

# THE FEDERAL COURTS LAW REVIEW<sup>‡</sup>

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## “TEN DOLLAR JUDGES”: THE FUGITIVE SLAVE ACT OF 1850 AND THE ORIGINS OF THE FEDERAL MAGISTRATES ACT\*

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*I had intended, in presenting [petitions calling for the repeal of the Fugitive Slave Act of 1850] to address some remarks to the Senate as to the practical operation of that law—as to the board of official ten dollar judges, who have been spawned into existence by it—as to the reptiles in the shape of attorneys and witnesses that it has called up.*

- Senator John Hale of New Hampshire on the floor of the Senate, April 7, 1852<sup>1</sup>

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<sup>1</sup> CONG. GLOBE, 32d Cong., 2d Sess. 991 (1852).

## INTRODUCTION

On September 18, 1850, President Millard Fillmore signed into law the Fugitive Slave Act of 1850 (FSA).<sup>2</sup> A little more than 118 years later, on October 17, 1968, President Lyndon Johnson signed into law the Federal Magistrates Act of 1968 (FMA).<sup>3</sup> While seemingly unrelated, the two events are connected. The nationwide system of United States magistrate judges,<sup>4</sup> created when Congress enacted the FMA,<sup>5</sup> had its origin in Congress's command in 1850 that the federal courts appoint increased numbers of circuit court commissioners to issue arrest warrants and conduct summary proceedings for the rendition of "fugitives from service or labor" as part of an expanded national bureaucracy to enforce the amended FSA.<sup>6</sup> In doing so, Congress transformed what had been a minor system of commissioners performing largely administrative and ministerial tasks for the federal courts into a corps of non-Article III judicial officers conducting significant judicial duties. These "ten dollar judges," as contemptuously described by Senator Hale,<sup>7</sup> were suddenly exercising profound powers under the new law.

At the heart of the FSA was Congress's intent to have circuit court commissioners play the primary judicial role in a federal enforcement system designed to assist Southern enslavers in retrieving runaway slaves from Northern states. The idea of using commissioners in this way, however, did not emerge in a vacuum. The Southern senators who drafted the FSA empowered federal

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<sup>2</sup> Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850) [hereinafter FSA] (repealed 1864).

<sup>3</sup> Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107 (1968) (codified as amended at 28 U.S.C. §§ 604, 631-39 and 18 U.S.C. §§ 3060, 3401-02 (1991)) [hereinafter Federal Magistrates Act].

<sup>4</sup> The official title of these judicial officers was changed by Congress from magistrates to magistrate judges in 1990. *See* Judicial Improvements Act, Pub. L. No. 101-650, 104 Stat. 5089 (1990); *see also* ADMIN. OFF. OF THE U.S. CTS., A GUIDE TO THE LEGISLATIVE HISTORY OF THE FEDERAL MAGISTRATE JUDGES SYSTEM 90 (2009) [hereinafter LEGISLATIVE HISTORY].

<sup>5</sup> *See* Federal Magistrates Act.

<sup>6</sup> *See* FSA § 4 (repealed 1864).

<sup>7</sup> The term "ten dollar judge" referred to the fee schedule created by Section Eight of the FSA, which paid a fee of \$10.00 to a circuit court commissioner who ordered the rendition of an alleged fugitive slave back to his or her master. A commissioner would only receive a \$5.00 fee if the fugitive was ordered released from custody. *See* FSA § 8 (repealed 1864); *see also infra* Part VI.

commissioners with duties like those exercised routinely by county court justices of the peace in the South when dealing with runaway slaves. The authority of these justices of the peace and commissioners evolved to control enslaved people in Southern states over decades and, in older states such as Virginia and South Carolina, hundreds of years since colonization.<sup>8</sup>

Enforcement of the FSA in the North resulted in shock, turmoil, and controversy throughout the nation, and many historians have written on this subject.<sup>9</sup> Surprisingly, however,

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<sup>8</sup> In 1680, Virginia's House of Burgesses enacted legislation authorizing justices of the peace to punish recalcitrant slaves. See 2 WILLIAM WALLER HENING, *THE STATUTES AT LARGE, BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619*, at 481 (1823); see, e.g., THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619-1860*, at 21 (1996) [hereinafter MORRIS, *SOUTHERN SLAVERY*]. In South Carolina, a 1761 manual for justices of the peace features more than twenty pages of statutes authorizing justices to punish slaves for various infractions. See WILLIAM SIMPSON, *THE PRACTICAL JUSTICE OF THE PEACE AND PARISH-OFFICER, OF HIS MAJESTY'S PROVINCE OF SOUTH-CAROLINA 161-89* (1761). See, e.g., SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* (2001); PHILIP J. SCHWARZ, *SLAVE LAWS IN VIRGINIA 124* (1996) ("Statutes designed to control runaway slaves appeared for two centuries, from 1660 to 1864."); 1 JOHN CODMAN HURD, *THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES* (1858). See *infra* Part V for further discussion of how justices of the peace were used to regulate and punish enslaved people.

<sup>9</sup> Over the past fifty years, a vast historical literature has examined aspects of the enforcement of the FSA, usually focusing on dramatic individual cases that often resulted in violent protests, attempted rescues of captured slaves, and heated political rhetoric in both the North and South. See, e.g., STANLEY W. CAMPBELL, *THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850-1860* (1968); R.J.M. BLACKETT, *THE CAPTIVE'S QUEST FOR FREEDOM: FUGITIVE SLAVES, THE 1850 FUGITIVE SLAVE LAW, AND THE POLITICS OF SLAVERY* (2018); ROBERT H. CHURCHILL, *THE UNDERGROUND RAILROAD AND THE GEOGRAPHY OF VIOLENCE IN ANTEBELLUM AMERICA* (2020); ERIC FONER, *GATEWAY TO FREEDOM: THE HIDDEN HISTORY OF THE UNDERGROUND RAILROAD* (2015) [hereinafter FONER, *GATEWAY TO FREEDOM*]; ANDREW DELBANCO, *THE WAR BEFORE THE WAR: FUGITIVE SLAVES AND THE STRUGGLE FOR AMERICA'S SOUL FROM THE REVOLUTION TO THE CIVIL WAR* (2018); STEVEN LUBET, *FUGITIVE JUSTICE: RUNAWAYS, RESCUERS, AND SLAVERY ON TRIAL* (2010); GORDON S. BARKER, *FUGITIVE SLAVES AND THE UNFINISHED AMERICAN REVOLUTION: EIGHT CASES, 1848-1856* (2013) [hereinafter BARKER, *FUGITIVE SLAVES*]; MILTON C. SERNETT, *NORTH STAR COUNTRY: UPSTATE NEW YORK AND THE CRUSADE FOR AFRICAN AMERICAN FREEDOM* (2002); STANLEY HARROLD, *BORDER WAR: FIGHTING OVER SLAVERY BEFORE THE CIVIL WAR 138-58* (2010). For books on individual cases under the Act, see, for example, STEVEN WEISENBURGER, *MODERN MEDEA: A FAMILY STORY OF SLAVERY AND CHILD-MURDER FROM THE OLD SOUTH* (1998); ALBERT J. VON FRANK, *THE TRIALS OF ANTHONY BURNS: FREEDOM AND SLAVERY IN EMERSON'S BOSTON* (1998); GORDON S. BARKER, *THE IMPERFECT REVOLUTION: ANTHONY BURNS AND THE LANDSCAPE OF RACE IN ANTEBELLUM AMERICA* (2010) [hereinafter BARKER, *THE IMPERFECT REVOLUTION*];

there has been almost no historical or legal study of the commissioner system in the federal courts in the past sixty years, even regarding the dramatic and violent events surrounding enforcement of the FSA.<sup>10</sup> While debate continues on whether the Act was effectively enforced in the years before the Civil War,<sup>11</sup> there is no question that federal commissioners exercised greatly expanded duties under the law.<sup>12</sup> This Article details Congress's expansion of those duties and describes in depth the work of two federal commissioners in three slave rendition cases under the FSA that occurred in Boston in 1850 and 1851 to show how commissioners exercised their newly expanded authority.<sup>13</sup>

During and after the Civil War, as it expanded the authority of the federal government and the federal judiciary, Congress continued to give more and varied duties to circuit court commissioners. Even after it was repealed in 1864,<sup>14</sup> Congress used the FSA as a template to increase the authority of federal court

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JANE H. PEASE & WILLIAM H. PEASE, *THE FUGITIVE SLAVE LAW AND ANTHONY BURNS: A PROBLEM IN LAW ENFORCEMENT* (Harold M. Hyman ed., 1975); EARL M. MALTZ, *FUGITIVE SLAVE ON TRIAL: THE ANTHONY BURNS CASE AND ABOLITIONIST OUTRAGE* (2010); GARY COLLISON, *SHADRACH MINKINS: FROM FUGITIVE SLAVE TO CITIZEN* (1997); ANGELA F. MURPHY, *THE JERRY RESCUE: THE FUGITIVE SLAVE LAW, NORTHERN RIGHTS, AND THE AMERICAN SECTIONAL CRISIS* (2016); H. ROBERT BAKER, *THE RESCUE OF JOSHUA GLOVER: A FUGITIVE SLAVE, THE CONSTITUTION, AND THE COMING OF THE CIVIL WAR* (2006); THOMAS P. SLAUGHTER, *BLOODY DAWN: THE CHRISTIANA RIOT AND RACIAL VIOLENCE IN THE ANTEBELLUM NORTH* (1991); SCOTT CHRISTIANSON, *FREEING CHARLES: THE STRUGGLE TO FREE A SLAVE ON THE EVE OF THE CIVIL WAR* (Darlene Clark Hine & Dwight A. McBride eds., 2010); NIKKI M. TAYLOR, *DRIVEN TOWARD MADNESS: THE FUGITIVE SLAVE MARGARET GARNER AND TRAGEDY ON THE OHIO* (2016).

<sup>10</sup> See *infra* Part II.

<sup>11</sup> For differing views on whether the FSA was effectively enforced, compare CAMPBELL, *supra* note 9, at 147, 195-96, and DAVID F. ERICSON, *SLAVERY IN THE AMERICAN REPUBLIC: DEVELOPING THE FEDERAL GOVERNMENT, 1791-1861*, at 90-91, 105 (2011) (arguing that the federal government was reasonably successful in enforcing the FSA), with BLACKETT, *supra* note 9, at 40-41, 456-59, and CHURCHILL, *supra* note 9, at 173-74, 198-200, 222-23 (arguing that the federal government's efforts to enforce the FSA was largely a failure in the face of stiff resistance from the African American communities and abolitionists in the North).

<sup>12</sup> See *infra* Part VII.

<sup>13</sup> See *infra* Part VIII.

<sup>14</sup> Act of June 28, 1864, ch. 166, 13 Stat. 200 (1864); CAMPBELL, *supra* note 9, at 194-95; FERGUS M. BORDEWICH, *CONGRESS AT WAR: HOW REPUBLICAN REFORMERS FOUGHT THE CIVIL WAR, DEFIED LINCOLN, ENDED SLAVERY, AND REMADE AMERICA* 254-64 (2020).

commissioners in statutes such as the Civil Rights Act of 1866<sup>15</sup> and the Chinese Exclusion Act of 1882.<sup>16</sup> At the same time, the number of commissioners appointed by the federal courts grew significantly.<sup>17</sup> By 1896, Congress replaced the century-old system of circuit court-appointed commissioners with a new system of “United States commissioners,” clothed with the same powers and duties as their predecessors, but appointed by the district courts and compensated for their services under a uniform federal fee schedule.<sup>18</sup> Seventy-two years later, Congress enacted the Federal Magistrates Act of 1968.<sup>19</sup>

This Article sheds light on the role played by circuit court commissioners in enforcing the Fugitive Slave Act of 1850. While it would overstate the case to say that the FSA was a direct model for the Federal Magistrates Act of 1968,<sup>20</sup> the FSA was arguably the seed for a national system of non-Article III judicial officers performing significant judicial duties to assist the federal courts. This Article argues that Congress’s expansion of commissioners’ duties in 1850, based on duties exercised by Southern state justices of the peace to deal with recalcitrant and runaway slaves, began a process of judicial expansion that eventually led to creation of the federal magistrates system in 1968. Out of the brutal, unsavory, and often violent events arising from the FSA came a primary source for today’s United States magistrate judges system.

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<sup>15</sup> Act of April 9, 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981-1986 (1982)).

<sup>16</sup> Act of May 6, 1882, ch. 126, 22 Stat. 58 (1882).

<sup>17</sup> In his report to Congress in 1878, the Attorney General of the United States noted that nearly 2,000 commissioners were currently serving in the federal courts, complaining about his inability to reign in the costs of these positions. DEPT OF JUST., ANNUAL REPORT OF THE ATTORNEY-GENERAL OF THE UNITED STATES FOR THE YEAR 1878 12 (December 2, 1878) [hereinafter 1878 ATTORNEY GENERAL’S REPORT].

<sup>18</sup> Act of May 28, 1896, ch. 252, §§ 19, 21, 29 Stat. 140, 184 (1896).

<sup>19</sup> See Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107 (1968) (codified as amended at 28 U.S.C. §§ 604, 631-39 and 18 U.S.C. §§ 3060, 3401-02 (1991)).

<sup>20</sup> There appears to be no evidence in the legislative history of the Federal Magistrates Act that the legislators who drafted that Act were looking directly at the FSA as a specific model when crafting the statute. See, e.g., *Federal Magistrates Act: Hearings Before the Subcomm. on Improvements in Jud. Mach. of the Comm. on the Judiciary on S. 3475 and S. 945*, 89th Cong. & 90th Cong. 318 (1967).

I. UNITED STATES COMMISSIONERS AND MAGISTRATE JUDGES:  
FORGOTTEN JUDICIAL OFFICERS IN AMERICAN LAW

It is unquestioned that United States magistrate judges today play a major role in handling the business of the federal courts. In 1991, Associate Justice John Paul Stevens described magistrate judges as “nothing less than indispensable” to the work of the federal judiciary.<sup>21</sup> Associate Justice Sonia Sotomayor wrote in 2015 that “it is no exaggeration to say that without the distinguished service of these judicial colleagues, the work of the federal court system would grind nearly to a halt.”<sup>22</sup> As of December 2020, there were 555 full-time United States magistrate judge positions, twenty-seven part-time, and three clerk of court/magistrate judge positions authorized to serve in all ninety-four of the United States district courts.<sup>23</sup>

Magistrate judges perform a wide array of tasks for the courts as set forth in Section 636 of the Federal Magistrates Act.<sup>24</sup> Routine, yet essential, judicial matters performed by magistrate judges include reviewing law enforcement applications for arrest and search warrants;<sup>25</sup> conducting initial appearances, detention hearings, and other preliminary and pretrial proceedings in federal felony cases;<sup>26</sup> disposing of virtually all federal misdemeanor and petty offense cases;<sup>27</sup> and handling numerous pretrial duties in civil cases,<sup>28</sup> including the final disposition of civil cases with the parties’

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<sup>21</sup> *Peretz v. United States*, 501 U.S. 923, 928 (1991) (quoting *Gov’t of the Virgin Islands v. Williams*, 892 F.2d 305, 308 (3d Cir. 1989)).

<sup>22</sup> *Wellness Int’l Network, Ltd. v. Sharif*, 575 U.S. 665, 668 (2015).

<sup>23</sup> Telephone Interview with Thomas Davis, Special Advisor for Magistrate Judges, Judicial Services Office, Administrative Office of United States Courts (Dec. 28, 2020). Magistrate judge positions are authorized by the Judicial Conference of the United States. *See* 28 U.S.C.A. § 631 (West).

<sup>24</sup> 28 U.S.C.A. § 636 (West).

<sup>25</sup> *Id.* at § 636(a); Fed. R. Crim. P. 3, 4 (arrest warrants, summons, and criminal complaints); Fed. R. Crim. P. 41 (search warrants).

<sup>26</sup> 28 U.S.C.A. § 636(a) (West); Fed. R. Crim. P. 5 (initial appearance); Fed. R. Crim. P. 44 (appointment of counsel); 18 U.S.C.A. § 3006A (West) (appointment of counsel); Fed. R. Crim. P. 5.1 (preliminary examination); 18 U.S.C.A. § 3060 (West) (preliminary examination); Bail Reform Act of 1984, 18 U.S.C.A. §§ 3141-3156 (West) (governing pretrial release or detention).

<sup>27</sup> 28 U.S.C.A. § 636(a) (West); 18 U.S.C.A. § 3401(a)-(b) (West); Assimilative Crimes Act, 18 U.S.C.A. § 13 (West).

<sup>28</sup> 28 U.S.C.A. § 636(b)(1)(A)-(B) (West).

consent.<sup>29</sup> Magistrate judges exercise this authority even though they do not have the protections of life tenure or irreducible salary that Supreme Court justices, United States court of appeals judges, and United States district judges have under Article III of the Constitution.<sup>30</sup>

The scope of their work is enormous. In fiscal year 2020,<sup>31</sup> magistrate judges reported conducting 452,502 felony preliminary proceedings, disposing of 58,771 Class A misdemeanor and petty offense cases, handling 333,018 pretrial duties in civil cases, and disposing of 16,522 civil cases with the consent of the parties.<sup>32</sup>

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<sup>29</sup> 28 U.S.C.A. § 636(b)(1)(B) (West).

<sup>30</sup>

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1.

<sup>31</sup> The year ending September 30, 2020.

<sup>32</sup> ADMIN. OFF. OF U.S. CTS., TABLE M-1, U.S. DISTRICT COURTS—CLASS A MISDEMEANOR DEFENDANTS DISPOSED OF BY U.S. MAGISTRATE JUDGES, BY NATURE OF OFFENSE, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2020 (2020), <https://www.uscourts.gov/statistics/table/m-1/judicial-business/2020/09/30> [<https://perma.cc/48S2-8EY9>]; ADMIN. OFF. OF U.S. CTS., TABLE M-1A, U.S. DISTRICT COURTS—CLASS A MISDEMEANOR DEFENDANTS DISPOSED OF BY U.S. MAGISTRATE JUDGES, BY TYPE OF DISPOSITION, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2020 (2020), <https://www.uscourts.gov/statistics/table/m-1a/judicial-business/2020/09/30> [<https://perma.cc/TCL3-P23L>]; ADMIN. OFF. OF U.S. CTS., TABLE M-2, U.S. DISTRICT COURTS—PETTY OFFENSE DEFENDANTS DISPOSED OF BY U.S. MAGISTRATE JUDGES, BY NATURE OF OFFENSE, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2020 AS OF NOVEMBER 18, 2020 (2020), <https://www.uscourts.gov/statistics/table/m-2/judicial-business/2020/09/30> [<https://perma.cc/FV6J-AHRJ>]; ADMIN. OFF. OF U.S. CTS., TABLE M-2A, U.S. DISTRICT COURTS—PETTY OFFENSE DEFENDANTS DISPOSED OF BY U.S. MAGISTRATE JUDGES, BY DISPOSITION, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER, 2020 AS OF NOVEMBER 18, 2020 (2020), <https://www.uscourts.gov/statistics/table/m-2a/judicial-business/2020/09/30> [<https://perma.cc/G4VS-K9AY>]; ADMIN. OFF. OF U.S. CTS., TABLE M-3, U.S. DISTRICT COURTS—FELONY PRELIMINARY PROCEEDINGS HANDLED BY U.S. MAGISTRATE JUDGES UNDER 28 U.S.C. § 636(a) DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2020 AS OF NOVEMBER 18, 2020 (2020), <https://www.uscourts.gov/statistics/table/m-3/judicial-business/2020/09/30> [<https://perma.cc/YS83-4VZV>]; ADMIN. OFF. OF U.S. CTS., TABLE M-3A, U.S. DISTRICT COURTS—MISCELLANEOUS MATTERS HANDLED BY U.S. MAGISTRATE JUDGES DURING THE 12-MONTH PERIOD ENDING SEPTEMBER, 2020 AS OF NOVEMBER 18, 2020 (2020),



Numerous treatises and law review articles analyze magistrate judge authority and utilization, and otherwise explain aspects of their duties in the federal court system.<sup>33</sup> Nevertheless, magistrate judges are largely ignored when scholars examine the reasoning or behavior of federal judges. As explained by retired District Judge Philip Pro, magistrate judges are “present, but unaccounted for” in scholarly works that purport to explore how federal judges make decisions and are generally not considered when academic

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<https://www.uscourts.gov/statistics/table/m-3a/judicial-business/2020/09/30> [https://perma.cc/6R83-R9AK]; ADMIN. OFF. OF U.S. CTS., TABLE M-4, U.S. DISTRICT COURTS—CRIMINAL PRETRIAL MATTERS HANDLED BY U.S. MAGISTRATE JUDGES UNDER 28 U.S.C. § 636(b), DURING THE 12-MONTH PERIOD ENDING SEPTEMBER, 2020 AS OF NOVEMBER 18, 2020 (2020), <https://www.uscourts.gov/statistics/table/m-4/judicial-business/2020/09/30> [https://perma.cc/T7W6-GAJ6]; ADMIN. OFF. OF U.S. CTS., TABLE M-4A, U.S. DISTRICT COURTS—CIVIL PRETRIAL MATTERS HANDLED BY U.S. MAGISTRATE JUDGES UNDER 28 U.S.C. § 636(b), DURING THE 12-MONTH PERIOD ENDING SEPTEMBER, 2020 AS OF NOVEMBER 18, 2020 (2020), <https://www.uscourts.gov/statistics/table/m-4a/judicial-business/2020/09/30> [https://perma.cc/MSX4-XH6F]; ADMIN. OFF. OF U.S. CTS., TABLE M-4B, U.S. DISTRICT COURTS—REPORTS AND RECOMMENDATIONS ISSUED BY U.S. MAGISTRATE JUDGES UNDER 28 U.S.C. § 636(b), DURING THE 12-MONTH PERIOD ENDING SEPTEMBER, 2020 AS OF NOVEMBER 18, 2020 (2020), <https://www.uscourts.gov/statistics/table/m-4b/judicial-business/2020/09/30> [https://perma.cc/TEW6-9X8X]; ADMIN. OFF. OF U.S. CTS., TABLE M-4C, U.S. DISTRICT COURTS—EVIDENTIARY PROCEEDINGS CONDUCTED BY U.S. MAGISTRATE JUDGES UNDER 28 U.S.C. § 636(b), DURING THE 12-MONTH PERIOD ENDING SEPTEMBER, 2020 AS OF NOVEMBER 18, 2020 (2020), <https://www.uscourts.gov/statistics/table/m-4c/judicial-business/2020/09/30> [https://perma.cc/669L-Q8WV]; ADMIN. OFF. OF U.S. CTS., TABLE M-5, U.S. DISTRICT COURTS—CIVIL CONSENT CASES TERMINATED BY U.S. MAGISTRATE JUDGES UNDER 28 U.S.C. § 636(c), DURING THE 12-MONTH PERIOD ENDING SEPTEMBER, 2020 AS OF NOVEMBER 18, 2020 (2020), <https://www.uscourts.gov/statistics/table/m-5/judicial-business/2020/09/30> [https://perma.cc/8CEF-QTUG].

