darien and in Nicaragua in the early explorations for a route for the proposed interoceanic canal . Later I was employed on the coast - survey service between cruises , in all about 14 years , and for nearly 6 years I had command of the *Alabatross* , the Fish Commission steamer . That vessel during a portion of that time was employed in the exploration of the Alaska salmon streams and brought me in contact with the salmon interests of Alaska . I was appointed by Mr. Cleveland a member of the International Fur Seal Commission in 1896 and 1897 , and was also engaged in deep- sea sounding and exploration . I was about a year engaged in exploring the South Seas with Mr. Alexander Agassiz , and , as I said before , my service under the Fish Commission was of such a nature as to bring me in contact with the salmon interests of Alaska.⁶⁶

In the 1912 hearings, he represented the Association quite well.⁶⁷ A good example comes in an exchange where Committee members quiz him on what materials or supplies APA sources from Alaska, in which Moser shows the detail and power of his extensive knowledge to dispel their misimpressions, unfounded assumptions, and basic ignorance of the practicalities of work and manufacture in a harsh environment of short temperate season:

Mr. WICKERSHAM . There is not anything else you use up there that comes from Alaska , is there ?

Mr. MOSER . Yes ; we use boxes . We would be very glad to take all the boxes for our pack from Alaska .

Mr. WICKERSHAM . I am talking of what you buy from Alaska .

Mr. MOSER . You mean what we do buy in Alaska?

Mr. WICKERSHAM . Yes .

⁶⁶Id. at 132-133.

⁶⁷ A summary annual report for 1911 was entered into the record by Moser, which provides a very interesting snapshot of APA's assets, operations, and liabilities. See id. at 169-172.

Mr. MOSER . We buy boxes there .

Mr. WICKERSHAM . To what extent ?

Mr. MOSER . We buy about 200,000 cases of boxes .

Mr. WICKERSHAM . Where do you get them ?

Mr. MOSER . Ketchikan and Wrangell .

The CHAIRMAN . What portion of your boxes do you get in Alaska ?

Mr. MOSER . This year we bought 150,000 cases at Ketchikan , and about 100,000 at Wrangell ; but we would be very glad to supply all those cases from Alaska if we could get them . In fact , we have even been considering , to encourage the industry in Alaska , sending our vessels into Ketchikan . We have even gone so far as to interview the mills at Ketchikan to see if we can get them there . We would be very glad to ship them there if we could .

The CHAIRMAN . Why is it they could not furnish you lumber and boxes ?

Mr. MOSER . You mean for western Alaska ?

The CHAIRMAN . Yes .

Mr. MOSER . They could possibly furnish some , Senator , but the risks of navigation at the time of the year when our vessels could call in there are so great that we have hesitated about making any arrangements for getting cases in southeast Alaska and carrying them to the westward . We have had the matter under consideration ; but to send a large deep - water vessel in the month of February through Dixon Entrance , which would then have to be towed 90 miles without having safe and proper means for towing , then having the vessel lie there for a month or two , and then come out again , going to the west- ward to Bering Sea , we considered a little too great

a risk under present conditions .⁶⁸

While not a lawyer, he had a good grounding on how law intersected with policy, as displayed in his aggressively bringing to the Committee's attention that the proposed fishers regulation would work what amounted to an uncompensated taking against the Association:

GOV . CLARK . Statements have frequently been made to me by representatives of the companies that from the standpoint of dollars and cents these hatcheries are not profitable .

Mr. MOSER . They are not at all .

Gov. CLARK . I should think in that case the companies would be very glad to be relieved of that burden .

Mr. MOSER . The company with which I am associated operated hatcheries long before the Government gave the subject any attention . We believed that it was due to the industry to put back into the water an equivalent of what was taken out . The first hatchery was established by my company in 1896. The Government hatchery was not established until 1905. Our second hatchery - this large hatchery - was constructed in 1900 , and operated in 1901 , long before the Government thought of doing anything to maintain the salmon industry in Alaska.

This bill actually wipes these hatcheries out and gives nothing in return . There is no provision made for any other hatcheries , and there is no question in the world in regard to the benefit of our hatcheries .

The CHAIRMAN . This bill would allow you to maintain your hatcheries , would it not ?

Mr. MOSER . Is it right that we should have the great expense of maintaining these fish hatcheries and receive

⁶⁸ Id. at 176-177.

no return for it ?

The CHAIRMAN . Of course , we can go into this whole situation later on .⁶⁹



Illustration 14—Star of Alaska today in San Francisco, CA⁷⁰

The results of Fortmann’s trust-structure and Moser’s shrewd and

⁶⁹ Id. at p. 38. It does not appear from the hearing transcript that the subject was revisited on the record.

⁷⁰ Downloaded from the photographer, [Sanfranman59](#), with description: “National Register of Historic Places in San Francisco, California. "Balclutha", San Francisco Maritime National Historic Park, San Francisco, California, USA. Photographed 2008-03-08 by Mike Hofmann from Aquatic Park beach. The "Balclutha" is a square-rigged sailing ship built in 1866.”
[https://en.wikipedia.org/wiki/Alaska Packers%27 Association#/media/File:Balclutha \(San Francisco\).JPG](https://en.wikipedia.org/wiki/Alaska Packers%27 Association#/media/File:Balclutha (San Francisco).JPG); see also “Balclutha,” SAN FRANCISCO MARITIME NATIONAL HISTORICAL PARK CALIFORNIA, at <https://www.nps.gov/safr/learn/historyculture/balclutha.htm>

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thoughtful superintendence speak for themselves. APA produced more than two-thirds of the canned salmon on the West Coast; it was the largest salmon canning company in the world; it “poured some \$ 30 million each year into the Bay Area by 1913; and by 1917, the Alaska canned salmon industry had a value of “\$72 million—second only to lumber as an industry on the Pacific Slope.”⁷¹

Moser’s role in answering Fortmann’s call “for both the substance and appearance of order and cleanliness” in the fleet was vital to APA’s success.⁷² “While the decks were often loaded with extra boats and gear, the ships were never dirty or disheveled.”⁷³ To Fortmann and Moser, “[d]irty or disorderly ships meant sick hands, injurious accidents[,] and lost work.”⁷⁴ Moser ensured that “[a]nnually, the ships were cleaned, fumigated, painted and scrubbed,” and Moser “set standards that the company followed throughout its existence.”⁷⁵



Illustration 15—Star of Alaska, under full sail, from Moser’s Star Fleet.⁷⁶

⁷¹ DYAL, *supra* n. 32, at 5.

⁷² *Id.* at 95.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Downloaded from Alaska Packers Fleet Association List, Maritime Compass, Oct. 19, 2011, <https://maritimecompass.blogspot.com/2011/10/alaska-packers->

Moser was – to use a 21st century phrase – “all in.” He established a routine that gave him a ground-up view of the fleet on an almost daily basis when it was in Alameda. “Moser lived in Alameda, and before hopping the ferry to the San Francisco office of” APA “every morning, he visited the shipyard,” where “he “inspected vessels and facilities, issued corrective orders (if needed), and generally insured that the vessels were serviceable, whether in service or not.”⁷⁷

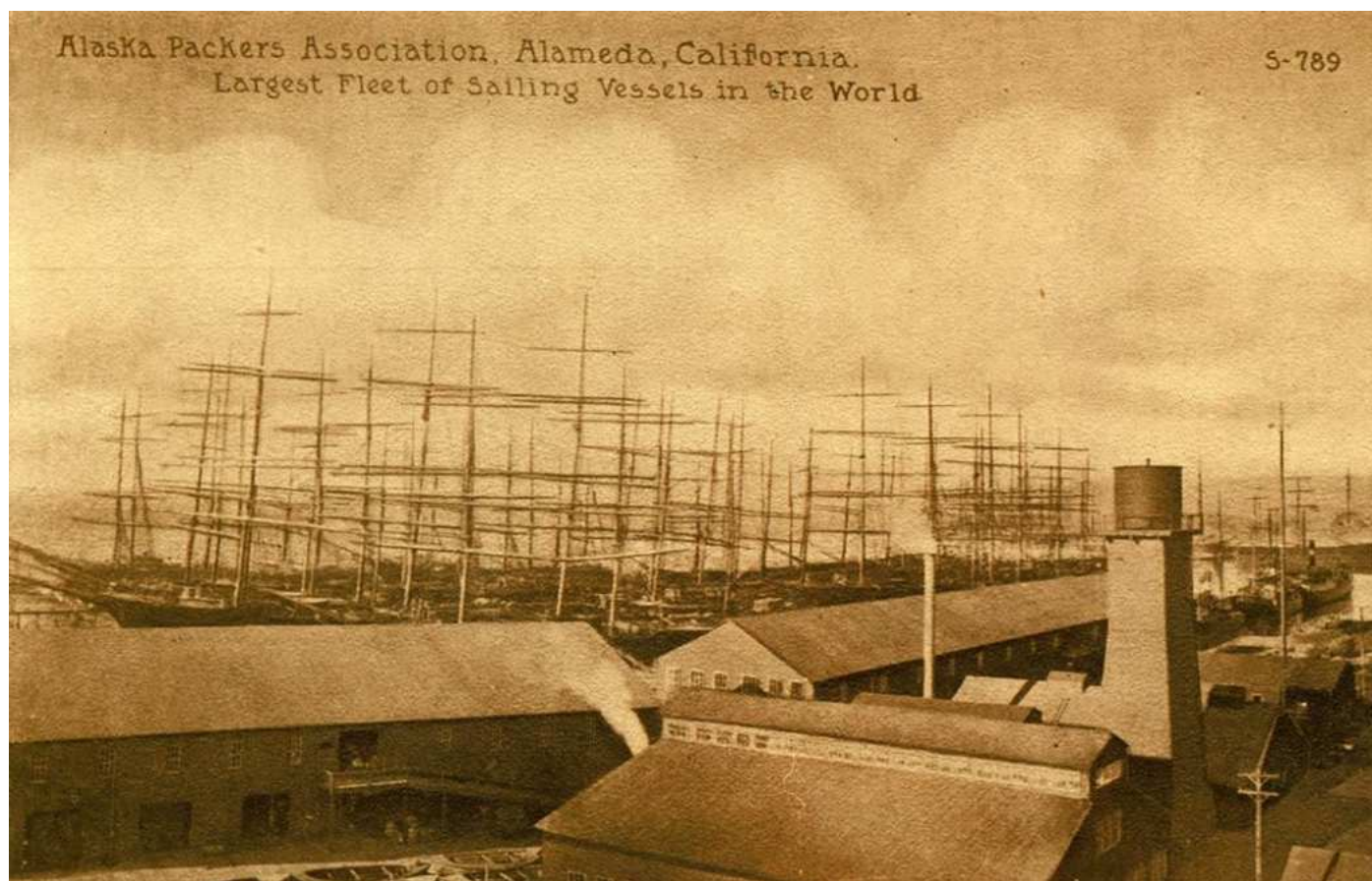


Illustration 16—APA Star Fleet Shipyard, Alameda, California.⁷⁸

[association-fleet-list.html?m=1](https://www.foundsf.org/index.php?title=File:Alaska_Packers_Association_Alameda_California_S789.jpg)

⁷⁷ Id.

⁷⁸ Downloaded by the author from FOUND SF: THE SAN FRANCISCO DIGITAL HISTORY ARCHIVE (posting by Chris Carlsson, Jan. 31, 2015) at: https://www.foundsf.org/index.php?title=File:Alaska_Packers_Association_Alameda_California_S789.jpg

Moser also brought under control challenges in the labor relations arena. Four years before he took charge of the Star Fleet, APA had a disaster with a wild-cat work stoppage among the fisherman of its ships in Pyramid Harbor. The fisherman, who received a daily pay but who made their real money based on actual number of fish caught each day, alleged that APA had provided such shoddy nets that they lost significant sums of money because of the deficiency in the daily catch that the holes in the nets created.⁷⁹ The fishermen called a work stoppage, demanded to see APA's superintendent in Pyramid Harbor, and gave him an ultimatum to double their wages for the season from \$50 agreed upon in San Francisco to \$100 given the condition of the nets they found in Pyramid Harbor upon arrival.⁸⁰ Upon their return to San Francisco at season's end, APA denounced the contract modifications and refused to honor them. The fisherman sued in federal court; having won nearly a clean sweep in the district court⁸¹, they snatched defeat

⁷⁹ *Alaska Packers Ass'n v. Domenico*, 117 F. 99 (9th Cir. 1902). The case quickly caught the attention of Harvard's leading all-around scholar at the time, Professor Beale, see Joseph H. Beale, Jr., *Notes On Consideration*, 17 HARV. L. REV. 71, 79 n.1 (1903), and eventually that of the later-arriving contracts titan at Harvard, Professor Williston, see Samuel Williston, *Consideration in Bilateral Contracts*, 27 Harv. L. Rev. 503, 514 n. 26 (1914). Today, the case is the primary way in which the Alaska Packers Association is known to 21st law students in America. See, e.g., BEN TEMPLIN & DAVID H. SPRATT, *CONTRACTS: A MODERN COURSEBOOK*, at 234-238 (Aspen 3d ed. 2023)(main case in Ch. 11, "Contract Modifications & The Consideration Requirement") Its fame persists as a leading example of the classic American position on the pre-existing exception to contractual consideration, see, e.g., Kevin M. Teeven, *Development of Reform of the Preexisting Duty Rule and Its Persistent Survival*, 47 ALA. L. REV. 387, 397 n. 46 (1996), and is also pointed to as an example of what would later be deemed by courts the defense to contract formation known in America as "economic duress." See, e.g., Gerald Caplan, *Legal Autopsies: Assessing the Performance of Judges and Lawyers Through the Window of Leading Contract Cases*, 73 ALB. L. REV. 1, 31 n. 168 (2009); Nancy S. Kim, *Situational Duress and the Aberrance of Electronic Contracts*, 89 CHI.-KENT L. REV. 265, 285 n. 85 (2014); see also *Austin Instrument, Inc. v. Loral Corp.*, 29 N.Y.2d 124, 274 N.E.2d 533 (1971)(Chief Judge Stanley Fuld's masterpiece on the modern doctrine of economic duress).

⁸⁰ *Alaska Packers*, 117 F. at ____.

⁸¹ *Domenico v. Alaska Packers' Ass'n*, 112 F. 554 (N.D. Cal. 1901), rev'd, 117 F. 99 (9th Cir. 1902). The District Judge who ruled in the fisherman's favor was a former California Supreme Court Justice and a Republican appointed to the federal bench by President McKinley. See John Jefferson De Haven (1845-1913), FED. JUD. CTR., at <https://www.fjc.gov/node/1379941> While the fishermen's friend, Judge de Haven was no friend to the public school students of Chinese ancestry who challenged racial

from the jaws of victory in the fledgling U.S. Ninth Circuit Court of Appeals, which denied enforcement of the contract modifications on the grounds they had a pre-existing duty to perform the work they threatened to withhold.⁸² Given his close contracts with APA, Moser was surely aware of and following this case.⁸³ It is also likely that Moser viewed the case as one of “wily fishermen taking calculated and unfair advantage of the vulnerable cannery, conduct coming close to if not actually constituting economic duress.”⁸⁴ With his years commanding *The Albatross* and being present in the Alaskan fisheries, Moser knew

segregation in San Francisco’s schools. See *Wong Him v. Callahan*, 119 F. 381 (C.C.N.D. Cal. 1902); see also Joyce Kuo, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools*, 5 *ASIAN L. J.* 181, 201 (1998).

⁸² 117 F. at _____. An eminent scholar gave a thorough treatment of the case’s historical and legal background in Debora L. Threedy, *A Fish Story: Alaska Packers’ Association v. Domenico*, 2000 *UTAH L. REV.* 185. Interestingly, Judge Ross, under whose name the 9th Circuit opinion was issued, had been a VMI Cadet at the start of the Civil War, graduating in 1865, and apparently was among the VMI cadets who fought at New Market in 1864. See *id.* at 194; note __ *infra*, discussing the call-up of cadets from VMI straight into battle at New Market in 1864); OSCAR T. SHUCK, *HISTORY OF THE BENCH AND BAR OF CALIFORNIA, BEING BIOGRAPHIES OF MANY REMARKABLE MEN, A STORE OF HUMOROUS AND PATHETIC RECOLLECTIONS, ACCOUNTS OF IMPORTANT LEGISLATION AND EXTRAORDINARY CASES, COMPREHENDING THE JUDICIAL HISTORY OF THE STATE*, at 657 (1901), available at <https://archive.org/details/benchandbarofcalooshuc>

⁸³ Indeed, the labor-relations perspective is a key dimension of the *Domenico* case too often lost in the modern pigeon holing of it as primarily a matter of contract consideration theory. See Debora L. Threedy, *Labor Disputes in Contract Law: The Past and Present of Alaska Packers’ Ass’n v. Domenico*, 10 *TEX. WESLEYAN L. REV.* 65 (2003). Based on her extensive study of the case, Professor Threedy came to the apt conclusion that “research into *Alaska Packers’* suggests that the classical contract doctrine was not well suited to dealing with the emerging problems of labor relations at the turn of the last century.” *Id.* at 65. Professor Threedy further elaborated on the contemporary views of the case:

Alaska Packers’, viewed from a labor law perspective, is fairly typical of its time. From labor’s perspective, the case did little to recognize workers’ grievances or support the self-help remedy of a work stoppage. From capital’s perspective, the case served to encourage investment in new industries, by preventing labor from using any monopoly power to leverage a larger share of the pie from the owners.

Id. at 69. Moser’s job, obviously, became to optimize the owner’s pie share where his predecessor had failed.

⁸⁴ Threedy, *supra* n. 69, 2000 *UTAH L. REV.* at 197.

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both Pyramid Harbor and the other canneries intimately⁸⁵; and he understood his personnel well⁸⁶ and ensured no repeat of such unrest – whatever the means he may have used to do so, consonant with labor relations concepts of the time and his own military background. In Moser’s first year as General Superintendent, the Pyramid Harbor cannery was idled; and three seasons later, in 1908, it was closed for good.⁸⁷

⁸⁵ Id. at 202-203 & nn. 118, 119, 121, 124-139.