<sup>33</sup> See, e.g., Douglas A. Lee & Thomas E. Davis, “Nothing Less Than Indispensable”: *The Expansion of Federal Magistrate Judge Authority and Utilization in the Past Quarter Century*, 16 NEV. L.J. 845 (2016); PETER G. MCCABE, A GUIDE TO THE FEDERAL MAGISTRATE JUDGES SYSTEM: A WHITE PAPER PREPARED AT THE REQUEST OF THE FEDERAL BAR ASSOCIATION (2016), <https://www.fedbar.org/wp-content/uploads/2019/10/FBA-White-Paper-2016-pdf-2.pdf> [https://perma.cc/HY6Z-F764]; Philip M. Pro & Thomas C. Hnatowski, *Measured Progress: The Evolution and Administration of the Federal Magistrate Judges System*, 44 AM. U. L. REV. 1503 (1995); J. Anthony Downs, *The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates*, 52 U. CHI. L. REV. 1032 (1985); Kelly Holt, *Congressional Guidance on the Scope of Magistrate Judges’ Duties*, 84 U. CHI. L. REV. 909 (2017); ADMIN. OFF. OF THE U.S. CTS., INVENTORY OF UNITED STATES MAGISTRATE JUDGE DUTIES (2013), [https://www.uscourts.gov/sites/default/files/inventory\\_of\\_magistrate\\_judge\\_duties\\_0.pdf](https://www.uscourts.gov/sites/default/files/inventory_of_magistrate_judge_duties_0.pdf) [https://perma.cc/7KVR-79RR].

commentators analyze the work of the federal judiciary.<sup>34</sup> Magistrate judges are often overlooked when the federal courts are discussed by scholars and judges.<sup>35</sup> This absence is even more apparent when one considers United States commissioners and the history of the federal courts. Historians and legal scholars who have studied the organization and development of the federal judiciary rarely, if ever, discuss the role of United States commissioners in that development. For example, United States commissioners are mentioned briefly in three paragraphs of Justin Crowe's history of the development of the federal court system.<sup>36</sup> Dwight Henderson's in-depth monograph on the first twelve years of the federal judiciary, while providing great detail about the first Supreme Court justices, the first federal district judges, the first clerks of court, and the first United States marshals, is silent concerning circuit court commissioners, even though Congress first authorized the appointment of such commissioners in 1793.<sup>37</sup> There appears to have been only two law review articles published in the last fifty-one years that have discussed in any detail the creation and history of the federal commissioner system.<sup>38</sup> No comprehensive list or roster of the United States commissioners who served the federal courts until the United States magistrate system was authorized in 1968 appears to exist—an absence of 175 years of judicial service

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<sup>34</sup> Philip M. Pro, *United States Magistrate Judges: Present but Unaccounted For*, 16 NEV. L.J. 783 (2016).

<sup>35</sup> For example, a prominent scholarly study of federal judge decision-making, co-authored by then-United States Court of Appeals Judge Richard Posner, LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013), ignores United States magistrate judges entirely. Pro, *supra* note 34, at 784-85.

<sup>36</sup> JUSTIN CROWE, *BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT* 242-44 (2012).

<sup>37</sup> DWIGHT F. HENDERSON, *COURTS FOR A NEW NATION* (1971); Act of March 2, 1793, ch. 22, § 4, 1 Stat. 334 (1793).

<sup>38</sup> Charles A. Lindquist, *The Origin and Development of the United States Commissioner System*, 14 AM. J. LEGAL HIST. 1 (1970); Leslie G. Foschio, *A History of the Development of the Office of United States Commissioner and Magistrate Judge System*, 1999 FED. CTS. L. REV. 4 (1999). See, e.g., Richard S. Goldsmith, *The Role and Jurisdiction of the United States Commissioner in the Federal Judicial Structure*, 1 LINCOLN L. REV. 89 (1968) (a summary of United States commissioner authority at the time the Federal Magistrates Act of 1968 was enacted); Peter G. McCabe, *The Federal Magistrates Act of 1979*, 16 HARV. J. ON LEGIS. 343, 345-47 (1979); Joseph F. Spaniol, Jr., *The Federal Magistrates Act: History and Development*, 1974 ARIZ. ST. L.J. 565 (1974) (brief history of the commissioner system prior to the enactment of the FMA).

since the office was first established by Congress in 1793. The Federal Judicial Center, the judicial agency whose mission includes the responsibility of conducting research on the history of the federal courts, has no list of United States commissioners.<sup>39</sup>

This dearth of information is particularly striking when one considers the dramatic history of the enforcement of the FSA. As noted above, a large historical literature describes the turbulent and often violent events surrounding the forced renditions of enslaved people under the Act.<sup>40</sup> All of these works, particularly the numerous books that address specific fugitive slave cases, mention in passing the circuit court commissioners who were at the center of these awful cases, issuing warrants, presiding over rendition hearings, issuing certificates of removal to slave owners, and even organizing United States marshals and posses of citizens to transport fugitive slaves back to their owners. Yet to date, with one exception,<sup>41</sup> little has been published about these commissioners or the system they worked in beyond passing mentions of their names in particular cases.<sup>42</sup>

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<sup>39</sup> “The Federal Judicial History Office helps courts and others study and preserve federal judicial history.” FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/about> [<https://perma.cc/EG5V-RBEZ>] (last visited Feb. 10, 2023). In response to an August 2020 email inquiry from the Author, FJC staff acknowledged that the agency has no list of United States commissioners.

<sup>40</sup> See Fugitive Slave Act of 1850, ch. 60, § 8 9 Stat. 462 (1850) (repealed 1864).

<sup>41</sup> The exception is Circuit Court Commissioner Edward J. Loring in Boston, Massachusetts. Because he presided in the rendition case of Anthony Burns in 1854, which generated enormous controversy and violent protests that coincided with the controversies over the Kansas-Nebraska Acts, Loring became the focus of sustained public attack by Boston’s abolitionist community, eventually losing his law lectureship position at Harvard University and being removed as a state probate judge in 1858 after lengthy public hearings. Accordingly, much more has been written about Loring in the context of the *Burns* case than about any other commissioner, including an unpublished doctoral dissertation focusing on the legal controversies surrounding Loring. See, e.g., MALTZ, *supra* note 9, at 1-3, 69-70, 86-87, 90-94, 108-11, 113-17, 120-56; VON FRANK, *supra* note 9, at 16-18, 116-18, 119-24, 139-42, 144-45, 199-203, 240-41, 262-64, 283-84, 320-21; BARKER, THE IMPERFECT REVOLUTION, *supra* note 9, at 9-10, 13-14, 16-17, 81-84; Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys*, 17 CARDOZO L. REV. 1793 (1996); Kevin L. Gilbert, *The Ordeal of Edward Greeley Loring: Fugitive Slavery, Judicial Reform, and the Politics of Law in 1850s Massachusetts* (2014) (unpublished Ph.D. dissertation, University of Massachusetts Amherst) (on file with author).

<sup>42</sup> Cooper Wingert, a graduate student at Georgetown University, has posted online research on circuit court commissioners and enforcement of the Fugitive Slave Act of 1850, including a list of commissioners serving in the federal courts between 1850 and

Before examining how federal commissioners' duties were expanded with the enactment of the FSA, however, this Article will describe the origins of the circuit court commissioner system in the early years of the republic. In addition, to better understand why Southern legislators looked to expand the authority of commissioners when they drafted the FSA, it will discuss the issue of runaway slaves under the United States Constitution and examine how local justices of the peace in Southern states played a central role in policing enslaved people before the Civil War.

## II. "DISCREET PERSONS LEARNED IN THE LAW": THE FIRST FEDERAL COMMISSIONERS

Shortly after Congress created the first federal courts in 1789,<sup>43</sup> the need for subsidiary judicial officers to assist federal judges appointed under Article III of the Constitution began to emerge. As Crowe states, "[a]s early as 1793, Congress had realized the need to provide federal judges with some sort of quasi-judicial assistance."<sup>44</sup>

Low-level judicial officers are a common feature of judicial systems in the English-speaking world. Such officers have limited powers and perform basic functions such as administering oaths, adjudicating minor criminal offenses, issuing arrest warrants, considering the bail or detention of alleged criminal defendants, and other tasks. The judicial position of justice of the peace first emerged in Great Britain in the fourteenth century during the reign of Edward II and was an integral element of the British legal system when its North American colonies were established.<sup>45</sup>

Whether known as justices of the peace, magistrates, or by other titles, all courts in the British colonies and the early United States employed such "quasi-judges" to perform a wide variety of

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1854, compiled for his undergraduate thesis at Dickinson College, Carlisle, Pennsylvania. See Cooper Wingert, *US Commissioners, 1850 FUGITIVE SLAVE LAW*, <http://blogs.dickinson.edu/hist-wingert/uscommissioners/> [https://perma.cc/VJ49-NTG5].

<sup>43</sup> Judiciary Act of 1789, ch. 20, § 3, 1 Stat. 73 (1789); *id.* § 9; *id.* § 33.

<sup>44</sup> CROWE, *supra* note 36, at 242.

<sup>45</sup> For an in-depth exploration of the roles of justices of the peace in the English legal system in the seventeenth and eighteenth centuries, see NORMA LANDAU, *THE JUSTICES OF THE PEACE, 1679-1760* (1984). See, e.g., C. G. Crump & C. Johnson, *The Powers of Justices of the Peace*, 27 *ENG. HIST. REV.* 226 (1912).

judicial duties.<sup>46</sup> As Boyer notes, “[b]y the beginning of the eighteenth century[,] there were men functioning as justices of the peace in each of the colonies. Their powers varied somewhat from one area to another, but they were usually the arm of the government with which the average man dealt.”<sup>47</sup> Whether appointed or elected, justices of the peace were usually prominent individuals in their communities but served without salary and only rarely had any legal training.<sup>48</sup> Accordingly, manuals for justices of the peace were among the earliest books published in English North America and could be found in many gentlemen’s libraries throughout the colonies.<sup>49</sup>

When Congress authorized the first federal courts with the Judiciary Act of 1789, all the states that had ratified the Constitution had justices of the peace. Many of the Founding Fathers served as magistrates or justices of the peace in their respective colonies and states. George Washington served as a justice of the peace in Fairfax County, Virginia beginning in 1764.<sup>50</sup> In 1777, Thomas Jefferson was appointed as a justice of the peace in Albemarle County, Virginia.<sup>51</sup> Roger Sherman, the only man to sign the Declaration of Independence, the Articles of Confederation, and the Constitution, served as a justice of the peace between 1755

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<sup>46</sup> For a discussion of roles of justices of the peace and magistrates in courts in the early history of the English colonies in North America, see BRADLEY CHAPIN, *CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606-1660*, at 66-69, 83-91 (1983); A. G. ROEBER, *FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680-1810*, at 32-72 (Morris S. Arnold ed., 1981); RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 5-7* (1971); Erwin C. Surrency, *The Courts in the American Colonies*, 11 *AM. J. LEGAL HIST.* 253 (1967); Larry M. Boyer, *The Justice of the Peace in England and America from 1506 to 1776: A Bibliographic History*, 34 *Q. J. LIBR. CONG.* 322, 322-26 (1977).

<sup>47</sup> Boyer, *supra* note 46, at 323.

<sup>48</sup> ROEBER, *supra* note 46, at 53. Roeber’s work details the transformation of Virginia’s legal culture in the eighteenth century from a system of “gentleman” justices of the peace (the “faithful magistrates” of his title) to a more professional legal system centering on district courts served by professional lawyers. *See, e.g.*, RHYS ISAAC, *THE TRANSFORMATION OF VIRGINIA, 1740-1790*, at 92-93 (1982).

<sup>49</sup> Boyer, *supra* note 46, at 322.

<sup>50</sup> *See* JAMES THOMAS FLEXNER, *GEORGE WASHINGTON: THE FORGE OF EXPERIENCE, 1732-1775*, at 250-51 (1965); HENRY WIENCEK, *AN IMPERFECT GOD: GEORGE WASHINGTON, HIS SLAVES, AND THE CREATION OF AMERICA* 126-30 (2003).

<sup>51</sup> *See* DUMAS MALONE, *JEFFERSON THE VIRGINIAN* 287 (1948).

and 1761 early in his legal career in New Milford, Connecticut.<sup>52</sup> John Marshall's only judicial experience before his appointment as Chief Justice of the United States in 1801 was serving as a magistrate for three years on the Hustings Court in Richmond, Virginia in the 1780s.<sup>53</sup>

The authors of the Constitution expected that state judges would actively participate in the enforcement of federal statutes.<sup>54</sup> Yet, early on it became apparent that a federal system reliant on state judiciaries for enforcement was often unworkable.<sup>55</sup> Accordingly, Congress in 1793 authorized the federal courts to appoint "discreet persons learned in the law" to conduct bail hearings in criminal cases to aid federal judges.<sup>56</sup> Congress expanded the duties of these officers in 1794 to take evidence in admiralty cases<sup>57</sup> and in 1812 to include authority to take affidavits in civil cases.<sup>58</sup> Congress first gave them an official title, circuit court commissioners, in 1817.<sup>59</sup> At that time, Congress also authorized commissioners to take depositions in civil cases and perform certain additional duties in admiralty actions.<sup>60</sup>

From the beginning, the office of circuit court commissioner in the federal courts was primarily an administrative and ministerial position. All commissioners worked part-time and were paid by fees established under the laws of the individual states.<sup>61</sup> This led to

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<sup>52</sup> See ROBERT G. FERRIS & JAMES H. CHARLETON, *THE SIGNERS OF THE CONSTITUTION* 211 (1986); DENISE KIERNAN & JOSEPH D'AGNESE, *SIGNING THEIR RIGHTS AWAY: THE FAME AND MISFORTUNE OF THE MEN WHO SIGNED THE UNITED STATES CONSTITUTION* 47 (2011).

<sup>53</sup> JEAN EDWARD SMITH, *JOHN MARSHALL: DEFINER OF A NATION* 105 (1996).

<sup>54</sup> See, e.g., JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 172-74 (1996); MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 80, 154-56 (1913).

<sup>55</sup> Lindquist, *supra* note 38, at 2-5.

<sup>56</sup> Act of Mar. 2, 1793, ch. 22, § 4, 1 Stat. 334 (1793). See James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 MICH. L. REV. 1, 36-40 (2008) (discussing Congressional legislation in 1793 and 1794 authorizing the appointment of commissioners compensated by fees as being intended to relieve Supreme Court justices and United States district judges from certain duties related to the burdens of riding circuit in the early days of the republic).

<sup>57</sup> Act of June 9, 1794, ch. 64, § 1, 1 Stat. 395 (1794).

<sup>58</sup> Act of Feb. 20, 1812, ch. 25, §§ 1-3, 1 Stat. 679 (1812).

<sup>59</sup> Act of Mar. 1, 1817, ch. 30, 2 Stat. 350 (1817).

<sup>60</sup> *Id.*; see also ALFRED CONKLING, *A TREATISE ON THE ORGANIZATION, JURISDICTION, AND PRACTICE OF THE COURTS OF THE UNITED STATES* 50-51, 120-21 (3d ed. 1856).

<sup>61</sup> Lindquist, *supra* note 38, at 6; Pfander, *supra* note 56, at 40.

problematic situations where commissioners were paid differing fees for performing the same duties in different locations.<sup>62</sup> Moreover, as Lindquist has emphasized, early commissioners “had *no* arrest or imprisonment powers and hence were not really federal justices of the peace; therefore, for all practical purposes, an effective minor federal judiciary did not exist.”<sup>63</sup>

While some cooperation between the federal courts and state courts in enforcing federal laws continued to take place, growing sectional differences between Northern and Southern states over federal laws, such as tariffs<sup>64</sup> and the Fugitive Slave Act of 1793,<sup>65</sup> eventually led to recognition that a separate cadre of minor federal judicial officers was needed to assist the courts in enforcing federal laws. Accordingly, in 1842, Congress gave circuit court commissioners “all the powers that any justice of the peace, or other magistrate, of any of the United States may now exercise in respect to offenders for any crime or offense against the United States by arresting, imprisoning, or bailing the same.”<sup>66</sup> In 1848, Congress further empowered circuit court commissioners to conduct extradition proceedings for individuals sought pursuant to treaty obligations for crimes committed in foreign countries.<sup>67</sup>

Yet, even with these expanded powers, before 1850, the office of circuit court commissioner remained largely an administrative position. Significantly, commissioners had no authority to issue search warrants or adjudicate minor criminal offenses. They had no power to render final judgments or orders in criminal or civil matters. Moreover, their authority, like their fees, was tied to the specific state laws of the districts where they served. It is telling that the names of most of the commissioners who served the circuit courts prior to 1850 are unknown since no master list or roster of these offices appears to have been kept in those years.<sup>68</sup>

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<sup>62</sup> Lindquist, *supra* note 38, at 6.

<sup>63</sup> *Id.*

<sup>64</sup> See WILLIAM W. FREEHLING, *PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA, 1816-1836* (1965).

<sup>65</sup> See Act of Feb. 12, 1793, ch. 7, §4, 1 Stat. 302 (1793) for further discussion of the issue of fugitive slaves under the United States Constitution and the Fugitive Slave Act of 1793.

<sup>66</sup> Act of Aug. 23, 1842, ch. 188, § 1, 5 Stat. 516 (1842).

<sup>67</sup> Act of Aug. 12, 1848, ch. 167, §§1-5, 9 Stat. 302 (1848).

<sup>68</sup> See HENDERSON, *supra* note 37.

To understand further why Congress enacted the FSA in 1850 and, in doing so, expanded the powers of circuit court commissioners, it is necessary to discuss the issue of runaway slaves embedded in the United States Constitution. This Article will also examine how Southern states used local justices of the peace to regulate and police recalcitrant and runaway slaves in those jurisdictions.

### III. "PERSONS HELD TO SERVICE AND LABOUR": RUNAWAY SLAVES UNDER THE CONSTITUTION

The issue of slavery vexed the United States from the ratification of the Constitution to the outbreak of the Civil War. When drafting the Constitution, the Founders avoided using the words "slave" or "slavery," yet the final document reflected the tensions caused by the issue. Southern slave owners demanded and received the right to reclaim bondsmen if their slaves fled to Northern states. Thus, the third paragraph of Article IV, Section 2 of the Constitution states:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.<sup>69</sup>

Enslavers therefore claimed a right under the Constitution to the recapture and return of enslaved people who had fled into Northern states without slavery.<sup>70</sup> In the years leading up to the Civil War, many Northerners who otherwise abhorred slavery acknowledged that this provision in the Constitution gave Southern slave owners legitimate authority to seize and return fugitive slaves who had escaped to the North.<sup>71</sup>

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<sup>69</sup> U.S. CONST. art. IV, § 2, cl. 3.

<sup>70</sup> DON E. FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATION TO SLAVERY* 207-09 (Ward M. McAfee ed., 2001).

<sup>71</sup> For example, Abraham Lincoln, while abhorring the institution of slavery, acknowledged that slave holders had a constitutional right to retrieve their slaves from Northern states and pledged to enforce federal fugitive slave laws in his first inaugural address in March 1861 after seven Southern states had voted to secede from the Union.



Historian Paul Finkelman observes that “[t]his clause was vague in its wording and opaque as to how it would be implemented.”<sup>72</sup> In particular, the clause was not self-enforcing. Not long after ratification of the Constitution, enslavers demanded a federal statute to assist them in recovering escaped bondsmen in Northern states. In response, Congress enacted the Fugitive Slave Act of 1793.<sup>73</sup> Under this statute, a slave owner seeking to retrieve his or her slave could initiate a rendition proceeding before “any judge of the circuit or district courts of the United States” in the state where the slave was apprehended, or “any magistrate of a county, city or town corporate, wherein such seizure or arrest shall be made,” with some limited protections set forth to prohibit free Blacks from being kidnapped or removed through mistaken identity.<sup>74</sup> As concerns about the kidnapping of free men and women grew, several Northern states enacted statutes, called personal liberty laws, to protect them.<sup>75</sup>

Historian James Oakes summarizes the inherent dispute growing between how Northerners and Southerners interpreted the Fugitive Slave Clause in Article VI of the Constitution:

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See ERIC FONER, *THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY* 158 (2010).

<sup>72</sup> Paul Finkelman, *Introduction: A Disastrous Decade, in CONGRESS AND THE CRISIS OF THE 1850S* 11 (Paul Finkelman & Donald R. Kennon eds., 2012).

<sup>73</sup> Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302; see CAMPBELL *supra* note 9, at 7-9. See also Paul Finkelman, *The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793*, 56 J. S. HIST. 397, 397-422 (1990); C. W. A. David, *The Fugitive Slave Law of 1793 and Its Antecedents*, 9 J. NEGRO HIST. 18, 22-23 (1924).

<sup>74</sup> Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 § 3.

<sup>75</sup> For an in-depth analysis of state personal liberty laws, see THOMAS D. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1781* (1974) [hereinafter MORRIS, *FREE MEN ALL*].

In effect, the Constitution established two different legal approaches to fugitive slaves: the master's summary right of recaption, and the state's power to require due process in fugitive slave renditions. The result was conflict. Slaveholders would claim that the Constitution, in recognizing a right of recaption, necessarily recognized a right of property in a slave. . . . Yet from the start northern states interpreted the clause as a recognition of their power to protect Black persons within their borders based on the presumption of freedom. . . . Through their power to regulate fugitive slave renditions, northern states could come close to nullifying the slaveholder's constitutionally recognized right of recaption.<sup>76</sup>

These tensions concerning fugitive slaves would continue up to the Civil War.

The issues arising under state personal liberty laws and enforcement of the Fugitive Slave Act of 1793 did not reach the Supreme Court until 1842 in *Prigg v. Pennsylvania*.<sup>77</sup> The plurality opinion in *Prigg*, written by Associate Justice Joseph Story, held that the Fugitive Slave Act of 1793 did not violate the Constitution.<sup>78</sup> It also held that a Pennsylvania anti-kidnapping statute, under which slave agent Prigg had been convicted, violated the Constitution, thus rendering Prigg's conviction invalid.<sup>79</sup> The Court further ruled, however, that because the federal government was exclusively responsible for the enforcement of the Fugitive Slave Act of 1793, states had no obligation to participate in enforcing the statute.<sup>80</sup> This aspect of the *Prigg* decision resulted in several Northern states enacting statutes that forb state judges, jailers, and other law enforcement officials from participating in

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<sup>76</sup> JAMES OAKES, *THE CROOKED PATH TO ABOLITION: ABRAHAM LINCOLN AND THE ANTISLAVERY CONSTITUTION* 12 (1st ed. 2021).

<sup>77</sup> *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

<sup>78</sup> *Id.* at 622. See also Paul Finkelman, *Sorting Out Prigg v. Pennsylvania*, 24 RUTGERS L.J. 605 (1993) for a detailed analysis of Justice Story's plurality opinion and the six other opinions issued by other members of the Court. See also Paul Finkelman & Joseph Story, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247 (1994).

<sup>79</sup> *Prigg*, 41 U.S. at 625-26.

<sup>80</sup> *Id.* at 622-25.

fugitive slave renditions, effectively leaving the 1793 law a dead letter.<sup>81</sup>

This was the state of the law when Congress once again took up the problem of how Southern enslavers could exercise their rights under the Constitution to retrieve fugitive slaves in 1850.

#### IV. JUSTICES OF THE PEACE AND SLAVERY IN SOUTHERN STATES

From the time that enslaved African captives were brought to England's North American colonies, Southern whites lived in fear of slave revolts and insurrections.<sup>82</sup> These fears were not groundless; full-fledged slave rebellions erupted several times in the South after ratification of the Constitution up to the Civil War.<sup>83</sup> Moreover, rumors of possible slave revolts often arose.<sup>84</sup> Aside from

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<sup>81</sup> See BERNARD SCHWARTZ, *FROM CONFEDERATION TO NATION: THE AMERICAN CONSTITUTION, 1835-1877*, at 101 (1973) (“The upshot [of the *Prigg* decision] was virtual ‘nullification’ in the North of the constitutional provision for the return of fugitive slaves.”); Jeffrey M. Schmitt, *The Federal Right to Recover Fugitive Slaves: An Absolute but Self-Defeating Property Right*, 2 SAVANNAH L. REV. 21, 28-30 (2015). For additional recent reevaluations of the *Prigg* decision, see Leslie Friedman Goldstein, *A “Triumph of Freedom” After All? Prigg v. Pennsylvania Re-examined*, 29 LAW & HIST. REV. 763, 763-96 (2011); Barbara Holden-Smith, *Lords of Lash, Loom, and Law: Justice Story, Slavery, and Prigg v. Pennsylvania*, 78 CORNELL L. REV. 1086 (1993).