⁸⁶ In the rough labor language and assumed prejudices of the day, Moser described the fisherman as

[t]he cannery fishermen are nearly all foreigners, the majority being "north countrymen,"
or, as they are termed, "hardheads," though there are some fishing gangs comprised of what are called "dagoes," consisting of Italians, Greeks, and the like. When these two classes form different fishing gangs for the same cannery, the north-country crew is referred to as the "white crew."

Threedy, *supra* n. 69, 2000 UTAH L. REV. at 205-206 n.147 (quoting JEFFERSON F. MOSER, THE SALMON AND SALMON FISHERIES OF ALASKA: REPORT OF THE OPERATION OF THE U. S. FISHERIES COMMISSION STEAMER ALBATROSS FOR THE YEAR ENDING JUNE, 1898, H. R. Doc. No. 308, at 123 (1899)).

⁸⁷ Id. at 202. Pyramid Harbor had proven to be one of the more expensive canneries for APA to operate. See id. at 202 & n. 116. For more information on the immigrants from many countries who worked as sailors/fisherman on the Star Fleet, see Bob King, *The Iron Men of Bristol Bay*, ALASKA HIST. SOC’Y, Dec. 7, 2015, at <https://alaskahistoricalsociety.org/tag/alaska-packers-association/> (noting that APA noted on personal cards those men who proved troublemakers and organizers). It must also be noted here that Moser inherited a workforce segregated in the industry by the classifications “white,” “native,” and “Chinese,” see JEFFERSON F. MOSER, THE SALMON AND SALMON FISHERIES OF ALASKA: REPORT OF THE OPERATIONS OF THE UNITED STATES FISH COMMISSION STEAMER ALBATROSS IN 1900 AND 1901, at 182, 320-321 (1902), and this racially stratified workforce was perpetuated for years, leading to major disparate impact discrimination litigation under Title VII of the Civil Rights Act of 1964, see *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), and amendments of Title VII thereafter in which Congress specifically cited the case for statutory overruling, see Civil Rights Act of 1991, Pub. L. 102-66, §§ 102(2) (“Findings”), 103(2) (“Purpose”) See generally DOUGLAS M. FRYER, JUSTICE FOR WARDS COVE (2016) (chronicling nearly 30 years of federal court litigation from 1972 through 2001). As Commander of the Albatross, however, Moser received delegations from the native Tlingit and Haida peoples and heard their complaints about the effects of commercial despoliation of their fishing grounds; “[a]lthough Moser expressed sympathy towards the Tlingit and Haida and recognized their claim to the land, he also mentioned the overpowering impact of extractive economic ventures in Alaska, especially the salmon canneries.” Bridget Lee Baumgarte, *Alaska Natives And The Power Of Perseverance: The Fight For Sovereignty And Land Claims In Southeast Alaska, 1912-1947* (2015) UNLV THESES, DISSERTATIONS, PROFESSIONAL PAPERS, AND CAPSTONES, Paper 2466.

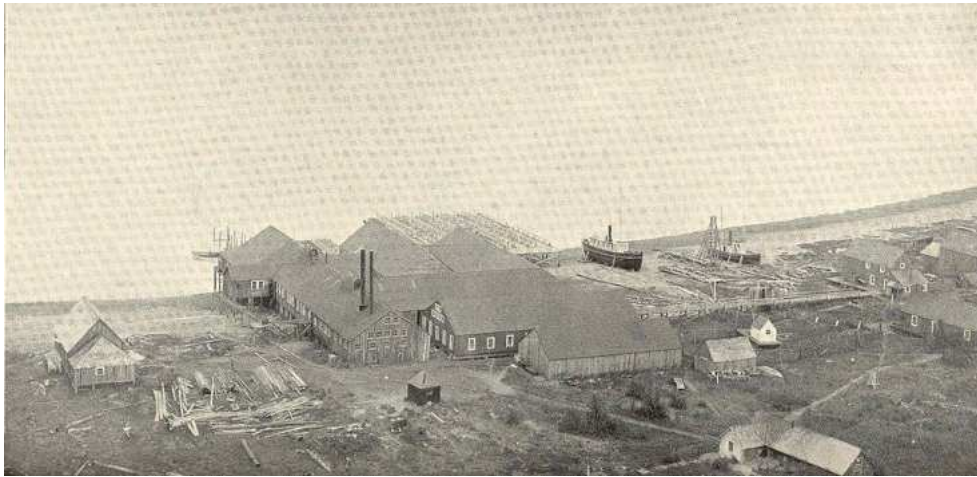


Illustration 17—APA's Cannery at Pyramid Harbor, Alaska⁸⁸

Moser's retirement from APA is not documented in the publicly accessible records available to the author. We know he was employed at the time his extensive 1912 testimony and commentary before the Congressional Hearing on the S.5856, a Bill to Amend an Act for the Protection and Regulation of the Fisheries of Alaska. He was quoted in that role by a 1916 *San Francisco Chronicle* article.⁸⁹ Moser would have attained the age of 70 by the end of World War I in 1918. With the end of the sailing life of the Star Fleet in the early 1920s⁹⁰, it would not be surprising that Moser, aging into his 70s, had retired by then.

But he did not give up his legal fight for his full rank and pension rights until he had won them with emphatic finality in December 1924, the subject of Section IV, *infra*.

<http://dx.doi.org/10.34917/7777294> (citing JEFFERSON F. MOSER, THE SALMON AND SALMON FISHERIES OF ALASKA: REPORT OF THE OPERATIONS OF THE UNITED STATES FISH COMMISSION STEAMER ALBATROSS FOR THE YEAR ENDING JUNE 30, 1898, at 43 (1899)).

⁸⁸ Plate 43 from JEFFERSON F. MOSER, THE SALMON AND SALMON FISHERIES OF ALASKA. REPORT OF THE OPERATIONS OF THE UNITED STATES FISH COMMISSION STEAMER ALBATROSS FOR THE YEAR ENDING JUNE 30, 1898. The digital file containing this image also resides at the Freshwater and Marine Image Bank, University of Washington Libraries, at:

<https://digitalcollections.lib.washington.edu/digital/collection/fishimages/id/38837>

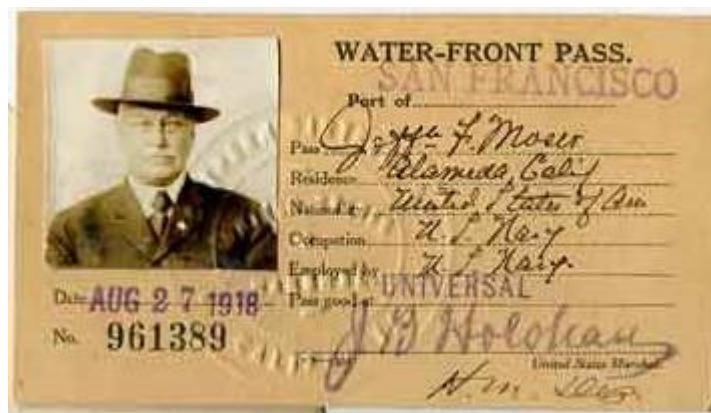
⁸⁹ See DYAL, *supra* note__ at 121, 199 n. 352 (citing *San Francisco Chronicle*, Oct. 14, 1916, at 6).

⁹⁰ See DYAL, *supra* note__ at __.

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E. Moser Answers America's Call For His Third War—World War I (1917-1919)

Moser worked out of San Francisco and Alameda, California, and for 14 years – until he re-entered U.S. Navy service in 1917 on the occasion of his Country's entry into World War I.⁹¹ One source with access to Moser's private papers reports that "[i]n 1914 he was recalled to duty to act as inspector of ships on the West Coast and oversaw construction of facilities at San Pedro, California," while he sat as well as a member "on Boards of Inquiry."⁹² From April 1917 through June 1919, the Navy recalled Moser to active duty as a Captain, where his activities included duties at the United States Naval Training Station at San Francisco, California, and, later, with the Commandant of the Twelfth Naval District.⁹³



⁹¹ San Francisco, 15 *Pacific Marine Review*, No. 3, at 91 (March 1918); see <http://www.usmilitariaforum.com/forums/index.php?/topic/257505-rear-admiral-jefferson-f-moser-civil-war-s-a-war-ww-1/>

⁹² See Kanemono, *Rear Admiral Jefferson F. Moser, Civil War, S A War, WW I*, U.S. MILITARIA FORUM, Jan. 1, 2016, at <https://www.usmilitariaforum.com/forums/index.php?/topic/257505-rear-admiral-jefferson-f-moser-civil-war-s-a-war-ww-1/> The record in the U.S. Supreme Court's 1924 case says in the Government's brief that Moser was called to active duty from April 8, 1917, until June 15, 1919. See, Transcript of Record in United States, No. 99, Appellant, versus Jefferson F. Moser, Appeal from the Court of Claims, filed June 26, 1923 at page 1 (Petition) (PDF copy of microfilmed document on file with the author, obtained from the National Archive)

⁹³ Transcript of Record in United States, No. 99, Appellant, versus Jefferson F. Moser, Appeal from the Court of Claims, filed June 26, 1923, at page 1 (Petition) (PDF copy of microfilmed document on file with the author, obtained from the National Archive).

Illustration 18—Moser's First World War Identification Badge.⁹⁴

Moser thus continued prosecuting his work for both the APA in time of peace while, once again, answering his Country's call for Naval duty in 1917 when the drums of war reached the American shore. Yet, he battled for his proper pension and retired rank throughout this lengthy period following his 1904 retirement from active duty. To better understand the context and background in which he waged that battle, the next Section surveys the history of pensions in America for veterans as well as career officers of the Navy, focusing on developments during and after the American Civil War. The relationship between the federal government and the individual citizen was radically redefined in this period, and pensions were a major tectonic plate along a society fault line that extended from Appomattox all the way through the 1930s.

III. THE POLITICS OF MILITARY PENSIONS AFTER THE CIVIL WAR

*"God and the soldier we like adore,
In time of danger, not before.
The danger past and all things righted,
God is forgotten, the soldier slighted."*⁹⁵

⁹⁴ Image posted at RADM Jefferson Franklin Moser, FIND A GRAVE MEMORIAL, at <https://www.findagrave.com/memorial/92739094/jefferson-franklin-moser>. In 1921, Moser was the subject of a news story involving the pilfering of a sketch of him from a locker chest that was the property of his son, Lt. Commander Robert McDowell Moser, who had seen active service in World War I. See *Even Old Book Shop Reveals Possibility of a Plot*, RICHMOND PALLADIUM & SUN TELEGRAM, Oct. 8, 1921, at 9 (Richmond, Indiana)(available online at <https://newspapers.library.in.gov/?a=d&d=RPDI9211008&e=-----en-20--1--txt-txIN----->). Unhappily, a month later, Robert Moser died at age 45 in Washington, D.C. See LCDR Robert McDowell Moser, FIND-A-GRAVE MEMORIAL, at https://www.findagrave.com/memorial/57196759/robert_mcdowell-moser. He is buried in Arlington National Cemetery. See <https://www.vlm.cem.va.gov/ROBERTMMOSER/4017C>

⁹⁵ Michael Phipps, *Mahan at West Point, "Gallic Bias," and the "Old Army": The Subconscious of Leadership at Gettysburg*, at 1 (National Park Service Gettysburg Seminar Papers. (1999) (verse attributed to Thomas Jordan), available at https://www.npshistory.com/series/symposia/gettysburg_seminars/9/essay1.pdf. Other writers have attributed the verse to Kipling, "A Time for Prayer": Rudyard Kipling: Quotes, GOODREADS, at <https://www.goodreads.com/quotes/583702-a-time-for-prayer-in-times-of-war-and-not>; Bartleby attributes it to Frances Quarles (1592-1644), an

The attitudes towards pensions for those who have given military service to the United States, whether in times of national crisis or as a career, have varied over time since the Founding. Initially, bounty beyond pay for service was discharged in the form of lump-sum payments, particularly to officers (whom some argued had sacrificed their business and profession at home “while those they protected were at home amassing fortunes”).⁹⁶ A full-throated threat to abandon the field by Continental Army officers led George Washington to warn the Continental Congress that it must enact “some better provision for binding the officers by the tie of interest to the service” pressured the Continental Congress to enact three pension provisions for officers – service pensions and pensions for widows and orphans of officers.⁹⁷ As a scholar has pointed out, while there was a general consensus in favor of “invalid” pensions for officers wounded in combat, “[o]fficers’ service pensions were an entirely different concept.”⁹⁸:

[Service pensions] violated core American ideals. Beyond the long-term financial commitment that they represented—a commitment the Continental Congress did not quite have the authority to make—they signaled a rejection of the political, moral, and evangelical calls thought to motivate the citizen soldier in favor of the standing Army’s corrupt association with patronage, rank, and pensions. Some members of the Continental Congress argued that it was only fair to compensate the Army’s officers with pensions, who sacrificed their time and property while those they protected were at home amassing fortunes. Many others, however, were outraged by the pension plan, for in their view, the hardships that

English poet, see <https://www.bartleby.com/lit-hub/respectfully-quoted/francis-quarles-15921644-3/> (citing “Of Common Devotion,” IN *THE COMPLETE WORKS IN PROSE AND VERSE OF FRANCIS QUARLES* (ALEXANDER B. GROSART ED.), vol. 2, p. 205 (1880)); while still others offer an elaborated version that they contend is an “anonymous poem ... from the American Civil War era” that “critiques the hypocrisy of society’s treatment of both God and soldiers.” *God and The Soldier*, ALL POETRY, at <https://allpoetry.com/God-And-The-Soldier>

⁹⁶ Laura S. Jensen, *Constructing and Entitling America’s Original Veterans*, in *DESERVING AND ENTITLED: SOCIAL CONSTRUCTIONS AND PUBLIC POLICY* at 43 (2005) (Anne L. Schneider & Helen M. Ingram, eds.)

⁹⁷ *Id.* at 42.

⁹⁸ *Id.* at 42-43.

the officers endured were also suffered, perhaps to an even greater degree, by the Army's soldiers and the militia.⁹⁹

But volatility continued, and the fledgling federal government had great difficulty in funding the pensions to which the Continental Congress agreed – and in fact, passed further nullifying legislation that reduced the benefits which had been previously offered and emphasized a lump sum option.¹⁰⁰ The 18th Century experience, therefore, was hardly an auspicious beginning to providing military pensions. Yet, crucial themes in military pensions emerged which were to endure for another 140 years. These themes are explored in the next subsection.

A. Pre-Civil War Military Pension Precedent

The Fifteenth Congress enacted the first systematic program of Veteran's Benefits administrated at the federal level.¹⁰¹ It had done so in part because of lobbying by Revolutionary War veterans who found

⁹⁹ Id. at 43.

¹⁰⁰ As Professor Jensen memorably described the situation:

Congressional efforts to persuade the states to fund the service pensions in 1782 failed. As the end of the war approached, the Army's officers worried that their life pensions would never materialize and threatened that they would not lay down their arms unless some effort was made to guarantee them. When the officers declared themselves willing to have their life pensions commuted into an equivalent lump-sum payment at the conclusion of the war, Congress quickly passed a Commutation Act on March 22, 1783, two days before news spread of the signing of the preliminary peace agreement. It provided that the Continental officers would receive five years of full pay in money or securities bearing six percent interest per year in lieu of half-pay for life. Lacking the resources required to implement the act, Congress was forced to ask the states to approve the establishment of a new impost duty in order to meet the nation's extraordinary financial obligations, which included approximately \$5,000,000 for the commutation of half-pay plus \$300,000 per year in interest. The states' response in the face of such an onerous fiscal burden was slow at best and, at worst, extremely hostile.

Id. at 43.

¹⁰¹ Id. at 35, 37-41, 49-53

themselves infirm and impecunious in the years running up to the War of 1812, and in part because of a President who heeded their influence, and called upon Congress in closing his December 1817 Annual Address to take action for them since, by 1817, the federal government was in good credit:

“In contemplating the happy situation of the United States, our attention is drawn, with peculiar interest, to the surviving officers and soldiers of our Revolutionary Army, who so eminently contributed, by their services, to lay the foundation. Most of those very meritorious citizens have paid the debt of nature and gone to repose. It is believed, that among the survivors, there are some not provided for by existing laws, who are reduced to indigence, and even to real distress. These men have a claim on the gratitude of their country, and it will do honor to their country, to provide for them. The lapse of a few years more, and the opportunity will be forever lost; indeed, so long already has been the interval, that the number to be benefited by any provision which may be made, will not be great.”¹⁰²

The legislation was, however, not easy to craft. Even though the financial problems with sustaining pension programs that were to loom large later was not on the front burner, the problem of declaring some citizens more worthy of government largesse than others was, by contrast, front and center.¹⁰³ The argument defining who would be eligible for pensions started with the fundamental fault line of federalism – would it be only those who served directly in the Continental Army (which hailed mainly from Northern States), or would it also include

¹⁰² Ann Becker, *The Revolutionary War Pension Act of 1818*, 47 *HIS. J. MASS.* 99, 102 (2019)(quoting James Monroe, “First Annual Message,” American Presidency Project. [https:// www.presidency.ucsb.edu/documents/first-annual-message-1](https://www.presidency.ucsb.edu/documents/first-annual-message-1); *Annals of Congress*, 15th Congress, 1st sess., 12–20). During a national tour in 1816, Monroe saw the veterans’ suffering in person, and – a Revolutionary War veteran himself and the last president to don a sword to take the field against an invading enemy (in the War of 1812), Monroe “was particularly attentive to them and was moved by their ‘broken-down’ condition and the ‘infirmities of old age’ from which they suffered.” Becker, *supra*, at 104–105 (quoting S. PUTNAM WALDO, *THE TOUR OF JAMES MONROE, PRESIDENT OF THE UNITED STATES, THROUGH THE NORTHERN AND EASTERN STATES IN 1817; HIS TOUR IN THE YEAR 1818; TOGETHER WITH A SKETCH OF HIS LIFE, WITH DESCRIPTIVE AND HISTORICAL NOTES* (Hartford: Silas Andrus, 1820), 112–113).

¹⁰³ Jensen, *supra* n. __, at 39–41, 51–57.

state militia troops (which is where most soldiers from Southern States served)?¹⁰⁴ Other perennial questions that arose here included would the pensions be limited to officers or would it embrace non-officer soldiers, too? Who would be considered a veteran – during what dates of service and for what duration? Would there be a disability requirement? Would that disability have to be connected to the military service – or could it be later arisen? How would “disability” be defined (in early 19th century understanding)? Would there also be a requirement that the veteran be impecunious – and if so, how would “poverty” be defined? How much would the benefits be? For how long would they last?¹⁰⁵

B. Pensions For Civil War Veterans

The subject of pensions for veterans of the Civil War is one that we can scarcely comprehend at a distance of 150 years¹⁰⁶ with the appreciation of its radical reappraisal of the relationship between the federal government and veterans that opened the door to new ways of thinking.¹⁰⁷ There are layers of complexity – political, religious, and fiscal – in addressing the utterly unrepresented dimensions of destruction, suffering, and loss that the Civil War caused.¹⁰⁸ As Drew Gilpin Faust

¹⁰⁴ Becker, *supra* n. __ at 102-103

¹⁰⁵ Becker, *supra* n. __ at __; Jenson, *supra* n. __, at __. These questions persisted when veterans of two succeeding wars, promised pensions during their initial service, sought those pensions. See WILLIAM H. GLASSON, *FEDERAL MILITARY PENSIONS IN THE UNITED STATES*, 108-119 (1918). “Service pensions on account of the war of 1812 were not granted until 1871,” and “[a]s usually happens with pension legislation, there was an underestimate of the number of claimants who would apply and the amount of expenditure involved.” *Id.* at 109. “In asking for service-pensions, the survivors of the War of 1812 appealed to the Revolutionary service-pension act of 1832 as a precedent.” *Id.* By 1916, benefits to the War of 1812 survivors had cost over \$14 million, while benefits to their widows tallied nearly \$32 million. *Id.* at 112-113. “Soon after the survivors of the War of 1812 were granted service-pensions in 1871, a movement was started to secure a similar law applying to the Mexican War.” *Id.* at 116. The object was not achieved until 1887, and by 1916, had reached a total cost in excess of \$50 million. *Id.* at 116-119.

¹⁰⁶ See BRIAN MATTHEW JORDAN, *MARCHING HOME: UNION VETERANS AND THEIR UNENDING CIVIL WAR*, 2-3 (2014) (describing the typical Union Army Civil War veteran as “lurking in the unwarranted shadows of historical obscurity—as distant and unfamiliar to us as they were as to those who lived in post-Civil War America”).

¹⁰⁷ See generally Skocpol, *supra* n. __, at 102-151 (discussing the transformation of the nation’s conceptualization of the relationship between veterans and the federal government in the aftermath of the Civil War).

¹⁰⁸ While lauding memories of the dead, many in the public wanted not to deal with

observed in her classic book, “[i]n the middle of the nineteenth century, the United States embarked on a new relationship with death, entering into a civil war that proved bloodier than any other conflict in American history,” and thus, “Civil War soldiers and civilians alike distinguished what many referred to as ‘ordinary death,’ as it had occurred in prewar years, from the manner and frequency of death in Civil War battlefields, hospitals, and camps, and from the war’s interruptions of civilian lives.”

¹⁰⁹ Americans scarcely had anticipated the level of loss that ensued. As the country took stock of what it had inflicted on itself, new ideas took hold that were unprecedented in the American experience:

Citizen soldiers snatched from the midst of life generated obligations for a nation defining its purposes and polity through military struggle. A war about union, citizenship, freedom, and human dignity required that the government attend to the needs of those who had died in its service. Execution of these newly recognized responsibilities would prove an important vehicle for the expansion of federal power that characterized the transformed postwar nation. The establishment of national cemeteries and the emergence of the Civil War pension system to care for both the dead and their survivors yielded programs of a scale and reach unimaginable before the war. Death created the modern American union—not just by ensuring national survival, but by shaping enduring national structures and commitments.¹¹⁰

While initially confined to the widows, orphans, and seriously disabled, the concept of the Union Civil War veteran expanded from 1865 through the 1890s to embrace an increasingly larger number of

the destitute and demoralized veterans returning to their communities; they wanted to entomb this human devastation with the monuments, speeches, and public virtue signaling in which they declared the war “over.” See Brian Matthew Jordan, *Marching Home: Union Veterans And Their Unending Civil War*, 58-59, 118-119 (2014). “Most civilians wanted the ‘piteous’ sight of the one-armed soldier begging in the streets, like the memory of the war, to just go away,” and were “disgusted at the sight of the crippled relic of the war.” *Id.* at 59.

¹⁰⁹ DREW GILPIN FAUST, *THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR*, at 9, (2009)

¹¹⁰ *Id.* at 12.

beneficiaries. “Over several decades, Civil War pensions evolved from a restricted program to compensate disabled veterans and the dependents of those killed or injured in military service[,] into an open-ended system of disability, old-age, and survivors benefits for anyone who could claim minimal service time on the northern side of the Civil War.”¹¹¹ Indeed, the Disability Pension Act of 1890 “allowed veterans to claim pensions for disabilities unrelated to military service, so long as they were not the result of ‘vicious habits or gross carelessness,’” and “reduced the length of military service needed to qualify for a pension to 90 days.”¹¹² Thereafter “the Service and Age Pension Act of 1907 transformed the pension system into a general old-age insurance scheme for veterans, declaring that old age itself was a disability covered by the 1890 Act.”¹¹³

But it was not “just the demographic givens of a major war that brought about this outcome.”¹¹⁴ To the contrary, it must be admitted that “[t]he political forces of late-nineteenth-century American patronage democracy fueled the expansion of Civil War social benefits.”¹¹⁵ But

¹¹¹ Theda Skocpol, *Public Aid for the Worthy Many: The Expansion of Benefits for Veterans of the Civil War*, in PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES, Ch. 2, at 102 (1992); see also Jordan, *supra* n. __, at 58, 77, 102, 129, 151-169, 278-279; see also Theda Skocpol, *America’s First Social Security System: The Expansion of Benefits for Civil War Veterans*, 108 POL. SCI. QRTLY. 85 (1993). The beneficiaries also included those ex-soldiers who had been born abroad, especially in England, Canada, Ireland, and Germany. See Peter Blanck & Chen Song, *Civil War Pensions for Native and Foreign-Born Union Army Veterans*, in THE CIVIL WAR VETERAN: A HISTORICAL READER, at 223-224 (2007) (Larry M. Logue & Michael Burton, eds.). Anglophone foreign-born veterans were significantly less likely to apply for pensions, however, than their domestically-born counterparts. See *id.* at 224-225.

¹¹² Blanck & Chen Song, *Civil War Pension Attorneys and Disability Politics*, 35 U. MICH. J. L. REFORM 137, 146 (2001).

¹¹³ *Id.*

¹¹⁴ Theda Skocpol, *supra* n. __, at 102. For commentary on how Civil War pension issues dominated political party politics during the 1880s and 1890s, see, e.g., Donald L. McMurray, *The Political Significance of the Pension Question, 1885-1897*, 9 MISS. VALLEY HIST. REV. 19 (1922).

¹¹⁵ Skocpol, *supra* n. __, at 102. In addition, Union Army veterans constituted a significant group among voting-eligible citizens in Northern States:

In 1885 there were a million and a half survivors of the union armies, most of them in the northern states. In New York, Pennsylvania, Ohio, Indiana, and Illinois they were twelve or fifteen per cent of the males of voting age. Only about one-sixth of them received pensions. They constituted a political element that had a

patronage itself does not complete the picture, for “[u]ltimately, the system became a kind of precocious social security system for those U.S. citizens of a certain generation and region who were deemed morally worthy of enjoying generous and honorable public aid.”¹¹⁶ The legislative expansion of these benefits and the scope of eligibility was prodigious.¹¹⁷ A significant protagonist in this story was one of America’s first powerful lobbying groups for individuals – the GAR, or Grand Army of the Republic, whose membership soared during the 1880s and 1890s as the organization aggressively, lobbied Congress for more and better veterans’ benefits.¹¹⁸ While the GAR’s ultimate objective was never realized -- of legislation to create a “straight ‘service pension’” that would provide benefits “for all” Civil War veterans “aged 62 or above, with no disability clause,” they did achieve pension expansions so that “over 90 percent of the Union veterans surviving in 1910” were receiving some

distinct class consciousness as a result of certain common interests, prominent among which was the pension question. In a period when elections were decided by small majorities, a voting element of these proportions was enough to cause serious concern among politicians if it could attain reasonable unanimity in regard to what it wanted and if it could make its wants known.

Id. at 121.

¹¹⁶ Id.

¹¹⁷ Id. at 109-110 & Figure 1. Indeed, many serving in Congress during this era were Civil War veterans:

¹¹⁸ Id. at 111-112. As an historian studying the period a century ago observed:

In 1888 the service pension element that represented the selfish class interests of the soldiers gained control of the Grand army, and from this time on it engaged in exploiting the public esteem for the veterans to obtain largesses from the public treasury. The development of pension activity by the Grand army was contemporaneous with a rapid growth of membership, from 60,678 in 1880 to 269,689 in 1885, and 427,981 in 1890. At the latter date about one-third of the survivors of the war were members. No doubt this growth was caused in part by interest in the increasing activity of the organization in regard to pensions.

Donald L. Murray, *supra* n. __, at 23. Murray’s tone reflects the anti-pension bias that had grown by the early years of the 20th century. The pension resentment led in part, the author would argue, to the over-cutting of the pensions that had been offered to long-serving offices, such as Captain Moser, to induce their retirements from the Army and Navy after having spent their entire careers in uniform. See discussion at __, *infra*.

level of federal pension.¹¹⁹ The greatest number of pensioners receiving the highest amount of benefits peaked in the late 1890s to early 1900s, when Civil War pensions accounted for a whopping 45% of federal spending at the time.¹²⁰

Readers in the 2020s and beyond must bear in mind that there were no federal income taxes at the time— federal revenue was raised by tariffs¹²¹, which could be variable from year to year and decade to

¹¹⁹ Id. at 110, 112.

¹²⁰ Id. at 11; MARY R. DEARING, *VETERANS IN POLITICS: THE STORY OF THE G.A.R.*, at vii (1952) (“At the height of th[e] [G.A.R.’s] influence, .. former soldiers were able to command benefits which cost the federal government more than one-fifth of its total revenue.”) Civil War Pensions, Encyclopedia of Arkansas, at <https://encyclopediaofarkansas.net/entries/civil-war-pensions-6396/>. This also lead to a massive federal Pension Office bureaucracy, that by 1885 approached 800 employees earning \$ 1 million in salaries annually. See also Claire Prechtel-Klusens , “A Reasonable Degree of Promptitude”—Civil War Pension Application Processing, 1861–1885, 42 Prologue Magazine No. 1 (2010), at <https://www.archives.gov/publications/prologue/2010/spring/civilwarpension.html>

As of 2017, there was still a daughter of a Union Army veteran receiving a statutory pension of \$73 from the federal government. See Curt Millis, *U.S. Still Paying A Civil War Pension: A North Carolina Woman Is The Daughter Of A Civil War Veteran, And Still Collects His Benefits*, U.S. NEWS & WORLD REPORTS, Aug. 8, 2016 (updated May 26 2017), available at <https://www.usnews.com/news/articles/2016-08-08/civil-war-vets-pension-still-remains-on-governments-payroll-151-years-after-last-shot-fired> Writing of the same beneficiary, the Wall Street Journal reported in 2014 that

[m]ore than 3 million men fought and 530,000 men died in the conflict between North and South. Pvt. Mose Triplett joined the rebels, deserted on the road to Gettysburg, defected to the Union and married so late in life to a woman so young that their daughter Irene is today 84 years old -- and the last child of any Civil War veteran still on the VA benefits rolls. Ms. Triplett's pension, small as it is, stands as a reminder that war's bills don't stop coming when the guns fall silent. The VA is still paying benefits to 16 widows and children of veterans from the 1898 Spanish-American War. The last U.S. World War I veteran died in 2011. But 4,038 widows, sons and daughters get monthly VA pension or other payments. The government's annual tab for surviving family from those long-ago wars comes to \$16.5 million.

Michael D. Phillips, *The Enduring Cost: The Civil War's Last Pensioner*, WALL ST. J., MAY 10, 2014, AT A1. “SPOUSES, PARENTS AND CHILDREN OF DECEASED VETERANS FROM WORLD WAR II, KOREA, VIETNAM, Kuwait, Iraq and Afghanistan received \$6.7 billion in the 2013 fiscal year,” by contrast. Of Mose Triplett, his grandson recalled that “[h]e served his time out with the Union so he would get a pension.” Id.

¹²¹ See Sheldon D. Pollock, *Origins of the Modern Income Tax, 1894–1913*, 66 TAX

decade.¹²² During that period, legislation – called Arrears Acts – appeared, which permitted eligible veterans to apply for benefits for the first time and receive benefits they would have received in earlier years as a lump-sum settlement. The Arrears Act created the opportunity for attorneys who represented veterans in making those claims to earn a fee “for every pension application they could drum up,”¹²³ in the words of their critics, and who vigorously and publicly sought clients (in an age where lawyer advertising had not yet become prohibited by state supreme courts) and lobbied for more arrears legislation,¹²⁴ effectively producing – at least among newspapers, some politicians, and a segment of the public – the stereotype of a class of “pension chasers” to presage the later disparaging appellation applied to lawyers for plaintiffs in torts claims, “ambulance chasers.”¹²⁵

LAWYER 295, 297-301 (2013).

¹²²See Skocpol, *supra* n. __, at 112-114. High tariffs produced prodigious federal government budget surpluses at the time, which became the basis for an impassioned advocacy by politicians and veterans groups to share that bounty with the men whose service had saved the very federal government enjoying it. See *id.* However, fluctuating economic conditions could produce variations in the amounts of federal revenues collected from tariffs and excise taxes on tobacco and alcohol, resulting in the quick onset of serious federal budgetary shortfalls. See, e.g., Frederic C. Howe, *The Federal Revenues and the Income Tax*, 4 ANNALS AM. ACAD. POL. & SOC. SCIENCE 65, 65-66 (1894) (observing that “an unforeseen commercial depression further embarrassed the administration by causing a marked reduction in the estimated receipts” as “the customs and internal revenue receipts for the same months show a falling off of upwards of twenty million dollars, the difference amounting not infrequently to as much as two millions a week,” and concluding that “[a]ssuming the present diminution to continue throughout the year, the revenues for the fiscal year 1894 will be smaller by over seventy-five millions than those of 1893, and, as compared with the treasury estimates made in 1892 for the same period, the loss will be considerably over one hundred millions”).

¹²³See Skocpol, *supra* n. __, at 113; Blanck & Song, *supra* n. __, at 148-149.

¹²⁴See Skocpol, *supra* n. __, at 114, 116-117.

¹²⁵For a balanced examination of the work of the pension attorneys for Civil War veterans that nonetheless acknowledge and discusses the negative stereotypes, see Blanck & Song, *supra*, at 141-150. The term “ambulance chaser” itself caught on in the 1920s, when the states began to legislate in response to small and solo practitioner efforts to solicit directly traffic accident victims to become their clients. See K.D. Ville, *New York City Attorneys and Ambulance Chasing in the 1920s*, 59 THE HISTORIAN 291 (1996); see, e.g., A. A. Golden, *The Tweedledee and Tweedledum Analysis of Ambulance Chasing*, 22 LAW. & BANKER & CENT. L.J. 5 (January-February 1929); Fred L. Berry, *The Bugaboo “Ambulance Chasing”*, 36 Com. L.J. 237 (1931); see J. Timothy Philibosian, Comment, *To Chasten or Cherish the Chaser: An Ethical Dilemma*, 11 Santa Clara Lawyer 427 (1971). For what appears to be the earliest use of the term in case law, see the opinion of Judge Willard Bartlett for the New York Court of Appeals in *In re Clark*, 77

N.E. 1, 5 (N.Y. 1906), in which the attorney was disbarred. See also *One Step Forward, Two Steps Back: How The New York Appellate Division Slowed The Progress of Judge Cardozo's Effort In MacPherson v. Buick Motor Co. To End Privity's Stranglehold Over Negligence Claims In Product Injury Cases*, 41 *Touro L. Rev.* Issue 1 (forthcoming Winter 2026)(discussing Judge Willard Bartlett's background and judicial view).

CLAIMS! CLAIMS!

This Claim House Estab-
lished in 1865!

GEORGE E. LEMON,

Attorney-at-Law,

OFFICES, 615 Fifteenth St., (Citizens' National Bank.)

WASHINGTON, D. C.

P. O. DRAWER 325.

Pensions.

If wounded, injured, or have contracted any disease, however slight the disability, apply at once. Thousands entitled.

Heirs.

Widows, minor children, dependent mothers, fathers, and minor brothers and sisters, in the order named, are entitled.

War of 1812.

All surviving officers and soldiers of this war, whether in the Military or Naval service of the United States, who served fourteen (14) days; or, if in a battle or skirmish, for a less period, and the widows of such who have not remarried, are entitled to a pension of eight dollars a month. Proof of loyalty is no longer required in these claims.

Increase of Pensions.

Pension laws are more liberal now than formerly, and many are now entitled to a higher rate than they receive.

From and after January, 1881, I shall make no charges for my services in claims for increase of pension, where no new disability is alleged, unless successful in procuring the increase.

Restoration to Pension Roll.

Pensioners who have been unjustly dropped from the pension roll, or whose names have been stricken therefrom by reason of failure to draw their pension for a period of three years, or by reason of re-enlistment, may have their pensions renewed by corresponding with this house.

Desertion

from one regiment or vessel and enlistment in another, is not a bar to pension in cases where the wound, disease, or injury was incurred while in the service of the United States, and in the line of duty.

Land Warrants.

Survivors of all wars from 1790 to March 3, 1865, and certain heirs are entitled to one hundred and sixty acres of land, if not already received. Soldiers of the late war not entitled.

Land warrants purchased for cash at the highest market rates, and assignments perfected.

Correspondence invited.

Prisoners of War.

Ration money promptly collected.

Furlough Rations.

Amounts due collected without unnecessary delay. Such claims cannot be collected without the furlough.

Horses Lost in Service.

Claims of this character promptly attended to. Many claims of this character have been erroneously rejected. Correspondence in such cases is respectfully invited.

Bounty and Pay.

Collections promptly made.

Property taken by the Army in States not in Insurrection.

Claims of this character will receive special attention, provided they were filed before January 1, 1880. If not filed prior to that date they are barred by statute of limitation.