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As the South's own black popula[tion] grew and its slave society expanded, the events of [the Haitian Revolution] frightened American slaveholders, reminding them to be vigilant in defense of their region's peculiar institution. . . . News of a large revolt that saw the brutal deaths of planters caused dread in white America.

CARL LAWRENCE PAULUS, *THE SLAVEHOLDING CRISIS: FEAR OF INSURRECTION AND THE COMING OF THE CIVIL WAR 13-14* (T. Michael Parrish ed., 2017). See also ALFRED N. HUNT, *HAITI'S INFLUENCE ON ANTEBELLUM AMERICA: SLUMBERING VOLCANO IN THE CARIBBEAN* 107-46 (1988); MORRIS, *SOUTHERN SLAVERY*, *supra* note 8, at 211; EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 595 (Vintage Books 1st ed. 1976); CLEMENT EATON, *THE FREEDOM-OF-THOUGHT STRUGGLE IN THE OLD SOUTH* 89-117 (1964).

<sup>83</sup> See HADDEN, *supra* note 8, at 137-66; GENOVESE, *supra* note 81, at 587-96. The four most prominent insurrections of enslaved people in the nineteenth century were the Gabriel Prosser revolt in 1800 (Virginia), the German Coast slave uprising in 1811 (Louisiana), the Denmark Vesey rebellion in 1822 (South Carolina), and the Nat Turner insurrection in 1830 (Virginia). GENOVESE, *supra* note 81, at 588; see also HERBERT APTHEKER, *AMERICAN NEGRO SLAVE REVOLTS* (6th ed. 2008) (early and controversial history of slave revolts) (arguing that slave resistance and rebellion was more pervasive than previous historians had been willing to admit).

<sup>84</sup> See, e.g., Charles B. Dew, *Black Ironworkers and the Slave Insurrection Panic of 1856*, 41 J. S. HIST. 321 (1975); Ray Granade, *Slave Unrest in Florida*, 55 FLA. HIST. Q.

these basic fears, enslavers also dealt with the ongoing issue of enslaved people running away, sometimes for temporary escape and sometimes seeking permanent freedom.<sup>85</sup> In response to such fears, real and imagined, all Southern colonies (and later states) with large slave populations enacted statutes to deal with runaway and intransigent slaves by using slave patrols and local courts.<sup>86</sup> In drafting these statutes, legislatures routinely authorized local justices of the peace to enforce laws dealing with runaway, insubordinate, and rebellious slaves.

We have seen that justices of the peace were a common feature in American judicial systems from colonial times extending into the antebellum years of the United States.<sup>87</sup> They were usually prominent gentlemen in their communities but rarely had legal training.<sup>88</sup> Justices of the peace, however, played an even greater societal role in Southern states, serving as primary representatives of the government most individuals encountered in rural areas, often performing administrative as well as legal duties in their localities.<sup>89</sup> In a region with few large cities, Southern justices of

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18 (1976); Wim Klooster, *Slave Revolts, Royal Justice, and a Ubiquitous Rumor in the Age of Revolutions*, 71 WM. & MARY Q. 401 (2014); Edwin A. Miles, *The Mississippi Slave Insurrection Scare of 1835*, 42 J. NEGRO HIST. 48 (1957); Philip D. Morgan, *Conspiracy Scares*, 59 WM. & MARY Q. 159 (2002); Junius P. Rodriguez, *Always "En Garde": The Effects of Slave Insurrection upon the Louisiana Mentality, 1811-1815*, 33 LA. HIST. 399 (1992); Harvey Wish, *The Slave Insurrection Panic of 1856*, 5 J. S. HIST. 206 (1939); Charles Edward Morris, *Panic and Reprisal: Reaction in North Carolina to the Nat Turner Insurrection, 1831*, 62 N.C. HIST. REV. 29 (1985) [hereinafter Morris, *Panic and Reprisal*].

<sup>85</sup> JOHN HOPE FRANKLIN & LOREN SCHWENINGER, *RUNAWAY SLAVES: REBELS ON THE PLANTATION* (1999) (the standard recent history on runaway slaves).

<sup>86</sup> *Id.* at 150-56; see also HADDEN, *supra* note 8, at 2-4.

<sup>87</sup> See *supra* notes 43-51 and accompanying text.

<sup>88</sup> See ROEBER, *supra* note 46, at 46-47 (noting the hostility of Virginia justices of the peace to the rise of professional lawyers in the colony).

<sup>89</sup> See, e.g., RACHEL N. KLEIN, *UNIFICATION OF A SLAVE STATE: THE RISE OF THE PLANTER CLASS IN THE SOUTH CAROLINA BACKCOUNTRY, 1760-1808*, at 40 (1990) ("In the absence of all but the most rudimentary forms of local organization, magistrates and militia officers, many of whom were slaveholders, storekeepers, and aspiring planters, were the primary agents of civil authority.") (writing of rural, eighteenth-century South Carolina).

the peace played a central role in maintaining order in the counties where they served.<sup>90</sup> Court sessions were significant social events in rural areas.<sup>91</sup> But while Southern justices of the peace had limited civil and criminal jurisdiction in cases involving White citizens,<sup>92</sup> their powers expanded greatly when dealing with enslaved people.<sup>93</sup>

State assemblies gave justices of the peace in Southern states a wide variety of judicial and administrative duties to assist in policing slaves. As members of county courts, justices of the peace participated in the appointment of slave patrols.<sup>94</sup> Justices administered the oaths to patrol members and oversaw records of

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In the southern colonies[,] the courts completely overshadowed the towns and were the principal agents of the local constitutions. American justices of the peace performed most of the main functions of their English forebears, including the licensing of ferries and taverns and the punishment of vagrants. . . . [I]n Kentucky, as in most of the southeastern part of the United States, the county court remained supreme until 1850 or afterward.

ROBERT M. IRELAND, *THE COUNTY COURTS IN ANTEBELLUM KENTUCKY* 1-2 (1972).

<sup>90</sup>

The Virginia assembly usually assigned the justice of the peace the task of enforcing the laws dealing with hunting, hog-stealing, Indians, runaways, servants, slaves, and tobacco. The Virginia justice also spent much of his time supervising the morals of his fellow citizens; adultery, barrety, buggery, bastardy, bigamy, marriage, and religion all came under the purview of the office.

Boyer, *supra* note 46, at 324.

<sup>91</sup> See CARL BRIDENBAUGH, *MYTHS & REALITIES: SOCIETIES OF THE COLONIAL SOUTH* 23-24 (1975) ("Annual fairs always drew large crowds, as did election days and the regularly scheduled meetings of county courts, which were the occasion not only for much extra-legal business but also for merriment of all kinds."). See also KLEIN, *supra* note 88, at 41; ISAAC, *supra* note 48, at 88-94; ROEBER, *supra* note 46, at 73-95, 114-37; E. Lee Shepard, "This Being Court Day": *Courthouses and Community Life in Rural Virginia*, 103 VA. MAG. HIST. & BIOG. 459 (1995).

<sup>92</sup> See ROEBER, *supra* note 46, at 42-44 (noting that justices of the peace in colonial Virginia only had jurisdiction to dispose of petty criminal cases and civil cases where the damages did not exceed the value of ten pounds); KLEIN, *supra* note 88, at 39 (noting that a requirement in South Carolina law that all civil cases where damages exceeded twenty pounds had to be heard by the main court in Charleston, rather than before justices of the peace, caused considerable problems for backcountry residents).

<sup>93</sup> See Morris, *Panic and Reprisal*, *supra* note 83, at 210-15.

<sup>94</sup> See HADDEN, *supra* note 8, at 35-37 (appointment of slave patrols in North Carolina). See, e.g., THE CODE OF TENNESSEE: ENACTED BY THE GENERAL ASSEMBLY OF 1857-8 (Return J. Meigs & William F. Cooper eds., 1858) ("The Justices of the Peace in each civil district may appoint patrols, not exceeding three, to serve for twelve months.").

patrol service.<sup>95</sup> When made aware of runaway or unruly slaves in particular places, justices were authorized to issue warrants directing the slave patrol or local constable to apprehend the slaves to be brought before them.<sup>96</sup>

Justices of the peace also had authority to order corporal punishment of slaves brought before them for a wide array of offenses, though they otherwise had limited individual authority in other criminal cases and could not try felony offenses against Whites.<sup>97</sup> Slavery as an institution relied on brutal violence to maintain order across the board, with masters and overseers routinely employing beatings and whippings to punish slaves.<sup>98</sup> Slave patrols had authority to administer beatings of the slaves captured on the spot,<sup>99</sup> while other statutes enacted by Southern state legislatures empowered virtually all White citizens to use immediate corporal punishment to control enslaved people in various situations.<sup>100</sup> In this context, it is not surprising that justices of the peace had the authority to order lashes or “stripes”

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<sup>95</sup> See HADDEN, *supra* note 8, at 77-78.

<sup>96</sup> See JOHN J. ORMOND, ARTHUR P. BAGBY & GEORGE GOLDTHWAITE, CODE OF ALABAMA 239 (1852); E.H. ENGLISH, A DIGEST OF THE STATUTES OF ARKANSAS: EMBRACING ALL LAWS OF A GENERAL AND PERMANENT CHARACTER, IN FORCE AT THE CLOSE OF THE SESSION OF THE GENERAL ASSEMBLY OF 1846; TOGETHER WITH NOTES OF THE DECISIONS OF THE SUPREME COURT UPON THE STATUTES, Chapter 153, “Slaves,” § 12 (1848); A. HUTCHINSON, CODE OF MISSISSIPPI: BEING AN ANALYTICAL COMPILATION OF THE PUBLIC AND GENERAL STATUTES OF THE TERRITORY AND STATE, WITH TABULAR REFERENCES TO THE LOCAL AND PRIVATE ACTS, FROM 1798 TO 1848, at 518-19 (1848); 2 CHARLES H. HARDIN, THE REVISED STATUTES OF THE STATE OF MISSOURI, REVISED AND DIGESTED BY THE EIGHTEENTH GENERAL ASSEMBLY, DURING THE SESSION OF ONE THOUSAND EIGHT HUNDRED AND FIFTY-FOUR AND ONE THOUSAND EIGHT HUNDRED AND FIFTY-FIVE; TO WHICH ARE PREFIXED THE CONSTITUTIONS OF THE UNITED STATES AND OF THE STATE OF MISSOURI, WITH AN APPENDIX, INCLUDING CERTAIN LOCAL ACTS OF THIS STATE, AND LAWS OF CONGRESS, AND FORM BOOK, Chapter CL, “Slaves,” Article III, “Of Runaway Slaves,” § 4 (1856).

<sup>97</sup> See Morris, *Panic and Reprisal*, *supra* note 83, at 211.

<sup>98</sup> See GENOVESE, *supra* note 81, at 63-68; FRANKLIN & SCHWENINGER, *supra* note 84, at 42-48, 239-40, 252-53. See, e.g., CHARLES JOYNER, DOWN BY THE RIVERSIDE: A SOUTH CAROLINA SLAVE COMMUNITY *passim* 32-33, 52-57, 66-70 (1984) (describing various forms of physical punishment of enslaved people inflicted by masters, overseers, slave drivers, and others in All Saints Parish, South Carolina).

<sup>99</sup> See HADDEN, *supra* note 8, at 105-06, 113-14, 123-26.

<sup>100</sup> See, e.g., ROBERT OLWELL, MASTERS, SLAVES & SUBJECTS: THE CULTURE OF POWER IN THE SOUTH CAROLINA LOW COUNTRY, 1740-1790, at 68 (1998).

for slaves found guilty of numerous offenses after conducting brief, summary hearings.<sup>101</sup>

For example, Edward Cantwell in his 1856 manual for North Carolina magistrates described the summary criminal jurisdiction of North Carolina justices of the peace “out of court” (jurisdiction outside of regular court sessions), noting that North Carolina statutes authorized justices to order that up to thirty-nine lashes could be inflicted on any slave found guilty of “trivial offenses,” such as being “insolent to any free white person,” uttering “mischievous and slanderous reports about any free white person,” forging a “free pass of certificate of freedom,” raising “horses, cattle, hogs or sheep,” teaching any slave or free negro “to read or write, the use of figures excepted,” selling “spiritous liquor or wine,” playing “at any game of cards, dice or nine pins,” or public preaching “at any prayer meeting or other association for worship,” among numerous other offenses.<sup>102</sup> Statutes in Alabama, Arkansas, Kentucky, Mississippi, Missouri, and Tennessee all authorized justices of the peace to order the flogging of enslaved people found guilty of “riots, routs, unlawful assemblies, trespasses, and seditious speeches,”<sup>103</sup> only varying on the severity of the punishment. In Alabama, a justice of the peace could order up to 100 lashes for these offenses,<sup>104</sup> while Kentucky magistrates could order a maximum of only thirty-nine lashes.<sup>105</sup> While Whites and free Blacks accused of similar

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<sup>101</sup> As Thomas Morris writes, “[a single justice of the peace] was an instrument in maintaining a system of racial [discrimination] in general and slavery in particular. This was aided by using a summary jurisdiction in relatively minor cases so that the labor needs of the master were only briefly interrupted.” MORRIS, *SOUTHERN SLAVERY*, *supra* note 8, at 211.

<sup>102</sup> EDWARD CANTWELL, *SWAIM’S JUSTICE—REVISED: THE NORTH CAROLINA MAGISTRATE, A PRACTICAL GUIDE TO THE LAWS OF THE STATE, AND THE DECISIONS OF THE SUPREME COURT, DEFINING THE DUTIES AND JURISDICTION OF JUSTICES OF THE PEACE OUT OF COURT UNDER THE REVISED CODE, 1854-’55, TOGETHER WITH FULL INSTRUCTIONS AND NUMEROUS FORMS AND PRECEDENTS* 150 (1856).

<sup>103</sup> *See, e.g.*, ALA. CODE § 1015 (1852); ARK. CODE ANN. § 53 (1848); RICHARD H. STANTON, *THE REVISED STATUTES OF KENTUCKY* 367 (1860); MISS. CODE ANN. § 16 (1848); MO. REV. STAT. § 22 (1856); TENN. CODE ANN. § 2621 (1858).

<sup>104</sup> ALA. CODE § 1015 (1852) (“Riots, routs, unlawful assemblies, trespasses, and seditious speeches by a slave, are punished, by the direction of any justice before whom he may be carried, with stripes not exceeding one hundred.”).

<sup>105</sup> KY. REV. STAT. ANN. § 9 (1860) (“Riots, routs, unlawful assemblies, breaches of the peace, and seditious speeches by slaves, shall be punished with a number of stripes not exceeding thirty-nine, upon conviction by the judgment of a justice of the peace.”).

misdeemeanor offenses would be bound over for trial at formal court sessions before state judges, enslaved people could be punished immediately after summary proceedings with minimal due process rights upon the order of a single county justice of the peace throughout the South.

Several Southern states further empowered justices of the peace as members of special slave courts to conduct trials of enslaved people accused of capital crimes. For example, in Virginia, five justices of the peace collectively were authorized to form a Court of Oyer and Terminer, organized to interrogate and then try slaves accused of murder, insurrection, and other capital crimes.<sup>106</sup> In South Carolina, slave courts consisting of at least two justices of the peace and three freeholders were authorized to try slaves accused of felony offenses.<sup>107</sup> While a few other Southern states employed special slave courts manned by justices of the peace to try slaves accused of felony matters,<sup>108</sup> most Southern states before the Civil War mandated that enslaved people accused of serious crimes be tried in more formal courts before state judges, with due process rights similar to White defendants.<sup>109</sup> Nevertheless, justices of the peace remained the judicial officers who presided over felony cases involving slaves in Virginia and South Carolina until the Civil War.

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<sup>106</sup> William F. Ritchie, *The Code of Virginia: With the Declaration of Independence and Constitution of the United States; and the Declaration of Rights and Constitution of Virginia* § 2 (1849). See also Daniel J. Flanigan, *Criminal Procedure in Slave Trials in the Antebellum South*, 40 J. S. HIST. 537, 543-44 (1974); ISAAC, *supra* note 48, at 92; PHILIP J. SCHWARZ, *TWICE CONDEMNED: SLAVES AND THE CRIMINAL LAWS OF VIRGINIA, 1705-1865*, at 16-17 (1998).

<sup>107</sup> 7 DAVID J. MCCORD, *THE STATUTES AT LARGE OF SOUTH CAROLINA; EDITED UNDER AUTHORITY OF THE LEGISLATURE 400-01* (1840). See also OLWELL, *supra* note 99, at 63; Flanigan, *supra* note 105, at 540.

<sup>108</sup> See MORRIS, *SOUTHERN SLAVERY*, *supra* note 8, at 215 (Georgia maintained a slave court system using justices of the peace until 1811, while North Carolina finally ended its slave court system in 1816.). See, e.g., Alan D. Watson, *North Carolina Slave Courts, 1715-1785*, 60 N. C. HIST. REV. 24 (1983); Betty Wood, *Until He Shall be Dead, Dead, Dead: The Judicial Treatment of Slaves in Eighteenth Century Georgia*, 71 GA. HIST. Q. 377 (1987).

<sup>109</sup> See Flanigan, *supra* note 105, at 545-47.



Indeed, the trials of the slaves involved in the Gabriel Prosser<sup>110</sup> and the Nat Turner<sup>111</sup> slave insurrections in Virginia were tried by Courts of Oyer and Terminer composed of magistrates, not judges from Virginia's circuit courts. Similarly, the slaves and free Blacks accused in the Denmark Vesey slave revolt were tried by a slave court consisting of two justices of the peace and five freeholders in South Carolina.<sup>112</sup> The *ad hoc* slave court that ordered the immediate execution of twenty-one of the insurgent slaves in the German Coast uprising in Louisiana in 1811 consisted of one parish judge from St. Charles Parish and five other slaveowners.<sup>113</sup>

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<sup>110</sup> See DOUGLAS R. EGERTON, *GABRIEL'S REBELLION: THE VIRGINIA SLAVE CONSPIRACIES OF 1800 & 1802*, at 85-95 (1993) (description of trials of slaves after the Gabriel Prosser rebellion by a Court of Oyer and Terminer consisting of justices of the peace); see also Bert M. Mutersbaugh, *The Background of Gabriel's Insurrection*, 68 J. OF NEGRO HIST. 209, 209-11 (1983) (description of earlier trial of Gabriel Prosser before a court of justices of the peace in 1799).

<sup>111</sup> In his compilation of source material about the Nat Turner Revolt and its aftermath, Henry Irving Tragle presents transcriptions for trial records for the slaves prosecuted for their involvement in the uprising. Tragle lists fifty slaves tried in Courts of Oyer and Terminer in Southampton and other Virginia counties. Courts consisting of justices of the peace presided in all of these trials, including the penultimate trial of Nat Turner himself on November 5, 1831. See Henry Irving Tragle, *The Southampton Slave Revolt: A Compilation of Source Material 173-245* (Jan. 1971) (Ph.D. dissertation, University of Massachusetts) (on file with the author); see also PATRICK H. BREEN, *THE LAND SHALL BE DELUGED IN BLOOD: A NEW HISTORY OF THE NAT TURNER REVOLT* 108-09 (2015) (discussing the organization of Courts of Oyer and Terminer in Virginia, noting that "accused slaves faced a bench of five magistrates," that by law all magistrates on Virginia Courts of Oyer and Terminer had to be slaveholders, and that "the ultimate fate of the accused slave rebels in Southampton rested with only twenty slaveholders"); STEPHEN R. OATES, *FIRES OF JUBILEE: NAT TURNER'S FIERCE REBELLION* 141-43 (1975); WILLIAM SIDNEY DREWRY, *THE SOUTHAMPTON INSURRECTION* 95-102 (1900) (discussing interrogation by and trials before justices of the peace after the suppression of the Nat Turner insurrection).

<sup>112</sup> See LIONEL H. KENNEDY & THOMAS PARKER, *AN OFFICIAL REPORT OF THE TRIALS OF SUNDRY NEGROES, CHARGED WITH AN ATTEMPT TO RAISE AN INSURRECTION IN THE STATE OF SOUTH CAROLINA* (1822), reprinted as *THE TRIAL RECORD OF DENMARK VESEY* (1970) (narrating the Denmark Vesey Insurrections and providing a summary of the trial records of all slaves and free Blacks accused in the insurrection prepared by the two local magistrates who presided over the slave court after the rebellion was quelled); and EDWARD A. PEARSON, *DESIGNS AGAINST CHARLESTON: THE TRIAL RECORD OF THE DENMARK VESEY SLAVE CONSPIRACY OF 1822* (1999). See also DOUGLAS R. EGERTON, *HE SHALL GO OUT FREE: THE LIVES OF DENMARK VESEY* 175-202 (1999); HOWELL M. HENRY, *THE POLICE CONTROL OF THE SLAVE IN SOUTH CAROLINA* 152-53 (1914).

<sup>113</sup> See DANIEL RASMUSSEN, *AMERICAN UPRISING: THE UNTOLD STORY OF AMERICA'S LARGEST SLAVE REVOLT* 151-57 (2011); Junius Rodriguez, *Rebellion on the River Road:*

Finally, justices of the peace played a central role in how local governments dealt with runaway slaves. State legislatures throughout the South enacted precise procedures for what should be done when a runaway slave was captured. All statutes mandated that when a runaway slave was apprehended, he or she should immediately be brought before the nearest justice of the peace for further proceedings.<sup>114</sup> These were not criminal proceedings; other statutes usually provided for the punishment of captured bondsmen. Rather, the statutes established procedures for how “escaped property” should be handled: how the enslaved person should be returned to an enslaver; how the person who apprehended the runaway should be reimbursed; and how the slave should be housed, fed, and ultimately sold if owners did not appear to claim their property.

The Virginia runaway slave statute provides a typical example of how these statutes operated throughout the South.<sup>115</sup> After the fugitive slave was brought before the justice of the peace, a summary hearing was held to determine whether there was reasonable cause “to suspect that such slave is a runaway.”<sup>116</sup> Upon establishing that the captured bondsman was a runaway, the justice “shall give a certificate thereof stating . . . the distance of the place of arrest from that from which the slave may be supposed to have fled, and the sum of money demandable therefore by the person making the arrest, including mileage.”<sup>117</sup> Subsequent provisions described precisely the fees and costs to be paid by the slave’s master upon the slave’s return, as well as the payment of

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*The Ideology and Influence of Louisiana’s German Coast Slave Insurrection of 1811, in* ANTISLAVERY VIOLENCE: SECTIONAL, RACIAL, AND CULTURAL CONFLICT IN ANTEBELLUM AMERICA 76-77 (John R. McKivigan & Stanley Harrold eds., 1999); ADAM ROTHMAN, *SLAVE COUNTRY: AMERICAN EXPANSION AND THE ORIGINS OF THE DEEP SOUTH* 114-15 (2005); Robert L. Paquette, “A Horde of Brigands?” *The Great Louisiana Slave Revolt of 1811 Reconsidered*, 35 HIST. REFLECTIONS 72 (2009).

<sup>114</sup> See FRANKLIN & SCHWENINGER, *supra* note 84, at 150-52, 179-81.

<sup>115</sup> VA. CODE ANN. §§1-16 (1849). See, e.g., FRANKLIN & SCHWENINGER, *supra* note 84, at 150-52. For additional examples of statutory schemes governing runaway slaves, see, for example, ALA. CODE §§ 1023-1031 (1852); ARK. CODE ANN §§ 9-29 (1848); KY. REV. STAT. ANN. §§ 1-8 (1860); MISS. CODE ANN. §§ 33-35 (1848); MO. REV. STAT. §§ 1-20 (1856); TENN. CODE ANN. §§ 2581-2599 (1858).