In addition to the above we prosecute Military and Naval claims of every description, procure Patents, Trade-Marks, Copyrights, attend to business before the General Land Office and other Bureaus of the Interior Department, and all the Departments of the Government.

We invite correspondence from all interested, assuring them of the utmost promptitude, energy, and thoroughness in all matters intrusted to our hands.

GEORGE E. LEMON.

Illustration 19— Pension Lawyer Advertising: The 19th Century’s “Ambulance Chasers”¹²⁶

C. Pension Plans for Career Naval Officers

The Civil War pensions gripped the public mind and controlled the contours of the military pension debate from the 1860s through the First World War. However, Moser did not seek benefits from such a plan. He was a career U.S. Navy Officer from his commissioning in 1868 until his retirement in 1904. Thus, there was a pension plan (of sorts) already in existence for career officers like Moser.¹²⁷ However, the basis of this pension was even less secure at times than the Civil War veterans pensions. For some time, Congress restricted pension eligibility to those “injured in the line of duty.”¹²⁸ Later expansions embraced

¹²⁶<https://images.app.goo.gl/VB3hftqS3KjcLhZ4A>
<https://images.app.goo.gl/VB3hftqS3KjcLhZ4A> See *Civil War-Era Veterans’ Benefits*, in V.A. HANDBOOK FOR VETERANS AND ADVOCATES, <https://va-handbook.com/veterans-law-history/civil-war/> <https://va-handbook.com/veterans-law-history/civil-war/> Attorney Georgia Lemon would have been right at home in the entrepreneurial model of law practice being advocated in the 21st century. To keep pension claims coming and his practice growing, he advocated an expansion of the money supply “for paying the pension bill” by “printing Greenbacks.” SKOCPOL, *supra* n. __ at 114. Described as “a prominent Washington [DC] pension attorney” who “always put pensions first,” he was also “a vocal advocate of linking tariffs and pensions” to increase the federal government’s ability to continue to maintain and expand pension benefits for Civil War pensioners. *Id.* His firm “handled tens of thousands of cases.” *Id.* For further commentary on Attorney Lemon and what would later be seen as his excesses and liberties, see McMurry, *supra* n. __, at 26 (“Although Lemon was known to have been concerned in the most unsavory scandals in the pension bureau, and although his activities were repeatedly investigated, he continued his work with impunity.”).

¹²⁷ See, e.g., Robert L. Clark, Lee A. Craig, & Jack W. Wilson, *The Life and Times of a Public-Sector Pension Plan Before Social Security: The U.S. Navy Pension Plan in the Nineteenth Century*, in PENSIONS IN THE PUBLIC SECTOR, Ch. 11, at 241-263 (2001) (Olivia S. Mitchell and Edwin C. Hustead, Eds.)

¹²⁸ *Id.* at 246. Prize monies, however, proved a highly variable source of principal:

Between 1814 and 1828, the plan received a total of \$451,694 from the sale of prizes. Annual revenues from these sales peaked in 1814 at \$150,367 and in 1819 at \$174,848; however, in six of the fifteen years, no revenues were received.

those who became disabled because of age (superannuation) as well as for widows and orphans of service members.¹²⁹ A succession of naval pension plans were inaugurated and maintained primarily from investing in government bonds money from “the sale of prizes captured by the Revolutionary Navy” and captures in later years.¹³⁰ When Congress loosened the investment criteria to permit the statutorily designated commissioners of the fund “to invest fund monies ‘in any manner which a majority of them might deem most advantageous,’”¹³¹ that’s when the real trouble started. Investments in banks that failed along with much tinkering with the plan’s benefits and beneficiaries by Congress lead, ultimately, to a pension plan insolvency, dissolution, and replacement with payments from the general treasury – i.e., from tariffs and excises taxes.¹³² As scholars of the Navy’s 19th century pension plans have observed, “[t]he history of legislation regulating the navy pension

Id. at 250.

¹²⁹ Id. at 250-251.

¹³⁰ See Clark, Craig, & Wilson, *supra* n. __ at 241-253. As the authors there observe:

Given the incentive to defer or backload a certain proportion of a seaman's compensation through pensions, and given the fact that prizes often made up a portion of the crew's current compensation, it was only natural that the two features would be combined and thus that naval pensions would be funded from prize monies. So from its inception the pension plan for naval personnel was designed to be funded from the assets of the plan. In practice, unfortunately, the flow of prize monies did not always match the plan's legislated liabilities. The lack of actuarial assessments linking inflow and outgo of funds, coupled with the political pressures faced by Congress, and its responses to those pressures made for a rather colorful history of the navy pension plan

Id. at 246.

¹³¹ Id. at 246-247.

¹³² Id. at 250-253. The synergies at play lead to an unhappy result:

These defaults and the accompanying reduction in bond prices occurred while the fund was selling securities to meet pension obligations. The value of the plan's portfolio declined from \$253,139 at the end of 1839 to virtually zero by the end of 1841. The only assets remaining in the plan by this time were shares in the Union Bank and Washington Bank, which were almost worthless. So the navy pension plan was dissolved in 1841, and Congress began paying pensions from general tax revenues.

Id. at 253.

plan demonstrates that Congress, at times when plan assets were growing rapidly, choose to expand coverage, often beyond the plan's actuarial capacity. The ultimate result was a shifting of the plan's liabilities to taxpayers."¹³³

The Civil War, however, brought about new opportunities to launch a prize-funded pension plan for the Navy:

From the outset of the war, a primary component of the Union's strategy required blockading the Confederacy. This situation provided both a new cohort of claimants for benefits from the navy pension plan and a large number of potential prizes to finance a new fund. By the middle of the Civil War, navy pension payments had reached \$159,812 and the prizes sent to prize courts since the start of the war were valued at \$13 million. Congress reestablished the navy pension fund, directing Secretary of the Navy Gideon Welles to place half the net proceeds from the sale of prizes into the fund.¹³⁴

¹³³ Id. at 250. An a federal audit of the plan revealed poor management in general:

There was evidence of excess commissions paid to agents for purchasing assets for the portfolios, commingling of agents' funds to pay pensions and manage the portfolio, receipt by agents of dividends and bond coupons that were not remitted to the fund, and failure to make prompt reinvestment of portfolio income flows. These problems were further complicated by the decline of investment opportunities in the national financial markets associated with the paying off of the national debt by 1832[,] and the default by various states on their debt.

Id. at 253 (references omitted).

¹³⁴ Id. at 254. Secretary Welles offered a rosy forecast and a prescription for keeping the forecast rosy:

[The] prize money dedicated as a pension fund, and now accumulating, should be made a permanent investment in registered government securities. Were such the case, it is believed that the annual interest would be sufficient to meet all liabilities for naval pensions. At least two million five hundred thousand dollars can now be invested without interfering with the prompt payment of pensions. I recommend that the fund now on hand be made permanent, and that thereafter, whenever the amount shall reach one hundred thousand dollars, at least one-half shall be invested in registered government securities bearing six per cent interest."

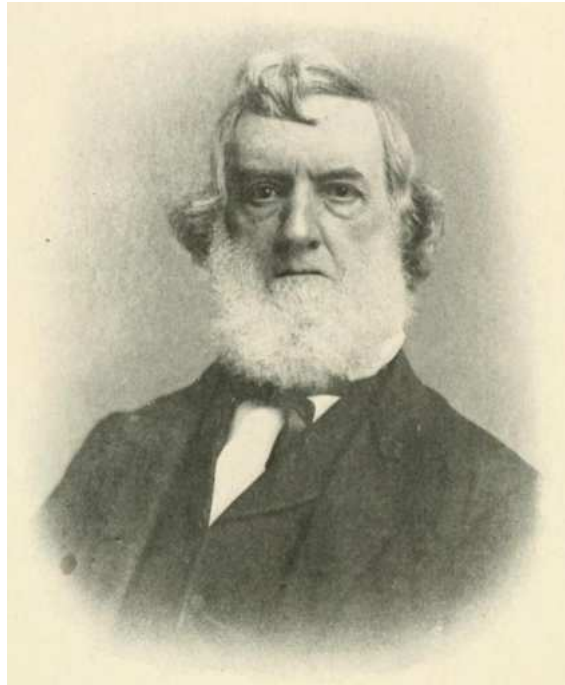


Illustration 20—Gideon Welles, Secretary of the Navy in the Lincoln and Andrew Johnson Cabinets.¹³⁵

But the pensions even for career Naval Officers of the Civil War-era suffered under Congressional tinkering, which, “after lengthy and acrimonious debate” resulted in legislation that “altered the character of the assets held by the plan and in so doing lowered returns from these assets” and thus “fundamentally altered the navy pension plan for the rest of its existence.”¹³⁶ As three scholars of the post-Civil War Navy Pension Plan have described it:

From 1869 until World War I, with the exception of 1891, the U.S. Treasury annually credited the navy pension

Id. at 254.

¹³⁵ 6 JAMES BARNES, *THE PHOTOGRAPHIC HISTORY OF THE CIVIL WAR: THE NAVIES*, at 53 (1911), available at <https://archive.org/details/photographichisto6mill>; see Obituary: *Gideon Welles*, N.Y. TIMES, Feb. 12, 1878.

¹³⁶ Id. at 255-257 (discussing the reduced finances of the Navy Pension plan and constant back filling from the United States treasury, and further observing that “The exact value of the loss imposed on the plan’s assets by the action of Congress is difficult to determine”).

plan \$420,000 (3 percent of \$ 14million). Indeed, the essential features of the plan continued until it was abolished by Congress in 1935. When expenditures exceeded that amount, they were paid from other naval accounts; when they were less, the navy shifted the surplus to other items. In essence, the navy pension plan was a pay-as-you-go system.¹³⁷

The lessons these scholars have drawn from the post-Civil War Navy Pension Plan foreshadow the experience of Moser in the lead up to his decision to retire, and the twenty-year fight to keep the benefits on which he reasonably and foreseeably relied upon to his detriment in deciding to retire when he did:

The history of the U.S. Navy pension plan shows that Congress expanded benefits in response to existing fund surpluses. These actions changed the navy pension plan from one that was intended to be funded to one that was ultimately insolvent. It is clear that the acquisition of private equities exposed the navy pension plan to substantial risk and management problems. Once the downside variability that characterizes such risk became evident, Congress shifted this risk to taxpayers and bailed out the fund on two separate occasions.¹³⁸

It appears that this, in part, led some in Congress to nip and tuck at plan eligibility criteria in an effort to cut its costs to the bone, particularly with the dawn of the 20th century.

D. The Navy Pension Plan Legislation Under Which Captain Moser Retired

The Act of Congress that motivated Captain Moser to retire when he did in 1904 has somewhat obscure origins. It has not been the subject of scholarly study. Nor do there seem to be readily locatable contemporary discussions of the measure – although the author has located a 1943 discussion of Naval officer personnel issues of the era that sheds at least a shaft of light.

¹³⁷ Id. at 257.

¹³⁸ Id.

What we know starts with the record in the Supreme Court case bearing Moser's name.¹³⁹ According the record before the Supreme Court, Moser retired "under the only act then in existence relating to the retirement of officers of the Navy having Civil War service," which provided:

That any officer of the Navy with a creditable record who served during the Civil War shall, when retired with the rank and three-fourths the sea pay of the next higher grade.¹⁴⁰

We learn from *Wood v. United States*¹⁴¹, a case involving a different issue concerning retirement of a naval officer, that the law in question is called "The Navy Personnel Act of 1899," which carried the title "An Act to Reorganize and Increase the Efficiency of the Personnel of the Navy and Marine Corps of the United States."¹⁴² A 1943 book on Roosevelt and his impact on the "Modern Navy" fills in some of the lost provenance. It appears that as Assistant Secretary of the Navy in the McKinley Administration, future President Theodore Roosevelt had pushed for this legislation, to open more promotion slots for junior offices by retiring off – voluntarily and even involuntarily – senior officers who stood in the way (in Roosevelt's view) of promotions of officers who were too long held in the middle ranks.¹⁴³ Today, we would call such

¹³⁹ See generally Transcript of Record supra n. __.

¹⁴⁰ Act of March 3, 1899, § 11, 30 Stat. 1007 (quoted in Transcript of Record, supra n. __, at 3 (Moser's 1922 Petition to the Court of Claims, at 1)).

¹⁴¹ 224 U.S. 132, 132-133 (1912)(White, C.J.). For the Supreme Court's struggle with an issue somewhat closer to the one raised by Moser's case, see *White v. United States*, 239 U.S. 608 (1916)(Holmes, J.).

¹⁴² *Wood*, 224 U.S. at 132-133. For the full text, including the Act's particular name, see *Act of March 3, 1899, The Dreadnought Project*, at http://www.dreadnoughtproject.org/tfs/index.php/Act_of_March_3,_1899

¹⁴³ See Gordon Carpenter O'Gara, Ch. 6 "Naval Personnel", in *THEODORE ROOSEVELT AND THE RISE OF THE MODERN NAVY*, at 94-108 (1943), available at <https://archive.org/details/theodoreroosevelooogar>

O'Gara elaborated on Roosevelt's views that drove the McKinley Administration's position to Congress:

As was mentioned above, the promotion of naval officers presented as large a problem as did their number. Under the act of 1899 promotion was almost entirely by seniority. Captains, commanders and lieutenant-commanders could at any time apply for voluntary retirement. If the casualties for that year had not been over a certain

measures a voluntary retirement plan connected with *Reduction In Force* (RIF).

By 1906, however, Theodore Roosevelt, now President, and others in his Administration came to the view that the 1899 approach wasn't working. "[I]t proved quite inadequate, especially in the face of the enlarged class at Annapolis and the large classes in the higher ranks. Officers spent so long a time in the lower subordinate grades that they never learned to think for themselves."¹⁴⁴ In turn, "[t]hey usually reached command ranks so late that they had lost their youth and ambition and had learned only to obey, not to command."¹⁴⁵ Roosevelt appointed a Naval Personnel Board, which made recommendations, but Roosevelt and his Navy Secretary were emphasis about moving away from the retirement emphasis instead to an increase in slots and promotion emphasis, which would require Congress to approve and fund a significant increase in the officer corps.¹⁴⁶ Roosevelt's Administration sent Congress such a bill; but it went nowhere. Congress did, however,

number, depending upon the rank, the President could place the applicants upon the retired list with the rank and three-fourths of the sea pay of the next higher grade. If these voluntary retirements should not prove sufficient, the Secretary of the Navy was empowered to call a board of five rear-admirals to select a very limited number of officers in each rank for involuntary retirement. Thus there was an elimination system, although extremely limited, designed to assist the flow of promotions. But it proved quite inadequate, especially in the face of the enlarged class at Annapolis and the large classes in the higher ranks. Officers spent so long a time in the lower subordinate grades that they never learned to think for themselves. They usually reached command ranks so late that they had lost their youth and ambition and had learned only to obey, not to command.

Id. (footnotes omitted). Himself only age 40 in 1899, Roosevelt held fast to a strong age bias which would have stung the sensibilities and lived experience of a veteran Naval Officer such as Moser: "Back in 1897 [when Roosevelt served as Assistant Navy Secretary], he had written to [Navy] Secretary Long that above all an officer must be young enough to have dash and decision, and it would be better to "have him err on the side of too much daring rather than too much caution." Id. (footnotes omitted). Evidence that would be eventually cited for Roosevelt's view compared the U.S. Navy to the British (and other) rival navies: "In December 1906 the age of the youngest captain in the American Navy was 55 and the average time spent in that grade was 4.5 years; in Great Britain the youngest captain was 35 and the average time spent in that grade 11.2 years" Id.

¹⁴⁴ Id.

¹⁴⁵ Id.

¹⁴⁶ Id.

consider and, ultimately, approved notable raises for officers.¹⁴⁷

With new financial burdens on the horizon and apparently feeling more penurious about the 1899 retirement incentives in particular—and the general question of Civil War pension obligations in general—the Congress rethought the 1899 Act in 1906, some two years after Captain Moser had retired under the provisions of the 1899 plan, which treated him as having advanced from the rank of Captain to that of Rear Admiral, with a benefit three-quarters of a Rear Admiral's pay. In the Naval Appropriations Act of that year, a clause appears that radically changed things for retirees, like Moser, whose years of service and rank were based on counting his time as a cadet at Annapolis or West Point. The statute doesn't reference the 1899 Act explicitly. Instead, it makes a change retroactively with the insertion of a mere clause, "*otherwise than as a cadet*":

That any officer of the Navy not above the grade of captain who grade on retirement served with credit as an officer or as an enlisted man in the regular or volunteer forces during the civil war prior to April ninth, eighteen hundred and sixty-five, *otherwise than as a cadet*, and whose name is borne on the official register of the Navy, *and who has heretofore been*, or may hereafter be, *retired on account of wounds or disability incident to the service or on account of age or after forty years' service*, may, in the discretion of the President, by and with the advice and consent of the Senate, be placed on the retired list of the Navy with the rank and retired pay of one grade above that actually held by him.¹⁴⁸

¹⁴⁷ Id. O'Gara illuminates the small – but significant to recent retirees such as Moser – accomplishment of all of Roosevelt's pushing and shoving on this issue:

Actually the only real accomplishment was in increasing the pay of the Navy to offer more adequate rewards and to attract more talented men. In June 1906 officers were granted full pay while on shore duty instead of having to take a fifteen per cent pay cut. In May 1908 a general ten per cent raise in pay was voted and any officer who had served thirty years was allowed to retire at the discretion of the President at three-fourths pay.

Id. (footnotes omitted).

¹⁴⁸ Naval Appropriations Act, Pub. L. No. 336, 59th Cong., 1st Sess. Ch. 3590, at 553 (June 29, 1906)(emphases supplied).

There is no extensive discussion of what prompted the inclusion of that phrase “*otherwise than as a cadet*”. Nor is there a discussion of why Congress chose to make this exclusionary phrase apply *retroactively* to those, like Moser, who had already retired under the term of the 1899 Act.¹⁴⁹ The legislative history we do have suggests that rising costs were driving cost-cutting instincts, and the burden seemed to fall most heavily on career officers who retired under the “upgrade” provision.¹⁵⁰

Republican Eugene Hale, senior Senator from Maine, was the most powerful player in naval affairs at the time, sitting as Chair of the Committee on Naval Affairs.¹⁵¹ He had “successfully piloted through

¹⁴⁹ There was, however, a turn in public opinion by 1900 that worked against military pensions: “... the disappearance of the surplus and the development of a militant public opinion against further extravagant pension grants rendered a new pension bait inexpedient.” MARY R. DEARING, *supra* n. 115, at 496. Concomitantly, limiting existing pension obligations would flow from that starting point. In this way, the very public campaigns for Civil War Veterans benefit plans hurt the fledgling retirement plans for career Naval Officers, such as Moser.

¹⁵⁰ To those familiar with the no-cut back rule and vesting requirements created for private-sector pension plans by the Employee Retirement Income Security Act of 1974 (ERISA), see, e.g., Kathryn L. Moore, *An Overview of the U.S. Retirement Income Security System and the Principles and Values It Reflects*, 33 COMP. LAB. L. & POL’Y J. 5, 24-26 (2011) the notion that retirement benefits earned could later be reduced or abolished for someone who had already retired with those benefits will seem surprising. However, absent ERISA statutory provisions, the retirement schemes of Moser’s time left retired employees legally vulnerable. In Moser’s era, the prevailing view in Congress and the courts seemed to be that a military pension was “a mere bounty or gratuity from the Government—just and reasonable, but still a bounty.” Russell L. Johnson, “*Great Injustice*”: *Social Status and the Distribution of Military Pensions after the Civil War*, 10 J. GILDED AGE & PROGRESSIVE ERA 137, 144 (2010). As such, even modern theories of reliance-based protection such as promissory estoppel would not appear to protect such retirees in the absence of a specific federal statute providing for (a) no cuts and (b) vesting of benefits. Cf. *Johnson v. Univ. Health Servs., Inc.*, 161 F.3d 1334, 1340-1341 (11th Cir. 1998) (reliance that is foreseeable for purposes of promissory estoppel is not necessarily reasonable, particularly where the promise alleged is “substantial” but not made in writing). The American promissory estoppel doctrine had 19th century origins in cases such as *Kirksey v. Kirksey*, 8 Ala. 131, 132 (1845) (Ormand, J., dissenting) (“The inclination of my mind, is, that the loss and inconvenience, which the plaintiff [widow] sustained in breaking up [her homestead] and moving [her family] to the defendant’s [her brother-in-law’s farm], a distance of sixty miles, is a sufficient consideration to support the promise, to furnish her with a house, and land to cultivate, until she could raise her family.”).

¹⁵¹ See Stephen Svonavec, *The “Little Navy” Faction in the House of Representatives: Opposition to Naval Expansion 1913-1916*, XVIII THE NORTHERN MARINER/LE MARIN DU NORD 155, 156 (Nos. 3-4, July-Oct. 2005); Congressional Record—Senate, March 29,

the Senate the personnel bill of the Navy, which provided for placing the officers of the civil war on the retired list at one grade higher than that in which they served.”¹⁵² There were others, however, including Senator Henry Cabot Lodge, who had antipathy towards the very concept of Hale’s 1899 bill, which came out in a vigorously argued and heated debate about whether the Army and Navy were being treated with equality as to retirements and other issues:

... my service on the Military Affairs Committee has been an extremely brief one. I went on with some hesitation with regard to subjects on which special knowledge is more or less required. I have been startled, I confess, by the magnitude of the retired list and by the practice which has grown up of taking men from lieutenant-colonels and colonels and making them brigadiers for one day’s service. I am surprised by the extent to which that has been carried, and there is legislation in a House bill which will very largely put a stop to that practice.¹⁵³

Clearly, the mood was afoot in the 1906 Congress to reduce what had been offered to incentivize retirement from 1899-1906. And the mood was ugly enough to make the measure retroactive, not merely prospective, as these remarks by Senator Warren from Wyoming, who reminded Senator Hale that the rounded-up rank retirement had proven much more expensive per capita in the Navy than the Army, though in total, both were costing over \$2 million annually.¹⁵⁴

1906, at 4447. From his years on the Naval Affairs and Senate Appropriations Committees, Senator Hale “was often known as the ‘Owner of the Navy.’” O’GARA, *supra* n. 134, at 31.

¹⁵² Congressional Record—Senate, March 29, 1906, at 4447 (statement of Senator Warren).

¹⁵³ *Id.* at 4450 (statement of Senator Lodge).

¹⁵⁴ *Id.* at 4447 (Statement of Senator Warren). Senator Warren thought it appropriate for the Congress in 1904 to have done for the Army what it had done in 1899 for Navy retirements. *Id.* (“In my opinion, it is the least that a generous country could do for those veterans who had served in the civil war”). That 1904 Act, however, specifically excluded from the rounding –up of rank at retirement those who spent the Civil War as cadets at West Point – “otherwise than as a cadet,” *id.*, the same language we see used in the 1906 Naval Appropriations Act that the federal government argued disenfranchised Moser of his Rear Admiral rank and concomitantly higher pension at retirement.

By excluding Moser's time as an Annapolis midshipman during the Civil War, this 1906 Act deprived him of the 40 years' of service that qualified him for retiring "with the rank and required pay of one grade above" his rank as Captain – i.e., as a Rear Admiral. This proved costly.

E. The Process for Pension Claims By Veterans

1. Antebellum Antecedents

We have become quite used to litigation against the United States government in the federal courts of the United States. However, that was not the original understanding of how claims would be made against the National Sovereign. As Professor Floyd Shimomura explained in a seminal study published some forty years ago, "[d]uring this early period, private claims were regarded as fiscal matters that were the proper and natural province of legislative bodies which maintained control over the public purse-strings. Accordingly, Congress, until as late as the Civil War, received and attempted to determine private claims itself by use of its committee system or congressional bodies subject to its control":

Congress, or bodies subject to its control, determined private claims against the United States from the adoption of the Constitution until the Civil War. In the early days of the republic, claims for money against the United States were regarded as financial questions for Congress and not legal questions for the courts. Private claimants were accustomed to pressing their claims in the legislative hall rather than in the courthouse. Legislative determination of private claims was considered a natural and appropriate legislative function, and state legislatures—as well as Congress followed this practice.¹⁵⁵

¹⁵⁵Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 La. L. Rev. 626, 626-627 (1985). For a more detailed discussion, see *id.* at 643-648. In addition, see also Newell W. Ellison, *The United States Court Of Claims: Keeper Of The Nation's Conscience For One Hundred Years*, 24 Geo. Wash. L. Rev. 251 (1956); William C. Wiecek, *The Origin Of The United States Court Of Claims*, 20 Admin. L. Rev. 387 (1968); Ernest L. Wilkinson, *The United States Court of Claims: Where Uncle Sam Is Always the Defendant* 36 A.B.A. J.

However, the Mexican-American and American Civil Wars changed the burdens and complexities of these problems¹⁵⁶, giving rise to a decision by Congress to delegate some of this authority, because it simply did not have the time and resources to handle the growing numbers of claims itself:

During this transitional period, the public increasingly came to view private claims as legal rather than political matters. However, Congress was reluctant to part with its traditional authority. Therefore, Congress continued to consider claims, particularly tort and moral claims, while gradually authorizing other categories of claims (such as contract and "taking" claims) to be determined by a special Court of Claims or, in limited instances, the regular federal courts.¹⁵⁷

2. Post-Bellum Process: Creation Of The Court Of Claims

After much investigation, debate, and disputation, Congress authorized a "Court of Claims" in 1855 – but gave it only the power to recommend resolutions of claims against the government, which would still remain a dead letter unless or until Congress approved it legislatively.¹⁵⁸ This got the hopes of litigants up, until Congress sat on these decisions without legislatively implementing them, returning the situation to the status quo ante of the pre-Court of Claims era.¹⁵⁹ The situation had reached a crisis by the time President Lincoln pointedly raised it with Congress:

In 1861 President Lincoln, in his annual message to Congress, noted the Civil War and the resulting increase

89, 155 (Feb. 1950).

¹⁵⁶ Shimomura, *supra* note __, at 648-651.

¹⁵⁷ Shimomura, *supra* note __, at 627.

¹⁵⁸ Shimomura, *supra* note __, at 651-653.

¹⁵⁹ Shimomura, *supra* note __, at 653 ("Predictably, all the old problems reappeared. Between 1855 and 1860, the Court of Claims rendered judgments totaling \$529,000. By 1860, Congress had only paid approximately half such amount. This created bitter disappointment among successful litigants and many attorneys considered it no advantage to even submit a claim to such tribunal.")

in the number of claims.

He bluntly told Congress it was time for major reform.
... Lincoln said:

It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals. The investigation and adjudication of claims, in their nature belong to the judicial department; besides, it is apparent that the attention of Congress will be more than usually engaged, for some time to come, with great national questions.

Lincoln urged Congress to make the judgments of the Court of Claims final, subject to the right of appeal to the Supreme Court.¹⁶⁰

After further arguments, debates, discussions, and compromises – including concerns over constitutionality and the English inheritance of the “sovereign can do no wrong” notion, Congress settled on the Court of Claims as we have come to know it.¹⁶¹

Of particular relevance to Jefferson Moser, the Court of Claims became the place for those who had been granted pensions under Acts of Congress to litigate whether retirement pay was being paid correctly under the terms of the Act.¹⁶² This was clearly distinguished from the

¹⁶⁰ Shimomura, *supra* note __, at 655 (quoting Cong. Globe, 37th Cong., 2d Sess. app. 1-4 (1862)). John Quincy Adams preceded Lincoln in seeing the need for such a court, as recorded in an 1832 diary entry. See Wiecek, *supra* note __, at 392 & note 8 (“There ought to be no private claims before Congress. ... It is judicial business, and legislative assemblies ought to have nothing to do with it.”).

¹⁶¹ _____); William C. Wiecek, *The Origin Of The United States Court Of Claims*, 20 Admin. L. Rev. 387, 398-406 (1968).

¹⁶² Judson A. Crane, *Jurisdiction of the United States Court of Claims*, 34 HARV. L. REV. 161, 163, 167-168 (1920). During the 1880s and 1890s, “[i]f a given applicant did not feel that his or her case had been correctly processed by the Pension Bureau, or if he or she thought that things were moving too slowly or that existing statutes did not quite cover the special merits of the case, a petition to a congressional representative might result.” Skocpal, *supra* n. __, at 121-122. Correspondence between Congressmen and the

determining whether one had a right to any pension, or to setting the amount of pension¹⁶³, which was viewed as beyond the province of the Court of Claims' jurisdiction, and to remain as a matter of legislative discretion.¹⁶⁴ By contrast, "[r]etirement pay, on the other hand, is a continuation of active pay on a reduced basis. Even though an officer is retired from active duty and is receiving retirement pay, he is still subject

Pension Bureau ballooned from 40,000 in 1880 to 94,000 in 1888, and peaked at 151, 817 in 1891 – an average in excess of 500 “for each working day.” Skocpol, *supra* n. ___, at 122. And in those cases where the Pension Bureau and the Secretary of the Interior, to whom the Bureau reported, ruled against applicants, Congressmen sponsored “private pension bills” to add applicants to the roll or increase their benefits. *Id.* In the Forty-Ninth Congress alone (1885-1887) “40 percent of the legislation in the House and 55 percent in the senate consisted of special pension act.” *Id.* When Congresses of that area were in session, Friday nights were customarily “pension nights” where private pension bills were passed by general consent, often in the absent of a quorum. *Id.* “When special pension bills were enacted at the highest rates in the early twentieth century, most raised the rates for individuals that congressional representatives found especially meritorious, even though these applicants’ situations fell outside of existing statutes.” *Id.* at 123. After President Garfield appointed a Colonel Dudley as Pension Commissioner in 1881, Dudley found political gold when his Department compiled statistics that showed “over a million living Union veterans and almost 87,000 pensionable relatives had not yet applied for benefits” and that “two-fifths of existing pensioners” – including over half of the 300,000 claims pension claims pending – “came from the electorally crucial states of Illinois, Indiana, New York, Ohio, and Pennsylvania.” *Id.* Dudley further collaborated with the GAR “to draw up lists of potentially eligible veterans in each state” and “made lists of veterans’ addresses available to new applicants so that they could locate witnesses.” *Id.* There were other examples of using “the pension bureaucracy in a partisan fashion” in order “to create an enduring alliance with ex-soldiers and build a national political machine.” *Id.* at 124.

¹⁶³ Indeed, the Waite-era Supreme Court ruled that a federal “pensioner can claim a vested legal right to his pension, but that pensions are the bounty of the government, which Congress has the right to give or recall, increase or diminish, at its discretion.” WILLIAM H. GLASSON, *FEDERAL MILITARY PENSIONS IN THE UNITED STATES* at 1 n. 1 (1918)(citing *United States v. Teller*, 107 U.S. 64 (1883)).

¹⁶⁴ Crane, *supra* n. 64, at 163, 167-168.. Although the 1887 Tucker Act explicitly excluded “pensions” from the Court of Claims’ jurisdiction, see Crane, *supra*, 34 Harv. L. Rev. 168 & n. 40, this exclusion was subsequently construed “not to bar a suit for military retired pay.” John Daniel Meader, *Judicial Determinations Of Military Status*, 72 YALE L.J. 1293, 1296 & n. 19 (1963)(“ Suits for monetary benefits stemming from military status are based on the legislation authorizing the benefits and come under” 28 U.S.C. § 1491, “which provides that ‘The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department.’” *Id.* Although the Tucker Act, as later codified at 28 USC §1501, “provided that ‘[t]he Court of Claims shall not have jurisdiction of any claim for a pension,’ this has been construed not to bar a suit for military retired pay.” *Id.* (citing *Lemly v. United States*, 109 Ct. Cl. 760, 75 F. Supp. 248 (1948)).

to call to active duty as long as his physical condition will permit. He is still an officer in the service of his country even though on the retired list.”¹⁶⁵ Under that rationale, the Court of Claims “considered claims for retirement pay over a long period of time.”¹⁶⁶

IV. JEFFERSON MOSER’S LEGAL BATTLE FOR THE FULL PENSION BENEFITS AND RANK HE WAS PROMISED UPON RETIREMENT

It appears that after Moser retired in 1904, the government soon began to deny him both his full retirement rank of Rear Admiral, and to his full pension benefits in accordance with that rank.¹⁶⁷ He periodically sought the arrears in actions, after further application for correction of benefits, and persistent denials:

¹⁶⁵ Lemly v. United States, 109 Ct. Cl. 760, 762, 75 F. Supp. 248, 250 (1948).

¹⁶⁶ Id.

¹⁶⁷ The most detailed discussion of how this came to pass appears in a mandamus suit that Moser’s lawyers filed in 1911. See n. [155], *infra*. It appears that the Acting Secretary of the Navy in 1904 “being of the opinion that service in the Naval Academy was not service ‘during the Civil War,’ recommended to the President that the relator be placed upon the retired list of the officers of the Navy” but not “with the rank and three fourths the sea pay of the next higher grade” to which Moser would otherwise have been entitled. See U.S. ex rel. Moser v. Meyer, 38 App. D.C. 13, 14-15 (D.C. Ct. App. 1912). The Navy Secretary position was in flux at the time, with a change from William H. Moody, who left to become President Theodore Roosevelt’s Attorney General, and railroad executive William Morton, who was soon forced to resign over financial scandal that arose out of his tenure at the Santa Fe Railroad. See Paul T. Heffron, *Theodore Roosevelt and the Appointment of Mr. Justice Moody*, 18 VANDERBILT L. REV. 545, 556 (1965);

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These arrears add up to a sum of \$15,803.44. But that doesn't tell the whole story.

If we convert¹⁶⁸ the arrears at the time they accrued to 2025 U.S. dollars, we have:

Arrears Accumulated	Dates of Service	Arrears in 2025 \$
\$2,587.50	September 29, 1904-December 31, 1906 ¹⁶⁹	\$91,421.19
\$5,843.73	January 1, 1907-February 9, 1914 ¹⁷⁰	\$187,855.47
\$3,101.38	February 10, 1914-December 31, 1917 ¹⁷¹	\$77,889.46
\$0.00	<i>World War I active duty January 1, 1918 - June 15, 1919</i> ¹⁷²	\$0.00
\$4,270.83	June 16, 1919 - March 15, 1923 ¹⁷³	\$80,287.86
Total \$15,803.44		Total \$437,453.98

Thus, the total arrears sought—and collected—by Moser's lawyers on his behalf amount to \$437,453.98 in 2025 dollars. Borrowing from an old idiom particularly popular among American lawyers, "the game *was* worth the candle."¹⁷⁴

And in choosing a lawyer, Moser chose wisely in this fight: Washington, D.C. attorney George A. King of the firm then known as King & King. Just as Moser's professional career as a Naval Officer was born out of the Civil War, so, too, was the law practice of George A.

¹⁶⁸ Using the online conversion tool found at <https://www.officialdata.org/us-economy>

¹⁶⁹ Moser v. United States, 42 Ct. Cl. 86, 88, 94 (1907); see Moser v. United States, 58 Ct. Cl. 164 (1923).

¹⁷⁰ Moser v. United States, 49 C. Cl. 285, 294 (1914); see Moser, 58 Ct. Cl. at 164.

¹⁷¹ Moser v. United States, 53 Ct. Cl. 639 (1918); see Moser, 58 Ct. Cl. at 165. This third Court of Claims action won by Moser resulted in single-line memorandum opinion documenting the result: "Opinion: Additional pay, naval officer, \$3,101.38." 53 Ct. Cl. at 639.

¹⁷² See *id.*

¹⁷³ *Id.*

¹⁷⁴ See, William McGeeveran, *The Trademark Fair Use Reform Act*, 90 B.U. L. REV. 2267, 2282 n.63 (2010)(explaining the meaning and origins of the favorite idiom among lawyers and judges, "the game isn't worth the candle"); see, e.g., State v. Lehre, 41 S.C.L. (7 Rich.) 234 (S.C. App. L. 1854)(early example of judges' fondness for the idiom); *Helvering v. Schine Chain Theaters*, 121 F.2d 948, 950 (2d Cir. 1941)(L. Hand, J.); *Kansas v. Ventris*, 556 U.S. 586, 593 (2009)(Scalia, J.). Westlaw reveals 299 cases in which this idiom (or a variant) is employed.