<sup>116</sup> VA. CODE ANN. § 1 (1849).

<sup>117</sup> *Id.*

rewards.<sup>118</sup> Other sections set forth precise procedures for the delivery of the bondsman to the owner, if known, and for jailers to advertise the presence of a runaway and to subsequently sell the slave (minus costs of boarding the slave) if the enslaver did not claim his or her property.<sup>119</sup> Set fees and costs were established for all stages of the transactions between the apprehension and discharge of the slave to his or her old or new owner, depending on the circumstance. The statute focused upon managing property, not on the punishment of the individual slave. No due process rights for the enslaved person nor right of appeal from a justice's ruling are mentioned in the statute. And the justice of the peace was the only judicial officer participating in the governmental process concerned with the proper means of establishing and, if necessary, transferring the ownership of human chattel.

The official sale of runaway slaves by local sheriffs at the county courthouse door was a regular feature of Southern life.<sup>120</sup> Ariela Gross argues that local courts and the slave trade were deeply entwined features of the Southern economy.<sup>121</sup> Indeed, slave markets were often located near courthouses. For example, before he became a prominent Confederate general during the Civil War (and, after the war, the first Grand Wizard of the Ku Klux Klan), Nathan Bedford Forrest operated a slave market in Memphis, Tennessee across the street from a courthouse.<sup>122</sup>

The use of justices of the peace in these varied roles involving slaves is not surprising. The very term “justice of the peace” incorporates the basic expectation that these officers would help keep the peace in their counties. Yet, the growing fundamental differences between the Northern and Southern states in the years leading up to the Civil War are highlighted by observing the duties of justices of the peace in states with large populations of enslaved

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<sup>118</sup> *Id.* at §§ 2-6.

<sup>119</sup> *Id.* at §§ 7-16.

<sup>120</sup> See ARIELA J. GROSS, *DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM* 31 (2000) (“Before 1833 [in Natchez, Mississippi], slaves were sold everywhere . . . [including] on the steps of the county courthouse in court-ordered sales . . .”).

<sup>121</sup> *Id.* at 22-46.

<sup>122</sup> See CONNOR TOWNE O'NEILL, *DOWN ALONG WITH THAT DEVIL'S BONES: A RECKONING WITH MONUMENTS, MEMORY, AND THE LEGACY OF WHITE SUPREMACY* 228-37 (2020).

people. While all states moved away from judicial systems centered on unpaid justices of the peace towards using professional paid judges who had exclusive jurisdiction over capital and other more serious crimes,<sup>123</sup> justices of the peace in the South retained authority to inflict severe corporal punishment with minimal due process rights upon enslaved people for a wide array of “petty” offenses. Moreover, states like Virginia and South Carolina retained slave court systems where justices of the peace were the only judicial officers involved in trying slaves accused of felonies, including capital crimes, until the Civil War. And, uniquely in the South, justices of the peace oversaw elaborate civil procedures to manage the transfer and sale of runaway bondsmen, again with no due process rights for the enslaved individual.<sup>124</sup>

Thus, when it came time to draft federal legislation to strengthen the rights of Southern enslavers under the Constitution to retrieve fugitive slaves from Northern states, Southern legislators had only to look at how justices of the peace were used in their home states to find the model for the type of federal judicial officers needed to enforce the new law.

#### V. THE COMPROMISE OF 1850: SOUTHERN SENATORS DRAFT A FUGITIVE SLAVE LAW

The Compromise of 1850 was a pivotal event in American history. In accordance with its importance as one of the central confrontations between the North and South that eventually led to

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With independence and maturing, the nature of county government in the new nation gradually changed, especially in New England, the Middle Atlantic states, and the Old West. Here[,] elected boards of county commissioners began to replace justices of the peace and county courts as the nucleus of the county constitution.

See IRELAND, *supra* note 88, at 2; see also RALPH A. WOOSTER, THE PEOPLE IN POWER: COURTHOUSE AND STATEHOUSE IN THE LOWER SOUTH, 1850-1860, at 64-70 (1969) (describing the limited jurisdiction of justices of the peace and county courts in South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas); RALPH A. WOOSTER, POLITICIANS, PLANTERS AND PLAIN FOLK: COURTHOUSE AND STATEHOUSE IN THE UPPER SOUTH, 1850-1860, at 79-87 (1975) (describing the limited jurisdiction of justices of the peace and county courts in Virginia, North Carolina, Kentucky, Tennessee, Missouri, and Arkansas).

<sup>124</sup> See *supra* notes 118-20 and accompanying text.

the Civil War, historians have analyzed the Compromise of 1850 at length.<sup>125</sup> Yet, comparatively little attention has been given to the genesis of the FSA, one of the several bills passed by Congress that constituted the Compromise.<sup>126</sup>

The FSA was drafted by Southern senators with little input from Northern lawmakers.<sup>127</sup> Since the Compromise involved several significant Southern concessions, including the admission of California as a free state, the boundaries of Texas, the organization of the newly-acquired New Mexico and Arizona Territories, and the abolition of the slave trade in the District of Columbia,<sup>128</sup> Southern lawmakers insisted on a strong statute to

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<sup>125</sup> See, e.g., ALAN TAYLOR, *AMERICAN REPUBLICS: A CONTINENTAL HISTORY OF THE UNITED STATES* 371-73 (2021); JAMES M. MCPHERSON, *THE BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 70-77* (1988); ALLAN NEVINS, *ORDEAL OF THE UNION: VOLUME I: FRUITS OF MANIFEST DESTINY, 1847-1852*, at 253-379 (1947); DAVID M. POTTER, *THE IMPENDING CRISIS: 1848-1861*, at 90-120 (1976); HOLMAN HAMILTON, *PROLOGUE TO CONFLICT: THE CRISIS AND COMPROMISE OF 1850* (1964); FEHRENBACHER, *supra* note 70, at 226-32; WILLIAM W. FREEHLING, *THE ROAD TO DISUNION: VOLUME I, SECESSIONIST AT BAY 1776-1854*, at 487-510 (1990); MICHAEL F. HOLT, *THE FATE OF THEIR COUNTRY: POLITICIANS, SLAVERY EXTENSION, AND THE COMING OF THE CIVIL WAR* (2004); JOHN C. WAUGH, *ON THE BRINK OF CIVIL WAR: THE COMPROMISE OF 1850 AND HOW IT CHANGED THE COURSE OF AMERICAN HISTORY* (2003); ROBERT V. REMINI, *AT THE EDGE OF THE PRECIPICE: HENRY CLAY AND THE COMPROMISE THAT SAVE THE UNION* (2010); FERGUS M. BORDEWICH, *AMERICA'S GREAT DEBATE: HENRY CLAY, STEPHEN A DOUGLAS, AND THE COMPROMISE THAT PRESERVED THE UNION* (2012). For popular historians who have recently written about the Compromise of 1850 see, for example, H.W. BRANDS, *HEIRS TO THE FOUNDERS: THE EPIC RIVALRY OF HENRY CLAY, JOHN CALHOUN AND DANIEL WEBSTER, THE SECOND GENERATION OF AMERICAN GIANTS* 322-70 (2018); THOMAS FLEMING, *A DISEASE OF THE PUBLIC MIND: A NEW UNDERSTANDING OF WHY WE FOUGHT THE CIVIL WAR 177-86* (2013).

<sup>126</sup> See, e.g., MORRIS, *FREE MEN ALL*, *supra* note 74, at 131 ("Less focus has been directed on the congressional debates over the specific parts of that compromise package, including the Fugitive Slave Law.").

<sup>127</sup> Senator James Murray Mason from Virginia was the primary sponsor and drafter of the legislation. See CAMPBELL, *supra* note 9, at 15-16; F. H. Hodder, *The Authorship of the Compromise of 1850*, 22 MISS. VALLEY HIST. REV. 525, 526, 529, 534, 536 (1936). See, e.g., ROBERT W. YOUNG, *SENATOR JAMES MURRAY MASON: DEFENDER OF THE OLD SOUTH* 35-39 (1998) (describing Mason's role in drafting the FSA and debating the other provisions of the Compromise of 1850).

<sup>128</sup> For example, Jared Cohen notes that "[the FSA] was just about the only victory the South could claim [out of the Compromise of 1850]." JARED COHEN, *ACCIDENTAL PRESIDENTS: EIGHT MEN WHO CHANGED AMERICA* 79 (2019). See, e.g., WILLIAM J. COOPER, JR., *THE SOUTH AND THE POLITICS OF SLAVERY* 298-99 (1978); DELBANCO, *supra* note 9, at 5; FREEHLING, *supra* note 124, at 499-507; HAMILTON, *supra* note 124, at 168; WAUGH, *supra* note 124, at 184; LUBET, *supra* note 9, at 45; REMINI, *supra* note 124, at 146 ("The fugitive slave law was a sine qua non for southerners . . ."). However, for a

vigorously assist enslavers in securing their rights under the Constitution for the capture and return of enslaved people who had escaped to Northern states. Considering the central role justices of the peace played policing runaway slaves in the Southern states, it was only natural that the Southern senators drafting the new fugitive slave legislation would look to provide a similar role to circuit court commissioners in the federal courts. In essence, the FSA was intended to create a federal version of the runaway slave provisions enacted in the Southern states to govern the return of slaves captured away from their masters' plantations. In the new national enforcement bureaucracy contemplated in the expanded FSA, commissioners would play a preeminent role.

The idea to expand the authority of circuit court commissioners to handle proceedings involving fugitive slaves had already been suggested to Congress by a member of the Supreme Court. In 1842, Associate Justice Joseph Story, author of the plurality opinion in the *Prigg* case,<sup>129</sup> wrote a letter to Senator John M. Berrien of Georgia, then the Chairman of the Senate Judiciary Committee, shortly after the *Prigg* decision was issued.<sup>130</sup> In this correspondence, Justice Story sent Senator Berrien draft legislation that would amend the Fugitive Slave Act of 1793 by empowering circuit commissioners to hear slaveholders' claims for the rendition of fugitive slaves. Justice Story, noting that he had discussed his proposal with other members of the Supreme Court, explained to Senator Berrien:

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contrary view that the other bills enacted as elements of the Compromise of 1850 were in fact also favorable to Southern interests, see Paul Finkelman, *The Appeasement of 1850*, in *CONGRESS AND THE CRISIS OF THE 1850S* 53-79 (Paul Finkelman & Donald R. Kennon eds., 2012).

<sup>129</sup> See *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

<sup>130</sup> See JAMES MCCLELLAN, *JOSEPH STORY AND THE AMERICAN CONSTITUTION: A STUDY IN POLITICAL AND LEGAL THOUGHT* 262 n.94 (1971) (McClellan notes that Story's son omitted this language when publishing his father's letters in 1851.); see also JOHN D. GORDAN, III, *THE FUGITIVE SLAVE RESCUE TRIAL OF ROBERT MORRIS: BENJAMIN ROBBINS CURTIS AND THE ROAD TO DRED SCOTT* (2013). Justice Story's letter was dated April 29, 1842. The Supreme Court's decision in *Prigg* was released on March 1, 1842. 41 U.S. 539 (1842).

[W]here by the laws of the U. States, powers were conferred on State Magistrates, the same powers might be exercised by Commissioners appointed by the Circuit Courts. I was induced to make the provision thus general, because State Magistrates now generally refuse to act, & cannot be compelled to act; and the [Fugitive Slave Act of 1793] respecting fugitive slaves confers the power on States Magistrates to act in delivering up Slaves. . . . In conversing with several of my [Brothers] on the Supreme Court, we all thought that it would be a great improvement, & would tend much to facilitate the recapture of Slaves, if Commissioners of the Circuit Court were clothed with like powers.<sup>131</sup>

Justice Story and his fellow justices had no apparent qualms about expanding the authority of circuit court commissioners to include the final disposition of fugitive slave renditions proceedings. Paul Finkelman concludes that “Story presented Senator Berrien with the solution to the debate over federal exclusivity and the role of the states in enforcing the Fugitive Slave Act. The federal government would supply the enforcement mechanism, through the appointment of commissioners, and the enforcement would be uniform throughout the nation.”<sup>132</sup>

Justice Story believed that the Constitution required this outcome to protect the right of masters to recover slaves who had fled to Northern states. The authority of the federal courts, particularly the circuit court commissioners, had to be expanded to reach this goal. While “[t]he cost . . . was the freedom of some free blacks and fugitive slaves,”<sup>133</sup> Justice Story and other members of the Court concluded that this solution was a necessary consequence under the Constitution.

One commentator has concluded that Justice Story, through his letter to Berrien, should be considered one of the chief architects of the FSA, even though Story died in 1845.<sup>134</sup> Senator Berrien was a member of the Committee of Thirteen appointed to work out the

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<sup>131</sup> MCCLELLAN, *supra* note 129, at 262 n.94; GORDAN, *supra* note 129, at 7-8.

<sup>132</sup> Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247, 291-92 (1994) [hereinafter Finkelman, *Story Telling*].

<sup>133</sup> *Id.* at 294.

<sup>134</sup> See Holden-Smith, *supra* note 80, at 1137-38; Finkelman, *Story Telling*, *supra* note 131, at 291-92.

final bills that eventually became the Compromise of 1850<sup>135</sup> and participated vigorously in the August 1850 Senate debates over the final form of the FSA.<sup>136</sup> It is fair, then, to consider Senator Berrien one of the drafters of the FSA that made Justice Story's idea a reality.<sup>137</sup>

In drafting tougher fugitive slave legislation, Southern legislators envisioned a new federal bureaucracy to enforce slaveholder's rights. An early version of the draft legislation contemplated giving virtually *any* federal officer authority to preside over hearings involving fugitive slaves. In this draft, postal inspectors, collectors of customs, and other federal executive branch officials would have been able to handle these proceedings, along with federal judges and circuit court commissioners.<sup>138</sup>

Southern senators contemplated that the federal courts would appoint numerous additional circuit court commissioners to preside in these cases. Some senators believed that federal commissioners would be appointed in literally every county in the North, ready to assist owners in the return of fugitive slave property.<sup>139</sup> Justice Story had echoed this view that a large number of additional commissioners should be appointed, writing to Senator Berrien in 1842, "[t]he Courts would appoint commissioners in every county, & thus meet the practical difficulty now presented by the refusal of [Northern state justices of the peace to enforce the Act]."<sup>140</sup> The irony of this position is striking. In general, Southern legislators fiercely opposed the idea that the federal government had any authority to regulate slavery (or any other issue) in their states.<sup>141</sup> Yet, the same legislators had few qualms about creating an enormous new federal bureaucracy devoted to helping enslavers to recapture enslaved people who had escaped to Northern states.<sup>142</sup>

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<sup>135</sup> CAMPBELL, *supra* note 9, at 19; BORDEWICH, *supra* note 124, at 47; HOLT, *supra* note 124, at 94; WAUGH, *supra* note 124, at 141; REMINI, *supra* note 124, at 746; and Hodder, *supra* note 126, at 529.

<sup>136</sup> See, e.g., CONG. GLOBE, 31st Cong., 1st sess. 1597-1606 (1850).

<sup>137</sup> GORDAN, *supra* note 129, at 15.

<sup>138</sup> CAMPBELL, *supra* note 9, at 15; BORDEWICH, *supra* note 124, at 127; FEHRENBACHER, *supra* note 70, at 226.

<sup>139</sup> BORDEWICH, *supra* note 124, at 127.

<sup>140</sup> MCCLELLAN, *supra* note 129, at 262 n.94; GORDAN, *supra* note 129, at 8.

<sup>141</sup> See *infra* note 144.

<sup>142</sup> One exception was Jefferson Davis, the future President of the Confederacy, who was a senator from Mississippi in 1850. Davis remained suspicious of the new FSA,



The drafters of the new fugitive slave statute did not view the legislation as involving a criminal proceeding.<sup>143</sup> Rendition proceedings under the Act would be a form of civil proceeding regarding the return of property, with no due process protections for the captured fugitive.<sup>144</sup> The closest comparison to a criminal proceeding would be a removal proceeding involving an individual accused of a crime in one state being returned from another state to face charges, as stated in Section 2 of Article IV of the Constitution, the language immediately preceding the Fugitive Slave Clause.<sup>145</sup> This is consistent with provisions of the Southern state laws governing runaway slaves that regulated the transfer of property and did not specifically address the punishment of wayward slaves.<sup>146</sup>

In the process, however, Southern lawmakers refused to recognize that by federalizing court procedures to facilitate the return of slave “property,” they might be infringing on the constitutional rights of Northern citizens, both Black and White.<sup>147</sup> Historian William Freehling articulates this paradox:

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fearful that empowering the federal government to recapture fugitive slaves would create a precedent of federal authority over slavery that would ultimately undermine the authority of Southern states to preserve slavery itself. *See, e.g., BORDEWICH, supra* note 124, at 325-26; DELBANCO, *supra* note 9, at 9.

<sup>143</sup> See William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1890 (2000).

<sup>144</sup> Paul Finkelman, *Defining Slavery Under a “Government Instituted for Protection of the Rights of Mankind,”* 35 HAMLINE L. REV. 551, 582 (2012).

<sup>145</sup>

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

U.S. CONST. art. IV, § 2, cl. 2.

<sup>146</sup> See *supra* notes 112-117 and accompanying text.

<sup>147</sup> See FREEHLING, *supra* note 124, at 500-02.

This controversy showed again that both Yankees and slaveholders were democrats, but with a difference. While the racist North hardly provided color-blind justice, every accused northern black had a right to a jury trial. Southern trials of alleged slave insurrectionists, in contrast, often featured specially appointed commissioners serving as judge and jury. Forcing this non-jury procedure on the North, Yankees protested, meant condemning the accused and their offspring to life imprisonment, without judgment by their peers.<sup>148</sup>

In the eyes of Southern lawmakers, granting expanded jurisdiction to circuit court commissioners was consistent with long-standing legal procedures governing slave issues in their states, where justices of the peace and local magistrates routinely handled matters involving runaway bondsmen.<sup>149</sup> In the process, they greatly expanded circuit court commissioners' adjudicatory authority, giving them powers they had not previously had.<sup>150</sup>

In the Senate debates leading up to the final passage of the new FSA, Southern senators rejected several proposed amendments from Northern senators that would have allowed jury trials in fugitive slave proceedings.<sup>151</sup> The final version of the statute made no allowance for a jury trial in either the state from which the fugitive escaped or the state where the fugitive was captured.<sup>152</sup> Moreover, on the question of whether a captured fugitive would have access to a writ of habeas corpus, several senators, including both Senators Mason and Berrien, argued disingenuously that the new authority given to federal commissioners to issue certificates of rendition would not resolve the issue of whether or not captured fugitives were actually free men or women, and would not prevent recaptured individuals from

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<sup>148</sup> *Id.* at 501.

<sup>149</sup> *Id.* at 501-02.

<sup>150</sup> *See id.* at 500-01.

<sup>151</sup> MORRIS, FREE MEN ALL, *supra* note 74, at 146 ("The Fugitive Slave Law of 1850 was scarcely a compromise. Every effort by northerners to include some security for free blacks, particularly the trial by jury and habeas corpus, was defeated by a coalition of southerners and some northern Democrats."); BORDEWICH, *supra* note 124, at 322-25; CAMPBELL, *supra* note 9, at 19-21; DELBANCO, *supra* note 9, at 260.

<sup>152</sup> BLACKETT, *supra* note 9, at 11; BORDEWICH, *supra* note 124, at 325.

seeking habeas corpus relief in the Southern states they were returned to.<sup>153</sup>

In these debates, the Southern senators argued they were not really giving commissioners significant new authority, since these officers would merely be conducting summary identity hearings to confirm that a captured individual was the enslaved person identified by the enslaver.<sup>154</sup> Yet, despite these arguments, the fact remained that recaptured slaves would never realistically have access to Southern courts to seek habeas corpus or any other relief from bondage. Accordingly, whether they acknowledged it or not, the new law crafted by these senators, which would make all commissioners' rulings final and not subject to any appeal, would expand enormously the authority of circuit court commissioners.

The Act was intended to be coercive. Freehling notes:

Southern senators believed Northerners had to be dragooned. Permit Northerners to refuse to be slave catchers, Southerners scoffed, and no successful posses could be formed. Allow Yankee juries to block extradition, and no slave would be returned. Without legislation drawn to southern specifications, declaimed James Mason, "you may as well go down into the sea, and recover from his native element a fish which has escaped you."<sup>155</sup>

Accordingly, the federal courts were to become a mechanism to assist enslavers in recapturing fugitive bondsmen, and circuit court commissioners would be the primary judicial officials at the center of this process.

#### VI. PROVISIONS OF THE FUGITIVE SLAVE ACT OF 1850 AND EXPANDED COMMISSIONER AUTHORITY

The final version of what came to be known as the Fugitive Slave Act of 1850 was passed by the Senate on August 24, 1850, and then passed by the House of Representatives on September 12.<sup>156</sup> It was signed into law by President Fillmore on September 18,

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<sup>153</sup> CONG. GLOBE, 31st Cong., 1st Sess. 1589-90, 1599 (1850).

<sup>154</sup> *Id.*

<sup>155</sup> FREEHLING, *supra* note 124, at 501.

<sup>156</sup> CONG. GLOBE, 31st Cong., 1st Sess., 1625, 1660 (1850); CONG. GLOBE, 31st Cong., 1st Sess., 1806-07 (1850); H. JOURNAL, 31st Cong., 1st Sess. 1289, 1448-53 (1850).

1850.<sup>157</sup> Technically, the statute amended the Fugitive Slave Act of 1793, and never used the word “slave.”<sup>158</sup>

The new statute significantly expanded the authority of circuit court commissioners. Moreover, the new duties given to commissioners mirrored procedures followed by Southern justices of the peace when dealing with runaway slaves.<sup>159</sup>

Section One of the Act gave existing circuit court commissioners authority to perform all duties created by the Act.<sup>160</sup> Section Two authorized territorial courts in the United States to appoint commissioners to perform duties under the Act.<sup>161</sup> Most significantly, Section Three commanded the circuit courts to appoint additional commissioners to provide “reasonable facilities” to reclaim fugitives and to promptly “discharge duties imposed” by the Act.<sup>162</sup> While the new statute did not set specific numbers of commissioners to be appointed, it is clear that Congress contemplated a greatly expanded corps of commissioners placed throughout the northern states to facilitate enforcement of the Act. This expectation was expressed several times by drafters of the Act.<sup>163</sup>

In Section Four, circuit court commissioners were given concurrent jurisdiction with federal circuit and district judges in the states where they served over matters arising under the FSA.<sup>164</sup> It further authorized commissioners to issue certificates of removal to return fugitive slaves back to their masters.<sup>165</sup> These certificates were to be issued to claimants who came before the commissioner and provided “satisfactory proof” the captured fugitive was in fact an escaped slave.<sup>166</sup> Upon the issuance of the certificate, the claimant was authorized to return the fugitive to his or her home

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<sup>157</sup> See Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850).

<sup>158</sup> The statute’s official title was “An Act to amend, and supplementary to, the Act entitled ‘An Act respecting Fugitives from Justice, and Persons escaping from the Service of their Masters.’” *Id.*

<sup>159</sup> Compare *id.*, with sources cited *supra* note 115.

<sup>160</sup> Fugitive Slave Act, ch. 60, § 1, 9 Stat. 462 (1850) (repealed 1864).

<sup>161</sup> *Id.* § 2.

<sup>162</sup> *Id.* § 3.

<sup>163</sup> See *supra* notes 135-36 and accompanying text.

<sup>164</sup> FSA § 4.

<sup>165</sup> *Id.* § 6.

<sup>166</sup> *Id.* § 4.

state.<sup>167</sup> These certificates of removal or rendition were comparable to the certificates that justices of the peace issued to individuals who had apprehended runaway slaves under Southern state slave codes.<sup>168</sup>

Section Five of the Act commanded all marshals and deputy marshals to execute all warrants issued by commissioners (or other federal judges) under the Act.<sup>169</sup> If marshals and deputy marshals refused or failed to execute properly issued warrants, they could be fined up to \$1,000.<sup>170</sup> The fine would be paid to the claimant if the claimant made a successful motion to the court.<sup>171</sup> Commissioners were also authorized to appoint other individuals in the community as needed to execute warrants under the Act.<sup>172</sup> Finally, commissioners were given additional authority to summon bystanders and other individuals in the community to form a *posse comitatus* to enforce the Act.<sup>173</sup> The provision commanded all citizens to “aid and assist in the prompt and efficient execution” of the Act.<sup>174</sup> In other words, commissioners now had the power to force Northern citizens to become *ad hoc* slave catchers if that was what was needed to enforce the Act. Each of these provisions mirrored enactments in Southern slave codes governing justices of the peace, slave patrols, constables, and other local law enforcement officials.<sup>175</sup>

Section Six, the longest section of the new Act, first set forth specific procedures for capturing fugitive slaves.<sup>176</sup> In situations where a slave had escaped from his or her owner to another state, the owner or the owner’s agent was authorized to go to the state where the fugitive had escaped to “pursue and reclaim” the slave.<sup>177</sup> The section provided for two ways in which a claimant under the FSA could capture a fugitive.<sup>178</sup> The person could either: (1) obtain

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<sup>167</sup> *Id.* § 6.

<sup>168</sup> *See supra* note 115 and accompanying text.

<sup>169</sup> FSA § 5.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *See, e.g., supra* notes 94-96 and accompanying text.

<sup>176</sup> FSA § 6.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

an arrest warrant from a commissioner (or federal judge) of the state where the fugitive slave was residing; or (2) seize the fugitive if this could be done “without process.”<sup>179</sup> The commissioners’ newly authorized power to issue warrants to seize suspected fugitive slaves was again similar to the warrant authority exercised by Southern justices of the peace concerning suspected runaway slaves.<sup>180</sup>

Another provision of that section mandated that the captured fugitive slave be brought immediately before “such court, judge, or commissioner.”<sup>181</sup> While the section provided that a claimant could bring the fugitive before a commissioner, district judge, or circuit judge, it seems clear Congress anticipated that most of these hearings would occur before commissioners.<sup>182</sup>

The section also set forth procedures to be followed before a commissioner.<sup>183</sup> The commissioner was required to conduct a summary hearing to determine the owner’s claim over the fugitive based on “satisfactory proof” being made.<sup>184</sup> The section provided for two ways to establish proof of the owner’s claim.<sup>185</sup> First, a deposition or an affidavit in writing could be taken and certified by the commissioner.<sup>186</sup> Secondly, a claimant could instead use another form of evidence: a sealed certificate obtained by the claimant from a court in his or her home state.<sup>187</sup> The certificate had to contain “other satisfactory testimony” that had been provided before a “magistrate, justice of the peace or other legal officer” in the state from which the fugitive had escaped.<sup>188</sup> This evidence was to be in the form of a certificate with “the seal of the proper court or officer thereto attached.”<sup>189</sup> An appropriately sealed

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<sup>179</sup> *Id.*

<sup>180</sup> *See, e.g., supra* note 96 and accompanying text.

<sup>181</sup> FSA § 6.

<sup>182</sup> This intention may be inferred by the repeated use of the term of commissioner throughout the statute, as well as the command in Section 3 that federal courts appoint as many additional commissioners as needed to adequately enforce the Act. *See id.* §§ 3, 6.

<sup>183</sup> FSA § 6.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

certificate was deemed under the statute to be sufficient to establish the proof of the identity of the fugitive slave and that the captured fugitive was in fact the slave owned by the claimant.<sup>190</sup> The certificate had to state the “substantial” facts establishing that the fugitive was a slave owned by the claimant and explain the fugitive’s escape to another state.<sup>191</sup> The certificate also had to provide reasons why “reasonable force and restraint” needed to be used to apprehend and return the fugitive slave to the claimant’s home state.<sup>192</sup>

Section Six also imposed other strict constraints on the evidence that could be used at the hearing before the commissioner.<sup>193</sup> In particular, the captured fugitive was prohibited from testifying at the summary hearing.<sup>194</sup> The fugitive had no right to cross examine the witnesses against him.<sup>195</sup> Moreover, the provision provided that a summary hearing could be based entirely on *ex parte* evidence.<sup>196</sup> The fugitive had no right to trial by jury.<sup>197</sup> These provisions follow the standard practice in Southern slave codes: unlike slaves accused of serious crimes, captured runaway slaves had no cognizable due process rights before a Southern justice of the peace.<sup>198</sup>

Although in hearings that arose after enactment of the Fugitive Slave Act commissioners often allowed counsel to appear on behalf of captured fugitives,<sup>199</sup> the Act was silent on the involvement of attorneys in these proceedings.<sup>200</sup> Similarly, attorneys were not usually involved in matters involving runaway slaves appearing before justices of the peace under state slave

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> See *supra* notes 113-18 and accompanying text.

<sup>199</sup> For example, Abraham Lincoln’s law partner, William Herndon, represented fugitive slaves in three rendition proceedings in Springfield, Illinois. See BLACKETT, *supra* note 9, at 159-61. Future president Rutherford B. Hayes appeared on behalf of a fugitive slave in Cincinnati, Ohio in 1853. See *id.* at 245.

<sup>200</sup> FSA.

codes, even though by 1850 many Southern states provided for counsel for enslaved people accused of serious crimes.<sup>201</sup>

Finally, under Section Six, no appeal was permitted from the commissioner's decision to issue a certificate of removal.<sup>202</sup> When the commissioner issued a certificate, the claimant was given an absolute right to remove the fugitive slave back to the claimant's home state.<sup>203</sup> The certificate prevented "all molestation" of the claimant or the claimant's agent "by any process issued by any court, judge, magistrate, or other person whomsoever."<sup>204</sup> This language was interpreted as prohibiting state judges or other courts from issuing writs of habeas corpus to free the fugitive after the certificate of removal was issued.<sup>205</sup> Runaway slaves also had no rights of appeal after a justice of the peace ruled under Southern slave codes.<sup>206</sup>

Section Seven established penalties for violating the Act.<sup>207</sup> A person who knowingly: (1) obstructed, hindered, or prevented a claimant from arresting a fugitive slave, with or without process; (2) attempted to rescue the fugitive slave; (3) aided, abetted, or assisted the escape of a fugitive slave; or (4) harbored or concealed a fugitive slave to prevent his or her arrest; committed a federal crime and was subject to a \$1,000 fine and a sentence of up to six months imprisonment imposed by the federal district court.<sup>208</sup> The individual could also be subject to civil penalties and could be required to pay to "the party injured by such illegal conduct" monetary damages of \$1,000 for each fugitive slave "so lost."<sup>209</sup>

Section Eight established fees for various duties performed under the Act.<sup>210</sup> After establishing fees to be paid to marshals, their deputies, and clerks of the District and Territorial Courts, the

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<sup>201</sup> See, e.g., *supra* note 108 and accompanying text.

<sup>202</sup> FSA § 6.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* See CAMPBELL, *supra* note 9, at 45-47; BLACKETT, *supra* note 9, at 11-13; FEHRENBACHER, *supra* note 70, at 231 n.2. See, e.g., *supra* note 152 and accompanying text.

<sup>206</sup> See, e.g., *supra* notes 114-18 and accompanying text.

<sup>207</sup> FSA § 7.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* § 8.



Act set forth fees to be paid to commissioners.<sup>211</sup> A circuit court commissioner was entitled to receive a fee of \$10.00 in cases where a certificate of removal was issued to a claimant.<sup>212</sup> By contrast, the commissioner would only receive a fee of \$5.00 in a case where proof presented was insufficient to justify issuing a certificate of removal.<sup>213</sup> This is the one provision of the FSA that is mentioned by almost every historian who discusses the law.<sup>214</sup> This section inspired the derisive label for commissioners as “ten dollar judges.”<sup>215</sup>

While defenders of the Act argued that the larger fee paid to a commissioner when a fugitive slave was returned to a master was justified by the extra work involved in drafting and issuing a certificate of removal,<sup>216</sup> this discrepancy was described by those who opposed the Act as nothing less than a bribe that transformed the commissioner from an impartial judicial officer into a party with a financial interest in the outcome of the case.<sup>217</sup> This difference in the fees paid to commissioners under the Act is often cited by historians as the clearest evidence of the inherent inequities embedded in the statute.<sup>218</sup>

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> See, e.g., BLACKETT, *supra* note 9, at 52; CAMPBELL, *supra* note 9, at 24; CHURCHILL, *supra* note 9, at 141; FEHRENBACHER, *supra* note 70, at 232; FONER, GATEWAY TO FREEDOM, *supra* note 9, at 124-25; FREEHLING, *supra* note 124, at 501; HAMILTON, *supra* note 124, at 169; HOLT, *supra* note 124, at 86; LUBET, *supra* note 9, at 43; MCPHERSON, *supra* note 124, at 80; MORRIS, FREE MEN ALL, *supra* note 74, at 146; POTTER, *supra* note 124, at 131; TAYLOR, *supra* note 124, at 373; WAUGH, *supra* note 124, at 183.

<sup>215</sup> See CONG. GLOBE, 32d Cong., 2d Sess. 991 (1852).

<sup>216</sup> FEHRENBACHER, *supra* note 70, at 232; FONER, GATEWAY TO FREEDOM, *supra* note 9, at 124-25; MCPHERSON, *supra* note 124, at 80.

<sup>217</sup> CHURCHILL, *supra* note 9, at 141; BLACKETT, *supra* note 9, at 53; FEHRENBACHER, *supra* note 70, at 232; FONER, GATEWAY TO FREEDOM, *supra* note 9, at 124-25; MCPHERSON, *supra* note 124, at 80.

<sup>218</sup> FEHRENBACHER, *supra* note 70, at 232; MCPHERSON, *supra* note 124, at 80; POTTER, *supra* note 124, at 131; LUBET, *supra* note 9, at 43; HOLT, *supra* note 124, at 86 (“this star-chamber setting”); FREEHLING, *supra* note 124, at 501 (“[T]he doubled payment (or pernicious bribe, as Yankees called it) for extraditing rather than freeing a black was as provocative a red herring as any American Congress ever included in an already [pernicious] proposal.”); FONER, GATEWAY TO FREEDOM, *supra* note 9, at 125 (“[The \$5 fee for releasing a fugitive under the Act] set the price of a northern conscience at five dollars, abolitionists complained.”).

Section Eight also established an additional \$5.00 fee to be paid for each warrant executed by individuals other than the marshal and set other fees to be “deemed reasonable by the commissioner” for (1) attending an examination; (2) keeping a fugitive in custody; (3) providing food and lodging for claimants or their agents; and (4) “Other duties as may be required by the claimant.”<sup>219</sup> All fees were to be paid by the claimant.<sup>220</sup>

Section Nine stated that in situations after a commissioner had issued a certificate of removal, a claimant could make an affidavit expressing reasons for believing that efforts might be made to rescue the fugitive by force.<sup>221</sup> Where such an affidavit was made, the arresting officer holding the fugitive in custody was authorized “and required” to employ as many persons as he deemed necessary to prevent such a rescue.<sup>222</sup> These expenses for employing these persons to aid in transporting the fugitive were to be paid by the United States Treasury.<sup>223</sup>

Historians have disagreed over interpretation of Section Ten of the Act. In 1968, Campbell argued that Section Ten was merely a catch-all provision, summarizing it this way:

Whenever a slave escaped, if the owner could present “satisfactory proof” of his ownership of such slave, the court in his home state was required to issue an authenticated copy of the testimony, with a description of the fugitive, which, upon being presented to any judge, commissioner, or other officer authorized by this act, was to be held as conclusive evidence of the escape and claimant’s right to the fugitive.<sup>224</sup>

In other words, Campbell suggests that Section Ten simply reiterated the earlier evidentiary provisions of the Act found in Section Six.

In a recently published history of African American resistance to the FSA, Robert Churchill argues to the contrary that Section Ten set forth an additional mechanism allowing a slave owner to go

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<sup>219</sup> Fugitive Slave Act, ch. 60, § 8, 9 Stat. 462 (1850) (repealed 1864).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* § 9.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> CAMPBELL, *supra* note 9, at 25 (quoting FSA § 10).

before a Southern state court to obtain a transcript of proceedings that could then be used as “final and conclusive evidence” of the owner’s claim.<sup>225</sup> Perceived procedural discrepancies between Sections Six and Ten would be used by attorneys for captured fugitives to argue that the two procedures could not be used in combination.<sup>226</sup>

There is no question that the provisions of the Fugitive Slave Act of 1850 dramatically expanded the authority of circuit court commissioners. While federal commissioners had limited powers in federal criminal and civil cases before the FSA, they now had final dispositional authority over proceedings that determined the fates of captured fugitive bondsmen. Under Section Three, they had concurrent jurisdiction with district and circuit judges in cases under the Act.<sup>227</sup> They could conduct summary hearings and, after deciding the claimants’ cases, no appeals could be taken from the commissioners’ rulings.<sup>228</sup> Indeed, once a certificate of removal was issued, the “prevent all molestation . . . by any process issued by any court, judge, magistrate, or other person whomsoever” language in Section Six arguably shielded a commissioner’s ruling from interference by writs of habeas corpus issued by *any* court, state or federal.<sup>229</sup> In all this, however, the increased powers of federal commissioners merely mirrored duties exercised routinely by justices of the peace in dealing with runaway slaves in Southern states.

#### VII. COMMISSIONERS AT WORK: GEORGE TICKNOR CURTIS, BENJAMIN FRANKLIN HALLETT, AND THE BOSTON EXPERIENCE

Enforcement of the new Act began immediately. On September 26, 1850, eight days after President Fillmore signed the FSA into law, fugitive slave James Hamlet became the first individual apprehended under the new law, arrested by deputy U.S. marshals

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<sup>225</sup> CHURCHILL, *supra* note 9, at 140.

<sup>226</sup> See, for example, Richard Henry Dana, Jr.’s argument before Commissioner Edward Loring in the Anthony Burns case. CHARLES EMERY STEVENS, ANTHONY BURNS: A HISTORY, 103-04 (1856) [hereinafter STEVENS].

<sup>227</sup> FSA § 3.

<sup>228</sup> *Id.* § 6.

<sup>229</sup> *Id.*

in New York City.<sup>230</sup> The next day, Alexander Gardiner, a circuit court commissioner for the Southern District of New York, held a brief summary hearing that ended before Hamlet's attorney could arrive.<sup>231</sup> Gardiner ordered that Hamlet be sent back to Baltimore, Maryland where his master Mary Brown resided, and Hamlet was returned to Maryland by steamboat at the federal government's expense.<sup>232</sup> Shortly thereafter, members of New York's Black community collected funds to buy the fugitive's freedom from his owner for \$800, and Hamlet returned to New York City in October 1850.<sup>233</sup>

Many additional cases followed where enslavers and their agents used the provisions of the FSA to retrieve escaped enslaved people in the North. And numerous other circuit court commissioners besides Alexander Gardiner (who would die less than a year after the Hamlet hearing, on September 26, 1851),<sup>234</sup> found themselves presiding in these cases and acting upon their new powers under the Act. As noted earlier, little historical research has been done focusing on the commissioners at the heart of these cases.<sup>235</sup> For example, it is not known how many commissioners were appointed especially under the FSA, compared to the number of incumbent commissioners who suddenly found themselves wielding greatly expanded authority. As noted earlier, Cooper Wingert has compiled a list of circuit court commissioners who served the federal courts between 1850 and 1854, but he acknowledges that the list is incomplete and will be modified as additional research is done.<sup>236</sup>

While an in-depth examination of all cases handled by circuit court commissioners is beyond the scope of this article, a close look at three cases arising in Boston, Massachusetts in 1850 and 1851

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<sup>230</sup> FONER, *GATEWAY TO FREEDOM*, *supra* note 9, at 126-27. *See also* CAMPBELL, *supra* note 9, at 115; BLACKETT, *supra* note 9, at 377-78; MARION GLEASON MCDUGALL, *FUGITIVE SLAVES (1619-1865)*, at 43-44 (1891).

<sup>231</sup> BLACKETT, *supra* note 9, at 378.

<sup>232</sup> Campbell cites Treasury records showing that taxpayers were billed \$152.50 for James Hamlet's rendition. CAMPBELL, *supra* note 9, at 115 n.5.

<sup>233</sup> FONER, *GATEWAY TO FREEDOM*, *supra* note 9, at 127.

<sup>234</sup> *Death of Alexander Gardiner*, *THE BROOKLYN DAILY EAGLE*, Jan. 23, 1851, at 2.

<sup>235</sup> *See supra* notes 38-40 and accompanying text.

<sup>236</sup> Cooper Wingert, *Mapping the Law's Enforcement, 1850 FUGITIVE SLAVE LAW* (Aug. 26, 2020), [https://blogs.dickinson.edu/hist-wingert/journal/\[https://perma.cc/N7TS-Q8B8\]](https://blogs.dickinson.edu/hist-wingert/journal/[https://perma.cc/N7TS-Q8B8]). *See also supra* note 40 and accompanying text.

illustrates how the federal courts reacted to the new legislation and how commissioners used their expanded authority under the Act. We have already seen that the Anthony Burns case in Boston in 1854 was perhaps the most publicized and controversial case under the Fugitive Slave Act.<sup>237</sup> Nevertheless, three earlier cases in Boston, involving William and Ellen Craft, Shadrach Minkins,<sup>238</sup> and Thomas Sims, also generated great publicity, widespread protests, and violent unrest. And while Edward G. Loring remains the most famous (or notorious) commissioner acting under the Fugitive Slave Act,<sup>239</sup> two lesser-known Boston commissioners, George Ticknor Curtis and Benjamin Franklin Hallett, provide a useful perspective on what commissioners faced in the first years of enforcing the Act. Because these three cases generated enormous controversy in a city known both as an abolitionist stronghold and as one of the intellectual centers of the country,<sup>240</sup> we also have more information about the actions of the commissioners involved in these cases than for most matters arising under the Act. Accordingly, examining the actions of Commissioners Curtis and Hallett in these three cases provides a good overview of how the new powers were exercised by commissioners under the Fugitive Slave Act of 1850.

#### VIII. GEORGE TICKNOR CURTIS AND BENJAMIN FRANKLIN HALLETT

George Ticknor Curtis was a remarkable nineteenth century attorney and scholar who has largely been forgotten by history. His service as a circuit court commissioner represented only a small part of a distinguished career as a lawyer, historian, and man of letters. Born into a prominent Boston family well known in high

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<sup>237</sup> See *supra* note 39.

<sup>238</sup> Shadrach Minkins's name is also spelled as Shadrack in some publications. See, e.g., CAMPBELL, *supra* note 9, at 149-51. Although contemporary commentators and some later historians referred to this case as the Shadrach or Shadrack case, the author uses his last name of Minkins, as was done with the fugitives in other Boston rendition cases. See, e.g., *id.*; DELBANCO, *supra* note 9, at 270-77.

<sup>239</sup> See *supra* note 39.

<sup>240</sup> Ralph Waldo Emerson, Henry David Thoreau, Henry Wordsworth Longfellow, and John Greenleaf Whittier, among many other writers in the vicinity of Boston, would all comment on the FSA in the years after the Act's enactment. See DELBANCO, *supra* note 9, at 255-56, 263, 277, 283, 314-16.

society (his name George Ticknor was in honor of his uncle George Ticknor, an eminent Boston Brahmin),<sup>241</sup> Curtis practiced law in Boston, New York, and Washington, D.C.<sup>242</sup> His older brother was Benjamin Robbins Curtis, who was appointed to the Supreme Court by President Fillmore in 1852 and wrote a famous dissenting opinion in the *Dred Scott* case.<sup>243</sup> George was retained as co-counsel for *Dred Scott* in the oral arguments before the Supreme Court<sup>244</sup> and his argument in that case was published as a pamphlet in 1857.<sup>245</sup>

Curtis was a close confidante of Daniel Webster,<sup>246</sup> writing the first scholarly biography of Webster in 1870.<sup>247</sup> He also wrote the first biography of President James Buchanan,<sup>248</sup> and published an apologia and appreciation for General George McClellan after the general's death in 1886.<sup>249</sup> George was a prolific author on legal subjects, publishing treatises on admiralty law,<sup>250</sup> copyright law,<sup>251</sup>

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<sup>241</sup> See DAVID B. TYACK, *GEORGE TICKNOR AND THE BOSTON BRAHMINS* (1967).

<sup>242</sup> Mark V. Tushnet, *Curtis, George Ticknor*, AM. NAT'L BIOGRAPHY ONLINE (Feb. 2000), <https://www.anb.org/view/10.1093/anb/9780198606697.001.0001/anb-9780198606697-e-1100953> [<https://perma.cc/F4FK-JZTV>] [hereinafter AM. NAT'L BIOGRAPHY].

<sup>243</sup> For an in-depth analysis of the jurisprudence of Justice Benjamin Curtis, see STUART STREICHLER, *JUSTICE CURTIS IN THE CIVIL WAR ERA: AT THE CROSSROADS OF AMERICAN CONSTITUTIONALISM* 4 (2005). For a recent discussion of the significance Justice Curtis's dissent in the *Dred Scott* case, see MELVIN I. UROFSKY, *DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT'S HISTORY AND THE NATION'S CONSTITUTIONAL DIALOGUE* 72-79 (2015).

<sup>244</sup> See DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 293-94, 296, 300-02 (1978).

<sup>245</sup> See GEORGE TICKNOR CURTIS, *THE CONSTITUTIONAL POWER OF CONGRESS OVER THE TERRITORIES* (1857).

<sup>246</sup> 1 GEORGE TICKNOR CURTIS, *LIFE OF DANIEL WEBSTER* 500 (2d ed. 1870).

<sup>247</sup> *Id.*; see 2 GEORGE TICKNOR CURTIS, *LIFE OF DANIEL WEBSTER* (4th ed. 1872) [hereinafter CURTIS, *LIFE OF DANIEL WEBSTER* 4TH ED.].

<sup>248</sup> See 1 GEORGE TICKNOR CURTIS, *LIFE OF JAMES BUCHANAN: FIFTEENTH PRESIDENT OF THE UNITED STATES*, (1883); 2 GEORGE TICKNOR CURTIS, *LIFE OF JAMES BUCHANAN: FIFTEENTH PRESIDENT OF THE UNITED STATES* (1883).

<sup>249</sup> See GEORGE TICKNOR CURTIS, *MCCLELLAN'S LAST SERVICE TO THE REPUBLIC, TOGETHER WITH A TRIBUTE TO HIS MEMORY* (1886); GEORGE TICKNOR CURTIS, *LIFE, CHARACTER, AND PUBLIC SERVICES OF GENERAL GEORGE B. MCCLELLAN* (1887).

<sup>250</sup> See GEORGE TICKNOR CURTIS, *A TREATISE ON THE RIGHTS AND DUTIES OF MERCHANT SEAMEN, ACCORDING TO THE GENERAL MARITIME LAW, AND THE STATUTES OF THE UNITED STATES* (1841).