King and King & King. “King & King was organized in 1866 in Washington D.C. The nature of its practice at that time principally involved litigation against the United States arising out of government contracts entered into during the Civil War.”¹⁷⁵ The firm’s evolution from the early days of Reconstruction lent it a particular expertise – representing private litigants in the U.S. Court of Claims – that made it the ideal choice for someone with Moser’s dispute:

The firm, when first organized in 1866 bore the name of Sanborn & King. Its original partners were General John B. Sanborn and Charles King, both Minnesotans, who came to Washington, D.C. as part of their Civil War service. The nature of the firm’s practice involved the resolution of claims brought by private parties seeking compensation from the federal government for goods and services provided to the Union Army.

In 1880, when the legal work related to the Civil War had largely run its course, General Sanborn retired from the firm and returned to Minnesota. George A. King, the eldest son of Charles King entered the practice and the firm name was changed to Charles and George A. King. Charles retired in 1899 and the practice was continued by his two sons, under the firm name of George A. King and William B. King. In 1910, the firm’s name was simplified to King & King.¹⁷⁶

¹⁷⁵ King & King, LLP: *Counselors To The Construction Industry Since 1866*, <http://www.king-king-law.com/k6.html> (visited in 2017).

¹⁷⁶ Id. Attorney King had enough work to do in his specialized practice before the U.S. Court of Claims that he used form letters to associate counsel for particular matters, such as depositions taken of King’s clients by Government attorneys, as shown by this example from 1892 held in the Virginia Tech archives. See Letter, from Attorney George A. King Regarding Bosworth claim, Court of Claims, August 24, 1892 (Ms2010-060), VT SPECIAL COLLECTIONS AND UNIVERSITY ARCHIVES ONLINE, https://digitalsc.lib.vt.edu/Ms2010-060/Ms2010_060_BosworthSquires_CourtofClaims_1892_0824/2681 (digitized from Squire Bosworth Papers, Ms2010-060 - Special Collections, Virginia Polytechnic Institute and State University). He authored several scholarly articles and a book on specific categories of cases brought before the U.S. Court of Claims. See, e.g., GEORGE A. KING, *THE FRENCH SPOILIATION CLAIMS* (U.S. Gov’t Printing Office 1916); George A. King, *French Spoliation Claims*, 6 AM. J. INT’L L. 830 (1912); George A. King, *Liability of the United States for Use of Patented Inventions; with Special Reference to the Act of*

George A. King was a tireless champion for his clients, and Moser was no exception. One wonders how much of Moser's pension recovered pension benefits were offset by legal fees. In the beginning of the representation, however, the length of the struggle would not have been apparent. Having won a claim for his pension at full (Rear Admiral) rank, the matter should have been done.¹⁷⁷ But for motivations that have been obscured in the mists of time, the Executive Branch continued to fight the pensioners, including Moser, well into the 20th century. Even after winning in the Court of Claims in 1906, the Secretary of the Navy continued to deny Moser's further accrual of pension pay at the Rear Admiral rank, and forced him again into litigation.¹⁷⁸ To justify the Department's continued obstinacy, the Secretary of the Navy sought a self-serving opinion from President Taft's Attorney General, George Wickersham¹⁷⁹, who obliged in 1910:

Congress Entitled, an Act to Provide Additional Protection for Owners of Patents of the United States, and for Other Purposes - Approved June 25, 1910, 33 ANN. REP. A.B.A. 851 (1910); see also Henry Cox, A Nineteenth-Century Archival Search: The History of the French Spoliation Claims Papers, 33 AM. ARCHIVIST 389, 389 n.1 (Oct. 1970) (noting that King's 1910 article on the French Spoliation Cases "is a good summary of the legislative handling of the claims through the Court of Claims Act of 1885").

¹⁷⁷ See *Moser v. United States*, 42 Ct. Cl. 86 (1907).

¹⁷⁸ See *Moser v. United States*, 49 C. Cl. 285, 294 (1914).

¹⁷⁹ Wickersham, once a dominating mover and shaker in the New York bar and among influential fellow Republicans in New York and Washington, see *George W. Wickersham Who Is to Be Taft's Attorney General*, 17 LAW STUDENTS HELPER 83 (1909), has faded from the collective consciousness of the practicing bar. His name, though, lives on in the elite New York City firm he joined and in which he became a senior partner, Cadwalader, Wickersham & Taft LLP. See <https://www.cadwalader.com/about/>; see also the firm's history timeline at <https://www.cadwalader.com/about/history>. Wickersham had "practiced law in Philadelphia and continued to do so until 1882," when he "then moved to New York City and worked at the old, prestigious law firm of Strong and Cadwalader, where he became an associate of the President's brother, Henry Taft." *George W. Wickersham*, UVA MILLER CENTER, at <https://millercenter.org/president/taft/essays/wickersham-1909-attorney-general>. His Taft Administration record shows support for the rights of an African American Assistant Attorney General in Wickersham's Department, William H. Lewis, who sought membership in the American Bar Association over fierce opposition from Southern members, but also, post-government service, antisemitism towards the nomination of Louis Brandeis to the U.S. Supreme Court. Compare, e.g. Evan Albright, *Three Lives of an African American Pioneer: William Henry Lewis (1868-1949)*, 13 MASSACHUSETTS HISTORICAL REVIEW 127 (2011), with BRUCE AFRAN & ROBERT A. GARBER, *JEWS ON TRIAL*, at 157-158 (2005). In his day, Wickersham frequently published articles in law reviews and the ABA Journal, commenting upon the legal and social issues of the day. See, e.g., *Federal Control of*

Captain Moser was placed on the retired list with the rank he then held on September 29, 1904, on his own application after forty years' service. If he had served during the civil war within the meaning of section 11 of the personnel act of March 3, 1899 (30 Stat. 1007), he was entitled when retired to 'be retired with the rank and three-fourths of the sea pay of the next higher grade.' On September 29, 1864, he was appointed a midshipman at the Naval Academy, and was there continuously until after the close of the civil war. The Navy Department held that his service as a student at the academy was not service during the civil war; and that therefore he was not entitled to increased rank under the personnel act. But in a suit brought by Captain Moser for salary of the increased rank, the Court of Claims decided that 'service as a midshipman at the Naval Academy from the date of his appointment thereto until the close of the rebellion was service 'during the civil war,' within the intent and meaning of section 11 of said Navy personnel act, and he was therefore entitled to have been retired with the rank and three-fourths of the sea pay of the next higher grade.'¹⁸⁰

The Attorney General hitched his argument to a statute which the government had failed to raise, but, the Attorney General insisted, could now be relied on to justify a renewal of the Department's refusal to make continued payments at the Rear Admiral rank:

At the time of this judgment there was in existence another law, the act approved June 29, 1906, which had not

Interstate Commerce, 23 Harv. L. Rev. 241 (1909); New States and New Constitutions, 21 Yale L.J. 1 (1909); The Judicial Function, 60 U. Pa. L. Rev. 601 (1911-1912); Moral Character of Candidates for the Bar, 9 A.B.A. J. 617 (1920); The Police Power and the New York Emergency Rent Laws, 69 U. Pa. L. Rev. 301 (1921); Codification of International Law, 11 ABA J 664 (1925); The American Law Institute and the Projected Restatement of the Common Law in America, 43 L. Q. REV. 449 (October 1927). His work on a national law enforcement commission created by the Hoover Administration produced a lengthy published report, THE WICKERSHAM COMMISSION, REPORT OF THE NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT (1931); see Franklin E. Zimring, Barrock Lecture: *The Accidental Crime Commission: Its Legacies And Lessons*, 96 MARQ. L. REV. 995 (2013)(critiquing the Wickersham Commission).

¹⁸⁰ Naval Officers—Rank & Pay of Captain Jefferson F. Moser., 28 U.S. OP. ATTY. GEN. 352 (1910)

been considered in the case. That law provided (34 Stat. 554):

‘That any officer of the Navy not above the grade of captain who served with credit as an officer or as an enlisted man in the regular or volunteer forces during the civil war prior to April ninth, eighteen hundred and sixty-five, *otherwise than as a cadet*, and whose name is borne on the official register of the Navy, and who has heretofore been, or may hereafter be, retired on account of wounds or disability incident to the service or on account of age, or after forty-years’ service, may, in the discretion of the President, by and with the advice and consent of the Senate, be placed on the retired list of the Navy with the rank and retired pay of one grade above that actually held by him at the time of retirement: Provided, That this act shall not apply to any officer who received an advance of grade at or since the date of his retirement or who has been restored to the Navy and placed on the retired list by virtue of the provisions of a special act of Congress.’¹⁸¹

Wickersham’s view of the law of claim and issue preclusion was a decidedly 19th century one. He relied heavily on Justice Stephen J. Field’s opinion in *Cromwell v. County of Sac*,¹⁸² to frame the law in a

¹⁸¹ Id. at 353-354 (emphasis added).

¹⁸² Id. at 354 (citing *Cromwell v. County of Sac*, 94 U. S. 351 (1876)). *Cromwell* was a main case in the Cound et al. casebook the author referenced in the Introduction, *supra*. See JOHN J. COUND, ET AL., *supra* n. 3, at 1207. Field’s turgid prose and suffocating formality, combined with the obscurity of the subject matter (municipal bound coupons of the 19th century!), made it one of the most difficult cases to teach of any in an already difficult casebook, as the authors concede, see JACK H. FRIEDENTHAL, ARTHUR R. MILLER, JOHN E. SEXTON, & HELEN HIRSHKOFF, *TEACHER’S MANUAL TO CIVIL PROCEDURE: CASES AND MATERIALS*, at 313 (West Am. Casebook Series 11th ed. 2013) (“This case is a classic but the students may find its factual context difficult to comprehend.”), although Field’s (in)famous opinion in *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714 (1877), runs it a close second. JOHN J. COUND, ET AL., at 62; see also Charlene Ochogo, *The Cases We Read: Pennoyer v. Neff*, BC LAW IMPACT, Sept. 18, 2016, at

manner that suited the Navy Secretary's position in Moser's case, writing "[t]hat the judgment in the case decided upon the merits is a bar to all further litigation of the same demand is indisputable. All controversy upon that is closed. Its validity can not [sic] be contested, no matter what might have been said at the trial for or against it. *But it is conclusive only upon such matters as were litigated and determined in the action. Parties are not estopped by a judgment in one cause of action from disputing in another cause of action the doctrines of law applied to the first.*"¹⁸³ Wickersham's argument continued:

And so, in a suit between the same parties, upon another although similar cause of action, the parties are not precluded from contesting the constitutionality or existence and force of a statute which was not alluded to or brought to the attention of the court in the former suit.¹⁸⁴

<https://bclawimpact.org/2016/09/18/the-cases-we-read-pennoyer-v-neff/>
<https://bclawimpact.org/2016/09/18/the-cases-we-read-pennoyer-v-neff/> (describing Pennoyer as inducing "Fear? Loathing? Confusion?"). The author himself drew the short straw in his Fall 1984 Civil Procedure course when he was cold-called to stand and deliver about this thicket of a case.

Although his act must suffer the most severe disapprobation and condemnation as outside all bounds of a lawful society, one can understand how reading Field's prose could drive a law students and lawyers to the brink of madness that gripped one of Field's professional and political rivals in California, David Terry. As described in an article on Justice's Field's *Personal Reminiscences of Early Days in California*:

Justice Field's friend and former court clerk George C. Gorham added a detailed account of the attempted assassination of Fields by former California Associate Justice David S. Terry in 1889. Terry was shot to death by Field's deputy marshal bodyguard as Terry tried to bludgeon Field at a dining station in Lathrop, California. Terry had served with Field on the California Supreme Court and later became a sworn enemy of his colleague.

James Marchiano, *Justice Stephen J. Field's Personal Reminiscences, Remembered*, CAL. SUP. CT. HIST. SOC'Y NEWSL., at 10 (Spring/Summer 2011). Field was the last, and longest-serving, of President Lincoln's Supreme Court appointees. See, e.g., BRIAN MCGINTY, LINCOLN AND THE COURT (2008); Abraham Lincoln's Supreme Court, at <https://www.abrahamlincolnonline.org/lincoln/education/supreme.htm>.

¹⁸³ Naval Officers—Rank & Pay of Captain Jefferson F. Moser., 28 U.S. Op. Atty. Gen. 352, 354 (1910)(citing, *inter alia*, Cromwell v. County of Sac, 94 U. S. 351 (1876)).

¹⁸⁴ *Id.* at 355.

Wickersham shifted his focus to Moser's case, and opined that "the exact question decided by the Court of Claims in the case of Captain Moser is not presented in a later case brought upon a similar cause of action," *because*, Wickersham argued, "[w]hat was decided was that the officer was entitled to pay for a certain specified time."¹⁸⁵

Accordingly. Wickersham advised the Navy Secretary that "[a]dmitting that the rank and pay are correlative, and that the right to one is the same as the right to the other, ... the Secretary of the Navy is [not] estopped, by the judgment heretofore rendered, from refusing to place Captain Moser's name 'in the Navy Register in the list of officers in the Navy retired with the rank of rear admiral.'"¹⁸⁶



Illustration 21—George W. Wickersham, 47th U.S. Attorney General (1909-1913), photographed in 1929.¹⁸⁷

Moser was left with choice that many an American naval commander has faced – fight, as John Paul Jones had done¹⁸⁸; or

¹⁸⁵ Id. (emphasis supplied)

¹⁸⁶ Id. (emphasis supplied)

¹⁸⁷ Underwood & Underwood, Jan. 3, 1929 (available from the United States Library of Congress's Prints and Photographs division; digital ID cph.3b3o281)(public domain).

¹⁸⁸ SAMUEL ELIOT MORISON, JOHN PAUL JONES: A SAILOR'S BIOGRAPHY, at 231, 240, 416 (1959). A once perfectly acceptable reference, the author uses it here with hesitation, given that contemporary revelations about Jones' later conduct in Moscow while in the service of Empress Catherine the Great shows another side of Jones that will pass no muster in our times. Compare JOHN HENRY SHERBURNE, THE LIFE AND CHARACTER OF JOHN PAUL JONES: A CAPTAIN IN THE UNITED STATES NAVY

surrender. Given that he (a) apparently had the financial resources and (b) *certainly* had the requisite indomitable spirit, Moser chose to *fight*.¹⁸⁹

DURING THE REVOLUTIONARY WAR (1851); WALTER CHARLES BROWN, JOHN PAUL JONES OF NAVAL FAME: A CHARACTER OF THE REVOLUTION (1902) with Jacob Bell, “Я Тоже:” *The Rape of Katerina Stepanova and John Paul Jones’ Russian Legacy*, 7 PAST TENSE: GRADUATE REVIEW OF HISTORY 42, 50 (2019) (“Compared to the twenty-first century, [Jones’ own] words still invoke the same defenses used by those accused of sexual assault,” such as Jones’ 1789 letter in which “Jones first asserted that Katerina and her mother were lying, then proceeded to accuse Katerina of being a whore and frequent visitor to his bedchamber, remarking he always paid her well.”); see JAMES A. MCKAY, I HAVE NOT YET BEGUN TO FIGHT: A LIFE OF JOHN PAUL JONES, at 153, 286-287 (1998).

¹⁸⁹ Moser’s resolve attracted the attention of the New York Times. See *SUES TO BE AN ADMIRAL*; *Capt. Moser, Not Advanced When He Was Retired, Complains*, N.Y. Times, Feb. 5, 1911, at 16, available at <https://www.nytimes.com/1911/02/05/archives/sues-to-be-an-admiral-capt-moser-not-advanced-when-he-was-retired.html>. It appears Moser’s lawyers attempted an end-run around the repetitive Court of Claims process by using the common-law writ of mandamus to compel the Navy Secretary to recognize his higher retirement rank under the 1899 law. See *id.* As the Times summarized:

Proceedings in mandamus against George Von L. Meyer, Secretary of the Navy, were instituted in the Supreme Court of the District of Columbia to-day by Jefferson F. Moser of California, a retired officer of the navy. He seeks to compel the Secretary to place his name on the official register of the navy as a Rear Admiral on the retired list instead of with the rank of Captain, retired, as he is now designated. The officer complains to the court that despite a decision of the United States Court of Claims that he is and has been since Sept. 29, 1904, entitled to the rank and emoluments of a Rear Admiral on the retired list, Mr. Meyer refused to recognize him as of the higher grade.

Id. The mandamus action was unsuccessful. See *U.S. ex rel. Moser v. Meyer*, 38 App. D.C. 13 (D.C. Ct. App. 1912) (ruling that the relief sought by Moser was not a ministerial action of the Navy Secretary and therefore not available by way of mandamus). Similar mandamus actions filed by other litigants against Meyer over naval retirements failed as well. See *U.S. ex rel. Foreman v. Meyer*, 38 App. D.C. 472 (D.C. Cir. 1912). The result is not surprising, given a ruling nearly 30 years before that such matters as “[t]he relative rank of officers of the Navy is a subject within the control and direction of the Secretary of the Navy, and cannot be interfered with by mandamus.” See *U.S. ex rel. Hall v. Whitney*, 5 Mackey 370, 16 D.C. 370, 1887 WL 12674 (D.C. Superior Ct. Jan. 10, 1887). The Navy Secretary in question here bore the cumbersome name of George von Lenge Meyer, and was a prominent Boston brahmin and New England conservative, as well as a Germanophile. See Keith W. Olson, *Book Review, Patrician in the Progressive Era: A Biography of George Von Lengerke Meyer*, 76 J. Am. Hist. 1294 (1990). The father of Justice Holmes’ biographer, Mark DeWolfe

Moser sued the government for arrears and rank and won judgments in 1914¹⁹⁰, 1918¹⁹¹, and 1923.¹⁹² In this interim period, the Naval Bureau of Navigation finally recognized Moser's time as a Midshipman as constituting Civil War service with a medallion, which was transmitted to him inscribed with the retirement rank for which he'd been arguing since 1904:

Howe, wrote an uncritically laudatory biography of Meyer. See M.A. DEWOLFE HOWE, *GEORGE VON LENGERKE MEYER: HIS LIFE AND PUBLIC SERVICES*, at 422-492 (1919), available at <https://archive.org/details/georgevonlengerkooohowe/page/n9/mode/zup> (a hagiography of Meyer's service as Secretary of the Navy). Among other things, Howe describes Meyer's luncheon with Kaiser Wilhelm II, his War Minister, and other military types on the Emperor's yacht in 1913—a mere year before World War I was to come ablaze. See *id.* at 495-503. Blatant conflicts of interests in Presidential Cabinets were as alive and well a century ago as they are today. And the President then appeared just as insensible to them.