<sup>251</sup> See GEORGE TICKNOR CURTIS, *A TREATISE ON THE LAW OF COPYRIGHT IN BOOKS, DRAMATIC AND MUSICAL COMPOSITIONS, LETTERS AND OTHER MANUSCRIPTS*,

and patent law,<sup>252</sup> two volume history of the Constitution,<sup>253</sup> and an update of Justice Story's treatise on the Constitution.<sup>254</sup> Amid these numerous publications, Curtis was also a successful attorney and well-known member of both the Boston and New York bars.<sup>255</sup> He died in New York in 1894.<sup>256</sup> By any standard, Curtis's career was exceptional, yet he is largely unknown today, with one historian noting that there is little biographical information available about him.<sup>257</sup>

Benjamin Franklin Hallett is another nineteenth-century figure who played a prominent role in antebellum politics yet is also largely forgotten. Born in Barnstable, Massachusetts, in 1797, Hallett began his career as both an attorney and newspaperman in Providence, Rhode Island.<sup>258</sup> He later moved to Boston soon after, becoming a prominent attorney in Massachusetts and editing several newspapers.<sup>259</sup>

Hallett was much more of a political animal than Curtis. Hallett was an influential member of the Democratic Party in the years leading up to the Civil War, and as the Chairman of the Democratic Party in 1852, he played a decisive role in the nomination of Franklin Pierce as the Democratic nominee for

ENGRAVINGS, AND SCULPTURE, AS ENACTED AND ADMINISTERED IN ENGLAND AND AMERICA; WITH SOME NOTICES OF THE HISTORY OF LITERARY PROPERTY (1847).

<sup>252</sup> See GEORGE TICKNOR CURTIS, THE INVENTOR'S MANUAL OF LEGAL PRINCIPLES, AND GUIDE TO THE PATENT OFFICE (1851); GEORGE TICKNOR CURTIS, A TREATISE ON THE LAW OF PATENTS FOR USEFUL INVENTIONS IN THE UNITED STATES OF AMERICA (1854).

<sup>253</sup> See GEORGE TICKNOR CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES; WITH NOTICES OF ITS PRINCIPAL FRAMERS (1860).

<sup>254</sup> See 1 GEORGE TICKNOR CURTIS, CONSTITUTIONAL HISTORY OF THE UNITED STATES FROM THEIR DECLARATION OF INDEPENDENCE TO THE CLOSE OF THEIR CIVIL WAR (1889); 2 GEORGE TICKNOR CURTIS, CONSTITUTIONAL HISTORY OF THE UNITED STATES FROM THEIR DECLARATION OF INDEPENDENCE TO THE CLOSE OF THEIR CIVIL WAR (Joseph Culbertson Clayton ed., 1896).

<sup>255</sup> BEACH, ED., THE NEW STUDENTS REFERENCE WORK FOR TEACHERS, STUDENTS AND FAMILIES (1914) (entry on George Ticknor Curtis).

<sup>256</sup> AM. NAT'L BIOGRAPHY, *supra* note 241.

<sup>257</sup> See BARKER, THE IMPERFECT REVOLUTION, *supra* note 9, at 97 n.26 ("There appears to be very little biographical material about this Curtis, who seems to have rivaled his better-known brother in legal ability and output.")]

<sup>258</sup> 3 APPLETON'S CYCLOPÆDIA OF AMERICAN BIOGRAPHY 51 (James Grant Wilson & John Fiske eds., 1887) [hereinafter APPLETON'S CYCLOPÆDIA] (entry for Benjamin F. Hallett).

<sup>259</sup> *Id.*

President.<sup>260</sup> For this he was rewarded by President Pierce with the appointment as the United States District Attorney for Massachusetts beginning in 1853.<sup>261</sup> In that office, he would participate (and meddle) in the infamous rendition proceedings for Anthony Burns in 1854.<sup>262</sup> Hallett was also instrumental in James Buchanan being nominated as the Democratic candidate for president in 1856 and participated in a walkout at the 1860 Democratic Convention that ended up splitting the party.<sup>263</sup> Historian Alan Nevins described Hallett as “that smutchy Massachusetts politician B. F. Hallett” when discussing Democratic Party politics in the early 1850s.<sup>264</sup> Hallett died in Lowell in 1862.<sup>265</sup>

Both men were political conservatives (Curtis beginning as a “Cotton” Whig in Webster’s circle but later joined the Democratic Party in 1856; Hallett first as an Anti-Mason and later as a Democrat).<sup>266</sup> Both embraced the Compromise of 1850 and believed that the new Fugitive Slave Act should be vigorously enforced to help preserve the Union.<sup>267</sup> And as circuit court commissioners in Massachusetts, they would be among the first commissioners in the

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<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *See, e.g.,* VON FRANK, *supra* note 9, at 128-30 (describing Hallett’s statements made during the Anthony Burns rendition hearing before Commissioner Edward Loring, even though the United States district attorney had no formal role in rendition proceedings under the Fugitive Slave Act). Hallett would also interfere with several attempts by abolitionists to purchase Burns from his owner in efforts to free Burns before the rendition hearing was concluded. *See* MALTZ, *supra* note 9, at 68, 71, 74-75, 91; BARKER, *THE IMPERFECT REVOLUTION*, *supra* note 9, at 52-53.

<sup>263</sup> *Benjamin F. Hallett*, WORLD HERITAGE ENCYCLOPEDIA ONLINE, [http://community.worldheritage.org/articles/eng/Benjamin\\_F.\\_Hallett](http://community.worldheritage.org/articles/eng/Benjamin_F._Hallett) [https://perma.cc/2G2E-YEZ4] (last visited Sep. 12, 2022).

<sup>264</sup> 2 ALLAN NEVINS, *ORDEAL OF THE UNION: A HOUSE DIVIDING, 1852-1857*, at 17 (1947).

<sup>265</sup> *The Death of Benjamin F. Hallett*, N.Y. TIMES, Oct. 1, 1862.

<sup>266</sup> AM. NAT’L BIOGRAPHY, *supra* note 241 (Curtis); APPLETON CYCLOPEDIA, *supra* note 257, at 51 (Hallett).

<sup>267</sup> On November 26, 1850, shortly after the Fugitive Slave Act was passed, both Curtis and Hallett attended a rally at Faneuil Hall in Boston organized to express political support for the new statute. George Ticknor Curtis helped organize the event, while his brother Benjamin Robbins Curtis was the most prominent speaker. Benjamin Franklin Hallett also spoke at this rally. In his speech, Benjamin Curtis emphasized the constitutionality of FSA and the necessity that the statute be vigorously enforced. STREICHLER, *supra* note 242, at 45-48; *see* sources cited *supra* note 37.



country to exercise their newly expanded powers under the FSA in the cases arising in Boston in 1850 and 1851.

#### A. Arrest Warrants

Under the FSA, slave owners and their agents could request warrants from circuit court commissioners to seize and arrest alleged fugitive slaves.<sup>268</sup> In Boston, the first request for a warrant under the Act came on October 21, 1850, about a month after the new law went into effect.<sup>269</sup> The case involved William and Ellen Craft, a married couple who had pulled off a daring escape from bondage in Georgia in 1848 by railroad, with the light-skinned Ellen posing as an elderly White slave owner and William pretending to be his “owner’s” servant.<sup>270</sup> The Crafts’ escape had generated wide-spread publicity in the North in the abolitionist press and lecture circuit after the couple settled in Boston.<sup>271</sup> Shortly after the FSA was enacted, the couple’s Georgia enslaver sent two agents, Willis Hughes and John Knight, north to recapture them under the Act’s provisions.<sup>272</sup> Upon their arrival in Boston in October, the two men sought to obtain a warrant from federal judges in the city.<sup>273</sup> Here, however, they ran into problems.

Virtually all the details of Hughes and Knight’s efforts to obtain an arrest warrant for the Crafts come from two letters written by the men to newspapers in Georgia after they returned home, which were subsequently reprinted in William Lloyd

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<sup>268</sup> See *supra* notes 93-95 and accompanying text.

<sup>269</sup> Georgia Constitutionalist, *Hughes, the Slave-Hunter’s Account of His Mission*, THE LIBERATOR, Dec. 6, 1850, at 196 [hereinafter *Hughes*].

<sup>270</sup> The story of William and Ellen Craft’s escape has been recounted by numerous historians, with William Craft publishing a personal account in 1860. See WILLIAM CRAFT, RUNNING A THOUSAND MILES FOR FREEDOM; OR, THE ESCAPE OF WILLIAM AND ELLEN CRAFT FROM SLAVERY (1860). For other nineteenth century accounts of Crafts’ escape, see AM. ANTI-SLAVERY SOC’Y, THE FUGITIVE SLAVE LAW AND ITS VICTIMS 12 (1856); MCDUGALL, *supra* note 229, at 58-60. For modern historians’ discussion of the Crafts’ escape, see LARRY GARA, THE LIBERTY LINE: THE LEGEND OF THE UNDERGROUND RAILROAD 48-49 (1961); MCPHERSON, *supra* note 124, at 81-82; DELBANCO, *supra* note 9, at 267-70; LUBET, *supra* note 9, at 47-48, 134-35.

<sup>271</sup> LUBET, *supra* note 9, at 134.

<sup>272</sup> Georgia Constitutionalist, *Diary of John Knight, the Slave Pursuer*, THE LIBERATOR, Dec. 6, 1850, at 196 [hereinafter *Knight*].

<sup>273</sup> *Id.*

Garrison's abolitionist newspaper in Boston, *The Liberator*.<sup>274</sup> The comedy of errors described by Hughes and Knight shows that the federal judges, commissioners, and other federal officials in Boston were confused about the new law and unready to apply it. The agents first went to Associate Supreme Court Justice Levi Woodbury, in his capacity as a circuit judge, who told them that he was "not the proper person to issue [the warrant]," and advised them to obtain the warrant from the United States District Attorney George Lunt.<sup>275</sup> That same evening, after Lunt also refused to consider the warrant, the agents went to the home of Commissioner Benjamin F. Hallett.<sup>276</sup> At first, Hallett advised the agents that they did not need a warrant and could seize the Crafts on their own.<sup>277</sup> After Hughes gave the commissioner the text of the Act, however, Hallett agreed to review the statute and meet again with the agents the next morning.<sup>278</sup>

On Tuesday morning, October 22, 1850, Hallett met with Hughes and advised him to hire an attorney and to make certain changes to the warrant's form.<sup>279</sup> Hughes hired attorney Seth Thomas, a Boston lawyer who would become famous (or infamous) for representing enslavers and their agents in fugitive slave cases.<sup>280</sup> On Wednesday, October 23, 1850, Thomas approached United States District Judge Peleg Sprague, who also refused to issue the warrant and told him to take the warrant application to another commissioner.<sup>281</sup> On Thursday, October 24, 1850, Thomas requested the warrant from Commissioner George Ticknor Curtis, Curtis told Thomas to come back the next day after all six Boston commissioners had had an opportunity to discuss the issue with Justice Woodbury and Judge Sprague at a meeting on Thursday

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<sup>274</sup> Hughes, *supra* note 268, at 196; Knight, *supra* note 271, at 196.

<sup>275</sup> Knight, *supra* note 271, at 196.

<sup>276</sup> Hughes, *supra* note 268, at 196.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> BLACKETT, *supra* note 9, at 400. Thomas would subsequently represent the slave owners in the Shadrach Minkins and Thomas Sims cases in 1851 and the Anthony Burns case in 1854. See, e.g., CAMPBELL, *supra* note 9, at 118, 127-28, 149; COLLISON, *supra* note 9, at 117, 118; LUBET, *supra* note 9, at 148-50, 176-78; BLACKETT, *supra* note 9, at 415, 422.

<sup>281</sup> Hughes, *supra* note 268.

evening.<sup>282</sup> Finally, on Friday, October 25, when Thomas and Hughes returned to the federal courthouse, Justice Woodbury in open court issued an arrest warrant for Crafts under the Act.<sup>283</sup> The warrant was then given to the United States for execution.<sup>284</sup>

The Crafts were never apprehended.<sup>285</sup> The five days of delays in obtaining the warrant gave Boston's African American and White abolitionist communities plenty of time to first hide the Crafts and subsequently to help them obtain passage by ship to England.<sup>286</sup> Marshal Devens was threatened with legal actions by Boston abolitionist organizations and did little to execute the warrant.<sup>287</sup> Moreover, Hughes and Knight were accosted by strangers, threatened by angry protestors, and arrested themselves on state law criminal complaints on attempted kidnapping charges, which required them to post expensive bonds for their release.<sup>288</sup> The two finally left Boston after the prominent Unitarian minister and abolitionist Theodore Parker, backed by an angry crowd outside the men's hotel room, advised the slave catchers that their safety could not be guaranteed if they stayed in town.<sup>289</sup>

The first attempt to issue a warrant under the FSA in Boston thus ended in fiasco. Collectively, the federal judges and commissioners, as well as other officers of the federal government, appeared confused and uncertain about the Act's requirements (for example, Section One of the Act clearly authorized both Justice Woodbury and Judge Sprague to issue the requested warrant).<sup>290</sup> Nevertheless, the adverse publicity generated by Hughes and Knight's letters published in Southern newspapers, then reprinted throughout the country, placed a spotlight on the federal court in Boston, with subsequent requests for warrants resulting in the

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<sup>282</sup> *Id.*

<sup>283</sup> *Knight*, *supra* note 271, at 196.

<sup>284</sup> *Id.*

<sup>285</sup> DELBANCO, *supra* note 9, at 269-70.

<sup>286</sup> *See* BLACKETT, *supra* note 9, at 401-03; LUBET, *supra* note 9, at 134-35; MALTZ, *supra* note 9, at 32-33; DELBANCO, *supra* note 9, at 268-69; CHURCHILL, *supra* note 9, at 179.

<sup>287</sup> *See* BLACKETT, *supra* note 9, at 403.

<sup>288</sup> *Id.*

<sup>289</sup> *See Hughes*, *supra* note 268; *Knight*, *supra* note 271, at 196. *See also* BLACKETT, *supra* note 9, at 403.

<sup>290</sup> *See* Fugitive Slave Act of 1850, ch. 60, § 1, 9 Stat. 462 (1850).

warrants being quickly issued.<sup>291</sup> Commissioner Curtis issued the arrest warrants in both the Shadrach Minkins and Thomas Sims cases in 1851,<sup>292</sup> while Commissioner Edward Loring would issue the fateful arrest warrant for Anthony Burns in 1854.<sup>293</sup>

### B. Rendition Hearings

After a warrant was issued and an alleged fugitive seized under the warrant, the Act required that the arrested individual be brought immediately before a circuit court commissioner or other federal judge for a rendition hearing.<sup>294</sup> These hearings were intended to be brief, summary matters that provided almost no “due process” protections for the person arrested.

While the Act set forth the minimal evidentiary requirements for establishing the identity of the alleged runaway slave, it prohibited an arrested individual from testifying on his or her own behalf.<sup>295</sup> Since the senators who drafted the statute contemplated summary proceedings,<sup>296</sup> the Act was silent on what procedures should apply to govern hearings before commissioners. As noted earlier, the statute said nothing about attorneys for captured fugitives.<sup>297</sup> In Boston, the commissioners ended up conducting what amounted to lengthy, trial-like proceedings in the absence of clear rules.<sup>298</sup> And, as would often occur in rendition proceedings in the North, attorneys, including many prominent lawyers in the legal community, appeared on behalf of the captured fugitives.<sup>299</sup>

The rendition hearings in the Minkins, Sims, and Burns cases all resulted in violent protests in Boston. Indeed, the first scheduled rendition proceeding was interrupted, barely after being started, by

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<sup>291</sup> See, e.g., COLLISON, *supra* note 9, at 112.

<sup>292</sup> *Id.*; Leonard W. Levy, *Sims' Case: The Fugitive Slave Law in Boston in 1851*, 35 J. NEGRO HIST. 39 (1950) [hereinafter Levy].

<sup>293</sup> See VON FRANK, *supra* note 9, at 1-3.

<sup>294</sup> See FSA § 6.

<sup>295</sup> *Id.*; see, e.g., *supra* notes 281-91 and accompanying text.

<sup>296</sup> See *supra* notes 181-91.

<sup>297</sup> See *supra* notes 182-96 and accompanying text.

<sup>298</sup> See, e.g., COLLISON, *supra* note 9, at 116-19.

<sup>299</sup> For example, Abraham Lincoln's law partner William Herndon represented fugitive slaves in three rendition proceedings in Springfield, Illinois. See BLACKETT, *supra* note 9, at 159-61. Future president Rutherford B. Hayes appeared on behalf of a fugitive slave in Cincinnati, Ohio in 1853. See BLACKETT, *supra* note 9, at 245.

a dramatic rescue of the fugitive directly from a commissioner's courtroom.<sup>300</sup>

On Saturday, February 15, 1851, Shadrach Minkins was arrested at the coffeehouse where he worked by United States Marshals pursuant to a warrant issued by Commissioner Curtis.<sup>301</sup> Later the same day, Minkins was brought to the main courthouse in Boston to appear before the commissioner.<sup>302</sup> After Minkins's counsel moved to continue the hearing to Tuesday, February 18, Commissioner Curtis endorsed the arrest warrant and granted the motion.<sup>303</sup> After Curtis adjourned the proceeding and the courtroom emptied, a group of approximately twenty Black men rushed into the courtroom, grabbed Minkins, and helped him escape from Boston.<sup>304</sup>

The rescue of Minkins directly from the Boston courthouse shocked many and caused great embarrassment in the federal government.<sup>305</sup> In the wake of Minkins's escape, numerous individuals, both Black and White, were arrested and prosecuted on federal charges of violating Section Seven of the Fugitive Slave Act.<sup>306</sup> Stanley Campbell writes:

The Shadrack rescue was the greatest defeat suffered by the national government in the enforcement of the Fugitive Slave Law. Not only was a fugitive slave snatched from a federal marshal in the Boston courthouse, but the district attorney was unable to secure a single conviction against those charged with aiding and abetting the escape. This caused great consternation in Washington, and moves were made to see that it never happened again.<sup>307</sup>

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<sup>300</sup> The most thorough account of the Shadrach Minkins case is found in Collison. *See, e.g.*, COLLISON *supra* note 9. For other accounts, see MCPHERSON, *supra* note 124, at 82-83; CAMPBELL, *supra* note 9, at 148-51; BLACKETT, *supra* note 9, at 409-13; GORDAN, *supra* note 129, at 28-34.

<sup>301</sup> COLLISON, *supra* note 9, at 112-13.

<sup>302</sup> *Id.* at 113-14, 116-17.

<sup>303</sup> *Id.* at 117.

<sup>304</sup> *Id.* at 124-33.

<sup>305</sup> *Id.* at 138-41.

<sup>306</sup> See GORDAN, *supra* note 129, at 30-33 for an in-depth analysis of the criminal cases that arose from the Minkins escape. See also *infra* Section VIII.D for a discussion of Benjamin F. Hallett's preliminary examinations in two of these cases.

<sup>307</sup> CAMPBELL, *supra* note 9, at 151.

The next rendition hearing that followed at the Boston courthouse, for Thomas Sims in April 1851,<sup>308</sup> would take place amid greatly increased security, including city police, local militia, federal troops, and a *posse comitatus* organized by the United States marshal.<sup>309</sup> The rendition hearing for Sims would serve as a model for how these matters would proceed throughout the nation.

In February 1851, Thomas Sims, a man enslaved by rice planter James Potter in Georgia, escaped bondage by stowing away on a brig leaving Savannah.<sup>310</sup> Although he hid during most of the ship's two-week voyage, he was discovered shortly before the ship's arrival in Massachusetts and was locked in a cabin when the vessel anchored in Boston Harbor.<sup>311</sup> Using a pocketknife, Sims jimmied the cabin's lock, stole a rowboat, and escaped into Boston.<sup>312</sup> When Sims' owner later learned of Sims's whereabouts, he sent his agent, John B. Bacon, to Boston to recapture his slave under the Fugitive Slave Act.<sup>313</sup>

On Thursday evening, April 3, 1851, Sims was arrested by two police officers executing an arrest warrant issued by Commissioner George Ticknor Curtis under the Act.<sup>314</sup> After a brief struggle where Sims stabbed one officer with a pocketknife, a posse of bystanders helped the officers subdue Sims.<sup>315</sup> After being thrown into a carriage, Sims was driven to Boston's courthouse, which housed

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<sup>308</sup> The most detailed account of the Thomas Sims rendition remains Levy, *supra* note 291. For a near-contemporary account of the case from an abolitionist perspective, see SAMUEL MAY, JR., *THE FUGITIVE SLAVE LAW AND ITS VICTIMS* 16-17 (1861). For other modern accounts, see MCPHERSON, *supra* note 124, at 83-84; CAMPBELL, *supra* note 9, at 117-21; BLACKETT, *supra* note 9, at 413-421; LUBET, *supra* note 9, at 146-56; DELBANCO, *supra* note 9, at 273-82.

<sup>309</sup> Levy, *supra* note 291, at 52, 69-70. Robert Coakley states in his history of the use of federal military forces in domestic disturbances in the United States in the eighteenth and nineteenth centuries that the combined forces assembled for the rendition of Anthony Burns, totaling approximately 1,600 men, was likely "the largest *posse comitatus* in the nation's history, even if it does not appear to have been completely under the marshal's control or at his disposition." ROBERT W. COAKLEY, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1789-1878*, at 137 (2011).

<sup>310</sup> Levy, *supra* note 291, at 43.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 44.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

both state and federal courts.<sup>316</sup> Sims was confined that night (and for the duration of the rendition proceedings) in the courthouse's jury room by employees of the United States Marshal since there was no federal prison facility in Massachusetts and a Massachusetts personal liberty statute that prohibited local jails from holding individuals accused of being fugitive slaves.<sup>317</sup>

On Friday morning, April 4, 1851, Boston residents were surprised to find the courthouse barricaded with chains and guarded by police officers to prevent protestors from entering the building.<sup>318</sup> Access into the building was limited, and even Chief Justice Lemuel Shaw of the Massachusetts Supreme Court had to pass beneath the chains.<sup>319</sup> Local authorities were taking no chances of a possible repeat of Shadrach Minkins's rescue.

The rendition hearing for Thomas Sims began at 9:00 am in the United States courtroom on the third floor of the Boston courthouse, with Commissioner Curtis presiding.<sup>320</sup> The fugitive was represented by former United States Senator Robert Rantoul, Jr.<sup>321</sup> and Charles G. Loring, both prominent members of the

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<sup>316</sup> See ISAAC SMITH HOMANS, SKETCHES OF BOSTON, PAST AND PRESENT, AND OF SOME FEW PLACES IN ITS VICINITY 169-70 (1851); see also METCALF & CUSHING, SUPPLEMENT TO THE REVISED STATUTES LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 261 (1844).

<sup>317</sup> Levy, *supra* note 291, at 45-46.

<sup>318</sup> *Id.* at 46.

<sup>319</sup> *Id.* at 47.

<sup>320</sup> *Id.* at 48.

<sup>321</sup> Rantoul's *pro bono* involvement in the Sims case presents a window into the convoluted politics of Massachusetts in the 1850s. Rantoul was elected to the United States House of Representatives in November 1850. Prior to taking office as representative in March 1851, he was appointed as the United States Senator for Massachusetts in February 1851 to fill the term of Senator Robert Charles Winthrop. Although Winthrop was a former Speaker of the U.S. House of Representatives (1847-1849) and had been appointed by Governor George Briggs to fill out the Senate term of Daniel Webster after Webster's appointment as Secretary of State by President Fillmore in July 1850, he resigned his Senate seat on February 1, 1851, after not winning election in the state legislature as a Whig. Rantoul would only serve as a senator for approximately a month before being sworn into his House seat on March 4, 1851. Thus, when Rantoul represented Sims in April 1851, he had just become a former United States senator. See Biography of Robert Rantoul Jr., BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, <https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=r000063> [<https://perma.cc/32WJ-NEG3>] (last visited Aug. 28, 2022); Biography of Robert Charles Winthrop, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, <https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=W000646>

Boston bar. Counsel for the claimants Potter and Bacon was Seth Thomas, the attorney who had previously represented claimants in the Craft and Minkins cases.<sup>322</sup>

The rendition hearing followed the prescribed evidentiary rules established by the Fugitive Slave Act. Thomas first introduced into evidence court documents obtained by Potter from a Georgia court to establish that Sims was his property.<sup>323</sup> He then presented testimony from Bacon and an additional witness who had traveled with Bacon from Georgia, both of whom identified Sims as Potter's slave.<sup>324</sup> Consistent with Section Six of the Fugitive Slave Act, Curtis did not permit Sims to testify on his own behalf, and further refused to consider an affidavit presented by Sims's counsel averring that Sims was born in Florida and was a free man.<sup>325</sup>

The rendition hearing would continue in this fashion for several days while protesting crowds swirled around the courthouse, meetings were held throughout Boston denouncing the proceedings,<sup>326</sup> and unsuccessful plans were made by Black and White abolitionists to rescue Sims.<sup>327</sup> When the hearing resumed on Saturday, April 5, Commissioner Curtis received testimony from additional witnesses to further establish that Sims was Potter's slave.<sup>328</sup> Beyond cross-examination of the claimant's witnesses, attorneys for Sims would spend their time making elaborate legal arguments before the commissioner.<sup>329</sup> Rantoul would publish the

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[<https://perma.cc/2MBL-GLTJ>] (last visited Aug. 28, 2022); Merle E. Curti, *Robert Rantoul, Jr., The Reformer in Politics*, 5 *NEW ENG. Q.* 264, 276 (1932). Shortly after the Sims case was concluded, Charles Sumner was elected as senator by the state legislature on April 25, 1851 after an extended series of close votes in the Massachusetts House of Representatives. Sumner, among his other commitments, was serving as a federal circuit court commissioner in Boston alongside Curtis, Hallett, and Loring when he was elected to the Senate. See BLACKETT, *supra* note 9, at 51 n.16; DAVID DONALD, *CHARLES SUMNER AND THE COMING OF THE CIVIL WAR 164-71* (1961). Rantoul would die unexpectedly in office a year later in August 1852.

<sup>322</sup> See COLLISON, *supra* note 9, at 116-17.

<sup>323</sup> Levy, *supra* note 291, at 49.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* at 49-50.

<sup>326</sup> After the State Legislature refused to allow a public meeting on the state house yard, Theodore Parker addressed a crowd on Boston Commons, while Wendell Phillips and other abolitionists addressed a crowd at Tremont Temple. *Public Opinion in Boston*, *DAILY NAT'L INTELLIGENCER*, Apr. 8, 1851; see also CAMPBELL, *supra* note 9, at 118-19.

<sup>327</sup> See CAMPBELL, *supra* note 9, at 119-20; BLACKETT, *supra* note 9, at 416-17.

<sup>328</sup> Levy, *supra* note 291, at 53.

<sup>329</sup> *Id.* at 54-55.



complete arguments presented by Sims's attorneys before Curtis at the rendition hearing as a pamphlet in 1851.<sup>330</sup> For example, on both Monday, April 7, and Tuesday, April 8, Sims's attorneys conducted several hours of oral argument before Commissioner Curtis.<sup>331</sup> Although counsel also moved to postpone the hearing to secure additional evidence that Sims was a free man, Curtis denied the motion.<sup>332</sup>

While the rendition hearing took place before Curtis, several additional attorneys for Sims tried numerous legal maneuvers in both Massachusetts state court and federal court to delay or prevent Sims's rendition. In the week between the beginning of the rendition hearing and Commissioner Curtis's final decision, attorneys Samuel Sewall, Richard Henry Dana, Jr.,<sup>333</sup> and Charles Sumner (another Massachusetts Circuit Court Commissioner who would be elected to the United States Senate in 1852)<sup>334</sup> filed numerous petitions for writs of habeas corpus before Chief Justice Shaw of the Massachusetts Supreme Court,<sup>335</sup> the full Massachusetts Supreme Court,<sup>336</sup> United States District Judge Peleg Sprague,<sup>337</sup> and finally on Thursday, April 10, Associate Supreme Court Justice Levi Woodbury.<sup>338</sup> None were successful. While the final habeas corpus petition before Justice Woodbury would result in a brief procedural victory for Sims,<sup>339</sup> the net result of these petitions was to confirm the authority of Commissioner

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<sup>330</sup> See JAMES W. STONE, TRIAL OF THOMAS SIMS, ON AN ISSUE OF PERSONAL LIBERTY, ON THE CLAIM OF JAMES POTTER, OF GEORGIA, AGAINST HIM, AS AN ALLEGED FUGITIVE FROM SERVICE: ARGUMENTS OF ROBERT RANTOUL, JR. AND CHARLES G. LORING, WITH THE DECISION OF GEORGE T. CURTIS (1851).

<sup>331</sup> Levy, *supra* note 291, at 61.

<sup>332</sup> *Id.*

<sup>333</sup> Dana is a Boston lawyer, abolitionist, and author of the famous 1840 maritime memoir, *Two Years Before the Mast and Twenty-Four Years After*. R. H. DANA, JR., TWO YEARS BEFORE THE MAST AND TWENTY-FOUR YEARS AFTER (Charles W. Eliot ed., 1969). He would also serve as counsel for Anthony Burns in his 1854 rendition hearing. See, e.g., CAMPBELL, *supra* note 9, at 125, 128; BLACKETT, *supra* note 9, at 421-25; LUBET, *supra* note 9, at 162-215; DELBANCO, *supra* note 9, at 308-10.

<sup>334</sup> Levy, *supra* note 291, at 46.

<sup>335</sup> *Id.* at 50.

<sup>336</sup> *Id.* at 55.

<sup>337</sup> *Id.* at 65.

<sup>338</sup> *Id.* at 66.

<sup>339</sup> *Id.*

Curtis to render the final decision in the rendition hearing under the Fugitive Slave Act and to delay the final resolution of the case.

In addition, while the habeas corpus petitions were argued before state and federal courts, there was also a conflict between state and federal warrants arising from an attempt by Boston abolitionists to extricate Sims from federal custody. Based upon a complaint issued by a Boston abolitionist group, a Massachusetts justice of the peace issued an arrest warrant for Sims on Monday, April 8, based on state law assault charges arising from the incident where Sims stabbed the deputy marshal during his arrest the previous Thursday.<sup>340</sup> At the same time, however, Commissioner Benjamin Franklin Hallett issued an arrest warrant for Sims on federal criminal assault charges stemming from the same stabbing incident. This warrant was given to United States Marshal Devens, but Devens did not attempt to execute or return the warrant on that date.<sup>341</sup> However, on Tuesday, April 9, when state officials attempted to execute the Massachusetts warrant upon the federal marshal to obtain custody of Sims, Devens refused to honor the state warrant, arguing that the unexecuted federal criminal arrest warrant for Sims in Devens's possession took precedence over the state warrant.<sup>342</sup> Accordingly, Sims remained in federal custody.<sup>343</sup>

On Friday morning, April 11, Commissioner Curtis made the final decision in the rendition hearing with a lengthy opinion concluding that the Fugitive Slave Act did not violate the Constitution, ordering Sims's rendition back to Potter, and issuing a certificate of rendition.<sup>344</sup> On Friday afternoon, Sims's counsel appeared once again before Justice Woodbury. Executing Curtis's order, Woodbury remanded Sims to Devens's custody.<sup>345</sup> Seth Thomas read Curtis's certificate of rendition into the record and Woodbury closed the case.<sup>346</sup> Finally, at 4:15 AM on Saturday morning, April 12, Sims was taken to a ship in Boston Harbor, accompanied by an escort of 100 policemen and several hundred

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<sup>340</sup> *Id.* at 62.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> STONE, *supra* note 329, at 39-47; Levy, *supra* note 291, at 68-69. See also *infra* Section VIII.C for further discussion of Commissioner Curtis's opinion in the *Sims* case.

<sup>345</sup> Levy, *supra* note 291, at 69.

<sup>346</sup> *Id.*

armed volunteers. Sims was returned to Potter in Savannah, Georgia, where he received thirty-nine lashes punishment as a runaway.<sup>347</sup> Shortly thereafter, Sims was transferred to slave markets in Charleston, South Carolina and New Orleans, Louisiana, where he was sold at auction to a bricklayer in Vicksburg, Mississippi.<sup>348</sup>

The rendition hearing for Thomas Sims was dramatic, yet it set forth the basic parameters that would apply in other rendition proceedings under the Fugitive Slave Act. Indeed, while rendition proceedings for Anthony Burns in 1854 proved even more dramatic and controversial (including the death of a deputized civilian protecting the courthouse during a violent attempt to rescue Burns),<sup>349</sup> the rendition hearing for Burns was remarkably similar to that in the Sims case.<sup>350</sup> Absent clear guidance in the statute, Commissioner Loring exercised broad discretion to determine how the hearing would proceed.<sup>351</sup> With zealous counsel present for Burns, the brief summary proceeding intended by the Act's authors became a protracted, quasi-trial, with multiple witnesses, cross-examination, and lengthy legal arguments.<sup>352</sup> Novel legal theories were raised before the commissioners and other courts to delay and counteract the rendition decision.<sup>353</sup> At the conclusion of the hearings, the commissioners issued lengthy legal opinions explaining their decisions along with issuing the required rendition certificate.<sup>354</sup>

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<sup>347</sup> *Id.* at 72; *see also* BLACKETT, *supra* note 9, at 417.

<sup>348</sup> CAMPBELL, *supra* note 9, at 120. Sims would once again escape from bondage in 1863 and after the Civil War ended, would end up working as a messenger at the Department of Justice for Charles Devens, the same man who, as the United States Marshal for Massachusetts, had overseen Sims's rendition to Georgia. *Id.*

<sup>349</sup> *See, e.g.*, VON FRANK, *supra* note 9, at 68; MALTZ, *supra* note 9, at 63-64; BARKER, THE IMPERFECT REVOLUTION, *supra* note 9, at 12-13.

<sup>350</sup> A near-contemporary account of the Anthony Burns case, including a detailed description of the rendition hearing and Commissioner Loring's rendition opinion, can be found in STEVENS, *supra* note 225.

<sup>351</sup> *Id.* at 80-96.

<sup>352</sup> *Id.* at 97-112.

<sup>353</sup> *Id.* at 106-07 (noting that Dana's constitutional arguments to Commissioner Loring against enforcement of the FSA were modeled after the arguments made by Rantoul to Commissioner Curtis in the *Sims* case).

<sup>354</sup> *See, e.g., id.* at 113-23 for Commissioner Loring's rendition opinion.

While fugitive slave rendition hearings would vary across the country,<sup>355</sup> it quickly became apparent that the brief, ministerial proceedings intended to provide for quick renditions of fugitive slaves contemplated by the Southern legislators who drafted the FSA did not happen in the face of realities on the ground in Northern states. The Southern belief in a right to the recapture of slave property guaranteed by the Constitution ran into direct conflict with the Northern belief that fugitive slaves remained individuals who were guaranteed certain inherent due process rights under the same Constitution. Despite the intentions of Southern lawmakers, the rendition hearings under the Act bore little resemblance to the property proceedings conducted by Southern justices of the peace when dealing with captured runaway slaves. And through it all, circuit court commissioners were left to sort out the issues as best they could with little guidance in the law or procedural rules.

### C. Legal Opinions

At the conclusion of the rendition hearing, Section Six of the Fugitive Slave Act merely commanded the commissioner to issue a rendition certificate.<sup>356</sup> The Act was silent as to whether commissioners could issue opinions explaining their rulings.<sup>357</sup> Nevertheless, Commissioners Curtis and Loring wrote lengthy opinions to accompany the certificates of rendition they issued in the *Sims* and *Burns* cases.<sup>358</sup> Curtis's opinion in the *Sims* case provides an excellent example of where the "ministerial" commissioner felt compelled to engage in extensive legal reasoning to explain his ruling under the Act.<sup>359</sup>

Commissioner Curtis had already established himself as a legal scholar at the time of the *Sims* case, having published his treatises on maritime law and copyright law before 1851.<sup>360</sup> He would publish his first work on patent law in 1851.<sup>361</sup> As noted

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<sup>355</sup> See BLACKETT, *supra* note 9, at 158-79, 243-68, 273-307, 357-93 for descriptions of rendition proceedings in Illinois, Ohio, Pennsylvania, and New York, respectively.

<sup>356</sup> Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850) (repealed 1864).

<sup>357</sup> *Id.* (repealed 1864).

<sup>358</sup> STONE, *supra* note 329, at 39-47; STEVENS, *supra* note 225, at 113-23.

<sup>359</sup> STONE, *supra* note 329, at 39-47.

<sup>360</sup> See CURTIS, LIFE OF DANIEL WEBSTER 4TH ED., *supra* note 246.

<sup>361</sup> See sources cited *supra* note 248.

earlier, Curtis's full decision in the *Sims* case was included in the pamphlet published by Sims's attorney, Robert Rantoul, containing the arguments of Sims's counsel in the rendition proceedings.<sup>362</sup>

The bulk of Curtis's opinion dealt with arguments raised by Sims's attorneys that the Fugitive Slave Act violated the Constitution.<sup>363</sup> Curtis stated that his decision would have been brief except for the constitutional issues raised, noting:

I should have been glad to have been relieved of this labor and responsibility, by any tribunal whatever, competent to assume the decision of the question; but inasmuch as my decision is final, so far as the restoration of the fugitive to the state of Georgia is concerned, and inasmuch as no court has felt it to be necessary to interpose to relieve me of this responsibility, I know of no reason why I should shrink from it.<sup>364</sup>

Curtis also countered Sims's attorneys' suggestion that the fee structure of the Act "must be humiliating to this Court," the "ten dollar judge" issue:

If the learned counsel supposed that the sum of five dollars was likely to influence my judgment upon any question in this case, he did right in reminding me that the Statute provides for a compensation.—But it would, in my opinion, have been well, if the learned counsel, before he addressed to me this observation, had examined the Statute, to see whether, although it authorizes the Commissioner to receive a compensation, it imposes upon him any obligation to take it. If it does not, I see no cause for humiliation, and I certainly feel none.<sup>365</sup>

Curtis first addressed the fundamental challenge to his authority as a commissioner: that the fugitive slave rendition proceeding, as a case and controversy that involved the exercise of judicial power under Article III of the Constitution, required a federal judge with the protections of life tenure and irreducible salary; and that Congress, in giving this authority to a commissioner under the FSA,

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<sup>362</sup> STONE, *supra* note 329, at 39-47.

<sup>363</sup> *Id.*

<sup>364</sup> *Id.* at 39.

<sup>365</sup> *Id.* at 39-40.

not an Article III judge, violated Article III of the Constitution.<sup>366</sup> Citing Justice Story's opinion in the *Prigg* case,<sup>367</sup> Curtis noted that a fugitive slave matter was in fact a constitutional case and controversy and that "it was for Congress to regulate and prescribe the remedy, the form of proceedings, and the mode and extent in which the judicial power of the Union should be called into activity."<sup>368</sup>

In addressing whether Congress could properly authorize commissioners to conduct fugitive rendition proceedings, Curtis provided numerous examples from legal history where judicial authority was delegated to officials who were not judges under Roman law, English law, Massachusetts law, and United States statutes, finally declaring:

[I]t would seem, that in every government of laws, administered by a judiciary, there must be a class of judicial inquiries embraced within the general compass of the judicial power, but from their special, limited and ministerial nature, capable, without violating any constitutional rule, of being withdrawn from the action of the Courts, and intrusted [*sic*] to officers specially authorized to conduct them. It may be difficult to define the boundary, on one side of which all these cases would range themselves. It might be wholly inexpedient to define it, in a written Constitution. That it exists, no jurist can entertain any doubt; and it seems to me the only question in this case is, whether Congress, in authorizing these summary proceedings before a Commissioner, for the surrender of a fugitive from service, have passed that boundary or not.<sup>369</sup>

Then looking to the specific rendition proceedings under the Act, Curtis noted that these matters were analogous to rendition proceedings where a prisoner escaped to one state from another and was returned to the home state, that such proceedings were ministerial by nature, and therefore did not constitute a final proceeding requiring an Article III judge.<sup>370</sup> Curtis admitted that no federal court had yet directly addressed the question of whether

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<sup>366</sup> *Id.* at 40.

<sup>367</sup> *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

<sup>368</sup> STONE, *supra* note 329, at 40.

<sup>369</sup> *Id.* at 41-42.

<sup>370</sup> *Id.* at 43.

Congress could confer authority to conduct fugitive slave rendition proceedings “upon an inferior magistrate” such as a commissioner.<sup>371</sup> However, citing dicta in the *Prigg* decision and the habeas corpus decision regarding Sims issued by Justice Shaw of the Massachusetts Supreme Court earlier in the week,<sup>372</sup> Curtis concluded that Congress’s delegation of the authority to conduct fugitive slave rendition proceedings to circuit court commissioners did not violate Article III of the Constitution and therefore he had the authority to decide the case at bar.<sup>373</sup>

Curtis briefly rejected four other legal objections to the proceedings raised by Sims’s attorneys: (1) that Sims was entitled to a jury trial under the Sixth Amendment;<sup>374</sup> (2) that the Georgia court transcript used to establish Potter as Sims’s owner constituted incompetent evidence;<sup>375</sup> (3) that the Georgia state proceedings were improper because Sims was not present to cross examine witnesses;<sup>376</sup> and (4) that the federal government had no authority whatsoever to legislate on issues involving fugitive slaves.<sup>377</sup>

Turning to the evidence presented at the rendition hearing, Curtis noted that the Act required the claimant to prove two things: (1) that some person, owing service or labor to the claimant, had escaped from the state where such service was due; and (2) that the person under arrest is in fact the person who had escaped.<sup>378</sup> Curtis first accepted the transcript of the Georgia state court proceedings establishing “that on or about the 22d day of February last, one Thomas Sims escaped from the State of Georgia, while owing service or labor to James Potter, the claimant.”<sup>379</sup> The commissioner then reviewed the testimony of the several witnesses, all of whom identified Sims as the individual who had escaped Georgia by boat on February 22, 1851.<sup>380</sup> Curtis accepted this

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<sup>371</sup> *Id.*

<sup>372</sup> *In re Sims*, 61 Mass. 285 (1851).

<sup>373</sup> STONE, *supra* note 329, at 43.

<sup>374</sup> *Id.* at 43-44.

<sup>375</sup> *Id.* at 44.

<sup>376</sup> *Id.*

<sup>377</sup> *Id.* at 44-45.

<sup>378</sup> *Id.* at 45.

<sup>379</sup> *Id.* at 46.

<sup>380</sup> *Id.* at 46-47.

testimony and disregarded attempts by Sims to establish that he was a free man from Florida, concluding that the evidence “leaves no room whatever for a doubt that the prisoner before me is the identical person described in the record, as having escaped from Georgia, while owing service to James Potter.”<sup>381</sup> Curtis therefore granted the rendition certificate to Potter, ordering Sims returned to Georgia.<sup>382</sup>

Curtis’s decision in *Sims* was significant. His opinion was apparently the first by any federal judicial officer ruling on the constitutionality of the Fugitive Slave Act of 1850.<sup>383</sup> Curtis produced a scholarly and comprehensive analysis of the constitutional issues raised by the Act. Although not formally published as a decision of the federal court, Curtis’s decision was analyzed and attacked by abolitionist attorneys who disagreed with his ruling.<sup>384</sup> Commissioners, intended by Congress to conduct summary hearings to assist enslavers in recapturing runaway slaves, were contributing to the ongoing legal debate over the validity of the FSA. In the process, the visibility of circuit court commissioners had risen dramatically along with their expanded authority.<sup>385</sup>

#### D. Preliminary Examinations

Resistance in the North to the Fugitive Slave Act was immediate after the Act’s passage in 1850 and continued until the Civil War. As we have seen, all four Boston cases resulted in public protests and active attempts to prevent the Act from being enforced, including the rescue of Shadrach Minkins<sup>386</sup> and the violent confrontation between protesters and police and deputized citizens at the Boston courthouse steps in the Burns case that resulted in multiple injuries and the shooting death of one defender.<sup>387</sup> Out of

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<sup>381</sup> *Id.* at 47.

<sup>382</sup> *Id.*

<sup>383</sup> Curtis himself believed this to be true. *Id.* at 43.

<sup>384</sup> *See, e.g.*, THOMAS H. TALBOT, THE CONSTITUTIONAL PROVISION RESPECTING FUGITIVES FROM SERVICE OF LABOR AND THE ACT OF CONGRESS, OF SEPTEMBER 18, 1850 33-37 (1852).

<sup>385</sup> *Id.*

<sup>386</sup> COLLISON, *supra* note 9, at 124-33.

<sup>387</sup> Levy, *supra* note 291, at 69-70; CAMPBELL, *supra* note 9, at 126-27; DELBANCO, *supra* note 9, at 308.



these confrontations came numerous federal prosecutions of individuals accused of violating the Act.<sup>388</sup> Besides their roles in rendition hearings, circuit court commissioners were involved in other criminal proceedings arising out of these prosecutions. Preliminary examinations, where commissioners would examine evidence upon which defendants were arrested on the government's complaint to determine whether the evidence was sufficient to hold the defendants over for trial, required commissioners to make judicial evaluations of evidence.<sup>389</sup> This judicial aspect of the commissioners' duties is usually overlooked by historians. Presiding in preliminary examinations of individuals arrested after Shadrach Minkins's rescue, Commissioner Benjamin Franklin Hallett would play a central role in several prosecutions that arose from the Minkins case.

After Minkins's rescue, the Fillmore administration made a concerted effort to arrest and prosecute numerous persons who were in the vicinity of the courthouse when the rescue occurred on charges of violating the Fugitive Slave Act.<sup>390</sup> For two of these individuals, white attorney Charles Davis and Black attorney Robert Morris (only the second African American to be admitted to the Massachusetts bar), Commissioner Hallett conducted preliminary examinations to determine whether the arrested defendants should be held over for trial. A complete transcript of the proceedings in Charles Davis's case, including the arrest warrant issued by Commissioner Curtis, the complaint issued by Commissioner Hallett, the testimony and arguments during the preliminary examination, and a summary of Hallett's final opinion

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<sup>388</sup> GORDAN, *supra* note 129, at 30-31.

<sup>389</sup> See Goldsmith, *supra* note 38, reprinted in *Federal Magistrates Act: Hearings Before the Subcomm. on Improvements in Jud. Mach. of the Comm. on the Judiciary on S. 3475 and S. 945*, 89th Cong. & 90th Cong. 318-68 (1967) for a discussion on commissioners and preliminary hearings in the federal judicial system prior to enactment of the Federal Magistrates Act. These proceedings are now called preliminary hearings under Fed. R. Crim. P. 5.1 and preliminary examinations under 18 U.S.C. § 3060. See also ADMIN. OFF. OF THE U.S. CTS, INVENTORY OF U.S. MAGISTRATE JUDGE DUTIES 12-14 (2013).

<sup>390</sup> Nine men who were near the site of the rescue and affiliated with Boston abolitionist organizations were arrested between February 17 and March 1, 1851. GORDAN, *supra* note 129, at 30-31.

was published as a pamphlet in 1851.<sup>391</sup> For the preliminary examination of Robert Morris, Commissioner Hallett's decision was reported in several Boston newspapers.<sup>392</sup> The difference between Commissioner Hallett's treatment of the two defendants is striking.

Both Collison and Gordan, the scholars who have studied these proceedings in depth, note that the factual cases against both Davis and Morris were weak.<sup>393</sup> After four days of witness testimony (which included the testimony of the presiding Commissioner Curtis),<sup>394</sup> and a full day of argument, on February 26, 1851, Hallett held that the evidence was insufficient to establish that Davis had committed the charged offense.<sup>395</sup> During the hearing, Davis stated that he was glad that Minkins was free and refused to denounce the rescue as unlawful. Hallett rebuked Davis for these comments, calling them a "manifestation of a resistance to or contempt of legal process . . . whose countenance or encouragement may have involved . . . the excitable and less informed in an open violation of law."<sup>396</sup> Nevertheless, Hallett concluded that:

[T]here is no evidence which connects [Davis] criminally with a preconcerted plan of rescue; and I take pleasure in adding that the conduct of the defence [*sic*] by the learned counsel, and his testimony and disavowals, have greatly aided me in coming to that conclusion. . . . Upon the whole evidence, therefore, and applying the rule which should govern preliminary examinations, of not binding over a party accused, without testimony beyond that which might constitute legal probable cause for his arrest and examination, I shall order that the defendant be discharged.<sup>397</sup>

The federal charges against Davis were therefore dismissed.