¹⁹⁰ Moser v. United States, 49 C. Cl. 285 (1914).

¹⁹¹ Moser v. United States, 53 Ct. Cl. 639 (1918).

¹⁹² Moser v. United States, 58 Ct. Cl. 164 (1923).

N. Nav. 466.

Address Bureau of Navigation, Navy Department,
and refer to No. 33211-IRB



WASHINGTON, D. C.,

1 November, 1923.

Sir:

The Bureau transmits herewith a Civil War Badge (No. 2463) conferred upon you in accordance with the provisions of an Act of Congress approved May 13, 1908, directing the preparation and distribution of badges to the officers and men of the Navy and Marine Corps of the United States who participated in engagements and campaigns deemed worthy of such commemoration.

The badge issued to you is in recognition of your services on board the U.S.S. during the Civil War.

For the purpose of identification this badge is marked with a number on the rim, which is recorded. The Bureau authorizes you to also engrave on the rim of this badge your name, rank at that time, and the name of the vessel to which you were attached.

Please sign and return to the Bureau the receipt attached below.

Very respectfully,

A.T. Long.
Chief of Bureau.

Captain
J.F. Moser, U.S.N. (Ret).
2040 Santa Clara Ave.,
Alameda, Calif.

H.H. Good.
By direction.

(Enclosure).

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In reply address not the signer of
this letter, but Bureau of Navigation,
Navy Department, Washington, D. C.
Refer to No. 3804-73

NAVY DEPARTMENT
BUREAU OF NAVIGATION
WASHINGTON, D. C.


1 November, 1923.

From: Bureau of Navigation.
To: Captain
J.F. Moser, U.S.N. (Retired),
2040 Santa Clara Avenue,
Alameda, California.
SUBJECT: Civil War Medal.

1. Inasmuch as you were appointed a Midshipman on April 15, 1861 and served continuously in said grade until April 9, 1865, when you were appointed to the grade of Ensign, you are entitled to a Civil War Campaign Badge in accordance with a decision of the Judge Advocate General in the case of Commodore Richard D. Davenport, U.S.N., Retired.

2. A Civil War Campaign Badge is forwarded herewith.

A.T. Long.
Chief of Bureau.


H.H. Good.

Enclosures.



Illustration 22—Correspondence and Enclosed Medallion, November 1922, from U.S. Navy Bureau of Navigation to Ret. Rear Admiral Jefferson F. Moser¹⁹³

Yet, the government was not done trying to thwart Moser.

After the 1923 loss in the Court of Claims, the government decided to take an appeal from the Court of Claims to the United States Supreme Court, where the case was argued October 21, 1924 – and the Court’s decision issued less than a month later, on November 17, 1924.¹⁹⁴ It was less than a week after Commerce Secretary Herbert Hoover, on behalf of President Coolidge, delivered an Armistice Day speech on November 11, 1924, two years before Congress finally recognized it as a federal holiday.¹⁹⁵

¹⁹³Posting by Epsom Green, U.S. MILITARY FORUM, March 5, 2025, at <https://www.usmilitariaforum.com/forums/index.php?/topic/257505-rear-admiral-jefferson-f-moser-civil-war-s-a-war-ww-1/>. As the poster observed, not only did “[t]he added service time entitl[e] Captain Moser to retire as a Rear Admiral and receive the pension thereof (the true purpose of the appeal),” it also entitled him to “his Civil War Campaign Medal, transmitted by the Bureau of Navigation on 1 November 192[2],” which “has to be one of the last traceable medals of its kind.” Id.

¹⁹⁴ Moser v. United States, 266 U.S. 236, 236 (1924).

¹⁹⁵ Matthew Schaefer, *Hoover: Armistice Day and Veterans’ Day*, NAT’L ARCHIVES (Nov. 10, 2021), at <https://hoover.blogs.archives.gov/2021/11/10/hoover-armistice-day-and-veterans-day/>. Hoover was so active across the Harding and Coolidge Administrations that he earned the moniker, “Secretary of Commerce and Under-Secretary of all other departments.” WILLIAM E. LEUCHTENBURG, HERBERT



Illustration 23—The Taft Court, photographed in 1925. Front Row: Justices McReynolds and Holmes, Chief Justice Taft, Justices VanDevanter and Brandies. Back Row: Justices Sanford, Sutherland, Butler, and Stone.¹⁹⁶

The Supreme Court that heard the government’s appeal was not the natural ally of the veteran. Indeed, the Taft Court cut a figure that defines an overall regressive era with occasional and idiosyncratic punctuations of light.¹⁹⁷

HOOVER, at 53-63 (2009).

¹⁹⁶ See *In Long-Awaited Volume, Professor Robert Post Tells Story of Taft Court in its Own Time*, YALE LAW SCHOOL, Jan. 23, 2024, at <https://law.yale.edu/yls-today/news/long-awaited-volume-professor-robert-post-tells-story-taft-court-its-own-time> (crediting the Library of Congress for the photograph).

¹⁹⁷ The most detailed and thorough account of the Taft Court is found in the long-awaited Volume 10 of the Oliver Wendell Holmes Devise History of the Supreme Court, see *id.*, which was published in 2023. See generally ROBERT POST, *THE TAFT COURT: MAKING LAW FOR A DIVIDED NATION, 1921-1930* (2023)(2 volumes; hereinafter citations are to Volume 1).

Chief Justice Taft assigned the opinion in *Moser* to one of the court's three most recently appointed Justices, George Sutherland.¹⁹⁸

¹⁹⁸ 266 U.S. at 239. President Harding had three vacancies arise on the Court during the last five months of 1922. Justices Sanford and Butler were only a few months junior to Sutherland. All three were appointed by President Harding: Sutherland was confirmed in September 1922; Butler, in December 1922; and Sanford, in January 1923. See ROBERT POST, *supra* n. __, at 38-39, 63-64, 90-91. The *Moser* case was decided November 17, 1924. See 266 U.S. 236. A post-Presidency, post-stroke, and irascible Woodrow Wilson wrote in September 1922 to recently retired Justice John A. Clark of President Harding's nomination of Sutherland, "[i]n my dealings with Mr. Sutherland I have seen no reason to suspect him of either principles or brains, and the substitution [of Sutherland for Justice Clark, who had resigned from the Court to campaign for America to enter the League of Nations] is most deplorable." 1 ROBERT POST, *supra* n. __, at 38-39 & n. 34. For its part, the U.S. Senate unanimously confirmed Sutherland in September 1922, "waving he usual referral to the Judiciary Committee." *Id.* at 39 & n.33. For Wilson's part, he was prone to harshness as he continued to mull seeking a third term, even after his debilitating stroke, see, e.g., Wesley M. Bagby, *Woodrow Wilson, a Third Term, and the Solemn Referendum*, 60 AM. HIST. REV. 567 (1955), and even after his exit from office, see e.g., Saladin Ambar, *Woodrow Wilson: Life After The Presidency*, UVA MILLER CTR, at <https://millercenter.org/president/wilson/life-after-the-presidency> ("Although he was nearly blind and remained partially paralyzed, Wilson fantasized about running for a third term in 1924"); W. BARKSDALE MAYNARD, *WOODROW WILSON: PRINCETON TO THE PRESIDENCY*, at 338 (2008) ("Pathetically, the broken man who could barely make his way around the house began planning an oratorical and political comeback and even drafted this third inaugural address."); JOHN MILTON COOPER, JR., *WOODROW WILSON: A BIOGRAPHY*, at 588, 591-593 (2009) ("Incredible as it might seem, Wilson wanted to run again for [P]resident in 1924 ... he made notes in shorthand and on his typewriter for a speech accepting the democratic nomination and a third inaugural address.").

Another former President – and at the time, the Chief Justice of the United States – William Howard Taft, held an opinion of Sutherland very different from Wilson's, calling Sutherland "the greatest constitutional lawyer in the Senate" and "the ablest lawyer in Congress," the latter view endorsed by none other than the leading Supreme Court advocate of the day and Wilson's own Solicitor General from 1913-1918, John W. Davis. See ROBERT POST, *supra* n. __, at 51 n. 43; see also Robert Ireland, Book Review: *Lawyer's Lawyer: The Life of John W. Davis* by William H. Harbaugh, 47 NEW ENGL. QRTLY. 475, 476 (1973) ("It is Harbaugh's opinion, bolstered by much contemporary testimony, that Davis was the greatest Solicitor General in the nation's history. His charm, wit, brilliance, and, above all, orator placed him quickly at the head of the Supreme Court bar an evoked fear and respect in the hearts and minds of the attorney for the nation's regulated industries."); James W. Ely Jr., *Lawyer's Lawyer: The Life of John W. Davis*, 72 MICH. L. REV. 1495, 1496 (1974) ("For several decades before his death in 1955, Davis was widely recognized as the foremost advocate in the United States and the leader of the appellate bar. ... Between 1913 and 1954 he argued 140 cases before the Supreme Court, and appeared regularly before the federal circuit courts and the state appellate bench.").

Sutherland was one of two men born in England to serve on the U.S. Supreme Court, and one of six men born outside of America.¹⁹⁹ Sutherland was not the only Justice on the Taft Court with significant connections to England – Holmes had them²⁰⁰, and McReynolds would come to have them.²⁰¹

At the time, Sutherland had only been on the Court for a little over two years—in fact, only since September 1922.²⁰² While Sutherland might have been a rookie Justice, at age 62 and with a long career as a successful lawyer and a United States Senator from Utah behind him, he was no *legal* rookie.²⁰³

¹⁹⁹ The six include two English born, George Sutherland (1922-1939) born in Buckinghamshire, England, and James Iredell (1790-1799) born in Lewes, England and one Scots born, James Wilson (1789-1798) born in Caskardy, Scotland; one Irish born, William Paterson (1793-1806) born in County Antrim, Ireland; one born in the Ottoman Empire, the son of American missionaries, David J. Brewer (1889-1910) born in Smyrna, Turkey; and one born in Austria, Felix Frankfurter (1939-1962) born in Vienna, Austria. See *About The Court*, UNITED STATES SUPREME COURT, at https://www.supremecourt.gov/about/faq_justices.aspx

²⁰⁰ Holmes “was one of the few Americans of his generation to have an intimate acquaintance with English society at the height of the British empire,” which he visited and from which he drew inspiration. G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF*, at 3, 96-98, 101-102, 224, 226-227, 229-231, 239-240, 243, 244-245 251-252, 296, 478, 484 (1993). His extensive and extended correspondence with Frederick Pollack and Louis Lasky amply evidence this. See *HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932* (1941)(Mark DeWolfe Howe, ed.); *HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935* (1953)(Mark DeWolfe Howe, ed).

²⁰¹ *M'REYNOLDS CARES FOR 33 CHILDREN; Jurist Also Offers to Be the First of Thousand Donors of \$10,000 for Young Britons — ADOPTEES' AGED 1 TO 14, Some Dunkerque Orphans -- Save the Children Chairman Will Fly to England*, N.Y. TIMES, July 17, 1941, at 15, available at <https://www.nytimes.com/1941/07/17/archives/mreynolds-cares-for-33-children-jurist-also-offers-to-be-the-first.html>; see Todd C. Peppers, *Cancelling Justice? The Case of James Clark McReynolds*, 24 RICH. PUB. INT. L. REV. 59, 67-68 (2021). In retirement, his correspondence was with each of his British wards. See Calvin P. Jones, *Kentucky's Irascible Conservative: Supreme Court Justice James Clark McReynolds*, 57 FILSON CLUB HIST. QRTLY. 20, 25 (1983).

²⁰² 1 ROBERT POST, *supra* n. __, at 39; see 266 U.S. 236.

²⁰³ 1 ROBERT POST, *supra* n. __, at 39-41. Tellingly, Professor Post observes that Sutherland “regarded bureaucracy as a form of “petty despotism.” Id. at 41. Clearly, Sutherland would have been predisposed to take a dim, even if *sub silentio*, view of the unremitting obstinacy of the Naval pension bureaucrats and their federal lawyers in declining to accept their loss to Moser in the first Court of Claims case Moser brought. See also Gary C. Leedes, *Justice George Sutherland and the Status Quo: A Biographical and Review Essay*, 1995 J. SUP. CT. HIST. 137, 139-142 (1995)(discussing Thomas Cooley’s influence on Sutherland regarding how common-law rights and privileges lined the

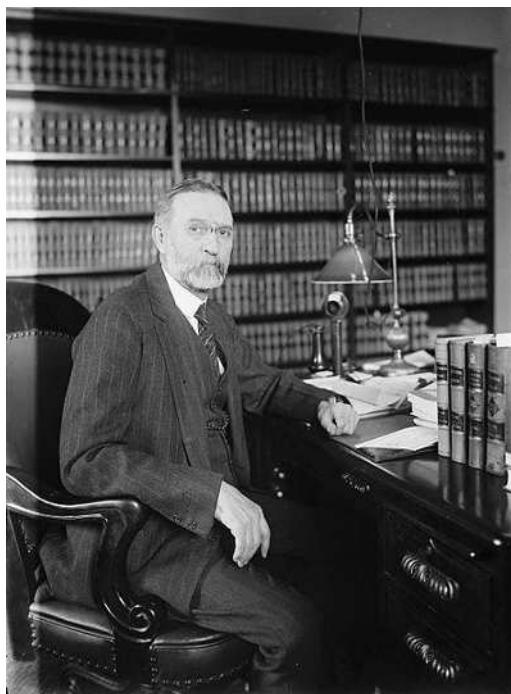


Illustration 24—Justice George Sutherland²⁰⁴

The Moser opinion bears all of the hallmarks of the 320-some opinions²⁰⁵ authored by Sutherland: clear, concise, to the point, and authoritative in tone.²⁰⁶ It is also one of the few majority opinions by

boundaries of legitimate uses of legislative and administrative acts); see generally Paul D. Carrington, *Law As “The Common Thoughts Of Men”: The Law-Teaching and Judging of Thomas McIntyre Cooley*, 49 STANFORD L. REV. 495 (1997) (examining the lessons and legacy of the most influential of Sutherland’s law-school professors at Michigan).

²⁰⁴Public domain image from Library of Congress Prints and Photographs Division, Harris & Ewing Collection. Call number: LC-H25- 12013-A[P&P] Digital id:hec 15852

²⁰⁵ See, e.g., Derek Monson, *Five Consequential Supreme Court Decisions Written by George Sutherland*, SUTHERLAND INSTITUTE, Oct. 28, 2022, at <https://sutherlandinstitute.org/5-consequential-supreme-court-decisions-written-by-george-sutherland/>; Edward L. Carter & James C. Phillips, *The Mormon Education Of A Gentile Justice: George Sutherland and Brigham Young Academy*, 33 J. SUP. CT. HIST. 322, 326 (2011).

²⁰⁶ For an estimate of Justice Sutherland that confirms these observations about the hallmarks of his work, see

Harold Stephens, *Mr. Justice Sutherland*, 31 A.B.A. J. 446, 452. Stephens wrote:

As was to be expected from the nature of the man, Sutherland’s style of writing was almost Lincolnian in directness and simplicity.

The dictionary was his constant companion and most used book. He paid close attention to the connotation of words and selected the simplest and clearest means of expressing his thought. He was impatient of flowery writing, striving always for complete clarity. Yet his prose was not barren nor mathematical. It had grace, and in his political addresses especially, where he felt a duty to induce action, a highly persuasive quality the source of which was in reasonableness, fairness, and a keen understanding of the other man's mind and heart. When occasion called for their use he could wield the weapons of wit, humor, irony, sarcasm, even ridicule, effectively. He was able from the depth of his convictions to strike powerful blows. Always he was but the vehicle of his message. He told the truth for the truth's sake.

His judicial style was the clear product of his concept of law and of the judicial function. The facts of a case, its foundation in truth, and reasoned application of the appropriate rule of law, directed him to the result. To will the result and then seek to justify it was never his method. Accordingly his opinions are but simple statements of the facts and the law and of the result reached, and of the reasons why the facts and the law require it. He felt in his judicial writing a duty to demonstrate, not to persuade. Even his dissents, though they show depth of conviction, are more expository than partisan. His opinions have the clarity of engravings in outline and in detail. His pen was never darkened by uncertainty of mind, nor unsteadied by emotion, nor colored by desire for effect or attention. His stream of thought ran crystal clear between the banks of fact and law and upon the bed of reason.

Id. at 452. As Professor Post has noted, “[t]he abstract and formal clarity of Sutherland’s approach earned him the honor in 1964 of having written ‘more opinions that have been specifically overruled than any other Justice in the history of the Supreme Court.’” ROBERT POST, *supra* n. __, at 43 (further noting that “[o]f those opinions repudiated by name since the reconstruction of the court in the late 1930s, Sutherland was the author of more than 20 per cent” (citation omitted)). Yet, even in that ignominy, Sutherland found dignity. “[O]f the Four Horsemen[,] ‘only Sutherland escaped the crisis of 1934-1935 with his reputation intact. He had so eloquently articulated the theoretical underpinnings of Fieldian jurisprudence that his opposition to the New Deal seemed on a higher level.’” Id. at 57-58, n. 79 (quoting G. EDWARD WHITE: *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JURISTS*, at 194 (1976)). Sutherland’s greatest and most lasting majority opinion came in a case involving the rights of criminal defendants with federal constitutional dimensions. After the Supreme Court failed to save Leo Frank from a Georgia lynch mob in 1915, see *(S)election Of Georgia Supreme Court Justices: Democracy — Or Dynasty?*, 87 ALB. L. REV. 101 (2024), Justice Sutherland’s powerful opinion in *Powell v. Alabama* was a significant step towards atoning for the institutional insensitivity the Court had displayed both for the rights of discrete and insular minority group members and for the rights of persons facing the fearsome power of the

Justice Sutherland that survived the Taft, Hughes, and Stone Courts to remain good law today.²⁰⁷ In fact, Sutherland's opinion in *Moser* was

States in criminal prosecutions. See *Powell v. Alabama*, 287 U.S. 45 (1932). As Professor Bill Ross observed in Sutherland's thought and prose in *Powell*:

In *Powell*, however, the Court cast aside ... cramped formalism to face squarely the substance rather than the form of justice in the Scottsboro case. As one commentator has aptly observed, the rhetoric of Justice Sutherland's opinion "captures the sociopolitical drama behind the legal questions to which the Court's judgment is addressed: It notes the convergence of race, gender, age, and class, and it uses the statement of facts to presage the outcome." The recognition of such realities was a necessary precedent for the Court's rejection of the separate but equal doctrine.