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<sup>391</sup> CHARLES G. DAVIS, REPORT OF THE PROCEEDINGS AT THE EXAMINATION OF CHARLES G. DAVIS, ESQ., ON A CHARGE OF AIDING AND ABETTING IN THE RESCUE OF A FUGITIVE SLAVE (1851) [hereinafter DAVIS].

<sup>392</sup> *Another Rescue Case Sent Up*, BOS. POST, Mar. 10, 1851, at 1; BOS. DAILY EVENING TRANS., Mar. 8, 1851, at 2; *Court Calendar*, BOS. COURIER, Mar. 10, 1851. *See also* GORDAN, *supra* note 129, at 32.

<sup>393</sup> GORDAN, *supra* note 129, at 32.

<sup>394</sup> DAVIS, *supra* note 390, at 14.

<sup>395</sup> *Id.* at 41-42.

<sup>396</sup> *Id.* at 40-41.

<sup>397</sup> *Id.* at 41, 42.

The preliminary examination of Morris held on March 1, 1851 went very differently. The proceedings were abbreviated; Morris declined to present any witnesses and did not testify on his own behalf.<sup>398</sup> Hallett concluded that Morris's mere presence among other Black participants in Minkins's rescue was sufficient to justify Morris being held over for trial.<sup>399</sup> During the hearing, Morris's attorney argued that, as a Black attorney in Boston, Morris had been subjected to racial abuse. Hallett was clearly offended by this argument:

His counsel in the defence has suggested that the defendant, on account of caste, has had to contend with great difficulties and prejudices in the profession he has chosen. I think that the suggestion is not well founded. On the contrary, the bearing of the profession and the courts towards him, to the extent of my observation, has always been kind and courteous, but I know of no immunity that he can claim as an individual or as a counsellor at law, from the penalty that attaches to the wilful violation of the laws of the land. He who best knows the law is the more guilty *if* he wilfully violates it, or incites others to do so. It is the defendant's own act which has brought him into the peril in which he now stands, and which, if committed by the most distinguished member of the bar, or the bench, would produce the same result and the same judgment that are now to follow as the consequences of that act.<sup>400</sup>

Hallett described all the testimony for the government's witnesses placing Morris in the vicinity when various Black individuals participated in the rescue. Specifically, Morris was seen by several witnesses in a cab with Minkins and other individuals after Minkins's escape from the courthouse. Hallett concluded that the only reasonable interpretation of the facts was that Morris knew about and aided in the rescue. Although Morris's attorney suggested that Morris may have been in the cab with Minkins for a lawful purpose, Hallett rejected this argument with scorn:

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<sup>398</sup> GORDAN, *supra* note 129, at 32.

<sup>399</sup> *Another Rescue Case Sent Up*, *supra* note 391, at 1.

<sup>400</sup> *Id.*

Had the defendant appeared here as a witness aiding in bringing to justice those who have committed this outrage upon the public peace, the sanctity of courts of justice and the supremacy of the laws, that argument might have been effective. Standing as he does and upon this evidence, there can be but one conclusion to this examination.<sup>401</sup>

Morris was ordered held over for trial, and bail for his release was posted immediately by Josiah Quincy, Jr., a former mayor of Boston.<sup>402</sup>

Morris's first trial on these charges, in the United States District Court with District Judge Peleg Sprague presiding, abruptly ended in a mistrial in June 1851 when the United States District Attorney George Lunt revealed that a juror was biased against enforcement of the Fugitive Slave Act.<sup>403</sup> Sprague continued the case to the next session of the district court, but when the trial was restarted on October 31, it was tried in the United States circuit court with newly-appointed Associate Justice of the Supreme Court, Benjamin Robbins Curtis (Commissioner George Ticknor Curtis's older brother), co-presiding with Judge Sprague.<sup>404</sup> Commissioner Curtis was called as a witness in Morris's trial. Historian John Gordan argues that Justice Curtis, in his opinions to the jury in the Morris case, was trying to obtain a guilty verdict.<sup>405</sup> Nevertheless, the jury acquitted Morris on November 11, 1851 after the United States District Attorney Lunt failed to present any evidence of a premeditated conspiracy among the alleged rescuers.<sup>406</sup> Ironically, Commissioner Hallett would replace Lunt as the United States District Attorney in Massachusetts after Franklin Pierce's election as President in 1852.<sup>407</sup>

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<sup>401</sup> *Id.*

<sup>402</sup> *Id.*; see also GORDAN, *supra* note 129, at 36. Quincy served as Mayor of Boston from 1846-1848. 22 JOSIAH QUINCY, ENCYCLOPÆDIA BRITANNICA 754 (11th ed. 1911).

<sup>403</sup> GORDAN, *supra* note 129, at 36.

<sup>404</sup> *Id.* at 41-42. Curtis was appointed to the Supreme Court by President Fillmore of September 22, 1851, after the death of Justice Levi Woodbury on September 4, 1851. Interestingly, Daniel Webster had wanted Benjamin Curtis to be the Government's counsel in the trials of the Minkins defendants before Curtis was appointed to the Supreme Court. *Id.* at 37-38.

<sup>405</sup> *Id.* at 69-72.

<sup>406</sup> COLLISON, *supra* note 9, at 194.

<sup>407</sup> APPLETON'S CYCLOPÆDIA, *supra* note 257, at 51; 11 *George Lunt*, DICTIONARY OF AMERICAN BIOGRAPHY 507-08 (Dumas Malone ed., 1933).

Commissioner Benjamin F. Hallett never presided in a rendition hearing under the Fugitive Slave Act. Nevertheless, his judicial actions as a commissioner presiding over federal preliminary examinations of defendants accused of violating the FSA illustrate another important role played by circuit court commissioners in interpreting the law and in making evidentiary rulings and conclusions that were crucial in enforcing the Act.

#### IX. CONTINUED EXPANSION OF COMMISSIONER AUTHORITY AFTER THE CIVIL WAR

As noted earlier, historians continue to debate how vigorously the Fugitive Slave Act was enforced and whether it achieved any of its purposes.<sup>408</sup> Scholars suggest that enforcement of the Act waned later in the 1850s; an appendix of FSA cases compiled by Stanley Campbell lists far fewer federal rendition cases after 1851 and enumerates a total of only 191 rendition proceedings brought under the FSA between 1850 and 1860.<sup>409</sup>

Even with the possibility of additional unreported federal rendition cases emerging with further research, the Southern dream of a large federal law enforcement bureaucracy assisting slaveholders in recovering runaway slaves in the North was not realized. Circuit court commissioners were not appointed in every county in Northern states, as envisioned by some Southern senators.<sup>410</sup> Blackett argues that federal courts had difficulty finding attorneys willing to serve as commissioner in some locations.<sup>411</sup> Historian Gautham Rao notes that the Department of the Treasury records show that only 33 commissioners throughout the nation sought reimbursement for fees under the Act in 1860.<sup>412</sup>

With the advent of the Civil War in 1861, enforcement activity under the FSA further wound down. As the war progressed, the Union Army's policy of allowing runaway slaves that reached Union lines to be treated as "contrabands" who would not be returned to their owners, led to thousands of slaves liberating themselves from

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<sup>408</sup> See *supra* note 11 and accompanying text.

<sup>409</sup> CAMPBELL, *supra* note 9, at 199-207.

<sup>410</sup> See GORDAN, *supra* note 129, at 15.

<sup>411</sup> BLACKETT, *supra* note 9, at 53-58.

<sup>412</sup> Gautham Rao, *The Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America*, 26 LAW & HIST. REV. 1, 29 n.79.

bondage, further undermining enforcement of the FSA in slave states still loyal to the Union.<sup>413</sup> Nevertheless, Campbell reports that fugitive slave rendition proceedings were still occurring before commissioners in the District of Columbia as late as June 1863, six months after the Emancipation Proclamation.<sup>414</sup> The Act itself was finally repealed in 1864.<sup>415</sup>

Congress, however, continued to use the FSA as a model for increasing the authority of circuit court commissioners as it greatly expanded the jurisdiction of the federal courts during and after the Civil War. As Stanley Kutler states, “The fifteen years following the outbreak of Civil War . . . witnessed the greatest legislative expansion of jurisdiction since 1789.”<sup>416</sup> Eric Foner notes that the expanded power of the federal courts was one of the few aspects of the national government’s authority that did not shrink after Reconstruction ended in Southern states in 1877.<sup>417</sup> In this context, Congress used the template it established with the Fugitive Slave Act to steadily increase the responsibilities of circuit commissioners.

One of the first laws passed by Congress during Reconstruction was the Civil Rights Act of 1866.<sup>418</sup> This law specifically gave commissioners authority to commence proceedings under the Act in cases where individuals sought to enforce civil rights abrogated by local officials.<sup>419</sup> The statute further authorized

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<sup>413</sup> See OAKES, *supra* note 75, at 134-75. See also JAMES OAKES, FREEDOM NATIONAL: THE DESTRUCTION OF SLAVERY IN THE UNITED STATES, 1861-1865 (1st ed. 2013) for an in-depth history of how slavery was ended during the Civil War.

<sup>414</sup> CAMPBELL, *supra* note 9, at 192-93.

<sup>415</sup> See *supra* note 11 and accompanying text. See, e.g., DELBANCO, *supra* note 9, at 387; FONER, *supra* note 71, at 295.

<sup>416</sup> STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 143 (1968).

<sup>417</sup> ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877, at 555-56 (Ann Finlayson ed., 1st ed. 1988).

<sup>418</sup> Civil Rights Act of 1866, Pub. L. No. 39-26, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981-1986).

<sup>419</sup> Section 4 of the Civil Rights Act of 1866 provided that:

federal courts to appoint additional commissioners to exercise this expanded authority.<sup>420</sup>

The enforcement provisions of the Civil Rights Act of 1866 were specifically modeled upon the Fugitive Slave Act of 1850, including the use of circuit court commissioners to perform duties under the statute.<sup>421</sup> In an ironic twist, Congress shifted from authorizing federal commissioners to help slaveholders in retrieving runaway slaves from Northern states, to empowering commissioners to assist freedmen in securing their civil rights throughout the country, but particularly in Southern states. Congress would further increase the authority of circuit court commissioners with the Ku Klux Klan Act of 1871<sup>422</sup> and the Civil Rights Act of 1875.<sup>423</sup> Enforcement of these acts declined as the United States government retreated from its Reconstruction policies in the 1870s<sup>424</sup> and after the Supreme Court severely limited federal enforcement of these statutes in *United States v.*

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[T]he commissioners appointed by the circuit and territorial courts of the United States, with powers of arresting, imprisoning, or bailing offenders against the laws of the United States . . . shall be, and they are hereby, specially authorized and required, at the expense of the United States, to institute proceedings against all and every person who shall violate the provisions of this act, and cause him or them to be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States or territorial court as by this act has cognizance of the offence.

*Id.* at 28.

<sup>420</sup> *Id.*

<sup>421</sup> See ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 67 (1st ed. 2019) (“Ironically, the law’s enforcement mechanisms were modeled on the infamous Fugitive Slave Act of 1850.”); PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* 37 (2011) (“It is true that in writing the Civil Rights Act of 1866, Republicans copied some of the machinery of the Fugitive Slave Act of 1850 . . .”). See, e.g., Robert J. Kaczorowski, *The Supreme Court and Congress’s Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 *FORDHAM L. REV.* 153, 205-11 (2004); Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of Runyon v. McCrary*, 98 *YALE L.J.* 565, 588 (1989).

<sup>422</sup> Pub. L. No. 42-22, 17 Stat. 13 (1871).

<sup>423</sup> 18 Stat. 335, 336 (1875), *invalidated* by *The Civil Rights Cases*, 103 U.S. 3 (1883).

<sup>424</sup> See Everette Swinney, *Enforcing the Fifteenth Amendment, 1870-1877*, 28 *J. S. HIST.* 202 (1962).

*Cruikshank*.<sup>425</sup> Nevertheless, Congress would continue to expand the authority of commissioners even after Reconstruction's end.

Along with the Reconstruction statutes, the nation's need for substantial additional revenue during and after the Civil War also created increased work for commissioners. In 1862, Congress passed legislation that, in addition to establishing the first federal income tax, restored excise taxes on many products, particularly alcohol production, as a major source of federal revenue.<sup>426</sup> This legislation also created the Internal Revenue Service to enforce these tax laws. The need to collect this revenue and to punish those who evaded the new taxes led to more enforcement officers and the related need for more commissioners to issue the necessary federal arrest and seizure warrants.<sup>427</sup> Indeed, attempts to enforce alcohol excise taxes in Southern states in the 1860s and 1870s found commissioners facing violent resistance eerily comparable to attempts to thwart the enforcement of federal civil rights for Black Americans under Reconstruction statutes.<sup>428</sup>

The numbers of circuit court commissioners further increased with the addition of new states and territories to the United States. Lindquist states, "After the Civil War, the westward expansion of the nation into the territories, coupled with an increase in the population, saw an increase in the number of commissioners until by 1878 approximately 2000 individuals were serving in that

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<sup>425</sup> 92 U.S. 542 (1876) (This case arose from federal prosecutions resulting from the April 1873 massacre in Colfax, Louisiana, where more than 60 African Americans were killed by white supremacists led by William Cruikshank, after disputed local elections.); see CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* (1st ed. 2008) (further explains the Colfax massacre and the cases that arose from it).

<sup>426</sup> Revenue Act of 1862, Pub. L. No. 37-119, 12 Stat. 432 (1862).

<sup>427</sup> See WILBUR R. MILLER, *REVENUE & MOONSHINERS: ENFORCING FEDERAL LIQUOR LAW IN THE MOUNTAIN SOUTH, 1865-1900*, at 117, 184-85 (1991) (anecdotal discussion of corruption between circuit court commissioners and law enforcement officials in issuing excess warrants to generate fees).

<sup>428</sup> See Bruce E. Stewart, "When Darkness Reigns Then is the Hour to Strike": *Moonshining, Federal Liquor Taxation, and Klan Violence in Western North Carolina, 1868-1872*, 80 N.C. HIST. REV. 453, 458 (2003) ("Federal liquor taxation, however, also shaped Klan violence in western North Carolina. Between 1868 and 1872, liquor taxation emerged as a major issue in mountain politics, escalating the potential for violence.").



capacity.”<sup>429</sup> As we have seen, however, the exact number of commissioners in these years is not yet known.<sup>430</sup>

Congress continued to expand the commissioners’ authority in the 1880s. As with the Fugitive Slave Act, Congress empowered circuit court commissioners to perform sometimes unsavory duties, thereby relieving other federal judges from these tasks. For example, in 1882, Congress enacted the first Chinese Exclusion Act,<sup>431</sup> and followed with additional exclusion statutes in 1884<sup>432</sup> and 1888.<sup>433</sup> In these statutes, circuit court commissioners were empowered to conduct summary hearings for the removal of Chinese individuals found to be illegally in the United States.<sup>434</sup>

Problems with the fee system for compensating commissioners were also increasingly apparent in the decades after the Civil War. In in his annual report for 1878, the Attorney General noted with alarm that the number of commissioners in the federal courts demanding reimbursement for fees was approaching 2,000 and complained that he had no authority to demand that commissioners provide any accounting for these fees. He recommended:

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<sup>429</sup> Lindquist, *supra* note 38, at 8-9.

<sup>430</sup> See sources cited *supra* notes 37, 40, 233.

<sup>431</sup> Chinese Exclusion Act, ch. 126, 22 Stat. 58, *repealed by* Chinese Exclusion Repeal Act of 1943, ch. 7, §§ 262-297, 299, 57 Stat. 600.

<sup>432</sup> Act of July 5, 1884, ch. 220, 23 Stat. 115 (1884).

<sup>433</sup> Act of Sept. 13, 1888, ch. 1015, 25 Stat. 477 (1888); Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504 (1888).

<sup>434</sup> See, e.g., Section 12 of the 1882 Act:

And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, by direction of the President of the United States, and at the cost of the United States, after being brought before some justice, judge, or *commissioner* of a court of the United States and found to be one not lawfully entitled to be or remain in the United States.

Chinese Exclusion Act § 12 (emphasis added); see also Lucy Salyer, *Captives of Law: Judicial Enforcement of the Chinese Exclusion Laws, 1891-1905*, 76 J. AM. HIST. 91, 91-117 (1989).

By proper legislation, I think the number of commissioners should be fixed in each district, and that their compensation should be limited to a stated sum, to be allowed after a return of all their emoluments has been rendered to the Department of Justice, including such as may have been received in compromise cases.<sup>435</sup>

Lindquist observes that “[b]eing compensated on a fee basis, many commissioners were prone to issue complaints and hold preliminary examinations at the slightest real, imagined, or contrived violation of federal law.”<sup>436</sup> Congressional hearings in 1891<sup>437</sup> and 1894<sup>438</sup> revealed a system where “commissioners, deputy marshals, and informer-witnesses [would commonly] act in collusion in order to submit the highest possible fee bills,” as well as instances where a commissioner would engage in “double-dipping” by serving simultaneously as a circuit court commissioner, clerk of court and a jury commissioner.<sup>439</sup> In addition, there were numerous instances of commissioners holding several federal offices simultaneously in questionable efforts to maximize their salaries and influence.<sup>440</sup>

Judge Foschio notes that Millard Fillmore, Jr., the son of President Millard Fillmore, served in multiple capacities as a circuit court commissioner and as the clerk of the circuit and district court in the Northern District of New York from 1868 to 1886.<sup>441</sup> Another was Henry Hallett, son of Benjamin Franklin Hallett, who like his father served as a commissioner in Boston, beginning in 1857, and was subject to withering criticism for alleged padded fees, as well as for serving as both circuit court commissioner and supervisor of elections in the 1880s and 1890s.<sup>442</sup> Henry died in 1892, allegedly from overwork and stress due to the

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<sup>435</sup> See 1878 Attorney General’s Report, *supra* note 17, at 12.

<sup>436</sup> Lindquist, *supra* note 38, at 9.

<sup>437</sup> H.R. REP. NO. 51-3823 (1891).

<sup>438</sup> H.R. REP. NO. 53-1077 (1894).

<sup>439</sup> Lindquist, *supra* note 38, at 9.

<sup>440</sup> *Id.* at 9.

<sup>441</sup> Foschio, *supra* note 38, at 611.

<sup>442</sup> *Boston Bothered With a Federal Court Clerk Who Is Airily Insolent*, THE DAILY EXAM’R, Jan. 2, 1888, at 7.

pending corruption charges made against him.<sup>443</sup> In 1894, Hallett's estate recovered approximately \$6,000 in disputed commissioner fees previously disallowed by the Comptroller of the Treasury after suing the government and winning the case in the United States Circuit Court for Massachusetts.<sup>444</sup>

In 1896, Congress finally reorganized the federal courts, abolishing the office of circuit court commissioners and renaming them United States commissioners.<sup>445</sup> United States commissioners were now officers of the reorganized United States district courts and served for four-year terms, but they continued, however, to be compensated entirely by fees, albeit under a newly unified fee schedule.<sup>446</sup> Lindquist sums up the problem: "Empowered with the same statutory authority of the old circuit court commissioners, plus some new miscellaneous duties, U.S. Commissioners began the twentieth century within an essentially nineteenth century framework—including the antiquated fee system . . ."<sup>447</sup> The fee system would not be updated for almost fifty years, despite recognition that reliance on fees for compensation was a significant problem.<sup>448</sup>

The United States district courts would muddle along with the expanded, but flawed, United States commissioner system for many decades. Despite the huge growth in federal criminal offenses in the federal courts caused by Prohibition statutes in the 1920s and early 1930s, Congress did not modify the jurisdiction of United States commissioners to include authority to try petty offense cases until 1940.<sup>449</sup> In 1942, at the request of the Judicial Conference of the

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<sup>443</sup> *Overwork and Worry: Apparent Cause of Death of Commissioner Hallett*, BOS. GLOBE, Dec. 16, 1892, at 5.

<sup>444</sup> *Hallett v. United States*, 63 F. 817 (C.C.D. Mass. 1894); see also *Decision Awaited with Interest: Case of Henry L. Hallett Against the United States May be Ended Soon*, BOS. EVENING TRANSCRIPT, Apr. 16, 1894, at 1.

<sup>445</sup> Act of May 28, 1896, ch. 252, §§ 19, 21, 29 Stat.140, 184 (1896).

<sup>446</sup> Foschio, *supra* note 38, at 611.

<sup>447</sup> Lindquist, *supra* note 38, at 14.

<sup>448</sup> See, e.g., HOMER CUMMINGS & CARL MCFARLAND, *FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE* 493 (1937) ("[B]y far the greatest evil which beset the administration of federal justice in the nineteenth century was the fee system of compensation for local federal law officers.")

<sup>449</sup> See Act of Oct. 9, 1940, ch. 785, 54 Stat. 1058 (permitting district courts to authorize its commissioners to exercise petty offense jurisdiction); see also Lindquist, *supra* note 38, at 15.

United States, the recently-created Administrative Office of the United States Courts prepared an in-depth study of the office of the United States commissioner.<sup>450</sup> Although the report made several recommendations for reforming the commissioner system,<sup>451</sup> Congress enacted only a revised fee schedule and made minor administrative changes to the system in 1946.<sup>452</sup>

Finally, after various proposals were made to reform further the office of United States commissioner,<sup>453</sup> Congress in 1965 undertook “an extensive and exhaustive examination of the commissioner system.”<sup>454</sup> After numerous public hearings and lengthy debate, Congress finally replaced the commissioner system when it enacted the Federal Magistrates Act of 1968.<sup>455</sup>

What began as a dream of Southern legislators to create a corps of federal judicial officers to enforce the constitutional right of enslavers to capture and return bondsmen who had fled to Northern states was transformed by Congress into a nationwide system of non-Article III judges exercising wide-ranging authority within the United States district courts.

With the despised “slave” commissioners in Northern states, the “ten dollar judges” authorized by the Fugitive Slave Act, Congress planted an idea of permitting low-level commissioners or magistrates to do more and varied judicial duties on behalf of federal judges in other situations throughout the country. This notion would eventually inspire the United States magistrate judge system that serves the federal courts today.

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<sup>450</sup> ADMIN. OFF. OF THE U.S. CTS, UNITED STATES COMMISSIONERS—A REPORT TO THE JUDICIAL CONFERENCE (1942).

<sup>451</sup> See, e.g., Spaniol, *supra* note 38, at 566.

<sup>452</sup> Act of Aug. 1, 1946, ch. 721, 60 Stat. 752; Act of July 10, 1946, chs. 548-549, 60 Stat. 525-26.

<sup>453</sup> Spaniol, *supra* note 38, at 566-68.

<sup>454</sup> McCabe, *supra* note 38, at 347; see, e.g., *U.S. Comm’r Sys.: Hearing Before the Subcomm. On Improvements in Jud. Mach. of the Senate Comm. On the Judiciary*, 89th Cong. (1965).

<sup>455</sup> See Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107 (1968) (codified as amended at 28 U.S.C. §§ 604, 631-39 and 18 U.S.C. §§ 3060, 3401-02 (1991)). See also Spaniol, *supra* note 38, at 566-70; McCabe, *supra* note 38, at 347-51; LEGISLATIVE HISTORY, *supra* note 4, at 5-19 (detailing the congressional debates leading up to enactment of Act and the specific provisions of the 1968 legislation).