William G. Ross, *The Constitutional Significance of the Scottsboro Cases*, 28 CUMB. L. REV. 591, 597 (1998)(footnote omitted).

²⁰⁷ Upon his retirement from the Court in 1938, contemporary scholarly views of Justice Sutherland were harsh. See, e.g., Alpheus Thomas Mason, *The Conservative World Of Mr. Justice Sutherland, 1883-1910*, 32 AM. POL. SCI. REV. 443 (1938). Of Mr. Justice Sutherland, Mason wrote:

The Supreme Court of the United States was dominated for almost two decades by the philosophy of Mr. Justice Sutherland. Even prior to becoming an Associate Justice, October 2, 1922, he had been a figure of national prominence for over twenty years, serving one term as congressman, 1898-1900, and two terms as senator, 1905-1917. His retirement, January 16 of this year, closes the more active phases of a long career in public service. Throughout he has shown himself a man of firm convictions and pronounced views, whether expressed on the floors of Congress, in public addresses, or in Supreme Court opinions.

Justice Sutherland is as significant as Holmes or Brandeis, but for a different reason.

Id. at 443-444 (attacking Justice Sutherland for a tenure during which "the Supreme Court nullified more constructive legislation than in any period of equal duration in our history"). Some judicial colleagues at the time were more kind. See Hon. Harold M. Stephens, *Mr. Justice Sutherland*, 31 A.B.A. J. 446 (1945); see also Harold Montelle Stephens, at Hist. Soc'y Dist. Colum. Jud. Cir., at <https://dcchs.org/judges/stephens-harold-montelle/>; Ronald J. Krock, *Strange Bedfellows: Judge Harold M. Stephens and the New Dealers in the Age of Administrative Law Reform*, at <https://dcchs.org/wp-content/uploads/2018/12/JudgeStephensArticle.pdf> ("Over a long tenure as Associate and Chief Judge (1935-1955), Harold M. Stephens gained a well-deserved reputation as an informal "lobbyist" for the D.C. Circuit. A judicial conservative and student of the

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quickly noted by Professors Scott and Seavey, the authors of the *Restatement (First) Of Judgements*.²⁰⁸

The crux of the argument in the Supreme Court arose from the persistence of Moser and the intransigence of the federal government. Having won the Court of Claim's determination in his original suit for full Rear Admiral rank and pension benefits at three-quarters pay at that rank²⁰⁹, Moser should have been "one and done."²¹⁰ However, the federal government repeatedly refused to recognize his rank and pay him accordingly. So Moser had to file three additional actions in the Court of claims to recover the unpaid benefits of Rear Admiral rank.²¹¹ As

common law, Stephens was perpetually suspicious of executive overreach and administrative agencies in particular."). Even 30 years later, the caricature of Justice Sutherland among leading Supreme Court scholars had not mellowed. Of Sutherland, Professor Alexander Bickel, the first erstwhile chronicler of the Taft Court for the Oliver Wendell Holmes Devise History, wrote, "Harding's appointment of Sutherland and Butler, both rigidly committed conservatives, created an almost unvarying majority, which set the institution firmly on one of the several courses it had been pursuing. And this was the course that led, in essential attitudes if not in all niceties of doctrine, to the struggle of 1937, and to the veritable revolution that followed." Alexander M. Bickel, *Mr. Taft Rehabilitates the Court*, 79 YALE L.J. 1, 2-3 (1969). More recently, however, others have seen a quite clear distinction between Justice Sutherland and the three lesser lights (Justices VanDevanter, Butler, and McReynolds) who often flocked with him in a voting block. See, e.g., Samuel R. Olken, *Justice Sutherland Reconsidered*, 62 Vand. L. Rev. 639 (2009); John C. Eastman & Henry V. Jaffa, *Review: Understanding Justice Sutherland as He Understood Himself: The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights* by Hadley Arkes, 63 U. Chicago L. Rev. 1347 (1996); HADLEY ARKES, *THE RETURN OF JUSTICE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS* (1994).

²⁰⁸ Austin Wakeman Scott, *Collateral Estoppel By Judgment*, 56 HARV. L. REV. 1, 8-9 (1942).

²⁰⁹ Moser v. United States, 42 Ct. Cl. 86 (1907); see Moser v. United States, 58 Ct. Cl. 164 (1923).

²¹⁰ This is a phrase the author learned from now-retired Dean Malcolm Morris. He used it to describe the status of contract professors hired in the mid-2010s during a period of austerity. The author uses it to exhort law students to adopt the mindset will ensure that they pass the bar examination on the *first*—and *only*—attempt.

²¹¹ One commentator observed about Moser's case:

Nor is it clear why Captain Moser had to bring four actions. After the first judgment in Moser's favor, the government won a similar suit, *Jasper v. United States*, 43 Ct. Cl. 368 (1908); see Moser, 266 U.S. at 240, a victory which may have inspired it to ignore its obligation to Captain Moser. When he sued again, the lower court distinguished *Jasper* and applied *res judicata* based on the first judgment in Moser's favor. See *id.* at 240. Apparently the government ignored this judgment and the next as well, so that by the time Moser was taken to

Professors Cound, Friendenthal, Sexton and Miller elaborate, “[a]though the Court of Claims changed its mind about the interpretation of the pension statutes, [Moser] won his next two actions for later installments of his pay on the basis of *res judicata*.”²¹² The Government, incredibly, dug in its heels for a fourth time, and refused to pay Moser as a retired Rear Admiral. Although he was over half a century beyond the teenaged version of himself who showed up as a cadet at the Naval Academy in its Newport exile, Moser had not lost a jot of his fighting spirit. “In his fourth action for still later installments, the Court of Claims ruled both that its initial interpretation of the statute had been correct and that in any event he was entitled to rely on *res judicata*.”²¹³

Unlike the 1907 decision, the government appealed the 1923 Court of Claims decision to the Supreme Court, and did not dismiss the appeal as it had in 1907. In so doing, the government unwittingly handed the game, set, and match to Moser – for once, for all, fully, and finally, the Supreme Court found that the government was estopped from denying Moser his retirement rank of Rear Admiral and the full Navy pension benefits to which he was entitled.

In affirming that Court of Claims judgment, Justice Sutherland cut to the heart of the matter, and rebuked the Government’s failure to

the Supreme Court, there appears to have been a string of unsatisfied judgments in Moser’s favor.

Alexandra M. Shafer, *Issue Preclusion, Demand, and the Government: A New Bundle of Principles?*, 46 U. PITT. L. REV. 487 (1985). Jasper had continued his litigation against the Secretary of the Navy to recognize his rights under the 1899 Act. But unlike Moser, Jasper had never won his claim at any level. Moser’s ultimate victory in the Supreme Court sealed Jasper’s fate – his loss stood. See Comptroller Gen. McCarl to the Sec’y of the Navy, 5 COMP. GEN. 334 (Nov. 6, 1925). And that is so even though in one of the later Court of Claims cases brought by Jasper for his pension arrears, the Court of Claims “implied that the conclusion of law in the Jasper case was probably erroneous and the conclusion in the Moser case was correct.” *Id.* at 334-335; see *Moser v. United States*, 42 Ct. Cl. 86, 92-94 (1907) (discussing the arguments and finding the more plausible view to be that Civil War service included the time that a retiring officer spent as a Midshipman at the Naval Academy during the Civil War, regardless of whether although “claimant was subject to be ordered to active duty on board ship or otherwise during his term in the Naval Academy, it does not appear that he was so ordered or that he performed any service other than that required of him as a student at the academy”). See the further discussion of Commander Jasper’s legal saga at n. __, *infra*.

²¹² JOHN J. COUND, ET AL., *supra* n. 3, at 1216.

²¹³ *Id.*; see *Moser v. United States*, 58 Ct. Cl. 164 (1923), *aff’d*, 266 U.S. 236 (1924).

acknowledge the same crucial distinction also denied by Attorney General Wickersham fourteen years earlier:

The question expressly and definitely presented in this suit is the same as that definitely and actually litigated and adjudged in favor of the claimant in the three preceding suits, viz. whether he occupied the status of an officer who had served during the Civil War.

The contention of the government seems to be that the doctrine of *res judicata* does not apply to questions of law; and, in a sense, that is true. It does not apply to unmixed questions of law. Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a fact, question or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law. That would be to affirm the principle in respect of the thing adjudged but, at the same time, deny it all efficacy by sustaining a challenge to the grounds upon which the judgment was based. A determination in respect of the status of an individual upon which his right to recover depends is as conclusive as a decision upon any other matter.²¹⁴

Moser's win also attracted the attention of the *New York Times*, which published a short article on the Supreme Court's decision the day after it was handed down:

Long litigation over the claim of Captain Jefferson F. Moser of the navy that when he retired he should have attained the rank of Rear Admiral was disposed of today by the Supreme Court, which held that he was entitled to that rank. Captain Moser contended that because of his

²¹⁴ 266 U.S. at 242. Justice Sutherland's unanimous opinion in *Moser* has been cited and discussed in later collateral estoppel cases to which the federal government was a party. See, e.g., *Montana v. United States*, 440 U.S. 147, 162 (1979); *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 169-171 (1984).

service as midshipman in the Naval Academy during the Civil War, he should have been retired under the act of March 3, 1899, with the rank and pay of the next higher grade. The Court of Claims had upheld him.²¹⁵

²¹⁵ SUPREME COURT RULINGS—*Captain Moser is Upheld in Claim to Rank of Rear Admiral*, N.Y. TIMES, Nov. 18, 1924, at 3. Justice Sutherland's opinion thrice mentioned a less successful claimant seeking recognition of his Civil War Naval Academy years for pension and retirement rank, Commander Robert T. Jasper. See 266 U.S. at 240-241. Moser's lawyer eventually represented Commander Jasper in the last act of Jasper's own 25-year quest for full rank and pension under the 1899 Act. Jasper, who retired in 1899, sought the benefits of the 1899 Act to be retired as a Captain at three-quarters of the Captain's pay. *Du Bose v. United States*, 65 Ct. Cl. 142, 143 (1928). ("The decedent entered the United States Navy as a midshipman at the Naval Academy on July 21, 1864, where he remained until June 2, 1868, when his course of instruction was completed. He was promoted to ensign on April 19, 1869; to master (now styled lieutenant, junior grade), July 12, 1870; to lieutenant, October 27, 1872; to lieutenant commander, July 4, 1893, and to commander, March 3, 1899. He remained a commander until September 21, 1899, when he was retired from active service, and from that time to the date of his death he was an officer of the Navy on the retired list."). Jasper's litigation yielded not a single validation of his valid claim in the courts. See the four Court of Claims decisions reported under the style, *Jasper v. United States*, at 38 C. Cls. 202 (1903); 40 C. Cls. 76 (1904) (granting Jasper's motion for a new trial); 43 C. Cls. 368 (1908) (applying 1906 Naval Personnel Act and distinguishing its own 1904 decision in the Moser case), and 52 C. Cls. 521 (1917) (dismissing without opinion a further claim by Jasper). After Jasper's death, his estate continued the fight—this time with Moser's attorney Georgia King at the helm. See *Du Bose v. United States*, 65 Ct. Cl. 142 (1928). It appears that King devised a strategy of lobbying the Navy Secretary and President Coolidge to grant Jasper a retroactive promotion to the rank of Captain, which President Coolidge indeed did in 1925, and then, after Jasper died in Washington, D.C., on February 16, 1926, to sue the government "for \$9,369.80, the amount which he claims is due the estate of Robert T. Jasper on account of his advance to the grade of captain." *Du Bose*, 65 Ct. Cl. at 143, 146. The Court of Claims, however, accepted the government's argument that whether or not the President had the authority to promote an already retired officer (which it doubted on the statutory authorities of the day), no statute cited to the court authorized additional benefits based on a retroactive promotion of an officer on the retired list. See *id.* at 147-149. Jasper, born in 1846 in New York City, was, like Moser, see n. 199 & accompanying text, *infra*, buried in Arlington National Cemetery. See Robert Thompson Jasper, FIND A GRAVE, at <https://www.findagrave.com/memorial/49236756/robert-thompson-jasper>. Jasper is included in an 1865 group photo of five midshipmen, pages 11-12 of an 1865 Photographic Album available at https://usna.primo.exlibrisgroup.com/discovery/delivery/01USNA_INST:01USNA/1_2101741250006751 Jasper's executor, William G. Du Bose, was his son-in law who served as a career naval officer for 45 years, and retired with the rank of Rear Admiral in 1940. See REAR ADMIRAL DUBOSE ON BOARD OF CRAMP'S; *Retired Naval Constructor to Head Executive Group*, N.Y. Times, Bus. & Fin., p. 35, Oct. 14, 1940; Elizabeth

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We do not know how the government's repeated denial of pension benefits, fairly earned and won through valor in a time we can scarcely imagine, affected Moser's life. It must have been a source of constant frustration. Moser did not shrink from fights. And he did not shrink from this one. From the Administration of Theodore Roosevelt, to the Administration of Calvin Coolidge, from age 56 until age 76, Moser battled with the government for what he earned by his service and merited by the law at the time he retired. The legal fees could not have been small; who knows how much they consumed of what he won? But win he did, and he kept winning. If he ever thought of giving up the fight, we do not know it; nothing in the slim extant record shows it. Instead, we see a true *American* spirit – the same spirit that would induce a young man from Allentown, Pennsylvania, to enroll in the Naval Academy in the midst of a war and the uncertainties of life and death that were inextricably a part of those times.

Moser's last battle – the one all mortals most eventually lose – was with the heart attack and broken hip the conspired to take his life in 1934.²¹⁶ He is buried with his wife, who preceded him in death by fifteen years, in the Arlington National Cemetery.²¹⁷

Moser's legal struggle and his victory over bureaucracy and the shifting priorities of elected government toward Civil War veterans is but obliquely referenced in the marker at Arlington which situates his final resting place:

Seldon Jasper Dubose, Find A Grave, at
https://www.findagrave.com/memorial/49175652/elizabeth_seldon-dubose;
RADM William Gunnell Dubose (1876-1955), Find A Grave, at
https://www.findagrave.com/memorial/49175657/william_gunnell-dubose/photo; ; see
also NH 50441 Rear Admiral William G. Du Bose, NAVAL HISTORY & HERITAGE
COMMAND, at:

<https://www.history.navy.mil/our-collections/photography/numerical-list-of-images/nhmc-series/nh-series/NH-50000/NH-50441.html>

²¹⁶ See Moser, *Creator of "Star Fleet," Dies*, BERKELEY DAILY GAZETTE (Berkeley, CA), Friday, October 12, 1934, page 12, column 7. The clipping is available at <https://www.findagrave.com/memorial/92739094/jefferson-franklin-moser#view-photo=155668363>

²¹⁷ See <https://www.findagrave.com/cemetery/49269/memorial-search?firstName=&lastName=Moser&includeMaidenName=true&page=1#sr-29264600> (confirming location of Moser's grave at Section 3 Site 4216).



Illustration 25—Moser's Headstone at Arlington.²¹⁸

Two words succinctly commemorate the unanimous victory Moser won in the Taft Court:

Rear Admiral U.S.N. Retired²¹⁹

“*Rear Admiral*.” To know the full context and meaning of its background, that statement of rank requires the viewer to know a great deal more before its significance can be grasped. This article has striven to do that for both the man, and his age.²²⁰

²¹⁸ Image posted at RADM Jefferson Franklin Moser, FIND A GRAVE MEMORIAL, at <https://www.findagrave.com/memorial/92739094/jefferson-franklin-moser>

²¹⁹ Id. (emphasis supplied).

²²⁰ Among American Civil War veterans, the choice of marker inscription was a thoughtful and introspective decision. Justice Holmes himself provides corroboration. He wrote to his British correspondent, Harold Laski, that

I have a lovely spot in Arlington toward the bottom of the hill where the house is, with pine trees, oak, and tulip all about, and where one looks to see a deer trot out (although of course there are no deer). I have ordered a stone out of the form conventional for officers, which will bear my name, Bvt. Col. and Capt. 20th Mass. Vol. Inf. Civil

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Without knowing the particulars of Moser's odyssey to claim his entitlement to that rank, the marker bears but silent witness to the

War—Justice Supreme Court, U.S.—March, 1841—His wife Fanny B. Holmes and the dates. It seemed queer to put up my own tombstone—but these things are under military direction and I suppose it was necessary to show a soldier's name to account for my wife”

2 HOLMES-LASKI LETTERS, *supra* n. __, at 270 (Holmes to Laski, June 15, 1929).



Illustration 26—Justice Holmes' Gravestone, Arlington.

See Oliver Wendell Holmes [Jr.], Sec. 5, Row 7004-A, Arlington Nat'l Cemetery, <https://www.arlingtoncemetery.mil/Explore/Notable-Graves/Supreme-Court/Oliver-Wendell-Holmes>

Two years later, Holmes wrote to American diplomat, historian, and art devotee Lewis Einstein (1877-1967):

I shall go out to Arlington tomorrow, Memorial Day, and visit the gravestone with my name and my wife's on it., and be stirred by the military music, and, instead of bothering about the Unknown Soldier shall go to another stone that tells beneath it are the bones of, I don't remember the number but two or three thousand and odd, once soldiers gathered from the Virginia fields after the Civil War. I heard a woman say there once, 'They gave their all. They gave their very names.'

THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR., (1992)(Hon. Richard A. Posner, ed.)(Holmes to Lewis Einstein, May 29, 1931). Lewis Einstein was a most famous American intellectual during his lifetime who has all but been forgotten in the nearly sixty years since his death. Among Lewis Einstein's books were *DIVIDED LOYALTIES: AMERICANS IN ENGLAND DURING THE WAR OF INDEPENDENCE* (1933).

significance of the name of Jefferson Franklin Moser. Nor without that knowledge does the marker reveal in its fullness the indomitable spirit that Moser displayed throughout his life in all matters, a spirit which is forever epitomized and ensconced within the *United States Reports*, with his last and, arguably, his greatest victory.

Moser epitomized the energy, tenacity, audacity, and fidelity of purpose that characterize the best of the American spirit. Qualities that now seem extraordinary were but a century ago the essence of Americanism.